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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HEATHER TURREY, et al.,

Plaintiffs,

v.

VERVENT, INC., etc., et al.,

Defendants.

Case No. 3:20-cv-00697-DMS-AHG

CLASS ACTION

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS FOR CLASS REPRESENTATIVES

Date: **August 16, 2024**
Time: **1:00 p.m.**

District Judge Dana M. Sabraw
Courtroom 13A, 13th Fl. (Carter-Keep)
Magistrate Judge Allison H. Goddard
Chambers Room 3B, (Schwartz)

Complaint Filed: April 10, 2020
Trial Date: June 8, 2023

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I. INTRODUCTION

From the start, the case against the loan servicer and the related defendants was a difficult one. Plaintiffs faced daunting challenges, both legal and practical. They overcame all these challenges to obtain a jury verdict against Defendants Vervent, Inc., Activate Financial, LLC, and David Johnson. As a result, Plaintiffs are entitled to recoup fully their costs and to receive an award of a reasonable attorneys' fee. *See* 18 U.S.C. § 1964(c).

When Class Counsel took up this case, a series of prior actions by government agencies and the ITT bankruptcy trustee had marked PEAKS as a sham student loan program. Indeed, because of the fraud that was the reason to create the program, all PEAKS loan balances were cancelled and discharged six months into this litigation. But none of the prior litigation recovered the money paid by those few diligent student borrowers who made payments on these sham loans.[1]

The prospect of recovering any sum at all for this group of PEAKS borrowers was formidable. ITT, the prime actor in this fraud, was long gone and could not be sued. Deutsche Bank, another deep pocket that created the PEAKS program, protected itself through a forced arbitration clause that meant as a practical matter the Class could not obtain recovery against it. And Defendants were intent on defending the case by emphasizing their remoteness and peripheral participation and by repeatedly invoking the supposed "absurdity" of holding them liable for the PEAKS fraud—a theme that could resonate with a jury.

Stepping back and looking at what Class Counsel needed to accomplish to persuade a jury to return a liability verdict in this case is instructive.

[1] The unique status of this case was acknowledged in the ITT bankruptcy, where care was taken to exclude the putative class in this case from the broad release of claims obtained by the Trustee on behalf of borrowers. *See* Settlement Agreement, *In re ITT Educational Services Inc.*, No. 16-7207, Doc. 4110-1 at 13 (S.D. Ind. Oct. 21, 2020).

First, RICO's structure and language are difficult for lawyers to comprehend, let alone jury members.[2] Although the instructions were far more comprehensible than found in other cases, the jury instructions comprised some 14 pages on the RICO issues alone. Class Counsel not only had to get a jury to understand RICO generally, they also had to establish liability on the abstract concept of conspiracy liability under 18 U.S.C. § 1962(d). Even more challenging to the Plaintiffs' case was the necessity of connecting frauds that were targeted at federal taxpayers and ITT's investors to the injuries suffered by the PEAKS borrowers. Those borrowers obtained loans, after all.

Second, for a jury to understand the fraudulent object of the PEAKS conspiracy meant that the jury would have to understand ITT's business plan and the vital role federal financial aid played. More complicated still, the role that the 90/10 Rule

[2] Courts have long recognized the special complexity and difficulty RICO presents. Courts have recognized the difficulty of civil RICO litigation. *See Preferred Commc'ns v. City of L.A.*, No. 91-56018, 1994 U.S. App. LEXIS 760, at *7 (9th Cir. Jan. 7, 1994) ("RICO remains a difficult and often surprising area of the law…") (Kleinfeld, J., dissenting); *Cent. Distribs. of Beer v. Conn*, 5 F.3d 181, 186 (6th Cir. 1993) ("RICO is a difficult statute fraught with problems in its interpretation.") (Wellford, J., dissenting); *O'Malley v. N.Y.C. Transit Auth.*, 896 F.2d 704, 709 (2d Cir. 1990) ("Our circuit, like most others around the country, has had great difficulty with the RICO concepts of "pattern" and "enterprise"…); *Kyne v. Deloitte & Touche*, No. 92-6146, 1993 U.S. App. LEXIS 31536, at *9 (6th Cir. Dec. 2, 1993) ("The question of what activity constitutes a pattern under RICO is a notoriously difficult one to answer."); *CGC Holding Co., Ltd. Liab. Co. v. Hutchens*, No. 11-cv-01012-RBJ-KLM, 2017 U.S. Dist. LEXIS 220354, at *8, 10 (D. Colo. Dec. 18, 2017) ("RICO cases are difficult … RICO is a difficult statute to understand and to apply."); *Lucas-Cooper v. Palmetto GBA*, No. 1:05-cv-00959, 2006 U.S. Dist. LEXIS 51531, at *4–5 (N.D. Ohio July 27, 2006) ("RICO claims are not simple, common, or routine and even the most seasoned attorneys may find pleading a RICO claim difficult. RICO claims are very serious charges and can be very burdensome to all parties if they are pursued without a firm basis in law and fact."); *Henry v. Farmer City State Bank*, 127 F.R.D. 154, 156 (C.D. Ill. 1989) ("[S]ome aspects of RICO are difficult to deal with for attorneys and judges alike."); *Philatelic Found. v. Kaplan*, 647 F. Supp. 1344, 1347 (S.D.N.Y. 1986) ("The difficulties presented by RICO have been the subject of extensive review by the courts…").

played in that business plan. It required the jury to grasp how ITT could benefit from student loans that everyone involved knew would mostly not be repaid, and that ITT was willing to pay tens of millions of dollars in guaranteed payments—plus the $16 million in surreptitious "payments on behalf of borrowers"—to keep receiving billions in federal financial aid dollars.

Third, much of evidence concerning the fraudulent structure of the PEAKS program and of Defendants' culpable knowledge came from the dense program documentation underlying the program, such as the Servicing Agreement and the Private Placement Memorandum, and from mountains of data, like that in the Monthly Servicing Reports. Not only did this material require substantial analysis, but Plaintiffs also had to make it all understandable, not to mention convincingly probative of Defendants' knowing participation in a fraud. It was an enormous challenge to bring to life matters such as the PEAKS underwriting guidelines, ITT's control over loan servicing, and delinquency and default trends to pin liability against Defendants who joined the conspiracy more than a year after no further PEAKS loans were made.

Fourth, to prove their case, Plaintiffs' counsel had to make use of a great deal of complex financial and governmental evidence that did not directly implicate the Defendants and convince the jury that a fraud existed based largely on these documents. Class Counsel, meanwhile, had to thread the needle with evidence of regulatory actions brought against ITT by the Securities and Exchange Commission, ("SEC") the Consumer Financial Protection Bureau ("CFPB"), and multiple actions arising out of ITT's bankruptcy, which were admissible to prove Defendant's knowledge of the fraud. The evidentiary challenges to get this material admitted and explained to the jury were considerable, but the chief problem, one raised again and again by Defendants, was that these regulators and proceedings did not take any measures against the Defendants in this case or to recover money paid by Class Members. Plaintiffs ended up bearing the burden to prove that the lack of action

directed against the Defendants was not dispositive of their liability for the fraud.

Fifth, Defendants, while assuredly culpable, were hardly the most prominent or dominant of actors in the PEAKS loan scheme. Class Counsel had to face obvious jury skepticism wondering why ITT was not a Defendant or Deutsche Bank or the initial PEAKS program loan servicer. Class Counsel needed to persuade the jury to visit liability on Defendants, including Defendant Johnson, personally, when none was a principal operator of the underlying fraud.

Finally, it is one thing to successfully argue that, as a matter of law, RICO's conspiracy provision holds accountable service providers who come late to an alleged conspiracy, and who only play one role among many in the scheme. It is another altogether to persuade a jury to so find.

Nothing was easy in taking this case to that successful jury verdict. Even placing to one side discovery disputes and the tortured pleading and motion practice, the trial was arduous as Class Counsel strived to simplify and streamline and simplify it. It lasted seven days. Plaintiffs' main expert was cross-examined for three hours; the named plaintiffs were cross-examined at length, and in the case of Mr. Hernandez, over the course of two days. And the Court is well-aware of the motion practice and maneuvering that unfolded during trial itself. Through it all, Class Counsel had to keep the jury focused on difficult terrain.

On top of all that, very few RICO class actions are tried and even fewer are successful. Class Counsel achieved what very few lawyers in the country have ever done.

18 U.S.C. section 1964(c) mandates that Plaintiffs be awarded all their nontaxable expenses[3] and a reasonable attorneys' fee. Plaintiffs' fee request is reasonable. Class Counsel's lodestar of $5,061,915, which Class Counsel reduced for

[3] Plaintiffs have concurrently filed Rule 54(d)(1) bills of costs seeking $28,449.78 in taxable costs, separate from the request for $465,149.76 in nontaxable costs.

time spent on matters unrelated to the RICO claim, reflects the efficient prosecution of a challenging case from pre-complaint investigation through to jury verdict. Plaintiffs further request service awards for the class representatives of $25,000 (Ms. Turrey) and $20,000 (Mssr. Fiaty, Sazon and Hernandez) for their hard work and dedication to this case, including taking time off for depositions, attendance at settlement conferences, and appearances and testimony at trial.

II. HISTORY OF THE LITIGATION

A. Pre-Complaint Investigation, The Initial Complaint, Early Motions and Appellate Practice

Class Counsel began its investigative and analytic work in July 2019. Declaration of Irv Ackelsberg, ¶ 15. The pre-filing investigation involved interviewing PEAKS borrowers, analyzing transactional, loan, and securitization documents used to create and operate the PEAKS program, reviewing investment analyses of ITT as they related specifically to PEAKS, and reviewing the complaints filed against ITT by the CFPB, the SEC and the bankruptcy trustee. *Id.* As a result, well before filing an initial complaint, counsel had gained a detailed understanding of the fraudulent purpose and complex structure of the PEAKS program. *Id.* This pre-filing investigation allowed counsel to file an extraordinarily detailed initial complaint. *Id.*

In April 2020, Plaintiffs Jody Aliff, Marie Smith, and Heather Turrey filed the initial complaint. ECF 1. The complaint named Vervent, Activate, David Johnson, Christopher Shuler, and Laurence Chiavaro (the "Vervent Defendants"), and Deutsche Bank Trust Company Americas ("DBTCA") as defendants. Plaintiffs alleged violations of RICO, 18 U.S.C. § 1962(c) and (d); the Fair Debt Collection Practices Act, 15 U.S.C. § 1962, *et seq*. ("FDCPA"); Rosenthal Fair Debt Collection Practice Act, Cal. Civ. Code §§ 1788-1788.33 ("Rosenthal Act"); California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq*. ("UCL"); and negligent misrepresentation.

In July 2020, Defendants filed Fed. R. Civ. P. 12(b)(1) motions to compel arbitration in conjunction with efforts of DBTCA to enforce an arbitration provision in the PEAKS loan documentation. While the Court granted DBTCA's motion, it denied the motion of the Vervent Defendants, finding that the arbitration clause at issue did not encompass Defendants. *Aliff, et al. v. Vervent, Inc*., No. 20-cv-00697-DMS-AHG, 2020 U.S. Dist. LEXIS 175778 (S.D. Cal. Sept. 24, 2020). The Vervent Defendants appealed the Court's order denying their motion. ECF Nos. 45 and 51. Plaintiffs successfully opposed the appeal following briefing and oral argument before the Ninth Circuit. *Aliff*, 2021 U.S. App. LEXIS 37348 (9th Cir. Dec. 17, 2021). Throughout the course of the appeal, Plaintiffs were forced to litigate and successfully opposed Defendants' efforts to stay the underlying litigation. ECF Nos. 68 and 79.

B. Discovery

To prevail on the merits in this case, Class Counsel had to prove Defendants' liability from the circumstantial evidence revealing the extent of Defendants' knowledge of the fraudulent purpose underlying the PEAKS program from a variety of sources. This required extensive document discovery, educating themselves about relevant and esoteric aspects of the student loan industry, and deposition practice. Predictably, Plaintiffs' efforts were met with consistent resistance by Defendants. On several occasions, discovery disputes had to be resolved by Magistrate Judge Goddard. Ackelsberg Decl., ¶ 18.

Ultimately, hundreds of thousands of documents had to be reviewed and organized. *Id.* These documents included communications among conspirators, large databases and spreadsheets reflecting loan and servicing records, all the highly specialized and lengthy securitization and trust documents, and all manner of complex financial reports and records. Plaintiffs also took a number of depositions over the course of the case, including against two Rule 30(b)(6) deponents, employees of Vervent and Activate, and Defendants Chiavaro and Johnson. Each was critical to the development of the case and were used at or in preparation for trial.

Plaintiffs also engaged in significant third-party discovery. Plaintiffs obtained discovery from DBTCA, the architect of the PEAKS program, including a complete set of the PEAKS deal documents and copies of critical Monthly Servicing Reports. These reports enabled Class Counsel and their experts to reconstruct and analyze the history of all PEAKS borrower payments and defaults, as well as the fee revenue generated by Defendants and other parties, and to substantiate and ultimately prove the scale and importance of the guarantee payments by ITT. *Id.*, ¶¶ 17–18. Class Counsel also conducted document and deposition discovery of Boston Portfolio Advisors and its CEO, Thomas Glanfield, who first introduced Defendants to ITT. *Id.*, ¶ 18. It was through Glanfield that Class Counsel were able to uncover the extent of ITT's control over Defendants' servicing activities. This was essential to the effective questioning of Defendants Johnson and Chiavaro in deposition and later at trial. *Id.* Finally, through an arduous process, Class Counsel obtained discovery from the Access Group. *Id.* Access Group had processed all the PEAKS loan applications and was the initial servicer for PEAKS loans until Defendants took over that role in December 2011. In its continuing role as Trust Administrator until the loans were cancelled in October 2020, Access Group also received the End of Month data from Defendants and, using this data, generated the Monthly Servicing Reports for DBTCA and the PEAKS investors. *Id.* From Access Group, Plaintiffs (i) obtained missing End of Month reports that enabled a complete picture of loan-level payment and default activity during the class period and (ii) critically established the absence of any classwide origination documentation beyond what the Defendants had. *Id.*

On several occasions Class Counsel were forced to refer discovery disputes to the Magistrate Judge. For instance, as late as January 24, 2022, Magistrate Judge Goddard held a discovery conference at the parties' request to resolve disputes concerning Plaintiffs' request for TILA disclosure statements for Plaintiff Turrey; communications sent to Plaintiff Turrey by Vervent; information concerning Defendant Johnson's LLCs that performed services in connection with the SEC and

CFPB's investigations; information concerning Defendants' additional projects for ITT that were proposed but never came to fruition; and the parties' dispute over Defendants' blanket confidential designations. Declaration of Timothy G. Blood ("Blood Decl."), ¶ 23. Indeed, Class Counsel did not receive many of these documents until long after discovery formally ended and only where the Court reiterated its previous orders requiring Defendants to comply with discovery requests and deadlines.

C. Defendants' Ongoing Efforts to Pick Off Class Representatives

Efficiency and timeliness in this case were severely impeded by Defendants' effort to kill the case through targeted settlements with named plaintiffs. Well aware that ex-students of ITT tended to be people at the economic margins, Defendants offered substantial individual settlements in order to pressure Plaintiffs to settle and ending their class liability on the cheap. This strategy of "picking off" named plaintiffs wreaked havoc on the orderly prosecution of the case. Following their depositions in June of 2021, Defendants tendered individual settlement offers to Plaintiffs Aliff, Turrey and Smith. Blood Decl., ¶ 14. Plaintiffs Aliff and Smith accepted. Plaintiff Turrey, at considerable risk to herself, refused to be bought off even though she knew very well there was no guaranty of any recovery at all or, even in the case prevailing, of a recovery equal to what Defendants were offering at that time. Plaintiffs Aliff and Smith voluntarily dismissed their claims in August 2021. ECF Nos. 89 and 90. This left Plaintiff Turrey as the only class representative, but she had standing for only some of the alleged claims. *Id.*

Plaintiffs had to move to amend the Complaint in July 2021 to add new class representatives and to add new allegations based on information learned through discovery. ECF No. 84. Defendants opposed Plaintiffs' motion for leave to amend even though their "pick off" strategy created the need to add new plaintiffs. ECF No. 94. As expected, Defendants quickly tendered settlement offers to the newly added plaintiffs, Philip Hernandez and Tara Chambers. Both accepted, again leaving Ms.

Turrey as the sole class representative. Blood Decl., ¶ 21.

In September 2022, Plaintiffs once again moved to amend to replace Plaintiffs Philip Hernandez and Tara Chambers with Plaintiffs Oliver Fiaty, Jordan Hernandez and Jeffrey Sazon, as well as to conform some of the legal claims to newly acquired information from on-going discovery. ECF No. 133. Defendants again opposed Plaintiffs' motion. ECF No. 136. Ultimately, the Court partially granted Plaintiffs' motion, permitting most of the requested amendments. ECF No. 140.

D. Multiple Motions for Class Certification and Motions for Summary Judgment

A considerable portion of the time expended by counsel was due to the aggressive motion practice engaged in by Defendants. Plaintiffs initially moved for class certification in July 2021 based on their then pending motion to amend the complaint. ECF No. 87. Despite ongoing discovery, Defendants elected to file what would be their first motion for summary judgment on the incomplete record. ECF No. 85. Then, five months later, after the Court granted Plaintiffs' pending motion to amend, Defendants filed a Rule 12(b)(6) motion in December 2021 only to withdraw it in January 2022, shortly before Plaintiffs had finished drafting their responsive brief. ECF Nos. 100 and 104. The Court then stayed Plaintiffs' motion for class certification pending resolution of the original motion for summary judgment. ECF No. 111.

In March 2022, the Court held oral argument on Defendants' motion for summary judgment. Blood Decl., ¶ 24.[4] In August 2022, the Court effectively denied Defendants motion for Summary Judgement. *Aliff*, 2022 U.S. Dist. LEXIS 150672 (S.D. Cal. Aug. 22, 2022).

[4] Reflecting the manner of litigation engaged in by Defendants, shortly after argument on the Motion for Summary Judgment, Defendants filed a "Supplemental Brief Regarding Misrepresentations Made During the March 4, 2022 Hearing," to which Plaintiffs moved to strike on that same day. ECF Nos. 122 and 123.

In October 2022, Plaintiffs filed an amended motion for class certification, seeking certification of the same classes and claims as in their first motion, *see* ECF No. 87, but with the newly added plaintiffs replacing those who had voluntarily dismissed their claims. ECF No. 143. In January 2023, the Court granted Plaintiffs' motion for class certification, declining only to certify the debt collection claims against Defendant Johnson. *Aliff*, 2023 U.S. Dist. LEXIS 5500 (S.D. Cal. Jan. 11, 2023).

With the Class certified and trial approaching, on February 24, 2023, Defendants filed a second motion for summary judgment. ECF No. 158. That motion largely reiterated arguments that the Court had denied as the basis for their previous motion *Id*. Yet more briefing and more time was consumed. Then, in their reply in support of their motion, Defendants attached third-party documents that had never been produced (and long past the discovery deadline) and about which no Rule 26(a)(1) disclosures had been made. This was vexing because these were the same documents that Plaintiffs had sought pursuant to a subpoena against Access Group but had never received. Plaintiffs then moved to strike Defendants' use of undisclosed documents or, alternatively requested leave to file a surreply. Yet more briefing ensued. The Court granted Plaintiffs' motion for leave to file their surreply, denied their motion to strike, and denied Defendants' second motion for summary judgment. *Aliff*, 2023 U.S. Dist. LEXIS 69654 (S.D. Cal. Apr. 20, 2023). The case now seemed cleared for trial.

On April 26, 2023, days before the parties' pretrial order was due and a week before motions *in limine* were due, Defendants next moved to modify the operative scheduling order to allow them to file a motion to decertify the class. ECF No. 181. On April 28, 2023, the Court ordered briefing on Defendants' motion to modify and their motion to decertify the class. ECF No. 183. Plaintiffs filed their opposition to both motions just a week later, on May 5, 2023. ECF No. 189. Plaintiffs prevailed.

The Court denied Defendants' motions to modify and to decertify the class on May 12, 2023, and the case proceeded to trial. ECF No. 193.

E. Expert Reports, Discovery, and Litigation

Experts were essential to the successful litigation of this case. Class Counsel retained five experts over the course of the litigation. These have included both consulting experts and testifying experts.

Early on, Class Counsel retained Kevin Byers. Mr. Byers is a CPA, who Plaintiffs engaged to perform some preliminary forensic accounting, the PEAKS transaction documents, SEC filings and some investment analyses of ITT that he was able to locate.

Class Counsel retained two experts to support their first motion for class certification filed in September 2021. These experts included Heather Wilson, CPA, a forensic accountant employed by the accounting firm Marcum LLP, and Sandy Baum, Ph.D., professor emerita of economics at Skidmore college and a senior fellow at the Urban Institute in Washington, D.C., whose academic focus is higher education finance, including student loans. Both Ms. Wilson and Dr. Baum submitted declarations in support of Plaintiffs' original motion for class certification. ECF 87-10; ECF 87-11.

As trial approached, Class Counsel sought out testifying experts with more specific experience in aspects of student loans and the student loan industry at issue in the case who also could effectively communicate with a jury. In the fall of 2022, Class Counsel retained Persis S. Yu, J.D., an expert in the student loan industry and its regulatory environment, including specific expertise in the regulatory history surrounding ITT. They also hired Thomas D. Cooper, CPA, an expert in accounting, securitization, and loan servicing, who worked previously for Sallie Mae, at the time the nation's largest originator and servicer of private student loans. Blood Decl., ¶ 26. Class Counsel met with Ms. Yu and Mr. Cooper repeatedly through the development of their expert reports to ensure they had access to the facts relevant to the case and

that their analysis focused on the claims at issue. Ms. Yu and Mr. Cooper, in turn, analyzed the reports prepared by Defendants' experts. Class Counsel spent significant time preparing Ms. Yu and Mr. Cooper for their depositions. And Ms. Yu and Mr. Cooper also spent significant time preparing for trial with the help of Class Counsel. Finally, both Ms. Yu and Mr. Cooper testified on matters essential to Plaintiffs' RICO claims.

Class Counsel also had to respond to Defendants' expert reports. Defendants disclosed one expert witness at the initial expert deadline, David Harmon, a private student loan industry insider. On the deadline for rebuttal reports, Defendants disclosed another expert, Xiaoling Lim Ang, Ph.D., whose report purported to respond to an expert report on damages which was never filed. While the Court granted Plaintiffs' motion to strike Dr. Ang, ECF No. 193, Class Counsel still had to expend time and resources reviewing his proposed testimony and preparing motion papers to strike his proposed testimony.

Class Counsel deposed Mr. Harmon and later cross-examined him at trial. Class Counsel spent significant time researching Mr. Harmon's history as the CEO of a student loan servicer, which yielded useful material for cross examination. Class Counsel also researched the materials cited in his report and deposition which, in some cases, directly contradicted his testimony and which Class Counsel raised effectively on cross-examination.

F. Settlement Efforts

From its inception, Defendants took the position that this litigation, and particularly the RICO claim, were patently without merit. Their posture marred efforts to settle the case. Though Defendants never backed away from their dismissive attitude about the case, Class Counsel nevertheless made good faith efforts to resolve the dispute through mediation. In January 2021, the parties participated in their first mediation session with Magistrate Judge Allison H. Goddard, and a second mediation session in February of that year. Blood Decl., ¶ 11. Settlement negotiations were

unsuccessful. *Id.*

Formal settlement efforts did not restart until January 2023 when the parties attended another settlement conference with Magistrate Judge Goddard. A month later, in an effort to break the impasse, the parties engaged in a full-day, private mediation session in Los Angeles, CA, with Robert A. Meyer, Esq. These efforts, however, were unsuccessful. *Id*., ¶ 30.

As trial loomed, in March 2023, Magistrate Judge Goddard held another mandatory settlement conference. *Id*., ¶ 32. She held another one just two weeks before trial, on May 26, 2023. The parties attended one last pretrial mandatory settlement conference with Magistrate Judge Goddard on May 31, 2023, one week before trial but this was unsuccessful as well. *Id.*, ¶ 40. Throughout, Judge Goddard continued to foster negotiations outside of formal settlement conferences, primarily through phone calls and email. *Id.*

G. Pretrial Motions, Trial Preparation, Trial, and Post-Trial

As trial approached, Class Counsel began the laborious task of trial preparation in earnest with the attendant huge expenditure of funds and attorney time. Blood Decl., ¶ 41.

The case had the potential to be sprawling. There were numerous issues and storylines that could have been pursued. But Class Counsel cut, focused and simplified the case, developing strong themes that would resonate with a jury and not overwhelm it. Through their preparatory and theme building work, they also knew the trial had to be condensed and that shorter was a key to success. With a strong sense of what a trial should look like, they approached the rest of pretrial and trial matters with these themes in mind. *Id.*

This also case warranted substantial pretrial motion practice, including five motions *in limine* per side, *Daubert* motions to exclude all three remaining experts on both sides, and an additional motion by Defendants to exclude testimony of absent class members. Accordingly, Class Counsel spent significant hours preparing for trial

including reviewing exhibits, creating exhibit lists, objecting to Defendants exhibit lists, determining witness lists, preparing for witnesses, creating deposition video clips for use at trial, developing an opening argument and related visual exhibits, coordinating with the Court and Defendants over administrative matters, researching and drafting a trial brief and jury instructions, negotiating with Defendants over the trial brief and jury instructions, retaining and coordinating with trial services technology vendors, and other miscellaneous tasks.

Trial began on June 8, 2023. At trial, Plaintiffs called the four named Plaintiffs as witnesses, as well as five Defendant witnesses, and two expert witnesses. Plaintiffs also cross-examined Defendants' expert witness. The trial lasted seven days. Over the course of trial, the parties disputed several legal issues which required resolution by the Court, including a Rule 50(a) motion which Plaintiffs prevailed on. The parties delivered their closing arguments on June 20, 2023. The jury deliberated for three days and sent multiple questions to the Court, one of which required briefing on an issue concerning the *mens rea* applicable to RICO liability. *See* ECF Nos. 291–292. On June 22, 2023, the jury returned a verdict in favor of Plaintiffs on their RICO claim as to Defendants Vervent, Activate, and Johnson, and in favor of Defendant Chiavaro. ECF No. 300. The jury awarded Plaintiffs and the Class $4,000,000, pre-trebling.

At the conclusion of trial, the Court scheduled a bench trial on Plaintiffs' UCL claim to take place on July 24, 2023. ECF No. 302. The bench trial was continued on multiple occasions. Plaintiffs' UCL claim was heavily briefed. The parties filed their opening briefs on July 18, 2023, ECF Nos. 312 and 314, a second round of briefs on September 6, ECF Nos. 334 and 335, and a third round on September 13. ECF Nos. 335 and 336. In the interim, on July 25, 2023, Plaintiffs filed a motion to amend the judgment pursuant to Fed. R. Civ. P. 59(e), ECF No. 313, and a motion for leave to amend the second amended complaint ECF No. 322. The Court held oral argument on the motion for leave to amend on August 24, 2023, and, on September 29, 2023, the Court denied Plaintiffs' motion to amend and dismissed Plaintiffs' UCL claim

pursuant to *Guzman v. Polaris Industries, Inc*., 49 F.4th 1308, 1314 (9th Cir. 2022).

On November 14, 2023, the Court denied Plaintiffs' motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). ECF No. 345.

On June 18, 2024, the Court entered final judgment against Defendants Vervent, Activate, and Johnson in the amount of $12 million, "plus attorneys' fees and costs in an amount yet to be determined." ECF No. 351.

III. PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES AND EXPENSES

A. Legal Standard

Section 1964(c) of RICO provides that the prevailing plaintiff "shall" be entitled to recover its fees and costs, meaning that "'[a]n award of reasonable attorney's fees and expenses is mandatory for the RICO claim and claims related to it." *Monex Deposit Co. v. Gilliam*, No. SACV 09-287 JVS (ANx), 2010 U.S. Dist. LEXIS 65660, at *19 (S.D. Cal. June 1, 2010); *Valadez v. Aguallo*, No. C 08-03100 JW, 2009 U.S. Dist. LEXIS 144987, at *10 (N.D. Cal. Dec. 9, 2009) (collecting cases); *see also United Healthcare Corp. v. Am. Trade Ins. Co., Ltd.*, 88 F.3d 563, 575 (8th Cir. 1996) (language of § 1964(c) "indicates that an award of reasonable attorney's fees and costs under RICO is mandatory, and several courts of appeals have so held") (citations omitted); *Uniroyal Goodrich Tire Co. v. Mut. Trading Corp*., 63 F.3d 516, 525 (7th Cir. 1995) (successful RICO plaintiff's "entitlement to attorneys' fees cannot be disputed").

Under RICO and other fee-shifting statutes, "[t]he determination of reasonableness of an attorney's fees request is typically guided by the lodestar method." *Monex Deposit Co. v. Gilliam*, No. SACV 09-287 JVS (ANx), 2010 U.S. Dist. LEXIS 65767, at *8–9 (C.D. Cal. May 24, 2010); *Oxina v. Lands' End, Inc*., No. 14cv2577-MMA (NLS), 2016 U.S. Dist. LEXIS 191738, at *11 (S.D. Cal. Dec. 2, 2016). "The lodestar calculation begins with the multiplication of the number of hours reasonably expended by a reasonable hourly rate." *In re Hyundai & Kia Fuel Econ.*

Litig., 926 F.3d 539, 570 (9th Cir. 2019). The lodestar figure is "presumptively reasonable." *Named Plaintiffs & Settlement Class Members v. Feldman (In re Apple Inc. Device Performance Litig.)*, 50 F.4th 769, 784 (9th Cir. 2022). "The most critical factor is a party's success in the litigation because the fee award should be "reasonable in relation to the results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

The Supreme Court has emphasized that courts need not "achieve auditing perfection" or "become green-eyeshade accountants." *Fox v. Vice*, 563 U.S. 826, 838 (2011). Rather, because the "essential goal in shifting fees [] is to do rough justice," the court may "use estimates" or "take into account [its] overall sense of a suit" to determine a reasonable attorney's fee. *Id*.

B. The Rates Proposed by Plaintiffs Are Reasonable for Attorneys of Their Skill, Experience and Reputation

Reasonable hourly rates are determined by prevailing market rates in the relevant community, frequently where the district court sits. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Class Counsel are entitled to the hourly rates charged by attorneys of comparable skill, experience, and reputation engaged in complex litigation in this District. *See Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454–55 (9th Cir. 2010) (analyzing *Blum*). "The difficulty and skill level of the work performed, and the result achieved—not whether it would have been cheaper to delegate the work to other attorneys—must drive the district court's decision." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008).

Class Counsel's lodestar is calculated using rates accepted in numerous other class action cases. *See, e.g.*, Blood Decl., ¶¶ 71–72; Ackelsberg Decl., ¶ 36; *see also Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 696 (9th Cir. 1996) (declarations regarding the prevailing rate in the relevant community suffice to establish a reasonable hourly rate). These rates range from $550 to $960 for partners and $550 to $575 for associates.

Class Counsel's rates also compare with rates approved by other trial courts in

class action litigation and by what attorneys of comparable skill charge in this District. *See, e.g.*, *In re Outlaw Labs., LP Litig.*, No. 18-cv-840-GPC-BGS, 2023 U.S. Dist. LEXIS 180097, at *20 (S.D. Cal. Oct. 5, 2023) (approving $996 for partners); *Lopez v. Mgmt. & Training Corp.*, No. 17cv1624 JM(RBM), 2020 U.S. Dist. LEXIS 70029, at *24–25 (S.D. Cal. Apr. 20, 2020) (approving attorneys' fee request with rates ranging from $500 to $900 per hour); *McGrath v. Wyndham Resort Dev. Corp.*, No. 15cv1631 JM (KSC), 2018 U.S. Dist. LEXIS 16095, at *7–10 (S.D. Cal. Jan 30, 2018) (approving rates ranging from $450 to $850).

Class Counsel have submitted declarations attesting to their hourly rates, their experience, and describing their efforts to prosecute this litigation. Their hourly rates are reasonable.

C. The Hours Expended by Class Counsel Are Reasonable

The number of hours spent by Class Counsel is reasonable given the efforts needed to obtain the jury verdict and judgment. This litigation has been hard-fought and expensive. *See* § II above. It involved sophisticated legal issues and complex fact patterns. It required substantial briefing, much of it occasioned by the need to respond to Defendants' tactic of repeating arguments multiple times after they had been rejected by the Court. And it included the extensive preparations necessary for a seven-day class action trial on a civil RICO conspiracy claim, where Class Counsel took a potentially sprawling litigation and narrowed and focused the far-flung facts and numerous actors involved in the massive ITT scheme. Narrowing and focusing takes a great deal of time and effort.

RICO class action trials demand an enormous amount of preparatory work. This was true in this case. Class Counsel have not included all time spent on the litigation, but only that time benefiting the recovery in this action. *See* Blood Decl., ¶ 75; Ackelsberg Decl., ¶¶ 39–40. Class Counsel eliminated the time spent on the DBTCA claims, the post-trial briefing on Plaintiffs' UCL claim, the motion to alter or amend the judgment, and the motion for leave to amend the Second Amended

Complaint. Blood Decl., ¶ 75; Ackelsberg Decl., ¶ 40. The amount requested captures the actual hours spent on prosecuting the RICO claims. The resulting 6,660.40 hours spent by Class Counsel are thus conservative and reasonable.

D. Class Counsel Achieved an Exceptional Result for the Class

In determining the reasonableness of a fee request, the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (same); *Lanard Toys v. Dimple Child LLC*, 843 Fed. Appx. 894, 898 (9th Cir. 2021) (same). Here, Class Counsel battled for years with formidable adversaries and prevailed in a complex and difficult trial against three of four defendants. This factor alone justifies the requested fee award.

After years of contentious litigation involving a motion to dismiss and an appeal, class certification, two summary judgment motions, a motion for judgment on the pleadings, *Daubert* motions, substantial party and third-party discovery, a motion to decertify, and a seven-day jury trial, Class Counsel obtained a unanimous jury verdict finding that Defendants Vervent, Activate, and David Johnson violated RICO's conspiracy provision, 18 U.S.C. § 1962(d).

Although Plaintiffs alleged other violations of law, including FDCPA, Rosenthal Act, and negligent misrepresentation, Plaintiffs' 18 U.S.C. section 1962(d) claim, RICO's conspiracy provision was the heart of this litigation. The facts Class Counsel developed applied to the RICO claim, along with the other claims. Before trial, the parties devoted most of their attention to the RICO claim in discovery and in motion practice. And the RICO claim was the central focus during the jury trial. Facts needed to establish the other claims were also facts needed to establish Plaintiffs' RICO claim.

The Court ultimately awarded $12,000,000 to the Class, an excellent result in a difficult and complex case.

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E. Class Counsel Provided High-Quality Work Which Required Significant Time and Skill

Class Counsel have produced high-quality work throughout the litigation that took time, skill, persistence, and a high tolerance for risk.

Defendants retained a large, capable white shoe law firm to represent them. Defendants are well insured and mounted an aggressive defense.

Class Counsel have spent approximately 6,660.40 hours on this litigation, excluding the time not related to development of the RICO claim. *See* § III.C, *supra* (detailing time excluded). Class Counsel have reviewed all of their time entries to ensure their accuracy and can make them available if the Court wishes. Blood Decl., ¶ 64.

Class Counsel persevered through Defendants' motion to dismiss, class certification, Defendants' multiple rounds of summary judgment, a motion to decertify the class, a motion for judgment as a matter of law, six class representative depositions, Defendants' pick-off tactics which necessitated finding substitute class representatives in short order, depositions of Defendants' current and former employees, officers and executives, the CEO of an entity that consulted ITT Tech on the PEAKS loan program, and retained experts. Class Counsel retained experts who were highly qualified and who are authorities in their field.

The skill and tenacity of Class Counsel were tested throughout this litigation and it resulted in an exceptional recovery for the Class that justifies the requested attorneys' fee award.

F. Class Counsel Assumed Substantial Risk

Perhaps the greatest indicator of risk is that so few civil RICO class actions are successfully tried. Yet Class Counsel willingly took on the challenge. The RICO claim was not a secondary claim, but the primary claim driving the litigation from the outsell.

Further, the risk and expense of the action also support the proposed fee award. Plaintiffs brought their RICO claim under RICO's conspiracy provision, 18 U.S.C. section 1962(d), which required an understanding of 18 U.S.C. section 1962(c). Plaintiffs bore a difficult burden of proving the requisite *mens rea*, *i.e.*, that Defendants facilitated the PEAKS enterprise while knowing that the purpose of the PEAKS loan program was to falsify ITT's compliance with the 90/10 Rule. In the face of a vigorous defense that dismissed as frivolous the notion that Defendants could be guilty of chargeable federal crimes, Plaintiffs met their burden that primarily relied on circumstantial evidence, including Defendants' officers' and executives' business backgrounds, the extraordinary characteristics of the PEAKS loan program itself, and Defendants' awareness of the lawsuits focusing on the PEAKS loan program.

In addition to proving the requisite knowledge, Plaintiffs also needed to establish all other elements of 18 U.S.C. § 1962(c), including proving the existence of a conspiracy, an enterprise, underlying racketeering activity, and that the activities of the enterprise affected interstate commerce.

Plaintiffs met their burden even with critical co-conspirators absent at trial, including ITT Tech and its executives, DBTCA, and Access Group (the original PEAKS loan servicer).

Plaintiffs overcame numerous arguments Defendants made to the jury, including that they were merely conducting normal and legal loan servicing activities, that Class Members nonetheless needed and received the loans to pay their tuition, that despite numerous governmental investigations into ITT and PEAKS no public agency ever sued them or ordered them to halt collecting on PEAKS loans, that they were contractually obligated to continue servicing and collecting the PEAKS loans, that Plaintiffs and members of the Class received ITT degrees and therefore received value from their PEAKS loans, and that Defendants never retained Plaintiffs' and Class members' loan payments. Plaintiffs also overcame Defendants' last-minute disclosure of TILA documentation, which Defendants argued served as proof of the

PEAKS loan program's legitimacy and also as grounds for decertifying the class.

This case in particular presented the parties and the Court with challenging legal, factual, and evidentiary issues related to RICO liability including but not limited to conspirator liability, causation, the statute of limitations, the application of a deliberate ignorance standard, the existence of a civil RICO enterprise where no criminal RICO charges had been filed, the use of normal business practices as a cover for illegal RICO activities, and the relevance and admissibility of government investigations to prove knowledge, and the admissibility of conspirator statements and government reports to prove the underlying enterprise. These issues were briefed and argued before the Court, and Class Counsel's skill and sophistication were critical to their ability to prevail on the RICO claim and the attendant legal, factual, and evidentiary issues related to it.

Class Counsel faced these difficulties and risks but prevailed. They should be compensated for their efforts.

G. Class Counsel Prosecuted the Case Purely on a Contingency Basis

That Class Counsel "took this case on a contingency fee basis and assumed the contingent risk of non-payment [] weighs in favor of" the requested fee award. *Figueroa v. Capital One, N.A.*, No. 18cv692 JM(BGS), 2021 U.S. Dist. LEXIS 11962, at *26 (S.D. Cal. Jan. 21, 2021); *see also* Blood Decl., ¶ 53; Ackelsberg Decl., ¶ 12. "It is an established practice in the private legal [world] to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994); *accord Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 261 (N.D. Cal. 2015) ("[W]hen counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award.") The work done here deserves a multiplier of the lodestar. However, Class Counsel do not request one unless the Court were to reduce either the number of hours or hourly rates requested.

Class Counsel undertook the litigation solely on a contingent basis with no guarantee of recovery. *See* Blood Decl., ¶ 53; Ackelsberg Decl., ¶ 12. Despite such risk, Class Counsel obtained a final judgment that provides an excellent result for the Class.

H. Plaintiffs' Expenses Are Reasonable and Compensable

18 U.S.C. § 1964(c) of RICO provides that the injured party shall recover "the cost of the suit." *See also In re Outlaw Labs.*, 2023 U.S. Dist. LEXIS 180097, at *36. "This permits recovery of standard out-of-pocket litigation expenses, such as printing and legal research, as well as costs that are normally non-taxable, such as travel expenses." *Id.*; *see also Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 580 (9th Cir. 2010) ("[W]e repeatedly have allowed prevailing plaintiffs to recover non-taxable costs where statutes authorize attorney's fees awards to prevailing parties.") The Federal Rules of Civil Procedure also provide for expenses. *See* Fed. R. Civ. P. 54(d) (costs "should be allowed to the prevailing party"); Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law …").

Class Counsel's claimed nontaxable litigation expenses are itemized in exhibits to Class Counsel's declarations, totaling $465,149.76. *See* Blood Decl., Exs. C–K; and Ackelsberg Decl., Ex. B. Class Counsel incurred these costs for, *inter alia*, expert fees, deposition costs, mediation fees, electronic discovery database support, issuing class notice, filing and service of process, travel, online research, photocopies, postage, telephone charges, and the jury trial. *See* Blood Decl., ¶¶ 78–82; Ackelsberg Decl., ¶¶ 45–46; Declaration of Sharon Grace, ¶ 14. Class Counsel exercised discretion in selecting which costs are justified as reasonable litigation expenses and thus claim less than Class Counsel's total out-of-pocket expenses in this matter. *See* Blood Decl., ¶ 79.

IV. THE CLASS REPRESENTATIVE SERVICE AWARDS SHOULD BE APPROVED

Class Counsel apply for service awards in the amount of $25,000 for Plaintiff Turrey and $20,000 each for Plaintiffs Fiaty, Hernandez, and Sazon, to be paid directly by Defendants separately from the amount awarded to the Class. Service awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp*., 563 F.3d 948, 959 (9th Cir. 2009); *id.* at 958-59 ("Incentive awards are fairly typical in class action cases," and are "generally sought after a settlement or verdict has been achieved.") (Emphasis removed).

The Ninth Circuit has "repeatedly held that 'reasonable incentive awards' to class representatives 'are permitted,'" *In re Apple Inc. Device Performance Litig*., 50 F.4th at 785 (9th Cir. 2022) (citing *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1057 (9th Cir. 2022)), "and the Supreme Court recently acknowledged that '[a] class representative might receive a share of class recovery above and beyond her individual claim' through an incentive award." *Id.* (citing *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018)).

Plaintiff Turrey served as a class representative throughout the entirety of the litigation, promptly responded to correspondence from Class Counsel, sat for a deposition, responded to written discovery, and testified at trial. In turning down Defendants' multiple settlement "pick off" efforts, Plaintiff Turrey acted as a model class representative who acted in the best interests of her fellow class members.

Plaintiffs Fiaty, Hernandez, and Sazon each stepped forward on short notice to replace the plaintiffs who had accepted Defendants' settlement offers. They quickly familiarized themselves with the case, sat for depositions—sometimes during the weekend—spent substantial time preparing for trial, and testified at trial. They, along with Ms. Turrey, were invaluable to the success of this litigation.

The $25,000 service award requested for Plaintiff Turrey and $20,000 service awards for Plaintiffs Fiaty, Hernandez, and Sazon are well within the acceptable range and should be approved. *See, e.g.*, *Montera v. Premier Nutrition Corp.*, No. 16-cv-06980-RS, 2022 U.S. Dist. LEXIS 190146, at *14 (N.D. Cal. Oct. 18, 2022) (approving $25,000 service award to plaintiff who attended and testified at trial); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821 - IEG (BLM), 2010 U.S. Dist. LEXIS 53416, at *4 (S.D. Cal. June 1, 2010) (approving $25,000 service award to class representative); *Louie v. Kaiser Found. Health Plan, Inc.*, No. 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008) (approving service awards of $25,000); *Hose v. Wash. Inventory Serv.*, No. 14-cv-2869-WQH-AGS, 2020 U.S. Dist. LEXIS 117242, at *51 (S.D. Cal. July 2, 2020) (approving service award of $20,000).

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant this motion.

Respectfully submitted,

Dated: June 27, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury that the foregoing is true and correct. Executed on June 27, 2024.

s/ Timothy G. Blood

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