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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA

14 CLIFFORD ARMSTRONG, individually
15 and on behalf of all others similarly
16 situated,

17 Plaintiff,

18 v.

19 CODEFIED, INC., a Delaware
20 corporation,

21 Defendant.

No. 2:19-cv-00550-JAM-EFB

**PLAINTIFF'S NOTICE OF MOTION,
UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AND INCORPORATED
MEMORANDUM OF LAW**

Hearing Date: February 11, 2020

Hearing Time: 1:30 p.m.

Courtroom: 6, 14th Floor

Judge: John A. Mendez

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2 NOTICE IS HEREBY GIVEN that on February 11, 2020, at 1:30 p.m., or as soon
3 thereafter as counsel may be heard, in the Courtroom of the Honorable John A. Mendez, United
4 States District Court for the Eastern District of California, Robert T. Matsui United States
5 Courthouse, 501 I Street, Sacramento, California 95814, Plaintiff Clifford Armstrong, on behalf
6 of himself and a class of similarly situated persons, with the consent of Defendant Codefied Inc.
7 d/b/a HouseCall Pro (“Codefied”), will and hereby does move the Court, by and through its
8 counsel, for entry of a final order approving the class action settlement set forth in the Parties’
9 Settlement Agreement (“Settlement Agreement” or “Agreement”), certifying a class for
10 settlement purposes, approving the Notice to the Settlement Class, and granting a service award
11 to Plaintiff and class counsel’s attorneys’ fees and costs.¹ This motion is based on this Notice of
12 Motion, the following Memorandum of Points and Authorities, the Declaration of the Settlement
13 Administrator, the Declaration of Avi R. Kaufman, the Declaration of Stefan Coleman, all
14 pleadings, records and papers on file, and such other matters that may be presented to the Court.
15
16

17 **I. INTRODUCTION**

18 This is a Telephone Consumer Protection Act (“TCPA”) settlement in which the results
19 speak for themselves. The Settlement Agreement establishes a non-reversionary Settlement Fund
20 in the amount of \$2,200,000 for the benefit of the Settlement Class, which will also be used to
21 pay the settlement costs. Pursuant to the Settlement Agreement, Codefied has also agreed that it
22 already has and will continue to implement and enforce policies and procedures to prevent against
23 the placement of calls and text messages to cellphones using an Automated Telephone Dialing
24 System or an artificial or prerecorded voice potentially in violation of the TCPA. To date,
25 approximately 5,368 Settlement Class Members have submitted claims, none have objected, and
26

27 _____
28 ¹ The Agreement is attached as Exhibit 1. All capitalized terms used herein have the same definitions as those defined in the Agreement.

1 only 6 have opted out. Based on the expected claims rate based on claims to date, each claiming
2 Settlement Class Member will receive approximately \$180, if the Court grants the relief requested
3 in this Motion. The Settlement will bring an end to what has otherwise been, and likely would
4 continue to be, hard-fought litigation centered on unsettled legal questions, and was reached after
5 mediation before an experienced mediator, former Chief Judge of District Court for the Northern
6 District of Illinois, James F. Holderman. Ultimately, the Settlement provides Class Members
7 with outstanding relief under the circumstances and should be finally approved.
8

9 For the reasons set forth in this memorandum and in the papers previously submitted in
10 support of approval, including but not limited to Plaintiff's Unopposed Motion for Preliminary
11 Approval of Class Settlement (D.E. 24), Plaintiff respectfully requests that the Court grant final
12 approval of the settlement by: (1) finally certifying the Settlement Class; (2) approving the
13 proposed Settlement Agreement as fair, adequate, and reasonable for the certified Settlement
14 Class; (3) determining that adequate notice was provided to the Settlement Class; (4) approving
15 payment to the claims administrator estimated to be between \$344,297.52 and \$367,897.52; (5)
16 approving Class Counsel's requested attorneys' fees of \$733,333.33 and reimbursement of
17 \$13,930.08 in out-of-pocket litigation costs; and (6) approving an award of \$5,000 to Plaintiff for
18 his service as the Class Representative. The parties request entry of the agreed proposed order
19 filed herewith, attached as Exhibit 2 to this Motion, at or after the fairness hearing.
20
21

22 **II. PROCEDURAL AND FACTUAL BACKGROUND**

23 Plaintiff's Motion for Preliminary Approval, incorporated by reference, details the basis of
24 Plaintiff's claims, the procedural history, and the parties' settlement efforts. (See Preliminary
25 Approval Motion [D.E.] 24 at pp. 2-11). Plaintiff focuses here on those matters pertinent to the
26 instant Motion.
27
28

1 On March 28, 2019, Plaintiff filed the Complaint against Codefied, Inc. in this action.
2 [D.E. 1]. On May 21, 2019, Codefied filed a Motion to Dismiss the Complaint [D.E. 9]. The
3 Parties conducted a Rule 26 conference on June 7, 2019 and submitted a joint scheduling report
4 on June 13, 2019. At that time, the Parties began settlement discussions, and ultimately agreed to
5 submit to mediation with Judge James F. Holderman (Ret.) of JAMS.
6

7 On July 15, 2019, the Parties participated in an initial mediation conference with Judge
8 Holderman. As part of the mediation process, the Parties agreed to and engaged in informal
9 discovery regarding Plaintiff and the classes' claims and Defendant's defenses. Based on the
10 Parties' analyses of the relative strengths and weaknesses of their cases through this discovery
11 and the realities of Defendant's financial condition, on August 14, 2019, the Parties engaged in a
12 full-day, contentious mediation at JAMS, resulting in an agreement in principle to settle the
13 Action. Thereafter, the Parties provided notice of the Parties' agreement to settle the Action.
14 Following weeks of further negotiations and discussions, the Parties resolved all remaining
15 issues, culminating in the Settlement Agreement.
16

17 **III. SUMMARY OF THE SETTLEMENT TERMS**

18 **a. Settlement Class**

19 The proposed Settlement establishes a Settlement Class of:
20

21 All individuals or entities in the United States who, from March 28, 2015 to the
22 date of the Preliminary Approval Order, received one or more telephone calls or
23 texts concerning Codefied's (*i.e.*, Housecall Pro's) goods or services from or on
24 behalf of Defendant.

25 Excluded from the Settlement Class are: (1) the trial judge presiding over this case; (2) Codefied,
26 as well as any parent, subsidiary, affiliate or control person of Codefied, and the officers,
27 directors, agents, servants or employees of Codefied; (3) any of the Released Parties; (4) the
28 immediate family of any such person(s); (5) any member of the Settlement Class who has timely

1 opted out of the Settlement; and (6) Class Counsel and their employees. Agreement at section
2 1.1.34.

3 **b. Settlement Consideration**

4 Pursuant to the Settlement Agreement, Codefied established a non-reversionary
5 Settlement Fund in the amount of Two Million Two Hundred Thousand Dollars (\$2,200,000) for
6 the purpose of making all required payments under the Settlement, including payments for
7 Approved Claims, any approved Fee Award, any approved service award for Representative
8 Plaintiff, and the costs of reasonable class notice and class administration. Agreement at Section
9 5. Codefied further agrees that it has and will implement and enforce policies and procedures to
10 prevent against the placement of calls and text messages to cellphones using an Automated
11 Telephone Dialing System or an artificial or prerecorded voice. Agreement at Section 5.
12

13
14 The Settlement Fund will be distributed pro rata to Settlement Class Members. The
15 Settlement authorizes the payment of settlement administration costs, a deduction of up to one-
16 third of the Settlement Fund for attorneys' fees plus expenses up to \$15,000, and a class
17 representative service award in the amount of \$5,000. After deducting these amounts from the
18 Settlement Fund, based on the expected claims rate, each Claimant will receive a pro rata
19 distribution of approximately \$180.
20

21 **IV. IMPLEMENTATION OF THE PROPOSED SETTLEMENT**

22 This Court entered its Order Granting Preliminary Approval of the Settlement on October
23 22, 2019. [D.E. 28]. Since that date, the Parties have worked diligently with each other and the
24 Claims Administrator to effectuate the terms of the Settlement Agreement. Declaration of
25 Settlement Administrator attached as Exhibit 3.

26 On September 20, 2019, in accordance with the Class Action Fairness Act of 2005, 28
27 U.S.C. § 1715 ("CAFA"), the Settlement Administrator sent the CAFA Notice to the United
28

1 States Attorney General and all State Attorneys General. *Id.* at ¶ 2. A supplemental CAFA Notice
2 was sent on October 25, 2019, which included class size estimations by state. *Id.* at ¶ 2.

3 On November 5, 2019, Defendant provided the telephone numbers for all Settlement
4 Class Members along with the class member's name and contact information, to the extent
5 Codefied possessed that additional contact information. *Id.* at ¶ 3.

7 On November 21, 2019, the Settlement Administrator activated the settlement website and
8 began implementing the direct notice plan and issuing the Postcard Notice to Settlement Class
9 Members pursuant to the Settlement and this Court's Preliminary Approval Order. *Id.* at ¶ 4. To
10 date, 5,368 timely claims have been made. *Id.* at ¶ 8. Only 6 people have opted out and no
11 objections have been filed with the Court to Plaintiff's knowledge. *Id.* at ¶¶ 9-10.

12
13 **V. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE**

14 As a matter of public policy, courts favor settlement of class actions for their earlier
15 resolution of complex claims and issues, which promotes the efficient use of judicial and private
16 resources. *E.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). The
17 policy favoring settlement is especially relevant in class actions and other complex matters, where
18 the inherent costs, delays and risks of continued litigation might otherwise overwhelm any
19 potential benefit the class could hope to obtain. *See, e.g., id.; In re Syncor ERISA Litig.*, 516 F.3d
20 1095, 1101 (9th Cir. 2008); *see also Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing
21 cases). In the Ninth Circuit, to assess the fairness of a class-action settlement there are eight
22 factors a court may consider: (1) the strength of the plaintiff's case; (2) the risk, expense,
23 complexity, and likely duration of further litigation; (3) the risk of maintaining class action status
24 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed
25 and the stage of the proceedings; (6) the experience and view of counsel; (7) the presence of a
26 governmental participant; and (8) the reaction of the class members of the proposed settlement. *In*
27
28

1 *re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir. 2015) (internal citation
2 omitted). In assessing the Settlement, the Court’s discretion should be “limited to the extent
3 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
4 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
5 whole, is fair, reasonable and adequate to all concerned.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d
6 948, 965 (9th Cir. 2009).

8 **a. This Non-Collusive Settlement is Entitled to a Presumption of Fairness and Is**
9 **Fair, Adequate, and Reasonable**

10 “The assistance of an experienced mediator in the settlement process confirms that the
11 settlement is non-collusive.” *Satchell v. Fed. Express Corp.*, No. C03-2659 SI, 2007 U.S. Dist.
12 LEXIS 99066, at *17 (N.D. Cal. Apr. 13, 2007); *Goodwin v. Winn Mgmt. Grp. LLC*, No.
13 115CV00606DADEPG, 2017 U.S. Dist. LEXIS 117133, at *20 (E.D. Cal. July 26, 2017) (finding
14 the settlement process non-collusive where the settlement resulted from a full day of mediation
15 with a mediator). A non-collusive settlement, negotiated with the involvement of a respected
16 mediator, is entitled to a “a presumption of fairness.” *In re Toys R Us-Delaware, Inc.--Fair &*
17 *Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 450 (C.D. Cal. 2014) (citing
18 *Rodriguez*, 563 F.3d at 965) (“We put a good deal of stock in the product of an arms-length, non-
19 collusive, negotiated resolution.”).

21 The Settlement in this action is the result of a full day mediation with a mediator with
22 unique experience and perspective regarding TCPA settlements, the Hon. James F. Holderman
23 (Ret.). *See In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 809 (N.D. Ill.
24 2015) (finally approving class action settlement with estimated payout of \$39.66 per claiming
25 class member and awarding attorneys’ fees of 36% fee for first \$10,000,000 of settlement). The
26 Settlement is accordingly presumptively fair.
27
28

1 Even without a presumption of fairness, this Settlement is fair, adequate, and reasonable.
2 An objective evaluation of the Settlement Agreement, compared to the risk, expense, complexity,
3 and likely duration of further litigation confirms that the Settlement should be viewed as fair,
4 reasonable, and adequate. *See Wannemacher v. Carrington Mortg. Servs., LLC*, No. SA CV 12-
5 2016 FMO (ANx), 2014 U.S. Dist. LEXIS 199156, at *16 (C.D. Cal. Dec. 22, 2014) (discussing
6 that a court should “objectively” evaluate the “strengths and weaknesses inherent in the
7 litigation”) (internal citation omitted).
8

9 **i. The Strength of Plaintiff’s Case Compared to the Complexity and**
10 **Likely Duration of Further Litigation Support Final Approval**

11 As the Ninth Circuit has instructed, in assessing the probability and likelihood of success,
12 “the district court’s determination is nothing more than an amalgam of delicate balancing, gross
13 approximations, and rough justice.” *Officers for Justice v. Civil Serv. Com.*, 688 F.2d 615, 625
14 (9th Cir. 1982). There is “no particular formula” to be applied, but the court may presume the
15 parties’ counsel and the mediator arrived at a reasonable range of settlement by considering
16 plaintiff’s likelihood of recovery. *Rodriguez*, 563 F.3d at 965. Moreover, “[i]t has been held
17 proper to take the bird in hand instead of a prospective flock in the bush.” *Couser v. Comenity*
18 *Bank*, 125 F. Supp. 3d 1034, 1041 (S.D. Cal. 2015) (citing *Nat’l Rural Telecomms. Coop. v.*
19 *DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004)).
20

21 This case likely would have involved extensive third party discovery, technical expert
22 witnesses, and significant disputes as to procedural, merits, and class certification issues. Class
23 Counsel has taken into account Codefied’s financial viability, the strength of Codefied’s defenses,
24 difficulties in obtaining class certification and proving liability, including proving vicarious
25 liability, the general uncertainty and risks attendant to complex actions such as this one, and the
26 inherent delays in such litigation.
27
28

1 These risks must be balanced against the anticipated Settlement result: if the Settlement is
2 finally approved, claiming Settlement Class Members will receive approximately \$180 in relief
3 immediately. Additionally, Codefied has agreed that it has and will continue to implement
4 policies and procedures to prevent future potential TCPA violative calls concerning Codefied’s
5 goods or services to Settlement Class Members and other members of the general public. This
6 factor therefore weighs in favor of final approval. *Morales v. Stevco, Inc.*, No. 1:09-cv-00704
7 AWI JLT, 2011 U.S. Dist. LEXIS 130604, at *27 (E.D. Cal. Nov. 10, 2011) (immediate recovery
8 for the class is “preferable to lengthy and expensive litigation with uncertain results”) (internal
9 citation omitted).

11 **ii. The Risks of Maintaining Class Action Status Through Trial Support**
12 **Final Approval**

13 The risk that the Class may not be certified also favors final approval. *Wannemacher*,
14 2014 U.S. Dist. LEXIS 199156, at *18 (finding that where motion for class certification had not
15 been filed the risk that the class would not be certified weighed in favor of approving the
16 settlement); *Couser*, 125 F. Supp. 3d at 1042 (same); *Grannan v. Alliant Law Grp., P.C.*, No.
17 C10-02803 HRL, 2012 U.S. Dist. LEXIS 8101, at *17-18 (N.D. Cal. Jan. 24, 2012) (finding that
18 since discovery could result in factors that would risk certification of the class this factor weighs
19 in favor of settlement). The risks inherent in proceeding with class litigation weigh strongly in
20 favor of final approval.

22 **iii. The Amount of the Settlement Favors Final Approval**

23 In evaluating the range of possible approval, “courts primarily consider plaintiffs’
24 expected recovery balanced against the value of the settlement offer.” *In re Tableware Antitrust*
25 *Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). “Thus, when analyzing the amount offered
26 in settlement, the Court should examine ‘the complete package taken as a whole,’ and the amount
27 is ‘not to be judged against a hypothetical or speculative measure of what *might* have been
28

1 achieved by the negotiators.” *Morales*, 2011 U.S. Dist. LEXIS 130604, at *28 (internal citations
2 omitted).

3 The non-reversionary \$2,200,000 settlement amount provides much more than “a fraction
4 of the potential recovery” to Settlement Class Members. Class members that submit claims will
5 each receive an average net settlement payment (net of attorneys’ fees, costs, service awards, and
6 claims administration fees) of approximately \$180. This amount is well in line with—and indeed
7 exceeds—many other court approved TCPA settlements. *See Manouchehri v. Styles for Less, Inc.*,
8 No. 14cv2521 NLS, 2016 U.S. Dist. LEXIS 80038 (S.D. Cal. June 20, 2016) (preliminarily
9 approving settlement where class members could choose to receive \$10 cash or \$15 voucher);
10 *Franklin v. Wells Fargo Bank, N.A.*, No. 14cv2349-MMA (BGS), 2016 U.S. Dist. LEXIS 13696
11 (S.D. Cal. Jan. 29, 2016) (approving settlement where class members received \$71.16); *Estrada*
12 *v. iYogi, Inc.*, No. 2:13–01989 WBS CKD, 2015 U.S. Dist. LEXIS 137299 (E.D. Cal. Oct. 6,
13 2015) (preliminarily approving TCPA settlement where class members estimated to receive \$40).

14 As one court noted in approving an unrelated TCPA class settlement: “[t]he essential point
15 here is that the court should not reject a settlement solely because it does not provide a complete
16 victory to plaintiffs, for the essence of settlement is compromise.” *Gehrich v. Chase Bank USA,*
17 *N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) (approving \$34 million TCPA settlement for class of
18 more than 32 million individuals with a per-claimant recovery of \$52.50) (citing *Isby v. Bayh*, 75
19 F.3d 1191, 1200 (7th Cir. 1996)). Here, as in *Gehrich*, “[i]ndividual class members receive less
20 than the maximum value of their TCPA claims, but they receive a payout without having suffered
21 anything beyond a few unwanted calls or texts, they receive it (reasonably) quickly, and they
22 receive it without the time, expense, and uncertainty of litigation.” *Id.* Codefied, “for its part, buys
23 peace and mitigates risk.” *Id.* What the Settlement Class releases through the settlement is related
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1 to what the Class gains. In this case, the release for the class members is appropriately tailored to
2 the claims at issue in this case.

3 The monetary relief here and agreement that Codefied has and will implement and enforce
4 policies and procedures to prevent against the placement of calls and text messages to cellphones
5 using an Automated Telephone Dialing System or an artificial or prerecorded voice is a fair and
6 meaningful outcome in class members' favor, and places the settlement well within the range of
7 approval.
8

9 **iv. Discovery Has Advanced Far Enough to Allow the Parties to**
10 **Responsibly Resolve the Case**

11 “In the context of class action settlements, as long as the parties have sufficient
12 information to make an informed decision about settlement, ‘formal discovery is not a necessary
13 ticket to the bargaining table.’” *Couser*, 125 F. Supp. 3d at 1042; *see, e.g., Konstantinos*
14 *Moshogiannis v. Sec. Consultants Grp., Inc.*, No. 5:10-cv-05971 EJD, 2012 U.S. Dist. LEXIS
15 16287, at *14 (N.D. Cal. Feb. 8, 2012) (holding that settlement was fair, reasonable, and adequate
16 where, *inter alia*, “the parties conducted a significant amount of informal discovery...”); *Williams*
17 *v. Costco Wholesale Corp.*, No. 02cv2003 IEG (AJB), 2010 U.S. Dist. LEXIS 19674, at *16
18 (S.D. Cal. Mar. 4, 2010) (“Plaintiff ha[d] sufficient information from investigation and from
19 informal discovery to have a clear view of the strengths and weaknesses of the case and to
20 support the settlement.”).

21
22 Although this case was mediated early, it was extensively investigated pre-suit and after
23 filing without the need for formal discovery, and has been actively litigated. The Parties agreed
24 and engaged in the informal exchange of information concerning the claims and defenses and
25 decided to broach the issue of possible settlement. Class Counsel conducted a thorough
26 investigation and analysis of Plaintiff’s claims and engaged in extensive informal discovery with
27 Defendant, and confirmatory discovery including a formal interview of Codefied’s Chief
28

1 Operating Officer. Declaration of Avi R. Kaufman (Kaufman Decl.), attached as Exhibit 4 at ¶ 4.
2 Class Counsel’s investigation and review of the discovery enabled them to gain an understanding
3 of the evidence related to central questions in the Action and Codefied’s financial capacity as a
4 start-up, and prepared them for well-informed settlement negotiations, including Codefied’s
5 financial capacity as a start-up. *Id.* at ¶ 8.

7 **v. Class Counsel’s Experience and Views of the Action Favor Final**
8 **Approval**

9 Settlement recommendations of competent counsel are accorded “great weight” by the
10 Courts since “[p]arties represented by competent counsel are better positioned than courts to
11 produce a settlement that fairly reflects each party’s expected outcome in the litigation.” *Nat’l*
12 *Rural Telecomms. Coop.*, 221 F.R.D. at 528 (citations omitted). “The Court’s function on this
13 application is well known it is not to reopen and enter into negotiations with the litigants in the
14 hope of improving the settlement to meet an objector’s particular objections; nor is the Court
15 called upon to substitute its business judgment for that of the parties who worked out a settlement
16 after hard, arm’s-length, good-faith bargaining. Rather, it is called upon to evaluate the
17 probabilities of success upon a trial and to compare the benefits thereof with the terms of
18 compromise.” *Kuck v. Berkey Photo, Inc.*, 87 F.R.D. 75, 78 (S.D.N.Y. 1980).

20 The Settlement here is the result of extensive, arm’s-length negotiations between
21 experienced attorneys who are familiar with class action litigation and with the legal and factual
22 issues of this Action. Kaufman Decl. ¶ 13. Furthermore, Class Counsel are particularly
23 experienced in the litigation, certification, and settlement of nationwide TCPA class action cases.
24 Kaufman Decl. ¶ 14 & Ex. 1. Class Counsel zealously represented Plaintiff and the Settlement
25 Class members’ interests throughout the litigation, and continue to do so. Kaufman Decl. ¶ 15.
26 Class Counsel are confident in the strength of Plaintiff’s case, but are also pragmatic in their
27 awareness of the various defenses available to Defendant, and the risks inherent in trial and post-

1 judgment appeal. Kaufman Decl. ¶ 9. The success of Plaintiff's claims turn on questions that
2 would arise at class certification, summary judgment, trial and during an inevitable post-judgment
3 appeal. The risks of further litigation were also weighed against Codefied's financial capacity as
4 a start-up. Under the circumstances, Class Counsel appropriately determined that the Settlement
5 outweighs the risks of continued litigation. Kaufman Decl. ¶¶ 8-12. And the absence of any
6 objections from Class Members, and minimal number of opt outs, strongly support Class
7 Counsel's conclusion.
8

9 **vi. The Reaction of the Settlement Class Members Favors Final Approval**

10 The Settlement Class endorses the Settlement. To date, there are no objections to the
11 Settlement and only 6 opt outs. These numbers weigh strongly in favor of final approval. *See*
12 *Nat'l Rural Tele. Coop.*, 221 F.R.D. at 529 ("It is established that the absence of a large number
13 of objections to a proposed class action settlement raises a strong presumption that the terms of a
14 proposed class action settlement are favorable to the class members."); *Davis v. Brown Shoe Co.,*
15 *Inc.*, No. 1:13-cv-01211-LJO-BAM, 2015 U.S. Dist. LEXIS 149010, at *18 (E.D. Cal. Nov. 3,
16 2015) (granting final approval where there were no objectors and only two opt-outs and finding
17 that the settlement was presumptively fair, adequate and reasonable).
18

19 The \$2,200,000 being made available for the Settlement Class is more than reasonable
20 given the complexity of the litigation, significant limits of Codefied's financial capacity, and
21 significant risks and barriers that loomed in the absence of settlement including, but not limited
22 to, class certification, summary judgment, *Daubert* motions, trial, as well as appellate review
23 following a final judgment. There can be no doubt that this Settlement is a fair and reasonable
24 recovery. Kaufman Decl. ¶ 16.
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1 **b. Notice Was the Best Practicable and Was Reasonably Calculated to Inform**
2 **the Settlement Class of its Rights**

3 “Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class
4 members who would be bound by a proposed settlement, voluntary dismissal, or compromise
5 regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3).” *Manual for*
6 *Compl. Lit.* § 21.312 (internal quotation marks omitted). The best practicable notice is that which
7 is “reasonably calculated, under all the circumstances, to apprise interested parties of the
8 pendency of the action and afford them an opportunity to present their objections.” *Mullane v.*
9 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). To satisfy this standard, “[n]ot only
10 must the substantive claims be adequately described but the notice must also contain information
11 reasonably necessary to make a decision to remain a class member and be bound by the final
12 judgment or opt-out of the action.” *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th
13 Cir. 1998) (internal quotation marks omitted); *see also Manual for Compl. Lit.* § 21.312 (listing
14 relevant information).
15

16 The Notice program satisfies these criteria. As recited in the Settlement, the Motion for
17 Preliminary Approval and above, the Notice Program was implemented pursuant to the
18 Settlement and this Court’s Preliminary Approval Order, and advised Settlement Class members
19 of the substantive terms of the Settlement, their options for remaining part of the Settlement
20 Class, for objecting to the Settlement, Class Counsel’s Attorneys’ fee application and request for
21 Service Award, or for opting-out of the Settlement, and how to obtain additional information
22 about the Settlement.
23

24 **c. The Settlement Class Should Be Finally Certified**

25 This Court conditionally certified the Settlement Class for settlement purposes only. [D.E.
26 24]. For all the reasons set forth in Plaintiff’s preliminary approval briefing, incorporated by
27 reference herein, and the Preliminary Approval Order, the Court should finally certify the
28

1 Settlement Class as it continues to meet all the requirements of Rule 23(a) and at least one of the
2 requirements of Rule 23(b).

3 **VI. THE REQUESTED SERVICE AWARD FOR THE CLASS**
4 **REPRESENTATIVE IS REASONABLE AND SHOULD BE APPROVED**

5 Pursuant to the Settlement, Class Counsel respectfully request, and Defendant does not
6 oppose, a Service Award for the Class Representative in the amount of \$5,000. “Because a named
7 plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is
8 necessary to induce an individual to participate in the suit.” *Cook v. Niedert*, 142 F.3d 1004, 1016
9 (7th Cir. 1998). The requested incentive payment is reasonable and within the range of incentive
10 payments often awarded in class actions. *Ogbuehi v. Comcast of*
11 *California/Colorado/Florida/Oregon, Inc.*, No. 2:13-cv-00672-KJM-KJN, 2015 U.S. Dist.
12 LEXIS 74548, at *36 (E.D. Cal. June 9, 2015) (approving incentive award of \$5,000); *In re Mego*
13 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving incentive awards of \$5,000
14 each to the two class representatives); *Ontiveros v. Zamora*, 303 F.R.D. 356, 366 (E.D. Cal. 2014)
15 (approving an incentive award of \$13,550 for the named plaintiff).
16
17

18 Here, Plaintiff invested his time into this litigation. He took personal time to speak with
19 Class Counsel, search for relevant evidence, review and approve the complaint for filing, keep
20 abreast of the litigation, and evaluated the settlement proposal during mediation. This sacrifice
21 was made to support a case in which he had a relatively modest personal interest, but that has
22 provided benefits to hundreds of thousands of Settlement Class Members and the general public,
23 and warrants the Court’s approval of the requested service award. Given Plaintiff’s contribution
24 to the successful prosecution of this action, Plaintiff should be granted a service award in the
25 amount of \$5,000.
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1 **VII. CLASS COUNSEL’S APPLICATION FOR FEES AND EXPENSES ARE FAIR,**
2 **REASONABLE, AND JUSTIFIED**

3 The Settlement permits Class Counsel to apply to the Court for attorneys’ fees, expenses,
4 and costs, totaling up to one-third of the Settlement Fund for attorneys’ fees and up to \$15,000 for
5 documented and reasonable expenses and costs. Accordingly, given the outstanding outcome
6 under the circumstances, Class Counsel request approval of attorneys’ fees amounting to one-
7 third of the Settlement Fund and \$13,930.08 for documented and reasonable expenses.

8 Rule 23 permits a court to award “reasonable attorney’s fees... that are authorized by law
9 or by the parties’ agreement.” Fed. R. Civ. P. 23(h). “Where a settlement produces a common
10 fund for the benefit of the entire class, courts have discretion to employ either the lodestar method
11 or the percentage-of-recovery method.” *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935,
12 942 (9th Cir. 2011). Here, where the “benefit to the class is easily quantified” in a common-fund
13 settlement, the court can employ the percentage-of-recovery method. *Id.* The Ninth Circuit has
14 held that, when employing the percentage of the fund method for non-reversionary common fund
15 settlements, the court may, but is not required to, compare the lodestar and the percentage
16 benchmark to determine if requested attorneys’ fees are inappropriately high or low. *Fischel v.*
17 *Equitable Life Assurance Society of the U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002). Overall, the
18 goal is to produce a fair and reasonable result. *In re Bluetooth Headset Prod. Liab. Litig.*, 654
19 F.3d 935, 942 (9th Cir. 2011); *Pointer v. Bank of Am., N.A.*, No. 2:14-CV-00525-KJM-CKD,
20 2016 U.S. Dist. LEXIS 176930, at *40-41 (E.D. Cal. Dec. 20, 2016).

21 Regardless of the method chosen, courts award attorneys’ fees based on an evaluation of
22 “all the circumstances of the case.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir.
23 2002). According to the Ninth Circuit, these circumstances include: (1) the results achieved for
24 the class; (2) the quality of representation; (3) the novelty and complexity of the issues; (4) the
25 risks of the litigation; and (5) awards in similar cases. *See id.* at 1048–51; *see also Dakota Med.*,
26

1 *Inc. v. RehabCare Grp., Inc.*, No. 1:14-cv-02081-DAD-BAM, 2017 U.S. Dist. LEXIS 154458, at
2 *23 (E.D. Cal. Sep. 21, 2017) (same). All of these factors weigh in favor of approving the
3 requested attorneys' fees.

4
5 **a. Class Counsel Achieved Exceptional Results for the Class**

6 The "party's success in the litigation [is] the most critical factor" of the Vizcaino factors.
7 *Rodriguez v. Kraft Foods Grp., Inc.*, No. 1:14-cv-1137-LJO-EPG, 2016 U.S. Dist. LEXIS
8 138652, at *39 (E.D. Cal. Oct. 5, 2016) *citing Yamada v. Nobel Biocare Holding AG*, 825 F.3d
9 536, 546 (9th Cir. 2016) ("Of those factors, a party's success in the litigation is the 'most
10 critical'"). As described above, the Settlement establishes a \$2.2 million non-reversionary fund
11 for the Settlement Class resulting in an estimated payout of \$180 per claiming Settlement Class
12 Member, and the Settlement Class fully endorses the Settlement. Moreover, Codefied further
13 agreed in the Settlement that it has and will implement and enforce policies and procedures to
14 prevent against the placement of calls and text messages to cellphones using an Automated
15 Telephone Dialing System or an artificial or prerecorded voice, which benefits every Class
16 Member. Given Codefied's limited means, the risks of litigation, and the likelihood that
17 potentially TCPA violative calls concerning Codefied's goods and services would have continued
18 absent this litigation, Class Counsel obtained an exceptional result.

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20
21 **b. Class Counsel Exhibited Outstanding Skill and Diligence**

22 The quality of Class Counsel's representation in this case supports an award of one third
23 of the Settlement Fund. Plaintiff and the Settlement Class benefited from the high caliber
24 representation of Class Counsel, including Class Counsel's extensive TCPA class action
25 experience. Kaufman Decl. at ¶ 14 & Ex. 1, and Declaration of Stefan Coleman at ¶ 2, attached as
26 Exhibit 5, & Ex. 1 to the Coleman declaration. Of further testament to Class Counsel's skill is the
27 quality of opposing counsel in this action. *See Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D.
28

1 431, 449 (E.D. Cal. 2013) (“The quality of opposing counsel is important in evaluating the quality
2 of Class Counsel’s work.”). Orrick, Herrington & Sutcliffe LLP is a renowned national defense
3 firm with significant experience in defending all types of consumer class actions, including TCPA
4 actions. Class Counsel’s analysis of the issues in this action, litigation strategy and diligence in
5 pushing this action also support the requested award. Class Counsel vigorously litigated this
6 matter. Kaufman Decl. at ¶ 15. Class Counsel’s work was necessary to resolve this action and
7 achieved an excellent result for Plaintiff and the Settlement Class.
8

9 **c. The Risks of Litigation and the Novelty and Complexity of the Issues Justify**
10 **the Requested Fees and Costs**

11 “The risk that further litigation might result in Plaintiffs not recovering at all, particularly
12 in a case involving complicated legal issues, is a significant factor in the award of fees.” *In re*
13 *Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046-7 (N.D. Cal. 2008) *citing Vizcaino*, 290 F.3d at
14 1048. Likewise, “the importance of ensuring adequate representation for plaintiffs who could not
15 otherwise afford competent attorneys justifies providing those attorneys who do accept matters on
16 a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee.” *Id.* at
17 1047; *see also Morales v. Conopco, Inc.*, No. 2:13-2213 WBS EFB, 2016 U.S. Dist. LEXIS
18 144349, at *21 (E.D. Cal. Oct. 18, 2016) (“Since class counsel took this case on a contingency
19 basis, their risk of recovery was the same as the class members.”). As discussed above,
20 specifically in Section V.b.i. and ii., this Action posed significant risks in proceeding. The risks
21 of litigation, including the ever-changing TCPA landscape, and the complexity of the issues
22 justify the requested fees and costs.
23

24 **d. Awards in Similar Cases Demonstrate the Requested Fees are Reasonable**

25 The Ninth Circuit recognizes 25% of the common fund as a “benchmark,” that may be
26 adjusted upward or downward based on the circumstances of the case. *In re Online DVD-Rental*
27 *Antitrust Litig.*, 779 F.3d at 949. “[T]he exact percentage varies depending on the facts of the

1 case,” and courts in this District have concluded that “in most common fund cases, the award
 2 exceeds that benchmark.” *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal.
 3 2010) (granting class counsel an award of attorneys’ fees in the amount of one-third of the
 4 common fund); *RehabCare Grp., Inc.*, No. 1:14-cv-02081-DAD-BAM, 2017 U.S. Dist. LEXIS
 5 154458 (same in TCPA class action); *Elzen v. Educator Grp. Plans, Ins. Servs.*, No. 1:18-cv-
 6 01373-WCG, 2019 U.S. Dist. LEXIS 170798, at *6 (E.D. Wis. Oct. 2, 2019) (granting class
 7 counsel an award of attorneys’ fees in the amount of one third of the settlement fund in a TCPA
 8 class action); *Syed v. M-I, L.L.C.*, No. 1:12-cv-01718-DAD-MJS, 2017 U.S. Dist. LEXIS 118064,
 9 at *21 (E.D. Cal. July 26, 2017) (granting class counsel’s fee application in the amount of one-
 10 third of the common fund equaling \$2.3 million); *Emmons v. Quest Diagnostics Clinical Labs.,*
 11 *Inc.*, No. 1:13-cv-00474-DAD-BAM, 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. Feb. 27, 2017)
 12 (approving attorneys’ fees of one-third of the common fund); *Williams v. Centerplate, Inc.*, No.
 13 11-2159, 2013 U.S. Dist. LEXIS 121307 (S.D. Cal. Aug. 26, 2013) (concluding an award of
 14 attorneys’ fees in the amount of thirty percent of the common fund was reasonable); *In re*
 15 *Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) (noting “nearly all common fund
 16 awards range around 30%”). Accordingly, Class Counsel is requesting attorneys’ fees in the
 17 amount of one third of the Settlement Fund, which is justified in light of the outcome when
 18 compared to the risks attendant in this Action and the fees awarded in similar class actions.
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22 **e. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fees**

23 To calculate the lodestar, the Court “multipl[ies] the number of hours the prevailing party
 24 reasonably expended on the litigation ... by a reasonable hourly rate for the region and for the
 25 experience of the lawyer.” *Bluetooth*, 654 F.3d at 941. This base “unadorned” lodestar figure is
 26 “presumptively reasonable.” *Id.* “Courts have routinely enhanced the lodestar to reflect the risk of
 27 non-payment in common fund cases. This mirrors the established practice in the private legal
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1 market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over
2 their normal hourly rates for winning contingency cases. In common fund cases, attorneys whose
3 compensation depends on their winning the case must make up in compensation in the cases they
4 win for the lack of compensation in the cases they lose.” *Vizcaino*, 290 F.3d at 1051 (internal
5 citation omitted).

6
7 Class Counsel has invested approximately 602.65 hours prosecuting Plaintiff’s claims
8 through December 30, 2019. Additionally, Class Counsel expects to spend about another 45
9 hours communicating with Settlement Class Members, preparing for and attending the Final
10 Fairness Hearing, and tending to any claims-administration issues that arise. Counsel has a
11 lodestar of \$451,474.50. Kaufman Decl. ¶¶ 21-27; Coleman Decl. ¶¶ 7-12. Counsel has provided
12 summaries of their work in order to “identify the general subject matter of [their] time
13 expenditures.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983); *Fischer v. SJB-P.D. Inc.*,
14 214 F.3d 1115, 1121 (9th Cir. 2000) (“a summary of the time spent on a broad category of tasks
15 such as pleadings and pretrial motions” satisfies the “basic requirement”).

16
17 Class Counsel’s requested attorneys’ fee award here is \$733,333, which represents
18 application of a very modest multiplier of approximately 1.6 to Counsel’s lodestar, which
19 includes a conservative estimate of hours that will be expended through the end of this Action.
20 Accordingly, although the circumstances of this Action warrant a substantial positive multiplier,
21 Class Counsel is not seeking one, and for that reason as well the requested fee is more than
22 reasonable. *See e.g. Vizcaino*, 290 F.3d at 1051 n.6 (holding that in the Ninth Circuit, multipliers
23 “ranging from one to four are frequently awarded” and affirming multiplier of 3.65); *Steiner v.*
24 *Am. Broad. Co.*, 248 F. App’x 780, 783 (9th Cir. 2007) (approving multiplier of approximately
25 6.85 as “well within the range of multipliers that courts have allowed”).
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1 **i. The Hours Class Counsel Have Expended Are Reasonable**

2 Class Counsel has devoted 602.65 hours to this litigation, and conservatively anticipate
3 expending an additional 45 hours between the final fairness hearing and continued case and
4 settlement management. Kaufman Decl. ¶ 21; Coleman Decl. ¶ 7. The appropriate number of
5 hours includes all time “reasonably expended in pursuit of the ultimate result achieved in the
6 same manner that an attorney traditionally is compensated by a fee-paying client for all time
7 reasonably expended on a matter.” *Knox v. Chiang*, No. 2:05-cv-02198-MCE-CKD, 2013 U.S.
8 Dist. LEXIS 79230, at *11 (E.D. Cal. June 5, 2013) (internal citation omitted). In determining the
9 reasonableness of the hours worked, the district court can “exclude hours ‘that are excessive
10 redundant, or otherwise unnecessary’” but it “need not, and should not, become green-eyeshade
11 accountants.” *Id.* (internal citations omitted). The Ninth Circuit has found that courts should defer
12 to successful counsel’s judgment as to how much work was needed to succeed. *Moreno v. City of*
13 *Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (“By and large, the court should defer to the
14 winning lawyer’s professional judgment as to how much time he was required to spend on the
15 case; after all, he won, and might not have, had he been more of a slacker.”). Class Counsel’s
16 hours are not excessive or otherwise unnecessary.

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18
19 Class Counsel has exerted significant effort to achieve the excellent results reflected in the
20 Settlement. The efforts included, inter alia, researching, investigating, drafting, and filing the
21 class-action complaint; preparing for and conducting a case management conference; engaging in
22 informal discovery, including the review and analysis of thousands of pages of electronic
23 discovery; engaging in settlement negotiations; coordinating, briefing and attending a full-day
24 mediation; documenting the settlement; conducting confirmatory discovery, including a formal,
25 in-person corporate representative interview; moving for preliminary approval and attending the
26 preliminary approval hearing; working with the Settlement Administrator to ensure the proper
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28

1 administration of the settlement process; responding to Class Member inquiries regarding the
2 Settlement; and, briefing final approval and attending the Final Fairness Hearing. Kaufman Decl.
3 ¶¶ 21-27.

4 **ii. Class Counsel's Rates Are Reasonable**

5 Class Counsel's hourly rates, which have been computed based on the Adjusted Laffey
6 Matrix and decreased for the Sacramento market, range from \$650 to \$730. This court has
7 previously accepted as reasonable for lodestar purposes hourly rates using the Laffey Matrix for
8 attorney billing rates in major U.S. cities. *Story v. Mammoth Mt. Ski Area*, No. 2:14-CV-02422-
9 JAM-DB, 2018 U.S. Dist. LEXIS 41367 (E.D. Cal. Mar. 13, 2018) (granting final approval and
10 approving fees where Class Counsel's hourly rates based on the Laffey Matrix ranged from
11 \$841.54 for the most senior partner to approximately \$350 for junior associates, with the vast
12 majority of hours being billed at the rate of \$698.36); *see also Syed v. M-I, L.L.C.*, No. 1:12-cv-
13 01718-DAD-MJS, 2017 U.S. Dist. LEXIS 118064, at *21 (granting class counsel's fee
14 application in the amount of one-third of the common fund equaling \$2.3 million); *Emmons v.*
15 *Quest Diagnostics Clinical Labs., Inc.*, No. 1:13-cv-00474-DAD-BAM, 2017 U.S. Dist. LEXIS
16 27249 (granting class counsel fee award of one-third of the common fund and using a lodestar
17 cross-check and accepting as reasonable hourly rates between \$545 and \$695 for senior counsel
18 and partners); *Kearney v. Hyundai Motor America*, No. SACV 09-1298-JST (MLGx), 2013 U.S.
19 Dist. LEXIS 91636, at *25 (C.D. Cal. June 28, 2013) (approving hourly rates between \$650 and
20 \$800 for class counsel in a consumer class action).

21 Additionally, when the lodestar is being used as a cross-check, courts in the Eastern
22 District have recognized that the Laffey Matrix, as explained more fully below, can be used as a
23 general way to examine the reasonableness of hourly rates. *See Bond v. Ferguson Enters., Inc.*,
24 No. 1:09-cv-1662 OWW MJS, 2011 U.S. Dist. LEXIS 70390, at *30 (E.D. Cal. June 30, 2011)
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1 (using the Laffey Matrix as a general way to examine the reasonableness of counsel’s hourly rates
 2 and approving rates of up to \$675 for partners). Because the reasonableness of the hourly rates
 3 should be according to the prevailing market rates in the relevant legal community, (*Blum v.*
 4 *Stenson*, 465 U.S. 886, 895 (1984))— *i.e.*, the forum where the district court sits—the Laffey
 5 Matrix rates should be adjusted for the Sacramento area. This Court recently reviewed a
 6 comparison of the 2018 OPM tables for the Sacramento area and the Washington D.C. area, and
 7 approved fees based on rates of up to \$841.54 per hour, where the vast majority of hours were
 8 billed at the rate of \$698.36. *Story v. Mammoth Mt. Ski Area*, No. 2:14-CV-02422-JAM-DB (E.D.
 9 Cal. Mar. 13, 2018).

11 The current Adjusted Laffey Matrix provides for the following rates:

Year	8-10 Years Out of Law School	11-19 Years Out of Law School
6/01/19-5/31/20	\$661	\$747
6/01/18-5/31/19	\$658	\$742

16 Here, Class Counsel investigated and has been litigating this action from December 2018
 17 to the present and seeks attorneys’ fees based on the hourly rate of \$730 for partners who have
 18 been practicing law for eleven years or more and \$650 for a partner who has been practicing for
 19 more than 9 years. Class Counsel’s hourly rates track the current Adjusted Laffey Matrix rates
 20 taking into consideration a downward adjustment for the Sacramento area. The resulting rates
 21 and lodestar are fair and reasonable. Given the strong results for the Settlement Class and the
 22 substantial work done by Class Counsel to litigate this case, a fee award of \$733,333 is justified
 23 and appropriate.
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1 **f. Class Counsel’s Request for Expenses Is Reasonable**

2 Rule 23(h) also permits the Court to “award . . . nontaxable costs that are authorized by
3 law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). The Settlement permits Class Counsel to
4 seek reimbursement of their reasonable expenses not to exceed \$15,000. Attorneys who create “a
5 common fund for the benefit of the class [are] entitled to reimbursement of reasonable litigation
6 expenses from that fund.” *Arredondo v. Delano Farms Co.*, No. 1:09-cv-01247-MJS, 2017 U.S.
7 Dist. LEXIS 161319, at *21 (E.D. Cal. Sept. 29, 2017) (collecting cases). Class Counsel has
8 incurred expenses in the prosecution of this action that total \$13,930.08. These expenses are
9 described in the accompanying declarations of Class Counsel. Kaufman Decl. ¶ 28; Coleman
10 Decl. ¶ 15. These expenses were reasonable and necessary for the prosecution of this action and
11 therefore should be approved.
12

13 **VIII. CONCLUSION**

14 The Settlement securing \$2,200,000 in cash and Codefied’s agreement that it has and will
15 continue to implement policies and procedures to prevent potentially TCPA violative calls in the
16 future represents an excellent result for the Settlement Class given the risks and obstacles in this
17 Action. The Settlement more than satisfies the fairness and reasonableness standard of Rule
18 23(e), as well as the class certification requirements of Rules 23(a) and (b)(3). Further, Class
19 Counsel’s request for a Service Award for the Class Representative and the application for
20 attorneys’ fees and expenses is reasonable under all the circumstances. Accordingly, for the
21 foregoing reasons, Plaintiff and Class Counsel respectfully request that this Court (1) grant Final
22 Approval to the Settlement; (2) certify for settlement purposes the Settlement Class; (3) appoint
23 as Class Representative the Plaintiff; (4) appoint as Class Counsel the undersigned law firms and
24 attorneys, as listed in section 1.1.7 of the Agreement; (5) approve the requested Service Award
25
26
27
28

1 for the Class Representative; (6) award Class Counsel attorneys' fees and expenses; and (7) enter
2 Final Judgment.

3 Date: December 30, 2019

Respectfully submitted,

4
5 By: s/ Rachel E. Kaufman

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18 *Counsel for Plaintiff and all others similarly situated*

19
20 **CERTIFICATE OF SERVICE**

21 I HEREBY CERTIFY that on December 30, 2019, I electronically filed the foregoing
22 document with the Clerk of the Court using CM/ECF, and it is being served this day on all
23 counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.
24

25
26 /s/ Rachel E. Kaufman

Rachel E. Kaufman