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	[PROPOSED] 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, AND DENYING OBJECTIONS DATE ACTION FILED: Oct. 3, 2012

This matter comes before the Court on indirect purchaser plaintiffs' motion for final approval of settlements (filed June 11, 2019) and motion for attorneys' fees, reimbursement of expenses, and service awards (ECF No. 2487). A hearing on these motions was held on July 16, 2019.

The Court has carefully reviewed and considered the record in this matter, including the memoranda and supporting declarations submitted in support of the motion to direct notice to the class and the exhibits attached thereto, such as the proposed settlement agreements and each of the class notices; indirect purchaser plaintiffs' (IPPs or Plaintiffs) motion for final approval of the settlement agreements; the memoranda and declarations in support of the motion for final approval submitted by Plaintiffs; the memoranda and declarations submitted in support of the fee petition; and all objections submitted to the Court and Plaintiffs responses to those objections.

Good cause appearing, the Court orders as follows:

I. BACKGROUND

Plaintiffs move for final approval of their settlements with defendants Samsung SDI Co., Ltd. and Samsung SDI America, Inc. (SDI), TOKIN Corporation (TOKIN), Toshiba Corporation (Toshiba), and Panasonic Corporation, Panasonic Corporation of North America, Sanyo Electric Co., Ltd., and Sanyo North America Corporation (Panasonic/Sanyo), collectively "Settling Defendants." On March 11, 2019, this Court directed notice to the class regarding the SDI, TOKIN, Toshiba, and Panasonic/Sanyo settlements, granting preliminary approval of these settlements, provisionally certifying the settlement class, and ordering dissemination of notice to class members. ECF No. 2475.

The notice administrator provided notice in accordance with this Court's order. Out of the millions of class members, only ten class members requested exclusion from the class, and a total of three objections were filed. The settlements will result in the recovery of $49 million for the indirect purchaser class. Under the proposed schedule, the class is able to make claims until July 19, 2019, at which point Plaintiffs have proposed that the settlement funds be distributed.

II. SUMMARY OF THE SETTLEMENTS

A. Settlement Terms

The proposed settlement resolves all claims against the Settling Defendants – the last remaining defendants in the case – stemming from the alleged conspiracy to restrain competition for lithium-on batteries (LIBs). The settlement class is defined as follows:

> [A]ll persons and entities who, as residents of the United States and during the period from January 1, 2000 through May 31, 2011, indirectly purchased new for their own use and not for resale one of the following products which contained a lithium-ion cylindrical battery manufactured by one or more defendants or their coconspirators: (i) a portable computer; (ii) a power tool; (iii) a camcorder; or (iv) a replacement battery for any of these products. Excluded from the class are any purchases of Panasonic-branded computers. Also excluded from the class are any federal, state, or local governmental entities, any judicial officers presiding over this action, members of their immediate families and judicial staffs, and any juror assigned to this action, but included in the class are all non-federal and non-state governmental entities in California.

See, e.g., SDI Settlement Agreement ¶ 1.d, ECF No. 2459-1, Ex. A; TOKIN Settlement Agreement ¶ 1.d, ECF No. 2459-1, Ex. B; Toshiba Settlement Agreement ¶ 1.d, ECF No. 2459-1, Ex. C.; Panasonic Settlement Agreement ¶ 1.d, ECF No. 2459-1, Ex. D.

B. The Settlement Consideration.

Under the proposed settlements, the Settling Defendants will pay a total of $49 million in cash: SDI will pay $39.5 million, TOKIN will pay $2 million, Toshiba will pay $2 million, and Panasonic/Sanyo will pay $5.5 million. The settlement funds are non-reversionary to the defendants. Inclusive of the settlement previously approved between Plaintiffs and other defendants in this case, Plaintiffs have secured settlements of $113.45 million for the indirect purchaser class.

C. Release of Claims

Each Settlement Agreement provides that upon final approval and entry of judgment, class members will release state and federal law claims against the Settling Defendants relating to purchases of lithium-ion batteries or products containing lithium-ion batteries up through May 31,

2011. The proposed settlement class includes only purchasers of portable computers, power tools, camcorders, and replacement batteries, consistent with the class for which Plaintiffs originally sought certification. As to these settlement class members, the Settlement Agreements will release all antitrust claims based on all lithium-ion battery types (*i.e.*, cylindrical, prismatic, and polymer batteries) and additional products (*e.g.*, mobile phones, smart phones, cameras, digital video cameras, and digital audio players), consistent with the scope of claims originally pleaded. SDI Settlement Agreement ¶ 1(m), (q)-(s); TOKIN Settlement Agreement ¶ 1(m), (q)-(s); Toshiba Settlement Agreement ¶ 1(m), (q)-(s); Panasonic Settlement Agreement ¶ 1(m), (q)-(s).

D. Plan of Distribution

Plaintiffs propose to distribute the settlement funds in two steps. *First*, 90 percent of the settlement funds will be allocated toward Class Member residents from so-called *Illinois Brick* repealer states, and the remaining 10 percent will be allocated toward residents of non-repealer states. *Second*, within each allocation, the funds will be distributed *pro rata* to claimants based on the total number of covered products purchased from January 1, 2000 through May 31, 2011. Should a balance remain after distribution to the class (whether by reason of tax refunds, uncashed checks, or otherwise), Class Counsel[1] propose to allow the money to escheat to federal or state governments. Accordingly, no settlement funds will revert to the Settling Defendants.

III. THE SETTLEMENTS ARE FAIR, REASONABLE, AND ADEQUATE

The Court must conduct a multiple-step inquiry to determine whether to approve a class action settlement. *First*, the Court must certify the proposed settlement class. *Second*, it must determine that the settlement agreement is "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2). *Third*, it must assess whether appropriate notice and other requirements have been met under the Constitution, the Class Action Fairness Act (CAFA), the Ninth Circuit, and the Northern District of California. *See* 28 U.S.C. § 1715(d); *Adoma v. Univ. of Phoenix. Inc.*, 913 F. Supp. 2d 964, 972 (E.D. Cal. 2012) (conducting three-step inquiry). Each of these requirements is met here.

[1] Class Counsel refers to the firms of Hagens Berman Sobol Shapiro LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Cotchett, Pitre & McCarthy, LLP.

A. The Court Will Certify the Settlement Class.

At final approval, this Court must decide whether the proposed settlement class meets Rule 23's requirements. *See* Order Directing Notice to the Class Regarding the SDI, Tokin, Toshiba, and Panasonic Settlements, ¶ 2 (ECF No. 2475). To certify this proposed settlement class, Plaintiffs must show that the requirements of Rule 23(a) and 23(b)(3) are met. The Ninth Circuit recently confirmed that "[t]he criteria for class certification are applied differently in litigation and settlement classes." *In re Hyundai & Kia Fuel Economy Litig.*, No. 15-56014, 2019 WL 2376831, at *5 (9th Cir. June 6, 2019) (en banc). In *Hyundai*, the Ninth Circuit clarified the application of the Rule 23 criteria in the settlement class action context, which informs the analysis here. As discussed below, the Court certifies the class for settlement purposes under Rule 23(e).

1. The Settlement Class meets the requirements of Rule 23(a).

This Court previously determined that identical nationwide litigation and settlement classes met the requirements of Rule 23(a). *See* Order Denying Without Prejudice Mots. for Class Cert., ECF No. 1735; Order Granting Final Approval of Class Action Settlements With Hitachi Maxell, NEC, and LG Chem Defendants; Denying Motion to Intervene at 3, ECF No. 2003. This Court now confirms its prior ruling.

In short, under Rule 23(a), the proponent of class certification must show that the proposed class meets the requirements of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. Those requirements are met here, where, respectively:

- the class numbers in the million, which would make joinder impracticable, if not impossible (numerosity);[2]
- the central, common questions underlying each of Plaintiffs' claims in this case are whether defendants participated in a conspiracy to raise, fix, stabilize or maintain the prices of lithium ion batteries sold in the United States, and the impact from this conspiracy

[2] *See In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350-51 (N.D. Cal. 2005); *In re TFT-LCD (Flat Panel) Antitrust Litig.* ("*TFT-LCD II*"), 267 F.R.D. 291, 300 (N.D. Cal. 2010).

(commonality);[3]

- "it is alleged that the defendants alleged in a common [price-fixing] scheme relative to all members of the class" (typicality);[4]
- the Class Representatives have no interests that conflict with the Settlement Class; and
- the Class Representatives have been actively involved in the litigation of this case, as has Class Counsel, whose experienced firms have vigorously prosecuted the action since their appointment in 2013 (adequacy).[5]

2. Common issues predominate under Rule 23(b)(3).

The settlement class satisfies Rule 23(b)(3) because common questions predominate over questions affecting individual class members. "The predominance inquiry under Rule 23(b)(3) 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Hyundai*, 2019 WL 2376831, at *6 (quoting *Amchen Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The Ninth Circuit in *Hyundai* emphasized that Rule 23(b)(3) does not require that all elements of a claim be susceptible to class-wide proof; rather, "even if just one common question predominates, 'the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.'" *Id.* (quoting *Tyson Foods, Inc. v. Bouaphakeo*, _U.S._, 136 S. Ct. 1036, 1045 (2016)). This Court already found that the predominance requirement of Rule 23(b)(3) was met for an identical settlement class.[6]

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[3] *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006) ("[T]he very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist." (quoting *Rubber Chems.*, 232 F.R.D. at 351)); *TFT-LCD II*, 267 F.R.D. at 300.

[4] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 613 (N.D. Cal. 2015) (quoting *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss. 1993)); *see also Facciola v. Greenberg Traurig LLP*, 281 F.R.D. 363, 369 (D. Ariz. 2012) ("[T]he claims of all investors in the proposed classes turn on a common scheme premised on the same alleged course of conduct by defendants.").

[5] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

[6] Order Granting Final Approval of Class Action Settlements with Hitachi Maxell, NEC, and LG Chem Defendants; Denying Motion to Intervene at 3, Oct. 27, 2017, ECF No. 2003.

a. Predominance is readily shown in antitrust cases.

In horizontal price-fixing cases, questions as to the existence of the alleged conspiracy and as to the occurrence of price-fixing are readily found to predominate. *See, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 300 (3d Cir. 2011); *see also Amchem*, 521 U.S. at 625 (Predominance under Rule 23(b)(3), "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."). The court in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 291, 310 (N.D. Cal.), collected cases and explained: "Courts have frequently found that whether a price-fixing conspiracy exists is a common question that predominates over other issues because proof of an alleged conspiracy will focus on defendants' conduct and not on the conduct of individual class members."

This case is no different. Here, resolution of Plaintiffs' claims depends principally on whether defendants participated in a price-fixing conspiracy, and whether the conspiracy caused an artificial increase to the market price of lithium ion batteries. Thus, if Plaintiffs were able to prove these elements based on common evidence, a jury could reasonably infer that every class member suffered some injury as a result. Antitrust cases, like consumer fraud cases, are ones in which predominance is "readily met" because the class is comprised a "cohesive group of individuals [who] suffered the same harm in the same way because of the [defendants'] alleged conduct." *Hyundai*, 2019 WL 2376831, at *7; *see also id.*, at *8 ("We have held that these types of common issues, which turn on a common course of conduct by the defendant, can establish predominance in nationwide class actions."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging consumer . . . fraud or violations of the antitrust laws.").

On the other hand, if, for example, class members brought their claims individually, each would have to rely on the same evidence of cartel behavior, and prove damages using the same economic modeling on which Plaintiffs rely. Although this Court denied Plaintiffs' renewed motion for class certification, courts "will certify settlement classes although they had previously denied certification of the same class for litigation purposes." 3 Newberg on Class Actions § 7:35

(5th ed.). *See also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486-PJH, 2013 WL 12333442, at *56 (N.D. Cal. Jan. 8, 2013); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 269 F.R.D. 80, 81-82 (D. Me. 2010).

b. Predominance is met despite variations in state law.

Plaintiffs move to certify a nationwide settlement class of consumers – including residents of both repealer states and non-repealer states. While this Court previously performed a choice of law analysis with respect to the litigation class, it is not obligated to do so here. *Hyundai*, 2019 WL 2376831, at *9. The Ninth Circuit recently eschewed the need to do so in the settlement context, holding, "[t]he prospect of having to apply the separate laws of dozens of jurisdictions present[s] a significant issue for *trial manageability*," and need not be considered in the settlement context. *Id.*, at *10 (emphasis added).

Indeed, because it previously determined that applying California law to a nationwide class would not violate constitutional due process protections,[7] this Court "is free to apply the substantive law of a single state to the entire class." *See Hyundai*, 2019 WL 2376831, at *9 (internal citations omitted). This Court, sitting in California, must apply California law by default "unless a party litigant timely invokes the law of a foreign state, in which case it is the foreign law proponent who must shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims." *Id.* (quoting *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906 (2001) (internal quotation marks omitted)). Here, because no party or objector has argued to the contrary, California law should be applied to the settlement class.[8]

[7] *See* Order Denying Without Prejudice Mots. for Class Cert. at 20-22.

[8] Objector Christopher Andrews argues in conclusory fashion that the Settlement Class should not be certified for the same reasons expressed by defendants in the *Qualcomm* litigation. Objections to the Settlement by Christopher Andrews at 14-15 ("Andrews Obj."), May 30, 2019, ECF No. 2497. 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 is grounds alone to reject the objections. *See* Fed. R. Civ. P. 23(e)(5)(A). The 2018 Advisory Committee Notes on the Rule 23 amendment provides that "[t]he objection must state . . . with specificity the grounds for the objection," "clarif[ying] that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them."

Moreover, centering the certification inquiry on variations in state law would wrongly focus predominance on the merits of a single aspect of whether such class members may recover to the exclusion of determining "simply whether common issues of fact or law predominate." *Sullivan*, 667 F.3d at 304-05; *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 468 (2013) (courts should look to the existence of a question common to the class rather than whether plaintiffs have satisfied their burden on each element of proof). In antitrust cases involving certification of a nationwide settlement class, including purchasers from *Illinois Brick* repealer and non-repealer states, the presence of this single variation does not defeat predominance; "the supposed lack of one element necessary to prove a violation on the merits – statutory standing [under *Illinois Brick*] – does not establish a concomitant absence of the predominantly common issues." *Sullivan*, 667 F.3d at 307; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) ("Variations in state law do not necessarily preclude a 23(b)(3) action, but class counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members." (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985))).

Courts consequently have repeatedly found that nationwide settlement classes may be certified notwithstanding state law variations, and this Court will do the same. *Hanlon*, 150 F.3d at 1022; *Sullivan*, 667 F.3d at 301; *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001). In other words, as the Ninth Circuit reaffirmed in *Hyundai*, even if this were an individual issue, it would only be one such issue among a host of obviously common ones, and would not obviate the required analysis of whether common issues nevertheless predominate. *Hyundai*, 2019 WL 2376831, at *6.[9]

c. Differing allocation of funds does not affect predominance.

Nor does allocating different amounts to subgroups of the class defeat predominance. Courts have recognized that individualized damages determinations, particularly when they are

[9] The Ninth Circuit elaborated that "[p]redominance is not, however, a matter of nose-counting. Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Hyundai*, 2019 WL 2376831, at *6 (internal quotation marks and citation omitted).

largely formulaic, do not defeat predominance. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 42 (2013) (Ginsburg & Breyer, JJ., dissenting) ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal."); *Pulaski & Middleman, LLC v. Google, Inc*., 802 F.3d 979, 988 (9th Cir. 2015) (reaffirming "the proposition that differences in damage calculations do not defeat class certification").

Acting as a neutral mediator, Judge Rebecca J. Westerfield (ret.) has recommended that either zero or 10 percent of the Gross Settlement Funds be allocated for distribution to class members from non-repealer states. Plaintiffs recommend that the Court allocate 10 percent of the settlement funds for distribution to non-repealer state residents, based on considerations of the risk-discounted value of the claims those class members release under the terms of the Settlement Agreements. This Court held in its Order Directing Notice to the Class that it "is likely to find [Plaintiffs'] proposed distribution plan fair, reasonable, and adequate." Order Directing Notice, ¶ 1(d), ECF No. 2475. No class member has objected to Plaintiffs' proposal, nor to this Court's tentative recommendation to endorse it. As explained in more detail *infra*, in Section III.B.4, the Court now confirms its provisional conclusion.

3. The Settlement Class satisfies superiority under Rule 23(b)(3).

Resolution of Plaintiffs' claims through a class action is superior to alternative methods. For example, litigating every class member's claims separately would waste both judicial and party resources, given that the vast majority of evidence of liability would be identical. *See Hanlon*, 150 F.3d at 1023.

This Court certifies the proposed settlement class.

4. Appointment of class counsel under Rule 23(g).

Pursuant to Rule 23(g), this Court appoints Hagens Berman Sobol Shapiro LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Cotchett, Pitre & McCarthy, LLP as Class Counsel to represent the certified settlement class. At the outset of this action, the Court appointed these firms as Interim Co-Lead Counsel for indirect purchaser plaintiffs after a competitive application process. Order Appointing Interim Co-Lead Counsel & Liaison Counsel for Indirect Purchaser Pls.,

May 17, 2013, ECF No. 194. Considering counsel's work in this action, their collective expertise and experience in handling similar actions, and the resources they have committed to representing the class, they are appointed as class counsel for the settlement class under Rule 23(g)(1).

B. The Proposed Settlements Are Fair, Adequate, and Reasonable

This Court may exercise its "sound discretion" when deciding whether to grant final approval. *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981) ("Dismissal or compromise of a class action is left to the sound discretion of the trial judge."). In doing so, the Ninth Circuit advises:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate[.][10]

In the Ninth Circuit, there is a "'strong judicial policy that favors settlements, particularly where complex class action litigation is involved . . . .'" *Hyundai*, 2019 WL 2376831, at *4 (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) and *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008)). "This presumption [in favor of voluntary settlements] is especially strong in class actions and other complex cases . . . because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Sullivan*, 667 F.3d at 311 (internal quotation marks omitted; ellipsis in original).

The new amendments to Rule 23 provide that in determining whether a proposed settlement is fair, reasonable, and adequate, the Court must consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;

[10] *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.[11]

Recognizing that "[c]ourts have generated lists of factors," the Advisory Committee emphasizes that these new provisions are intended to "focus" the inquiry on "the primary considerations that should always matter to the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) 2018 Advisory Committee Notes. The proposed Settlement Agreements are fair, reasonable, and adequate under the above-referenced factors and other relevant considerations identified by the Ninth Circuit.[12]

1. Rule 23(e)(2)(A): The class representatives and class counsel have vigorously represented the Class.

The Court finds that the class representatives and class counsel have more than adequately represented the Class. The Advisory Committee Notes explain that this subsection, in conjunction with subsection (B), "identify matters that might be described as 'procedural' concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." *See* Fed. R. Civ. P. 23, Notes of Advisory Comm., Subdivision (e)(2), Paragraphs (A) and (B) (2018).

As an "example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base." *Id.* Ninth Circuit law, too, instructs court to consider the "extent of discovery completed and the stage of the proceedings." *See Bluetooth*, 654 F.3d at 946 (factor

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

[12] Prior to the recent Rule 23 amendments, the Ninth Circuit instructed courts to weigh some or all of the following factors: "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

five). The extent of the discovery conducted to date and the stage of the litigation are both indicators of counsel's familiarity with the case and of Plaintiffs having enough information to make informed decisions. *See, e.g.*, *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). "A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *See Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 U.S. Dist. LEXIS 11149, at *10 (N.D. Cal. Feb. 2, 2009).

Plaintiffs here – during *six and half years of hard-fought litigation* – survived at least four rounds of dispositive motions and conducted extensive discovery, thoroughly testing the claims and defenses in this case. During fact discovery, Plaintiffs took and defended over eighty depositions, served voluminous discovery, reviewed millions of pages of documents (mostly in Japanese, Korean, and Chinese), and analyzed enormous electronic data files produced by defendants and third parties. To obtain this discovery, Plaintiffs brought and prevailed on, at least in part, fourteen fiercely contested motions to compel. 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 evidence to show the conspiracy's substantial and universal impact on consumers. As a result of their work, Plaintiffs obtained substantial recoveries for the Settlement Class from all but one of the Defendant families prior to the Court's final denial of class certification.

These facts make clear that the Class Representatives and Class Counsel had the information they needed to negotiate intelligently on behalf of the class. In such circumstances in particular, it is important to defer to "the experience and views of counsel." *See Bluetooth*, 654 F.3d at 946 (factor six). Indeed, courts have explained that "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). The experienced views of counsel and their intimate

knowledge of the strengths and weaknesses of the case weigh in favor of final approval.

2. Rule 23(e)(2)(B): Class counsel negotiated these settlements at arm's length.

Rule 23(e)(2)(B) instructs courts to consider whether "the proposal was negotiated at arm's length." The Settlement Agreements were negotiated at arm's length among experienced and sophisticated counsel. The Advisory Committee Notes state, "the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Here, the largest settlement at issue in this motion, the $39.5 million settlement with SDI, followed multiple mediation sessions involving retired Judge Vaughn R. Walker. The smaller TOKIN, Toshiba, and Panasonic/Sanyo Settlements resulted from iterative negotiations directly between counsel.

As a final procedural consideration, the Advisory Committee Notes to the federal rules directs courts to consider the "treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms." The Ninth Circuit has identified three related signs as troubling and potentially indicative that a proposed settlement is 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. *Hyundai*, 2019 WL 2376831, at *14; *Bluetooth*, 654 F.3d at 946. Here, none of these typical signs of collusive behavior are present. 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.

In sum, all procedural considerations support a conclusion that negotiations occurred at arm's length.

3. Rule 23(e)(2)(C): The relief provided by the settlement represents a strong recovery, taking into account the costs, risks, and delay of trial and appeal.

Rule 23(e)(2)(C) asks the court to consider whether "the relief provided for the class is adequate," taking into account four enumerated factors.

Costs, Risks, and Delay of Trial and Appeal. The first factor – "the costs, risks, and delay of trial and appeal"[13] – is analogous to the Ninth Circuit's consideration of the risk, expense, complexity, and likely duration of further litigation, while also examining the strength of plaintiffs' case, the risk of maintaining class action status throughout the trial, and the amount offered in settlement. *Bluetooth*, 654 F.3d at 947-48 (identifying these factors).

Recovery of $49 million in settlements for the indirect purchaser class from the SDI, TOKIN, Toshiba, and Panasonic/Sanyo Defendants is a strong result given the tremendous risks, challenges, and costs faced. Plaintiffs reached settlements totaling $43.5 from the SDI, TOKIN, and Toshiba Defendants – representing 20.11 percent of the *nationwide* single damages attributable to these defendants – which is greater than the average recovery in settled cartel cases. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 3648478, at *7 n.19 (N.D. Cal. July 7, 2016) (citing survey of 71 settled cartel cases which showed that the weighted mean – weighting settlements according to their sales – was 19% of possible single damages recovery). Indeed, this was after this Court denied Plaintiffs' original motion for class certification and while Plaintiffs' renewed motion was pending – "a time of extraordinary risk for the class receiving no recovery at all." *See In re Optical Disk Drive Prods. Antitrust Litig.*, No. 10-md-2143 RS, 2016 WL 7364803, at *14 (N.D. Cal. Dec. 19, 2016) (explaining the great risk associated with this time period in a case). Plaintiffs took a calculated risk, leaving only Panasonic/Sanyo potentially liable for damages. The risk of no further recovery increased when the renewed motion was denied. But Class Counsel persevered to maximize recovery for the Class, achieving a $5.5 million settlement with Panasonic/Sanyo on the eve of trial. The Ninth Circuit recognizes that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal citation omitted). These

[13] Fed. R. Civ. P. 23(e)(2)(C)(i).

settlements, while compromises, represent a strong result for the Class.

This is especially true given that there are undeniably great risks (and related potential costs and delay) in this case. *First and foremost*, the Court is aware of the risk of nominal or no recovery by the Class. This Court denied Plaintiffs' initial and renewed motions for class certification, greatly limiting Plaintiffs' potential recovery to only the damages of the Class Representatives, and Plaintiffs faced a summary judgment motion and then trial at the time of the final settlement with Panasonic/Sanyo. Thus, recovery of $49 million is outstanding given the real risk that the class faced the possibility of little to no recovery if the Ninth Circuit had upheld this Court's denials of class certification, or if this Court granted summary judgment, or if a jury returned a verdict in favor of the defendants.

Second, antitrust cases are particularly risky and challenging, with courts recognizing that the "antitrust class action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig.*, MDL No. 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). Even where liability is proven, there is the very real risk that plaintiffs will "recover[] no damages, or only negligible damages, at trial, or on appeal." *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("'Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.'" (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998))); *see also In re Super. Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990) ("The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated.").

Third, this case has always had unique risks and challenges. The sheer scale of this

litigation required extensive coordination among Class Counsel and the supporting firms in developing pleadings, engaging in motion practice, and conducting discovery. At every turn, defendants had the opportunity to significantly narrow the scope of or altogether end the litigation. For example, as discussed, Plaintiffs survived at least four rounds of dispositive motions. This is also an intrinsically difficult case due to the scope and length of the conspiracy alleged – a more than decade-long conspiracy centered in Asia with the evidence mostly in foreign language documents and obtained via translated depositions – and the complexity associated with proving the existence of overcharges. Moreover, in addition to measuring the overcharge as to battery cells, Plaintiffs, as indirect purchaser plaintiffs, had to measure the pass-through of the overcharge to the end-consumer of a finished product, a data-intensive task. All of these challenges support final approval of the settlements.

Effectiveness of Distribution. Rule 23(e)(2)(C) also instructs the Court to take into account the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Plaintiffs' proposed distribution plan will maximize the effectiveness of the distribution of the settlement proceeds.

After the claims period closes on July 19, 2019, any outreach requested by the parties to review the validity of claims is complete, and the Court approves the settlement and enters final judgment (which may take several months, pending appeals and Court availability), settlement administrators will send an email to all valid claimants. The email will provide instructions on how to receive payments electronically via PayPal, Google Wallet, Amazon Balance, and other popular methods. Epiq also will mail physical checks to Settlement Class Members who have requested to receive compensation in that manner.

Terms of Proposed Attorney's Fees. A third factor to be considered under Rule 23(e)(2)(C) is "the terms of any proposed award of attorney's fees, including timing of payment." Here, while Settlement Agreements do not contemplate a specific award of attorney's fees, they do provide that any Court-awarded fees will be paid from the Gross Settlement Fund. Plaintiffs have requested a total award of $34,035,000 in attorneys' fees plus interest, which represents 30 percent

of the total recovery in this case, inclusive of the $4,495,000 already awarded.[14] There are no troubling terms about fees in the settlements agreements, and each is subject to this Court's approval.

Other Agreements. The last factor of Rule 23(e)(2)(C) instructs courts to consider "any agreement required to be identified under Rule 23(e)(3)." This provision is aimed at "related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others." Fed. R. Civ. P. 23(e) 2003 Advisory Committee Notes. Plaintiffs have entered into no such agreements.

4. Rule 23(e)(2)(D): The settlements treats class members equitably relative to each other.

This Court finds that the settlements treat class members equitably relative to each other. The proposed Settlement Agreements do not contemplate any unwarranted preferential treatment of class representatives or segments of the class, a consideration identified by Rule 23(e)(2)(D). Matters of concern for the Court may include "whether apportionment of relief among class member takes appropriate account of differences among their claims." Fed. R. Civ. P. 23(e)(2) 2018 Advisory Committee Notes. Under the terms of the Settlement Agreements, the plan of distribution is, appropriately, left for the determination of the Court. *See* SDI Settlement Agreement ¶¶ 1.(h), 23; TOKIN Settlement Agreement ¶¶ A.1.(h), 23; Toshiba Settlement Agreement ¶¶ A.1.(h), 23 ; Panasonic Settlement Agreement ¶¶ A.1.(h), 23.

Plaintiffs have recommended that this Court adopt the second of Judge Westerfield's recommended methods of allocation: allocating ninety percent of the settlement funds to class members from repealer states, and the remaining ten percent to class members from non-repealer states.[15]

The Court agrees with this recommendation and orders distribution using this method. It is appropriate for class members from non-repealer states to receive a limited recovery because they

[14] As described in the proposed notice to the class, these fees would be awarded proportionally from these and all prior settlements.

[15] The proposed notice provides for an allocation of 90% of funds to claimants from repealer states and 10% of funds to claimants from non-repealer states.

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. *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981); *see also Anderson v. Nextel Retail Stores, LLC*, No. CV 07-4480-SVW FFMX, 2010 WL 8591002, at *9 (C.D. Cal. Apr. 12, 2010). Thus, in recognition of the fact that such releases themselves have some value, even if nominal, the Court will allocate ten percent of the settlement funds for distribution to non-repealer state residents.

C. Plaintiffs have complied with all additional approval factors.

1. Plaintiffs have provided adequate notice under Rule 23(b)(3).

Class actions brought under Rule 23(b)(3) must satisfy the notice provisions of Rule 23(c)(2), and upon settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal[.]" Fed. R. Civ. P. 23(e)(l)(B). Rule 23(c)(2) prescribes the "best notice that is practicable under the circumstances, including individual notice [of particular information] to all members who can be identified through reasonable effort[.]" Fed. R. Civ. P. 23(c)(2)(B) (enumerating notice requirements for classes certified under Rule 23(b)(3)). "[N]otice may be by one or more of the following: United States mail, electronic means, or other appropriate means." *Id.* "To satisfy Rule 23(e)(1), settlement notices must 'present information about a proposed settlement neutrally, simply, and understandably.'" *Hyundai*, 2019 WL 2376831, at *14 (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009)). "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.'" *Id.*

The proposed notice plan was undertaken and carried out pursuant to this Court's preliminary approval order. The notice campaign has been successful both procedurally and substantively. Epiq Class Action & Claims Solutions ("Epiq"), the Court-appointed settlement notice administrator, implemented a direct notice campaign via email, as well as a multifaceted indirect notice campaign. The class received direct and indirect notice through a variety of means: email notice, mailed notice upon request, an informative settlement website, a telephone support

line, and a vigorous online publication campaign. Pursuant to this Court's orders,[16] the notice administrator provided direct notice via email (obtained from retailers of the products at issue here) to about 9.06 million potential class members, as well as via mail to those requesting mailed notice. The notice administrator estimates an 86.9 percent deliverable rate for the email notice.

This direct notice campaign was supported by a number of other outreach methods to ensure class members both heard about the settlement, and received sufficient information to evaluate their options. Since April 11, 2017, the settlement website (www.reversethecharge.com) has been available to the class. The website provides answers to frequently asked questions, the claims form, relevant motions and orders (including the motion for attorneys' fees), and the notices themselves. A toll-free automated telephone support line was put in place to provide answers to frequently asked questions by class members. And the notice administrator engaged in an extensive public notice campaign, including:

a. A party-neutral Informational Release to approximately 15,000 media outlets, including newspapers, magazines, national wire services, television, radio, and online media in all 50 states, including in Spanish to the Hispanic newsline, which reaches over 7,000 U.S. Hispanic media contacts, including online placement of approximately 100 Hispanic websites nationally;

b. Targeted television advertisements covering a variety of networks such as History, The Weather Channel, A&E, Syfy, and Lifetime;

c. Digital banners and advertising in English and Spanish on the Google DoubleClick and Oath Ad Networks (formerly Yahoo! Ad Network), which served 468,809,829 impressions with 145,391 clicks through to the case website;

d. Sponsored search listings on Google, which were displayed 3,972,843 times, resulting in 8,886 clicks through to the case website;

e. Digital banners and advertising on Facebook, Instagram, and Twitter, which served 63,591,790 impressions with 20,801 clicks through to the case website;

f. Digital video notices on Facebook, Instagram, Twitter, and YouTube, utilizing advanced targeting algorithms to identify and target possible class members, which served 58,128,552 impressions with 912 clicks through to the website; and

g. Targeted digital media advertisements, including pacing advertisements alongside online articles, blogs, and content that specifically contain keywords and phrases in line with lithium-ion cylindrical battery products.

[16] *See* Order Directing Notice, ¶¶ 6-12, ECF No. 2475; Order Granting Stipulation Regarding Modification to Direct Notice Campaign, Apr. 8, 2019, ECF No. 2486.

In total, for example, the banner notices and digital video notices for this round of settlements generated over 590 million impressions, directing over 195,473 clicks through to the case website. The notice administrator estimates that the notice program reached approximately 87 percent of adults who purchased portable computers, power tools, camcorders, or replacement batteries, and even then, these class members were notified an average of 3.5 times each.

As a result of Plaintiffs' notice efforts, in total, 1,025,449 class members have submitted claims. That includes 51,961 new claims, and 973,488 claims filed under the prior settlements, which will be applied to this round of settlements. The claims period for the settlement closes on July 19, 2019. The Court finds that Plaintiffs have complied with all of the notice requirements in Rule 23.

2. Defendants have complied with the Class Action Fairness Act's notice requirements.

Defendants have provided notice under the Class Action Fairness Act's (CAFA) requirements. CAFA requires that "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official[.]" 28 U.S.C. § 1715(b), (d) (CAFA notice requirement must be met before final approval). Here, the SDI, TOKIN, Toshiba, and Panasonic/Sanyo Defendants provided CAFA notices on February 27, 2019, February 1, 2019, January 31, 2019, and February 1, 2019, respectively. No Attorneys General have submitted statements of interest or objections in response to these notices.

3. The reaction of class members to the proposed settlement favors final approval.

The Northern District Procedural Guidance and the Ninth Circuit in *Bluetooth* held that the reaction of the class members to the proposed settlement is also a relevant consideration. Plaintiffs' notice program reached millions of consumers who purchased the consumer products involved in this case. Over one million class members have taken action to file claims. ***Yet, only three objections and ten requests for exclusion*** were received out of millions of class members. The reaction of the class strongly favors approval of the settlement. *See, e.g.*, *Churchill Village L.L.C.*

v. Gen. Elec., 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with 45 objections out of 90,000 notices sent); *In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (finding "an overall positive reaction" by the class where only 57 class members opted out and six objected out of a class of 798,000).

* * *

In summary, the Court finds that the proposed settlements are fair, reasonable, and adequate and gives the settlements final approval. The Court shall enter the final proposed judgment provided by the settling parties.

IV. PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES OF 30 PERCENT OF THE COMMON FUND IS FAIR AND REASONABLE

Plaintiffs request: (1) an award of $29.54 million in attorneys' fees—equal to 30 percent of the common fund of all settlements reached in this case ($113.45 million), or $34.035 million, minus the $4.495 million this Court already awarded; (2) reimbursement of expenses incurred in connection with this litigation totaling $5.89 million, which does not include the $860,188.50 ordered reimbursed by this Court previously; and (3) service awards for each of the class representatives—$10,000 for each of the twenty-one individual class representatives and $25,000 for each of two governmental entity class representatives.

In the Ninth Circuit, the district court has discretion in a common fund case to choose either the "percentage-of-the-fund" or the "lodestar" method in calculating fees. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). 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." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 & n.5 (9th Cir. 2002). Regardless of what method is chosen as the primary method to calculate attorneys' fees, the Ninth Circuit encourages district courts to conduct "a cross-check using the other method." *Id.*

This Court will evaluate Plaintiffs' fee request using the percentage-of-the fund method, with the lodestar used as a cross-check to confirm the reasonableness of the percentage figure.

Inclusive of the amount this Court awarded in fees previously, Plaintiffs requests 30 percent of the common fund. Applying a lodestar cross-check, this would result in a negative 0.82 multiplier of Class Counsel's lodestar of $41,458,223.50. The Court finds Plaintiffs' request is fair and reasonable based on a percentage-of-the-fund and lodestar cross-check basis.

A. The Request for Thirty Percent of the Common Fund Is Reasonable and Will Be Granted

When applying the percentage-of-the fund method, the Ninth Circuit has established a benchmark percentage of 25 percent to be used as the "starting point" for analysis. *Online DVD*, 779 F.3d at 949, 955. "That percentage amount can then be adjusted upward or downward depending on the circumstances of the case." *de Mira v. Heartland Emp't Serv., LLC*, No. 12–CV–04092 LHK, 2014 WL 1026282, at *1 (N.D. Cal. Mar. 13, 2014); *accord Vizcaino*, 290 F.3d at 1048 (25 percent is "a starting point for analysis," but "[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"). Courts in this District have recognized that "'in most common fund cases, the award *exceeds* the benchmark.'" *de Mira*, 2014 WL 1026282, at *1 (quoting *Omnivision*, 559 F. Supp. 2d at 1047). At bottom, the Ninth Circuit asks district courts to "consider[] all of the circumstances of the case" and "reach[] a reasonable percentage." *Vizcaino*, 290 F.3d at 1048; *accord Online DVD*, 779 F.3d at 949.

The following factors are among those the Ninth Circuit has held courts should consider when determining whether a fee request is reasonable: (1) the market rate for the particular field of law; (2) whether counsel achieved exceptional results for the class; (3) whether the case was risky for class counsel; (4) whether the case was handled on a contingency basis; and (5) the burdens class counsel experienced while litigating the case. *Online DVD*, 779 F.3d at 954-55.

1. The market rate for antitrust class action lawyers with the experience of Class Counsel supports the 30 percent fee request.

The market rate for antitrust class action lawyers with Class Counsel's experience supports the 30-percent fee request. 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. *See Online DVD*, 779 F.3d at 955; *Vizcaino*, 290 F.3d at 1049-50.

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 surveyed 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. Eisenberg, Miller & Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 952 (2017) ("EMG Study"). 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 between $100 and $249 million (the settlements here total $113.45 million), ***was 30 percent***. *See* 2018 Antitrust Annual Report: Class Action Filings in Federal Court, published May 2019, Ex. E to 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 Omnibus Response to Objections, June 10, 2019. 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. *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).

This empirical research and case law focuses specifically on the market rate in antitrust class actions, the "particular field of law" at issue,[17] and courts have recognized that the "antitrust

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

class action is arguably the most complex action to prosecute." *See Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10. The requested 30 percent fee award would place the award to Class Counsel within the range of fees in comparable cases.

2. Class Counsel has achieved exceptional results for the class.

Class Counsel has achieved exceptional results for the class in light of the enormous risks, challenges, and complexities faced. Indeed, obtaining a $113.45 million common fund where class certification was denied twice, evidences a strong result under any measure.

Moreover, by Plaintiffs' estimates, the common fund equates to 11.7 percent of single damages for a nationwide class during the eleven-and-a-half year class period. The quality of the merits and expert evidence presented enabled Plaintiffs to obtain substantial settlements for the Class, despite not ultimately prevailing on their class certification motions. Indeed, Plaintiffs achieved settlements with SDI, TOKIN, and Toshiba totaling $43.5 million, approximately 20.11 percent of the $216 million in estimated nationwide damages attributed to those Defendants, after the Court denied Plaintiffs' original motion for class certification and while Plaintiffs' renewed motion was pending—"a time of extraordinary risk for the class receiving no recovery at all." *See In re Optical Disk Drive Prod. Antitrust Litig.*, 2016 WL 7364803, at *14. Plaintiffs took a calculated risk, leaving only Panasonic/Sanyo potentially liable for damages. The risk of no further recovery increased when the renewed motion was denied. But Class Counsel persevered to maximize recovery for the Class, settling with Panasonic/Sanyo for $5.5 million on the eve of trial.

That the percentage of single damages here supports a 30 percent fee award is supported by several decisions, including in price-fixing cases in this District, which have awarded ***33 percent*** or more in fees where class plaintiffs recovered similar percentages of possible damages in complex and risky actions. *See 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 Sec. 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. Sec. 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. Sec. 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); *see also Omnivision*, 559 F. Supp. 2d at 1046 (holding that ["t]he overall result and benefit to the class from the litigation is the most critical factor in granting a fee award," and 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").

3. This case posed an enormous risk for Class Counsel.

The risk associated with this case plays an important role in determining a fair fee award. *Online DVD*, 779 F.3d at 955; *Vizcaino*, 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. Sec. Litig.*, 47 F.3d at 379 (no abuse of discretion where the "$4 million award (thirty-three percent [of the class's recovery]) for attorneys' fees is justified because of the complexity of the issues and the risks'").

A number of risks made this case unique – and made the actions of Class Counsel unique. *First*, the sheer scale of this litigation required extensive coordination among Class Counsel and the supporting firms in developing pleadings, engaging in motion practice, and conducting discovery. At every turn, Defendants had the opportunity to significantly narrow the scope of or altogether end the litigation. Some of the efforts included:

- Preparing four comprehensive consolidated amended complaints detailing Defendants' alleged violations of the antitrust laws;
- Conducting exhaustive legal research regarding the claims and the defenses, particularly with respect to multiple rounds of motions to dismiss, three motions for class certification, at least fourteen motions to compel discovery, and two motions for summary judgment;

- Retaining expert economists and consultants to analyze and review Defendant and non-party data to assist counsel in their investigation and analysis and to prepare expert reports;
- Maintaining close communication with class representatives throughout the litigation and responding to multiple sets of discovery requests propounded by Defendants, including document requests, interrogatories, and requests for admission;
- Securing settlements with every Defendant group; and
- Building a notice program to inform Class Members of the pending settlements.

Second, this was an intrinsically difficult case due to the scope and length of the conspiracy alleged and the complexity associated with proving the existence of overcharges. Class Counsel reviewed more than 2.7 million predominantly foreign-language documents, which required attorneys with specialized knowledge of antitrust law, of organizing and running a foreign language review, and of managing hundreds of certified translations—including some who had these skills and who could also speak Japanese or Korean. Class Counsel brought to bear hard-learned lessons from *TFT-LCD*, *ODD*, *CRT*, *SRAM*, and other antitrust cases, and the class benefited enormously. After reviewing the documents and having dozens translated in the weeks before each deposition, Class Counsel in many instances assigned lawyers with dozens of prior foreign-language depositions in cartel cases to take them. These lawyers brought a degree of skill and experience to the depositions that could be matched by very few other firms.

Moreover, in addition to the substantial challenge of measuring the overcharge as to battery cells, Plaintiffs had to measure the pass-through of the overcharge to the end-consumer of a finished product where the value of the component was of much smaller value relative to the finished good than, for example, CRT tubes or LCD screens in televisions. This Court ultimately denied the class certification motions, but had this work not been done and these costs not incurred, *none* of the settlements (possibly other than the Sony settlement) would have been possible.

Third, Plaintiffs did not have the benefit of a more extensive concurrent criminal investigation, the outcome of which could have been more closely aligned with the conspiracy pleaded in the Complaint. *See In re TFT-LCD Antitrust Litig.*, No. M 07–1827 SI, 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013) (recognizing that class counsel's risk is minimized when civil litigation has the benefit of parallel criminal price-fixing charges and guilty pleas). For

example, while the plaintiffs in *LCDs* proved a broader and longer conspiracy than the criminal enforcement authorities, nearly all of the civil defendants pleaded guilty to something, and some pleaded guilty to a lengthy and continuous criminal enterprise. *Id.* By contrast, here, only two Defendants, Sanyo and LG Chem, pleaded guilty to criminal price-fixing. Each of these Defendants admitted to participating in a lithium-ion battery price-fixing conspiracy, but their plea agreements covered a much narrower time period and class of products—April 2007 to September 2008 and only cylindrical batteries used in laptops—than those alleged here.

In light of these significant risks and complex issues, the $113.45 million common fund achieved in this case demonstrates the high level of skill and of work required by Class Counsel to face down these challenges. Class Counsel's unique perseverance, on its own, in the face of these enormous risks, deserves recognition.

4. Class Counsel's litigation on a contingency basis.

Class Counsel litigated this case on a contingency basis. The Ninth Circuit has held that a fair fee award must include consideration of the contingent nature of the fee. *See, e.g.*, *Online DVD*, 779 F.3d at 954-55 & n. 14; *Vizcaino*, 290 F.3d at 1050. Attorneys who take on the risk of a contingency case should be compensated for the risk they assume. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994).

Here, the contingent nature of Class Counsel's engagement incentivized counsel to both achieve strong results for the Class and to do so as efficiently as possible. A 30 percent fee award reasonably compensates Class Counsel for the six-and-a-half year financial burden of this risky case, in which Class Counsel has been carrying a total lodestar of $41.46 million, and paying millions of dollars in out-of-pocket expenses for over six years with no guarantee of recovery. *Hopkins v. Stryker Sales Corp.*, No. 11–CV–02786–LHK, 2013 WL 496358, at *3 (N. D. Cal. Feb. 6, 2013) (awarding 30% fee because the "case was conducted on an entirely contingent fee basis against a well-represented Defendant"). A 30-percent award is also below the 33 percent market rate for contingent representation.[18]

[18] *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); *see, e.g.*, Lester

5. The burdens on class counsel support the request for attorneys' fees.

The Ninth Circuit instructs district courts to consider the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work). This litigation has been pending for 6.5 years. Class Counsel has advanced substantial sums out-of-pocket with only minimal reimbursement to date. Class Counsel also has devoted substantial time to this litigation – more than 101,000 hours, for a lodestar of $41.46 million – and foregone other work while litigating this case. The burden factor support the 30 percent fee award. *See Aee Torrisi v. Tuscon Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) ("This [25 percent] benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." (internal quotation marks omitted)).

B. Using The Lodestar As a Cross-Check Further Supports the Requested Fees

The lodestar cross-check confirms the reasonableness of the requested fee award. This Court has held that "the lodestar cross-check is meant to 'confirm that a percentage of [the] recovery amount does not award counsel an exorbitant hourly rate.'" Order Granting Co-Lead Counsel For Direct Purchaser Plaintiffs' Motion and Motion for An Award of Attorneys' Fees, Reimbursement of Expenses and Services Awards at 2, May 16, 2018, ECF No. 2322 (quoting *Online DVD*, 779 F.3d at 949 (citation and internal quotation marks omitted)); *see also Vizcaino*, 290 F.3d at 1050 ("the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted"). Over the course of this case, Class Counsel incurred a total lodestar of $41,458,223.50, based on 101,048.2 hours of work. The requested fee award of 30

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))); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that "[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases").

percent of the common fund, or $34,035,000,[19] therefore represents approximately 82 percent of the total lodestar, or a negative 0.82 multiplier.

A 30-percent fee award is particularly appropriate in this case, where the lodestar cross-check results in a ***negative*** multiplier.[20] A negative multiplier is below the usual range of multipliers surveyed by the Ninth Circuit in *Vizcaino*, which looked at common fund settlements between $50 and $200 million. *Vizcaino* found that 20 of the 24 cases it surveyed had a multiplier between 1.0 and 4.0. *See Vizcaino*, 290 F.3d at 1051 n.6. This Court noted in its order approving a 30-percent fee award for direct purchasers' counsel that a negative multiplier "obviates concern about any windfall" in the context of a large recovery (or "megafund") because counsel earned an effective hourly rate below the market rate. ECF No. 2322 at 2; *see Bluetooth*, 654 F.3d at 942. Other courts have held that a negative multiplier supports the reasonableness of a fee request.[21]

Moreover, the lodestar in this case reflects exceptional efficiency on the part of Class Counsel given the scale of this case. Throughout the litigation, Class Counsel took meaningful steps to ensure that work was efficient and limited to reasonable and necessary work. Class Counsel have been mindful of the efficiency guidelines set forth in Exhibit A of this Court's Modified Pretrial Order No. 1, May 24, 2013, ECF No. 202. As a result, Class Counsel's lodestar is substantially lower than the lodestar reported by counsel for the direct purchaser plaintiffs in this case ($72.5 million).

Moreover, the blended hourly rate for Class Counsel, if they are awarded 30 percent of the

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[19] In connection with this fee motion, Plaintiffs request $29,540,000, which is $34,035,000 minus $4,495,000 the Court awarded in connection with earlier settlements.

[20] The "lodestar" is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Bluetooth*, 654 F.3d at 941.

[21] *See, e.g.*, *TFT-LCD (Flat-Panel) Antitrust Litig.*, No. M 07–1827 SI, 2013 WL 149692, at *1 (N.D. Cal. Apr. 3, 2013) (negative multiplier of 0.86 confirmed amount of attorneys' fees requested was fair and reasonable); *Gong-Chun v. Aetna Inc.*, No. 1:09–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 0.59 indicated fee award was "reasonable and a fair valuation of the services rendered to the class by class counsel"); *In re Portal Software, Inc. Sec. 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 "suggests that the requested percentage based fee is fair and reasonable").

common fund, is $336.82 per hour.[22] Harvard Law Professor William B. Rubenstein recently showed that this hourly rate is below the average blended billing rate of $528.11 per hour for forty approved class action settlements in the Northern District of California in 2016 and 2017. Declaration of William B. Rubenstein In Support of Plaintiffs' Motion For 3.0 Liter Attorneys' Fees And Costs at 16-18, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Product Liability Litigation*, No. 3:15-md-02672-CRB (N.D. Cal. June 30, 2017), ECF No. 3396-2 Class Counsel's blended hourly rate further supports the fee request's reasonableness.

* * *

In conclusion, the Court finds that under the percentage-of-the-fund method, with the lodestar used as a cross-check, Plaintiffs' request for attorneys' fees is fair and reasonable. The Court awards Class Counsel the requested amount of $29,540,000 in attorneys' fees, together with a proportional share of interest earned on the Settlement Fund for the same time period until dispersed to Class Counsel.

Co-Lead Class Counsel – Hagens Berman, Lieff Cabraser, and Cotchett Pitre – shall allocate the fees and reimbursement of expenses among themselves and supporting counsel in a fair and equitable manner that, in Co-Lead Class Counsel's good-faith judgment, reflects each firm's contribution to the institution, prosecution, and resolution of the litigation.

V. THE REQUESTED REIMBURSEMENT OF EXPENSES IN REASONABLE

Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary, and directly related to the prosecution of the action. *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). Reasonable reimbursable litigation expenses include: those for document production, experts and consultants, depositions, translation services, travel, and mail and postage costs. *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995) (Court fees, experts/consultants, service of process, court reporters, transcripts,

[22] A blended billing rate is captured by dividing the total fee sought by the number of hours worked, thus providing the average hourly billing rate for the case across timekeepers ranging from high-end partners to paralegals.

deposition costs, computer research, photocopies, postage, telephone/fax); *Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *remanded on other grounds*, 461 U.S. 952 (1983) (travel, meals and lodging).

Plaintiffs request reimbursement of $5,891,547.34 in unreimbursed expenses. Previously, this Court ordered reimbursement of $860,188.50 in expenses.

The additional $5,891,547.34 requested in unreimbursed expenses is largely due to three types of expenses – economic experts and consultants ($4,857,677.85), online document database services ($738,527), and payment for translations and interpreters ($239,037.66). These expenses are reasonable and well within the limits of other cases. Class Counsel shall be reimbursed for their out-of-pocket expenditures in the amount of 5,891,547.34.

VI. THE REQUESTED SERVICE AWARDS FOR THE CLASS REPRESENTATIVES ARE APPROPRIATE GIVEN THEIR EXTENSIVE PARTICIPATION IN THIS CASE

Plaintiffs also request that the Court approve service awards for each of the class representatives – $10,000 for each of the twenty-one individual class representatives and $25,000 for each of two governmental entity class representatives, to be deducted from the common settlement fund. Service awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities and risks of representing the class and to recognize the time and effort spent in the case. "Incentive *awards* are fairly typical in class action cases." *Rodriguez*, 563 F.3d at 958 (emphasis in original). In the Ninth Circuit, service awards "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." *Id.* at 958-59. Courts have discretion to approve service awards based on, *inter alia*, 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. *See Van Vraken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

Here, the twenty-three class representatives have spent a significant amount of time assisting in the litigation of this case. Defendants deposed nearly every class representative, which amounted to thirty-two depositions, lasting a total of over 144 hours on the record (approximately

4.5 hours per deposition on average). Defendants also propounded 22 interrogatories, 37 document requests, and four requests for admission to each of the class representatives.

Finally, each class representative took his or her responsibilities seriously. In addition to bringing the case, these class representatives continued to prosecute the case following adverse decisions, including this Court's second denial of class certification. In consultation with counsel, each class representative reviewed and approved of the settlements presented to the Court. Each plaintiff submitted a declaration detailing the time he or she spent involved in this litigation (ECF No. 2487-7). The requested awards are consistent with service awards in other cases and the Court awards them here.

VII. THE REQUESTED ADMINISTRATIVE FUNDS SHALL BE PAID FROM THE SETTLEMENT FUND

This Court has approved of the Settlement Notice Administrator expending funds from the escrow accounts to pay taxes, tax expenses, notice, and administration costs as set forth in the Settlement Agreements. *See* ECF No. 2475, ¶ 9. The Administrator has estimated that there will be a need for up to an additional $10,000 to pay for future costs of distribution – the issuance of hard copy checks. This Court approves of Plaintiffs' request to pay up to $10,000 for these costs from the common settlement fund.

VIII. THE OBJECTIONS ARE OVERRULED

Three objectors have filed objections to the fairness of the settlement – Gordon Morgan represented by Christopher Bandas and others,[23] Michael Frank Bednarz represented by Theodore H. Frank,[24] and Christopher Andrews, *pro se*.[25] None of objections has merit. To the extent that an objection is not directly addressed below, this Court has considered the objection and it is overruled.

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[23] *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.

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

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

A. The Objections Regarding Attorneys' Fees.

As explained, courts in the Ninth Circuit award attorneys' fees under either the "percentage-of-the-fund" method or the "lodestar" method. *Online DVD*, 779 F.3d at 949. In this case, the Court has used the percentage method as the primary basis to determine the appropriate fee award, with the lodestar method employed as a cross-check. The objectors do not disagree with this approach, only with the amount requested by Plaintiffs.

1. The objectors have failed to show that the requested 30 percent fee award is unreasonable under the percentage-of-the-fund analysis.

This Court has found that an award of $29.54 million in attorneys' fees – equal to 30 percent of the common fund of all settlements reached in this case, or $34.035 million, minus the $4.495 million this Court already awarded, is reasonable under the percentage-of-the-fund analysis.

The objectors disagree, but their objections fail to, as required, "consider[] all of the circumstances of the case" – *Vizcaino*, 290 F.3d at 1048 – when arguing a 30 percent fee award would be unreasonable. The Court has explained that the following factors are among those the Ninth Circuit has held courts should consider when determining whether a fee request is reasonable: (1) the market rate for the particular field of law; (2) whether counsel achieved exceptional results for the class; (3) whether the case was risky for class counsel; (4) whether the case was handled on a contingency basis; and (5) the burdens class counsel experienced while litigating the case. *Online DVD*, 779 F.3d at 954-55. The Court finds that consideration of all of these factors under the circumstances in this case demonstrates that the 30 percent fee request is reasonable. Because the objections fail to consider these Ninth Circuit circumstances under the circumstances of this case, the objections fail on that basis alone.

The specific arguments made by the objectors are also lacking in merit. The objectors argue that the "market rate" in the particular field of law factor does not support the fee request. But the most reliable and recent empirical research shows that the 30 percent fee request is consistent with the market rate. The 2017 EMG Study found that, of the 19 antitrust settlements surveyed, the mean and median percentages awarded were 27 percent and 30 percent, respectively. That finding was confirmed by the 2018 Antitrust Annual Report's finding that the median fee awarded for

settlements between $100 and $249 million (the settlements here total $113.45 million), ***was 30 percent***. Moreover, as discussed, 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. The requested 30 percent fee award is consistent with the market rate.

The objectors also contend that the results obtained for the class show that a 30 percent fee award is unreasonable because, according to the objectors, the results "fall far short" of the results necessary for a 30 percent fee award. However, obtaining a $113.45 million common fund where class certification was denied twice, evidences a strong result under any measure.

Moreover, by Plaintiffs' estimates, the common fund equates to 11.7 percent of single damages for a nationwide class during the eleven-and-a-half year class period. 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. To the contrary, as explained *supra*, in Section IV.A.2, 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.

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 damages – and were awarded 30 percent of the common fund. *See* Co-Lead Counsel for DPPs' Notice of Motion and Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards, Feb. 8, 2018, ECF No. 2171; 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.

However, the fact that this Court awarded direct purchasers the percentage of the common fund they requested, 30 percent, does not demonstrate that indirect purchaser plaintiffs' 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. *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."). This was a key risk to the indirect purchaser plaintiffs, litigated heavily by the defendants, and ultimately realized in this Court's orders denying class certification.

2. The correct calculation of the fee request is 30 percent.

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. However, the Ninth Circuit has repeatedly rejected this argument, including when made on a previous occasion by counsel for Mr. Bednarz. *See Online DVD*, 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").

3. A lodestar cross-check supports the reasonableness of the requested fees and obviates any concern about a "windfall."

The objectors argue that because Plaintiffs' $113.45 million recovery is a "megafund," the fee request is unreasonable. They argue that 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. 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." *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).

Moreover, the lodestar cross-check confirms that the 30 percent request is reasonable, and there is no windfall, even if the $113.45 million recovery is considered "megafund." Class Counsel's reasonable lodestar means that the requested attorneys' fees results in a negative, 0.82 multiplier, which obviates concern about any windfall given the size of the settlement recovery. The megafund concern arises when a percentage of the fund would result in excessive profits for class counsel in light of the hours actually spent. *See Bluetooth*, 654 F.3d at 942. The lodestar cross-check is meant to "confirm that a percentage of [the] recovery amount does not award counsel an exorbitant hourly rate." *Online DVD*, 779 F.3d at 949 (citation and internal quotation marks omitted). Here, the lodestar cross-check results in an effective hourly rate below the market rate for the hours devoted to the case by Class Counsel. Consequently, the Court overrules any objections to the fee request based on the size of the recovery, and finds that it is reasonable and is justified by the circumstances of this case, including according to the lodestar cross-check.

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

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. 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, indirect purchasers' results and the efficiency with which they litigated this case is illustrated by the fact that indirect purchasers' 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 indirect purchaser counsel conducted this litigation, particularly given that the indirect purchaser 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.[26]

4. The *rejected* lead counsel bid of Hagens Berman is irrelevant to 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*. 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

[26] 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, 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); *Vizcaino*, 290 F.3d at 1050 & n.5, similarly found that the lodestar method provided the right balance of efficiency and incentives, finding the "primary basis of the fee award remains the percentage method," with 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."

that was not part of Hagens Berman's original proposal.[27] 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. 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 Class 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. But because this confidential submission is irrelevant, the Court finds that it should remain sealed.

B. Objector Morgan's objections to the settlement terms are overruled.

Objector 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. But there are no signs of unfairness to the class here.

As discussed, 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.[28] As discussed in Section III.B.2, *supra*, these potentially troubling signs are not present in this case. Mr. Morgan's objection is overruled.

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[27] *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).

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

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

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.[29] But to the extent the Court comprehends the objections, they are discussed below. Each is overruled.

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. The evidence submitted by Plaintiffs shows that 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. 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. 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. Finally, the Settlement Administrator avers that, contrary to Mr. Andrews's contentions, class members were able to submit claims between May 17 and May 26. And even if Mr. Andrews was correct, 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.

[29] *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).

Notice content. Mr. Andrews also takes issue with the content of the notices. 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 that, "[t]o satisfy Rule 23(e)(1), settlement notices must 'present information about a proposed settlement neutrally, simply, and understandably.'" *Hyundai*, 2019 WL 2376831, at *14 (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009)). "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.'" *Id*. 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.'" *Id*. (quoting *Online DVD-Rental*, 779 F.3d at 946-47).

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. 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. 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. 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. To the contrary, the evidence shows 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 who can be identified through reasonable effort[.]" 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."). 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. In fact, the evidence presented by Plaintiffs shows that the rate of claims here is similar to, if not substantially greater than, in similar antitrust cases.

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. However, 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 the 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. 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 to reject the objections. *See* Fed. R. Civ. P. 23(e)(5)(A) & Advisory Committee Notes to 2018 Amendments to Rule 23(e)(5)(A), discussed *supra*. 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. *See Hyundai*, 2019 WL 2376831, at *5.

Service awards. Andrews attacks the service awards requested as excessive. 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. 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. 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. However, Andrews cites no legal authority for any of these arguments, and there is none of which the Court is aware. A severability clause at the end of a contract, including a settlement agreement, is typical and does not render the contract defective.

The objections are overruled.

IT IS SO ORDERED.

DATED: _____

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HONORABLE YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE