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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

LORI WAKEFIELD, individually and on behalf of a class of others similarly situated, Plaintiff, v. **VISALUS, INC.**, a Nevada corporation, Defendant.	No. 3:15-cv-01857-SI **Amended Motion for Attorneys' Fees under Fed. R. Civ. P. 23(h) and Fed. R. Civ. P. 54(d)(2) and an Incentive Award**

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INTRODUCTION

In this case, the jury returned a special verdict finding that the Defendant violated the law when it placed 1,850,436 phone calls. (Dkt. 282.) If each recipient of those calls steps forward to claim the damages the law awards, the resulting judgment will be the largest judgment on record in a case brought under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. (Dkt. 383.) This verdict was the end result of a litigation that included an adversarial class certification, and several waves of complex motions practice, and the ensuing claims process comes after Class Counsel successfully defended the verdict on appeal and the Supreme Court denied review.

The resulting fee award should reflect that great success, years of uncompensated effort, and the quality of the work Class Counsel has performed for the Class's benefit. The Ninth Circuit has adopted a fee award "benchmark" of 25%. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). As Class Counsel recently made clear (Dkt. 461, at 2), in this case, that benchmark should be measured against the amounts claimed and paid to the Class. For instance, if $100 million worth of the verdict is claimed, the benchmark should be measured against that $100 million number. This approach follows the Ninth Circuit's recent rulings in the settlement context where fees are based on the amounts claimed by class members where total amount paid by a defendant is contingent upon the number of claims. *See Lowery v. Rhapsody Int'l, Inc.*, 75 F.4th 985, 992–93 (9th Cir. 2023).

If any departure from the benchmark is warranted here, it is an upward one. Class Counsel achieved the largest TCPA verdict in the law's history, and fee awards in TCPA cases that go to trial are typically closer to 33% of any fund generated. But given that Class Members have had to wait for years for the opportunity to claim their share of the verdict, Class Counsel

will seek no more than the benchmark, an award fully justified by the results, the quality of the work done, and reasonable under either a percentage-of-the-fund or lodestar calculation. Plaintiff therefore moves the Court for an award of attorneys' fees of 25% of the total amount paid to class, plus expenses, as well as an incentive award of $50,000 for Class Representative Lori Wakefield.[1]

I. Review of Work Performed for the Class's Benefit.

This action began in 2015. After receiving a rapid series of unwanted telephone calls from Defendant ViSalus, Inc., Plaintiff Lori Wakefield sued ViSalus, alleging three claims for relief: One under the TCPA for making an unsolicited phone call featuring a pre-recorded voice, *see* 47 U.S.C. § 227(b)(1)(A), another under the TCPA for calling Wakefield despite her registration on the National Do-Not-Call registry, *see id.* § 227(c)(5), and a third claim under Oregon's Stop Calling law, Or. Rev. Stat. § 646.563. (Dkt. 27, Ex. 1.) Wakefield also proposed to represent a class of individuals who has received similar, harassing phone calls. *See id.*

The parties proceeded directly to a complicated discovery period. One of ViSalus's principal defenses was that any phone calls placed to putative class members were placed by independent contractors over whom ViSalus did not exercise control. One of Plaintiff's key tasks, therefore, was to determine what calls were placed by ViSalus itself. (*See* Dkt. 389, ¶ 2.) Plaintiff also needed to determine how ViSalus's calling technology worked, what calling records ViSalus kept, how those records were kept, and what policies ViSalus had for ensuring compliance with state and federal telemarketing laws. Ultimately, Class Counsel reviewed several gigabytes worth of discovery materials, including dozens of audio files and nearly 3,000 spreadsheets containing call information, and conducted several depositions of witnesses

[1] Defendant has indicated that it intends to oppose the motion.

designated by ViSalus. (*Id.* ¶¶ 3-4.) Among these documents were the critical calling campaign logs that were featured at trial. Class Counsel also issued several third-party subpoenas to round out the record. (*Id.* ¶ 5.) Wakefield herself also produced dozens of documents from her own files and sat for a deposition during this time.

In April 2017, Wakefield moved to certify a class to litigate each of her three claims. Briefing on class certification encompassed arguments on several unsettled issues, including Plaintiff's standing to sue under the then-recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and the effect of then-recent Ninth Circuit decisions like *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125 (9th Cir. 2019), and *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). Ultimately, the district court, then in the person of Judge Anna Brown, certified one of Wakefield's proposed classes to litigate Wakefield's claim that ViSalus violated federal law by making unsolicited phone calls using an artificial or prerecorded voice.

After the parties litigated the notice process (during which Class Counsel had to take another deposition of a ViSalus witness), the parties began to prepare for trial. Pre-trial preparations began in earnest in June 2018, nearly three years after the complaint was filed. Trial preparations began with negotiations over a joint statement of undisputed facts. (Dkt. 108.) The parties then began the process of preparing the required joint pretrial briefing, when two disputes cropped up: how to instruct the jury on determining whether a given phone line was residential, and whether the jury must find that a given class member actually heard an artificial or prerecorded voice play. (*See* Dkts. 128, 129.) While the parties litigated those two interpretive issues, ViSalus moved to amend its answer to, for the first time, include a defense that it had obtained consent from class members to be called. (Dkt. 133.) After intense back and forth on that issue (*see, e.g.*, Dkt. 139), ViSalus withdrew the motion. (Dkt. 145.)

As pre-trial preparations kicked into high gear, both sides retained new trial counsel. Trial counsel immediately began the work of distilling the record into something usable at trial, including designating deposition testimony, preparing witness lists, and proposing jury instructions and voir dire questions. Class Counsel invested significant time and money into trial preparations. This included: spending significant time analyzing ViSalus' call log data and summarizing it into something that could be easily presented to the jury; working closely with Wakefield and Plaintiff's other witnesses to streamline their trial testimony; and preparing to cross-examine ViSalus' witnesses Scott Gidley and Blake Mallen (who ViSalus put on its witness list but never ended up calling at trial). In addition, Class Counsel held a mock trial in Portland with two mock juries to hone their trial message. (*See generally* Dkt. 390, ¶¶ 4-6.) In the midst of these pretrial preparations, ViSalus attempted to wriggle out of the earlier stipulation of undisputed facts, an action which precipitated its own motions practice. (*See, e.g.*, Dkts. 174-78, 202-06, 216, 221, 223, 232.) Plaintiff also moved to sanction ViSalus for spoliating evidence. (Dkt. 228.) ViSalus objected to essentially all of Plaintiff's proposed exhibits. (Dkts. 194, 212.) The Court held several pretrial conferences to resolve these and other evidentiary disputes. (*E.g.*, Dkts. 262, 268.)

Once all of this pretrial wrangling was out of the way, trial began. After a day of voir dire, the parties litigated some final evidentiary issues (including a motion by ViSalus to exclude three of Plaintiff's exhibits), and then contested the merits in a 3-day trial, which included testimony from, among others, Lori Wakefield. The jury found that ViSalus had placed 4 unlawful calls to Lori Wakefield, and 1,850,436 unlawful calls to absent class members. (Dkt. 282.)

The jury verdict precipitated another wave of complex motions practice. First, Plaintiff moved for an award of enhanced damages under the TCPA based on the willfulness of ViSalus's conduct. (Dkt. 297.) At roughly the same time, Defendant moved to decertify the class based on the jury's findings. (Dkt. 304.) Both motions involved dozens of pages of briefing, heavy with citations to the record compiled in the just-completed trial. The Court also held an evidentiary hearing on the motion for enhanced damages. (Dkt. 320.)

Before the Court could resolve those motions, ViSalus filed a notice that it had received from the Federal Communications Commission a waiver of the class member consent standard which had governed at trial. (Dkt. 321.) ViSalus then submitted supplemental briefing on the effect of this FCC waiver on its motion to decertify, and Plaintiff responded in kind. (Dkts. 327, 333.) The Court then specifically asked Plaintiff to file a surreply addressing the issue of waiver (Dkt. 337), which Plaintiff filed (Dkt. 340). ViSalus then moved to strike a portion of that surreply, and Plaintiff opposed. (Dkts. 342, 343.) The Court ultimately denied both the motion to enhance the damages, and the motion to decertify the class, finding that by failing to raise the issue of consent during the litigation ViSalus could not now benefit from the FCC's ruling.

ViSalus then moved to reduce the damages as unconstitutionally excessive. (Dkt. 358.) This complex issue also generated dozens of pages of briefing and spawned a fight over ViSalus's decision to submit additional evidence along with its motion. (Dkts. 364, 365, 374.) The Court ultimately denied the motion, concluding that the Due Process analysis focused only on the individual award, and not on the aggregated award, and that the TCPA's $500-per-call liquidated damages provision was not unconstitutionally excessive. Around this time, the parties also attempted to mediate the case, in light of ViSalus's insistence that they would be unable to fund much of the judgment, and Plaintiff's desire to get relief to the Class as soon as possible,

rather than have the case tied up in appeals or a bankruptcy proceeding. Counsel for both parties participated in a day-long mediation session, held via videoconference, presided over by the Hon. James Holderman (ret.) of JAMS. The mediation produced some movement, but no concrete steps toward a settlement. Thus, the Court, after denying ViSalus's motion to reduce the damages, entered a judgment in favor of Wakefield for $2,000 and the Class for up to $925,218,000. (Dkt. 383.)

After entry of the judgment, ViSalus renewed its motion for judgment as a matter of law and for a new trial. (Dkt. 395.) After more evidence-heavy briefing based on the trial evidence (Dkt. 408), the Court denied the motion. (Dkt. 420.)

ViSalus appealed that judgment to the United States Court of Appeals for the Ninth Circuit, which heard argument on the appeal in May 2022. In a decision issued in late 2022, the appeals court ultimately affirmed this Court's judgment as it relates to liability, agreeing with Wakefield and this Court that the Class had standing to sue and that ViSalus had waived any defense of consent. *Wakefield v. ViSalus*, 51 F.4th 1109, 1117-20 (9th Cir. 2022). But the appeals court concluded that, with respect to the damages award, the Due Process Clause was concerned just as much with the aggregated damages award as with the individual, per call awards, and so remanded for this Court to consider whether the overall award is consistent with Due Process. *Id.* at 1120-25. ViSalus then filed a petition for a writ of certiorari from the Supreme Court, which was denied on April 17, 2023. *See ViSalus v. Wakefield*, 143 S. Ct. 1756 (2023).

On remand, following additional briefing on the Due Process issue, the Court concluded that, "under the unique circumstances of this case," the best course would be to administer the notice and claims process before conducting the Due Process analysis, because unclaimed funds might revert to the Defendant. During that briefing, Class Counsel made clear that, ultimately,

they would seek fees only on claimed amounts, and, accordingly, hereby submit an amended fee petition in line with that representation.

II. The Court Should Award Fees Using the Common-Fund Method.

As an initial matter, the sum total of the per call amounts awarded here should be treated like a common fund, and fees awarded using the common-fund method. In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980), the Court explained that "this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole" and that "the doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* at 478 (citations omitted). In assessing when the common-fund doctrine is appropriately employed, the Court wrote that "the criteria are satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Id.* at 479. The Court was also clear that a class member's right to a portion of the judgment did not need to be mathematically *ascertained*, explaining that "although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery." *Id.*

Boeing itself involved an adversarial class-action judgment (reached at summary judgment), *id.* at 474, and the Ninth Circuit has applied its teachings to judgments reached after class-action trials, *see Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Moreover, fees awarded following two recent TCPA trials were awarded on a common-fund basis, *see Perez v. Rash Curtis & Assocs.*, No. 16-cv-3396, 2020 WL 1904533, at

*17 (N.D. Cal. Apr. 17, 2020); *Krakauer v. DISH Network LLC*, No. 14-cv-0333, 2018 WL 6305785, at *3-5 (M.D.N.C. Dec. 3, 2018), as are nearly all fees awarded pursuant to TCPA class-action settlements. This Court should do likewise.

As to the question of what the appropriate denominator is, *Boeing* itself suggests that the Court has discretion to calculate fees against the entire amount made available to Class Members. *See Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (holding that the relevant denominator for a fee analysis in a common-fund case is the total amount made available to class members, not just that claimed). More recent authority, from the settlement context, suggests that fees should only be awarded against *claimed* funds, *see, e.g.*, *Lowery*, 75 F.4th at 992, though many courts have calculated fees against the combined total of claimed funds plus any *cy pres* distribution, *see e.g.*, *Hartless v. Clorox Co.*, 273 F.R.D. 630, 635 (S.D. Cal. 2011) ("Moreover, objector Cannata's argument that the Court should base the attorneys' fee award on the amount actually claimed by class members is without merit as that argument has been rejected and the unclaimed funds do not revert to Clorox but are distributed *cy pres* for the benefit of the class."). Here, as Plaintiff has previously acknowledged, the Court has substantial discretion over the manner of disposing any unclaimed funds, including *cy pres* distribution or reversion to the defendant. *See Six Mexican Workers*, 904 F.2d at 1311-12. That choice will undoubtedly be colored by the lurking Due Process issues in this case. To expedite things, therefore, Class Counsel proposes that the appropriate benchmark against which to measure a percentage-of-the-fund award, is the sum total of the amounts claimed and paid to class members. *See Stanikzy v. Progressive Direct Ins. Co.*, No. 2:20-cv-118 BJR, 2022 WL 1801671, at *4 (W.D. Wash. June 2, 2022) (calculating fees on amounts claimed because overall settlement amount was never paid out to class members); *see also Holtzman v. Turza*, 828 F.3d

606, 608-09 (7th Cir. 2016) (affirming decision to award counsel $167 of each $500 award claimed in TCPA case resolved on summary judgment, and holding that counsel were not entitled to compensation for unclaimed awards that reverted to defendant).

III. The Court Should Award the Standard 25% Benchmark Fee Award.

When a common fund is at issue, the Ninth Circuit has established a "benchmark" fee award of 25% of the fund. *Vizcaino*, 290 F.3d at 1048. The 25% benchmark is intended to be the starting point for the Court's analysis, and adjusted upwards or downwards based upon several factors:

> (1) the result obtained; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of nonpayment assumed by counsel; (7) the reaction of the class; (8) non-monetary or incidental benefits, including helping similarly situated persons nationwide by clarifying certain laws; and (9) comparison with counsel's lodestar.

Azar v. Blount Int'l, Inc., No. 16-cv-0483-SI, 2019 WL 7372658, at *2 (D. Or. Dec. 31, 2019). At the moment, at least, the "reaction of the class" (which is of course normally gauged with respect to a settlement) is neutral. The class has had no opportunity to submit claims. Sixty-nine individuals did opt out following class certification. *See id.* at *11. Likewise, the "non-monetary or incidental benefits" factor is neutral because the judgment provides only monetary benefits. *See id.* The remaining factors, however, suggest that an award above the benchmark is appropriate here. Class Counsel submits that, in the end, the 25% fee award is most appropriate in light of all of the circumstances.

A. Class Counsel obtained excellent results.

First, the results obtained by Class Counsel are outstanding. The jury verdict here has resulted in potentially the largest judgment ever in a TCPA case, a number that alone counsels in favor of a greater-than-benchmark award. *See Azar*, 2019 WL 7372658, at *10 (settlement

providing between 4% and 8% of damages was ordinary result); *Demmings v. KKW Trucking, Inc.*, No. 14-cv-0494-SI, 2018 WL 4495461, at *14 (D. Or. Sept. 19, 2018) (recovery at or near the maximum permitted by statute was "exceptional"). The jury verdict and judgment provide for Class Members to receive the full damages to which they are entitled under the TCPA. And the jury's verdict here results in a potential recovery for the class that could be around 3 times larger than the verdict in *Perez* and more than 10 times larger than the verdict in *Krakauer*. Viewed from whatever angle, the verdict here represents an exceptional result. Moreover, Class Counsel successfully defended the verdict on appeal from arguments that, if successful, would have left the class empty handed. This factor, if anything, weighs in favor of an award greater than the 25% benchmark.

B. Class Counsel expended substantial effort.

The effort expended by Class Counsel here also warrants an above-benchmark fee award. True enough, the work Class Counsel did during discovery, and in litigating class certification on an adversarial basis, may not stand out from other cases. *Demmings*, 2018 WL 4495461, at *15. But this case also involved a trial and assorted post-trial motions, as well as an appeal, something that is rare in any context, and especially rare in the TCPA context. Class Counsel's dedication to litigate this case to and through trial, and then through appeal, stands out from other class action litigation. *See, e.g.*, *In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 524 (N.D. Cal. 2020) (crediting work done by counsel because "[t]here is also an enormous difference between surviving a motion to dismiss and prevailing at trial").

Moreover, the work of Class Counsel will continue long after the Court awards fees here. First, the Defendant has indicated that it may enter bankruptcy, at which point Class Counsel will need to front further costs and expenses in order to defend the Class's rights in the bankruptcy

proceeding. The controlled chaos of the bankruptcy will likely require significant investments of time and money as Class Counsel seeks to safeguard the Class's rights flowing from the verdict.

All told Class Counsel has invested 6,568.17 hours into this litigation, as of April 7, 2024, for a total lodestar amount of $4,068,669.42, plus $365,530.26 in expenses. Given the age of the case, and the numerous twists and turns it has taken in the near-decade it has been on the docket, these numbers reflect incredibly efficient work by Class Counsel, including an intelligent division of labor between the various firms representing the Class here. To achieve such positive results without the kinds of inefficiencies that normally plague legal work is remarkable. *Cf. Albion Pac. Prop. Res., LLC v. Seligman*, 329 F. Supp. 2d 1163, 1178 (N.D. Cal. 2004) ("[P]laintiff is entitled to an above-average hourly rate if it can demonstrate that its counsel were more efficient than reasonably competent counsel would have been."). At the same time, this is an extraordinary amount of work, and, if anything, would support an above-benchmark fee award. *See, e.g., Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2018 WL 4030558, at *3 (N.D. Cal. Aug. 23, 2018) (awarding above-benchmark fees where class counsel obtained full trial victory and defended verdict on appeal in case lasting 6 years).

C. This litigation involved substantial risk and complexity.

Third, the risk involved in this litigation warrants at least a 25% fee award. "The risk of costly litigation and trial is an important factor in determining the fee award." *Demmings*, 2018 WL 4495461, at *15 (quotations omitted). "[T]he risk of loss in a particular case . . . is a product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits." *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). Counsel acknowledges that TCPA litigation is not necessarily complex. That said, it has been estimated that the average TCPA case carries only a 43% chance of success. *See In re Capital One TCPA Litig.*, 80 F.

Supp. 3d 781, 806 (N.D. Ill. 2015). So, complexity or no, the case involved significant risk from the outset.

And there were several issues that set this case apart from the mine run of TCPA litigation. Here, for instance, Class Counsel has litigated class certification twice. Adversarial class certification is never a sure thing, as demonstrated here by the Court's initial order on class certification, which denied Plaintiff's motion as to two of her three proposed classes. And the second of these motions was only successful because of the record Class Counsel built at the trial. Indeed, in large part here, the risk is not that Wakefield would lose, but that her proposed class would be unsuccessful, particularly in light of the developing law surrounding standing and class certification. *See, e.g.*, *Demmings*, 2018 WL 4495461, at *15.

The trial itself also was a significant source of risk and complexity. Because the vast majority of TCPA cases settle, "plaintiff[] had few models for proceeding to trial." *Ridgeway v. Wal-Mart Stores Inc.*, 269 F. Supp. 3d 975, 998 (N.D. Cal. 2017) (finding that because case went to trial, the complexity of the action weighed in favor of a greater fee award). The weeks and months leading up to trial also featured an array of complex, trial-related motions practice, as the parties sorted through jury instructions on just about every issue in this case (from how to explain the nature of a class action to a jury to whether the jury should be told about the statutory damages available here), and also litigated several complex evidentiary issues.

The trial itself was particularly pivotal here because it laid the groundwork for several complex, post-trial motions, including on whether damages should be enhanced under the TCPA, a revisit of class certification based on the record created at trial, a motion to reduce damages on constitutional grounds, and motions for a new trial and JMOL.

In other words, there were several places in which an adverse result could have ended the case entirely, or significantly reduced the likelihood that any portion of the absent class would recover. Given the array of difficult issues, any one of which could have resulted in no payment to the Class, Class Counsel assumed a significant risk of nonpayment. Class Counsel has fronted more than $360,000 in expenses (including nearly $230,000 to send notice to the class), and thousands of hours of attorney time in order to overcome these risks. (Supplemental Declaration of Eve-Lynn Rapp ("Rapp. Decl.") ¶¶ 2-3, which is being filed simultaneously.) But there was no glide path to victory. The risk involved here counsels in favor of at least a benchmark award. *See Arnett v. Bank of Am., N.A.*, No. 11-cv-1372-SI, 2014 WL 4672458, at *13 (D. Or. Sept. 18, 2014) (lack of authority governing claims, combined with trial, counseled in favor of benchmark award).

D. The litigation required substantial skill from counsel.

Next, success here required skilled advocacy by counsel. Again, counsel acknowledges that TCPA litigation does not necessarily involve substantial complexity. But this was no ordinary TCPA case. Counsel's skill in navigating the trial, complex motions practice, and appeal that characterized this case supports an above-benchmark award. The two firms who represented the Class brought complementary skills to the table. The Edelson firm is well-versed in class actions and the TCPA, and was prepared to litigate many of the issues raised by the statute itself, including class certification, standing, and the constitutionality of any damages award.[2] The Dovel & Luner firm, by contrast, are trial specialists, and were key to navigating the

[2] As Class Counsel explained in the motion for class certification (*see* Dkt. 69, at 27-28), Edelson PC has been involved in groundbreaking TCPA litigation, including, for instance, *Satterfield v. Simon & Schuster, Inc.*, where the Ninth Circuit first confirmed the TCPA's application to text message calls. 569 F.3d 946, 949 (9th Cir. 2009). Lawyers at Edelson PC also have successfully defended the TCPA against Constitutional challenges, *see Holt v. Facebook,*

many pitfalls inherent in the trial process, and in building the trial record that helped achieve the verdict in favor of the Class, and set the Class up to succeed in the post-trial proceedings and on appeal.[3] Given the big risks present in this case, Class Counsel's skill in obtaining and protecting a verdict in favor of the class warrants an above-benchmark award in this case. *See also Aranda v. Caribbean Cruise Line, Inc.*, No. 12-cv-4069, 2017 WL 818854, at *4 (N.D. Ill. Mar. 2, 2017) (lauding the results achieved through the "complementary experience of co-counsel").

E. A lodestar cross-check will confirm a benchmark award as reasonable.

The final applicable factor is a lodestar cross-check. Counsel submits that a crosscheck is unnecessary here. Counsel are unaware of any TCPA class action in which an award of attorneys' fees was not based upon a percentage of the fund. *See Perez*, 2020 WL 1904533, at *17 ("courts often award percentage fees of more than 25% in the TCPA settlement context"). And awards of one-third of a common fund are typical in TCPA class actions. *See Krakauer*, 2018 WL 6305785, at *3 (collecting cases). In fact, the lawyers in both *Krakauer* and *Perez* were awarded 33% of the common fund those judgments produced. In light of the much larger recovery here, Class Counsel suggests that a benchmark award, of 25% of the fund, is appropriate here. Moreover, reliance on the lodestar method has been criticized because it

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Inc., 240 F. Supp. 3d 1021, 1033-35 (N.D. Cal. 2017) (First Amendment); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1011-12 (N.D. Ill. 2010) (First Amendment); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1169-71 (N.D. Cal. 2010) (Fifth Amendment vagueness). Prior to the results here and in the *Perez* case in the Northern District of California, Edelson PC also served as Class Counsel to the largest adversarially certified class ever under the TCPA and had secured one of the largest settlements under the law, as well. *See Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014). In other words, lawyers at Edelson PC brought to bear a wealth of skill and experience on the complex issues presented by this case.

[3] As set forth in Plaintiff's Motion to Appoint Co-Counsel, Dovel & Luner has amassed an impressive record of trial victories across several substantive areas of law. (Dkt. 171, ¶¶ 3-5.)

incentivizes lawyers to inflate their time spent on any given task, without necessarily incentivizing work done for the client. *See e.g., In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *5 (N.D. Cal. Aug. 17, 2018).

That said, a lodestar cross-check is likely to confirm the reasonableness of a benchmark award here. The lodestar method is a two-step process. First, counsel's reasonably expended hours are multiplied by a reasonable hourly rate to achieve a base lodestar figure. Second, that figure is then multiplied to reflect counsel's success and skill, and to compensate them for the risk they bore during the litigation. *See Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). Lodestar multipliers typically range between 1 and 4, *see Hunt v. Bloom Energy Corp.*, No. 19-cv-02935, 2024 WL 1995840, at *9 (N.D. Cal. May 6, 2024), though higher multipliers are awarded when the circumstances merit. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (finding "ample authority" supporting a 5.2 multiplier under a crosscheck analysis, collecting cases awarding multipliers as high as 19.6)

Here, as explained above, the base lodestar figure is just under $4.1 million. In fact, this likely understates things. Counsel reached that number by merely adding their lodestar for the time spent on this litigation since their hours were last submitted to the Court. That means that most of the lodestar is calculated at counsel's 2020 rates, even though the lodestar calculation typically uses present-day rates. *See Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016) ("The lodestar should be computed either using an hourly rate that reflects the prevailing rate as of the date of the fee request, to compensate class counsel for delays in payment inherent in contingency-fee cases, or using historical rates and compensating for delays with a prime-rate enhancement."). Counsel's rates, moreover, are within a range of reasonableness. *See Dimercurio v. Equilon Enters., LLC*, No. 3:19-cv-4029, 2024 WL 2113857, at *10 (N.D. Cal.

May 9, 2024) ("While the Court need not and does not decide that the exact rates requested by counsel are reasonable, they are at least within the range of reasonableness required to use the lodestar figure as a cross check."). The cited lodestar figure works out to a blended rate of $619/hour, a very reasonable number for a case that went to trial and up on appeal. *See, e.g.*, *Griffin v. Consol. Commc'ns*, No. 2:21-cv-0885 WBS KJN, 2023 WL 3853643, at *7 (E.D. Cal. June 6, 2023) (conducting lodestar cross-check, and finding that blended rate of $725/hour was reasonable); *Elder v. Hilton Worldwide Holdings, Inc.*, No. 16-cv-00278, 2021 WL 4785936, at *9 (N.D. Cal. Feb. 4, 2021) (same with blended rate of $673). It is also well below the top end rates for lawyers working in Portland in the same area of practice. *See* Debi Elliott, *et al.*, *Oregon State Bar 2022 Economic Survey*, at 44 tbl. 37 (March 2023), https://www.osbar.org/_docs/resources/Econsurveys/22EconomicSurvey.pdf (showing that for lawyers in the field of "Civil Litigation – Plaintiff (excluding personal injury)," the 95th percentile average hourly rates was $685/hour). Counsel's rates have been approved as reasonable in other cases, as well. *See, e.g.*, *Amans v. Tesla, Inc.*, No. 21-CV-03681-VC, 2024 WL 1024735, at *6 (N.D. Cal. Mar. 8, 2024) (approving Edelson P.C.'s current hourly rates as reasonable in a lodestar crosscheck); *In re Facebook Biometric Info. Privacy Litig.*, 522 F. Supp. 3d 617, 633 (N.D. Cal. 2021) (finding that Edelson PC's hourly rates "were reasonable for the applicable localities and experience levels of the timekeepers"); *Goodrich et al. v. Alterra Mountain Co., et al.*, No. 20-cv-01057-RM-SKC, ECF No. 158, at 11 (D. Colo. Jan. 27, 2023) (finding Dover & Luner's hours to be reasonable in a lodestar crosscheck).

For many of the reasons stated above, a multiplier of at least 3 would be warranted here. The results achieved were outstanding, and the quality of Class Counsel's representation was first rate. Although it is not yet possible to calculate a lodestar multiplier, given that the claims

process must go forward before Class Counsel's 25% fee can be calculated, Class Counsel are confident that a lodestar cross-check will show that their request is reasonable.

IV. Class Counsel should be reimbursed their reasonable expenses.

As set forth in the supplemental declaration of Eve-Lynn Rapp, Class Counsel has incurred $365,439.26 in reasonable expenses in the litigation of this case, both in this Court and on appeal. This represents an increase of $7,189.07 in expenses incurred since Class Counsel submitted their initial fee petition. (Rapp Decl. ¶¶ 2-3.) These expenses should be reimbursed separately from any judgment fund.

It is well-settled that attorneys who create a common fund from which eligible claimants can seek to recover are entitled to have their reasonable litigation costs reimbursed from that fund. *See Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Uschold v. NSMG Shared Servs., LLC*, 333 F.R.D. 157, 174 (N.D. Cal. 2019). Counsel are generally entitled to reimbursement of the types of expenses that might ordinarily be charged to a paying client. *See, e.g.*, *In re Infospace, Inc.*, 330 F. Supp. 2d 1203, 1216 (W.D. Wash. 2004). Class Counsel's expenses here are the type of ordinary litigation expenses that are properly chargeable against a common fund.

For instance, Plaintiff seeks reimbursement of Class Counsel's expenses associated with, among other things, travel, and trial preparation. These expenses are critical to counsel's work in securing and defending the trial victory and are therefore appropriately reimbursed from the judgment fund. *See, e.g.*, *Tait v. BSH Home Appliances Corp.*, No. SAVC 10-0711-DOC (ANx), 2015 WL 4537463, at *15 (C.D. Cal. July 27, 2015) (awarding reimbursement of "court fees, discovery costs, travel costs, copying costs, mailing costs, and so forth"); *Alvarez v. XPO Logistics*, No. 2:18-cv-03736-RGK-E, 2022 WL 644168, at *6 (C.D. Cal. Feb. 8, 2022)

(awarding reimbursement for "filing fees, mediation fees, copying, online research, travel expenses, and expert fees" and noting that fees were reasoning in light of counsel's "trial preparation"). For expenses that can appropriately be taxed as costs under 28 U.S.C. § 1920 and Fed. R. Civ. P. 54, Plaintiff will file the appropriate motion with the clerk. For additional, nontaxable expenses, because they will be paid out of any judgment, Plaintiff seeks such approval through this motion.

Counsel further seeks reimbursement of mediation costs fronted in attempting to settle this case. Such costs are typically reimbursed from a common fund, as a paying client would expect to be charged for the cost of mediation. *See, e.g.*, *Alvarez*, 2022 WL 644168, at *6; *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1023-24 (C.D. Cal. 2019).

Lastly, Class Counsel seeks reimbursement of the cost of post-certification notice to the Class. Fees for class-action notice likewise are routinely reimbursed from a common fund, particularly since such notice is necessary to ensure the Class's participation, and to apprise class members of their ability to claim a portion of the judgment fund. *See, e.g.*, *Carlin*, 380 F. Supp. 3d at 1024; *In re Immune Response Secs. Litig.*, 497 F. Supp. 2d 1166, 1177 (C.D. Cal. 2007) (noting that reimbursement for "class action notices" is routine and awarding such costs from a common fund).

V. The Court Should Award Lori Wakefield an Incentive Award of $50,000.

In addition to an award of fees, the Court should also issue an incentive award to Lori Wakefield in recognition of her service to the absent class. "[I]ncentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class action cases." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (quotations omitted); *see also Bell v. Consumer Cellular, Inc.*, No. 15-cv-941, 2017 WL

2672073, at *8 (D. Or. June 21, 2017) ("Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit.") (quotations omitted). To determine the appropriate amount of an award, courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Bell*, 2017 WL 2672073, at *8 (quotations omitted).

Here, Ms. Wakefield's service to the absent class is almost without precedent. In the nearly five years from complaint to judgment, Ms. Wakefield has shouldered the burden of representing the class by herself. In accordance with her duties to the absent class, Ms. Wakefield engaged in extensive trial preparation. And she was perhaps the Class's most important trial witness; her testimony was key to securing the judgment in favor of the absent class. She also made the decision to dismiss her surviving individual claims before trial, believing that it would be better for the Class if the trial could focus exclusively on the Class claims, even though her remaining individual claims might have netted her several thousand more dollars. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (considering "the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.").

While an ordinary case may justify an award of a few thousand dollars, extraordinary efforts and results justify an award of $50,000. *See, e.g., id.* (awarding $50,000 on a judgment of $67 million); *del Toro Lopez v. Uber Techs., Inc.*, No. 17-cv-6255, 2018 WL 5982506, at *3 (N.D. Cal. Nov. 14, 2018) (awarding $50,000 and $30,000 to class representatives on a $10 million recovery); *Pan v. Qualcomm Inc.*, No. 16-cv-1885, 2017 WL 3252212, at *13 (S.D. Cal. July 31, 2017) (awarding $50,000 to seven representatives on a $19.5 million recovery). In the

Perez case, the district court approved a $25,000 service award for representative who, like Plaintiff, testified at trial and helped secure a favorable jury verdict for class. *See* 2020 WL 1904533, at *23. That representative, however, did less than Ms. Wakefield. For example, "Perez left during the first break on the second day of trial and never returned." *Id.* at *22. Ms. Wakefield not only attended the entire trial, she put in weeks of preparation, including preparing for a mock trial. (*See generally* Dkt. 394.) Given Wakefield's more extensive and careful participation in this case, a larger award, of $50,000, is justified.

Moreover, a $50,000 incentive payment is not disproportionate to the total recovery or to the recovery of individual class members. An award "which amount[s] to just 0.4 percent of the total recovery," does not "create a conflict or potential conflict between the Class Representatives and the Class." *In re High-Tech Emp. Antitrust Litig.*, No. 11-cv-2509, 2014 WL 10520478, at *3 (N.D. Cal. May 16, 2014). Here, a $50,000 award is less than 1/10 of 1 percent of the $925 million judgment. And because class members received dozens of calls (at $500 per call) there are likely to be absent class members entitled to tens of thousands of dollars. (Dkt. 303 (4/12 Trial Transcript), at 538-540 (providing examples of class members called 40, 50, and 56 times).) Moreover, because this is a judgment and not a settlement, there is no threat that Wakefield was motivated to accept a suboptimal settlement in light of the prospect of an incentive award.

CONCLUSION

This was a hard-fought case. Both sides fought tooth and nail to achieve a victory on the merits. In the end, Class Counsel secured a historic verdict for the certified Class. Any fee award should reflect that verdict. Counsel respectfully submits that a benchmark award of 25% is appropriate here. A copy of this amended motion will be posted on the case website and

discussed in the forthcoming notice and claim form. Class members will be able to object to the request after receipt of the notice. *See* Fed. R. Civ. P. 23(h).

Respectfully submitted,

LORI WAKEFIELD, individually and on behalf of all similarly situated individuals,

Dated: July 19, 2024

/s/ Eve-Lynn J. Rapp

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