Steve W. Berman (*Pro Hac Vice*)
Thomas E. Loeser (Cal. Bar No. 202724)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
Email: steve@hbsslaw.com
toml@hbsslaw.com

Terrence A. Beard (Cal. Bar No. 98013)
LAW OFFICE OF TERRENCE A. BEARD
525 Marina Blvd.
Telephone: (925) 778-1060
Facsimile: (925) 473-9098
Email: TBeard1053@aol.com

Attorneys for Non-Settling Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFFERY ETTER; SUSAN ETTER; PAUL KAHLER; FRAN CURTIS; MICHELLE CURTIS; LESLIE CRAWSHAW; RICHARD KAYLOR; BRIAN MCBRIDE; DENNIS OSHA; JAMES PEARCE; CRAIG POST; RAYMOND ROLLE, SR; EMIL VARGO; LEONARD SOMERVILLE; ORRENE SOMERVILLE; RICHARD SPEARS; ALICE KNIGHT; ALAN BURKHART; SANDRA BURKHART; GEORGE FREDERICK; KATHLEEN FREDERICK; ALAN GREAGER; and, LINDA GREAGER, individually, and on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

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

Defendant.

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

Assigned for all purposes to the Honorable Josephine Staton

NON-SETTLING PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEY'S FEES AND EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date of Hearing: 9/16/16
Time: 2:30 p.m.
Courtroom: 10A

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

TO ALL PARTIES AND TO THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 2:30 p.m. on September 16, 2016, or as soon thereafter as the matter can be heard, in Courtroom 10A of this Court, located at 411 West Fourth Street, Santa Ana, California 92701-4516, Non-Settling Plaintiffs' Attorneys will move for an award of attorney's fees and expenses. This Motion is based upon this notice and the accompanying Memorandum of Points and Authorities; the Declaration of Terrence A. Beard In Support of Non-Settling Plaintiffs' Motion For Attorney's Fees and Expenses; the Declaration of Thomas E. Loeser In Support of Non-Settling Plaintiffs' Motion For Attorney's Fees and Expenses; and all other documents and arguments submitted in support of the Motion, including the Court docket and record.

DATED: August 11, 2016

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*
Steve W. Berman
Thomas E. Loeser
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
toml@hbsslaw.com

Terrence A. Beard (Cal. Bar No. 98013)
LAW OFFICES OF TERRENCE A. BEARD
525 Marina Blvd.
Pittsburg, CA 94565
Telephone: (925) 778-1060
Facsimile: (925) 473-9098
Email: tbeard1053@aol.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

The settlement that is before the Court for final approval would not exist without the efforts of Non-Settling Plaintiffs and their attorneys.[1] Non-Settling Plaintiffs include all of the original plaintiffs in this action, including the named Plaintiff, Jeffrey Etter. Non-Settling Plaintiffs' attorneys were responsible for initiating this action and worked tirelessly to prosecute this action on behalf of the Class. Through their work, overwhelming evidence of Defendants' malfeasance was brought to light, resulting in an initial settlement proposal that – solely through the extraordinary efforts of Non-Settling Plaintiffs and their attorneys – was reshaped, modified and improved in every material respect for the benefit of the rank and file Class member.

Through this motion, Non-Settling Plaintiffs and their attorneys request that the Court make the following rulings:

1. Award attorney's fees of $7.2 million, representing 20% of the $36 million Settlement Fund;
2. Allocate the attorney fee award equally ($3.6 million each) between Settling Plaintiffs' Attorneys[2] and Non-Settling Plaintiffs' attorneys; and
3. Award Non-Settling Plaintiffs' attorneys reimbursement of costs and expenses reasonably and necessarily incurred of $92,458.20.

[1] Non-Settling Plaintiffs ("NSP") are Jeff and Susan Etter, Fran and Michelle Curtis, Paul Kahler, Brian McBride, Richard Kaylor and Emil Vargo. Non-Settling Plaintiffs are represented by the Law Offices of Terrence A. Beard (Beard) and Hagens Berman Sobel Shapiro, LLP (HB), who are collectively referred to herein as the "Non-Settling Plaintiffs' Attorneys" ("NSPA").

[2] Settling Plaintiffs are represented by Zimmerman Reed, LLP ("ZR"), which includes the previously separate firm of Ridout Lyon + Ottoson, LLP ("RLO"). Both firms are referred to collectively herein as the "Settling Plaintiffs' Attorneys" ("SPA").

II. THE ATTORNEY FEE AWARD SHOULD BE CAPPED AT 20% OF THE SETTLEMENT FUND

Settling Plaintiffs' Attorneys negotiated a "clear sailing" agreement with Defendants whereby Defendants would not object to an attorney fee award up to 25% of the settlement fund.[3] While 25% is considered the benchmark for attorney's fees in common fund cases, the Court nevertheless has the discretion – if not the duty – to carefully scrutinize any fee request and adjust this percentage based on the actual benefits received by the class.[4]

NSP and their attorneys, who initiated this case and performed the research and investigation necessary for its filing, have never been happy with SPA's settlement and have doggedly challenged it. Through those efforts, NSPA have improved the settlement in every material respect.[5] Still, the settlement remains seriously flawed, and the real-world benefits to the class questionable. The following examples are illustrative:

- The settlement does not remove a *single defective refrigerator* from the marketplace, while granting the Defendants nationwide relief from ever having to fix or replace their defective refrigerators on a class wide basis;
- The settlement does not provide sufficient funds to allow the rank and file Class member to replace their defective refrigerators on their own, thus operating to

[3] *See* Settlement Agreement (Dkt. No. 412-1) at Section VII.

[4] *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (very existence of clear sailing provision increases likelihood that class counsel bargained away something of value to the class, creating heighted duty on the court to "peer into the provision and scrutinize closely the relationship between attorney's fees and benefit to the class" (citing *Staton v. Boeing* Co., 327 F.3d 938, 954 (9th Cir. 2003); *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 500 (6th Cir. 2011) (reduction in fee award appropriate where class did not receive "an especially good benefit" and settlement mechanism agreed to yielded low claims rate)).

[5] *See* Declaration of Terrence A. Beard in Support of Non-Settling Plaintiffs' Motion for Attorney's Fees and Expenses ("Beard Decl.") at ¶ 47.

shove virtually the entire cost and risk of Defendants' defective product onto consumers;[6]

- The settlement does nothing to alleviate the ongoing public safety risk caused by Defendants' defective products continuing to fail and ignite fires;[7]
- The settlement provisions providing for a warning – while better than originally proposed – are still inadequate in content in that they do not convey the nature of the defect, the manner in which it manifests itself, and all of the safety risks involved;
- The proposed warning is fundamentally deceptive in that it continues to convey the notion that if a consumer has the latest recall device installed, it will be safe to use, when it is undisputed – even by Defendants – that the HTS device will not stop N6/N8/1200 Series refrigerators from corroding, cracking, and leaking flammable and toxic gases;[8] and
- The settlement provisions regarding an extended warranty for N6/N8 owners is unsupported by any showing that the warranty conveys an actual benefit to Class members.[9]

---

[6] While the SPA have not submitted a formal damage calculation, the parties are in general agreement that the cost in material and labor to replace a 1200 Series cooling unit is $1,700.00, and the cost to replace a N6/N8 cooling unit is $1,129.00. While the claims rate is currently unknown, under the projections by the SPA (Dkt. No. 413-1) – adjusted based on a net class recovery of $25 million after fees and expenses – the only scenario in which 1200 Series owners would recover sufficient funds to replace their defective cooling units would be if the claims rate did not exceed 6%. At that rate, N6/N8 owners could expect to receive $384.25 – barely a third of the cost of a replacement CU. These results could not be obtained unless *94% of eligible class members did not file a claim*.

[7] *See, e.g.*, Dkt. No. 452, at 3:3-7:7.

[8] *See, e.g.*, Dkt. No. 117, at 17:9-18:6; 24:11-26:27.

[9] *See Bluetooth*, 654 F.3d at 944 (citing FRCP 23(h), 2003 Advisory Cmte. Notes: non-monetary provisions for class members require careful scrutiny to ensure that the provisions have actual value to the class; *In re TD Ameritrade Accountholder Litig*., 266 F.R.D. 418, 423 (N.D. Cal. 2009) ("'The standard [under Rule 23(e)] is not how much money a company spends on purported benefits, but the value of those benefits to the class.'"). Here, the SPA have yet to produce any evidence that the warranty provisions of the Settlement Agreement convey actual benefits to class members. As the Court pointed out in its June 15, 2015 Order (Dkt. No. 402), "An extended

Simply put, this settlement will mean that thousands more unsuspecting Norcold gas absorption refrigerator owners will experience a failed and leaky cooling system, if not a dangerous hydrogen gas fire that will likely destroy their RV or camper and could cause serious injury or death. This is a statistical certainty with Norcold's present failure rate exceeding four units per week.[10] And the problem will only get worse. The nature of the defect is that over time the caustic mixture of hydrogen and ammonia eats away at the metal wall of the boiler tube. The older the cooling units get, the more likely they are to fail. As NSP explained in their opposition to the settlement, there is and was a better alternative that Defendants could have afforded that would have taken these dangerous products out of circulation. But rather than join NSP in driving that resolution, SPA aligned with Defendants to do everything they could to stop it.

NSP and their attorneys recognize, however, that the Court has only one proposed settlement before it, and its grant of preliminary approval carries with it the distinct possibility that the settlement, even with all its flaws, will be deemed to meet the fair, reasonable and adequate standard of Rule 23(e). However, as SPA concede, the settlement is not an exceptional – or even good – result for the class.[11] It is instead, in their view, the "best they could do." If the settlement ultimately is deemed to meet the standards for final approval, it does so on the extreme low end of the fair, reasonable and adequate scale. Such a result for the class does not justify a 25% attorney fee award. And it certainly does not justify such an award in the context of SPA having spent hundreds of hours fighting NSPA's winning efforts to make the settlement better.

---

warranty that allows consumers to replace a product after it corrodes, cracks, and leaks, and potentially catches on fire, does not help remedy the serious safety risks these consumers currently face."

[10] *See, e.g.*, Beard Decl. in Opposition to Renewed Motion for Preliminary Approval (Dkt. No. 452) at pp. 3-4.

[11] *See, e.g.*, Beard Reply Decl. in Support of Motion to Conduct Discovery (Dkt. No. 269) at pp. 5-14 (citing Oct. 10, 2014 Transcript of Proceedings at 30:3-14).

NSP and their attorneys respectfully request that the Court reject the 25% clear sailing agreement between the SPA and the Defendants, cap the attorney fee award at 20% of the settlement fund, and return the $1.8 million difference to the settlement fund for distribution to the class.

III. ANY ATTORNEY FEE AWARD SHOULD BE APPORTIONED EQUALLY BETWEEN SPA AND NSPA

The determination of an appropriate attorney fee award in this case involves not just the percentage of the settlement fund to be set aside for that purpose, but the allocation of any fee award between attorneys in this case. While NSPA Terry Beard initiated and investigated this action while working with SPA, their irreconcilable differences on agreeing to the instant claims-made, low-dollar cash settlement required NSP and NSPA to take a stand and break away from ZR and RLO, who then merged and became SPA.

As a result, there are two groups of attorneys – SPA and NSPA – who have contributed time, effort and money to the creation of the settlement fund. Any attorney fee award entered in this case should be split between these two groups equally, based on their relative contributions to the benefits generated for the Class. An equal allocation of the attorney fee award is not only the most reasonable method for allocating fees given the particular circumstances of this case, but is more than justified for the following reasons:

A. NSPA Initiated the Litigation

Defendants are institutional litigants who have been involved in claims and lawsuits over their defective gas absorption refrigerators for almost two decades. Up to 2010, they had been universally successful in litigating claims on an individual basis. In April 2010, a Norcold 1200 Series refrigerator owned by Joseph Reis failed and ignited a fire that destroyed Mr. Reis' RV, damaged his house, and severely burned Mr. Reis. Mr. Reis retained Terrance Beard, one of NSPA, to represent him in an individual product liability state court action against Norcold and Thetford.

Through discovery obtained in that action – much of which had never been produced in a Norcold refrigerator fire case before – Beard unearthed evidence of the Defendants' longstanding pattern and practice of designing, manufacturing and selling refrigerators throughout the United States containing common defects that put lives and property at risk. Beard recognized the potential for holding the Defendants accountable on a class-wide basis, and in November/December, 2011 took the initiative to contact other firms to assist in the filing of a class action lawsuit, including RLO, who introduced Beard to ZR.[12]

In the year prior to the filing of the original complaint in this action, Beard led efforts, with the assistance of ZR and RLO, to investigate the viability of a class action against the Defendants. Beard was solely responsible for obtaining substantial amounts of documentary evidence regarding the Defendants and their defective products through individual state court litigation he was involved in, including the Reis Action. Beard alone took depositions of the Defendants' corporate witnesses, conducted tests of exemplar Norcold refrigerators, and interacted with experts – including the Defendants' retained experts. Through these efforts, Beard obtained detailed knowledge of the common defects inherent in Defendants' gas absorption refrigerators, Defendants' concealment of the defects and the risks those defects posed to consumers, and Defendants' fraudulent recall/retrofit campaigns.[13]

Beard interviewed and screened potential plaintiffs/class representatives. Beard was responsible for signing up all three of the original plaintiffs in this litigation – Jeff and Susan Etter, Fran and Michelle Curtis, and Paul Kahler.[14] Because of protective orders entered in other litigation, Beard was limited to the amount of documentary evidence he could share with SPA prior to the filing of the original complaint and thus had to perform the vast majority of the pre-filing investigation himself. Beard's

[12] Beard Decl., ¶ 7.
[13] Beard Decl., ¶¶ 8-10.
[14] Beard Decl., ¶ 12.

extensive knowledge and background with Defendants and their defective refrigerators was therefore essential to the drafting of the original Class Action Complaint ("CAC") and the First Amended Complaint ("FAC"). In particular, the detailed factual allegations in the CAC and FAC were drafted by Beard, and based solely on Beard's knowledge, background and expertise with Defendants and their products.[15]

The present action is the first – and only – effort to hold the Defendants' accountable on a class-wide basis. The action would have never been filed but for Beard's initiative, knowledge and expertise.

B. Until Their Dispute Concerning the Proposed Settlement, Beard Was an Equal Participant in Every Phase of the Prosecution of This Action

Beard and SPA worked collaboratively pursuant to a *de facto* division of labor that recognized the contributions of each to the efficient prosecution of the case on behalf of the Class, *i.e.*, Beard's litigation experience and detailed knowledge and expertise regarding the Defendants and their defective products, and SPA's experience with class action procedure.[16] Beard spent substantial time on every aspect of the case, including drafting and revising pleadings, declarations, motions, correspondence, and in reviewing and responding to email traffic from co-counsel, opposing counsel, experts, clients and Class members. Beard continued to interview and screen potential new plaintiffs, and was responsible for bringing class plaintiffs Emil Vargo, Brian McBride, Dennis Osha, Raymond Rolle, and Richard Kahlor into the action.

Beard was particularly responsible for litigation, discovery, document production and review, and developing the evidentiary basis underlying the class claims. For example, Beard was the person who identified and worked with Plaintiffs' experts, Alan Kam, Pete Layson and Orion Keifer of AEGI. Beard took the depositions of all of the defense witnesses, including Bob Cutright, Mary Pouliot, Michael Harris, and Jerry Alexander. Beard prepared virtually all of the Plaintiffs for

[15] Beard Decl., ¶ 10.

[16] Beard Decl., ¶¶ 13, 15.

their depositions, and defended several of them, including the initial depositions of the named plaintiffs, Jeff and Susan Etter, Fran Curtis, and Brian McBride. Beard prepared the Plaintiffs' engineering experts for deposition, and defended their expert depositions in Florida. Beard also spent substantial time developing the detailed factual and evidentiary support for the motion for class certification – including the expert declarations of Orion Keifer and Peter Layson.[17]

C. When SPA Agreed to an Inadequate Settlement, NSPA Refused to Go Along and Fought to Make It Better

Beard and SPA fundamentally disagreed on agreeing to a class resolution that left consumers at risk of fire, property damage, burn injuries and even death. This disagreement proved insurmountable when SPA agreed to seek approval of a claims-made settlement that would return to Class members a mere fraction of the cost to replace a defective gas absorption refrigerator. At the risk of NSP recovering nothing, and Beard never recovering a penny of his extensive investment of time and money in the litigation, NSP drew a line in the sand and walked away. And Beard walked with them.

Beard sought out the assistance of Hagens Berman ("HB"), to both bring its extensive class action and consumer defect litigation experience to bear, and to combat SPA's efforts to push through the settlement that Beard and HB were steadfast was simply not good enough. Together, Beard and HB fought to better the settlement. Twice, in response to NSPA's opposition to SPA's motions for preliminary approval of the settlement, the Court demanded more for the Class. And during this period, SPA were not working to benefit the Class, instead they were working hand in hand with Defendants to keep their settlement, and *de facto* control of the case, intact.

D. The Class Substantially Benefitted from the Efforts of NSPA

In addition to initiating the case in the first instance, NSPA provided a number of benefits to the Class that would not have been available without them.

[17] *See* Beard Decl., ¶¶ 16-21.

First, NSPA's extensive knowledge and experience with Defendants and their defective product created efficiencies that saved the Class both time and money. Because of NSPA's involvement in the case, Plaintiffs started the action with the benefit of a substantial amount of documentary evidence and deposition testimony to support their claims, including the depositions of Defendants' corporate representatives and experts. Plaintiffs did not therefore have to "reinvent the wheel" when it came to discovery. Nor did Plaintiffs have to risk an adverse ruling in a discovery battle that would deprive them of relevant evidence. This efficiency saved hundreds of hours of attorney time and tens of thousands of dollars of costs.[18]

Second, the fact that the Class had the benefit of documents, deposition testimony and expert reports from other litigation is undoubtedly the reason why Defendants – notwithstanding the size of this case and potential exposure – never filed a dispositive motion.

Third, the detailed factual support for the Class claims is the reason why Defendants came to the bargaining table in the first place, and the reason they put the original $33 million on the table. Bare class allegations – without evidentiary support – would have never generated the initial offer.

Fourth, NSPA's challenges to the settlement negotiated between SPA and Defendants, and their dogged pursuit of meaningful confirmatory discovery on Defendants' inability to pay claims, resulted in substantive changes to the original agreement that improved the settlement in every material respect, providing substantial benefits to the Class. For example:

- NSPA efforts to pursue confirmatory discovery led to Defendants adding an additional $3 million to the Settlement Fund, increasing it to $36 million;

[18] *See* Beard Decl., ¶ 34.

- NSPA challenges to the allocation plan in the original settlement led to material modifications that improved the fairness of the allocation between Class members, and ensured that claimants to the fund be compensated commensurate with their out of pocket losses;
- NSPA challenges to the warning provisions of the settlement agreement led to an expansion of the distribution of the warning to all Class members who receive notice of the settlement, and improved the content of the warning by providing additional information to owners regarding signs of cooling unit failure; and
- NSPA challenges to the linkage between individual settlements of some SPA and agreement of the Class settlement led to the removal of fatal conflicts of interest that prevented preliminary approval.[19]

IV. NSPA HAVE REQUESTED REASONABLE ATTORNEY'S FEES

Rule 23 of the Federal Rules of Civil Procedure provides that "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."[20] "[A]wards of attorneys' fees serve the dual purpose of encouraging persons to seek redress for damages caused to an entire class of persons and discouraging future misconduct."[21] In "common fund" cases, such as this, the district court has the discretion to award attorneys' fees as either a percentage of the common fund, or by using the lodestar method.[22] The district court's decision in

[19] *See* Beard Decl., ¶ 47.

[20] Fed. R. Civ. P. 23(h).

[21] *See In re Apollo Group Inc. Secs. Litig.*, 2012 U.S. Dist. LEXIS 55622, at *19 (D. Ariz. Apr. 20, 2012) (internal quotation marks omitted).

[22] *See Hensley v. Eckerhart*, 461 U.S. 424, 457 (1983); *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1301 (W.D. Wash. 2001), *aff'd*, 290 F.3d 1043 (9th Cir. 2002).

awarding attorneys' fees and expenses to the plaintiffs is reviewed for abuse of discretion.[23]

In the Ninth Circuit, the "benchmark" award in common fund cases is 25% of the recovery obtained, with 20-30% being "the usual range."[24] The Court may also use the lodestar method to determine reasonable attorneys' fees, multiplying the number of hours reasonably expended by a reasonable hourly rate.[25] In common fund cases, the lodestar method may also be used as a cross-check of the percentage-of-fund method.[26]

Here, NSPA seek $3,600,000.00 in attorneys' fees, representing 10% of the $36,000,000.00 Settlement Fund. As set forth above, the fees requested are half of an overall award of 20% of the Settlement Fund – on the low end of the Ninth Circuit's benchmark award in common fund cases. Defendants – having already agreed to attorney's fees up to 25% – have no basis to oppose this request, and its reasonableness is confirmed when cross-checked against the lodestar. Accordingly, under either the percentage-of-fund or lodestar approach, NSPA's requested fee award is reasonable.

A. NSPA's Fee Request is Reasonable Under a "Common Fund" Percentage-of-Recovery Analysis

NSPA seek an award of attorneys' fees representing 10% of the Settlement Fund – a percentage that, in light of the equal apportionment with the SPA, is on the low end of fees awarded by courts in this Circuit. In *Vizcaino*, the Ninth Circuit outlined a number of factors that courts may consider in setting an appropriate fee, including whether counsel achieved exceptional results, and the degree of risk

[23] *See City of Roseville Emps. Ret. Sys. v. Orloff Family Tr. UAD 12/31/01*, 2012 U.S. App. LEXIS 11512, at *4 (9th Cir. June 7, 2012).

[24] *Vizcaino*, 290 F.3d at 1047.

[25] *See Hensley*, 461 U.S. at 433.

[26] *Vizcaino*, 142 F. Supp. 2d at 1305.

assumed by counsel.[27] The Ninth Circuit has clarified that these are not the only factors that district courts may consider in awarding fees and expenses; rather, "in selecting a reasonable percentage fee award in a common fund case the district court must consider *all* relevant circumstances."[28] Here, the NSPA request that the Court award fees of 20% of the Settlement Fund, and apportion the fees equally between SPA and NSPA. This request is fully supported by the relevant circumstances of this case.

First, NSPA are responsible for initiating this action. This is significant because it represents the first and only time Defendants have been compelled to address their 15-year history of manufacturing defective refrigerators on a class-wide basis. Put simply, this case would have never been filed – and there would be no benefits to distribute to the Class – without NSPA's initiative and hard work in developing the case.

Second, the case was factually and technically complex, involving three interrelated corporate defendants, 1.5 million defective gas absorption refrigerators, seven product safety recalls, and three different retrofit devices. The case required a detailed understanding of the technology behind the product, the science underlying the defects common to all Class member's refrigerators, and the relationship between the Defendants. It required a mastery over the tens of thousands of pages of documentary evidence to establish the factual basis for the Class claims, and to provide an impetus for Defendants to come to the bargaining table. NSPA's work contributed specific and detailed knowledge, experience and expertise on these myriad factual and technical issues that directly benefitted the Class, and which would not have been available otherwise.

---

[27] *Vizcaino*, 290 F.3d at 1048.

[28] *Steiner v. Am. Broadcasting Co., Inc.*, 248 F. App'x 780, 782 (9th Cir. 2007) (emphasis in original).

Third, NSPA assumed exceptional risk by challenging the original settlement negotiated by SPA with Defendants. HB joined Beard's efforts with no clear path to recovery and significant time and expense requirements on the horizon. Together, NSPA pursued meaningful confirmatory discovery on the central premise underlying the settlement, *i.e.*, the Defendants' claimed inability to pay and the supposed impossible task of replacing the defective gas absorption refrigerators.

There was no guarantee that the challenge would ultimately result in any benefit to the Class. If unsuccessful, there was every indication that the time and money put into the effort would be substantially discounted, if not completely disallowed, in any subsequent fee/cost petition. Indeed, it was likely that an unsuccessful challenge would result in NSPA and NSP being blamed for delaying the settlement and distribution to Class members unnecessarily, with similar negative consequences to NSPA's ability to be compensated for the time and money invested in the case up to the challenge.

The challenge was vigorously opposed by the united efforts of SPA and Defendants, who objected at every turn, delayed and frustrated court-ordered discovery, and forced NSPA to engage in protracted litigation to obtain documents and deposition testimony that the Court deemed necessary for its evaluation of whether the original settlement met the standard of fair, reasonable and adequate.[29]

Notwithstanding the substantial time, costs and risks involved, NSPA would not back down, and NSPA's efforts ultimately improved the settlement for the benefit of all Class members. As a direct result of NSPA's efforts, the Settlement Fund was increased by $3 million; the allocation provisions were modified to improve fairness between Class members; the provisions regarding a warning were improved to include more information and to be distributed to all Class members; and the improper conflicts of interest that threatened the adequacy of SPA and certain Settling

[29] *See, e.g.*, Court's Orders re: NSPA's Motion to Conduct Discovery (Dkt. No. 275) and NSPA's Request to Cross-Examine Jeffrey Brandlin (Dkt. No. 299).

Plaintiffs – and which stood in the way of preliminary approval – were removed. None of these changes would have been made but for NSP's and NSPA's willingness to assume an exceptional amount of time, cost and risk for the benefit of the Class.

Fourth, throughout the litigation, and most particularly after NSPA mounted the challenge to the original settlement agreement, NSPA risked receiving no fees. Moreover, NSPA invested significant funds in the case, including, for example, hiring experts to support the class certification motion, and hiring financial experts to review and analyze Defendants' financial statements and financing agreement, and provide an expert declaration to the Court on the core inability to pay issue.[30]

B. NSPA's Fee Request is Reasonable Under the Lodestar Cross-Check

NSPA's $3,600,000.00 fee request is reasonable when cross-checked using the lodestar method. Under the lodestar method, a presumptively reasonable fee award can be determined by multiplying the number of hours reasonably expended by plaintiffs' counsel by their reasonable hourly rate.[31]

1. The number of hours that NSPA devoted to this litigation is reasonable.

Under the lodestar method, courts first look at the number of hours spent by counsel on the case.[32] Here, in support of the lodestar determination, NSPA submit the declarations of Terrence A. Beard and Thomas E. Loeser attesting to their total hours, hourly rates, experience, and efforts to prosecute this action.

As set forth in the supporting declarations, NSPA have collectively spent more than 3,281.55 hours of attorney and litigation support time attributable to this action, representing a lodestar of $1,968,722.40.[33] NSPA's time and expenses are shown in the table below:

---

[30] *See* Beard Decl., ¶ 49, Ex. B.

[31] *See Hensley*, 461 U.S. at 433.

[32] *Id.*

[33] Beard Decl., ¶ 49, Ex. A; Declaration of Thomas E. Loeser In Support of Non-Settling Plaintiffs' Motion For Attorney's Fees and Expenses ("Loeser Decl."), ¶ 9.

	Hours	Lodestar	Expenses
LAW OFFICES OF TERRENCE A. BEARD	2,933.45	1,760,070.00	74,189.52
HAGENS BERMAN	348.10	208,652.40	18,269.38
TOTAL	**3,281.55**	**$1,968,722.40**	**$92,458.90**

The number of hours that NSPA have devoted to pursuing this litigation is appropriate and reasonable, given: (1) the extensive pre-filing investigation described above; (2) the extensive discovery efforts in this action, including extensive negotiations regarding protective orders; numerous meet and confer sessions with opposing counsel, both in person and telephonically; contested hearings before the Magistrate Judge over document production, including expert reports; (3) the review, organization and analysis of over 200,000 pages of documents and ESI; (4) the taking of defense witness depositions; (5) the defense of plaintiff and expert depositions; (6) the consultation with experts, including the preparation of detailed declarations in support of the class certification motion; (7) the analysis of Defendants' electronic databases, including their Incident Log, Incident Files and warranty/return databases; (8) the efforts to certify the N6/N8/1200 Class; (9) the extensive settlement negotiations with Defendants; (10) the repeated challenges to preliminary approval of the original settlement; (11) the extensive litigation to obtain meaningful confirmatory discovery on Defendants' inability to pay claims, including contested document discovery and deposition of SPA's financial expert; (12) consultation with financial experts, including the preparation of detailed declarations for submission to the Court on the issue of Defendants' inability to pay; (13) regular contact and communication with Plaintiffs and Class members; and (14) the time spent communicating and assisting Class members in the consideration the Settlement.

In sum, the hours that NSPA devoted to this action were extensive, but reasonable and necessary, particularly given the complexity of the issues and parties

involved in this case, the necessity of obtaining and analyzing the extensive information regarding Defendants' defective product and business practices that led directly to the original settlement, and the extraordinary efforts to challenge not only the defects in the original settlement, but the premise upon which the settlement was based. Flawed as it is, the settlement that is before the Court would not exist but for NSPA's relentless pursuit of relief for the Class.

2. NSPA's hourly rates are reasonable.

As detailed in the declarations of Terrence A. Beard and Thomas E. Loeser, the NSPA's rates are also fair and reasonable. Under the lodestar method, counsel's reasonable hourly rates are determined by the prevailing market rates that a lawyer of comparable skill, experience, and reputation could command in the relevant community.[34] "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate."[35]

Counsel's hourly rates in this action range from $500 to $900. Hourly rates for paralegals are $200 or lower.[36] Beard is an attorney with 35 years of experience representing a wide range of clients against corporate and governmental defendants, and has extensive litigation experience, including handling large, complex multi-party cases.[37] HB is a well-respected national consumer protection plaintiffs' firm with extensive experience in prosecuting complex litigation, including consumer class actions.[38] The Principal attorney at HB for this case, Thomas E. Loeser, is an attorney

[34] *See, e.g., Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).

[35] *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1110 (9th Cir. 2014), *cert. denied sub nom., City of Los Angeles v. Chaudhry*, 135 S. Ct. 295 (2014).

[36] Beard Decl., ¶ 51, Ex. A; Loeser Decl., ¶ 9.

[37] Beard Decl., ¶ 3.

[38] Loeser Decl., ¶ 20, Ex. A.

licensed in California, DC, and Washington State, with 17 years of litigation experience, including nearly five years as a federal prosecutor in Los Angeles. NSPA's hourly rates are appropriate for litigation of this complexity and are comparable to those approved in courts in this District and the Ninth Circuit generally.[39] Indeed, the Northern District of California recently approved HB's rates in complex class action litigation involving the use of NCAA student-athletes likenesses in videogames.[40]

3. NSPA's fee request is reasonable considering the results obtained, time and labor required, complexity of the litigation, the risks involved, and counsel's skill and experience.

Multiplying the hours spent by the NSPA on the litigation by their respective hourly rates yields a lodestar of $1,968,722.40. "Though the lodestar figure is presumptively reasonable, the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment."[41] The fee award of $3,600,000.00 requested by NSPA represents a multiplier of 1.8, on the low end of the range of multipliers accepted by courts in this District and across the country.[42] As discussed below, these reasonableness factors weigh heavily in favor of granting the total requested fee award.

---

[39] *See, e.g., Aronson v. Dog Eat Dog Films, Inc.*, 2010 WL 4723723, at *3 (W.D. Wash. Nov. 16, 2010) (approving hourly rates of $505, $265, and $175).

[40] *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv-01967 (N.D. Cal., filed May 9, 2009), Dkt. No. 1244, ¶ 11 (Final Approval Order, August 18, 2015).

[41] *Bluetooth*, 654 F.3d at 941-42 (internal citations and quotation marks omitted); *see also Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

[42] *See, e.g., Vizcaino*, 290 F.3d at 1051 n.6 (surveying class actions settlements nationwide, and noting 54 percent of lodestar multipliers fell within the 1.5 to 3.0 range, and that 83 percent of multipliers fell within the 1.0 to 4.0 range); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1328 (W.D. Wash. 2009) (approving "modest 1.82 multiplier"); *Barovic v. Ballmer*, 2016 WL 199674, at *4 (W.D. Wash. Jan. 13, 2016), *appeal dismissed* (May 6, 2016) (multiplier of 2.5); *Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at *5 (N.D. Cal. Feb. 6, 2013) (multiplier of 2.86); *In*

First, the Class benefitted from NSPA's work in this case. "Foremost among these considerations … is the benefit obtained for the class."[43] There would have been no case in the first place without NSPA initiating and developing it. There would have been no $33 million settlement offer without the extensive efforts of NSPA to put together an overwhelming case of liability on the merits, supported by a detailed evidentiary showing that included documents, deposition testimony, and expert declarations. And the Class would not have the benefit of the additional $3 million in the Settlement Fund, revised apportionment scheme, or improved warnings without NSPA's unceasing efforts to run the Defendants to ground on their inability to pay claims, and challenge – rather than accept – the settlement terms originally negotiated by SPA with the Defendants, and stubbornly defended by SPA.

Second, NSPA have expended a significant amount of time and resources on the litigation. To date, counsel have expended more than 3,281.55 hours, for a lodestar of $1,968,722.40, and have incurred $92,458.90 in expenses in prosecuting this litigation for the benefit of the Class.[44] NSPA vigorously litigated this action and were challenged every step of the way – first by Defendants prior to the original settlement, and then by the united efforts of SPA and Defendants, whose motivations were dubious. NSPA committed a significant amount of time and expense on a contingency basis with absolutely no guarantee of being compensated in the end. This was particularly the case with regard to the work and money invested after SPA and Defendants agreed to a settlement the Court twice rejected as not worthy of preliminary approval.

---

re TFT-LCD (Flat Panel) Antitrust Litig., 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013) (multipliers ranging on average between 2.4-2.6); *Pokorny v. Quixtar, Inc.*, 2013 WL 3790896, at *2 (N.D. Cal. July 18, 2013) (multiplier of 2.2); *see also Milliron v. T-Mobile USA, Inc.*, 423 F. App'x 131, 135 (3d Cir. 2011) (approving district court's use of 2.2 multiplier); *Di Giacomo v. Plains All Am. Pipeline*, 2001 WL 34633373, at *10-11 (S.D. Tex. Dec. 19, 2001) (5.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (4.65 multiplier).

[43] *Bluetooth*, 654 F.3d at 942.

[44] Beard Decl., ¶ 49, Exs. A & B; Loeser Decl., ¶¶ 9, 19.

Third, the litigation was novel in the sense that it was the first time Defendants had ever been sued on a class-wide basis, notwithstanding thousands of prior individual fire cases and claims arising from their defective refrigerators. Effective prosecution of the case required the extensive knowledge, experience and expertise NSPA brought to bear on the complex legal, factual and technical issues in this litigation, as described above.

Fourth, NSPA Beard is an experienced litigator who has developed a reputation for tenacity, competence and technical expertise in pursuing claims on behalf of consumers damaged by Defendants' defective refrigerators.

NSPA Hagens Berman is one of the most well-respected class action litigation firms in the country and has litigated some of the largest class actions in history,[45] including the tobacco litigation,[46] *In re Visa MasterCard Litig.*,[47] and the *Toyota Motor Corp. Unintended Acceleration Litig.*[48] Hagens Berman has over 65 lawyers in offices across the country.[49] Since its founding in 1993, the firm has been recognized in courts throughout the United States for its ability and experience in handling major class litigation efficiently and obtaining outstanding results for its clients.[50] Courts in this District have repeatedly appointed Hagens Berman to leadership roles in class

[45] Loeser Decl., ¶ 20, Ex. A (Firm Resume).

[46] In the historic litigation against Big Tobacco, Hagens Berman represented 13 states and advanced groundbreaking legal claims to secure a global settlement worth $260 billion, the largest recovery in history. Only two firms went to trial, and Hagens Berman served as co-lead trial counsel.

[47] *In re Visa-MasterCard Litig.*, CV-96-5238 (E.D.N.Y.). Hagens Berman was co-lead counsel in a case alleging antitrust violations by Visa and MasterCard. The case settled for $3 billion in cash and changes in practices valued at $20 billion.

[48] *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 8:10ML2151 JVS (C.D. Cal.). Hagens Berman recovered $1.6 billion for the class.

[49] Loeser Decl., ¶ 20.

[50] *Id*.

litigation proceedings, including most recently in *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*[51]

The reputation, experience, and skill of NSPA were essential to the achievement of the current settlement before the Court. Long before the complaint was filed in this case, NSPA Beard used his experience, expertise and skill to develop the factual basis for the class claims. His efforts continued throughout the litigation. Joined by HB, NSPA pushed for the best possible recovery for the Class, given the particular factual and legal complexities of this litigation. At no time have Defendants ever conceded liability, the appropriateness of certification other than for settlement purposes, or the existence of damages. Given the significant risks and uncertainty associated with this complex class action – particularly the post-settlement litigation over Defendants' inability to pay claims – it is a testament to NSPA's skill, creativity, and determination that the Settlement Agreement before the Court is an improvement in every material respect over the original.

C. NSPA's Expenses Are Reasonable and Were Necessarily Incurred

In addition to attorneys' fees, NSPA seek an award of $92,458.90 for expenses necessarily incurred in connection with the prosecution of this action. The Ninth Circuit allows recovery of pre-settlement litigation costs in the context of class action settlements.[52] All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable.[53] With this Motion, NSPA provide an accounting of the $92,458.90 in expenses incurred by the NSPA.[54] Expenses include expert fees incurred regarding the expert declarations filed in support of the motion for class certification (AEGI); expert fees incurred regarding the Lesch expert declaration

[51] *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 8:10ML2151 JVS (C.D. Cal.)., Order No. 2: Adoption of Organization Plan and Appointment of Counsel (Dkt. No. 169).

[52] *See Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003).

[53] *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

[54] Beard Decl., ¶ 49, Ex. B (Expense Report); Loeser Decl. ¶ 19.

submitted in support of the NSP's report to the Court regarding the results of discovery on the Defendants' ability to pay; costs incurred regarding the deposition of SPA's expert, Jeffrey Brandlin; and travel expenses related to attendance at depositions of Plaintiffs and experts, mediation and court appearances. All of these expenses were necessarily and reasonably incurred in the prosecution of this action, and they reflect market rates for the various categories of expenses incurred. None of the expenses were incurred for litigation other than the present case.[55]

D. NSP Request Incentive Awards

By separate motion concurrently filed, Non-Settling Plaintiffs request that the Court approve incentive awards to compensate NSP for their actual time spent prosecuting this case on behalf of the Class.

V. CONCLUSION

For the foregoing reasons, Non-Settling Plaintiffs request the Court make the following rulings:

1. Award attorney's fees of $7.2 million, representing 20% of the $36 million Settlement Fund;
2. Allocate the attorney fee award equally ($3.6 million each) between Settling Plaintiffs' Attorneys and Non-Settling Plaintiffs' Attorneys; and
3. Award Non-Settling Plaintiffs' attorneys reimbursement of costs and expenses reasonably and necessarily incurred of $92,458.90.

[55] Beard Decl., ¶ 49.

DATED: August 11, 2016

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*
Steve W. Berman
Thomas E. Loeser
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
toml@hbsslaw.com

Terrence A. Beard (Cal. Bar No. 98013)
LAW OFFICES OF TERRENCE A. BEARD
525 Marina Blvd.
Pittsburg, CA 94565
Telephone: (925) 778-1060
Facsimile: (925) 473-9098
Email: tbeard1053@aol.com

PROOF OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on August 11, 2016.

/s/ Steve W. Berman
Steve W. Berman