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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE EASYSAYER REWARDS  
LITIGATION

Case No. 09-cv-02094-BAS-WVG

**ORDER GRANTING OBJECTOR’S  
MOTION FOR ATTORNEY’S FEES  
AND INCENTIVE AWARD  
(ECF No. 368)**

Presently before the Court is Objector Brian Perryman’s motion seeking \$805,000 in attorney’s fees and a \$2,500 incentive award. (ECF No. 368.) Plaintiffs briefly respond. (ECF No. 370.) The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the following reasons, the Court **GRANTS** Objector’s motion.

**I. BACKGROUND**

The Court chronicled this action’s lengthy history in its last order. (ECF No. 367 at 2:1–17:9.) Relevant here, this case is a consumer class action where the Court approved a settlement with two components. First, the settlement provided for class members to

1 receive credits with a total face value of \$25.5 million. Second, the settlement established  
2 a \$12.5 million common fund for paying refunds to class members, attorney’s fees,  
3 litigation costs, incentive awards, and settlement administration expenses. Any funds left  
4 over will be distributed to several *cy pres* beneficiaries.

5 In 2013, the Court approved Plaintiffs’ counsel’s request for \$8.7 million in  
6 attorney’s fees. After subtracting this award and the other items from the common fund,  
7 about \$3 million remained for the *cy pres* distribution.

8 Brian Perryman objected. He argued the *cy pres* award was improper and the  
9 attorney’s fee award did not comply with the Class Action Fairness Act’s requirements for  
10 coupon settlements. The Court rejected Objector’s challenges, and he appealed. The Ninth  
11 Circuit vacated the settlement approval and remanded for further proceedings in light of its  
12 then-recent decision in *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934 (9th  
13 Cir. 2015), which addresses what qualifies as a “coupon” under CAFA.

14 On remand, the Court determined that it was unnecessary to apply CAFA’s  
15 requirements for coupon settlements. The Court then reapproved the \$8.7 million  
16 attorney’s fee award.

17 Objector again appealed to challenge the attorney’s fee award and *cy pres*  
18 component. *In re Easysaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018). As to the fee  
19 award, Objector argued the Court erred in not applying CAFA’s coupon settlement  
20 provisions. *Id.* The Ninth Circuit agreed. *Id.* at 756. It vacated the fee award and  
21 remanded for the award to “be recalculated in a manner that treats the credits as coupons  
22 under CAFA.” *Id.* at 760. The Ninth Circuit, however, rejected Objector’s challenge to  
23 the *cy pres* component of the settlement. *Id.* at 760–62. Further, “given both the structure  
24 of [the] settlement agreement and the focus of Objector’s challenges,” the Ninth Circuit  
25 held that it was “unnecessary to reverse the entire settlement approval in conjunction with  
26 [its] vacatur of the fee award.” *Id.* at 762. Thus, the Ninth Circuit otherwise affirmed the  
27 settlement approval. *Id.*

1           Upon remand, Plaintiffs filed a new motion for attorney’s fees. (ECF No. 338.)  
2 They asked for the same fees as before—\$8.7 million. Objector opposed on several  
3 grounds. The Court found some of his objections had merit and ultimately bifurcated the  
4 fee award. (ECF No. 352.) Specifically, the Court permitted Plaintiffs to resubmit a  
5 request for attorney’s fees based on only the non-coupon portion of the settlement—i.e.,  
6 the \$12.5 million cash fund—and then later seek an additional fee award based on the value  
7 of the coupons redeemed by the class members.

8           Around this time, bankruptcy-related events unfolded that further muddled this case.  
9 Eventually, the Court addressed a renewed fee motion from Plaintiffs based “solely on the  
10 cash fund” component of the settlement. (ECF No. 356.) Plaintiffs sought a reduced fee  
11 award of \$5.7 million under the lodestar method, and Objector again opposed. He argued,  
12 among other things, that the requested award would disproportionately benefit class  
13 counsel at the expense of the class.

14           By this time, considering the bankruptcy developments, the Court valued the cash  
15 fund at \$10.5 million—instead of \$12.5 million. (ECF No. 367.) The Court agreed that  
16 awarding Plaintiffs’ counsel \$5.7 million for recovering \$10.5 million would be  
17 unreasonable. After applying the lodestar method, the Court found it appropriate to adjust  
18 the \$5.7 million lodestar with a 0.6 multiplier. That adjustment reduced the \$5.7 million  
19 lodestar to \$3.42 million, which is approximately 32.5% of the \$10.5 million fund.

20           In short, after two appeals and multiple rounds of motions in this Court, Objector  
21 succeeded in convincing the Court to reduce class counsel’s fee award from \$8.7 million  
22 to \$3.42 million. As seen below, after accounting for other developments, the *cy pres*  
23 beneficiaries are expected to now receive \$3.23 million more from the settlement.

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**Common Fund Breakdown**

	<b>Original</b>	<b>Modified</b>
<u>Contribution</u>	\$ 12,500,000.00	\$ 10,500,000.00
<u>Disbursements</u>		
Attorney's Fees	\$ 8,650,000.00	\$ 3,417,904.13
Claims Administration	\$ 345,000.00	\$ 345,000.00
Claims	\$ 225,000.00	\$ 225,000.00
Litigation Costs	\$ 200,000.00	\$ 200,000.00
Incentive Awards	\$ 80,000.00	\$ 82,500.00
<u>Remainder</u>		
<i>Cy Pres</i> Award	\$ 3,000,000.00	\$ 6,229,595.87
	<b>Difference:</b>	<b>\$ 3,229,595.87</b>

Objector asks the Court to award 25% of the \$3.23 million increase in the *cy pres* benefit as attorney's fees for his counsel, which equals about \$805,000. He also asks for a \$2,500 incentive award, which is reflected in the breakdown above. Plaintiffs file a one-page response. (ECF No. 370.) They "respectfully leave the determination of what fee, if any, Mr. Perryman's counsel, Ted Frank, should ultimately receive to the discretion of the Court." (*Id.*)

**II. ANALYSIS**

Class action members may object to a settlement that requires court approval. Fed. R. Civ. P. 23(e)(5). And in some circumstances, "attorneys for objectors may be entitled to attorneys' fees from the fund created by class action litigation." *Rodriguez v. Disner*, 688 F.3d 645, 658 (9th Cir. 2012). As the Ninth Circuit summarized:

If these objections result in an increase to the common fund, the objectors may claim entitlement to fees on the same equitable principles as class counsel. Conversely, objectors who do "not increase the fund or otherwise substantially benefit the class members" are not entitled to fees, even if they bring "about minor procedural changes in the settlement agreement." Nor is it error to deny fees to objectors whose work is duplicative, or who merely echo each others' arguments and confer no unique benefit to the class.

1 *Id.* at 658–59 (citations omitted); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,  
2 1051 (9th Cir. 2002).

3 One circumstance where objectors might benefit the class is where they “contend  
4 that class counsel’s requested fee—to be taken from the common fund—is too great.”  
5 Newberg on Class Actions § 15:94 (5th ed. 2020). “If an objector is successful in trimming,  
6 say, \$10 million from class counsel’s fee request, that money goes back into the class’s  
7 common fund. Objectors’ counsel have, in such a situation, generated (or preserved) \$10  
8 million of value for the class.” *Id.*

9 The Court finds Objector is entitled to fees here. Although Objector did not prevail  
10 on many of his challenges to the settlement, he did succeed in convincing the Court to  
11 significantly reduce class counsel’s fee award. As outlined above, this reduction preserves  
12 approximately \$3.23 million more of the common fund for the *cy pres* beneficiaries. The  
13 Ninth Circuit affirmed the Court’s approval of the settlement’s *cy pres* component.  
14 *Easysaver*, 906 F.3d at 760–63. Under this approach, the class members who did not  
15 submit claims are receiving “an indirect benefit” instead of “a direct monetary payment.”  
16 *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). That indirect benefit is now  
17 much greater due to Objector’s efforts. Hence, awarding fees to Objector’s counsel is  
18 appropriate. *See Rodriguez*, 688 F.3d at 658.

19 The Court turns to calculating a reasonable fee award. The familiar tools are at the  
20 Court’s disposal: the lodestar method and the percentage-of-recovery method. *See In re*  
21 *Riverstone Networks, Inc.*, 256 F. App’x 168, 170 (9th Cir. 2007) (citing *Vizcaino*, 290  
22 F.3d at 1047). The “lodestar method” involves “multiplying the number of hours the  
23 prevailing party reasonably expended on the litigation . . . by a reasonable hourly rate.” *In*  
24 *re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). “In the  
25 percentage method, ‘the court simply awards the attorneys a percentage of the fund  
26 sufficient to provide class counsel with a reasonable fee,’ using 25% as a benchmark.” *In*  
27 *re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019) (en banc) (quoting  
28 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)).

1 In many cases involving successful objections to a settlement, the benefit to the  
2 class is not easily quantifiable. *See, e.g., In re Lithium Ion Batteries Antitrust Litig.*, No.  
3 13-MD-02420-YGR (DMR), 2020 WL 7261313, at \*1 (N.D. Cal. Dec. 10, 2020)  
4 (awarding \$250,000 in fees where objector’s complaints led to a shift in the distribution of  
5 the settlement funds from one segment of the class to another); *Marshall v. Northrop*  
6 *Grumman Corp.*, No. 2:16-cv-06794-AB-JCX, 2020 WL 5668963, at \*4 (C.D. Cal. Sept.  
7 18, 2020) (awarding \$48,900 in fees where objectors convinced the court to deny initial  
8 approval of the settlement, which led to an amended settlement agreement that included a  
9 narrower release of claims). The lodestar method is understandably used in those cases.

10 In contrast to those cases, there is a quantifiable benefit to the class here: Objector’s  
11 challenges led to the preservation of approximately \$3.23 million more of the common  
12 fund for the *cy pres* beneficiaries. Because this benefit is due to Objector’s efforts, he asks  
13 the Court to calculate his counsel’s fees by applying the percentage method to the benefit.  
14 *See Arnett v. Bank of Am., N.A.*, No. 3:11-cv-1372-SI, 2014 WL 5419125, at \*3 (D. Or.  
15 Oct. 22, 2014) (finding that where objector’s challenges to class counsel’s requested  
16 expenses led to a \$38,267.11 increase in the settlement fund, a fee award to objector’s  
17 counsel of 25% of this amount—\$9,566.78—was appropriate).

18 This approach makes sense. It ties Objector’s fee award to the benefit he obtained  
19 for the class and aligns their interests. *Cf. In re Anthem, Inc. Data Breach Litig.*, No. 15-  
20 MD-02617-LHK, 2018 WL 3960068, at \*5 (N.D. Cal. Aug. 17, 2018) (“By tying the award  
21 to the recovery of the Class, Class Counsel’s interests are aligned with the Class, and Class  
22 Counsel are incentivized to achieve the best possible result.”). And Objector’s request for  
23 \$805,000 in fees is right about at the 25% benchmark typically used in the percentage  
24 method.

25 There is the usual concern, however, that using the percentage method may lead to  
26 a windfall for Objector’s counsel. *See Newberg on Class Actions* § 15:94 (5th ed. 2020).  
27 Indeed, \$805,000 is a substantial fee award for an objector’s counsel. Therefore, to  
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1 ameliorate this concern, the Court will cross-check the percentage method with the lodestar  
2 method. *See Bluetooth*, 654 F.3d at 944–45.

3 As mentioned, the lodestar method “begins with the multiplication of the number of  
4 hours reasonably expended by a reasonable hourly rate.” *Hyundai*, 926 F.3d at 570. The  
5 Court may then apply a risk multiplier to the lodestar and adjust the figure upward or  
6 downward. *Stetson v. Grissom*, 821 F.3d 1157, 1166–67 (9th Cir. 2016). A lodestar cross-  
7 check does not need to involve “mathematical precision” or “bean-counting,” and the court  
8 “may rely on summaries submitted by the attorneys and need not review actual billing  
9 records.” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005); *accord In re*  
10 *Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 768 F. App’x  
11 651, 654 (9th Cir. 2019).

12 Objector’s attorneys submit a lodestar that includes 847 hours of attorney time.  
13 (Frank Decl. ¶ 15, ECF No. 368-1.) As Objector’s motion reasonably summarizes:

14 Over seven years of litigation, Perryman’s attorneys analyzed and objected to  
15 a settlement; prepared motions and supplemental declarations in response to  
16 Plaintiffs’ challenges to Perryman’s standing and Perryman’s counsel;  
17 prepared for and attended a fairness hearing; defended an excessive appeal  
18 bond request; pursued the objection on appeal; briefed the appeal; engaged in  
19 motion practice on appeal; prepared supplemental briefing regarding remand;  
20 opposed class counsel’s renewed fee request; prepared motion for release of  
21 bond; prepared notice of additional decisions; prepared for and attended  
22 hearing regarding remand and fee request; prepared supplemental briefing in  
23 connection with hearing; pursued a second appeal; engaged in motion practice  
24 on appeal; briefed the appeal; prepared for and attended oral argument on the  
25 second appeal; opposed renewed request for fees after remand; [and] prepared  
26 supplemental briefing on renewed fee request after Defendant’s bankruptcy.

27 (Mot. 17.) Given the history of this case, the Court finds these hours are the amount  
28 “reasonably expended on the litigation.” *See Moreno v. City of Sacramento*, 534 F.3d  
1106, 1111 (9th Cir. 2008). The Court also finds Objector’s counsel’s proposed rates are  
appropriate, which are comparable to those the Court approved for Plaintiffs’ counsel. (*See*  
Frank Decl. ¶ 23.) The Court thus adopts Objector’s proposed lodestar of \$496,116.

1 Accordingly, Objector's request for \$805,000 in fees under the percentage method  
2 implies a lodestar multiplier of about 1.62 ( $\$805,000 / \$496,116 = \sim 1.62$ ). This multiplier  
3 is "within the range of multipliers applied in common fund cases." *See Vizcaino*, 290 F.3d  
4 at 1051. The lodestar method confirms the reasonableness of the fee award determined  
5 under the percentage method. Consequently, the Court will grant Objector's request for  
6 \$805,000 in fees.


7 Finally, Objector seeks a modest incentive award of \$2,500, which is significantly  
8 less than the incentive awards approved for the class representatives. Given Objector's  
9 participation in the case, the Court finds this modest award is appropriate. (*See Frank Decl.*  
10 ¶ 31.) *See, e.g., Marshall*, 2020 WL 5668963, at \*4 (approving a \$1,500 service award for  
11 an objector).

### 12 **III. CONCLUSION**

13 For the foregoing reasons, the Court **GRANTS** Objector's motion. (ECF No. 368.)  
14 The Court awards Objector's counsel \$805,000 in attorney's fees and Objector Brian  
15 Perryman a \$2,500 service award from the settlement's common fund component.

16 **IT IS SO ORDERED.**

17  
18 **DATED: January 22, 2020**

  
**Hon. Cynthia Bashant**  
**United States District Judge**