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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

14 **NICHOLAS C. SMITH-WASHINGTON,**)
 15 **JOYCE MAHONEY, JONATHAN AMES,**)
 16 **MATTHEW HARTZ, and JENNY LEWIS** on)
 behalf of themselves and all others similarly)
 situated,)
 17 Plaintiffs,)
 18 vs.)
 19 **TAXACT, INC.,** an Iowa corporation,)
 20 Defendant.)

Case No. 3:23-CV-830-VC
 Assigned for all purposes to Hon. Vince Chhabria
**PLAINTIFFS’ NOTICE OF MOTION AND
 MOTION FOR APPROVAL OF
 ATTORNEYS’ FEES, EXPENSE AWARD,
 AND SERVICE AWARDS;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF**
 Courtroom: 4, 17th Floor
 Hearing Date: November 21, 2024
 Hearing Time: 2:00 p.m.

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on November 21, 2024, at 2:00 p.m., or as soon thereafter as this matter may be heard, before the Honorable Vince Chhabria, in Courtroom 4, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs Nicholas C. Smith-Washington, Joyce Mahoney, Jonathan Ames, Matthew Hartz, and Jenny Lewis (“Plaintiffs” or “Settlement Class Representatives”), by and through their undersigned counsel, will and hereby do move the Court for: (1) an order awarding attorneys’ fees to Class Counsel of up to \$5,812,500 calculated as follows: \$4,362,500, which is 25% of the \$17,450,000 Total Cash Settlement Amount (which comprises a non-reversionary \$14,950,000 common fund plus \$2,500,000 for notice and case administration costs), payable 30 days after the Final Approval and Final Judgment become final, plus *up to* \$1,450,000, which is between 4.68% and 25% of the anticipated actual redeemed value of the In-Kind Payment, payable at the time (after May 2025) when a reasonable valuation of the redeemed value of the In-Kind Payment can be ascertained; (2) reimbursement of the expenses Class Counsel incurred litigating this action, in the amount of \$57,558.36, and (3) service awards of \$10,000 for each of the five Named Plaintiffs in this action.

Plaintiffs’ motion is based upon this Notice, the Memorandum of Points and Authorities filed herewith, the Declaration of Julian Hammond (“Hammond Decl.”), and exhibits thereto, filed herewith, the Declaration of Warren D. Postman (“Postman Decl.”), and the exhibit thereto, filed herewith, the Court’s record in this matter, and such oral and documentary evidence as may be presented in connection herewith.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should award Class Counsel attorneys’ fees in the amount of 25% of the Total Cash Settlement Amount (\$4,362,500) plus up to \$1,450,000 based on the redeemed value of the In-Kind Payment;

2. Whether the Court should hold back \$1,450,000 from the cash settlement until such time (after May 2025) as the redeemed value of the in-kind relief can be ascertained;

1 3. Whether Class Counsel should be reimbursed for the reasonable and necessary expenses
2 they incurred in furtherance of this action; and

3 4. Whether the Court should award Service Awards to the five Settlement Class
4 Representatives of \$10,000 each, for their time spent, efforts made, and risks undertaken in pursuing this
5 action.

6
7 Dated: July 29, 2024

Respectfully submitted,

8 **HAMMONDLAW, P.C.**

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25 *Attorneys for Plaintiffs and the Putative Classes*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Nicholas C. Smith-Washington, Joyce Mahoney, Jonathan Ames, Matthew Hartz, and Jenny Lewis (“Plaintiffs” or “Class Representatives”) and HammondLaw, P.C. and Keller Postman LLC (“Class Counsel”) respectfully seek approval of their request for attorneys’ fees, expense award, and service awards for Plaintiffs in connection with the class-wide settlement in this case.

Plaintiffs and Class Counsel have achieved an excellent result while facing a very real and substantial risk that Plaintiffs’ claims would be compelled to individual arbitrations. Defendant has agreed to pay \$17,450,000 for the benefit of the Settlement Classes (which comprises a \$14,950,000 non-reversionary common fund plus \$2,500,000 for notice and case administration costs, any unused portion of which will be distributed to the Settlement Classes), and to provide substantial in-kind relief with an estimated expected redeemed value of \$5,800,000 and a potential value of as much as \$31 million (based on a 5% claims rate); for a total estimated settlement value of at least \$23,250,000. In addition, Defendant has also entered into a Stipulated Consent Judgment with the Missouri Attorney General which enjoins the practices challenged by Plaintiffs.

This substantial recovery was achieved due to Class Counsel’s skill, experience, and tremendous efforts to investigate, develop, litigate, and ultimately resolve the case under significant time pressure and risk created by the pending motion to compel arbitration. The result in this case stands in stark contrast to the results in *Kirkham v. TaxAct*, No. 23-cv-3303, 2024 WL 1143481 (E.D. Pa. Mar. 15, 2024), in which the court granted TaxAct’s motion to compel the claims of direct filers to individual arbitration (and denied it with respect to married non-filers),¹ and in two similar cases, *Caimano v. H&R Block*, No. 23-cv-3272, 2024 WL 3295589 (E.D. Pa. July 3, 2024) (granting defendants’ motion to compel arbitration and stay proceedings) and *Hunt v. Meta Platforms, Inc.*, No. 23-cv-04953, 2024 WL 1561469 (N.D. Cal. Apr. 11, 2024) (granting H&R Block’s motion to compel arbitration).

¹ Despite the fact that plaintiff’s counsel in *Kirkham* followed Class Counsel’s lead in the instant case at nearly every turn (filing the complaint six months after the complaint was filed in this case; adding a claim on behalf of married joint filers six months after it was added in this case; and filing a virtually identical motion for protective order and corrective notice after one was filed in this case), plaintiff’s counsel in *Kirkham*, to date, was not able to achieve any class benefit. *See* Hammond Decl. ¶ 8.

1 For their efforts and the significant financial risks assumed, Class Counsel seek a fee award of
 2 up to \$5,812,500, calculated as follows: \$4,362,500, which is 25% of the \$17,450,000 Total Cash
 3 Settlement Amount, plus *up to* \$1,450,000, based on the actual redeemed value of the In-Kind Payment.²
 4 Class Counsel request that the Court award \$4,362,500 from the cash settlement at the time of final
 5 approval, and hold back \$1,450,000 from the cash settlement in order to award attorneys’ fees on the
 6 value of the In-Kind Payment when the actual redeemed value can be ascertained (in or about May 2025),
 7 with the amount, if any, not ultimately awarded as fees to be paid to the designated *cy pres* beneficiary.

8 The requested fee award is consistent with the Ninth Circuit “benchmark” and is fair and
 9 reasonable as detailed below and in the accompanying declarations. Importantly, there is no clear sailing
 10 provision in the Settlement Agreement.

11 Class Counsel also seek \$57,558.36 in litigation costs, and service awards of \$10,000 for each
 12 Class Representative for their time spent, efforts made, and risks faced in representing the Classes.

13 **II. RELEVANT BACKGROUND**

14 Consistent with the Northern District’s Procedural Guidance, Plaintiffs do not repeat the
 15 background of the case here, except to provide context for the fees request.

16 **A. Overview of the Litigation Work Performed by Class Counsel**

17 As of July 19, 2024, Class Counsel have devoted 2,984.07 hours to the prosecution of this action,
 18 with a lodestar of \$2,582.024.05. The fee award requested represents a multiplier of 2.25. Hammond
 19 Decl. ¶ 13 and Ex. 1. Class Counsel dedicated very substantial efforts to this Action from its outset and
 20 have devoted their time and resources on a contingent basis, without any guarantee of recovery.

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 24 ² If the redeemed value of the in-kind relief is \$5.8 million, then the requested \$1,450,000 will represent
 25 25% of the actual redeemed value. If the actual redeemed value is greater than \$5.8 million, Class
 26 Counsel will not seek fees greater than the \$1,450,000 they ask the Court to hold back, and, thus, will
 27 seek less than 25% of the redeemed value. If, for example, the redeemed value is \$31 million, then the
 28 \$1,450,000 Class Counsel will seek in fees will represent just 4.68% of the redeemed value. If the actual
 redeemed value of the in-kind relief is less than \$5.8 million, Class Counsel will seek attorneys’ fees of
 25% of that lower value (i.e., less than \$1,450,000), and the remaining portion of the amount held back
 by the Court will be paid to the designated *cy pres* beneficiary. Hammond Decl. ¶¶ 11-12.

1 **1. Pre-Filing Research and Investigation, and Complaints**

2 Class Counsel thoroughly researched applicable law and facts, including statutes and regulations
3 governing tax preparation providers, communicated with users of Defendant’s services and obtained
4 documents from them, analyzed the tracking tools embedded on Defendant’s website with the assistance
5 of experts, analyzed cases filed against other companies for similar digital privacy violations, drafted the
6 detailed initial Complaint, as well as drafted two amended complaints adding claims and a new class of
7 married non-filers (including fully briefing a motion for leave to amend). Hammond Decl. ¶¶ 18-22, 36-
8 38, 48.

9 **2. Motions to Compel**

10 Defendant’s Motion to Stay (“first Motion to Compel”), filed swiftly after Defendant removed
11 Plaintiffs’ Complaint to this Court, threatened Plaintiffs’ ability to proceed on a class-wide basis and
12 Class Counsel worked diligently to oppose it. Counsel researched and crafted an opposition and a
13 surreply, resulting in Class Counsel successfully opposing Defendant’s Motion. However, the Court’s
14 denial of Defendant’s motion was without prejudice (Dkt. 44) and Defendant quickly filed its second
15 and third Motions to Compel. Dkt. 50, 68. Counsel researched and drafted another opposition to address
16 new issues and arguments raised in Defendant’s Motions related to the new allegations and a new class
17 of married non-filers added in the First Amended Complaint. The opposition was supported by over 500
18 pages of documents, including deposition transcripts, declarations from Plaintiffs, and a request for
19 judicial notice. Dkt. 79-1 to 79-14. Class Counsel also filed a 33-page separate evidentiary objection.
20 Dkt 78, 80. Defendant’s third Motion to Compel was set to be heard on January 25, 2024. The parties
21 agreed to a settlement just two weeks before the scheduled hearing. Hammond Decl. ¶¶ 23-26, 36-42.

22 **3. Discovery**

23 Class Counsel conducted extensive discovery. Following the denial of Defendant’s first Motion
24 to Compel, Class Counsel served two sets of written discovery, met and conferred with Defendant
25 extensively over its responses and objections, reviewed over 7,336 pages that were produced by
26 Defendant and over 100 pages of written discovery responses, and obtained further information and data
27 as part of an informal exchange of documents prior to mediation. Plaintiffs also took the depositions of
28 Defendant’s Marketing Technology Expert and of its Vice President of Tax Operations (at Defendant’s

1 Counsel’s Chicago office), and served third-party subpoenas on Meta and Google. Hammond Decl.
2 ¶¶ 27-34.

3 **4. Mediation, Further Litigation, and Further Settlement Efforts**

4 Mediation and settlement negotiations were extensive, contentious and protracted, conducted
5 over a three-month period. Class Counsel poured tremendous energy and resources into preparing for
6 mediation. Class Counsel thoroughly analyzed TaxAct’s corporate structure, the merger and sales
7 agreement of TaxAct from Blucora to Avantax (including whether Blucora and/or Avantax bore liability
8 for TaxAct’s actions challenged in this case), assessed potential insurance coverage, reviewed
9 comparable settlements, participated in dozens of video conferences and telephones calls, and exchanged
10 emails regarding the documents and information to be informally produced by Defendant. Class Counsel
11 drafted two detailed mediation briefs (totaling 22 pages of single-spaced text) accompanied by extensive
12 supporting evidence. Hammond Decl. ¶ 45.

13 Following more than eight hours of arm’s-length negotiations at mediation, the case did not settle.
14 With Defendant’s Motion to Compel pending and posing a risk of no class recovery, Class Counsel
15 quickly pivoted back to litigating and at the same time continued to pursue settlement, holding dozens
16 of video conferences and telephone calls, including on New Year’s Day, and exchanging numerous
17 emails with Defendant’s Counsel in an attempt to reach class settlement, which the parties finally reached
18 in early January 2024. Hammond Decl. ¶¶ 46, 48-51.

19 After reaching an agreement to settle in principle, the parties spent six weeks resolving the final
20 details of the Settlement, including obtaining administration bids, and meeting extensively with each
21 potential administrator to select the one best suited to handle this settlement. Hammond Decl. ¶¶ 51-55.
22 Class Counsel has since spent many hours of work obtaining preliminary approval, overseeing the notice
23 process, responding to questions from class members, drafting the instant motion, and will spend many
24 additional hours of work before this case is concluded. *Id.* ¶¶ 56-58.

25 **B. Benefit Negotiated for the Classes Under the Settlement**

26 Class Counsel’s efforts resulted in a very favorable settlement for the Classes, one which the
27 Court found is “fair, reasonable, and adequate.” Dkt. 132, at p. 2. As stated above, Defendant has agreed
28 to pay \$17,450,000 for the benefit of the Class, which comprises a \$14,950,000 common fund plus

1 \$2,500,000 set aside to be used towards Notice and Administration Costs, with any unused remainder of
 2 that total amount, after court-approved fees, litigation expenses, service awards to the Plaintiffs, and
 3 costs of notice and administration, to be distributed to the Settlement Class Members who submit a valid
 4 claim form, in accordance with the Plan of Allocation.

5 In addition to the cash component, the Settlement provides for in-kind relief in the form of
 6 complimentary access to TaxAct® Xpert Assist for Class Members who submit a valid claim form.
 7 Xpert Assist is an add-on feature that TaxAct offers to its customers that provides live advice and
 8 assistance from tax experts to customers completing a tax return through TaxAct. Xpert Assist is
 9 available for all online do-it-yourself consumer Form 1040 tax filing products (including products that
 10 are free) and is currently offered by TaxAct at a cost of \$59.99. Assuming a 5% claims rate, the total
 11 redeemable value of the in-kind relief would be as much as \$31 million. Hammond Decl. ¶¶ 67.

12 C. Distribution of Notice

13 As required by the Settlement Agreement and the Preliminary Approval Order, the Settlement
 14 Website and the Notice, which was mailed and/or emailed to the Class on June 13, provide Class
 15 Members with detailed information about the case and access to key documents. As relevant here, the
 16 Notice explains the requested fees award, reimbursement of litigation expenses, and service awards for
 17 the Plaintiffs. This motion and the forthcoming motion for final approval will be added to the Settlement
 18 Website when they are filed with the Court. Hammond Decl. ¶ 2.

19 The deadlines to opt-out and submit objections are still weeks away. Class Counsel anticipates
 20 that, given the size of the settlement and the size of the Class, the fact that one objection was filed already
 21 (Dkt. 133), and that counsel for the plaintiff in the *Kirkham* matter stated their intention to file an
 22 objection (*see* Dkt. 122), several objections will be filed to which Class Counsel will respond by the
 23 deadline set by the Court. Class Counsel also anticipates that the total number of opt-outs and objections
 24 will demonstrate the overwhelmingly positive reaction of the Class.

25 III. THE COURT SHOULD GRANT CLASS COUNSEL’S ATTORNEYS’ FEES REQUEST

26 A. Legal Standard

27 Federal Rule of Civil Procedure 23(h) provides that courts may award “reasonable attorney’s
 28 fees and nontaxable costs that are authorized by law or the parties’ agreement.” Fed. R. Civ. P. 23(h). It

1 is well established that where, as here, “a lawyer who recovers a common fund for the benefit of persons
2 other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing*
3 *Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047
4 (9th Cir. 2022). The Ninth Circuit applies two primary methods to calculating attorneys’ fees: the
5 “percentage of the fund” method or the “lodestar” method. *See In re Online DVD-Rental Antitrust Litig.*,
6 779 F.3d 934, 949 (9th Cir. 2015). The trend in this Circuit is to use the percentage of recovery as the
7 dominant approach in common fund cases. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046
8 (N.D. Cal. 2008); *see also Vizcaino*, 290 F.3d at 1050 (same proposition). “[T]he percentage of the
9 available fund analysis is the preferred approach in class action fee requests because it more closely
10 aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the
11 size of the class fund and working in the most efficient manner.” *Aichele v. City of Los Angeles*, No. 12-
12 cv-10863, 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015); *see also Thomas v. MagnaChip*
13 *Semiconductor Corp.*, No. 14-cv-01160, 2018 WL 2234598, at *3 (N.D. Cal. May 15, 2018) (percentage
14 of the fund approach is preferred in common-fund settlements to the often more time-consuming task of
15 calculating the lodestar” (citation omitted)).

16 **B. Class Counsel’s Fee Request is Appropriate Under the Percentage Method**

17 A common fund includes the value of the benefits made available to the Class, including the
18 value of both monetary benefits (including attorneys’ fees, litigation expenses, notice costs) and any in-
19 kind relief. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 953 (“The district court did
20 not abuse its discretion in calculating the fee award as a percentage of the total settlement fund, including
21 notice and administrative costs, and litigation expenses.”); *see also Staton v. Boeing*, 327 F.3d 938, 974-
22 75 (9th Cir. 2003) (noting “costs of providing notice to the class can reasonably be considered a benefit
23 to the class” and “courts should consider the value of the injunctive relief obtained as a ‘relevant
24 circumstance’ in determining what percentage of the common fund class counsel should receive as
25 attorneys’ fees.”); *Rael v. Children’s Place, Inc.*, No. 16-cv-370, 2024 WL 1898455, at *2 (S.D. Cal.
26 Apr. 30, 2024) (Order granting renewed fees motion, in part, and stating court must use percentage-of-
27 recovery method to award attorneys’ fees based on actual redeemed value of vouchers for use at The
28 Children’s Place).

1 Here, Class counsel, through its efforts, has created a common fund for the benefit of the Class
2 the value of which exceeds \$23 million: as described above the common fund includes a \$17,450,000
3 Total Cash Settlement Amount plus substantial in-kind relief with an estimated expected redeemed value
4 of \$5,800,000 and potential redeemed value of \$31 million. Hammond Decl. ¶ 3.

5 **1. The Court Should Grant the Benchmark Request from the Cash Settlement**

6 For common fund settlements, like this one, the Ninth Circuit has set the “benchmark” fee award
7 at 25 percent of the recovery obtained. *Vizcaino*, 290 F.3d at 1047. The 25% benchmark is “of the total
8 settlement value, including both monetary and non-monetary recovery.” *Kumar v. Salov N. Am. Corp.*,
9 No. 14-cv-2411, 2017 WL 2902898, at * 7 (N.D. Cal. July 7, 2017) (citing *Six (6) Mexican Workers v.*
10 *Ariz. Citrus Growers*, 904 F. 2d 1301, 1311 (9th Cir. 1990)).

11 Class Counsel seek the standard benchmark fee of 25% of the \$17,450,000 Total Cash Settlement
12 Amount (which comprises \$14,950,000 non-reversionary common fund plus \$2,500,000 for notice and
13 administration costs, any unused remainder of which will be added to the common fund). While in many
14 cases the costs of notice and case administration are paid out of the common fund, in this case, Defendant
15 will pay such costs separately. Either way, as discussed above, such costs are appropriately included in
16 the total settlement value for purposes of calculating fee awards. *See In re Online DVD-Rental Antitrust*
17 *Litig.*, 779 F.3d at 953; *see also Staton*, 327 F.3d at 974-75.

18 Class Counsel respectfully submit that their request for 25% of the Total Cash Settlement
19 Amount is reasonable and would compensate them for their investment of time, skill, and capital, which
20 produced excellent results for the Settlement Classes in a case that was complex and highly risky. As
21 discussed above, Plaintiffs faced a concrete and material risk that Defendant would be able to compel
22 their claims (at least those of direct filers) to individual arbitration. Plaintiffs also faced the risk that the
23 one-year statute of limitations in Defendant’s Terms would be enforced and would bar claims of most
24 Class Members, as well as that recovery would be limited to amounts paid by the Class Members. Given
25 these and other merits and certification risks, there was a very real risk of zero recovery and thus a real
26 risk that Class Counsel would receive no reimbursement for the over \$2.58 million incurred in fees (and
27 more than \$57,000 in litigation expenses). Thus, a benchmark fee award is more than justified.

1 **2. The Court Should Hold Back \$1,450,000 from the Cash Settlement and Award**
2 **Fees on the In-Kind Relief Once Actual Redeemed Value Can Be Ascertained**

3 Class Counsel also appropriately seek fees set at no more than 25% of the actual redeemed value
4 of the In-Kind Payment (up to a maximum redeemed value of \$5.8 million, giving a maximum fee award
5 of \$1,450,000). Assuming a 5% claims rate, the Xpert Assist benefit is potentially worth \$31 million.
6 Thus, this portion of Class Counsel’s requested fee represents between 4.68% and 25% of the redeemed
7 value, depending on the actual redemption rate. This portion of the fee request is, thus, entirely consistent
8 with the “benchmark” and is appropriate because it is tied to the benefit that will be received by the
9 Class. *See e.g.*, 28 U.S.C. § 1712 (“[T]he portion of any attorney’s fee award to class counsel that is
10 attributable to the award of the coupons shall be based on the value to class members of the coupons that
11 are redeemed”).

12 Class Counsel is not asking the Court to guess the value of the In-Kind Payment, but, rather, for
13 the Court to hold back \$1,450,000 from the cash settlement and revisit the portion of the fees request
14 based on the value of the in-kind relief when the actual redeemed value can be ascertained. The expected
15 date when the actual redeemed value can be ascertained is in or about May 2025, after the 2024 tax filing
16 deadline. This approach of holding back funds from the cash settlement and revisiting the fees request
17 at a later time fully comports with precedent in this Circuit. *See In re HP Inkjet Printer Litig.*, 716 F.3d
18 1173, 1186 n. 19 (9th Cir. 2013) (discussing with approval bifurcating fee awards to provide immediate
19 payment of fees on the guaranteed portion of settlement, and delaying future payment of fees until the
20 time ultimate class recovery can be ascertained); *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 662 (9th
21 Cir. 2020) (recognizing that in coupon settlements with extended redemption periods, a court may opt
22 to pay class counsel periodically as coupons are redeemed). This approach is also advocated by A Pocket
23 Guide for Judges. *See Managing Class Action Litigation: A Pocket Guide for Judges* (3d ed. 2010), at 34
24 (suggesting that courts “hold back the portion of any attorney fee award that is linked with coupons,
25 discounts, or other nonmonetary benefits until after the redemption period has ended and the value of
26 the benefits can be established by calculating class members’ actual use”).

27 The \$5.8 million value is based on the Xpert Assist’s price of \$59.99, an assumption of a 65%
28 year-over-year customer retention rate, and the conservative assumption that only 9-10% of the

1 Settlement Class Members who are returning users will take advantage of the Xpert Assist. Hammond
 2 Decl. ¶¶ 10, 64, 67. The Xpert Assist is correctly valued at its market value or price (as opposed to its
 3 cost to Defendant) because that is the value Class Members will actually receive. See *In re Online DVD-*
 4 *Rental Antitrust Litig.*, 779 F.3d 934 (holding that the in-kind relief (in the form of gift cards or vouchers)
 5 should be valued at dollar for dollar for purposes of calculating attorneys’ fees under the percentage-of-
 6 the-benefit method). *Id.* at 950, 952 n.11; see also *In re Equifax Inc. Customer Data Sec. Breach Litig.*,
 7 No. 17-md-2800, 2020 WL 256132, at *38 (N.D. Ga. Mar. 17, 2020), *aff’d as to attorneys’ fees*, 999
 8 F.3d 1247 (11th Cir. 2021) (“[C]ourts have often recognized the benefit of credit monitoring, use its
 9 retail cost as evidence of value, and consider that value in awarding fees.”).

10 **3. The Vizcaino Factors Confirm that the Requested Fee is Fair and Reasonable**

11 As the Ninth Circuit explained, “[s]election of the [25%] benchmark or any other rate must be
 12 supported by findings that take into account all of the circumstances of the case.” *Vizcaino*, 290 F.3d at
 13 1048. The non-exhaustive list of factors established in *Vizcaino* to evaluate the reasonableness of a
 14 percentage award include: (1) the results achieved for the class; (2) the risk undertaken by class counsel
 15 and the financial burden shouldered by counsel on a contingency basis; (3) the skill required and quality
 16 of work; and (4) awards made in similar cases. *Vizcaino*, 290 F.3d at 1048-50; see also *Tarlecki v. bebe*
 17 *Stores, Inc.*, No. 5-cv-1777, 2009 WL 3720872, at *4 (N.D. Cal. Nov. 3, 2009).

18 **a. Class Counsel Obtained a Very Favorable Result for the Settlement Class**

19 The degree of success is the most important factor in determining attorneys’ fees. See *Vizcaino*,
 20 290 F.3d at 1048. The result reached in this case – the \$17,450,000 Total Cash Settlement Amount and
 21 substantial In-Kind Payment – is a very favorable one for the Classes, especially considering the risk of
 22 much lower or no recovery – if the case was compelled to arbitration, and/or Defendant prevailed on any
 23 of its other defenses. Thus, while the maximum realistic damages in this case are \$151 million, this
 24 assumes that the case would not be compelled to individual arbitration, the one-year limitations periods
 25 in Defendant’s Terms of Service would not be upheld, and none of Defendant’s merits or certification
 26 defenses would prevail. Hammond Decl. ¶¶ 3, 5. As set forth in the preliminary approval papers, the
 27 result in this case – \$1.69 per class member – also compares favorably to the results achieved in other
 28 similar data privacy cases on a per-class member recovery basis. See e.g., *In re Vizio, Inc., Consumer*

1 *Privacy Litig.*, No. 16-ml-02693, 2019 WL 12966638 (C.D. Cal. July 31, 2019) (\$17 million settlement
2 on behalf of \$16 million class members, with a gross per class member recovery of \$1.06); *In re Plaid*
3 *Inc. Privacy Litig.*, No. 20-cv-03056, 2022 WL 2829882 (N.D. Cal. July 20, 2022) (\$58 million
4 settlement on behalf of 98 million class members, a \$0.59 gross, per class member recovery). *See also*
5 approved settlements providing only *cy pres* relief and/or injunctive relief, *Adkins v. Facebook, Inc.*,
6 No. 18-cv-05982, Dkts. 350, 369 (N.D. Cal. May 6, 2021) (approving settlement for injunctive relief
7 only, in class action arising out of Facebook data breach); *Lane v. Facebook*, No. 8-cv-3845, 2010 WL
8 9013059 (N.D. Cal. Mar. 17, 2010), *aff'd*, 696 F.3d 811 (9th Cir. 2012) (approving settlement of a VPPA
9 claim that only provided *cy pres* relief with no monetary relief for the Class).

10 **b. This Case Presented a Very Significant Risk of Total Loss**

11 Class Counsel accepted and pursued Plaintiffs' claims on a purely contingent basis and invested
12 considerable resources towards prosecution of this matter despite substantial risk of no recovery of their
13 invested time of more than 2,980 hours and expenses of over \$57,500. While attorneys often face the
14 prospect of non-payment when accepting a case on contingent basis, Plaintiffs' claims here carried an
15 exceptional risk of little or no recovery. While the Court denied Defendant's first attempt to compel
16 Plaintiffs' case to arbitration, it did so without prejudice and on somewhat technical grounds, which
17 served as a good indicator that Defendant's further attempt to compel arbitration could very likely be
18 successful and would leave Plaintiffs with no means for obtaining class relief. Hammond Decl. ¶ 5.

19 Moreover, even if Plaintiffs' claims proceeded in Court, Plaintiffs faced the risks, as discussed
20 above, that the Court would find that many of the Class Members' claims are time-barred and/or that
21 their recovery is limited to the amounts paid to use Defendant's services. *Id.* ¶ 3. Thus, if settlement was
22 not reached, recovery was very far from certain. Class Counsel's investment of substantial time and
23 resources in the face of these substantial risks justifies the requested benchmark fee. *See Vizcaino*, 290
24 F.3d at 1051 ("In common fund cases, 'attorneys whose compensation depends on their winning the
25 case[] must make up in compensation in the cases they win for the lack of compensation in the cases
26 they lose.'" (citation omitted)); *see also In re Omnivision*, 559 F. Supp. 2d at 1046-47.

1 **c. Class Counsel Provided Quality Representation**

2 “[T]he prosecution and management of a complex national class action requires unique legal
3 skills and abilities.” *In re Omnivision*, 559 F. Supp. 2d at 1047 (citation omitted); *Destefano v. Zynga,*
4 *Inc.*, No. 12-cv-04007, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) (same). Class Counsel are a
5 team of attorneys from two law firms, each with extensive experience representing plaintiffs in complex
6 class actions. *See* Hammond Decl. ¶¶ 79, 84-96; Postman Decl. ¶¶ 5-6, 11. Attorneys from these firms
7 have been appointed to serve as class counsel and/or co-lead counsel in large class actions, including
8 MDL actions. Hammond Decl. ¶¶ 79, 84-96 and Ex. 3; Postman Decl. ¶¶ 5-6, 11, & Ex. A.

9 Beyond general qualifications, the work performed by Class Counsel in this case can also be
10 measured by their ability to negotiate a settlement in excess of \$23 million while a fully-briefed motion
11 to compel was pending (and after a day-long mediation with a skilled mediator did not result in a
12 settlement). It is Class Counsel’s skill and quality representation that put them in the position to negotiate
13 a favorable settlement in the face of a pending motion to compel, whereas other similar cases, *Kirkham,*
14 *Caimano,* and *Hunt*, as noted in section I above, resulted in no class recovery. *Moreyra v. Fresenius*
15 *Med. Care Holdings, Inc.*, No. 10-cv-517, 2013 WL 12248139, at *3 (C.D. Cal. Aug. 7, 2013) (noting
16 that the result is “[t]he single clearest factor reflecting the quality of class counsels’ services”) (quoting
17 *In re Heritage Bond Litig.*, No. 2-ml-1475, 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005)).

18 The quality of opposing counsel should also be considered when evaluating the performance and
19 quality of work of Class Counsel. *See In re Am. Apparel, Inc. S’holder Litig.*, No. 10-cv-06352, 2014
20 WL 10212865, at *22 (C.D. Cal. July 28, 2014) (“In addition to the difficulty of the legal and factual
21 issues raised, the court should also consider the quality of opposing counsel as a measure of the skill
22 required to litigate the case successfully.” (citing *Wing v. Asarco Inc.*, 114 F.3d 986, 989 (9th Cir.
23 1997))). Defendant was represented by highly skilled attorneys from two nationally respected law firms
24 in the area of complex litigation – Sidley Austin LLP and Kirkland Ellis LLP, who provided vigorous
25 opposition and mounted strong defenses. Hammond Decl. ¶ 78. To combat such opponents, Class
26 Counsel was required to litigate at a very high level of skill, strategy and professionalism. *Id.*

1 **d. The Fee Requested is Within the Range of Fees Awarded in Similar Cases**

2 The benchmark of 25% percentage of recovery (and higher) has been found to be appropriate in
 3 similar complex data privacy cases by many courts in this Circuit. See, e.g. *In re Google Plus Profile Litig.*,
 4 No. 18-cv-06164, 2021 WL 242887, at *6-7 (N.D. Cal. Jan. 25, 2021) (awarding 25% of a \$7.5 million
 5 settlement), *appeal dismissed*, No. 21-15365, 2021 WL 7210686 (9th Cir. May 6, 2021); *In re: Vizio,*
 6 *Inc., Consumer Priv. Litig.*, 2019 WL 12966638, at *6 (awarding 33.33% of a settlement that included a
 7 \$17 million cash fund and injunctive relief); *In re Lenovo Adware Litig.*, No. 15-md-02624, 2019 WL
 8 1791420, at *8 (N.D. Cal. Apr. 24, 2019) (awarding 30% in fees of an \$8.3 million settlement); *Lane v.*
 9 *Facebook, Inc.*, No. 8-cv-3845, 2010 WL 2076916, at *2 (N.D. Cal. May 24, 2010) (awarding class
 10 counsel attorney fees of approximately 25% of a \$9,500,000 fund involving *cy pres* recipients). And in
 11 cases with similarly sized settlement funds. See, e.g., *Abadilla v. Precigen, Inc.*, No. 20-cv-06936, 2023
 12 WL 7305053, at *15 (N.D. Cal. Nov. 6, 2023) (awarding 25% in fees of a \$13 million settlement fund);
 13 *In re: Roundup Prods. Liab. Litig.*, 666 F. Supp. 3d 1011, 1014 (N.D. Cal. 2023) (awarding 25% in fees
 14 of settlement value of \$23 million).

15 **C. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee**

16 “As a final check on the reasonableness of requested attorneys’ fees, courts often compare the
 17 amount counsel would receive under the percentage-of-recovery method with the amount counsel would
 18 have received under the lodestar method.” *In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185, 2019
 19 WL 6622842, at *12 (N.D. Cal. Nov. 12, 2019); see also *Vizcaino*, 290 F.3d at 1050 (“Calculation of
 20 the lodestar, which measures the lawyers’ investment of time in the litigation, provides a check on the
 21 reasonableness of the percentage award.”). The lodestar method requires multiplying the hours invested
 22 in the case by counsel by a reasonable hourly rate. The figure is then often enhanced to account for the
 23 results achieved and the risk of nonpayment. See *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245,
 24 261-62 (N.D. Cal. 2015); see also *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479, 2018 WL 6619983,
 25 at *14 (N.D. Cal. Dec. 18, 2018), *aff’d sub nom. Hefler v. Pekock*, 802 F. App’x 285 (9th Cir. 2020).
 26 The cross-check does not require “mathematical precision or bean counting.” *In re Capacitors Antitrust*
 27 *Litig.*, No. 17-md-02801-JD, 2018 WL 4790575, at *6 (N.D. Cal. Sept. 21, 2018). Rather, the aim of the
 28 cross-check is to “do rough justice.” *Hefler*, 2018 WL 6619983, at *14 (citation omitted).

1 **1. The Number of Hours Devoted to the Case Was Reasonable**

2 Class Counsel have expended 2,984 hours in this litigation, as of July 19, 2024, for a total lodestar
3 of \$2,582,024.50. Hammond Decl. ¶ 13. Summary reports of these hours based on the actual billing
4 records, are included in Class Counsel’s declarations for the Court’s review. Hammond Decl. ¶¶ 15-59,
5 Ex. 1; Postman Decl. ¶¶ 15-20. In calculating their lodestar, Class Counsel exercised billing judgment
6 by deleting time entries totaling more than 500 hours that were duplicative, inefficient, excessive, or
7 otherwise non-compensable. Hammond Decl. ¶ 78; Postman Decl. ¶ 20.

8 As described in section II.A above, Class Counsel did a great deal of work in order to achieve
9 the excellent result in this case including thoroughly researching the facts and the applicable law,
10 including expert-led review of tracking tools at issue; developing theories of the case and assessing the
11 viability of potential claims; drafting complaints; opposing Defendant’s Motions to Compel; engaging
12 in substantial written and oral discovery; preparing for and participating in a full-day mediation and
13 subsequent intense and difficult settlement negotiations after mediation failed, while at the same time
14 continuing to vigorously litigate the case and engaging in discovery and motion practice; negotiating and
15 finalizing the Settlement Agreement and selecting a settlement administrator; following developments
16 in similar cases; obtaining preliminary approval; overseeing the notice process and responding to Class
17 Member inquiries. Hammond Decl. ¶¶ 15-59, Ex. 1; Postman Decl. ¶¶ 15-20.

18 The hours spent were reasonably necessary to the conduct of the litigation and to the ultimate
19 success and excellent result achieved. The litigation was highly contentious and vigorous and Class
20 Counsel’s relentless approach to both litigation and settlement negotiations was, in Class Counsel’s
21 opinion, key to the success achieved. At the same time, Class Counsel worked to litigate this case as
22 efficiently as possible. The work was largely handled by six core attorneys, including two partners and
23 two other highly experienced attorneys from HammondLaw and one partner and one other experienced
24 attorney from Keller Postman, who together billed 78.9% of hours to this case. This core group was
25 assisted as needed by other attorneys and staff. Hammond Decl. ¶¶ 77-78, Ex. 2; Postman Decl. ¶¶ 16-
26 19.

1 **2. Class Counsel’s Hourly Rates Are Reasonable**

2 In assessing the reasonableness of an attorney’s hourly rate, courts consider whether the claimed
3 rate is “in line with those prevailing in the community for similar services by lawyers of reasonably
4 comparable skill, experience and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895-96, 895 n. 11 (1984).
5 Courts apply each biller’s current rate for all hours of work performed, regardless of when the work was
6 performed, as a means of compensating for the delay in payment. *In re Wash. Pub. Power Supply Sys.*
7 *Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994); *see also Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th
8 Cir. 2016) (“The lodestar should be computed either using an hourly rate that reflects the prevailing rate
9 as of the date of the fee request, to compensate class counsel for delays in payment inherent in
10 contingency-fee cases, or using historical rates and compensating for delays with a prime-rate
11 enhancement.”).

12 Class Counsel are experienced, skilled and highly regarded members of the bar. They are
13 particularly experienced in the area of class action and complex litigation, including consumer litigation.
14 Hammond Decl. ¶ 79; Postman Decl. ¶ 5. Class Counsel’s hourly rates – ranging from \$575 - \$1,025
15 for partners, counsel, and attorneys whose work accounts for over 97.8% of the lodestar,³ which are in
16 line with the prevailing market rates in this District and have been approved by other state and federal
17 courts in this District, including *this Court* in *Miner v. ITT Educational Services, Inc.*, No. 16-cv-04827,
18 2021 WL 9929174 (N.D. Cal. Mar. 19, 2021). Hammond Decl. ¶ 83 (listing cases in which rates have
19 been approved); Postman Decl. ¶¶ 7-14.

20 **3. The Effective Multiplier is Justified**

21 The requested fee award based on the lodestar as of July 19, 2024, represents a modest multiplier
22 of 2.25. The lodestar does not reflect all the time that Class Counsel will have to spend before this case
23 is concluded. This multiplier (which will be significantly lower by the time the case is completed) is
24 reasonable and justified in light of the very substantial risk of non-payment, as discussed in section
25 III.B.3.b above, and the excellent result achieved.

26
27
28 ³ 3.2 hours were billed to this case by Keller Postman’s partner Warren D. Postman at a rate of \$1,500,
and 41.1 hours were billed by Barry Goldstein, a nationally acclaimed litigator who acted as a settlement
consultant in this case, at an hourly rate of \$1,225. Hammond Decl., Ex. 2.

1 “[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common
 2 fund cases.’ This mirrors the established practice in the private legal market of rewarding attorneys for
 3 taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning
 4 contingency cases.” *Vizcaino*, 290 F.3d at 1051 (citation omitted). “Multipliers of 1 to 4 are commonly
 5 found to be appropriate in common fund cases.” *Aboudi v. T-Mobile USA, Inc.*, No. 12-cv-2169, 2015
 6 WL 4923602, at *7 (S.D. Cal. Aug. 18, 2015); *see also Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326,
 7 334 (N.D. Cal. 2014) (awarding a 2.83 multiplier and observing that it “falls within the Ninth Circuit’s
 8 presumptively acceptable range of 1.0-4.0”); *Taylor v. FedEx Freight, Inc.*, No. 13-cv-01137, 2016 WL
 9 6038949, at *7 (E.D. Cal. Oct. 13, 2016) (awarding a 2.26 multiplier as falling “within the range of
 10 multipliers generally awarded to counsel in successful class action litigation.”).

11 **IV. THE COURT SHOULD AWARD LITIGATION COSTS**

12 “Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund
 13 are reimbursed proportionately by those class members who benefit.” *In re Media Vision Tech. Sec.*
 14 *Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) (citation omitted); *see also Fed. R. Civ. P. 23(h); Harris*
 15 *v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may recover reasonable expenses
 16 that would typically be billed to paying clients in non-contingency matters); *Floyd v. First Data Merch.*
 17 *Servs. LLC*, No. 20-cv-02162, 2022 WL 6713122, at *6 (N.D. Cal. Oct. 7, 2022) (“Class counsel is
 18 entitled to reimbursement of reasonable out-of-pocket expenses.”).

19 Class Counsel have incurred \$57,558.36 in unreimbursed litigation expenses, including costs
 20 advanced in connection with filings fees, court reporting services, experts, consultants, legal research,
 21 electronic discovery, depositions costs, travel costs, mediation fees, and other litigation expenses.
 22 Hammond Decl. ¶¶ 97-98. These costs are routinely approved by the courts in this District. *See, e.g., In*
 23 *re LendingClub Sec. Litig.*, No. 16-cv-02627, 2018 WL 4586669, at *3 (N.D. Cal. Sept. 24, 2018)
 24 (expenses such as expert and consultant fees, court fees, travel and lodging costs, legal research fees,
 25 and copying expenses were reasonable and recoverable); *Thomas*, 2018 WL 2234598, at *4 (granting
 26 request for “court fees, online research fees, postage and copying, travel costs, electronic discovery
 27 expenses, deposition costs, mediation charges, and travel costs”).
 28

V. THE COURT SHOULD AWARD THE REQUESTED SERVICE AWARDS

Class Counsel also requests a \$10,000 service award for each Plaintiff. Such service awards “are fairly typical in class action cases” and “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). “[A]wards “typically range from \$2,000 to \$10,000.” *Bellinghausen*, 306 F.R.D. at 266 (collecting cases). The court in *Bellinghausen* observed that higher incentive awards are sometimes awarded in larger settlements and awarded Plaintiff \$10,000 as an incentive award (and \$5,000 for the general release) from a settlement fund of \$1 million. *Id.* at 267-68. Notably, *Bellinghausen* and the cases it relies on are at least 15 years old, and some adjustment for inflation is warranted.

The requested awards (totaling \$50,000) represent just 0.22% of the total settlement fund. Plaintiffs made substantial efforts to develop this case. They have spent substantial time on it, including conferring with counsel, searching for and producing documents going back many years, reviewing and approving pleadings, keeping abreast of the case proceedings, and evaluating the Settlement. *See* Plaintiffs’ declarations submitted at the time of preliminary approval (Dkts. 121-11, 12, 121-13, 121-14, 121-15). Moreover, they faced potential reputational harm in putting their name to this lawsuit. Plaintiffs have agreed that their support of the settlement is not contingent on receiving any service award.

VI. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court enter the accompanying proposed order awarding Class Counsel their attorneys’ fees, expenses, and granting the requested service awards to Plaintiffs, and holding back an additional \$1,450,000 from the cash settlement to allow for an award of fees based on the redeemed value of the In-Kind Payment when that value becomes ascertainable.

1 Dated: July 29, 2024

Respectfully submitted,

2 **HAMMONDLAW, P.C.**

3
4 /s/ Julian Hammond
Julian Hammond

5
6 **KELLER POSTMAN LLC**

7
8 /s/ Warren D. Postman
Warren D. Postman

9 *Attorneys for Plaintiffs and the Putative Classes*

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