Christopher L. Lebsock (Bar No. 184546)
Arthur N. Bailey, Jr. (Bar No. 248460)
Bruce J. Wecker (Bar. No. 78530)
HAUSFELD LLP
580 California St., 12th Floor
San Francisco, CA 94104
Tel: (415) 633-1908
Fax: (415) 358-4980
clebsock@hausfeld.com
abailey@hausfeld.com
bwecker@hausfeld.com

Counsel for Plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

DISTRICT COUNCIL #16 NORTHERN CALIFORNIA HEALTH AND WELFARE TRUST FUND, individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

SUTTER HEALTH; SUTTER BAY HOSPITALS; MARINHEALTH MEDICAL CENTER; SUTTER COAST HOSPITAL; SUTTER VALLEY HOSPITALS; SUTTER BAY MEDICAL FOUNDATION; SUTTER VALLEY MEDICAL FOUNDATION, and DOES 1-100.

Defendants

Case No. RG15753647

ASSIGNED FOR ALL PURPOSES TO:
JUDGE: Honorable Michael Markman
DEPT: 23

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARD

Date: July 24, 2025
Time:10:00 a.m.
Reservation No: A-15753647-022

Date Filed: January 6, 2015

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I. INTRODUCTION

Plaintiff District Council #16 Northern California Health and Welfare Trust Fund ("DC16"), seeks final approval of a proposed class action settlement with Defendants Sutter Health, Sutter Bay Hospitals, Sutter Valley Hospitals, MarinHealth Medical Center, Sutter Coast Hospital, Sutter Bay Medical Foundation, and Sutter Valley Medical Foundation (collectively "Sutter" or "Defendants"), and entry of a Proposed Final Judgment and Order. The Settlement was reached after years of hard-fought litigation and with the help of an experienced mediator, Robert A. Meyer. The settlement creates a $11 million common fund and provides substantial financial compensation to Class Members. DC16 and Sutter reached this settlement after more than nine years of extensive investigation, discovery, motion practice, and negotiation. Before mediating, the parties engaged in written discovery, conducted approximately 27 depositions, produced over a million pages of documents, fully briefed and obtained ruling on Class Certification, fully briefed and obtained rulings on six summary adjudication and related motions regarding Sutter's affirmative defenses, and completed the exchange of expert reports.

The Settlement Administrator, JND Legal Administration LLC ("JND") has mailed notice to 14,506 potential Class Members with deliverable addresses. (Declaration of Gina M. Intrepido-Bowden ("Intrepido-Bowden Decl."), ¶ 11.) As of today, 128 Class Members have submitted claims, and zero objected to the Settlement. (*Id*., ¶ 22.) Class Members have until the Final Approval hearing to submit objections, so it is too soon to fully assess the Class's reaction to the settlement. (Id.., Exh. A p. 6-7.) But the indication to date is that the settlement has widespread support.

Final approval of the Settlement is warranted as it satisfies all the criteria for approval under California law. As demonstrated in the motion for preliminary approval, the proposed Settlement provides excellent benefits to the class, particularly considering the complexities and risks of the case. Accordingly, Plaintiffs request that the Court grant final approval of the proposed Settlement.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. The Claims of DC16 and the Class.

Plaintiff's claims center around the allegations that Sutter's billing for anesthesia services under the 37x revenue code between 2003 and 2013, except for conscious sedation, was false, fraudulent, unfair, and misleading because the bills represented charges: (1) for services not provided, (2) for services already charged elsewhere on the hospitals' bills or on anesthesiologists' separate bills to payers, or (3) for costs not appropriately billed chronometrically for the duration of an operating room ("OR") procedure. (*Id.*) This case followed a November 2013 settlement between Sutter and the State of California, in conjunction with a *qui tam* relator, Rockville Recovery Associates, Ltd., of litigation seeking civil penalties and injunctive relief which alleged that Defendants engaged in essentially the same fraudulent, unlawful, and unfair billing practices at issue in this action. (Bailey Decl. ¶ 15.) ("*Rockville*"). DC16 filed this action on January 15, 2015. DC16's complaint alleged that, between 2003 and 2013, Sutter engaged in the practice of submitting and receiving payment from self-funded health benefit plans for fraudulent, unlawful, and unfair bills for anesthesia services using the 37x revenue code in violation of the UCL, Cal. Bus. & Prof. Code §§ 17200, et seq. (*See* Second Amend. Compl. ¶¶ 1, 2.)

B. Discovery and Motions

The parties engaged in significant discovery. Approximately 1.7 million pages of documents were produced by Defendants and third parties and reviewed by Class Counsel. (Bailey Decl. ¶ 18.) Approximately 27 depositions were taken in this case. (*Id.*) In addition, over 35 depositions from the Rockville case were produced and reviewed. (*Id.*) As to written discovery, Plaintiff propounded a set of form interrogatories, 7 sets of special interrogatories totaling 27 interrogatories, and 2 sets of requests for admission totaling 42 requests. Plaintiff responded to 1 set of form interrogatories, 44 special interrogatories, and 2 supplemental interrogatories issued by Defendants. (*Id.*) From discovery and pre-filing investigation, DC16 gathered extensive and relevant information on Plaintiff's claims. DC16 also retained the services of several experts who provided their

opinions and reports in Support of Plaintiff's Motion for Class Certification, and in preparation for trial.

Early in the case, in February 2015, Sutter removed the case to the United States District Court for the Northern District of California arguing complete federal preemption under the Employee Retirement Income Security Act of 1974. Plaintiff filed a Motion to Remand which was successful in remanding the case. (*Id.* ¶ 8.) In 2015, Sutter also filed a motion to compel arbitration as to DC16 that included multiple rounds of briefing and leave for Sutter to take limited discovery regarding the existence of a binding arbitration agreement. The Court issued an order denying the motion to compel arbitration, which Sutter appealed. On July 9, 2018, the Court of Appeal affirmed the trial court's order denying the motion to compel arbitration.

In October 2019, DC16 moved the Court to certify the Class. After extensive briefing the Court certified a class on June 29, 2021 consisting of all self-funded payers ("SFPs") that were citizens of California on January 6, 2015, or state and local governmental entities of the State of California, that compensated Sutter Health for anesthesia services administered in Sutter hospitals between January 1, 2003 and December 31, 2013, with certain minor exclusions. (*See* 6/29/2021 Order Deciding Evidence Motions and Granting Motion of Plaintiffs for Class Certification at p. 40.) Subsequently, the Court approved class notice that was mailed to approximately 13,800 potential class members informing the Class of class certification and of the procedure and deadline for submitting a request for exclusion. Only four class members opted out of the Class. (Bailey Decl. ¶ 8; Intrepido-Bowden Decl. ¶ 6.)

In April 2022, the parties filed multiple summary adjudication and other motions regarding Defendants' affirmative defenses of arbitration and settlement and release. (*See* Bailey Decl. ¶ 19.) On September 19, 2022, after a hearing and extensive briefing by the parties, including post-hearing briefing, the Court denied Defendants' motions and granted DC16's Motion for Summary Adjudication as to Sutter's Release and Related Defenses, including settlement, accord & satisfaction, and res judicata. (*Id.*; 9/19/2022 Amended Order at pp. 1-2.) The Court ruled that class-member SFPs had not agreed to be bound to the arbitration provisions in Sutter's contracts with insurers, nor had they delegated authority to insurers to bind them. (9/19/2022 Amended Order at pp. 6-9.) Further, the Court

ruled that certain settlements and releases entered between Sutter and the insurers did not release the UCL claims of Class-member SFPs. (*Id*. at pp. 18-20.)

Both sides prepared and developed expert opinions. DC16 hired five experts that produced reports on key issues to the case including anesthesiology, hospital contracting and cost reporting, healthcare markets, medical billing, and restitution. (Bailey Decl., ¶ 20.) Defendants produced reports by five experts to oppose DC16's experts on those issues (*Id.*) The parties served all expert reports, including rebuttal reports by April 1, 2024. (*Id.*)

C. Settlement Negotiation and Agreement

The Parties agreed to mediate after the completion of the expert reports, but before the completion of expert depositions and post-discovery preparation for trial. The mediation was conducted in person on April 4, 2024 and a settlement in principle was reached as a result of a mediator's proposal. (*Id*., ¶ 5.) Negotiations regarding the details of the settlement were conducted by the parties over the next several months and the settlement agreement was executed on October 22, 2024. (*Id.*, ¶ 6.) All settlement discussions were conducted at arm's length, with each side aware of the strengths and weaknesses of Plaintiff's claims and Sutter's defenses. The Parties were willing to explore a potential settlement but were also prepared to litigate their positions through trial and appeal if a settlement could not be reached. (*Id.*)

D. Preliminary Approval of the Settlement

DC16 filed the motion for Preliminary Approval on November 22, 2024. The Court's February 27, 2025 order on the motion found, on a preliminary basis, that the settlement was fair, reasonable, and adequate and granted the motion subject to Plaintiff submitting a revised notice and a revised proposed order within five days of notice of entry of the order. (2/27/25 Order re: Hearing on Motion – Other Preliminary Approval of Class Action Settlement.) DC16 submitted the revised notice and proposed order, and the Court granted preliminary approval of the Settlement on March 13, 2025. (3/13/25 Order Granting Motion for Preliminary Approval of Class Action Settlement.) The Final Approval Hearing was set for July 24, 2025.

The date for submission for written objections was May 12, 2025, although Class Members have until the Final Approval Hearing to object. Reaction of the Class to the settlement has been overwhelmingly positive. As of the filing of this Motion, no Class Members have objected to the Settlement (Intrepido-Bowden Decl., ¶ 22.)

E. Key Terms of the Proposed Settlement

Under the Settlement, Sutter will pay $11 million to resolve this litigation. The key terms include:

1. Class Members. The Settlement defines the Class as "All self-funded payers that (1) are citizens of California [as of January 6, 2015] or state and local governmental entities of the State of California and (2) compensated Sutter for any anesthesia services other than conscious sedation administered in operating rooms at its acute care hospitals at any time from January 1, 2003 to December 31, 2013." This is the certified class in the order granting class certification on June 29, 2021. Excluded from the Class are all self-funded payers that opted out of the Class by the Court-ordered opt-out deadline of June 7, 2022 and any entity in which the self-funded payer is a health plan offered by Sutter Health to its employees or a plan where a Sutter Health affiliate is financially responsible for the claims paid by the self-funded health plan. (Bailey Decl., Exh, A, § 2.2.)

2. Gross Settlement Amount. Under the Settlement, Sutter will pay a total of $11,000,000. (Id. § 2.18.) The gross settlement amount will comprise the Class payments, Class Counsel's attorneys' fees, costs and any incentive award to the Class Representative, and any distribution to the *cy pres* recipients. (*Id.*, §§ 9.1.6-8.)

3. Class Payments to Class Members. Every Class Member is eligible to receive an equal *pro rata* share of the net settlement amount. The notice sent to Class Members and posted on the settlement website explained that Class Members may submit a claim form to elect to receive a payment under the Settlement. (Intrepido-Bowden Decl., Exh. A at 1-2.) Class Members are not required to submit any proof of injury other than making an attestation that they are a Class Member. (*Id.*, Exh. B at 2.) Payments will be based on a *pro rata* distribution of the Gross Settlement Fund minus any award of

fees and costs that the Court orders for Class Counsel, notice and other costs of the Settlement Administrator, and any Court-approved incentive award to DC16. (Bailey Decl., Exh. A, § 9.1.)

4. Release of Claims. DC16 and the Class have agreed to release "all claims, whether federal or state, known or unknown, asserted or unasserted, suspected or unsuspected, contingent or non-contingent, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct that is negligent, intentional, with or without malice, or a breach of any duty, law, or rule, arising from or related to the facts, activities or circumstances alleged in the Action, including but not limited to claims regarding Defendants' billing practices under the 37x, 36x, and 25x revenue codes." (*Id.*, § 10.1.)

5. Notice. The Settlement mandates the Claims Administrator shall be responsible for the notice administration process as ordered by the Court in granting preliminary approval. Consistent with these provisions and the preliminary approval order, the Notice and claims form, as approved by the Court, were mailed to all potential class members with identifiable addresses except the four who opted out of the Class. (Intrepido-Bowden Decl., ¶ 6.) This resulted in 14,506 notices[1] with 3,016 of the notices returned as undeliverable, and of those 1,604 were remailed. (*Id.*, ¶ 11.) The notice and claim form along with other important documents like the preliminary approval order and the proposed settlement are available on the settlement website activated by JND on April 10, 2025. (*Id.*, ¶ 14.)

6. Plan of Allocation. Class Members' *pro rata* share of the Settlement fund will be based on the size of their plan membership located in California during the Class period using information Class members provide on their claim form of the number of active participants they had in California for each year between January 1, 2003 and December 31, 2013, thus allowing Class Members to verify their own membership numbers. (Bailey Decl, ¶ 9, Exh. A § 9.1.3-4).

7. Objections and Exclusions. The Court's order granting preliminary approval modified the

[1] The second notice had a slightly larger distribution because approximately 700 additional potential Class members were identified by Class Counsel subsequent to the April 2022 Notice of Pendency mailing. (Bailey Decl. ¶ 8.)

objections provision of the Settlement. A written objection may be filed and served on the parties, but any objector may appear at the final approval hearing and request to be heard. (Intrepido-Bowden Decl. Exh. A at p. 2, 6-7.) Because the Court already provided Class Members an opportunity to opt-out of the action, the Settlement does not provide a second opportunity to opt out. (Bailey Decl, Exh. A § 5.)

8. Attorneys' Fees, Costs, and Incentive Award. Class Counsel may apply for Attorneys' Fees and Costs. (Bailey Decl., Exh. A § 11.) Following the Court's preference, Class Counsel has included the requests for fees and costs in this motion. Class Counsel is requesting reimbursement of all costs incurred, the anticipated settlement administration costs to be incurred, and a $10,000 service award for DC16. Consistent with the benchmark stated in the Court's order, Class Counsel are requesting 30% of the settlement fund in attorneys' fees, net of costs. The Settlement Administrator will make this motion available on the settlement website so that Class Members may easily access it. (Intrepido-Bowden Decl., ¶ 17.)

III. ARGUMENT

To prevent fraud, collusion, or unfairness to the class, the settlement of a class action requires court approval. (*Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1800-01.) The court must determine that the settlement is "fair, adequate, and reasonable." (*Id*. at p. 1801.) The court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v. Super. Ct*. (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is reached through arm's'length bargaining; (2) the investigation is sufficient to allow counsel and the court to act intelligently; (2) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*Dunk*, 48 Cal.App.4th at 1800.) Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 ("[t]he fact that the plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement.").)

In considering whether a settlement is reasonable, the trial court should consider relevant factors, which may include the strength of the plaintiff's case, the risk, expense, complexity and likely

duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of government participants, and the reaction of class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself that the class settlement is within the "ballpark" of reasonableness (*Id.* at 133.) The record need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 (holding that Kullar does not require "an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims", but instead, only an "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.").)

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is presumption here that the negotiations were conducted in good faith. (Conte & Newberg, Newberg on Class Actions (3rd Ed. § 11.51.)

As discussed below, Class Counsel has provided information exceeding the threshold required to provide this Court with materials and information necessary to determine that the proposed settlement is fair, adequate, and reasonable.

A. Reasonable Notice Was Given to All Class Members

Notice requirements are set forth in the California Rules of Court. Cal. Rules of Court, rule 3.766. California law vests the Court with broad discretion in fashioning an appropriate notice program. (*Cartt v. Super. Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no statutory or due process requirement that all class members receive actual notice. Rather, as the Court of Appeal has explained, "[t]he notice given should have a reasonable chance of reaching a substantial percentage of the Class Members." (*Id*. at 974.)

The notice provided here, which reached the vast majority of Class Members – well over a "substantial percentage" meets and far exceeds that standard. (Intrepido-Bowden Decl., ¶ 25.) The

Settlement Administrator mailed notice to each Class Member and published the notice on the Settlement website, where Class Members may also access copies of the Settlement Agreement and other important documents. (*Id.* ¶ 14.)

As the Court recognized in granting preliminary approval, the Notices' substance complies with all applicable due process requirements. The Notices inform Class Member of the terms of the settlement and informed Class Members who wish to object to this settlement of their opportunity to submit written objections and/or be heard at the Final Approval hearing. (Id. Exh. A. at p. 6-7.) They summarized the proceedings to date and the terms and conditions of the settlement, in an informative and coherent manner. (*Id*., p. 3-4) The Notices made clear that the Settlement does not constitute an admission of liability by Sutter, which denies all liability, and recognizes that this Court has not ruled on the merits of the action. (*Id.*, p. 3) They further informed Class Members that the final settlement approval decision has yet to be made. (*Id*., p. 8.) Finally, the Notice directs Class Members with questions about the Settlement to contact Class Counsel or the Settlement Administrator, who maintains an email address dedicated to fielding inquiries from Class Members (*Id*.) Accordingly, the notice process complied with the standard of fairness and completeness required of a class settlement notice.

B. The Settlement is Fair, Reasonable and Adequate.

1. The Settlement Was Reached Through Arm's Length Negotiations.

The Settlement was reached following years of hard-fought litigation and after extensive, well-informed negotiations including two in-person mediation sessions – one in February 2020 with mediator Hon. Vaughn R. Walker, and the other in April 2024 with Robert Meyer. (Bailey Decl., ¶ 5,) The Settlement was reached only after a mediator's proposal was presented to the parties. (*Id.*) The settlement negotiations were at arm's length and although conducted in a professional manner, were adversarial. The Parties participated in mediation willing to explore the potential for settlement of the dispute, but each side was also prepared to litigate their position through trial and appeal if a settlement had not been reached. (*Id.* p. 6.)

2. Investigation and Discovery Were Sufficient to Allow Counsel to Act.

Prior to mediation and settlement, the Parties conducted substantial discovery and motion practice. In responding to the discovery, the parties produced 1.7 million pages of documents relevant to the claims in this case pursuant to document requests. (id., ¶ 18.) Approximately 27 party and third-party depositions of the health insurance intermediaries were taken including depositions of persons most qualified for identified topics. (*Id.*) Plaintiff gathered extensive and relevant information on Plaintiff's claims. After reviewing the produced documents and deposition testimony, Plaintiffs also retained the services of several experts who provided their opinions and declarations in support of Plaintiff's motion for class certification, and again in preparation for trial. (*Id.* ¶¶ 18, 28.)

In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses asserted in the litigation. Plaintiff litigated these claims vigorously, including moving for and obtaining Class Certification, and in successfully opposing Sutter's summary adjudication of its affirmative defenses and in opposing Sutter's two motions to compel arbitration. (Bailey Decl. ¶¶ 15-20.) The parties had the opportunity to review the expert opinions regarding liability and restitution. Thus, DC16 and Class Counsel were able to act intelligently and effectively in negotiating the proposed Settlement. (*Id.* ¶ 21.)

In assessing whether the settlement constitutes a reasonable compromise in light of the strength of the claims being released, courts must account for the risk and expense of continued litigation. (*Kullar, supra*, 168 Cal.App.4th at 129.) As noted above, the case was heavily litigated for nine years. The Class was certified, fact discovery was completed, expert reports were completed, and various pre-trial motions, including motions for summary adjudication of Sutter's affirmative defenses, were briefed and decided. Class Counsel did the work necessary to accurately assess issues of liability, restitution, and Sutter's remaining defenses. Based on that work, Plaintiff has assessed that there are multiple risks on all fronts favoring the settlement over proceeding to trial.

3. The Risk and Expense of Continued Litigation

The case would be brought to trial using significant evidence produced from the earlier *Rockville* litigation. In *Rockville*, three components of a 37x charge for anesthesia services were litigated: (1) the "anesthesia technician"; (2) the anesthesia machine; and (3) gases. Plaintiff anticipated presenting evidence that these items were not properly billed by Sutter under revenue code 37x, including evidence that (1) billing for the technician was billing for services not rendered because the technician is not present or otherwise assisting on the case throughout the chronometrically billed period, and the work was related to performing mainly small room turnover and set-up tasks that normally only take a few minutes at the beginning of each day or in between uses of the OR; (2) the anesthesia machine is OR equipment and therefore billed under the 36x OR charge; and (3) the gases were double billed under both the 37x and the 25x pharmacy charge. (Bailey Decl. ¶ 22.)

In opposition, Plaintiff anticipates Sutter would make several factual and legal arguments at trial which pose significant risks of an adverse outcome at trial. First, Sutter is expected to present expert and other evidence to show that the anesthesia technician and anesthesia machine are appropriately included in the 37x charge, and that gases were not included in the amount of the charge. (*Id.* ¶ 23.)

Second, Sutter is expected to argue Plaintiff's claims fail because Sutter did not make any misrepresentations, and specifically did not make any misrepresentations to the SFPs who are Class members because Sutter only sends its bills to insurance companies. In addition, Sutter is expected to present evidence that the insurance companies who received the bills did not find them to be false, fraudulent, unfair, or misleading. Third, Sutter is expected to present evidence that the alleged misrepresentations are not material to insurers because (1) charges were paid at negotiated rates and therefore are unrelated to the billed charges, and (2) insurers focus only on the cost of procedures as a whole (*e.g.*, for a knee-replacement surgery), not individual component costs such as anesthesia, and (3) insurers had no reaction in response to the *Rockville* settlement. (*Id.* ¶ 24.)

Lastly, Sutter is expected to present evidence that the statute of limitation eliminates a substantial number of the Class's claims, and that Plaintiff's restitution amounts are greatly inflated. Restitution experts for both parties prepared estimates of competing restitution amounts to be presented at trial. At the high end, Sutter's expert estimated restitution is approximately 1.5% of the lowest restitution estimate determined by Plaintiff's expert. (*Id.* ¶ 25.)

The litigation risks involve challenges to liability and restitution, significant additional expenses that would need to be expended in preparing the case for trial, and potential delay and costs of appeal. All these risks favor granting preliminary approval of the Settlement.

4. Plaintiff's Counsel Has Substantial Class Action Experience.

Class Counsel has considerable experience and has demonstrated competence with litigating class actions. Hausfeld has been recognized as a leading claimant firm in antitrust and complex class action litigation, having recovered 129 settlements totaling over $8.4 billion between 2009-2023 as recognized by the 2023 Antitrust Annual Report, published by the Center for Litigation and Courts, UC Law SF and The Huntington National Bank. Class Counsel has substantial experience in all facets of litigation in state and federal court, including discovery, law and motion, trial, appeals, and mediation. Class Counsel have litigated numerous class actions on behalf of plaintiffs and have been lead counsel or otherwise exercised significant case handling responsibilities in numerous cases. (Bailey Decl., ¶ 27.)

Based on Class Counsel's experience as class action attorneys, Class Counsel is eminently qualified to evaluate the strength of Plaintiff's claims, the strength of Defendants' defenses, and the fairness of the Settlement. Their opinion that final approval of the Settlement would be in the best interest of class members in light of the significant risks of litigation is entitled to great weight. (See *Kullar*, *supra*, 168 Cal.App.4th at 129 ("The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct.").)

5. Objections to the Settlement Are Expected to Be Absent or Minimal.

Factors to be considered in evaluating a class action settlement include "the reaction of the class members to the proposed settlement." (*Kullar*, 168 Cal.App.4th at 128.) The reaction here has been overwhelmingly positive. To date, no Class Members have objected to the settlement. (Intrepido-Bowden Decl. ¶ 22.). Considering the potential class size of 14,500 Class Members, this represents an overwhelming positive response of the class which strongly supports final approval of the settlement (*See, e.g., In re Lifelock, Inc. Marketing and Sales Practices Litigation* (D. Ariz., Aug. 31 2010, No. 08-1977) 2010 WL 3715138, at *6 (relatively few objections support approval); *In re Anthem, Inc. Data Breach Litigation* (N.D. Cal. 2018) 327 F.R.D. 299, 320 ("low rates of objections … are 'indicia of the approval of the class'".).)

Considering the factors discussed above, the Court should find that the Settlement is fair, reasonable, and adequate.

C. Class Counsel is Entitled to Attorneys' Fees Under California Law

Under California law, the court is empowered to award reasonable attorneys' fees and costs when a litigant proceeding in a representative capacity has achieved a "substantial benefit" for a class of persons. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 38.) There are two methods for calculating attorneys' fees in a civil class action: (1) the lodestar/multiplier method, and (2) the percentage of recovery method. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 254.)

Class Counsel obtained a great result for the Class after thorough investigation, litigation, mediation, and negotiation of a settlement. Class Counsel also performed a substantial amount of work in the case. As set forth below, Class Counsel's request is reasonable under either approach, particularly when measured against the significant negative multiplier on Class Counsel's lodestar that the requested fee represents.

1. The Percentage of the Recovery Method Supports the Requested Fees.

The purpose of the common fund approach is to "spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*

Hughes Air West, Inc. (9th Cir. 1977) 557 F.2d 759, 769; *Quinn v. State of California* (1975) 15 Cal.3d 162, 167 (One who expends attorneys' fees in winning a suit that creates a common fund may require passive beneficiaries who derive benefits from a common to bear a fair share of the litigation costs.); *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110.)

When class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable power awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. (*Laffitte v. Robert Half Internat. Inc*. (2016) 1 Cal.5th 480, 503.) Numerous other courts have recognized the advantage of awarding fees as a percentage of the common fund over the alternative lodestar approach, which usually involves review of voluminous time records (*See e.g., In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375; *see also Lealao v. Beneficial Cal., Inc*. (2000) 82 Cal.App.4th 19, 28.)

Class Counsel seeks an award of $2,490,342.82 in attorneys' fees, equivalent to 30% of the $11 million common fund (after deduction of the costs) on the common fund theory. This figure is reasonable and falls within the range that California courts usually award in class actions, and this settlement provided substantial benefits to class members and advanced the public interest.

A 33% fee award is the custom and practice in common fund class action cases (*See Lafitte, supra,* 1 Cal.5th 480, 487-88 ("an award of one-third the common fund was in the range set by other class action lawsuits"); *see also Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn.11 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").) Here, Class Counsel seeks a 30% fee award, less than the customary award, so it falls within the range of reasonableness consistent with similar awards in California.

2. The Lodestar and Multiplier Analysis Confirms Reasonableness.

Class Counsel's fee application is also reasonable based on the lodestar method. The lodestar figure is calculated by multiplying the hours spent on the case by the reasonable hourly rates for the

region and attorney experience. (*In re Bluetooth Headset Products Litigation* (9th Cir. 2011) 654 F.3d 935, 941-42.) The hours spent and the reasonable hourly compensation are computed to arrive at a "lodestar" figure which may be augmented or diminished by various "multiplier" factors. (*See Ramos v. Countrywide Home Loans, Inc*. (2000) 82 Cal.App.4th 615, 622.) In addition to determining the fee award in the first instance, Courts may also use the lodestar method "to confirm or question the reasonableness" of a percentage of recovery award. (*Lafitte, supra*, 1 Cal.5th 480, 496.)

Multiplying the total hours billed by Class Counsel to the litigation by their reasonable hourly historical rates yields a lodestar of almost 13 million, which is significantly more than the $2,490,342.82 in attorneys' fees Class Counsel are requesting. When plaintiffs seek an amount in fees that is less than what they actually billed – sometimes called a negative multiplier - the requested fee amount is generally considered "a reasonable and fair valuation of the services rendered." (*Chun-Hoon v. McKee Foods Corp*. (N.D. Cal. 2010) 716 F.Supp.2d 848, 854.)

Class Counsel expended a significant amount of time litigating the case to achieve a result that benefits the class. To date, Class Counsel collectively spent over 16,800 hours devoted to tasks necessary for litigating the case, which includes over 14,000 hours in attorney time (Bailey Decl. ¶¶ 28-29.)

3. The Substantial Contingent Risk, Including the Risk of Further Litigation, Supports the Requested Fees

The contingent risk that Class Counsel assumed in prosecuting the action supports the requested attorneys' fees and costs. (*Churchill Village, L.L.C. v. Gen. Electric* (9th Cir. 2004) 361 F.3d 566, 575.) Class Counsel took this case on a pure contingency basis, and had no guarantee that they would receive any remuneration for the many hours they spent litigating the Class's claims, or for the 2.5 million in out-of-pocket costs they reasonably incurred to date.

Large scale litigation of this type is, by its very nature, complicated and time consuming, and any law firm undertaking representation of thousands of class members inevitably must be prepared to make a significant investment of time, energy, and resources. Lawyers must be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee recovery of any kind.

(*Vizcaino v. Microsoft Corp*. (9th Cir. 2002) 290 F.3d 1043, 1051.) The demands and risks of this type of litigation overwhelm the resources, and deter participation, of many traditional claimants' firms. For these reasons, California courts recognize a need to reward plaintiff's counsel who accept cases on a pure contingency basis. (*Ketchum v. Moses,* (2001) 24 Cal.4th 1122 (California Supreme Court instructing courts to upwardly adjust fee compensation to ensure that the fees account for contingency risk.).) The high contingent risk borne by Class Counsel supports the fee request.

D. Class Counsel's Costs Are Reasonable

Class Counsel seeks reimbursement of costs in the amount of $2,514,857.27. (Bailey Decl.¶ 34.) These costs were reasonably incurred in prosecuting this action on behalf of the Class and should be approved by the Court. (*Id.* ¶ 34.-35) Counsel can recover "out-of-pocket" expenses that would normally be charged to a fee-paying client including costs of service of summons and complaint, service of subpoenas, experts at deposition, postage, document copying, reimbursement for travel, meals, lodging, long-distance telephone calls, computer legal research, courier services, mediation, and similar costs. (*See Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19; *Rutti v. Lojack Corp*. (C.D. Cal., July 31, 2012, No. CV 06-00350) 2012 WL 3151077, at *12.) Such costs are properly recoverable on motions for settlement approval. (*See Nunez v. BAE Systems San Diego Ship Repair Inc*. (S.D. Cal. 2017) 292 F.Supp.3d 1018, 1057; *Rutti, supra,* 2012 WL 33151077, at *2.)

E. The Service Award to the Class Representative is Fair and Reasonable.

Named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz, supra,* 186 Cal.App.4th at 412.) Courts routinely grant approval of class action settlement agreements that permit the class representatives to seek such awards, which are necessary to provide incentive to represent the class and are appropriate giving the benefit the class representatives help to bring about for the class (*See Rodriquez v. W. Publishing Corp*. (9th Cir. 2009) 563 F.3d 948, 958-59; *see also Clark v. Am. Residential Services LLC* (2009) 175 Cal.App.4th 785, 804; *Cellphone Term. Fee Cases* (2010) 186 Cal.Supp.4th 1380, 1394.) The criteria courts use in determining whether

to make an incentive award include: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation, and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. (*Cellphone*. at 1394-95; *see also Clark, supra,* 175 Cal.App.4th at 807) (an incentive, enhancement, or service award must be supported with "quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs.").)

Here, Plaintiff has the right to move the Court for an incentive service award paid from the gross settlement amount. As detailed in Plaintiff's concurrently filed declarations, DC16 devoted a great deal of time and effort assisting counsel in the case (Bailey Decl. ¶¶ 38-46; Declaration of Robert Williams III ("Williams Decl."), ¶¶ 6-14.) Among other things, DC16 spent a substantial amount time in participating in and preparing for depositions, responding to discovery requests, assisting with declarations in support of Class Counsel's briefing, as well as participating in meetings and calls monitoring and supervising the case. (*Id.*). DC16 incurred financial and other risks that support the award. (Williams Decl., ¶ 7.)

IV. CONCLUSION

For the foregoing reasons, Plaintiff, through its counsel, respectfully requests that the Court grant final approval of the proposed class action settlement and enter an order awarding the attorneys' fees and costs requested and requested service award for DC16.

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By: _____

Christopher L. Lebsock (Bar No. 184546)
Arthur N. Bailey, Jr. (Bar No. 248460)
Bruce J. Wecker (Bar. No. 78530)
HAUSFELD LLP
580 California St., 12th Floor
San Francisco, CA 94104
(415) 633-1908

clebsock@hausfeld.com
abailey@hausfeld.com
bwecker@hausfeld.com