

1 William M. Audet (CA State Bar #117456)

waudet@audetlaw.com

2 Joshua C. Ezrin (CA State Bar #220157)

jezrin@audetlaw.com

3 AUDET & PARTNERS, LLP

221 Main Street, Suite 1460

4 San Francisco CA 94105

415.568.2555 T

5 415.568.2556 F

6 Alan R. Plutzik (CA State Bar No. 077785)

aplutzik@bramsonplutzik.com

7 Jennifer S. Rosenberg (CA State Bar No. 121023)

jrosenberg@bramsonplutik.com

8 BRAMSON, PLUTZIK, MAHLER & BIRKHAUSER, LLP

2125 Oak Grove Road, Suite 120

9 Walnut Creek, CA 95498

925.945.0200 T

10 925.945.8792 F

11 Harris L. Pogust (PA Bar No. 52721)

hpogust@pbmattorneys.com

12 Derek T. Braslow (PA Bar No. 78994)

dbraslow@pbmattorneys.com

13 POGUST, BRASLOW & MILLROOD, LLC

161 Washington Street, Suite 1520

14 Conshohocken, PA 19428

610.941.4204 T

15 610.941.4245 F

16 *Attorneys for Plaintiffs*
17 *and the Proposed Settlement Class*

18 **UNITED STATES DISTRICT COURT**

19 **NORTHERN DISTRICT OF CALIFORNIA**

20 TINA WALTER, CHRISTOPHER
21 BAYLESS and ERIC SCHUMACHER,
22 individually and on behalf of others
23 similarly situated,

Plaintiff,

v.

24 HUGHES COMMUNICATIONS, INC. and
25 HUGHES NETWORK SYSTEMS, LLC,

26 Defendants.

CASE NO: 09-CV-02136 SC

**NOTICE OF MOTION, MOTION, AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR AWARD
OF ATTORNEYS' FEES, COSTS, AND
SERVICE AWARDS TO THE NAMED
PLAINTIFFS**

Hearing Date: November 16, 2011

Hearing Time: 10:00 a.m.

Courtroom: 1

The Honorable Samuel Conti

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In re Media Vision Tech. Sec. Litig., 913 F. Supp. 1362 (N.D. Cal. 1996)17

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In re Vitamins Antitrust Litig., 2001 WL 34312839 (D.D.C. July 16, 2001)14

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5 *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837; 124 P.3d 530 (2005)7

6 *Snell v. Allianz Life Ins. Co. of N. Am.*, No. 97-2784,
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9 *Varacallo v. Massachusetts Mutual Life Ins. Co.*, 226 F.R.D. 207 (D.N.J. 2005)14

10 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002).....7

11 *Vo v. Las Virgenes Mun. Water Dist.*, 79 Cal. App. 4th 440 (2000)10

12 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001).....7

13 *Wren v. RGIS Inventory Specialists*, 2011 U.S. Dist. LEXIS 38667 (N.D. Cal. 2011).....9

14

15 **Treatises**

16 *Journal of Empirical Legal Studies*, Vol.1, (Mar. 2004).....16

17 MANUAL FOR COMPLEX LITIGATION (2004) § 21.626

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1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **NOTICE IS HEREBY GIVEN** that on November 16, 2012, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, in the Courtroom of the Honorable Samuel Conti of the
4 Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California
5 94102, Plaintiffs Tina Walter, Christopher Bayless and Eric Schumacher on behalf of
6 themselves and all others similarly situated, by and through their undersigned counsel, will and
7 hereby do request that this Court enter an Order:

- 8 (1) To approve the service award to the Named Plaintiffs and Class Representatives; and
9 (2) To award reasonable attorneys' fees, costs, and expenses to Class Counsel.

10 This motion is based upon Plaintiffs' memorandum of law in support thereof; the
11 executed Settlement Agreement preliminarily approved by the Court on March 2, 2012; the
12 Order Granting Preliminary Approval of Settlement and Provisional Class Certification (Docket
13 No. 112) which sets forth the briefing schedule for the instant motion; and the Declaration of
14 Joshua C. Ezrin, filed herewith in support of this Motion; and all other papers filed in this
15 action. Defendant does not object to the motion in the context of the parties' proposed settlement.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Plaintiffs in the instant action, *Walter, et al., v. Hughes Communications, Inc., et al.*, (hereinafter “Class Counsel”) submit this motion for an award of attorneys fees and costs totaling \$630,000.00, and for service awards to the class representatives totaling \$15,000 (\$5,000 to each of the three (3) Named Plaintiffs). This motion is made to compensate Class Counsel for the efforts, time and services they have rendered to the Class throughout the litigation. These efforts resulted in a Settlement conservatively valued at over \$10,672,141.50, and which has generated over eighty-seven thousand (87,000) timely claims.

Class Counsel have collectively devoted intensive efforts and spent considerable time investigating, prosecuting and resolving this litigation. The hours spent by Class Counsel in the investigation and prosecution the action were necessary, appropriate and to the benefit of the Class. Class Counsel collectively expended over 1,900 hours in the prosecution and settlement of the Actions. The hours spent to date multiplied by Counsels’ reasonable hourly rates, results in a total lodestar of \$897,179.30, which is over \$260,000 more than the fees requested here. Significantly, the fees and costs requested by Class Counsel shall be paid by Defendants, subject to the Court’s approval, in addition to (and not out of) the relief made available to the Class.

As discussed below, Class Counsels’ request for attorneys’ fees and costs is eminently reasonable in light of the outstanding result Class Counsel achieved for the Class, which provides all affected Class members provides substantial benefits to the Class. Likewise, Class Counsels’ request for a service award to the Named Plaintiffs for their service to the Class is also supported by Ninth Circuit and California law and the facts of this case. For these reasons, and the reasons stated more fully below, Class Counsel respectfully request that the Court grant their request for fees and a service award to the Named Plaintiffs.

II. BACKGROUND

On March 2, 2012, the Court issued an Order granting preliminarily approving the parties’ settlement and provisional class certification. (See *Order Conditionally Certifying Class and Granting Preliminary Approval of Class Action Settlement*, Docket No. 112.) In that Order,

1 the Court granted: (1) preliminary approval of settlement; (2) provisional class certification and
2 designation of Tina Walter, Christopher Bayless and Eric Schumacher as class representatives;
3 (3) approval of class representatives' Class Counsel as "Class Counsel;" (4) approval of the
4 notice of settlement and claim form; and (5) the setting of a final settlement approval hearing
5 and related filing deadlines.

6 The parties' Settlement Agreement authorizes Class Counsel to petition the Court for
7 attorney's fees and reimbursement of costs in the amount of \$630,000. (Settlement Agreement,
8 p. 13.) The Settlement Agreement also authorizes Class Counsel to petition the Court for a class
9 representative service award for Named Plaintiffs in the amount of \$5,000 for their work on
10 behalf of the Settlement Class. (*Id.* at p. 14.) As stated in Plaintiffs' memorandum of points and
11 authorities supporting final approval of the settlement, which is incorporated here by reference,
12 the requested amounts are reasonable in light of the overall benefits of the settlement, which is
13 conservatively estimated to have a total value of \$10,672,141.50. (See generally *Pls.' Mot. and*
14 *Mem. of Points and Authorities in Support of Final Approval of Class and Collective Action*
15 *Settlement* ("Motion for Final Approval"), filed concurrently with this Motion.)

16 This litigation was resolved after two and half years of litigation during which Plaintiffs
17 and Class Counsel faced considerable risk in a case that involved hotly contested allegations and
18 complex issues of fact and law. Class Counsel utilized their expertise in this specialized area of
19 law to efficiently handle this case, prompting Defendants to engage in mediation efforts early
20 during the course of this case. Plaintiffs agreed to serve as representatives of the Plaintiff Class
21 and participated fully and actively in the investigation of the claims in this case, producing
22 records regarding their respective speeds of internet service when necessary and answering
23 requests for information. Each cooperated fully with Class Counsel, and through their efforts
24 provided Class Counsel access to the underlying facts, including but not limited to regularly
25 testing their respective internet speeds, which in turn led to a favorable outcome for the entire
26 Class. (*See Declaration of Joshua C. Ezrin In Support Of Plaintiffs' Motion For Award For*
27 *Attorneys' Fees, Costs, And Service Award To The Named Plaintiffs* ("Ezrin Decl."), ¶ 6.)

1 The value of the settlement and the resolution of the complex issues presented by this
2 litigation are the direct result of the experience, efforts and focus of Class Counsel. Specifically,
3 Class Counsel completed the following important tasks during the pendency of this case: (1)
4 Drafted and amended the operative complaint four times following a diligent investigation into
5 the facts surrounding the actual service speeds of Defendants' internet satellite services and
6 Defendants' representations regarding the same; (2) conducted informal discovery and
7 investigation, including a thorough review of all the documents produced by Hughes; (3)
8 opposed two motions to dismiss filed by Defendants; (4) engaged in extensive review of
9 information and data regarding the speed of internet service experienced by the Named
10 Plaintiffs; (5) coordinated the gathering of marketing and other information and data to support
11 the Class members; (6) surveyed, interviewed, gathered documents, responded to inquiries from
12 and communicated status updates to Plaintiff Class Members; (8) engaged in multiple rounds of
13 settlement negotiations, including two full day mediation sessions in San Francisco, California,
14 conducted with the assistance of the Honorable Ronald Sabraw of JAMS, during which time
15 counsel for the parties engaged in a contentious arms-length negotiation process with the highly-
16 regarded settlement agreement was finalized, Class Counsel sought preliminary approval,
17 which was rejected twice. After further settlement negotiations, an amended settlement
18 agreement was agreed upon. To increase the benefits to the Class, Class Counsel voluntarily
19 reduced a previously agreed upon fee of by \$350,000, with the funds going back to the Class.
20 (*See* Docket No. 99.) On the third attempt, with a substantially improved Settlement Agreement,
21 this Court granted preliminary approval. (*See* Docket No. 112.)

22 In sum, Class Counsel expended over 1900 hours prosecuting this action on behalf of the
23 Named Plaintiffs and the Plaintiff Class. (*See* Ezrin Decl., ¶¶ 10, 11; *see also* Declaration of
24 Harris L. Pogust In Support Of Class Counsels' Motion For Award For Attorneys' Fees, Costs,
25 And Service Award To The Named Plaintiffs ("Pogust Decl."), ¶ 9; Declaration of Alan R.
26 Plutzik In Support Of Class Counsels' Motion For Award For Attorneys' Fees, Costs, And
27 Service Award To The Named Plaintiffs ("Plutzik Decl."), ¶ 26.) The current total lodestar of
28 Settlement Class Counsel in this litigation as of September 30, 2012, is \$897,179.30, and the

1 total un-reimbursed costs and expenses incurred is \$19,640.63. (*See* Ezrin Decl., 12; Pogust
2 Decl., ¶ 12; Plutzik Decl., ¶ 29.) These efforts resulted in a Settlement which has a total value of
3 10,672,141.50 and which has been the subjected of over 87,000 timely valid claims. (*See*
4 Declaration of Jonathan D. Carameros Re: Notice Procedures (“Carameros Decl.”), ¶¶ 18-21.)
5 Defendants’ payment of fees and expenses (including costs associated with claims
6 administration and the proposed class representative service awards) is separate and apart from
7 the Class Settlement, and will in no way diminish any benefit provided to any Class Member
8 under the terms of the Settlement Agreement. (Settlement Agreement, p. 13.)

9 **III. A SERVICE AWARD TO THE NAMED PLAINTIFFS IS APPROPRIATE**

10 Plaintiffs here request a combined service award of \$15,000, consisting of \$5,000
11 payments to each of the three (3) named Plaintiffs in the Action. This amount is the result of
12 agreement by the Parties and is set forth in the Settlement. (Settlement Agreement, p. 14.) These
13 awards do not affect or reduce the benefits to the Class in any way, and are paid in addition to
14 the other relief the class representatives may receive under the settlement.

15 Named plaintiffs are routinely granted service awards as part of a class action settlement.
16 *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) Service or incentive payments
17 recognize the named plaintiffs’ time and efforts, and the risks they undertake on behalf of a
18 class. In addition to compensating class representatives for their time, effort, and inconvenience,
19 service awards advance public policy by encouraging individuals to come forward and take
20 action to protect the rights of the class. Courts within the Ninth Circuit, including this Court,
21 have routinely approved the award of service payments to class representatives for their
22 assistance to a plaintiff class. *Staton*, 327 F.3d 963-64.

23 Under *Staton*, such awards should be evaluated using “‘relevant factors, includ[ing] the
24 actions the plaintiff has taken to protect the interests of the class, the degree to which the class
25 has benefited from those actions, . . . the amount of time and effort the plaintiff expended in
26 pursuing the litigation . . . and reasonabl[e] fear[s] of workplace retaliation.’” *Staton*, 327 F.3d
27 at 977 (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)) (ellipses in original). Small
28 enhancement payments, which serve as premiums in addition to any claims-based recovery from

1 the settlement, promote the public policy of encouraging individuals to undertake the
2 responsibility of representative lawsuits. MANUAL FOR COMPLEX LITIGATION at § 21.62 fn. 971
3 (2004) (enhancement payments may be “warranted for time spent meeting with class members,
4 monitoring cases, or responding to discovery”).

5 Here, the efforts of the Named Plaintiffs on behalf of the class underscore the propriety
6 of the requested incentive awards. Throughout the litigation, each of the Named Plaintiffs
7 performed the following tasks, among others: (1) assisted Class Counsel with the preparation of
8 the complaints and amended complaints; (2) tested their respective internet service speeds and
9 supplied documentation and informal discovery regarding the actual speeds provided under the
10 various HughesNet service plans; (3) stayed abreast of the settlement negotiations; and (4)
11 assisted Class Counsel in evaluating and formulating the various terms of the Settlement
12 Agreement. (*See* Ezrin Decl., ¶ 6.) The efforts of each Plaintiff were instrumental in achieving
13 the Settlement on behalf of the Class.

14 Indeed, the \$5,000 payments requested here are at the modest end of the spectrum. *See*
15 *Hughes v. Microsoft Corp.*, 2001 U.S. Dist. LEXIS 5976 (W.D. Wash. 2001), at *36-38
16 (approving incentive awards of \$7,500, \$20,000, and \$40,000); *Carroll v. Blue Cross & Blue*
17 *Shield of Mass.*, 157 F.R.D. 142, 143 (D. Mass. 1994), *af’d* 34 F.3d 1065 (1st Cir. 1994) (“the
18 class representatives shall receive payments of \$7,500 each as compensation for services
19 rendered to the class in initiating and prosecuting this action”); *Bogosian v. Gulf Oil Corp.*, 621
20 F. Supp. 27, 32 (E.D. Pa. 1985) (stating “the propriety of allowing modest compensation to class
21 representatives seems obvious,” and awarding \$20,000 to two named class representatives). *See*
22 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (approving service
23 awards of \$5,000 from a total settlement of \$1,725,000); *Razilov v. Nationwide Mutual Ins. Co.*,
24 No. 01-CV-1466-BR., 2006 WL 3312024, *3-*4 (D. Or. Nov. 13, 2006).

25 After the Court granted preliminary approval of the Settlement and the service payment
26 request, the Class Notice informed Class Members that Plaintiffs will be requesting an incentive
27 payment. At the time of filing this motion, only one Class Member indicated any issues
28 whatsoever related to the requested service payments. The letter from Leo John Keller II, dated

1 May 13, 2012, states in pertinent part that “I feel that Hughes should be required in the
2 settlement to provide a settlement of at least 5% of the amount being provided for the Class
3 Representatives, or \$250 to each class member.” (*See* Objection of Leo John Keller II, dated
4 May 13, 2012) Mr. Keller does not actually appear to object to the amount the Named Plaintiffs
5 are receiving, but rather focuses on what he himself as a Class Member is receiving. Even if this
6 were a valid objection, which it is not, it is only one such objection out of a class of over half a
7 million persons. Given the lack of objections, and the benefits these Named Plaintiffs helped
8 confer upon the Class, approval of the incentive payments is warranted.

9 **IV. CLASS COUNSELS’ REQUEST FOR AN AWARD OF ATTORNEYS’ FEES**
10 **AND COSTS IS WELL SUPPORTED**

11 Counsel who represent a class and produce a benefit for the class members are entitled to
12 be compensated for their services. Because Plaintiffs asserted claims under California law,
13 California law also governs the award of attorneys' fees here. *Vizcaino v. Microsoft Corp.*, 290
14 F.3d 1043, 1047 (9th Cir. 2002). Under both California and Ninth Circuit precedent, a court
15 may exercise its discretion to award attorneys' fees by applying the lodestar/multiplier method,
16 the percentage-of-the-fund method, or by granting the fees negotiated by the Parties. *Wershba v.*
17 *Apple Computer, Inc.*, 91 Cal. App. 4th 224, 253 (2001); *Hanlon v. Chrysler Group*, 150 F.3d
18 1011, 1029 (9th Cir. 1998); *Fischel v. Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997, 1006
19 (9th Cir. 2002) (citing *Vizcaino*, 290 F.3d at 1047); *Shuette v. Beazer Homes Holdings Corp.*,
20 121 Nev. 837, 864-65; 124 P.3d 530, 548-49) (2005).

21 **A. Agreed-Upon Fees Are Generally Entitled To Significant Deference**

22 When a defendant agrees to pay fees and costs separately from the benefit for a class, the
23 courts possess discretion to approve the petition without the need to conduct an intensive
24 inquiry beyond the submission of counsel. *See Lobatz v. U.S. West Cellular of California, Inc.*,
25 222 F.3d 1142, 1148 (9th Cir. 2000); *Fulford v. Logitech, Inc.*, No. 08-cv-02041, 2010 WL
26 807448, at *1-2 (N.D. Cal. Mar. 5, 2010). Instead, the reasonableness of an award can include
27 evidence of an arm’s-length negotiation or an agreement by the defendant to pay a certain
28 amount that does not impact the relief afforded to the class, as well as the Court’s knowledge of

1 the proceedings. *See Fulford*, 2010 WL 807448, at *1. *Accord McBean v. City of New York*, 233
2 F.R.D. 377, 392 (S.D.N.Y. 2006) (concluding that the parties' agreement for attorneys' fees was
3 objectively reasonable because it was the product of arm's length negotiations); *Snell v. Allianz*
4 *Life Ins. Co. of N. Am.*, No. 97-2784, 2000 WL 1336640, at * 19 (D. Minn. Sept. 8, 2000) (a
5 court's "acceptance of the fee request is facilitated by the fact that the fee amount was
6 independently negotiated by the settling parties, and comes from a source that does not impact
7 upon the total settlement fund that is available to the Class"); *Hofman v. Constr. Protective*
8 *Servs., Inc.*, No. 6105640, 2006 WL 6105640, at *2 (C.D. Cal. Dec. 21, 2006) (awarding
9 plaintiffs' counsel's attorneys' fees in case involving FLSA and California Labor Code
10 violations based on "'hybrid lodestar/multiplier' method").

11 The parties in this case worked diligently to reach a fair and reasonable settlement. The
12 fee award was negotiated so as not to affect the amount available to pay Class Member claims.
13 There was no collusion and Class Counsel has served the best interests of the Plaintiff Class in
14 all respects. Negotiations over nearly every detail were vigorous and contentious. Ultimately,
15 Defendants have agreed to pay, and Class Counsel has agreed to request, no more than a sum
16 certain. Without this agreement, the onus would be on the Court to determine the appropriate fee
17 award. With Defendants' agreement, and without evidence of impropriety, this Court has
18 discretion to approve the amount based upon the submissions herein. *Lobatz*, 222 F.3d at 1148;
19 *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL No. 901, 1992 WL 226321, at
20 *4 (C.D. Cal. June 10, 1992) (holding that where there are arm's-length fee negotiations with
21 sophisticated defendants by attorneys intimately familiar with the case, the risks, the amount and
22 value of their time, and the nature of the result obtained for the class, "the Court is reluctant to
23 interpose its judgment as to the amount of attorneys' fees in the place of the amount negotiated
24 by the adversarial parties in the litigation"), *appeal dismissed*, 33 F.3d 29 (9th Cir. 1994).

25 As of November 2, 2012, Class Counsels' collective current time/lodestar is
26 \$897,179.30, with expenses/costs outstanding and unreimbursed in the amount of \$19,640.63.
27 (*See Ezrin Decl.*, ¶ 12.) As noted below, the amount requested is reasonable, supported by both
28 the lodestar multiplier approach, and, in view of the potential value of this settlement, amounts

1 to less than 6% of the value of the Settlement (well below the customary 25 to 30% awarded in
2 this district). This factor weighs heavily in favor of the requested fees and costs.

3 **B. Class Counsels' Fee Request Is Appropriate And Reasonable**

4 **1. Class Counsel's Hourly Rates Are Reasonable**

5 Plaintiffs' attorneys are entitled to the hourly rates charged by attorneys of comparable
6 experience, reputation, and ability for similar litigation. *Ketchum v. Moses*, 24 Cal. 4th 1122
7 (2001). In assessing the reasonableness of an attorney's hourly rate, courts should consider the
8 prevailing market rate in the community for similar services by lawyers of reasonably
9 comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 895-96 & n.1 1
10 (1984). Courts look to the forum in which the District is located to determine the hourly rates
11 that should apply. *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 979 (9th Cir. 2008)
12 ("[a]ffidavits of the plaintiffs' attorney[s] and other attorneys regarding prevailing fees in the
13 community, and rate determinations in other cases[, particularly those setting a rate for the
14 plaintiff's' attorney,] are satisfactory evidence of the prevailing market rate" (quoting *United*
15 *Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir.1990)).

16 Class Counsels' respective rates are set forth in their supporting declarations. (*See* Ezrin
17 Decl., ¶ 9; Pogust Decl., ¶ 9; Plutzik Decl., ¶ 2 .) In this case, Class Counsel are highly regarded
18 members of the bar who are experienced in the area of consumer class actions and complex
19 class action litigation. (*See generally* Ezrin Decl.; Pogust Decl.; Plutzik Decl.) Class Counsels'
20 customary rates, which were used for purposes of calculating lodestar here, are based on
21 prevailing fees in this District and have been approved in the Northern District of California and
22 other Courts. For example, on March 4, 2011, Magistrate Judge Joseph C. Spero of the Northern
23 District of California approved Audet & Partners, LL's rates (including Mr. Audet's and Mr.
24 Ezrin's) after specifically reviewing them for reasonableness. (Ezrin Decl., ¶ 13.)

25 A review of the hourly rates claimed by other Bay Area class action lawyers reveals the
26 reasonableness of the rates charged by the other two firms. For example, in *Wren v. RGIS*
27 *Inventory Specialists*, 2011 U.S. Dist. LEXIS 38667 (N.D. Cal. 2011), the Court approved 2010
28 hourly rates of \$650 for a San Francisco lawyer with 17 years experience and \$675 for a 30-year

1 East Bay lawyer. *See also Californians for Disability Rights v. al. DOT*, 2010 U.S. Dist. LEXIS
2 141030 at *13-39 (N.D. Cal 2010) (approving 2010 hourly rates of \$730 per hour for an
3 attorney with 25 years of experience, \$650 per hour for an 18-year lawyer, and \$750 per hour
4 for a 10-year lawyer); *Santa Fe Pointe L.P. v. Greystone Servicing Corp.*, 2009 WL 3353449,
5 *1 (N.D. Cal. 2009) (approving a 2009 hourly rate of \$675 for a lawyer with 20 years
6 experience.) All of the above demonstrates that Class Counsels' hourly rates are reasonable.

7 **2. The Number of Hours Class Counsel Worked is Reasonable**

8 Under California law, counsel is entitled to compensation for every hour reasonably
9 spent on the matter. Reasonableness of hours is assessed by "the entire course of the litigation,
10 including pretrial matters, settlement negotiations, discovery, litigation tactics, and the trial itself
11 *Ketchum*, 24 Cal. 4th at 1133; *Vo v. Las Virgenes Mun. Water Dist.*, 79 Cal. App. 4th 440
12 (2000). The number of hours that Class Counsel spent on this matter was eminently reasonable.
13 Each firm made every effort to prevent the duplication of work or inefficiencies that might have
14 resulted from having multiple firms working on the case.

15 A breakdown of counsel's lodestar is summarized in the undersigned Counsel's
16 Declaration. (*See Ezrin Decl.*, ¶9.) It shows over 1900 hours have been expended on this
17 litigation and Plaintiff's counsel have advanced expenses of \$19,640.63 during this nearly three-
18 year-long litigation. Specifically, Class Counsel: (1) drafted the initial complaints and amended
19 the consolidated complaint four times following a diligent investigation into the facts
20 surrounding the actual service speeds of Defendants' internet satellite services and Defendants'
21 representations regarding the same; (2) conducted informal discovery and investigation,
22 including a thorough review of all the documents produced by Hughes; (3) opposed a motion to
23 two motions to dismiss; (4) engaged in extensive review of information and data regarding the
24 speed of internet service experienced by the Named Plaintiffs; (5) coordinated the gathering of
25 information and data to support the Class members; (6) surveyed, interviewed, gathered
26 documents, responded to inquiries from and communicated status updates to Plaintiff Class
27 Members; (8) engaged in multiple rounds of settlement negotiations, including two full day
28 mediation sessions; (9) sought preliminary approval three times, and (10) after notice was

1 effectuated responded to Class Member questions concerning the class notice and Settlement.
2 (See Ezrin Decl., ¶ 4.)

3 It is well established that Plaintiff's counsel is "not required to record in great detail how
4 each minute of his time was expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983).
5 Instead, counsel need only "identify the general subject matter of his time expenditures." *Id.*
6 (citations omitted); see also *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000)
7 (concluding that "a summary of the time spent on a broad category of tasks such as pleadings
8 and pretrial motions" met "basic requirement" of documentation). If the Court prefers to review
9 Class Counsels' detailed time records, Class Counsel will willingly make them available for in
10 camera review at the Court's request.

11 Class Counsels' responsibilities will not end with final approval. For instance, the
12 Claims Administrator will provide periodic reports to Class Counsel and Defendants indicating
13 the number of claims subsequently approved and denied as a result of Class Member appeals.
14 (See Carameros Decl., ¶ 21.) Moreover, Class Counsel will remain available to answer any
15 Class Member inquiries. These are potentially substantial tasks, and based on prior experience,
16 this ongoing work could add many hours of work by Class Counsel and their staff. (See Ezrin
17 Decl., ¶ 14.)

18 Not only were the hours that Class Counsel put into this case reasonable, but they also
19 served the public good. Indeed, Class Counsels' efforts have succeeded in serving important
20 public purposes by helping increase corporate accountability, make more prominent disclosures
21 regarding actual speeds of the internet services Defendants sell, create a prorated ETF, and
22 compensating the Class for the damage it suffered. Thus, Class Counsel respectfully submits
23 that this Court may and should find that all of the hours Class Counsel spent in this action were
24 reasonably incurred.

25 3. The Exceptional Results Obtained Warrant the Fees Sought

26 As the U.S. Supreme Court has explained, in determining the reasonableness of
27 attorneys' fees, "the most critical factor is the degree of success obtained." *Hensley*, 461 U.S. at
28

1 436; *see also Glendora Cmty. Redev. Agency v. Demeter*, 155 Cal. App. 3d 465, 475-76 (1984).
2 Here, the exceptional results obtained in this Settlement warrant the fees sought.

3 As set forth in greater detail in Plaintiffs' Motion for Final Approval, there are two
4 components to the cash compensation offered to class members. Former Hughes customers who
5 paid an early termination fee are entitled to claim a \$40 cash payment under the terms of the
6 Settlement. These class members made claims in the amount of \$460,800, as compared to the
7 \$354,417.60 projected by the Settlement Administrator at the time the preliminary approval
8 motion was filed. *See* Motion for Final Approval at 7:15-22.

9 Second, former Hughes customers who did *not* pay an early termination fee and who met
10 the other requirements for compensation as set forth in the Settlement, were entitled to claim a
11 \$5 cash payment. This group of Class Members have made claims in the total amount of
12 \$372,105. Again, this number is above the estimate that the Settlement Administrator
13 previously made, based on the claims rate in a similar case. *See* Motion for Final Approval at
14 7:23-8:7.

15 Additionally, the litigation resulted in a fundamental change in Defendants' ETF policy.
16 Prior to the settlement, Hughes charged a flat \$400 as an ETF if the subscriber cancelled at any
17 time after the first 30 days of the 24-month contract, whether it is on the 31st day or the last day
18 of the 23rd month. Hughes will now be pro-rating its ETFs. For example, a subscriber who
19 terminates a contract with one month left would pay an ETF of only \$85, instead of the \$400
20 Hughes previously charged – a difference of \$315. *See* Motion for Final Approval at 8:11-23.
21 Hughes has agreed to maintain these amounts in effect for at least 18 months after the
22 effectiveness of the new schedule, and not to return to a flat ETF for a period of three years. *Id.*

23 Under the settlement, Hughes has also agreed to provide subscribers with a token per
24 month allowing their download allowances to be reset if the subscriber reaches maximum
25 download allowance under the Fair Access Policy, without waiting for the usual reset period to
26 elapse. This program will be in effect for no fewer than eighteen months. *See* Motion for Final
27 Approval at 8:25-9:6. The parties provided the Court with an estimate of the value of this part of
28 the settlement as a part of the preliminary approval motion, by multiplying the value of a token

1 (\$5, \$7.50 and \$10.50 for the Home/Basic, Pro/Power 150 and Pro Plus service plans
 2 respectively) and multiplying it by the estimated number of times such a token will be
 3 redeemed. The estimated value of the Restore Tokens is \$5,366,574. In Plaintiffs' preliminary
 4 approval filing, Hughes provided information from which it estimated the value of pro rating
 5 ETFs to be \$4,472,662.50 over the 18 month period following final approval of the Settlement.
 6 *Id.*

7 Lastly, the Settlement provides that commencing no later than ninety (90) days after the
 8 date of the Final Order, Hughes shall, when advertising upload or download speeds measured in
 9 MBPS or KBPS on its website or in print, include, via hyperlink or close to the advertised
 10 speeds, a disclosure similar to the following:

11 *When you connect to the Internet using HughesNet, the upload and download*
 12 *speeds you experience will vary based on a variety of factors including the*
 13 *configuration of your computer, the number of concurrent users, network or*
 14 *Internet congestion, the speed of the Websites you are accessing, and other*
 15 *factors. Stated speeds and uninterrupted use of service are not guaranteed. Actual*
 16 *upload and download speeds may be lower than maximum advertised speeds,*
 17 *particularly during peak periods.*

18 The Settlement expressly provides that this disclosure must be used for at least five years
 19 after the Final Order Date. The value of the improved advertising disclosure, which levels the
 20 playing field and provides consumers with the information necessary to make an educated
 21 decision regarding the services provided by Hughes, cannot be quantified. *See* Motion for Final
 22 Approval at 9:8-20.

23 Taking into consideration the actual cash compensation claimed, and the estimated value
 24 of the prorated ETF schedule and the Restore Tokens, the estimated total value of the Settlement
 25 is as follows:

24	Cash Payments	\$832,905.00
25	ETF Relief	\$4,472,662.50
26	Restore Tokens	\$5,366,574.00
27	Total	\$10,672,141.50

28 *See* Motion for Final Approval at 9:24-27.

1 Under the percentage of recovery method, after valuation has been established, the Court
2 then determined what percentage to apply to the “valuation”. Courts generally apply, in this
3 District, any value from 25% to 33% of the valuation. *See, e.g., In re Insurance Brokerage*
4 *Antitrust Litig.*, 2009 WL 411856, at *4 (D.N.J. Feb. 17, 2009) (“[a]lthough the Settlement
5 Agreement [was] not strictly a common fund,” the court utilized a percentage method with a
6 lodestar cross check “where defendants ... agreed to pay an amount certain for fees and costs in
7 addition to the amount designated to go to the Class Members directly, [because] the analysis is
8 analogous to that performed to the common fund doctrine”); *Varacallo v. Massachusetts Mutual*
9 *Life Ins. Co.*, 226 F.R.D. 207 (D.N.J. 2005) (“Although this Settlement is not strictly speaking a
10 common fund case, the Court finds it is analogous in that the fees and Class award would be
11 paid by the Defendants and a common fund has been established for the Class.”); *In re Vitamins*
12 *Antitrust Litig.*, 2001 WL 34312839 (D.D.C. July 16, 2001) (based on its recognition that
13 ascribing a value to the settlement was difficult – but not impossible – the court regarded the
14 arrangement as a constructive common fund and applied the percentage of the recovery
15 method).

16 As set forth above, and more fully in Plaintiffs’ Motion for Final Approval, the potential
17 total Settlement value is \$10,672,141.50. The payment of the requested fees in the 6% range is
18 almost ‘too low’ in light of the benefits and value provided to Class. The extraordinary results
19 achieved in this case underscore the extent to which the modest fees requested here are
20 reasonable and warranted.

21 **4. The Risk Taken by Plaintiff’s Counsel Warrants the Attorneys’ Fees** 22 **Sought**

23 An attorney whose fee is contingent on success usually and rightly expects a higher fee
24 than an attorney who is paid a market rate as the case goes along, win or lose. *See, e.g., Rader v.*
25 *Thrasher*, 57 Cal. 2d 244, 253 (1962) (“[a] contingent fee contract, since it involves a gamble
26 on the result, may properly provide for a larger compensation than would otherwise be
27 reasonable”). Risk multipliers, therefore, are “intended to approximate market-level
28 compensation for . . . services, which typically includes a premium for the risk of nonpayment

1 or delay in payment.” *Ketchum*, 24 Cal. 4th at 1138. Risk multipliers are not windfalls; they are
2 “earned compensation.” *Id.* In the Court’s words, “[t]he adjustment to the lodestar figure, *e.g.*, to
3 provide a fee enhancement reflecting the risk that the attorney will not receive payment if the
4 suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither
5 unexpected nor fortuitous.” *Id.*

6 In deciding whether to accept a contingent fee matter, and the percentage fee they would
7 require to undertake the representation, a law firm evaluates factors including the chance of
8 winning the case, the expense involved, the amount of attorney and staff time that will be
9 required, the likelihood of settlement, the likelihood of appeal and the likelihood of delay in
10 payment if the case is successful. Here, several factors made this case risky and warrant a
11 commensurate fee award. The first factor is the financial risk; Plaintiffs’ Counsel prosecuted
12 this case solely on a contingency basis. Because there was no ready source of information and
13 evidence that could be used to establish Defendant’s liability, counsel knew this case would
14 require the devotion of resources. To date, the firms have risked significant time and expense
15 prosecuting this case. The Second factor is the risk of litigation; further adding to the risk,
16 Defendants are substantial, well-funded corporations capable of vigorously defending
17 themselves and hiring highly competent lawyers to defend this action.

18 Protracted litigation is enormously expensive with no guarantee of success. The various
19 inherent risks associated with pursuing a case of this nature on a contingency fee basis, coupled
20 with the benefits achieved for the Class Members, all militate heavily in favor of Class
21 Counsels’ requested fees.

22 **5. The Novelty, Difficulty and Complexity of the Litigation Supports the**
23 **Fees Sought**

24 The novelty, difficulty, and complexity of the action is another factor that courts
25 consider when assessing the reasonableness of class counsels’ fee application. *Serrano v. Priest*,
26 20 Cal. 3d 25, 48 (1977). In fact, a very recent study describes the factors to be considered in the
27 Court’s complexity analysis:

1 Some cases are more complex than others, either because the proof required is
 2 technical or difficult to obtain, because the procedural context or applicable rules
 3 are convoluted or unique, or because the dynamics of litigation between the
 4 parties generates difficulties such as motions to compel discovery, motions for
 protective orders, motions for sanctions, and appellate proceedings such as
 petitions for writs of mandamus and appeals.

5 *Journal of Empirical Legal Studies*, Vol.1, 27, 37 (Mar. 2004).

6 Almost all of the factors identified are present here. The issues involved in this case –
 7 specifically the speed of Defendants’ various internet satellite services and Defendants’
 8 advertising and marketing regarding the same – are necessarily highly technical. Analysis of the
 9 cause and nature of the defects in a service such as that provided by Defendants is both time
 10 consuming and complex. The ability of counsel to identify and analyze the problems, and
 11 discover the necessary information relating to the problems to establish liability made the case
 12 more complicated than it may appear. Accordingly, these factors also weigh heavily in favor of
 13 Class Counsels’ fees.

14 **6. The Preclusion of Other Employment Supports the Fees Sought**

15 In determining a reasonable fee, the Court may enhance the lodestar to account for "the
 16 extent to which the nature of the litigation precluded other employment by the attorneys."
 17 *Serrano*, 20 Cal. 3d at 48 (1977). Plaintiff’s counsel forwent alternative employment in order to
 18 participate in this litigation on a contingent basis. Plaintiff’s counsel dedicated significant
 19 resources and attorney time to the initial investigation, litigation, and settlement of the case,
 20 including the preparation of pleadings, the review of documents, and to the use of other
 21 discovery tools. All of the time spent on this case required the lawyers to turn down other
 22 potentially lucrative work. In the legal marketplace, these factors justify the modest fees
 23 requested here. See *Atkins v. Astrue*, 2012 U.S. Dist. LEXIS 154882 (N.D. Cal. Oct. 29, 2012)

24 **7. The Experience, Reputation and Ability of the Attorneys**

25 The reputation, experience, and ability of Class Counsel were essential to success in this
 26 litigation. As noted in the declaration of the undersigned Counsel and the firm resumes
 27 submitted herewith, Class Counsel have substantial experience in consumer class action
 28 litigation. (Ezrin Decl., ¶ 5) Indeed, Class Counsels’ skills in developing an extensive factual

1 record and convincing Defendants of its litigation exposure were essential to achieving this
2 Settlement. Class Counsels' history of aggressive, successful prosecution of consumer class
3 actions made credible their commitment to pursue this litigation until Defendants provided a fair
4 result for the Class members. Through their skill, reputation, and ability, Class Counsel were
5 able to obtain a settlement that provides an outstanding result for Class members.

6 **8. The Lack Of Objections Supports the Fees Sought**

7 The lack of objections to Class Counsels' requested fees weights heavily in favor of
8 approval. Indeed, only one individual out of a class of over one million persons raised any
9 objection to the fees sought by Class Counsel. The letter from Leo John Keller II, dated May 13,
10 2012, states in pertinent part that "Class Counsel is likely to receive a larger reward from this
11 settlement than the class they are supposed to be representing to obtain justice and relief. (*See*
12 *Objection of Leo John Keller II, dated May 13, 2012*)

13 It should be noted that Class Counsel agreed to accept not more than \$630,000 in
14 attorneys' fees and costs (approximately a 30% reduction from the fee originally negotiated).
15 Additionally, Class Counsel added the amount taken from their fees to the Settlement fund. The
16 overall value of the settlement is estimated at \$10,672,141.50. The negotiated attorneys' fees are
17 only 6% of that number. The fee is not being paid from a common fund; Hughes is paying it in
18 addition to class relief. .

19 **C. Class Counsels' Request For Reimbursement Of Costs Is Also Reasonable**

20 "Reasonable costs and expenses incurred by an attorney who creates or preserves a
21 common fund are reimbursed proportionately by those class members who benefit from the
22 settlement." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996)
23 (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970)); see also *Staton* 327 F.3d
24 at 974. The requested costs must be relevant to the litigation and reasonable in amount. *In re*
25 *Media Vision*, 913 F. Supp. at 1366.

26 Throughout the course of this litigation, Class Counsel had to incur un-reimbursed, out-
27 of-pocket costs totaling \$19,640.73. (Ezrin Decl., ¶ 12, Ex. 5.) These costs included but are not
28 limited to: (1) filing fees; (2) copying, mailing, faxing and serving documents; (3) conducting

1 computer legal research; (4) travel to settlement negotiations and meetings; and mediation fees.
2 (*Id.*) Class Counsel put forward these out-of-pocket costs without assurance that they would
3 ever be repaid. The expenses incurred were necessary to secure the resolution of this litigation.
4 See *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007) (finding
5 that costs such as filing fees, photocopy costs, travel expenses, postage, telephone and fax costs,
6 computerized legal research fees, and mediation expenses are relevant and necessary expenses
7 in a class action litigation).

8 **V. CONCLUSION**

9 For the reasons stated above, Plaintiffs respectfully request that this Court award Class
10 Counsel \$630,000 in fees and costs, and award the Named Plaintiffs the requested service
11 awards of \$5,000 each.

12 Dated this November 2, 2012

AUDET & PARTNERS, LLP

13
14 /s/ Joshua C. Ezrin

Joshua C. Ezrin
221 Main Street, Suite 1460
San Francisco, CA 94105
415.568.2555 T
415.568.2556 F
jezrin@audetlaw.com

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19 *Attorneys for Plaintiffs*
20 *and the Proposed Settlement Class*