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Class Counsel

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

PHILIP ALVAREZ, RANDALL BETTISON, MARC KELLEHER, and DARLENE VAUGH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SIRIUS XM RADIO INC.,

Defendant.

Case No. 2:18-cv-08605-JVS-SS

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND EXPENSES AND FOR SERVICE PAYMENTS

Hon. James V. Selna, presiding

Date: February 8, 2021
Time: 1:30 P.M.
Location: Courtroom 10C
411 West 4th Street,
Santa Ana, CA 92701

See, *lifetimesiriusxmsettlement.com* for attendance details and information for video conference

(*Filed with* Decl. of C. Tregillis & Decl. of R. Pearl)

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I. INTRODUCTION

Class Counsel appreciate the opportunity to submit this supplemental brief and supporting declarations in response to the Court's Tentative Order Regarding Motion for Final Approval of Class Action Settlement and Motion for Attorney's Fees ("Tentative Order"). As explained herein, Class Counsel respectfully submit that the requested multiplier of 2.1 on their lodestar is appropriate under all applicable authority, and request that the Court award them the full amount of attorneys' fees and expenses they originally requested—$3.5 million.

The Class Action Settlement that the Court tentatively approved is exceptional. Despite dismissal in this Court based on Defendant's arbitration agreements that include class action waivers, Class Counsel achieved everything Class Members realistically could have hoped to achieve through a class trial, and perhaps more. Under the Settlement, Class Members get everything they originally bargained for—true Lifetime Subscriptions to Defendant's satellite radio service that will last for their lifetimes, rather than for the lifetime of a limited number of electronic devices through which they receive that service. In addition, the Settlement provides a substantially reduced $35 transfer fee, when their original agreements with Defendant required a $75 transfer fee.

The benefits of the Settlement provide clear, unambiguous, substantial value to Class Members. In the concurrently filed Supplemental Declaration of Christian Tregillis, the Settlement is conservatively valued at $408,944,000 (which includes the value of the lower transfer fee and unlimited transfers). This valuation is based on a transfer rate of once every 6.25 years, and a reasonable estimate that Class Members would be required to purchase, on average, at least 72 months (six years) of separate satellite radio subscriptions after hitting the three-transfer maximum (upon the fourth transfer).

Chambers v. Whirlpool, 980 F.3d 645 (9th Cir. 2020), which the Court appeared to follow in its Tentative Order, does not apply to this case because the

Settlement before the Court is not a coupon settlement. Further, because this case turns on principles of contract law governed by state law, state law governs the award of attorneys' fees here. *Chambers* involved a fee award governed by federal law concerning fee awards in "coupon settlements." *Id.* at 657-59; 28 U.S.C. § 1712. This Settlement is not a coupon settlement, does not fall within the provisions of 28 U.S.C. § 1712 and, under well-established, controlling precedent unaffected by *Chambers*, the requested multiplier in this case is appropriate.

California law supports application of a multiplier here, and recognizes that a contrary ruling would create the perverse incentive for Class Counsel to negotiate a less valuable, common fund settlement featuring a cash fund from which Class Counsel reasonably could expect to receive 25% as fees under the percentage approach. But such a cash settlement would not deliver the value to Class Members that the present Settlement delivers, *and* would require Class Members to pay attorneys' fees, further reducing their own recovery (rather than Defendant paying those fees as is the case here).

II. BACKGROUND

A. The Court Tentatively Approved an Exceptional Settlement in This Case

The Settlement represents an achievement that most likely is better than any result Plaintiffs could have hoped to achieve through continued litigation, particularly given that this Court previously dismissed the earliest filed of these actions and compelled it to individual arbitration under the terms of Defendant's subscriber agreement. *See Wright v. Sirius XM Radio, Inc.*, No. 16-01688 JVS, Dkt. 59, 2017 WL 4676580 (C.D. Cal. June 1, 2017).

The Settlement achieves true "Lifetime Subscriptions" for Class Members that actually last for their lifetimes, as opposed to a maximum of four Devices. (Dkt. 68, Settlement Agreement ¶¶ 66-68.) Under the Settlement, Class Members will be able to transfer their Lifetime Subscriptions to an *unlimited* number of

different Devices, for a charge of $35 per transfer, a significant reduction from Defendant's currently imposed $75 per transfer fee, and its prior limitation of three such transfers. (*Id.* ¶ 66(a).)

The benefits of the Settlement inure automatically to a vast majority of Class Members: the Active Lifetime Subscribers. In the event a Class Member holds an Inactive Lifetime Subscription, he or she had the option of reactivating that Lifetime Subscription[1] (at no charge) with the above benefits, or claiming $100 in cash. (*Id.* ¶ 67.)

Inactive Subscribers had to submit a Claim Form to obtain the Settlement's benefits (*i.e.*, reactivation of the Lifetime Subscription or a $100 payment). (*Id.* ¶ 68(a) and Ex. A (Claim Form).) The Claim Deadline now has passed. The Settlement Administrator reports that 12,029 Claim Forms were submitted, and that approximately 72% of those Claimants chose to reactivate their Lifetime Subscription. (Dkt. 91 at ¶ 14.)

B. The Supplemental Declaration of Christian Tregillis Provides the Court with the Information It Found Necessary and Lacking in Its Tentative Order

The concurrently filed, detailed Supplemental Declaration of Christian Tregillis provides the information the Court found necessary and lacking in its Tentative Order. In response to the Court's inquiries in the Tentative Order, Christian Tregillis provides the following conclusions and analysis:

1. The frequency at which Class Members transfer their Lifetime Subscriptions is at least once every 6.25 years. (Tregillis Decl. ¶¶ 1.a., 8-27.)
2. Absent the Settlement, in order to receive the programming Class Members will receive under the Settlement, Class Members would be required to purchase, on average, at least 72 months (six years) of separate satellite radio

[1] In addition, Internet streaming of Sirius XM's radio service will be made available to Inactive Lifetime Subscribers who chose to reactivate with no additional fee (Internet streaming is already available to Active Lifetime Subscribers at no additional fee). (Id. pp. 1-2 & ¶ 66(c).)

subscriptions after hitting the three-transfer maximum (upon the fourth transfer). (*Id.* ¶¶ 1.b., 43-49.)

3. The value of the subscription fees avoided on the additional extended service provided by making the number of permitted transfers unlimited, as provided by the Settlement, is on average at least $360 per Class Member. (*Id.* ¶¶ 1.c., 43-49.)
4. The value of the Settlement attributable to the lower transfer fee ($35, down from $75), is at least $128 per Class Member, based on an additional 3.2 number of future transfers after the Settlement. (*Id.* ¶¶ 1.d., 28-42.)
5. A conservative total value of the Settlement is $408,944,000 (*Id.* ¶¶ 1.e., 46-47, 52-54.)

This valuation is consistent with Tregillis's earlier, very conservative estimate that the Settlement is valued at a minimum at $96.4 million, or at least $100 per Class Member. (*Id.* ¶¶ 7, 54.)

III. LEGAL ANALYSIS

Subsection A, below, explains why the award of fees in this case is governed by California law rather than by federal law, distinguishing this case from *Chambers v. Whirlpool*, 980 F.3d 645, 657-59 (9th Cir. 2020), where the award of fees was governed by federal law by virtue of that settlement's coupon relief.

Subsection B analyzes how California law expressly provides for multipliers such as that requested here in analogous cases. *See e.g.*, *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133, 1136-37 (2001).

Subsection C discusses how the requested multiplier of 2.1 is merited even under the (inapplicable) rule enunciated in *Chambers*, in light of the Supplemental Declaration of Christian Tregillis, which demonstrates the "exceptional" value of this Settlement in relation to the requested fee. (Tentative Order at 18 (quoting *Chambers*, 980 F.3d at 665, and *Perdue*, 559 U.S. at 554).) The "actual value of the settlement" represents more than 100% of "the scope of litigation as a whole"

(Tentative Order at 18 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)), because even if Plaintiffs were successful at every turn of the litigation (and assuming hypothetically the Court never granted the motion to compel individual arbitration) they could have recovered only the balance of their lifetime subscription and not the discount of the transfer fee. Furthermore, as caselaw and the Declaration of Richard Pearl demonstrate, the base "lodestar fee [contemplated in the Tentative Order] would not have been 'adequate to attract competent counsel.'" *Perdue*, 559 U.S at 554 (quoting *Blum v. Stenson*, 465 U.S. 886, 897, 901(1984).

A. California Law Controls the Award of Attorneys' Fees in This Case

Plaintiffs here advanced, and the Settlement the Court tentatively approved resolves, claims alleged under California law. (Dkt. 67 (operative complaint), ¶¶ 27-34 (alleging single cause of action for breach of contract).) Accordingly, California law applies to the award of attorneys' fees. *See, e.g., Klein v. City of Laguna Beach*, 810 F.3d 693, 701 (9th Cir. 2016) ("[F]ederal courts apply state law for attorneys' fees to state claims because of the *Erie* doctrine."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002), ("Because Washington law governed the claim, it also governs the award of fees.") (citing *Mangold v. Calif. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir.1995)).[2]

In this respect, the present case is entirely different from *Chambers*, as that case involved a fee award subject to *federal* law—specifically, 28 U.S.C. § 1712, which by its express terms governs fee awards in the context of "coupon settlements"

[2] As stated in the text, California law applies because the claims in this action are based on California law; furthermore, California law also applies because, here, there is no proponent of foreign law meeting its burden to show that some other state's law applies. *See, e.g., Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 995 (9th Cir. 2010) ("The party advocating the application of a foreign state's law bears the burden of identifying the conflict between that state's law and California's law on" a specific issue, and of "establishing that the foreign state has an interest in having its law applied. . . . If it fails to meet either of these burdens, the court 'may properly find California law applicable without proceeding [any further in application of California's choice-of-law principles].'") (quoting *Wash. Mut. Bank, F.A. v. Superior Court*, 24 Cal. 4th 906, 920 (2001)).

of class actions. *Chambers*, 980 F.3d at 657 ("Importantly here, CAFA . . . established specific rules to govern fee awards *for coupon settlements* in federal class actions.") (emphasis added).

While this case is subject to diversity jurisdiction by virtue of those provisions of the Class Action Fairness Act of 2005 ("CAFA") that modified 28 U.S.C. § 1332 (specifically, § 1332(d)), so as to give U.S. District Courts diversity jurisdiction over most class actions, it is not a "coupon settlement" as defined in, and subject to the requirements of, those provisions of CAFA governing coupon settlements, including 28 U.S.C. § 1712. *See* Pub. L. 109-2, 119 Stat. 4 (2005).

As the *Chambers* court explained, "[t]he parties' settlement [in that case was] a coupon settlement." *Chambers*, 980 F.3d 659. Thus, the *Chambers* court was compelled to ensure that the award of fees in that case complied with 28. U.S.C. § 1712, which by its terms applies only to "coupon settlements." *Id.*; *see also* 28 U.S.C. §§ 1712(a) (governing "Contingent Fees in *Coupon* Settlements") (emphasis added); 1712(b) (governing "Other Attorney's Fee Awards in *Coupon* Settlements") (emphasis added); 1712(c) (governing "Attorney's Fee Awards Calculated on a Mixed Basis in *Coupon* Settlements") (emphasis added).

While *Chambers* made clear that CAFA's provisions concerning "coupon settlements" apply to every class action in federal court, and preempt any contrary state law, it also recognized that those provisions, by their terms, apply only to fee awards in class actions featuring "coupons." *Chambers*, 980 F.3d at 657 ("Importantly here, CAFA also established specific rules to govern fee awards for *coupon settlements* in federal class actions.") (emphasis added); *id.* at 659 ("The parties' settlement is a coupon settlement."). Because the Settlement here is not a coupon settlement, § 1712 does not preempt the well-established principles of state law that govern the award of attorney fees in this case.

Chambers did not command lower courts to find a way to cram their analysis of fee awards in non-coupon cases into the coupon-specific language of § 1712, and

it did not overrule the decades of Ninth Circuit and other precedent approving and requiring fee awards in non-coupon cases based on lodestar-multiplier or percentage-of-fund methodologies that would not comply with § 1712, whether the claims at issue arise under state or federal law.

Indeed, the Ninth Circuit's *en banc* opinion *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 926 F.3d 539 (9th Cir. 2019), is particularly on-point, and more aptly applies to the fee award in this case than does the same court's opinion in *Chambers*. In *Espinosa*, the Ninth Circuit affirmed an award of attorney fees using the lodestar-multiplier approach in connection with a class action settlement resolving claims "under California consumer protection statutes and theories of common law fraud and negligent misrepresentation" governed by state, rather than by federal law. *Id.* at 553. The *Espinosa* court reasoned:

> [T]he district court properly exercised its discretion in calculating the fee award using the lodestar method. As the district court found, the automakers "will pay attorneys' fees separately from the amount allocated to those covered by the class." Moreover, it is difficult to estimate the settlement value's upper bound. The settlement extended the Reimbursement Program's enrollment deadline by a year and a half, allowing additional class members to participate. These class members will continue to receive compensation from the program for many years into the future, the present value of which will depend on how many miles they drive and their cost of fuel.

Id. at 570.

As an *en banc* decision in a non-coupon case resolving claims under state law, *Espinosa* is far more closely on point than is *Chambers*. The *Espinosa* court affirmed "modest" positive multipliers that the district court in that case applied to lodestars for class counsel based on "'the complexity and volume of work that counsel engaged in in order to diligently pursue this case and develop its primary theory of liability,'" and on the risk assumed "by being one of the first firms to take up this cause." *Id.* at 571-72. This Court's analysis should be guided by the Ninth

Circuit's *en banc* opinion concerning an award of attorney fees using the lodestar-multiplier approach in the non-coupon class action in *Espinosa*, rather than by that court's opinion in *Chambers*, which concerned a fee award in a coupon settlement.

The Ninth Circuit's observations that the lodestar-multiplier approach properly applied in *Espinosa* because defendant there would pay fees separately from the amount allocated to the class, and because the value of that settlement's "upper bound" was "difficult to estimate," apply with full force here. *Id.* at 570. Likewise, the Ninth Circuit's approval of the district court's application of a positive multiplier in that case applies equally to this case. Finally, the Ninth Circuit's approval of the district court's "cross-check[of] the lodestar amount" against the settlements total value supports this Court's use of the same approach here. *Id.* at 570-71.

Indeed, the Ninth Circuit repeatedly has held it an abuse of discretion to refuse to consider whether a risk multiplier should be applied to a fee award based on the lodestar approach in a class action. *See Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016) (vacating and remanding award of fees based on lodestar approach in non-coupon case, under abuse-of-discretion standard of review, because "district court failed entirely to consider whether Class Counsel's representation merited a risk multiplier"); *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) (same); *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("It is an abuse of discretion to fail to apply a risk multiplier . . . when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky.").

1. This Settlement Is Not Subject to CAFA's Provisions Governing Fee Awards in Coupon Settlements and Thus *Chambers* Does Not Apply to This Case

This case does not feature a coupon settlement to which § 1712 would apply. As the *Chambers* Court observed, the Ninth Circuit

> has established three factors to determine whether a settlement is a coupon settlement: (i) "whether class members have 'to hand over more of their own money before they can take advantage of' a credit"; (ii) "whether the credit is valid only 'for select products or services'"; and (iii) "how much flexibility the credit provides, including whether it expires or is freely transferrable."

Chambers, 980 F.3d at 659 (quoting *In re Easysaver Rewards Litigation*, 906 F.3d, 747, 755 (9th Cir. 2018)).

Here, as explained in the Final Approval Motion (Dkt. 89 at 8-9), under the terms of the Settlement, Class Members get true Lifetime Subscriptions to Defendant's service, which they already purchased. These true Lifetime Subscriptions last for Class Members' lifetimes, instead of the "lifetime" of a particular electronic receiver device, as Sirius previously limited them. Class Members do not have to pay any additional money or use any "coupon" to receive this benefit. Indeed, Class Members have to hand over *less* of their money to transfer their Lifetime Subscriptions to a new device than Sirius previously required, rather than "more of their own money" as would be the case if the Settlement featured coupon recovery. *Chambers*, 980 F.3d at 659. Class Members get at least the service they originally bargained for, although that service actually has gotten better over time as Sirius has added channels and offerings. (Dkt. 89 at 21; Dkt. 89-2 at ¶ 5.) Class Members thus are not limited to some inferior or possibly undesired "select products or services," as might be provided via a CAFA coupon. *Chambers*, 980 F.3d at 659. And the Lifetime Subscriptions now will be freely transferrable to an unlimited number of devices, rather than just the three transfers to which Sirius previously limited Class Members. (Dkt. 89 at 8, 15.) *See also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 950 (9th Cir. 2015) (employing similar analysis

to conclude that gift cards offered under terms of class action settlement did not "constitute a coupon settlement that falls under the umbrella of CAFA") (approved in *Chambers*, 980 F.3d at 660); *Hendricks v. Ference*, 754 F. App'x 510, 512 (9th Cir. 2018) (applying same analysis to hold an "award of tuna vouchers was not a form of coupon relief under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1712(a)"); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 323 (N.D. Cal. 2018) (finding settlement's provision of credit monitoring did not constitute a coupon settlement covered by § 1712).

Indeed, this Court recognized the Settlement's real, non-coupon-like value to Class Members in its Tentative Order. (Tentative Order at 2 (summarizing Settlement), 11 (overruling objections), 14 (concluding "that the value of the Settlement is at least $12.6 million, but *is surely worth some amount more than that*," and recognizing that the requested "$3.5 million in attorneys' fees and expenses . . . is reasonable relative to the benefits of the Settlement for Settlement Class Members").) Because this is not a coupon case, the federal principles of law that the *Chambers* court applied to the award of fees in that case, which was controlled by § 1712 by virtue of the coupon relief afforded by the settlement at issue in *Chambers*, do not apply here.

2. Class Counsel Do Not Request a Fee Award Under a Federal Statute, so the Federal Rule Against Multipliers Does Not Apply Here

The 1992 Supreme Court decision on which the *Chambers* court relied to conclude that a multiplier was not appropriate to the award under § 1712 at issue in *Chambers* controls only where a fee award is governed by federal, rather than state, law. That Supreme Court case, *City of Burlington v. Dague*, also involved an award of fees subject to federal law—specifically, "an award of reasonable attorney's fees under § 7002(e) of the Solid Waste Disposal Act (SWDA), . . . 42 U.S.C. § 6972(e), or § 505(d) of the Federal Water Pollution Control Act (Clean Water Act (CWA)), . . . 33 U.S.C. § 1365(d)." *City of Burlington v. Dague*, 505 U.S. 557, 559

(1992); *see also Chambers*, 980 F.3d at 668 ("In *Dague*, the Supreme Court held that 'enhancement for contingency is not permitted' *in certain statutory fee-shifting cases*.") (emphasis added). *Chambers* did not overrule the decades of precedent since *Dague* approving and making fee awards in non-coupon cases that would not comply with *Dague*'s requirements for fee awards under "certain" federal statutes (*id.*), or that would not comply with § 1712's provisions regarding "coupon settlements" (28 U.S.C. § 1712).

With respect to fee awards under *California* law, the California Supreme Court has expressly rejected *Dague*'s restrictions on contingent risk multipliers in no uncertain terms. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1136-37 (2001); *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 569 (2004). Instead, California caselaw expressly recognizes the importance of compensating risk as an incentive to counsel to undertake difficult but important cases: "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." *Ketchum*, 24 Cal. 4th at 1133 (internal quotation and citation omitted).

B. A Multiplier Is Appropriate Under California Law

California courts "recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *see also Laffite v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 502 (2016) (quoting same). California law expressly provides for multipliers in contract fee cases. *See PLCM v. Drexler Group*, 22 Cal.4th 1084, 1095 (2000) (approving of fee award in breach of contract case, and observing that the "lodestar figure may . . . be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided"). It is beyond dispute that, under California law, an award of attorneys' fees under the lodestar-multiplier approach is

appropriate, particularly where a class settlement does not result in a cash fund. *Laffite*, 1 Cal. 5th at 502 (citing *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 37-39 (2000)).)

Under California law, where a settlement does not include a cash fund, as is the case here, the Court may properly make an award using the lodestar-multiplier approach and, furthermore, the Court may properly incorporate a percentage-of-the-benefit approach into its lodestar calculation, as a crosscheck, where the value of the class's recovery can be calculated with a reasonable degree of certainty. *See, e.g.*, *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (affirming 2.52 multiplier in class action settlement concerning defendants' practice of charging uninsured patients more than insured patients, and crosschecking lodestar against "estimated value of the *retrospective* relief alone") (italics in original); *Lealao*, 82 Cal. App. 4th at 39, 45-46 (explaining that a multiplier may be justified by comparing lodestar to settlement's value) (citing, *inter alia*, *Hanlon v. Chrysler Corp.*, 150 F.3d, 1011,1029 (9th. Cir. 1998)); *Lealao*, 82 Cal. App. 4th at 49-50 ("[I]n cases in which the value of the class recovery can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate, a trial court has discretion to adjust the basic lodestar through the application of a positive or negative multiplier where necessary to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation."). This is particularly true where, as here, the fees are being paid separately by the defendant, and do not reduce Class Members' recovery. *Id.* at 36.

Again, the California Supreme Court repeatedly has declined to follow the U.S. Supreme Court's approach precluding multipliers in awards using the lodestar approach under California law. *Ketchum*, 24 Cal. 4th 1122, 1136-37 (2001); *Graham*, 34 Cal. 4th at 569. Rather, under California law, a "lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid

no more, competent counsel will be reluctant to accept fee award cases." *Ketchum*, 24 Cal. 4th at 1133 (internal quotation and citation omitted).

Furthermore, California law recognizes that a rule denying such a multiplier under the present circumstances creates the perverse incentive for class counsel to seek a cash fund worth less to the class, from which attorneys' fees are subtracted, rather than a more valuable non-fund settlement that gets class members more value and requires defendant to pay attorneys' fees separately. *Lealao*, 82 Cal. App. 4th at 51 ("[A]ppellants 'could have had a deal at $5 million of the pot and they could have made their [attorney fee] claim against it, or $6 million,' in which case there 'would have been a common fund.' In that event . . . a percentage fee (which would have been well in excess of $1 million if a 25 percent benchmark were adopted) would have been available.") (alteration in original).

Similarly here, under the reasoning employed in the Tentative Order to limit Class Counsel's fees to their base lodestar, it would have been better for Class Counsel to negotiate a common fund settlement featuring a $50 million cash fund, from which Class Counsel could have expected to receive an award in the neighborhood of $12.5 million under the percentage approach. But a $50 million cash fund would not have come close to getting Class Members the relief afforded by the Settlement here. Such a settlement would not have gotten Class Members true Lifetime Subscriptions, and it would not have been enough to get them anywhere close to the value of such subscriptions (and on this point, it is worth noting that 72% of the Inactive Subscribers who submitted claims chose to reactivate their Lifetime Subscriptions under the terms of the Settlement rather than to receive $100, providing additional evidence that those subscriptions are worth more than $100). (Dkt. 91, Supplemental Declaration of Cameron R. Azari, ¶ 14; Supp. Tregillis Decl. ¶ 50.)

As explained in Class Counsel's original fee motion (Dkt. 83 at 22-23), the requested multiplier of 2.1 is merited by the extensive efforts required of Class

Counsel to get to this point and to secure an exceptional settlement for the Class, the complexity of the issues this litigation entailed, and the risk of no recovery in light of Defendant's arbitration policy (which included a class action waiver and which this Court held required dismissal of Plaintiff Wright's claims) and other defenses to both the merits of the case as well as class action certification. *See, e.g.*, *Espinosa*, 926 F.3d at 571-72 (approving "modest" multipliers based on "complexity and volume of work" and risk of representation); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 15-md-2672, 2017 WL 3175924, at *4 (N.D. Cal. July 21, 2017) (approving lodestar multiplier of 2.02 as "more than reasonable given the complexities of this case, the skill and diligence of Class Counsel, and the extraordinary results achieved for the Class"); *In re: Toyota Motor Corp Unintended Acceleration Litig.*, No. 10-ml-2151-JVS-FMO, Dkt. 3802, Order re: Mot. for Attorneys' Fees (June 17, 2013), at p.15 (approving multiplier of 2.87 as "within the range approved by courts within this Circuit").

C. A Multiplier Is Appropriate Even Under the Rule Set Forth in *Chambers*

As explained above, *Chambers* did not alter or overrule prior authority concerning fee awards outside the context of § 1712's requirements concerning coupon settlements. However, even under the rules governing fee awards in the coupon context enunciated in *Chambers*, the requested award is appropriate.

1. This Case Qualifies for a Multiplier Under the "Rare and Exceptional" Standard

In its Tentative Order, this Court quoted *Chambers* and *Perdue v. Kenny A.*, 559 U.S. 542 (2010), for the proposition that, "'[b]ecause of a 'strong presumption that the lodestar is sufficient,' a multiplier is warranted only in 'rare and exceptional circumstances.'" (Tentative Order at 18 (quoting *Chambers*, 980 F.3d at 665, and *Perdue*, 559 U.S. at 554).) The High Court's statements regarding multipliers in *Perdue v Kenney* came in the context of a statutory fee award under § 1983. There, the Court held that multipliers may be applied in "'rare' and 'exceptional" cases in

which superior results are achieved because of the "superior" quality of the attorney's performance. *Perdue v. Kenny A.*, 559 U.S. 542, 554 (2010). Courts have determined that such enhancements are appropriate where they are necessary to provide "fair and reasonable compensation" and where "the lodestar fee would not have been 'adequate to attract competent counsel.'" *Perdue*, 559 U.S at 554 (quoting *Blum*, 465 US at 897, 901).

Even assuming that federal law applicable to fee awards under § 1983 applies to the fee award here (which, as explained above, would not be a correct application of the law to the facts of this case), the Settlement here is "exceptional" such that the requested multiplier, which would bring the award closer, but still below, a level justified by a common-fund crosscheck, would be "fair and reasonable." *Perdue*, 559 U.S at 554. Indeed, the base "lodestar fee [contemplated in the Tentative Order] would not have been 'adequate to attract competent counsel.'" *Perdue*, 559 U.S at 554 (quoting *Blum*, 465 US at 897, 901); *see also Ketchum*, 24 Cal. 4th at 1133 (explaining how fee awards under California law must reward the successful contingency fee representation but compensate for both the time spent on the representation, and for the risk entailed by that representation, because otherwise "competent counsel will be reluctant to accept fee award cases") (quotation marks and citations omitted).

The concurrently filed declaration of Richard M. Pearl ("Pearl Decl.") provides "specific evidence" that the base lodestar fee in this case "would not have been 'adequate to attract competent counsel.'" *Perdue*, 559 U.S at 554 (quoting *Blum*, 465 US at 897, 901). Pearl, a recognized expert in court-awarded attorneys' fees (Pearl Decl. ¶¶ 4-8) testifies that the requested multiplier of 2.1 in this case "is appropriate under federal law." (*Id.* ¶¶ 11-14.) Pearl opines that the requested

> multiplier is appropriate and reasonable in light of the need to attract competent counsel willing and able to take on massive consumer protection actions challenging unfair or otherwise invalid consumer

> practices propagated by large corporations. This is especially true with respect to actions like this one that do not primarily seek or result in large damages funds from which fully compensatory fees can be paid, but instead seek forward-looking relief such as the relief obtained here.

(*Id.* ¶ 11.) "[C]lass actions seeking primarily injunctive relief provide significantly less incentive to highly-skilled attorneys than damages cases. (*Id.* ¶ 13.) "As a result, victims of wrongdoing that primarily requires injunctive relief, like the Plaintiffs here, have lesser access to competent and skilled attorneys." (*Id.*)

2. A Comparison of the Fee Award to the Value of This Exceptional Settlement Is Appropriate Under *Chambers* and Prior Ninth Circuit Authority, and Supports the Requested Multiplier

This Court recognized, in its Tentative Order, that a multiplier could be merited in this case by comparison of "the 'actual value of the settlement' to 'the scope of the litigation as a whole.'" (Tentative Order at 19 (quoting *Chambers*, 980 F.3d at 667, and *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) (considering fee award under federal statute).)

Even without expert valuations, it is clear that the result obtained by the Settlement is exceptional as compared to the "scope of litigation as a whole." The Settlement achieves everything a trial in this contract case could have achieved, and more. Not only does it reinstate Class Members with the full benefit of their bargain, but it reduces the transfer fee by more than half on top of that. And it does so for every Class Member despite this Court's dismissal of the case in favor of arbitration on an individual basis. This truly is a rare and exceptional result.

Indeed, given the Court's recognition "that the value of the Settlement is at least $12.6 million, but *is surely worth some amount more than that*," an award of the base lodestar ($1,646,825.25) would amount to only 13% of the *minimum* (and clearly low) Settlement value already recognized by the Court. (Tentative Order at 14 (emphasis added).) This is well below the 25% "benchmark" in common fund cases—an appropriate crosscheck on any lodestar-based award in this case. *Hanlon*,

150 F.3d at 1029 (discussing "benchmark" in context of fee award where settlement did not create any "cash fund" or true "'common fund'" but, rather, required Chrysler to replace defective latches on minivans); *see also Espinosa*, 926 F.3d at 570-71 (approving, but not requiring, such a percentage-based crosscheck of lodestar-based fee award); *Staton v. Boeing*, 327 F.3d 938, 973 (9th Cir. 2003) (analyzing and approving of *Hanlon*'s use of the percentage analysis in a "putative fund" case "as a cross-check of the lodestar amount").

As explained in the Supplemental Declaration of Christian Tregillis, a very conservative valuation of the Settlement is $96.4 million. (Supp. Tregillis Decl. ¶ 54.) However, if the value of the Settlement's reduced transfer fees to Class Members over the course of their lifetimes is taken into account, along with the value of the unlimited transfers of the Lifetime Subscriptions, as the Court requested, the Settlement's value rises to $408,944,000. (*Id.* ¶¶ 1.e., 47-48, 52)

This Court's comparison, in its Tentative Order, of the fee award to the value of the Settlement as a whole is appropriate, both under *Chambers* and under the decades of Ninth Circuit authority including *Espinosa* and *Hanlon* that preceded and remain good law following *Chambers*, which call for just such an analysis. Conducting that analysis here reveals that a positive multiplier on Class Counsel's lodestar is required to bring the fee award in line with the value of the exceptional Settlement achieved in this case.

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IV. CONCLUSION

For all the reasons set forth above, Class Counsel respectfully request that the Court award them the full award of attorneys' fees and expenses they originally requested, in the total amount of $3.5 million.

Respectfully submitted,

AHDOOT & WOLFSON, PC

Dated: February 1, 2021 By: */s/ Robert Ahdoot*

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