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10 *Class Counsel*

11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA

14 IGNACIO PEREZ, on Behalf of Himself and all  
 15 Others Similarly Situated,

16 Plaintiff,

17 v.

18 RASH CURTIS & ASSOCIATES,

19 Defendant.

Case No. 4:16-cv-03396-YGR

20 **PLAINTIFF’S NOTICE OF MOTION AND**  
**MOTION FOR THE COURT TO APPROVE**  
**THE PROPOSED PLAN OF**  
**DISTRIBUTION**

Date: October 5, 2021

Time: 2:00 p.m.

Courtroom: 1

Judge: Hon. Yvonne Gonzalez Rogers

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

2                   **PLEASE TAKE NOTICE THAT** on October 5, 2021 at 2:00 p.m. or as soon thereafter as  
3 counsel may be heard by the above-captioned Court, located at 1301 Clay Street, Oakland, CA  
4 94612, Courtroom 1, 4th Floor in the Courtroom of Judge Yvonne Gonzalez Rogers, Plaintiff  
5 Ignacio Perez (“Plaintiff” or “Class Representative”), by and through his undersigned counsel of  
6 record, will move and hereby does move for an order approving the Proposed Plan Of Distribution  
7 of the recovery from *Perez v. Indian Harbor Insurance Co.*, Case No. 4:19-cv-07288-YGR (N.D.  
8 Cal.) (“*Perez II*”).

9                   This motion is made on the grounds that the Court’s October 11, 2019 Order approving the  
10 Assignment required Plaintiff and Class Counsel to notify the Court of the recovery, if any,  
11 obtained on behalf of Class Members as a result of the Assignment and seek approval of a fair,  
12 reasonable and adequate method for distributing the proceeds of the recovery to Class Members.  
13 Doc. 392, at 2.

14                   Specifically, Plaintiff seeks an order (1) confirming the court’s prior approval of the  
15 Assignment; (2) approving Perez’s entry into the *Perez II* Settlement Agreement (“Agreement”) as  
16 fiduciary and class representative for the class was authorized and fair, reasonable, and equitable;  
17 (3) approving the selection of the Administrator for distribution of the recovery; (4) approving the  
18 plan for distribution of the recovery as fair, reasonable and adequate; (5) determining that the Final  
19 Judgment in *Perez I* will be deemed satisfied upon the Administrator’s receipt of payment; and (6)  
20 dismissing the *Perez II* lawsuit with prejudice upon the Administrator’s receipt of payment, per the  
21 Agreement.

22                   This motion is based on: (1) this Notice of Motion and Motion, (2) the Memorandum of  
23 Points and Authorities in support thereof, (3) the Declarations of Scott A. Bursor (“Bursor Decl.”),  
24 and Mark Schey (“Schey Decl.”) filed herewith, (4) the papers and pleadings on file, and (5) the  
25 arguments of counsel at the hearing on the Motion.

26                   **CIVIL RULE 7-4(a)(3) STATEMENT OF ISSUE TO BE DECIDED**

27                   Whether the Court should enter an order (1) confirming the court’s prior approval of the  
28 Assignment; (2) approving Perez’s entry into the *Perez II* Settlement Agreement (“Agreement”) as

1 fiduciary and class representative for the class was authorized and fair, reasonable, and equitable;  
2 (3) approving the selection of the Administrator for distribution of the recovery; (4) approving the  
3 plan for distribution of the recovery as fair, reasonable and adequate; (5) determining that the Final  
4 Judgment in *Perez I* will be deemed satisfied upon the Administrator's receipt of payment; and (6)  
5 dismissing the *Perez II* lawsuit with prejudice upon the Administrator's receipt of payment, per the  
6 Agreement.

7  
8 Dated: August 19, 2021

**BURSOR & FISHER, P.A.**

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*Class Counsel*

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**TABLE OF AUTHORITIES**

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**CASES**

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4 *Bolton v. U.S. Nursing Corp.*,

5 2013 WL 2456564 (N.D. Cal. June 6, 2013)..... 5

6 *Brotherton v. Cleveland*,

7 141 F. Supp. 2d 907 (S.D. Ohio 2001)..... 10

8 *Charvat v. Travel Servs.*,

9 2015 WL 76901 (N.D. Ill. Jan. 5, 2015)..... 13

10 *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*,

11 2018 WL 2296588 (E.D. Okla. Mar. 27, 2018) ..... 10

12 *Couser v. Comenity Bank*,

13 125 F. Supp. 3d 1034 (S.D. Cal. 2015) ..... 13

14 *Gehrich v. Chase Bank USA, N.A.*,

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16 *Harris v. Chevron U.S.A., Inc.*,

17 2020 WL 8187464 (E.D. Okla. Feb. 27, 2020) ..... 10

18 *Hashw v. Dep’t Stores Nat’l Bank*,

19 182 F. Supp. 3d 935 (D. Minn. 2016) ..... 13

20 *Howard v. Web.com Grp. Inc.*,

21 2020 WL 3827730 (D. Ariz. July 8, 2020)..... 5

22 *In re Capital One Telephone Consumer Protection Litig.*,

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24 *In re Cendant Corp. Secs. Lit.*,

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28 *In re Giant Interactive Grp., Inc. Secs. Lit.*,

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*In re Lorazepam & Clorazepate Antitrust Lit.*,

2003 WL 22037741 (D.D.C. June 16, 2003) ..... 10

*In re Lucent Techs, Inc. Secs. Lit.*,

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1 *In re Omnivision Techs., Inc.*,  
 2 559 F. Supp. 2d 1036 (N.D. Cal. 2008)..... 6

3 *Kolinek v. Walgreen Co.*,  
 4 311 F.R.D. 483 (N.D. Ill. 2015) ..... 13

5 *Lane v. Page*,  
 6 862 F. Supp. 2d 1182 (D.N.M. 2012)..... 10

7 *New York State Teachers’ Retirement System v. Gen. Motors Co.*,  
 8 315 F.R.D. 226 (E.D. Mich. 2016)..... 8

9 *Noll v. eBay, Inc.*,  
 10 309 F.R.D. 593 (N.D. Cal. 2015) ..... 5

11 *Perez v. Indian Harbor Ins. Co.*,  
 12 2020 WL 2322996 (N.D. Cal. May 11, 2020)..... 2, 3

13 *Perez v. Rash Curtis & Associates*,  
 14 2020 WL 1904533 (N.D. Cal. Apr. 17, 2020)..... 2

15 *Rose v. Bank of Am. Corp.*,  
 16 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014)..... 13

17 *Six (6) Mexican Workers v. Arizona Citrus Growers*,  
 18 641 F. Supp. 259 (D. Ariz. 1986)..... 4, 5

19 *Six (6) Mexican Workers v. Arizona Citrus Growers*,  
 20 904 F.2d 1301 (9th Cir. 1990)..... 4, 5

21 *Vinh Nguyen v. Radient Pharms. Corp.*,  
 22 2014 WL 1902293 (C.D. Cal. May 6, 2014)..... 6

23 *Vizcaino v. Microsoft Corp.*,  
 24 290 F.3d 1043 (9th Cir. 2002)..... 11

25 *Wright v. Nationstar Mortgage LLC*,  
 26 2016 WL 4505169 (N.D. Ill. Aug. 29, 2016)..... 13

**OTHER AUTHORITIES**

27 IRS Publication 1281 (rev. 5-2021)..... 2

28

1 **I. INTRODUCTION**

2 In the related case, *Perez v. Indian Harbor Insurance Co.*, Case No. 4:19-cv-07288-YGR  
 3 (*Perez II*), the parties have executed a Settlement Agreement (“Agreement”) through which the  
 4 Class will recover \$75.6 million. A copy of the Settlement Agreement is attached as Exhibit 1 to  
 5 the Declaration of Scott A. Bursor, submitted herewith. Class Counsel believe this is the largest  
 6 recovery on a class action TCPA claim, exceeding the \$75.5 million settlement in *In re Capital*  
 7 *One Telephone Consumer Protection Litig.*, 80 F. Supp.3d 781, 787 (N.D. Ill. 2015). The  
 8 insurance policy at issue in *Perez II* provides a \$1 million limit for TCPA claims. So the recovery  
 9 is more than 75x the policy limit.

10 Class Counsel now propose that the proceeds of the recovery should be distributed to Class  
 11 Members *pro rata* based on the number of phone calls each Class Member received, as shown by  
 12 the same call logs upon which the trial verdict was based. If the court approves Plaintiff’s and  
 13 Class Counsel’s share of attorney’s fees, costs and expenses, and service award (as discussed in  
 14 more detail below), Class Members will be paid \$82.09 per call, for an average payout of \$711.34  
 15 per Class Member. The largest payment will be \$39,649.47, to an individual Class Member who  
 16 received 483 calls. More than 12,000 Class Members will receive payments in excess of \$1,000,  
 17 with 728 payments of \$5,001-\$10,000, 132 payments of \$10,001-\$20,000, and 11 payments to  
 18 Class Members exceeding \$20,000. *Id.*

19

TABLE 1	
Payment Amount	No. of Class Members
\$82.09	11,227
\$82.09 to \$599.99	31,417
\$600 to \$1,000	7,372
\$1,001 to \$5,000	10,818
\$5,001 to \$10,000	728
\$10,001 to \$20,000	132
> \$20,000	11

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1 The proposed Plan of Distribution (“Plan”) is set forth in more detail in the Declaration of  
 2 Mark Schey, submitted herewith. Wherever possible, the Plan will make payments to Class  
 3 Members automatically, without requiring the submission of a claim form. *See* Schey Decl. ¶ 10.  
 4 Class Members will be contacted by email and postcard to advise them of the amount of the initial  
 5 payment they will receive, and to allow them to select a method of payment, including electronic  
 6 payments via PayPal, Venmo, Zelle or a cryptocurrency wallet if the Class Member elects an  
 7 electronic payment method. *Id.* ¶ 12-13. For payments exceeding \$600, the Administrator will  
 8 request information to enable the Administrator to issue Forms 1099 or, if such information is not  
 9 provided, the Administrator will deduct backup withholding as required by IRS Publication 1281  
 10 (rev. 5-2021). *Id.* ¶ 19. For payments to Class Members exceeding \$1,000, the Plan includes  
 11 additional procedures to reach such Class Members and ensure their receipt of payment, including  
 12 a live call campaign to locate Class Members, confirm their contact and payment information, and  
 13 explain the distribution process. *Id.* ¶ 14. Inevitably, some payments to Class Members will fail  
 14 because the Class Member cannot be located, fails to cash the check, or for other reasons. Those  
 15 funds will be paid as part of a second distribution to Class Members who were identified and  
 16 payable in the initial distribution. *Id.* ¶ 17. The goal is to pay the entire amount of the recovery,  
 17 less attorneys’ fees and expenses, to Class Members rather than have any funds go to cy pres. *Id.*  
 18 ¶ 17. After completing the distribution of all funds, the Administrator will submit a report to the  
 19 Court and to Class Counsel. *Id.* ¶ 18.

## 20 II. PROCEDURAL BACKGROUND

21 The context of this action is well known and has been described in prior orders. *See Perez*  
 22 *v. Rash Curtis & Associates*, 2020 WL 1904533 (N.D. Cal. Apr. 17, 2020); *Perez v. Indian Harbor*  
 23 *Ins. Co.*, 2020 WL 2322996 (N.D. Cal. May 11, 2020).

24 In this case, *Perez v. Rash Curtis & Associates*, Case No. 16-cv-03396-YGR (“*Perez I*”),  
 25 this court certified four classes (the “Class”) with Perez as the class representative.<sup>1</sup> Following a  
 26 one-week trial a jury found in favor of Perez and the Class, finding Rash Curtis had made 534,698

27 \_\_\_\_\_  
 28 <sup>1</sup> The distinctions between the four classes are discussed in a prior order, Doc. 81, but are immaterial to the present motion.

1 calls in violation of the TCPA. Thereafter the court entered judgment on the verdict in the amount  
2 of \$500 per call, totaling \$267,349,000. Doc. 430. That judgment is on appeal to the Ninth  
3 Circuit, and has been fully briefed.

4 After entry of judgment, on the eve of an anticipated bankruptcy filing, Defendant Rash  
5 Curtis entered into an “Assignment of Cause of Action in Exchange for Covenant Not to Execute”  
6 with Ignacio Perez, on behalf of himself and the Class (the “Assignment”), which assigned Rash  
7 Curtis’s claim against its insurer, Indian Harbor Insurance Company, for bad faith refusal to  
8 negotiate settlement of *Perez I*. On October 25, 2019, this court approved the Assignment, subject  
9 to the following two conditions:

- 10 (1) Plaintiff, through Class Counsel, shall promptly notify the Court of the recovery, if  
11 any, obtained on behalf of Class Members as a result of the Assignment; and
- 12 (2) Any recovery obtained as a result of the Assignment shall be held in trust until this  
13 Court approves a fair, reasonable, and adequate method for distributing the proceeds  
14 of the recovery to Class Members.

15 Doc. 392.

16 After obtaining approval of the Assignment, Perez filed the related action, *Perez v. Indian*  
17 *Harbor Ins. Co.*, Case No. 4:19-cv-07288-YGR (“*Perez II*”), asserting a claim against Rash  
18 Curtis’s insurer for bad faith refusal to settle *Perez I*. The related action, *Perez II*, was litigated  
19 vigorously for 2 years, including completion of fact discovery, the designation of 7 expert  
20 witnesses (2 for the plaintiff and 5 for the insurance company defendant), and the completion of  
21 expert discovery.

22 On August 13, 2021, the parties executed the Agreement to settle *Perez II*. Bursor Decl.  
23 Ex. 1. The Agreement provides for Indian Harbor to pay \$75.6 million to be held in trust by Perez  
24 through the class action administrator approved by this court. Agreement ¶ 3a, Bursor Decl. Ex. 1.  
25 The Agreement also requires Perez, through Class Counsel, to file a motion requesting an order  
26 that is final and appealable making the following findings:

- 27 (1) confirmation of the prior approval of the Assignment;
- 28

- 1 (2) approval that Perez’s entry into this Agreement as fiduciary and class representative
- 2 for the Class was authorized and fair, reasonable, and equitable;
- 3 (3) approval of the Administrator for distribution of the Settlement Amount;
- 4 (4) approval of plan for distribution of the Settlement Amount as fair, reasonable and
- 5 adequate;
- 6 (5) determination that the Final Judgment is deemed satisfied upon the Administrator’s
- 7 receipt of the Settlement Amount; and
- 8 (6) dismissal of *Perez II* with prejudice, per the Agreement.

9 Agreement, ¶ 4, Bursor Decl. Ex. 1. The parties are submitting herewith a proposed order which  
10 meets all these requirements.

11 The Agreement is not a class action settlement, and does not include a class release. *See*  
12 Agreement ¶ 7c, Bursor Decl. Ex. 1 (“the releases above shall not include nor be construed to  
13 include any release by or of the other members of the four certified classes in the Underlying  
14 Lawsuit”). The class action was not settled. It was litigated to a final judgment.

15 This motion is brought pursuant to the October 25, 2019 Order approving the Assignment,  
16 Doc. 392, to notify the court of the \$75.6 million recovery, and to seek the court’s approval for the  
17 proposed distribution of that recovery to Class Members. Notice of this motion is being given to  
18 Class Members through the same website that was established before the trial of *Perez I* in  
19 connection with the notice of pendency of this class action. *See* 8/10/21 Hearing Tr. at 10-11  
20 (approving notice).

### 21 **III. LEGAL STANDARD FOR APPROVING A PLAN OF DISTRIBUTION**

22 Distributions of class action judgments are exceedingly rare. The only case we have found  
23 within the Ninth Circuit concerning distribution of a class action judgment is *Six (6) Mexican*  
24 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990). In *Six Mexican*  
25 *Workers*, the plaintiffs obtained a judgment in a class action under the FLCRA, which provides for  
26 statutory damages. *Id.* at 1304.

27 The district court held that “identified class members need to be informed of their right to  
28 recover their individual statutory damage awards.” *Six (6) Mexican Workers v. Arizona Citrus*

1 *Growers*, 641 F. Supp. 259, 261 (D. Ariz. 1986). The defendant argued that each class member  
2 should be required to submit a proof of claim (including dates of employment, etc.). However, the  
3 district court held that there was no requirement for class members to submit proof of claims in a  
4 case of statutory damages, and “held that individual statutory damages may be distributed to class  
5 members on the basis of the defendants’ records.” *Id.* at 262. The district court also noted that  
6 requiring class members to “prove up” their claims, *i.e.*, prove that the plaintiffs worked for the  
7 specific defendant during the specific time period would “allow the defendants to relitigate the  
8 issues” at the heart of the case. The plaintiffs proposed, and the district court accepted, for class  
9 members to submit claims solely so that their identity could be verified (since the case was about  
10 undocumented foreign laborers, the identity of class members was heavily contested). The district  
11 court approved a plan where payments would be provided to class members once identity was  
12 verified. *See id.* at 263.

13 On appeal, the Ninth Circuit affirmed that “[s]tatutory damages ... are not dependent on  
14 proof of actual injury.” *Six(6) Mexican Workers*, 904 F. 2d at 1306. “Therefore, the district court  
15 was not obligated to require individual proof of injury from each class member.” *Id.*

16 In cases where the identities of class members are known, district courts in the Ninth  
17 Circuit routinely approve for payments to be sent out to class members without a claims process.  
18 *See, e.g., Bolton v. U.S. Nursing Corp.*, 2013 WL 2456564, at \*2 (N.D. Cal. June 6, 2013)  
19 (granting preliminary approval in case where settlement fund would be distributed to class  
20 members automatically without a claims process in proportion to their estimated share of total class  
21 damages); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 601 (N.D. Cal. 2015) (granting final approval where  
22 settlement provided class members with automatic credits without a claims process). As a practical  
23 matter, class members’ interests are better served by automatic distributions without requiring a  
24 claim form, because claim forms sometimes “serve[] as a choke on the total amount paid to class  
25 members.” *Howard v. Web.com Grp. Inc.*, 2020 WL 3827730, at \*10 (D. Ariz. July 8, 2020)  
26 (“When the defendant already holds information that would allow at least some claims to be paid  
27 automatically, those claims should be paid directly without requiring claim forms.”) (quoting 2010  
28

1 version of the “Judges’ Class Action Notice and Claims Process Checklist and Plain Language  
2 Guide” produced by the Federal Judicial Center).

3 When this Court issued its Order Granting Motion to Approve the October 11, 2019  
4 Assignment, Doc. 392, the Court required that “[a]ny recovery obtained as a result of the  
5 Assignment shall be held in trust until this Court approves a fair, reasonable, and adequate method  
6 for distributing the proceeds of the recovery to Class Members.” Dkt. 392, at 2. In the class  
7 settlement context, the standard for plans of allocation is identical: “the plan must be fair,  
8 reasonable, and adequate.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1045 (N.D. Cal.  
9 2008).

10 “A Plan of Allocation is fair and reasonable as long as it has a ‘reasonable, rational basis.’”  
11 *In re Flag Telecom Holdings, Ltd. Secs. Lit.*, 2010 WL 4537550, at \*21 (S.D.N.Y. Nov. 8, 2010).  
12 “Courts recognize that the adequacy of an allocation plan turns on whether counsel has properly  
13 apprised itself of the merits of all claims, and whether the proposed apportionment is fair and  
14 reasonable in light of that information.” *Id.* (internal quotations omitted). *See also id.* (“An  
15 allocation formula need only have a reasonable and rational basis, particularly if recommended by  
16 experienced and competent counsel.”); *In re Giant Interactive Grp., Inc. Secs. Lit.*, 279 F.R.D. 151,  
17 163 (S.D.N.Y. 2011) (“[I]n determining whether a plan of allocation is fair, courts look primarily  
18 to the opinion of counsel.”). An allocation plan “can be reasonable if it fairly treats class members  
19 by awarding a pro rata share to every Authorized Claimant, but also sensibly makes interclass  
20 distinctions based upon, inter alia, the relative strengths and weaknesses of class members’  
21 individual claims.” *See Vinh Nguyen v. Radiant Pharms. Corp.*, 2014 WL 1902293, at \*5 (C.D.  
22 Cal. May 6, 2014) (internal quotations omitted). “As numerous courts have held, a plan of  
23 allocation need not be perfect.” *In re Giant Interactive Grp. Inc. Secs. Lit.*, 279 F.R.D. at 163.

#### 24 **IV. THE PROPOSED DISTRIBUTION**

25 Class Counsel propose that the proceeds of the recovery, net of attorneys’ fees and  
26 expenses and the costs of administration, should be distributed to Class Members *pro rata* based on  
27 the number of phone calls each Class Member received, as shown by the same call logs upon  
28 which the trial verdict was based.

1           **A. Attorneys' Fees And Expenses, And The Class Representative**  
 2           **Incentive Award**

3           **1. The Prior Award Of Attorney's Fees And Expenses**

4           The court has already awarded Class Counsel one-third of the judgment in attorney's fees,  
 5           which amounted to \$89,116,333.33. Dkt. No. 427, at 24-36. The court also awarded Class  
 6           Counsel out-of-pocket nontaxable costs and expenses of \$277,416.28. *Id.* at 38.

7           **2. Expenses Incurred In Perez I and Perez II**

8           Class Counsel have paid out-of-pocket expenses of \$856,525.80 pursuing *Perez I* and *Perez*  
 9           *II* for the benefit of Class Members. This figure includes the \$277,416.28 in expenses previously  
 10          approved in *Perez I*, *id.* at 38, which have not yet been reimbursed. An itemized listing of each of  
 11          these expenses is submitted herewith as Exhibit 14 to the Bursor Declaration. Each of these  
 12          expenses was necessarily and reasonably incurred to maximize the recovery in *Perez II* for the  
 13          benefit of Class Members, and they reflect market rates for the various categories of expenses  
 14          incurred. Bursor Decl. ¶ 19. Class Counsel's total expenses incurred for litigating the *Perez I* and  
 15          *Perez II* matters are \$5,856,525.80. *Id.* ¶ 19. As discussed below, \$5,000,000 of the total expense  
 16          is a net liability Class Counsel owes to Omni Bridgeway (Fund 4) Invt. 5 L.P. ("Omni") in  
 17          connection with a litigation funding agreement. *Id.* An additional \$300,000 is a fee paid by Class  
 18          Counsel to FinCorp for brokering the agreement with Omni. *Id.*

19          **3. The Omni Expense**

20          Class Counsel seek to recover as expenses \$5 million owed to Omni in connection with a  
 21          litigation funding agreement (the "Omni Agreement") and \$300,000 which has been paid to  
 22          FinCorp Associates for brokering the Omni Agreement. *See* Bursor Decl. ¶ 20. Omni's financial  
 23          interest in the litigation was disclosed pursuant to Civil L.R. 3-15 in both *Perez I* (Doc. 449) and  
 24          *Perez II* (Doc. 93). In connection with the Omni Agreement, Omni (1) retained Blank Rome LLP  
 25          and a team of lawyers headed by Linda Kornfeld, Blank Rome's Vice Chair of the Insurance  
 26          Recovery Practice Group, to appear as counsel in *Perez II* to assist with strategy, fact and expert  
 27          discovery, summary judgment and *Daubert* briefing, and settlement negotiations; and (2) provided  
 28          \$10 million in funding to Class Counsel. Under the terms of the Omni agreement, Class Counsel

1 must repay \$15 million to Omni, for a net expense of \$5 million. Bursor Decl. ¶ 20. Omni has  
2 paid Blank Rome's fees and expenses in *Perez II*, which will not be reimbursed other than through  
3 the payment Class Counsel owes to Omni. *Id.*

4 The Omni Agreement directly benefitted the Class because it greatly enhanced the Class's  
5 bargaining position in settlement negotiations. Bursor Decl. ¶ 21 . Through more than 5 years of  
6 litigation prior to the disclosure of the Omni Agreement, Indian Harbor's largest settlement offer  
7 was \$2.5 million. *Id.* The disclosure of the Omni Agreement fundamentally changed the parties'  
8 bargaining positions. *Id.* The Omni Agreement showed that a sophisticated litigation funder had  
9 conducted extensive diligence on the appeal of *Perez I* and also on Perez's likelihood of success in  
10 *Perez II*, and deemed the matter worthy of a \$10 million investment. *Id.* It established a floor for  
11 Defendant's settlement offers, since Perez obviously would not accept any settlement that would  
12 not recover enough money to repay Omni and provide a reasonable recovery to the Class. *Id.*  
13 Because Omni's investment return would increase over time, the Omni Agreement also created  
14 time-pressure for Defendant to settle earlier rather than later. *Id.* These factors were key elements  
15 of Class Counsel's settlement strategy. *Id.* And that strategy worked. *Id.* Upon learning of the  
16 existence of the Omni Agreement, Indian Harbor agreed to pay \$75.6 million to settle *Perez II*. *Id.*  
17 This is the largest TCPA class recovery to date, and the recovery is more than 75x the policy limit  
18 for TCPA claims under Indian Harbor's applicable insurance policy. *Id.* The settlement is more  
19 than 30x the largest settlement offer that pre-dated the disclosure of the Omni Agreement. *Id.*

20 The Omni Agreement also facilitated the appearance of Blank Rome in *Perez II*. *Id.* ¶ 22.  
21 Blank Rome lawyers took 5 of the expert depositions and were heavily involved in preparing  
22 summary judgment and *Daubert* motions. *Id.* More importantly, Blank Rome's reputation and  
23 expertise in the insurance recovery field enhanced Class Counsel's bargaining power in settlement  
24 negotiations, which helped Class Counsel to negotiate a historic settlement. *Id.* *See also In re*  
25 *Cendant Corp. Secs. Lit.*, 404 F.3d 173, 191 (3d Cir. 2005) (awarding fees to non-lead counsel  
26 appropriate where their work conferred a benefit on the class beyond that conferred by lead  
27 counsel); *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 2010 WL 4537550, at \*30 (S.D.N.Y. Nov.  
28 8, 2010) (awarding as reasonable expenses in a class settlement "fees for foreign counsel"); *New*

1 *York State Teachers' Retirement System v. Gen. Motors Co.*, 315 F.R.D. 226, 245 (E.D. Mich.  
2 2016) (awarding as reasonable expenses fees paid for the “retention of specialized bankruptcy  
3 counsel to advise on matters arising from the bankruptcy and liquidation of GM’s predecessor”).

4 The Court has discretion to approve the expense of the Omni agreement if it conferred a  
5 benefit to the Class. Here the Omni agreement provided Class Counsel with enormous leverage  
6 that led to a \$75.6 million settlement. In the opinion of Class Counsel who directly negotiated the  
7 deal, the Omni agreement was the dominant factor influencing settlement negotiations, and likely  
8 added as much as 50% to the value of the settlement. Bursor Decl. ¶ 23. This extraordinary result  
9 would not have been possible without the Omni Agreement. *Id.* The expense of the Omni  
10 Agreement, including \$5 million owed to Omni, and \$300,000 paid to FinCorp Associates, was  
11 thus reasonable, conferred a benefit to the Class, and should be compensated from the recovery.  
12 *Id.*

#### 13 **4. Proposed Distribution Of Attorneys’ Fees And Expenses**

14 The Court has already awarded Class Counsel one-third (33.33%) of the judgment in  
15 attorney’s fees, which amounted to just over \$89 million. Dkt. No. 427, at 24-36. Consistent with  
16 the Court’s prior order, Plaintiff and Class Counsel propose an attorneys’ fee of one-third (33.33%)  
17 of the \$75.6 million recovery, or \$25.2 million. This is a reduction of more than 70% from the  
18 attorney’s fee the court previously awarded. The court’s prior reasoning, awarding a one-third fee,  
19 remains sound. The court previously found the result achieved by Class Counsel was  
20 “extraordinarily good,” weighing in favor of a one-third fee of more than \$89 million. Doc. 427,  
21 at 28. The result now is even better, with the largest actual recovery obtained in a TCPA class  
22 action, with money in hand and about to be distributed to Class Members. Accordingly, the Court  
23 need not revisit its prior analysis supporting a one-third fee.<sup>2</sup>

24 <sup>2</sup> The Court previously recognized that “a district court is not required to conduct a lodestar cross-  
25 check to assess the reasonable of a fee award.” Dkt. No. 30. Nevertheless, the Court did conduct a  
26 lodestar cross-check and found the prior fee award of \$89,116,333.33 was reasonable. There is no  
27 need to repeat that exercise again, for a second lodestar cross-check on the smaller attorney’s fee,  
28 \$25.2 million, now being sought. Nevertheless, Class Counsel has provided detailed billing  
records to enable the Court to conduct a cross-check if it wishes. Bursor Decl., Ex. 3. Through  
August 18, 2021, Bursor & Fisher attorneys and staff have worked 7,826.7 hours on *Perez I* and  
*Perez II*, for a lodestar fee based on current billing rates of \$5,830,155.00. *Id.* ¶ 13. A fee award of  
33.33% of the recovery, \$25.2 million, would represent a multiplier of 4.32 over the base lodestar

1           Should the Court find that it is not appropriate to award the \$5,300,000 in Omni and  
 2 FinCorp payments discussed above as expenses, Class Counsel asks that the fee award be increased  
 3 to \$30,500,000 (\$25.2 million, plus \$5.3 million for Omni and FinCorp) such that these expenses  
 4 are offset by the fee award. An award of \$30,500,000 in fees would represent a multiplier of 5.26  
 5 above the lodestar, well within the range approved by this Court in its April 17, 2020 Order when it  
 6 awarded Class Counsel fees of \$89 million. *See* Dkt. No. 427, at 36 (noting that multipliers of  
 7 13.42, 15.42, and 18.52 “are still within the surveyed acceptable range in the Ninth Circuit.”);  
 8 Bursor Decl ¶ 24. It would also amount to 40.3 percent of the \$75.6 million recovery, which is in  
 9 line with the recovery agreed to amongst Class Counsel and the Class Representative in his  
 10 retention agreement, and supported by caselaw. *See* Bursor Decl., Ex. 13 (Perez retention  
 11 agreement stating: “If your case settles after a ... trial, we shall receive a contingent fee of 40% of  
 12 any recovery, or alternatively such additional fee as paid by the defendant.”); *Chieftain Royalty Co.*  
 13 *v. Laredo Petroleum, Inc.*, 2018 WL 2296588, at \*2 (E.D. Okla. Mar. 27, 2018) (awarding \$32  
 14 million – 40% – as attorneys fees where the settlement created an \$80 million cash fund); *Lane v.*  
 15 *Page*, 862 F. Supp. 2d 1182, 1256 (D.N.M. 2012) (“fees in the range of 30-40% of any amount  
 16 recovered are common in complex and other cases taken on a contingent fee basis”); *Rippee v.*  
 17 *Boston Mkt. Corp*, Case No. 05-CV-1359 TM (JMA), ECF No. 70, at 7 (S.D. Cal. Oct. 10, 2006)  
 18 (awarding a 40% fee in a common fund settlement); *Harris v. Chevron U.S.A., Inc.*, 2020 WL  
 19 8187464, at \*4 (E.D. Okla. Feb. 27, 2020) (noting that the fact that the class representative  
 20 “negotiated a forty percent contingency fee when she agreed to be a class representative in this  
 21 Class Lawsuit” supported the award of attorney’s fees of 40% of the common fund); *In re Lucent*  
 22 *Techs, Inc. Secs. Lit.*, 327 F. Supp. 2d 426, 432 (D.N.J. 2004) (“As a general matter, awards  
 23 calculated under the percentage-of-recovery method can widely range from nineteen percent to  
 24 forty-five percent of a settlement fund.”); *In re Lorazepam & Clorazepate Antitrust Lit.*, 2003 WL  
 25 22037741, at \*7 (D.D.C. June 16, 2003) (“fee awards in common fund cases may range from  
 26 fifteen to forty-five percent”); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 910 (S.D. Ohio 2001)  
 27 fee. *Id.* ¶ 15. These figures include only the time worked by Class Counsel, and do not include  
 28 any charge for the hundreds of hours worked by Blank Rome lawyers on *Perez II*, which were paid  
 directly by Omni. *Id.* ¶ 20.

1 (“Typically, the percentage awarded ranges from 20 to 50 percent of the common fund created.”).  
2 *See also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, Appendix (9th Cir. 2002) (providing a Table  
3 of Percentage-Based Attorneys’ Fee Awards in Common Fund Cases of \$50-200 million, and  
4 noting a case where a 40% fee was awarded). In either scenario, Class Counsel should not be  
5 penalized for incurring a \$5.3 million expense which dramatically and directly increased the value  
6 of the recovery for the benefit of the Class. *Id.*

### 7 **5. Proposed Distribution To Perez**

8 The Court previously awarded Plaintiff Perez \$25,000 as a service award. Doc. 427, at 39  
9 (“The Court recognizes that Perez has been actively participating in this litigation for several years,  
10 and has spent time and effort in this matter, including being deposed and testifying at trial.”).  
11 Since that time, Plaintiff Perez filed and assisted Class Counsel in litigating and settling *Perez II* as  
12 well. Without his dedication and commitment to two separate lawsuits over a six-year period,  
13 Class Members would have recovered nothing. That service award should be paid from the  
14 recovery obtained through *Perez II*.

15 In addition, the *Perez I* judgment awards \$7,000 to Perez based on the jury’s finding that he  
16 received 14 phone calls in violation of the TCPA, with \$500 statutory damages per call. Doc. 430,  
17 at 2. Class Counsel proposes that Perez should be paid \$82.09 per call, the same as other Class  
18 Members, for each of those 14 calls, for an additional \$1,149.26. Perez should also be paid as part  
19 of the second distribution of residual funds using the same formula as other Class Members.

20 The total initial payment to Perez, including his service award, would thus be \$26,149.26.  
21 This is fair, reasonable and adequate given his role as the Class Representative in *Perez I*, and as  
22 the assignee and Plaintiff in *Perez II*. Indeed, as discussed above, 11 Class Members are set to  
23 receive payments exceeding \$20,000, and one class member who received 483 calls will be paid  
24 \$39,649.47. Thus, even with the service award, Perez will not be the highest-compensated Class  
25 Member in this case.

### 26 **B. Administration Expenses**

27 Class Counsel solicited proposals from 5 class action settlement administration companies.  
28 Based on the costs and procedures available to distribute payments to Class Members, Class

Counsel propose the selection of Digital Settlement Group, LLC (“DSG”) for distribution of the recovery. As set forth in the Declaration of Mark Schey, submitted herewith, DSG has proposed a robust and efficient program for distributing the recovery to Class Members, and has agreed to cap its fees and expenses at \$650,000, including for the second distribution of residual funds. DSG’s proposal estimates the cost of administration to be \$392,680. Schey Decl ¶ 20. This is well below the proposed cap of \$650,000. The cap allows some flexibility for DSG to incur additional expenses up to \$650,000 to ensure payments reach Class Members. If the total costs come in below the cap, the residual funds will be paid to Class Members as part of the second distribution.

**C. Payments To Class Members *Pro Rata* Based on the Number of Calls**

Class Counsel propose that the net proceeds of the recovery should be distributed to Class Members *pro rata* based on the number of phone calls each Class Member received, as shown by the same call logs upon which the trial verdict was based. If the Court approves Plaintiff’s and Class Counsel’s share of attorney’s fees, costs and expenses, and service award, as well as the proposed cost of administration, there will be \$43,893,474.20 remaining to be paid to Class Members. Based on the jury’s verdict finding 534,698 calls to Class Members in violation of the TCPA, a *pro rata* per call payment amounts to \$82.09.

Total Recovery	\$75,600,000.00
Attorney’s Fees 33.33%	\$25,200,000.00
Perez I & II Costs & Expenses	\$556,525.80
Class Counsel Payment to Fincorp	\$300,000.00
Class Counsel Omni Net Expense	\$5,000,000.00
<u>Proposed Administration Expense (Cap)</u>	<u>\$650,000.00</u>
	\$43,893,474.20
Pro Rata per call payment 534,698 calls	\$82.09

Class Members will be paid per call, for an average payout of \$711.34 per Class Member. The largest payment will be \$39,649.47, to an individual Class Member who received 483 calls. More than 12,000 Class Members will receive payments in excess of \$1,000, with 728 payments of

1 \$5,001-\$10,000, 132 payments of \$10,001-\$20,000, and 11 payments to Class Members exceeding  
2 \$20,000. *Id.*

3 The amount recovered here is extraordinary. The \$75.6 million recovered here is \$100,000  
4 more than the \$75.5 million settlement in *In re Capital One Telephone Consumer Protection Act*  
5 *Lit.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. Feb. 12, 2015). We believe this is the largest class recovery  
6 ever on a TCPA claim. On a per-class-member basis, the recovery here is even more impressive.  
7 In *In re Capital One* the recovery was “a relatively diminutive \$2.72” per class member. *See id.*  
8 The average per-class member recovery here is \$711.34, which is more than 261x larger than *In re*  
9 *Capital One*. The recovery here is orders of magnitude larger than typical recoveries in TCPA  
10 class settlements. *See, e.g., Rose v. Bank of Am. Corp.*, 2014 WL 4273358, \*10 (N.D. Cal. Aug.  
11 29, 2014) (\$20 to \$40 per claimant); *Kazemi v. Payless Shoesource, Inc.*, No. 09-cv-5142, dkt. 94  
12 (N.D. Cal. Apr. 2, 2012) (\$25 merchandise voucher); *Hashw v. Dep’t Stores Nat’l Bank*, 182 F.  
13 Supp. 3d 935, 944 (D. Minn. 2016) (\$33.20 per class member); *Couser v. Comenity Bank*, 125 F.  
14 Supp. 3d 1034, 1044 (S.D. Cal. 2015) (\$13.75 per class member); *Kolinek v. Walgreen Co.*, 311  
15 F.R.D. 483, 493 (N.D. Ill. 2015) (\$30 per class member); *Wright v. Nationstar Mortgage LLC*,  
16 2016 WL 4505169, at \*8 (N.D. Ill. Aug. 29, 2016) (\$45 per class member); *Gehrich v. Chase Bank*  
17 *USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) (\$52.50 per class member); *Charvat v. Travel*  
18 *Servs.*, 2015 WL 76901, at \*1 (N.D. Ill. Jan. 5, 2015) (\$48.37 per class member).

19 Class Counsel’s proposal to distribute the net recovery *pro rata* based on the number of  
20 calls received by each Class Member is directly related to the theory of damages in this case, the  
21 jury’s verdict and the Judgment, and is fair, adequate, and reasonable. It also secures an  
22 outstanding result for Class Members, and should be approved.

## 23 **V. CONCLUSION**

24 For the foregoing reasons, the court should enter an order (1) confirming the court’s prior  
25 approval of the Assignment; (2) approving Perez’s entry into the *Perez II* Settlement Agreement as  
26 a fiduciary and class representative for the class was authorized and fair, reasonable, and equitable;  
27 (3) approving the selection of the Administrator for distribution of the recovery; (4) approving the  
28 plan for distribution of the recovery as fair, reasonable and adequate; (5) determining that the Final

1 Judgment in *Perez I* will be deemed satisfied upon the Administrator's receipt of payment; and (6)  
2 dismissing the *Perez II* lawsuit with prejudice upon the Administrator's receipt of payment, per the  
3 Agreement.

4 Dated: August 19, 2021

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