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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL ALLAGAS, ARTHUR RAY and BRETT MOHRMAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BP SOLAR INTERNATIONAL, INC., HOME DEPOT U.S.A., INC. and DOES 1-10, inclusive,

Defendants.

Case No. 3:14-cv-00560-SI (EDL)

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND COSTS AND INCENTIVE AWARDS

Judge: Hon. Susan Illston
Date: December 22, 2016
Time: 3:00 PM
Crtm: 1

Action Filed: January 9, 2014

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 22, 2016 at 3:00 p.m. in Courtroom 1of this Court, located at 450 Golden Gate Ave., San Francisco, California, Class Counsel will move and hereby do move the Court for orders: (1) awarding Class Counsel attorney fees of $11 million; (2) awarding Class Counsel $600,000 as reimbursement of out-of-pocket costs and expenses incurred in prosecuting the litigation; and (3) awarding each of the representative plaintiffs an incentive award, in the amount of $7,500 for Plaintiffs Michael Allagas, Arthur Ray and Brett Mohrman, and $3,500 for Plaintiff Brian Dickson.

The motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support thereof, Plaintiffs' motion for final approval, the Settlement Agreement, the Declarations of David M. Birka-White, Robert J. Nelson, Jennifer M. Keough, and Jeanne C. Finegan filed in support of the motion for final approval, any reply papers, the argument of counsel, and all pleadings and records on file in this matter.

Dated: November 3, 2016

Respectfully submitted,

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By: */s/ Robert J. Nelson*
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Attorneys for Plaintiffs and the Class

I. INTRODUCTION

Class Counsel has presented a proposed Settlement Agreement ("Settlement") that offers substantial and meaningful benefits to Class Members valued at more than $67 million: a $45.33 million common fund used to remove and replace FDK+ Class Panels (the higher failure rate models), plus $20 million to fund inspections, inverter installations, and replacements of Non-FDK+ panels, as well as $2 million in attorneys' fees in connection with the claims made portion of the Settlement. As detailed in their final approval motion, Class Counsel achieved the key goals of the litigation by negotiating a Settlement that funds replacement of all failed panels, full replacement of all high failure rate models and individual systems, and installation of advanced inverters on systems not eligible for full replacement. The Settlement is thus designed not only to deliver valuable benefits to Class Members, but also to substantially eliminate any lingering safety risk caused by the Panels. In addition, Class Counsel negotiated a procedural mechanism, paid for by Defendants, for Large Non-Residential Customers to resolve any claims arising out of their Class Panels.

This outstanding Settlement is the result of Class Counsel's tireless efforts over two and a half years, including detailed pre-filing investigation; successful opposition to two rounds of motions to dismiss and to strike; review and analysis of hundreds of thousands of pages of fact discovery; eight fact and 30(b)(6) depositions; development of common defect theories for hundreds of thousands of panels sold over the better part of a decade; extensive work with solar panel, metallurgical, soldering, inspection, fire safety, and statistics experts; development of a classwide damages model; a detailed class certification motion supported by 93 exhibits; briefing on Defendants' motion to exclude Plaintiffs' class certification experts; multiple days of mediation; and nearly six months of negotiations over the terms of a highly-detailed Settlement Agreement and Claims Protocol.

Class Counsel are requesting a total fees and costs award of $11.6 million, which Defendants have agreed not to oppose. Of this award, $600,000 is for costs (in fact, Plaintiffs have incurred almost $650,000 in costs, with more expected over the many years the Settlement will be implemented). The remaining $11 million is for reasonable attorneys' fees. Viewed as a

common fund case that warrants a percentage-of-the-fund award, Class Counsel seek only 16.3% of the maximum settlement value ($67.33 million), or 23.2% of the absolute minimum settlement value ($47.33 million). Both figures are below the Ninth Circuit's benchmark 25% fee in common fund cases, in a case where Class Counsel's effort, determination, and ultimate success might justify an even higher percentage. Further, should the Court elect to conduct the discretionary lodestar cross check, it, too, supports the requested award, as Class Counsel's multiplier is approximately 1.52, and will decrease with time as Class Counsel oversee, monitor, and help implement this years-long Settlement.

Class Counsel also seek incentive awards of $7,500 and $3,500 for the Class Representatives, who dedicated considerable time on this case in support of the entire Class.

II. CLASS COUNSEL'S EFFORTS ON BEHALF OF THE CLASS

A. Investigation and Fact Discovery

Even before filing Plaintiffs' initial complaint, Class Counsel conducted detailed investigation into the case, including consultation with photovoltaic experts regarding the defect and any history of problems with BP panels. Birka-White Decl., ¶ 8.

After filing the case, fact discovery was extensive and comprehensive. On September 19, 2014, eleven days after the Court denied Defendants' motion to dismiss and strike the class allegations from the First Amended Complaint, Class Counsel issued document requests ("RFPs") for warranty documents, product representations, product advisories, customer claims relating to the solar panels, databases in which these claims were stored and any descriptions thereof, and documents relating to Defendants' investigation of its allegedly defective junction box and any related testing. After months of meet and confer efforts, Class Counsel moved to compel responses from Defendants on January 26, 2015. Counsel went on to serve seven additional sets of RFPs, spanning 176 individual requests for documents and a request to inspect returned solar panels, and involving topics such as the design of and technical specifications for BP junction boxes, BP solar panel sales figures, Defendants' warranty claim data, and BP's agreements with third-party marketers, retailers, and distributors. Class Counsel also filed three additional motions to compel on topics including electronically stored information (ESI), BP

international warranty data, soldering instructions, and privilege logs. Dkts. 56, 95, 100, and 125. Counsel held frequent teleconferences concerning contested discovery matters, often avoiding motion practice only through last-minute compromise. Birka-White Decl., ¶ 17. Ultimately, BP and Home Depot made 45 separate rolling document productions, totaling over 580,000 pages, or 182,780 documents, plus 11,718 documents produced in native format, including complex, multi-tabbed spreadsheets and other multipage documents. Birka-White Decl., ¶ 13. Class Counsel reviewed a substantial portion of these documents, and in the process located and effectively used key documents to further Plaintiffs' case. Birka-White Decl., ¶ 13; Nelson Decl., ¶ 11.

Class Counsel prepared and served 25 interrogatories on BP (in four separate sets) and six interrogatories on Home Depot. The interrogatories covered a variety of critical topics, including sales of Class Panels in California and the United States, junction box design and design changes, and BP's and Home Depot's handling of customer complaints and warranty claims. Birka-White Decl., ¶ 14. Plaintiffs also took eight fact depositions of BP and Home Depot employees, including corporate representatives from each Defendant, BP engineers responsible for the design of the panels and investigation into the alleged defect, and BP employees responsible for warranty claims. Birka-White Decl., ¶ 15.

Class Counsel also responded to over 20 defense interrogatories—the vast majority of which were contention interrogatories calling for in-depth document review and meticulous, exhaustive responses. Birka-White Decl., ¶ 16. These early contention interrogatories were served before Plaintiffs had an opportunity to review BP's document production; this triggered an acrimonious discovery battle resulting in weeks of exchanges and, eventually, motion practice and a ruling from the Court. Plaintiffs, through counsel, responded to certain of these interrogatories twice—each time reviewing and categorizing many dozens of responsive documents, and identifying other facts in support of their contentions. Class Counsel also responded to 77 requests for production of documents, producing thousands of pages of documents. *Id.* Class Counsel also conducted third party discovery against numerous entities in the distribution chain. *Id.*

B. Expert Discovery

Expert class discovery in this case was particularly robust and overlapped significantly with merits discovery. Class Counsel identified, prepared, and disclosed eight experts and one rebuttal expert. Plaintiffs' experts were preeminent in their varied fields, including solder design and fatigue, solar panel failure investigations, solar panel design and manufacture, fire safety, damages, and statistics. Birka-White Decl., ¶ 18. These witnesses prepared 12 expert reports (opening and rebuttal) based on their respective analyses of thousands of pages of photographs, infrared images, x-rays and other advanced imaging, warranty database records, internal BP documents (including design schematics and internal analyses), sample modules, fire safety materials, relevant academic literature, and on-site inspection of 1,200 installed Class Panels, and inspection of hundreds of removed Class Panels at a BP storage site in Oregon. Birka-White Decl., ¶ 19; *see, e.g.*, Dkt. 161 (Plaintiffs' Opp. to Mot. to Strike) at 1, 4. Class Counsel worked with each of these experts in significant detail to assist them in preparing their reports, and obtaining and providing relevant discovery for their analyses.

Class Counsel also defended all of Plaintiffs' experts at deposition, and deposed the five experts offered by Defendants. Birka-White Decl., ¶¶ 18, 21. As noted above, Defendants moved to strike many of Plaintiffs' experts under *Daubert*. Birka-White Decl., ¶ 22. At the time the Settlement was reached, Class Counsel had filed their opposition brief. Dkts. 158, 161.

C. Motion Practice and Class Certification

Defendants attacked the pleadings multiple times, requiring Class Counsel to devote extensive resources to defend and replead the claims. Class Counsel's coordinated efforts included legal and factual research, drafting, editing, communicating regularly with one another, and determining sound strategies for advancing and pursuing the claims on behalf of Plaintiffs and the proposed Class. Birka-White Decl., ¶¶ 44-45. *See* Dkts. 14, 15, 17, 18 (Defendants' first motions to dismiss and strike); 37 (second motion). On January 8, 2016, Plaintiffs moved for class certification, filing a detailed Memorandum of Points and Authorities, accompanied by numerous declarations and 93 exhibits. Dkt. 148, 149. The motion was fully briefed before agreement was reached. Dkt. 157, 160. Defendants also moved to strike the opinions of four of

Plaintiffs' experts. Dkts. 158, 161 (Plaintiffs' opposition).

D. Settlement Negotiations

Class Counsel also devoted a considerable amount of time and energy toward Settlement. The first mediation session took place on February 1-2, 2016, and ended without resolution. Birka-White Decl., ¶¶ 23-25. The parties agreed to a third day of mediation on March 1, 2016. *Id.* After highly contentious and arms-length negotiations, the parties reached an agreement in principle and executed a memorandum of understanding. *Id.* Countless e-mails and lengthy conference calls followed as the parties painstakingly negotiated detailed settlement terms including a mutually-agreeable claims process and protocol, claims administrator, special master, and notice provider. It took nearly six months following mediation before the terms were finalized and the Settlement was executed resulting in a highly-detailed Agreement and Claims Protocol. Birka-White Decl., ¶11; Nelson Decl., ¶ 12.

Class Counsel also searched for the appropriate candidate to serve as the administrator of the claims process. Ultimately, the parties recommended the appointment of Jennifer M. Keough of JND Legal Administration, who is experienced in administering class action settlements. Birka-White Decl., ¶ 30. During the latter stages of the settlement negotiations, Class Counsel worked at length with notice provider Jeanne C. Finegan of HF Media, LLC to develop a customized plan to notify the Class of the Settlement. Birka-White Decl., ¶ 30. That Notice Plan has now been fully implemented in accordance with the Preliminary Approval Order. Birka-White Decl., ¶ 30; Finegan Decl., ¶¶ 12-35; Keough Decl., ¶¶ 4-10; Dkt. 171-1 at 57-76 (Claims Protocol).

III. LEGAL STANDARD

As this Court has explained, "'[w]hile attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. P. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount.'" *Jordan v. Paul Fin., LLC*, No. C 07-04496 SI, 2013 WL 6086037, at *2 (N.D. Cal. Nov. 19, 2013) (quoting *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011)).

The Ninth Circuit has approved two different methods to calculate reasonable attorneys' fees: the percentage-of-recovery or the lodestar method. *Id.* "Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." *In re Bluetooth*, 654 F. 3d at 942. The Ninth Circuit has repeatedly noted that 25% of the common fund is the "benchmark" for a reasonable fee award. *See id; see also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990). Under the lodestar method, by contrast, the "figure 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." *Id.*

Though not mandatory, the Ninth Circuit has "encouraged courts to guard against an unreasonable result by cross-checking their calculations against a second method." *Id.* at 944; *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050–51 (9th Cir. 2002).

IV. ARGUMENT

The Settlement establishes a $45.33 million common fund to be used for Class Members with higher failure rate, FDK+ panels, and makes available another $20 million for lower failure rate, Non-FDK+ panels (plus an additional $2 million for attorneys' fees). The Settlement also provides that Defendants will not oppose Class Counsel's fee request of up to $11 million, plus $600,000 in costs and expenses.

Though it has both common fund and claims made elements, Class Counsel respectfully submit that the Settlement is predominantly a common fund settlement warranting a percentage of recovery award. Indeed, at *minimum* the Settlement has created a fund of $47.33 million ($45.33 million common fund plus $2 million separate fee payment allocated to the claims made fund), making the $11 million fee approximately 23.2% of the *minimum* fund value. When accounting for the $20 million in additional relief made available to Class Members with lower failure rate models (which only reverts to Defendants if it is not exhausted within the lengthy three-year claims period punctuated by a second notice program half-way through), the overall percentage sought by Class Counsel is far lower, at 16.3% (= $11M/$67.33M).

Should the Court conduct a discretionary lodestar cross check, that will confirm the propriety of the requested award. For almost three years, Class Counsel worked tirelessly and at great financial risk to themselves to prosecute this complex product defect class action. In sum, Class Counsel expended 12,610.6 hours, valued at $7,246,378.50 in lodestar based on their customary rates. The requested fee award would thus represent a 1.52 multiplier on lodestar to date. That multiplier, in turn, will decrease over time as Class Counsel continue to monitor the Settlement and advocate for the Class for many years until the common fund is exhausted. Finally, Class Counsel seek reimbursement of $600,000 in costs reasonably incurred in prosecuting this case.

A. The requested fee award is a reasonable percentage of the common fund created through Class Counsel's efforts.

The Supreme Court "has recognized consistently that a 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 Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26-30 (2000). "25% of the common fund is typically the "benchmark" for a reasonable fee award." *Jordan v. Paul Fin., LLC*, No. C 07-04496 SI, 2013 WL 6086037, at *2 (N.D. Cal. Nov. 19, 2013) (Illston, J.). "Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). The relevant circumstances include (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *Vizcaino*, 290 F.3d at 1048-50.

Here, all of these factors strongly support Class Counsel's requested $11 million fee, which represents 16.3% of the maximum settlement value, or 23.2% of the absolute minimum value, both below the Ninth Circuit's benchmark. Indeed, given the outstanding result and the effort required to achieve it, an even higher percentage would be warranted.

1. Class Counsel achieved an excellent result for the Class.

The first factor strongly supports the fee request, as Class Counsel secured an excellent result that achieved all the goals of the litigation, including replacing relatively high failure rate models and individual systems, and outfitting all other systems with state-of-the-art arc fault detection. Importantly, these measures are designed to eliminate any potential safety risk posed by the Class Panels.

As detailed more fully in the accompanying final approval motion, Class Members who own models with relatively higher failure rates, referred to as FDK+ or Category 1 Class Panels, will receive full replacement of all of their Class Panels whether or not they show signs of failure. The Settlement will pay the cost of removal and disposal of the Class Panels, and the purchase and installation of replacement panels; or Class Members can opt for a cash payment of $2.35 per watt, which materially exceeds the average amount BP was paying under its warranty program. Class Members with Non-FDK+ or Category 2 panels receive a series of benefits: a free inspection to identify failed panels; free replacement of any failed panels, or full replacement if the failure rate exceeds 20% at any time during the claims period; and for any system that does not receive full replacement, installation of a new inverter with advanced safety technology. Finally, Large Non-Residential (LNR) Class Members, *i.e.*, those with 400 or more panels in a non-residential setting, are invited to participate in mediated commercial negotiations with BP Solar, a valuable procedural mechanism that short circuits expensive litigation.

These benefits are valued at $67.33 million. Given both the quantity and quality of the relief afforded the Class, this "most critical factor" in selecting an appropriate percentage award strongly favors the requested fee. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (the "most critical factor is the degree of success obtained").

2. The Settlement was obtained despite the substantial risks and difficulties in prosecuting this complex class action.

Class Counsel's achievement is all the more noteworthy given the litigation risks the Settlement Class faced. First and perhaps foremost, Class Counsel had to develop a uniform defect theory applicable to hundreds of thousands of Class Panels, thus creating a path for class

certification. This took extensive discovery against sophisticated and ably-represented Defendants, and highly technical work with a team of experts to understand the underlying technology and defect, and to develop the necessary expert opinions to support Plaintiffs' contentions. Given the number of panels sold over the better part of a decade, Defendants trained serious and sustained arguments on this position. BP argued that the varying warranty claims rates regarding each of the models at issue counseled against certifying a class.

BP's use of third parties to distribute its products and disseminate its marketing message threatened to pose a problem for certain consumer claims that arguably depended on the existence of a widespread, pervasive marketing campaign. BP also mounted legal challenges to the express warranty claims, arguing that its limited warranty covering "defects in materials and workmanship" did not extend to the alleged design defect. It further argued that the alleged defect did not manifest and/or was not substantially certain to manifest in most of the Class Panels.

Even if Plaintiffs could have obtained a class certification order and proceeded to trial, victory would have been uncertain. There were differences in claims rates among models, and the panels were getting old – in some instances 16 years old – which could have impacted recoverable damages. Such uncertainty, moreover, was compounded by the appeals virtually certain to have followed any verdict. In short, while Class Counsel believe that the Plaintiffs' claims are viable and strong, there can be no denying the array of serious classwide risks, any one of which could have precluded the Class from recovering anything at all. Birka-White Decl., ¶¶ 45-47. Because Class Counsel took on these risks on behalf of the Class, and overcame them to achieve an excellent result, this factor strongly supports Class Counsel's requested fee.

3. <u>The Settlement was achieved by experienced and qualified counsel</u>

Class Counsel have combined some 60 years of experience prosecuting and settling complex class actions, including product defect cases. Nelson Decl., ¶¶ 3-9, 16-17; Birka-White Decl., ¶¶ 3-7 and Ex. A. They were supported by qualified and experienced partners and associates at their firms. *Id*. The quality of Class Counsel's work is readily apparent from the case docket. Class Counsel have consistently prepared thoughtful and thorough work on behalf

of Plaintiffs and the Class, as summarized briefly above. The excellent result obtained for the Class is further evidence of Class Counsel's skill, which expanded a California class action into a nationwide settlement that provides substantial benefits to Class members around the country.

In evaluating the quality of Class Counsel's work, it is also proper to consider the quality of opposing counsel and the resources they applied to this case. *See Barbosa v. Cargill Meat Solutions Corp*., 297 F.R.D. 431, 449 (C.D. Cal. 2013) ("The quality of opposing counsel is important in evaluating the quality of Class Counsel's work."); *Wing v. Asarco Inc*., 114 F.3d 986, 988–89 (9th Cir. 1997) (approving a 2.0 fee multiplier and noting "the quality of the [defendant's] opposition"). Defense counsel included attorneys from the prominent defense firm Arnold & Porter LLP, who zealously litigated the claims and defenses and would have continued to do so absent their resolution. This factor, too, strongly supports the requested fee.

4. Class Counsel's representation was contingent in nature

The risk of receiving little or no payment for professional work is relevant to the determination of a fee award. *See Vizcaino*, 290 F.3d at 1048 (affirming that "[r]isk is a relevant circumstance" in determining an award of attorneys' fees). Class Counsel undertook this litigation on a contingent fee basis, knowing from the start that there was a possibility of the case yielding no recovery, leaving them uncompensated for substantial work and hundreds of thousands of dollars in litigation expenses. Birka-White Decl., ¶¶ 33, 44; Nelson Decl., ¶ 15. Class Counsel's work has been without compensation or reimbursement of any kind for nearly three years, and Class Counsel had to forego other work in order to devote the requisite time, resources, and energy to handle this complex matter. Birka-White Decl., ¶ 43; Nelson Decl., ¶ 15.

5. The fee request is below the "benchmark" fee of 25%.

Courts commonly award a "benchmark" for attorney fees of 25% to class counsel who have secured a common fund for the benefit of a class. *See In re Online DVD–Rental Antitrust Litig*., 779 F.3d 934, 949 (9th Cir. 2015) ("Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%.").

Class Counsel seek a fee award of $11 million representing approximately 16.3% of the total settlement value ($67.33 million). Even if measured solely against the non-reversionary common fund and separate fee payment (valued at $47.33 million combined), the requested fee represents 23.2% of the fund, below the 25% benchmark. Accordingly, the requested fee is well within the accepted range of fee awards in class actions.

6. A lodestar cross-check further verifies the reasonableness of the requested fee.

Though not mandatory, a lodestar cross-check may be used to ensure the reasonableness of the requested fee. *Vizcaino*, 290 F.3d at 1051. Here, the cross-check yields a modest and well-deserved multiplier, and thus supports the fee request.

Class Counsel have spent approximately 12,610.6 hours investigating, analyzing, researching, litigating, and negotiating a resolution of this action. Birka-White Decl., ¶ 49; Nelson Decl., ¶ 17. Class Counsel's hourly rates, used to calculate the lodestar here, are in line with prevailing rates in this District, and have recently been approved by federal and state courts. Birka-White Decl., ¶ 35; Nelson Decl., ¶ 16; *see Kuffner v. Suntech*, Contra Costa County Superior Court, Case No.C13-01328 (March 7, 2016) (approving Birka-White Law Offices rates); *United Desert Charities, Inc., et al. v. Sloan Valve Company, et al*., 2:12-cv-06878 SJO (SHx) (C.D. Cal. August 25, 2014) (same); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015) (finding reasonable rates for Bay Area attorneys, including those from LCHB, of between $475-$975 for partners, $300-$490 for associates, and $150-$430 for litigation support and paralegals); *In re A-Power Energy Generation Systems, Ltd. Securities Litig*., No. MDL 11-2302-GE (CWx), Dkt. No. 123 (C.D. Cal. Aug. 29, 2013) (granting LCHB's requested attorneys' fees); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litig*., No. 10-ml-02151 NS (FMOx), Dkt. No. 3933 (C.D. Cal. June 24, 2013) (awarding LCHB's requested fees and finding that "[c]lass counsel's experience, reputation, and skill, as well as the complexity of the case" justified their rates that ranged from $150 to $950); *White v. Experian Information Solutions, Inc*., No. CV 05-1070 DOC (MLGx), Dkt. No. 775 (C.D. Cal. June 15, 2011) (approving LCHB's billing rates as justified "in light of

the attorney's reputation and experience" and the prevailing rates in the district); *Berger v. Property ID. Corp.*, No. CV 05-5373-GHK (CWx), Dkt. No. 899 (C.D. Cal. Jan. 28, 2009) (awarding LCHB's requested fees).

The total reported lodestar is $7,246,378.50. Accordingly, the requested $11 million fee constitutes a relatively low multiplier of 1.52. Importantly, here, the multiplier will decrease over time given the substantial additional work Class Counsel will expend in monitoring and helping to implement the Settlement terms. Birka-White Decl., ¶¶ 39(w, aa), 41; Nelson Decl., ¶ 19. Under a lodestar analysis, this multiplier is warranted here for all the reasons described above: the quality of the result, and the sustained effort by Class Counsel in achieving that result in the face of significant risks and difficulties, including the real risk of nonpayment in this contingency matter. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (lodestar figure may be adjusted upward to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment).

Because the lodestar multiplier is warranted and well within the appropriate range in this Circuit, the lodestar cross-check verifies the reasonableness of the requested fee award. *See In re LinkedIn User Privacy Litigation*, 309 F.R.D. 573, 591 (N.D. Cal. 2015) ("most multipliers range between 1.0 and 4.0" (citing *Vizcaino*)); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *10-11 (N.D. Cal. Sept. 2, 2015) (awarding a $40.043 million fee with a 2.2 (net 2.5) multiplier, and praising the work of class counsel, including LCHB); *Moore v. Verizon Commc'ns Inc*., No. C 09-1823 SBA, 2014 WL 588035, at *9 (N.D. Cal. Feb. 14, 2014) (awarding a $7.5 million fee with a 1.58 multiplier, and noting that class counsel, including LCHB, deserved a multiplier of at least 1.5 "given the results achieved, Class Counsel's efforts on behalf of the class, and the substantial risk that Plaintiffs would not succeed at the class certification or merits stage of the litigation").

B. <u>The requested fee is reasonable even if the Court considers the common fund and claims made fees separately.</u>

As noted above, $9 million of the requested $11 million fee is allocated to the Common

Fund of $45.33 million, with the remaining $2 million being paid separately by Defendants for the creation of (and in addition to) the $20 million Claims Made Fund. And, as discussed in the prior sections, the total requested $11 million fee is appropriate and reasonable in light of the confirmed Settlement value of between $47.33 million and $67.33 million.

Nonetheless, should the Court consider the fees separately, the same result obtains. The $9 million fee paid from the $45.33 million non-reversionary common fund is 19.9% of the common fund. The $2 million fee allocated to the claims made fund, in turn, is also best evaluated under a constructive common fund approach. As this Court recently explained:

> Where a settlement does not create a common fund from which to draw, a court may, in its discretion, analyze the case as a "constructive common fund" for fee-setting purposes. *See Bluetooth*, 654 F.3d at 940-41. To calculate appropriate attorneys' fees under the constructive common fund method, the Court should look to the maximum settlement amount that could be claimed. *See*, *e.g.*, *Lopez v. Youngblood*, No. CV–F–07–0474 DLB, 2011 WL 10483569, at * 12 (E.D. Cal. Sept. 1, 2011); *In re Wal–Mart Stores, Inc. Wage & Hour Litig.*, No. 06–02069, 2011 WL 31266, at *5 n.5 (N.D. Cal. Jan. 5, 2011).

Nwabueze v. AT&T Inc., No. C 09-01529 SI, 2014 WL 324262, at *1 (N.D. Cal. Jan. 29, 2014).

While any unused portion of the $20 million claims made fund reverts to Defendants if unused after three years, it is nonetheless best considered a constructive common fund because of its largely open-ended nature. The fund will pay claims for as long as it has money, or for three years, whichever is sooner, and Class Members can submit unlimited claims during that period. Moreover, in addition to the just completed Notice program, Class Counsel negotiated a *second* notice to be issued during the pendency of the claims period, to bring even more Class Members to the Settlement. Further, every claimant with verified Non-FDK+ Class Panels receives guaranteed relief valued at thousands of dollars due to installation of a new, state-of-the-art inverter, a free inspection, and replacement of any failed panels.

Viewed as a constructive common fund, Class Counsel seek only 9.1% for their fee (= $2M/$22M), well below the benchmark. Even if the Court does not measure the percentage against the maximum potential value, the $2 million fee requested more than accounts for the potential that some portion of the fund may revert to Defendants many years in the future. Finally, if considered under the lodestar method, the requested fee of $2 million from the claims

made fund is appropriate for all the reasons explained in the prior sections. Class Counsel's time and effort inured to the benefit of all Class Members, including obtaining discovery, filing for class certification, and developing classwide defect and damages theories with the help of qualified experts, as described above and in Plaintiffs' final approval motion. Finally, the $2 million fee is not being paid by Class Members. The fee is in addition to the $20 million made available to Class Members with Non-FDK+ panels.

C. Class Counsel's request for reimbursement of costs is reasonable.

Class Counsel are entitled to recover the out-of-pocket costs reasonably incurred in investigating, prosecuting, and settling this action. *Deatrick v. Securitas Security Services USA, Inc.* , No. 13-CV-05016-JST, 2016 WL 5394016, at *7 (N.D. Cal., Sept. 27, 2016). Class Counsel notified all Class Members that they would seek reimbursement for litigation costs from the Settlement Fund. Keough Decl., ¶¶ 4-7 & Ex. A (Class Notice).

During the course of their representation, Class Counsel have incurred reasonable costs and expenses in connection with investigating claims, retention of experts, performing extensive legal research, electronic discovery, filing fees, photocopies, faxes, mail, and telephone calls. Birka-White Decl., ¶ 38; Nelson Decl., ¶ 18. These are customary case expenses awarded in class settlements and are the type typically billed by attorneys to clients. All of these expenses were reasonably and necessarily incurred in Class Counsel's efforts to prosecute the Class claims. The expenses here are in line with expenses incurred in other complex class action lawsuits. Birka-White Decl., ¶ 38; Nelson Decl., ¶ 18.

Further, these costs were advanced by Class Counsel on a purely contingent basis without interest. If there had been no recovery, the money would have been lost. Class Counsel will also necessarily expend more cost going forward: additional work remains before the final approval hearing on December 22, 2016, and Class Counsel will be actively overseeing the Settlement, including regular interaction with claimant and the Claims Administrator regarding the status and management of claims. Birka-White Decl., ¶¶ 39(w, aa), 41; Nelson Decl., ¶ 14.

Accordingly, Class Counsel's request for reimbursement of costs and expense is reasonable and should be awarded.

D. The incentive awards to the Class Representatives are reasonable and well-deserved.

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton v. Boeing Co*., 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez v. West Pub'g Corp*., 563 F.3d 948, 958 (9th Cir. 2009) (noting that such service awards "are fairly typical in class action cases."). They are "intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action." *Id.*

Here, the class representatives have each devoted a substantial amount of time, effort, and expense in assisting Class Counsel's efforts to prosecute this case. Birka-White Decl., ¶¶ 52-58. Plaintiffs Allagas, Ray and Mohrman each dedicated hundreds of hours over two and a half years working on the case, including responding to numerous requests, sitting for depositions, reviewing briefs and pleadings, attending site inspections, opening up their homes to invasive inspections of their solar systems, discussing settlement options, and reviewing settlement documents.[1] Birka-White Decl., ¶ 56.

Plaintiff Brian Dickson worked with Class Counsel at length to review the amended complaint, discuss the proposed settlement terms, learn about inverters with arc fault protection, allow experts onto his property for testing, and review settlement documents. Birka-White Decl., ¶ 54. Their efforts in bringing and diligently prosecuting the lawsuit have conferred a substantial benefit to the other Class Members. Birka-White Decl., ¶ 57.

Accordingly, Class Counsel seek an award of $7,500 each for Plaintiffs Michael Allagas, Arthur Ray, and Brett Morhman, and $3,500 for Plaintiff Brian Dickson. The incentive awards are therefore reasonable and in line with similar cases. *In re LinkedIn User Privacy* Litigation, 309 F.R.D. at 592 ("a $5,000 payment is presumptively reasonable"); *Jacobs v. California State Auto. Ass'n Inter-Ins. Bureau*, No. C 07-00362 MHP, 2009 WL 3562871, at *5 (N.D. Cal., Oct. 27, 2009) (approving $7,500 service award); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D.

[1] Additionally, Plaintiff Brett Morhman worked with Class Counsel for nearly a year before litigation was commenced. Birka-White Decl., ¶ 57.

245, 268 (N.D. Cal. 2015) (approving $10,000 incentive award).

Indeed, the payments to Allagas, Ray, and Mohrman represent approximately 0.0005% of the $45.33 million common fund and the payment to Brian Dickson represents 0.0001% of the $20 million claims made fund. The Class Notice disclosed the amount of the incentive awards and, to date, no Class member has objected to them. Further, Defendants agreed not to oppose incentive awards of these amounts. Birka-White Decl., ¶ 51. The proposed incentive awards are appropriate and warranted and should be approved by this Court.

V. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court award attorneys' fees in the amount of $11 million and reimbursement of costs in the amount of $600,000, and incentive awards of $7,500 each to Michael Allagas, Brett Mohrman and Arthur Ray, and $3,500 to Brian Dickson.

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Respectfully submitted,

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