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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

LOUIS FLOYD, et al.,  
Plaintiffs,  
v.  
FIRST DATA MERCHANT SERVICES  
LLC, et al.,  
Defendants.

Case No. [5:20-cv-02162-EJD](#)

**ORDER GRANTING MOTION FOR  
FINAL APPROVAL OF CLASS  
ACTION SETTLEMENT; GRANTING  
MOTION FOR ATTORNEYS' FEES,  
COSTS, AND SERVICE AWARDS;  
JUDGMENT**

Re: Dkt. Nos. 73, 77

The Court previously granted a motion for preliminary approval of the Class Action Settlement between Plaintiffs Louis Floyd and Terry Fabricant and Defendants First Data Merchant Services LLC, Sam's Club Merchant Services, National Payment Systems, LLC and National Payment Systems OR, LLC (d/b/a One Connect Processing) (collectively "Defendants") on March 17, 2022. (Dkt. No. 72.) As directed by the Court's preliminary approval order, on June 1, 2022, Plaintiffs filed their unopposed motion for attorneys' fees, costs, and service awards. (Dkt. No. 73.) Thereafter, Plaintiffs Floyd and Fabricant filed their unopposed motion for final settlement approval on August 11, 2022. (Dkt. No. 77.) The Court heard oral arguments from the parties on October 6, 2022. (Dkt. No. 79.)

Having considered the motion briefing, the terms of the Settlement Agreement, the objections and response thereto, the arguments of counsel, and the other matters on file in this action, the Court **GRANTS** the motions for final approval. The Court finds the settlement fair,

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1 adequate, and reasonable. The provisional appointments of the class representatives and class  
2 counsel are confirmed.

3 The Motion for Attorneys’ Fees, Costs, and Incentive Awards is **GRANTED**. The Court  
4 **ORDERS** that class counsel shall be paid \$533,280.00 in attorneys’ fees and \$43,671.02 in litigation  
5 costs and class representative and named Plaintiffs Floyd and Fabricant shall each be paid a  
6 \$5,000.00 incentive award.

7 **I. BACKGROUND**

8 **A. Procedural History**

9 Plaintiff(s) filed the putative class action complaint on March 30, 2020 against Defendants  
10 alleging unsolicited telemarketing to Plaintiffs using an automated telephone dialing system  
11 (“ATDS”) and prerecorded messages. Plaintiff’s complaint alleges claims for violation of the  
12 Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(b)(1)(A)(iii), a federal statute  
13 enacted in 1991 in response to widespread public outrage about the proliferation of intrusive calling  
14 practices. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371 (2012).

15 The parties reached a settlement prior to class certification after arm's-length negotiation with  
16 the assistance of an experienced mediator the Honorable Louis Meisinger (Ret.). The Settlement  
17 Agreement defines the class as:

18 All persons in the United States to whom a) one or more calls  
19 (including text messages) were made; b) to a cellular telephone  
20 number; c) that could have promoted First Data or Sam’s Club  
21 Merchant Services’ goods or services; d) using a dialing system the  
22 same as or similar to that used to call any of Plaintiffs and/or an  
23 artificial or prerecorded voice; e) from March 30, 2016 to the date of  
24 preliminary approval,. The following are excluded from the  
25 Settlement Class: (1) any trial judge and other judicial officers that  
26 may preside over this case; (2) the Mediator; (3) Defendants, as well  
as any parent, subsidiary, affiliate or control person of Defendants,  
and the officers, directors, agents, servants or employees of  
Defendants; (4) any of the Released Parties; (5) any Settlement Class  
Member who has timely submitted a Request for Exclusion by the  
Opt-Out Deadline; (6) any person who has previously given a valid  
release of the claims asserted in the Action; (7) Plaintiffs’ Counsel;  
and (8) persons for whom Defendants have a record demonstrating  
“prior express written consent” as defined by the TCPA.

1 (“the Settlement Class”). In its preliminary approval order, the Court conditionally certified the  
2 Settlement Class and provisionally appointed Edward A. Broderick, Esq., Matthew P. McCue, Esq.,  
3 Anthony I. Paronich, Esq., and Andrew Heidarpour, Esq. as Class Counsel, Plaintiffs Floyd and  
4 Fabricant class representatives, and AB Data, Ltd. as the class administrator. (Dkt. No. 72).

5 **B. Terms of the Settlement Agreement**

6 Under the terms of the Settlement Agreement, defendant will pay \$1,600,000.00 into a  
7 common settlement fund, without admitting liability. This amount includes attorneys’ fees and  
8 costs, the cost of class notice and settlement administration, the class representative’s service award,  
9 and taxes due on any payments made to them pursuant to the Settlement Agreement.

10 **1. Attorneys’ Fees and Costs**

11 Under the Settlement Agreement, Plaintiff’s counsel agreed to seek up to \$533,280.00 in  
12 attorneys’ fees and no more than \$43,671.02 in litigation costs. The common settlement fund also  
13 includes a provision for \$269,000.00 in settlement administration costs; and \$10,000.00 in total to be  
14 paid to Plaintiffs Floyd and Fabricant as an incentive award in exchange for a general release of all  
15 claims against defendant.

16 **2. Class Relief**

17 After deductions from the common fund for fees, costs, and service incentive awards,  
18 approximately \$744,048.98 will remain to be distributed among the participating class members.  
19 Class members will receive a *pro rata* share of the Settlement. Dividing this amount across the  
20 3,673 participating class members who filed timely and valid claims yields an average recovery of  
21 approximately \$202.57 per class member. The Agreement provides that no amount will revert to  
22 Defendants except as provided in Section 11 of the Agreement (“Termination of the Agreement”).

23 **3. Cy Pres/Remainder**

24 The Settlement Agreement provides that when checks mailed to participating class members  
25 are not redeemed or deposited, such unclaimed monies shall be distributed as follows: (a) to the  
26 Settlement Class Members who cashed their initial Benefits Checks, to the extent such a distribution

1 is administratively and economically feasible; and if not so feasible, (b) any funds from any  
2 unredeemed checks will be paid to the *cy pres* recipient, the National Consumer Law Center. In  
3 exchange for the settlement awards, class members will release any claims against defendants that  
4 arise from the telemarketing calls made by or on behalf of First Data through the date of the  
5 Preliminary Approval Order as set forth in Section 8 of the Settlement Agreement.

6 **C. Class Notice and Claims Administration**

7 The Settlement Agreement is being administered by AB Data, Ltd (“AB Data”), which has  
8 extensive experience administering class action settlements. Following the Court’s preliminary  
9 approval and conditional certification of the settlement, the Court directed the Settlement  
10 Administrator to provide Class Notice of the proposed Settlement by Direct Mail Notice, Long Form  
11 Notice on the Settlement Website, and Publication Notice by April 16, 2022.

12 The Class Administrator also established a settlement website (the “Settlement Website”) at  
13 [www.FirstDataMerchantTCPASettlement.com](http://www.FirstDataMerchantTCPASettlement.com), containing information about the Settlement and  
14 case-related documents such as the Settlement Agreement, Long-Form Notice, Claim Form, Direct  
15 Mail Notice and the Preliminary Approval Order. In addition, the motion for final approval and the  
16 application for attorneys’ fees, costs, and incentive awards were uploaded to the website after they  
17 were filed. The Class Administrator also operated a toll-free number for class member inquiries.

18 Class members were given until July 15, 2022, to object to or exclude themselves from the  
19 Settlement Agreement. Out of Out of 3,673 total class members, no requests to opt out of the  
20 Settlement Class were received.

21 A total of 8,533 claims were received by the administrator, of which 3,673 were eligible for  
22 payment.

23 **II. FINAL APPROVAL OF SETTLEMENT**

24 **A. Legal Standard**

25 A court may approve a proposed class action settlement of a class only “after a hearing and  
26 on finding that it is fair, reasonable, and adequate,” and that it meets the requirements for class

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1 certification. Fed. R. Civ. P. 23(e)(2). In reviewing the proposed settlement, a court need not  
2 address whether the settlement is ideal or the best outcome, but only whether the settlement is fair,  
3 free of collusion, and consistent with plaintiff’s fiduciary obligations to the class. *See Hanlon v.*  
4 *Chrysler Corp.*, 150 F.3d at 1027. The *Hanlon* court identified the following factors relevant to  
5 assessing a settlement proposal: (1) the strength of the plaintiff’s case; (2) the risk, expense,  
6 complexity, and likely duration of further litigation; (3) the risk of maintaining class action status  
7 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and  
8 the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a  
9 government participant; and (8) the reaction of class members to the proposed settlement. *Id.* at  
10 1026 (citation omitted); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.  
11 2004).

12 Settlements that occur before formal class certification also “require a higher standard of  
13 fairness.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). In reviewing such  
14 settlements, in addition to considering the above factors, a court also must ensure that “the  
15 settlement is not the product of collusion among the negotiating parties.” *In re Bluetooth Headset*  
16 *Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011).]

17 **B. Analysis**

18 **1. The Settlement Class Meets the Prerequisites for Certification**

19 As the Court found in its order granting preliminary approval and conditional certification of  
20 the settlement class herein, the prerequisites of Rule 23 have been satisfied purposes of certification  
21 of the Settlement Class. (*See* Dkt. No. 72.)

22 **2. Adequacy of Notice**

23 A court must “direct notice [of a proposed class settlement] in a reasonable manner to all  
24 class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). “The class must be  
25 notified of a proposed settlement in a manner that does not systematically leave any group without  
26 notice.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 624 (9th Cir. 1982). Adequate

1 notice requires: (i) the best notice practicable; (ii) reasonably calculated, under the circumstances, to  
2 apprise the Class members of the proposed settlement and of their right to object or to exclude  
3 themselves as provided in the settlement agreement; (iii) reasonable and constitute due, adequate,  
4 and sufficient notice to all persons entitled to receive notice; and (iv) meet all applicable  
5 requirements of due process and any other applicable requirements under federal law. *Phillips*  
6 *Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Due process requires “notice reasonably  
7 calculated, under all the circumstances, to apprise interested parties of the pendency of the action  
8 and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr.*  
9 *Co.*, 339 U.S. 306, 314 (1950).

10 The Court found the parties’ proposed notice procedures provided the best notice practicable  
11 and reasonably calculated to apprise Class members of the settlement and their rights to object or  
12 exclude themselves. (Dkt. No. 72.) The Class Administrator carried out that program using the  
13 procedure for notice outlined in the Settlement Agreement. (Dkt. No. 77-1.) The Class  
14 Administrator received 142,243 unique phone numbers of potential Settlement Class Members. Of  
15 these numbers, 138,725 had an associated mailing address. The Class Administrator reported that  
16 137,766 identified Settlement Class Members received notice by direct mail, successfully reaching  
17 approximately 99% of the Settlement Class. It indicated that there were 959 Settlement Class  
18 Members for whom a good mail address had not been found. Digital publication was also provided  
19 on both desktop and mobile formats to supplement notice efforts; the AB Data used digital banners  
20 and newsfeed ads to appear on various websites and social media platforms which were viewed by  
21 95,981,361 users and accumulated 54,668 ad clicks.

22 Based upon the foregoing, the Court finds that the Settlement Class has been provided  
23 adequate notice.

24 **3. *The Settlement Is Fair And Reasonable***

25 As the Court previously found in its order granting preliminary approval, the *Hanlon*  
26 indicate the settlement here is fair and reasonable and treats class members equitably relative to

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1 one another. (Dkt. No. 72.)

2 The reaction of the class was overwhelmingly positive. The Court received no objections  
3 and no opt-outs as of the July 15, 2022 deadline. “[T]he absence of a large number of objections  
4 to a proposed class action settlement raises a strong presumption that the terms of a proposed class  
5 settlement action are favorable to the class members.” *In re Omnivision Techs., Inc.*, 559  
6 F.Supp.2d 1036, 1043 (N.D. Cal. 2008) (citation omitted); *see also Churchill Vill.*, 361 F.3d at  
7 577 (holding that approval of a settlement that received 45 objections (0.05%) and 500 opt-outs  
8 (0.56%) out of 90,000 class members was proper).

9 In its preliminary approval order, the Court approved the proposed plan of allocation.  
10 (Dkt. No. 72.) That plan is:

11 The Total Class Member Benefits Payout shall be distributed to  
12 Settlement Class Members who file an Approved Claim on a pro rata  
13 and equal basis. Each Settlement Class Member shall be entitled to  
14 submit only one claim, and only one claim can be made per telephone  
15 number, regardless of the number of calls to that phone number. Each  
16 Settlement Class Member who files an Approved Claim shall be paid,  
17 by a Benefit Check, a cash benefit (the “Cash Benefit”) that shall be  
18 equal to the Total Class Member Benefits Payout divided by the total  
19 number of Approved Claims.

20 (“Settlement Agreement,” Dkt. No. 73-1.) The Court finds the plan of allocation to be fair and  
21 reasonable and to treat class members equitably and therefore approves that plan of allocation.

22 **4. Objections**

23 There are no objections. (Dkt. No. 77 at 1.)

24 **5. Other Findings**

25 The parties provided the required notice to federal and state attorneys general under the Class  
26 Action Fairness Act (“CAFA”), 28 U.S.C. § 1715(b). (Dkt. No. 77-1.) Notice occurred more than 90  
27 days before the date of this order, as required by 28 U.S.C. § 1715(d).]

28 **6. Certification Is Granted and the Settlement Is Approved**

After reviewing all of the required factors, the Court finds the Settlement Agreement to be  
fair, reasonable, and adequate, and certification of the Settlement Class as defined therein to be

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1 proper. The following persons are excluded from the Settlement Class: “(1) any trial judge and  
2 other judicial officers that may preside over this case; (2) the Mediator; (3) Defendants, as well as  
3 any parent, subsidiary, affiliate or control person of Defendants, and the officers, directors, agents,  
4 servants or employees of Defendants; (4) any of the Released Parties; (5) any Settlement Class  
5 Member who has timely submitted a Request for Exclusion by the Opt-Out Deadline; (6) any  
6 person who has previously given a valid release of the claims asserted in the Action; (7) Plaintiffs’  
7 Counsel; and (8) persons for whom Defendants have a record demonstrating ‘prior express written  
8 consent’ as defined by the TCPA.” (Dkt. No. 77-2.)

9 The *cy pres* recipient, National Consumer Law Center, is **APPROVED**.

10 **III. MOTION FOR ATTORNEYS’ FEES, COSTS, AND CLASS REPRESENTATIVE AWARDS**

11 Attorneys’ fees and costs may be awarded in a certified class action under Federal Rule of  
12 Civil Procedure 23(h). Such fees must be found “fair, reasonable, and adequate” in order to be  
13 approved. Fed. R. Civ. P. 23(e); *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). To “avoid  
14 abdicating its responsibility to review the agreement for the protection of the class, a district court  
15 must carefully assess the reasonableness of a fee amount spelled out in a class action settlement  
16 agreement.” *Id.* at 963. “[T]he members of the class retain an interest in assuring that the fees to be  
17 paid class counsel are not unreasonably high,” since unreasonably high fees are a likely indicator  
18 that the class has obtained less monetary or injunctive relief than they might otherwise. *Id.* at 964.

19 Class counsel requests an attorneys’ fee award of \$533,280.00. Based on the detailed time  
20 records submitted by counsel, the attorneys’ fees sought amount to approximately one third of its  
21 lodestar. Defendants do not oppose the fee request.

22 The Court analyzes an attorneys’ fee request based on either the “lodestar” method or a  
23 percentage of the total settlement fund made available to the class, including costs, fees, and  
24 injunctive relief. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The Ninth  
25 Circuit encourages courts to use another method as a cross-check in order to avoid a “mechanical  
26 or formulaic approach that results in an unreasonable reward.” *In re Bluetooth*, 654 F.3d at 944–

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1 45 (citing *Vizcaino*, 290 F.3d at 1050–51.)

2 Under the lodestar approach, a court multiplies the number of hours reasonably expended  
3 by the reasonable hourly rate. *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016) (“[A] court  
4 calculates the lodestar figure by multiplying the number of hours reasonably expended on a case  
5 by a reasonable hourly rate. A reasonable hourly rate is ordinarily the ‘prevailing market rate [] in  
6 the relevant community.’”). Under the percentage-of-the-fund method, courts in the Ninth Circuit  
7 “typically calculate 25% of the fund as the ‘benchmark’ for a reasonable fee award, providing  
8 adequate explanation in the record of any ‘special circumstances’ justifying a departure.” *In re*  
9 *Bluetooth*, 654 F.3d at 942 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d  
10 1301, 1311 (9th Cir. 1990)). The benchmark should be adjusted when the percentage recovery  
11 would be “either too small or too large in light of the hours devoted to the case or other relevant  
12 factors.” *Six (6) Mexican Workers*, 904 F.2d at 1311. When using the percentage-of-recovery  
13 method, courts consider a number of factors, including whether class counsel “ ‘achieved  
14 exceptional results for the class,’ whether the case was risky for class counsel, whether counsel’s  
15 performance ‘generated benefits beyond the cash settlement fund,’ the market rate for the  
16 particular field of law (in some circumstances), the burdens class counsel experienced while  
17 litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled  
18 on a contingency basis.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir.  
19 2015) (quoting *Vizcaino*, 290 F.3d at 1047-50. “[T]he most critical factor [in determining  
20 appropriate attorney’s fee awards] is the degree of success obtained.” *Hensley v. Eckerhart*, 461  
21 U.S. 424, 436 (1983).

22 Using the Lodestar method, the Court finds the attorneys’ fees sought to be reasonable.  
23 The lodestar figure is: \$122,400 for Mr. Broderick; \$212,320 for Mr. McCue; \$179,685 for Mr.  
24 Paronich; and \$33,468 for Mr. Heidarpour. Plaintiffs claim hourly rates that are commensurate  
25 with their experience and with the legal market in this district. On the basis of these reasonable  
26 hourly rates and amounts, class counsel calculates the lodestar to be \$547,873.00. Class counsels’

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1 requested attorneys’ fee award of \$533,280.00 falls below the lodestar. No objector has  
2 challenged any of counsel’s hour or rates.

3 The Court finds that the hours claimed were reasonably incurred and that the rates charged  
4 are reasonable and commensurate with those charged by attorneys with similar experience in the  
5 market. The Court also finds that Class Counsel represented their clients with skill and diligence  
6 and obtained an excellent result for the class, taking into account the possible outcomes and risks  
7 of proceeding trial.

8 **B. Costs Award**

9 Class counsel is entitled to reimbursement of reasonable out-of-pocket expenses. Fed. R.  
10 Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may  
11 recover reasonable expenses that would typically be billed to paying clients in non-contingency  
12 matters). Costs compensable under Rule 23(h) include “nontaxable costs that are authorized by  
13 law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). Here, class counsel seeks reimbursement  
14 for litigation expenses, and provides records documenting those expenses, in the amount of  
15 \$43,671.02. The Court finds this amount reasonable, fair, and adequate.

16 **C. Incentive Award**

17 The district court must evaluate named plaintiff’s requested award using relevant factors  
18 including “the actions the plaintiff has taken to protect the interests of the class, the degree to  
19 which the class has benefitted from those actions . . . [and] the amount of time and effort the  
20 plaintiff expended in pursuing the litigation.” *Staton*, 327 F.3d at 977. “Such awards are  
21 discretionary . . . and are intended to compensate class representatives for work done on behalf of  
22 the class, to make up for financial or reputational risk undertaken in bringing the action, and,  
23 sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez v. West*  
24 *Publishing Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009). The Ninth Circuit has emphasized that  
25 district courts must “scrutiniz[e] all incentive awards to determine whether they destroy the  
26 adequacy of the class representatives.” *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1163

1 (9th Cir. 2013).

2 Here, the plaintiff came forward to represent the interests of 3,673 participating class  
3 members, with very little personally to gain. Plaintiff responded to discovery, searched for  
4 relevant evidence, reviewed and approved the complaint for filing, prepared for mediation,  
5 evaluated the settlement proposals during and following the mediation, read through and discussed  
6 drafts of the Settlement Agreement, regularly corresponded with counsel telephonically and by  
7 email, and took the substantial risk of litigation which, at a minimum, involves a risk of losing and  
8 paying the other side's costs. Because the laws are not self-enforcing, it is appropriate to give  
9 incentives to those who come forward with little to gain and at personal risk and who work to  
10 achieve a settlement that confers substantial benefits on others. Thus, the Court approves the  
11 requested incentive award payment for Plaintiffs Floyd and Fabricant.

12 **IV. CONCLUSION**

13 Based upon the foregoing, the motion for final approval of class settlement is **GRANTED**.  
14 The motion for attorneys' fees, costs, and service awards is **GRANTED** as follows: Class Counsel is  
15 awarded \$533,280.00 in attorneys' fees and \$43,671.02 in litigation costs. Plaintiffs Floyd and  
16 Fabricant are granted an incentive award of \$5,000 each.

17 Without affecting the finality of this order in any way, the Court retains jurisdiction of all  
18 matters relating to the interpretation, administration, implementation, effectuation and enforcement  
19 of this order and the Settlement.

20 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that final judgment is **ENTERED** in  
21 accordance with the terms of the Settlement, the Order Granting Preliminary Approval of Class  
22 Action Settlement filed on March 17, 2022, and this order. This document will constitute a final  
23 judgment (and a separate document constituting the judgment) for purposes of Rule 58, Federal  
24 Rules of Civil Procedure.

25 As provided in the Settlement Agreement, the parties shall file a post-distribution  
26 accounting in accordance with this District's Procedural Guidance for Class Action Settlements

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1 within 21 days after the distribution of the settlement funds and payment of attorneys' fees. The  
2 Court **SETS** a compliance deadline on **January 4, 2023** to verify timely filing of the post-  
3 distribution accounting.

4 **IT IS SO ORDERED.**

5 Dated: October 6, 2022

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EDWARD J. DAVILA  
United States District Judge

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