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UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

AT&T MOBILITY LLC; NEW CINGULAR WIRELESS PCS LLC; NEW CINGULAR WIRELESS SERVICES, INC., AND DOES 1 THOUGH 50,

Defendants.

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

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLANTIFF'S REQUEST FOR ATTORNEYS' FEES

Judge: Honorable Claudia Wilken
Date: March 17, 2021

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SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

A. Introduction

Pursuant to this Court's Preliminary Approval Order (Dkt.# 402), Plaintiff submits this supplemental memorandum of points and authorities in support of his request for an award of $6,057,978.37 in attorneys' fees.[1] The award will not reduce the money available to the Class: over 99% of Class Members can claim a cash payment or account credit equal to at least one hundred cents on the dollar of their losses. Former customers who submit a claim will receive a minimum payment of $4, approximately twice the median loss. And all current AT&T customers (over 50% of the entire Class) will receive a Day Pass valid for one day of international roaming even if they do not file a claim; these Day Passes are sold by AT&T for $10 each, or twice the mean loss and five times the median loss. In addition to achieving these cash remedies and passes for future services, this litigation obtained substantial non-monetary relief: (a) implementation of new switching technology that prevents the imposition of international roaming charges, (b) more truthful disclosures, and (c) a final appellate opinion holding unenforceable AT&T's arbitration provision in cases seeking public injunctive relief. Plaintiff and his counsel have not yet received any compensation for their work on this case, which has been pending more than twelve years, and the requested fee is significantly below Class Counsel's actual lodestar.

B. Summary Of Relief Obtained In the Litigation

This case was filed because of AT&T's undisclosed prior practice of charging international roaming fees for unanswered calls. In many instances, AT&T charged such fees not just once, but twice, for each unanswered call, for connecting the call to the foreign carrier's switch, and then for forwarding the unanswered call back to the customer's U.S.-based voicemail. At least ten thousand California customers called to complain. (Dkt.# 96, ¶ 31.) Prior to the lawsuit, AT&T had developed, but chose not to implement, technology called Voicemail Call Completion ("VMCC"), which could have prevented the charges. (Id., Ex. L, Cato Depo. at 87:3-89:7; Ex. D; Ex. Z.) Throughout the class period, AT&T omitted from all its brochures, rate plans, websites and other

[1] The total request is for $6,130,000.00 in fees and costs. Deducting the costs of $72,061.63, the fee request is $6,057,978.37. Plaintiff has already briefed the request for costs in his motion dated November 4, 2020. (Dkt.# 395.)

documentation the key facts about the charges. Even where AT&T made a reference to charges for unanswered international calls, the references were buried in fine print and drafted to obscure the issue. AT&T tried to immunize itself from liability by adopting an arbitration provision that prohibited class actions, required arbitration, and prohibited the arbitrator from issuing an injunction against its illegal practices in favor of the general public. Each of these issues has now been addressed by Plaintiff's extraordinary, decade long diligence in prosecuting this litigation.

1. Implementing VMCC

In a 2004 proposal, AT&T employees recommended the implementation of VMCC, which would route unanswered calls to the customer's U.S.-based voicemail without connecting through the foreign carrier's switch even when the customer was roaming internationally. With VMCC, the voicemail connection for the internationally roaming customer would not create either the "incoming" or "outgoing" legs of an international roaming call. (Dkt.# 96, Ex. L, Cato Depo. at 87:3-89:7.) AT&T employees explained that VMCC would reduce customer confusion and complaints and save money in customer service. (Id., Ex. D.) They also explained that the cost of VMCC (approximately $800,000) was *less* than the cost of customer service and refunds relating to the problem (more than $3 million). (Id.) Nevertheless, AT&T declined to implement VMCC, because it concluded that doing so would cut off a much larger revenue stream from international roaming fees for voicemail deposits. (Dkt.# 17, ¶ 11.)

After this case was filed in 2009, Defendants finally implemented VMCC in most countries. (Dkt.# 96, Ex. B, Papner Depo. at 250:10-22; Ex. Z.) That change effectively eliminated the principal issue underlying the litigation—international roaming charges for unanswered calls.

2. Fixing the faulty disclosures

Each AT&T customer receives a copy of the Terms of Service upon signing up. (Dkt.# 96, Ex. B, Papner Depo. at 27:20-23; Ex Q.) AT&T published various versions of its Terms of Service from February 2005 to February 2009, but none warned consumers that they might be charged twice for the same incoming unanswered call. When asked to identify *any* provision in the Terms of Service that authorized AT&T to impose charges for unanswered calls received while roaming on phones outside the United States, its witness identified only the following: "Chargeable time

may also occur from other uses of our facilities, including by way of example, voicemail deposits and retrievals and call transfers." (Id., at 35-36; 53-54.)

This sentence was wholly inadequate. It said nothing about *either* international roaming *or* unanswered calls. The Terms of Service also did not define "voicemail deposit" or explain that "voicemail deposit" means the act of a caller reaching the voicemail platform, whether or not the caller leaves a message. It did not warn that this "chargeable time" was to be billed separately from (rather than included within) customer's monthly allotment of "minutes." Yet, AT&T admitted that it had enticed customers to take their cell phones abroad by advertising that doing so was "just like using your phone at home"[2] even though, within the U.S., unanswered calls do *not* result in additional "chargeable time," including when a voicemail message *is* left. (Id.) Nor did the Terms of Service warn that charges could occur when the phone is off, nor disclose the "trombone" effect that could result in double charges for the same unanswered call. (Id.)

From February 2005 through the end of 2008, the only disclosure in AT&T's rate brochures was a cryptic sentence that appeared in the section "Caller ID Blocking." In both the Cingular Nation brochure from February 2005 and AT&T Nation brochure from January 2008, which were typical of the domestic brochures during the period, the relevant sentence starts with "You" in the following passage:

> address and live in the immediate geographic area in which subscription is made. **Caller ID Blocking:** Your billing name may be displayed along with your wireless number on outbound calls to other wireless and landline phones with Caller ID capability. Contact customer service for more information on blocking the display of your name and number. You may be charged for both an incoming and an outgoing call when incoming calls are routed to voicemail, even if no message is left. In the event that the conditions of the Plan as described above are violated, Cingular may move subscriber to

(Dkt.# 96, M (emphasis added); 301-1, Ex. 1 at 2.) Several sentences later, in both brochures, the documents stated that "Chargeable Time may also occur from other uses of our facilities, including by way of example, voicemail deposits and retrievals." (Id.) The language that appeared

[2] (Dkt.# 96, Ex. E.; Ex. B, Papner Depo. at 84:1-85:5 (agreeing that AT&T had touted to customers that using an AT&T phone internationally was "just as easy as using it at home.").)

in these documents never changed in any meaningful way across any of AT&T's major domestic rate plan brochures from February 2005 through the end of 2008. (Dkt.# 96, Ex. B, Papner Depo. at 153:9-162:11; Dkt.# 301-1. Ex.1-3.)

As part of the Settlement, Defendants will now ensure that their 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.*" (Dkt.# 395-1, Ex. 1, ¶ 3.1(a).)

3. Invalidating AT&T's Arbitration Provision

Although the underlying misconduct that led to the litigation—international roaming fees—was drastically reduced early in the case by adoption of VMCC, another issue became even more prominent, and caused the litigation to last for a dozen years with protracted, contentious motions and multiple trips through the appellate courts. That issue was the enforceability of Defendants' arbitration provision and class action waiver. In his September 2009 amendment to the Complaint, Plaintiff pled as follows:

> This case also is about how Defendants include, in their mobile telephone service agreements, a provision that purports to require customers to arbitrate all disputes and to waive their rights to bring a class action. Despite the fact that such provisions are unconscionable and unenforceable under California law, Defendants have included it in all their customer agreements and have attempted to enforce it against Plaintiff and others in California.

(Dkt.# 78, ¶ 2.) On that basis, he alleged a CLRA violation and requested injunctive and declaratory relief on behalf of a "Compelled Arbitration Class." (Id., ¶¶ 41-43, 69-70 & Prayer For Relief.)

After AT&T answered the Complaint, it moved to compel arbitration and to stay proceedings. (Dkt.# 1-4, 43, 47.) This Court denied both motions, and AT&T appealed. (Dkt.# 74, 79.) While the appeal was pending, in May 2010, Plaintiff moved for class certification, and the parties completed briefing on the certification motion. (Dkt.## 95, 96, 126, 127). AT&T then renewed its motion to stay after the United States Supreme Court granted a petition for certiorari it

had filed in another case involving arbitration: *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom. AT&T Mobility LLC v. Concepcion*, 78 U.S.L.W. 3454 (U.S. May 24, 2010) (No. 09-893) ("*Concepcion*"). This Court granted AT&T's renewed motion to stay, and on March 25, 2011, it denied without prejudice Plaintiff's motion for class certification. (Dkt.# 191.) After the Supreme Court ruled in favor of AT&T in *Concepcion*, the Ninth Circuit summarily reversed this Court's order denying the motion to compel arbitration and remanded for further proceedings. *See McArdle v. AT&T Mobility, LLC*, 474 F. App'x 515 (9th Cir. 2012). This Court the compelled individual arbitration on September 25, 2013. (Dkt.# 257.)

Plaintiff continued to believe that despite the ruling in *Concepcion*, there were other infirmities with AT&T's arbitration provision, and that AT&T was unconscionably using it to withhold remedies from all the other class members. So, although he had only a few dollars at stake on his individual claim, he did not give up. He asked the arbitrator to stay proceedings until the California Supreme Court had ruled on whether companies could legally impose arbitration provisions in which customers waive all rights to public injunctive relief—i.e., all rights to seek an injunction to end unlawful conduct towards the general public. The arbitrator refused the stay, so Plaintiff proceeded to a two-day arbitration, which included live lay and expert witness testimony about how AT&T's conduct on the international roaming issue deceived him and others. After the parties completed arbitration, the arbitrator ruled for Defendants. Yet again Plaintiff did not concede; instead, on December 16, 2016, he moved to vacate the arbitral award. (Dkt.# 263.) And on May 12, 2017, he moved for reconsideration of the Court's order granting AT&T's motion to compel arbitration. (Dkt.# 273.) Both motions were based in large part on the California Supreme Court's hearing, and subsequent decision, in *McGill v. Citibank*, 2 Cal. 5th 945 (2017). *McGill* held that consumers may not waive the right to seek the California statutory remedy of public injunctive relief, and that such waivers are unenforceable even if contained in an arbitration agreement, as they are contrary to California public policy and Section 1751 of the Consumer Legal Remedies Act. *Id.* at 951.

On October 3, 2017, this Court granted Plaintiff's motion for reconsideration. (Dkt.# 287.) It held that the waiver of public injunctive relief in subsection 2.2(6) of the parties' agreement is

unenforceable, which triggers the "poison pill" in the agreement rendering the entire arbitration provision null and void. (Id., p. 12.) It therefore vacated the arbitral award. (Id., p. 15.) Defendants appealed to the Ninth Circuit from the order setting aside the arbitral award. After briefing and argument, the Ninth Circuit affirmed. AT&T petitioned the United States Supreme Court for a writ of certiorari, which was denied.

The final decision of the Ninth Circuit should have the effect of barring AT&T from enforcing its arbitration provision not only in this case, but in any similar case alleging California claims and seeking a public injunction. *See, e.g., Shaw v. Hahn*, 56 F.3d 1128, 1131 (9th Cir.1995) (Collateral estoppel, or issue preclusion, bars "relitigation of issues actually litigated and necessarily decided, after a full and fair opportunity for litigation, in a prior proceeding.")[3] Thus, Plaintiff achieved the exact relief he sought in his September 2009 complaint of invalidating the arbitration provision, and his actions benefit not only class members here, but all California AT&T customers, on a wide variety of claims for which they can now seek classwide judicial redress when previously they would have been limited to individual arbitration.[4]

Because of the arbitration dispute, this case was essentially un-resolvable on a class-wide basis until the arbitration issue was finally decided. Indeed, AT&T flatly refused to finally resolve this litigation on a classwide basis, until the Supreme Court denied certiorari. (Safier Supp. Decl., ¶ 6). While the legal fees incurred by both sides dwarf the actual monetary loss at stake for the

[3] "A federal court decision has preclusive effect where (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005). Here, the first prong is satisfied as it concerns the same arbitration provision and any request for public injunction. The second prong is satisfied as the Ninth Circuit's decision is final. And the third prong is satisfied as the Defendants here would also be defendants in other consumer actions seeking a public injunction.

[4] While the appeal from the reconsideration motion was pending, Plaintiff renewed his renewed motion for class certification, including certification of the Compelled Arbitration Class, renamed the "Waiver Class." The Court denied certification of the Waiver Class on the ground that "McArdle does not need the Court to certify the Waiver Class for him to achieve the relief he seeks because he can pursue public injunctive relief as an individual plaintiff." (Dkt.# 345, p. 29-30.) The fact that certification was denied does not mean that Plaintiff failed to achieve the desired result: namely the invalidation of the arbitration provision.

international roaming fees, they were necessarily incurred to bring the case to resolution on behalf of the Roaming Class, and to achieve the invalidation of the arbitration provision, not just for this case but for any future case by Californians seeking injunctive relief on behalf of the general public.

4. Monetary Relief

All current customer Class Members may submit a claim for an Account Credit. If they do not act, they automatically receive a Day Pass. (Dkt.# 395-1, Ex. 1, ¶¶ 4.1 (a)-(b).) Former customer Class Members must submit a claim for a Cash Refund (Id. ¶ 4.1(c).) The amount of the Account Credit or Cash Refund is the full amount paid during the Class Period for all one-minute international roaming calls, up to a maximum of $50. (Id. ¶¶ 2.1, 2.7.) The minimum amount of a Cash Refund is $4. (Id. ¶ 4.1(c).)

An analysis of Defendants' international roaming billing data indicates that there are approximately 267,000 Class Members. Approximately eighty-percent (80%) of Class Members incurred less than $4 in international roaming charges for unanswered calls; less than four-percent (4%) incurred between $4-4.99; eleven percent (11%) between $5-9.99; less than six percent (6%) between $10-$50; and, finally, less than one percent (1%) incurred $50.01+. The median class member was charged $1.98; the mean was $5.09; and the mode was $0.79. The Day Pass (valued at $10) accordingly represents double the average loss. It provides a full recovery for more than ninety-five percent (95%) of current customer class members, and more than double recovery for approximately eighty-five percent (85%) of current customer Class Members. (Safier Supp. Decl., ¶ 2.) And the $4 minimum cash payment is again more than double the total loss of the median former customer Class Member. (Id.)

5. Administrative Expenses, Attorneys' Fees and Costs

All attorneys' fees and costs, the proposed incentive award, and the costs of notice and administration of the Settlement will be paid by Defendants separate from any claims. (Dkt.# 395-1, Ex. 1, ¶ 5.2(q).).) They will not diminish the amounts received by Class members. (Id.)

C. Legal Framework

"While attorneys' fees and costs may be awarded in a certified class action where so

authorized by law or the parties' agreement, Fed. R. Civ. Pro. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 941 (9th Cir. 2011). In the Ninth Circuit, "where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." *Id*., at 942 (stating "[b]ecause the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar.") However, "[t]he 'lodestar method' is appropriate in class actions brought under fee-shifting statutes (such as federal civil rights, securities, antitrust, copyright, and patent acts)…" *Id*., at 941. Moreover, in situations where "the benefit to the class" is not "easily quantified," district courts have discretion to award fees based on how much time counsel spent and the value of that time (a lodestar calculation) without needing to "perform a 'crosscheck'" in which they "attempt to estimate how this compares to the recovery for the class." *See Campbell v. Facebook, Inc*., 951 F.3d 1106, 1126 (9th Cir. 2020). As set forth in Plaintiff's motion for preliminary approval, here, (a) the relief is primarily injunctive, (b) there are fee-shifting statutes (California Civil Code § 1750 and California Code of Civil Procedure § 1021.5), and (c) given the difficulty of valuing the non-monetary relief obtained, it is appropriate for this Court to analyze the attorneys' fee request and issue an award based solely on the "lodestar" method. *Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

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

Under the lodestar approach, "[t]he lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000); *accord Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016). Class Counsel's lodestar[5] through the date of this memorandum is approximately $7,282,430. (Safier Supp. Decl. ¶¶ 4-5.) Details of all the work performed are

[5] Information regarding Class Counsel's hourly rates is set forth in the motion for preliminary approval. (Dkt.# 395-1.) It remains unchanged.

contained in the November 4, 2020 Safier Decl. ¶¶ 3-62. (Dkt.# 395-1.) Since submission of the preliminary approval motion, Class Counsel has performed an additional 67.3 hours work, including in connection with the oral argument on the preliminary approval motion; supervising the work of the Claims Administrator including multiple rounds of testing the settlement website; reviewing and responding to correspondence from Class Members; and researching and drafting this memorandum. (Safier Supp. Decl., ¶ 3.)

An updated table setting forth the total hours worked is set forth in paragraph 4 of the Supplemental Safier Declaration and reprinted below:

Timekeeper	Hours	GSLLP Rate	Total
Adam J. Gutride	1,915.3	$1,050	$2,011,065.00
Adriana Klompus	1.2	$275	$330.00
Anthony Patek	0.2	$850	$170.00
Ashley Garcia	49.1	$275	$13,502.50
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	13.2	$950	$12,540.00
Matthew McCrary	255.3	$925	$236,152.50
Miranda Bane	23.2	$300	$6,960.00
Rajiv Thairani	20.6	$625	$12,875.00
Seth A. Safier	3,907.7	$1,050	$4,103,085.00
Stephen Raab	1.7	$850	$1,445.00
Tekesha Geel	69.3	$750	$51,975.00
Todd Kennedy	4.0	$900	$3,600.00
TOTAL	7,477.0		$7,292,240.00

(Safier Supp. Decl., ¶ 5.) In the Ninth Circuit, the lodestar figure is "presumptively a reasonable fee award." *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).

These hourly rates are Class Counsel's 2020 rates. (Safier Supp. Decl., ¶¶ 4-5.) Those rates have slightly increased for 2021. (Safier Supp. Decl., ¶ 5.) Though it would be appropriate to recalculate the lodestar with the higher 2021 rates,[6] Plaintiff has not done so. The rates employed

[6] *E.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987) (holding "In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.")

accordingly remain equal to (and likely lower than) current market rates in San Francisco for attorneys of Class Counsel's background and experience. *See, e.g., Schneider v. Chipotle Mexican Grill, Inc*., No. 16-cv-02200-HSG, 2020 U.S. Dist. LEXIS 206507, at *31 (N.D. Cal. Nov. 4, 2020) (finding that rates between $425 and $695 for associates, and $830 and $1,275 for partners, are "in line with prevailing rates in this district for personnel of comparable experience, skill, and reputation."); *Hefler v. Wells Fargo & Co.,* No. 16-CV-05479-JST, 2018 U.S. Dist. LEXIS 213045, at *14 (N.D. Cal. Dec. 18, 2018) (approving rates ranging from $650 to $1,250 for partners or senior counsel, and $400 to $650 for associates); *Superior Consulting Servs. v. Steeves-Kiss,* No. 17-cv-06059-EMC, 2018 U.S. Dist. LEXIS 80261, at *5 (N.D. Cal. May 11, 2018) (noting that "district courts in Northern California have found that rates of $475-$975 per hour for partners and $300-$490 per hour for associates are reasonable."); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig*., No. 2672 CRB (JSC), 2017 U.S. Dist. LEXIS 39115, at *5 (N.D. Cal. Mar. 17, 2017) (approving billing rates ranging from $275 to $1600 for partners, $150 to $790 for associates, and $80 to $490 for paralegals "given the complexities of this case and the extraordinary result achieved for the Class"); *In re Optical Disk Drive Prod. Antitrust Litig.,* No. 3:10-MD-2143-RS, 2016 U.S. Dist. LEXIS 175515 at *8 (N.D. Cal. Dec. 19, 2016) (approving hourly rates of $205 to $950); *Gutierrez v. Wells Fargo Bank, N.A*., No. C-07-05923-WHA, 2015 U.S. Dist. LEXIS 67298 at *5 (N.D. Cal. May 21, 2015) (approving hourly rates of $475 to $975). Each of the lawyers who did substantive work on the case graduated from top law schools; and the key players have at least 10 and in some cases 20-25 years of litigation experience. (Dkt.# 395-1, ¶ 94.)

2. This Court Is Not Obligated to "Cross-Check" Class Counsel's Lodestar.

A recent Ninth Circuit decision, *Chambers v. Whirlpool Corp*., 980 F.3d 645 (9th Cir. 2020)[7] ("*Whirlpool*"), provides that where 28 U.S.C § 1712 (of the Class Action Fairness Act ("CAFA")) applies to a settlement—i.e., where "coupons" are made available in a settlement, a

[7] All pincites to *Whirlpool* are Lexis cites—i.e., *Chambers v. Whirlpool Corp*., 2020 U.S. App. LEXIS 35366. A rehearing en banc has been requested in *Whirlpool*. *See Chambers v. Whirlpool Corp*., Case No., 16-56666 (Dkt.## 168-169).

court must apply a lodestar "cross-check," or in the alternative, articulate why it is not feasible in a particular case. *Id*., at *26. Because the settlement in this case is not a "coupon settlement," section 1712 of CAFA and, by extension, *Whirlpool* do not apply. However, even if this settlement were to be deemed a "mixed" coupon settlement, the Court should apply the lodestar methodology without the necessity of a cross-check because, as articulated below, it is infeasible.

a. This Case Is Not Governed By The Coupon Provisions Set Forth In CAFA (28 U.S.C § 1712).

(1) This Is A Cash Settlement.

In *Whirlpool*, class members were required to file a claim to receive a coupon.[8] Most *Whirlpool* class members could only claim a coupon; they were ineligible to receive any cash compensation. Only 4% of filed claims potentially involved cash. *See Whirlpool*, 980 F.3d at *10 (stating "put another way, only 4% of the 133,040 filed claims—at most—could potentially involve cash reimbursement.") By contrast, cash (or a cash credit to their AT&T account for current customers) is available to everyone in this settlement. Cash (or an account credit) is the only benefit that Class Members can affirmatively claim. This is a 100% cash settlement.

It is true that if a current AT&T class member customer does nothing, she will automatically have a Day Pass deposited into her AT&T account. This default provision does not change the analysis. *See Williamson v. McAfee, Inc*., No. 5:14-cv-00158-EJD, 2017 U.S. Dist. LEXIS 15838 (N.D. Cal. Feb. 3, 2017) (settlement was "not a coupon settlement, since class members had the option to receive cash instead of value certificates, even though they received certificates by default."); *See Foos v. Ann, Inc*., No. 11cv2794 L (MDD), 2013 U.S. Dist. LEXIS 136918, at *7-*8 (S.D. Cal. Sept. 23, 2013) ("having a coupon option does not necessarily transform a class action settlement into a coupon settlement under CAFA").

A relatively recent Ninth Circuit case—*In re Online DVD-Rental Antitrust Litig*, 779 F.3d 934 (9th Cir. 2015)—also is instructive. In *In re Online DVD* settlement class members were given

[8] *I.e.,* (i) a $100 or a 30% discount coupon for a new Whirlpool dishwasher if there is a future overheating incident within two years of the settlement notice date, or within 10 years of purchase for NewGen/Raptor owners and/or (ii) a 10-20% "rebate" coupon to purchase a new Whirlpool dishwasher, which expires 120 days after the claim deadline. *Whirlpool*, 980 F.3d at *8-9.

the choice between a $12 gift card, for use on the Walmart website, or $12 in cash. *See In re Online DVD*, 779 F.3d at 952. The Ninth Circuit concluded that the settlement did not constitute a "coupon settlement" within the meaning of CAFA. *Id*. It explained that "[c]lass members who selected gift cards must have valued them at close to face value, because they selected them over essentially the same value in cash." *Id*.

The facts here are even more favorable. Here, the settlement agreement contemplates that only some class members (current customers) will be presented a choice between claiming account credit and or doing nothing and receiving a Day Pass. (Dkt.# 395-1, Ex. 1, ¶¶ 4.1 (a)-(c).) The Day Pass is worth up to five times the dollar amount of the median charge to a class member[9] and more than double the mean charge; 95% of current Customer Class Members will receive at least the value they lost and 85% will receive double the value.[10] (Safier Supp. Decl., ¶ 2.) This Court can accordingly conclude, as in *In re Online DVD*, that those current AT&T customers who "*chose*" not to act—i.e., not to affirmatively claim the account credit—valued the Day Pass the same as, or perhaps more than, the account credit. (*See* Dkt.# 395, pp. 5-6 (explaining claims process).)

(2) The Day Pass Is Not A "Coupon."

In addition to the fact that the settlement provides everyone with the option for cash, the Day Pass itself is not even properly seen as a "coupon" under CAFA. Though CAFA does not define "coupon," the Ninth Circuit has established three factors to determine whether a settlement is a coupon settlement: (i) "whether class members have 'to hand over more of their own money before they can take advantage of' a credit"; (ii) "whether the credit is valid only 'for select products or services'"; and (iii) "how much flexibility the credit provides, including whether it expires or is freely transferrable." *In re Easysaver Rewards Litig.*, 906 F.3d 747, 762 (9th Cir. 2018) *(citing In re Online DVD-Rental Antitrust Litig*., 779 F.3d 934, 951 (9th Cir. 2015)). Here, the first and third factors indicate the Day Pass is not a coupon.

Regarding the first factor, use of the Day Pass does not require an additional purchase,

[9] This is calculated against the mode recovery of $0.79. (Safier Supp. Decl., ¶ 2.)

[10] This calculated against the fact that approximately 85% of all Class Members incurred less than $4.99 in international roaming charges for unanswered calls. (Id., ¶ 2.)

setting aside the regular monthly fees for use of AT&T cellphone service. The class member can use the Day Pass for a single day of international roaming without agreeing to use or pay for international roaming on any other day of travel. The Day Pass therefore differs from a benefit like the one in *Whirlpool*, for "20% off" a purchase, where there is merely a discount toward future services. The Day Passes are far from the kinds of "rebates and coupons aim[ed] to facilitate a sale to a purchaser who would not otherwise purchase a product at a higher price." *See True v. Am. Honda Motor Co*., 749 F. Supp. 2d 1052, 1075 (C.D. Cal. 2010); *see also Chaikin v. Lululemon USA Inc.,* No. 3:12-CV-02481-GPC-MDD, 2014 U.S. Dist. LEXIS 35258, at *7 (S.D. Cal. Mar. 14, 2014) (settlement providing $25 "credit vouchers" redeemable at Lululemon stores that "require[d] no additional purchase" was not a coupon settlement); *Foos,* 2013 U.S. Dist. LEXIS 136918, at *7-*8 (settlement providing $15 voucher for Ann Taylor merchandise with no minimum purchase required was not a coupon settlement); *Morey v. Louis Vuitton N. Am. Inc*., No. 11cv1517 WQH (BLM), 2014 U.S. Dist. LEXIS 3331, at *17 (S.D. Cal. Jan. 10, 2014) (settlement providing $41 "Merchandise Certificate" redeemable at Louis Vuitton retail stores was not coupon settlement); *Tchoboian v. FedEx Office & Print Servs., Inc*., No. SA CV 10-01009 JAK (MLGx), 2014 U.S. Dist. LEXIS 184376, at *6 (C.D. Cal. Mar 25, 2014) ("[C]ourts have distinguished between 'coupons,' which provide 'discounts on merchandise or services offered by the defendant,' and 'vouchers,' which provide 'free merchandise or services.'").

Regarding the third factor, the Day Pass is flexible in that it can be used anywhere and anytime within 18 months (compared to 120 days in *Whirlpool*). This is three times longer than the "flexibility" dividing line in the Ninth Circuit, which is generally around 6 months. *See Chaikin,* 2014 U.S. Dist. LEXIS 35258, at *3 (approving a class action settlement offering vouchers that expire within six months); *Foos*, 2013 U.S. Dist. LEXIS 136918, at *3 (same); *Davis v. Cole Haan, Inc*., No. C-11-01826-JSW, 2013 U.S. Dist. LEXIS 151813, at *3 (N.D. Cal. Oct. 21, 2013) (finding a class action settlement was a coupon settlement, in part, because of "significant limitations" including that "the vouchers expire after six months").[11]

[11] Though it is not expressly non-transferrable as in *Whirlpool*, Plaintiff concedes that, because the Day Pass can only be used in the Class Member's mobile telephone account, it is likely not "transferrable."

b. Even If This Is A "Mixed" Coupon/Non-Coupon Settlement, The Lodestar-Based Fee Is Appropriate Without Need For A Cross-Check.

Should this Court nevertheless determine that the Day Pass qualifies as a "coupon," the settlement must be treated as a "mixed" settlement—i.e., "involving coupon and non-coupon relief"—under 1712(c). *See HP Inkjet,* 716 F.3d at 1184-85 (holding section 1712(c) applies where a settlement provides both coupons and other relief, such as equitable relief). Under § 1712(c) — the percentage-of-redemption-value method applies only to the portion of fees *attributable to obtaining the coupon relief*. 28 U.S.C. § 1712(c)(1) (stating that fees "based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a)," which sets forth the percentage-of-redemption-value methodology). But the remaining portion of fees attributable to "non-coupon relief" is calculated under § 1712(b) as a reasonable lodestar amount times any appropriate multiplier. *See* 28 U.S.C. § 1712(b) (stating that where "a portion of the recovery of the coupons is not used to determine the attorney's fees," it "shall be based upon the amount of time class counsel reasonably expended"). In short, the total fee award for "mixed" settlements under § 1712(c) is the sum of: (i) "a reasonable contingency fee based on the actual redemption value of the coupons" (§ 1712(a)); and (ii) "a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained" (§ 1712(b)). *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1184-85 (9th Cir. 2013).

(1) The Court May Disregard the Value of the Day Passes and Still Award The Full Amount Of Fees.

If the coupon provision of CAFA is applicable, this Court can (and should) attribute no value to the Day Passes, and instead determine, per § 1712(b), a reasonable lodestar amount to compensate class counsel for the other relief obtained.

In *In re Easysaver Rewards Litigation*, the Ninth Circut explained that a district court in "mixed" settlements may opt to use the "lodestar approach provided that it does so without reference to the dollar value of [the coupon relief]." 906 F.3d at 759. Here, Class Counsel's request of $6,130,000.00 for combined fees and costs (equating to approximately $6,057,000 in fees and $72,000 in expenses), comes in well *below* the fee amount of $7,339,970 calculated using the lodestar method. Thus, far from any "upward" multiplier, Class Counsel's requested fee results

in a fractional multiplier of 0.83; in other words, Class Counsel has effectively "written off" approximately 1270 hours expended on this litigation. *See, e.g.*, *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 690-91 (N.D. Cal. 2016) (holding negative lodestar multiplier to be indication of reasonableness of fee request); *Johnson v. Triple Leaf Tea Inc.*, No. 3:14-cv-01570-MMC, 2015 U.S. Dist. LEXIS 170800 at *6 (N.D. Cal. Nov. 16, 2015) (finding where "Class Counsel's lodestar exceeded the negotiated award" to be "well within the range courts have allowed in the Ninth Circuit"); *Lusby v. GameStop Inc.*, No. C12-03783 HRL, 2015 U.S. Dist. LEXIS 42637 at *4 (N.D. Cal. Mar. 31, 2015) ("Class Counsel's lodestar . . . result[s] in a negative multiplier of approximately .54. This is below the range found reasonable by other courts in California."); *Covillo v. Specialtys Café*, No. C-11-00594-DMR, 2014 U.S. Dist. LEXIS 29837 at *7 (N.D. Cal. Mar. 6, 2014) ("Plaintiffs' requested fee award is approximately 65% of the lodestar, which means that the requested fee award results in a so-called negative multiplier, suggesting that the percentage of the fund is reasonable and fair.")

At best, a very small number of the hours worked in this litigation—and far fewer than the approximately 1270 hours that are being written off—are attributable to the Day Pass component of the settlement. Only a tiny fraction of the total hours worked—far less than 17% of the total being written off—were devoted to obtaining the Day Pass. (Safier Supp. Decl., ¶ 6.)[12] The bulk of the fees incurred in this litigation are attributable to preventing the Defendants from enforcing the arbitration agreement. Plaintiff succeeded in invalidating that agreement and should be compensated for the time spent doing so. Plaintiff also succeeded in leading Defendants to change their practices with regard to international roaming, by implementing VMCC, and to agree in settlement to improved disclosures. Finally, Plaintiff succeeded in obtaining cash benefits

[12] The Ninth Circuit reasoned that "attributable to" means "to explain as caused or brought about by: regard as occurring in consequence or on account of." *Id*. (quoting Webster's Third New International Dictionary (2002)). Then, in applying this term, the Ninth Circuit explained:

> [A]n attorneys' fees award is 'attributable to' an award of coupons where the attorneys' fees award is a 'consequence' of the award of coupons. Or, put differently, attorneys' fees are 'attributable to' an award of coupons where 'the [singular] award of the coupons' is the condition precedent to the award of attorneys' fees.

HP Inkjet, 716 F.3d at 1181.

averaging significantly more than the median loss for any class member who submits a simple claim form—a claim form that is simpler than would likely be required in a post-trial claim process for a smaller refund. The purported "coupon" provision of the settlement—the Day Pass—is just icing on the cake, for those who do not want to file a claim. It would be an odd result if Class Counsel's fee award were to be reduced because it negotiated for, and obtained, an additional automatic benefit for class members who decided not to make a claim, a benefit that is greater than could be obtained at trial.

Even if the Court was inclined to attribute more hours to the Day Pass and thus reduce the lodestar below the requested fee amount, it should then apply a positive "multiplier" to take into account a variety of other factors. These factors include the quality of the representation, the novelty and complexity of the issues, the results obtained (excluding those attributable to the Day Pass), and the contingent risk presented. *See, e.g., Bluetooth*, 654 F.3d at 942 n.7; *see also Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001) (indicating the court may adjust the fee award considering "the following factors: (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award."). Each factor would justify an positive multiplier large enough to account for whatever lodestar reduction the Court attributed to work on the Day Pass component of the settlement.

Quality of Representation. Class Counsel has worked diligently on this litigation for 12 years. Their work included four appeals to the Ninth Circuit, an appeal to the Supreme Court, and a two-day in person arbitration. It also included two motions for class certification.

Novelty and Complexity. Certainly the arbitration issues were novel, as this was the first case applying *Concepcion* in the Ninth Circuit, and the first case applying *McGill* in a District Court or in the Ninth Circuit. There was also an in-person arbitration involving expert witnesses.

Results Obtained. Ninety-nine percent (99%) of Class members can claim at least 100% of their losses in cash or account credit. (Supp. Safier Decl., ¶ 2.) The minimum payment to former customers is twice the median loss amount. (Id.) Even without making a claim, current AT&T customers can receive the Day Pass, which is worth up to 5 times the median loss. (Id.) Most

importantly, there is significant, albeit not easily quantifiable, value conferred in the form of changed practices, injunctive relief and invalidation of AT&T's arbitration provision, all of which confers a benefit to Class members and Calfornia's general public that will continue into the future. *See McCown v. City of Fontana*, 565 F.3d 1097, 1101-02 (9th Cir. 2009) ("The reasonableness of the fee is determined primarily by reference to the level of success achieved by the plaintiff.")

Contingent Risks. Plaintiff's Counsel bore considerable risk in litigating this case wholly on a contingent basis and advancing all costs. (Dkt.# 395-1., ¶ 82.) During its pendency, Plaintiff's Counsel turned away other work. (Id.) And Plaintiff's Counsel will have to perform more work before the Settlement will become effective, to respond to any objections, communicate with class members, supervise the claim administrator, and oppose any appeals. As the California Supreme Court has explained:

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.

Ketchum, 24 Cal. 4th at 1132-33; *see also Cazares v. Saenz*, 208 Cal. App. 3d 279, 288 (1989) ("in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a non-contingent fee for the same case.")

(2) A Lodestar Cross-Check Is Not Feasible or Practical.

In this case, a "cross-check" of the lodestar (against a theoretical amount of benefit conferred) is not feasible or practical. Nearly all the litigation was driven by the dispute over the arbitration provision—not the international roaming charges. But for that dispute, this case would have been resolved years ago. It would not have gone to arbitration and would not have repeatedly been appealed to the Ninth Circuit and the Supreme Court. The value of that injunctive relief (and other changed practices) cannot be easily monetized, so a cross-check that focused only on the

cash, account credits and Day Passes made available or redeemed would severely undervalue this settlement. *See, e.g., Coles v. City of Oakland,* No. C03-2961 TEH, 2007 U.S. Dist. LEXIS 100533, at *50 (N.D. Cal. Jan. 4, 2007) (holding that injunctive relief obtained served public interest and that attorneys who serve public interest should be rewarded with lodestar-based fee); *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1418 (1991) (multipliers are used to compensate counsel for the risk of loss, and to encourage counsel to undertake actions that benefit public interest); *Robertson v. Fleetwood Travel Trailers of California, Inc*., 144 Cal.App.4th 785, 820 (2006) (holding trial courts should calculate fee awards using the lodestar method "based on actual time expended, rather than a percentage of the recovery, so that pursuit of consumer warranty cases [is] economically feasible.")

c. The Catalyst Theory Would Support A Lodestar Award Even In The Absence of Any Settlement Relief.

Finally, even if the parties had not settled but had gone to trial, and even if Plaintiff had lost at trial, Plaintiff and his counsel would still be entitled to the full requested fee award under the lodestar analysis for their work prior to trial invalidating the arbitration provision and causing AT&T to adopt VMCC. *A fortiorari*, they should not receive a lower fee having obtained additional relief for the class in settlement.

Section 1021.5 of the California Code of Civil Procedure authorizes a court (including a federal court) to award attorneys' fees to a party who has achieved "the enforcement of an important right affecting the public interest." *See id.*; *see also Klein v. City of Laguna Beach*, No. 13-56973, 810 F.3d 693, 701 (9th Cir. Jan. 14, 2016) ("When California plaintiffs prevail in federal court on California claims, they may obtain attorneys' fees under section 1021.5.") (citing *Mangold v. Cal. Pub. Utils. Comm'n,* 67 F.3d 1470, 1478 (9th Cir.1995)). To be eligible for a fee award pursuant to C.C.P. § 1021.5, a party need not win at summary judgment or trial. Rather, as the California Supreme Court has explained:

> The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.

Maria P. v. Riles, 43 Cal. 3d 1281, 1291 (1987) (internal citations omitted); accord *MacDonald v.*

Ford Motor Co., No. 13-CV-02988-JST, 2015 WL 6745408, at *3 (N.D. Cal. Nov. 2, 2015).

A plaintiff who obtains changed practices, even during the litigation, meets the "prevailing party" standard. *See, e.g., Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989) (explaining that under certain statutes, a "prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation"). It is not even necessary for the plaintiff to obtain an injunction or similar judicially enforceable result, if she was the "catalyst" for the desired result. *See Tipton-Whittingham*, 316 F.3d at 1062, *certified question answered,* 34 Cal. 4th 604 (2004) ("California law continues to recognize the catalyst theory and does not require 'a judicially recognized change in the legal relationship between the parties' as a prerequisite for obtaining attorney fees under Code of Civil Procedure section 1021.5."); *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 560-61 (2004), *as modified* (Jan. 12, 2005) (same); *accord Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 844 (9th Cir. 2007).

Further, a lawsuit that primarily, or even entirely, achieves non-monetary benefits is still eligible for a full lodestar fee. As the California Supreme Court has explained, "By permitting prevailing [parties] to recover their attorney fees in addition to costs and expenses, our Legislature has provided injured consumers strong encouragement to seek legal redress in a situation in which a lawsuit might not otherwise have been economically feasible." *Murillo v. Fleetwood Enterprises, Inc.*, 17 Cal.4th 985, 994 (1998); *see also Bluetooth*, 654 F.3d at 941 (holding that lodestar award appropriate when the relief obtained is "not easily monetized," such as when injunctive relief is part of the settlement; *Camacho*, 523 F.3d at 978 (holding the lodestar figure is "presumptively a reasonable fee award.")

3. Reduction of the Fees Would Not Serve Class Member or Public Interests

Finally, it is important to note that reduction of the fees would not benefit the Class; rather, it would exclusively enrich (and benefit) Defendants.

D. Conclusion

For all these reasons, and for the further reasons set forth in Plaintiff's motion to approve the settlement (Dkt.# 395), Plaintiff respectfully requests that the Court approve the full requested fee

award, for a total award of fees and expenses of $6,130,000.00.

Dated: January 15, 2021

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