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7 UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

8 STEVEN MCARDLE, an individual, on
9 behalf of himself, the general public and
10 those similarly situated,

11 Plaintiff,

12 v.

13 AT&T MOBILITY LLC; NEW
14 CINGULAR WIRELESS PCS LLC; NEW
CINGULAR WIRELESS SERVICES,
15 INC., AND DOES 1 THROUGH 50,

16 Defendants.

Case No. 4:09-cv-01117-CW

**PLAINTIFF'S MOTION FOR APPROVAL
OF CLASS ACTION SETTLEMENT**

Date: December 23, 2020

Time: 2:30 p.m.

Courtroom: Via Zoom

Judge: Honorable Claudia Wilken

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on December 23, 2020, at 2:30 p.m. (or sooner if the Court grants a pending stipulated request to shorten time) or as soon as the matter may be heard, via Zoom videoconference, before the Honorable Claudia Wilken, Plaintiff Steven McArdle (“Class Representative”)¹ shall and hereby does move the Court for an order:

(1) approving of sending notice to all class members who would be bound by the settlement of this class action as set forth in the class action settlement agreement dated October 28, 2020, a true and correct copy of which is attached as Exhibit 1 to the Declaration of Seth Safier filed herewith (“Settlement”);

(2) directing the dissemination of notice in the form and manner set forth in the Settlement; and

(3) setting a date for a final approval hearing.

A copy of the [Proposed] Order Granting Preliminary Approval of Class Action Settlement is attached to the Settlement Agreement as Exhibit C and also separately submitted herewith.

PLEASE ALSO TAKE NOTICE that, after expiration of the time for class members to opt out or object, and upon the occurrence of the final approval hearing, Class Representatives will seek entry of a further order:

(1) granting final approval to the Settlement and entering judgment thereon;

(2) requiring Defendants AT&T Mobility LLC, New Cingular Wireless PCS LLC, and New Cingular Wireless Services, Inc. (collectively, “AT&T” or “Defendants”) to include agreed upon disclosures in the Wireless Customer Agreement as further set forth in the Settlement;

(3) requiring Defendants to pay all Valid Claims made by Class Members under the Settlement;

¹ The capitalized terms used herein are defined in and have the same meaning as used in the Settlement Agreement unless otherwise stated.

- 1 (4) awarding a class representative incentive award of \$15,000 to the named plaintiff
2 Steven McArdle; and
3 (5) awarding attorneys' fees and expenses to Plaintiff's counsel in the amount of
4 \$6,130,000.00.

5 A copy of the [Proposed] Order Granting Final Approval of Class Action Settlement is
6 attached to the Settlement Agreement as Exhibit D and separately submitted herewith.

7 This Motion is based on Federal Rule of Civil Procedure 23, this Notice of Motion, the
8 supporting Memorandum of Points and Authorities, the Declaration of Seth Safier filed herewith,
9 the Declaration of Jay Geraci filed herewith, and the pleadings and papers on file in this action,
10 and any other matter of which this Court may take judicial notice.

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MEMORANDUM OF POINTS AND AUTHORITIES**A. Introduction**

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3 After nearly twelve years of litigation, Defendants have agreed to settle claims regarding
4 their practice of charging consumers international roaming fees for incoming, unanswered mobile
5 telephone calls without adequate prior notice. They have agreed to ensure that their Wireless
6 Customer Agreements notify consumers of the potential charges and to compensate class
7 members. In particular, current customers automatically receive a free day of international
8 roaming (“a Day Pass”) or, if they would prefer, to make a claim for an Account Credit for one-
9 minute international roaming calls during the Class period, up to a maximum of \$50. Former
10 customers may make a claim for a Cash Refund of those charges (up to the same \$50 maximum).
11 Defendants will also pay all costs of notice and administration.

12 Plaintiff seeks a \$15,000 representative incentive award, and Plaintiff’s counsel seeks an
13 award of \$6,130,000.00 in fees and in costs. None of these sums comes at the expense of any
14 amount of money set aside for the Class. Plaintiff and his counsel have not yet received any
15 compensation for their more than 7400 hours of work on this case (equating to a lodestar of
16 \$7,225,310.00 or for the more than \$72,000.00 in out-of-pocket expenses they have incurred (for
17 experts, deposition transcripts, filing fees, etc.). The monetary relief obtained for the certified class
18 in the Settlement is likely superior to results that could have been achieved at trial, because (1) it
19 was not guaranteed that Plaintiff would prove that Defendants engaged in any unlawful conduct or
20 that such conduct caused harm to him or others, (2) there might still need to be proof at or after
21 trial that each one-minute call to be compensated by the Settlement was in fact not answered or
22 placed by the Class Member, requiring individualized testimony; and (3) there would be no
23 minimum guaranteed recovery per Class Member, and the average recovery per Class Member
24 would likely be less than the value of the Day Pass.

25 As the fair, reasonable and adequate Settlement is the product of a non-collusive,
26 adversarial negotiation, and Class Counsel’s request for fees and costs is fair and reasonable,
27 Plaintiff respectfully requests that this motion be granted so that notice of the proposal can be
28 given to the class.

B. Background and Settlement Negotiations

1
2 On February 10, 2009, Plaintiff through his counsel Gutride Safier LLP filed a Class
3 Action Complaint in San Francisco County Superior Court against Defendants alleging claims for
4 violations of the California Consumer Legal Remedies Act, Civil Code § 1750, *et seq.*; false
5 advertising under California Business and Professions Code § 17500, *et seq.*; unfair business
6 practices under California Business and Professions Code § 17200 *et seq.*; and fraud or
7 misrepresentation; and seeking damages, an injunction and other relief, alleging that Defendants
8 had improperly charged him and similarly situated persons international roaming fees for
9 incoming mobile telephone calls even though the calls were not answered. Plaintiff sought to
10 pursue these claims on behalf of himself and all California residents who were charged
11 international roaming fees by Defendants for unanswered incoming calls to their U.S.-based
12 mobile numbers. On March 13, 2009, Defendants timely removed the Litigation to this Court and
13 subsequently answered the Complaint, denying Plaintiff's allegations and asserting several
14 affirmative defenses, including the defense that the litigation was subject to arbitration per the
15 terms of its contract. The Litigation was assigned to this Court.
16
17

18 Beginning in June 2009, the parties engaged in extensive discovery. Plaintiff reviewed over
19 one million pages of Defendants' documents. The Plaintiff was deposed. Plaintiff also conducted
20 depositions of Defendants' Director of Inter-Carrier Product Strategy and Development, Executive
21 Director of Product Management and Marketing for International Services, and an Area Manager
22 in the Office of the President. Plaintiff retained an expert who opined as to how Class Member
23 identities (including the number of unanswered international calls and the amounts of international
24 roaming fees charged therefore) could be ascertained from various of Defendants' records.
25 Defendants retained an expert who conducted a survey of AT&T customers and opined that Class
26 Members understood that they could be charged international roaming fees for unanswered calls.
27 The experts were deposed.
28

1 On July 2, 2009, Plaintiff moved to strike Defendants' defense of arbitrability and on July
2 30, 2009, AT&T cross-moved to compel arbitration. On September 14, 2009, the District Court
3 struck the affirmative defense of arbitrability and denied the motion to compel arbitration under
4 the rule enunciated in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) and *Shroyer v.*
5 *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007) ("*Discover Bank* rule"),
6 holding that the arbitration provision was both procedurally and substantively unconscionable, in
7 that it purported to bar class actions in an environment where (1) the contract was one of adhesion,
8 (2) individual damages were predictably small, and (3) AT&T was alleged to be carrying out a
9 scheme to deliberately defraud large numbers of consumers out of small sums of money. AT&T
10 filed an appeal on October 6, 2009. Meanwhile, Plaintiff filed a motion for class certification, on
11 which this Court deferred ruling.

13 While AT&T's appeal was pending, the United States Supreme Court ruled in *AT&T*
14 *Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011) that the *Discover Bank* rule
15 was preempted by the Federal Arbitration Act. After the Supreme Court issued its decision in
16 *Concepcion*, the Ninth Circuit Court of Appeals reversed this Court's order denying the motion to
17 compel arbitration and remanded for further proceedings. On remand, AT&T filed a renewed
18 motion to compel arbitration, which the Court granted, and the Court stayed the action pending
19 arbitration.

21 While the arbitration was pending, the California Supreme Court, in *McGill v. CitiBank,*
22 N.A., 2 Cal.5th 945 (Cal. 2017), granted a petition for review to assess the enforceability under
23 California law of contracts that purported to waive the right to seek public injunctive relief.
24 Plaintiff asked the arbitrator to stay the arbitration until the California Supreme Court decided
25 *McGill*, but the arbitrator denied the request and held an in-person arbitration on June 27–28,
26 2016. After the arbitrator heard testimony from Plaintiff, Defendants and expert witnesses, the
27 arbitrator issued a decision on September 16, 2016 in favor of AT&T.
28

1 On December 16, 2016, Plaintiff timely moved to vacate the arbitral award, and on May
2 12, 2017, he moved for reconsideration of the Court's order granting AT&T's motion to compel
3 arbitration, based on the subsequent decision in *McGill* that held that contracts purporting to waive
4 the right to seek the California statutory remedy of public injunctive relief are unenforceable under
5 California law. The Court granted the motion for reconsideration, determining that (a) *McGill*
6 represented an intervening "change in controlling law" requiring reconsideration of its prior order
7 compelling arbitration, (b) the ban on public injunctive relief was unenforceable, (c) because the
8 arbitration agreement provided that the public injunction ban could not be severed, the entire
9 arbitration agreement was unenforceable and (d) as a result, the arbitrator's award was null and
10 void. The Court denied Plaintiff's motion to vacate the arbitral award as moot, and also denied
11 AT&T's cross-motion to confirm the arbitration award.
12

13 AT&T appealed to the Ninth Circuit from the order reconsidering the initial order
14 compelling arbitration and denying AT&T's motion to confirm the arbitral award. While that
15 appeal was pending, Plaintiff renewed his renewed motion for class certification in this Court,
16 which the Court granted in part on August 13, 2018. AT&T petitioned the Ninth Circuit Court of
17 Appeals to appeal from order of certification. The Ninth Circuit denied the petition for permission
18 to appeal from the order of class certification. After briefing and argument, the Ninth Circuit
19 affirmed the order of the Court rescinding the order compelling arbitration and denying AT&T's
20 motion to confirm the arbitral award. AT&T petitioned the United States Supreme Court for
21 certiorari, which was denied.
22

23 Plaintiff's Counsel and Defendants' Counsel participated in multiple efforts to resolve the
24 litigation. On October 13, 2009, all parties participated in a full-day Early Neutral Evaluation
25 under the auspices of this Court. On April 14, 2020, the parties attended a mediation with the
26 Honorable Edward A. Infante (Retired) and subsequently had follow-up conversations to advance
27 the mediation.
28

C. The Benefits Conferred on the Certified Class Under the Proposed Settlement of this Action

The proposed settlement agreement (“Settlement”) resolves claims between AT&T and the certified class of “all California residents who, any time between February 6, 2005 and January 31, 2009, were charged international roaming fees by Defendants for unanswered incoming calls to their U.S.-based mobile numbers.” (Ex. 1 (“Settlement”) ¶ 2.12.) Excluded Persons are (a) the Honorable Judges Claudia Wilken, Maria-Elena James (Ret.), Thomas S. Hixson, Sallie Kim and Edward Infante (Ret.) and any member of their immediate families; (b) any government entity; (c) any entity in which any Defendant has a controlling interest; (d) any of Defendants’ subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; (e) counsel for the Parties; and (f) any persons who timely opt-out of the Class. (Id.) Under the Settlement Agreement, Class Members (except any such Person who has filed a proper any timely request for exclusion from the Class), will agree to release all Allegations, Claims, or contentions related to the Released Claims. (Id. ¶ 8.2.)

1. Injunctive Relief

Defendants have committed to ensuring that its Wireless Customer Agreement includes a disclosure materially similar to the following italicized text: “International roaming rates apply to incoming and outgoing calls messages and data use while you’re located outside the United States, Puerto Rico, or the U.S. Virgin Islands. *In some countries, you may be charged international roaming rates even for calls that you do not answer.*” (Settlement ¶ 3.1(a).) Defendants shall have the right to make revisions to these disclosures provided that the revised text is clear, accurate, complete, and non-misleading. Defendants shall also have the right to revise their wireless customer agreement in a manner that is consistent with any prospective changes to federal and California law. The right to make revisions includes the right to remove these disclosures if customers cannot be charged international roaming rates for calls that are not answered (Id. ¶ 3.1(b).)

2. Monetary Relief

Each current customer Class Member shall automatically receive a Day Pass, unless he or she elects to submit a Valid Claim for an Account Credit in lieu of a Day Pass. (Id. ¶¶ 4.1 (a)-(b).)

1 Former customer Class Members shall submit a Valid Claim for a Cash Refund (Id. ¶ 4.1(c).) The
2 amount of the Account Credit or Cash Refund is the full amount paid during the Class Period for
3 all one-minute international roaming calls, up to a maximum of \$50. (Id. ¶¶ 2.1, 2.7.) The
4 minimum amount of a Cash Refund is \$4. (Id. ¶ 4.1(c).)

5 The claim form is simple. The form can be completed online or downloaded and submitted
6 by mail, and is designed to be completed in minutes. (Id. ¶¶ 4.5-4.7.) It requires no specific call
7 information, only a certification that the Class Member did not answer or place one or more of the
8 one-minute calls that were billed at an international roaming rate during the Class Period and did
9 not already receive a refund or credit for the charges for those calls. (Id.)

10 There is no cap on the total number of claims that can be submitted and no pro-rata
11 reduction. It is estimated that there are 267,000 Class Members, of whom approximately 140,000
12 will be automatically provisioned with a free day of international roaming without need for filing a
13 claim, and another approximately 8000 Class Members will file a claim for either an account
14 credit or cash refund. (Geraci Decl. ¶ 13.) The proposed settlement notices inform class members
15 that if the settlement does not become final or is terminated, then the litigation will continue on
16 behalf of the certified class. (Id. ¶ 7.6.)

17 **3. Administrative Expenses, Attorneys' Fees and Costs, 18 Representative Service Awards**

19 All costs of notice and administration of the Settlement will be paid by Defendants. (Id. ¶
20 5.2(q).) The parties propose that KCC serve as the Settlement Administrator. The additional
21 information required by N.D. Cal. Procedural Guidance for Class Action Settlements (“N.D. Cal.
22 Guide”) ¶ 2 regarding the selection of the settlement administrator is provided in the Gutride
23 Declaration. (Safier Decl., ¶ 80.)

24 In addition, the Settlement provides for a Class Representative Incentive Award from
25 Defendants of \$15,000 for Plaintiff. (Settlement ¶ 6.6.) Plaintiff provided assistance that enabled
26 Class Counsel to successfully prosecute this Litigation and reach a settlement, including attending
27 the Early Neutral Evaluation; locating and forwarding responsive documents and information,
28 responding to written discovery, sitting for a full-day deposition, participating in a two-day
arbitration and providing oral testimony; and attending mediation. (Safier Decl., ¶¶ 78-79.) He also

1 stayed in contact with counsel through the twelve years of litigation and supervised its
 2 prosecution. He continued to prosecute the case even after this Court compelled arbitration,
 3 despite the fact that his individual damages were small, with the hope that the order of arbitration
 4 would eventually be vacated and he would be able to obtain class relief. The Incentive Award is
 5 designed to compensate the Class Representative for (1) the inordinate time and effort undertaken
 6 in and risks of pursuing this action (including the risk of liability for the costs of suit) and
 7 (2) because his is agreeing to a release broader than the one that will bind settlement Class
 8 Cembers. (Settlement ¶ 8.1.)

9 Class Counsel also requests an award of Attorneys' Fees and Costs of \$6,130,000.00. (*Id.*,
 10 ¶ 6.1.) The amount will reimburse them for their expenses and approximately 84% of their total
 11 lodestar. (Safier Decl., ¶¶ 84, 96.) The reasonableness of this request is discussed in Section E,
 12 *infra*.

13 **D. Approval of the Settlement**

14 **1. Legal Framework**

15 Strong judicial policy favors settlement of class actions. *See Class Plaintiffs v. City of*
 16 *Seattle*, 955 F.2d 1269, 1276 (9th Cir. 1992); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234,
 17 1238 (9th Cir. 1998). Settlements of complex cases greatly contribute to the efficient utilization of
 18 scarce judicial resources and achieve the speedy resolution of justice. "The claims, issues, or
 19 defenses of a certified class . . . may be settled . . . only with the court's approval." Fed. R. Civ. P.
 20 23(e). A decision "to approve or reject a settlement is committed to the sound discretion of the trial
 21 judge because [s]he is exposed to the litigants, and their strategies, positions, and proof." *In re*
 22 *Mego Fin. Corp.*, 213 F. 3d 454, 458 (9th Cir. 2000). The Court must consider whether the
 23 settlement as a whole is reasonable; it stands or falls in its entirety. *See Hanlon v. Chrysler Corp.*,
 24 150 F.3d 1101, 1026 (9th Cir. 1998) ("*Hanlon*"). In addition, Rule 23(e) "requires the district court
 25 to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Id.* at
 26 1026. Under Ninth Circuit precedent, the district court must balance a number of factors including:

27 the strength of the plaintiffs' case; the risk, expense, complexity, and likely
 28 duration of further litigation; the risk of maintaining class action status throughout
 the trial; the amount offered in settlement; the extent of discovery completed and
 the stage of the proceedings; the experience and views of counsel; the presence of

1 a governmental participant; and the reaction of the class members to the proposed
2 settlement.

3 *Id.* Rule 23(e)(2) similarly requires the district court to consider whether:

4 (A) the class representatives and class counsel have adequately represented the class;

5 (B) the proposal was negotiated at arm's length;

6 (C) the relief provided for the class is adequate, taking into account:

7 (i) the costs, risks, and delay of trial and appeal;

8 (ii) the effectiveness of any proposed method of distributing relief to the class,
9 including the method of processing class-member claims;

10 (iii) the terms of any proposed award of attorney's fees, including timing of
11 payment; and

12 (iv) any agreement required to be identified under Rule 23(e)(3); and

13 (D) the proposal treats class members equitably relative to each other.

14 Fed. R. Civ. P. 23(e)(2). The Court should apply "the framework set forth in Rule 23, while
15 continuing to draw guidance from the Ninth Circuit's factors and relevant precedent." *Hefler v.*
16 *Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 213045, at *13 (N.D. Cal. Dec.
17 17, 2018).

18 **2. Adequacy of Notice**

19 The proposed notice plan and claim form, which are attached to the Settlement as Exhibits
20 A, B1, B2, and B3, comport with the procedural and substantive requirements of Rule 23 and the
21 N.D. Cal. Guide. Under Rule 23, due process requires that Class Members receive notice of the
22 settlement using the best notice that is "practicable under the circumstances." *See* Fed. R. Civ. P.
23 23(c)(2)(B). The mechanics of the notice process are left to the discretion of the Court, subject
24 only to the broad "reasonableness" standards imposed by due process. *See* 7A Wright & Miller,
25 FEDERAL PRACTICE & PROCEDURE § 1786 (3d ed. 2008); *see also* *Rosenburg v. I.B.M.*, No. CV-
26 06-00430-PJH, 2007 U.S. Dist. LEXIS 53138 at *5 (N.D. Cal. July 12, 2007) (notice should
27 inform class members of essential terms of settlement including claims procedure and their rights
28 to accept, object or opt-out of settlement); N.D. Cal. Guide ¶¶ 3-5 (identifying information to be
included in notice). In this Circuit, it has long been the case that a notice of settlement will be
adjudged satisfactory if it "generally describes the terms of the settlement in sufficient detail to

1 alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill*,
2 361 F.3d 566, 575 (9th Cir. 2004) (citing *Mendoza v. Tucson Sch. Dist. No.1*, 623 F.3d 1338, 1352
3 (9th Cir. 1980)). The proposed Notice Plan satisfies these content requirements and is designed to
4 reach a high percentage of the Settlement Class.

5 Notice of the settlement is to be provided to the Settlement Class as follows: (1) Email
6 Notice via electronic mail to each Class Member for which Defendants have provided or the Claim
7 Administrator can obtain an email address; and (2) mailed notice to each other Class Member.
8 (Settlement ¶ 5.2(b).)

9 The proposed notices inform Class Members about the proposed settlement; a summary of
10 settlement benefits; their right to opt out and the information required by N.D. Cal. Guide ¶ 4
11 regarding opt outs; their right to object and the information required by N.D. Cal. Guide ¶ 5
12 regarding objections; the need to file a claim; and the prospective request for attorneys’ fees, costs
13 and representative service awards. The mailed notices refer Class Members to the settlement
14 website where they can obtain the long-form notice, which provides more details about the case
15 and the settlement, online and printable versions of the claim form and the opt out forms, a fuller
16 discussion of the release, and methods to obtain additional information. In addition, the settlement
17 website, will also contain a contact information page that will include address and telephone
18 numbers for the Claim Administrator and Class Counsel, the Settlement Agreement, the date of the
19 final approval hearing, the motions for approval and for attorneys’ fees and any other important
20 documents in the case. Further, the administrator will provide a toll-free telephone number at
21 which Class Members can obtain information.

22 As explained in the declaration from the Claim Administrator filed herewith, this multi-
23 communication method is expected to reach up to 90% of the settlement Class Members. (Geraci
24 Decl. ¶ 3). *See, e.g., Simpao v. Gov’t of Guam*, 369 F. App’x 837, 838 (9th Cir. 2010) (notice plan
25 was “best notice practicable” where direct notice was mailed to class members among other
26 methods); *In re Netflix Privacy Litig.*, No. 5:11-cv-00379, 2012 U.S. Dist. LEXIS 93284 at *5
27 (N.D. Cal. July 5, 2012) (approving notice procedure that included emailing customers at last
28 known email address).

1 The Class Action Fairness Act requires that Defendants give notice of the proposed class
 2 action settlement to appropriate state and federal officials and supply all of the information and
 3 documents set forth in 28 U.S.C. § 1715 (b)(1)-(8). The Claim Administrator will do so within ten
 4 days after the Settlement Agreement is filed with the Court. (Settlement ¶5.2(h).)

5 **3. Fairness, Adequacy, and Reasonableness of Settlement**

6 **(a) Procedural Concerns**

7 The Court must consider whether “the class representatives and class counsel have
 8 adequately represented the class” and whether “the proposal was negotiated at arm’s length.” Fed.
 9 R. Civ. P. 23(e)(2)(A)-(B). As the Advisory Committee notes suggest, these are “matters that
 10 might be described as ‘procedural’ concerns, looking to the conduct of the litigation and of the
 11 negotiations leading up to the proposed settlement.” Fed. R. Civ. P. 23(e)(2)(A)-(B) advisory
 12 committee’s note to 2018 amendment. These concerns implicate factors such as the non-collusive
 13 nature of the negotiations, as well as the extent of discovery completed and stage of the
 14 proceedings. *See Hanlon*, 150 F.3d at 1026.

15 *i. Adequate Representation of the Class*

16 In granting class certification, the Court concluded that the Class Representative and Class
 17 Counsel were adequate. (Dkt. 345 at 18.) This remains true. The Class Representative has no
 18 conflicts of interest (*Id.*) and has invested significant time and resources in this litigation for
 19 almost twelve years.

20 *ii. Arm’s Length Negotiations*

21 The Ninth Circuit “put[s] a good deal of stock in the product of an arm’s-length, non-
 22 collusive, negotiated resolution” in approving a class action settlement. *Rodriguez v. West Publ’g*
 23 *Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Class settlements are presumed fair when they are
 24 reached “following sufficient discovery and genuine arms-length negotiation,” both of which
 25 occurred here. *See Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D.
 26 Cal. 2004) (“*DIRECTV*”); 4 Newberg at § 11.24. “The extent of discovery [also] may be relevant
 27 in determining the adequacy of the parties’ knowledge of the case.” *DIRECTV*, 221 F.R.D. at 527
 28 (quoting *Manual for Complex Litigation, Third* § 30.42 (1995)). “A court is more likely to approve

1 a settlement if most of the discovery is completed because it suggests that the parties arrived at a
2 compromise based on a full understanding of the legal and factual issues surrounding the case.”
3 *DIRECTV*, 221 F.R.D. at 527 (quoting 5 *Moore’s Federal Practice*, §23.85[2][e] (Matthew Bender
4 3d ed.)).

5 Here, before agreeing upon the terms of the settlement, the parties engaged in extensive
6 factual and expert investigation, which included depositions of seven people and document
7 production of over a million pages of documents, interrogatories, and third-party discovery. (Safier
8 Decl. ¶¶ 54, 56. 58-62.) The parties also undertook extensive briefing and argument on various
9 significant legal issues. *See* Section B, *supra*. The record was thus sufficiently developed that the
10 parties were fully informed as to the viability of the claims and able to adequately evaluate the
11 strengths and weaknesses of their respective positions and risks to both sides if the case did not
12 settle. (Safier Decl. ¶¶ 65-66.)

13 The parties negotiated the proposed settlement in good faith with the assistance of an
14 independent experienced mediator, the Honorable Edward A. Infante (Ret.) (Safier Decl. ¶ 69).
15 “The assistance of an experienced mediator in the settlement process confirms that the settlement
16 is non-collusive.” *Adams v. Inter-Con Sec. Sys. Inc.*, No. C-06-5428-MHP, 2007 U.S. Dist. LEXIS
17 83147 at *3 (N.D. Cal. Oct. 30, 2007).

18 (b) Substantive Concerns

19 Rule 23(e)(2)(C) and (D) set forth factors for conducting “a ‘substantive’ review of the
20 terms of the proposed settlement.” Fed. R. Civ. P. 23(e)(2)(C)-(D) advisory committee’s note to
21 2018 amendment. In determining whether “the relief provided for the class is adequate,” the Court
22 must consider “(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any
23 proposed method of distributing relief to the class, including the method of processing class-
24 member claims; (iii) the terms of any proposed award of attorney’s fees, including timing of
25 payment; and (iv) any agreement required to be identified under Rule 23(e)(3).” Fed. R. Civ. P.
26 23(e)(2)(C). In addition, the Court must consider whether “the proposal treats class members
27 equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D).
28

i. *Strength of Plaintiff's Case and Risk of Continuing Litigation*

Consistent with Rule 23's instruction to consider "the costs, risks, and delay of trial and appeal," Fed. R. Civ. P. 23(e)(2)(C)(i), courts in this circuit evaluate "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; [and] the risk of maintaining class action status throughout the trial," *Hanlon*, 150 F.3d at 1026. Generally, the principal risks to be assessed are the difficulties and complexities of proving liability and damages. *See, e.g., Mego*, 213 F.3d at 458-59 (assessing risk of inability to prove fraudulent scheme in affirming settlement); *Linney v. Cellular Alaska Partnership*, 151 F.3d at 1240-1241 (9th Cir. 1998) (assessing risks involving fraudulent concealment and ability to obtain damages in affirming settlement); *Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993), *cert denied*, 512 U.S. 1220 (1994) (approving settlement based in part on "inherent risks of litigation"); *Class Plaintiffs*, 955 F.2d at 1292 (approving settlement based on uncertainty of claims and avoidance of summary judgment); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982, *cert denied*, 495 U.S. 1217 (1983) (approving settlement based in part on the possibility that a judgment after a trial, when discounted, might not reward class members for their patience and the likely delay reflected in the "track record" for large class actions)).

In considering whether to enter into the Settlement, Plaintiff, represented by counsel experienced in class action litigation, weighed the risks inherent in establishing all the elements of his claims in a jury trial, as well as the expense of trial and likely duration of post-trial motions and appeals. Plaintiff agreed to settle this litigation on these terms based on his careful investigation and evaluation of the facts and law relating to Plaintiff's allegations and consideration of the facts and views expressed by the mediators and Defendants during the settlement negotiations. *See Louie v. Kaiser Found. Health Plan, Inc.*, No. 08-cv-0795, 2008 U.S. Dist. LEXIS 78314, at *6 (S.D. Cal. Oct. 6, 2008) ("Class counsels' extensive investigation, discovery, and research weighs in favor of preliminary settlement approval.").

Plaintiff and Class Counsel were aware that, in order to prevail at trial, they would have to prove liability or restitution and damages on a class-wide or individual basis, including that Defendants' materials were likely to deceive reasonable consumers, and the amount of damages or

1 restitution due to the Class or to any Class Member. Although Plaintiff believes the evidence
2 obtained in discovery established Defendants' liability and damages, Defendants vigorously deny
3 those allegations, and Defendants were successful on these issues in front of the arbitrator, creating
4 substantial uncertainty of obtaining a successful verdict after trial and appeal.

5 While Class Counsel is confident in its positions and believe Plaintiff's claims are strong,
6 Class Counsel is also experienced and realistic enough to know that the recovery and certainty
7 achieved through settlement, as opposed to the uncertainty inherent in the trial and appellate
8 process, weighs heavily in favor of settlement, particularly given the above risks, which could
9 easily have impeded Plaintiff's successful prosecution at trial and in an eventual appeal. (Safier
10 Decl., ¶¶ 70-72.) Under the circumstances, Plaintiff and Class Counsel appropriately determined
11 that the instant settlement outweighs the gamble of continued litigation. *Id.* Moreover, even if
12 Plaintiff prevailed at trial, any recovery could be delayed for years by an appeal. *Id.* Thus, even in
13 the best case, it could take years to secure any meaningful relief for Class Members. *See Lipuma v.*
14 *American Express Company*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that
15 appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement).

16 Further, a comparison of the settlement award to the potential damages that might be
17 recovered for the Class at trial, given the risks of the litigation, supports the reasonableness of the
18 Settlement. *See* N.D. Cal. Guide ¶1(d) (preliminary approval motion should set forth "potential
19 recovery if plaintiffs were to prevail" and "likely recovery per plaintiff" under the settlement).
20 Even after trial, Defendants might be successful at arguing that class members were not entitled to
21 compensation for each one-minute call, as provided in the Settlement, unless there was proof that
22 the call was actually unanswered, and that such proof was not readily available. *See Briseno v.*
23 *ConAgra Foods, Inc.*, 844 F.3d 1121, 1131-32 (9th Cir. 2017) ("Rule 23 specifically contemplates
24 the need for such individualized claim determinations after a finding of liability."). Under the
25 settlement, without the need for such proof, current customers obtain an automatic free day of
26 international roaming usable within 18 months after being added to the customer's account
27 following the Effective Date (a Day Pass), which is similar to the AT&T Day Pass that AT&T
28 sells for up to \$10.00, even if they paid less in total international roaming fees for unanswered

1 calls. Class members may also obtain an account credit (current customers) or cash refund (former
2 customers) for all one-minute calls charged at an international roaming rate upon a simply claim
3 form declaration that the calls were not placed or answered, up to a maximum of \$50.²

4 Additionally, there is substantial value to Defendants’ commitment to include a clear disclosure
5 regarding the potential of international roaming charges for unanswered calls in its Wireless
6 Customer Agreement. This is a very favorable outcome given the substantial risks of continuing
7 with this complex litigation, and the uncertainty inherent in a jury trial, as well as the advantages
8 of obtaining an immediate benefit for Class Members and avoiding the substantial expenses of
9 further litigation.

10 The Settlement release is no broader than a res judicata release that would be obtained after
11 trial. It releases only claims that were or could have been asserted regarding international roaming
12 charges during the Class Period—the very issues in suit. *See Allied Fire Prot. v. Diede Constr.,*
13 *Inc.*, 127 Cal. App. 4th 150, 155 (2005) (“Res judicata serves as a bar to all causes of action that
14 were litigated or that could have been litigated in the first action.”); *see also In re Anthem, Inc.*
15 *Data Breach Litig.*, 327 F.R.D. 299, 327 (N.D. Cal. 2018) (“the Ninth Circuit allows federal
16 courts to release not only those claims alleged in the complaint, but also claims ‘based on the
17 identical factual predicate as that underlying the claims in the settled class action.’”) (quoting
18 *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010)). Claims relating to “personal
19 injury or property damage arising out of the use of the Product” are specifically excluded from the
20 release.

21 _____
22 ² “[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to
23 only a fraction of the potential recovery that might be available to the class members at trial.”
24 *DIRECTV*, 221 F.R.D. at 527, *citing Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th
25 Cir. 1998). *See also e.g., Destefano v. Zynga, Inc.*, No. 12-cv-04007-JSC, 2016 U.S. Dist. LEXIS
26 17196 at *11 (N.D. Cal. Feb. 11, 2016) (“Settlement Amount represent[ing] approximately 14
27 percent of likely recoverable aggregate damages at trial” was “well within the range of percentages
28 approved in other securities-fraud related actions”); *In re Biolase, Inc. Sec. Litig.*, No. SACV 13-
1300-JLS, 2015 U.S. Dist. LEXIS 189232 at *23 (C.D. Cal. June 5, 2015) (settlement representing
“approximately 8% of the maximum recoverable damages ... equals or surpasses the recovery in
many other securities class actions”); *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036,
1042 (N.D. Cal. 2008) (settlement representing 9% of maximum damages fair and reasonable and
“higher than the median percentage of investor losses recovered in recent shareholder class action
settlements”).

ii. *Effectiveness of Distribution Method*

1 The Court must consider “the effectiveness of [the] proposed method of distributing relief
2 to the class.” Fed. R. Civ. P. 23(e)(2)(C)(ii). Here, benefits (the Day Passes) are distributed
3 automatically to all Class Members who are current AT&T customers, without need for any claim
4 form.

5 Current Customer Class Members who wish to elect different benefits, as well as Former
6 Customers, must only to submit a relatively simple claim form with basic questions about class
7 membership. The form can be completed online, or class members have the option to print and
8 mail the claim form to the Claim Administrator. (Settlement ¶ 5.2(b).) Payments will be made by
9 account credit to current customers or mailed check to former customers. This procedure is
10 claimant-friendly, efficient, cost-effective, proportional and reasonable. Pursuant to N.D. Cal.
11 Guide ¶1(g), Class Counsel estimates, based on its experiences with recent settlements in other
12 cases and the input of the Claims Administrator, between 4000 and 10,000 Class Members will
13 submit a claim. (Safier Decl. ¶ 81; Geraci Decl. ¶ 13.)

14 iii. *Terms of Attorneys’ Fees*

15 Class Counsel seeks an award of attorneys’ fees and costs for all Class Counsel in an
16 amount of \$6,130,000.00. That request is addressed in Section E, *infra*.

17 iv. *Supplemental Agreements*

18 Rule 23(e)(3) requires identification of any “supplemental” agreements. Defendants have
19 separately reached agreement with the plaintiff Kenneth Thelian in *Thelian v. AT&T Mobility LLC*
20 *et al.*, Case No. 4:2010-cv-03440-CW in connection with that litigation. Mr. Thelian has also been
21 represented by Class Counsel; his claims were sent to arbitration, but the arbitration has been
22 stayed pending the attempted resolution of this matter. A copy of the agreement between
23 Defendants and Mr. Thelian is attached as Exhibit 4 to the Safier Declaration. Mr. Thelian is being
24 compensated for agreeing not to opt out of the Class and for dismissing his own independent
25 claims. No compensation is being paid under that agreement to either the Class Representative or
26 to Plaintiff’s counsel so there is no risk that the separate agreement provides any incentive to them
27 to support this settlement at the expense of the Class.
28

v. *Equitable Treatment of Class Members*

All Class Members are entitled to the same relief under the Settlement: compensation for their one-minute calls, which was the charge imposed for a call that was not answered. The Settlement also provides for an Incentive Award for the Representative Plaintiff, which is explained in Section F, *infra*.

vi. *Counsel's Experience*

Although not articulated as a separate factor in Rule 23(e), courts have given considerable weight to the opinion of experienced and informed counsel who support settlement. *See DIRECTV*, 221 F.R.D. at 528; *see also In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA, 2008 U.S. Dist. LEXIS 117351 at *4 (N.D. Cal. Dec. 22, 2008); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988). In deciding whether to approve a proposed settlement of a class action, “[t]he recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.” *Stewart v. Applied Materials, Inc.*, No. 15-cv-02632-JST, 2017 U.S. Dist. LEXIS 137130 at *6 (N.D. Cal. Aug. 25, 2017); *accord Omnivision*, 559 F. Supp. 2d at 1043 (same). Here, Class Counsel came to recommend this Settlement after over 11 years of hard-fought litigation, during which it expended over 7400 hours, which included extensive briefing on a variety of significant contested legal issues and preparation for a jury trial. (Safier Decl. ¶¶ 3-62, 84.) Defendants are also represented by seasoned, class-action litigators who support the settlement. (Id. ¶ 64.)

vii. *Past Distributions*

The information requested by N.D. Cal. Guide ¶ 11 regarding past distributions in other comparable class settlements is provided in the Safier Declaration. (Safier Decl., Ex. 2.)

E. Approval of the Attorneys’ Fees and Expenses.

1. Plaintiff’s Fee Request is Reasonable Under the Lodestar Approach.

Plaintiff requests the payment of attorneys’ fees and expenses in the amount of \$6,130,000.00 which is provided for in the Settlement Agreement separate and apart from the money made available to the class for purposes of claims payment and notice and administration expenses. Under Ninth Circuit standards, in cases such as this where the relief is primarily

1 injunctive and there is a fee-shifting statute (California Civil Code § 1750 and California Code of
 2 Civil Procedure § 1021.5), it is appropriate for a District Court to analyze an attorneys’ fee request
 3 and issue an award based on the “lodestar” method. *Bluetooth Headset Prods. Liability Litig.*, 654
 4 F.3d 935, 941 (9th Cir. 2011). Plaintiff’s fee request is reasonable under this approach as Class
 5 Counsel obtained both injunctive and monetary relief. Further, an attorney is entitled to “recover
 6 as part of the award of attorney’s fees those out-of-pocket that would normally be charged to a fee
 7 paying client.” *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (internal quotation marks and
 8 citation omitted). To support an expense award, Plaintiff should file an itemized list of his
 9 expenses by category, listing the total amount advanced for each category, allowing the Court to
 10 assess whether the expenses are reasonable. *See Wren v. RGIS Inventory Specialists*, No. 06-cv-
 11 05778-JCS, 2011 U.S. Dist. LEXIS 38667 at *30 (N.D. Cal. Apr. 1, 2011); N.D. Cal. Guide ¶ 6.

12 2. **Analysis**

13 Under the lodestar approach, “[t]he lodestar (or touchstone) is produced by multiplying the
 14 number of hours reasonably expended by counsel by a reasonable hourly rate.” *Lealao v.*
 15 *Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000); *accord Kelly v. Wengler*, 822 F.3d
 16 1085, 1099 (9th Cir. 2016). Once the court has fixed the lodestar, it may increase or decrease that
 17 amount by applying a positive or negative (i.e. fractional) “multiplier to take into account a variety
 18 of other factors, including the quality of the representation, the novelty and complexity of the
 19 issues, the results obtained and the contingent risk presented.” *Id.*; *see also Serrano v. Priest*
 20 (*“Serrano III”*), 20 Cal. 3d 25, 48-49 (1977); *Ramos v. Countrywide Home Loans, Inc.*, 82 Cal.
 21 App. 4th 615, 622 (2000); *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1418 (1991)
 22 (multipliers are used to compensate counsel for the risk of loss, and to encourage counsel to
 23 undertake actions that benefit the public interest).

24 Class Counsel’s lodestar through the date of this application is approximately
 25 \$7,225,310.00. (Safier Decl. ¶ 84.) Class Counsel’s efforts to date included, without limitation:

- 26 • Pre-filing investigation;
- 27 • Drafting a class action complaint and two amended complaints;
- 28 • Drafting numerous case management conference statements and stipulations;

- 1 • Meeting-and-conferring with Defendants’ counsel regarding the scope of discovery, the
- 2 sufficiency of discovery responses and production, the retention of electronic documents,
- 3 searches for electronically stored information, and the timing of production and briefing
- 4 numerous discovery disputes;
- 5 • Reviewing in excess of a million pages of documents produced by Defendants;
- 6 • Taking five depositions and defending two depositions;
- 7 • Briefing the motion for class certification and an opposition to Defendants’ petition for
- 8 permission to appeal;
- 9 • Litigating multiple rounds of motions regarding enforceability of Defendants’ arbitration
- 10 provision, including two appeals to the Ninth Circuit and a petition for certiorari to the U.S.
- 11 Supreme Court;
- 12 • Participating in arbitration, including associated motion practice and a two-day in-person
- 13 hearing which included examination and cross-examination of percipient witnesses and
- 14 experts;
- 15 • Preparing a plan for class notice and ensuring the dissemination of notice in accordance
- 16 with the terms of the notice plan;
- 17 • Participating in Early Neutral Evaluation and drafting a mediation statement and
- 18 participating in a mediation with the Honorable Edward A. Infante (Retired);
- 19 • Negotiating and drafting the Settlement Agreement along with corresponding documents,
- 20 including claim forms, summary notice, and long form notice; and
- 21 • Preparing this Motion and supporting documentation.

22 *See* Safier Decl., ¶¶ 3-62.

23 Before the final approval hearing, Class Counsel’s efforts will also include, without
24 limitation:

- 25 • Reviewing and responding to correspondence from Class Members;
- 26 • Supervising the work of the Claims Administrator; and
- 27 • Researching and drafting a reply in support of this motion and opposing objections, if any.

28 (Safier Decl., ¶ 68.)

1 Class Counsel calculated their lodestar using Class Counsel's regular billing rates, which
 2 for the attorneys involved range from \$300 to \$1050 per hour and for legal assistants ranged from
 3 \$150 to \$275 per hour. (Safier Decl. ¶ 85.). These hourly rates are equal to market rates in San
 4 Francisco for attorneys of Class Counsel's background and experience. *Id.*; see also *In re Optical*
 5 *Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143-RS, 2016 U.S. Dist. LEXIS 175515 at *8
 6 (N.D. Cal. Dec. 19, 2016) (approving hourly rates of \$205 to \$950); *Gutierrez v. Wells Fargo*
 7 *Bank, N.A.*, No. C-07-05923-WHA, 2015 U.S. Dist. LEXIS 67298 at *5 (N.D. Cal. May 21,
 8 2015), *appeal dismissed* (Oct. 30, 2015) (approving hourly rates of \$475 to \$975). Each of the
 9 lawyers who did substantive work on the case graduated from top law schools; and the key players
 10 have at least 10 and in some cases 20 years of litigation experience. (Safier Decl. ¶ 94.)³

11 A table setting forth hours worked is set forth in paragraph 84 of the Safier Declaration and
 12 reprinted below:

Timekeeper	Hours	GSLLP Rate	Total
Adam J. Gutride	1889.5	\$1,050	\$1,983,975.00
Adriana Klompus	0.6	\$275	\$165.00
Anthony Patek	0.2	\$850	\$170.00
Ashley Garcia	48.9	\$275	\$13,447.50
Austin Ku	69.0	\$150	\$10,350.00
Chuck Martin	165.5	\$150	\$24,825.00
Jay Kuo	621.6	\$800	\$497,280.00
Kristen Simplicio	360.1	\$850	\$306,085.00
Marie McCrary	12.1	\$950	\$11,495.00
Matthew McCrary	254.2	\$925	\$235,135.00
Miranda Bane	23.2	\$300	\$6,960.00
Rajiv Thairani	19.9	\$625	\$12,437.50
Seth A. Safier	3879.1	\$1,050	\$4,073,055.00
Stephen Raab	1.3	\$850	\$1,105.00
Tekesha Geel	61.5	\$750	\$46,125.00
Todd Kennedy	3.0	\$900	\$2,700.00
TOTAL			\$7,225,310.00

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³ Furthermore, it is almost certain the rates paid by Defendants to its attorneys in this case far exceed the rates requested for Class Counsel. See *Managing Class Action Litigation: A Pocket Guide For Judges* § IV(F) (suggesting an examination of the defendant's attorney fee records as a measure of what might be reasonable). The billing rates are standard rates and/or have been recently approved by other judges in this District. (Safier Decl. ¶¶ 85-95.)

1 These rates are the current rates charged by Class Counsel, which is appropriate given the
2 deferred and contingent nature of counsel’s compensation. *See LeBlanc-Sternberg v. Fletcher*, 143
3 F.3d 748, 764 (2nd Cir. 1998) (“[C]urrent rates, rather than historical rates, should be applied in
4 order to compensate for the delay in payment. . . .”) (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-
5 84 (1989)); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir.
6 1994) (“The district court has discretion to compensate delay in payment in one of two ways:
7 (1) by applying the attorneys’ current rates to all hours billed during the course of litigation; or
8 (2) by using the attorneys’ historical rates and adding a prime rate enhancement.”).

9 In any event, Class Counsel’s request of \$6,130,000.00 for combined fees and costs
10 (equating to approximately \$6,057,000 in fees and \$72,000 in expenses), comes in well *below* the
11 fee amount of \$7,225,310 calculated using the lodestar method. Thus, far from any “upward”
12 multiplier, Class Counsel’s requested fee actually results in a fractional multiplier of 0.84, which
13 further justifies the full requested fee award. *See, e.g., Schuchardt v. Law Office of Rory W. Clark*,
14 314 F.R.D. 673, 690-91 (N.D. Cal. 2016) (holding negative lodestar multiplier to be indication of
15 reasonableness of fee request); *Johnson v. Triple Leaf Tea Inc.*, No. 3:14-cv-01570-MMC, 2015
16 U.S. Dist. LEXIS 170800 at *6 (N.D. Cal. Nov. 16, 2015) (finding where “Class Counsel’s
17 lodestar exceeded the negotiated award” to be “well within the range courts have allowed in the
18 Ninth Circuit”); *Lusby v. GameStop Inc.*, No. C12-03783 HRL, 2015 U.S. Dist. LEXIS 42637 at
19 *4 (N.D. Cal. Mar. 31, 2015) (“Class Counsel’s lodestar . . . result[s] in a negative multiplier of
20 approximately .54. This is below the range found reasonable by other courts in California.”);
21 *Covillo v. Specialtys Café*, No. C-11-00594-DMR, 2014 U.S. Dist. LEXIS 29837 at *7 (N.D. Cal.
22 Mar. 6, 2014) (“Plaintiffs’ requested fee award is approximately 65% of the lodestar, which means
23 that the requested fee award results in a so-called negative multiplier, suggesting that the
24 percentage of the fund is reasonable and fair.”).

25 Class Counsel requests that, in addition to reasonable attorneys’ fees, the Court grant its
26 application for reimbursement of out-of-pocket expenses incurred by it in connection with the
27 prosecution of this litigation. (Safier Decl., ¶ 96.). As required by the N.D. Cal. Guide ¶ 6, the
28 expenses incurred are itemized in counsel’s declaration. (Id. & Ex. 3.) The current total shown in

1 GSLLP records is \$72,021.63, although the amount may increase prior to final approval. (Id.)

2 **F. Approval of the Representative Incentive Award.**

3 This Court should also approve a \$15,000 representative incentive award to the Plaintiff as
4 it is just, fair and reasonable. In deciding whether to approve such an award, a court should
5 consider: “(1) the risk to the class representative in commencing suit, both financial and otherwise;
6 (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of
7 time and effort spent by the class representative; (4) the duration of the litigation and; (5) the
8 personal benefit (of lack thereof) enjoyed by the class representative as a result of the litigation.”
9 *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *see also* N.D. Cal.
10 Guide ¶ 7. Further, as a matter of public policy, representative incentive awards are necessary to
11 encourage consumers to formally challenge perceived false advertising and unfair business
12 practices.

13 Plaintiff took on substantial risk, most importantly the risk of publicity and notoriety.
14 (Safier Decl., ¶ 78.) Plaintiff also worked with counsel throughout *nearly twelve years* of
15 litigation. *Id.* ¶¶ 78-79. Plaintiff responded to discovery requests, including interrogatories and
16 requests for production, searched his personal records for responsive documents, and attended his
17 deposition and testified at arbitration. *Id.* Plaintiff also remained actively involved in the litigation
18 prior to and after settlement. *Id.* He continued to prosecute the case even when it had been limited
19 (by arbitration) to his individual claims, which were only for a few dollars, solely with the hope
20 that the case would eventually return to court and that class relief could be obtained.

21 The proposed representative incentive award is reasonable in light of the Plaintiff’s efforts
22 and the relief to the Class resulting from this litigation. *See* Theodore Eisenberg & Geoffrey P.
23 Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303,
24 1333 (2006) (an empirical study of incentive awards to class action plaintiffs has determined that
25 the average aggregate incentive award within a consumer class action case is \$29,055.20, and that
26 the average individual award is \$6,358.80.); *see also* *Mego*, 213 F.3d at 463 (awarding the named
27 plaintiff \$5,000 involving a class of 5,400 people and a total recovery of \$1.725 million); *Smith v.*
28 *CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 6049 *6 (S.D. Cal. Jan. 14, 2013) (finding the

1 amount of the incentive payments requested, \$15,000, is well within the range awarded in similar
 2 cases); *Gibson & Co. Ins. Brokers, Inc. v. Jackson Nat. Life Ins. Co.*, 2008 WL 618893 (C.D. Cal.
 3 Feb. 27, 2008) (awarding \$5,000 incentive fee).

4 **G. Dates for the Final Approval Process**

5 Plaintiff requests that in connection with preliminary approval, this Court set a date for a
 6 final approval hearing. Subject to preliminary approval being entered by November 20, 2020,
 7 Plaintiff proposes the following schedule:

<u>Item</u>	<u>Proposed Due Date</u>
Notice Date	December 21, 2021
Deadline for objections, claims, opt-outs	February 19, 2021
Replies in support of final approval and motion for attorneys' fees, costs and representative awards; response to objections	March 3, 2021
Final approval hearing	March 17, 2021

14 **H. Conclusion**

15 For the reasons stated above, Plaintiff respectfully requests that this Court now grant
 16 preliminary approval to the proposed class action settlement, and that it grant final approval after
 17 the Class has been given notice and an opportunity to make claims, opt out or object.
 18

19 Dated: November 4, 2020

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/s/ Seth A. Safier

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