

**PAYNE & FEARS LLP**  
ATTORNEYS AT LAW  
1100 GLENDON AVENUE, SUITE 1250  
LOS ANGELES, CALIFORNIA 90024  
(310) 689-1750

1 Dowling Aaron Incorporated  
Donald R. Fischbach, Bar No. 053522  
2 dfischbach@dowlingaaron.com  
Mark D. Kruthers, Bar No. 179750  
3 mkruthers@dowlingaaron.com  
8080 N. Palm Avenue, Third Floor  
4 Fresno, California 93711  
Telephone: (559) 432-4500

5 Payne & Fears LLP  
6 C. Darryl Cordero, Bar No. 126689  
cdc@paynefears.com  
7 Scott O. Luskin, Bar No. 238082  
sol@paynefears.com  
8 Matthew K. Brown, Bar No. 252503  
mkb@paynefears.com  
9 Leilani E. Livingston, Bar No. 298896  
llj@paynefears.com  
10 1100 Glendon Avenue, Suite 1250  
Los Angeles, California 90024  
11 Telephone: (310) 689-1750

12 Marko & Magolnick, P.A  
Joel S. Magolnick, Bar No. 776068  
13 magolnick@mm-pa.com  
3001 S.W. 3rd Avenue  
14 Miami, Florida 33129  
Telephone: 305-740-1967

15 Attorneys for Plaintiff Dakota Medical, Inc., dba  
16 Glenoaks Convalescent Hospital

17 **UNITED STATES DISTRICT COURT**

18 **EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION**

19 DAKOTA MEDICAL, INC., individually,  
20 and on behalf of all others similarly  
situated,

21 Plaintiff,

22 v.

23 REHABCARE GROUP, INC., *et al.*,

24 Defendants.

Case No.: 1:14-cv-02081-DAD-BAM

**Hon. Dale A. Drozd**

**Memorandum of Points and Authorities  
in Support of Motion for Incentive Fee  
Award for Service as Class  
Representative**

Date: Sept. 7, 2017  
Time: 9:30 A.M.  
Courtroom: 5

**PAYNE & FEARS LLP**  
ATTORNEYS AT LAW  
1100 GLENDON AVENUE, SUITE 1250  
LOS ANGELES, CALIFORNIA 90024  
(310) 689-1750

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Table of Contents**

**Page**

Introduction..... 1

Glenoaks’s Efforts Towards Settlement ..... 1

Argument ..... 3

I. Plaintiff Is Entitled to an Incentive Award ..... 3

II. An Award of \$15,000 for Plaintiff Is Reasonable..... 4

Conclusion ..... 6

**PAYNE & FEARS LLP**  
 ATTORNEYS AT LAW  
 1100 GLENDON AVENUE, SUITE 1250  
 LOS ANGELES, CALIFORNIA 90024  
 (310) 689-1750

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Table of Authorities**

**Page**

**Cases**

*Aguilar v. Wawona Frozen Foods*,  
 1:15-cv-00093-DAD-BAM, 2017 WL 214936 (E.D. Cal. May 19, 2017)  
 (Drozd, J.)..... 5, 6

*Emmons v. Quest Diagnostics Clinical Laboratories, Inc.*,  
 1:13-cv-00474-DAD-BAM, 2017 WL 749018 (E.D. Cal. Feb. 27, 2017)  
 (Drozd, J.)..... 3, 5, 6

*Linney v. Cellular Alaska Part.*,  
 No. C-96-3008 DLJ, 1997 WL 450064 (N.D. Cal. July 18, 1997)..... 3

*Louie v. Kaiser Found. Health Plan, Inc.*,  
 No. 08CV0795 IEG RBB, 2008 WL 4473183 (S.D. Cal. Oct. 6, 2008)..... 4

*In re Mego Fin. Corp. Sec. Lit.*,  
 213 F.3d 454 (9th Cir. 2000)..... 3

*Taylor v. Fedex Freight, Inc.*,  
 1:13-cv-01137-DAD-BAM, 2016 WL 6038949 (E.D. Cal. Oct. 13, 2016)  
 (Drozd, J.)..... 5

*Van Vranken v. Atl. Richfield Co.*,  
 901 F. Supp. 294 (N.D. Cal. 1995) ..... 4

*West v. Circle K Stores, Inc.*,  
 No. Civ. S-04-0438 WBS GGH, 2006 WL 1652598 (E.D. Cal. Oct. 19,  
 2006) (Shubb, J.)..... 3

**Statutes**

Telephone Consumer Protection Act of 1991, 47 U.S.C.A. § 227..... 2

**PAYNE & FEARS LLP**  
ATTORNEYS AT LAW  
1100 GLENDON AVENUE, SUITE 1250  
LOS ANGELES, CALIFORNIA 90024  
(310) 689-1750

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## Introduction

Glenoaks Convalescent Hospital vigorously prosecuted its junk fax claims against tenacious and skilled adversaries for two years. Glenoaks’s stewardship produced an extraordinary result for *all* junk fax recipients of “Polaris Group” faxes. Indeed, Glenoaks prevailed where two prior class representatives failed.

The proposed settlement creates a \$25 million fund for a class of about 13,000. Class members will share the benefits without having to submit claims or prove they received any faxes. The net settlement recovery averages over \$1,300 per class member. The settlement does not require class members to submit claims, but instead automatically distributes proceeds to members at addresses recorded in Defendants’ business records. Under no circumstances will any settlement funds revert to Defendants. None of this would have happened without Glenoaks’s initiative and resolve to see this case through.

Glenoaks now seeks an incentive award of \$15,000. Glenoaks oversaw every stage of litigation, including the negotiation of the settlement. Glenoaks Administrator Henry LeVine devoted significant time to this case—over 60 hours. Even more impressive was Glenoaks’s determination to obtain relief for the entire class and stop Defendants’ junk faxing program. To incentivize representatives like Glenoaks to continue to step forward to protect consumers’ rights, Glenoaks should receive a substantial service award.

## Glenoaks’s Efforts Towards Settlement

Glenoaks is a skilled nursing facility in Glendale, California, providing 24-hour, extended-stay nursing care to seniors with varying levels of disabilities. (*See* LeVine Decl. ¶ 2.) The facility regularly receives junk faxes, which interfere with its business and healthcare operations and unnecessarily consume resources. (LeVine Decl. ¶ 4.)

PAYNE & FEARS LLP  
ATTORNEYS AT LAW  
1100 GLENDON AVENUE, SUITE 1250  
LOS ANGELES, CALIFORNIA 90024  
(310) 689-1750

1 In a span of about three years, Glenoaks received 241 fax advertisements hawking  
2 products and services offered by “Polaris Group.” (*See* Doc. No. 158-16, p. 4 [Biggerstaff  
3 Dep. 239:7-23].) The ads promoted a wide variety of product offerings, including care  
4 manuals and CDs, Medicare reimbursement services, audit compliance consulting, and  
5 workshops and seminars on healthcare industry topics. (*See* Doc. Nos. 149-1 at 84:1-3,  
6 84:22-25, 85:1-3, 85:16-18, 149-3.) Some advertisements promoted care manuals that  
7 were “Developed by RehabCare Group.” (*See* Doc. No. 1, Ex. 5.)  
8

9 Glenoaks, desiring to put an end to Defendants’ fax blasting, commenced this  
10 lawsuit December 29, 2014, to recover damages under the Telephone Consumer Protection  
11 Act of 1991. (LeVine Decl. ¶¶ 5-7.) Glenoaks brought the case on behalf of itself and all  
12 others to whom Defendants had sent junk faxes during the four years preceding the filing  
13 of the complaint. Glenoaks was originally joined by R. Fellen, Inc., which does business  
14 as Sunnyside Convalescent Hospital. Last year, however, Sunnyside dismissed its claims  
15 without prejudice and withdrew as a named plaintiff. (*See* Doc. No. 138.)  
16

17 From the outset, Glenoaks took an active role in the case. LeVine has been  
18 instrumental in guiding and overseeing the litigation. LeVine spent considerable time  
19 reviewing and responding to Defendants’ discovery—including responding to document  
20 requests and collecting those documents, as well as answering fact-intensive  
21 interrogatories. (LeVine Decl. ¶¶ 9, 12.) Among other things, LeVine sat for a full day of  
22 intense cross-examination by Defendants’ attorneys at deposition. (*Id.*)  
23

24 Beyond his participation in discovery, LeVine regularly conferred with class  
25 counsel about major case issues and developments, even participating in a full-day  
26 mediation in Los Angeles in May 2016. (LeVine Decl. ¶¶ 9-10.) Even though LeVine  
27 was unable to attend the parties’ second mediation, he was on call and in communication  
28 with Glenoaks’s lead attorney, by email and phone. (LeVine Decl. ¶ 11.) He

1 independently approved the tentative settlement achieved at that mediation. (*Id.* ¶¶ 11-13.)  
2 LeVine’s diligence took substantial hours away from Glenoaks’s business. LeVine  
3 reasonably estimates that he devoted at least 60-70 hours to the litigation. (LeVine Decl. ¶  
4 12.)

5  
6 Glenoaks took on the duties and responsibilities of class representative and  
7 diligently executed them well. These efforts consummated with a \$25 million class  
8 settlement, the third largest junk fax recovery ever.

9  
10 **Argument**

11  
12 **I. Plaintiff Is Entitled to an Incentive Award**

13  
14 Courts have long recognized that class representatives, like Glenoaks, should be  
15 compensated for their service to the class. *In re Mego Fin. Corp. Sec. Lit.*, 213 F.3d 454,  
16 463 (9th Cir. 2000); *West v. Circle K Stores, Inc.*, No. Civ. S-04-0438 WBS GGH, 2006  
17 WL 1652598, at \*12 (E.D. Cal. Oct. 19, 2006) (Shubb, J.). This Court recognizes that  
18 incentive awards are typical. *See, e.g., Emmons v. Quest Diagnostics Clinical*  
19 *Laboratories, Inc.*, 1:13-cv-00474-DAD-BAM, 2017 WL 749018, at \*9 (E.D. Cal. Feb.  
20 27, 2017) (Drozd, J.). These awards provide the economic motivation to induce potential  
21 plaintiffs to lend their names and support to class actions generally. *West*, 2006 WL  
22 1652598, at \*12. The same incentive fees further ensure that meritorious actions, like this  
23 one, are prosecuted to completion. *See Linney v. Cellular Alaska Part.*, No. C-96-3008  
24 DLJ, 1997 WL 450064, at \*7 (N.D. Cal. July 18, 1997). In preliminarily approving the  
25 settlement, the requested incentive award provided “no cause for the court to hesitate in  
26 finding the settlement preliminarily fair.” (Doc. No. 177 at 8.)

1 Glenoaks’s service exemplifies the reasons for approving an incentive award.  
2 Glenoaks’s efforts have both protected the class and afforded it a substantial benefit—a  
3 \$25 million settlement that will pay out automatically to each class member. Indeed,  
4 Glenoaks’s service resulted in the Defendants establishing the third largest junk fax  
5 settlement fund ever.

6  
7 Approving an incentive award here will not only compensate Glenoaks for its  
8 efforts and results, but will also encourage potential class representatives to bring class  
9 claims and to diligently prosecute them in other actions where individual suits are unlikely.  
10 Glenoaks initiated this matter with the best intentions, and its consistent service and  
11 vigilance entitles it to a modest incentive award.

12  
13 **II. An Award of \$15,000 for Plaintiff Is Reasonable**

14  
15 Glenoaks respectfully requests a \$15,000 award in recognition of its service to the  
16 class. The Court found this amount preliminarily fair, assuming a “sufficient showing” of  
17 reasonableness. (Doc. No. 177 at 8.) The award is reasonable because Glenoaks provided  
18 exceptional service, it devoted substantial time to the litigation (spanning two years), it  
19 will receive a small recovery from the settlement fund, and the outstanding result achieved  
20 for the class.

21  
22 In determining Glenoaks incentive award, the Court should broadly consider “the  
23 degree to which the class has benefited from those actions ... [and] the amount of time and  
24 effort the plaintiff expended in pursuing the litigation ... [citations omitted].” *Louie v.*  
25 *Kaiser Found. Health Plan, Inc.*, No. 08CV0795 IEG RBB, 2008 WL 4473183, at \*7  
26 (S.D. Cal. Oct. 6, 2008). The Court should also consider the duration of the litigation and  
27 the personal benefit or lack thereof enjoyed by the class representative as a result of the  
28 litigation. *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). In

1 the past, this Court has also taken into account the number of class representatives,  
 2 whether the representative independently determined the fairness of settlement, whether  
 3 the agreement to settle was conditioned on the promise of receiving an award, and the  
 4 incentive award's proportionality to class member recovery. *Aguilar v. Wawona Frozen*  
 5 *Foods*, 1:15-cv-00093-DAD-BAM, 2017 WL 214936, at \*7-8 (E.D. Cal. May 19, 2017)  
 6 (Drozd, J.) (awarding \$7,500 to two named plaintiffs for \$4.5 million settlement);  
 7 *Emmons*, 2017 WL 749018, at \*9 (awarding \$8,000 each to two named plaintiffs in \$2.35  
 8 million settlement); *Taylor v. Fedex Freight, Inc.*, 1:13-cv-01137-DAD-BAM, 2016 WL  
 9 6038949, at \*8 (E.D. Cal. Oct. 13, 2016) (Drozd, J.) (awarding \$15,000 to class  
 10 representative in \$3.75 million settlement).

11  
 12 Glenoaks's service to the class exceeds the requirements for approving a \$15,000  
 13 award. LeVine devoted substantial time, participating in all aspects of the case from  
 14 discovery to mediation, resulting in an incredible \$25 million settlement. (LeVine Decl. ¶¶  
 15 9-12.) LeVine independently approved the settlement, which the Court has views  
 16 favorably. *See, e.g., Emmons*, 2017 WL 749018, at \*9. Glenoaks was also the only class  
 17 representative to take this matter to completion. Without Glenoaks's leadership this action  
 18 could have concluded with no recovery after Sunnyside withdrew. But Glenoaks  
 19 continued protecting the case without any promise of receiving compensation. (LeVine  
 20 Decl. ¶ 12.) LeVine made clear that the "requested award did not influence [his]  
 21 independent judgment in determining the settlement was fair and reasonable." (*Id.*)

22  
 23 The stellar class response also favors this exemplary award. No class members  
 24 have objected to the requested award. (Lue Decl. ¶ 10.) In fact, only *one* member opted  
 25 out of the settlement. (*Id.* ¶ 9.) Several class members instead provided enthusiastic  
 26 support for the settlement, including the service award. (*See Anderson Decl. ¶ 6* (38 Plum  
 27 Healthcare Group facilities); *Cranwell Decl. ¶¶ 5-7* (12 American HealthCare facilities);  
 28 *Creagh Decl. ¶ 6* (6 Grane Healthcare); *Grayson Decl. ¶ 6* (California Armenian Home);





1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Proof of Service**

**R. Fellen, Inc., et al., vs. RehabCare Group, Inc., et al.**  
**United States District Court, Eastern District of California (Sacramento Division)**  
**Case No. 1:14-cv-02081-DAD-BAM**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1100 Glendon Avenue, Suite 1250, Los Angeles, CA 90024.

On August 1, 2017, I served true copies of the following document(s) described as **Memorandum of Points and Authorities in Support of Motion for Incentive Fee Award for Service as Class Representative** on the interested parties in this action as follows:

Jon M. Wilson  
Erin K. Kolmansberger  
Melissa Jill Gomberg  
Kimberly Freedman  
BROAD AND CASSEL  
One Biscayne Tower, 21<sup>st</sup> Floor  
2 S. Biscayne Boulevard  
Miami, Florida 33131  
Telephone: (305) 373-9400  
[jwilson@broadandcassel.com](mailto:jwilson@broadandcassel.com)  
[ekolmansberger@broadandcassel.com](mailto:ekolmansberger@broadandcassel.com)  
[mgomberg@broadandcassel.com](mailto:mgomberg@broadandcassel.com)  
[kfreedman@broadandcassel.com](mailto:kfreedman@broadandcassel.com)

Oliver W. Wanger  
WANGER JONES HELSEY PC  
265 East River Circle, Suite 310  
Fresno, California 93720  
Telephone: (559) 233-4800  
[owanger@wjhattorneys.com](mailto:owanger@wjhattorneys.com)

*Counsel for Defendant RehabCare Group, Inc.*

*Counsel for Defendant RehabCare Group, Inc.*

Fletcher C. Alford  
David L. Jordan  
Daniel S. Kubasek  
GORDON & REES, LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111  
Telephone: (415) 986-5900  
[FAlford@gordonrees.com](mailto:FAlford@gordonrees.com)  
[dljordan@gordonrees.com](mailto:dljordan@gordonrees.com)  
[dkubasak@gordonrees.com](mailto:dkubasak@gordonrees.com)

*Counsel for Defendant, Cannon & Associates*

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

**PAYNE & FEARS LLP**  
ATTORNEYS AT LAW  
1100 GLENDON AVENUE, SUITE 1250  
LOS ANGELES, CALIFORNIA 90024  
(310) 689-1750

1 I declare under penalty of perjury under the laws of the United States of  
2 America that the foregoing is true and correct and that I am employed in the office  
3 of a member of the bar of this Court at whose direction the service was made.

4 Executed on August 1, 2017, at Los Angeles, California.

5   
6 \_\_\_\_\_

7  
8  
9  
10  
11  
12 **PAYNE & FEARS LLP**  
13 ATTORNEYS AT LAW  
14 1100 GLENDON AVENUE, SUITE 1250  
15 LOS ANGELES, CALIFORNIA 90024  
16 (310) 689-1750  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28