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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE LITHIUM ION BATTERIES ANTITRUST LITIGATION	**Case No. 4:13-md-02420 YGR**
This Document Relates to: **All Indirect Purchaser Actions**	**INDIRECT PURCHASER PLAINTIFFS' OMNIBUS RESPONSE TO OBJECTIONS TO SETTLEMENTS WITH HITACHI MAXELL, NEC, AND LG CHEM DEFENDANTS** Date: May 20, 2020 Time: 2:00pm Judge: Hon. Yvonne Gonzalez Rogers Court: Courtroom 1, 4th Floor

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I. INTRODUCTION

Numerous courts have observed that "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."[1] Of millions of Class Members who stand to benefit from these Proposed Settlements, there have been only four objectors, who largely repeat arguments previously made and correctly overruled by this very Court.

Two of the objectors, Gordon Morgan and Michael Frank Bednarz, principally attack IPPs' requested attorneys' fees, due to what they characterize as missteps by Class Counsel over the course of this lengthy and unquestionably complex litigation. According to these objectors, reducing IPPs' attorneys' fees is appropriate because the proposed recovery is a "megafund," or because external factors, such as the DPPs' case or Hagens Berman's previously rejected leadership bid somehow justify a reduction in IPPs' fees. None of these claims has merit, and all of them ignore factors *actually* evaluated by the Ninth Circuit in awarding attorneys' fees. These objectors also claim that IPPs' proposal to allocate 10% of the settlement fund to Class Members making purchases in non-*Illinois Brick* repealer states and 90% to Class Members making purchases in repealer states is somehow a "betrayal" to the Class. In so doing, the objectors seem to ignore the procedural safeguards taken to select this plan of allocation: a contested proceeding before a respected neutral, Judge Rebecca Westerfield (Ret.). The objectors also ignore the substantial risks overcome by Class Counsel, and the excellent results they obtained.

The other two objectors, Christopher Andrews and Edward Orr, object both to IPPs' requested attorneys' fees and to the settlements as a whole.[2] Mr. Orr claims the Settlement Class is not worthy of settlement class certification at all, an argument that, if accepted, would result in zero recovery to him or any other Class Member, calling into question his motives for filing the

[1] *Larsen v. Trader Joe's*, No. 11-cv-05188-WHO, 2014 U.S. Dist. LEXIS 95538, at *16 (N.D. Cal. July 21, 2014) (internal quotes omitted) (citing *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)); *see also Create-A-Card, Inc. v. INTUIT, Inc.*, No. CV-07-6452 WHA, 2009 U.S. Dist. LEXIS 93989, at *15 (N.D. Cal. Sept. 22, 2009).

[2] To the extent any of the objectors' attacks can be construed as a broad-based attack against other Settlement rounds, they should be outright rejected. The time for objecting to the Settlements in Rounds 1 or 3 has passed, and the objections by Mssrs. Andrews, Bednarz, Morgan, and Orr are only properly construed as against the Round 2 Settlements exclusively.

objection in the first place. And the arguments made by Mr. Andrews should be viewed with similar skepticism: his vague attacks on the class notice, settlement agreement terms, and the adequacy of the Class Representatives have either been repeatedly overruled in this and other courts,[3] or are otherwise unsupportable. Both Mr. Orr and Mr. Andrews make arguments without reference to either the governing law or factual record in this case. They should be overruled.

IPPs' settlements with the Settling Defendants should be approved. By any appropriate measure, they are fair, reasonable, and adequate, and result from extensive negotiations between experienced and informed counsel. The settlements provide $44.95 million in cash for the Settlement Class: a significant achievement for class members. These four objectors have not justified a different result.

Given the presence of these objections and the widespread impacts of COVID-19, IPPs respectfully request a hearing via Zoom, teleconference or any other means deemed appropriate by the Court to hear these objections.[4]

II. ARGUMENT

A. The Objections to the Requested Attorneys' Fees Are Meritless

Only four class members, out of millions, have filed objections to Class Counsel's motion for attorneys' fees. The objections are meritless and have already been considered and correctly rejected by this Court in connection with Class Counsel's previous fee motion.[5] All four objectors claim Class Counsel's attorneys' fees request is excessive,[6] but none advance an argument

[3] Mr. Andrews in particular has a history of raising baseless objections to class settlements in order to hold up relief to the class and to extort payments for himself. *See, e.g., In re Polyurethane Foam Antitrust Litigation*, No. 1:10 MD 2196 (N.D. Ohio) (ECF No. 2113) (imposing sanctions against Mr. Andrews for failure to post an appeal bond); (ECF No. 2150, imposing sanctions on Mr. Andrews for, among other things, failing to appear for a deposition); (ECF No. 2127, holding Mr. Andrews in contempt for is "ongoing misconduct," and ordering U.S. Marshalls to "bring Mr. Andrews before this Court as soon as practicable for him to answer why he should not be requires to pay additional monetary sanction in light of his continued contumacious conduct, and his undisguised failure to follow this Court's December Orders").

[4] *See* Northern District of California's General Orders in response to the Coronavirus; See also Scheduling Notes, https://apps.cand.uscourts.gov/CEO/cfd.aspx?7145#Notes ("[A]ll law and motion hearings before Judge Gonzales Rogers in the month of May 2020 will be **held by Zoom platform** . . . .").

[5] *See e.g.*, ECF 2516, at 4-6.

[6] Objectors Bednarz, Morgan, and Andrews also claim that Plaintiffs have "increased" their fee request from 25 percent to 30 percent. That is false. In a previous round of settlements, Plaintiffs requested 25 percent of the prior partial common fund, cognizant of the fact that the

justifying a reduction of the Court's previous award of 30% of the entire settlement fund. Each of the four objectors – Gordon Morgan represented by Christopher Bandas, Michael Frank Bednarz represented by Theodore H. Frank, and Christopher Andrews and Edward Orr proceeding *pro se* – has filed similar objections that have been repeatedly rejected in substance by courts throughout the country, including this Court in this case.[7] As such, the objections largely amount to nothing more than an inappropriate request for reconsideration of this Court's previous order without demonstrating any changes circumstances. The objections should be overruled.[8]

The Ninth Circuit has repeatedly held that an evaluation of attorneys' fees must take into account "all the circumstances of the case."[9] Rather than focus their attacks on established factors courts in this Circuit evaluate, the objectors espouse a new set of criteria for this Court to consider, while ignoring the unique risks in this complex matter, which the district court judge is well-positioned to analyze given its familiarity with the litigation. Well-established metrics for evaluating attorneys' fees requests, such as a lodestar crosscheck revealing a *negative* multiplier,[10] show definitively that Class Counsel's requests are reasonable.

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case was not finished, and seeking a partial recovery of fees as a percentage of the recovery to that date, while the case continued. This Court denied without prejudice Plaintiffs' fee request, in part so that it could grant an appropriate fee after the case was finished, considering all of the circumstances of the entire case. *See* Order Granting in Part and Denying in Part, IPPs' Mot. for Attorneys' Fees, at 2, Oct. 27, 2017, ECF No. 2005. Now that all of the settlements are completed, Plaintiffs seek a 30 percent award from the entire common fund, an attorney fee award for Class Counsel's work during the entirety of the case. *This is exactly the same amount this Court previously awarded—no less, and no more.*

[7] *See e.g.*, ECF 2516 at 4-6; ECF 1508 at 23-24 (listing Mr. Andrews' serial objections in other Courts); ECF 2606 (Bednarz Obj.); ECF 2607 (Morgan Obj.), ECF 2604 (Andrews Obj.), ECF 2605 (Orr Obj.).

[8] *See* Order Granting DPPs' Fee at 2 (negative multiplier "obviate[d] concern about any windfall"); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (using lodestar cross-check to guard against "windfall profits for class counsel").

[9] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002); *see In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) (courts should avoid "mechanical or formulaic" rules in awarding fees in favor of a totality of circumstances analysis), *In re Optical Disc Drive Prods. Antitrust Litig.*, No. 10-md-2143 (N.D. Cal. Feb. 21, 2019).

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

1. Characterizing the Proposed Settlements as a "Megafund" Does Not Change the Result

As they did previously, Objectors Bednarz,[11] Morgan, and Andrews argue that IPPs' $113.45 million total recovery is a "megafund," and thus the fee request is unreasonable and should be reduced to prevent a "windfall." This argument has been repeatedly made by these same objectors in this case[12] and rejected by the Court consistent with Ninth Circuit precedent. Nothing has changed since when the Court last overruled these objections.

The "megafund" concern arises when a percentage of the recovery would result in excessive profits for class counsel in light of the hours actually spent on the case. But in the Ninth Circuit, a cross-check to counsel's lodestar that results in a negative multiplier "obviate[s] concern about any windfall," because counsel earned an effective hourly rate below the market rate.[13] Here, a lodestar cross-check on a 30-percent fee award to Class Counsel results in a negative multiplier, demonstrating compensation to Class Counsel at an hourly rate well below the market value of their time. Moreover, a comparison of lodestar between IPPs and DPPs shows that IPPs billed fewer hours than DPPs, confirming that IPPs worked with great efficiency.[14] There is, therefore, no concern about a "windfall." Moreover, federal district courts across the country routinely award class counsel fees equivalent to, and often exceeding, 30 percent of the

[11] Mr. Bednarz repeatedly describes IPPs' requested attorneys' fees as "37.5% of $113.45m" which incorrectly bases the percentage on the gross common fund rather than the net, contrary to well-established precedent in the Ninth Circuit and in this Court. *See e.g., Online DVD-Rental*, 779 F.3d at 953; *see also Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000) (rejecting an objector's argument that a fee award in a securities settlement should be based on "net recovery," which does not include "expert fees, litigation costs, and other expenses"); *see also* Order Granting DPPs' Fee at 1.

[12] *See* ECF 1915 at 5 (2017 Morgan Obj.); ECF 2495 at 16 (2019 Bednarz Obj.).

[13] *Id.*; *see e.g. In re TFT-LCD (Flat-Panel) Antitrust Litig.*, No.M-07-1827 SI, 2013 WL 149692, at *1 (N.D. Cal. Jan. 14, 2013) (negative multiplier of 0.86 confirmed amount of attorneys' fees requested was fair and reasonable); *Gong-Chun v. Aetna Inc.*, No., 09-cv-01995-SKO, 2012 WL 2872788, at *23 (E.D. Cal. July 12, 2012) (negative multiplier of 0.79 suggested that fee award was reasonable); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 853-54 (N.D. Cal. 2010) (negative multiplier of .59 indicated fee award was "reasonable and a fair valuation of the services rendered to the class by class counsel"); *In re Portal Software, Inc. Secs. Litig.*, No C-035138 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (negative lodestar multiplier of 0.83 or 0.74 "suggest[s] that the requested percentage based fee is fair and reasonable").

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

common fund,[15] including where settlements are much greater than IPPs' $113.45 million recovery here.[16] The objectors appear to argue that the excellent result obtained by Class Counsel was "too high" and as such their attorneys' fees should be reduced. Such reasoning is illogical in light of the extensive work performed and strong results obtained in connection with these Proposed Settlements.

2. Comparison Between IPPs' and DPPs' Attorneys' Fees Should Not Change the Result

The objectors compare the $139.3 million in settlements obtained by the direct purchasers in this case, estimated to be 39 percent of DPPs' possible damages, with IPPs' and $113.45 million settlement fund, estimated to be an 11.7% recovery. This Court awarded DPPs' counsel attorneys' fees amounting to 30 percent of the common fund.[17] According to the objectors, Class Counsel conferred less benefit to the IPP class than the DPP attorneys, and therefore a reduction to their 30% attorneys' fees request is warranted. This argument has already been rejected by the Court.[18]

It should be rejected again. *First*, simply comparing the percentage of damages recovered by DPPs and IPPs ignores the risks associated with indirect purchaser class actions in general, and this one in particular. IPPs must show the overcharge due to the cartel passed-through multiple distribution channels to the indirect purchaser class members. The Court has acknowledged this

[15] *See e.g.,* ECF 2501-8, at 23 (Berman Final App. Decl., Ex. E); *see also* EMG Study, 92 N.Y.U. L. Rev. at 952 (finding that among antitrust class action settlements surveyed with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median percentages awarded were 27 percent and 30 percent, respectively).

[16] *Allapattah Servs. Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (awarding 31.33% fee on $1.075 billion settlement); accord *In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *1 (D.Kan. July 29, 2016) (awarding 33.33% fee on $835 million settlement and noting 34 megafund cases in which the court awarded fees of 30 percent or more); *In re Polyurethane Foam Antitrust Litig.*, No.10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% fee on $147.8 million settlement); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (awarding 33.3% fee on $410 million settlement fund); *In re Nat'l Collegiate Athl. Grant-in-Aid Cap Antitrust Litig.*, No. 14md-2541-CW, 2017 WL 6040065, at *5, *9 (N.D. Cal. Dec. 6, 2017) ("federal district courts across the country have . . . routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases").

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

[18] *See* Morgan 2019 Obj. ECF 2496 at 4; ECF 2516 (Order Approving Round 3 Settlements), at 4-6.

unique risk to the indirect plaintiffs, litigated heavily by the defendants, and ultimately realized in this Court's orders denying class certification.[19]

Second, even if the Court were to measure IPPs' requested attorneys' fees with DPPs', this would be only one data point in the totality of circumstances of the Court's analysis. The fact that this Court awarded direct purchasers the percentage of the common fund they requested, 30 percent, does not somehow demonstrate that IPPs' request is unreasonable. To the contrary, application of the Ninth Circuit factors demonstrates that a 30 percent award is abundantly reasonable under all of the circumstances in this case.[20]

3. Hagens Berman's Rejected Leadership Bid Remains Irrelevant

Messrs. Bednarz and Morgan repeat their prior claim that Class Counsel's fee award should be tied to the lead counsel submission of Hagens Berman.[21] This Court rejected an identical objection by Morgan in connection to the Round 3 Settlements, emphasizing that it "ultimately did not accept the bid and instead ordered that there would be Co-Lead Class Counsel, so the bid is irrelevant to the reasonableness of the attorneys' fees here." ECF 2516. It should do so again here. This Court rejected Hagens Berman's lead counsel submission, instead appointing three firms as Interim Co-Lead Counsel.[22] As such, this Court's Modified Pretrial Order No. 1 (May 24, 2013, ECF No. 202), not the rejected bid, governs billing and work performed in this case. This Court has overseen the hours expended in this case via Class Counsel's submission of quarterly reports. It would be nonsensical and unfair to other Class Counsel, who were not part of this proposal, to tie Class Counsel's fee award to Hagens Berman's rejected bid. Moreover, the objectors' argument that the bid somehow constitutes the exclusive source of evidence for

[19] *See, e.g.*, Order Denying Class Certification, Apr. 12, 2017, ECF 1735 ("In a class of indirect purchasers, the issue of class-wide impact is complicated by the need to demonstrate a method" for showing pass-through).

[20] Moreover, Mr. Morgan claims that if the Court's previous denial of class certification is a risk factor justifying a 30%, rather than a 25% attorneys' fees award, such an increase should "only apply" to settlements obtained after the Court's order denying class certification. Morgan Obj. at 6. Such parsing is illogical and ignores the Court's totality of circumstances evaluation of attorneys' fees here.

[21] Bednarz Obj. at 6; Morgan Obj. ECF 1915 at 9.

[22] *Compare* ECF 108 (Hagens Berman's lead counsel submission), *with* ECF No. 194 (this Court's order appointing interim co-lead counsel and liaison counsel for DPPs and IPPs).

determining market rate for attorneys' fees should be rejected in light of the other well-established methods for determining the market rate.[23]

4. Class Counsel's Proposed Plan of Allocation is Fair, Reasonable, and Adequate

The objectors argue that a change in allocation of the Round 2 Settlements justifies a reduction in Class Counsel's attorneys' fees because IPPs allegedly "betrayed the interests of repealer-state class members"[24] by initially negotiating a set of settlements with a *pro rata* plan of allocation, creating a purportedly "conflicted representation."[25] This argument is easily refuted. First, the law cited by the objectors is inapplicable. The objectors point to *Rodriguez v. Disner*,[26] and *Rodriguez v. West Publ'g Corp.*,[27] for the argument that there is a conflict of interest inherent in IPPs' proposed plan of allocation.[28] In the *Rodriguez* cases, class counsel had entered into "incentive agreements" at the outset of the case with some class representatives, providing for a sliding scale of incentive payments based on the ultimate amount of the recovery—i.e., the larger the settlement fund, the higher a class representative's incentive payment. The Ninth Circuit disapproved of these agreements, finding they made "the contracting class representatives' interests actually different from the class's interests in settling a case instead of trying it to verdict, seeking injunctive relief, and insisting on compensation greater than $10 million."[29] And worse, the court was unaware of the presence of this agreement until it was asked to approve the settlements, a factor strongly criticized by the court.[30] But no such conflict exists in this case. No

[23] *See* IPPs' Attorneys' Fees Mot. ECF 2588 at 28, n. 42 (collecting cases)

[24] Mssrs. Morgan and Orr argue that Class Counsel should not be awarded their requested fees due to the original *pro rata* allocation plan IPPs' proposed in 2017. This argument is illogical: Mr. Morgan's claims arise from Texas, a non-repealer state, meaning that he would have received more in damages under the *pro rata* method he seeks to punish Class Counsel for initially adopting. Similarly, Mr. Orr resides in Connecticut, a state without a repealer law during the class period. *See* Michael A. Lindsay, Overview of State RPM, The Antitrust Source, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf (Apr. 2017). Their arguments are backwards.

[25] Bednarz Obj. at 11-16.

[26] 688 F.3d 645 (9th Cir. 2012) ("*Rodriguez I*").

[27] 563 F.3d 948, 968 (9th Cir. 2009) ("*Rodriguez II*").

[28] Bednarz Obj. at 12-14; Andrews Obj. at 9; 32; Morgan Obj. at 3-6, Orr Obj. at 2-6.

[29] *Rodriguez I* at 959.

[30] *Rodriguez I* ("[t]he arrangement was not disclosed when it should have been and where it was plainly relevant, at the class certification stage."). There was no such hidden agenda here; indeed the Court is well-aware of the changing state of the law over this multi-year litigation, the

Class Representatives agreed to any such incentive agreements, and no Class Representative was motivated to agree to the Round 2 Settlements because of a personal interest.

The proposed 90/10 allocation in this case is appropriate in light of the fact that both residents of repealer and non-repealer jurisdictions are releasing claims as part of this settlement, and residents of non-repealer states continue to hold appellate rights as the Court correctly held in connection with the Round 3 Settlements.[31] Indeed, Courts have approved such *de minimis* awards to class members to achieve global peace.[32] As such, an allocation of 10 percent of the settlement funds for non-repealer state residents is appropriate, and does not present a conflict of interest detrimental to absent Class Members, as the objectors contend.

Moreover, the 10 percent allocation to residents of non-repealer states has already been subjected to a contested proceeding in which advocates representing each group of repealer and non-repealer class members argued the relative values of their claims before a neutral, Judge Westerfield (Ret.). The 90/10 split thus includes "structural assurance of fair and adequate representation for the diverse groups and individuals affected" as required by *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997). This Court evaluated that adversarial process in determining IPPs' proposed 90/10 allocation was "fair, reasonable, and adequate" and "appropriate," and the same allocation adopted in connection with the Round 3 Settlements. In sum, this plan of allocation was vetted, preliminarily approved, and fairly compensates class members consistent with the laws of their state.[33] It is not reflective of a purported ethical violation as the objectors contend. That there are *some* differences amongst Class Members is a common feature in class actions and does not justify a reduction in the fee, particularly in light of

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effects of which were considered in approving the 90/10 split in conjunction with both the Round 3 and 2 Settlements. *See* ECF 2590 at 4-7 (factual background describing changes to the plan of allocation in this case).

[31] *See* ECF 2516; *see also Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 19 (2d Cir. 1981).

[32] *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 668 (E.D. Va. 2001) (10 percent); *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000) (10 percent and less)).

[33] Even if there were a conflict of interest here (there is not), the court in *Rodriguez v. Disner*, 688 F.3d 645, 651 (9th Cir. 2012), so heavily relied upon by the objectors, acknowledged the general principle against conflicted representation to absent class members, but clearly stated: "This general principle has exceptions" since "conflicts of interest among class members are not uncommon," and "a court may tolerate certain technical conflicts."

the Court oversight and procedural safeguards described above to ensure fairness. Regardless of any change in allocation over the course of this case, the $44.95 million benefit to the Class in connection with the Round 2 Settlements (combining to $113.45 million in total settlements) remains, and is substantial in light of the risks involved and weighs strongly in favor of granting IPPs' requested attorneys' fees.[34]

5. Counsel's Time Was Appropriately Spent and Recorded

The objectors claim Class Counsel's time was not properly accounted for, "double billed," that Class Counsel's hourly rate is too high, and that several categories of time should be eliminated from Class Counsel's billing records to reduce their overall attorneys' fees request.[35] The arguments are wrong for several reasons.

First, Class Counsel seek a percentage of the common fund they created (unlike counselor Frank, who seeks a percentage of a fund he did not create). The lodestar figure, therefore, merely serves as a guidepost or "crosscheck." In a negative multiplier case like this one, the law firms themselves bear completely the cost of any duplicative or unnecessary time spent on the case.[36] Even if Class Counsel removed certain categories of billing records as the objectors request under a lodestar-only method, the requested fee would be hardly unreasonable given the considerable work undertaken by Class Counsel and other firms in this extraordinarily complex litigation. In fact, Class Counsel would have to reduce their combined lodestar by *18 percent* to simply obtain a fee award that would not equate to a negative multiplier.[37] In light of the foregoing, objectors' arguments fail to "move the needle" in any material way.[38]

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[34] Court-approved notice has been disseminated to the Class explaining the proposed 90/10 allocation. *See* ECF 2571 at 2; Azari Decl., Exs. 1-6 (Notice).

[35] Bednarz Obj. at p. 14-15, Morgan Obj. at 8; Andrews Obj. at 19-31.

[36] *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) ("in the common fund case, if a percentage-of-the-fund calculation controls, inefficiently expended hours only serve to reduce the per hour compensation of the attorney expending them."); *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979–80 (7th Cir. 2003) ("if consumer class counsel invested too many hours, dallied when preparing the settlement, or otherwise ran the meter, the loss falls on counsel themselves. . . . . Inefficient conduct of the litigation therefore does not afford any reason to reduce class counsel's percentage of the fund that their work produced.").

[37] *See Hyundai*, 926 F.3d at 571-72 (wherein the Ninth Circuit recently described as "modest" a positive fee enhancement of 1.22 and observed that multipliers up to 3.65 have been sustained in complex and labor-intensive class actions like this one.); ECF 2322, at 2 ("the lodestar cross-check is meant to 'confirm that a percentage of [the] recovery amount does not award counsel an

Second, IPPs' counsel worked under oversight by the Court. Class Counsel managed their own time and the time of supporting counsel and audited the time entries.[39] The Court periodically reviewed regular submissions from Class Counsel, which would have highlighted in real-time any unreasonable billing trends. This further supports the reasonableness of the time.

B. The Objections to the Fairness, Reasonableness, or Adequacy of the Round 2 Settlements Are Groundless.

Andrews and Orr attack the Round 2 Settlements as being unfair, unreasonable, or inadequate on a variety of grounds, each of which lacks merit. But even putting their specific arguments to the side, granting either Andrews or Orr their requested relief would be disastrous to the class, including to Andrews and Orr themselves. Andrews and Orr fashion themselves as protectors of the class's interests, but in doing so, they argue that the settlements should be rejected in whole. This position does not account for the fact that after the Round 2 Settlements were reached, the Court denied IPPs' motion for class certification – not once, but twice (and struck a third unauthorized motion).[40] Parties and courts rarely have the benefit of hindsight as clear as this case offers. Thus, should Andrews or Orr's objections be credited or sustained, they would have absolutely no hope of obtaining their stated desire (*i.e.*, more settlement funds in their own pockets). Instead, they would be lucky to get anything from the Round 2 Settling Defendants, who would have little or no incentive to come back to the settlement table at all, given the court's repeated denial of class certification, let alone with forty-four-plus million dollars. Indeed, after the Court denied certification of a litigation class, Panasonic paid a small sum to exit the case despite being the largest seller of lithium ion batteries in the world and an admitted conspirator. Besides their basic lack of logic, Andrews and Orr simply repeat generic objections that have no connection to the facts of this case.

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exorbitant hourly rate.'); *Online DVD*, 779 F.3d at 949); *Vizcaino*, 290 F.3d at 1050 ("the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted").

[38] ECF 2588 (IPPs' Mot. For Attorneys' Fees) at 29-31.

[39] *See* IPP Mot. for Fees (ECF No. 1814) at 21.

[40] *See* Order Den. Without Prejudice Mot. for Class Certification; Granting in Part & Den. in Part Mots. to Strike Expert Reports or Portions Thereof (Apr. 12, 2017), ECF 1735.

1. There Is No Intraclass Conflict

Mr. Andrews claims the 90/10 proposed allocation plan is unfair due to differences in state law, and Mr. Orr claims certification of a nationwide settlement class is "illegal" due to such "substantial material differences."[41]

The appropriateness of both the 90/10 allocation and nationwide settlement class have been detailed in Section II(A)(4), *infra* and do not rise to the level of an intraclass conflict.[42] As noted, if the Court were to grant Mr. Orr's objection and "vacate" the Round 2 Settlements or decide not to certify the proposed Settlement Class, IPPs would be forced to prepare for trial on the individual claims only, as the Court has already rejected class certification. Thus, what Mr. Orr's proposal amounts to is an argument that the Class should not be compensated at all. As explained *supra*, the significant risk in this case of the Class recovering nothing (which Mr. Orr's objection ignores) bolsters the fairness and adequacy of the settlement. Andrews and Orr also ignore the fact that Class Counsel originally sought to certify a nationwide litigation class under California law, given the cartel's connections with California.[43] While the Court ultimately denied certification of such a class, it never *dismissed* the claims of non-repealer state residents. Accordingly, those individuals still retained an appeal right on that issue, and the 90/10 proposed allocation plan, the result of an adversarial process before Judge Westerfield (ret.), provides a reasonable approximation of the relative values of the claims belonging to those class members.

As set forth in Section II(A)(4), *supra*, IPPs' proposed allocation plan has been thoroughly vetted by the Court after "structural assurance[s]" of fairness and adequacy. Similarly, differences in state law do not defeat settlement class certification (*In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 559, 561 (9th Cir. 2019)), and the Proposed Settlements readily satisfy requirements for certifying the Settlement Class here.

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[41] Andrews Obj. at 1-17, Orr. Obj. at 1-5.

[42] To the extent this objection is aimed at attacking adequacy, it similarly fails. *See In re Transpacific Passenger Air Transportation Antitrust Litigation*, No. 15-16280, 2017 WL 2772177 (9th Cir. June 20, 2017), the Ninth Circuit affirmed Judge Breyer's rejection of a similar adequacy argument against a class action antitrust settlement under Rule 23(a)(4). *Id.*, at *3. The court explained that "while some class members' claims might have been more valuable than others at trial, 'that does not cast doubt on the district court's conclusion as to the fairness and adequacy of the overall settlement amount as the class as a whole.'" *Id.*

[43] *See* ECF 1782 (IPPs' Motion for Class Certification).

2. Mr. Andrews' Other Objections Should be Rejected.

Mr. Andrews also advances a litany of other objections to the settlement and notice plan, many of which repeat prior objections or appear out of place in the context of this litigation. IPPs have already addressed most of Mr. Andrews' many (and boilerplate) objections.[44] The objections are difficult to comprehend and fail to state with specificity how the they apply to these facts, a requirement under the Rule 23(e)(5)(A), which alone is grounds for overruling them.[45] Nonetheless, IPPs attempt to parse and respond to each below.

i. The Class Representatives Are Adequate.

Mr. Andrews claims the Class Representatives are inadequate for 1) purportedly changing the amount of their requested incentive award, and 2) accepting the incentive award "rather than the per-device damages the unnamed class members will receive." Neither assertion is correct as a matter of fact or law.

First, none of the Class Representatives have altered the amount of the incentive awards they seek. The Class Representatives simply seek a re-affirmation of their previous awards granted both in connection with Rounds 2 and 3.[46] Andrews' assertion that the change in IPPs' requested service awards is somehow dishonest ignores the record in this case.[47] On May 29, 2017, Class Counsel moved the Court to partially reimburse its expenses up to that date, as well as award attorneys' fees, and service awards in the amount of $1,500 for each Class Representative.[48] On October 27, 2017, the Court issued an interim order, granting in part and denying in part IPPs' motion, and awarding the requested $1,500 service awards ("Interim

[44] *See, e.g.*, Omnibus Response to Objections to Settlements With SDI, Tokin, Toshiba and Panasonic Defendants, ECF 2501-2.

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

[46] ECF 2005; 2516.

[47] *See* Andrews Obj. at 9-16.

[48] *See* ECF 1814 at 24.

Award").[49] While the Round 2 Settlements were up on appeal, on June 11, 2019 IPPs moved for final approval of the Round 3 Settlements, seeking complete services awards: $10,000 for each individual Class Representative, and $25,000 for each entity.[50] On August 16, 2019, the Court granted final approval of the Round 3 Settlements, and awarded $23,500 to each entity Class Representative, and $8,500 for each individual, which simply subtracted the Interim Award from the amount ultimately sought by IPPs.[51] IPPs are now moving for service awards identical to those previously sought. All of these requests have been made in briefing to the Court and IPPs' requested service awards were contained in the Class Notice. There is nothing nefarious at play here, contrary to the objectors' claims.

Second, a class representative does not give up his or her right to recover their *pro rata* share of the settlement funds as a qualified claimant because of their receipt of an incentive award. To the contrary, the incentive award recognizes class representatives for their service on behalf of the class, and such awards are routinely authorized by courts.[52] The efforts of the Class Representatives in the lengthy duration of this case have been previously described, and they are deserving of the awards sought.[53]

ii. IPPs' Notice and Claims Programs Were Robust

Mr. Andrews makes certain arguments that the Class Notice failed to include certain information, or that the Notice and Claims Programs violated due process.[54] Due process requires that absent class members be provided the best notice practicable, reasonably calculated to apprise them of the pendency of the action, and affording them the opportunity to opt out or object.[55] The

[49] See this Court's October 27, 2017 Order Granting In Part And Denying In Part, Without Prejudice, Motion For An Award Of Attorneys' Fees, Reimbursement Of Expenses, and Service Awards ("Interim Award"). (ECF 2005.)

[50] ECF 2501.

[51] ECF 2516.

[52] *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009); *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1801 (2018) (noting "class representative might receive a share of class recovery above and beyond her individual claim"); *Van Vraken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

[53] ECF 2487-7 (Class Representative Declarations).

[54] *E.g.,* Andrews' Obj. at 9, 17-18; 34-35.

[55] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *see also Int'l Union, United Auto, Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007) (quoting *Mullane*, 339 U.S. at 314).

"best notice practicable" does not mean actual notice, nor does it require individual, mailed notice where there are no readily available records of class members' individual addresses or where it is otherwise impracticable to send notice by mail.[56] Here, the notice program was extensive and specifically structured to reach potential class members. And it did. Indeed, the objectors' knowledge of the settlements and their submission of objections according to the terms of the notice illustrate the effectiveness of the notice program used in this case.[57]

Moreover, Mr. Andrews' objection regarding the alleged unavailability of the "full details" of the settlements contradicts the record. The full text of the Settlement Agreements and all relevant court documents were available via the class website and on the ECF/PACER system.[58] Similarly, the Claims Program was highly interactive: Class Members had several ways to ask questions, including via the case website, toll free phone number, or by emailing or calling Epiq or Class Counsel. These safeguards were designed to prevent any confusion with the Settlement Terms or Claims process. And Mr. Andrews' arguments that the notice did not contain certain details, such as the per device amount to each Class Member, is belied by the legal requirements for notice. Rule 23 is clear about what is required, and IPPs' notice has far exceeded these basic requirements. *See* IPPs' Mot. for Final Approval, Section II(D), filed herewith.

Mr. Andrews also argues the settlement agreements are deficient in the release, the manner in which they are dated, or for being vague.[59] However, Andrews cites no legal authority for any of these arguments, and IPPs can find none. These objections are pasted from past, overruled objections he has made to this Court (and likely others). They lack any legal or factual

[56] *Briseno v. ConAgra Foods, Inc*., 844 F.3d 1121, 1129 (9th Cir. 2017) (holding that "when individual notice by mail is 'not possible, courts may use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process"); *see also Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008); *In re Domestic Air Transp. Antitrust Litig*., 141 F.R.D. 534, 548-53 (N.D. Ga. 1992).

[57] *See In re Kendavis Holding Co.,* 249 F.3d 383, 387 (5th Cir. 2001); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983).

[58] Azari Decl. at ¶¶ 26-29.

[59] Andrews Obj. at 24-25.

basis and should be rejected on their face.[60] As mentioned, if Mr. Andrews were confused about the terms of the settlement, he (or any other class member) was free to contact Epiq or Class Counsel to ask any such questions.

III. CONCLUSION

For the foregoing reasons, IPPs respectfully request that this Court overrule the foregoing meritless objections and grant final approval of the IPP settlements with the Settling Defendants. The objectors have presented no reason to take an alternative course.

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Respectfully submitted,

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[60] *See In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1137 (N.D. Cal. 2015) ("[O]bjectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement.").

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