DANIEL S. ROBINSON, State Bar No. 244245
drobinson@robinsonfirm.com
WESLEY K. POLISCHUK, State Bar No. 254121
wpolischuk@robinsonfirm.com
ROBINSON CALCAGNIE, INC.
19 Corporate Plaza Drive
Newport Beach, CA 92660
Telephone: (949) 720-1288
Facsimile: (949) 720-1292

WAYNE R. GROSS, State Bar No. 138828
WGross@ggtriallaw.com
EVAN C. BORGES, State Bar No. 128706
EBorges@GGTrialLaw.com
GREENBERG GROSS LLP
650 Town Center Drive, Suite 1750
Costa Mesa, CA 92626
Telephone: (949) 383-2800
Facsimile: (949) 383-2801

Attorneys for Plaintiffs Sheri Dodge, Neil Dodge, Ram Agrawal, Sarita Agrawal and All Others Similarly Situated

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHERI DODGE and NEIL DODGE, and RAM AGRAWAL and SARITA AGRAWAL, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PHH CORPORATION, a Maryland corporation; REALOGY HOLDINGS CORP., a Delaware corporation; PHH HOME LOANS LLC, a Delaware limited liability company; PHH MORTGAGE CORPORATION, a New Jersey corporation; RMR FINANCIAL, LLC, a California limited liability company; NE MOVES MORTGAGE LLC, a Massachusetts limited liability company; PHH BROKER PARTNER CORPORATION, a Maryland corporation; REALOGY GROUP

Case No. 8:15-CV-01973-FMO-AFM

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, EXPENSES AND SERVICE AWARDS

Date: August 16, 2018
Time: 10:00 a.m.

Judge: Hon. Fernando M. Olguin
Ctrm: 6D, 6th Floor – 1st Street

LLC, a Delaware limited liability company; REALOGY INTERMEDIATE HOLDINGS LLC, a Delaware limited liability company; TITLE RESOURCE GROUP LLC, a Delaware limited liability company; WEST COAST ESCROW COMPANY, a California corporation; TRG SERVICES ESCROW, INC., a Delaware corporation; EQUITY TITLE COMPANY, a California corporation; NRT LLC, a Delaware limited liability company; REALOGY SERVICES GROUP LLC, a Delaware limited liability company; REALOGY SERVICES VENTURE PARTNER LLC, a Delaware limited liability company,

Defendants.

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Plaintiffs Sheri Dodge, Neil Dodge, Sarita Agrawal, and Ram Agrawal ("Plaintiffs" or "Class Representatives"), by and through Class Counsel, respectfully submit this memorandum in support of their motion for an award of attorneys' fees and expenses and class representative incentive payments.

I. INTRODUCTION

Plaintiffs' Counsel obtained an outstanding result for borrowers in 32,221 residential mortgage transactions. As a result of this Settlement, these Class Members will receive settlement checks in amounts estimated to be between $0.75 and $17,412.91—representing cash payments of between 15% to 20% of the title-, escrow-, and closing-related charges the Class Members paid in connection with the closing of their loans.[1] (Pursuant to the Settlement Class definition, these Class Members are those persons who, on or after November 25, 2014 and on or before November 25, 2015, closed on any mortgage loan originated by PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, or their affiliates (including loans where PHH Mortgage Corporation provided origination services on behalf of any PLS Partners), and paid title-, escrow-, and closing-related charges in connection with that mortgage loan to Title Resource Group LLC or its affiliates.)

Plaintiffs now seek an award of attorneys' fees in the amount of $5.1 million, out-of-pocket expenses of $36,704.82, and a $2,500 incentive payment for each Class Representative. The requested fee is reasonable both under the percentage of the fund approach and a lodestar/multiplier cross-check. The requested $5.1 million fee is extremely reasonable given the tremendous result obtained for the Class and the efforts taken by Counsel to obtain that result. Likewise, an incentive payment of

[1] Defendants' records indicate the lowest amount paid by a Class Member for title-, escrow-, and closing-related charges is $5.00 and the highest amount paid by a Class Member for title-, escrow-, and closing-related charges is $87,064.56. There are only three (3) Class Members that paid less than $100.00 in title-, escrow-, and closing-related charges.

$2,500 to each Class Representative is reasonable given the time and effort they put into this case.

II. HISTORY OF THE LITIGATION

RESPA—particularly its prohibition on referral fees and kickbacks in 12 U.S.C. § 2607—was designed to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). One goal of RESPA was the "elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b).

Section 8(a) of RESPA prohibits certain business referral fees and provides:

> No person shall give and no person shall accept any fee, kickback, or *thing of value* pursuant to any *agreement or understanding*, oral or otherwise, that business incident to or a part of a real estate settlement service involving a *federally related mortgage loan* shall be referred to any person.

12 U.S.C. § 2607(a) (emphasis added).

In response to RESPA, many settlement service providers abandoned the classic kickback and instead devised business arrangements where one settlement service provider maintained an enhanced relationship with a second provider of a different settlement service, through which each service provider captured the clients of the other. In turn, Congress enacted two amendments to section 8 to address instances in which no direct kickback or referral fee is paid. First, Congress changed the calculation of damages from three times the amount of the kickback or referral fee to three times "any charge paid" for the settlement service. 12 U.S.C. § 2607(d)(2). Second, Congress severely limited the existence of ABAs. 12 U.S.C. § 2607(c)(4).

A. Overview of Plaintiffs' Allegations

In this case, Plaintiffs alleged that Defendants entered a series of illegal contracts to refer to one another "settlement services" in exchange for items of value and other contractual benefits (*i.e.*, kickbacks), which constitute per se violations of

RESPA. *See* Declaration of Daniel S. Robinson in Support of Motion for Attorneys' Fees, Expenses and Service Awards ("Robinson Decl."), ¶ 8; *see also* Plaintiffs' Fourth Amended Complaint ("Fourth Am. Comp.") ¶¶ 2-12, Dkt. 115. Specifically, Plaintiffs alleged PHH and Realogy created an ABA (PHH Home Loans), which was designed to facilitate the payment of unlawful referral fees, kickbacks and things of value in exchange for referrals of settlement services among Defendants. Robinson Decl. ¶ 8.

Around this time, PHH entered into a Strategic Relationship Agreement ("SRA") with Cendant Corporation, the former parent of both PHH and Realogy, that provided contractually mandated exchanges of value that Plaintiffs alleged violate RESPA. First, Plaintiffs alleged that, prior to an amendment that occurred on October 21, 2015, PHH was bound to refer all title insurance and settlement services to Realogy's subsidiary, TRG. Each customer of PHH Home Loans was also referred to TRG for title insurance and other settlement services. In return, PHH received a variety of monetary and nonmonetary referral fees and kickbacks via its ownership and control of the ABA and PHH's relationship with Realogy. Pursuant to the SRA, PHH Home Loans was also the exclusively recommended mortgage lender for Realogy's vast real estate brokerage network. Robinson Decl. ¶ 9.

Second, PHH managed all aspects of the mortgage process for the PLS Partners. Under this line of business and the SRA, PHH directed the PLS Partners to refer title insurance and other settlement services to Realogy's subsidiary, TRG, without disclosing to consumers the existence of PHH's affiliation with TRG or the fact that PHH was required to have the PLS Partners refer title insurance and other settlement services to TRG. TRG charged these borrowers for the referred services and PHH received what plaintiffs alleged to be kickbacks and fees for the referrals made in the form of, among other things, the right of first refusal over the purchase of mortgage servicing rights. Robinson Decl. ¶ 10.

RESPA provides borrowers with a private right of action and imposes joint and several liability against each person involved in a kickback violation for three times the full amount paid for the referred settlement service. 12 U.S.C. § 2607(d)(2); *see Edwards v. First Am. Corp.*, 610 F.3d 514, 516-17 (9th Cir. 2010) (plaintiffs need not show that they were overcharged for the settlement service in order to recover treble damages based on the full amount paid). Moreover, courts have upheld the use of federal class actions to enforce kickback violations under RESPA. *See, e.g.*, *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1185 (9th Cir. 2015), *cert. dismissed sub nom. First Am. Fin. Corp. v. Edwards*, 136 S. Ct. 1533 (2016) (reversing denial of class certification for alleged kickback violations under RESPA).

B. The Litigation

On November 25, 2015, after extensive pre-litigation investigation, witness interviews, and review of documents, Plaintiffs Lester L. Hall, Jr., and Timothy L. Strader, Sr. and Susan M. Strader, as trustees of the T/S Strader Family Trust, individually and on behalf of a Class of all similarly situated residential mortgage borrowers and purchasers of settlement services from Defendants, filed a putative class action against Defendants PHH Corporation, PHH Broker Partner Corp., PHH Mortgage Corp., Realogy Intermediate Holdings LLC, Realogy Holdings Corp., Realogy Group LLC, Realogy Services Venture Partner LLC, Realogy Services Group LLC, Title Resource Group LLC ("TRG"), West Coast Escrow Company, TRG Services Escrow, Inc., Equity Title Company, NRT LLC, PHH Home Loans, LLC, RMR Financial, LLC, and NE Moves Mortgage LLC (collectively, the "Defendants"). The Plaintiffs alleged violations of section 8(a) of RESPA by (1) paying and receiving kickbacks, referral fees, or other things of value in connection with the referral of title insurance and other settlement services to TRG and its affiliates, and (2) operating PHH Home Loans as an improper Affiliated Business Arrangement ("ABA"). Robinson Decl. ¶ 7.

On December 10, 2015, Plaintiffs filed their First Amended Complaint (Dkt. 10), which Defendants moved to dismiss on February 5, 2016 (Dkt. 46) on the basis that Plaintiffs failed to plead sufficient facts for equitable tolling of RESPA's one-year statute of limitations. Following the Court's granting of Defendants' motion to dismiss on April 5, 2016, Plaintiffs filed their Second Amended Complaint on April 21, 2016 (Dkt. 67), and, pursuant to a joint stipulation granted by the Court, Plaintiffs subsequently filed their Third Amended Complaint on May 12, 2016 (Dkt. 74). Defendants again moved to dismiss on May 26, 2016 (Dkt. 75) on the same grounds. In successfully opposing the motion to dismiss, Plaintiffs argued that under the appropriate Ninth Circuit equitable tolling standard, Plaintiffs had met their burden. The Court denied Defendants' motion to dismiss on October 6, 2016, finding that Defendants' contention regarding equitable tolling for the statute of limitations was "better resolved in either a motion for summary judgment or trial" (Dkt. 90). Plaintiffs also produced substantial documents in their possession and responded to discovery. Robinson Decl. ¶ 11.

After Defendants filed Answers to the Third Amended Complaint (Dkt. 91-93), the Parties continued a lengthy and highly contested meet and confer regarding the scope of discovery.[2] Defendants ultimately produced over 35,000 pages of documents

[2] Plaintiffs' discovery, which included 71 Requests for Production of Documents, was aimed at understanding the schemes and business relationships, including the reasons for them, alleged in Plaintiffs' Fourth Amended Complaint. Specifically, Plaintiffs were seeking exemplars of the different forms, disclosures, and contracts that Defendants provided to residential homebuyers; Defendants' policies, practices, and procedures related to their marketing, referral, and provision of residential mortgage loans and settlement services; Defendants' policies, practices, and procedures related to their operation of the PHH-Realogy-PHH Home Loans joint venture and PHH's PLS Partner business; documents relating to the nature and extent of Defendants' joint venture or relationship agreements amongst themselves, including communications regarding amendments to the agreements in September and October 2015;

to Plaintiffs. Robinson Decl. ¶ 12. On January 31, 2017, the Parties participated in a mediation with Viggo Boserup, Esq. Although the Parties did not reach an agreement to settle at that time, they continued to participate in negotiations regarding discovery. On May 19, 2017, the Parties participated in a settlement conference before the Honorable Jay C. Gandhi, which resulted in an agreement to settle this Action. Robinson Decl. ¶ 13. Through those arm's-length negotiations, the original named Plaintiffs agreed to settle their individual claims and the Parties stipulated to the filing of the Fourth Amended Complaint. The Fourth Amended Complaint, which was filed on July 31, 2017 (Dkt. 115), amended certain claims and added Sheri Dodge, Neil Dodge, Ram Agrawal, and Sarita Agrawal as Plaintiffs. Following the settlement conference, the Parties engaged in confirmatory discovery, including document production, written discovery, and depositions to, among other things, confirm the identification of the Class Members and the amount each Class Member paid for title-, escrow-, and closing-related settlement services. Robinson Decl. ¶ 14.

III. TERMS OF THE SETTLEMENT

The Settlement Class is defined as follows:

> All borrowers who, on or after November 25, 2014 and on or before November 25, 2015, closed on any mortgage loan originated by PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, or their affiliates (including loans where PHH Mortgage Corporation provided origination services on behalf of any PLS Partners), and paid title-, escrow-, and closing-related charges in connection with that mortgage loan to Title Resource Group LLC or its affiliates. Excluded from the Class are borrowers who exclude themselves by submitting a Request For Exclusion that is accepted by the Court.

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communications regarding Defendants' SEC filings in November 2015 that disclosed the amendments to Defendants' agreements; communications regarding Defendants' RESPA compliance, including internal communications related to government investigations and that led up to Defendants' amendment of the SRA; and documents showing settlement amounts charged to putative Class Members. Robinson Decl. ¶ 12.

Through confirmatory discovery, the Parties have determined from Defendants' records that 32,221 transactions fall within the Settlement Class definition. Robinson Decl. ¶ 14. The Settlement requires Defendants to pay $17,000,000 into a non-reversionary settlement fund that will be used to make cash payments to Class Members. Robinson Decl. ¶ 16.

On January 29, 2018, the Court issued an Order re: Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class ("Preliminary Approval Order") (Dkt. 140). Robinson Decl. ¶ 15. The Preliminary Approval Order, among other things, ordered the Claims Administrator to mail the class notice in accordance with the Amended Stipulation of Settlement by February 12, 2018. To participate in the Settlement, a Class Member need not do anything after receiving the class notice. A Class Member is also able to submit a claim if the Class Member disagrees with the amount of the title-, escrow- and other qualified closing-related charges identified on the individualized class notice sent to the Class Member, object to the Settlement or opt out of the Settlement. As of the date of this filing, twenty-six (26) Class Members have submitted claim forms, zero (0) Class Members have objected to the Settlement, and two (2) Class Members have opted out of the Settlement. The Preliminary Approval Order further ordered Plaintiffs to file a motion for an award of attorneys' fees, costs, and class representative incentive payments by April 13, 2018. Robinson Decl. ¶ 15.

The Settlement—as evidenced by Class Members' reaction to and support of the Settlement— represents a tremendous result for the Class.

IV. THE COURT SHOULD AWARD THE REQUESTED ATTORNEYS' FEES

A. Plaintiffs' Counsel Are Entitled to an Award of Attorneys' Fees

Federal Rule of Civil Procedure 23(h) permits the Court to award "reasonable

attorney's fees and nontaxable costs" provided by either law or agreement. Fed. R. Civ. P. 23(h). As described above, this action settled pursuant to Defendant's agreement to create a $17,000,000 cash fund, from which Plaintiffs would exclusively seek attorneys' fees and costs. Robinson Decl. ¶ 16. Thus, this is a "common fund" settlement because Defendants have paid a single cash lump sum to settle all claims including attorneys' fees and costs. *Staton v. Boeing Co.*, 327 F.3d 938, 970-71 (9th Cir. 2003) ("Under the regular common fund procedure, the parties settle for the total amount of the common fund and shift the fund to the court's supervision … [t]he plaintiff's lawyers then apply to the court for a fee award from the fund"); *see*, *e.g.*, *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2008) (analyzing common fund).[3]

Because this is a common fund settlement, equitable principles permit Plaintiffs' Counsel to recover from the fund they helped create, the fees and expenses incurred in creating the fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Omnivision*, 559 F.Supp.2d at 1046 ("[i]t is well established that a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorney's fees") (internal quotation omitted). This is a "well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees." *Staton*, 327 F.3d at 967.

In common fund settlements like this one, courts have discretion to employ either the lodestar method or the percentage-of-recovery method. *In re Online DVD-*

[3] Plaintiffs' RESPA claim entitled them to attorneys' fees if successful. 12 U.S.C. § 2607. However, the availability of statutory fee-shifting does not take this case out of the "common fund" analysis because, in a lump sum settlement such as this, courts presume Defendants' total payment to settle the case included Defendants' valuation of what Plaintiffs would have been entitled to under the fee-shifting statute if successful. *See Staton*, 327 F.3d at 967 n.18 (citing cases).

Rental Antitrust Litig., 779 F.3d 934, 949 (9th Cir. Feb. 27, 2015) (citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011)). "The ultimate goal under either method of determining fees is to reasonably compensate counsel for their efforts in creating the common fund." *Omnivision*, 559 F.Supp.2d at 1046 (citing *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 270-71 (9th Cir. 1989)). Counsel may also recover reasonable expenses. *Id.* (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)); *see also Williams v. Supershuttle Int'l, Inc.*, 2015 WL 685994, at *2 (N.D. Cal. Feb. 12, 2015) ("The prevailing view is that expenses are awarded in addition to the fee percentage.") (quotation omitted).

Although the Court is free to use either method, the overarching inquiry is whether the requested fee is ***reasonable*** regardless of which method the Court employs. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 n.2 (9th Cir. 1994) ("Whether a court applies the lodestar or the percentage method, 'we require only that fee awards in common fund cases be ***reasonable*** under the circumstances.'") (quoting *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (emphasis in original)). Thus, the Court must consider Counsel's request based on the specific facts of the case. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).

B. The Fee Amount Sought is Reasonable

Plaintiffs seek an award of attorneys' fees of $5.1 million, representing a multiplier of approximately 1.41 to Class Counsel's lodestar of $3,618,790, and which is 30% of the common fund made available to Class Members under the Amended Stipulation of Settlement.

1. The Requested Fee is Reasonable Under the Percentage of Fund Approach

Federal courts, including the Ninth Circuit, have developed a strong preference for using a percentage-of-the-recovery method. *See Six Mexican Workers v. Ariz.*

Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990). California state courts also recognize the advantages of the percentage method—relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—and are convinced that "the percentage method is a valuable tool that should not be denied our trial courts." *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480, 503 (2016).

Under the percentage-of-recovery method, the court simply awards a percentage of the total fund recovered. *Bluetooth*, 654 F.3d at 942. The Ninth Circuit's "benchmark" for awarding fees is 25% of the total recovery, but percentages in the range of 20% to 33-1/3% of the value of the recovery are typical. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *Vizcaino*, 290 F.3d at 1050 (affirming a 28% fee award); *Six Mexican Workers*, 904 F.2d at 1311 (affirming 25% fee award); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (approving 33 1/3% fee award as fair and reasonable); *see also Laffitte*, 1 Cal. 5th at 506 (affirming fee award of one-third of the gross settlement amount); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004) (noting fee award of 25%); *Parker v. Los Angeles*, 44 Cal. App. 3d 556, 567-68 (1974) (affirming award of one-third (33 1/3%) of the recovery); *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 377-79 (9th Cir. 1995) (affirming 33.3% fee award); *Morris v. Lifescan, Inc.*, 54 Fed. App'x 663 (9th Cir. 2003) (same); *Medeiros v. HSBC Card Servs., Inc.*, CV 15-09093, Dkt. 105 at 15 (C.D. Cal. Oct. 23, 2017) (approving 33.3% fee award); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) (approving 33.3% fee award and explaining that "where recovery is uncertain, an award of one-third of the common fund" is appropriate); *Stuart v. Radioshack Corp.*, No. C-07-4499, 2010 WL 3155645, *6 (N.D. Cal. Aug. 9, 2010) (approving 33.3% fee award

and explaining that it is "well within the range of percentages which courts have upheld as reasonable").

In determining the amount of the benefit conferred, the appropriate measure is the total recovery available for the class, not the amount actually claimed. *See Boeing*, 444 U.S. at 479-81; *accord Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). This method recognizes that the efforts of Plaintiffs' Counsel established the entire Settlement for the benefit of the entire Class. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (citing *Williams*, 129 F.3d at 1027); *Vizcaino*, 290 F.3d at 1049.

In determining whether the percentage requested is fair and reasonable, courts may consider a range of factors, including: (1) the results achieved; (2) the risk of litigation; (3) the skill required; (4) the quality of work; and (5) the contingent nature of the fee and the financial burden. *Vizcaino*, 290 F.3d at 1048-50; *see also Laffitte*, 1 Cal. 5th at 504 (same).

a. The Settlement is an Exceptional Result for the Class

The Ninth Circuit has found counsel "achieved exceptional results for the class" when they pursued the case "in the absence of supporting precedents," difficult factual circumstances and against vigorous opposition. *Vizcaino*, 290 F.3d at 1048. This was the case here. After contentious litigation involving three rounds of motions to dismiss, multiple discovery requests and depositions, analysis of over 35,000 pages of documents, witness interviews, expert analysis, and five months of settlement negotiations, Plaintiffs' Counsel obtained an incredible settlement: a common fund of $17 million. *See* Robinson Decl. ¶¶ 7-12.

As a result of Plaintiffs' Counsel's work, Class Members will receive cash payments of between 15% to 20% of the title-, escrow-, and closing-related charges they paid in connection with certain mortgage loans, with estimated settlement

payments of between $0.75 and $17,412.91.[4] This is an excellent result by any measurement. *See Schaffer v. Litton Loan Servicing, LP*, 2012 WL 10274679, at *6 (C.D. Cal. Nov. 13, 2012) (approving RESPA class action settlement with a pro rata distribution of the fund up to $60 per claimant); *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 737 n.3 (E.D. Pa. 1995) (approving RESPA class action settlement where monetary relief was "just a few dollars each"); *Omnivision*, 559 F.Supp.2d at 1046 (total award of 9% of possible damages was "a substantial achievement"); *In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 467 (C.D. Cal. 2014) ($5–$30 vouchers was a "positive" result); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005) (class members' recovery of "approximately 23% of the class' claimed loss" was "considerable, and is greater than those obtained in cases where class counsel was awarded one-third of a common fund").

The Settlement provides Class Members with prompt, high-value benefits and avoids the risks of the certification and liability phases, which might have taken years to determine. These are significant benefits for the Class. Accordingly, a percentage of the overall recovery that falls within the range of previously approved fee requests is justified.

b. Plaintiffs' Counsel Assumed Significant Risks in This Complex Case

The risk, expense, and complexity of this case also support the reasonableness of the fee award. Although Plaintiffs' Counsel was ready to proceed with trial, they knew the case faced obstacles. Class certification could have been a risky and

[4] The Settlement provides a monetary fund that will pay Class Members in cash and not intangible benefits. Therefore, this is not a case where the "common fund" is "largely illusory" because its value consists primarily of injunctive relief and the actual payout to the class is significantly lower. *See, e.g., LaGarde v. Support.com, Inc.*, 2013 WL 1283325, at *12 (N.D. Cal. Mar. 26, 2013).

complex undertaking. Expert analysis and testimony needed to prove Plaintiffs' claims and Defendants' common course of conduct would be both extensive and expensive. In this case, litigation risks also included (a) Defendants moving for summary judgment arguing there were no referrals, no kickbacks, or adequate disclosures; (b) prevailing on the elements of a section 8(a) violation at trial or summary judgment; and (c) Defendants challenging a certification motion by arguing that Class Members' claims were too unique such that individualized issues predominated.

After certification, significant time and expense would continue to be incurred to conclude expert discovery, to move for or defend against summary judgment, to conduct trial, and to handle appeals that are almost inevitable in a case of this size. Moreover, the risk of maintaining class action status through trial is not merely hypothetical, as evidenced by recent decisions denying class certification in RESPA cases. *See, e.g.*, *Mims v. Stewart Title Guaranty Co.*, 590 F.3d 298 (5th Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 2010 WL 908464 (N.D. Ohio Mar. 11, 2010); *Toldy v. Fifth Third Mortg. Co.*, No. 1:09 CV 377, 2011 WL 4634156, at *1 (N.D. Ohio May 24, 2011), *report and recommendation adopted*, No. 1:09 CV 377, 2011 WL 4634154 (N.D. Ohio Sept. 30, 2011).

Plaintiffs' Counsel incurred one hundred percent of the risk in litigating this case. Plaintiffs' Counsel in particular was forced to forego other employment in order to devote the time and resources necessary to pursue this litigation. Robinson Decl. ¶ 4. Throughout this time, there was no assurance of success or compensation. The requested fee award is entirely reasonable in light of the substantial risks incurred.

c. Plaintiffs' Counsel Was Qualified to and did Provide High-Quality Work

The requested fee is reasonable in light of Plaintiffs' Counsel's significant skill and quality work in litigating this action. *See Hopkins v. Stryker Sales Corp.*, 2013

WL 496358, at *2 (N.D. Cal. Feb. 6, 2013) (finding this element satisfied because "Class Counsel's extensive investigation, comprehensive discovery practice, and skillful preparation resulted in a favorable Settlement for the Class").

Plaintiffs' Counsel are experienced in complex class litigation and have substantial experience prosecuting consumer class actions involving consumer protection claims and contributed particularized knowledge needed for the case. Robinson Decl. ¶ 20; *see also* Declaration of Evan C. Borges in Support of Motion for Attorneys' Fees, Expenses and Service Awards ("Borges Decl.") ¶ 21. Plaintiffs' Counsel have a thorough understanding of the issues presented by these types of cases and through their skill and reputation, were able to obtain a settlement that provides everything the Class could reasonably hope to obtain in this case.

Counsel skillfully and aggressively prosecuted this case through every stage of litigation by (1) engaging in extensive pre-filing investigation; (2) filing multiple complaints; (3) opposing multiple motions to dismiss, engaging in significant contested discovery, including the production of over 35,000 pages of documents, oral discovery, and written discovery; (4) undertaking substantial investigation, including interviewing witnesses and industry analysts; (5) consulting with a number of experts; and (6) negotiating a settlement, including settlement documents and the preliminary approval motion, over multiple months. Robinson Decl. ¶¶ 6-12. This element thus demonstrates that Counsel's request for 30% of the Settlement Fund is reasonable.

d. Plaintiffs' Counsel Took the Case on a Contingency Basis

An attorney whose compensation is dependent on success—who takes a significant risk of no compensation—should expect a significantly higher fee than an attorney who is paid a market rate as the case goes along, win or lose. *Cotchett, Pitre & McCarthy v. Siller*, 520 B.R. 796, 812 (E.D. Cal. 2014); *Ketchum v. Moses*, 24 Cal.

4th 1122, 1132-33 (2001). Plaintiffs' Counsel's representation of the Class on a contingent basis over two years, entailing $36,704.82 in out-of-pocket expenses, $3,618,755 in lodestar and requiring Plaintiffs' Counsel to forgo other work, support a finding the requested fee is reasonable. *Vizcaino*, 290 F.3d at 1050; Robinson Decl. ¶¶ 3, 24; Borges Decl. ¶¶ 4, 25. Because Plaintiffs' Counsel bore the substantial financial risk of litigating this case against vigorous opposition, this element shows Plaintiffs' Counsel's requested fee of 30% of the fund is reasonable. *See Hopkins*, 2013 WL 496358, at *3 (finding this element satisfied because "Class Counsel took a significant risk in investing in this case and was able to secure a substantial victory on behalf of the class, resulting in the creation of a common fund of $4.25 million").

e. No Class Members Have Objected to the Requested Fees

Plaintiffs' intention to request attorneys' fees (and the amount) was provided to each Class Member in the Court-approved Class Notice and in information found on the Settlement website. *See* Am. Stip. of Settlement, Dkt. No. 134. As of the filing of this brief, no one has objected to either the Settlement or the amount of attorneys' fees sought. Robinson Decl. ¶¶ 5, 15. The last day to object is May 14, 2018. Am. Stip. of Settlement, Dkt. No. 134. The lack of objection signifies the Class Members' approval of the requested attorneys' fees. *See Heritage Bond*, 2005 WL 1594403, at *21 ("The existence or absence of objectors to the requested attorneys' fee is a factor in determining the appropriate fee award.").

f. The Requested Amount is Comparable to Attorneys' Fees Awarded in Other RESPA Settlements

The fee awards in other RESPA cases suggest Plaintiffs' Counsel's requested fee of 30% of the common fund is reasonable. *See, e.g., Alexander v. Washington Mut., Inc.*, 2012 WL 6021103, at *1 (E.D. Pa. Dec. 4, 2012) (awarding 30% of the fund). Courts in RESPA cases tend to award fees based on the lodestar method rather

than the percentage method. *See, e.g., Rendler v. Gambone Bros. Dev. Co.*, 1999 WL 252395, at *9 (E.D. Pa. Apr. 27, 1999) (awarding lodestar); *Schneider v. Citicorp Mortgage, Inc.*, 324 F. Supp. 2d 372, 379 (E.D.N.Y. 2004) (same). Thus, Plaintiffs' Counsel's lodestar (*see infra*, Sec. III(b)) shows the fee requested here in supported by the awards in similar RESPA cases. Beyond RESPA cases, courts routinely award 30-35% of common funds where the case involved novel legal issues, and lengthy and complex litigation. *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 457-58 (E.D. Cal. 2013) (surveying cases). Thus, the fact Plaintiffs' Counsel seek a fee representing 1.41 times their lodestar further suggests the fee is reasonable.

2. The Requested Fee Is Reasonable Under a Lodestar/Multiplier Crosscheck

"[T]rial courts have discretion to conduct a lodestar cross-check on a percentage fee" award. *Laffitte*, 1 Cal. 5th at 500, 506. Under the two-step lodestar/multiplier method, trial courts first calculate the lodestar, consisting of all the hours reasonably spent multiplied by reasonable hourly rates. *See Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *reh'g denied, amended on other grounds by* 108 F.3d 981 (9th Cir. 1997); *Ketchum*, 24 Cal. 4th at 1133. That figure may be enhanced or multiplied to account for other factors which are not subsumed within it.[5] *Ferland v. Conrad Credit Corp.*,

[5] The factors already taken into account by the lodestar calculation are: "'(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, . . . (4) the results obtained,' and (5) the contingent nature of the fee agreement." *Morales*, 96 F.3d at 364 n.9 (citation omitted). Other factors include: (1) time and labor required; (2) preclusion of other employment by the attorney due to acceptance of the case; (3) customary fee; (4) time limitations imposed by the client or the circumstances; (5) undesirability of the case; (6) nature and length of the professional relationship with the client; and (7) awards in similar cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

244 F.3d 1145, 1149 n.4 (9th Cir. 2001). This allows the court "'to fix a fee at the fair market value for the particular action.'" *Syers Props. III v. Rankin*, 226 Cal. App. 4th 691, 697-98 (2014) (quoting *Ketchum*, 24 Cal. 4th at 1132). The purpose of using the lodestar/multiplier method is to mirror the legal marketplace: the adjusted lodestar should not significantly differ from the percentage fee freely negotiated in comparable litigation. *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 50 (2000).

In this case, Plaintiffs' Counsel's lodestar to date is $3,618,755. Robinson Decl. ¶ 21; Borges Decl., ¶ 22. The requested $5.1 million fee award represents a modest multiplier of approximately 1.41 of this amount.

a. The Hourly Rates Are Reasonable

Reasonable hourly rates are determined by "prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. Typically, the forum where the district court sits is recognized as the "relevant community." *Shirrod v. Dir., OWCP*, 809 F.3d 1082, 1087 (9th Cir. 2015) (citing *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009)). Thus, Plaintiffs' Counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Blum*, 465 U.S. at 895 n.11; *Ketchum*, 24 Cal. 4th at 1133; *see also Serrano v. Unruh*, 32 Cal. 3d 621, 640 n.31 (1982) ("The formula by which 'reasonable market value' is reached is variously phrased" as "comparable salaries earned by private attorneys with similar experience and expertise in equivalent litigation," and the "hourly amount to which attorneys of like skill in the area would typically be entitled.") (citations omitted).

Plaintiffs' Counsel's background, experience, and hourly rates are set forth in their concurrently filed declarations. Robinson Calcagnie, Inc. has an excellent reputation as class action litigators, with specialized experience in consumer protection class action law, including those cases involving defective products, false advertising, and data breaches. Robinson Decl. ¶ 20. Likewise, Greenberg Gross

LLP has decades of extensive experience in a wide range of areas of law, including financial institutions, lender liability, real estate, and consumer class actions. Borges Decl. ¶ 21.

Declarations of attorneys regarding prevailing fees in the community and rate determinations in other cases "are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). The hourly rates of Plaintiffs' Counsel for this case (between $650 and $825 for partners and between $400 and $625 for associates) are well within the range of rates billed by comparable attorneys in this market and are the standard rates they charge to all of their clients.[6] Robinson Decl. ¶¶ 20, 22; Borges Decl. ¶¶ 21, 23.

The hourly rates are reasonable and consistent with what attorneys of comparable skill charge for complex litigation in the Central District of California. *See Chambers v. Whirlpool Corp.*, No. 11-cv-01733, 2016 U.S. Dist. LEXIS 140839, at *52 (C.D. Cal. Oct. 11, 2016) (finding Los Angeles to be the legal market for the Central District and citing with approval the "National Law Journal survey of regional billing rates published in 2014, showing standard partner rates among top Los Angeles firms ranges from $490 to $975"). The rates charged by Plaintiffs' Counsels' firms fall well within that framework.

Further, the National Law Journal Billing Survey ("NLJ Survey") provides the following average billing rates for certain Southern California firms: Irell & Manella ($800-$975 partner rates, $395-$750 associate rates); O'Melveny & Myers ($615-$950 partner rates); and Sheppard, Mullin, Richter & Hampton ($490-$875 partner

[6] An attorney's actual billing rate for similar work is presumptively appropriate. *See People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996); *accord In re Animation Workers Antitrust Litig.*, No. 14-cv04062, 2016 U.S. Dist. LEXIS 156720, at *20 (N.D. Cal. Nov. 11, 2016); *see also Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254-55 (2001).

rates, $275-$535 associate rates). *See* Robinson Decl. ¶ 23, Ex. 2 (2014 NLJ Survey). Thus, the hourly rates between $400 and $825 of Plaintiffs' Counsel are reasonable.

b. The Hours Expended Are Reasonable

As of April 13, 2018, Plaintiffs' Counsel have spent 5,574.9 hours litigating this case. Robinson Decl. ¶ 20; Borges Decl. ¶ 21. As detailed above and in the declarations, these hours include: (1) engaging in extensive pre-filing investigation, (2) filing multiple complaints, (3) opposing multiple motions to dismiss, engaging in significant contested discovery, including the production of over 35,000 pages of documents, oral discovery, and written discovery, (4) undertaking substantial investigation, including interviewing witnesses and industry analysts, (5) consulting with several experts, (6) negotiating a settlement, including settlement documents and the preliminary approval motion, over multiple months, and (7) responding to inquiries from Class Members after Class Notice was disseminated.[7] Robinson Decl. ¶¶ 6-14; Borges Decl. ¶¶ 7-15.

Moreover, additional work will be required. Plaintiffs' Counsel must still: (1) prepare for and attend the final approval hearing, including the research and drafting of the reply papers and responses to objections; (2) continue to respond to the many inquiries from Class Members; (3) oversee the Settlement through final approval of distribution of the common fund; (4) oversee the claims administration process, including addressing any claim review issues; and (5) handle any appeals. Robinson Decl. ¶ 18.

c. The Multiplier Confirms the Reasonableness of the Requested Fee

Courts often enhance the lodestar with a multiplier. *Vizcaino,* 290 F.3d at 1051 (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir.

[7] The fee award should also include time Plaintiffs' Counsel has spent and will spend to establish and defend the attorneys' fee claim. *Serrano,* 32 Cal. 3d at 639.

1994)). The purpose of this practice is to mirror the legal marketplace by rewarding attorneys for taking and winning contingency cases. *Id.*; *see also Lealao,* 82 Cal. App. 4th at 50. Courts consider various factors in determining a multiplier, including the novelty and complexity of the litigation, counsel's skill and experience, the quality of representation, the results obtained, and the contingent nature of the fee agreement. *See Morales*, 96 F.3d at 364; *Kerr*, 526 F.2d at 70; *see also Laffitte*, 1 Cal. 5th at 489 (same); *Lealao,* 82 Cal. App. 4th at 26 (same).

The requested fee award represents a multiplier of 1.41 based only on the time spent by Plaintiffs' Counsel on the case to date, which is within the accepted range for class action cases. "In the Ninth Circuit, multipliers 'ranging from one to four are frequently awarded . . . when the lodestar method is applied.'" *Chambers*, 2016 U.S. Dist. LEXIS 140839, at *57 (quoting *Vizcaino,* 290 F.3d at 1051 n.6); *see also Wershba*, 91 Cal. App. 4th at 255 ("Multipliers can range from 2 to 4, or even higher."); 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §14:6 (4th ed. 2002) ("Multiples ranging from one to four frequently are awarded in common fund when the lodestar method is applied."); *Steiner v. Am. Broad. Co., Inc.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (holding that a multiplier of 6.85 "falls well within the range of multipliers that courts have allowed"); *Sternwest Corp. v. Ash,* 183 Cal. App. 3d 74, 76 (1986) (case remanded with directions "to enhance the lodestar award by such factor (two, three, four or otherwise) that the court, in its discretion shall deem proper"); *Vizcaino,* 290 F.3d at 1051 n.6 (multiplier of 3.65); *Keith v. Volpe,* 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5); *Buccellato v. AT&T Operations, Inc.*, No. 10-cv-00463, 2011 U.S. Dist. LEXIS 85699, at *4-5 (N.D. Cal. June 30, 2011) (collecting cases and approving multiplier of 4.3).

As discussed above, the benefits for the Class, the complexity of this case, Plaintiffs' Counsel's skill displayed in effectively and efficiently prosecuting this

case, the preclusion of accepting other work, and the contingent nature of the fee award support the application of a modest 1.41 multiplier.

V. PLAINTIFFS' COUNSEL ARE ENTITLED TO REIMBURSEMENT OF LITIGATION EXPENSES

Plaintiffs' Counsel request reimbursement of the expenses they advanced to litigate this case. California and the Ninth Circuit both allow recovery of litigation costs in the context of class action settlements. *See Staton*, 327 F.3d at 974; *Serrano*, 20 Cal. 3d at 35. "Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." *Omnivision*, 559 F. Supp. 2d at 1048 (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)).

Plaintiffs' Counsel have incurred expenses in the amount of $36,704.82 for the Litigation, and will likely incur additional expenses through the final approval hearing and administration of the Settlement. Robinson Decl. ¶ 24; Borges Decl. ¶ 25. All of these expenses are the types typically charged to paying clients in the marketplace and are also routinely reimbursed in class action settlements. For example, in *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007), the awarded expenses included: "1) meals, hotels, and transportation; 2) photocopies; 3) postage, telephone, and fax; 4) filing fees; 5) messenger and overnight delivery; 6) online legal research; 7) class action notices; 8) experts, consultants, and investigators; and 9) mediation fees."

Other than office overhead, "all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case" are subject to reimbursement. *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1368 (N.D. Cal. 1996). The out-of-pocket expenses incurred by Plaintiffs' Counsel are all the types of expenses normally charged to paying clients, were all incurred in the course of the Litigation, were necessary to the Litigation, and are not included in the overhead of Plaintiffs' Counsel's hourly rates. Robinson Decl. ¶ 23; Borges Decl.

¶ 24.

As detailed in Plaintiffs' Counsel's declarations, the expenses sought are for travel costs, filing fees, service of process, electronic document management, photocopies, overnight delivery, experts and consultants, investigators, mediation, online legal research, depositions and conference calls. Robinson Decl. ¶ 24; Borges Decl. ¶ 25. Thus, Plaintiffs' Counsel's request for reimbursement of $36,704.82 in out-of-pocket expenses should be granted.

VI. THE CLASS REPRESENTATIVE INCENTIVE PAYMENTS SHOULD BE APPROVED

"Incentive awards are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* §11:38 (4th ed. 2008); *see also Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (same). The Ninth Circuit recognizes that incentive payments "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, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958-59. The trial court has sound discretion to decide whether to award incentive payments and they should be awarded based upon the court's consideration of certain criteria, including the amount of time and effort spent on the litigation, the duration of the litigation, and the degree of personal gain obtained as a result of the litigation. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *accord Wilson v. Airborne, Inc.*, No. 07-cv-00770, 2008 U.S. Dist. LEXIS 110411, at *36-37 (C.D. Cal. Aug. 13, 2008).

Here, Plaintiffs respectfully request that the Court approve a modest incentive payment of $2,500 for each of the Class Representatives in recognition of their contributions toward the successful prosecution of this case. They all served the Class well by reviewing relevant pleadings and settlement documents, and keeping in

constant communication with Plaintiffs' Counsel throughout their involvement in the case. They provided information regarding their residential mortgage loans, including all documents in their possession related to those loans, and were actively involved in the confirmatory discovery process. *See* Robinson Decl. ¶ 14. Defendants do not oppose the payment of these service awards. Am. Stip. of Settlement, Dkt. No. 134.

Further, the requested service awards fall below amounts awarded in comparable cases. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving $5,000 incentive awards); *Toys "R" Us-Del., Inc.*, 295 F.R.D. at 470-72 (approving $5,000 incentive awards); *Williams v. Costco Wholesale Corp.*, No. 02-cv-02003, 2010 U.S. Dist. LEXIS 19674, at *10 (S.D. Cal. Mar. 4, 2010) (approving $5,000 service award); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-cv-01365, 2010 U.S. Dist. LEXIS 49477, at *47 and n.8 (N.D. Cal. Apr. 22, 2010) (service award of $20,000 was "well justified" given plaintiffs' efforts on behalf of the class) (compiling cases); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1330 (W.D. Wash. 2009) ("When compared to service awards in other cases, the $7,500 payments requested here are justified.").

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court award Plaintiffs' Counsel $5.1 million in attorneys' fees and $36,704.82 in expenses, and that the Court award the Class Representatives $2,500 each in service awards.

DATED: April 13, 2018

ROBINSON CALCAGNIE, INC.

By: */s/ Daniel S. Robinson*

Daniel S. Robinson
Wesley K. Polischuk
ROBINSON CALCAGNIE, INC.
19 Corporate Plaza Drive
Newport Beach, CA 92660
Telephone: (949) 720-1288
Facsimile: (949) 720-1292

Wayne R. Gross
Evan C. Borges
GREENBERG GROSS LLP
650 Town Center Drive, Suite 1750
Costa Mesa, CA 92626
Telephone: (949) 383-2800
Facsimile: (949) 383-2801

Attorneys for Plaintiffs Sheri Dodge, Neil Dodge, Ram Agrawal, Sarita Agrawal and All Others Similarly Situated

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I caused to be filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: April 13, 2018

/s/ Daniel S. Robinson
Daniel S. Robinson