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15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18
19 IN RE TRACFONE UNLIMITED
20 SERVICE PLAN LITIGATION

Lead Case No. 13-cv-03440-EMC

Consolidated Cases:
13-cv-05295-EMC
13-cv-05296-EMC
14-cv-01347-EMC

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22
23 **NOTICE OF MOTION AND MOTION**
24 **FOR AWARD OF ATTORNEYS' FEES**
25 **AND EXPENSES AND FOR SERVICE**
26 **AWARDS FOR PLAINTIFFS;**
27 **MEMORANDUM**
28 **OF POINTS AND AUTHORITIES**

Date: June 23, 2015
Time: 2:30 p.m.
Judge: Hon. Edward M. Chen

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 23, 2015, at 2:30 p.m., in the Courtroom of the Honorable Edward M. Chen, United States District Judge for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiffs and Class Counsel¹ in the above-captioned matter will and hereby do move the Court for an Order: (a) awarding Class Counsel attorneys' fees in the amount of \$5 million, plus reimbursement of litigation expenses in the amount of \$63,644.75; and (b) awarding Plaintiffs service awards in the amount of \$2,500 each for their commitment and efforts on behalf of the Class, with all such attorneys' fees, expenses, and service awards to be paid separately by Defendant TracFone Wireless, Inc. in addition to (*i.e.*, on top of) the \$40 million Settlement Fund in this action.

As discussed in the accompanying memorandum, the amounts requested are fair, reasonable and appropriate under applicable law, and are well-justified under the circumstances of this matter.

This motion is based upon this notice of motion and motion; the accompanying memorandum of points and authorities; the declarations filed in support hereof; the proposed Class Settlement Agreement (the "Settlement") previously filed with the Court² and all papers filed in support thereof; the argument of counsel; all papers and records on file in this matter; and such other matters as the Court may consider..

Dated: April 20, 2015

By: /s/ Michael W. Sobol

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¹ "Class Counsel" are the firms appointed as Class Counsel pursuant to the Preliminary Approval Order (Docket No. 118): Loeff Cabraser Heimann & Bernstein LLP, Hattis Law, and Morgan & Morgan Complex Litigation Group.

² The Settlement is on file at *Hansell* Docket No. 107-1.

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Class Counsel and Attorneys for Plaintiff in Browning

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Settlement in this matter establishes a \$40 million common fund reached in
4 conjunction with the Federal Trade Commission, where Class Counsel was instrumental in not
5 only procuring the common fund, but in establishing the notice, claim and distribution protocol
6 that will result in the entire fund, net of administrative costs, being distributed to at least 20
7 percent (or even more) of the Class. TracFone will also change its business practices. Moreover,
8 TracFone has agreed to separately pay Class Counsel a fee of up to \$5 million in addition to the
9 \$40 million fund, a deal term negotiated after the parties reached the major terms of the
10 Settlement. Class Counsel, having vigorously and effectively represented the Class, respectfully
11 move the Court for an award of reasonable attorneys' fees of \$5 million and reimbursement of
12 \$63,644.75 in litigation expenses reasonably incurred in prosecuting and settling this matter.

13 As set forth herein, the requested fee is fair, reasonable and appropriate under applicable
14 law. The requested fee, if granted, would represent approximately 11.1% of the total monetary
15 payout by TracFone, which is far less than the 25 percent "benchmark" that Ninth Circuit courts
16 apply in common fund cases like this one. Moreover, the requested fee is well-justified under the
17 circumstances of this litigation, including given the substantial monetary and non-monetary
18 benefits that Class Counsel's efforts have generated for Class Members; the challenges and risks
19 that Class Counsel assumed in pursuing this matter on a contingency basis; and the substantial
20 time and resources that Class Counsel have expended.

21 The relief achieved here represents a strong result for Class Members. Pursuant to the
22 terms of the Settlement, and in conjunction with the related FTC Agreement, TracFone has
23 agreed to establish a \$40 million non-reversionary Settlement Fund from which Class Members
24 who submit valid claims, and all Class Members for whom TracFone has a mailing address
25 (whether or not they submit claims), will be sent cash payments. The Settlement also provides
26 for a robust, multi-pronged notice program which has been implemented as approved by the
27 Court, and which was well-designed to provide notice to Class Members of their rights and how
28 to submit claims. More than 350,000 claims have already been submitted, with two months still

1 remaining until the end of the claims period.¹ And given the provision for automatic payments to
2 Identified Class Members and the number of claims submitted to date, it is expected that the *full*
3 amount of the net settlement funds will be distributed to Class Members in an initial distribution,
4 with at least 20 percent (or even more) of Class Members receiving payments. The Settlement
5 further provides for a secondary distribution to Class Members should there be sufficient
6 uncashed checks from the first distribution to make that practical.

7 In addition to the monetary relief, Class Counsel also achieved industry-leading practice
8 changes, with TracFone agreeing to improve and replace its advertising and packaging to clearly
9 and prominently disclose its restrictions on the amount and speed of mobile data in its
10 “unlimited” plans. These and the other agreed upon changes will benefit Class Members and
11 other consumers for years to come.

12 This strong result for the Class would not have been possible but for the hard work and
13 dedication of Class Counsel. Class Counsel have already devoted more than 5,582 hours to the
14 investigation, discovery, prosecution, and settlement of this litigation, for a total combined
15 lodestar to date of \$2,961,792.00, with significant work still to be done in connection with
16 obtaining final settlement approval and implementing the Settlement should the Court approve it.

17 Notably, the reaction from the Class has been very positive thus far. The deadline for
18 Class Members to exclude themselves or object is May 20, 2015. As of April 14, 2015, only 65
19 persons have asked to be excluded, and just two objections have been submitted.² These numbers
20 stand in stark contrast to the hundreds of thousands of claims that have been submitted.

21 For the foregoing reasons and the others detailed below, Class Counsel respectfully
22 request that the Court grant their motion for attorneys’ fees and expenses, and grant service
23 awards in the amount of \$2,500 each for the Plaintiffs, to compensate them for their commitment
24

25 ¹ This includes more than 275,000 claims submitted since the Court entered the Preliminary
Approval Order and the notice program commenced. Simmons Decl., ¶ 32.

26 ² Simmons Decl., ¶¶ 34-35. The final numbers of timely claims, opt-outs and objections will be
27 reported to the Court in advance of the June 23, 2015 Fairness Hearing. Pursuant to the
28 procedure established by the Court in the Preliminary Approval Order, Plaintiffs and Class
Counsel will address in their reply papers any timely objections that may be submitted before the
May 20, 2015 objection deadline. See Docket No. 118 at ¶ 30.

1 and efforts on behalf of the Class.

2 **II. BACKGROUND**

3 **A. Class Counsel Achieved a Strong Result for the Class**

4 **1. The Settlement Fund and Cash Payments to the Class**

5 In conjunction with the Settlement and the FTC Agreement, TracFone has agreed to
6 establish a \$40 million non-reversionary Settlement Fund which will be used for: (a) providing
7 cash payments to Class Members; and (b) payment of administrative costs.³ Class Counsel was
8 instrumental not only in procuring the common fund, but also in negotiating and establishing the
9 notice, claim, and distribution protocol that will result in the *full* net settlement proceeds (*i.e.*, the
10 \$40 million fund, minus administrative costs) being paid out to at least 20 percent (or even more)
11 of the Class.

12 Pursuant to the Settlement, payments will be sent by mailed check to all “Valid
13 Claimants,” which includes: (a) all Class Members who submit timely and valid claims; and (b)
14 all “Identified Class Members” (meaning that TracFone has a mailing address for them). In other
15 words, pursuant to the Settlement, Class Members for whom TracFone has a mailing address,
16 whether or not they submit a claim, will automatically be considered “Valid Claimants,” and will
17 be sent a check. Appropriate steps will be taken to re-mail checks that are returned undeliverable.
18 The specific payment amounts for Valid Claimants will depend on the number of timely, valid
19 claims that are submitted, how their service was affected, and when they were a TracFone
20 customer. (Settlement, § IV)

21 There have already been more than 350,000 claims submitted to date, with two months
22 still remaining in the claim period.⁴ Moreover, given the provision in the Settlement for
23 automatic payments to Identified Class Members,⁵ and the number of claims submitted to date, it

24 ³ The Settlement Administrator estimates that the total administrative costs will be approximately
25 \$3,680,544. Simmons Decl., ¶ 36. The estimate has increased subsequent to the preliminary
26 approval hearing primarily because the number of available mailing addresses and claims rate
27 have exceeded the Settlement Administrator’s prior expectations. *Id.*

28 ⁴ More than 275,000 of the claims submitted to date were submitted after the Court entered the
Preliminary Approval Order and the notice program commenced. Simmons Decl., ¶ 32.

⁵ TracFone has mailing addresses for approximately 1.8 million to 1.9 million Identified Class
Member accounts.

1 is expected that the *entire* amount of net settlement funds (*i.e.*, the \$40 million, less administrative
 2 costs) will be mailed out to Valid Claimants in an initial distribution, with at least 20 percent (or
 3 even more) of the Class Members receiving payments.⁶ And to the extent residual funds remain
 4 one year after the initial distribution (*e.g.*, due to uncashed checks), the Settlement provides for a
 5 secondary distribution to Valid Claimants as long as the residual amounts are sufficient to make
 6 such secondary distribution practical. None of the Settlement Fund will revert to Defendants.
 7 (Settlement, § IV.B.5 & 6)

8 **2. Robust Notice Program and User-Friendly Claim Process**

9 Class Counsel also were instrumental in establishing a multi-pronged notice program that
 10 is well-designed to get notice of the Settlement to the Class and provide easy to follow guidance
 11 on how to submit claims. The robust notice program, which was approved by the Court and is
 12 being implemented by the Settlement Administrator and the parties, includes:

- 13 • Direct mail and email notice to Class Members for whom TracFone has contact
 14 information;
- 15 • SMS (*i.e.*, text message) notice to Class Members who are current TracFone
 16 subscribers and who have not opted-out of receiving informational SMS messages;
- 17 • A state-of-the-art Internet and media-based notice campaign that has included:
 18 banner ads on Internet sites and mobile applications, publication in wide-
 19 circulation magazines, a Facebook page dedicated to the Settlement, audio
 20 advertisements, social media advertisements, and media outreach efforts which
 21 included a multi-media press release and audio news release.
- 22 • A Settlement Website where Class Members can submit online claims, obtain
 23 additional information, and view key documents;
- 24 • A toll-free telephone number where Class Members can obtain additional
 25 information; and

26 _____
 27 ⁶ With two months remaining in claims period, the take rate, including the Identified Class
 28 Member accounts and the submitted claims to date, is already approximately 20-25% (assuming
 approximately 8 million Class Members), and could be higher depending on the extent of overlap
 between the claimants and the Identified Class Members.

1 • Notice posted on TracFone’s brands’ Internet home pages and Facebook pages.
2 (Settlement, § V; Docket No. 118; *see also generally* Simmons Decl.; Finegan Decl.)

3 The Settlement also provides for a straightforward claim form and a simplified claim
4 process that are designed to make claim submission convenient. Class Members have the option
5 of submitting claims electronically via the Settlement Website or by mail. (Settlement, § IV.B.3,
6 V.C.6, Ex. 1).

7 **3. Separate Payment of Attorneys’ Fees and Expenses**

8 TracFone has agreed to separately pay attorneys’ fees of up to \$5 million, plus expenses
9 of up to \$100,000. Pursuant to the Settlement, any attorneys’ fees and expenses awarded to Class
10 Counsel will be paid by TracFone in addition to (*i.e.*, on top of) the \$40 million Settlement Fund,
11 meaning such awards will not reduce the monetary relief provided to the Class Members. The
12 same is true for any Plaintiff service awards granted by the Court, which likewise will be paid
13 separately by TracFone on top of the Settlement Fund. (Settlement, § IX)

14 **4. Important Practice Changes**

15 In addition to the monetary relief, Class Counsel achieved significant, valuable non-
16 monetary relief for the Class. TracFone has agreed in the Settlement to make industry-leading
17 practice changes, including modifying its “unlimited” plan advertising and packaging to clearly
18 and prominently disclose any throttling caps or limits and the lower speeds to which customers
19 will be throttled. TracFone has agreed to not only make changes to its future advertising, but also
20 to instruct its retailers to remove existing advertising, plan cards, and products from the shelves
21 and replace them with new Settlement-compliant materials. The agreed conduct changes, the
22 details of which are set forth in Section IV.C of the Settlement, include but are not limited to:

- 23 • TracFone will not advertise its mobile service plans as providing access to “unlimited”
24 data unless it also makes clear and adjacent disclosures, as detailed in the Settlement,
25 regarding any applicable throttle limits or caps and the actual speeds to which customer
26 data will be slowed.
- 27 • TracFone’s terms and conditions have been updated to describe the impact throttling can
28 have on the functionality of services.

- 1 • TracFone has implemented changes to its customer service to ensure that customers
2 contacting TracFone receive accurate information about TracFone’s throttling,
3 suspension, and service termination policies, and about the impact throttling can have on
4 the functionality of services.
- 5 • TracFone has implemented a system to advise customers by SMS message when their data
6 speed has been throttled upon reaching specified data usage caps.

7 (Settlement, § IV.C)

8 **B. Class Counsel Expended Considerable Time and Resources in Achieving the**
9 **Strong Results Here.**

10 Class Counsel have worked very hard to achieve the strong results delivered under the
11 proposed Settlement. This litigation started in July 2013, with the filing of the *Hansell* action.
12 The *Hansell* action alleged various claims based the advertising of TracFone’s Straight Talk-
13 branded mobile service plans as providing “unlimited” data when, in fact, TracFone had a
14 practice of “throttling” (*i.e.*, slowing) or suspending customers’ data, or terminating their service
15 altogether, when the customer reached a certain undisclosed and/or inadequately disclosed data
16 usage limit. The *Browning*, *Gandhi* and *Blaqmoor* actions followed. Collectively, the four
17 related actions allege substantially-similar claims and misconduct by TracFone in connection with
18 TracFone’s Straight Talk, Net10, Simple Mobile, and Telcel America brands.

19 Before filing suit, Class Counsel conducted a thorough factual investigation, including
20 tracking and analyzing TracFone’s marketing materials and packaging, multiple visits to stores
21 where TracFone products and plans are sold, reviewing TracFone’s purported terms of service
22 and the methods by which such terms were communicated to consumers, and speaking with
23 numerous customers about their experiences with TracFone products. Class Counsel also
24 conducted considerable legal research regarding the legal issues raised and expected to be raised
25 in the litigation. Sobol Decl., ¶ 5; Hattis Decl., ¶¶ 9-11; Yanchunis Decl., ¶¶ 10-11.

26 Class Counsel’s investigative efforts continued after the complaints were filed, including
27 through significant formal discovery. Among other things, Class Counsel deposed four senior
28 TracFone executives, propounded written discovery, reviewed and analyzed thousands of

1 documents produced by Defendants (including, but not limited to, internal correspondence and
2 documents regarding TracFone’s marketing of “unlimited” plans and relevant policies and the
3 development and implementation of the throttling and other practices at issue), and reviewed and
4 analyzed pertinent customer and sales data to evaluate potential class damages. Class Counsel
5 engaged in several meet and confer conference calls with Defendants’ counsel regarding the
6 appropriate scope of discovery and Defendants’ search for and production of responsive
7 materials. Moreover, Class Counsel continued to speak with customers about their experiences
8 with TracFone. Sobol Decl., ¶¶ 6-7; Hattis Decl., ¶ 12; Yanchunis Decl., ¶ 15.

9 There was significant litigation activity as well, requiring Class Counsel to research and
10 address important issues. Counsel in the *Hansell* actions successfully opposed Defendants’
11 motion to transfer the *Hansell* case. *Hansell* Docket No. 50. And in each of the underlying
12 actions, Defendants moved to compel arbitration of the plaintiffs’ claims. While the briefing on
13 these motions was eventually stayed, the motions required Class Counsel to conduct legal
14 research and closely analyze the provisions at issue, both for purposes of opposing the motions
15 and to be in a position to properly address Defendants’ arbitration defenses at mediation. Sobol
16 Decl., ¶ 6; Hattis Decl., ¶ 12.

17 Moreover, the proposed Settlement is the product of extensive, hard-fought settlement
18 negotiations and related efforts by Class Counsel. In late 2013, the parties in the *Browning* action
19 participated in two mediation sessions with Rodney Max, an experienced mediator, and reached
20 agreement on an initial settlement (the “Browning Settlement”). After the Browning Settlement
21 was presented for preliminary consideration (initially to Judge Marcia Cooke of the Southern
22 District of Florida, and then to this Court after the *Browning* case was transferred to this Court),
23 counsel in the *Hansell* actions intervened, arguing that the result achievable for the Class could be
24 improved through additional discovery, and that consideration of the Browning Settlement should
25 thus be deferred until counsel had the opportunity to take such additional discovery. After the
26 Court permitted the additional discovery, Class Counsel conducted significant discovery and the
27 parties agreed to engage in further mediation. Sobol Decl., ¶¶ 6-7.

28 The parties engaged in two full-day mediation sessions with Prof. Eric Green of

1 Resolutions, LLC, the first on September 15, 2014 and the second on October 30, 2014. With
 2 Prof. Green's assistance, an agreement in principle was reached on improved settlement terms.
 3 The parties agreed that a class settlement would be entered into in conjunction with the resolution
 4 of a then-pending investigation of TracFone's practices by the FTC, which resolution TracFone
 5 was also in the process of negotiating. After the parties reached agreement in principle on the
 6 merits they were able to reach an agreement, with Prof. Green's assistance, regarding Class
 7 Counsel's request for attorneys' fees and expenses. Sobol Decl., ¶ 8; Hattis Decl., ¶ 13;
 8 Yanchunis Decl., ¶ 20.

9 Following the mediation, all Class Counsel worked hard on negotiating and finalizing the
 10 written settlement agreement, forms of notice, claim form and other exhibits to the settlement,
 11 and have all devoted substantial time and resources to ensuring that the funds procured will go to
 12 Class Members, including working closely with the Settlement Administrator and media
 13 consultant on the design and implementation of the notice program and claims process. Class
 14 Counsel have also conferred extensively with Defendants and the FTC regarding how best to
 15 coordinate the Settlement and the FTC Agreement; have continued to speak with Class Members;
 16 and worked on drafting settlement approval papers. Sobol Decl., ¶ 9; Hattis Decl., ¶¶ 13-14;
 17 Yanchunis Decl., ¶ 21.

18 **III. ARGUMENT**

19 **A. The Requested Fee is Fair, Reasonable, and Justified**

20 In deciding whether the requested fee amount here is appropriate, the Court's role is to
 21 determine whether such amount is "fundamentally 'fair, adequate, and reasonable.'" *Staton v.*
 22 *Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)); *In re Wash. Pub.*
 23 *Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294-95 n.2 (9th Cir. 1994) (overriding principle is
 24 that the fee award be "reasonable under the circumstances"). The fee requested here is reasonable,
 25 appropriate, and well justified under applicable law and the circumstances of this matter.

26 **1. The Fee Should Be Calculated Using the Percentage-of-the-Fund** 27 **Method**

28 Where a class settlement results in the creation of common benefits for the class, courts in

1 the Ninth Circuit have discretion to use either the “percentage-of-the-fund” method or the
 2 “lodestar-multiplier” method to determine a reasonable fee. *Hanlon v. Chrysler Corp.*, 150 F.3d
 3 1011, 1029 (9th Cir. 1998); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th
 4 Cir. 2011). Regardless of which approach is used, the ultimate objective is to ensure that the fee
 5 awarded to class counsel is “reasonable under the circumstances.” *Wash. Pub. Power*, 19 F.3d at
 6 1295.

7 The fairest and most efficient way to calculate a reasonable fee where, as here,
 8 contingency fee litigation has produced common monetary benefits is by awarding class counsel a
 9 percentage of the total funds achieved. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047
 10 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.
 11 1990); *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007) (“use
 12 of the percentage method in common fund cases appears to be dominant”).

13 The percentage-of-the-fund method comports with the legal marketplace, where counsel’s
 14 success is frequently measured in terms of the results counsel has achieved. *See Swedish Hosp.*
 15 *Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) (in common fund cases “the monetary
 16 amount of the victory is often the true measure of [counsel’s] success”). By assessing the amount
 17 of the fee in terms of the amount of the benefit conferred on the class, the percentage method
 18 “more accurately reflects the economics of litigation practice” which, “given the uncertainties and
 19 hazards of litigation, must necessarily be result-oriented.” *Id.* Moreover, it most effectively
 20 aligns the incentives of the class members and their counsel, encouraging counsel to focus on
 21 maximizing the relief available to the class. *Vizcaino*, 290 F.3d at 1050 n.5; *In re Activision Sec.*
 22 *Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989).

23 **2. The Requested Fee is Well Below the Ninth Circuit’s “Benchmark”**
 24 **and is Absolutely Reasonable Under the Circumstances**

25 In the Ninth Circuit, the “benchmark” for a fee award in a common fund case is 25
 26 percent of the fund achieved. *Vizcaino*, 290 F.3d at 1048-1050. Courts may stray from the
 27 benchmark if there are “special circumstances” present. *In re Bluetooth Headset Prods. Liab.*
 28 *Litig.*, 654 F.3d 935, 942 (9th Cir. 2011).

1 Here, TracFone has agreed to establish a \$40 million fund, and to pay Court-awarded
 2 attorneys' fees and expenses on top of the fund amount. When the fee requested by Class
 3 Counsel is included, the total monetary payout by TracFone (*i.e.* inclusive of the requested fee)
 4 would be \$45 million. *See Staton*, 327 F.3d at 974-75 (9th Cir. 2003) (appropriate to include all
 5 amounts paid by defendant, including notice costs, in defining the "fund" used for applying
 6 percentage-of-the-fund method); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011)
 7 ("In cases such as this one, where attorneys' fees are paid separately from the claim fund, courts
 8 base the fee award on the entire settlement fund as that package is the benefit to the class. This
 9 amount includes notice and administration costs and separately paid attorneys' fees and costs.").
 10 The \$5 million fee that Class Counsel requests represents approximately 11.1% of that total
 11 payout⁷—which is *less than half* of the Ninth Circuit's 25 percent benchmark.

12 It should be noted that the \$40 million fund is not merely a potential or hypothetical value
 13 of the monetary relief achieved. Nor is this a situation where the bulk of settlement funds will go
 14 to a *cy pres* recipient instead of to the class. Rather, at Class Counsel's insistence, the Settlement
 15 includes multiple provisions—including automatic payment for Identified Class Members without
 16 the need to submit a claim, a secondary distribution of residual funds to Valid Claimants, and a
 17 robust, multi-pronged notice plan coupled with a simplified claims process⁸—that will ensure the
 18 *entire* net settlement funds (*i.e.*, net of administrative costs) will be distributed to Class Members
 19 through the initial distribution, with only limited amounts going to the Federal Trade Commission
 20 if the uncashed checks following the initial distribution are so small as to make a secondary
 21 distribution impractical or if there are still uncashed amounts remaining after a second
 22 distribution.

23 Moreover, while the \$40 million fund is being paid by TracFone to resolve both these
 24 class actions and the FTC's later filed enforcement action, Class Counsel respectfully submit that

25 _____
 26 ⁷ \$5 million / \$45 million = 11.11%.

27 ⁸ As noted above, with more than two months remaining in the claim period, there have already
 28 been approximately 350,000 claims submitted to date, more than 275,000 of which were
 submitted since the Court entered the Preliminary Approval Order and the notice program
 commenced. Simmons Decl., ¶ 32.

1 it is appropriate under the circumstances to consider the entire Settlement Fund amount in
 2 applying the percentage-of-the-fund method here. TracFone has made clear that it was only
 3 willing to agree to the resolution reached if it was settling *both* the class actions and the FTC
 4 action. *See* Docket No. 113 at 2. While this may preclude any definitive apportionment of
 5 responsibility for the fund amount, it also makes clear that but for Class Counsel's efforts in these
 6 actions, the fund achieved would not exist. Moreover, as set forth above, not only was Class
 7 Counsel instrumental in procuring the fund itself, but Class Counsel's extensive efforts in
 8 establishing the notice, claim, and distribution protocols were critical to ensuring the monetary
 9 relief will be distributed among a substantial portion of the Class.⁹

10 In any event, even if the Court were to very conservatively attribute just one-half of the
 11 Settlement Fund amount to the Settlement, the fee requested by Class Counsel *still* would
 12 represent just a 20% fee award,¹⁰ which is still significantly lower than the Ninth Circuit's
 13 benchmark and would be well deserved under the circumstances here.

14 Courts in the Ninth Circuit consider a number of factors to determine the appropriate
 15 percentage to apply under the percentage-of-the-fund method, including: (1) the results achieved;
 16 (2) whether there are benefits to the class beyond the generation of a cash fund; (3) the contingent
 17 nature of the fee; and (4) the complexity of the case and skill required of class counsel. *Vizcaino*,
 18 290 F.3d at 1048-1050; *In re Omnivision*, 559 F. Supp. 2d at 1046. Consideration of these factors
 19 strongly supports that the fee requested here is reasonable.

20 **a. Class Counsel Achieved a Strong Monetary Result for the Class**

21 The results obtained for the class are generally considered to be the most important factor
 22 in determining the appropriate fee award in a common fund case. *See Hensley v. Eckerhart*, 461
 23 U.S. 424, 435-36 (1983); *Vizcaino*, 290 F.3d at 1049; *Omnivision*, 559 F. Supp. 2d at 1046; *see*
 24 *also* Federal Judicial Center, Manual for Complex Litigation, § 27.71, p. 336 (4th ed. 2004) (the
 25 "fundamental focus is on the result actually achieved for class members").

26 ⁹ As noted above, it is expected that the *entire* net settlement funds will be distributed, as part of
 27 an initial distribution, to at least 20 percent (or even more) of the Class, with the Settlement
 28 further providing for a secondary distribution of uncashed check amounts.

¹⁰ \$5 million / \$25 million = 20%.

1 Here, the \$40 million fund achieved represents a strong monetary result for the Class,
2 particularly given the harm alleged and the substantial risks and delay of ongoing litigation. In
3 addition to the numerous other defenses and arguments that Defendants have indicated they
4 would advance on merits and damages issues, *see, e.g.*, Docket No. 113, Defendants have filed
5 motions to compel arbitration in each of the underlying cases. Obviously, if those motions were
6 successful, it would spell the end of the litigation.

7 To further put the \$40 million amount in perspective, the average cost of a monthly
8 “unlimited” service plan from TracFone during the class period was approximately \$45.00.
9 Assuming Plaintiffs were to overcome the numerous pre-trial obstacles in this action, prevail at
10 trial and on an inevitable appeal, and ultimately recover damages equal to the full cost of one
11 month of service for each of the approximately 8 million Class Members, then the total class
12 damages in that scenario would be approximately \$360 million. While Plaintiffs believe they
13 would have a credible basis for seeking twice that amount at trial (*i.e.*, the cost of two months of
14 service), Defendants argue that Class Members were on notice of TracFone’s policies the first
15 month their service was affected, and could have discontinued their no-contract service plans at
16 that time. Thus, there is uncertainty regarding whether Plaintiffs could have recovered more than
17 one full month’s charge per Class Member even in the proverbial “home run” scenario.

18 Defendants also argue that any damages would have to be limited to reflect the fact that
19 Class Members’ plans included three services—talk, text, and data—and that TracFone’s
20 throttling and suspension practices only affected one of the three services (data). If accepted by
21 the fact finder, this argument could reduce damages by as much as two-thirds (*i.e.*, to \$120
22 million if one month of service is the starting point).

23 Defendants also argue that even for the data portion, Class Members got some of what
24 they paid for—*i.e.*, data service for the period of the month before they were throttled or
25 suspended. Defendants have argued, the throttling and suspension typically occurred in the latter
26 part of the service month. However, if on average customers were throttled in the middle of the
27 month, this could cut in half the amount claimed for any one-month’s throttling (resulting in a
28 \$60 million recovery at trial, if the \$120 million starting point referenced above was accepted).

1 While Plaintiffs do not agree with them, TracFone's damages arguments present
2 significant risks to recovering two full months' service charges. Even before these arguments are
3 considered, the \$40 million Settlement Fund represents a substantial amount. When the
4 possibility of Defendants prevailing on some or all of their damages arguments is considered, it is
5 clear that \$40 million represents a very strong monetary result for the Class, particularly in light
6 of the arbitration issue and other litigation risks in this case.

7 The substantial monetary relief achieved, particularly under the circumstances, militates
8 strongly in favor of the requested fee award.

9 **b. Class Counsel Achieved Valuable Additional Benefits Beyond**
10 **the Settlement Fund**

11 The Ninth Circuit and other courts have repeatedly held that where, as here, class counsel
12 achieves significant benefits that are not accounted for in the dollar value of the common
13 settlement fund, the court "should consider the value of [such] relief as a relevant circumstance in
14 determining what percentage of the common fund class counsel should receive as attorneys'
15 fees." *Staton*, 327 F.3d at 974; *see also, e.g., Vizcaino*, 290 F.3d at 1049 (affirming enhanced fee
16 award where "the court found that counsel's performance generated benefits beyond the cash
17 settlement fund"); *Linney v. Cellular Alaska P'ship*, 1997 U.S. Dist. LEXIS 24300, * 19-20 (N.D.
18 Cal. July 18, 1997) (granting fee award of 1/3 of common fund where settlement provided
19 additional non-monetary relief); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d
20 503, 525 (E.D.N.Y. 2003) ("I agree that the substantial injunctive relief here should inform [the
21 court's] decision on awarding fees, and it has.").

22 In addition to the monetary relief procured for the Class, Class Counsel achieved industry-
23 leading practice changes which will benefit the Class and other customers for years to come.
24 (Settlement, § IV.C; *see also supra* section II.A.4 (summarizing practice changes)) These
25 important changes, which TracFone agreed to pursuant to the Settlement, will help to ensure that
26 customers are not deceived going forward about the nature and limits of TracFone's data plans.
27 These additional benefits are not accounted for in the Settlement Fund amount, and further
28 support the requested fee award.

1 c. **Class Counsel Assumed Significant Risk in Litigating on a**
 2 **Purely Contingent Basis**

3 Courts have long recognized that the public interest is served by rewarding attorneys who
 4 assume representation on a contingent basis with an enhanced fee to compensate them for the risk
 5 that they might be paid nothing at all for their work. *See Wash. Pub. Power*, 19 F.3d at 1299
 6 (“Contingent fees that may far exceed the market value of the services if rendered on a non-
 7 contingent basis are accepted in the legal profession as a legitimate way of assuring competent
 8 representation for plaintiffs who could not afford to pay on an hourly basis regardless whether
 9 they win or lose.”); *Vizcaino*, 290 F.3d at 1051 (courts reward successful class counsel in
 10 contingency case “by paying them a premium over their normal hourly rates”).

11 Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all
 12 necessary expenses and that they would only receive a fee if there was a recovery.¹¹ Class
 13 Counsel’s outlay of resources has been significant.¹² Class Counsel expended these resources
 14 despite the very real risk that they may never be compensated at all. Indeed, the risk assumed
 15 was magnified in this case, given the formidable defenses and challenges that they faced in
 16 prosecuting this action. Class Counsel’s “substantial outlay, when there is a risk that that none of
 17 it will be recovered, further supports the award of the requested fees” here. *Omnivision*, 559 F.
 18 Supp. 2d at 1047.¹³

19 d. **Successfully Prosecuting This Matter Required Significant Skill**
 20 **and Effort on the Part of Class Counsel**

21 The “prosecution and management of a complex national class action requires unique
 22 legal skills and abilities” that are to be considered when determining a reasonable fee. *In re*
 23 *Omnivision*, 559 F. Supp. 2d at 1047 (citation omitted); *see also Vizcaino*, 290 F.3d at 1048 (the
 24 complexity of the issues involved and skill and effort displayed by class counsel are additional

25 ¹¹ Sobol Decl., ¶ 23; Hattis Decl., ¶ 23; Yanchunis Decl., ¶ 27.

26 ¹² Sobol Decl., ¶¶ 22-25, Ex. A.; Hattis Decl., ¶¶ 23-25, Ex. A; Yanchunis Decl., ¶¶ 22-24.

27 ¹³ Further, Class Counsel had to turn down opportunities to work on other cases in order to devote
 28 the appropriate amount of time and resources necessary to handle this matter. Sobol Decl., ¶ 22;
 Hattis Decl., ¶ 23; Yanchunis Decl., ¶ 27. Class Counsel’s devotion to this matter in lieu of other
 opportunities further supports the requested fee award here. *See Vizcaino*, 290 F.3d at 1050; *In re*
Heritage Bond Litig., 2005 U.S. Dist. LEXIS 13555, *69 (C.D. Cal. Jun. 10, 2005).

1 factors used in determining the proper fee under the percentage-of-the-fund approach).

2 Class Counsel in this matter are experienced litigators who have successfully prosecuted
3 and resolved numerous large consumer class actions and other complex matters, including cases
4 regarding false advertising and unfair business practice claims.¹⁴ Class Counsel's skill and
5 relevant experience were very important to achieving a strong result for the Class in this matter.

6 Moreover, prosecuting and settling this action required considerable commitments of time
7 and resources by Class Counsel. Among other important tasks, Class Counsel have done the
8 following:

- 9 • Conducted extensive factual investigation and legal research;
- 10 • Propounded written discovery requests;
- 11 • Deposed four senior TracFone executives;
- 12 • Reviewed and analyzed thousands of documents produced by Defendants in discovery;
- 13 • Engaged in meet and confer with Defendants' counsel regarding discovery issues;
- 14 • Litigated Defendants' motion to transfer venue, and conducted analysis and research
15 regarding Defendants' arbitration motions;
- 16 • Analyzed customer and sales data and class damages;
- 17 • Prepared for and participated in multiple mediation sessions;
- 18 • Negotiated the Settlement, and drafted the settlement agreement and exhibits thereto;
- 19 • Worked closely with the Settlement Administrator and media notice consultant on the
20 design and implementation of the class notice program and claims process;
- 21 • Worked closely with Defendants' counsel and the FTC on coordinating the Settlement and
22 FTC Agreement;
- 23 • Overseeing settlement implementation issues; and
- 24 • Prepared settlement approval papers.

25 *See supra* section II.B; Sobol Decl., ¶¶ 5-21; Hattis Decl., ¶¶ 9-22; Yanchunis Decl., ¶¶ 10-24.

26 The skill and effort displayed by Class Counsel here further justifies the requested fee award.

27
28 ¹⁴ Sobol Decl., ¶¶ 2-4, 12-21; Hattis Decl., ¶¶ 3-8; Yanchunis Decl., ¶¶ 1-8.

1 3. **A Lodestar-Multiplier “Cross-Check” Confirms the Reasonableness of**
 2 **the Fee Requested**

3 A court applying the percentage-of-the-fund method may use the lodestar-multiplier
 4 method as a “cross-check on the reasonableness of a percentage figure.” *Vizcaino*, 290 F.3d at
 5 1050 & n.5. A lodestar-multiplier cross-check confirms that the requested fee here is reasonable.

6 The first step in the lodestar-multiplier method is to multiply the number of hours counsel
 7 reasonably expended by a reasonable hourly rate. *Hanlon*, 150 F.3d at 1029. Once this raw
 8 lodestar figure is determined, the court may then adjust that figure based upon its consideration of
 9 many of the same “enhancement” factors considered in the percentage-of-the-fund analysis, such
 10 as: (1) the results obtained; (2) whether the fee is fixed or contingent; (3) the complexity of the
 11 issues involved; (4) the preclusion of other employment due to acceptance of the case; and (5) the
 12 experience, reputation, and ability of the attorneys. *See Kerr v. Screen Extras Guild, Inc.*,
 13 526 F.2d 67, 70 (9th Cir. 1975).

14 a. **Class Counsel’s Hourly Rates are Reasonable**

15 The accompanying declarations of Class Counsel set forth the billing rates used to
 16 calculate their lodestars, and summarize the experience of the attorney timekeepers who worked
 17 on this litigation.¹⁵ In assessing the reasonableness of an attorney’s hourly rate, courts consider
 18 whether the claimed rate is “in line with those prevailing in the community for similar services by
 19 lawyers of reasonably comparable skill, experience and reputation.” *Blum v. Stenson*, 465 U.S.
 20 886, 895-96 n.11 (1984). Courts apply each biller’s current rates for all hours of work performed,
 21 regardless of when the work was performed, as a means of compensating for the delay in
 22 payment. *Wash. Pub. Power*, 19 F.3d at 1305.

23 Class Counsel here are experienced, highly regarded members of the bar. They have
 24 brought to this case extensive experience in the area of consumer class actions and complex
 25 litigation, including specific experience litigating and settling cases regarding misleading
 26 advertising and unfair business practices.¹⁶ Class Counsel’s customary rates, which were used in

27 ¹⁵ Sobol Decl., ¶¶ 2-4, 12-21, Ex. A; Hattis Decl., ¶¶ 4-8, Ex. A; Yanchunis Decl., ¶¶ 1-8, 22.

28 ¹⁶ Sobol Decl., ¶¶ 2-4, 12-21; Hattis Decl., ¶¶ 3-8; Yanchunis Decl., ¶¶ 1-8.

1 calculating the lodestar here, are in line with prevailing rates in this District, have been approved
2 by courts in this District and other courts, and/or are paid by hourly-paying clients.¹⁷

3 **b. The Number of Hours That Class Counsel Worked is**
4 **Reasonable**

5 The accompanying declarations of Class Counsel also set forth the number of hours that
6 Class Counsel have worked in this litigation and describe the work performed. As set forth
7 therein, Class Counsel and their staffs have devoted a total of approximately 5,582 hours to this
8 litigation, and have a total unadjusted lodestar to date of approximately \$2,961,792.00.¹⁸

9 The number of hours that Class Counsel have billed is reasonable. *See Caudle v. Bristow*
10 *Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000) (counsel entitled to recover for all hours
11 reasonably expended). In order to be in a position to vigorously pursue this matter and evaluate
12 and negotiate the Settlement, Class Counsel were required to spend considerable time
13 investigating the factual issues involved, researching and analyzing applicable law and the
14 potential legal claims, and speaking with class members about their experiences. These efforts
15 continued throughout the course of the litigation. Class Counsel also engaged in extensive
16 discovery practice and contended with Defendants' motion to transfer venue and Defendants'
17 arbitration motions. Further, Class Counsel committed considerable time and resources to
18 preparing for settlement negotiations, including reviewing pertinent documents, analyzing
19 pertinent customer and sales data to assess class damages, and negotiating and finalizing the
20 settlement papers. Moreover, since reaching the Settlement, Class Counsel have spent significant
21 time working with the Settlement Administrator, media notice consultant, and TracFone
22 regarding the design and implementation of the notice program and claim process, and

23 ¹⁷ Sobol Decl., ¶¶ 27-28; Hattis Decl., ¶ 27; Yanchunis Decl., ¶ 23.

24 ¹⁸ Sobol Decl., ¶¶ 24-25, Ex. A; Hattis Decl., ¶¶ 24-25, Ex. A; Yanchunis Decl., ¶ 22. These
25 amounts do not include the additional time that Class Counsel will have to spend going forward
26 in obtaining final approval of, and implementing, the Settlement. Nor do these amounts include
27 time spent by non-Class Counsel firms who worked on this litigation, including Abington Cole &
28 Ellery, co-counsel of record in *Hansell* (reported lodestar of \$109,285.00, Dukelow Decl., ¶ 5);
and Robert C. Gilbert, P.C., who served as local counsel for the *Hansell* plaintiffs in the
pre-transfer *Browning* proceedings in the Southern District of Florida (reported lodestar of
\$13,668.75, Sobol Decl., ¶ 6). Although any fee allocation for these non-Class Counsel firms
would come from the fee awarded to Class Counsel, Class Counsel conservatively only base their
fee request on the time incurred by the three appointed Class Counsel firms.

1 coordinating with the FTC. *See supra* section II.B.¹⁹

2 To summarize, among other important tasks, Class Counsel spent substantial time in this
3 litigation: conducting factual investigation, speaking with Class Members, conducting legal
4 research, developing case strategy and discovery strategy, drafting complaints, drafting briefs and
5 other pleadings, propounding written discovery, taking depositions, reviewing and analyzing
6 thousands of documents produced by Defendants, preparing for and participating in settlement
7 negotiations, drafting settlement papers, working closely with the Settlement Administrator on the
8 design and implementation of the class notice program and claims process; and working closely
9 with Defendants and the FTC on how best to coordinate the Settlement and FTC Agreement.²⁰

10 These tasks were performed for the benefit of the Class, and contributed to the success
11 achieved. Moreover, the time spent on these tasks was reasonable. Further, Class Counsel made
12 every reasonable effort to prevent the duplication of work or inefficiencies.²¹

13 **4. The Fee Requested Represents a Modest 1.688 Multiplier on Class**
14 **Counsel's Lodestar**

15 Class Counsel request a fee of \$5 million, which represents a multiplier of approximately
16 1.688 on Class Counsel's total lodestar of \$2,961,792.00 incurred in this litigation. Such a
17 multiplier is well within the range of multipliers that courts in the Ninth Circuit and elsewhere
18 regularly approve. *See 3 Newberg on Class Actions* § 14.03 (multipliers "ranging from one to
19 four are frequently awarded in common fund cases when the lodestar method is applied"); *see*
20 *also, e.g., Vizcaino*, 290 F.3d at 1051 and Appendix (approving multiplier of 3.65 and citing cases
21 with multipliers ranging from 0.6 to 19.6, with most of the cases ranging from 1.0 to 4.0); *Van*
22 *Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298-99 (N.D. Cal. 1995) (multiplier of 3.6
23 was "well within the acceptable range for fee awards in complicated class action litigation").
24 Moreover, the circumstances here fully support the fee requested—including the strong monetary

25 ¹⁹ It is well established that in moving for fees, counsel is "not required to record in great detail
26 how each minute of his time was expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12
27 (1983). Instead, counsel need only "identify the general subject matter of his time expenditures."
28 *Id.* If the Court prefers to review Class Counsel's detailed time records, Class Counsel will make
them available for *in camera* review.

²⁰ Sobol Decl., ¶¶ 5-21; Hattis Decl., ¶¶ 9-22; Yanchunis Decl., ¶¶ 10-24.

²¹ Sobol Decl., ¶¶ 10-11; Hattis Decl., ¶ 15; Yanchunis Decl., ¶ 27.

1 result achieved for the Class; the valuable additional non-monetary benefits achieved (*i.e.*, the
 2 practice changes); the contingent nature of the fee; the challenges Class Counsel faced; the
 3 complexity of the issues involved; and the skill and effort demonstrated by Class Counsel. *Kerr*,
 4 526 F.2d at 70; *see also Wash. Pub. Power*, 19 F.3d at 1300 (“[C]ourts have routinely enhanced
 5 the lodestar to reflect the risk of non-payment in common fund cases.”).

6 **B. Class Counsel’s Reasonable Litigation Expenses are Recoverable**

7 Under well-settled law, Class Counsel are entitled to reimbursement of the expenses they
 8 reasonably incurred investigating and prosecuting this matter. *See Staton*, 327 F.3d at 974; *In re*
 9 *Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995) (citing *Mills v. Electric*
 10 *Auto-Lite Co.*, 396 U.S. 375, 391–92 (1970)). Pursuant to the Settlement, all litigation expenses
 11 awarded to Class Counsel will be separately paid by TracFone on top of the \$40 million
 12 Settlement Fund.

13 To date, Class Counsel have incurred a total of \$63,644.75 in out-of-pocket litigation
 14 expenses for which they seek reimbursement. This amount includes costs for mediation fees,
 15 transcripts, filing fees, legal research, process service, and postage. This amount does not include
 16 significant internal and other additional costs that Class Counsel incurred in this litigation but, in
 17 an exercise of discretion, do not seek to recover.²² The expenses for which Class Counsel seek
 18 reimbursement were reasonably necessary for the continued prosecution and resolution of this
 19 litigation, and were incurred by Class Counsel for the benefit of the Class with no guarantee that
 20 they would be reimbursed. They are reasonable in amount and the Court should approve their
 21 reimbursement.

22 **C. The Requested Service Awards for Plaintiffs Are Reasonable and Justified**

23 As the Ninth Circuit has recognized, “named plaintiffs, as opposed to designated class
 24 members who are not named plaintiffs, are eligible for reasonable incentive payments.” *Staton*,
 25 327 F.3d at 977; *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (service
 26 awards “are fairly typical in class action cases”). Such awards are “intended to compensate class
 27

28 ²² Sobol Decl., ¶¶ 29-31, Ex. B; Hattis Decl., ¶¶ 28-29, Ex. B; Yanchunis Decl., ¶¶ 25-26.

1 representatives for work done on behalf of the class [and] make up for financial or reputational
2 risk undertaken in bringing the action.” *Id.*; *see also Van Vranken*, 901 F. Supp. at 299-300.

3 The requested service awards here are reasonable and justified. In addition to lending
4 their names to these cases, and thus subjecting themselves to public attention, the named
5 Plaintiffs here were actively engaged. Among other things, they provided information to Class
6 Counsel, gathered documents, reviewed pleadings, stayed updated about the litigation, reviewed
7 and approved the proposed Settlement, and, in the case of one plaintiff, had their deposition
8 taken.²³ Their commitment is notable given the relatively modest size of their personal financial
9 stakes in this matter. *See Van Vranken*, 901 F. Supp. at 299 (“In exchange for his participation,
10 Van Vranken will not receive great personal benefit. He owns a moderately sized truck stop and
11 his claim makes up only a tiny fraction of the common fund.”).

12 Moreover, the \$2,500 awards requested here are well within the range of service awards
13 that courts have granted in similar circumstances. *See, e.g., Larsen v. Trader Joe’s Co.*, 2014 U.S.
14 Dist. LEXIS 95538, *33 (N.D. Cal. Jul. 11, 2014) (granting \$2,500 service awards); *Gould v.*
15 *Rosetta Stone, Ltd.*, 2013 U.S. Dist. LEXIS 138921, *19-22 (N.D. Cal. Sep. 26, 2013) (approving
16 service awards of \$5,000 and stating that “[i]n this district, a \$5,000 payment is presumptively
17 reasonable”) (citing cases).

18 **IV. CONCLUSION**

19 For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court
20 enter an Order: (a) awarding Class Counsel attorneys’ fees in the amount of \$5 million, plus
21 reimbursement of litigation expenses in the amount of \$63,644.75; and (b) awarding the
22 Plaintiffs service awards in the amount of \$2,500 each for their efforts and commitment on behalf
23 of the Class, with all such attorneys’ fees, expenses and service awards to be paid separately by
24 TracFone in addition to (*i.e.*, on top of) the \$40 million Settlement Fund in this action.

25
26
27 _____
28 ²³ *See* Declarations of David Hansell, Edward Tooley, Christopher Valdez, Mona Gandhi,
Marisha Johnston, Marshall Tietje, Martin Blaqmoor, and John Browning, filed herewith.

1 Dated: April 20, 2015

By: /s/ Michael W. Sobol

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