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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALEXIS BRONSON and CRYSTAL HARDIN on behalf of themselves and all other similarly situated, Plaintiffs v. SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG ELECTRONICS CO., LTD., Defendants.	Case No.: 3:18-cv-02300-WHA PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR REASONABLE ATTORNEY'S FEES AND COSTS AND INCENTIVE AWARD The Honorable William H. Alsup

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 27, 2020, at 11:00 am, or as soon thereafter as this matter may be heard, in the United States District Court, Northern District of California, San Francisco Courthouse, located at 450 Golden Gate Avenue, 19th Floor, Courtroom 12, San Francisco, California 94102, before the Honorable William Alsup, Plaintiff Crystal Hardin ("Plaintiff" or "Hardin") will, and hereby do, move this Court for an order awarding attorneys' fees and costs and incentive award, upon the final approval of the Settlement for the above referenced matter.

Specifically, the Court should award an incentive award of $6,000 to Plaintiff Crystal Hardin as class representative and attorney's fees and costs in the total amount of $487,000 to Paul S. Rothstein and Kyla V. Alexander as Class Counsel.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Proposed Order filed concurrently herewith, the pleadings and papers on file in this action, and such other written or oral argument that may be presented to the Court.

DATED: December 19, 2019

Respectfully submitted,
By: /s/ Paul S. Rothstein
Paul S. Rothstein
Counsel for Plaintiffs

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I. INTRODUCTION

Plaintiff, Crystal Hardin ("Hardin"), moves for an award of reasonable attorney's fees, expenses, costs and incentive award. The favorable Settlement provides a full refund or exchange for California consumers' nearly six year old Samsung plasma televisions—if their Plasma Display Panel ("PDP") failed for their Affected Model television. Class Counsel seeks a significantly discounted award of $487,000.00 for attorney's fees and costs. Extensive factual investigation, research, in-depth expert involvement, comprehensive discovery, and challenging effective motion practice including adversarial proceedings in front of the Judicial Panel on Multi-District Litigation(JPML), *inter alia*, comprise the foundation and justification for the requested award. No fees are sought for the time spent securing preliminary approval of the Settlement, or time and expenses that will accrue through final approval of the Settlement or through the injunctive relief period, until November 30, 2021. Plaintiff, Crystal Hardin also seeks the approval of a $6,000 incentive award for her committed efforts through this case including: Preparing, producing, reviewing and otherwise cooperating with extensive discovery; preparing for and sitting for her deposition; opening her home to a camera crew, attorneys, engineers and repair providers for the inspection of her television; reviewing and overseeing the essential stages of litigation and the negotiation of the class action Settlement – including its multiple revisions and briefings.

For the reasons stated below, Plaintiff respectfully request that the Court grant this application for reasonable attorneys' fees, expenses, and costs in the amount of $487,000 to Class Counsel and an incentive award of $6,000 to Plaintiff, Crystal Hardin.

II. BACKGROUND

The Song-Beverly Act, Cal. Civ. Code Section 1793.03(b) requires manufacturers of products wholesaling for more than $100 to make parts available to authorized service providers for at least seven years from the date of manufacture. The statute mandates availability; that's all. The consumer pays for parts and labor, unless the manufacturer offers good will. Had Samsung complied with the statute, and made the PDP available to Hardin, she would have had to spend an estimated $315 for the part, $164 for labor to complete the repair. *See* DE 186 at p. 14. In a case of first impression although the statute has been in effect since 1986, Plaintiff alleged that Samsung failed to make the PDP available to consumers through the Authorized Service Centers ("ASC's") in violation of Section 1793.03(b). *See e.g.* DE 98 at ¶25

III. ARGUMENT

A. Plaintiff is Entitled to Prevailing Party Status.

Plaintiff is a prevailing party under the Song-Beverly Act, and the UCL by virtue of the Court's approval of the Settlement Agreement. *See, e.g., Carbonell v. I.N.S.,* 429 F.3d 894, 899 (9th Cir.2005) (The Ninth Circuit "found that a litigant prevailed when he entered into a legally enforceable settlement agreement."); *Barrios v. Cal. Interscholastic Found.*, 277 F.3d 1128, 1134 (9th Cir. 2002) (plaintiff prevails when he or she "enters into a legally enforceable settlement agreement against the defendant"). A party is deemed to have prevailed even if, as here, all the relief originally sought was not obtained. *See La Asociacion Trabajadores v. City of Lake Forest*, 624 F.3d 1083, 1089-90 (9th Cir. 2010) (reversing denial of fees because plaintiffs received actual relief where, although settlement was couched in terms of existing policies, parties' relationship was materially altered because city subjected itself to federal jurisdiction to enforce policies and plaintiffs would not have to file new action to enforce them. The court

stated "extremely small amount of relief is necessary to confer prevailing party status."); *Sokolow v. County of San Mateo*, 261 Cal. Rptr. 520, 529-30 (Cal. Ct. App. 1989). As a prevailing party, under the Song-Beverly Act. *See* Cal. Civ. Code § 1794(d), Plaintiff seeks a significantly reduced lodestar fee and expense award of $487,000. With a lodestar of more than $1,400,000.00, the fees requested amount to approximately 34% of the lodestar.

B. Class Counsel Achieved a Beneficial Result for the Class.

Plaintiff has achieved a substantial result for the Class. The Settlement obtained by Hardin provides: the availability of the last remaining replacement PDP; communication from Samsung to ASCs regarding the availability of PDPs and other accommodations; and in the event a PDP is unavailable (and as is Samsung's intention), (at the Class Member's election) the full reimbursement of purchase price or an exchange for a similar television. DE 226-2.

The Settlement also provides for continuing jurisdiction by the Court to oversee enforcement of the Agreement while Class Counsel provides annual updates of claims made of the Settlement. DE 226-2 at p. 5. The Parties did not begin negotiating attorneys' fees and costs until there was agreement as to the injunctive relief for the benefit of the proposed Class. Declaration of Paul S. Rothstein ¶3. Attorneys' fees and costs were resolved with the assistance of Judge Corley only after the Parties finalized Class relief. *Id*. Ultimately, the Settlement did not contain a clear sailing agreement for fees. DE 226-2.

The final case pled by Class Counsel identified the best viable case for the Class without overreaching and losing it all. This result underscores the reasonableness of Plaintiff's requested fee award. *See Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983)*. The court in *Hensley* cautioned, that "it is not necessarily significant that a prevailing

plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Hensley*, 461 U.S. at 435 n. 11. The Ninth Circuit has likewise held that "courts should not reduce lodestars based on relief obtained simply because the amount of damages recovered on a claim was less than the amount requested.... Failure to obtain all relief requested for a claim on which the Plaintiff prevailed should not deprive plaintiff's attorney of a reasonable hourly fee for hours needed to obtain the relief." *Quesada v. Thomason*, 850 F.2d 537, 539–40 (9th Cir.1988).

Counsel expended only as much time as was needed to fully protect the interests of the Class and to successfully litigate and settle this matter. Counsel are experienced attorneys working in a specialized area of law, and as a result, were able to prosecute and ultimately settle, a complicated and novel case requiring substantive as well as legal knowledge. Class Counsel moved efficiently after filing the case to propound discovery, proceed to class certification, and engage in substantial settlement negotiations.

C. Plaintiff's Lodestar Is Reasonable.

In injunctive relief cases under federal law, courts calculate attorney's fees pursuant to the lodestar method. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). To calculate the lodestar, courts multiply the number of hours reasonably expended by counsel's reasonable hourly rates. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983) ("This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services"). Once calculated, "[t]he lodestar amount is presumptively the reasonable fee

amount" and may only be adjusted upward or downward by applying a multiplier in "rare" or "exceptional" cases where "the lodestar amount is unreasonably low or unreasonably high." *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).

"[T]o determine whether attorneys for the prevailing party could have reasonably billed the hours they claim to their private clients, the district court should begin with the billing records the prevailing party has submitted." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). "It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

Here, the amount requested by Plaintiff represents a significant discount from the full amount to which Plaintiff might otherwise be entitled. First, the lodestar of more than $1,400,000 for time expended on this case by Class Counsel's firm from 2018 to the present is nearly three times the fixed sum of $487,000, which Class Counsel requests. This amount does not include any of the time and expenses incurred in preparing for preliminary approval, preparing this Motion, or much of the time expended by others who materially contributed to the success of the litigation. Declaration of Kyla V. Alexander, ¶ 9. Additionally, Class Counsel estimates that they will spend an additional 50 to 100 hours of work through the Final Approval hearing and monitoring the settlement for the duration of the injunctive relief period. Declaration of Paul S. Rothstein, ¶ 4.

1. The Number of Hours Claimed by Class Counsel Is Reasonable.

Prevailing plaintiffs are entitled to be compensated for "every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest[.]" *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982) "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case[.]" *Moreno*, 534 F.3d at 1112. Counsel's "sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case." *Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 738 (11th Cir. 1988). Therefore, to deny compensation, "it must appear that the time claimed is obviously and convincingly excessive under the circumstances." *Id.* Counsel engaged in reasonable activities, for the duration of the intense litigation. *See Fox v. Vice*, 563 U.S. 826, 838 (2011) ("[T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time."). No paralegal time has been included in the lodestar of Class Counsel although paralegals have spent hundreds of hours of compensable time working on behalf of the Class in this matter. In addition, "the verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous." *Horsford v. Board of Trustees of California State University*, 132 Cal. App. 4th 359, 396 (2005).

As a comparison, this Court has previously approved similar time expenditures for certain tasks:

	Lewis v. Silvertree Mohave Homeowners' Ass'n, Inc., No. C 16-03581 WHA, 2017 WL 5495816, at *5 (N.D. Cal. Nov. 16, 2017)		*Hardin et al. v. Samsung Electronics America, Inc. et al.*	
Project	**Hours**	**Amount**	**Hours**	**Amount**
Investigation	91.98	$45,226	76.2[1]	$23,568.75
Preparation of the complaint	185.71	$111,768	115.7[2] + 52.1[3] = **167.8**	$46,051.88 + $7,616.25 = **$53,668.13**
Settlement-related tasks	124.29	$66,76	47.7[4] +300.5[5] **=348.2**	$ 20,334.38 +0 **=$ 20,334.38**
Motion for class certification	161.86	$77,825	129.9[6]	$51,502.50

The Ninth Circuit has held in *Gonzalez v. City of Maywood*, 729 F.3d 1196 (9th Cir.2013), that "when a district court reduces either the number of hours or the lodestar by a certain percentage greater than 10%, it must provide a *clear and concise* explanation for why it chose the specific percentage to apply," *Id*. at 1200. Most of Class Counsel's time has already been reduced by more than 10%. Exhibit 2. The greater the deviation from the 10% threshold, the "more specific articulation of the court's reasoning is expected." *Moreno v. City of Sacramento*,534 F.3d 1106, 1111 (9th Cir.2008). In many instances of Class Counsel's fee presentation, entire projects were reduced by more than 25%; in fact nineteen (19) out of the forty (40) projects were reduced by at least 50%, many by 100%. Exhibit 2. Only a handful of projects were not reduced at all (the successful motions: Defending against Samsung's Motion to Strike (6.3 Hours, $ 3,082.50); Defending against Samsung's Motion for Partial Summary

[1] Fact Investigation – reduced by 50%
[2] Second Amended Complaint and Motion for Leave to Amend - Reduced by 25%
[3] Complaint; First Amended Complaint – Reduced by 75%
[4] Mediation – Reduced by 25%
[5] Settlement Briefing – (after July 7, 2019) Reduced by 100%
[6] Motion for Class Certification – reduced by 25%

Judgment (122.6 Hours, $66,892.50)[7]; lodging Plaintiff's Motion for Partial Summary Judgment (81.7 Hours, $40,392.50); defending against Defendants' efforts to MDL the case (17 Hours, $ 11,475)). *Id*. As described below, Class Counsel has exercised very cautious billing judgment on contemporaneously billed time, which supports the request for fees and costs.

2. Class Counsel's Claimed Hours Are Proportionate to the Case.

Class Counsel seeks compensation for only a portion of the more than 2,500 hours reasonably spent on this litigation through October 2019. Exhibit 2. Further, Plaintiff seek to be compensated only for time expended by the two attorneys who sought to be appointed by this Court as Class Counsel. Exhibit 3; Declaration of Kyla V. Alexander, ¶3. Yet the number of resources and the time spent on litigation-related matters leading to the successful settlement was far greater. Class Counsel is not seeking payment for more than 1,000 hours and $165,000 in other timekeeper's contributions to litigation. Exhibit 3; Declaration of Kyla V. Alexander, ¶ 5.

Class Counsel exercised reasonable billing judgment in appropriately assigning tasks among Paul S. Rothstein (Partner) (33%), Kyla V. Alexander (Associate) (36%) and Other (legal staff, including non-attorneys) (31%). *See In re Smith*, 586 F.3d 1169, 1174 (9th Cir.2009) ("the district court can impose a small reduction, no greater than 10–percent—a 'haircut'—based on its exercise of discretion, but anything more substantial requires clear explanation") (internal citation omitted); s*ee generally Moreno*, 534 F.3d at 1115 (admonishing court to avoid "impos[ing] its own judgment regarding the best way to operate a law firm").

[7] Another example of the reasonableness of Class Counsel's hours can be found in *See e.g. Laws v. Sony Music Entm't, Inc.*, No. CV032038LGBVBKX, 2004 WL 7319334, at *2 (C.D. Cal. Feb. 17, 2004), *judgment entered*, No. CV032038LGBVBKX, 2004 WL 7319333 (C.D. Cal. Mar. 11, 2004) (granting fees (after certain reductions) for *hundreds* of hours on motion for summary judgment).

The time Class Counsel expended on this case, and for which they seek to be compensated, is appropriate given the intensity and nature of the litigation and settlement negotiations and for a case of this scope. The work included extensive factual investigation, preparation and filing of the complaint, narrowing claims in an amended complaint, successfully defending against Defendants' Motion to Dismiss (in response to the Motion for Leave to file the operative complaint), inspection of the subject televisions, initiation and completion of important and time-sensitive discovery in preparation for class certification including production and review hundreds of pages of documents and propounding and responding to dozens of discovery requests, a successful effort to compel discovery, two Rule 30(b)(6) depositions, the depositions of named Plaintiff, briefing and argument on two motions for summary (and partial summary) judgment, completed briefing on class certification, several in-person settlement conferences with Magistrate Judge Corley and additional telephonic conferences with and without Judge Corley, drafting many versions of settlement agreements, and independent research for the purposes of litigation and settlement. Class Counsel has declared that their time entries "included only the hours …reasonably necessary to achieve our clients' goals." Declaration of Paul S. Rothstein ¶18; Declaration of Kyla V. Alexander ¶3(e).

3. Class Counsel's Lodestar Is Supported by Accurate and Contemporaneous Billing Records

Counsel's declarations describe the billing procedures, how counsel allocated projects between and within the co-counsel firms to minimize duplication and maximize efficiencies, and the work performed that was necessary to prosecute this case effectively. Counsel's hours are documented by contemporaneous time records showing discrete entries describing each item of work performed and recorded by tenths of an hour. Declaration of Kyla V. Alexander, ¶ 3(c).

These time records are prima facie evidence that Counsel's hours were reasonable. *See, e.g. Hensley*, 461 U.S. at 437 n.12 (adequate time records must "identify the general subject matter of . . . time expenditures"); *see also Lytle v. Carl*, 382 F.3d 978, 989 (9th Cir. 2004) ("minimal" descriptions sufficient to support an award of attorneys' fees so long as "they establish that the time was spent on the matters for which" the party seeks fees).

4. Class Counsel Have Exercised Significant Billing Judgment

Counsel have reviewed their billing records on an entry-by-entry basis to exercise billing judgment and reduced many of the projects to account for any duplicative work, a few instances of block billing, vagueness, any clerical entries, and other billing entries that are otherwise inadequate or non-compensable. Declaration of Kyla V. Alexander, ¶ 3(d). In total, Counsel requests approximately thirty-four (34) percent (a 66% reduction) of the lodestar amount. This reduction is sufficient to address unnecessary duplication, clerical time, vagueness and other billing errors. By comparison, the Ninth Circuit in *Davis v. City & Cnty. of S.F.*, 976 F.2d 1536, 1543 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993), held that a 5% billing reduction by counsel sufficient to address clerical time and other billing errors.

Any remaining concerns about duplication must be considered in light of the nature of this litigation, which involved several novel and complex issues, attended to by multiple attorneys representing Defendants. Class Counsel simultaneously litigated the case efficiently while engaging in settlement negotiations. Exhibit 5 is a summary of the hearings and other proceedings attended to by Class Counsel and a correlation of the attendance by Defendants' counsel as well as the percentage mark-down to the proceeding. Exhibit 5 demonstrates that there were no instances of excessive or unnecessary duplication of Class Counsel's appearances.

Further, Class Counsel reduced the time entries for many of the appearances by 25% or more. "Broadbased class litigation often requires the participation of multiple attorneys." *Davis*, 976 F.2d at 1544; *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 785 (9th Cir. 1986). A reduction for duplication is "warranted only if the attorneys are unreasonably doing the same work." *Johnson v. Univ. Coll. of Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original), *holding modified on other grounds by, Gaines v. Dougherty Cnty. Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985); *Serrano v. Unruh*, 32 Cal. 3d 621, 624 (1982) (attorney's "fee should ordinarily include compensation for all hours reasonably spent"). Moreover, under Ninth Circuit precedent, the amount of time required for a task is generally left to the "lawyer's professional judgment." *Moreno*, 534 F.3d at 1112. The Ninth Circuit has recognized that plaintiffs' contingent fee lawyers have little to gain from "churning" a case. *Id.* Class Counsel exercised significant billing judgment to reduce duplication and inefficiencies. Further reductions are not warranted.

5. The Scope, Complexity, and Novelty of the Case, Defendants' Litigation Strategy and Foregone Litigation all Support the Reasonableness of the Requested Lodestar.

The successful settlement will directly benefit some portion of hundreds of purchasers of Samsung plasma televisions in California. The broader effect sends a message to manufacturers that consumers care about this issue and it can be tested in court. Initiating and prosecuting this case required the expertise of Counsel, willing to litigate colorable but novel legal issues in uncharted territory. No other case has raised the protection of Cal. Civ. Code Section 1793.03(b) on behalf of consumers. The novelty and complexity (from a legal and factual standpoint) of the case required extensive investigation to fully understand the never-tested scope of the California

Statute (i.e. who was a manufacturer, what constituted "availability," whether a consumer must "tender" the product for repair, etc). *See* Declaration of Paul S. Rothstein ¶ 5.

A reasonable fee award must take into account the nature of the defendant's defense strategy. *See, e.g., Frank Music Corp. v. MGM, Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989); *Peak-Las Positas Partners v. Bollag*, 172 Cal. App. 4th 101, 114 (2009); *Instrumentation Lab. Co. v. Binder*, No. 11CV965 DMS (KSC), 2013 WL 12049072, at *4 (S.D. Cal. Sept. 18, 2013), *aff'd*, 603 F. App'x 618 (9th Cir. 2015). Here, Defendants' strategies greatly increased the attorneys' fees, expenses, and costs that Plaintiff incurred as they defended nearly every factual and legal issue in dispute aggressively. Characterizing it as 'scorched earth" is not missing the mark. Declaration of Paul S. Rothstein ¶6. One example of this 'no-holds-barred' approach manifested with a late-hour turnover of the documents in a foreign language and required Class Counsel to retain counsel fluent in Korean and English on an emergency basis. Declaration of Paul S. Rothstein ¶7. Notwithstanding the gamesmanship, which added to time and expense, Class Counsel has reduced most discovery matters (other than the few hours dedicated to the inspection of the televisions) by at least 25%. Exhibit 2.

Further, Class Counsel did not pursue at least two other class action cases during the pendency of this litigation to dedicate full resources to this matter. The details of those cases will be provided for an *in camera* review, upon request. *See* Declaration of Paul S. Rothstein ¶ 8.

6. Plaintiffs' Billing Rates Are in Line with Market Rates for Attorneys with Commensurate Skill, Experience, and Reputation in the San Francisco Bay Area.

The rates claimed are reasonable if they are within the market range of hourly rates charged by attorneys of comparable experience and ability for similar litigation. The Ninth Circuit determines the reasonable hourly rate by looking at the prevailing market rate "for similar

work performed by attorneys of comparable skill, experience, and reputation." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986); *Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 783 (2002). "Generally, the relevant community" for the purpose of determining the prevailing market rate "is the forum in which the district court sits." *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997): *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992). "[T]he proper scope of comparison . . . extends to all attorneys in the relevant community engaged in equally complex Federal litigation, no matter the subject matter." *Prison Legal News*, 608 F.3d at 455 (internal quotes omitted). Courts determine the reasonableness of a rate based upon "the rates prevailing in that district for similar services by lawyers of reasonably comparable skill, experience and reputation," irrespective of practice area. *Id.*, *quoting Blum v. Stenson*, 465 U.S. at 895 n. 11.

Therefore, to determine applicable rates, the relevant inquiry is whether attorneys in the San Francisco Bay Area with commensurate skill, experience, and reputation in handling complex litigation charge rates comparable to those sought by Class Counsel in this consumer class action. Recent orders in the Northern District demonstrate that the rates sought by Class Counsel here meet this requirement. *See, e.g.*, *Roberts v. Marshalls of CA, LLC*, Case No. 13-cv-04731-MEJ, 2018 WL 510286 (N.D. Cal. Jan. 23, 2018), at *14-15 (N.D. Cal. June 22, 2017) (approving rates between $300 and $750 per hour); *In re Magsafe Apple Power Adapter Litig.*, No. 5:09-CV-01911-EJD, 2015 WL 428105, at *12 (N.D. Cal. Jan. 30, 2015) ("In the Bay Area, reasonable hourly rates for partners range from $560 to $800, for associates from $285 to $510…"); *Stonebrae, L.P. v. Toll Bros.*, No. C-08-0221-EMC, 2011 WL 1334444, at *16 (N.D. Cal. Apr. 7, 2011), aff'd, 521 F. App'x 592 (9th Cir. 2013) (Approving rates for attorneys with

over 30 years experience between $675 - $800). Class Counsel's skill, knowledge, experience, and reputation in consumer class action litigation is of such a quality that their rates should be viewed in comparison to those of prestigious large firms. *See Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1120 (C.D. Cal. 2012) (concluding that the rates of "large, prestigious firms are valid comparators" to those of successful plaintiffs' firms practicing civil rights law). In this case, Plaintiff's counsel, are seeking $675 per hour for a 1980 law school graduate (Paul S. Rothstein) and $450 per hour for a 2010 law school graduate (Kyla V. Alexander). Declaration of Paul S. Rothstein ¶ 21, 22. Declaration of Kyla V. Alexander ¶ 12, 13.

Similarly, in L*ewis v. Silvertree Mohave Homeowners' Assoc. Inc.*, Case No. C-16-03581, 2017 WL 5495816 *4, this Court awarded a rate of $880 for a firm partner who graduated in 1999; rates of $660 and $755 for 2001 graduates; and $545 and $725 for 2007 graduates. While this Court ultimately reduced attorney rates by 10 percent, rejecting the plaintiffs' argument that the case was a "complex, class-action civil rights case" (*id*.), Class Counsel's rates remain in accord with the reduced rates in *Lewis*.

A detailed discussion of Class Counsel's qualifications are set forth in Counsel's supporting declarations. Declaration of Paul S. Rothstein ¶20-22; Declaration of Kyla V. Alexander ¶10-16. The success achieved by Counsel in this case demonstrates that Counsel provide a high level of representation that is comparable to lawyers at national law firms, despite any disparity in firm size. In short, based on Class Counsel's evidentiary showing, the Court should find that Counsel's rates are reasonable.

D. Plaintiffs' Costs and Expenses Are Recoverable and Reasonable.

The requested award is well-documented in the adjusted lodestar alone, however, Class Counsel incurred $66,054.79 in documented costs and expenses. Exhibit 4. Attorneys are entitled "recover as part of the award of attorneys' fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Alvarado v. Nederend*, No. 1:08-CV-01099 OWW DL, 2011 WL 1883188, at *10 (E.D. Cal. May 17, 2011) (noting that "filing fees, mediator fees, ground transportation, copy charges, computer research, and database expert fees ... are routinely reimbursed in these types of cases") (citation omitted). All expenses and costs incurred were necessary for the prosecution of this litigation, and are consistent with a matter of this scope and complexity. Declaration of Paul S. Rothstein ¶9. Where a significant portion of expenses were attributable to depositions, research, translation, consulting, travel and lodging; costs and expenses were reasonably incurred. *See e.g. In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007) (approving "reimbursements for 1) meals, hotels, and transportation; 2) photocopies; 3) postage, telephone, and fax; 4) filing fees; 5) messenger and overnight delivery; 6) online legal research; 7) class action notices; 8) experts, consultants, and investigators; and 9) mediation fees"). Counsel projects an additional expense of $2,300 to cover outlays associated with the Final Hearing. Declaration of Paul S. Rothstein ¶10. These future expenses are not included in the $66,054.79.

IV. INCENTIVE AWARD AND INDIVIDUAL SETTLEMENT

"Incentive awards are fairly typical in class action cases." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). However, the decision to approve such an award is a matter within the Court's discretion. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir.

2000). Generally speaking, incentive awards are meant to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaking in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958–59. "Incentive awards typically range from $2,000 to $10,000." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015). In determining whether an incentive award is reasonable, courts generally consider:

> **(**1) the risk to the class representative in commencing a suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Covillo v. Specialtys Café, No. C–11–00594-DMR, 2014 WL 954516, at *7 (N.D. Cal. Mar. 6, 2014) (citations omitted).

A class representative must justify an incentive award through "evidence demonstrating the quality of plaintiff's representative service," such as "substantial efforts taken as class representative to justify the discrepancy between [her] award and those of the unnamed plaintiffs." *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008). In this district, a $5,000 payment is presumptively reasonable. *See, e.g.*, *Burden v. SelectQuote Ins. Servs.*, No. C 10–5966 LB, 2013 WL 3988771, at *6 (N.D. Cal. Aug. 2, 2013).[8] "Such awards are discretionary ... and are intended to compensate class representatives for work done on behalf of the class, to

[8] *See also Hopson v. Hanesbrands, Inc.*, No. CV–08–0844, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009); *Morey v. Louis Vuitton North America, Inc.*, No. 11cv1517, 2014WL109194, at * 11 (S.D.Cal. Jan. 9, 2014) (approving a $5,000 award to a class representative); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09–00261 SBA (EMC), 2012 WL 5878390, at *7 (N.D.Cal. Nov. 21, 2012) ("In this District, a $5,000 incentive award is presumptively reasonable."); *Williams v. Costco Wholesale Corp.*, No. 02 cv2003 IEG (AJB), 2012 WL 2721452, at *7 (S.D.Cal. Jul. 7, 2010) (approving a $5,000 award to a class representative in an antitrust case settling for $440,000).

make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958–959 (9th Cir.2009).

Hardin seeks an incentive award of $5,000 plus $1,000 for a new television. This amount is reasonable in light of Ms. Hardin's active role in the litigation, her willingness to take on representing the interests of the Class, the fact that the settlement provides significant relief while preserving Class Members' damages claims, and because the relief will not reduce class recovery in this injunctive relief only settlement. Declaration of Crystal Hardin ¶5. Hardin has spent approximately forty-five (45) documented hours on this case and many more hours that she did not write down, which justify her requested award. Declaration of Crystal Hardin ¶6. S*ee, e.g., Knight v. Red Door Salons, Inc.*, No. 08–01520, 2009 WL 248367, at *7 (N.D.Cal. Feb.2, 2009) (Conti, J.) (awarding $5,000 for named plaintiffs expending 40–50 hours). Ms. Hardin has always remained accessible and meaningfully connected to the issues of the litigation and provided valuable contributions to factual development and consumer advocacy.

On top of what is routinely expected from a class representative, Hardin's deposition turned into a firing squad that put her at significant reputational risk. Hardin's personal exposure in this litigation far exceeded a dispute over repair parts for a television. Hardin's deposition was disparaging, personally attacking and borderline malicious. Declaration of Crystal Hardin ¶11. On May 7,2019, the deposition was on the verge of termination, but Ms. Hardin abided by her obligation to the putative class and stayed the course, despite the attacks. Declaration of Paul S. Rothstein ¶11. Simply put, without a class representative, willing, able and committed to this

arduous process of litigation – a settlement could *never* be rendered for the Class. Those are the efforts that justify awarding Ms. Hardin her requested class representative incentive award.

V. CLASS COUNSEL EXERCISED REASONABLE PROFESSIONAL JUDGMENT LEADING TO SETTLEMENT.

A. Remedies under the Song-Beverly Act for violation of Section 1793.03 are unsettled and not likely to exceed the remedy achieved through settlement.

A calculation of damages[9] for violation of Section 1793.03 remains untested. Class Counsel is unaware of any method to provide the Class Members with greater relief than obtained. Under the Settlement, Class Members are entitled to recover tangible and valuable compensation because of Class Counsel's work. Class Members may elect to recover a *full refund for their six-year-old television* – a review of the remedies available under the Song-Beverly Act reveals that this is an excellent result for the Settlement Class.

1. No court has developed a test for damages under Section 1793.03.

Where the operative provision of the Song-Beverly Act entitles consumers to the right to purchase – for an additional charge - a part for seven years; a case for damages is uncertain. How is the injury of an unavailable part valued? Is any recovery balanced against the cost of the part to avoid a windfall? What about consumers who did not need the part, do they recover?[10]

Plaintiff has no benefit of litigation on these issues, despite decades of the Section's existence. This case had several unique challenge in establishing damages: 1) Samsung had located in global storage (through litigation) at least one part[11] that the named Plaintiff alleged

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[9] Cal. Civ. Code § 1794 ("(a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter … the recovery of damages and other legal and equitable relief.")

[10] See Transcript of Hearing on May 30, 2019, p. 4: 3-5 ("So let's say that we go to trial on that. Are you trying to recover for people who never had a problem with their TV? How would we even know who gets to recover?").

[11] In January, 2019 at the hearing on Samsung's Motion to Dismiss the First Amended Complaint, they hauled a large box allegedly containing Mr. Bronson's PDP part in it. The Court recognized this as a significant obstacle for

were not available to the ASCs; 2) The PDP (for the Affected Models) costs approximately $315 plus additional labor charges (*see* DE 186 at p. 14); and 3) identifying persons who in the past attempted repair, but were not provided the part was not a record routinely maintained in the ordinary course of business. Class Counsel, faced with these considerations and others, ultimately decided that a full refund through the Settlement was of substantial value to a consumer with a six-year-old television. Class Counsel's judgment is in accord with other damage recoveries under the Song-Beverly Act.

2. Other provisions of the Song –Beverly Act allow a variety of damages from the "benefit of the bargain" to repair, full refund or exchange.

The express warranty section of the Song-Beverly Act provides that after a reasonable number of repair attempts the manufacture must provide a purchase price refund (less the amount directly attributable to use by the buyer prior to the discovery of the nonconformity) or a comparable replacement. *See e.g.* Cal. Civ. Code § 1793.2.[12] Class Counsel could not be certain that the same recovery would be available to the class, as the violations detailed in the instant case differ significantly from a breach of express warranty: 1) the plasma televisions were no longer under the manufacturer's warranty; 2) there is no requirement for "a reasonable number of attempts at repair;" and 3) repair under Section 1793.03 is contemplated at the expense of the consumer. Notwithstanding these differences, the Settlement secures either a replacement or a

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the case at the time of trial. Transcript of Hearing on January 10, 2019, p. 11:4-7 ("So that's going to be pretty hard for you to get around at the time of trial because they got the part you need in that big box right there, and it is a dramatic thing.").

[12] Cal. Civ. Code § 1793.3 (for failure to provide service or repair facilities within California or failure to make parts or service literature available during the warranty period) provides many of the same remedies; none of which exceed a full refund of the purchase price.

full refund of the televisions' estimated purchase price (without a reduction for use before discovery of the need for a replacement PDP) – more than in-warranty protection would offer.

Other damage calculations under the Song-Beverly Act require a "benefit of the bargain" or restitution analysis. *See e.g. Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 818–19 (9th Cir. 2019) ("[U]nder California law the remedies for breach of the implied warranty include benefit of the bargain damages.") (internal citations and quotations omitted). This benefit of the bargain theory claims to measure the difference in the value represented and the value actually received. *See Victorino v. FCA US LLC*, No. 16CV1617-GPC(JLB), 2019 WL 5268670, at *7 (S.D. Cal. Oct. 17, 2019) (internal citations and quotations omitted). Where breach of implied warranty and violation of Section 1793.03 both draw remedies from Cal. Civ. Code § 1794; the damage analysis in the instant case could mirror the recovery for a breach of implied warranty.

One potential "benefit of the bargain" analysis is to depreciate the purchase price over time (arguably on a straight-line basis over the seven year expectation of Section 1793.03(b)). Walking through this calculation is illustrative. Hardin's model, as an example, retailed for approximately $850 in 2013. DE 193-7 at p. 2. Applying straight-line depreciation over the seven years Samsung was obligated to make the parts available for purchase, the television depreciates in value by $121.43 per year ($850/7). Hardin contacted the ASC in 2018[13] for a replacement PDP, approximately five years after purchasing the television. The resulting depreciation is $607.14 ($121.43*5) retaining a value of approximately $242.86 ($850-

[13] From discovery, Plaintiff believed that Samsung stopped making the PDPs for affected Models available sometime after 2015, [DE 186 at p. 8] where the affected Models would have a depreciated value of approximately $607.14. In these cases, a full refund provides a better result for the settlement Class.

607.14).[14] Under the Settlement, a Class Member is better off to receive the *full refund* of their television, rather than a diminished value of the same, especially as the diminished value will soon be zero.

Alternatively, a damage analysis would require expert economic analysis to evaluate the value of a television received that did not have a replacement part available for the seven years. Plaintiff's counsel has explored numerous economic applications and consulted with an expert to assess their viability in litigation, including conjoint analysis, the opportunity cost of repair, premature replacement cost of buying a new television and the value received of an unrepairable television. As noted further below, such economic calculations were not robustly supported due to limited data and the lack of a current market for the technology. S*ee infra*.

B. The risks of continued litigation proved substantial obstacles to secure any further relief for the Class.

Class Counsel continued its due diligence throughout this case, remained committed to understanding the risks of litigation and eventually secured a beneficial result for the Settlement Class.

As with much class action litigation, Plaintiff and the Settlement Class faced a great deal of uncertainty. A substantial risk that class certification would be denied. As a threshold matter, there were challenges with numerosity, including the way records were maintained in identifying consumers who already had an experience like Ms. Hardin. *See* Declaration of Paul S. Rothstein at ¶12. There was unpredictability of how the Court would rule on "damages" and

[14] Section 1794(c) does apply an enhancement to damages if the violations are found to be willful. However, even if such a finding was secured for Hardin, a few key facts obscure it's to application the Class. Regardless, under Section 1794(c), Hardin would only recover $485.72 ($242.86*2); far less than the estimated purchase price of the television.

how to prove them on a class-wide basis. *See supra*. Even if Plaintiff and the Settlement Class were successful, given the litigious history of this case, there would likely be an appeal of class certification. An appeal would delay any certainty for consumers close to the end of Section 1793.03's application for plasma televisions.[15] Injunctive relief claims also present their own set of issues where a defendant may try to preemptively correct practices before any progress in the litigation, in hopes of mooting the claim. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) ("A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.").

Where Class Counsel has secured a good result for the Settlement Class, first weighed the benefit and risk of continued litigation and in an effort to conserve further resources, the result achieved through the Settlement reasonably and justifies the requested fee.

C. The settlement resulted from good faith investigation of the claims.

Class Counsel began this litigation knowing a few key facts, and set out to discover the best, most legally supported and consumer-driven case.

1. Narrowed Class Definition.

Class Counsel preferred to secure a settlement for all models of Samsung plasma televisions. However, Court rulings narrowed the case to only those models requiring the same PDP as the named representative(s). DE 155. The effect of that development played out in two important ways: 1) the discoverable information necessary to support a settlement was limited only to the Affected Models; and 2) Samsung had limited litigation exposure and therefore less

[15] A 2017 statistical analysis provided that the mean time from notice to final order of appeals in the Ninth Circuit was 22.8 months. See Exhibit __.

incentive to settle for any class greater than the Affected Models. Declaration of Paul S. Rothstein at ¶13.

Beyond the control of Class Counsel, Mr. Bronson on the eve of filing the Motion for Class Certification, declined to continue in a representative capacity. *See* DE 186 at fn 1.

2. Defect Claim.

Early in the litigation, Class Counsel consulted with an industry expert who pioneered plasma technology as it emerged in the United States in the early 1990s. Declaration of Paul S. Rothstein at ¶14. This expert developed plasma technologies throughout his career with a leading US manufacturer for approximately fifteen years. The expert has inspected the televisions, assessed their mode of failure, construction, design and performance issues. Declaration of Paul S. Rothstein at ¶14. Class Counsel has used this expert assessment to weigh the defect claim.

Plaintiff stayed apprised of developing case law in defect class actions and analyzed the challenges to certifying a class considering design modifications, multiple modes of failure and other individual use issues. One recent example of defect claims playing out negatively for the putative class was *In re Seagate Tech. LLC,* 326 F.R.D. 223 (N.D. Cal. 2018).The plaintiffs in Seagate were represented by a well-known and respected firm, Hagens Berman. Plaintiffs in *Seagate* alleged that certain hard drives were defectively designed and unreliable by industry standards. The Court held that "Plaintiffs evidence would require a level of individualized inquiry for which Plaintiff have proposed no manageable plan to resolve." *Id*. at 244. Ultimately class certification was denied and the Court held, that the plaintiffs had not submitted documentary evidence showing a product defect across the entire proposed class. *See id*. In *Seagate*, the plaintiffs unsuccessfully renewed their motion for class certification on October 15,

2018 which was denied on January 22, 2019. *In re Seagate Tech. LLC Litig.*, No. 16-CV-00523-JCS, 2019 WL 282369 (N.D. Cal. Jan. 22, 2019). *Seagate* was dismissed on May 2, 2019.

Considering the facts and law impacting this case, Class Counsel made the informed decision not to pursue a defect claim given the challenges of intricacy of design issues, variations among models and other potentially individual issues that would create a substantial challenge to certification.

3. Compensatory Damages

Plaintiff initiated this litigation with the option of pursuing compensatory damages in addition to injunctive relief. Plaintiff explored the full range of potential benefits to consumers through litigation. Class Counsel pressed forward to develop facts for a damage analysis, and explored the legal remedies available to consumers. Leading up to class certification, Class Counsel had to make a decision – is this a case for compensatory damages or was it better suited for injunctive relief? To help assess this question, Class Counsel consulted with a well-known and respected expert economist. Declaration of Paul S. Rothstein at ¶15. Several considerations arose in the damage analysis. First, due to the limited scope of discovery by model type and geographic area, there was limited data to analyze and formulate any economic determination (whether it is the opportunity cost/ premature replacement of a television, a conjoint analysis or something else). Second, because plasma televisions were no longer on the market, market comparisons are difficult (if not impossible) to assess in any meaningful way. A third complicating factor was that the replacement part, the PDP, came at a significant cost to the consumer and the televisions were aging. Where the statute only protected the replacement part's availability to consumers (not providing the parts free of charge), the willingness of a reasonable

consumer to pay the full repair part price may decrease over time. While none of these factors were a complete bar to the recovery of compensatory damages, they did confound a class-wide damage claim and weighed against the pursuit of a compensatory relief.

4. Notice.

Class Counsel understood that at the preliminary approval hearing in September 2019, the Court would adopt one of two approaches on notice – either the Court would take the position that notice was *not legally* required or the Court would insist that it was required for the adequacy of the settlement. Class Counsel was prepared to litigate if the Court required notice, as in the first settlement "Samsung consider[ed] the absence of notice to the Settlement Class a non-severable material term." Declaration of Paul S. Rothstein at ¶17; DE 204. Upon hearing the Court's admonition about the lack of notice, Class Counsel did not hesitate to proceed with litigation.[16] Ultimately, judicial oversight was effective; the Court sent a loud and clear message: if the case were to settle, it would require a notice program. However, Class Counsel maintains that reasonable minds can differ as to whether strategic decisions made by Class Counsel regarding the first proposed settlement withstand attack given all the downside risks discussed above.

VI. CONCLUSION

Plaintiff respectfully request that this Court enter an award of attorneys' fees, expenses, and costs for $487,000 and a service award to Crystal Hardin in the amount of $6,000.

[16] *See* Transcript of Hearing on September 26, 2019 at p. 17:5-6 ("And if we can't get a settlement, the Court will readjust the schedule and…")

DATED: December 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December 2019, the foregoing PLAINTIFF'S MOTION FOR REASONABLE ATTORNEY'S FEES, COSTS AND SERVICE AWARD and a copy of has been served on all Parties required to be served by electronically filing with the Clerk of the Court of the U.S., District Court for the Northern District of California, San Francisco Division, by using the CM/ECF system.

/s/ Paul S. Rothstein
Paul S. Rothstein