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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

YEVGENIYA GRANINA, on Behalf of
Herself and All Others Similarly Situated,

Plaintiff,

v.

EDDIE BAUER, LLC and DOES 1 through
100, inclusive,

Defendants.

) Case No: BC569111
)
) CLASS ACTION
)
) **MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AWARD OF
ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES,
CLAIMS ADMINISTRATION COSTS
AND INCENTIVE AWARD**
)

Date: April 23, 2018
Time: 9:00 a.m.
Dept: 323
Judge: Hon. Elihu M. Berle

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7 *Chavez v. Netflix, Inc.*,
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10 *Estate v. Stauffer*,
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11 *Glendale City Employees' Ass'n v. Glendale*
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12

13 *Knoff v. San Francisco*,
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14 *Laffitte v. Robert Half International, Inc.*,
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15

16 *Lealao v. Beneficial California, Inc.*,
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17 *Melendres v. Los Angeles*,
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19 *Parker v. Los Angeles*,
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3 Cal. 3d 252 (1970). 7

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22 *Serrano v. Priest*,
20 Cal. 3d 25 (1977). *passim*

23 *Serrano v. Unruh*,
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24

25 **FEDERAL CASES**

26 *In re Activision Sec. Litig.*,
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28 *Alyeska Pipeline Service Co. v. Wilderness Society*,
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4 *In re Gould Sec. Litig.*,
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5

6 *Hensley v. Eckerhart*,
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7 *Kirchoff v. Flynn*,
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9 *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*,
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10 *In re Warner Communications Sec. Litig.*,
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11

12 *In re Washington Pub. Power Supply Sys. Sec. Litig.*,
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13 *Mercury Interactive Corp. Secs. Litig. v. Mercury Interactive Corp.*,
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DOCKETED CASES

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16 *Azbug v. Kerkorian*,
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18 *Batmanghelich v. Sirius XM Radio, Inc.*,
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19 *Cohorst v. BRE Properties*
Case No. CV-10-02666-JM (S.D. Cal. 2010). 19

20

21 *Greenberg v. E-Trade Financial Corporation*,
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22 *Haitz, et al. v. Meyer, et al.*,
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23

24 *In re Liquid Carbon Dioxide Cases*,
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25 *In re Vitamin Cases*,
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26

27 *Nordstrom, Inc., Song-Beverly Act Cases*,
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28 *Marenco v. Visa*,

1 Case No. 10-08022-DMG (C.D. Cal. 2010) 19

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3 *Skuro v. BMW, ATX,*
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4 *Vu v. Ebay,*
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5

6 *Steiner, et al. v. Whittaker Corp., Etc., et al.,*
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8 **STATE STATUTES**

9 Cal. Penal Code

10 § 632 *passim*

11 § 632.7 *passim*

12 § 637.2 *passim*

13

14 Cal. Civ. Proc. Code

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17 **OTHER AUTHORITY**

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20 *California Class Actions and Coordinated Proceedings* § 15.03..... 10

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1 **I. INTRODUCTION**

2 Plaintiff Yevgeniya Granina, through her counsel, hereby respectfully submits this
3 memorandum in support of Plaintiff’s Motion for an Award of Attorneys’ Fees, Reimbursement
4 of Expenses, Claims Administration Costs, and an Incentive Award to Plaintiff in connection
5 with the final Settlement of this class action against Defendant Eddie Bauer, LLC (“Eddie Bauer”
6 or “Defendant”).¹ As a result of Class Counsel’s skill, tenacity, and hard work during the
7 litigation, the Class has obtained an outstanding recovery of \$300,000 in cash (the non-
8 reversionary “Common Fund”) and other valuable injunctive relief. The settlement successfully
9 resolves Plaintiff’s claims based on violations of California’s Invasion of Privacy Act, California
10 Penal Code § 630, *et seq.* (the “Privacy Act”). With the assistance of an experienced mediator,
11 retired California Supreme Court Justice Edward A. Panelli at JAMS, the Parties agreed to an
12 award of attorneys’ fees and expenses in an amount not to exceed 33 1/3% of the Common Fund
13 (\$100,000), plus actual out-of-pocket costs of no more than \$20,000, only *after* reaching
14 agreement as to all compensation terms and change in business practices. Class Counsel
15 respectfully applies to the Court for approval of the agreed attorneys’ fee award equal to 33 1/3%
16 of the Common Fund, and litigation costs of \$17,415.20. Class Counsel also requests an
17 incentive award to the Plaintiff in the amount of \$5,000 to compensate her for the time she spent,
18 and the risk she undertook, in prosecuting the lawsuit on behalf of the Class.

19 This memorandum is filed pursuant to this Court’s Order Granting Preliminary Approval
20 of Class Settlement and in advance of the March 22, 2018 deadline for Class Members to file an
21 objection to the Settlement. *Mercury Interactive Corp. Secs. Litig. v. Mercury Interactive Corp.*,
22 618 F. 3d 988, 994 (9th Cir. Cal. 2010) (requiring plaintiff’s counsel’s request for an award of
23 fees to be filed prior to the deadline for objections). Plaintiff will address the reaction of the

24
25
26 _____
27 ¹ This memorandum incorporates by reference the definitions in the Amended Settlement Agreement
28 and Release (“Agreement”) filed with the Court on or about November 16, 2017 and preliminarily
approved by this Court’s Order dated December 15, 2017. All capitalized terms used herein shall
have the same meanings as set forth in the Agreement, unless otherwise noted.

1 Class after the notice period expires.²

2 The requested attorneys' fees are justified under the percentage-of-the-recovery method,
3 supported by a lodestar cross-check. The requested attorneys' fee award falls within the range of
4 percentages awarded in similar class action cases and is fair compensation for undertaking such
5 complex, risky, and time-consuming litigation on a contingent basis against a well-funded and
6 ably-represented defendant and, despite these obstacles, Class Counsel obtained a very favorable
7 settlement for the Class. Indeed, the fee request is justified by, *inter alia*, the substantial benefit
8 conferred on the Class, the significant risks undertaken, the quality and extent of the services
9 performed, and the duration and extent of the litigation. The award is more than reasonable and
10 appropriate when viewed as a percentage of the Common Fund (33 1/3%), and is further
11 supported by reference to the lodestar-multiplier approach because the requested fees are *less*
12 than Class Counsel's actual lodestar of \$213,042.50 and represents a *negative* multiplier. The
13 requested expenses constitute the actual out-of-pocket expenses incurred.

14 Accordingly, for all of the reasons set forth below and in the Declaration of Zev B.
15 Zysman in Support of Plaintiff's Motion for An Award of Attorneys' Fees, Expenses and
16 Incentive Award ("Zysman Decl."), Class Counsel's fee and expense request in the amount of
17 \$100,000 (or 33 1/3% of the Common Fund) and expenses of \$17,415.20 should be granted.
18 Finally, Class Counsel respectfully requests that this Court order payment of the Class
19 Representative's incentive award of \$5,000 in accordance with the Agreement.

20 **II. OVERVIEW**

21 This brief description of the Action reveals not only the complexities of the case, but also
22 the host of factual and legal issues that Class Counsel had to address in order to achieve the
23 current Settlement. A summary of the substantial work performed by Counsel include:

24 ♦ Investigation of Defendant's practices and policies regarding the recording and
25 monitoring of telephone calls and Defendant's privacy policies based on publicly available
26 information;

27 _____
28 ² To date, no objections have been filed with respect to the requested fees and expenses.

- 1 ♦ Factual investigation and legal research concerning California Penal Code § 630 *et*
2 *seq.* violations and potential invasion of privacy rights relating to recording and monitoring of
3 customer service telephone calls with California customers;
- 4 ♦ Drafting and filing a detailed Class Action Complaint and Amended Complaint;
- 5 ♦ Researching, drafting and filing the Opposition to Defendant Eddie Bauer’s Demurrer
6 and Motion to Strike as to Original Complaint;
- 7 ♦ Researching, drafting and filing the Supplemental Brief in Opposition to Defendant
8 Eddie Bauer’s Motion to Strike as to Original Complaint;
- 9 ♦ Researching, drafting and filing the Opposition to Defendant Eddie Bauer’s Motion to
10 Strike as to First Amended Complaint;
- 11 ♦ Researching, drafting and filing the Preliminary Opposition in response to Defendant
12 Eddie Bauer’s Petition for Writ of Mandate with the Court of Appeal challenging the Order on
13 the Motion to Strike;
- 14 ♦ Monitoring and tracking of rapid legal developments in the California Supreme
15 Court/Courts of Appeal and Trial Courts (state and federal level) concerning California’s
16 Invasion of Privacy Act and researching potential motion for summary judgment/summary
17 adjudication based on liability issues;
- 18 ♦ Researching viability of preserving cell site location information vis-a-vis cellular
19 communication carriers, including Verizon, AT&T, T-Mobile, and Sprint;
- 20 ♦ Drafting multiple sets of detailed merits and class discovery, including interrogatories,
21 request for production of documents, and request for admissions;
- 22 ♦ Drafting and serving discovery directed to Eddie Bauer which requested information
23 concerning: (1) the names and contact information of putative class members, and (2) non-
24 content detail for each telephone call, including the class members’ telephone numbers, and the
25 date, time, and duration of the subject call.
- 26 ♦ Reviewing and analyzing all responsive documents and data produced by Eddie Bauer
27 relating to liability and damages;
- 28

- 1 ♦ Reviewing documents obtained through Class Counsel’s independent investigation;
- 2 ♦ Meeting and conferring with Defense Counsel over a period of several months
- 3 regarding the sufficiency of the discovery responses, preservation of electronically stored
- 4 information, and production of responsive documents;
- 5 ♦ Reviewing detailed information and documentation produced in discovery concerning,
- 6 *inter alia*, (1) the adoption, implementation, and enforcement of Defendant’s policies and
- 7 procedures regarding the recording and monitoring of inbound telephone calls with persons in
- 8 California; (2) the call technology manuals and policies; (3) training manuals, work shop
- 9 materials, call scripts, and protocols relating to the call centers; (4) the approximate class size
- 10 during the Class Period; (5) the reasons and uses for recording telephone calls; (6) the extent (if
- 11 any) to which Defendant notified persons in California that their telephone calls would be
- 12 recorded and/or monitored; (7) the retention of the audio recordings of telephone calls with
- 13 persons in California; (8) Defendant’s call recording software, archiving software, and any
- 14 related software utilized by Defendant during the Class Period; and (9) Defendant’s compliance,
- 15 or lack thereof, with the requirements of California Penal Code § 630, *et seq.*;
- 16 ♦ Drafting PMK deposition notices regarding class certification issues; purpose(s) for
- 17 which Defendant recorded telephone calls with California consumers; policy directives relevant
- 18 to the recording of telephone calls in California; call technology employed by Defendant at call
- 19 centers.
- 20 ♦ Preparing and defending Plaintiff’s deposition.
- 21 ♦ Consulting with potential privacy experts and IT specialists, to assess liability issues
- 22 and the appropriate measure of damages;
- 23 ♦ Researching and drafting Motion for Class Certification motion (withheld filing
- 24 following tentative agreement to settle);
- 25 ♦ Researching and drafting potential Motion for Summary Judgment based on certain
- 26 asserted affirmative defenses;
- 27 ♦ Drafting Confidential Mediation Brief, preparing detailed analysis and presentation of
- 28 Plaintiff’s claims and evidence in conjunction with the Mediation session, and attending full day

1 Mediation before Justice Panelli;

2 ♦ Negotiating, drafting, editing and finalizing the terms of the Settlement, including the
3 Settlement Agreement and Amended Settlement Agreement, and Class Notices; and

4 ♦ Drafting and filing Motion and Renewed for Preliminary Approval of Class Action
5 Settlement.

6 Class Counsel's more than three years effort to successfully resolve this litigation has
7 been without compensation of any kind, and payment of attorneys' fees was and always has been
8 wholly contingent upon the result achieved. As compensation for these efforts, Class Counsel
9 requests this Court to award attorneys' fees of 33 1/3% of the Common Fund. Class Counsel's
10 33 1/3% fee request is consistent with a great number of decisions, in the United States Supreme
11 Court, the Ninth Circuit and California Superior Courts, and appropriate compensation for the
12 result Counsel has obtained for the Class.

13 **III. LEGAL STANDARDS GOVERNING THE AWARD OF ATTORNEYS' FEES**

14 **A. The Agreement for the Payment of Fees and Expenses is Appropriate And**
15 **Should Be Enforced**

16 The United States Supreme Court has ruled that the parties to a class action properly may
17 negotiate not only the settlement of the action itself, but also the payment of attorneys' fees. *See*
18 *Evans v. Jeff D.*, 475 U.S. 717, 734-35, 738, n.30 (1980). In *Hensley v. Eckerhart*, 461 U.S. 424,
19 437 (1983), the Supreme Court held negotiated, agreed-upon attorneys' fee provisions are the
20 ideal towards which the parties should strive:

21 A request for attorneys' fees should not result in a second major litigation. Ideally,
22 of course, litigants will settle the amount of a fee.

23 *Id.*

24 The United States Supreme Court has reemphasized this policy and further stressed that
25 the trial court "has a responsibility to encourage agreement" on fees. *Blum v. Stevenson*, 465
26 U.S. 886, 902 n.19 (1984). Here, as part of the Settlement, Defendants agreed not to object to an
27 award of 33 1/3% for attorneys' fees and up to \$20,000 in out-of-pocket expenses. Such an
28 award is commensurate with what the market would provide for similar services and the Court
therefore can most certainly enforce the Agreement. As the California Court of Appeal instructs:

1 Given the unique reliance of our legal system on private litigants to enforce
2 substantive provisions of law through class and derivative actions, *attorneys*
3 *providing the essential enforcement services must be provided incentives*
4 *roughly comparable to those negotiated in the private bargaining that takes*
5 *place in the legal marketplace*, as it will otherwise be economic for defendants to
6 increase injurious behavior.

7 *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 47 (2000) (emphasis added and
8 citations omitted).

9 Here, the resulting agreed-upon attorneys' fees and expense amount is the product of a
10 non-collusive adversarial negotiation between experienced counsel for the Class and Defendant,
11 with Justice Panelli's assistance, only *after* negotiating and reaching an agreement as to all other
12 material terms of the Settlement, including all class compensation and change in business
13 practices. Defendant was represented by highly-skilled lawyers who are very experienced in this
14 type of consumer litigation, have litigated on the defense side for many years and are aware of
15 fees paid in other similar actions. The negotiated and requested fee and expense award is fair and
16 reasonable, reflects an arm's-length compromise, and should be granted approval by the Court.

17 **B. The Equitable Common-Fund Doctrine Allows Courts to Award Attorneys'**
18 **Fees and Expenses Out of the Fund Created**

19 Courts of equity have long permitted a party preserving or recovering a fund for the
20 benefit of others to receive his costs, including reasonable attorneys' fees, from the fund itself or
21 from those enjoying the benefit conferred. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
22 (1980); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The "common
23 fund" and "substantial benefit" doctrines serve the "twin goals of removing a potential financial
24 obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the
25 fees and costs of successful litigation among all who gained from the named plaintiff's efforts."
26 *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1203 (N.D. Ill. 1989).³

27 The California Supreme Court has expressly affirmed "the historic power of equity to
28 permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself,

³ California courts frequently look to federal courts in determining the approach to common fund actions, as the vast majority of actions that result in the creation of common funds and other substantial benefits have been brought in federal courts. *See Serrano v. Unruh*, 32 Cal. 3d 621 (1982). Accordingly, federal decisions are instructive and are cited throughout this memorandum.

1 to recover his costs, including his attorneys' fees, from the fund of property itself or directly from
2 the other parties enjoying the benefit.” *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977) (“*Serrano*
3 *III*”) (citing cases) (citation omitted).⁴

4 **C. The Percentage Approach is an Appropriate Method for Determining Fee**
5 **Awards in Both State and Federal Courts**

6 California courts have accepted the percentage approach for awarding fees in common
7 fund cases. For example, the California Supreme Court upheld fee awards to plaintiffs' counsel
8 set at a percentage of the common fund in *Sanders v. Los Angeles*, 3 Cal. 3d 252 (1970), and
9 *Glendale City Employees' Ass'n, v. Glendale*, 15 Cal. 3d 328 (1975), *cert. denied*, 424 U.S. 943
10 (1976). Likewise, the California Court of Appeal has upheld fee awards based on a percentage of
11 the common fund. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 63 (2008) (applying
12 percentage-of-the-fund method); *Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253,
13 1270 (2005) (fee awards under the common fund doctrine “are based on a ‘percentage-of-the-
14 benefit’ analysis,” while the lodestar method is used when a fee-shifting statute applies); *Parker*
15 *v. Los Angeles*, 44 Cal. App. 3d 556, 567-68 (1974) (upholding a fee award equal to one-third of
16 the damages to owners of residential property in an inverse condemnation action); *Melendres*, 45
17 Cal. App. 3d 267 (percentage award upheld); *Knoff v. San Francisco*, 1 Cal. App. 3d 184, 203
18 (1969) (same). Trial courts in this state also have adopted the percentage approach in awarding
19 fees in common fund cases. *See* opinions cited *infra* at Section III.E⁵.

20 ⁴ The doctrines rest on two theories. The first is preventing unjust enrichment – “that all who will
21 participate in the fund should pay the cost of its creation or protection and that this is best achieved
22 by taxing the fund itself for attorney’s fees.” *Serrano III*, 20 Cal. 3d at 35 n. 5 (citation omitted).
See also Lealao, 82 Cal. App. 4th at 27.

23 The second is a “salvage” rationale – “encouragement of the attorney for the successful litigant,
24 who will be more willing to undertake and diligently prosecute proper litigation for the protection
25 or recovery of the fund if he is assured that he will be promptly and directly compensated should his
26 efforts be successful.” *Estate v. Stauffer*, 53 Cal. 2d 124, 139 (1959). The salvage purpose requires
“a flavor of generosity . . . in order that an appetite for efforts may be stimulated.” *Melendres v. Los*
Angeles, 45 Cal. App. 3d 267, 273 (1975) (citation omitted).

27 ⁵ In federal courts, where common-fund fee awards are prevalent, the Ninth Circuit and other
28 Circuits have endorsed -- and in some cases, mandated -- use of the percentage-of-recovery method.
Indeed, in the Ninth Circuit, the percentage-of-the-benefit approach is the “preferred” method for
determining fees in common fund cases. *Lealao*, 82 Cal. App. 4th at 31. “[B]ecause the percentage-

1 **D. Substantial Public Policies are Served by Using the Percentage Method**

2 There are several reasons why courts endorse the percentage approach in common-fund
3 cases.

4 **1. The Interests of Counsel and their Clients are**
5 **Directly Aligned if the Percentage Method is**
6 **Used**

7 The percentage method directly aligns the interest of counsel with those they represent,
8 *i.e.*, the percentage method gives plaintiffs’ counsel a strong incentive to obtain the maximum
9 possible recovery in the shortest possible time by the most efficient means. *See, e.g., v. Flynn,*
10 *786 F.2d 320, 325-26 (7th Cir. 1986); In re Thirteen Appeals Arising Out of the San Juan Dupont*
Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995).

11 **2. The Percentage Method Provides Greater Certainty**

12 The percentage method provides predictability, ensuring that the reasonable expectations
13 of counsel and clients are met while at the same time ensuring that protracted fee proceedings do
14 not cause undue delay in the distribution of funds to class members. *Kirchoff, 786 F.2d at 325-*
15 *26.*

16 **3. The Percentage Method is Far Easier to Apply**

17 The percentage method is far easier to apply than the lodestar method, being much less
18 burdensome on the court and less time-consuming. It spares both counsel and the courts the
19 often difficult and tedious process of determining the reasonableness of every hour, every rate,
20 and every adjustment factor. *Lealao, 82 Cal. App. 4th at 30-31 (citing In re Activision Sec. Litig.,*
21 *723 F. Supp. 1373 (N.D. Cal. 1989)).*

22 **4. The Percentage Method is Consistent with the**
23 **Private Marketplace**

24 The percentage method is also consistent with practice in the legal marketplace. If the
25 client does not pay an hourly non-contingent fee on a current basis, attorneys and their clients
26 almost always negotiate percentage contingency agreements, even in cases where the potential

27 _____
28 of-the-benefit approach ‘is result-oriented rather than process oriented, it better approximates the
workings of the marketplace’ rather than the lodestar approach . . .” *Id.* at 48 (citations omitted).

1 recovery is very large. Such arrangements provide an incentive to counsel to maximize the
2 clients' recovery, while at the same time assuring counsel of fair compensation for the risks such
3 cases involve. *Thirteen Appeals*, 56 F.3d at 307.

4 In this case, the fees are being paid from the Common Fund, accordingly, the fee should
5 be awarded to mimic fees freely negotiated in the legal marketplace for comparable common
6 fund cases under *Lealao*. As *Lealao* acknowledged, in cases like this one, the percentage-of-the-
7 benefit approach should be considered because "it better approximates the workings of the
8 marketplace than the lodestar approach." 82 Cal. App.4th at 49; *see also Consumer Privacy*
9 *Cases*, 175 Cal. App.4th 545, 557-58 (2009).

10 E. **Class Counsel's Request For Fees in the Amount of 33 1/3% of the Common**
11 **Fund is Fair and Reasonable, As California Courts Recognize Benchmark**
Awards of at Least 33 1/3% of the Common Fund In Class Cases

12 Class Counsel seeks an attorney fee award for the successful prosecution and resolution
13 of this action, calculated as 33 1/3% of the Common Fund created by the Settlement. Here,
14 Defendant has stipulated to settle the class claims by establishing a non-reversionary Common
15 Fund in the amount of \$300,000. In cases such as this one, California and federal courts have
16 long recognized that an appropriate method for determining the award of attorneys' fees is based
17 on a percentage of the total value of benefits afforded to class members by the settlement. *See*
18 *Boeing Co.*, 444 U.S. at 478; *Paul, Johnson, Alston & Hunt v. Graelty*, 886 F.2d 268, 272
19 (1989); *Serrano III*, 20 Cal. 3d at 34. Recently, the California Supreme Court in *Laffitte v.*
20 *Robert Half International, Inc.*, 1 Cal. 5th 480 (2016), affirmed the discretion to solely use
21 percentage awards for attorney fees from common funds, and then upheld a 33 1/3% attorney fee
22 award from the common fund in a class action. Indeed, 33 1/3% is reasonable and falls within
23 the range of percentages awarded in similar class action cases. *See Chavez*, 162 Cal. App. 4th at
24 66, n.11 ("fee awards in class actions average around one-third of the recovery.") A review of
25 class action settlements over the past 10 years shows that the courts have historically awarded
26 fees in the range of 33% to 40%. *See Roos v. Honeywell International, Inc.*, 2015 Cal. App.
27 LEXIS 1004, *26 (Nov. 10, 2015) (confirming 37.5% fee award in \$8,150,000 class settlement);
28 *Birch v. Office Depot, Inc.*, Case No. 06-cv-1690 DMS, Dkt. No. 48 (S.D. Cal. Sept. 28, 2007)

1 (awarding a 40% fee on a \$16 million class action settlement); *Romero v. Producers Dairy*
2 *Foods, Inc.*, Case No. 1:05-cv-0484 DLB, 2007 U.S. Dist. LEXIS 86270, at *10 (E.D. Cal. Nov.
3 14, 2007) (noting that “fee awards in class actions average around one-third of the recovery.”);
4 *Parker*, 44 Cal. App. 3d at 567-68 (affirming award of 33%).

5 Indeed, California’s state trial courts have frequently awarded percentage fees of 33 1/3%
6 or more in common fund cases. *See, Nordstrom, Inc., Song-Beverly Act Cases*, J.C.C.P. Case
7 No. 4651 (L.A. Super. Ct. July 19, 2012) (Judge Jane Johnson) (awarded attorneys’ fees and
8 expenses totaling 33% of \$2.5 million common fund); *Vu v. Ebay*, Case No. 1-10-cv-167040
9 (Santa Clara Super. Ct., January 27, 2012) (Judge James Kleinberg) (awarded 33 1/3% of \$5.5
10 million settlement); *Azbug v. Kerkorian*, Case No. CA-000981 (L.A. Super. Ct., November 1990)
11 (45% fee of \$35 million class action settlement; cited in *California Class Actions and*
12 *Coordinated Proceedings* § 15.03); *Haitz v. Meyer, et al.*, Case No. 572968-3 (Alameda Super.
13 Ct., August 20, 1990) (45% fee award; cited in *California Class Actions and Coordinated*
14 *Proceedings* § 15.03); *In re Liquid Carbon Dioxide Cases*, J.C.C.P. 3012 (San Diego Super. Ct.
15 1996) (approving 33 1/3% award); *Urethane Cases*, J.C.C.P. Case No. 4367 (S.F. Super. Ct.,
16 June 25, 2013) (awarded 33 1/3% of \$1.78 million common fund); *In re Vitamin Cases*, J.C.C.P.
17 Case No. 4076 (S.F. Super. Ct., October 17, 2008) (awarded 33 1/3% of common fund).

18 Moreover, Judge Eli Chernow of the Los Angeles Superior Court awarded a fee of 35%
19 of a \$17.75 million recovery in a class action, stating: “35% certainly is not high compared to the
20 kinds of contingent fee arrangements that the Courts see all the time for plaintiffs’ litigation.”
21 *Steiner v. Whittacker Corp.*, Case No. CA 000817 (L.A. Super. Ct., March 13, 1989) (Reporter’s
22 Transcript; cited in *California Class Actions and Coordinated Proceedings* § 15.03).

23 A fee award of 33 1/3% of the Common Fund in this case is therefore reasonable in light
24 of the prevailing fees that have been awarded in other similar class actions and the excellent
25 outcome for the Class.

26 **F. The Requested Fee Also Is Reasonable Under the Lodestar Method**

27 Although Class Counsel makes this application on a percentage-of-recovery basis, using
28 the lodestar approach as a cross-check on the reasonableness of the requested fee further

1 demonstrates that it is fair and should be awarded. “Regardless of whether attorney fees are
2 determined using the lodestar method or awarded based on a ‘percentage-of-the-benefit’”
3 analysis under the common fund doctrine, ‘the ultimate goal . . . is the award of a reasonable’ fee
4 to compensate counsel for their efforts, irrespective of the method of calculation.” *Consumer*
5 *Privacy Cases*, 175 Cal. App.4th at 557-58 (citation omitted). “It is not an abuse of discretion to
6 choose one method over another as long as the method chosen is applied consistently using
7 percentage figures that accurately reflect the marketplace.” *Id.* at 558. “Empirical studies show
8 that, *regardless* whether the percentage method or the lodestar method is used, fee awards in
9 class actions average around *one-third* of the recovery.” *Id.* at 557, n.13. (citations omitted,
10 emphasis in original).

11 Under the lodestar-multiplier analysis, the base or “lodestar” figure is computed by
12 multiplying the number of hours reasonably spent in the litigation by the reasonable hourly rates
13 for each attorney. *Serrano III*, 20 Cal. 3d at 48-49.⁶ That figure is then augmented or multiplied
14 to reflect additional factors that must be considered in determining a reasonable attorneys’ fee,
15 including the results obtained, the contingent risk taken by plaintiffs’ counsel, and other similar
16 factors. *Id.* at 49. *See generally Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir.
17 2002) (approving multiplier of 3.65 and citing a survey of class settlements from 1996-2001
18 indicating that most multipliers range from 1.0 to 4.0); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th
19 43, 67 (2008) (2.5 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255
20 (2001) (“Multipliers can range from 2 to 4 or even higher”). This enhancement takes place
21 because “the unadorned lodestar reflects the general local hourly rate for a *fee-bearing case*; it
22 does *not* include any compensation for contingent risk, extraordinary skill, or any other factors a
23 trial court may consider.” *Ketchum v. Moses*, 24 Cal. 4th 1122, 1138 (2001) (emphasis in
24 original).

25
26 ⁶ Class Counsel is entitled to recover fees for all hours reasonably spent working on the case. *Weeks*
27 *v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1175 (1998) (“the attorney who takes such a [complex]
28 case can anticipate receiving full compensation for every hour spent litigating a claim against even
the most polemical opponent.”). The “lodestar” should also include time spent on the fee application
itself. *Serrano*, 32 Cal. 3d at 632-38.

1 Class Counsel has expended 335.50 attorney hours (excluding paralegal hours) spread
2 over more than three years to prosecute this action and bring about the proposed Settlement. The
3 total lodestar amount on the time spent is \$213,042.50. Accordingly, the requested fee in the
4 sum of \$100,000 actually results in a *negative lodestar multiplier*. As set forth below, the
5 number of hours and the hourly rate are reasonable and should be approved. Zysman Decl., ¶¶
6 16, 19.

7 **1. The Hourly Rates Are Reasonable**

8 Under the lodestar method, reasonable hourly rates are determined by “prevailing market
9 rates in the relevant community” which are the rates a lawyer of comparable skill, experience and
10 reputation could command in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895
11 (1984). Ordinarily, reasonable hourly rates are based on each attorneys’ current hourly rates.
12 *Vizcaino*, 290 F.3d at 1051 (“[c]alculating fees at [current hourly rates] . . . compensate[s] for
13 delay in receipt of payment”); *In re Wash. Public Power Supply System Sec. Litigation*, 19 F.3d
14 1291, 1305 (9th Cir. 1994) (“WPPSS”) (“The district court has discretion to compensate delay in
15 payment in one of two ways: (1) by applying the attorneys’ current rates to all hours billed during
16 the course of the litigation; or (2) by using the attorneys’ historical rates and adding a prime rate
17 enhancement.”). The relevant community is that in which the trial court sits, in this case
18 Southern California. *Schwarz v. Sec’y of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir.
19 1995). Class Counsel’s current rates are therefore reasonable if they are in line with the
20 prevailing rates for other attorneys practicing complex litigation in Los Angeles.

21 An attorneys’ actual billing rate for similar work is presumptively appropriate. *See*
22 *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996). Declarations by
23 counsel are sufficient to evidence the reasonable hourly rate. *See Wershba*, 91 Cal. App. 4th at
24 255; *see also United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir.
25 1990) (“Affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the
26 community, and rate determinations in other cases, particularly those setting a rate for the
27 plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.”). “Courts also
28 frequently use survey data in evaluating the reasonableness of attorneys’ fees.” *B-K Lighting*,

1 *Inc. v. Vision3 Lighting*, No. CV 06-0285 MMM (PLAx), 2009 WL 3838264, at *5 (C.D. Cal.
2 Nov. 16, 2009) (citing *Mathis v. Spears*, 857 F.2d 749, 755-56 (9th Cir. 1988)). Class Counsel's
3 request satisfies all of the foregoing criteria.

4 Class Counsel calculated its lodestar using a billing rate of \$635.00 per hour.⁷ Zysman
5 Decl., ¶ 19. No paralegal, secretarial, administrative or other staff time is being billed. Zysman
6 Decl., ¶¶ 7, 16.

7 Class Counsel's rate is in line with the rates prevailing in the community for similar
8 services of lawyers of reasonable comparable skill and reputation, and is appropriate given the
9 deferred and contingent nature of counsel's compensation. Zysman Decl., ¶¶ 21-23. All of the
10 matters undertaken by Class Counsel's firm are class actions. Mr. Zysman has been practicing
11 for nearly 23 years and has been lead counsel in numerous successful consumer class actions.
12 Zysman Decl., ¶ 20.

13 Class Counsel's hourly rate has been approved by other judges in Southern California
14 and awarded in numerous other fee awards. For example, on June 1, 2016, in a consumer class
15 action entitled *Furman v. Station Casinos LLC, et al.*, Case No. 56-2013-00446134-CU-BT-
16 VTA, pending in Ventura County Superior Court, Judge Vincent J. O'Neill approved Class
17 Counsel's hourly rate which is the *same* as the rate charged here. Zysman Decl., ¶ 24 and Ex. 2
18 thereto.

19 Moreover, on March 18, 2014, in a consumer class action entitled *Brown v. Defender*
20 *Security, Co.*, Case No. 12-cv-07319-CAS, pending in Los Angeles in the Central District of
21 California, District Judge Christina A. Snyder approved Class Counsel's hourly rate which is the
22 *same* as the rate charged here. Zysman Decl., ¶ 25 and Ex. 3 thereto.

23 In addition, on March 27, 2013, in a consumer class action entitled *Sosinov v.*
24 *RadioShack, Corp.*, Case No. BC449675, pending in the Los Angeles Superior Court, Central
25

26 ⁷ While the use of current hourly rates is appropriate because it accounts for the time value of
27 money where, as here, Class Counsel have *not* been paid contemporaneously with their work on this
28 case (*See, e.g., In re Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 609 (9th Cir. 1997)), for the
purpose of this Motion, Class Counsel relies on the lower rate in effect in **2015** when the case was
initiated.

1 Civil West, Judge William F. Highberger approved Class Counsel's hourly rate which is the
2 **same** as Class Counsel is seeking here. Zysman Decl., ¶ 26 and Ex. 4 thereto.

3 In addition, on February 7, 2012, in a consumer class action entitled *Pomerants v.*
4 *Skechers U.S.A. Inc.*, Case No. BC436360, pending in the Los Angeles Superior Court, Central
5 Civil West, Judge John S. Wiley approved attorney Class Counsel's hourly rate which is the
6 **same** as Class Counsel is seeking here. Zysman Decl., ¶ 27 and Ex. 5 thereto.

7 Moreover, on December 12, 2011, in a class action entitled *Konevskya v. Tommy Bahama*
8 *Group, et al.*, Case No. BC424931, pending in the Los Angeles Superior Court, Central Civil
9 West, Judge Jane L. Johnson approved attorney Class Counsel's hourly rate which is the **same** as
10 the rate charged here. Zysman Decl., ¶ 28 and Exs. 6-7 thereto.

11 Further, on June 27, 2011, in a consumer class action entitled *Burcham v. Welch Foods,*
12 *Inc.*, Case No. CV-10-01427-AHM, pending in Los Angeles in the Central District of California,
13 District Judge A. Howard Matz approved Class Counsel's attorney hourly rate which is the **same**
14 as the rate charged here. Zysman Decl., ¶ 29 and Ex. 8 thereto.

15 Additionally, on September 23, 2008, in a consumer class action entitled *Brand v. Simple*
16 *Tech, Inc.*, Case No. BC360001, pending in Los Angeles Superior Court, Judge William F. Fahey
17 approved Class Counsel's hourly rate which is similar to the rate charged here. Zysman Decl.,
18 ¶ 30 and Ex. 9 thereto.

19 Further, rates which are comparable to the rates sought here by Class Counsel have been
20 approved by courts in numerous other fee awards in Southern California. As far back as 2005,
21 the court in *Housing Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320738, at *2 (C.D.
22 Cal. Nov. 1, 2005) noted that hourly rates of up to \$650 per hour were routine in Los Angeles at
23 that time. In 2007, the court in *Love v. Mail on Sunday*, No. CV 05-7798 ABC (PJWx), 2007
24 WL 2709975, at *8 (C.D. Cal. Sept. 7, 2007) approved partner rates of \$540-\$690. In 2008, the
25 court in *POM Wonderful LLC v. Purely Juice, Inc.*, No. CV 07-2633 CAS (JWJx), 2008 WL
26 4351842, at *4 (C.D. Cal. Sept. 22, 2008) approved partner rates of \$475-\$750.

27 In further support of the reasonableness of the hourly rates, Class Counsel submits sworn
28 statements by class action attorneys in other consumer class actions prior to 2006 evidencing

1 hourly rates approved by courts in Southern California at even higher rates than the rates charged
2 by Class Counsel now. Zysman Decl., ¶ 31 and Ex. 10 thereto.

3 A 2009 National Law Journal survey further confirms the rate charged by Class Counsel
4 is reasonable. See *Firm-by-Firm Sampling of Billing Rates Nationwide*, Nat'l L.J., 2009. The
5 survey establishes that other prominent firms in Southern California that regularly litigate
6 complex class action cases charge rates up to \$995 for senior partners and \$695 for associates,
7 commensurate with or exceeding the rates charged by Class Counsel. Zysman Decl., ¶ 23 and
8 Ex. 1 thereto (identifying specific law firms).

9 **2. The Total Number of Hours is Reasonable**

10 Plaintiff's Counsel expended a total of 335.50 attorney hours on this litigation. The
11 Zysman Decl. ¶¶ 7, 16 sets forth the tasks performed and summarizes the hours expended by
12 Class Counsel into categories, grouping the time entries by the nature of the activity. This
13 information, coupled with the additional descriptions herein and in the Zysman Decl., is
14 sufficient to permit the Court to review the time spent.⁸

15 All of the time billed by Class Counsel was legitimately incurred and is consistent with a
16 case that has been pending, litigated and resolved over a period of more than three years. At no
17 time did Defendant simply roll over or capitulate. Class Counsel had to diligently litigate this
18 case and take all the litigation steps necessary to obtain the Settlement benefits for the Class,
19 including opposing Defendant's attempt to challenge the pleadings, filing Plaintiff's Preliminary
20 Opposition in response to Eddie Bauer's Petition for Writ of Mandate filed at the California
21 Court of Appeal regarding the motion to strike order, and undertaking substantial discovery.

22 Class Counsel undertook tasks that were specific to this case, as described in detail in the
23 Zysman Decl. ¶¶ 8, 16, including: (1) pre-suit investigation and drafting of the Complaint and
24

25 ⁸ It is well-settled under California law that time records are not required of class counsel to support
26 fee awards in class action cases and that declarations by counsel as to time spent are sufficient. See
27 *Concepcion v. Amscan Holdings*, 223 Cal. App. 4th 1309, 1324 (2014) ("Declarations of counsel
28 setting forth the reasonable hourly rate, the number of hours worked and the tasks performed are
sufficient."); see also *Wershba*, 91 Cal. App. 4th at 255 ("California case law permits fee awards in
the absence of detailed time sheets."); see also *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1810
(1996) (stating that lodestar calculation could be based on counsel's estimate of time spent).

1 Amended Complaint, which included researching of the applicable law with the respect to the
2 claims asserted therein and the potential defenses thereto; (2) preparing class certification and
3 merits discovery, including special interrogatories, request for production of documents, and
4 requests for admissions; (3) consulting with privacy experts and IT specialists; (4) reviewing
5 information and confirmatory documentation produced by Defendant concerning, *inter alia*, the
6 number of inbound calls with persons in California during the Class Period, the reasons and uses
7 for recording telephone calls, the extent (if any) to which Defendant notified persons in
8 California that their telephone calls would be recorded, the information technology systems used
9 by Defendants to enable call recording and monitoring, and Defendant's policies, procedures,
10 and practices regarding the recording, monitoring and retention of inbound telephone calls with
11 persons in California; (5) reviewing documents obtained through independent investigation;
12 (6) engaging in numerous meet and confer sessions with Defense Counsel over a period of many
13 months regarding the scope of discovery, the sufficiency of discovery responses and production,
14 the retention of electronic documents during the pendency of the litigation, and the timing of
15 production; (7) reviewing and analyzing all documents produced by Defendant in discovery;
16 (8) drafting PMK deposition notices regarding class certification issues; (9) preparing for and
17 defending Plaintiff's deposition and drafting responses to extensive written discovery;
18 (10) reviewing information and documentation provided by Defendant concerning proposed
19 post-litigation changes in Defendant's corporate policies and practices relative to recording and
20 monitoring of customer service telephone calls; (11) preparing for and attending Status
21 Conferences; (12) extensive discussions among the Parties regarding the legal and factual bases
22 for Plaintiff's claims and Defendant's defenses prior to and during the Mediation;
23 (13) researching, drafting and filing Opposition and Supplemental Brief to Defendant's Demurer
24 and Motion to Strike; (15) drafting, researching and filing Preliminary Opposition to Petition for
25 Writ of Mandate and Request for Stay; (16) briefing the class certification motion (withheld
26 filing following agreement to settle); (17) preparing for and attending full day Mediation session
27 before Justice Panelli at JAMS; (18) negotiating, drafting, editing and finalizing the terms of the
28 Settlement, including the Settlement Agreement and Amended Settlement Agreement, and Class

1 Notices; (19) drafting and filing Motion for Preliminary Approval; (20) fielding and responding
2 to numerous Class Member inquiries regarding the Settlement and implementation issues; and
3 (21) preparing this Fee Motion and Motion for Final Approval of the Settlement and supporting
4 documentation.

5 The bulk of the legal work was conducted by Mr. Zysman. In this way, Class Counsel
6 was able to focus on litigating the issues specific to this case and harnessing the evidence in order
7 to obtain the best settlement results for the Class while minimizing the costs. Zysman Decl. ¶17.

8 Class Counsel further expects to spend a minimum of 20 hours on this case through its
9 conclusion, including preparing for and attending the Final Approval hearing, responding to any
10 Class Member inquiries, reviewing materials provided by KCC, and overseeing Defendant's
11 compliance with the terms of the Settlement. Accordingly, the effective lodestar is *higher* than
12 the amount submitted herein. Zysman Decl. ¶18.

13 **3. Class Counsel Does Not Request A Multiplier, Though A Multiplier**
14 **Would be Appropriate If Necessary**

15 Though Class Counsel believes a multiplier would be fully justified in this case in light of
16 the results achieved, none is requested nor necessary to establish the reasonableness of Plaintiff's
17 requested fee award of \$100,000 because the base lodestar is already over that amount.

18 Indeed, California law permits fee enhancements under state statutes authorizing an
19 award of attorneys' fees to the prevailing party. *See Serrano v. Priest*, 20 Cal. 3d 25, 49 (1977)
20 *Ketchum*, 24 Cal. 4th at 1135. State law encourages multipliers or enhancements to the lodestar
21 in appropriate cases. The California Supreme Court has noted that “[u]nder our precedents, the
22 unadorned lodestar reflects the general local hourly rate for a *fee bearing case*; it does *not*
23 include any compensation for contingent risk, extraordinary skill, or any other factors a trial
24 court may consider under *Serrano III*.” *Ketchum*, 24 Cal. 4th at 1138 (emphasis in the original).
25 In *Serrano*, the court identified certain factors that may be taken into consideration in
26 augmenting the fee. Those factors are not “carved . . . into concrete” and the trial court may
27 consider other relevant factors in adjusting the fee. *Lealao v. Beneficial California, Inc.*, 82 Cal.
28 App. 4th 19, 40 (2000). There is no mechanical formula that dictates how the trial court should

1 evaluate these factors, and it “ha[s] wide latitude in assessing the value of the attorney’s
2 services.” *Id.* at 41.

3 The fact that Class Counsel was able to resolve this matter through settlement, without
4 the need for additional litigation and trial, does not negate a multiplier. Counsel should not have
5 to run up unnecessary lodestar in order to justify a fee. In fact, Class Counsel should be
6 rewarded, not penalized, for their conduct and for their efforts in achieving an early resolution of
7 this matter. *See, e.g., Lealao, supra*, 82 Cal. App. 4th at 52.

8 In deciding whether to apply a multiplier, the Court may consider a variety of factors,
9 including: (1) the results obtained as a result of the Settlement; (2) benefits to the public; (3) the
10 contingent nature of the work; (4) the novelty and difficulty of the questions involved; and
11 (5) the skill of Plaintiff’s Counsel in obtaining the result. *Serrano*, 20 Cal.3d at 49. No rigid
12 formula applies, and each factor should be considered only “where appropriate.” *Dep’t of Transp.*
13 *V. Yuki*, 31 Cal. App.4th 1754, 1771 (1995).

14 In this case, if a multiplier becomes necessary due to any reduction of Class Counsel’s
15 lodestar figure, only a relatively modest multiplier would likely be necessary to reach the
16 requested fee amount, and would be fully justified based on the factors described above.

17 **a. The Results Obtained And Benefits Conferred to the Public**

18 Courts have consistently recognized that the result achieved is the most important factor
19 to be considered in making a fee award. *See Hensley*, 461 U.S. at 436 (“[t]he most critical factor
20 is the degree of success obtained.”).

21 The all-cash Common Fund of \$300,000 created here is an excellent result. Class
22 Counsel are also familiar with several other class action settlements approved by California state
23 and federal courts which allege similar privacy-related violations under Penal Code § 630, *et seq.*
24 on behalf of California consumers. Based on the available information in this case, Class
25 Counsel believes that there are approximately 15,500 identifiable potential Class Members.
26 Using that estimate, the value of the instant non-reversionary Common Fund is comparable, if
27 not superior, with the net settlement value in the following class action settlements for which
28 information is available on a per class member basis:

- 1 a) *Batmanghelich v. Sirius XM Radio, Inc.*, United States District Court, Central
2 District of California, Case No. 09-9190-VBF – 3,500,000 potential class
3 members settled for \$7,000,000 (approximately \$2.00 per class member);
- 4 b) *Greenberg v. E-Trade Financial Corporation*, Los Angeles Superior Court, Case
5 No. BC360152 – 1,400,000 class members settled for \$5,625,000 (\$4.02 per class
6 member);
- 7 c) *Marenco v. Visa*, United States District Court, Central District of California, Case
8 No. 10-08022-DMG – 648,000 potential class members settled for \$13,000,000
9 (\$20.00 per class member);
- 10 d) *Cohorst v. BRE Properties*, United States District Court, Southern District of
11 California, Case No. 10-02666-JM – 1,170,000 million potential class members
12 settled for \$3,500,000 (\$2.99 per class member); and
- 13 e) *Skuro v. BMW, ATX*, United States District Court, Central District of California,
14 Case No. 10-8672-GW – 43,000 potential class members settled for \$300,000
15 (\$6.98 per class member or, alternatively, a six month extension of the BMW
16 Assist basic safety plan valued by the parties at \$100).

17 Moreover, the Common Fund is non-reversionary. In the event that any portion of the
18 Common Fund remains unclaimed, or any check paid to a Class Member remains uncashed for
19 more than 90 days after issuance, then such unclaimed or uncashed funds will revert for *cy pres*
20 distribution as follows: 1) 50% being distributed to the Alliance for Children’s Rights which is a
21 501(c)(3) non-profit child advocacy organization; (2) 25% of such funds being distributed to the
22 California State Treasury for deposit in the Trial Court Improvement and Modernization Funds;
23 and (3) 25% of such funds being distributed to the California State Treasury for deposit into the
24 Equal Access Fund of the Judicial Branch. Any *cy pres* funds distributed to the Alliance for
25 Children’s Rights will be used for child advocacy programs within the meaning of California
26 Code of Civil Procedure § 384(b).

27 ///

28 ///

1 Finally, as a result of Class Counsel's efforts, the Settlement of this action benefits not
2 only Class Members but the public generally. In addition to all of the foregoing benefits, the
3 Settlement also mandates a change in Eddie Bauer's business practices. Eddie Bauer agrees, that
4 in response to this Action, it re-implemented an automatic verbal notice that informs callers at
5 the outset of the call that the call may be monitored and recorded.

6 All of the foregoing are benefits negotiated by Class Counsel as a direct result of the
7 Settlement of this Action. The Settlement provides these benefits to Class Members and the
8 public generally immediately and avoids the myriad of risks and uncertain outcome, as well as
9 substantial delay, of continued litigation.

10 Class Counsel's exceptional efforts produced exceptional benefits which more than
11 justify a multiplier, if necessary. *Accord Chavez*, 162 Cal. App. 4th at 61 (noting that changes in
12 company policy, the absolute size of the class of persons eligible for benefit, and the interest to
13 class members are other factors that may be considered in awarding a multiplier). *See also*
14 *Lealao*, 82 Cal. App. 4th at 40-41 (noting that a multiplier should be awarded where the
15 settlement greatly benefits the public).

16 **b. The Novelty and Difficulty of the Questions Involved**

17 The litigation involved novel and difficult questions of law and Defendant raised
18 numerous defenses to the class claims. On the merits, Defendant has argued, *inter alia*, that
19 telephone calls to Defendant could not give rise to an objectively reasonable expectation that the
20 calls would not be recorded, and thus do not implicate the Privacy Act; and that customers
21 consented to the recording, either expressly or impliedly; and that, even in the event liability
22 were established, the amount of statutory damages under Penal Code §637.2 are limited to
23 \$5,000 per action and, if not, would be constitutionally excessive in light of the fact that none of
24 the unlawfully recorded calls resulted in any actual damages or economic harm and that an award
25 of aggregated statutory damages would violate the Excessive Fines and Due Process provisions
26 of the U.S. and/or California Constitutions. *See Hale v. Morgan*, 22 Cal.3d 388, 399-405 (1978)
27 (holding that a statutory penalty of \$100 per day was unconstitutional). Based on these
28 arguments, Defendant contends Plaintiff would potentially lose on the merits.

1 Moreover, Plaintiff faced risks that class certification would not have been granted. In
2 the call recording context, two federal district courts have denied motions for class certification,
3 and two panels of the California Court of Appeal have affirmed trial court orders denying class
4 certification. See e.g., *Quesada v. Bank of America Investment Svcs.*, 2013 U.S. Dist. LEXIS
5 32588 (N.D. Cal. Feb. 19, 2013); *Torres v. Nutrisystem, Inc.*, 2013 U.S. Dist. LEXIS 66444
6 (C.D. Cal. Apr. 8, 2013); *Hataishi v. First American Home Buyers Prot. Corp.*, 223 Cal. App.
7 4th 1454 (2014); *Kight v. CashCall, Inc.*, 231 Cal. App. 4th 112 (2014). Plaintiff believes that
8 she would have prevailed on class certification and the fact that class certification has been
9 granted in other cases based on a failure to disclose that telephone calls were being recorded
10 supports Plaintiff's position about the propriety of class certification. See, e.g., *Greenberg v. E-*
11 *Trade Financial Corp.*, L.A. Superior Court, Case No. BC360152 (Feb. 7, 2008); *Thomasson v.*
12 *GC Services, Ltd Partnership*, 2011 WL 1339063 (S.D. Cal. 2011); *Ades v. Omni Hotels*
13 *Management Corp.*, 2014 U.S. Dist. LEXIS 129689 (C.D. Cal. Sept. 8, 2014). Nevertheless,
14 Courts have discretion when it comes to determining whether or not to certify a class and
15 Defendant would have vigorously contested a motion for class certification. Defendant would
16 have argued that the class is not ascertainable; that individual issues of consent and expectation
17 of privacy predominate over common issues; and that a class action would not be superior
18 because, among other reasons, an award of aggregated statutory damages would be
19 disproportionate to the harm. Indeed, the uncertainty as to whether a class could be certified and
20 maintained in this case added to the risks of litigation here.

21 **c. The Contingent Nature of the Work**

22 The California Supreme Court has noted that “[t]he adjustment to the lodestar figure, e.g.,
23 to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the
24 suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected
25 nor fortuitous. Rather, it is intended to approximate market-level compensation for such
26 services, which typically includes a premium for the risk of nonpayment or delay in payment of
27 attorney fees.” *Ketchum*, 24 Cal. 4th at 1138.

1 The risk of the litigation is a significant factor that courts weigh in enhancing a lodestar
2 with what is called a “risk multiplier.” *Vizcaino*, 290 F. 3d at 1048-49. 1051. The Ninth Circuit
3 has even found it is an abuse of discretion for a court to fail to award a “risk multiplier” in
4 uncertain and risky litigation under some circumstances. *Fischel v. Equitable Life Assur. Society*
5 *of U.S.*, 307 F. 3d 997, 1008 (9th Cir. 2002); *WPPSS*, 19 F.3d at 1302 (trial court abused its
6 discretion by failing to apply a risk multiplier to lodestar where case “was fraught with risk and
7 recovery was far from certain”).

8 Risk multipliers are necessary because, without the prospect of some consideration for the
9 risks and uncertainties of the action, the incentive for prosecuting such a suit would be lacking
10 and a major weapon for enforcing various public policies would be blunted. A risk multiplier to
11 the base lodestar is appropriate to reward attorneys for taking the risk of non-payment by paying
12 them a premium over their normal hourly rates for winning contingency cases and is a legitimate
13 way of assuring competent representation for plaintiffs who could not afford to pay on an hourly
14 basis regardless whether they win or lose.

15 Class Counsel undertook to prosecute this litigation on a wholly contingent basis with no
16 guarantee that their fees or expenses would ever be recovered. If Plaintiff was entirely
17 unsuccessful, Class Counsel would have received no compensation for their efforts and no
18 reimbursement for the expenses incurred in prosecuting this case on behalf of the Class. As
19 demonstrated by the fact that no other counsel stepped forward to file a class action or to file
20 similar actions, this case presented a substantial risk for Class Counsel. Zysman Decl., ¶ 14.

21 Class Counsel understood that they were undertaking complex, lengthy and expensive
22 litigation with no guarantee of ever being compensated for the investment of time and money the
23 case would require. In undertaking that responsibility, Class Counsel were obligated to assure
24 that sufficient attorney resources were dedicated to the prosecution of this litigation and that
25 funds were available to compensate staff and to pay for out-of-pocket expenses required in a case
26 like this. Zysman Decl., ¶ 14.

27 As this Court and Defense Counsel are well aware, many class cases do not result in
28 compensation for plaintiff’s counsel because of denial of class certification, granting of summary

1 judgment for defendants, verdict for defendants at trial or reversal on appeal even after plaintiffs
2 succeed at trial. The risks in this case and the possibility that Class Counsel would not be paid
3 were very real. Any argument to the contrary or that Class Counsel never faced any risk of
4 litigation or any risk of non-payment of fees is disingenuous and only applies in hindsight.

5 **d. Skill of Class Counsel**

6 The skill and diligence displayed by Class Counsel was largely responsible for the
7 outstanding result achieved. Defendant was represented by very skilled and able counsel from a
8 nationally-recognized defense firm, and nevertheless, Class Counsel exhibited creativity in
9 crafting the Settlement and its very favorable terms, especially as compared to similar call
10 recording settlements. Such quality, efficiency and dedication should be rewarded.

11 **IV. CLASS COUNSEL'S OUT-OF-POCKET EXPENSES ARE REASONABLE
AND SHOULD BE APPROVED**

12 Awards of counsel's out-of-pocket expenses are appropriate in common fund cases
13 because those who benefit from counsel's efforts should share in not only the fee but the
14 expenses that were reasonably incurred in obtaining the result. *See Rider v. County of San*
15 *Diego*, 11 Cal. App.4th 1410, 1423 n.6 (1992). Out-of-pocket expenses are compensable under
16 Cal. Code of Civ. Proc. §1021.5 if they would normally be billed to a fee-paying client.

17 Pursuant to the Settlement Agreement, Class Counsel are entitled to apply to the Court for
18 reimbursement of actual out-of-pocket costs up to \$20,000. Here, however, Class Counsel have
19 incurred less than that amount and request reimbursement of \$17,415.20 in litigation expenses
20 actually incurred. As set forth in the Zysman Decl. ¶¶ 35-39, these expenses were necessary for
21 the conduct of the litigation and are reasonable and modest in amount. The expenses include
22 (1) filing and E-service fees, (2) complex and jury fees; (3) mediation fees, (4) postage and
23 courier services, (5) copying, (6) process servers, (7) long-distance phone calls, (8) faxes,
24 (9) computerized and database legal research, and (10) travel expenses. These types of expenses
25 are typically billed by attorneys to fee-paying clients in the marketplace. *See Beasley v. Wells*
26 *Fargo*, 235 Cal. App. 3d 1407, 1421 (1991), *overruled in part, Olson v. Automobile Club of*
27 *Southern California*, 42 Cal. 4th 1142 (2008); *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

1 Since the expenses incurred obtaining this Settlement for the Class meet the criteria enumerated
2 by the courts, those expenditures should be reimbursed out of the Common Fund.

3 **V. CLAIMS ADMINISTRATION FEES**

4 Pursuant to the Settlement Agreement, all fees and costs incurred by the Claims
5 Administrator, KCC, are to be paid from the Common Fund. KCC has provided a declaration
6 detailing the work performed and costs incurred totaling \$18,634.98 through January 2018 in the
7 administration of this settlement. On November 1, 2017, estimated their total costs between
8 \$39,193 and \$39,784. *See* Declaration of Andrew Perry of Kurtzman Carson Consultants
9 (“KCC”) in Support of Class Notice and Claims Administration Costs, filed concurrently with
10 the Motion In Support of Final Approval of Class Settlement, ¶ 17. KCC has performed and will
11 continue to perform tasks necessary to the administration of the settlement through the final
12 approval. KCC will provide a supplemental declaration setting forth its final fee and cost request
13 by April 9, 2018, as directed in the Court’s December 15, 2017 Preliminary Approval Order.

14 **VI. THE CLASS REPRESENTATIVE’S REQUESTED INCENTIVE AWARD IS
REASONABLE AND SHOULD BE AWARDED**

15 As stated by the California Court of Appeal in the *Cellphone Termination Fee Cases*, 186
16 Cal. App. 4th 1380, 1393-94 (2010) “[i]ncentive awards are fairly typical in class action cases . . .
17 and are intended to compensate class representatives for work done on behalf of the class, to
18 make up for financial or reputational risk undertaken in bringing the action, and, sometimes to
19 recognize their willingness to act as a private attorney general.” (citing *Rodriguez v. West Publ’g*
20 *Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Moreover, the Court of Appeal explained that
21 “[T]he rationale for making enhancements or incentive awards to named plaintiffs is that they
22 should be compensated for the expense or risk they have incurred in conferring a benefit on other
23 members of the class.’ An incentive award is appropriate ‘if it is necessary to induce an
24 individual to participate in the suit.” *Cellphone Termination Fee Cases*, 186 Cal. App. 4th at
25 1395. In instituting this litigation, the named Plaintiff has acted as a private attorney general to
26 seek a remedy for what appeared to be a public wrong, in effect providing private enforcement of
27 the privacy laws.

1 Plaintiff Yevgeniya Granina diligently fulfilled her obligations in a representative
2 capacity and was instrumental in achieving the relief obtained by the Class. As stated in the
3 declaration that accompanies this Motion, she fulfilled her obligations to the Class over the
4 course of the litigation by, *inter alia*, (1) providing factual background for the class action
5 Complaint; (2) reviewing the Complaint and Amended Complaint, and other pleadings in this
6 matter; (3) preparing for and attending her deposition; (4) providing documents to counsel;
7 (5) responding to detailed discovery, including special interrogatories and requests for production
8 of documents; (6) regularly engaging in numerous telephonic conferences and in-person
9 meetings with Class Counsel throughout the litigation concerning all developments; (7) actively
10 monitoring the Mediation process; (8) consulting with Class Counsel on the parameters of the
11 proposed Settlement; and (9) reviewing and approving the Settlement of this litigation.
12 Accordingly, the requested \$5,000 incentive award is reasonable. Zysman Decl., ¶ 43.

13 In addition, to dedicating a substantial amount of time and effort to enforce the important
14 public policy of privacy and consumer protection by pursuing this action on behalf of the Class
15 and achieving the Settlement now before the Court, the Class Representative took significant
16 professional and personal risks. For example, she bore the risk of an adverse judgment should
17 this case prove unsuccessful, thereby risking her own assets and credit.

18 The incentive award sought by Plaintiff is reasonable in comparison to enhancements in
19 other consumer class action settlements. *See, e.g., Cellphone Termination Fee Cases*, 186 Cal.
20 App. 4th at 1395 (approving \$10,000 incentive awards to each of the four class representatives);
21 *Stevens v. Safeway, Inc.*, 2008 U.S. Dist. LEXIS 17119 (C.D. Cal. 2008) (awarding enhancement
22 payments of \$20,000 and \$10,000 to the two named plaintiffs); *Cohorst v. BRE Prop.*, 2012 U.S.
23 Dist. LEXIS 78010 (S.D. Cal. June 5, 2012) (awarding a \$10,000 enhancement payment).

24 Thus, it is respectfully submitted that under the circumstances present here, approval of a
25 \$5,000 incentive award from the Common Fund is warranted in light of the Plaintiff's efforts and
26 the relief to the Settlement Class in this litigation.

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28 ///

1 **VII. CONCLUSION**

2 For all of the foregoing reasons, Class Counsel respectfully requests that the Court grant
3 Counsel's request for an award of attorneys' fees in the amount of \$100,000 (or 33 1/3% of the
4 Common Fund), reimbursement of out-of-pocket costs in the amount of \$17,415.20, and an
5 incentive award of \$5,000 to the Class Representative, all payable from the Common Fund.

6
7 Dated: February 13, 2018

LAW OFFICES OF ZEV B. ZYSMAN
A Professional Corporation

8
9 

Zev B. Zysman

10 *Attorneys for Plaintiff and*
11 *the Settlement Class*