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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ABANTE ROOTER AND PLUMBING, INC., individually and on behalf of all others similarly situated, Plaintiffs v. PIVOTAL PAYMENTS INC., d/b/a CAPITAL PROCESSING NETWORK and CPN, Defendant.	Case No. 3:16-cv-05486-JCS **OBJECTION OF ROUTE 42 DANCE ACADEMY, LLC**

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INTRODUCTION

The latest proposed settlement and request for attorneys' fees resolved some but not all of the concerns identified by the Court in the December 1, 2017 hearing. Dkt. 92-2. Despite the Court's identifying the flaws inherent in the claims process, when it appeared class members could reasonably be located for direct payments, the parties negotiated a settlement which depends on a claims process. The result to date is that fewer than 2% of the class receives compensation.[1]

The total $5.5 million[2] that will actually reach these members is a nuisance payment next to the $5 billion in statutory damages under the Telephone Consumer Protection Act ("TCPA)", 47 U.S.C. § 227, or $17 billion considering treble damages.[3] Class counsels' explanation for settling on this sum after just a year in litigation[4] remains dubious. Though *Jones v. Royal Administration Services, Inc. (Jones I)* affirmed summary judgment on the ground that a telemarketer was not an agent of an entity that hired it, the Ninth Circuit subsequently narrowed its holding in *Jones II* issued in April 2018. 866 F.3d 1100 (9th Cir. 2017), *opin. amended and*

[1] 27,850 claims filed among 1,902,283 members = 1.46% claims rate as of May 25, 2018. Dkt. 102, at 5; Dkt. 70, at 1.

[2] $9,000,000 (Gross Settlement Fund) - $2,250,000 (requested attorneys' fees and costs) - $2,000 (service award) - $1,231,675 (administrative and notice expenses) = $5,516,325. Dkt. 92-1, at 13, 15; Dkt. 103, at 7.

[3] 11,593,672 calls (Dkt. 70, at 4) x $500 minimum statutory TCPA relief = $5,796,836,000. 11,593,672 calls x $1,500 (treble damages) = $17,390,508,000. *See also* Dkt. 70, at 16 (discussing "Pivotal's total exposure at over $17 billion").

[4] Dkt. 92-1, at 1-2 (filed September 16, 2016, settlement signed September 25, 2017).

superseded, 887 F.3d 443 (9th Cir. 2018). Further, even class counsel are left to admit *Jones* is distinguishable (Dkt. 91, at 17). It was certainly not a foregone conclusion that Pivotal would have prevailed on summary judgment so as to justify a fire sale on the class claims.

And though class counsel appear to have submitted some documentation on Pivotal's financial condition, there is nothing accessible to the class (apart from mere assurances) showing that Pivotal could not pay more than the $9 million common fund offered. As discussed *infra*, compelling reasons for keeping these documents shielded from the class have not been shown. The class is entitled to consider this information in weighing whether to opt out or object to the settlement. Regardless, the risks do not justify the enormous discount on damages. Final approval should not be granted.

Class counsel did heed the Court's concern over the representatives' incentive awards, dropping the request from $25,000 to $2,000. Dkt. 102, at 23-24. But, no similar correction has been made for class counsels' own fee. They still claim 25% of the settlement, or $2,250,000, despite the poor return on potential class damages and the anemic claims rate. Dkt. 102, at 25. A 25% fee here would pay class counsel at 339% of their hourly rates.[5] Given the results, they should be limited to 7.3% of the

[5] Class counsel disclosed a 3.39 lodestar multiplier necessary to reach their requested $2.25 million fee. Dkt. 102, at 22.

common fund, the equivalent of their $663,640.50 lodestar.[6] The remainder should be returned for the benefit of the class.

STANDING AND PRELIMINARY STATEMENTS

Objector's name and address are as follows: Route 42 Dance Academy, LLC (hereinafter "Dance Academy"), 6825 Pearl Road, Suite 64, Parma Heights, Ohio 44130. Route 42 Dance Academy has a cellular phone. Ex. 1 attached hereto, Declaration of Nancy Hightower, incorporated by reference herein as if set forth in full. The phone number is 440-886-2667. *Id*. Nancy Hightower is the sole member of the Dance Academy, which is a Limited Liability Company. *Id.*

The Dance Academy is an entity that (a) received one or more non-emergency telephone calls; (b) allegedly on Pivotal's behalf; (c) promoting credit card processing services, other services, or goods of any kind; (d) to the Dance Academy's cellular telephone number; (e) through the use of an automatic telephone dialing system or an artificial prerecorded voice; and (f) in the period from April 15, 2016 up to and including September 2, 2016. *Id*. The Dance Academy is therefore a class member as defined by the class notice, and has standing to make this objection.

The Dance Academy received a class notice in the mail, which lists the Dance Academy's Class Member ID as EC8DA384B4. Ex. 1-A. The address on the notice lists the Dance Academy's address as 6825 Pearl Road, Suite 64, Cleveland, Ohio

[6] Dkt. 102, at 19. $107,625.00 of class counsels' lodestar remains unsubstantiated. Dkt. 106, at 9. Matthew McCue's declaration represents that he submitted his timesheets as an exhibit, yet no such exhibit was ever filed. *Id.*

44130-3070. Ex. 1. That is the same physical address as the 6825 Pearl Road, Suite 64, Parma Heights, Ohio 44130 address. *Id.*

An online claim was made on behalf of Route 42 Dance Academy, which to the best of Ms. Hightower's ability to recall, received around eight of the violative calls mentioned above. Ex. 1-B.

The Dance Academy is represented by local counsel, Timothy R. Hanigan, LANG, HANIGAN & CARVALHO, LLP. The Dance Academy is also represented by Bandas Law Firm, PC, as its general counsel in objecting to the settlement. Chris Bandas of Bandas Law Firm does not presently intend on making an appearance for himself or his firm, though he reserves the right to do so.

The Dance Academy objects to the settlement and proposed fees in *Abante Rooter and Plumbing, Inc. v. Pivotal Payments, Inc*., Case No. 3:16-cv-05486-JCS, for the reasons stated herein. While reserving the right to do so, neither the Dance Academy nor Ms. Hightower intend on appearing at the fairness hearing either in person or through counsel, but ask that the objection be submitted on the papers for ruling at that time. The Dance Academy relies upon the documents contained in the Court's file in support of these objections. Objection is made to any procedures or requirements to object in this case that require information or documents other than those that are contained herein on grounds that such requirements seek irrelevant information to the objections, are unnecessary, unduly burdensome, are calculated to

drive down the number and quality of objections to the settlement and violate the Dance Academy's and counsels' due process rights and/or Rule 23.

Objector incorporates by reference the arguments and authorities contained in other filed objections, if any, made in opposition to the fairness, reasonableness and adequacy of the proposed settlement, the adequacy of class counsel and to the proposed award of attorneys' fees and expenses that are not inconsistent with this objection.

OBJECTIONS

I. The Latest Settlement is Still Unfair.

Evaluation of the *Churchill* factors for a settlement that provides less than 2% of the class a miniscule fraction of damages advises against approval. The relevant factors include: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (citing *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

A. Class Counsel Fail to Justify the Release of $17 Billion in Damages for a Token $5.5 Million to the Class.

The fourth factor—the amount offered in the settlement—is "considered the

most important, because the critical component of any settlement is the amount of relief obtained by the class." *Bayat v. Bank of the W.*, No. C-13-2376 EMC, 2015 WL 1744342, at *2 (N.D. Cal. Apr. 15, 2015) (citing *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178–79 (9th Cir. 2013); *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 929 (9th Cir. 2014) (Chen, J. dissenting), *vacated on other grounds by* 772 F.3d 608 (9th Cir. 2014) ("[I]nescapably, the core of any settlement is 'the amount offered in settlement.' "). That factor cuts most against approval here. The $5.5 million that will reach the class under the current settlement represents a staggering 99.9% discount on potential damages. Without even allowing for treble damages, it is less than a tenth of one percent (0.1%) of damages. That is not an "excellent result." Dkt. 102, at 1; *Bayat*, 2015 WL 1744342, at *4–5 ("class recovery represents a whopping 99.5% discount from the theoretical verdict value … [and] cannot be credibly called an 'outstanding' result"). It is not even an acceptable result. *See In re Ravisent Techs., Inc. Sec. Litig.*, 2005 WL 906361, at *9 (E.D. Pa. Apr. 18, 2005) (citing study by Columbia University Law School, which determined that "since 1995, class action settlements have typically recovered between 5.5% and 6.2% of the class members' estimated losses.").

While class counsel belabor the risks, "because the TCPA has the potential of ruinous financial liability . . . defendants will almost always settle if there is any merit at all to the case." *Rose* v. *Bank of Am. Corp.*, Nos. 5:11-CV-02390-EJD, 12-CV-04009-EJD, 2014 WL 4273358, at *12 (N.D. Cal. Aug. 29, 2014). The risks

identified by class counsel do not warrant the fire sale on class damages here.

During the December 2017 hearing, this Court warned counsel, "If you want me believe that this case ought to be sold for some tiny fraction of the exposure based on the availability of a good defense, that's fine, but you have to actually go through the steps of proving to me that is the case." Dkt. Doc 81, at 3. Respectfully, class counsel have not satisfied that burden.

1. *Jones* Does Not Pose a Sufficient Risk to Warrant a 99.9% Discount.

Class counsel still have not done "anything in any significant way…to prove to [the court] that there are any good defenses" warranting over a 99.9% deduction from the potential recovery. Dkt. 81, at 3; *Compare* Dkt. 70, at 13–14 *with* Dkt. 91, at 16–21. Pivotal, of course, insists it cannot be held vicariously liable for EPLJ's and Roses's conduct, and while class counsel feigns an attempt at distinguishing *Jones* and *Kristensen v. Credit Payment Services, Inc.*, they inevitably bow down to the Pivotal's arguments that these cases doom the class if the litigation progresses past settlement. Dkt. 91, a 19; *see Jones*, 866 F.3d 1100; *Kristensen v. Credit Payment Servs.*, 879 F.3d 1010 (9th Cir. 2018).

Class counsel reluctantly claim "that this case is distinguishable from *Jones* [*I*] for various reasons," while mostly paying homage to the similarities in the cases. Dkt. 91, at 16–18. Pivotal, the party with a vested interest in making the meager payout seem reasonable, presents the only argument contrary to *Jones I*'s strength as a defense. Dkt. 95, at 13–16. Pivotal observes that "[I]n addition to 'actual authority,'

the … FCC[ ], the primary federal agency with regulatory authority over the TCPA, has recognized that an agency relationship may be inferred – and vicarious liability imposed – through the principles of 'apparent authority' and 'ratification.'" *Id.* (citing *In re Joint Petition filed by Dish Network, LLC*, 28 F.C.C.R. 6574, 6584 ¶ 28 (2013) (although a seller does not "initiate" a call that is placed by a third-party telemarketer on the seller's behalf, it "may be held vicariously liable under federal common law principles of agency for TCPA violations committed by third-party telemarketers . . . including not only formal agency, but also principles of apparent authority and ratification.")).

Interestingly, after the parties submitted their memoranda in support of the second proposed settlement, the Ninth Circuit amended *Jones I* to narrow its holding. The original opinion in *Jones I* states: "Taking these factors into account, it is clear that AAAP's telemarketers were independent contractors rather than agents." *Jones I*, 866 F.3d at 1108. The amended opinion leaves this conclusion out, holding only "that Royal did not have enough authority to control the AAAP telemarketers' work to hold Royal vicariously liable as if it were an employer of the AAAP telemarketers." *Jones II*, 887 F.3d at 453. *Jones II*, by its own terms, does not apply to cases where vicarious liability is established through an agency relationship by apparent authority or ratification. *Id.* at 449, 453 (holding "AAAP's telemarketers did not have actual authority to place the unlawful calls, and Royal exercised insufficient control over the manner and means of the work to establish vicarious liability under the asserted

theory," expressly not evaluating ratification or apparent authority). It is true that under *Kristensen*, an entity cannot be held vicariously liable by ratification of an action, where the actor is neither the agent nor the purported agent of the principal. *Kristensen*, 879 F.3d at 1014–15. However, *Kristensen* does not apply if an agency relationship is established, which is the real question at issue in determining the risk to class recovery posed by summary judgment. The question of agency in this case is far from the full-proof defense, and posing an enormous risk, that class counsel and Pivotal make it out to be.

The real question is, under the factors used by the Ninth Circuit, can Pivotal be held liable for calls made by EPLJ. Class counsel lists these factors: "(1) the control exerted by the employer, (2) whether the one employed is engaged in a distinct occupation, (3) whether the work is normally done under the supervision of an employer, (4) the skill required, (5) whether the employer supplies tools and instrumentalities [and the place of work], (6) the length of time employed, (7) whether payment is by time or by the job, (8) whether the work is in the regular business of the employer, (9) the subjective intent of the parties, and (10) whether the employer is or is not in business." Dkt. 91, at 17 (citing *Jones I*, 866 F.3d at 1106.). However, class counsel fail to provide analysis on each factor, and fail to explain how each factor does or does not support an agency relationship between EPLJ and Pivotal, as the Court asked. Dkt. 81, at 3 ("If you want me believe that this case ought to be sold for some tiny fraction of the exposure based on the availability of a good

defense, that's fine, but you have to actually go through the steps of proving to me that is the case …. I know since the *Jones vs. Royal* case that there are issues regarding when a principal can be held liable for a third party's calls, but that case has detailed tests that you have to go through.”). Class counsel simply reference two recent opinions where a defendant secured summary judgment in a TCPA case because agency factors were not met as a matter of law. Pivotal does go through these factors, of course in line with their inevitable bias to settle the case for fractions of a penny on the dollar. Dkt. 95, at 11–13.

It is far from clear that these factors are so weighted in Pivotal's favor as to warrant such a large departure from potential damages. *First*, Pivotal did assert some control over EPLJ. *See* Dkt. 96-1, at 103 (Rose deposition). *Second*, although telemarketing is a distinct occupation, its entire existence depends on companies requesting their services. Telemarketing is not a stand-alone business. *Third*, Pivotal did supervise EPLJ's work to some extent, even to the point of asking for specific ethnicities to be excluded from the campaign. *See id.* at 103–04, 112. *Fourth*, successful telemarketing obviously requires some skill, and over the years, Rose has built up his experience in the industry. *See id.* at 26–28. However, Rose stated he started out in the business at age 17, as a high school dropout, so the bar to entry into telemarketing is low. *See id.* at 25–26. *Fifth*, Pivotal supplied call centers in Dallas and Phoenix that worked with EPLJ. *Sixth*, although the length of employment was relatively short, there was a two-year contract in place, contemplating a long-term

relationship between the parties. *Id*. at 52. *Seventh*, EPLJ was paid by the job and not by time. *Id.* at 94. *Eighth*, the telemarketing campaigns were part of Pivotal's business plan before they hired EPLJ. *See id*. at 17. *Ninth*, the subjective intent of the parties can only truly be known by the parties themselves, but Rose did not intend to be held liable for Pivotal's violations of the TCPA; they were not using reciprocal compliance protocols he advocated for or paying a requested compliance fee. *See id.* at 27–29, 58–59, 69–70. *Tenth*, Pivotal is a business.

Only factor seven, that EPLJ was paid by the lead not by the hour, completely weighs against an agency relationship. All other factors could be construed as weighing in favor of an agency relationship. In fact, Pivotal's resort to attacking Rose as biased and unreliable is a tacit acknowledgement that the substance of their legal argument is weak. Dkt. 95, at 18–19. On the whole, the parties failed to make the requisite showing that summary judgment on vicarious liability was so inevitable as to justify the enormous discount on class damages.

2. To the Extent Class Have Proffered the Amount of a Judgment Pivotal Could Withstand, it Should be Unsealed and Made Available to the Class.

Class counsel submitted a declaration under seal for the Court's review that purportedly provides more specific evidence on Pivotal's financial status. Dkt. 94-3. But, the class members still have nothing more "on the financial condition of the defendant other than plaintiff's counsel's say so and defense counsel's say so. . . ." Dtk. 92-2, at 3. Without this critical information, the class members are left in the

dark on the fairness of the proposed settlement and cannot make an informed decision on whether to opt out or object.

The Sixth Circuit has noted that "[c]lass members cannot participate meaningfully in the process contemplated by Federal Rule of Civil Procedure 23(e) unless they can review the bases of the proposed settlement and the other documents in the court record." *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 309 (6th Cir. 2016). In *Shane Group*, the Sixth Circuit vacated approval of the settlement where documents which the parties considered in reaching the settlement were sealed from the class. *Id*. at 306, 309. Because class members could not view this critical information, the Court found that "[t]he Rule 23(e) objection process seriously malfunctioned." *Id*. at 309.

The class members here have similarly had no occasion to analyze the evidence considered by class counsel before agreeing to the tremendous discount on class damages. The need for transparency is particularly important with class actions because "many members of the 'public' are also plaintiffs in the class action." *In re Cendant Corp.*, 260 F.3d 183, 193 (3d Cir. 2001).

> Protecting the access right in class actions "promotes [class members'] confidence" in the administration of the case. . . . Additionally, the right of access diminishes the possibility that "injustice, incompetence, perjury, [or] fraud" will be perpetrated against those class members who have some stake in the case but are not at the forefront of the litigation. Finally, openness of class actions provides class members with "a more complete understanding of the [class action process] and a better perception of its fairness."

Id. (quotations omitted).

In the Ninth Circuit there is a "strong presumption in favor of access to court records." *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). For documents such as these that are more than tangentially related to the merits of the case (they are one of class counsels' primary bases for agreeing to the terms of the settlement), class counsel carry the burden of establishing a compelling reason to keep the records under seal. *See Ctr. for Auto Safety*, 809 F.3d at 1102.

"Even if a sealing order was proper at the time when it was initially imposed, the sealing order must be lifted at the earliest possible moment when the reasons for sealing no longer obtain." *Cendant*, 260 F.3d at 196; *In re Quintus Sec. Litig.*, 148 F. Supp. 2d 967, 975 (N.D. Cal. 2001) ("The bids were submitted under seal to ensure their confidentiality up to the point of selection, but are, with this order, unsealed to assure transparency of the selection process."). That is, "continued sealing must be based on "current evidence to show how public dissemination of the pertinent materials now would cause the competitive harm [they] claim[ ]." *Cendant*, 260 F.3d at 196 (quotations omitted). Other than the generic claim that these records contain "sensitive information" about Pivotal and include a profit loss balance sheet, class counsel made no showing of a compelling reason to keep the declaration sealed. Dkt. 90, 94. The possibility that disclosure of this information could harm Pivotal is

"hypothesis or conjecture[,]" which cannot support a sealing order. *Center for Auto Safety*, 809 F.3d at 1096-97. *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2013 WL 3814474, at *1 (N.D. Cal. July 22, 2013) (compelling reasons exist "when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secret"). The Court should unseal the declaration. Further, the class should be informed if $9 million is the highest settlement Pivotal was capable of funding.

B. The 1.5% Claims Rate Confirms Payments Should Have Been Mailed Directly to the Class.

Just 1.5% of the class members (27,850 of 1,902,283 = 1.46%) filed claims as of May 25, 2018. Dkt. 102, at 5; Dkt. 70, at 1. That is well below the 10% rate discussed by class counsel in describing relief to the class members in the first and second motions for preliminary approval. Dkt. 70, at 16; Dt. 91, at 7. It is also significantly below normal rates for consumer class action settlements. *See Ferrington*, 2012 WL 1156399, at *4 (discussing "the prevailing rule of thumb" for claims rates "with respect to consumer class actions is 3-5%"); *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F.Supp.2d 395, 404 (D.Mass.2008) ("It is not unusual for only 10 or 15% of the class members to bother filing claims.").

This Court rightfully questioned why payment could not be issued directly to class members rather than rely upon a claims process. In particular, class counsel expressed confidence in the reverse look-up process for notice, but disclaimed it for

distribution of funds. Dkt. 81, at 14. ("If you're going to mail notices to people through a reverse lookup process and you don't have confidence in it enough to send checks, well, I wonder why we have enough confidence in it to send notice."). Given the poor results and that class counsel were on notice of the court's concerns, final approval should not be granted.

In any event, the fact that so few class members benefit from the settlement weighs against a determination of fairness. *See e.g., Rodriguez v. Kraft Foods Group, Inc.*, 1:14-CV-1137-LJO-EPG, 2016 WL 5844378, at *9 (E.D. Cal. Oct. 5, 2016) ("In determining the fairness of a settlement, the Court should consider class member objections to the settlement and the claims rate") (citing *Larsen v. Trader Joes Co.*, No. 11-cv-01588-WHO, 2014 WL 3404531, *5 (N.D. Cal. July 11, 2014)); *Eastwood v. S. Farm Bureau Cas. Ins. Co.*, No. 3:11-CV-3075, 2014 WL 4987421, at *3 (W.D. Ark. October 7, 2014) (district court considered a low claims rate when considering the fairness of the settlement). As the Court did with the previous deal, the Court should reject the settlement that serves class counsel and Pivotal, but not the vast majority of the class.

II. Class Counsels' Request for 25% in Fees is Excessive Given the Poor Results and (Partially Unsubstantiated) 3.4 Lodestar Multiplier.

Even if the settlement survives the fairness inquiry, in no case should class counsel be awarded the benchmark 25%. It must be recalled that given the conflicts between class counsel and the class at the fee-setting stage, this Court is "a fiduciary for the class" and "must 'act with a jealous regard to the rights of those who are

interested in the fund' in determining what a proper fee award is." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010).

The Ninth Circuit instructs that "[t]he 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir.2002). This means "[t]he benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir. 1990).

Courts consider a number of factors to determine the appropriate percentage to apply, including: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; and (5) awards made in similar cases. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). The overall result and benefit to the class from the litigation is the most critical factor. *Id*.

A. The Relevant Factors Require a Dramatic Reduction from the Benchmark.

The less than favorable results, under 0.1% of potential damages allocated to less than 2% of the class, do not support anything approaching the benchmark. If the reason the class is receiving this whopping discount is that Pivotal cannot afford to pay, then class counsels' recovery should suffer as well (with excess returned to the

class). As the Court previously remarked, "if financial hardship is part of the deal here, I don't know how you can … give the lawyers … 25 percent of the recovery … when you're reducing the recovery [ ] for the class on a base of financial condition of the defendant." Dkt. 81, at 4.

Further, the amount of labor required was minimal. Class counsel litigated for around a year, and allege they spent just 1,294.05 hours on the case. Even then, 153.75 of those hours are unsubstantiated. Dkt. 106, at 9 (claiming hours as supported by timesheets in an exhibit without actually filing the exhibit). And as discussed *supra*, the risks, though real, are not so exceptional as to excuse what is in effect a nuisance settlement.

Despite class counsels' claims to the contrary, similar cases do not support 25% with a 3.39 multiplier for such diminutive class recovery. In fact, in many TCPA cases, courts often award fees of 20% or less. *See e.g.*, *Bayat*, 2015 WL 1744342, at *10 & n.10 (opting for the lodestar method but awarding the equivalent of 13.5% of the over $3.3 million settlement fund); *Rose*, 2014 WL 4273358, at *5, *13 (choosing the lodestar method and awarding a fee that constituted about 7.5% of the over $32 million fund); *Michel* v. *WM Healthcare Solutions, Inc.*, No. 1:10-cv-638, 2014 WL 497031, at *23 (S.D. Ohio Feb. 7, 2014) (awarding 15% of the $4.3 million settlement fund); *Malta v. Fed. Home Loan Mortgage Corp.*, 10-CV-1290-BEN-NLS, 2013 WL 12095060, at *1 (S.D. Cal. June 21, 2013) (22.5%); *Arthur* v. *Sallie Mae, Inc.*, No. 10-cv-00198-JLR, 2012 WL 4076119, at *2 (W.D. Wash. Sept. 17,

2012) (awarding 20% of the about $24 million fund).[7]

B. Any Fee Should be Commensurate with Class Counsels' $663,640.50 Lodestar.

Because the $9 million fund is more a product of the size of the potential class damages, and a 25% fee will overcompensate class counsel relative to their lodestar, the Court should employ the lodestar method. *Bayat*, 2015 WL 1744342, at *9. The Ninth Circuit recognizes a "strong presumption that the lodestar amount represents a reasonable fee, [and that] adjustments to the lodestar, 'are the exception rather than the rule.'" *Stranger v. China Elec. Motor, Inc*., 812 F.3d 734, 738 (9th Cir. 2016). Class counsel should be held to their $663,640.50 lodestar (or less based on their failure to provide time sheets as represented in at least one declaration).

Alternatively, to the extent this Court utilizes the percentage of the fund method, a lodestar cross-check should keep fees well below a 25% recovery to something in line with the actual labor invested. *Vizcaino*, 290 F.3d at 1050 ("[w]here [the lodestar] investment is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable").

Class counsels' 3.39 multiplier is unusually high for a TCPA settlement, where multipliers are generally between 1 and 2. *See e.g.*, *Bayat*, 2015 WL 1744342,at *8-9 (1.5 multiplier in TCPA settlement)*; Bellows v. NCO Fin. Sys., Inc.*, 07-CV-1413 W (AJB), 2009 WL 35468, at *8 (S.D. Cal. Jan. 5, 2009) (1.7 multiplier in TCPA

[7] Cases cited by class counsel outside the TCPA context should be given no deference in setting the percentage of the fund here.

settlement); *see also Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 Fed. Appx. 880, 883 (3d Cir. 2016) (2 multiplier in TCPA settlement); *Americana Art China Co. v. Firefox Printing Packaging, Inc.*, 743 F.3d 243, 246 (7th Cir. 2014) (upholding a 1.5 multiplier in TCPA settlement); *Michel*, 2014 WL 497031, at *23 (allowing for a 1.8 multiplier (instead of 4.3), while reducing the percentage of recovery from 33% to 15%).

As demonstrated *supra*, there is nothing exceptional about this settlement reached just over a year after filing suit. The results, while arguably passing muster under Rule 23's adequacy requirement, are less than 0.1% of potential damages. The risks faced, while certainly significant, are not so unique as to warrant a significant rise above the lodestar, and certainly do not justify a 3.39 multiplier.

Finally, if class counsel are indulged their 3.39 multiplier, it will produce absurd results. Beth E. Terrell, whose rates are already $725 per hour, would bill a preposterous $2457.75 per hour. Dkt. 103, at 16-17. Meanwhile, the senior paralegals at Terrell Marshall Law Group, who already bill $275 per hour, would bill $932.25 per hour with this multiplier. *Id.*

CONCLUSION

Class member Route 42 Dance Academy respectfully requests this Court reject the latest effort to pass through a settlement that unreasonably minimizes Pivotal's liability and offers the class less than 0.1% of class damages, which is only distributed to less than 2% of the class. Further, the Court should unseal the parties'

discussion of Pivotal's financial status so class members can make an informed decision on their rights. In no case should class counsel be compensated 3.39 times their hourly rates for this arrangement. Nothing more than class counsels' $663,640.50 lodestar, or 7.37% of the common fund, should be awarded.

DATED: June 29, 2018

Respectfully submitted,

/s/ Timothy R. Hanigan

Timothy R. Hanigan (125791)
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Attorney for Objector/Class Member

Certificate of Service

The undersigned certifies that today he filed the foregoing Objection on ECF which will send electronic notification to all attorneys registered for ECF-filing.

DATED: June 29, 2018

/s/ Timothy R. Hanigan

EXHIBIT 1

Timothy R. Hanigan (SBN 125791)
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Attorneys for Objector/Class Member,
Route 42 Dance Academy, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ABANTE ROOTER AND PLUMBING, INC., individually and on behalf of all others similarly situated, Plaintiffs v. PIVOTAL PAYMENTS INC., d/b/a CAPITAL PROCESSING NETWORK and CPN, Defendant.	Case No. 3:16-cv-05486-JCS **DECLARATION OF NANCY HIGHTOWER IN SUPPORT OF OBJECTION OF ROUTE 42 DANCE ACADEMY, LLC**

My name is Nancy Hightower. I am over 18 years old. I am qualified and competent to make this affidavit. The facts stated herein are within my personal knowledge.

I am the sole member of Route 42 Dance Academy, LLC, which is a Limited Liability Company. The address of Route 42 Dance Academy is 6825 Pearl Road, Suite 64, Parma Heights, Ohio 44130. Route 42 Dance Academy has a cellular phone. The number for that cellular phone is 440-886-2667.

Route 42 Dance Academy is an entity that (a) received one or more non-emergency telephone calls; (b) allegedly on Pivotal's behalf; (c) promoting credit card processing services, other services, or goods of any kind; (d) to the Dance Academy's cellular telephone number; (e) through the use of an automatic telephone dialing system or an artificial prerecorded voice; and (f) in the period from April 15, 2016 up to and including September 2, 2016. Route 42 Dance Academy is therefore a class member as defined by the class notice, and has standing to make its objection.

Route 42 Dance Academy received a class notice in the mail, which specified its Class Member ID is EC8DA384B4. A true and correct copy of the notice is attached hereto as Exhibit 1-A. The address on the notice lists Route 42 Dance Academy's address as 6825 Pearl Road, Suite 64, Cleveland, Ohio 44130-3070. That is one and the same as the 6825 Pearl Road, Suite 64, Parma Heights, Ohio 44130 address.

An online claim was made on behalf of Route 42 Dance Academy, which to the best of my ability to recall, received approximately eight of the calls mentioned

above. A true and correct copy of a screenshot of the confirmation page from the online claim is attached hereto as Exhibit 1-B. These calls are harassing and disruptive to Route 42 Dance Academy's business.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 27, 2018

Nancy Hightower

Nancy Hightower

Exhibit 1-A

Pivotal Payments Settlement
Claims Administrator
P.O. Box 3207
Portland, OR 97208-3207

PRESORTED
FIRST-CLASS MAIL
AUTO
U.S. POSTAGE
PAID
PORTLAND, OR
PERMIT NO. 2882

A COURT AUTHORIZED
THIS LEGAL NOTICE

If you received a call on your cellular telephone on behalf of Pivotal Payments, Inc. you may be entitled to benefits under a class action settlement.

A Settlement has been reached in a class action lawsuit, *Abante Rooter and Plumbing, Inc. et al. v. Pivotal Payments, Inc.*, No. 3:16-cv-05486-JCS (U.S. District Court, N.D. Ca.), where Plaintiff alleges that Pivotal Payments, Inc., doing business as Capital Processing Network or CPN ("Pivotal"), caused calls to cell phones using an automatic telephone dialing system and prerecorded messages. Pivotal denies any wrongdoing, has asserted numerous defenses, and in agreeing to settle, does not admit any wrongdoing.

Class Member ID: EC8DA384B4

723719704691

ROUTE 42 DANCE ACADEMY
6285 PEARL ROAD
CLEVELAND, OH 44130-3070

287
64781

WHO IS A CLASS MEMBER? You may be in the Class if you received an autodialed call to your cell phone on behalf of Pivotal Payments, Inc., doing business as Capital Processing Network or CPN ("Pivotal"), between April 15, 2016, and September 2, 2016.

SETTLEMENT TERMS: Pivotal will pay $9,000,000 into a fund to cover: (1) cash payments to Class Members who submit timely and valid claims; (2) Court-approved attorneys' fees and costs not to exceed $2,250,000; (3) a Court-approved Service Award of $2,000 to the Class Representative; and (4) Settlement Administration Costs of $1,231,675. The fund will be divided among Class Members who file timely and valid claims after deducting all Settlement expenses, the Service Award, and attorneys' fees and costs. Class Counsel estimate you will receive $20–$60. The amount will depend on the number of calls you received, the number of claims, and other factors. Visit www.PivotalTCPA.com to learn the number of calls you received.

YOUR RIGHTS AND OPTIONS

#1. Submit a Claim Form for a Cash Award: You may submit a Claim Form at www.PivotalTCPA.com, call 1-888-396-9692 to request a paper Claim Form, or download a Claim Form on the website. Your claim must be submitted by **June 29, 2018**. **#2. Opt Out:** You may opt out of the lawsuit and keep any right you may have to sue Pivotal by sending a letter to the Settlement Administrator by **June 29, 2018**, or by visiting the Settlement Website and following the instructions. If you do not opt out, you give up any right to sue Pivotal separately about the settled claims and you will not receive a payment from the fund. Visit the Settlement Website for more details. **#3. Object:** If you do not opt out, you may object to the Settlement. You must send your signed, written objections to the Court by **June 29, 2018**, and provide the reasons for your objection. **#4. Do Nothing:** If you do nothing, you will not receive any payment and will lose the right to sue Pivotal about the Released Claims. You will be bound by the Court's decision regarding the Settlement. **#5. Attend the Final Approval Hearing:** The Court has set a hearing to decide if the Settlement should be finally approved on October 5, 2018, at 2:00 p.m. at the United States District Court for the Northern District of California, 450 Golden Gate Ave., Courtroom G – 15th Floor, San Francisco, CA 94102. The date may change without notice to Class Members, so please monitor the Settlement Website. Anyone who timely objects to the Settlement may ask to appear at the Final Approval Hearing. The Court will also consider Class Counsel's attorneys' fee and costs request.

For more information visit: www.PivotalTCPA.com, call Class Counsel at 1-855-349-7023, or call 1-888-396-9692. DO NOT telephone the Court.

U4121 v.01

Exhibit 1-B

Important Dates

June 29, 2018

Deadline to Exclude Yourself from the Settlement

June 29, 2018

Deadline to File a Claim

June 29, 2018

Deadline to Object to the Settlement

October 5, 2018 at 2:00 p.m.

Final Approval Hearing

Submit a Claim - Certification

Phone Call Information:

Our records indicate that the affected phone number(s) associated with your Class Member ID received the number of calls indicated below. Please review this information and certify to the best of your ability that it is true and correct.

Phone Number	Number of Calls
4408862667	8

If you do not agree with this information, please download a paper Claim Form, fill it out and provide documentation to prove your adjusted phone number and/or call amounts.

Certification:

☑ By checking this box, I certify that the information on this form is true and correct to the best of my knowledge. *

Previous Submit

Abante Rooter and Plumbing v. Pivotal Payments Settlement

Abante Rooter and Plumbing, Inc. et al. v. Pivotal Payments, Inc. d/b/a Capital Processing Network and CPN. No. 3:16-cv-05486-JCS

Home FAQs Documents Submit a Claim Contact Us

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June 29, 2018

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Final Approval Hearing

Submit a Claim - Confirmation

Thank you for your submission. Your Confirmation Number is: **9MF2SYSJ**.

What Happens Next?

Now that your claim is submitted, it will be reviewed for validity by the Claims Administrator. If your Claim is rejected for any reason, you may be notified and given an opportunity to address any deficiencies. Otherwise, if your claim is deemed to be eligible, you may receive benefits depending on the results of the Final Fairness hearing and any appeals that might occur.

Please be patient and check this website for updates.

Contact Us Privacy Policy Terms of Use

Questions? Contact the Claims Administrator at 1-888-396-9692 (Toll-Free).