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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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Plaintiffs,

v.

THETFORD CORPORATION, a Delaware corporation; NORCOLD, INC., a Delaware corporation; THE DYSON-KISSNER-MORAN CORPORATION, a Delaware corporation; and, DOES 1 to 50, inclusive,

Defendants.

Case No. 8:13-CV-00081-JLS-RNB

Assigned for all purposes to the Honorable Josephine Staton

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS, REIMBURSEMENT OF EXPENSES AND SERVICE AWARDS TO CLASS REPRESENTATIVES

Date: September 16, 2016
Time: 2:30 p.m.
Courtroom: 10A

Date Action Filed: December 12, 2012
Removal Date: January 16, 2013

This document also relates to the following related action:

CHARLES CHOW, JOHN ROBINSON, RANDY DUPREE, RAY BURKHEAD, GORDON WILLIAMSON AND LINDA PIERSON, individually, and on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NORCOLD, INC., a Delaware corporation; THETFORD CORPORATION, a Delaware corporation; THE DYSON-KISSNER-MORAN CORPORATION, a Delaware corporation; and DOES 1 to 50, inclusive.

Defendants.

Case No.: SACV14-06759

Assigned for all purposes to the Honorable Josephine Staton

Date Action Filed: August 28, 2014

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TABLE OF CONTENTS

I. INTRODUCTION 1
II. GENERAL PROCEDURAL HISTORY 1
A. Pleadings Phase 2
B. Discovery and Motion Phase 2
C. Class Certification Motion Phase 3
D. Mediation Phase 3
E. Settlement Reached 4
F. Settlement Approval Phase 6
III. VALUE OF THE SETTLEMENT 8
IV. CLASS COUNSEL'S TIME AND EXPENSES 9
V. FEE PROVISIONS IN THE SETTLEMENT AGREEMENT 9
VI. FEE AND EXPENSE AWARD STANDARDS 10
A. Methods of Awarding Attorneys' Fees and Costs in Class Actions. 10
B. Percentage of the Common Fund Method 11
1. Class Counsel are Entitled to Compensation Based Upon the Benefits Created by the Litigation for the Class. 11
2. In Determining The Value Of The Settlement, Courts Consider Both The Monetary And Non-Monetary Benefits Conferred On The Class 12
3. Courts in the Ninth Circuit Apply a Benchmark Fee of 25% 13
4. The 25% Benchmark Fee Should Be Applied in This Case. 14
a. The Results Achieved for the Class Support the Fee Requested 14
b. The Substantial Risks and Complexity of the Litigation Support the Requested Award. 15
c. The Contingent Nature of the Fee and Financial Burden Carried by Plaintiffs Support the Requested Award. 19
d. The Skill Required and Quality of Work Performed by Counsel Support the Requested Award. 20
e. The Length the Case has Transpired Supports the Requested Award. 21

f. Awards Made in Similar Cases Support the Requested Award...21

C. The Lodestar Cross-Check Confirms the Requested Fee's Reasonableness.22

D. Class Counsel's Expenses Are Reasonable..24

E. Service Awards to Class Representatives Are Appropriate……………...24

F. An Award Of Compensation To The Class Representatives Is Appropriate.24

VII. CONCLUSION.. 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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25
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28

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118 F.R.D. 534 (S.D.Fla.1988) 22

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465 U.S. 886 (1984) 11, 25

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2 150 F.3d 1011 (9th Cir. 1998) 10, 13
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4 461 U.S. 424 (1983) 12
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16 109 F.3d 602 (9th Cir. 1997) 13
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22 225 F.R.D. 436 (S.D.N.Y.2004) 17, 18
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28 559 F. Supp. 2d 1036 (N.D. Cal. 2008) 12, 15, 19, 24

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2 852 F. Supp. 1437 (N.D. Cal. 1994) 12
3 *In re Pacific Enters. Sec. Litig.*,
4 47 F.3d 373 (9th Cir. 1995)............ 14, 21
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6 146 F. Supp. 2d 706 (E.D. Pa. 2001) 22
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10 912 F. Supp. 2d 1178 (D.N.M. 2012) 17
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19 *Knight v. Red Door Salons, Inc.*,
20 2009 WL 248367 (N.D. Cal. Feb. 2, 2009) 20
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22 No. S222996, slip op. (Cal., Aug. 11, 2016) 12
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6 886 F.2d 268 (9th Cir. 1989) 10, 11
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18 327 F.3d 938 (9th Cir. 2003) 10, 13, 24
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24 No. 8:10 ml-2151 (C.D. Cal. June 17, 2013) 21, 24
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2013 WL 6623224 (N.D. Cal. Dec. 16, 2013) 21

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I. INTRODUCTION

In a class action, the attorneys whose work is responsible for creating the common fund of settlement benefits for the Class are entitled to be compensated for their time, effort and risks litigating the case on a contingent basis. The proposed settlement now before this Court represents an outstanding outcome given the significant risks that the Class faced in both proving their claims and in securing the settlement benefits. The settlement creates a valuable common fund of both monetary and non-monetary benefits with an aggregate value exceeding $50 million, from which Class Counsel's attorneys' fees and costs, as well as proper service awards to the court-appointed Class Representatives can be paid. For their success in achieving the settlement, Class Counsel requests that the Court award attorneys' fees, costs and reimbursement of expenses in the amount of $9,000,000 to be paid from the settlement's Monetary Fund in accordance with Section VII of the Settlement Agreement ("SA"). (Doc. 412-1.). Class Counsel further requests that the Court allocate the fees, as may be necessary, pursuant to Section VII(C). The requested attorneys' fee represents 25% of the settlement's $36,000,000 Monetary Fund, and represents an even smaller percentage of the total Common Fund once all non-monetary benefits of the settlement (i.e., the extended warranties provided to all N6 and N8 owners) are considered. The requested fee, therefore, falls well within the Ninth Circuit's 25% benchmark and represents a reasonable request given the significant risks, contentious and prolonged objections and the excellent results.

Class Counsel also request that the Court approve service awards for the Class Representatives based on their time, up to a $7,500 maximum. The purpose of such awards is to compensate the Class Representatives for the time and risk undertaken by them on behalf of the Class; without their efforts, the settlement would not be possible.

II. GENERAL PROCEDURAL HISTORY

This litigation has been ongoing for nearly four years. As shown below and in greater detail in the Robinovitch and Ridout Declarations filed in support of this motion, the work required by Class Counsel to secure the settlement benefits has been substantial.

1 **A. Pleadings Phase**

2 This action, challenging Defendants' sale and distribution of defective gas
3 absorption refrigerators and cooling units was initially filed in the Orange County
4 Superior Court on December 12, 2012. Plaintiffs brought state consumer fraud and
5 breach of warranty claims contending that Defendants Norcold, Inc., Thetford, Corp. and
6 Dyson Kissner Moran Corp. ("Defendants") manufactured and sold gas absorption
7 refrigerators and cooling units for use in recreational vehicles ("RV's") that were prone
8 to premature corrosion in the boiler tubes, creating the risk of leaks whereby flammable
9 gases could escape. While prior to the commencement of the action Defendants had
10 undergone a series of recalls and retrofits to attempt to address the problem under the
11 supervision of the National Highway Transportation Safety Administration ("NHSTA"),
12 Plaintiffs claimed that those actions did not go far enough and that certain common
13 defects and related fire risks remained. Defendants denied all allegations, claimed that
14 the recalls were effective and approved by NHTSA and to the extent any issues remained,
15 any proceedings should occur before the NHTSA. Further, Defendants denied that either
16 of the two parent companies, DKM or Thetford, were liable under any alter-ego theory.

17 **B. Discovery and Motion Phase**

18 Shortly after the case was removed, the parties commenced fact and expert witness
19 discovery. Defendants served several sets of Interrogatories and Request for Production
20 on each Plaintiff and took the depositions of twenty-two (22) of the Named Plaintiffs.
21 These depositions took place across the country, with several named Plaintiffs travelling
22 to California for depositions. Plaintiffs, in turn, took numerous depositions of the
23 Defendants' corporate representatives and other fact witnesses. Through both formal and
24 informal discovery, Plaintiffs also sought to obtain Defendants' witnesses prior testimony
25 and expert reports from other leak cases. (Doc. 130.)

26 In addition, Plaintiffs hired several expert witnesses to opine on issues such as gas
27 absorption refrigerator construction and operation, the corrosive nature of the boiler
28 tubes, metallurgy, the effectiveness of the recalls and retrofits, and administrative

procedures before the NHSTA. (Docs. 122, 123, 124.) Defendants, in turn, presented their own experts to rebut Plaintiffs' experts' opinions. (Docs. 142, 143, 145, 148.)

The discovery phase involved numerous discovery disputes some of which eventually required motions to compel. (*See*, *e.g.*, Docs. 103, 105, 107, 130, 168.) In all, Plaintiffs served the maximum amount of interrogatories and over 618 Requests for Production (206 on each Defendant). Ultimately, Plaintiffs received and reviewed over 166,000 pages of responsive documents. Robinovitch Decl. ¶13.

C. Class Certification Motion Phase

In late December 2013, following nearly a year of discovery, Plaintiffs filed their initial motion for class certification. (Doc. 52.) Given the numerous legal and factual issues presented, preparing the motion was a significant endeavor. Each party supported their respective positions with the testimony of several expert witnesses and each of those expert's positions were subsequently challenged. (Docs. 75-81, 92-98, 110, 114-115, 122-124, 141-145, 148, 154-160.) A revised certification motion refining arguments was filed on May 5, 2014. (Docs. 117, 145.) Defendants' strenuously objected to class certification, citing cases that they argued were analogous where class certification was either denied or had proceedings transferred to the NHTSA. (Docs. 73, 134.)

In April 2014, it was also discovered that Defendants lacked insurance coverage for the class claims. (Docs. 109, 112.) This revelation was concerning and increased the risks of continued litigation, knowing that there likely was not another deep-pocket to pursue if a significant judgment was obtained which Norcold could not satisfy.

D. Mediation Phase

As the initial June 13, 2014 class certification motion hearing date approached, the risks attendant to that motion were evaluated by both sides. Robinovitch Decl. ¶20. (Doc. 185.) After discussions, the parties agreed to enter private mediation before the hearing to see if their disputes could be resolved via a class settlement. The parties agreed to mediate the dispute before the Honorable Judge Carl West (Ret.) at JAMS in

1 Los Angeles starting on June 4, 2014. Eventually, six days of mediation sessions
2 overseen by Judge West took place: June 4, 5, 9, 2014 and July 7, 17 and 18, 2014. *Id.*
3 During the course of these mediation sessions, issues pertaining to Defendants'
4 financial condition, lack of insurance for the class claims, loan covenants and inability to
5 fund a settlement in the range to be sought at trial, became significant. Defendants
6 produced financial data and reports and brought their outside restructuring consultant to
7 Los Angeles to explain these matters to all Plaintiffs' counsel and Judge West. West
8 Decl. (Doc. 191.) Plaintiffs' Class Counsel, in turn, retained an experienced expert
9 forensic accountant to evaluate the information presented, make inquiries and advise
10 them as to Defendants' likely ability to fund a significantly higher settlement before
11 reasonably considering other options. *See* Brandlin Decls. (Docs. 189, 334.)
12 During this period disputes arose with former co-counsel, Terrance Beard, over the
13 negotiations and possible settlement. Ridout Decl. at ¶¶ 31-34. (Doc. 186.) Beard did not
14 participate in certain mediation sessions with Judge West and decided instead, to object
15 to the settlement being negotiated. Among other things, it appeared to Class Counsel that
16 Mr. Beard discounted certain significant litigation risks, including the risk of bankruptcy
17 filings, disregarded or discounted the financial information provided, took inconsistent
18 positions regarding the existence of insurance coverage for the class claims, circulated
19 questionable proposals, and indicated personal animosity for the Defendants and their
20 Chairman. Plaintiff Jeff Etter, who joined Beard, indicated: "Personally I would prefer to
21 see Norcold / DKM in bankruptcy and out of business and just forget about accepting a
22 check for $15 to $50 dollars." (Docs. 181-182, 203.) In the midst of this, another Judge
23 denied class certification in a case involving similar issues, *Landen v. Electrolux Home*
24 *Prods.*, No. 13-cv-1033 (C.D. Cal., July 1, 2014), resulting in further disagreements.
25 These developments added to the risks already present.
26 **E. Settlement Reached**
27 The settling parties signed a settlement term sheet on or about July 22, 2014.
28 (Doc. 172.) The settlement was the result of a process where Class Counsel carefully

1 considered and balanced the numerous risk factors during intense and lengthy
2 negotiations before an experienced mediator, of which, Defendants inability to satisfy a
3 judgment in the range demanded (over $700M), and their lack of insurance for the class
4 claims, were only two. The following factors, any one which could have gutted the
5 class's claims, were part of the settlement evaluation: (1) the risk of losing the class
6 certification motion t; (2) the risk of any class losing on the merits at trial or at summary
7 judgment; (3) the risk that any choice of law analysis threatened to overwhelm any class
8 procedure as certain Plaintiffs bought or register their units in states other than where
9 they reside; (4) the risk the Court would apply the prudential mootness doctrine to
10 dismiss class' claims so that any dispute over the effectiveness of the recalls could be
11 handled administratively by the NHTSA; (5) risks that classwide tolling of lapsed claims
12 could not be established; (6) risks that the standard for establishing classwide damages
13 under *Comcast* could not be satisfied; (7) the risk of class representatives from key states
14 passing away (as unfortunately, Dennis Osha and Sandra Burkhart did), becoming
15 unavailable (Les Crawshaw), or not being able to be presented for deposition or as
16 adequate class representatives (Michelle Curtis); (8) concerns related to challenges to
17 Plaintiffs' experts at AEGI and their ability to demonstrate a common defect across all
18 models; (9) risks related to Defendants' ability to satisfy a judgment or pay a larger
19 settlement; (10) risks related to the inability to establish alter-ego liability against the two
20 parent defendants, leaving only the smallest defendant (Norcold) to proceed against; (11)
21 the risk of cost shifting if Defendants were ultimately to prevail; (12) risks related to the
22 need to prove a common defect when Defendants would attempt to present evidence
23 showing that incorrect installation of the retrofits were the cause of certain reported fires
24 (*See generally* Cutwright-Klien Decl., Doc. 75); (13) risks Defendants' assets had been
25 pledged to secured creditors; (14) other difficulties proving liability (*See generally* J.
26 Petty-Gallis Dec., Doc. 142); and, (15) risks as to how the court would interpret the fail
27 rate reported on the Incident Log regarding the 1200 series units and lower fail rates on
28 the N6 and N8 units. *See generally* Robinovitch Decl. at ¶¶ 26-44 (discussing risk factors

and other cases where similar risks materialized). Throughout the mediation process, Class Counsel attempted to weigh and balance the risk factors outlined and secure the best settlement for the Class, while avoiding potential pitfalls, all within the unique circumstances of the case.

F. Settlement Approval Phase

The initial Settlement Agreement and Motion for Preliminary Approval were filed on September 12, 2014. (Docs. 184-191, 196.) Settling Plaintiffs / Class Representatives supported the settlement. Mr. Beard, in turn, objected on behalf of the "Non-Settling Plaintiffs." (Docs. 176, 200, 202.)

On October 10, 2014, the Court heard Settling Plaintiffs' Motion for Preliminary Approval. The Court raised five issues that it felt needed to be adjusted before the motion could be granted. The initial motion was therefore denied without prejudice. (Doc. 221.) The Court's order provided guidance as to how the issues could be resolved and provided the parties time to file a new motion. Class Counsel worked diligently to address the issues raised in the Court's October 14, 2014 order and promptly filed a second Motion for Preliminary Approval on November 7, 2014. (Doc. 228.)

That motion was objected to as well by the Non-Settling Plaintiffs. (Docs. 259, 260.) The Non-Settling Plaintiffs simultaneously brought a motion seeking to conduct certain discovery of Defendants. (Docs. 239, 243.) On December 9, 2014 the Court granted the motion, in part, allowing certain limited discovery pertinent to Defendants' finances and insurance coverage for the class claims. (Doc. 275) Magistrate Judge Block oversaw proceedings related to the production of this discovery. (Doc. 287.)

During this period financial reports, financing agreements, insurance policies and other documents were produced by Defendants. Mr. Brandlin was deposed. (Doc. 321.) Mr. Brandlin's conclusions after reviewing the additional materials produced remained consistent with the positions that he took at the mediation in July 2014. Brandlin Decl. (Doc. 334.) Supplemental briefs and expert reports pertaining to the second Motion For Preliminary Approval were then filed. (Docs. 329, 331, 333-335.)

On June 15, 2015 the Court denied the second Motion for Preliminary Approval, again without prejudice. In that Order, the court identified three discrete terms that it felt still needed to be modified or supported by additional evidence, and provided guidance as to how those issues could be addressed. (Doc. 402.) At the same time, the Court recognized "[a]nd the Court does not agree with Non-Settling Plaintiffs that Defendant are capable of paying $20 million to $40 million more per year." (Doc. 402 at 27.) Further, while the December 9, 2014 Order allowed Mr. Beard a further opportunity to conduct discovery regarding insurance coverage for the class claims, no such evidence was presented. *See* Order, June 15, 2015, *19 (Doc. 402).

Following the June 15 Order, Class Counsel promptly contacted Judge West and entered additional negotiations with Defendants to revise the settlement so as to address the Court's concerns on those three issues, and provide the Court with the additional information requested. Ultimately, Class Counsel: (1) negotiated a three million dollar increase in the settlement's Monetary Fund, bringing it to $36 million, with the additional $3 million being paid in a fourth annual installment; (2) modified the allocation plan so that N6 and N8 series owners making claims received five shares in the Monetary Fund instead of three, and; (3) no longer presented certain named Plaintiffs who had alleged additional individual claims as putative class representatives.

On September 4, 2015, Settling Plaintiffs filed their third Motion for Preliminary Approval, along with a Revised Settlement Agreement memorializing these three changes. (Docs. 411, 412.) Defendants also filed papers in support of the revised Motion for Preliminary Approval, including the Declarations of Norcold's President Kevin Phillips and Norcold Independent Director, Joseph J. Farnan, a former judge of the U.S. District Court for the District of Delaware. (Docs. 418, 419.) These declarations further confirmed the significant risks facing the class as they indicated that absent approval of this settlement, Norcold would pursue other options it had. Phillips Decl. at ¶9. Despite this, Non-Settling Plaintiffs again objected to the settlement. (Docs. 429, 430.)

On October 23, 2015, the Court held a hearing on the third Motion for Preliminary Approval. (Doc. 439.) Certain adjustments to the allocation plan were then memorialized in addendums to address the Court's comments at the hearing. (Docs. 440, 444, 447, 449, 455.) Non-Settling Plaintiffs objected to these as well. (Docs. 441, 445, 451.)

On March 29, 2016, the Court granted Settling Plaintiff's Motion for Preliminary Approval, establishing a schedule for dissemination of the class notice and scheduling the final Fairness Hearing for September 16, 2016. (Docs. 468, 473-474.) Since then, Plaintiffs' Class Counsel have worked diligently to implement the settlement notice program and advise as many class members as possible about their ability to file a claim and share in the settlement's Monetary Fund.

III. VALUE OF THE SETTLEMENT

The Settlement creates a common pool of monetary and non-monetary benefits for the members of the settlement class, which can be valued at more than $50 million. There are three primary features of the common fund.

The primary feature of the settlement is the establishment of a $36 million Monetary Fund from which claims can be made by class members to receive shares. Depending on the type of refrigerator or cooling unit owned and whether any repair costs were incurred, claimants will be awarded a weighted number of shares in the Monetary Fund and paid accordingly in four installments. (Docs. 412-1, 447-1, 468.) As the entire $36 million will be distributed to the Class, without any reversion to Defendants, this represents a significant benefit created by Class Counsel's efforts.

Next, in addition to the ability to file claims and receive five shares in the settlement's Monetary Fund, all owners of N6 and N8 units will automatically receive a three-year extended warranty against cooling unit leaks. While a non-monetary benefit, the value of these warranties is significant and adds to the aggregate value of the common fund. Class Counsel estimate the value of the warranties based on retail prices. Defendants sell three-year extended warranties of N6 and N8 refrigerators at a retail cost of $199.95. Roberts. Decl. at ¶14. (Doc. 420.) While the warranties in this settlement are

1 limited to cooling unit repairs, as opposed to coverage for issues unrelated to the alleged
2 defect, such as if a door fell off due to a problem with the hinge or the interior light burnt
3 out, a significant percentage of that value can be ascribed to the cooling unit, since it is
4 one of the primary mechanical parts of the refrigerator. This is demonstrated, in large
5 part, by the fact the comparative cost of a replacement cooling unit to a new refrigerator
6 exceeds 50%. Robinovitch Decl. at n 2. Even if just 20% of the retail cost of the warranty
7 were attributed to the limited cooling unit warranty provided here, a conservative
8 estimate, the value to the 359,197 N6 and N8 class members would still be significant.
9 (($199.95 x 20%) x 359,197 = $14.4 million.) Finally, the settlement provides additional
10 warnings to the class. Courts such relief positively in evaluating settlements. *See e.g.*
11 *Beck-Ellman v. Kaz USA, Inc.*, 2013 WL 21302326 *3 (S.D. Cal. June 11, 2013); *Roberts*
12 *v. Electrolux Home Prods*. 2014 WL 4568632 at *6,12 (C.D.Cal. Sept 11, 2014).

13 Based on the foregoing, the aggregate value of the common settlement fund's
14 monetary and non-monetary features, can be reasonably estimated at more than $50
15 million. While Class Counsel seek fees and incentive awards to be paid only from the
16 settlement's $36 million Monetary Fund, consideration of the additional non-monetary
17 benefits is relevant as it shows that the fee request is below the Ninth Circuit's 25%
18 benchmark and therefore, is more than reasonable.

19 **IV. CLASS COUNSEL'S TIME AND EXPENSES**

20 The work performed by Class Counsel is described in detail in the Robinovitch and
21 Ridout Declarations. In total, Class Counsel have accumulated an unaudited lodestar
22 totaling $4,233,553.55 at historical billing rates, and incurred $180,462.45 in total
23 expenses, for a total of $4,414,016.00. Further, the lodestar will increase (and any
24 multiplier will consequently decrease) given the future work to be performed during the
25 three year period in which the settlement is implemented, as well as possible appeals.

26 **V. FEE PROVISIONS IN THE SETTLEMENT AGREEMENT**

27 Section VII of the Settlement Agreement contains provisions permitting counsel to
28 petition the Court for an award of reasonable attorneys' fees and costs up to 25% of the

$36 Monetary Fund. SA §VII(B)(Doc. 412-1). Whether the percentage of the fund or lodestar methodology is applied, the final determination of the total fee award and any allocations between the firms involved, of course, lies within the Court's discretion. SA §VII(B, E). Due to the structured payment schedule where the settlement funds are to be distributed over four (4) annual installments, the distribution of any attorneys' fees and costs awarded follows that same distribution schedule. SA §VII(D). Thus, any fees awarded, will not be fully paid for at least another three years. Finally, the Settlement Agreement allows each class representative to petition for an incentive award up to $7,500. SA §VII(E). Because of the smaller amounts involved, those awards however, are to be paid out of the first installment.

VI. FEE AND EXPENSE AWARD STANDARDS.

A. Methods of Awarding Attorneys' Fees and Costs in Class Actions.

In the Ninth Circuit, a district court may ascertain the reasonableness of an award of attorneys' fees from a common fund by applying either of two methodologies: (1) the percentage-of-the-benefit method; or, (2) the lodestar with multiplier method. *Fischel v. Equitable Life Assurance Soc'y of U.S.,* 307 F.3d 997, 1006 (9th Cir. 2002); *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

Generally, under the percentage method, a court assesses the amount of the common fund by determining the value of the benefits that the settlement agreement confers upon the class and then awards a percentage of the fund as attorneys' fees. *Staton v. Boeing Co.*, 327 F.3d 938, 974-75 (9th Cir. 2003). Under the lodestar method, a court "calculates the fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and then enhancing that figure, if necessary, to account for the risks associated with the representation." *Paul, Johnson*, 886 F.2d at 272. Regardless of which of the two methods is used, the award must be reasonable when considered in light of the circumstances of a particular case. *In re Washington Public Power Supply System Sec. Litig.,* 19 F.3d 1291, 1294 n. 2 (9th Cir. 1994)("*WPPSS*")("Whether a court applies

the lodestar or the percentage method, we require only that fee awards in common fund cases be *reasonable* under the circumstances").

B. Percentage of the Common Fund Method

1. Class Counsel are Entitled to Compensation Based Upon the Benefits Created by the Litigation for the Class.

The Supreme Court has repeatedly held that in case where a common fund of settlement benefits is secured for a Class it is appropriate to determine counsel's fee as a percentage-of- the-fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the common fund doctrine … a reasonable fee is based on a percentage of the fund bestowed on the class.") The common-fund doctrine's fundamental purpose is to spread the burden of a party's litigation expenses among those who are benefited. *Paul, Johnson*, 886 F.2d 268, 271 (9th Cir. 1989). As the Supreme Court explained:

> [P]ersons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing v. Van Gemert, 444 U.S. 472, 478 (1980) (citation omitted).

As the Ninth Circuit has further observed, "[t]here is nothing unfair about contingency enhancements in common fund cases because of the equitable notion that those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *WPPSS,* 19 F.3d at 1300.[1]

The Ninth Circuit has expressly approved the percentage-of-recovery approach, and this approach has become the prevailing method for awarding fees in common fund cases within the Ninth Circuit.[2] The percentage method is desirable because it most fairly

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[1] *See*, *e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery"); *Paul, Johnson*, 886 F.2d at 272.

[2] *In re Omnivision Tech.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) ("Despite this

correlates the compensation of counsel with the benefits conferred upon the class. *See, e.g., In re Activision Sec. Litig.,* 723 F.Supp. 1373, 1374–77 (N.D.Cal.1989) (collecting authority and describing benefits of the percentage method over the lodestar method). It aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. *In re Oracle Sec. Litig*., 852 F. Supp. 1437, 1454 (N.D. Cal. 1994). Further, it decreases the burden imposed on courts by eliminating a detailed and time-consuming lodestar analysis and assuring that the beneficiaries do not experience undue delay in receiving their share of the settlement.[3] It is also consistent with the practice in the private marketplace where contingent-fee attorneys are customarily compensated by a percentage of the recovery. *See Mashburn v. National Healthcare, Inc.,* 684 F.Supp. 679, 687 (M.D.Ala.1988) ("[A] financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time consuming cases for which they may never be paid.")

2. In Determining The Value Of The Settlement, Courts Consider Both The Monetary And Non-Monetary Benefits Conferred On The Class

Under the percentage of the fund method, the percentage fee is measured against the total benefit conferred upon the class. In determining the value of the settlement, courts consider the both the monetary and non-monetary benefits conferred on the class. *Loring v. City of Scottsdale, Arizona*, 721 F.2d 274, 275 (9th Cir. 1983)(reversing and remanding fee order where district court "failed to take into account the present

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discretion, use of the percentage method in common fund cases appears to be dominant."); *In re Oracle Sec. Litig.,* 131 F.R.D. 688, 694 (N.D. Cal. 1990) ("Indeed, when compared to the murky criteria of the lodestar approach, contingent fee compensation is vastly superior."); *Gerstein v. Micron Tech.*, 1993 U.S. Dist. LEXIS 21215, at *14 (D. Idaho Sept. 10, 1993) ("The Ninth Circuit Court of Appeals favors the use of the percentage method of awarding attorney fees in common fund cases").

[3] *See*, *e.g*., *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (holding that a request for attorneys' fees should not result in a "second major litigation"); *Activision*, 723 F.Supp. at 1374-77(same*); In re Cathode Ray Tube Antirust Liig.*, 2016 WL 4126533 *7 (N.D. Cal. Aug 3, 2016)(In conducting a cross-check "trial courts need not, and indeed should not, become green-eyeshade accountants. Rather, the Court seeks to "do rough justice, not to achieve auditing perfection." *citing Fox v. Vice*, 563 U.S. 826, 828 (2011)). *See also Lafitte v. Robert Half Int'l Inc.*, No. S222996, slip op. *28-30 (Cal., Aug. 11, 2016).

nonmonetary benefit bestowed upon plaintiffs' class"); *Staton*, 327 F.3d at 973-74, citing *Hanlon*, 150 F.3d at 1029 (value of non-monetary benefits may be considered as part of the value of a common fund). *See also Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 392 (1970) (Court concluded non-pecuniary benefits are within the scope of the "common fund" doctrine); *Roberts v. Electrolux Home Prods*. 2014 WL 4568632 at *6,12 ((C.D.Cal. Sept 11, 2014) (same).

Further, courts recognize that in claims-made settlements, the settlement benefits are conferred on the entire class. As the Supreme Court explained:

> Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery. …Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.

Boeing, 444 U.S. at 480-82. *See also Williams v. MGM-Pathe Comm. Co*., 129 F.3d 1026 (9th Cir. 1997). As a result, the value of the entire fund created in a claims-made settlement can be used to determine an appropriate fee under the percentage method.

3. Courts in the Ninth Circuit Apply a Benchmark Fee of 25%.

In common fund cases such as this, the Ninth Circuit has "established 25% of the common fund as the 'benchmark' award for attorney fees." *Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1376 (9th Cir. 1993).[4] The benchmark should only be adjusted "when special circumstances indicate that the percentage recovery would be either too small or too large …." *Id. citing Six Mexican Workers*, 904 F.2d at 1311. In *Vizcaino*, the Ninth Circuit articulated the following non-exhaustive factors should be taken into account in

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[4] *See also In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 942 (9th Cir. 2011); *Hanlon*, 150 F.3d at 1029; *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Vizcaino*, 290 F.3d at 1047; *Craft v County of San Bernardino*, 624, F.Supp.2d 1113, 1127 (C.D. Cal. 2008); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig*., 109 F.3d 602, 607 (9th Cir. 1997).

selecting the benchmark or other rate: (1) the results for the class; (2) the risk for its counsel; (3) non-monetary benefits; (4) market rate or reasonable expectation of fee award; and (5) the burden on class counsel of prosecuting the case. *Vizcaino*, 290 F.3d at 1048-50. *See also In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995).

4. The 25% Benchmark Fee Should Be Applied in This Case.

The 25% benchmark is the proper measure here because this is a true common fund settlement where fees are only sought to be paid from the $36 million, non-reversionary, Monetary Fund created. As explained in *Craft*, 624 F. Supp. 2d at 1127:

> In awarding percentages of the class fund, courts frequently take into account the size of the fund. Often, but not always, fees of less than 25% will be awarded in megafund cases (cases of $50 Million or more)… Cases of under $10 Million will often result in fees above 25%... For cases of the size of this fund, 25% is very much the norm. This case is neither a megafund case in which fees more commonly will be under the 25% benchmark, or an under $10 Million case in which they are often more than 25%. Thus, 25% of the fund is the appropriate percentage absent some strong reason to make an upward or downward departure.[5]

Application of the other relevant factors also demonstrates good cause to award the 25% benchmark, as well as the absence of any "special circumstances" or "strong reason" justifying a downward departure.

a. The Results Achieved for the Class Support the Fee Requested.

The settlement in this case represents an outstanding outcome given the significant risks that Plaintiffs faced in both proving their highly contested claims, obtaining class certification, and in both securing and then preserving the settlement benefits. SA §II(A)(B)(Doc. 412-1). The primary feature of the settlement is the establishment of a $36 million, non-reversionary Monetary Fund from which claims can be made by class members to receive certain shares. SA §II(D)(1)(i). All class members have the ability

[5] . In *Craft*, the court granted an award of 25% of a $25.550 million settlement fund, resulting in a 5.2 multiplier, plus reimbursement of costs. 624 F. Supp. 2d at 1125, 1127.

1 to file a simple claim form attesting to the particular model they own or owned and
2 whether any replacement or repair costs were incurred. Pursuant to the Allocation Plan
3 those who file timely claims will be awarded a weighted number of shares in the
4 Monetary Fund and paid accordingly in four installments. Settlement Agreement
5 §II(D)(4)(iii) and Revised Addendum (Docs. 412-1, 447-1, 468). As the entire $36
6 million fund will be distributed, without no portion of that reverting to Defendants, this
7 represents a significant benefit to the settlement Class. If any checks are undeliverable or
8 go uncashed, any residual funds will be applied to a *cy pres* beneficiary (Public Citizen or
9 an alternative charity approved by the Court), or escheat to the state. SA §II(D)(2)(iv).
10 The Monetary Fund will also be used to pay costs of notice, administrative costs,
11 attorneys' fees and costs and any incentive awards to the Class Representatives.
12 The non-monetary benefits are also important. In addition to the ability to file
13 claims and receive five shares in the settlement's Monetary Fund, all owners of N6 and
14 N8 units will automatically receive a three-year extended warranty against cooling unit
15 leaks. While a non-monetary benefit, the value of these warranties is significant and adds
16 to the aggregate value of the common fund. Reduced to monetary terms, this benefit is
17 valued at over $14 million based on the retail price of Defendants' extended warranties.
18 The warnings are another benefit to be considered. The results achieved support the
19 benchmark award requested.

20 **b. The Substantial Risks and Complexity of the Litigation Support the Requested Award.**

21 The request is reasonable in light not only of the result achieved, but also the
22 significant risks involved in litigating this complex matter, securing and then protecting
23 the settlement fund for the benefit of the Class. The risk that further litigation might
24 result in the members of the Class not recovering at all is an important factor in
25 determining a fair fee award. *Omnivision*, 559 F. Supp. 2d at 1047; *WPPSS*, 19 F.3d at
26 1299-1301; *In re Heritage Bond Litig.*, 2005 WL 1594389 *14 (C.D. Cal. June 10, 2005)
27 ("[t]he risks assumed by Class Counsel, particularly the risk of nonpayment or
28 reimbursement of expenses, is a factor in determining counsel's proper fee award").

Although Class Counsel believed that the Plaintiffs' claims were strong, this case nevertheless presented significant risks to the Class which threatened any potential recovery. *See* Robinovitch Decl. at ¶¶26-44 (describing risks). From its inception, this case was intensely litigated as Defendants repeatedly challenged the sufficiency of Plaintiffs' claims on the merits, challenged discovery requests, vigorously contested Plaintiffs' arguments in favor of class certification, denied any liability and challenged the court's jurisdiction in favor of administrative procedures before the NHSTA. The parties fought each other virtually every step of the way, only to then spend nearly 20 months addressing the series of objections presented by Non-Settling Plaintiffs. Litigating this case, therefore, required immense time, energy and resources from Class Counsel, all which was undertaken on a contingent basis.

The lawsuit initially sought a recovery equal to the amount necessary to replace each class members' refrigerator or cooling unit, among other relief – a cost of more than $700 million. While full replacements of class members' Norcold gas absorption refrigerators and cooling units (non-Norcold units or the cash equivalent, allowing class members the opportunity to make a choice of how to best address the issue) were originally sought, as the litigation advanced information was learned by Class Counsel, risks became more acute and it eventually became evident that obtaining a result in the high hundreds of millions for the Class was remote. The expert forensic accountant retained by Class Counsel confirmed that would be highly unlikely for a company in Norcold's position to pay anything close to this amount before exploring other options, such as those available in bankruptcy court. *See* Brandlin Decls. (Docs. 190, 334). Thus as the Ninth Circuit recognized in similar circumstances in *Torrisi*, "[I]it is a double contingency; first, they must prevail on the class claims, and then they must find some way to collect what they win." *Torrisi*, 8 F.3d at 1376.

The settlement reached was the limit that Norcold's officers and directors attested Defendants could pay before other available options they had to address the claims would be pursued. *See* Phillips Decl. ¶¶6-9 (Doc. 419); Farnan Decl. ¶6 (Doc. 418); Docs. 411,

414. Further no insurance coverage was found to exist for the class claims. (Docs. 109, 112.) Therefore, the settlement here, while not large enough to fund the full replacement (plus shipping and installation) of each class member's cooling unit, is in the range of what the financial documents reviewed showed Defendants could realistically pay.

The Ninth Circuit has held that the defendant's ability to pay a potential judgment and risk of bankruptcy is a proper factor to be considered in evaluating the risk of continuing litigation. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1295 (9th Cir. 1992)*(citing Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625, 631 (9th Cir. 1982). As the recognized in *Torrisi*, 8 F.3d at 1376, the financial condition of a settling defendant is a predominating factor in considering the fairness of a proposed settlement when a larger award carries with it the real threat of bankrupting the defendant, leaving "little if anything for the class members." *See Hester v. Vision Airline, Inc.*, 2014 WL 3547643 at *8 (D.Nev., July 17, 2014)("The greatest risk, however, was the likelihood that Vision would file for bankruptcy, which would have left little if anything for class members." *citing Torrisi,* 8 F.3d at 1376).[6]

In *In re Thornburg Mortg., Inc.*, 912 F. Supp. 2d 1178, 1206 (D.N.M. 2012) the Court approved a settlement considering the fact that "limited resources [were] available to satisfy any future judgment in the Plaintiffs' favor . . . [with] limited insurance proceeds . . . available to fund a settlement or satisfy a judgment." In also approving class counsel's fee petition, the Court recognized the heighted risks that counsel faced and the added challenges faced when attempting to preserve at least some pool of benefits for the class:

> Although the $2,000,000.00 Settlement Fund is not as high as members of the class hoped to receive, and is less than Co–Lead Counsel wanted upon

[6] *See In re EVCI Career College Sec. Litig*, 2007 WL 2230177, *8 (S.D.N.Y. July 27, 2007); *In re Warner Commc'ns Sec. Litig.*, 618 F.Supp. 735, 746 (S.D.N.Y.1985) (where defendant cited to risk of bankruptcy, "certainty of payment of the settlement is advantageous to the class"); *In re Global Crossing,* 225 F.R.D. 436, 460 (S.D.N.Y.2004) ("without the proposed settlement, class members might well receive far less than the settlement would provide to them, even if they could prevail on their claims").

> filing this action, it is a significant award, all the more so given the real likelihood that the Class could receive nothing. Class counsel was required to work around Thornburg Mortgage's various financial difficulties. The Defendants have contentiously fought the litigation, and it is likely that, had the case not settled, the Class may have been unable to enforce any judgment it may have received. Crane, Melfi, Wildner, and Reed all argue that the award is too small in light of their damages. Yet, Co–Lead Counsel fought through significant difficulties in securing a recovery for the Class at all. While no party disputes that the Class hoped to receive more, that the action has been brought at all and has survived to this stage weighs in favor of approving the requested award for attorneys' fees.

Id. at 1250. Courts have held that the presence of such risks justify fee awards above 25%. *See Heritage Bond*, 2005 WL 1594389 at *13-15 (awarding a 33 1/3 % fee in case where Defendant had limited ability to pay, various related entities were insolvent and all insurers except one disclaimed coverage; *Hester*, 2014 WL 3547643 at *11 (court awarded 30% fee noting "Class Counsel has achieved an exceptionally favorable result… in view of Vision's threatened bankruptcy, which would likely result in little recovery, if any"); *In re Safety Component Sec. Litigs,* 166 F.Supp.2d 72 100 (D.N.J 2001) (court found that threat of non-payment from "D & O" insurance carrier "weigh[ed] overwhelmingly" in favor of approval of fee request of one-third of a common fund). *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000) (court awarded 33 1/3 % fee and 2.04 multiplier where: "The risk of nonpayment in this case was acute. The settlement represented more than Whitman Medical Corporation's total profits over the past five years. …Whitman lacked significant unencumbered hard assets against which plaintiffs could levy had a judgment been obtained.")

The risks presented in the case were compounded by the series of objections filed by the Non-Settling Plaintiffs who at each step sought to derail this settlement, even if a bankruptcy resulted and the settlement fund was taken off the table. Notwithstanding

these challenges, Class Counsel worked hard to secure the settlement and as a result Class Members will share the settlement benefits, including the $36 million fund. The effort required well supports the requested attorneys' fee and expense award.

c. The Contingent Nature of the Fee and Financial Burden Carried by Plaintiffs Support the Requested Award.

Attorneys are entitled to a larger fee when their compensation is contingent in nature. *See Vizcaino*, 290 F.3d at 1048-50. This fee enhancement stems from the "established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases."[7] Indeed, there have been many class actions in which class counsel took on the risk of pursuing claims on a contingency basis, expended thousands of hours, yet received no remuneration whatsoever despite their diligence and expertise. A good example of this is *In re Whirlpool Corp. Front Loading Washer Products Liability Litig.*, No. 1-08-wp-6500 (N.D. Ohio, Feb. 18, 2015). In *Whirlpool*, while the class was certified and the decision affirmed by the Sixth Circuit, the class ultimately *lost* on the merits at trial after more than six years of hard-fought litigation. Plaintiffs then faced the defendant's motion seeking recovery of over $534,000 in costs, of which $292,930 was ultimately awarded.

In this case, Class Counsel have investigated and prosecuted this case intensely for nearly four years on a completely contingent basis. In the course of doing so counsel bypassed business opportunities to devote time to other cases that may have presented less risk. In addition, over $176,000 of costs have been advanced by Class Counsel also on a contingent basis. In light of these investments, the requested fee is reasonable.

d. The Skill Required and Quality of Work Performed by Counsel Support the Requested Award.

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[7] *WPPSS*, 19 F.3d at 1299; *see also Omnivision*, 559 F. Supp. 2d at 1047 ("[t]he importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee").

Courts recognize that "the prosecution and management of a complex class action litigation requires unique legal skills and abilities."[8] The experience and skill of Class Counsel were essential to the success in this litigation. From the outset, Class Counsel engaged in a concerted effort to obtain the maximum recovery for the Class, while steering clear of perceived pitfalls. When new risks developed, such as those related to the lack of insurance for the class claims or based on Defendants' finances, Class Counsel skillfully maneuvered so as to best protect the rights and interests of the Class.

The *Dryer v NFL* case, previously addressed with the court is an example of Class Counsel's judgment. There, Class Counsel also demonstrated the ability to secure a valuable settlement benefits before adverse risks could materialize and leave the class with far less. As the Court recognized, "But the objectors want a financial payout more than they want to embrace the reality of the limitations of their claims. Fortunately for the absent class members, experienced counsel and a knowledgeable and extremely capable Magistrate Judge saw the case for what it was, and negotiated a settlement that is truly one-of-a-kind, and a remarkable victory for the class as a whole." *Dryer v. National Football League,* No. CIV. 09-2182 PAM/AJB, 2013 WL 5888231, at *2-3 (D. Minn. Nov. 1, 2013). Thereafter, summary judgment was granted for Defendants. Here, Class Counsel similarly acted to preserve assets for the Class before risks could materialize.

The quality of opposing counsel is also important in evaluating the services rendered by Class Counsel. *See*, *e.g.*, *In re Equity Funding Corp. Sec. Litig*., 438 F. Supp. 1303, 1337 (C.D. Cal. 1977)("Moreover, plaintiffs' attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly."). Here, Defendants were represented by large, respected law firms with significant resources that vigorously defended against the class-wide claims asserted by Plaintiffs. That Plaintiffs' Class Counsel achieved the Settlement for the Class in the face of formidable legal opposition further evidences the quality of their work.

[8] *Knight v. Red Door Salons, Inc*., 2009 WL 248367 , at *6 (N.D. Cal. Feb. 2, 2009) (citation omitted); *Heritage Bond*, 2005 WL 1594389 *12.

1 This factor supports the requested fee.

2 **e. The Length the Case has Transpired Supports the Requested Award.**

3 This case has been litigated for nearly four years. While the case was initially filed
4 in December 2012, development of the case began several months before. The payment
5 of any fees ultimately awarded will take place in four installments over the ensuing three-
6 year period meaning that over seven years will pass before class counsel is fully
7 reimbursed for time and costs that they started to advance in 2012. If appeals are filed, as
8 objectors have threatened, the delay will be even longer. This supports the petition.

9 **f. Awards Made in Similar Cases Support the Requested Award.**

10 As described above, Class Counsel's request for 25% of the gross Monetary Fund
11 adheres to the Ninth Circuit's established benchmark. The 25% fee requested here is
12 equivalent to fee awards in comparable cases. *See e.g., Toyota Unintended Acceleration*
13 *Marketing Sales Practices*, No. 8:10 ml-2151 at *3-4 (C.D. Cal. June 17, 2013)(order
14 approving 25% attorneys fee); *In re Netflix Privacy Litig.*, No. 5:11-cv-00379, 2013 WL
15 1120801 (N.D. Cal. Mar. 18, 2013) (25%); *Walsh v. Kindred Healthcare*, No. C-11-
16 00050 JSW, 2013 WL 6623224 (N.D. Cal. Dec. 16, 2013) (awarding 30%); *Reed v. 1-*
17 *800 Contacts, Inc.*, No. 12-cv-02359, 2014 WL 29011 (S.D. Cal. Jan. 2, 2014) (25%).

18 Further, Courts within the Ninth Circuit often award fees above the 25%
19 benchmark in various types of complex litigation. *See Vizcaino*, 290 F.3d at 1046 (28%
20 of $96,885,000 settlement fund); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th
21 Cir. 1995) (33% fee award); *In re Apollo Group Inc. Secs. Litig.*, 2012 WL 1378677, at
22 *9 (D. Ariz., Apr. 20, 2012) (33%); *Mark v. Valley Ins. Co.*, 2004 U.S. Dist. LEXIS
23 20602, at *3-6 (D. Or. Oct. 6, 2004) (30% fee award); *Heritage Bond*, *supra* (33.3%
24 award). As these cases demonstrate, the 25% fee requested here is consistent with
25 recognized "market rates" in this Circuit and District.

26 Empirical studies of fee awards in class actions also support this conclusion. In
27 December 2010, Professor Brian Fitzpatrick of Vanderbilt University published what is
28 believed to be the most complete empirical study conducted into attorneys' fee awards in

1 class action cases. *An Empirical Study of Class Action Settlements and Their Fee Awards*,
2 7 J. Empirical L. Stud. 811 (2010)(Exh. M to Robinovitch Decl.). *See also* Fitzpatrick
3 articles attached as Exhs. N, O to Robinovitch Decl.) The study attempted to examine
4 every class action settlement approved by a federal court over a two year period (2006-
5 07). The study, which has been relied on by a number of courts and testifying experts,
6 found that during the relevant period the most common fee percentages awarded by all
7 federal courts were 25%, 30%, and 33%, with a mean award of 25.4 % and median award
8 of 25%. *Empirical Study*, *supra*, at 833-34, 838. The award requested here is in line with
9 this historical data, establishing that Class Counsel's request here is reasonable.

10 **C. The Lodestar Cross-Check Confirms the Requested Fee's Reasonableness.**

11 Although courts in this Circuit typically apply the percentage approach to
12 determine attorneys' fees in common fund cases, courts may use a lodestar, plus
13 multiplier analysis as a "cross-check" on the percentage method. *WPPSS*, 19 F.3d at
14 1296-98. When the lodestar method is employed "courts have routinely enhanced the
15 lodestar to reflect the risk of non-payment in common fund cases." *Vizcaino,* 290 F.3d at
16 1051, quoting *WPPSS*, 19 F.3d at 1300 (affirming fee that equaled 28% of the settlement
17 fund and a lodestar multiplier of 3.65). Indeed, "[m]ultipliers in the 3-4 range are
18 common in lodestar awards for lengthy and complex class action litigation."[9]

19 "The factors that may be relevant to a lodestar/multiplier analysis include: 1) the
20 time and labor required; 2) the novelty and difficulty of the questions involved; 3) the
21 requisite legal skill necessary; 4) the preclusion of other employment due to acceptance
22 of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) the time
23 limitations imposed by the client or the circumstances; 8) the amount at controversy and
24

25 [9] *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995)(awarding 25% fee with 1.8 multiplier noting "This would be a relatively low multiplier."); *see also*
26 *WPPSS*, 19 F3d at 1301 citing *Activision.*, 723 F.Supp. at 1377–78 (documenting common fund cases where fees were enhanced through use of multiplier or percentage
27 method) and *Behrens v. Wometco Enter., Inc.,* 118 F.R.D. 534, 548 (S.D.Fla.1988), *aff'd,* 899 F.2d 21 (11th Cir.1990), (same); *see In re Rite Aid Corp. Sec. Litig*., 146 F. Supp. 2d
28 706 (E.D. Pa. 2001) (finding multipliers of 4.5-8.5 within the reasonable range); *Steiner v. Am. Broad. Co*., 248 Fed. Appx. 780, 783 (9th Cir. 2007) (awarding a fee of 25% resulting in a 6.85 multiplier).

the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and length of the professional relationship with the client and; 12) awards in similar cases." *Van Vranken*, 901 F. Supp. at 298 citing *Kerr v. Screen Extras Guild,* 526 F.2d 67, 70 (9th Cir.1975).

Courts have held that a positive risk multiplier should be applied where, as here, the case is contains significant risk of non-payment by counsel litigating the case on a contingent basis. *WPPSS*, 19 F.3d at 1301–02 ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases.") As the Ninth Circuit explained "[i]f this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." *Id.* In turn, the Ninth Circuit has held that it is an abuse of discretion to fail to apply a risk multiplier when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky. *Fischel*, 307 F.3d at 1009 citing *WPPSS,* 19 F.3d at 1301–02;

As shown above, these factors demonstrate that Class Counsels' lodestar is reasonable and that the use of a modest 2.08 multiplier would be appropriate. In support of the lodestar determination, Class Counsel submit the Robinovitch and Ridout Declarations attesting to their total hours, hourly rates, experience, and efforts to prosecute this action.[10] Class Counsel's lodestar time is $4,233,553.55 and their litigation expenses are $180,462.45, for a total investment of $4,414,016.00. Considering the contingent costs, the multiplier is 2.03. This is at the low to median end of the range of multipliers that courts approve as fair and reasonable. *See* e.g. *Cathode Ray* 2016 WL

[10] Class Counsel's regular hourly rates applied here are also reasonable and their billings are based on routine, contemporaneous timekeeping in increments of 1/10 of an hour. When determining a reasonable hourly rate, the forum in which the district court sits is the relevant community. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Here, Class Counsel's rates fall well within the rates applied by lawyers of similar skill and experience in this district. *See* Robinovitch Decl. at Section G.

4126533 at *10 (awarding class counsel a fee equal to 27.5% of settlement fund and a 1.96 multiplier "which is well within the range of acceptable multipliers.").

D. Class Counsel's Expenses Are Reasonable.

In addition to being entitled to reasonable attorney fees, it is well settled that "an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." *See, e.g.*, *Alberto v. GMRI, Inc.*, 2008 U.S. Dist. LEXIS 91691, at *35 (E.D. Cal. Nov. 12, 2008); *Omnivision*, 559 F. Supp. 2d at 1048 ("[a]ttorneys may recover their reasonable expenses that would typically be billed to paying clients in noncontingency matters"). To date, the litigation expenses incurred by class counsel total $176,142.71. They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as expert fees, computerized research and other services, court filing and service costs, deposition and court reporter costs, printing, copying, shipping costs and travel costs. *Toyota* at *23. These expenses were reasonable and necessary to prosecute this case, and advanced without any assurance that they would be recouped. As a result, they should be approved and a similar risk multiplier applied.

E. Service Awards To The Class Representatives Are Appropriate.

Courts routinely approve service awards to compensate named plaintiffs for the services they provide and the risks they incur during the course of the class action litigation. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). The criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing 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. *Van Vranken*, 901 F. Supp. at 299; *Staton* 327 F.3d at 977.

Section VII of the Settlement Agreement allows each court-appointed class representatives to petition the court for an incentive award up to $7,500 for their time, effort and risk devotes to prosecuting their claims on behalf of the Class. In *Toyota Unintended Acceleration*, at *26-28, Judge Selna approved class representatives awards applying a rate of $100 per hour and Class Counsel petition for the same here. Each of the appointed Class Representative has submitted a declaration attesting to the time reasonably spent on the case and each requests a particular award not exceeding the $7,500 threshold. As shown by their declarations, the Class Representatives helped Class Counsel gather facts necessary for the prosecution of the case, were kept abreast of the proceedings and evaluated the various settlements. They assumed certain risks in filing litigation against well-armed corporate defendants, as well as the risk of cost-shifting. They were approached by counsel seeking to have them join objections. Further, given the nature of RV community, they all faced reputational risks. Finally, the concerns expressed in *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157 (9th Cir. 2013) and *Rodriquez, supra* are not present as no amounts were promised and any awards petitioned for are not conditioned on support of the settlement.

VII. CONCLUSION

From the beginning of this litigation, the Class Representatives and Class Counsel have faced determined adversaries represented by experienced counsel. With no assurance of success, they pursued this litigation and obtained a valuable Settlement. The Settlement reflects Class Counsel's efforts in the face of significant risk. Accordingly, we respectfully submit that the Court should grant the motion for an order awarding attorneys' fees, costs, reimbursement of expenses and service awards to the Class Representatives.

Respectfully submitted,

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