Matthew C. Helland, CA Bar No. 250451
mhelland@nka.com
NICHOLS KASTER, LLP
235 Montgomery St., Suite 810
San Francisco, CA 94104
Tel.: 415.277.7235; Fax: 415.277.7239

E. Michelle Drake, MN Bar No. 0387366*
emdrake@bm.net
John Albanese, MN Bar No. 0395882*
BERGER MONTAGUE PC
43 SE Main Street, Suite 105
Minneapolis, MN 55414
Tel.: 612.594.5999; Fax: 612.584.4470
**pro hac vice*

Attorneys for Plaintiff and the Proposed Classes

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

IAN DOUGLAS, individually, as a representative of the class, and on behalf of the general public

Plaintiff,

v.

DHI GROUP, INC. and DICE INC.,

Defendants.

Case No.: 18-cv-331732

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE PAYMENT

Hon. Thomas E. Kuhnle

Date: August 2, 2019
Time: 9:00 AM
Location: Department 5

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules and Statutes

I. INTRODUCTION

Pursuant to Cal. Rules of Court, rule 3.769(b), and in accordance with the Court's Preliminary Approval Order (*Douglas v. DHI Group, Inc., et al.*, No. 18-CV-331732, Order Re: Motion for Preliminary Approval of Class Action Settlement (Mar. 11, 2019)), Plaintiff Ian Douglas ("Plaintiff") and Class Counsel seek approval of an award of one-third of the Settlement Fund in attorneys' fees ($333,333), up to $32,098.08 to reimburse Class Counsel for out-of-pocket, documented expenses, $5,000 as a service payment to Plaintiff, and $56,800 to Angeion Group for settlement administration expenses. Class Counsel and Plaintiff have achieved a settlement in this case that provides significant relief to the Class. Class Counsel and Plaintiff accomplished this feat despite the numerous risks faced at every stage of the litigation. The requested fees, expenses, and service payments are authorized by the Settlement Agreement (Declaration of E. Michelle Drake in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement ("Drake Decl. in Support of Preliminary Approval"), Ex. A ("Settlement Agreement")) and are reasonable. Defendants DHI Group, Inc. and Dice Inc. (together, "Dice" or "Defendants") do not oppose this Motion, nor has any Settlement Class Member objected to the proposed awards or any other aspect of the settlement to date.[1]

II. BACKGROUND

The litigation history, settlement negotiations, and terms of the Settlement are set out in the Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Settlement Approval, and are incorporated here. This memorandum will focus on the efforts of Class Counsel and the Class Representative to achieve the significant result in this case.

[1] Plaintiff is filing this Motion in advance of the July 19, 2019 deadline for objections so that Settlement Class Members will have an opportunity to review the Motion, if they wish to do so, before deciding whether to file an objection. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010) (stating that such motions should be filed before the deadline to object has passed). If any objections are ultimately filed, they will be addressed in connection with the forthcoming motion for final settlement approval.

III. CLASS COUNSEL'S EXPERIENCE AND EFFORTS TO SECURE BENEFITS FOR THE CLASS

Class Counsel are experienced Fair Credit Reporting Act ("FCRA") and class action litigators. The qualifications of Berger Montague PC ("Berger Montague") and Nichols Kaster, PLLP ("Nichols Kaster") are set forth in the attached Declaration of E. Michelle Drake ("Drake Decl.") submitted with this motion as Exhibits A and B. Class Counsel have litigated over 40 FCRA class actions, and speak nationally on the FCRA and class action litigation. As a result of their experience in this area, Class Counsel were able to efficiently and effectively litigate this action and had the credibility necessary to negotiate a good settlement on behalf of the Class. Class Counsel litigated this case entirely on a contingency basis and have thus far received no compensation for their time or out-of-pocket costs. (Drake Decl. ¶ 24.) In the event that Class Counsel did not successfully resolve this matter, Class Counsel would have been paid nothing.

Plaintiff and Class Counsel have invested a substantial amount of time and resources investigating and litigating this action. After being contacted by Plaintiff, Class Counsel fully investigated Plaintiff's claims. Plaintiff and Class Counsel met in person in Boulder, Colorado to discuss the case. Class Counsel researched and drafted the complaint, which Plaintiff reviewed prior to filing. Class Counsel thoroughly reviewed Defendants' discovery responses and documents and prepared Plaintiff's responses to Defendants' discovery requests. The parties also engaged in numerous meet and confer sessions throughout the discovery process. (Drake Decl. ¶ 15.) Class Counsel also prepared for the mediation session with Defendants, and engaged in the extended settlement negotiations following the mediation. (*Id.* ¶ 16.) Class Counsel drafted the Settlement Agreement and the preliminary approval papers, and attended the preliminary approval hearing. Since preliminary approval, Class Counsel has been involved in the administration of the settlement, and will be prepare and argue the final approval motion. (*Id.* ¶ 18.)

Class Counsel's fee entries demonstrate the amount of time devoted to each of these tasks and how Class Counsel's lodestar was calculated. (*See id.*, Ex. D.) To date, Class

Counsel have devoted over 560 hours to this matter. (*Id.* ¶ 20.) The value of this time at Class Counsel's normal hourly rates is $214,340.35. Class Counsel anticipates contributing additional time and effort to this case if the Settlement is finally approved. Additional tasks Class Counsel expects to perform include continuing to oversee the administration of the Settlement, researching and drafting final approval papers, preparing for the final fairness hearing, traveling to and arguing at the final fairness hearing, and overseeing the distribution of the Settlement funds.

Importantly, Class Counsel's lodestar also does not reflect the full extent of Class Counsel's efforts outside of this case that ultimately benefited the Class. Berger Montague monitors every new FCRA case that is filed in court on a daily basis, tracks every FCRA class action case, and reads every FCRA opinion issued in anywhere in the country. (*Id*. ¶ 23.) The legal research costs incurred by Class Counsel in this case monitoring include case tracking expenses ("Courtlink"). This ongoing monitoring and research also allowed Class Counsel to effectively assess the reasonability of the recovery in this matter and motivated Class Counsel to negotiate a settlement. The out of pocket expenses for this research and tracking are divided among Counsel's active FCRA cases each month. (*Id.*)

These efforts provided tremendous benefits to the Class. Class Counsel's FCRA experience and expertise allowed Class Counsel to reach a favorable Settlement despite significant obstacles to recovery.

To date, Class Counsel has incurred $31,098.08 in out-of-pocket litigation costs.[2] (*Id.* ¶ 24.) All of these costs were necessarily incurred and are of the type typically reimbursed by paying clients. The estimated costs of settlement administration in this matter (which are not included in the litigation cost totals) are anticipated not to exceed $56,800 and are also reasonably incurred. (*Id.* ¶ 26.)

[2] To account for travel costs related to appearing at final approval, Class Counsel is requesting in this fee petition an additional $1,000. Class Counsel will provide an updated, precise number for costs prior to final approval.

IV. PLAINTIFF DOUGLAS' COMMITMENT AND EFFORTS WERE VITAL TO SECURING CLASSWIDE RELIEF.

Plaintiff Douglas played a vital role in the success of this lawsuit and at all times had the best interest of the Class in mind. In 2016, Plaintiff, who highly values his privacy, was tired of being contacted by recruiters and removed his voluntary Dice.com profile. (Declaration of Ian Douglas ("Douglas Decl.") ¶ 3.) In January and February 2017, Plaintiff was contacted by recruiters who found his information through Defendants' Open Web product that created candidate profiles aggregated from social media websites. (*Id.* ¶ 4.) Disturbed by this situation, Plaintiff posted regarding his experience and interactions with Dice on his website blog, alerting the public to the Dice Open Web product. Plaintiff also contacted Class Counsel, who had been involved in litigation against a company that also created candidate profiles aggregated from social media websites *Halvorson v. TalentBin, Inc.*, No. 3:15-cv-5166-JCS (N.D. Cal.). (*Id.* ¶ 5). Plaintiff met in person with Class Counsel, and thoroughly reviewed the complaint prior to filing. (*Id.* ¶ 6). Plaintiff also provided information and documents in response to Defendant's discovery requests, and was fully prepared to participate in the case through trial. (*Id.* ¶ 7.) Plaintiff has a technical background, and throughout the case, would provide Class Counsel with insights regarding the technical aspects of the case. (*Id.* ¶ 7.) Plaintiff also reached out to his friends and colleagues to see if they had any similar experiences with Dice. (*Id.* ¶ 8). Plaintiff was fully informed during the settlement process, and reviewed and approved the settlement. (*Id.* ¶ 9). Plaintiff estimates that he spent approximately 40-50 hours participating in this action, and was fully prepared to spend as much time as necessary in order to achieve relief for the class. (*Id.* ¶ 10.) In Class Counsel's opinion, Plaintiff has been an extraordinary class representative. (Drake Decl. ¶ 14.)

V. THE SETTLEMENT PROVIDES SUBSTANTIAL RELIEF.

Plaintiff alleged that Defendants, who operate a website and online tool that gathers information from various sources regarding potential job candidates and compiles that information into "Open Web Profiles," violated the FCRA. Defendants deny the allegations

and all liability with respect to all facts and claims alleged by Plaintiff, and specifically aver that the candidate profiles that Defendants prepare are not "consumer reports" under the FCRA, and thus the requirements and obligations of the FCRA do not apply to Defendants or their business.

The Settlement Class consists of approximately 21,598[3] individuals about whom Defendants created an Open Web Profile and (a) for whom a third party used a feature on the Open Web Profile to communicate with the individual or (b) who requested deletion of their Open Web Profile. (Settlement Agreement ¶ 3.1).[4] The Settlement provides multiple benefits to the Class. First, in connection with the settlement of the litigation, Defendants are providing significant non-monetary relief by implementing several business practice changes that will address Plaintiff's claims. (*See id.* ¶¶ 8.1-8.5.) Defendants will revise their Terms of Use to clarify to potential users that Open Web Profiles are to be used only to identify candidates for possible recruitment and to make initial contact with such candidates, to clarify that users are not permitted to use Open Web Profiles as a factor in determining any consumer's eligibility for employment, retention, or promotion, and to prohibit users from reviewing profiles of persons who are employed by the user or have already expressed interest in employment with the user outside of the Dice search process. (*Id.* ¶ 8.1.) Defendants are also enhancing various protections for the subjects of Open Web Profiles by permitting consumers to review their own Open Web Profiles, maintaining a policy to correct mismatched Open Web Profiles, allowing consumers to suppress specific social media platforms from inclusion in an Open Web Profile, and allowing consumers to request removal of their profiles and provide guidance on how to prevent the profiles from reappearing. (*Id.* ¶¶ 8.2-8.5.)

[3] Defendants initially compiled the estimate of Class members by determining the number of unique Open Web profiles for which the communication feature was used. After further research, Defendants determined that those profiles related to 21,598 unique individuals.

[4] The Settlement Agreement was attached to the Declaration of E. Michelle Drake submitted in support of Plaintiff's motion for preliminary approval.

Second, Defendants will create a non-reversionary common fund consisting of $1,000,000 for the benefit of the Settlement Class. (*Id.* ¶¶ 1.27, 6.3.) This fund will be distributed *pro rata* to all Settlement Class Members who submit valid Claim Forms which provide their mailing address, after the deductions for any Court-awarded attorneys' fees and costs, settlement administration costs, and a class representative service payment. (*Id.* ¶ 7.) No portion of the Settlement Fund will revert to Defendants in any circumstance. If any settlement checks are not cashed, funds associated with those uncashed checks will be donated to Public Justice, a non-profit organization that seeks to protect consumers' rights nationwide. (*Id.* ¶ 7.4.) *See generally* https://www.publicjustice.net/what-we-do/ (site last visited June 21, 2019).

On March 26, 2019, Angeion Group emailed Notice to the 20,290 Settlement Class Members for which emails addresses were available in accordance with the procedures outlined in the Settlement Agreement. On the same date, Angeion also activated the Settlement Website, http://www.dicefcrasettlement.com, and a toll-free telephone line for Settlement Class Members to utilize, Angeion also implemented the targeted online advertisements as outlined in the Settlement Agreement. On June 7, 2019, Angeion emailed a reminder notice to Settlement Class Members. Angeion anticipates that its total administrative cost will be approximately $56,800. (Drake Decl. ¶ 26).

As of June 14, 2019, there have been approximately 1,619 valid claims submitted, two opt-outs and zero objections received. This results in a claims rate of approximately 7.5%. The deadline for claims was June 24, 2019. If the approved fees, costs, and service award are approved, each participating Class members will receive a check for approximately $350. The postmark deadline for opt-outs was May 27, 2019, and the deadline for objections is July 19, 2019.

VI. ARGUMENT.

A. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES AND COSTS.

The requested award of one-third of the Settlement fund fairly and reasonably compensates Class Counsel. It is also consistent with fees awarded by California courts in similar cases. Class Counsel invested significant resources in this case with the possibility of no recovery whatsoever. Due in no small part to their skill, experience, and past success litigating similar claims, Class Counsel were able resolve this case in a Settlement that provides significant relief to class members, after extensive negotiations. The parties' ability to reach the Settlement without dispositive motion practice demonstrates Class Counsel's efficient use of resources and recognizes the risks and expenses of litigation and trial, as well as the benefits of Settlement. A lodestar cross-check confirms the appropriateness of awarding one-third of the fund as the award results in a modest multiplier of 1.56 which is well within the range generally approved in California.

1. The Percentage of the Settlement Fund Requested (33%) is Reasonable.

The Court has an "independent right and responsibility" to review the requested attorneys' fees and award fees that are determined to be reasonable. *See Garabedian v. Los Angeles Cellular Tel. Co.*, 12 Cal. Rptr. 3d 737, 741 (Cal. App. 4th Dist. 2004). "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." *Wershba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 169 (Cal. App. 6th Dist. 2001). Under the percentage method, the court may award class counsel a percentage of the common fund recovered for the class. *Id.* "The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.'" *Laffitte*, 376 P.3d at 679 (quoting *In re Rite Aid Corp. Securities Litigation* 396 F.3d 294, 300 (3d Cir.2005)). The percentage method is particularly appropriate in common fund cases, because "the benefit to the class is easily quantified." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *see also Laffitte*, 376 P.3d at 676 (affirming attorney fee award equal to 33% of settlement).

In determine the proper percentage of the fund, courts examine the risks and potential value of the litigation, the contingent nature of the representation, the novelty and difficulty of the issues presented, the skill shown by counsel, and the hours worked and asserted hourly rates. *Id.* at 687. California courts have not established a "benchmark" percentage of the fund but have noted that "[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 75 Cal. Rptr. 3d 413, 433 n.11 (Ct. App. 2008) (internal quotation omitted). Here, the requested one-third of the settlement fund is an appropriate award of attorneys' fees and is in line with similar awards in FCRA settlements from across the country. *See, e.g.*, *Moore v. Aerotek, Inc.*, No. 2:15-CV-2701, 2017 WL 2838148, at *8 (S.D. Ohio June 30, 2017), report and recommendation adopted, 2017 WL 3142403 (S.D. Ohio July 25, 2017); *Johnson v. Midwest Logistics Sys. Ltd.*, No. 2:11-cv-1061, 2013 WL 2295880, at *6 (S.D. Ohio May 24, 2013); *Flores v. Express Servs., Inc.*, No. 2:14-cv-03298, 2017 WL 1177098 (E.D. Pa. Mar. 30, 2017); *Smith v. Res-Care, Inc.*, No. CV 3:13-5211, 2015 WL 6479658, at *8 (S.D.W. Va. Oct. 27, 2015); *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 421 (E.D. Pa. 2010).

a. The Monetary and Non-Monetary Results Obtained are Significant.

Plaintiff and Class Counsel achieved a noteworthy result in this matter, especially in light of the relatively small individual amounts at issue (the FCRA provides for statutory damages of $100 - $1,000). The monetary relief achieved for the Settlement Class will result in payments of approximately $350 recovery per claiming Settlement Class Member, with a 7.5 % claims rate.[5] Further, the settlement provides substantive non-monetary relief that directly addresses the claims at issue in the case. Given that there is a disagreement about whether injunctive relief is even available to private plaintiffs under the FCRA, the

[5] Approximately 1,619 valid claims have been received, which is a claims rate of approximately 7.5%. (Drake Decl. ¶ 19.)

non-monetary relief in particular is remarkable, and may achieve more for class members than could have ever been achieved in litigation. *See, e.g., Gauci v. Citi Mortgage*, 2011 WL 3652589, at *3 (C.D. Cal. Aug. 19, 2011) ("District courts in the Ninth Circuit agree that a private party may not obtain injunctive relief under the FCRA.").

Combined, the monetary and non-monetary relief are in line with or better than similar settlements. For example in the *TalentBin* settlement, which involved the same counsel on both sides as this case, class members received $71. *Halvorson v. TalentBin, Inc.*, No. 3:15-cv-5166-JCS, ECF No. 67 at 2 (N.D. Cal. July 5, 2017). Here, the monetary amounts are significantly higher. *See also Barel v. Bank of Am.*, No. 06-cv-2372, ECF No. 60, Final Approval Order (E.D. Pa. Jan. 16, 2009) (granting final approval to claims-made settlement for 27,350 class members where class members who filed a claim received four months of credit monitoring); *Holman v. Experian Info. Solutions*, No. 11cv180, ECF No. 243-1, Settlement Agreement (N.D. Cal. Mar. 27, 2014) (settling for $375 per class member on claims made basis, with a less than 10% claims rate); *King v. United SA Fed. Credit Union*, No. 09cv937, ECF No. 31, Final Approval Order (W.D. Tex. Oct. 8, 2010) (approving claims made settlement for $100 and free credit score per class member); *Parthiban v. GMAC*, No. 05-cv-768, ECF No. 103-2, Sett. Agree. (C.D. Cal. Jan. 10, 2008) (settling for 12 months credit monitoring per class member on claims-made basis); *Phillips v. Accredited Home Lenders Holding Co.*, No. 06-cv-57, ECF No. 51, Final Approval Order (C.D. Cal. July 17, 2008) (approving $10 per class member claims-made settlement); *Sleezer v. Chase Bank USA, N.A.*, No. 07-cv-961, ECF No. 53-1, Settlement Agreement (W.D. Tex. Jan. 12, 2009) (settling for $71.94 worth of identity protection per class member, claims-made).

In light of the risks discussed further below that would have faced the Class had litigation continued, this is an excellent recovery which supports Class Counsel's requested fees.

b. Class Counsel Undertook Considerable Risk in Litigating this Case on a Contingency Basis as Recovery Was Far From Guaranteed.

Class Counsel took this case on a contingency fee basis, and Class Counsel invested time and resources in this matter without any compensation to date. (Drake Decl. ¶ 25.) Class action litigation is inherently complicated and time-consuming. On top of the demands that come with this type of litigation, Class Counsel also made this investment despite the very real possibility of an unsuccessful outcome and no fee recovery of any kind. The California Supreme Court has recognized the importance of rewarding attorneys who take cases on a contingency basis. S*ee Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 157 (Cal. 2004) ("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.") (citation and internal quotation marks omitted); *see also In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291 (9th Cir. 1994) ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.").

The claims and factual scenarios brought in this case were novel and there was no case law directly on point that would establish Defendants' liability. At all times, this case carried a very real possibility of an unsuccessful outcome and Class Counsel receiving no fees of any kind. At the time the complaint was filed, there were no obvious indications that a settlement would be reached or that the litigation would be successful. Further, continued litigation of this matter carried a number of very specific risks that could have resulted in no recovery for the Class and no compensation for Class Counsel. There were a number of novel and uncertain litigation issues in this case.

Specifically, Plaintiff would have confronted risks on the issues of whether the FCRA applied to Defendants' Open Web Profiles. Open Web Profiles are primarily used by recruiters regarding people who have not yet applied for a job opening. As such, Defendants would have argued that Open Web Profiles do not serve as a factor in evaluating

an applicant's "eligibility" for employment, promotion, reassignment, or retention, which is an element of the statutory definition of a "consumer report." See 15 U.S.C. § 1681a(d)(1). For the same reason, Plaintiff faced risks in arguing that Open Web Profiles were used a as factor in making an eligibility decision for "employment purposes." *Id*. Recent appellate decisions finding that other entities were not covered by the FCRA suggest that the risk that Defendants would be found not to be covered by the FCRA was real and substantial. *See Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 109 (2d Cir. 2019) (holding that defendant did not violate FCRA because reports produced by defendant's subscription-based internet platform were not "consumer reports"); *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 912 F.3d 1192, 1195 (9th Cir. 2019) (holding that defendant did not violate FCRA because reports produced by defendant's proprietary software were not "consumer reports").

Further, the FCRA is not a strict liability statute. *Dalton v. Capital Associated Indus.*, 257 F.3d 409, 417 (4th Cir. 2001). A FCRA plaintiff can recover statutory damages only where the defendant has acted negligently or willfully, and where the defendant's violation was at most negligent, recovery is limited to actual damages. *See* 15 U.S.C. §§ 1681n(a)(1), 1681o(a)(1). Because Plaintiff did not allege any actual damages, in order to recover anything, Plaintiff would have had to prove not only that Defendants violated the FCRA, but that they did so willfully. Throughout this litigation, Defendants have vigorously contested that they are subject to the FCRA, much less that they willfully violated it. *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (deeming willfulness in FCRA case "a high hurdle to clear" which weighed in favor of settlement approval); *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 253 (E.D. Pa. 2011) (that willfulness presented "considerable—albeit not insurmountable—risks" weighed in favor of settlement approval).

Plaintiff believes that these arguments could have been overcome in litigation, but also believes they demonstrate that there were serious obstacles to recovery in this case.

c. Counsel's Experience and Skill.

Class Counsel are highly experienced in complex class action litigation and consumer litigation in general. (*See* Drake Decl. Exs. A and C.) Berger Montague was founded in 1970, and has been concentrated on representing plaintiffs in complex class actions ever since. (*Id.*, Ex. A.) The firm has been recognized by courts for its skill and experience in handling major complex litigation. (*Id.*) Berger has been recognized by The National Law Journal in 11 of the last 15 years for its "Hot List" of top plaintiffs' oriented litigation firms in the nation. (*Id.*) Lead counsel from Berger, E. Michelle Drake, has worked extensively on FCRA class actions, and John G. Albanese, also from Berger, has concentrated his practice on FCRA litigation as well, and both are counsel of record in many active FCRA cases throughout the country. (*Id.*) Nichols Kaster, LLP is similarly dedicated to representing consumers in class actions and has extensive FCRA experience. (*Id.*, Ex. C.)

d. The Reaction of the Class to Date is Positive.

Notice of the settlement, including the proposed amounts to be requested in fees, costs, and service payments, was emailed on March 26, 2019 to 20,290 individuals. Not a single Settlement Class Member has filed an objection to the requested fee award to date, and only two have opted-out. (Drake Decl. ¶ 19.) The claims rate of 7.5% is also well in line with claims rate in other consumer cases. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc) (noting evidence that claims rates in consumer class settlements "rarely" exceed 7%, "even with the most extensive notice campaigns"). This factor supports the requested award. *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 448 (E.D. Cal. 2013) (finding only one opt-out and zero objections from 1,837 class members favored awarding 33% of the common fund); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-cv-1466, 2006 WL 3312024, at *3 (D. Or. Nov. 13, 2006) (finding 27 opt-outs out of 60,000 class members weighed in favor of granting fee award in excess of 25% benchmark); *Thieriot v. Celtic Ins. Co.*, No. 10-cv-4462, 2011 WL 1522385, at *6 (N.D.

Cal. April 21, 2011) ("[t]he fact that no members of the 390-person class objected to the proposed 33% fee award – which was also communication in the notice – supports an increase in the benchmark rate.").

e. Comparison with Class Counsel's Lodestar.

A comparison with Class Counsel's lodestar further demonstrates that the requested fee is reasonable. *Laffitte v. Robert Half Intern.*, 342 P.3d 1232 (Cal. 2015), *aff'd*, 376 P.3d 672 (Cal. 2016) ("[L]odestar may provide a useful perspective on the reasonableness of a given percentage award.") (quoting *Vizcaino,* 290 F.3d at 1050). The "cross-check calculation need entail neither mathematical precision nor bean counting…[courts] may rely on summaries submitted by the attorneys and need not review actual billing records." *Covillo v. Specialty's Café,* 2014 WL 954516, at *21-22 (N.D. Cal. Mar. 6, 2014) (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005)).

The lodestar method is calculated by multiplying "the reasonable hours expended by a reasonable hourly rate." *Wershba*, 110 Cal. Rptr. 2d at 169. In considering rates, courts examine the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Here, Class Counsel's hourly rates are comparable to those approved in California. *See In re Magsafe Apple Power Adapter Litig.*, 2015 WL 428105, at *12 (N.D. Cal. Jan. 30, 2015) ("In the Bay Area, reasonable hourly rates for partners range from $560 to $800, for associates from $285 to $510, and for paralegals and litigation support staff from $150 to $240") (citing cases); *see also Bohannon v. Facebook, Inc.*, 2016 WL 2962109, at *5-6 (N.D. Cal. May 23, 2016) (approving attorney hourly rates of $525-800); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 591-92 (N.D. Cal. 2015) (approving attorney rates from $335-685); *Klee v. Nissan N. Am., Inc.*, 2015 WL 4538426, at *13 (C.D. Cal. July 7, 2015) (approving rates of $370-$695); *Parkinson v. Hyundai Motor America*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010) (approving rates of $445-675).

Class Counsel's detailed fee records are attached to the Drake Declaration, with redactions for privilege. (Drake Decl., Ex. D.) To date, Counsel's cumulative lodestar is $214,340.35. (Drake Decl. ¶ 24.) The lodestar cross-check of the percentage requested thus results in a multiplier of 1.56. Multipliers of 1 to 4 are commonly awarded in complex class action cases in the Ninth Circuit. *See Vizcaino*, 290 F.3d at 1051, n.6 (finding that in approximately 83% of cases surveyed by the court, the multiplier was between 1.0 and 4.0 and affirming a multiplier of 3.65); *Wershba*, 110 Cal. Rptr. 2d at 170 (recognizing "[m]ultipliers can range from 2 to 4 or even higher"); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) (recognizing "[m]ultipliers in the 3-4 range are common"); *Steiner v. American Broad. Co., Inc.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming multiplier of 3.65); *McKenzie v. Federal Exp. Corp.*, 2012 WL 2930201 (C.D. Cal. July 2, 2012) (approving multiplier of 3.2).

The lodestar cross-check thus confirms the reasonableness of the requested fee award.

2. Class Counsel's Litigation Costs are Recoverable.

Class Counsel also seek, and Defendants do not oppose, reimbursement of documented out-of-pocket expenses incurred in litigating and settling this matter. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out-of-pocket expenses that would normally be charged to a fee paying client") (citation and internal quotation marks omitted); *Ashker v. Sayre*, 2011 WL 825713, at *3 (N.D. Cal. March 7, 2011) (finding "costs of reproducing pleadings, motions and exhibits are typically billed by attorneys to their fee-paying clients" and are thus reimbursable); *Trustees of Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258-59 (9th Cir. 2006) (legal research costs reimbursable); *In re Immune Response Secs. Litig.*, 497 F. Supp. 2d 1166, 1177-8 (S.D. Cal. 2007) (mediation expenses, expert fees, legal research, copies, postage, filing fees, messenger, and federal express costs reimbursable); *Marhoefer*, 24 F.3d at 19 (postage costs reimbursable).

As Counsel's expense records show, all of the costs incurred were reasonable and necessary to the successful conclusion of this litigation. (*See* Drake Decl., Exs. A-B.) These costs include: travel, mediation costs, filing fees, legal research, service of process, copying, mediation expenses, and FedEx costs.

These types of expenses are routinely reimbursed by the courts as noted above, thus Counsel's requested costs of up to $32,098.08 should be awarded. In addition, Angeion Group, who this Court appointed to administer the settlement, reasonably expects to incur $56,800 by the end of the settlement administration process. (Drake Decl. ¶¶ 24, 26.) These expenses are reasonable and should be approved.

B. THE REQUESTED SERVICE PAYMENT IS APPROPRIATE.

California courts recognize that a named plaintiff is eligible for a reasonable service payment. *Cellphone Termination Fee Cases*, 113 Cal. Rptr. 3d 510, 521 (Cal. App. 1st Dist. 2010) (service payment "are fairly typical in class action cases.") (citing *Rodriguez v. West Pub. Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)). Such awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and to recognize their willingness to act as private attorneys general. *Id.* "[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Id.* at 522.

Here, Plaintiff Douglas expended much time and effort (he estimates over 40 hours) on behalf of the class. He documented and publicized the claims on his website, reached out to and met with Class Counsel, responded to discovery, and actively participated and providing valuable input at every step in this litigation. (Douglas Decl. ¶¶ 7-10.) Plaintiff

Douglas was fully prepared to travel and sit for his deposition and participate in trial. (*Id.*) At all times, Plaintiff has been the sole class representative in this case, meaning that he if no longer was willing to participate in the lawsuit, the Class would most likely would have received nothing. As a result of Plaintiff's efforts, and his willingness to pursue this action, substantial benefits have been achieved on behalf of the Settlement Class. Aside from the requested service payment, Plaintiff will not gain any benefit not enjoyed by other Settlement Class Members. An incentive award is appropriate when a class representative will not gain any benefit beyond what he would receive as an ordinary class member. *See In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 472 (C.D. Cal. 2014) ("An incentive award may be appropriate when a class representative will not gain any benefit beyond that he would receive as an ordinary class member."); *Van Vranken*, 901 F. Supp. at 299 (finding incentive award supported by named plaintiffs' modest recovery under the settlement agreement, which was only a "tiny fraction" of the common fund); *Razilov*, 2006 WL 331204 at *4 (approving payment of incentive award where only benefit class representative received from settlement was same statutory damages other class members received).

Moreover, the requested service payments of $5,000 to Plaintiff is modest compared to awards granted in other complex litigation. *See, e.g., Nesbitt v. Postmates, Inc.*, No. CGC-15-547146 (Cal. Sup. Ct. San. Fran. Cnty. Nov. 8, 2017) (providing for incentive awards of $6,500 and $3,500) (Drake Decl., Ex. F); *Mount v. Wells Fargo Bank, N.A.*, 2016 WL 537604, at *4 (Cal. App. 2d Dist. Feb. 10, 2016) (approving incentive award of $10,000 each for both named plaintiffs); *Ralston v. Mortg. Investors Grp., Inc.*, No. 08-cv-536, 2013 WL 5290240, at *5 (N.D. Cal. Sept. 19, 2013) (approving service payment of $12,500); *In re Netflix Privacy Litig.*, No. 11-cv-379, 2013 WL 1120801, at *11 (N.D. Cal. March 18, 2013) (approving service payments of $6,000 for each named plaintiff); *Vedachalam v. Tata Consultancy Servs. Ltd.*, No. 06- cv-0963, 2013 WL 3929129, at *7 (N.D. Cal. July 18, 2013) (approving service payments of $25,000 and $35,000).

The notices sent in this matter specified the service payment Plaintiff would seek and no class member has objected. The service payment is fully justified, reasonable, and should be awarded.

II. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court grant Class Counsel's requested awards of one-third of the Settlement Fund as attorneys' fees ($333,333), $32,098.08 in costs, service payment to Named Plaintiff of $5,000, and $56,800 in settlement administration expenses.

Respectfully submitted,

BERGER MONTAGUE PC

Date: July 3, 2019

/s/ E. Michelle Drake
E. Michelle Drake (*pro hac vice*)

ATTORNEYS FOR PLAINTIFF