Steve W. Berman (*Pro Hac Vice)*
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
steve@hbsslaw.com

Elizabeth J. Cabraser (083151)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
ecabraser@lchb.com

Adam J. Zapala (245748)
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577
azapala@cpmlegal.com

Indirect Purchaser Plaintiffs
Interim Co-Lead Class Counsel

[Additional Counsel Listed on Signature Page]

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' OMNIBUS RESPONSE TO OBJECTIONS TO SETTLEMENTS WITH SDI, TOKIN, TOSHIBA AND PANASONIC DEFENDANTS Date: July 16, 2019 Time: 2:00pm Judge:Hon. Yvonne Gonzalez Rogers Court: Courtroom 1, 4th Floor DATE ACTION FILED: Oct. 3, 2012

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GLOSSARY OF DEFINED TERMS

Term	Definition
Azari Decl.	Declaration of Cameron R. Azari, Esq., on Implementation and Adequacy of Class Notice Program
Berman Final App. Decl.	Declaration of Steve W. Berman in Support of Indirect Purchaser Plaintiffs' Notice of Motion and Motion for Final Approval of Settlements With SDI, Tokin, Toshiba, and Panasonic Defendants and Response to Objectors
Class Counsel	Co-Lead Counsel and Supporting Counsel
Class Representatives	Jason Ames, Caleb Batey, Christopher Bessette, Cindy Booze, Matt Bryant, Steven Bugge, William Cabral, Matthew Ence, Drew Fennelly, Sheri Harmon, Christopher Hunt, John Kopp, Linda Lincoln, Patrick McGuiness, Joseph O'Daniel, Tom Pham, Piya Robert Rojanasathit, Bradley Seldin, Donna Shawn, David Tolchin, Bradley Van Patten, the City of Palo Alto, and the City of Richmond
Co-Lead Counsel	Hagens Berman Sobol Shapiro LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Cotchett, Pitre & McCarthy, LLP
DPPs	Direct Purchaser Plaintiffs
DPP Fee Motion	Co-Lead Counsel for DPPs' Notice of Motion and Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards at 2, Feb. 8, 2018, ECF No. 2171
ECF No.	Unless otherwise noted, all "ECF No." references are to the docket in *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420 YGR (DMR) (N.D. Cal. May 17, 2013)
IPPs/Plaintiffs	Indirect Purchaser Plaintiffs
Fee Motion	Indirect Purchaser Plaintiffs' Notice of Notice and Motion For Attorneys' Fees, Expenses, and Service Awards, Apr. 23, 2019, ECF No. 2487.
Joint Decl.	Joint Declaration of Steve W. Berman, Brendan P. Glackin, and Adam J. Zapala in Support of Indirect Purchaser Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards
LG Chem	LG Chem, Ltd., LG Chem America, Inc.
NEC	NEC Corporation
Order Directing Notice	Order Directing Notice To The Class Regarding The SDI, Tokin, Toshiba & Panasonic Settlements, Mar. 11, 2019, ECF No. 2475.

Order Granting DPPs' Fee	Order Granting Co-Lead Counsel for Direct Purchaser Plaintiffs' Notice of Motion and Motion for An Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards at 1, May 16, 2018, ECF No. 2322.
Panasonic/Sanyo	Panasonic Corporation, Panasonic Corporation of North America, Sanyo Electric Co., Ltd., Sanyo North America Corporation
SDI	Samsung SDI Co., Ltd., Samsung SDI America, Inc.
Sony	Sony Corporation, Sony Energy Devices Corporation, Sony Electronics, Inc.
Supporting Counsel	Class Counsel that assisted Co-Lead Counsel in litigating this case on behalf of Plaintiffs, apart from Co-Lead Counsel
TOKIN	TOKIN Corporation
Toshiba	Toshiba Corporation

I. INTRODUCTION

In response to (i) this Court's Order Directing Notice to the Class Regarding Settlement Agreements with the SDI, TOKIN, Toshiba, and Panasonic/Sanyo Defendants (ECF No. 2475), and (ii) Indirect Purchaser Plaintiffs' ("Plaintiffs") Motion for Attorneys' Fees, Expenses, and Service Awards (ECF No. 2487), only three individuals have filed written objections with the Court.[1] Because each of the arguments raised in the objections is unpersuasive, as detailed herein, Plaintiffs respectfully request that this Court overrule them.

All three objectors oppose Plaintiffs' request for attorneys' fees, but they fail to address the relevant legal standard for "reasonableness" under Rule 23 and Ninth Circuit authority. Rather, each objector simply takes issue with the aggregate amount of fees sought; they do not contest a single time entry, do not complain about counsel's hourly rates, and do not otherwise challenge counsel's lodestar in general. The request for fees in the amount of 30 percent of the total common fund is consistent with percentages awarded in similar antitrust cases, and the lodestar cross-check yields a ***negative*** lodestar multiplier of 0.82, obviating concerns about a windfall recovery. In short, the fee request represents a reasonable request that does not seek to recover for all of the time necessarily spent prosecuting this complex indirect purchaser action. No class member objects to the request for reimbursement of costs and expenses.

The remaining objections by Mr. Andrews are largely vague and fail to state with specificity how the objections apply to the facts of this case, as required by Rule 23(e)(5)(A). That alone is grounds to overrule them. But to the extent Plaintiffs understand his objections, they are individually addressed. Even if Mr. Andrews's objections were sufficiently cognizable, he misunderstands the facts, the governing law, or both.

Plaintiffs respectfully request that this Court (i) overrule all of the objections; (ii) grant Plaintiffs' motion for final approval of the settlement agreements, filed concurrently herewith; and (iii) grant Plaintiffs' motion for attorneys' fees, expenses, and service awards.

[1] *See* ECF Nos. 2495, 2496, 2497. As the Court is aware, these objectors are not new to the litigation, as each has filed oppositions to the approval of prior settlements in this case. Moreover, two of the objectors are represented by counsel who have routinely and frequently appeared in class actions across the country to oppose settlements.

II. ARGUMENT

The three objectors – Gordon Morgan represented by Christopher Bandas and others,[2] Michael Frank Bednarz represented by Theodore H. Frank,[3] and Christopher Andrews, proceeding *pro se*[4] – have filed objections that have been repeatedly rejected in substance by the Court in this case and by courts throughout the country. Their objections here are similarly unpersuasive. Plaintiffs address each category of objection in turn below. *First*, Plaintiffs address oppositions by all three objectors to Class Counsel's fee request. *Second*, Plaintiffs address objections to the adequacy of the settlements. *Third*, Plaintiffs respond to the myriad of other objections made by Mr. Andrews.

A. Plaintiffs' fee request is reasonable under both the percentage-of-the-fund method and lodestar cross-check; the objections fail to show otherwise.

Courts in the Ninth Circuit award attorneys' fees under either the "percentage-of-recovery" method or the "lodestar" method.[5] However, "the primary basis of the fee award remains the percentage method," with the lodestar used "merely as a cross-check on the reasonableness of a percentage figure."[6] The objectors do not disagree with using the percentage method as the primary basis for determining the appropriate fee to award. Nor do they explicitly disagree that the touchstone of that analysis is "reasonableness": at bottom, the Ninth Circuit asks district courts to "consider[] all of the circumstances of the case" and "reach[] a reasonable percentage."[7]

1. Plaintiffs' fee request is reasonable under the percentage-of-the-fund analysis.

Although required by Ninth Circuit law, the objectors do not consider all of the circumstances in this case when criticizing the fee request, and they misapply the factors they do

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[2] *See* Objection of Gordon Morgan to the Settlements with SDI, Tokin, Toshiba and Panasonic Settlements (sic), and to the Requested Attorneys' Fees ("Morgan Obj."), May 30, 2019, ECF No. 2496.

[3] *See* Objection of Michael Frank Bednarz to Indirect Purchaser Plaintiffs' Motion for Attorneys' Fees ("Bednarz Obj."), May 30, 2019, ECF No. 2495.

[4] *See* Christopher Andrews' Objection to the Settlements ("Andrews Obj."), May 30, 2019, ECF No. 2497.

[5] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015).

[6] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 & n.5 (9th Cir. 2002).

[7] *Vizcaino*, 290 F.3d at 1048; *accord*, *Online DVD*, 779 F.3d at 949.

discuss. The Ninth Circuit instructs that a 25-percent benchmark should be used as the "starting point" for analysis,[8] which "percentage amount can then be adjusted upward or downward depending on the circumstances of the case."[9] Courts in this District have long recognized that "in most common fund cases, the award *exceeds* the benchmark."[10] The objectors fail to demonstrate that a 30 percent fee request is unreasonable under the facts of this case. This Court, however, has overseen the litigation from its inception, and holds the ultimate discretion in deciding what fee to award.

a. A 30-percent award is consistent with the market rate.

One factor the Ninth Circuit has identified is the market rate for class counsel in the "particular field of law," which often includes comparisons to the fee percentage awarded to class counsel in analogous cases.[11] The objectors argue that consideration of this factor does not support the fee request.[12] But the most reliable and recent empirical research shows that the 30 percent fee request is consistent with the market rate. In a 2017 article, Professors Theodore Eisenberg, Geoffrey Miller, and Roy Germano found that of the 19 antitrust settlements between 2009 and 2013 with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median percentages awarded were 27 percent and 30 percent, respectively.[13] Even more recently, in the 2018 Antitrust Annual Report, Professor Joshua Davis found that among antitrust class action settlements surveyed between 2013 and 2018, the median fee awarded for settlements

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[8] *Online DVD*, 779 F.3d at 949, 955.

[9] *de Mira v. Heartland Emp't Serv., LLC*, No.12-CV-04092 LHK, 2014 WL 1026282, at *1 (N.D. Cal. Mar. 13, 2014). The court in *Vizcaino*, 290 F.3d at 1048, similarly found that while 25 percent is "a starting point for analysis," "[s]election of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case"; the "question is . . . whether in arriving at its percentage [the district court] considered all the circumstances of the case and reached a reasonable percentage."

[10] *de Mira*, 2014 WL 1026282, at *1 (citing cases) (internal quotation marks and citation omitted).

[11] *See Online DVD*, 779 F.3d at 955; *Vizcaino*, 290 F.3d at 1049-50.

[12] Morgan Obj. at 3, 6; Bednarz Obj. at 5.

[13] Eisenberg, Miller & Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 952 (2017) ("EMG Study").

between $100 and $249 million (the settlements here total $113.45 million), ***was 30 percent***.[14] And in large antitrust class actions involving cartels of electronics manufacturers litigated in this District, with many of the same defendants here, courts have awarded similar percentages in attorneys' fees.[15] This empirical research and case law focuses specifically on the market rate in antitrust class actions, the "particular field of law" at issue,[16] and courts have recognized that the "antitrust class action is arguably the most complex action to prosecute."[17] The requested 30 percent fee award would place the award to Class Counsel within the range of fees in comparable cases.

b. This case presented Plaintiffs and Class Counsel with considerable risks.

The objectors ignore another Ninth Circuit factor supporting Plaintiffs' fee request: the enormous risks, challenges, and complexities that Plaintiffs had to overcome to obtain the $113.45 million common fund.[18] This factor has been emphasized by the Ninth Circuit in affirming upward departures from the 25 percent benchmark.[19]

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[14] *See* Berman Final App. Decl., Ex. E at 23.

[15] *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 4126533 (N.D. Cal. Aug. 3, 2016) (30 percent for IPP settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013) (28.6 percent for IPP settlement); Order Granting Award of Attorneys' Fees, Reimbursement of Expenses & Incentive Payments, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-1819-CW (N.D. Cal. Oct. 14, 2011), ECF No. 1407 (33 percent for IPP settlement).

[16] *Online DVD*, 779 F.3d at 955 (describing factor to be considered in this manner).

[17] *See In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)) (internal quotation marks omitted); *see also In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 341 (E.D. Pa. 2007) (the "antitrust class action is arguably the most complex action to prosecute[;] [t]he legal and factual issues involved are always numerous and uncertain in outcome") (internal quotation marks and citation omitted).

[18] *See Online DVD*, 779 F.3d at 954-55 (identifying this factor).

[19] The *en banc* court in *In re Hyundai & Kia Fuel Econ. Litig.*, No. 15-56014, 2019 WL 2376831, at *17 (9th Cir. June 6, 2019), noted that upward departures are not unusual in high-risk cases:

> We have affirmed fee awards totaling a far greater percentage of the class recovery than the fees here. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002) (no abuse of discretion to award fees constituting 28% of the class's recovery given 'risk' assumed in litigating)); *In re Pac. Enters. Secs. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (no abuse of discretion where the "$4 million award (thirty-three percent [of the class's recovery]) for

Because antitrust cases involve multiple defendants with a web of contacts, pursuing discovery to track all of the anticompetitive conduct presents unique challenges. And, this case in particular, has had significant additional risks and challenges. These risks included the length of the class period, the ubiquity of the devices containing lithium-ion batteries, the international nature of the cartel (spanning multiple continents and four languages), and the need to demonstrate pass-through of the overcharge to U.S. consumers. For example, the interrogatory responses of one defendant alone (LG Chem) about their contacts with competitors involved identifying 221 meetings or communications and scores of witnesses, over twelve years.[20] Furthermore, given the length of the class period (2000 through 2011), many of the witnesses involved in the early class period discussions were no longer with the defendant companies. Again, in the case of LG Chem, there was one remaining such witness, as plaintiffs pointed out in moving to compel the testimony of Seok Hwan Kwak, an LG Chem employee: "the only [remaining] current LG Chem employee who can testify about meetings early in the class period."[21]

Moreover, although the economics of pass-through are widely accepted, getting access to the data to demonstrate industry wide pass-through is a challenge. Here, Plaintiffs issued 140 subpoenas for data and documents to non-parties, and reviewed 4,000 of their produced datasets, resulting in 1,000 pass-through regression analyses.[22] Plaintiffs fought an early motion to compel worldwide transactional data from the defendants, which was successful (ECF No. 624), and negotiated production of finished product data (the purchase/sales data of the computers, power tools, etc. which form the class), from five separate defendants.[23] After receipt of this data,

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attorneys' fees is justified because of the complexity of the issues and the risks").

[20] *See* Berman Final App. Decl., ¶ 8.

[21] Joint Letter Brief re Motion to Compel Deposition of Seok Hwan Kwak, Aug. 7, 2015, ECF No. 764-2.

[22] Joint Declaration of Steve W. Berman, Brendan P. Glackin, and Adam J. Zapala in Support of Indirect Purchaser Plaintiffs' Notice of Motion and Motion For Attorneys' Fees, Expenses, and Services Awards, ¶¶ 29, 36, Apr. 23, 2019, ECF No. 2487-2.

[23] *See* Status Report re Finished Products Transactional Data Productions, Dec. 16, 2014, ECF No. 607.

Plaintiffs' experts then had to apply regression analyses to identify the overcharge, and the pass-through of the overcharge to the consumer.

Plaintiffs' ability to recover meaningful relief for the class in the face of this complexity and risk justifies their request for a 30-percent fee award.

c. Plaintiffs and Class Counsel vigorously litigated this case at extraordinary expense.

The Ninth Circuit instructs district courts to consider the burdens class counsel experienced while litigating the case (e.g., cost, duration, and foregoing other work), which the objectors also do not mention.[24] Over the course of six-and-a-half years of hard-fought litigation, Plaintiffs engaged in vigorous motion practice, extensive expert work, and substantial fact discovery. At every phase of the litigation, the parties thoroughly tested the strength of the claims and defenses. Plaintiffs took and defended over eighty depositions, served voluminous discovery, reviewed millions of pages of documents, which were mostly produced in Japanese, Korean, and Chinese, and analyzed enormous electronic data files produced by defendants and third parties.[25] To obtain this discovery, Plaintiffs brought and prevailed on, at least in part, fourteen fiercely contested motions to compel.[26] That included obtaining orders compelling defendants to produce worldwide transactional sales and cost data for battery cells and packs (ECF Nos. 624, 710); orders compelling defendants to produce detailed interrogatory responses (ECF Nos. 690, 805); and an order after hotly disputed briefing compelling recalcitrant LG Chem witness Seok Hwan Kwak to appear for deposition (ECF No. 836).

Plaintiffs also engaged in extensive expert discovery and motion practice, and with the help of expert analyses, synthesized large amounts of data and evidence to show the conspiracy's substantial and universal impact on consumers.[27] Plaintiffs submitted four expert reports totaling 435 pages in support of their motions to certify a class.[28] Professor Edward E. Leamer analyzed

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[24] *Online DVD*, 779 F.3d at 954-55.

[25] Fee Motion at 3-8.

[26] *Id.* at 6.

[27] *Id.* at 6-8.

[28] Suppl. Expert Reply Report of Edward E. Leamer, Ph.D., Nov. 21, 2017, ECF No. 2089-2;

impact and damages using statistical modeling and conducted nearly 1,000 regressions. Dr. Rosa Abrantes-Metz, a specialist in cartel theory, analyzed whether the available economic evidence supported the existence and impact of the alleged conspiracy on a classwide basis. Dr. Leamer and Dr. Abrantes-Metz performed additional analyses with respect to the merits of Plaintiffs' claims, which supported briefing relating to Plaintiffs' second renewed motion for class certification and Panasonic's motion for summary judgment.[29] As a result of their work, Plaintiffs obtained substantial recoveries for the settlement class from all but one of the defendant corporate families prior to the Court's final denial of class certification.

In pursuing this litigation, Class Counsel advanced considerable funds to pursue claims on behalf of the class – $6.75 million in total out-of-pocket costs – with no guarantee that those costs would ever be recovered. Class Counsel also invested time and effort resulting in a lodestar (hours multiplied by hourly rate) of $41.46 million. Moreover, this case comprised a significant portion of case work handled by the primary Class Counsel lawyers who worked on this case, each of whom passed on other work while litigating it.[30]

d. The recovery for the class – exceeding $100 million – evidences strong results for the class given the risk and uncertainty.

The objectors contend that the results in this case "fall far short" of those necessary for a 30 percent fee award.[31] That is wrong. Obtaining a $113.45 million common fund where class certification was denied twice, evidences a strong result under any measure. Moreover, by Plaintiffs' estimates, that equates to 11.7 percent of single damages for a nationwide class during

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Suppl. Expert Report of Edward E. Leamer, Ph.D., Sept. 26, 2017, ECF No. 2088-1; Expert Rebuttal Report of Rosa M. Abrantes-Metz, Ph.D., Aug. 23, 2016, ECF No. 1604-8; Expert Report of Rosa M. Abrantes-Metz, PhD, Jan. 22, 2016, ECF No. 1599-6; Expert Reply Report of Edward E. Leamer, Ph.D., Aug. 23, 2016, ECF No. 1782-16; Corrected Expert Report of Edward E. Leamer, Ph.D., Feb. 2, 2016, ECF No. 1782-11.

[29] Expert Report of Edward E. Leamer, Ph.D., May 25, 2018, ECF No. 2379-8; Expert Reply Report of Edward E. Leamer, Ph.D., June 29, 2018, ECF No. 2379-10; Expert Report of Rosa M. Abrantes-Metz, Ph.D., May 25, 2018, ECF No. 2379-10; Expert Rebuttal Report of Rosa M. Abrantes-Metz, Ph.D., June 29, 2018, ECF No. 2379-12.

[30] *See* Fee Motion at 18.

[31] *See* Bednarz Obj. at 12; *see* also Morgan Obj. at 3-5.

the eleven-and-a-half year class period.[32] The objectors argue that only in cases where there is an "exceptional recovery," measured by a high percentage of possible damages recovered, do courts award upward departures from the benchmark of 25 percent.[33] To the contrary, several decisions, including in price-fixing cases in this District, have awarded ***33 percent*** or more in fees where class plaintiffs recovered similar percentages of possible damages in complex and risky actions.[34] In *In re Omnivision Technologies, Inc.*, a case cited by Objector Morgan, the court held that "[t]he overall result and benefit to the class from the litigation is the most critical factor in granting a fee award."[35] The court then held that because the settlement "creates a total award of approximately 9% of the possible damages, which is more than triple the average recovery in securities class action settlements," this "substantial achievement" weighed in favor of "granting the requested 28% fee."[36]

The objectors point to the settlements obtained by the direct purchasers in this case – who recovered $139.3 million in settlements, which DPPs estimated to be 39 percent of their possible

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[32] Fee Motion at 13-14.

[33] *See* Morgan Obj. at 6.

[34] *See* Order Granting Award of Attorneys' Fees, Reimbursement of Expenses & Incentive Payments, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-1819-CW (N.D. Cal. Oct. 14, 2011), ECF No. 1407 (33 percent awarded to IPP counsel); *id.* at ECF No. 1375 at 15 (showing that 33 percent awarded, $41.322 million, was 15% of possible damages estimated by IPPs' expert in *SRAM*); *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *7-*8 (E.D.N.Y. Aug. 7, 1998) (court increased 25% benchmark to 33.3% where plaintiffs recovered 17% of damages); *In re Crazy Eddie Secs. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (court increased 25% benchmark to 33.8% where plaintiffs recovered 10% of damages); *In re Gen. Instr. Secs. Litig.*, 209 F. Supp. 2d 423, 431, 434 (E.D. Pa. 2001) (one-third fee awarded from $48 million settlement fund that was 11% of the plaintiffs' estimated damages); *In re Corel Corp., Inc. Secs. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003) (one-third fee awarded from settlement fund that comprised about 15% of damages).

[35] *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008); *see* Morgan Obj. at 4 (quoting case for this proposition, and arguing that it is citing it in support of the argument the result achieved in this case does not "support the rise above the benchmark").

[36] *Omnivision*, 559 F. Supp. 2d at 1046. The other cases on which Objector Morgan relied are also inapposite. *See* Morgan Obj. at 6 (citing cases), These cases involved attorney fee awards of approximately $309 million, $337 million, and 278,3 million, which is far in excess of the $34.035 million sought by Class Counsel here, *See Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (awarding approximately $336.8 million in fees); *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (awarding approximately $278.33 million in fees); *TFT-LCD*, 2013 WL 1365900, at *20 (awarding $309,725,250 in fees).

damages – and were awarded 30 percent of the common fund.[37] However, the fact that this Court awarded direct purchasers the percentage of the common fund they requested, 30 percent, does not demonstrate that IPPs' request is unreasonable. To the contrary, what matters is that application of the Ninth Circuit factors shows that a 30 percent award is reasonable under all of the circumstances in this case. Furthermore, indirect purchasers must carry an additional burden; in addition to overcoming the challenges faced by direct purchasers, indirect purchasers also have to show that the overcharge due to the cartel passed-through the distribution channel to the end class members.[38] As the Court knows this was a key risk to the indirect plaintiffs, litigated heavily by the defendants, and ultimately realized in this Court's orders denying class certification.

e. Class Counsel handled this case on a contingency basis.

The objectors also ignore that the Ninth Circuit has held the fee percentage awarded should include consideration of the contingent nature of the fee.[39] It is well-established that attorneys who take on the risk of a contingency case should be compensated for the risk they assume.[40] The fact that Class Counsel litigated this case on a completely contingent basis supports the 30 percent fee request.[41] In sum, the requested 30 percent fee award is reasonable under the percentage-of-the-fund method.

2. The objectors' argument that the fee request is unreasonable because Plaintiffs' recovery constitutes a "megafund" ignores controlling Ninth Circuit authority.

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[37] DPP Fee Motion at 2; Order Granting DPPs' Fee at 1.

[38] *See, e.g.*, Order Denying Without Prejudice Motion for Class Certification; Granting in Part & Denying in Part Motions to Strike Expert Reports or Portions Thereof, at 14, Apr. 12, 2017, ECF No. 1735 ("In a class of indirect purchasers, the issue of class-wide impact is complicated by the need to demonstrate a method for showing whether, and to what extent, the overcharge 'impact' is passed on to each of the indirect purchasers in the distribution chain.").

[39] *See, e.g.*, *Online DVD*, 779 F.3d at 954-55 & n.14; *Vizcaino*, 290 F.3d at 1050.

[40] *See In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994).

[41] *See* Fee Motion at 17; *see also Vizcaino*, 290 F.3d at 1049 (explaining that fees requested were at or below "the standard contingency fee for similar cases," supporting the reasonableness of the request); *e.g.*, Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty three percent to forty percent of gross recoveries" (emphasis omitted)); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 Fla. L. Rev. 349, 383 (2008) (discussing "'the usual 33-40 percent contingent fee'" (quoting *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003))).

The objectors argue that because Plaintiffs' $113.45 million recovery is a "megafund," their fee request is unreasonable. According to the objectors, this Court should use an "increase-decrease rule," whereby the percentage of the fund awarded to class counsel necessarily decreases as the common fund increases over a certain amount. Otherwise, they say, Class Counsel will receive a windfall.[42] However, the Ninth Circuit in *Vizcaino* explicitly rejected the megafund "increase-decrease rule," and held that a court "cannot rationally apply any particular percentage . . . without reference to all the circumstances of the case."[43]

Consistent with Ninth Circuit precedent, this Court rejected making a "megafund reduction" in its order granting direct purchasers' fee request. This Court held that the fees requested should not be reduced "based upon the settlement being a 'megafund' or the fee percentage giving a 'windfall' to counsel for plaintiffs. The megafund concern arises when a percentage of the recovery would result in excessive profits for class counsel in light of the hours actually spent."[44] While the size of the fund may be a factor considered under Ninth Circuit law, this Court held that because a cross-check to counsel's lodestar resulted in a negative multiplier, that "obviate[d] concern about any windfall" in the context of a large recovery because counsel

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[42] Morgan Obj. at 3, 6; Bednarz Obj. at 5; Andrews Obj. at 42-45.

[43] *Vizcaino*, 290 F.3d at 1048 (internal quotation marks and citation omitted); *see Online DVD-Rental*, 779 F.3d at 949 (courts should avoid "mechanical or formulaic" rules in awarding fees in favor of a totality of circumstances analysis); *see also* Order Granting Final Approval of Indirect Purchaser Plaintiffs' Settlement with Defendants Samsung Electronics Co., Ltd., Toshiba Corporation, and Toshiba Samsung Storage Technology Corporation, Granting Motion for Attorney Fees and Expenses, and Denying Objections at 24, *In re Optical Disc Drive Prods. Antitrust Litig.*, No. 10-md-2143 (N.D. Cal. Feb. 21, 2019), ECF No. 2889 (rejecting "megafund" argument). Objector Morgan cites to *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 736 (3d Cir. 2001) for the proposition that a large recovery or megafund is the "predicate" to "reduc[e] fees below the benchmark for mega-fund settlements." Morgan Obj. at 5. As explained, the proposition that a megafund is grounds alone to reduce a fee award below the benchmark is at odds with Ninth Circuit law and many decisions in this circuit and elsewhere. Moreover, Objector Morgan misstates the holding in *Cendant*.The decision did not hold that a megafund calls for a *per se* reduction below the benchmark; rather, its holding was merely that one consideration in granting a fee award "is the size of the settlement." *See Cendant*, 243 F.3d at 736. Objector Bednarz cites other cases that discuss a "sliding scale" or "increase-decrease" rule that is at odds with Ninth Circuit authority, without any mention of that fact. *See* Bednarz Obj. at 10 (citing *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 486 (S.D.N.Y. 1998), *In re Royal Ahold NV Secs. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006), and *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371 (S.D.N.Y. 2013)), in support of his "sliding case" argument.

[44] Order Granting DPPs' Fee at 2 (citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)).

earned an effective hourly rate below the market rate.[45] Other decisions in the Ninth Circuit are in accord and hold that a negative multiplier indicates the reasonableness of a fee request.[46] Similarly here, awarding a 30-percent fee award to Class Counsel also would result in both (a) a negative multiplier and (b) an hourly rate well below the market rate.[47] For these reasons, there is no concern about a "windfall" if this Court grants Plaintiffs' fee request, even if the common fund is considered a megafund.

Moreover, federal district courts across the country routinely award class counsel fees equivalent to, and often exceeding, 30 percent of the common fund, including where settlements are much greater than Plaintiffs' $113.45 million recovery here.[48] For example, Professor Davis's May 2019 Report shows that 30 percent was ***the median*** percentage awarded for antitrust class

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[45] *Id.*

[46] *See, e.g. In re TFT-LCD (Flat-Panel) Antitrust Litig.*, No.M-07-1827 SI, 2013 WL 149692, at *1 (N.D. Cal. Jan. 14, 2013) (negative multiplier of 0.86 confirmed amount of attorneys' fees requested was fair and reasonable); *Gong-Chun v. Aetna Inc.*, No., 09-cv-01995-SKO, 2012 WL 2872788, at *23 (E.D. Cal. July 12, 2012) (negative multiplier of 0.79 suggested that fee award was reasonable); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 853-54 (N.D. Cal. 2010) (negative multiplier of .59 indicated fee award was "reasonable and a fair valuation of the services rendered to the class by class counsel"); *In re Portal Software, Inc. Secs. Litig.*, No C-03-5138 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (negative lodestar multiplier of 0.83 or 0.74 "suggest[s] that the requested percentage based fee is fair and reasonable").

[47] *See* Fee Motion at 18-21 (citing evidence, undisputed by the objectors).

[48] *Allapattah Servs.*, 454 F. Supp. 2d at 1210 (awarding 31.33% fee on $1.075 billion settlement fund); *accord In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *6 (awarding 33.33% fee on $835 million settlement; "Counsel's expert has identified 34 megafund cases with settlements of at least $100 million in which the court awarded fees of 30 percent or higher."); *see also, e.g.*, *In re Polyurethane Foam Antitrust Litig.*, No.10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% fee on $147.8 million settlement fund); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (awarding 33.3% fee on $410 million settlement fund); *Linerboard Antitrust Litig.*, 2004 WL 1221350, at *1 (awarding 30% fee on $202.5 million settlement fund); *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278, at 18-20 (E.D. Mich. Nov. 26, 2002) (awarding 30% of a $110 million dollar fund, which produced a multiplier of 3.7); *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839, at *9 (D.D.C. July 16, 2001) (awarding 33.7% fee on $365 million settlement fund); *In re Ikon Office Sols., Inc., Secs. Litig.*, 194 F.R.D. 166, 170 (E.D. Pa. 2000) (awarding 30 % fee on $111 million settlement fund); *see also In re Nat'l Collegiate Athl. Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-2541-CW, 2017 WL 6040065, at *5, *9 (N.D. Cal. Dec. 6, 2017) ("federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases") (internal quotation marks omitted).

actions with common funds between $100 and $249 million.[49] The common fund here is at the low end of that range.

Objectors Bednarz and Morgan rely heavily on *In re High-Tech Employee Antitrust Litigation*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015), and the surveys cited therein, for the argument that the size of the fund here supports a lower fee percentage.[50] The *High-Tech* case is inapplicable because, among other things, *High-Tech* involved a substantially higher common fund and the decision relied on a study that lumped together recoveries ***starting at 175.5 million and higher*** (which both objectors fail to mention); thus, even the lowest end of this range, the study surveyed settlements of substantially greater amounts than the common fund here.[51] Moreover, in *High-Tech*, unlike here, the empirical analysis was cited in the context of applying a percentage-of-the-fund cross-check where the lodestar method was used as the primary basis for determining the appropriate fee award. Specifically, the *High-Tech* decision relied on that analysis to find that the 4.8 lodestar multiplier requested by class counsel, as opposed to the 2.2 positive multiplier it awarded, would have led to a windfall gain.[52] The negative lodestar multiplier in this case obviates any concern about a windfall here.

[49] *See* Berman Final App. Decl., Ex. E at 23; *see also* EMG Study, 92 N.Y.U. L. Rev. at 952 (finding that among antitrust class action settlements surveyed with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median percentages awarded were 27 percent and 30 percent, respectively).

[50] Bednarz Obj. at 11; Morgan Obj. at 6-7.

[51] *High-Tech*, 2015 WL 5158730, at *13 (citing Eisenberg & Miller study). All of the other studies relied on by Bednarz, but one, are significantly outdated – published nine to sixteen years ago (and the cases surveyed in them are even older). *See* Bednarz Objs. at 11-12. Bednarz does cite to the EMG Study published in the NYU Law Review, but the finding he points to does not focus on antitrust actions. Moreover, the finding he cites, that for ***all*** recoveries above $67.5 million the average fee recovery was 22.3 percent of the recovery, has little meaning because it lumped together all commons funds in a wide range, anything above $67.5, which included common funds in the high hundreds and billions of dollars. *See* Bednarz Objs. at 11-12; EMG Study, 92 N.Y.U. L. Rev. at 948. The empirical evidence cited by Plaintiffs is more recent (including cases surveyed from 2018), surveyed settlement funds of comparable sizes to the common fund in this case, and is appropriately focused on antitrust cases. Moreover, the negative multiplier here obviates any concern about a windfall due to the size of the recovery, which is consistent with the Ninth Circuit's approach and this Court's decision awarding fees to direct purchaser counsel.

[52] *High-Tech*, 2015 WL 5158730, at *6, *10.

3. The correct calculation of the fee request is 30 percent of the total common fund.

Objector Bednarz contends that 30 percent is not really the percentage requested because the percentage awarded should be calculated on the net common fund, not the gross common fund, after expenses are deducted.[53] However, the Ninth Circuit has repeatedly rejected this argument, including when made on a previous occasion by counsel for Mr. Bednarz.[54] Moreover, this Court calculated the percentage awarded to the direct purchasers in this case based on the gross common fund.[55] No other circumstance dictates different treatment for the indirect purchasers.

4. A lodestar cross-check supports the reasonableness of the requested fees.

Plaintiffs explain in the Fee Motion and again above, that the reasonableness of their fee request is shown by the fact that a 30 percent award would lead to a *negative* multiplier of 0.82, and an hourly rate below the market rate.[56] That is particularly relevant in this case, where Plaintiffs' Fee Motion and supporting declaration and exhibits, including the detailed billing records produced for all hours counted as part of Class Counsel's lodestar, show the efforts Class Counsel made to efficiently litigate this case. Notably, despite presenting these detailed records, Objectors Morgan and Bednarz do not challenge Class Counsel's rates or hours in any respect.

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[53] Bednarz Obj. at 13.

[54] *See Online DVD-Rental*, 779 F.3d at 953; *see also Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000) (rejecting an objector's argument that a fee award in a securities settlement should be based on "net recovery," which does not include "expert fees, litigation costs, and other expenses").

[55] Order Granting DPPs' Fee at 1. Objectors Bednarz, Morgan, and Andrews also claim that Plaintiffs have increased their fee request from 25 percent to 30 percent. That is false. In a previous round of settlements, Plaintiffs requested 25 percent of the prior partial common fund, cognizant of the fact that the case was not finished, and seeking a partial recovery of fees as a percentage of the recovery to that date, while the case continued. This Court denied without prejudice Plaintiffs' fee request, in part so that it could grant an appropriate fee after the case was finished, considering all of the circumstances of the entire case. *See* Order Granting in Part and Denying in Part, Without Prejudice, Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards at 2, Oct. 27, 2017, ECF No. 2005. Now that all of the settlements are completed, Plaintiffs seek a 30 percent award from the entire common fund, an attorney fee award for Class Counsel's work during the entirety of the case.

[56] Fee Motion at 19-21 (citing several cases for proposition that a negative multiplier and below-market hourly rate demonstrated upon a lodestar cross-check confirms reasonableness of fee award calculated as a percentage of the common fund); *accord* Order Granting DPPs' Fee, at 2 (this Court so holding).

Mr. Andrews claims in conclusory fashion that the lawyers "appear to have inflated their attorney hours" and makes several other unfounded and incorrect claims, such as that Class Counsel did not maintain contemporaneous billing records (even though they were submitted to the Court).[57] These objections are without evidentiary support. Indeed, a comparison of lodestar between IPPs and DPPs shows that IPPs billed fewer hours than DPPs, further supporting the reasonableness of the hours spent on this case.[58]

Yet, Messrs. Bednarz and Morgan both make the argument that Class Counsel's negative multiplier should be further reduced to equate to, or be lower than, the *more negative* lodestar of direct purchaser counsel (0.58), because direct purchaser counsel supposedly achieved better results for the direct purchaser class.[59] This does not make sense. The percentage of the fund methodology naturally awards a lower fee because the fee is a percentage of the total class recovery, which is lower here than in the direct purchaser case. Moreover, IPPs' results and the efficiency with which they litigated this case is illustrated by the fact that IPPs' lodestar (a function of hours multiplied by hourly rate) is lower – $41.46 million versus $72.5 million for direct purchaser counsel. This difference in lodestar speaks volumes about the efficiency with which IPP counsel conducted this litigation, particularly given that the IPP case continued much longer – through a second phase of class certification (and a third class certification motion was filed with additional expert reports and other evidentiary support) and to the brink of trial. Reducing Class Counsel's award so that its multiplier is more negative than direct purchaser counsel's lodestar would simply encourage inefficiency. Such an approach is also at odds with the Ninth Circuit's use of the percentage-of-the-fund method to encourage efficient prosecution of litigation, with the lodestar merely used as a cross-check.[60]

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[57] Andrews Obj. at 37-42.

[58] *Compare* Fee Motion at 18 (101,000 hours billed to this case), *with* DPP Fee Motion at 2, 19 (173,863 hour billed to this case).

[59] Morgan Obj. at 1, 5; Bednarz Obj. at 2, 12, 14.

[60] The Second Circuit noted that percentage-of-recovery method is preferred because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," while "[i]n contrast, the lodestar [method] create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours,

5. The *rejected* lead counsel bid of Hagens Berman is irrelevant in determining what attorney fee to award to Class Counsel.

Messrs. Bednarz and Morgan spend considerable space arguing that *Class Counsel's* fee award should be limited or tied to the lead counsel submission of *Hagens Berman*.[61] Both objectors fail to mention that this Court *rejected* Hagens Berman firm's lead counsel submission, instead appointing three firms as Interim Co-Lead Counsel, and otherwise creating a leadership structure that was not part of Hagens Berman's original proposal.[62] Thus, it is this Court's Modified Pretrial Order No. 1 (May 24, 2013, ECF No. 202), not the rejected bid, that governs billing and work done in this case. And this Court has overseen the lodestar accrued throughout the litigation, through the submission of quarterly reports by Class Counsel. It would, therefore, be nonsensical, not to mention unfair to Co-Lead Counsel (to other Class Counsel, who were not part of this proposal, as well as to Hagens Berman, whose proposal was rejected), to tie Class Counsel's fee award to Hagens Berman's bid.

Objector Morgan also asks that Hagens Berman's lead counsel submission be unsealed.[63] Class Counsel respectfully submits that Hagens Berman's confidential submission is irrelevant; therefore, it should remain sealed. But if this Court finds Hagens Berman's confidential submission relevant for settlement class members to see for any reason, Class Counsel does not oppose unsealing it.

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and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (121 (internal quotation marks and citation omitted; alteration added and in original). The court in *Vizcaino*, 290 F.3d at 1050 & n.5, similarly found that the lodestar method provided the right balance of efficiency and incentives, It held that the "primary basis of the fee award remains the percentage method," with the lodestar normally used "merely a cross-check on the reasonableness of a percentage figure" because "it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement."

[61] *See* Bednarz Obj. at 13-14; Morgan Obj. at 7-8.

[62] *Compare* Application of Hagens Berman to be Appointed Interim Class Counsel and for the Appointment of a Plaintiffs' Steering Committee for the Indirect Purchaser Classes Pursuant to Fed. R. Civ. P. 23, Mar. 28, 2013, ECF No. 108 (Hagens Berman's lead counsel submission), *with* Order Appointing Interim Co-Lead Counsel and Liaison Counsel for Direct Purchaser Plaintiffs and Appointing Interim Co-Lead Counsel and Liaison Counsel for Indirect Purchaser Plaintiffs, May 17, 2013, ECF No. 194 (this Court's order appointing interim co-lead counsel and liaison counsel for DPPs and IPPs).

[63] Morgan Obj. at 7.

6. All factors support a fee of 30 percent of the common fund.

In sum, as discussed above, the Ninth Circuit and the Northern District primarily use a percentage-of- the-fund method with a lodestar cross-check when awarding fees from a common fund. The purpose of this analysis is to prevent windfall fee awards.[64] Here, Plaintiffs merely seek to recover attorneys' fees for the time and effort spent litigating this case. In doing so, Plaintiffs are not seeking to recover all of their time; Plaintiffs request a fee award that results in a ***negative*** multiplier. This conservative fee request is on the low end of the range of multipliers awarded in similar antitrust cases.

Case	Settlement Fund	Attorneys' Fees Awarded	Multiplier
***Batteries* (IPPs)[65]**	**$113.45 million**	**$34.035 million (30%)**	**0.82**
Batteries (DPPs)[66]	$139.3 million	$41.79 million (30%)	0.58
DRAM (IPPs)[67]	$310.72 million	$77.68 million (25%)	0.71-0.81
CRT (IPPs)[68]	$576.75 million	$158.6 million (27.5%)	2.13
TFT-LCD (IPPs)[69]	$1,082 million	$309.725 million (28.6%)	1.96

The argument that the percentage awarded should be lower because this is a megafund case is inapt. At $113.45 million, this settlement is barely a megafund case.[70] Considering settlements

[64] Order Granting DPPs' Fee at 2 (negative multiplier "obviate[d] concern about any windfall"); *Bluetooth*, 654 F.3d at 942 (using lodestar cross-check to guard against "windfall profits for class counsel").

[65] Fee Motion at 27.

[66] Order Granting DPPs' Fee at 3.

[67] Indirect Purchaser Plaintiffs and Attorneys General's Joint Application for Attorney's Fees, at 37 & n.16, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. 4:02-md-01486-PJH (N.D. Cal. Feb. 28, 2014), ECF No. 2181; *see also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. 1486, 2013 WL 12387371, at *4-5 (N.D. Cal. Nov. 5, 2013), *report and recommendation adopted sub nom. In re Dynamic Random Access Memory Antitrust Litig.*, No. C 06-4333 PJH, 2014 WL 12879521 (N.D. Cal. June 27, 2014).

[68] *CRT*, 2016 WL 4126533, at *10.

[69] *See* Supplemental Report and Recommendation of Special Master re Allocation of Attorneys' Fees in the Indirect-Purchaser Class Action, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-cv-01827-SI (N.D. Cal. Dec. 18, 2012), ECF No. at 25-28 (showing lodestar multipliers between 0.10 and 4.34 on a per-firm basis), *report and recommendation adopted in part*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *7-8 (N.D. Cal. Apr. 3, 2013).

[70] *See, e.g.*, *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp.*, No. Civ.A. 03-4578, 2005 WL 1213926, at *9 (E.D. Pa. May 19, 2005) (megafund settlements generally involve "common funds of $100 million or more").

from $100 to $150 million, the requested multiplier here again sits at the low end of the multipliers typically awarded.

Case	Settlement Fund	Attorneys' Fees Awarded	Multiplier
Batteries (DPPs)[71]	$139.3 million	$41.79 million (30%)	0.58
***Batteries* (IPPs)**[72]	**$113.45 million**	**$34.035 million (30%)**	**0.82**
Polyurethane Foam (DPPs)[73]	$147.8 million	$44.34 million (30%)	0.91
Lidoderm (End-Payors)[74]	$104.75 million	$34.92 million (33.3%)	1.37
Ikon Office Solutions[75]	$111 million	$33.3 million (30%)	2.7

Similarly, that the settlement fund for direct purchaser plaintiffs was greater than the fund here is of no import. As this Court is well aware, indirect purchaser claims present issues and complexities, such as choice of law and pass through questions that are not present in direct purchaser cases. Those complexities are reflected in the time, effort, and money that Plaintiffs spent in prosecuting this case, and Plaintiffs' request represents a modest request for recovery of time and costs, which is exemplified in the 0.82 multiplier cross-check.

B. This Court should grant final approval of the SDI, TOKIN, Toshiba, and Panasonic/Sanyo Settlements; the objections to the settlement terms are without merit.

Objector Morgan argues that granting Class Counsel's fee award would render the SDI, TOKIN, Toshiba, and Panasonic/Sanyo settlements improper under Rule 23(e).[76] His arguments are meritless. The SDI, TOKIN, Toshiba, and Panasonic/Sanyo Defendants will pay a total of $49 million in cash under the terms of these proposed settlements. The settlement funds are non-reversionary to the defendants. These settlements are with the last remaining defendants in the case; in total, Plaintiffs have secured settlements of $113.45 million.

[71] Order Granting DPPs' Fee at 3.

[72] Fee Motion at 27.

[73] *Polyurethane Foam*, 2015 WL 1639269, at *7.

[74] *In re Lidoderm Antitrust Litig.*, MDL No. 2521, 2018 WL 4620695, at *1-3 (N.D. Cal. Sept. 20, 2018).

[75] *Ikon Office Solutions*, 194 F.R.D at 193-95.

[76] Morgan Obj. at 9.

Mr. Morgan argues that under Rule 23(e)(2)(C)(iii), which asks the Court to take into account "the terms of any proposed award of attorney's fees, including timing of payment," the settlements are inadequate. Although it is unclear the precise quarrel Mr. Morgan has with some aspects of the fee proposal, there are no signs of unfairness to the class here. The Ninth Circuit has identified three related signs as troubling and potentially indicative that the attorney fee terms in proposed settlements are not in the class's interests: (a) when class counsel receive a disproportionate distribution of the settlement; (b) when the parties negotiate a "clear sailing" arrangement that provides for the payment of attorneys' fees separate and apart from class funds; or (c) when the parties arrange for fees not awarded to plaintiffs' counsel to revert to the defendants rather than the class.[77] These potentially troubling signs are not present in this case. Specifically, (a) the funds will be used to cover costs and fees and compensate the class based on a *pro rata* formula, (b) there is no "clear sailing" provision, no payment of fees separate and apart from the class funds, and (c) the proposed settlement is a common fund, all-in settlement with no possibility of reversion, and no "kicker" provision which would allow unawarded fees to revert to the defendants. The class notice informed class members that class counsel would make a request for attorneys' fees up to 30 percent of the settlement fund.[78]

C. Mr. Andrews's other objections are meritless.

In addition to objecting to the fee request, Mr. Andrews advances a litany of other objections. These objections are difficult to comprehend and fail to state with specificity how the objections apply to these facts, a requirement under the Rule 23(e)(5)(A). That alone is grounds for overruling them.[79] But to the extent Plaintiffs comprehend the objections, they are responded to

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[77] *Hyundai*, 2019 WL 2376831, at *15; *Bluetooth*, 654 F.3d at 946.

[78] Fee Motion at 25 (quoting class notice advising settlement class members that Class Counsel would seek attorneys' fees in the amount of $34,035,000 (inclusive of $4,495,000 already awarded by the Court) plus interest, equal to 30 percent of the common fund).

[79] *See* Fed. R. Civ. P. 23(e)(5)(A). The Advisory Committee Notes to 2018 Amendments to Rule 23(e)(5)(A) recent amendment to Rule 23 provide that "[t]he objection must . . . state with specificity the grounds for the objection," which the advisory committee notes explains "clarifies that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them." *See also United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (holding that objectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement).

below. Each is without merit.

Notice program. Mr. Andrews offers a series of objections to the notice program. First, he asserts that direct notice was not sent to those who submitted claims previously, that the direct notice portion of the campaign should have been by mail, that the online claim form was down between May 17 and 29, 2019, and that the notice program was not on the website.[80] Mr. Andrews is wrong as to each factual contention. The notice administrators sent direct notice to all potential class members for whom they had valid email addresses, irrespective of whether those individuals previously submitted claims. Moreover, the notice procedures *have* been on the website.[81] And email was the primary means of direct notice, as authorized explicitly by the recent amendments to Rule 23, and the notice administrator explains that this was the best notice that was practicable under the circumstances.[82] In any event, notice by mail was provided to those who requested it, and the direct notice campaign was buttressed by a robust indirect notice program.[83] Finally, Mr. Andrews is incorrect that class members were unable to submit claims between May 17 and May 26.[84] And even if that were true, he offers no authority why that would be grounds to find the notice program inadequate given the length of time for class members to submit claims, including months after May 26, as class members have until July 19, 2019 to submit claims.[85]

Notice content. Mr. Andrews also takes issue with the content of the notices.[86] For example, he states that the notice is deficient because there is no specific section stating that, for incapacitated or deceased class members, legally authorized guardians, executors, or legal representatives may make claims of their behalf. He also generally objects that the explanation of the benefits available to class members is insufficient. The Court in *Hyundai* recently explained

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[80] *See* Andrews Obj. at 10-11, 29.

[81] Azari Decl., ¶¶ 25, 45.

[82] *Id.*, ¶¶ 11, 22-26, 53-54 (explaining notice program, including direct notice by email, and affirming that it was the best means of direct notice that was practicable under the circumstances).

[83] *Id.*, ¶¶ 19, 26-44.

[84] *Id.*, ¶¶ 45.

[85] *Id.*, ¶ 49.

[86] *See* Andrews Obj. at 16-20, 32-34.

that, "[t]o satisfy Rule 23(e)(1), settlement notices must 'present information about a proposed settlement neutrally, simply, and understandably.'"[87] "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'"[88] Moreover, a "settlement notice need not 'provide an exact forecast' of the award each class member would receive, let alone a detailed mathematical breakdown; it must merely give class members 'enough information so that those with 'adverse viewpoints' could investigate and come forward and be heard.'"[89]

Here, in a neutral, simple, and understandable manner, the notices informed class members of the nature of the action, the terms of the proposed settlement, the effect of the action and the release of claims, as well as class members' right to exclude themselves from the action and their right to object to the proposed settlement.[90] Specifically, with regard to class member benefits, the notice explains both the total recoveries and a description of how much money class members can expect to get by filing a claim, as well as how to make a claim.[91] It is true that there is no provision specifically explaining that legal representatives of deceased or incapacitated class members may make claims on a class member's behalf. But that level of detail is not required, which makes sense, because notices would otherwise be so lengthy and detailed no one would read them. However, the common practice is that if such legal representatives do make claims, with the proper verification, they will be able to recover funds on behalf of class members.

Reach of notice program. Mr. Andrews also objects that the reach of the notice program was insufficient.[92] To the contrary, the notice program reached 87 percent of the target audience of likely class members, easily satisfying the legal requirement for the "best notice that is practicable under the circumstances, including individual notice [of particular information] to all members

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[87] *Hyundai*, 2019 WL 2376831, at *14 (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009)).

[88] *Id*.

[89] *Id*. (quoting *Online DVD-Rental*, 779 F.3d at 946-47).

[90] *See* Azari Decl., ¶¶ 23, 26 , 28, 33, 44 & Attachments 1, 2, 3, 4, 7.

[91] Azari Decl., Attachment 2, ¶¶ 7-8.

[92] Andrews Obj. at 16-20.

who can be identified through reasonable effort[.]"[93] Moreover Mr. Andrews's argument is based on statistics about the number of cell phone users. Cell phones are not products in the class definition. The rate of claims here is similar to, if not substantially greater than, in similar antitrust cases.[94]

Jurisdiction. Mr. Andrews objects that this Court does not have jurisdiction to approve this round of settlements until his appeals of the previous round of approvals are completed.[95] He cites no case law for this proposition, and Plaintiffs can find none. Courts routinely review motions for final approval of subsequent rounds of settlements while prior settlement round approvals are pending in the appellate courts. It would be inefficient to do it any other way.

Certification of settlement class. Mr. Andrews argues against certification of the Settlement Class, stating that the Settlement Class should not be certified for the same reasons expressed by defendants in the *Qualcomm* litigation.[96] But his objection is merely a verbatim copy of an article about the *Qualcomm* defendants' objections, without any explanation about how those objections apply to the facts of this case. That alone is grounds alone to reject the objections.[97] Mr. Andrews provides no explanation as to why he believes the class certification requirements are not met in this case. Moreover, many of the arguments raised by the *Qualcomm* defendants, as quoted by Andrews, such as the concern that the case would be unmanageable at trial, are irrelevant in the context of a settlement class action.[98]

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[93] Fed. R. Civ. P. 23(c)(2)(B) (notice requirements for classes certified under Rule 23(b)(3)); *see also In re Prudential Secs. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (Each class member need not receive actual notice for the due process standard to be met, "so long as class counsel acted reasonably in selecting means likely to inform persons affected."); Azari Decl., ¶¶ 12-13.

[94] Indirect Purchaser Plaintiffs' Notice of Motion and Motion to Direct Notice to the Class Regarding the SDI, Tokin, Toshiba and Panasonic Settlements, App'x B, Jan. 24, 2019, ECF No. 2459 (comparing claim rates to date in for Plaintiffs' settlements, versus those in other antitrust class action settlements).

[95] Andrews Obj. at 13-14.

[96] *Id.* at 14-15.

[97] *See* Fed. R. Civ. P. 23(e)(5)(A) & Advisory Committee Notes to 2018 Amendments to Rule 23(e)(5)(A) (discussed *supra*, in footnote 79).

[98] *See Hyundai*, 2019 WL 2376831, at *5.

Service awards. Andrews attacks the service awards requested as excessive.[99] But such service awards are typical in class actions, and the amounts requested here – $10,000 for each of the twenty-one individual Class Representatives, and $25,000 for each of the two governmental Class Representatives – are justified by the amount of work dedicated to this lengthy case.[100] Mr. Andrews attacks the veracity of the hours estimated by the Class Representatives. But the substance of the representatives' work and numbers of hours are substantiated by declarations under penalty of perjury.[101] Andrews's attacks have no legal or evidentiary support.

Deficiency of the settlement agreements. Mr. Andrews also makes various arguments about the deficiency of the settlement agreements, including that the severability clauses toward the end of the agreements invalidate the settlements.[102] However, Andrews cites no legal authority for any of these arguments, and Plaintiffs can find none. A severability clause at the end of a contract, including a settlement agreement, is typical and does not render the contract defective.

III. CONCLUSION

Plaintiffs respectfully request that this Court (i) overrule all of the objections; (ii) grant Plaintiffs' motion for final approval of the settlement agreements; and (iii) grant Plaintiffs' motion for attorneys' fees, expenses, and service awards.

DATED: June 11, 2019

HAGENS BERMAN SOBOL SHAPIRO LLP

By *s/ Steve W. Berman*
STEVE W. BERMAN

Shana E. Scarlett (217895)
Benjamin J. Siegel (256260)
715 Hearst Avenue, Suite 202

[99] Andrews Obj. at 20-29.

[100] Fee Motion at 24-25 (discussing facts and law, including *Rodriguez*, 563 F.3d at 958, which states that service "*awards* are fairly typical in class action cases,") and *Van Vraken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995), which held that courts have discretion to approve service awards based on the amount of time and effort spent, the duration of the litigation, and the personal benefit (or lack thereof) as a result of the litigation).

[101] Mr. Andrews specifically attacks the declarations of public employees who have zero to gain by misrepresenting the time spent on this case.

[102] Andrews Obj. at 29-35.

Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
steve@hbsslaw.com
shanas@hbsslaw.com
bens@hbsslaw.com

DATED: June 11, 2019

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By */s/ Brendan P. Glackin*
BRENDAN P. GLACKIN

Elizabeth J. Cabraser (SBN 083151)
Brendan P. Glackin (199643)
Lin Y. Chan (SBN 255027)
Michael K. Sheen (288284)
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
ecabraser@lchb.com
bglackin@lchb.com
lchan@lchb.com
msheen@lchb.com

DATED: June 11, 2019

COTCHETT, PITRE & McCARTHY, LLP

By */s/ Adam J. Zapala*
ADAM J. ZAPALA

Joseph W. Cotchett (36324)
Adam J. Zapala (245748)
Tamarah P. Prevost (313422)
840 Malcolm Road
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577
jcotchett@cpmlegal.com
azapala@cpmlegal.com
tprevost@cpmlegal.com

Class Counsel for Indirect Purchaser Plaintiffs