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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE LITHIUM ION BATTERIES ANTITRUST LITIGATION	Case No. 13-MD-02420 YGR (DMR) MDL No. 2420
This Documents Relates to: ALL INDIRECT PURCHASER ACTIONS	INDIRECT PURCHASER PLAINTIFFS' RESPONSE TO OBJECTIONS TO REVISED DISTRIBUTION PLAN DATE ACTION FILED: Oct. 3, 2012

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I. INTRODUCTION

As ordered by the Court, Indirect Purchaser Plaintiffs (IPPs) recently provided notice of the Court's intent to direct that "*all* of the IPP settlements are subject to the same specific plan of distribution"—meaning, the 90/10 split of the settlement between class claimants from repealer and non-repealer states, respectively.[1] Of millions of class members nationwide who received notice, just six objections have been filed, mostly from the small cadre of prior objectors in this litigation.[2] Under Ninth Circuit law, the favorable "reaction of the class members to the proposed settlement" supports the Court's decision to make the 90/10 allocation.[3]

Of the few objections, many are conclusory, misapprehend the limited purpose of the notice, or fail to satisfy Rule 23's particularity requirement.[4] Bearing in mind the Court's obligation to "give a reasoned response" only to "all non-frivolous objections," not to every granular statement in an objection, IPPs focus their response on the principal objections.[5]

The objectors mainly question whether the Court may apply the 90/10 allocation to all three settlement rounds and, if applied, the fairness, adequacy and reasonableness of a 90/10 allocation. As the Court already determined, however, it has the discretionary authority to divide the settlement proceeds in this fashion, instead of *pro rata* for both repealer and non-repealer states. The anecdotal

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[1] Order Directing Further Notice Regarding Settlement Distribution Plan ("Order Directing Further Notice") at 6, Aug. 27, 2020, ECF No. 2651; *see also* Notice of Notice Plan for Revised Settlement Distribution Plan, Sept. 10, 2020, ECF No. 2653.

[2] Objection of Matthew Erickson ("Erickson Obj."), Oct. 2, 2020, ECF No. 2659; Christopher Andrews's Objection to the Distribution Plan ("Andrews Obj."), Oct. 13, 2020, ECF Nos. 2660, 2663; Objection of Steven F. Hefland (Hefland Obj."), Oct. 15, 2020, ECF No. 2662; Objection of Aryeh Katz, ("Katz Obj."), Oct. 29, 2020, ECF No. 2666; Michael Frank Bednarz's Objections Regarding Distribution ("Bednarz Obj."), Nov. 16, 2020, ECF No. 2668; Objection of Edward W. Orr, Nov. 17, 2020, ECF No. 2669.

[3] *Campbell v. Facebook, Inc*., 951 F.3d 1106, 1121 (9th Cir. 2020); *see also Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 834 (N.D. Cal. 2017) (discussing further Ninth Circuit authority).

[4] "The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also *state with specificity the grounds for the objection*." Fed. R. Civ. P. 23(e)(5)(A) (emphasis added); *see, e.g., Kim v. Tinder, Inc.*, No. CV 18-3093-JFW(ASX), 2019 WL 2576367, at *10 (C.D. Cal. June 19, 2019) (particularity requirement not satisfied by "boilerplate objections").

[5] *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotation marks and citation omitted).

objections contesting the fairness of a 90/10 split, as allocating either too much or too little to each group, only underscore that this distribution falls within the range of reasonableness and thus within this Court's discretion.

II. REPORT ON THE EFFECTIVENESS OF NOTICE DISTRIBUTION

This Court requested that class counsel provide an update on the "effectiveness of the notice distribution."[6] In its August 27, 2020 Order Directing Further Notice, the Court ruled that "the fairest path forward is to notify all IPP Settlement class members that the Court intends to exercise its discretion to provide a plan of allocation and distribution of the settlement funds from all settlements in this matter consistent with its August 16, 2019 Order."[7] The August 2019 Final Approval Order provided for a 90/10 distribution—90 percent for residents of *Illinois Brick* repealer states, and the remaining 10 percent for class members who were residents of non-repealer states.[8]

As in many of the prior rounds of notice in this case, class counsel retained Hilsoft/Epiq to provide notice to the class.[9] Hilsoft designed the notice plan to provide notice in the same manner as before, through individual notice and paid media. Emails were sent to approximately 8.6 million unique class members for whom class counsel have valid email addresses. Notice was mailed to all persons who had requested it, approximately 28 people. Digital notice was placed on Google and Verizon's (former Yahoo) ad networks, and on Facebook and Instagram, resulting in approximately 97 million delivered impressions. Sponsored search listings were provided to search engine visitors resulting in 301,244 displayed listings, and 1,769 click-throughs to the settlement webpage. And finally, an informational release was distributed to approximately 15,000 media outlets, including newspapers, magazines, national wire services, television and radio media. As with all prior rounds of notice, a case website (www.reversethecharge.com), toll-free telephone number and postal mailing

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[6] Order Approving Amended Notice Schedule re Revised Distribution Plan, Sept. 22, 2020, ECF No. 2657.

[7] Order Directing Further Notice at 5.

[8] Order Granting Indirect Purchaser Plaintiffs' Motion for Final Approval of Settlements with SDI, TOKIN, Toshiba, and Panasonic Defendants, Granting Motion for Attorneys' Fees, Expenses, and Service Awards at 4 ("Final Approval Order"), Aug. 16, 2019, ECF No. 2516.

[9] *See* Declaration of Cameron R. Azari, Esq., Regarding Implementation and Adequacy of Notice of the Settlement Distribution Plan (Azari Decl.), ¶ 5, filed concurrently herewith.

address remained available to class members.[10] In the opinion of Hilsoft, the notice program met Constitutional due process, and federal and state laws. The notice plan provided full and proper notice to settlement class members before the objection deadline.[11]

III. RESPONSE TO OBJECTORS

A. This Court has authority to revise the plan of distribution.

Although calling the 90/10 distribution "preferable to the pro rata distribution the Court previously adopted," objector Michael Bednarz argues that the Court lacks authority to alter the plan of distribution for the Sony settlement absent reopening judgment pursuant to Rule 60, stating that the Court should make a "formal Rule 60(b)(4) finding" before applying this allocation to the Round 1 settlements.[12]

First, Bednarz is wrong that the Court lacks authority to alter the plan of distribution. The settlement orders provided the Court with continuing jurisdiction over the plan of allocation.[13] Ample authority supports this Court's discretion to alter the plan of allocation because of its case management power over this highly complex litigation and its intimate knowledge of the facts and equities.[14] As the Fifth Circuit affirmed in *Union Asset Management Holding, A.G. v. Dell, Inc.*, the

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[10] *Id.*, ¶¶ 9-32.

[11] *Id.*, ¶¶ 34-35.

[12] Bednarz Obj. at 1.

[13] *Id.*

[13] *See, e.g.*, Order Granting Final Approval of Class Action Settlement with Sony Defendants; Denying Without Prejudice Motion for Reimbursement of Certain Expenses ("Sony Final Approval Order"), ¶ 15, Mar. 20, 2017, ECF No. 1712.

[14] *See, e.g.*, McLaughlin on Class Actions § 6:23 (16th ed. 2019) (stating that "[b]ecause court approval of a settlement as fair, reasonable and adequate is conceptually distinct from the approval of a proposed plan of allocation . . . courts frequently approve them separately," and further noting that courts frequently approve partial settlements without a plan of allocation and stating that "[a] court also may properly enter final orders and judgments explicitly providing that their effectiveness shall not be conditioned on the resolution of any appeal relating solely to the plan of allocation"); *see also* Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 8.32 (4th ed. 2002) (noting that "it is not necessary for the settlement distribution formula to specify precisely the amount that each class member may expect to recover"); *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626 (E.D. Pa. 2015) (district court exercising its inherent authority to modify the plan of allocation on remand without further notice or effect on the settlement); *In re WorldCom, Inc. Securities Litigation*, No. 02-cv-3288-DLC, 2005 WL 3577135, at *1-2 (S.D.N.Y. Dec. 30, 2005) (rejecting the idea that modifications to the allocation plan by the Court rendered class notice inadequate); *In re WorldCom,*

district court had the authority to alter the plan of allocation because of the distinction between the settlement agreement and the plan of allocation.[15] The removal of the *de minimis* provision in the plan of allocation in that case was an amendment to the plan of allocation, not to the settlement agreement itself. The settlement agreement there, as it does here, recognized the distinction between a plan of allocation and the settlement agreement itself, such that any change to the plan of allocation would have no legal effect on the settlement.

As in *Union Asset Management*, the Sony Settlement Agreement in this case recognized that any plan of allocation or distribution would be separate and apart from the approval of the settlement agreement itself.[16] Moreover, this Court's Sony Final Approval Order expressly retained jurisdiction over the plan of allocation, further notifying class members that the plan of allocation could change.[17] Bednarz identifies no authority calling jurisdiction or due process into doubt simply because the Court revised the plan of distribution. Indeed, he seeks to revisit water under the bridge. After hearing from IPPs and Bednarz, the Court ruled it had the authority to allocate the settlement proceeds 90/10 for all three settlement rounds.[18] Rejecting Bednarz's position, the Court found "no reason to set aside its final approval of the Sony settlement or the judgment entered thereon."[19] This conclusion is supported not just by the record to date, but also the Court's "active role" and "flexibility" under Rule 23 "in the management of class actions," including matters of allocation.[20] Among the powers expressly afforded, the Court has broad authority to "determine the course of proceedings" and its

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Inc. Securities Litigation, No. 02-cv-3288-DLC, 2005 WL 1394679, at *5 (S.D.N.Y. June 4, 2005) (order permitting modification of the plan of allocation by the court).

[15] *Union Asset Management Holding, A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012).

[16] *See* Exhibit 5 (Sony Settlement Agreement, ¶ A(1)(h)) to Final Approval Order, Aug. 16, 2019, ECF No. 2516-5 ("Any Distribution Plan is not part of this Agreement.").

[17] Sony Final Approval Order, ¶ 15.

[18] Order Directing Further Notice at 2-5.

[19] *Id.* at 5; *see also* Indirect Purchaser Plaintiffs' Response to the Court's Order to Show Cause at 8-10, Aug. 24, 2020, ECF No. 2650 (collecting additional authority).

[20] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 184 (1974).

orders "may be altered or amended from time to time" within its discretion.[21] Therefore, Bednarz's claim that the Court's change to the plan of allocation is "without jurisdiction" falls short.

Second, Rule 60 does not address alterations to the plan of distribution. By its text, Rule 60(b)(4) governs a "void" judgment. This Court's judgment approving the Round 1 settlement does not remotely qualify as void. The Supreme Court instructs that "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard."[22] Likewise, the Ninth Circuit has "consistently held that a 'final judgment is "void" for purposes of Rule 60(b)(4) *only if* the court that considered it lacked jurisdiction, either as to the subject matter of the dispute or over the parties to be bound, or acted in a manner inconsistent with due process of law.'"[23] The inapplicability of Bednarz's Rule 60 argument is underscored by his failure to make any motion that would invoke Rule 60. Instead, he "urges" the Court to void its own judgment *sua sponte*.[24] This suggestion does not carry the "burden on the party objecting to a class action settlement," especially to support such exceptional relief.[25] In any event, Bednarz identifies nothing making this the rare case for which the Sony judgment could, much less should, be found void either on a party's motion (which *no* class member has made) or the Court's own motion (after determining, to the contrary, that the revised distribution plan fully accords with the record and applicable law).[26]

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[21] Fed. R. Civ. P. 23(d)(1), (2).

[22] *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010).

[23] *In re Sasson*, 424 F.3d 864, 876 (9th Cir. 2005) (quoting *United States v. Berke,* 170 F.3d 882, 883 (9th Cir.1999)).

[24] Objector Michael Frank Bednarz's Response re Order to Show Cause at 3, Aug. 21, 2020, ECF No. 2649.

[25] *United States v. State of Or.*, 913 F.2d 576, 581 (9th Cir. 1990).

[26] Separately, Objector Katz argues that in light of the Court's proposal to revise the distribution plan, class members in non-repealer states should have been afforded an "opportunity to be excluded from the class" and that the settlements in this action violate their rights under the Seventh Amendment. Katz Objection at 1. While this Court *may* afford class members a new opportunity to opt-out of the class, it was not compelled to do so, and it acted well within its discretion in not requiring a further opt-out opportunity. Fed. R. Civ. P. 23(e)(4); *see also Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982) ("[T]o hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law."); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 354 (6th Cir. 2009).

B. The proposed 90/10 distribution is fair, reasonable and adequate and fully within this Court's discretion under Rule 23 governing allocation of settlement proceeds.

The overwhelming majority of class members who received notice did *not* object to the proposed 90/10 allocation. The few objections received that object to the allocation simply argue that the objector should receive more. But these scant objections are insufficient to upend the revised allocation, a fair and beneficial outcome for millions who have not objected, and only illustrates the truth that a class allocation plan cannot (and need not) satisfy all class members all of the time.

In suggesting the allocation is not "fair, reasonable, and adequate,"[27] the objectors state:

- ***Urging pro rata.*** "The revised distribution plan *negatively impacts me*, as a resident of Maryland by *diluting my share* of the settlement by classifying me in the 'non-repealer' status."[28]
- ***Urging pro rata.*** "In my opinion, the harm suffered by members of this class is likely to be relatively constant regardless of geographic location. Thus, allocating 90% of the proposed proceeds to repealer states and 10% to non-repealer states *appears to be an inequitable distribution* of funds."[29]
- ***Urging 100/0.*** "Those who reside in non-repealer states and filed a claim *have no legal right to take monies from the class fund* in this proposed 90-10 split distribution plan."[30]
- ***Urging 100/0.*** "[I]if the Court is to reopen the distribution, the 90/10 proposal raises issues of adequate representation for repealer-state class members, given that Judge Westerfield recommended a *100/0 distribution as most equitable*."[31]

In contending that only one allocation can be legally correct, spanning from zero for class members in non-repealer states to a *pro rata* share, objectors urge a rigid approach to class allocation that conflicts with Ninth Circuit law. Under Ninth Circuit law, courts "evaluate the fairness of a settlement as a whole, rather than assessing its individual components."[32] Although *some* class members' claims might be more valuable *if* this case had been tried to a liability judgment, that is not

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[27] Fed. R. Civ. P. 23(e)(2).

[28] Katz Obj. at 1 (emphasis added).

[29] Erickson Obj. at 1 (emphasis added).

[30] Andrews Obj. at 8 (emphasis added).

[31] Bednarz Obj. at 1 (emphasis added).

[32] *Lane v. Facebook, Inc.*, 696 F.3d 811, 818-19 (9th Cir. 2012).

what occurred. The analysis in the settlement context is holistic.[33] Different *potential* recoveries at a trial that never happened do "not cast doubt on [a] district court's conclusion as to the fairness and adequacy of the overall settlement amount to the class *as a whole*."[34] Some variation in relief within a class is not unusual. As the Ninth Circuit stated in recently upholding a class action settlement: "Any settlement value based on averages will undercompensate some and overcompensate others."[35] Therefore, in reviewing a proposed settlement, courts should not engage in the objectors' exercise of "reversing the math" in a speculative quest for a "meaningfully different result" with the benefit of hindsight.[36]

There is good reason for the 90/10 allocation proposed here. The allocation reflects the approximate value of each group's claims and their contribution to the total settlement fund. The collective bargaining power of a nationwide class generally maximizes the classwide recovery in the aggregate. As the Ninth Circuit and the Supreme Court have emphasized, a national class action advances "the very purpose of Rule 23(b)(3)—'vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."'"[37] The participation of residents from non-*Illinois Brick* repealer states maximized the classwide recovery, permitting global resolution of the claims alleged. When negotiations ensued, the "landscape" bounding the parties' discussions focused on a nationwide settlement.[38] Again, this generated an excellent result that is virtually unchallenged. Thus, distinctions in state law, among the differences that can arise within a class nonetheless bound by a common wrong, do not defeat a settlement class.[39]

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[33] *Campbell*, 951 F.3d at 1122.

[34] *Lane*, 696 F.3d at 924 (emphasis in original).

[35] *In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, 895 F.3d 597, 609 & n.16 (9th Cir. 2018) (holding there was no "improper conflict of interest . . . which would deny absent class members adequate representation") (internal quotation marks and citation omitted).

[36] *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965-66 (9th Cir. 2009).

[37] *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)).

[38] Oct. 3, 2017 Hr'g Tr. at 9, Oct. 13, 2017, ECF No. 1984.

[39] *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 559, 561 (9th Cir. 2019) (en banc).

Moreover, the allocation of 10 percent of the available settlement funds to non-*Illinois Brick* repealer class members reflects the approximate value of their claims in light of this Court's choice of law analysis in its first order denying class certification. As this Court reasoned in its Order finding the 90/10 allocation appropriate (ECF No. 2475), despite the Court's prior choice of law analysis:

> It is appropriate for class members from non-repealer states to receive a limited recovery because they are still active litigants in the case, and their claims have been neither dismissed from nor amended out of the pleadings. Moreover, this Court's prior analysis of California choice-of-law rules would have been subject to an appeal had this case gone to judgment. *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981); *see also Anderson v. Nextel Retail Stores, LLC*, No. CV 07-4480-CVW FFMX, 2010 WL 8591004, at *9 (C.D. Cal. Apr. 12, 2010).[40]

Further, the Ninth Circuit has observed that, in class actions as in other legal disputes, there is always some respect in which a "settlement could have been better."[41] Yet "this possibility does not mean the settlement presented was not fair, reasonable or adequate. Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion."[42] As stated in another seminal Ninth Circuit decision, settlement is necessarily "an abandoning of highest hopes."[43]

Finally, Bednarz comments, in passing, that class counsel have somehow committed a "breach of fiduciary duty" because "the 90/10 proposal raises issues of adequate representation for repealer-state class members, given that Judge Westerfield recommended a 100/0 distribution as most equitable, but class counsel is failing to argue for that distribution."[44] But as Bednarz himself has previously admitted, "That [90/10] split is likely within a range of Rule 23(e) and Rule 23(e)(2) reasonableness[.]"[45] How it could be, as Bednarz now claims, that class counsel breached their

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[40] Order Directing Notice to the Class Regarding the SDI, Tokin, Toshiba and Panasonic Settlements at 3, Mar. 11, 2019, ECF No. 2475.

[41] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

[42] *Id.*

[43] *Officers for Justice*, 688 F.2d at 624 (internal citation and quotation marks omitted).

[44] Bednarz Obj. at 1.

[45] Objection of Michael Frank Bednarz to Indirect Purchaser Plaintiffs' Motion for Attorneys' Fees ("Bednarz Atty. Fees Obj.") at 15, May 28, 2019, ECF No. 2495. Consistent with this

fiduciary duties by recommending what Bednarz called a reasonable allocation is beyond class counsel. In fact, Bednarz has primarily sought to use the 90/10 allocation as a hook for his baseless objections to class counsel's fee motion.[46]

As explained above, there is good reason for the 90/10 plan of allocation.[47] Those reasons and the 90/10 distribution plan are also supported by a process that provided procedural assurances that residents of repealer and non-repealer states were adequately represented. This process, which included separate counsel who advocated for the interests of repealer and non-repealer class members, was described in detail in plaintiffs' motion regarding the plan of allocation.[48] Bednarz's characterization of Judge Westerfield's recommendation is also inaccurate. Judge Westerfield provided two alternative plans of allocation and recognized the possibility that the Court may find that "while weak, some of the non-repealer state residents' released claims have at least some value" and that under such circumstances, the Court should allocate 10 percent of the settlement funds to non-repealer class members.[49] Any suggestions class counsel breached their fiduciary duty are unfounded under these circumstances, where solid legal justifications exist for the 90/10 allocation, the process for arriving at that allocation involved separate advocates and a neutral (Judge Westerfield), and the Court (not plaintiffs' counsel), made the final determination. The objectors do not allege, much less show, collusion and the 90/10 allocation strikes a fair balance falling

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admission, at the Ninth Circuit oral argument last year addressing the original Round 2 settlements, Bednarz agreed that a 90/10 allocation was "more consistent than *pro rata*" with *Illinois Brick*. *See Indirect Purchaser Plaintiffs v. Bednarz*, No. 17-17367, 2019 WL 5497627 (9th Cir. Aug. 28, 2019) (in response to question, stating "that's absolutely right"). In particular, when asked whether his organization would *not* object "if the court were to come back and say 90-10," Bednarz told the Ninth Circuit: "That's probably what we would do." *Id.* Especially given Bednarz's prior concessions, any finding that a 90/10 allocation is substantively fair would not be "clearly erroneous." *Campbell*, 951 F.3d at 1123 (upholding district court's finding that settlement "had value to absent class members").

[46] Bednarz Atty. Fees Obj. at 1.

[47] *Nat'l Super Spuds*, 660 F.2d at 19.

[48] Indirect Purchaser Plaintiffs' Notice of Motion and Motion to Direct Notice to the Class Regarding the SDI, Tokin, Toshiba & Panasonic Settlements at 1, 4-5, 17-19, Jan. 24, 2019, ECF No. 2459.

[49] Neutral Analysis by Hon. Rebecca J. Westerfield (Ret.)) at 19, Exhibit I to the Declaration of Brendan P. Glackin in Support of Indirect Purchaser Plaintiffs' Motion to Direct Notice to the Class Regarding the SDI, Tokin, Toshiba & Panasonic Settlements, Jan. 24, 2019, ECF No. 2459-1.

comfortably within a range of reasonableness. As the Court summarized in its order adopting it, this allocation is "consistent as to all class members and would account for the difference in the settlement value of claims of residents of non-repealer states."[50] The 90/10 allocation is faithful to the Ninth Circuit's recent instruction that "the relief provided to the class cannot be assessed in a vacuum. Rather, the settlement's benefits must be considered by comparison to what the class actually gave up by settling."[51]

C. The class notices have not been misleading.

Two class members raise challenges to class notice but both objections fundamentally misapprehend the notice terms and accordingly should be overruled.

Challenging the Sony Class Notice[52] sent in 2017, objector Andrews says "[t]here is no mention of a repealer and non-repealer states affecting the division of damages down the line" so, therefore, "the class was misled in the notice and on the claim form."[53] Even if Andrews could collaterally attack the Sony Class Notice that was sent out three years ago, it was not misleading. As the Court observed recently, the Sony Class Notice stated—addressing the core question of "How Much Money Can I Get?"—that class member payments would be "'based on a number of factors, including the number of valid claims filed by all Class Members and the dollar value of each Class Member's purchases.'"[54] With the notice stating that the amount paid to particular class members still had yet to be determined, nothing about the notice was misleading.

Challenging the recent class notice, objector Steven Helfand faults the notice for not mentioning settlement approval or attorney fees while focusing, instead, on the plan of distribution, "as if all other matters were somehow moot, which they are not."[55] But advising class members of the

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[50] Order Directing Further Notice at 5.

[51] *Campbell*, 951 F.3d at 1123.

[52] "Sony Class Notice" refers to Exhibit 3 to the Declaration of Steven Williams in Support of Indirect Purchaser Plaintiffs' Motion for Final Approval of Class Action Settlement with Sony Defendants, Oct. 4, 2016, ECF No. 1504-2.

[53] Andrews Obj. at 9.

[54] Order Directing Further Notice at 2 (quoting Sony Class Notice at 4).

[55] Hefland Obj. at 1-2.

revised plan of distribution was the sole objective, as set forth in the Court's directive.[56] The aggregate settlement amount and any related award of attorney fees are not at issue in this approval proceeding. The notice of the revised settlement distribution satisfied the standard by "generally describ[ing] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard."[57]

The additional information that objectors Andrews and Helfand would have preferred was simply not required. Every class notice must strike a balance between providing adequate and relevant information but not so much detail that the notice becomes cluttered and difficult to understand. In one of several appeals Andrews has taken in this case, the Ninth Circuit rejected his argument that the Sony notice fell short because, akin to the argument he makes now, it did not contain "an estimate of the potential value of [the class's] claims' had the case proceeded to trial."[58] As the Ninth Circuit has confirmed elsewhere, the notice "did not need to and could not provide an exact forecast of how much each class member would receive" but "gave class members enough information" to make objections.[59]

D. Objectors identify no basis to shift the cost of class notice to class counsel.

Objector Christopher Andrews argues that class counsel "should be on the hook for the additional costs to the class for this distribution notice program"[60] and, similarly, objector Bednarz asserts that "class counsel, rather than the class settlement fund, should bear the expense of the supplemental notice regarding the Sony distribution."[61]

But neither Andrews nor Bednarz cites any pertinent authority and the only basis they have relied upon—the Ninth Circuit's memorandum disposition vacating and remanding the Round 2 settlements last year—is no justification. The Ninth Circuit did not reverse this Court's prior

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[56] Order Directing Further Notice at 2.

[57] *Hyundai*, 926 F.3d at 567 (internal quotation marks and citation omitted).

[58] *Young v. LG Chem Ltd.*, 783 F. App'x 727, 736 (9th Cir. 2019) (alteration in original; internal quotation marks and citation omitted).

[59] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015).

[60] Andrews Obj. at 4.

[61] Bednarz Obj. at 1.

settlement approval. Less dramatically than Bednarz in particular had sought, the Ninth Circuit vacated and remanded for a "more fulsome analysis" Rule 23's requirements.[62] Neither objector points to an action by class counsel that would necessitate bearing the cost of the re-notice campaign.

E. Service awards are appropriate.

Objector Andrews argues that a new plan of distribution requires that the service awards be revisited.[63] Setting aside the fact that the notice was ordered for the limited purpose of apprising class members of a change to the plan of distribution (Order Directing Further Notice at 6), Andrews's argument regarding service awards runs counter to established Ninth Circuit precedent and relies on an outlier decision from the Eleventh Circuit, *Johnson v. NPAS Sols., LLC*, a decision that has engendered much criticism.[64]

The Ninth Circuit has consistently permitted service awards "'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.'"[65] Here, the Court considered service awards at length on a full record,[66] noting plaintiffs "spent a significant amount of time assisting in the litigation of this case."[67]

By contrast, *Johnson* is both an outlier and misapplied two cases from the 1880s. The majority opinion clashes with not just Ninth Circuit law but, to IPPs' knowledge, the law of every

[62] *In re Lithium Ion Batteries Antitrust Litig*., 777 F. App'x 221, 223 (9th Cir. 2019).

[63] Andrews Obj. at 12.

[64] *Johnson v. NPAS Sols, LLC*, 975 F.3d 1244, 1249 (11th Cir. 2020). A petition for rehearing en banc is currently pending in *Johnson.*

[65] *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1057 (9th Cir. 2019) (quoting *Rodriguez*, 563 F.3d at 958-59).

[66] July 16, 2019 Hrg' Tr. at 34:16-38:11, 40:7-13, Aug. 30, 2019, ECF No. 2525.

[67] Final Approval Order at 15.

other circuit[68]—as well as the Supreme Court.[69] *Johnson* relied on *Trustees v. Greenough*, 105 U.S. 527 (1881), and *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U.S. 116 (1885). *Greenough* reasoned that reimbursing salary and expenses of a creditor in a *trust fund* action would create a moral hazard by tempting them to meddle in and duplicate the work of the trustee, who would have his or her own claim to compensation.[70] *Pettus* merely noted this holding.[71] Those cases actually support awards to class representatives, who play a role similar to trustees for the class; there is no danger of a moral hazard or interference with another person charged with such responsibilities.[72] Andrews's objection to the class representative service awards is unfounded.

IV. CONCLUSION

For the reasons stated, the objections to the revised distribution plan should be overruled.

DATED: November 30, 2020

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[68] *See Bezdek v. Vibram USA Inc.*, 809 F.3d 78 (1st Cir. 2015); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc); *Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015); *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285 (5th Cir. 2017); *Vassalle v. Midland Funding LLC*, 655 F. App'x 352 (6th Cir. 2016); *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998); *Caligiuri v. Symantec Corp.*, 855 F.3d 860 (8th Cir. 2017); *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017); *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012).

[69] *See, e.g., China Agritech, Inc. v. Resh*, _U.S._, 138 S. Ct. 1800, 1811 n.7 (2018) (observing that "[t]he class representative might receive a share of class recovery above and beyond her individual claim" and citing $25,000 incentive award with approval).

[70] *Greenough*, 105 U.S. at 537-38.

[71] *Pettus*, 113 U.S. at 122.

[72] *See Rodriguez*, 563 F.3d at 958-59.

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