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Chairman of the Executive Committee for the Direct Purchaser Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE OPTICAL DISK DRIVE ANTITRUST LITIGATION

This Document Relates to:

ALL DIRECT PURCHASER ACTIONS

Case No. 3:10-md-02143 RS

MDL No. 2143

DIRECT PURCHASER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE INCENTIVE AWARDS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: May 14, 2015
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg
Courtroom: 3

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 1:30 p.m. on May 14, 2015, Direct Purchaser Plaintiffs ("DPPs") and their counsel ("Class Counsel") will, and hereby do move before the Honorable Richard Seeborg, United States District Judge, at the United States Courthouse, 450 Golden Gate Avenue, Courtroom 3, San Francisco, California, for an award of attorneys' fees in the amount of 30% of the Settlement Fund ($11,370,000) plus interest, reimbursement of litigation expenses in the amount of $1,687,905.17, approval of the additional $1,593,268.18 in expenses paid with settlement funds, and payments to the Class Representatives of $5,000 or $10,000 for their time and effort representing the Class throughout the litigation. This motion is brought pursuant to Fed. R. Civ. P. 23(h), 54(b) and 54(d)(2).

This motion is made on the grounds that (a) such fees are fair and reasonable in light of Class Counsel's efforts in creating the Settlement Fund; (b) the requested fees comport with the Ninth Circuit case law in common fund cases; (c) the expenses for which reimbursement is sought were reasonably and necessarily incurred in connection with the prosecution of this action; and (d) a reasonable payment of $5,000 or $10,000 to each Class Representative for their efforts on behalf of the Class is warranted and appropriate.

This motion is based upon this Memorandum of Points and Authorities; the Declaration of Cadio Zirpoli in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Incentive Awards; the Declaration of R. Alexander Saveri in Support of DPP Counsel's Request for Reimbursement of Litigation Expenses From the Litigation Fund; the proposed order submitted herewith; the declarations of Class Counsel, and other records, pleadings, and papers filed in this action; and upon such argument and further pleadings as may be presented to the Court at the hearing on this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Direct Purchaser Plaintiffs ("DPPs") and their counsel ("Class Counsel") respectfully submit this Memorandum of Points and Authorities in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Incentive Awards. To date, DPPs have obtained settlements with three of the thirteen defendant groups totaling over $37.9 million (the "Settlement Fund").[1] Class Counsel have invested over $24,000,000 in time and $1,687,905.17 in out of pocket expenses since this case began over five years ago. By this motion, they seek an interim award of attorneys' fees in an amount equal to 30% of the Settlement Fund ($11,370,000), reimbursement of their litigation expenses in the amount of $1,687,905.17, and approval of the additional $1,593,268.18 in expenses paid with settlement funds.

DPPs also seek incentive awards for the Class Representatives for their service in this case. DPPs seek awards of $10,000 for the six class plaintiffs named in the Third Consolidated Amended Complaint (JLK Systems Group, Inc. and Jeff Kozik; Meijer, Inc. and Meijer Distribution, Inc.; Paul Nordine; Seneca Data Distributors, Inc.; Gregory Starrett; and Ashely Tremblay), and $5,000 for the three class plaintiffs named only in the Second Consolidated Amended Complaint (Univision-Crimson Holding, Inc.; Warren S. Herman; and The Stereo Shop).

Class Counsel have prosecuted this case on a purely contingent basis. The settlements were achieved in the face of a tremendously hard fought defense, fueled by Defendants' near limitless resources. The settlements represent excellent recoveries for the class, and the fee class counsel seek is eminently fair in light of the mammoth investment of time and money they have made and the substantial risks such an undertaking presented. Indeed, Class Counsel seek less than half of the lodestar they have incurred to date.

As detailed in the accompanying declarations, the work done by Class Counsel was

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[1]DPPs have settled with the following defendants: (1) Hitachi-LG Data Storage, Inc. and Hitachi-LG Data Storage Korea, Inc.; LG Electronics, Inc. and LG Electronics USA ("LG"); and Hitachi, Ltd. ("Hitachi") (collectively "HLDS")—$26,000,000; (2) Panasonic Corporation and Panasonic Corporation of North America (collectively "Panasonic")—$5,750,000; and (3) NEC Corporation ("NEC")—$6,150,000.

reasonable and necessary, of high quality, and efficiently performed. Among other things, Class Counsel have, to date:

- Conducted an initial investigation of this case to develop the theories and facts that formed the basis of the allegations against Defendants. The research included a review of publicly available information regarding the ODD industry and consultation with industry experts and economists prior to the filing of the complaints (*see e.g.,* Declaration of Cadio Zirpoli in Support of Direct Purchaser Plaintiffs' Notice of Motion and Motion for an Award Of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Incentive Awards; Memorandum of Points and Authorities In Support Thereof ("Zirpoli Decl.") ¶ 10);
- Drafted three comprehensive consolidated amended complaints detailing the Defendants' violations of the antitrust laws, and defended two rounds of hard-fought motions to dismiss the complaints (*id.* ¶¶ 16–21);
- Conducted exhaustive legal research regarding the class's claims and the defenses thereto (*id.* ¶¶ 16–18);
- Reviewed and analyzed, beginning in June 2011, millions of pages of grand jury documents Defendants provided to the U.S. Department of Justice ("DOJ") (*id.* ¶¶ 28, 37–46);
- Propounded discovery that—after extensive research, negotiations with defendants, and motion practice—resulted in the identification of over one hundred defendant-employee custodians and the production of over sixteen million pages of documents, as well as voluminous electronic transactional data (*id.* ¶¶ 28–31, 36);
- Reviewed and analyzed these additional documents (many of which were in foreign languages and required translation), as well as voluminous transactional data and many thousands of pages of documents and transactional data from non-parties (*id.* ¶¶ 36–37, 46–47);
- Propounded several sets of interrogatories on defendants and issued Rule 30(b)(6) deposition notices (*id.* ¶¶ 28, 49);
- Cooperated with the Indirect Purchaser Plaintiffs ("IPPs") to take the depositions of nine employees of Defendants (*id.* ¶¶ 50, 52, 67);
- Contended with near-constant discovery disputes and motions to compel (*id.* ¶¶ 32–35);
- Responded to Defendants' discovery requests of class representatives and prepared and defended the depositions of the class representatives (*id.* ¶¶ 22–26);
- Prepared a motion for class certification and supporting materials, including over two hundred exhibits and the expert report of Dr. Gary L. French (and a Rule 23(f) Petition for Permission to Appeal) (*id.* ¶¶ 22–26);
- Consulted extensively with experts on issues pertaining to liability, class certification, and damages throughout the course of the Action and deposed the Defendants' expert Dr. Janusz Ordover (*id.* ¶¶ 10, 16–19, 22–24, 47, 50);
- Engaged in settlement negotiations with Defendants (*id.* ¶¶ 56–59); and

- Documented the settlements with HLDS; Panasonic; and NEC, briefed motions for preliminary and final approval as to each settlement, and worked with the settlement administrator to provide notice to the class of each settlement (*id.* ¶ 59).

DPPs have faced substantial risks in this case, including, among others:

- The risk of litigating against some of the largest and most sophisticated law firms in the world with seemingly limitless resources;
- The risk that the consolidated complaints would not withstand the individual and joint motions to dismiss, which claimed, *inter alia*, that the alleged conspiracy was not plausible under *Twombly* and *Iqbal*; that the conspiracy was confined to a handful of individual bilateral agreements; that certain DPPs lacked standing to sue for federal antitrust violations; and that the claims were time barred;
- The risk that Defendants would use the HLDS guilty pleas to try to limit the scope and effect of the conspiratorial conduct to the three OEMs (Dell, HP, and Microsoft) that were the subject of the guilty pleas;
- The risk that each defendant, including those that pled guilty to criminal charges, would successfully argue that any antitrust violation engaged in by their company's representatives had no antitrust impact and caused no damages to class members;
- The risk of not achieving class certification;
- The risk of trying a case in which many of Defendants' key employees would invoke their Fifth Amendment privilege against self-incrimination, depriving DPPs of important information and making authentication of critical documents difficult;
- The changing landscape of the law with respect to civil antitrust actions and class actions.

In this context, DPPs' request for an interim fee award of 30% of the settlements obtained to date is fair and reasonable. While the benchmark for attorneys' fees in the Ninth Circuit is 25%, in practice, awards are generally closer to 30%. Many courts have awarded 30%, or higher, where, as here, the litigation posed substantial risks and/or the multiplier is low.

Importantly, DPPs' fee request appears to have the near unanimous support of the class. Each of the three notices of settlement sent to class members disclosed that class counsel might seek as much as one-third of the settlement fund as a fee. While more than 700,000 notices were sent in connection with the HLDS settlement, only four objections were received. Zirpoli Decl. ¶ 84. This is especially significant where, as here, the class contains many large and sophisticated companies.

Class Counsel should also be reimbursed for the expenses they have advanced on behalf of the class. All were reasonable and necessary. It is also appropriate that the nine Class

Representatives receive modest awards for their time and service to the Class.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Litigation History

1. Pre-Complaint Investigation, Service of Process, and the JPML

The first Direct Purchaser Class Action Complaint was filed on October 27, 2009 in the Northern District of California and assigned to the Honorable Vaughn R. Walker. Thereafter, eleven additional direct purchaser class action cases were filed; ten in the Northern District of California and one in the Central District of California. For many of the named foreign defendants, DPPs were required to effectuate service of process through the Hague Convention. This was a lengthy, time consuming, and in certain instances, expensive endeavor requiring the appointment of a special international process server. Zirpoli Decl. ¶¶ 11–12.

DPPs participated in the proceedings before the Judicial Panel on Multidistrict Litigation ("JPML") pursuant to which these actions were coordinated and transferred to this Court. *See ODD*, 701 F. Supp. 2d 1382. Zirpoli Decl. ¶ 13.

2. Appointment of Leadership

The firms representing DPPs agreed upon on a leadership structure. On April 29, 2010, DPPs submitted to the Court a proposed leadership structure that was unanimously supported by all DPPs and unopposed by the Defendants. (Dkt. No. 5). On May 7, 2010, as set forth in CMO No. 1, the Court endorsed DPPs' leadership proposal, and appointed an Executive Committee of DPPs' counsel, comprised of the following seven firms: Berman DeValerio; Cotchett Pitre & McCarthy, LLP; Hausfeld LLP; Kaplan Fox & Kilsheimer LLP; Lieff Cabraser Heimann & Bernstein, LLP; Pearson, Simon, & Warshaw, LLP; and Saveri & Saveri, Inc. Guido Saveri of Saveri & Saveri, Inc. was appointed Chairman of the Executive Committee and given the responsibility to oversee the litigation, including any subsequent related or tag-along cases, on behalf of the DPPs. Zirpoli Decl. ¶¶ 3–14. As set forth in CMO No. 1, the Chairman was tasked with making sure the DPP action was prosecuted in an effective and efficient manner, including, among other things, the periodic collection of time and expenses from Class Counsel, and coordinating the work of Class Counsel.

3. The Consolidated Complaints and Motions to Dismiss

On August 26, 2010, DPPs filed their Consolidated Direct Purchaser Class Action Complaint ("CAC"). Every Defendant except the leniency applicant moved—individually and/or as part of a joint motion—to dismiss the CAC. Following briefing and a hearing on the joint and individual motions to dismiss, on August 3, 2011, the Court dismissed the CAC with leave to amend. Zirpoli Decl. ¶ 17.

Following the dismissal of the CAC, DPPs drafted a more detailed Second Consolidated Direct Purchaser Class Action Complaint ("SCAC") that utilized information and documentary evidence provided by the amnesty applicant, along with industry-wide historical pricing and sales data from third parties. The SCAC was filed on September 23, 2011. In October 2011, the parties embarked on a second round of joint and individual motions to dismiss the SCAC (Dkt. Nos. 434, 436, 441, 446, 449, 458, 460, and 463). All Defendants except for the Philips/Lite-On/PLDS group (amnesty applicant) joined the joint motion to dismiss, most also filed individual motions.The Court denied all of the motions. (Dkt. No. 531). Defendants filed their answers between June 4 and August 17, 2012. Zirpoli Decl. ¶ 18.

As the case progressed, discovery uncovered new facts. In March of 2013, DPPs sought leave of Court and were permitted to file a Third Consolidated Direct Purchaser Class Action Complaint ("TCAC"). (Dkt. No. 782). DPPs made five changes from the SCAC to the TCAC. *First*, the TCAC modified the proposed class definition to eliminate references to "ODD Devices" and to clarify that the class is comprised of those who bought stand-alone external or internal ODDs, or ODDs incorporated only into desktop or laptop computers sold by Defendants, their affiliates, or their subsidiaries. *Second*, the TCAC dropped Sony Computer Entertainment America, Inc., as a named defendant, because that entity sold only game consoles which were no longer products within the definition of the litigation class. *Third*, the TCAC eliminated references to and allegations regarding ODD Devices. *Fourth*, three named plaintiffs that purchased ODD Devices—Warren Herman, The Stereo Shop, and the related companies Central New York Univision Video Systems, Inc., Crimson Tech, Inc., and Univision Crimson Holding, Inc. were withdrawn as proposed class representatives. *Finally*, the TCAC added four new named plaintiffs: the related

companies Meijer, Inc. and Meijer Distribution, Inc., Ashley Tremblay, Gregory Starrett, and Paul Nordine. Zirpoli Decl. ¶ 19.

The parties negotiated a stipulation and proposed order which deemed Defendants' previously filed Answers to the DPPs' SCAC as sufficient for purposes of responding to the DPPs' TCAC, which the Court approved on April 26, 2013 (Dkt. No. 851). Zirpoli Decl. ¶ 20.

During the course of this litigation, DPPs developed evidence with respect to the conspiratorial conduct of the Pioneer entities, and on August 18, 2014, filed a complaint against the Pioneer entities (*JLK Systems Group, Inc., et al. v. Pioneer Corp.., et al.*, Case No. 14-cv-03748-LB). This action was related to the *In re Optical Disk Drive Action* on August 28, 2014. The Pioneer Defendants answered DPPs' complaint on March 2, 2015. (Dkt. No. 1533). Zirpoli Decl. ¶ 21.

4. The Discovery Process

From the inception of this litigation, DPPs—in coordination with the IPPs—have had to fight for nearly every stitch of discovery that has been produced. At the first case management conference, the DOJ informed the Court that they intended to intervene for the purpose of staying discovery in the civil actions. On May 20, 2010, the DOJ filed a motion for a limited stay of discovery (Dkt. No. 67) and DPPs filed an opposition (Dkt. No. 90). On June 24, 2010 the Court heard argument from the parties on the DOJ's motion to stay discovery, and denied the DOJ's motion (Dkt. No. 119). Zirpoli Decl. ¶ 27.

On September 1, 2010, DPPs served their first set of requests for production of documents and interrogatories on all Defendants. After multiple rounds of objections and meet and confers, on May 11, 2011, DPPs and IPPs filed a joint motion to compel documents produced to the DOJ in connection with its criminal investigation. (Dkt. No. 370) On April 7, 2011, Judge Spero granted the motion, and ordered the production of the DOJ material. (Dkt. No. 379). In June 2011, Defendants produced the documents previously produced to the DOJ. The DOJ production consisted of millions of pages of documents, much of it in foreign languages. Zirpoli Decl. ¶ 28.

Following the denial of the motions to dismiss the SCAC, DPPs and IPPs engaged in months of meet and confers negotiating a discovery plan that included, *inter alia,* custodians, search terms, a deposition protocol, and matters relating to transactional and other electronic data. Ultimately the

1 parties could not agree on a number of items. The parties briefed the following issues for resolution
2 by Judge Spero: (1) the ESI protocol, (2) custodians, (3) search terms, (4) deposition protocols, (5)
3 production of certain transactional data, (6) categories of documents pertaining to class certification,
4 and (7) and supplemental interrogatory responses. Zirpoli Decl. ¶ 29.

5 Eventually Defendants agreed to search and produce over one hundred employee files
6 totaling more than sixteen million pages of documents. The documentary evidence was thoroughly
7 analyzed, coded, and organized by DPPs in an electronic review platform which DPPs used to
8 analyze and identify the important evidence in the case. DPPs used this database for many tasks,
9 including drafting the consolidated complaints, drafting briefs, preparing for depositions, informing
10 settlement negotiations, and drafting the motion for class certification and supporting expert
11 reports. The online database allowed DPPs to run targeted searches in both English and foreign
12 languages and prioritize documents by custodian and topic. *Id.* ¶ 36. The foreign language
13 documents were analyzed by lawyers and paralegals fluent in the respective foreign languages,
14 who then had to determine which documents were sufficiently relevant to the litigation to require
15 English translations and in certain cases, certified translations. *Id.* ¶ 46. Additionally, DPPs—in
16 coordination with IPPs—obtained and reviewed thousands of pages of non-party discovery and
17 transactional data. Zirpoli Decl. ¶ 47.

18 DPPs spent significant time responding to defendants' discovery requests. Class Counsel
19 assisted the named plaintiffs in the search and production of relevant documents and responding to
20 interrogatories. In particular, DPPs spent a significant amount of time and resources responding to
21 contention interrogatories. DPPs also spent significant time preparing for and defending each of the
22 named plaintiff depositions. Zirpoli Decl. ¶ 48.

23 DPPs also participated in the depositions of five sets of Defendants' employees and former
24 employees between April 2013 and November 2013. Of the nine Defendant witnesses deposed,
25 four of the depositions spanned multiple days and required the assistance of a translator, and the
26 remaining five deponents asserted their Fifth Amendment right against self-incrimination. *Id.* ¶¶
27 50, 52.

28 On July 11, 2014, DPPs and IPPs issued a subpoena to the DOJ Antitrust Division seeking

production of FBI recordings, and verbatim transcriptions thereof, among and between Defendants in this litigation. After extensive meeting and conferring with the DOJ, DPPs and IPPs reached an agreement and negotiated a draft stipulated proposed protective order regarding production of the tapes. On September 3, 2014, DPPs and IPPs filed the stipulated proposed protective order. Defendant TSST-Korea and interested party "John Doe 1" objected to production of the tapes. After extensive motion practice, their objections were overruled by this Court. On December 22, 2014, John Doe 1 filed a notice of appeal and an emergency motion for an injunction pending appeal. Zirpoli Decl. ¶ 55.

5. Motion for Class Certification and Rule 23(f) Petition

On May 29, 2013, DPPs filed their motion for class certification (Dkt. No. 878) with an accompanying Expert Report of Gary L. French Ph.D. Regarding Class Certification. DPPs' moving papers, accompanying declarations, proposed order, and sealing motion comprised in excess of 3,000 pages. DPPs' motion included 205 exhibits, most of which were identified through extensive searches of DPPs' electronic database of Defendants' documents—many of which required certified translations. Defendants filed their opposition to class certification and motion to strike report of DPPs' Expert Dr. Gary French on October 21, 2013, which also comprised hundreds of pages and exhibits. (Dkt. Nos. 1027, 1028, 1030, 1031, 1037, 1038, 1039, 1041). On February 18, 2014, DPPs filed their reply brief in support of class certification (Dkt. No. 1127) with an accompanying Expert Reply Report (Dkt. No. 1128), and Opposition to Motion to Strike (Dkt. No. 1130). Zirpoli Decl. ¶ 22.

On May 16, 2014, the Court held a hearing on the motions for class certification and motions to strike, at which DPPs presented extensive oral argument. On October 3, 2014, the Court denied DPPs' and IPPs' motions for class certification. (Dkt. No. 1444). On October 24, 2014, DPPs and IPPs separately petitioned for permission to appeal the Court's Order pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. On January 14, 2015, the United States Court of Appeals for the Ninth Circuit denied both DPPs' and IPPs' petitions for permission to appeal the Court's order denying class certification. Zirpoli Decl. ¶¶ 25–26.

B. Settlement History

In late 2012, DPPs and the HLDS defendants began to discuss the possibility of settlement. On November 13, 2012, after several months of negotiations, the parties entered into a settlement agreement pursuant to which HLDS agreed to pay $26,000,000. This amount represented approximately 3.42% of HLDS' sales of ODDs (after accounting for opt-outs). The Court finally approved the HLDS settlement on September 23, 2013. Zirpoli Decl. ¶ 56.

During the course of several months in early 2013, DPPs and Panasonic negotiated the terms of a settlement releasing the claims in the TCAC. On August 21, 2013, DPPs settled with Panasonic for $5,750,000. The $5,750,000 settlement amount represents approximately 3.833% of Panasonic's sales of ODDs after opt-outs. The Court finally approved the Panasonic settlement on May 15, 2014. Zirpoli Decl. ¶ 58.

Beginning in the spring of 2013, DPPs began negotiating the terms of a settlement with counsel for NEC. On February 24, 2014, DPPs settled with NEC for the claims in the TCAC for $6,150,000, approximately 3.1% of NEC's ODD sales (after accounting for opt-outs).[2] The Court finally approved the NEC settlement on August 14, 2014.[3] Zirpoli Decl. ¶ 59.

III. ARGUMENT

DPPs' requests (1) for an award of attorneys' fees in the amount of 30% of the Settlement Fund; (2) for approval of the expenses; (3) for reimbursement of expenses Class Counsel have advanced on behalf of the class; and (4) for incentive awards for the class representatives are reasonable and appropriate under Ninth Circuit law and should be approved.

A. The Common Fund Doctrine and the Percentage-of-the-Recovery Approach

1. The Ninth Circuit Recognizes the Common Fund Doctrine

Counsel who represent a class and produce a benefit for class members are entitled to compensation. As the Supreme Court has explained, "this Court has recognized consistently that a

[2] For each of these percentage-of-sales calculations, only the value of the ODD in a finished product is included—i.e., the value of the other components of a laptop computer, for example, is not counted.

[3] For a more detailed case history, DPPs respectfully refer the Court to the accompanying Zirpoli Declaration.

litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392–93 (1970); *Central R.R. & Banking Co. v. Pettus,* 113 U.S. 116, 123 (1885). The Supreme Court has also recognized that under the "common fund doctrine" a reasonable fee may be based "on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The purpose of this doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig*., 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*"); *see also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989) ("*Paul, Johnson*") (well-settled that lawyer who helps create common fund should be allowed to share in the award).

The Supreme Court has repeatedly recognized that private antitrust litigation is essential to the effective enforcement of the antitrust laws. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262–63 (1983); *Reiter v. Sonotone Corp*., 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *Perma Life Mufflers, Inc. v. Int'l Parts Corp*., 392 U.S. 134, 139 (1968). Substantial fee awards in successful cases encourage meritorious class actions, and thereby promote private enforcement of—and compliance with—the antitrust laws. As noted by the Second Circuit in *Alpine Pharmacy, Inc. v. Charles Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973), "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced . . . ."

Here, Class Counsel's efforts have created a common fund of $37.9 million for the benefit of the class. Under either a "percentage-of-the-fund" or "lodestar" method, Class Counsel's requested fee is warranted in light of the value of the extensive work performed, the difficulty and risk of the case, and the results achieved, among other things.

2. Percentage-of-the-Recovery Approach Is the Predominant Method for Determining Attorneys' Fees Under Ninth Circuit Law

The amount of the award of reasonable attorneys' fees and expenses is within the sound discretion of the district court. *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1029 (9th Cir. 1998);

1 *WPPSS*, 19 F.3d at 1296. In the Ninth Circuit, the district court has discretion in a common fund
2 case to choose either the "percentage-of-the-fund" or the "lodestar" method in calculating fees.
3 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) ("*Vizcaino II*"); *In re Online*
4 *DVD-Rental Antitrust Litig.*, No. 12-15705, 2015 WL 846008, at *9 (9th Cir. Feb. 27, 2015)
5 ("*Online DVD*"). Most district courts in the Ninth Circuit have exhibited a clear preference for the
6 percentage-of-the-fund method. Virtually all of the major recent antitrust class actions in the
7 Northern District of California have applied the percentage-of-the-fund approach. *See, e.g.*, *In re*
8 *TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2011 WL 7575003, at *1–2 (N.D. Cal.
9 Dec. 27, 2011) ("*LCD I*") (30%); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI,
10 2013 WL 149692, at *1–2 (N.D. Cal. Jan. 14, 2013) ("*LCD II*") (30%); *In re TFT-LCD (Flat*
11 *Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *7–8 (N.D. Cal. Apr. 3, 2013)
12 ("*LCD III*") (28.6%); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, Case No. 07-
13 md-1819-CW (N.D. Cal. June 30, 2011) (Dkt. No. 1370) ("*SRAM*") (30%); *Meijer v. Abbott*
14 *Laboratories*, C-07-05985 (N.D. Cal. Aug. 11, 2011) (Dkt. No. 514) ("*Meijer*") (33⅓%); *In re*
15 *Dynamic Random Access Memory (DRAM) Antitrust Litig.*, M-02-1486, 2007 WL 2416513 (N.D.
16 Cal. Aug. 16, 2007), at *1 ("*DRAM*") (25%).
17 This Court has used the percentage-of-the-fund approach with a lodestar cross-check in
18 recent cases. *See, e.g.*, *In re SunPower Sec. Litig.*, Case No. 09-cv-5473-RS ¶ 6 (N.D. Cal. July 3,
19 2013) (Dkt. No. 270) ("*SunPower*"); *In re Warner Music Group Corp. Digital Downloads Litig.*,
20 Case No. 12-cv-559-RS ¶ 3 (N.D. Cal. Jan. 12, 2015) (Dkt. No. 116) ("*Digital Downloads*").
21 The most recent Ninth Circuit opinion on fees in an large antitrust class action, *Online*
22 *DVD*, affirmed the validity of the percentage-of-the-fund approach and noted that it was reasonable
23 to apply the percentage to the entire fund (as opposed to the net fund after costs). 2015 WL
24 846008, at *13 ("Here, the district court concluded that class counsels' fee request, which applied
25 the 25% benchmark percentage to the entire common fund, was reasonable. Indeed, the court
26 explicitly explained how administrative costs in particular make it possible to distribute a
27 settlement award 'in a meaningful and significant way.' Similarly, notice costs allow class
28 members to learn about a settlement and litigation expenses make the entire action possible.").

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B. Application of the Pertinent Factors Shows that an Upward Adjustment of the Benchmark Is Justified

"[I]n this circuit, the benchmark percentage is 25%." *Id.* at *9. However, "[t]he 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases." *Vizcaino II*, 290 F.3d at 1048. Indeed, *Vizcaino II* makes clear that it is not sufficient to arbitrarily apply a percentage; rather the district court must show why that percentage and the ultimate award are appropriate based on the facts of the case. *Id.*; *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) ("This '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.'" (quoting *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)). In considering whether an award of 30% would be fair, several factors may be considered:

> In [*Vizcaino II*], we listed several factors courts may consider in assessing a request for attorneys' fees that was calculated using the percentage-of-recovery method. These factors include the extent to which class counsel "achieved exceptional results for the class," whether the case was risky for class counsel, whether counsel's performance "generated benefits beyond the cash settlement fund," the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis. In addition, a court may cross-check its percentage-of-recovery figure against a lodestar calculation.

Online DVD, 2015 WL 846008, at *14 (citations omitted). In addition, the Court may consider other factors including the volume of work performed, counsel's skill and experience, the complexity of the issues faced, and the reaction of the class. *See, e.g.*, *In re Heritage Bond Litig.*, 02-ML-1475 DT, 2005 WL 1594403, at *18–23 (C.D. Cal. June 10, 2005) ("*Heritage Bond*").

As a practical matter, fee awards tend to approximate 30%. *See, e.g.*, *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) ("*Activision*") ("[T]his court finds that in most recent cases the benchmark is closer to 30%.").

Thus, in the other large electronics antitrust class actions in this district over the past decade, the court, with one exception, has awarded a fee of 30% or near 30%. *See, e.g.*, *LCD I*, 2011 WL 7575003 (30%); *LCD II*, 2013 WL 149692 (30%); *LCD III*, 2013 WL 1365900 (28.6%); *SRAM*, Case No. 07-md-1819-CW (N.D. Cal. June 30, 2011) (Dkt. No. 1370) (30%); *DRAM*, 2007

WL 2416513 (25%).

Similarly, a 2008 study of the effectiveness of private antitrust enforcement reviewed "forty of the largest recent successful private antitrust cases." Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008). In cases with recoveries of less than $100 million, eleven of sixteen cases involved fee awards of at least 30%, with seven awards of 33.3%. *Id.* at 911 tbl.7A.[4]

Finally, fee awards of less than 30%, unlike this case, often involve substantial multipliers—*i.e.*, counsel receive a multiple of their hourly rate. *See, e.g.*, *DRAM*, 2007 WL 2416513 (multiplier of 2.3). By the same token, fees in excess of 30% often involve cases presenting substantial risk, again, as here. *See, e.g.*, *See, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("*Pac. Enters.*") (award of 33% justified because of complexity and risk).

In this context, it is plain that the fee award DPPs seek is in line with recoveries awarded in other major class action cases. Consideration of the *Vizcaino* factors confirms the appropriateness of the fee requested.

1. Class Counsel Achieved an Excellent Recovery for the Class

Courts emphasize that the recovery achieved is an important factor to be considered in determining an appropriate fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983); *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1303 (W.D. Wash. 2001) *aff'd,* 290 F.3d 1043 (9th Cir. 2002) ("*Vizcaino I*"); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) ("*Omnivision*").

Here, DPPs have obtained a $37.9 million in cash. The settlements confer a substantial and immediate benefit to class members, and represent an excellent recovery, especially in light of the many risks involved in the action, as detailed below and in the Zirpoli Declaration.

The combined settlements represent a recovery of 3.55% of the settling defendants' sales during the class period. This compares favorably with similar class action settlements finally

[4] Consistent with the Supreme Court's emphasis on the importance of private enforcement of the antitrust laws, the authors also found that "private litigation provides more than four times the deterrence of the criminal fines." *Id.* at 893.

approved in other price-fixing cases. For example, in *In re Rubber Chemicals Antitrust Litigation*, No. C-04-1648 MJJ ¶ 6 (N.D. Cal. Jan. 9, 2007) (Dkt. No. 458) ("*Rubber Chems.*"), a price-fixing case in which some of the defendants had entered guilty pleas in related criminal proceedings, Judge Jenkins characterized a settlement payment of 4% of a defendant's sales as "an excellent recovery." *See also*, *e.g.*, *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 627 (E.D. Pa. 2004) (1.62% of sales); *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2004 WL 6248154, at *7 (E.D. Pa. Sept. 27, 2004) (recovery represented 2% of sales); *In re Plastic Tableware Antitrust Litig.*, No. Civ. A. 94-3564, 1995 WL 723175, at *1 (E.D. Pa. Dec. 4, 1995) (settlement equal to 3.5% of sales).

2. A High Level of Skill Was Required to Prosecute This Case and Class Counsel Are Highly Qualified

The skill and quality of legal counsel also support the requested fee award. *See Mark v. Valley Ins. Co.*, Case No. CV 01-1575-BR, 2004 WL 2260605, at *2 (D. Or. Oct. 6, 2004). Class Counsel are among the nation's most experienced and skilled practitioners in the antitrust litigation field, and each firm has successfully litigated these types of cases on behalf of direct purchasers of price-fixed products throughout the country—including within this Circuit.[5]

This was a complex case which required DPPs to confront many novel and/or difficult legal and factual issues. Courts have recognized that the novelty and difficulty of issues in a case are significant factors to be considered in making a fee award. *See*, *e.g.*, *Vizcaino I*, 142 F. Supp. 2d at 1303, 1306. Antitrust price-fixing conspiracy cases are notoriously complex and difficult to litigate. *See, e.g.*, *In re Linerboard Antitrust Litig.*, No. CIV.A. 98-5055, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) ("antitrust class action is arguably the most complex action to prosecute"). Not only did Class Counsel effectively manage the logistics of litigating such a complex case, with more than thirty plaintiffs' firms, scores of able defense counsel, and thirteen defendant groups (both foreign and domestic), but as described in detail below, they successfully tackled many difficult legal and factual issues presented by this case.

[5] *See, e.g.*, *DRAM*, MDL No. 1482; *SRAM*, MDL No. 1819; *LCD*, MDL No. 1827; *CRT*, MDL No. 1917. *See also* Exhibit 1 to the Saveri Declaration and the firm biographies attached as exhibits to each of the Class Counsel's individual declarations filed concurrently herewith.

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The caliber of opposing counsel is another important factor in assessing the quality of Class Counsel's work. *Vizcaino I*, 142 F. Supp. 2d at 1303; *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974). Here, DPPs were opposed by attorneys from some of the best and largest firms in the country with near limitless resources at their disposal.[6]

3. The Risks of This Litigation

Risk is an important factor in determining a fair fee award. *Online DVD*, 2015 WL 846008, at *14. Ninth Circuit courts have recognized that risk is a reason to increase a fee award above the 25% benchmark. *Vizcaino I*, 142 F. Supp. 2d at 1303–04. While DPPs believe that they can overcome it, consistent with the complexity and difficulty of antitrust class actions in general, this case has presented, and continues to present, substantial risk. DPPs address a few of the risks presented in this case below.

a. Defendants Have Tremendous Resources

The resources available to the opposing parties are also an important risk factor to be considered. *See Vizcaino I*, 142 F. Supp. 2d at 1303–04. Here, of course, Defendants' resources are vast.[7]

b. Antitrust Class Actions Are Unpredictable

"Antitrust litigation in general, and class action litigation in particular, is unpredictable." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). "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." *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990). Moreover, there is always the risk that the law may change in

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[6] By way of example of the resources available to the Defendants, Latham & Watkins (Toshiba/TSST's counsel) employs over 2,100 attorneys in 33 offices worldwide. *See* http://www.lw.com. Ropes & Gray (HLDS's counsel) employs over 1,100 attorneys at 11 offices worldwide. *See* http://www.ropesgray.com.

[7] For example, Samsung Group, parent of the Samsung Defendants, has $470.2 billion in assets and employs over 425,000 people. *See* http://www.samsung.com/us/aboutsamsung/samsung_group/our_performance.

1 unfavorable ways.

2 **c. The Risk that Class Certification Will Be Denied**

3 As the state of the present litigation has shown, there is a risk that a class will not be
4 certified. Several large antitrust class actions have been denied certification in recent years. *See,*
5 *e.g.*, *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 508 (N.D. Cal. 2008)
6 (denying certification of indirect purchaser class and certifying a direct purchaser class that was
7 much smaller than requested); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255
8 (D.C. Cir. 2013) (vacating District Court's granting of class certification and remanding for further
9 proceedings in light of *Comcast*, 133 S. Ct. 1426); *In re Flash Memory Antitrust Litig.*, No. C 07-
10 0086 SBA, 2010 WL 2332081, at *19 (N.D. Cal. June 9, 2010).

11 **d. The Risk of Not Being Able to Establish Liability**

12 Many large antitrust cases do not make it past summary judgment. *See*, *e.g.*, *In re Online*
13 *DVD-Rental Antitrust Litig.*, No. 11-18034, 2015 WL 845842, at *17 (9th Cir. Feb. 27, 2015)
14 (affirming district court's granting of summary judgment against plaintiffs); *In re Citric Acid*
15 *Antitrust Litig.*, 191 F.3d 1090, 1093, 1108 (9th Cir. 1999), *cert. denied sub nom. Gangi Bros.*
16 *Packing Co. v. Cargill, Inc.*, 529 U.S. 1037 (2000) (Ninth Circuit affirmed grant of summary
17 judgment in favor of Cargill, the only defendant not to settle).

18 While one defendant and four of its employees pled guilty to charges brought against them
19 by the DOJ, Defendants have consistently argued the conduct underlying those pleas related only
20 to bid-rigging in relation to three large OEMs, and do not evince the market wide conspiracy DPPs
21 allege. *See* Zirpoli Decl. ¶ 18.

22 Additionally, there is no guarantee that DPPs will be able to obtain evidence of the alleged
23 conspiracy. For example, five of the nine deponents thus far in this case invoked their Fifth
24 Amendment right against self-incrimination and refused to testify, thereby potentially depriving
25 DPPs of usable evidence. Zirpoli Decl. ¶¶ 52–53. Several of these individuals were thought to be
26 ringleaders of the conspiracy. *Id.* They also authored important documents, and their refusal to
27 testify could make it difficult to establish the admissibility of these documents at trial. *Id.*

28 DPPs must also prove that the alleged conspiracy harmed class members and the amount of

such harm. Both of these issues are complex and difficult (and expensive) to prove, and, again, success is hardly guaranteed.

4. Contingent Nature of the Fee

The Ninth Circuit has confirmed that a fair fee award must include consideration of the contingent nature of the fee, where there is no assurance of attorneys' fees or reimbursement of expenses. *See, e.g.*, *Vizcaino II*, 290 F.3d at 1050; *Online DVD*, 2015 WL 846008, at *14 & n.14. It is well-established that attorneys who take on the risk of a contingency case should be compensated for the risk they take:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* § 21.9, at 534–35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

WPPSS, 19 F.3d at 1299.

The commencement of a class action is no guarantee of success. "[T]he risk of non-payment in complex cases, such as this one, is very real." *In re Veeco Instruments Inc. Sec. Litig.*, No. 05-md-01695(CM), 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007).

Class Counsel have received no compensation during the over five-year course of the litigation. They have incurred over $24 million in time and $1.6 million in expenses, and took the chance that they might never be compensated. This factor strongly supports the requested fee.

5. High Quality of Work Performed

Finally, Class Counsel respectfully submit that the work they have performed has been of the highest quality and has been of great benefit to the class. The Court is familiar with the history of this case, having presided over five years of contentious litigation, represented by over fifteen hundred docket entries. The Litigation History in Part II.A provides an overview of the substantial work Class Counsel undertook by describing the various substantive motions, procedural matters, discovery requests and disputes, depositions, and other work necessary to build a case of this magnitude. Further description of the work performed by Class Counsel is set forth in the Zirpoli

Declaration at paragraphs 10 through 59. The amount and quality of the work of Class Counsel also strongly supports the fee they seek.

6. Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

Finally, a cross-check of the requested fee with Class Counsel's lodestar demonstrates that the proposed fee is more than reasonable, because it amounts to less than half of the value—over $24.8 million—of the time Class Counsel has invested in the case. *See Online DVD*, 2015 WL 846008, at *15; *Vizcaino II*, 290 F.3d at 1048–50.

As summarized in the Saveri Declaration, Class Counsel have spent—through December 31, 2014—56,197.50 hours prosecuting this Action. All of this time was reasonable and necessary for the prosecution of this action. *Online DVD*, 2015 WL 846008, at *9 ("The lodestar method requires 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." (quotation marks omitted)).Class Counsel took meaningful steps to ensure that their work was efficient. Among other things, work was assigned by Saveri & Saveri, Inc. among the various firms to avoid duplication; as required by CMO 1, counsel kept contemporaneous time records and periodically reported their time to Saveri & Saveri, Inc.; and wherever possible, DPPs coordinated with the Indirect Purchaser Plaintiffs to avoid duplication of effort. Zirpoli Decl. ¶¶ 14, 27, 29–30, 33–36, 40, 46, 49, 67.

Moreover, the lodestar materially understates the work performed by class counsel because (1) it does not include time spent by counsel before the appointment of the executive committee, and therefore excludes substantial work by counsel in connection with their pre-filing investigation of the case, the JPML proceeding, and the organization of counsel; and (2) it includes time only through December 31, 2014. Zirpoli Decl. ¶¶ 7, 67.

At the historic hourly rates of class counsel—i.e., those in place at the time the work was performed—this time results in a lodestar of $24,811,762.75. *See* Ex. 4 to Saveri Decl.; *see also* declarations from all other Class Counsel firms filed herewith. The record demonstrates that Class Counsel's hourly rates are reasonable. Each firm's declaration avers that the rates charged are that

1 firm's usual and customary rates at the time the work was performed. *See* declarations of Class
2 Counsel filed herewith. Furthermore, in connection with one of the largest tasks they undertook, if
3 not the largest—the initial review and coding of the millions of pages of documents produced in
4 the case—Class counsel capped the allowable hourly rate at $350. Zirpoli Decl. ¶¶ 42, 67.

5 DPPs' fee request of $11,370,000 thus amounts to less than half (46%) of their lodestar.
6 This confirms its reasonableness beyond question. *See Online DVD*, 2015 WL 846008, at *15
7 ("[W]here, as here, the lodestar amount was *three times* the benchmark, it was not an abuse of
8 discretion for the district court to accept the benchmark using a quick cross-check of class
9 counsel's lodestar summary figures."); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138
10 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (fact that fee sought is less than the
11 lodestar suggests fairness of award); *LCD II*, 2013 WL 149692, at *1 (fact that fee sought is less
12 than the lodestar "serves to confirm the reasonableness of the fees requested.").

13 **7. The Reaction of the Settlement Class to Date Supports the Fee Request**

14 Settlement notices were sent to class members in connection with each of the settlements
15 with HLDS, Panasonic, and NEC. All three settlement notices informed class members that "At a
16 future time, Interim Lead Counsel will ask the Court for attorneys' fees not to exceed one-third
17 (33.3%) of this or any future Settlement Fund plus reimbursement of their costs and expenses."
18 *See, e.g.*, Declaration of Markham Sherwood in Support of Final Approval of Class Action
19 Settlement with HLDS (Aug. 29, 2013) (Dkt. No. 986-3), Ex. 1 at p. 4. As noted above, out of over
20 700,000 class members, including many large and sophisticated businesses, only four objections
21 were received, and only one—from an individual—challenged the percentage of fees that might be
22 sought by Class Counsel.[8] "When a class is comprised of sophisticated business entities that can be

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[8] No objections were received from the over 300,000 members of the Panasonic or NEC settlement classes. Two class members sent letters were sent to the Court (*see* Dkt. Nos. 1134, 1278), one in regard to the Panasonic settlement and one in regard to the NEC settlement. One sought exclusion from the settlement, and the other (received three weeks after the deadline to object) objected generally to lawsuits against Japanese companies. *See* Zirpoli Decl. ¶ 84. No objections to the Panasonic or NEC settlements were received other than these two letters. This brief and supporting documentation will also be posted on the website established for the settlements prior to the notice to the class of the instant fee request. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994–95 (9th Cir. 2010).

expected to oppose any request for attorney fees they find unreasonable, the lack of objections 'indicates the appropriateness of the [fee] request.'" *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ.03-0085 FSH, 2005 WL 3008808, at *13 n.1 (D.N.J. Nov. 9, 2005) (awarding fee of 33.3% of a $75 million settlement). The reaction of the class to date, therefore, also supports the amount of the fee DPPs seek.

C. Class Counsel Are Entitled to Reimbursement for Their Reasonable Litigation Expenses

Class Counsel also request reimbursement of litigation costs and expenses they incurred on behalf of the class in the amount of $3,281,173.35. Saveri Decl. ¶ 32. 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 West*, 557 F.2d 759, 769 (9th Cir. 1977); *OmniVision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."). Reasonable reimbursable litigation expenses include: those for document production, experts and consultants, depositions, translation services, notice, claim administration. *See, e.g.*, 1 Alba Conte, *Attorney Fee Awards* § 2.19 (3d ed. 2004).

Here Class Counsel's reasonable expenses include: (i) document management system and database costs of $412,415.86; (ii) notice and claims administration costs of $192,367.90 (iii) translation services of $28,713.17; (iv) court filing fees and costs of $7,458.17; (v) payments to experts of $2,266,336.54; (vi) federal express costs of $3,746.71; (vii) transcript costs of $16,480.06; (viii) online legal and factual research (e.g., LexisNexis and Westlaw) of $158,727.04; (ix) messenger and delivery costs of $2,960.88; (x) in-house copy charges (capped at 20 cents per page) of $76,800.34; (xi) professional copy charges of $3,492.25; (xii) postage charges of $1,015.40; (xiii) service of process charges of $5,970.23; (xiv) telephone and facsimile charges of $17,603.24; and (xv) travel and meal charges of $87,085.56. Saveri Decl. ¶ 33. These expenses were reasonable and necessary for the prosecution of this action and are customarily approved by courts as proper litigation expenses. *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, 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); *Redding v. Fairman*, 717 F.2d 1105, 1119 (9th Cir. 1983) (same); Conte, *Attorney Fee Awards* § 2.19.

Class Counsel maintained strict control over the Litigation Expenses. Some of the Litigation Expenses were paid out of a litigation fund created by Class Counsel and maintained by Saveri & Saveri (the "Litigation Fund"). Class Counsel collectively contributed $1,265,000.00 to the Litigation Fund for which they seek reimbursement. Saveri Decl. ¶ 30. A description of the payments from the Litigation Fund by category is set forth in Exhibit 5 to the Saveri Declaration. *Id*. In addition, the Court approved the withdrawal of a total of $2,000,000 from the Settlement Fund for use in the prosecution of the litigation, subject to an accounting. *See* Dkt. Nos. 1085, 1336, 1504. Expenses paid using those funds are set forth in Exhibit 6 to the Saveri Declaration. Saveri Decl. ¶ 31.

Accordingly, Class Counsel respectfully request (1) Court approval of the expenses and (2) reimbursement of the $1,687,905.17 that Class Counsel have advanced on behalf of the class and that have not been reimbursed. Saveri Decl. ¶ 29–30, 32.

D. Payments to the Class Representatives Are Appropriate

Courts often approve incentive awards to class representatives for their service to the Class. *Online DVD*, 2015 WL 846008, at *4, *8 (approving incentive awards of $5,000 per class representative and noting that they were "relatively small, well within the usual norms of 'modest compensation' paid to class representatives for services performed in the class action"); *In re Lorazepam & Chlorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (approving incentive awards of $25,000 and $10,000, a total of 0.3% of each class's recovery); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming $5,000 incentive awards to class representatives). *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). ("Incentive awards are fairly typical in class action cases."). Incentive awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or

reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as private attorneys general. *Rodriguez*, 563 F.3d at 958–59.

DPPs seek awards of $10,000 per Class Representative in the TCAC (for a total of $60,000) and $5,000 to each of the three class representative in the SCAC who were dropped from the TCAC (for a total of $15,000). These modest awards would be well within the amounts Ninth Circuit courts find acceptable. *See, e.g.*, *Online DVD*, 2015 WL 846008, at *8 (approving incentive awards of $5,000, amounting to 0.17% of settlement fund); *Presley v. Carter Hawley Hale Profit Sharing Plan*, No. C9704316SC, 2000 WL 16437, at *2 (N.D. Cal. 2000) (approving $25,000 incentive awards); *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 844, 851 (N.D. Cal. 2005) (approving $5,000 incentive awards); *In re Sorbates Direct Purchaser Antitrust Litig.*, No. 99-1358MMC, 2002 WL 31655191, at *3 (N.D. Cal. Nov. 15, 2002) (approving $7,500 incentive award). In *LCD II*, the Court approved a two-tiered incentive award, giving $5,000 to all eleven class representatives and an additional $10,000 to the four that testified at trial. 2014 WL 149692, at *9.

Here, the class representatives each expended substantial time and effort as named plaintiffs herein. Among other things, they spent time reviewing and responding to multiple sets of document requests and interrogatories, including collecting responsive documents; reviewing briefs and pleadings; and consulting with class counsel regarding litigation strategy, settlement negotiations, and other matters. Zirpoli Decl. ¶¶ 68–80. In addition, the TCAC Class Representatives spent significant time preparing for and being deposed. Zirpoli Decl. ¶ 73–78.

By shouldering the burdens associated with this litigation, each Class Representative has made a significant contribution to the recovery obtained for the class. In light of the benefits conferred by the settlements reached in this case, the important role of the class should be acknowledged with a reasonable payment to compensate them for their time and expenses associated with actively participating in this litigation.

IV. CONCLUSION

For the foregoing reasons, DPPs respectfully request that the Court grant Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Incentive Awards.

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Dated: March 16, 2015

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