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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAKOTA MEDICAL, INC., a California corporation doing business as Glenoaks Convalescent Hospital,

Plaintiff,

v.

REHABCARE GROUP, INC., a Delaware corporation, and CANNON & ASSOCIATES, LLC, a Delaware limited liability corporation doing business as Polaris Group,

Defendants.

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

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AWARDING ATTORNEYS' FEES AND INCENTIVE PAYMENTS, AND DIRECTING DISTRIBUTION OF SETTLEMENT

(Doc. Nos. 179, 180, 181)

This matter is before the court on three motions filed by plaintiff on August 1, 2017: a motion for final approval of settlement and certification of the settlement class (Doc. No. 179); a motion for attorneys' fees and expenses (Doc. No. 180); and a motion for an incentive payment to be made to class representative Dakota Medical (Doc. No. 181). The motions were heard collectively on September 7, 2017, with attorneys C. Darryl Cordero and Donald Fischbach appearing on behalf of Dakota Medical, Inc. and the class, and attorneys Oliver Wanger, Jon Wilson, and David Jordan appearing on behalf of defendants. Following the hearing, plaintiff submitted supplemental briefing and a final report of the settlement administrator on

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1 September 11, 2017. (Doc. Nos. 187, 188.) Each of the motions will be granted for the reasons
2 discussed below.

3 BACKGROUND

4 The court granted preliminary certification of a class action settlement in this matter on
5 April 19, 2017. (Doc. No. 177.) As the pertinent factual background is set forth in that order, it
6 will not be repeated here. Following the granting of preliminary approval, the class administrator
7 sent class settlement notices to almost 13,000 class members starting on May 10, 2017. (Doc.
8 No. 179-13 at ¶ 3.) Of those, 10,898 were successfully transmitted, and through subsequent
9 research and location of mailing addresses, notices were delivered to 12,489 of the 12,867 class
10 members. (*Id.* at ¶¶ 3–6.) Therefore, over 97 percent of the class received notification of the
11 settlement. No class members have objected, and only one has opted out of the settlement. (*Id.* at
12 ¶¶ 9–10.) The settlement administrator declares that, as of the final report, there were 12,302
13 class members eligible to receive a distribution, to be credited with a total of 2,328,003 shares
14 under the settlement. (Doc. No. 187 at ¶ 3.)

15 FINAL CERTIFICATION OF CLASS ACTION

16 The court has already evaluated the standards for class certification in its prior order
17 granting preliminary approval of the class action settlement here. (Doc. No. 177 at 13–18.)
18 Nothing has been raised subsequently to the court that might affect its prior analysis of whether
19 class certification is appropriate here, and the court has no cause to revisit that analysis. The
20 court finds final certification of the following class is appropriate:

21 All persons that were subscribers of facsimile telephone numbers to
22 which there was a successful transmission of one or more
23 facsimiles by defendants (or either of them) between July 17, 2010
24 and February 4, 2014, in broadcasts by WestFax Inc. Excluded
25 from the class are officers, directors, and employees, accountants,
26 and/or agents of defendants; any affiliated company; legal
27 representatives, attorneys, heirs, successors, or assigns of
28 defendants, defendants' officers and directors, or of any affiliated
company; any entity in which any foregoing persons have or have
had a controlling interest; any members of the immediate families
of the foregoing persons; any federal, state and/or local
governments, governmental agencies (including the Federal
Communications Commission), government entities, government
body and any attorneys of record in this action; and any person or

1 entity that has released defendants from all claims based on the
2 transmission of faxes during the entire class period.

3 C. Darryl Cordero of Payne & Fears LLP is confirmed as lead settlement class counsel, and
4 Donald R. Fischbach of Dowling Aaron and Joel S. Magolnick of Marko & Magolnick P.A. are
5 further confirmed as settlement class counsel. Dakota Medical, Inc. is the representative for this
6 settlement class, and KCC LLC is the settlement administrator in this matter.

7 **FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

8 Class actions require the approval of the district court prior to settlement. Fed. R. Civ. P.
9 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed,
10 or compromised only with the court’s approval.”). This requires that: (1) notice be sent to all
11 class members; (2) the court hold a hearing and make a finding that the settlement is fair,
12 reasonable, and adequate; (3) the parties seeking approval file a statement identifying the
13 settlement agreement; and (4) class members be given an opportunity to object. Fed. R. Civ. P.
14 23(e)(1)–(5). The settlement agreement was previously filed on the court docket (Doc. No. 171)
15 and class members have been given an opportunity to object. The court now turns to the
16 adequacy of notice and its review of the settlement following the final fairness hearing.

17 **A. Notice**

18 “Adequate notice is critical to court approval of a class settlement under Rule 23(e).”
19 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). “Notice is satisfactory if it
20 ‘generally describes the terms of the settlement in sufficient detail to alert those with adverse
21 viewpoints to investigate and to come forward and be heard.’” *Churchill Vill., L.L.C. v. Gen.*
22 *Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d
23 1338, 1352 (9th Cir. 1980)). Any notice of the settlement sent to the class should alert class
24 members of “the opportunity to opt-out and individually pursue any state law remedies that might
25 provide a better opportunity for recovery.” *Hanlon*, 150 F.3d at 1025. It is important for class
26 notice to include information concerning the attorneys’ fees to be awarded from the settlement,
27 because it serves as “adequate notice of class counsel’s interest in the settlement.” *Staton v.*
28 *Boeing Co.*, 327 F.3d 938, 963 n.15 (9th Cir. 2003) (quoting *Torrissi v. Tucson Elec. Power Co.*, 8

1 F.3d 1370, 1375 (9th Cir. 1993)) (noting that where notice references attorneys’ fees only
2 indirectly, “the courts must be all the more vigilant in protecting the interests of class members
3 with regard to the fee award”).

4 The court previously reviewed the notice of class certification at the preliminary approval
5 stage, and found it satisfactory. (Doc. No. 177 at 18–19.) Notice has been sent to the class, first
6 by facsimile transmission at the numbers forming the basis for the class, and then at mailing
7 addresses for those class members where facsimile transmission failed. (Doc. No. 179-13 at
8 ¶¶ 3–4.) Of the 12,867 potential class members, 10,898 faxed class notices were successfully
9 transmitted. (*Id.* at ¶ 3.) The settlement administrator obtained address information for 1,855
10 class members out of the 1,969 not contacted by fax, and mailed notice through the U.S. Postal
11 Service. (*Id.* at ¶ 4.) Of the mailed notices, only 276 were returned as undeliverable, and further
12 address reviews allowed an additional twelve of these class members to receive notice of the
13 settlement. (*Id.* at ¶ 5.) Therefore, 12,489 of the 12,867 total class members—or approximately
14 97 percent—received the class notice the court previously found sufficient.

15 Of the class members receiving notice, none have objected to the settlement to date.
16 (Doc. No. 184-1 at ¶ 4.) One class member—Robinson Health Care of North Little Rock,
17 Arkansas, representing 286 shares of the ultimate settlement fund—has opted out of the class.
18 (Doc. No. 179-13 at ¶ 9.) No objections were heard at the final fairness hearing held before the
19 court.

20 The settlement administrator advised the court that it lacks sufficient information to
21 provide settlement proceeds to 564 class members, representing 19,312 shares of the settlement,
22 because information is missing concerning their names and addresses. (Doc. No. 187 at ¶ 4.)
23 Thus, the eligible settlement class consists of 12,303 class members, reflecting the initial class
24 size of 12,867, minus 564 class members for whom there is insufficient identifying information
25 and one class member who opted out. (*Id.*)

26 Given the above, the court concludes adequate notice was provided to the vast majority of
27 the class here. *Silber v. Mabon*, 18 F.3d 1449, 1453–54 (9th Cir. 1994) (court need not ensure
28 class members all receive actual notice, only that “best practicable notice” is given); *Winans v.*

1 *Emeritus Corp.*, No. 13-cv-03962-HSG, 2016 WL 107574, at *3 (N.D. Cal. Jan. 11, 2016)
2 (“While Rule 23 requires that ‘reasonable effort’ be made to reach all class members, it does not
3 require that each individual actually receive notice.”). The court accepts the reports of the
4 settlement administrator, and finds sufficient notice has been provided so as to satisfy Federal
5 Rule of Civil Procedure 23(e)(1).

6 **B. Final Fairness Hearing**

7 On September 7, 2017, the court held a final fairness hearing, at which class counsel and
8 defense counsel appeared. No class members, objectors, or counsel representing the same
9 appeared at the hearing. The court now determines that the settlement is fair, adequate, and
10 reasonable. *See* Fed. R. Civ. P. 23(e)(2).

11 In assessing whether a district court’s determination of the fairness of a class action
12 settlement was within its discretion, the Ninth Circuit Court of Appeals balances the following
13 factors:

14 (1) the strength of the plaintiffs’ case; (2) the risk, expense,
15 complexity, and likely duration of further litigation; (3) the risk of
16 maintaining class action status throughout the trial; (4) the amount
17 offered in settlement; (5) the extent of discovery completed and the
stage of the proceedings; (6) the experience and views of counsel;
(7) the presence of a governmental participant; and (8) the reaction
of the class members to the proposed settlement.

18 *Churchill Vill., L.L.C.*, 361 F.3d at 575; *see also In re Online DVD-Rental Antitrust Litig.*, 779
19 F.3d 934, 944 (9th Cir. 2015); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 964–67 (9th Cir.
20 2009). These settlement factors are non-exclusive, and not each need be discussed if they are
21 irrelevant to a particular case. *Churchill Vill., L.L.C.*, 361 F.3d at 576 n.7. While the Ninth
22 Circuit has observed that “strong judicial policy . . . favors settlements,” *id.* at 576 (quoting
23 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)), where the parties reached
24 a settlement agreement prior to class certification, the court has an independent duty on behalf of
25 absent class members to be vigilant for any sign of collusion among the negotiating parties. *See*
26 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (noting “settlement
27 class actions present unique due process concerns for absent class members,” because the
28 “inherent risk is that class counsel may collude with the defendants, tacitly reducing the overall

1 settlement in return for a higher attorney’s fee”) (internal quotations and citations omitted).

2 In particular, where a class action settlement agreement was reached prior to a class being
3 certified by the court, “consideration of these eight *Churchill* factors alone is not enough to
4 survive appellate review.” *In re Bluetooth*, 654 F.3d at 946–47. District courts must be watchful
5 “not only for explicit collusion, but also for more subtle signs that class counsel have allowed
6 pursuit of their own self-interests and that of certain class members to infect the negotiations.”
7 *Id.* at 947. These more subtle signs include: (1) “when counsel receive a disproportionate
8 distribution of the settlement, or when the class receives no monetary distribution but class
9 counsel are amply rewarded”; (2) the existence of a “clear sailing” arrangement, which provides
10 “for the payment of attorneys’ fees separate and apart from class funds,” and therefore carries
11 “the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange
12 for counsel accepting an unfair settlement on behalf of the class”; and (3) “when the parties
13 arrange for fees not awarded to revert to defendants rather than be added to the class fund.” *Id.*
14 (internal citations and quotations omitted). The Ninth Circuit has also recognized that a version
15 of a “clear sailing” arrangement exists when a defendant expressly agrees not to oppose an award
16 of attorneys’ fees up to a certain amount. *Lane v. Facebook, Inc.*, 696 F.3d 811, 832 (9th Cir.
17 2012); *In re Bluetooth*, 654 F.3d at 947; *In re Toys R Us-Delaware, Inc.*, 295 F.R.D. 438, 458
18 (C.D. Cal. 2014) (“In general, a clear sailing agreement is one where the party paying the fee
19 agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls
20 beneath a negotiated ceiling.”) (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518,
21 520 n.1 (1st Cir. 1991)).

22 While this court has wide latitude to determine whether a settlement is substantively fair,
23 it is held to a higher procedural standard and “must show it has explored comprehensively all
24 factors, and must give a reasoned response to all non-frivolous objections.” *Allen v. Bedolla*, 787
25 F.3d 1218, 1223–24 (9th Cir. 2015) (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir.
26 2012)). Thus, while the court should examine any relevant *Churchill* factors, the failure to review
27 a pre-class certification settlement for those subtle signs of collusion identified above may also
28 constitute error. *Id.* at 1224–25.

1 1. Strength of the Plaintiffs' Case

2 Here, plaintiff believes its case against defendant Cannon was strong. Henry LeVine,
3 plaintiff's president and administrator, declares that the Glenoaks Convalescent Hospital regularly
4 receives advertising faxes from businesses with whom Glenoaks does not do business and who
5 have not been given permission to send such advertisements. (Doc. No. 179-2 at ¶¶ 1–4.) The
6 faxes disrupt the operations of the business, waste personnel resources, and consume paper
7 unnecessarily. (*Id.* at ¶ 4.) Particularly, plaintiff received numerous junk faxes offering books,
8 manuals, and services from both Polaris Group and RehabCare Group. (*Id.* at ¶ 5.) Despite
9 consulting with his staff and reviewing business records, LeVine could determine no business
10 relationship Glenoaks had with either group. (*Id.*) Defendants acknowledged they could find no
11 evidence of having done business with plaintiff. (Doc. No. 179-4 at 4.) They suggested that
12 plaintiff was a member of the California Association of Health Facilities (“CAHF”), and that this
13 membership granted defendants permission to send faxes to plaintiff. (*Id.* at 5.) However,
14 plaintiff was not a member of CAHF, which at any rate had not published a membership directory
15 since at least 2006. (Doc. No. 179-2 at 3, n.1; Doc. No. 149-10 at ¶ 8.)

16 However, as discussed in the order preliminarily approving class settlement, proving
17 liability against defendant RehabCare would likely have been more difficult. RehabCare has
18 maintained that none of its goods or services was advertised in the faxes and the faxes were not
19 sent on its behalf. (Doc. No. 177 at 11.) While there was some evidence that might point to
20 liability for defendant RehabCare, it was far from certain the plaintiff class would prevail against
21 it. (*Id.*) Therefore, while plaintiff had potentially meritorious claims, it is far from certain that
22 they would have prevailed on those claims against both defendants.

23 2. Risk, Expense, Complexity, and Likely Duration of Further Litigation

24 As also previously discussed, the fact that plaintiff might not prevail against defendant
25 RehabCare is of special significance in this case, because defendant Cannon has only limited
26 assets and is essentially judgment-proof in excess of its insurance policies. (Doc. No. 177 at 10–
27 11; *see also* Doc. No. 179-3 at ¶ 7 (Decl. of Cordero).) Moreover, even RehabCare would be
28 unable to satisfy the maximum potential judgment of \$1.2 billion. (*Id.* at 10.) This amount would

1 “result in a certain bankruptcy for RehabCare.” (Doc. No. 179-14 at ¶ 4) (Decl. of Robert
2 Sherwin). While plaintiff notes it is somewhat more likely defendant RehabCare would have
3 been liable for \$39.1 million based on the 78,240 faxes that specifically advertised RehabCare
4 products (Doc. No. 179-1 at 16), even that amount “would be at the upper end of RehabCare’s
5 ability to pay and might, instead, result in bankruptcy.” (Doc. No. 179-14 at ¶ 4.) It is therefore
6 clear that, in this case, there was significant risk in continuing to pursue litigation, particularly in
7 the hopes of achieving a significantly larger recovery which would almost certainly be
8 uncollectable.

9 Further, this case was one of some complexity. As the court discussed in its preliminary
10 approval order, the court’s docket reflects extensive litigation in this case. (Doc. No. 177 at 2–3.)
11 Besides numerous discovery disputes, contested class certification and summary judgment
12 motions had been filed prior to a settlement being reached by the parties. (Doc. Nos. 145, 162,
13 164.) Significant legal obstacles faced the class in the event litigation continued. The risk and
14 complexity of the suit supports approval of the settlement.

15 3. Risk of Maintaining Class Action Status Throughout Trial

16 As mentioned, the parties here seriously contested the certification of a class. (*See* Doc.
17 Nos. 145–56 (motion to certify class and supporting documents); Doc. Nos. 164–168 (oppositions
18 to motion and supporting documents).) Defendants filed well over 1,000 pages of materials
19 supporting their opposition to the class certification motion. (*See* Doc. Nos. 164, 166–168.)
20 While the court has no occasion to decide what the end result of a contested class certification
21 motion here would have been, defendants’ oppositions were not frivolous. Defendants claimed
22 that because consent is a valid defense to claims under the Telephone Consumer Protection Act
23 (“TCPA”), there would have been thousands of individual inquiries into the consent or lack
24 thereof from various class members which would not have been susceptible of common proof.
25 (Doc. No. 164 at 21–30; Doc. No. 165 at 35–38.) While such arguments are commonly heard
26 from defense counsel in class actions, they are not wholly without merit. Attorney Cordero also
27 notes in his declaration that defendants intended to argue that the faxes were not transmitted over
28 a “regular telephone line,” a requirement for liability under the TCPA. (Doc. No. 179-3 at ¶ 6,

1 n.1.) Sustaining the matter as a class action throughout trial may have proved challenging for
2 plaintiff and the class.

3 4. Amount Offered in Settlement

4 The amount offered in settlement is \$25 million. This is less than, but on a similar order
5 of magnitude with, the \$39.1 million in claims most likely to be sustained against defendant
6 RehabCare. While the settlement amount represents only a fraction of the potential total liability
7 of \$1.2 billion, this amount would have been both difficult to prove and likely impossible to
8 collect. Further, the plaintiffs have presented evidence that this is the third-largest TCPA
9 settlement in the Ninth Circuit in the last decade. (*See* Doc. No. 179-1 at 20; Doc. No. 179-9;
10 Doc. No. 179-10.) The amount offered supports settlement here.

11 5. Extent of Discovery Completed and the Stage of the Proceeding

12 The court has detailed the voluminous discovery completed here in its prior order,
13 including multiple informal discovery conferences and motions to compel spanning over two
14 years and including more than a dozen depositions, in addition to the exchange of more than
15 70,000 documents. (Doc. No. 177 at 6.) The significant effort displayed by counsel on both sides
16 bolsters this court's conclusion that the settlement is fairly reached.

17 6. Experience and Views of Counsel

18 Plaintiff's counsel Cordero declares that he strongly supports final approval of this
19 settlement, which represents the best possible outcome for the class "by far." (Doc. No. 179-3 at
20 ¶ 4.) Attorney Cordero lays out the risks of continued litigation, not only in relation to the
21 certification motion and the collectability of a judgment, but also concerning various merits-stage
22 defenses defendants were likely to raise. (Doc. No. 179-3 at ¶¶ 6–7.) Attorney Cordero has 34
23 years' worth of litigation experience, and has practiced complex business litigation for much of
24 that period, including serving as lead counsel in a number of other class actions. (*Id.* at ¶¶ 18–
25 20.) Additionally, the other class counsel—attorneys Magolnick and Fischbach—similarly
26 submitted declarations indicating they are well-versed in class action litigation and fully support
27 the settlement in this case. (Doc. No. 179-6 at ¶¶ 2–6, 11; Doc. No. 179-7 at ¶¶ 2–5, 8.)

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1 7. Presence of a Government Participant

2 Pursuant to 28 U.S.C. § 1715(b), defendants provided notice to the U.S. Attorney General
3 and the relevant government officials for all fifty states, the District of Columbia, Guam, Puerto
4 Rico, and the Virgin Islands. (Doc. No. 173 at ¶ 8; Doc. No. 174 at ¶ 6.) This notice was
5 provided by defendant RehabCare on March 28, 2017 and by defendant Cannon on April 7, 2017.
6 (Doc. No. 173 at ¶ 8; Doc. No. 174 at ¶ 6.) More than 90 days have elapsed since notice was
7 given, and this court has received no objections to this settlement from federal or state officials.
8 28 U.S.C. § 1715(d); *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1075 (9th Cir. 2017).

9 8. Reaction of the Class Members to the Proposed Settlement

10 As mentioned previously, no class members have objected to the settlement, and only one
11 has opted out of being included in it, suggesting general approval of the class for the settlement.

12 9. Subtle Signs of Collusion

13 The court now turns to a review of whether any of the “more subtle signs” of collusion
14 noted by the Ninth Circuit are present here. *See In re Bluetooth*, 654 F.3d at 947. The award of
15 attorneys’ fees sought here—one-third of the settlement fund—is on the high end of amounts
16 typically awarded in the Ninth Circuit. *See Morales v. Stevco, Inc.*, No. 1:09-cv-00704, 2011 WL
17 5511767 AWI JLT, at *12 (E.D. Cal. Nov. 10, 2011) (“The typical range of acceptable attorneys’
18 fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the
19 benchmark.”) (quoting *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000)). That said, the
20 proposed attorneys’ fees award is not disproportionate to the significant monetary distribution the
21 class will receive. Additionally, there are no “clear sailing” provisions here, and settlement of the
22 claims is expressly not conditioned on the approval of fees, costs, and expenses to class counsel
23 under the settlement agreement. (Doc. No. 171 at 9.) Class counsel’s attorneys’ fees and costs are
24 to be paid from the common fund, and will not be paid separately by defense counsel. (*Id.*)
25 Finally, there is no reversionary clause in the agreement, which specifically states “[d]efendants
26 shall have no reversionary or other interest in the Common Fund or excess funds not distributed
27 to Settlement Class Members.” (Doc. No. 171 at 14.) The court is satisfied that none of the
28 subtle signs of collusion present in some class action settlements are apparent here. The court

1 therefore finds that the settlement is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e).

2 **C. Tax Identification Number Deficiency Notice**

3 On August 31, 2017, plaintiff filed a status report. (Doc. No. 184.) In that status report,
4 plaintiff noted that there are 8,555 class members who are eligible to receive \$600 or more in
5 proceeds. (*Id.* at 3.) Plaintiff represents this is the threshold which triggers certain reporting
6 requirements with the Internal Revenue Service (“IRS”). (*Id.*) In order to file the necessary
7 reporting documents, the settlement administrator requires the Taxpayer Identification Numbers
8 (TINs) for the class members, which it does not have for 8,135 of the class members. (*Id.*)
9 According to plaintiff, without these, the IRS will assess penalties on settlement administrators
10 and class members for failing to submit Form W-9s and 1099s, even if the settlement
11 administrator appropriately withholds tax payments and sends these to the IRS. (*Id.*) Plaintiff has
12 already sent deficiency notices to these class members, to which they have not responded. (*Id.*)
13 Plaintiff requests the court order the settlement administrator KCC to send additional deficiency
14 notices to these members in advance of the distribution. (*Id.*) The court finds plaintiff’s request
15 to be appropriate and therefore directs administrator KCC to send additional deficiency notices to
16 the members for whom KCC lacks TIN information. Additionally, KCC is authorized to pay
17 class members who fail to return TIN information to it following the second deficiency notice in
18 annual installments of less than \$600 each.

19 **ATTORNEYS’ FEES**

20 **A. Attorneys’ Fees**

21 This court has an “independent obligation to ensure that the award [of attorneys’ fees],
22 like the settlement itself, is reasonable, even if the parties have already agreed to an amount.” *In*
23 *re Bluetooth*, 654 F.3d at 941. This is because, when fees are to be paid from a common fund, the
24 relationship between the class members and class counsel “turns adversarial.” *In re Mercury*
25 *Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010); *In re Wash. Pub. Power Supply*
26 *Sys. Secs. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994). As such, the district court assumes a
27 fiduciary role for the class members in evaluating a request for an award of attorneys’ fees from
28 the common fund. *Id.*; *see also Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012);

1 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 968 (9th Cir. 2009).

2 Because this case is premised on federal question jurisdiction (Doc. No. 1 at 1), federal
3 law governs the award of attorneys' fees. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047
4 (9th Cir. 2002) ("Because Washington law governed the claim, it also governs the award of
5 fees."); *see also* 10 Fern M. Smith, *Moore's Federal Practice Civil* § 54.171 (2015) ("In cases
6 within the district courts' federal-question jurisdiction, state fee-shifting statutes generally are
7 inapplicable.") "Under Ninth Circuit law, the district court has discretion in common fund cases
8 to choose either the percentage-of-the-fund or the lodestar method" for awarding attorneys' fees.
9 *Vizcaino*, 290 F.3d at 1047. The Ninth Circuit has generally set a 25 percent benchmark for the
10 award of attorneys' fees in common fund cases. *Id.* at 1047–48; *see also In re Bluetooth*, 654
11 F.3d at 942 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee
12 award, providing adequate explanation in the record of any 'special circumstances' justifying a
13 departure."). Reasons to vary the benchmark award may be found when counsel achieves
14 exceptional results for the class, undertakes "extremely risky" litigation, generates benefits for the
15 class beyond simply the cash settlement fund, or handles the case on a contingency basis.
16 *Vizcaino*, 290 F.3d at 1048–50; *see also In re Online DVD-Rental*, 779 F.3d at 954–55.
17 Ultimately, however, "[s]election of the benchmark or any other rate must be supported by
18 findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048.
19 The Ninth Circuit has approved the use of lodestar cross-checks as a way of determining the
20 reasonableness of a particular percentage recovery of a common fund. *Id.* at 1050 ("Where such
21 investment is minimal, as in the case of an early settlement, the lodestar calculation may convince
22 a court that a lower percentage is reasonable. Similarly, the lodestar calculation can be helpful in
23 suggesting a higher percentage when litigation has been protracted."); *see also In re Online DVD-*
24 *Rental*, 779 F.3d at 955.

25 Counsel here presents numerous reasons for awarding an above-benchmark recovery of
26 one-third of the settlement fund: (1) the result is exceptional, because it is the third-largest TCPA
27 settlement in the Ninth Circuit in recent years, yields a \$1,339 average member recovery after
28 fees, and does not require class members to make claims in order to receive payments; (2) class

1 counsel faced a substantial risk of non-payment; (3) a one-third attorney fee recovery is consistent
2 with that in *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200 (C.D. Cal. 2014) and
3 *Hageman v. AT&T Mobility LLC*, No. 13-cv-00050-BLG-RWA, 2015 WL 9855926 (D. Mont.
4 Feb. 11, 2015); (4) class counsel devoted considerable efforts to litigating this case; (5) class
5 counsel was only able to recover on a contingency basis for this action; (6) class counsel are
6 skilled and experienced litigators; (7) the issues involved were complex; (8) there were no
7 objections from class members concerning the attorneys' fees to be sought; and (9) a lodestar
8 cross-check supports the fees. (Doc. No. 180-1 at 12–26.) The court addresses those of counsel's
9 arguments it finds pertinent below.

10 The result achieved in this case is fairly exceptional in proportional terms. The eligible
11 class members suffered 2,328,003 violations over the class period, as one “share” of the class
12 settlement equals one junk fax transmission. (See Doc. No. 187 at ¶ 3.) The net distribution to
13 the class is likely to be around \$16.4 million. (Doc. No. 179-13 at ¶ 13.) This means class
14 members are receiving a payment of approximately \$7.00 for each violation. Moreover, courts
15 regularly use an opt-in procedure in TCPA class actions whereby each class member must file a
16 claim in order to receive any payment. *Rose v. Bank of Am. Corp.*, No. 5:11–CV–02390–EJD
17 and 5:12–CV–04009–EJD, 2014 WL 4273358, at *5 (N.D. Cal. Aug. 29, 2014) (noting that
18 approximately 228,000 claims had been made out of a potential class of seven million members);
19 *Grannan v. Alliant Law Grp., P.C.*, No. C10-02803 HRL, 2012 WL 216522, at *2–3 (N.D. Cal.
20 Jan. 24, 2012) (observing 1,986 valid claims were made out of almost 138,000 potential class
21 members). Here, there is no opt-in procedure, and settlement checks will be automatically sent to
22 each of the class members for whom there is a name and address. (Doc. No. 171 at 13–14.)
23 Distributed over the entirety of a class, rather than just the individuals who submitted claim
24 forms, this settlement recovers more on a per-violation basis than many TCPA settlements of
25 which this court is aware. See *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493 (N.D. Ill. 2015)
26 (\$1.20 per violation recovery); *Wilkins v. HSBC Bank Nev., N.A.*, No. 14 C 190, 2015 WL
27 890566, at *5–6 (N.D. Ill. Feb. 27, 2015) (approving \$2.95 per violation recovery); *In re Capital*
28 *One Tele. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 789–790 (N.D. Ill. 2015) (\$2.72 per

1 violation recovery); *Rose*, 2014 WL 4273358, at *10 (approximately \$4.23 recovery per
2 violation); *Grannan*, 2012 WL 216522, at *2–3 (\$4.41 per violation recovery). While the
3 statutory penalties for the claims alleged here range as high as \$1,500 per violation, if the
4 violation is willful, 47 U.S.C. § 227(b)(3), it is clear defendants could not satisfy a judgment in
5 the amount of the maximum potential liability, as discussed above.

6 Class counsel here also faced a substantial risk of non-payment. As the court has already
7 explained, this case was subjected to extensive and serious litigation, discovery, and motion
8 practice. (Doc. No. 177 at 6.) All three law firms representing the class here accepted the matter
9 on a purely contingent basis. (See Doc. No. 179-3 at 5, n.4; Doc. No. 179-6 at 3; Doc. No. 179-7
10 at 2–3.) None would have been compensated at all absent a recovery for the class. “[A]ttorneys
11 whose compensation depends on their winning the case[] must make up in compensation in the
12 cases they win for the lack of compensation in the cases they lose.” *Vizcaino*, 290 F.3d at 1051
13 (quoting *In re Wash. Pub. Power Supply*, 19 F.3d at 1300–01).

14 As discussed above, class counsel devoted significant efforts in litigating this case. (See
15 Doc. No. 177 at 6.) Attorney Cordero declares that attorneys at his firm devoted 4,696 hours to
16 this case while paralegals contributed 707 hours. (Doc. No. 179-3 at ¶ 12.) Attorney Magolnick
17 declares he spent more than 132 hours on this case, while attorney Fischbach indicates attorneys
18 at his firm spent 311.5 hours litigating this case. (Doc. No. 179-6 at ¶ 13; Doc. No. 179-7 at ¶ 9.)
19 Therefore, class counsel have spent more than 5,000 hours litigating this case. This, too, supports
20 an above-benchmark award.

21 The absence of any objections to the settlement also supports the award of attorneys’ fees
22 here. The class notices here specifically advised class members that class counsel would seek
23 one-third of the fund for attorneys’ fees, as well as reimbursement for any costs for litigation.
24 (Doc. No. 171 at 26, 36.) No objections to the proposed settlement were received, and only one
25 class member opted out of the settlement. Therefore, this attorneys’ fee arrangement appears to
26 have the support of the class.

27 Finally, a lodestar cross-check bolsters the attorneys’ fees request further. Where a
28 lodestar is merely being used as a cross-check, the court “may use a ‘rough calculation of the

1 lodestar.” *Bond v. Ferguson Enters., Inc.*, No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879, at
2 *12 (E.D. Cal. June 30, 2011) (quoting *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-
3 04149 MMM (SHx), 2008 WL 8150856 (C.D. Cal. July 21, 2008)). Beyond simply the
4 multiplication of a reasonable hourly rate by the number of hours worked, a lodestar multiplier is
5 typically applied. “Multipliers in the 3–4 range are common in lodestar awards for lengthy and
6 complex class action litigation.” *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D.
7 Cal. 1995) (citing *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988)); *see*
8 *also* 4 Newberg on Class Actions § 14.7 (courts typically approve percentage awards based on
9 lodestar cross-checks of 1.9 to 5.1 or even higher, and “the multiplier of 1.9 is comparable to
10 multipliers used by the courts”); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*,
11 148 F.3d 283, 341 (3d Cir. 1998) (“[M]ultiples ranging from one to four are frequently awarded
12 in common fund cases when the lodestar method is applied.”) (quoting Newberg).

13 This court has previously accepted as reasonable for lodestar purposes hourly rates of
14 between \$370 and \$495 for associates, and \$545 and \$695 for senior counsel and partners. *See*
15 *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, 1:13-cv-00474-DAD-BAM, at *8 (E.D. Cal.
16 Feb. 27, 2017). Some judges in the Fresno division of the Eastern District of California have
17 approved similar rates in various class action settings, while others have approved lower rates.
18 *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 452 (E.D. Cal. 2013) (awarding between
19 \$280 and \$560 per hour for attorneys with two to eight years of experience, and \$720 per hour for
20 attorney with 21 years of experience); *Gong-Chun v. Aetna Inc.*, No. 1:09-cv-01995-SKO, 2012
21 WL 2872788, at *23 (E.D. Cal. July 12, 2012) (awarding between \$300 and \$420 per hour for
22 associates, and between \$490 and \$695 per hour for senior counsel and partners). *But see In re*
23 *Taco Bell Wage and Hour Actions*, 222 F. Supp. 3d 813, 838–40 (E.D. Cal. 2016) (concluding
24 that Fresno division rates are \$350 to \$400 per hour for attorneys with twenty or more years of
25 experience, \$250 to \$350 per hour for attorneys with less than fifteen years of experience, and
26 \$125 to \$200 per hour for attorneys with less than two years of experience); *Reyes v. CVS*
27 *Pharm., Inc.*, No. 1:14-cv-00964-MJS, 2016 WL 3549260, at *12–13 (E.D. Cal. June 29, 2016)
28 (awarding between \$250 and \$380 for attorneys with more than twenty years of experience, and

1 between \$175 and \$300 for attorneys with less than ten years' experience); *Rosales v. El Rancho*
2 *Farms*, No. 1:09-cv-00707-AWI, 2015 WL 4460635, at *25 (E.D. Cal. July 21, 2015) (awarding
3 between \$175 and \$300 per hour for attorneys with less than ten years of experience and \$380 per
4 hour for attorneys with more than twenty years' experience); *Schiller v. David's Bridal, Inc.*, No.
5 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *22 (E.D. Cal. June 11, 2012) (awarding
6 between \$264 and \$336 per hour for associates, and \$416 and \$556 per hour for senior counsel
7 and partners). Here, the court generally adopts the hourly rates provided by class counsel for
8 lodestar cross-check purposes as appropriate.¹

9 Additionally, counsels' declarations are sufficient to establish the number of attorney
10 hours worked on this matter. *See Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264
11 (N.D. Cal. 2015) (“[I]t is well established that ‘[t]he lodestar cross-check calculation need entail
12 neither mathematical precision nor bean counting . . . [courts] may rely on summaries submitted
13 by the attorneys and need not review actual billing records.’”) (quoting *Covillo v. Specialtys Café*,
14 No. C-11-00594 DMR, 2014 WL 954516 (N.D. Cal. Mar. 6, 2014)). Here, counsel represents
15 that more than 5,800 hours have been spent by all attorneys and paralegals on the case. (Doc. No.
16 180-1 at 22.) Combining the hours counsel represented they spent on the case with the applicable
17 hourly rate, the lodestar base figure here is \$2,802,352.50, rather than the \$2,972,631 counsel
18 estimated. (See Doc. No. 180-1 at 22.)

19 Ultimately, class counsel request an award of one-third of the \$25 million settlement fund,
20 or \$8,333,333. Thus, the lodestar multiplier is approximately 3.0. Multipliers of 3.65 have been
21 approved by the Ninth Circuit. *See Vizcaino*, 290 F.3d at 1051. “Multipliers in the 3–4 range are
22 common in lodestar awards for lengthy and complex class action litigation.” *Van Vranken*, 901

23 ¹ The rates provided by class counsel range between \$215 for paralegals and \$775 for lead
24 counsel Cordero. The court will adjust these rates downward somewhat. The prevailing rate for
25 paralegals in the Eastern District of California is on the order of \$95 to \$115 per hour, and the
26 court applies a rate of \$115 per hour here. *See Moore v. Millennium Acquisitions, LLC*, No 1:14-
27 cv-01402-DAD-SAB, 2017 WL 1079753, at *2–3 (E.D. Cal. Mar. 21, 2017); *Trujillo v. La Valley*
28 *Foods, Inc.*, No. 1:16-cv-01402-AWI-BAM, 2017 WL 2992453, at *5 (E.D. Cal. July 14, 2017).
Additionally, class counsel Cordero's rate is adjusted downward to \$695 per hour, which is the
outside limit recognized for senior counsel and partners in this division of this court. While rates
provided for the other attorneys here are likely somewhat higher than would normally be awarded
in the Fresno division of the Eastern District of California, the court accepts them as given, in the
interest of expediting this “rough calculation.” *Bond*, 2011 WL 2648879, at *12.

1 F. Supp. at 298 (citing *Behrens*, 118 F.R.D. at 549). The court finds a 3.0 lodestar multiplier
2 reasonable here for purposes of a cross-check.

3 Given the above facts as found by this court, an above benchmark award of attorneys' fees
4 is warranted here. Therefore, the request that one-third of the settlement fund be awarded as
5 attorneys' fees will be granted.

6 **B. Distribution of Attorneys' Fees Among Class Counsel**

7 Class counsel requests that the court order attorneys' fees to be distributed amongst the
8 three firms representing the class in accordance with their agreement. (*See* Doc. No. 180 at 2.)
9 The final proposed allocation of attorneys' fees amongst the firms, as agreed to by each of the
10 class counsel, is 5.19 percent to Dowling Aaron Inc., 3.84 percent to Marko & Magolnick, P.A.,
11 and 90.97 percent to Payne & Fears LLP. (Doc. No. 185 at 2.) Courts typically look to the
12 “relative efforts of, and benefits conferred upon the class by, co-counsel’ when deciding whether
13 to accept” a proposed fee allocation amongst co-counsel. *Keller v. NCAA*, No. C 09-1967 CW, C
14 09-3329 CW, 2015 WL 8916392, at *4 (N.D. Cal. Dec. 15, 2015) (quoting *In re FPI/Agretech*
15 *Secs. Litig.*, 105 F.3d 469, 474 (9th Cir. 1997)). Here, considering the hours each firm devoted to
16 this litigation as detailed above, along with the agreement of class counsel on the matter, the court
17 will grant the fee allocation proposed by class counsel.

18 **C. Expenses of Class Counsel**

19 Additionally, class counsel seeks to recover the costs expended on this litigation. Expense
20 awards “should be limited to typical out-of-pocket expenses that are charged to a fee paying client
21 and should be reasonable and necessary.” *In re Immune Response Secs. Litig.*, 497 F. Supp. 2d
22 1166, 1177 (S.D. Cal. 2007). These can include reimbursements for “(1) meals, hotels, and
23 transportation; (2) photocopies; (3) postage, telephone, and fax; (4) filing fees; (5) messenger and
24 overnight delivery; (6) online legal research; (7) class action notices; (8) experts, consultants, and
25 investigators; and (9) mediation fees.” *Id.*

26 Attorney Cordero reports that his firm incurred costs of \$123,108.08, including
27 \$20,095.84 on mediation expenses, \$61,265.95 on experts and consultants, \$11,586.23 on court
28 reporter and transcript-related expenses for twelve of the thirteen depositions taken, and

1 \$17,395.83 in travel expenses, among other costs. (Doc. No. 179-3 at ¶ 22.) Additionally,
2 attorney Cordero requests the court approve an additional \$1,200 for future expenses, to be
3 available for any costs incurred during subsequent administration of the settlement.² (Doc. No.
4 179-3 at ¶ 22(e).) Attorney Magolnick declares he spent \$9,229.46 in expenses on the case,
5 including travel, transportation, and lodging expenses for two mediations and one deposition.
6 (Doc. No. 179-6 at ¶ 16.) Finally, attorney Fischbach relates his firm advanced costs associated
7 with the litigation in the amount of \$4,302.28 for delivery services, hearing transcripts, mediators,
8 photocopying, filing fees and court costs, and travel. (Doc. No. 179-7 at ¶ 12.) The court finds
9 these expenses to be reasonable and will approve them. The court therefore will direct that
10 \$123,108.08 be paid from the settlement fund to attorney Cordero's firm Payne & Fears; that
11 \$9,229.46 be paid from the settlement fund to attorney Magolnick's firm Marko & Magolnick;
12 and that \$4,302.28 be paid from the settlement fund to attorney Fischbach's firm Dowling Aaron,
13 Inc. Additionally, the settlement administrator shall establish an expense reserve from the
14 common fund of an additional \$1,200 to be used to reimburse attorney expenses incurred during
15 administration of the settlement, if any. Any unspent portion of this amount shall be added back
16 into the common fund.

17 **D. Fee-Sharing With Referral Attorney**

18 Class counsel indicated in a footnote in their attorneys' fee motion that "[t]he parties have
19 agreed, subject to the Court's approval, to remit 3.33 percent of their respective shares to Frank
20 Owen, the Florida attorney that originally worked with Cordero to develop the case." (Doc. No.
21 180-1 at 26 n.10.) Attorney Cordero further explains in a declaration that "[t]his goodwill
22 payment . . . is in recognition of the fact that Mr. Owen indirectly assisted me in originating this
23 matter." (Doc. No. 179-3 at 11.) As discussed at the final fairness hearing, attorney Owen is not
24 class counsel here and did not assist in the active litigation of this case. Class counsel advised
25 that they seek court approval to pay Owen what is essentially a referral fee, and are not seeking an
26 award of attorneys' fees to him under Rule 23. The court requested further briefing addressing
27

28 ² Any amount unspent is to be added to the common fund.

1 the necessity for such court approval and the authority pursuant to which the court could grant
2 that approval. Plaintiff filed the requested briefing on September 11, 2017. (Doc. No. 188.)

3 Federal courts follow what is known as the American Rule, wherein “[e]ach litigant pays
4 his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.”) *Baker Botts*
5 *L.L.P. v. ASARCO LLC*, ___ U.S. ___, ___, 135 S. Ct. 2158, 2164 (2015) (quoting *Hardt v.*
6 *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010)). In common fund cases, district
7 courts “have the power to award attorneys’ fees ‘in the exercise of their equitable powers.’”
8 *Winger v. SI Mgmt. LP*, 301 F.3d 1115, 1120 (9th Cir. 2002) (quoting *Hall v. Cole*, 412 U.S. 1,
9 5 (1973)); *see also Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012) (describing the
10 common fund doctrine as “a traditional equitable doctrine ‘rooted in concepts of quasi-contract
11 and restitution.’”) (quoting *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 770 (9th Cir. 1977)).
12 So long as the court has jurisdiction over the fund itself, there is no requirement that the work
13 being compensated be within “the strict confines of the litigation immediately before the court.”
14 *Winger*, 301 F.3d at 1121. The guiding principle the court should look to is whether “the non-
15 litigation work was calculated to—and in fact did—bring about the common fund presently under
16 the district court’s control.” *Id.* at 1121 n.3.

17 Here, the court accepts the representation of class counsel that attorney Owen contributed
18 to the ultimate creation of this common fund by helping attorney Cordero originate this case.
19 Given counsel’s representation that attorney Owen helped to develop the case, the agreement of
20 both other class counsel to the fee-sharing arrangement, and the absence of any objections raised
21 by defendants, the class representative, or class members, the court will exercise its discretionary
22 equitable powers and approve the proposed fee-sharing arrangement. Accordingly, each class
23 counsel is hereby directed to provide attorney Owen with 3.33 percent of their respective award
24 of attorneys’ fees, pursuant to their agreement.

25 **D. Payment to Class Counsel Over Time**

26 Class counsel requested at the hearing that this court direct the settlement administrator to
27 establish a qualified settlement fund under Internal Revenue Code § 468B for purposes of paying
28 attorneys’ fees, if any attorney wishes to receive their fee in periodic payments rather than a lump

1 sum. The court will grant class counsel’s request and, if counsel request the settlement
2 administrator make payments in a periodic manner, the settlement administrator is hereby
3 directed to establish a qualified settlement fund under 26 U.S.C. § 468B.

4 **INCENTIVE PAYMENTS FOR CLASS REPRESENTATIVES**

5 Plaintiff seeks an incentive payment of \$15,000 for its service as a class representative in
6 this action. While incentive awards are “fairly typical in class action cases,” they are
7 discretionary sums awarded by the court “to compensate class representatives for work done on
8 behalf of the class, to make up for financial or reputational risk undertaken in bringing the action,
9 and, sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez v.*
10 *West Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *Staton*, 327 F.3d at 977 (“[N]amed
11 plaintiffs . . . are eligible for reasonable incentive payments.”). Such payments are to be
12 evaluated individually, and should look to factors such as “the actions the plaintiff has taken to
13 protect the interests of the class, the degree to which the class has benefitted from those actions, .
14 . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and
15 reasonabl[e] fear[s of] workplace retaliation.” *Staton*, 327 F.3d at 977 (quoting *Cook v. Niedert*,
16 142 F.3d 1004, 1016 (7th Cir. 1998)). Such awards must be “scrutinize[d] carefully . . . so that
17 they do not undermine the adequacy of the class representatives.” *Radcliffe v. Experian Info.*
18 *Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013). Thus, incentive awards which are explicitly
19 conditioned on the representatives’ support for the settlement, as well as those that are
20 significantly higher than the average amount awarded in settlement, should often not be approved.
21 *Id.* at 1164–65. The core inquiry is whether an incentive award creates a conflict of interest, and
22 whether plaintiffs “maintain a sufficient interest in, and nexus with, the class so as to ensure
23 vigorous representation.” *In re Online DVD-Rental*, 779 F.3d at 943.

24 Here, plaintiff has presented a declaration from Henry E. LeVine, Jr., the president and
25 administrator of Dakota Medical, Inc., detailing his involvement with this case. LeVine notes
26 that he retained Darryl Cordero of Payne & Fears to represent plaintiff and the class in this
27 lawsuit in 2014. (Doc. No. 179-2 at ¶ 6.) LeVine reviewed and approved the co-counsel
28 agreement that was signed between Cordero and attorneys Fischbach and Magolnick. (*Id.*)

1 LeVine avers he knows of no conflicting interests between the class and plaintiff, and has
2 exercised his independent judgment to pursue resolution in the best interests of the class. (*Id.* at
3 ¶ 8.) He has kept abreast of case developments, coordinated the collection of documents, assisted
4 with interrogatory responses, and appeared for deposition. (*Id.* at ¶ 9.) According to LeVine, he
5 attended the first of the mediations, and was available by telephone and e-mail throughout the
6 second mediation. (*Id.* at ¶¶ 10–11.) LeVine devoted approximately sixty to seventy hours of
7 work to this litigation over its course, and was not provided with or promised financial
8 consideration for doing so. (*Id.* at ¶ 12.) In light of this involvement in the litigation, plaintiff
9 requests a \$15,000 incentive payment.

10 The average net settlement recovery per class member will be approximately \$1,300.
11 Therefore, an incentive award of \$15,000 is more than ten times what the average class member
12 could expect to receive in this litigation. Moreover, because of the nature of this litigation,
13 plaintiff bears little associational or reputational risk. Further, because plaintiff does not do
14 business with the defendants, there is no real risk of jeopardizing its business relationships by
15 pursuing this case. An award of \$15,000 reflects compensation for the time devoted by Mr.
16 LeVine to the litigation at the rate of between \$215 and \$250 per hour. These factors might be
17 viewed as supporting a somewhat lower incentive payment than that requested.

18 That said, plaintiff has also presented declarations from several class members indicating
19 strong support for both the settlement and the requested incentive award. (*See, e.g.*, Doc. No.
20 179-15 at ¶¶ 5–7 (Decl. of Cranwell, in-house counsel for American HealthCare, LLC); Doc. No.
21 179-29 at ¶ 6 (Decl. of Creagh, general counsel of Grane Healthcare Co.); Doc. No. 179-34 at
22 ¶¶ 6–7 (Decl. of Lane, in-house counsel for Rockport Healthcare Services).) Moreover, a number
23 of the class members will be receiving large payouts from the settlement, given the number of
24 facilities and fax numbers that received the junk faxes at each organization. (*See, e.g.*, Doc. No.
25 179-27 at ¶ 7 (Golden Living Centers will receive almost \$300,000 from the settlement); Doc.
26 No. 179-34 at ¶ 6 (Rockport Healthcare Services anticipates receiving \$80,000 from the
27 settlement); Doc. No. 179-36 at ¶ 6 (Windsor assisted living facilities will receive \$30,000 from
28 the settlement).) Ultimately, the proposed incentive payment is not far outside the amounts

1 previously approved by courts under similar circumstances. *See, e.g., Taylor v. FedEx Freight,*
2 *Inc.*, No. 1:13-cv-01137-DAD-BAM, 2016 WL 6038949, at *8 (E.D. Cal. Oct. 13, 2016)
3 (approving a \$10,000 incentive award where average awards were estimated to be \$2,616);
4 *Ontiveros v. Zamora*, 303 F.R.D. 356, 366 (E.D. Cal. 2014) (approving \$15,000 incentive
5 payments for average recovery of \$3,700); *Clayton v. Knight Transp.*, No. 1:11-cv-00735-SAB,
6 2014 WL 1154098 at *2, 6 (E.D. Cal. Mar. 21, 2014) (awarding \$3,500 incentive payment where
7 the average recovery was approximately \$150); *Davis v. Brown Shoe Co., Inc.*, No. 1:13-cv-
8 01211-LJO-BAM, 2015 WL 6697929 at *12 (E.D. Cal. Nov. 3, 2015) (approving \$7,000
9 incentive payments where the average class recovery was approximately \$400).

10 Considering it is far smaller than a number of payments that will be made to individual
11 class members, and given the support for the requested incentive award from class members, the
12 court will award plaintiff Dakota Medical the requested \$15,000 incentive payment.

13 CONCLUSION

14 Given the foregoing:

- 15 1. Plaintiff's motion for final approval of the settlement and certification of the settlement
16 class (Doc. No. 179) is granted, the settlement class is certified, and the court approves the
17 settlement as fair, reasonable, and adequate;
- 18 2. C. Darryl Cordero of Payne & Fears LLP, Donald R. Fischbach of Dowling Aaron, Inc.,
19 and Joel S. Magolnick of Marko & Magolnick P.A. are confirmed as class counsel;
20 plaintiff is confirmed as class representative; and KCC LLC is confirmed as the settlement
21 administrator;
- 22 3. Settlement administrator KCC is directed to send an additional deficiency notice to class
23 members entitled to payments of more than \$600 requesting their TINs, and may pay any
24 class members who fail to respond in annual installments of less than \$600 until the full
25 amount due to each class member is paid;
- 26 4. Within twenty (20) days of service of this order, defendants shall deposit \$24,935,000,
27 representing the balance of the \$25,000,000 fund not already deposited for notice and
28 settlement administration costs, in an account established by the settlement administrator.

1 The settlement administrator has filed a report setting forth eligible class members and
2 their respective shares of the settlement. (Doc. No. 187-1.) The settlement administrator
3 shall distribute the proceeds of the settlement fund, after deducting its costs, attorneys'
4 fees and expenses, and incentive payments as set forth below, to the class members in
5 accordance with the settlement agreement;

6 5. Class counsel's motion for attorneys' fees (Doc. No. 180) is hereby granted, the court
7 approves the proposed fee allocation (Doc. No. 185), and \$8,333,333 is hereby awarded
8 from the common fund to class counsel, to be divided as follows:

9 a. Dowling Aaron, Inc. shall receive 5.19 percent of the total fee award, or
10 \$432,499.99;

11 b. Marko & Magolnick, P.A. shall receive 3.84 percent of the total fee award, or
12 \$319,999.98; and

13 c. Payne & Fears LLP shall receive 90.97 percent of the total fee award, or
14 \$7,580,833.03;

15 d. Each firm named as class counsel in this matter shall remit 3.33 percent of their
16 respective fee awards to attorney Frank Owen;

17 6. Class counsel's expenses are approved, and class counsel are to be awarded the following
18 amounts from the common fund:

19 a. Dowling Aaron, Inc. is awarded \$4,302.28;

20 b. Marko & Magolnick, P.A. is awarded \$9,229.46;

21 c. Payne & Fears LLP is awarded \$123,108.80; and

22 d. The settlement administrator is directed to establish an expense reserve from the
23 common fund of \$1,200 to be used to reimburse attorney expenses incurred during
24 settlement administration, if any, with unused portion returned to the common
25 fund after the initial distribution;

26 7. The settlement administrator is hereby directed to establish a qualified settlement fund
27 under 26 U.S.C. § 468B, if any class counsel advises the administrator of a desire to
28 receive periodic payments in lieu of a lump sum payment of attorneys' fees;

- 1 8. The motion for an incentive payment for plaintiff and class representative Dakota Medical
2 (Doc. No. 181) is granted and plaintiff is awarded a \$15,000 incentive payment to be paid
3 from the common fund;
- 4 9. The settlement administrator has been paid \$22,311 for the costs of notice and settlement
5 administration through July 31, 2017, and this sum is approved. The settlement
6 administrator shall be paid an additional amount, not to exceed \$94,069 from the common
7 fund for the costs of settlement administration from August 1, 2017 through the initial
8 distribution and subsequent report to the court;
- 9 10. The parties and the settlement administrator shall advise the court within 21 days
10 following the lapse of the time in which to negotiate settlement checks set forth in ¶ 11(A)
11 of the settlement agreement (Doc. No. 171) whether undistributed funds from this
12 settlement remain, and if so, whether the parties intend to seek a further distribution to
13 class members or will move the court for a *cy pres* distribution;
- 14 11. All parties are directed to abide by the settlement agreement (Doc. No. 171), including
15 any deadlines or procedures for distribution included therein, and take all necessary steps
16 to complete and administer the settlement in accordance therewith; and
- 17 12. The court retains jurisdiction to consider any further applications arising out of or in
18 connection with the settlement.

19 IT IS SO ORDERED.

20 Dated: September 20, 2017

21 
22 _____
23 UNITED STATES DISTRICT JUDGE
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