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12 *Attorneys for Non-Settling Plaintiffs*

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 JEFFERY ETTER; SUSAN ETTER;
16 PAUL KAHLER; FRAN CURTIS;
17 MICHELLE CURTIS; LESLIE
18 CRAWSHAW; RICHARD KAYLOR;
19 BRIAN MCBRIDE; DENNIS OSHA;
20 JAMES PEARCE; CRAIG POST;
21 RAYMOND ROLLE, SR; EMIL
22 VARGO; LEONARD SOMERVILLE;
23 ORRENE SOMERVILLE; RICHARD
24 SPEARS; ALICE KNIGHT; ALAN
25 BURKHART; SANDRA BURKHART;
26 GEORGE FREDERICK; KATHLEEN
27 FREDERICK; ALAN GREAGER; and,
28 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 INCENTIVE
AWARDS; 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

1 **TO ALL PARTIES AND TO THEIR RESPECTIVE COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that at 2:30 p.m. on September 16, 2016, or as soon
3 thereafter as the matter can be heard, in Courtroom 10A of this Court, located at 411
4 West Fourth Street, Santa Ana, California 92701-4516, Non-Settling Plaintiffs' Jeff
5 and Susan Etter, Fran and Michelle Curtis, Paul Kahler, Brian McBride, Richard
6 Kaylor and Emil Vargo will move for an award of incentive awards. This Motion is
7 based upon this notice and the accompanying Memorandum of Points and Authorities;
8 the Declaration of Jeff Etter In Support of Non-Settling Plaintiffs' Motion For
9 Incentive Awards; the Declaration of Fran Curtis In Support of Non-Settling
10 Plaintiffs' Motion For Incentive Awards; the Declaration of Paul Kahler In Support of
11 Non-Settling Plaintiffs' Motion For Incentive Awards; the Declaration of Brian
12 McBride In Support of Non-Settling Plaintiffs' Motion For Incentive Awards; the
13 Declaration of Richard Kaylor In Support of Non-Settling Plaintiffs' Motion For
14 Incentive Awards; the Declaration of Emil Vargo In Support of Non-Settling
15 Plaintiffs' Motion For Incentive Awards; and all other documents and arguments
16 submitted in support of the Motion, including the court docket and record.

17 DATED: August 11, 2016

HAGENS BERMAN SOBOL SHAPIRO LLP

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INTRODUCTION

Courts and commentators have often lamented how the role of plaintiffs in class action litigation has been reduced to that of office furniture – necessary, but entirely fungible and completely ignored. While theoretically serving as a fiduciary to promote the interests of the Class, as well as an effective monitor of class counsel’s conduct – particularly regarding settlements negotiated by class counsel – named plaintiffs are often kept in the dark while the litigation swirls around them, controlled by class counsel who only seeks their “input” when they are asked to sign off on a settlement they had no part in negotiating, and only dimly understand, if at all.¹ As a result, class actions are sometimes settled in a way that conveys no meaningful benefit to class members, resulting in public disgust and disapproval of the entire process.

The Non-Settling Plaintiffs in this case (“NSP”) are exemplars of what class action plaintiffs are supposed to be, and how they are supposed to act.² They include all of the original plaintiffs in this action, including plaintiff Jeffrey Etter, for whom the case is captioned. NSP worked tirelessly to help prosecute this action on behalf of the class, keep themselves up to speed on the litigation, and actually read and considered all of the various settlement proposals in this case. They went to extraordinary lengths and assumed daunting risks in challenging the settlement

¹ See, e.g., Judge Posner’s observations in *Eubank v. Pella Corp.* 753 F.3d 718, 719 (7th Cir. 2014) – “The named plaintiffs are the representatives of the class – fiduciaries of its members – and therefore charged with monitoring the lawyers who prosecute the case on behalf of the class.” Their selection by class counsel “inevitably dilutes their fiduciary commitment,” and while, in theory, plaintiffs have control over class counsel and direction of the litigation, “this is rarely true in practice.” Indeed, while a class representative who knows nothing about the case and defers control over the action to counsel may be deemed inadequate – see, e.g., *In re Facebook, Inc. PPC Adver. Litig.*, 282 F.R.D. 446, 454 (N.D. Cal. 2012) – the adequacy bar is so low that many times the class is stuck with representatives that have neither the capability nor the desire to fulfill their fiduciary duties and monitor class counsel’s conduct of the litigation. *Eubank, supra*.

² The Non-Settling Plaintiffs are Jeff and Susan Etter, Fran and Michelle Curtis, Paul Kahler, Brian McBride, Richard Kaylor and Emil Vargo. The Non-Settling Plaintiffs are represented by the Law Offices of Terrence A. Beard (Beard) and Hagens Berman Sobel Shapiro, LLP (HBSS), who are collectively referred to herein as the “Non-Settling Plaintiffs’ Attorneys” (“NSPA”).

1 negotiated by the Settling Parties Attorneys and the Defendants, and through those
2 efforts, improved the settlement that is currently before the Court in every material
3 respect. They respectfully request that – if the Court grants final approval to the
4 proposed settlement – they be granted incentive awards that acknowledge their
5 genuine efforts – and risks assumed – on behalf of the Class, and compensate them
6 fairly for the time they have devoted to the case.

7 **A. Incentive Awards to the NSP are Appropriate Given the Facts of This Case**

8 Incentive awards for class representatives are routinely provided to encourage
9 individuals to undertake the responsibilities of representing the class and recognize the
10 time and effort spent in the case.³ Incentive awards “compensate class representatives
11 for work done on behalf of the class, to make up for financial or reputational risk
12 undertaken in bringing the action, and, sometimes, to recognize their willingness to act
13 as a private attorney general.”⁴ Courts have discretion to approve incentive awards
14 based on, *inter alia*, the risk (financial or otherwise) of commencing suit, the notoriety
15 and personal difficulties encountered, the amount of time and effort spent, and the
16 duration of the litigation.⁵ In considering the reasonableness of an award, courts
17 should consider “the actions the plaintiff has taken to protect the interests of the class,
18 [and] the degree to which the class has benefitted from those actions.”⁶ In addition,
19 courts focus on the number of class representatives, the average incentive award
20 permitted by courts, and the proportion of the entire settlement that is spent on the
21 incentive award.⁷

22
23 ³ See *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)
24 (“Incentive awards are fairly typical in class action cases.”).

25 ⁴ *Id.* at 958-59.

26 ⁵ See *Van Vracken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

27 ⁶ See, e.g., *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *In re Mego*
28 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000).

⁷ See *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015)
(approving a \$5,000 incentive award for each of nine class representatives even where
each class member only received \$12).

1 Here, Non-Settling Plaintiffs include the original three plaintiffs in this action –
2 Etter, Curtis and Kahler. The other three Non-Settling Plaintiffs – McBride, Kaylor
3 and Vargo – joined the action in early 2013. Each of the Non-Settling Plaintiffs has
4 been actively involved in the litigation for more than four years. They have assisted
5 SPA and NSPA in all phases of the case, including gathering evidence to file
6 pleadings; providing counsel with details of their experiences with Defendants’
7 product; reviewing and approving pleadings; providing responses to successive rounds
8 of written discovery, including the retrieval and analysis of documents; having their
9 depositions taken; reviewing and responding to inquiries from counsel; and drafting
10 and approving declarations for filing in support of the motion for class certification.⁸

11 In addition, each Non-Settling Plaintiff has taken the extraordinary step of
12 challenging the terms of the original settlement negotiated by SPA with Defendants at
13 the preliminary approval stage, and diligently pursuing a better settlement for the
14 Class. The choice was not an easy one. By challenging the settlement, each Non-
15 Settling Plaintiff put his/her own recovery of any settlement benefits on hold, if not at
16 risk. Some turned down financial incentives offered by SPA to get them to sign off on
17 the settlement,⁹ and all Non-Settling Plaintiffs endured intense pressure from SPA and
18 the Settling Plaintiffs to acquiesce to the original settlement terms. However, each
19 was committed to seeking a resolution that provided a meaningful benefit to the Class,
20 regardless of the effect on their own interests, and devoted themselves to the effort.
21 Each Non-Settling Plaintiff filed declaration(s) in opposition to the original
22 settlement.¹⁰ Each diligently followed the tortured path of the subsequent litigation,
23 including reviewing all the pleadings filed, and cooperating with NSPA.

24
25
26 ⁸ See Dkt. Nos. 125 (Etter) and 126 (Kahler).

27 ⁹ See, e.g., Kahler Decl. in Opposition to Motion for Preliminary Approval (Dkt.
28 No. 204) at 4:5-6.

¹⁰ See, e.g., Dkt. Nos. 203, 204, 205, 261, 262, 263.

1 The time and effort expended by Non-Settling Plaintiffs was instrumental in this
 2 action being filed, and in prosecuting the case up to the negotiation of the original
 3 settlement. Non-Settling Plaintiffs' efforts to protect the interests of the Class by
 4 challenging the original settlement has resulted in substantial benefits to the Class by
 5 making substantive improvements to the original settlement that would not have
 6 happened but for their continuing efforts over the last two years on behalf of the Class.

7 **B. Non-Settling Plaintiffs Requested Incentive Awards**

8 Non-Settling Plaintiffs request that the Court approve incentive awards in the
 9 total amount of \$83,811.00, to be deducted from the Settlement Fund, as apportioned
 10 in the table below. The requested incentive awards are based on hours actually
 11 devoted to the case by NSP, charged at the rate of \$100.00/hr.¹¹

13 Jeff and Susan Etter	\$35,325.00
14 Fran Curtis	\$7,500.00
15 Paul Kahler	\$7,500.00
16 Brian McBride	\$15,531.00
17 Richard Kaylor	\$7,500.00
18 Emil Vargo	\$11,191.00
19 TOTAL	\$83,811.00

20
 21 The incentive awards are reasonable in amount, representing less than one-third
 22 of one percent (.31%) of the \$26.8 million Settlement Fund (based on attorney's fees
 23 of 20%) available for distribution to the class. The incentive awards are modest in
 24 comparison to the \$3 million dollars NSP's efforts added to the Settlement Fund, and
 25 the additional \$1.8 million they propose be retained in the fund through a reduction in
 26

27 ¹¹ See Declarations of Jeff and Susan Etter, Fran Curtis, Paul Kahler, Brian
 28 McBride, Richard Kaylor and Emil Vargo, filed concurrently herewith.

1 the attorney fee award from 25% to 20%.¹² The \$83,811.00 also compares favorably
2 to the \$149,992.22 in improper individual settlements and fatal conflicts of interest
3 eliminated from the Settlement Agreement through NSP and NSPA efforts, and it is
4 based on time actually spent on the case.¹³ NSP respectfully request that their
5 requested incentive payments be awarded.

6
7 DATED: August 11, 2016

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22 ¹² See Non-Settling Plaintiffs Motion for Award of Attorney's Fees and Expenses,
23 filed concurrently herewith.

24 ¹³ See, e.g., *Garnett v. ADT, LLC*, 2016 U.S. Dist. LEXIS 84006, at *19 (E.D. Cal.
25 June 27, 2016) (incentive payment of \$7,500.00 (.46% of \$1.6 million settlement
26 fund) reasonable); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 942
27 (incentive awards of \$5,000 for nine plaintiffs, representing an award 417 times larger
28 than the average class recovery); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322,
1329-30 (W.D. Wash. 2009) (incentive awards of \$7,500 for four plaintiffs); *Barovic*
v. Ballmer, 2016 WL 199674, at *5 (W.D. Wash. Jan. 13, 2016), *appeal dismissed*
(May 6, 2016) (incentive awards of \$5,000); *Grays Harbor Adventist Christian Sch. v.*
Carrier Corp., 2008 WL 1901988, at *6-7 (W.D. Wash. Apr. 24, 2008) (incentive
awards of \$3,500 for eleven plaintiffs).

