EDUARDO G. ROY (Bar No. 146316)
DANIEL C. QUINTERO (Bar No. 196492)
PROMETHEUS PARTNERS L.L.P.
388 Market Street, Suite 950
San Francisco, CA 94111
Tel.: 415.527.0255

ALEC CIERNY (Bar No. 275230)
THE CIERNY FIRM
650 California Street, Floor 7
San Francisco, CA 94108-2737
Tel.: 415.259.4646
Fax: 415.230.5777

Attorneys for Plaintiff
DANIEL NORCIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DANIEL NORCIA, on his own behalf and on behalf of all others similarly situated,

Plaintiffs,

vs.

SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a New York Corporation, and SAMSUNG ELECTRONICS AMERICA, INC., a New Jersey Corporation,

Defendants.

CASE NO. 3:14-cv-582-JD

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND PLAINTIFF INCENTIVE AWARD; MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 28, 2021
Time: 10:00 a.m.
Dept.: Courtroom 11, 19th Floor
Judge: Hon. James Donato
Complaint Filed: February 7, 2014

TO THIS HONORABLE COURT, ALL PARTIES HERETO, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 28, 2021 at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 11, 19th Floor of the United States District Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable James Donato, Plaintiff Daniel Norcia will and hereby does move for an Order:

(1) Attorneys' fees in the amount of $1,398,861.24 (i.e., 10.44% of the Total Settlement Value and 49.97% of the Common Fund);

(2) Litigation expenses of $101,138.76 (which includes $25,846 in expert expenses and $49,409 in document management expenses to compile, search, and review Samsung's voluminous production of documents); and

(3) An incentive payment to the representative Plaintiff Daniel Norcia in the sum of $7,500.

This motion is made on the grounds that Plaintiff's requests for attorneys' fees, reimbursement of costs incurred in prosecuting the case, and the incentive award are fair, objectively reasonable, and appropriate in light of the results obtained on behalf of the class and the relevant Ninth Circuit authority.

This motion is based on this notice of motion and motion; the accompanying memorandum in support; the declarations of Eduardo Roy as well as the attachments thereto (including the declaration of Jonathan Arnold); the declaration of Alec Cierny; and all other papers filed and proceedings held in this action.

Dated: August 24, 2020

Respectfully submitted,

PROMETHEUS PARTNERS L.L.P.

By /s/ EDUARDO G. ROY
EDUARDO G. ROY
Attorneys for Plaintiff
DANIEL NORCIA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion for attorneys' fees is made in connection with the settlement of a class action on behalf of consumers who, like Plaintiff, were victims of an unfair marketing scheme. Plaintiff Daniel Norcia ("Plaintiff") has alleged that Defendant Samsung Electronics America, Inc. ("Samsung") coded the Samsung Galaxy S4 smart phone ("GS4") to intentionally manipulate the benchmark performance of the GS4 by boosting the performance of the GS4 when it detected third-party benchmarking applications testing the speed and performance of the GS4 with the knowledge and/or intent that such false representations would be passed on to consumers and that it would influence their purchase decisions. (SAC ¶ 25.)[1]

On July 22, 2020, the Court entered an order preliminarily approving a California classwide settlement between Plaintiff and Samsung and setting a schedule for Plaintiff to file a motion for final approval and a request for fees, costs, and incentive awards. [Dkt. No. 177.] Eduardo Roy and Daniel Quintero of Prometheus Partners L.L.P. and Alec Cierny of The Cierny Firm ("Class Counsel") respectfully request an award of attorneys' fees in the amount of $1,398,861.24 and the reimbursement of $101,138.76 in litigation expenses for their efforts in prosecuting and obtaining a settlement that is the subject of the forthcoming motion for final approval. The requested fees fall within the norm for attorneys' fees in class actions and they are justified by the results of the settlement and relevant Ninth Circuit authority.

The proposed settlement will pay the Settlement Class $2,800,000 ("Common Fund") to resolve all claims and will enjoin Samsung from the alleged conduct that gave rise to this action for three years, resulting in an additional $10,594,921 of benefit to the Settlement Class and the public at large creating a total settlement value of $13,394,921 ("Total Settlement Value"). The allocation of the settlement funds will be on a pro rata basis with a maximum recovery of $10.00

[1] Capitalized terms in this memorandum are defined in the Settlement Agreement attached as **Exhibit 1** to the Declaration of Eduardo G. Roy in Support of Plaintiff's Motion for Award of Attorneys' Fees ("Roy Decl.").

in exchange for releases from approximately 780,000[2] members of the Settlement Class. The Common Fund will be used to pay for attorneys' fees and costs, administrative costs, and class benefits. Pursuant to the Settlement Agreement, settlement class members who complete and submit a claim form will be able to receive a cash payment of up to ten dollars ($10). Significantly, there is no reversion under the terms of the Settlement Agreement—that is, no part of the Common Fund will return to Samsung. Given the amount of legal work done by experienced Class Counsel on behalf of the Settlement Class and the results obtained in this litigation, the request for $1,398,861.24 in attorneys' fees is both fair and reasonable. The fees represent 10.44% of the $13,394,921 Total Settlement Value provided under the settlement. Not only do the fees requested fully comply with the Ninth Circuit's 25% benchmark, it represents a multiplier of negative 0.72 to the more than $1,951,060 lodestar of attorney time expended by Class Counsel in the prosecution of this case.[3]

In addition, Plaintiff seeks an incentive award of $7,500 for Representative Plaintiff, Daniel Norcia. The requested service award is justified in light of Plaintiff's willingness to step forward and assert claims on behalf of the Class and in light of Plaintiff's significant assistance during the prosecution of this case over the past six years, including giving his deposition.

Because the requested attorneys' fees, reimbursement of litigation expenses, and incentive payment are objectively reasonable and appropriate, Plaintiff and Class Counsel respectfully request that the Court approve this motion in full.

II. ARGUMENT

A. The $1,398,861.24 In Requested Attorneys' Fees Is Fair, Reasonable, and Appropriate in Light of the Results Obtained on Behalf of the Class.

Pursuant to the Court's guidelines, Plaintiff does not recite the facts and case history herein and, instead, respectfully requests that the Court reference the forthcoming Motion for

[2] The estimated class size is based on extrapolation of Samsung's national unit sales. The parties will not know the exact class size until the Cell Phone Carriers provide their respective class lists.

[3] Class Counsel's total lodestar of $1,951,060 is materially less than the previously estimated lodestar of $2,050,000 provided in Plaintiff's Motion for Preliminary Approval because Class Counsel was unable to include the time entries of attorney John Hurley who stopped work on this matter in late-2018. (Roy Decl. ¶ 57.)

Final Approval for this information.[4] Under Ninth Circuit standards, in a common fund case, a District Court is required to award attorneys' fees under either the "lodestar" method or the "percentage-of-the-fund" method. *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). Plaintiff's fee request is reasonable under both of these approaches.

1. **Class Counsel's Requested Fee Is A Reasonable Percentage of The Common Fund.**

Where the settlement involves a common fund, courts typically award attorneys' fees based on a percentage of the total settlement. *See State of Fla. v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming attorney's fee award of 33% of the recovery); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming attorney's fee award of 33% of the recovery). Additionally, when determining the value of the settlement, courts consider the non-monetary benefits conferred under the settlement terms. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 972-74 (9th Cir. 2003); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011), aff'd, 473 F. App'x. 716 (9th Cir. 2012). Finally, Ninth Circuit precedent requires courts to award class counsel fees based on the total benefits being made available to class members rather than the amount actually claimed. *Young v. Polo Retail, LLC*, 2007 WL 951821, at *8, Case No. 3:02-cv-04546-VRW (N.D. Cal. Mar. 28, 2007) (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) ("district court abused its discretion in basing attorney fee award on actual distribution to class" instead of amount being made available)).

In the Ninth Circuit, the benchmark for an attorney fee is 25% of the total settlement value, including the monetary and non-monetary recovery. *See Six Mexican Workers*, 904 F.2d 1301, 1311 (9th Cir. 1990). However, many cases have found that between 30% and 50% of the common fund is an appropriate range when the settlement fund, most frequently when the common fund is less than ten million, like it is here. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995) (collecting cases); *see also Johnson v. Gen. Mills, Inc.*, 2013

[4] Consistent with the Court's guidelines, Plaintiff delays filing a Proposed Order regarding the present Motion so that the Court is presented with a single Proposed Order pertaining to the present Motion and Plaintiff's forthcoming Motion for Final Approval of Class Action Settlement.

WL 3213832, at *6 (C.D. Cal. June 17, 2013) (awarding a fee award of 30% of the settlement fund in a food labeling class action); *In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 749 (S.D.N.Y.1985) ("Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%–50% range in class actions"); *In re Dun & Bradstreet Credit Services Customer Litigation*, 130 F.R.D. 366, 372 (S.D.Ohio 1990) ("Fee awards in common fund cases generally are calculated as a percentage of the fund created, with the percentages awarded typically ranging from 20 to 50 percent of the common fund created").

Here, the non-monetary recovery adds tremendous value to the Class. Specifically, Samsung has agreed to discontinue the alleged benchmarking conduct for a period of three years for all smartphones sold in California which will also ensure that the phones California consumers purchase from Samsung are, in fact, performing in a manner consistent with independent benchmarking applications. Plaintiff's expert assigns a value of $10,594,921 to the Injunctive Relief component. (Declaration of Eduardo G. Roy ("Roy Decl."), Ex. 2 (Arnold Declaration).) This injunction is particularly valuable because no state or federal regulatory agency has prosecuted Samsung or its competitors for benchmarking manipulation and no state or federal court has issued a judgment declaring benchmarking manipulation illegal. In fact, it appears that benchmarking manipulation continues in the smart phone industry.[5] Furthermore, although this is a California class action, Samsung's agreement to discontinue benchmarking manipulation will have the likely effect of discontinuing benchmarking manipulation on a national basis which is especially valuable because many states do not have consumer protection statutes as robust as California's UCL. Specifically, Samsung sells its phones to third-party cell phone carriers in bulk and those cell phone carriers sell Samsung phones to their customers. Samsung does not dictate what phones are sold in what states by the third-party cell phone carriers. In other words, the practical effect of this injunction is that Plaintiff has achieved a national prohibition on benchmarking manipulation. Accordingly, the value of this injunction is almost certainly exponentially larger than the $10,594,921 estimated by Mr. Arnold. Here, the

[5] See https://www.androidauthority.com/the-companies-we-busted-cheating-on-benchmarks-in-2018-936168/

requested fee is 10.44% of the total settlement value, far below the Ninth Circuit benchmark. Although the fee equates to 49.97% of the monetary relief obtained, that percentage is also within the range of the cited similar cases.

2. Class Counsel's Requested Fee Is Also Reasonable When Measured Using the Lodestar-Multiplier Method.

After applying the percentage method to calculate fees, courts typically conduct a rough calculation of the lodestar as a "cross-check to assess the reasonableness of the percentage award." *Weeks v. Kellogg Co.*, 2013 WL 6531177, at *25 (C.D. Cal. Nov. 23, 2013); *see also Serrano v Priest (Serrano III)*, 20 Cal. 3d 25, 48-49 (1977); *Meister v. Regents of Univ. of Calif.*, 67 Cal. App. 4th 437, 449 (1998); *Melnyk v. Robledo*, 64 Cal. App. 3d 618, 624-25 (1976); *Clejan v. Reisman*, 5 Cal. App. 3d 224, 241 (1970); *Fed-Mart Corp. v. Pell Enterprises*, 111 Cal. App. 3d 215 (1980). Under this approach, "[t]he lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao*, 82 Cal. App. 4th at 26. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained and the contingent risk presented." *Id.*; *see also Serrano III*, 20 Cal. 3d at 48-49; *Ramos v. Countrywide Home Loans, Inc.*, 82 Cal. App. 4th 615, 622 (2000).

Class Counsel's lodestar through the date of this application is approximately $1,951,060 ((Roy Decl., ¶ 57-62; Declaration of Alec Cierny ("Cierny Decl."), ¶¶ 10-11.) (tables showing hours worked by timekeeper).) Class Counsel's efforts to date included, without limitation:

- Pre-filing investigation;
- Drafting and filing a class action complaint and two amended complaints;
- Drafting and filing oppositions to Defendant's following motions
    - Motion to Compel Arbitration
    - Motion to Dismiss
    - Motion for Judgment on the Pleadings

- Conducting a Trial on Defendant's Motion to Compel Arbitration;
- Opposing Defendant's Ninth Circuit Appeal of Court's Order Denying Motion to Compel Arbitration
- Drafting and filing numerous case management conference statements and case management stipulations;
- Meeting-and-conferring with Defendant's counsel regarding the scope of discovery, the sufficiency of discovery responses and production, the retention of electronic documents, the terms and scope of a stipulated protective order, and the timing of production;
- Briefing discovery disputes to this Court,
- Reviewing in excess of 100,000 pages of documents produced by Defendant;
- Subpoenaing third party witnesses;
- Taking Defendant's 30(b)(6) deposition;
- Defending Plaintiff's deposition;
- Drafting a Motion for Class Certification;
- Drafting a comprehensive mediation statement, a supplemental mediation statement, and participating in one all day mediation before Judge Kramer and four separate settlement conference with Judge Beeler;
- Negotiating and drafting the Settlement Agreement along with corresponding documents, including claim forms, summary notice, and long form notice;
- Filing the motion for preliminary approval and supporting documents, including a proposed preliminary approval order and a proposed final judgment, and appearing at a hearing thereon;
- Supervising the work of the Claims Administrator; and
- Preparing this motion and supporting documentation.

((Roy Decl., ¶ 57-62; Cierny Decl., ¶¶ 10-11.)

Before the final approval hearing, Class Counsel's efforts will also include, without limitation:

- Continued correspondence with Settlement Class Members and supervision of the work of the Claims Administrator; and
- Researching and drafting a reply memorandum and opposing objections, if any.

(Id., ¶70.)

Class Counsel calculated their lodestar using Class Counsel's regular billing rates and or the Laffey Matrix rates, which for the attorneys involved range from $700 to $1,000 per hour. (Roy Decl., ¶ 61; Cierny Decl., ¶ 16.) These hourly rates are equal to market rates in San Francisco for attorneys of Class Counsel's background and experience. (Roy Decl., ¶ 61; Cierny Decl., ¶ 16.); *see In re Wells Fargo & Co. S'holder Derivative Litig.*, No. 16-CV-05541-JST, 2020 WL 1786159, at *12 (N.D. Cal. Apr. 7, 2020) (approving hourly rates ranging from $560 to $1,075 for partners or "of counsel" attorneys); *In re HP Printer Firmware Update Litig.*, Case No. 5:16-CV-05820-EJD, 2019 WL 2716287, at *1 (N.D. Cal. June 28, 2019) (approving hourly rates ranging from $700 to $950).

Class Counsel Eduardo Roy of Prometheus Partners is a 1990 graduate from University of Vanderbilt Law School with thirty years of litigation experience. (Roy Decl., ¶ 8.) Class Counsel Daniel Quintero of Prometheus Partners is a 1998 graduate from University of California, Berkeley School of Law with twenty-two years of litigation experience. (Roy Decl., ¶¶ 31, 66.) Class Counsel Alec Cierny of The Cierny Firm is a 2010 graduate from University of California, Berkeley School of Law with over ten years of litigation experience. (Cierny Decl., ¶6 .)[6]

These rates are the 2020 rates charged by Class Counsel, which is appropriate given the deferred and contingent nature of counsel's compensation. *See LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2nd Cir. 1998) ("[C]urrent rates, rather than historical rates, should be applied in order to compensate for the delay in payment….") (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th

[6] Eduardo Roy and Alec Cierny were previously attorneys at the San Francisco office of the law firm of DLA Piper, where litigators who graduated in 1990, 1999, and 2010 respectively currently bill at hourly rates of in excess of $700 and $1,000. Furthermore, it is almost certain the rates paid by the Defendant to its firms in this case far exceed the rates requested for Class Counsel. See Managing Class Action Litigation: A Pocket Guide For Judges § IV(F) (suggesting an examination of the defendant's attorney fee records as a measure of what might be reasonable.) (Roy Decl., ¶ 67.)

Cir. 1994) ("The district court has discretion to compensate delay in payment in one of two ways: (1) by applying the attorneys' current rates to all hours billed during the course of litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement.").

3. **An Upward Multiplier Would Be Appropriate.**

Because Class Counsel's lodestar of $1,951,060 is more than the requested fee award of $1,398,861.24, no multiplier is necessary. But, if this Court reduces the lodestar below $1,398,861.24, it should still award Class Counsel $1,398,861.24, in fees, by applying a multiplier.

A law firm that focuses on contingent-fee class action cases does not get paid in every case. Frequently it gets nothing or is awarded fees equal to only a small percentage of the amount it had worked. Where a plaintiff's firm does succeed, therefore, it is appropriate to award a multiplier, to compensate for the risks the firm regularly undertakes. This Court has discretion to apply a multiplier to account for various factors, including, inter alia, the contingent nature of the fee award (both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award), the novelty and complexity of the questions involved, the value of class benefits obtained, the efficiency and skill displayed by class counsel, and the importance of other injunctive relief obtained. *See Serrano III*, 20 Cal. 3d at 49; *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001); *City of Oakland*, 203 Cal. App. 3d 78 (1988); *Downey Cares v. Downey Community Dev. Comm'n*, 196 Cal. App. 3d 983 (1987), 995 n11; *see also Maria P. v. Riles*, 43 Cal. 3d 1281, 1294 n8 (1987); *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, (1983), 322; *Serrano v. Unruh (Serrano IV)*, 32 Cal.3d 621, 625 n6 (1982). Each of these factors exists here.

First, here, both this litigation and the underlying legal claims and factual issues were complex. The "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). Class Counsel are experienced class action litigators. Furthermore, this case involved a relatively novel and complex area of law, which required specific skills and experience. In particular, the case raised numerous complex factual and legal issues regarding technology and deceptive

marketing strategies used to insulate the deceiver from the end consumer. Not only are Class Counsel extremely well versed in complex class actions, they have significant experience in consumer practices and products. This experience and expertise of Class Counsel should not be ignored. Furthermore, Class Counsel conducted an extensive factual investigation, discovery, and the analysis of thousands of pages of documents. (Roy Decl., ¶ 49.) The Parties engaged in over five years of active litigation including a trial on Samsung's Motion to Compel Arbitration before reaching the settlement. Further, Samsung challenged the pleadings on multiple occasions and appealed the Court's decision on its Motion to Compel Arbitration. As a result of Samsung's aggressive defense, Plaintiff only has one remaining claim against Samsung for violation of the UCL. Additionally, Plaintiff and Samsung have engaged in significant informal and formal discovery, including both inter-party discovery and third-party discovery. Further, the depositions were taken of Plaintiff and Samsung's 30(b)(6) witness in addition to the extensive written discovery and document productions. After extensively meeting and conferring about various discovery objections, Defendants produced thousands of documents, including internal emails, marketing data, and financial and sales data. (Roy Decl. ¶ 49.)

From the outset, Class Counsel litigated this action vigorously and skillfully, maximizing recovery for the benefit of the Class. As a result of Class Counsel's skill and diligence, they reached an excellent settlement result for the Class. The quality of Class Counsel's work, and the efficiency and dedication with which it was performed, should be rewarded. Moreover, the quality of opposing counsel is also an important factor when evaluating the quality of the work done by Class Counsel. *See In re Equity Funding Corp. Sec. Litigation*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Here, Class Counsel were opposed by skilled and respected counsel from Paul Hastings LLP and Hunton Andrews Kurth LLP who had significant resources and experience with which to represent the interests of Samsung. This factor also strongly supports the fees requested. In summary, the factual and legal complexity of this action combined with Paul Hastings LLP's and Hunton Andrews Kurth LLP's vigorous defense of Samsung weigh strongly in favor of awarding the requested attorneys' fees.

In addition to the time-consuming research and investigation needed to support Plaintiffs'

theories, success on any given motion was far from certain. Nonetheless, Class Counsel represented Settlement Class Members' claims with creativity, skill, and ingenuity, drafting numerous briefs on challenging areas of the law, and were either successful or partially successful on every motion filed in the case. As Defendant was represented by able counsel who fought hard on all fronts, the settlement of this case was due to Class Counsel's litigation skill and experience.

Second, Class Counsel reached a settlement before class certification and thus should be rewarded for its efficiency (and the concomitant savings to the judicial system). In *Lealao*, the Court explained that, unless multipliers are provided when counsel agree to settle early, there will be "a disincentive to settle promptly inherent in the lodestar methodology. Considering that our Supreme Court has placed an extraordinarily high value on settlement, it would seem counsel should be rewarded, not punished, for helping to achieve that goal, as in federal courts." *Lealao*, 82 Cal. App. 4th at 52 (citing *Merola v. Atlantic Richfield Company*, 515 F.2d 165, 168 (3d Cir. 1975)) (lodestar-multiplier approach "permits the court to recognize and reward achievements of a particularly resourceful attorney who secures a substantial benefit for his clients with a minimum of time invested"); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1282-1283 (S.D. Ohio 1996) (case settled "in swift and efficient fashion"); *Arenson v. Board of Trade of City of Chicago*, 372 F. Supp. 1349, 1358 (N.D. Ill. 1974) (awarding a fee of four times the normal hourly rate on ground that, if the case had not settled and gone to verdict, "there is no doubt that the number of hours of lawyer's time expended would be more than quadruple the number of hours expended to date"). Similarly, in *Thayer v. Wells Fargo Bank*, 92 Cal. App. 4th 819 (2001), the Court noted that "[t]he California cases appear to incorporate the 'results obtained' factor into the 'quality' factor: i.e., high-quality work may produce greater results in less time than would work of average quality, thus justifying a multiplier."

Third, Class Counsel bore considerable risk in litigating this case wholly on a contingent basis and advancing all costs. (Roy Decl., ¶¶ 53-55.) And, Class Counsel will have to perform more work before the Settlement will become effective, to respond to objections, communicate

with class members, supervise the claim administrator, and oppose any appeals.[7] As the California Supreme Court has explained:

> [a] contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.

Ketchum, 24 Cal. 4th at 1132-33; *see also Cazares v. Saenz*, 208 Cal. App. 3d 279, 288 (1989) ("in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a non-contingent fee for the same case."). Indeed, in *In re Continental Illinois Securities Litigation*, 962 F.2d 566 (7th Cir. 1993), a federal appellate court reversed a fee award in a class action for, among other things, the trial court's refusal to enhance class counsel's lodestar for contingency risk. It explained, "The judge refused to award a risk multiplier—that is, to give the lawyers more than their ordinary billing rates in order to reflect the risky character of their undertaking. This was error in a case in which the lawyers had no source of compensation for their services." *Id.* at 569. "[T]he failure to make any provision for risk of loss may result in systematic under-compensation of Plaintiff's counsel in a class action case, where as we have said the only fee that counsel can obtain is, in the nature of the case, a contingent one." *Id.*

Fourth, as explained above, Class Counsel achieved an excellent settlement in this Litigation. Should the Court reduce Class Counsel's lodestar, the multiplier necessary to offset that reduction would fall well within the range commonly applied by California courts. For example, in *Wilson v. Airborne, Inc.*, Case. No. 07-770-VAP(Opx), 2008 WL 3854963 (C.D. Cal. Aug. 13, 2008), the court approved a multiplier of 2.0 in a false advertising class action brought on behalf of consumers. *Id.* at *12. Likewise, in *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74 (1986), the Court of Appeal remanded a case for a lodestar enhancement of "two, three, four or

[7] Class Counsel anticipates that there will be another 50 - 75 hours before this settlement is entirely complete and an estimated 175-250 hours if this Court's judgment is appealed. (Roy Decl., ¶ 70) Should the Court award less than the maximum amount of fees, Class Counsel reserves its right to seek additional attorneys' fees for later-performed work in connection with this Settlement.

otherwise." *Id.* at 76; see also *Coalition for L. A. County Planning etc. Interest v. Board of Supervisors*, 76 Cal. App. 3d 241, 251 (1977) (affirming a multiplier of 2); *Arenson*, 372 F. Supp. at 1358 (awarding a fee four times the normal rate on ground that, if the case had not settled and gone to verdict, "there is no doubt that the number of hours of lawyer's time expended would be more than quadruple the number of hours expended to date")); *see also City of Oakland*, 203 Cal. App. 3d at 83 (affirming a 2.34 multiplier); *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal. App. 3d 465, 479-80 (1984) (approving a multiplier of 12).

B. Class Counsel Should Be Reimbursed for Their Reasonable Costs Incurred in Prosecuting the Action.

Class Counsel requests that, in addition to reasonable attorneys' fees, the Court grant its application for reimbursement of $101,138.76 in expenses incurred by it in connection with the prosecution of this Litigation. The expenses incurred are itemized in the Roy Declaration. (Roy Decl., ¶ 72; Cierny Decl., ¶ 17.) Attorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class. *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionally by those class members who benefit from the settlement."). Expenses that are of the type normally charged to hourly paying clients are reimbursable. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (recovery of "those out-of-pocket expenses that 'would normally be charged to a fee paying client'" are reimbursable); *see also In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007) (approving reasonable costs in class action settlement to include travel expenses, postage, telephone, fax, notice, filing fees, photocopies, and computerized legal research).

Here, the expenses which Class Counsel seek are the type of expenses routinely charged to hourly paying clients and are well-within the range of reasonableness given the length and complexity of this litigation. For example, Class Counsel seeks reimbursement for expert costs, document management fees, deposition costs, document retrieval fees. and filing fees. All of

these charges are commonly accepted as reimbursable in a common fund case.

Class Counsel is typically entitled to reimbursement of all reasonable out-of-pocket expenses and costs in prosecution of the claims and in obtaining a settlement. *See Vincent v. Hughes Air West*, 557 F.2d 759, 769 (9th Cir. 1977). Plaintiff, therefore, respectfully requests that the Court order the reimbursement of Class Counsel's costs in the amount of up to $101,138.76.

C. The Incentive Award to The Representative Plaintiff Is Reasonable.

This Court should also approve a $7,500 incentive award to Plaintiff as it is just, fair and reasonable. In deciding whether to approve an incentive award, a court should consider: "(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty 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 (of lack thereof) enjoyed by the class representative as a result of the litigation." *Van Vranken*, 901 F. Supp. at 299. Further, as a matter of public policy, incentive awards are necessary to encourage consumers to formally challenge perceived false advertising and unfair business practices.

In the context of this lawsuit, an award of a $7,500 incentive payment to Plaintiff is fair and reasonable. Plaintiff contributed extensive time and effort to the litigation of this class action. Plaintiff has litigated this case for over six years, during which he had regular telephone conversations and email communications with Class Counsel, provided Class Counsel with background information regarding his claims, assisted Class Counsel in understanding his claims and in responding to discovery, searched for and produced documents supporting his claims and the claims of the Class, he was deposed and testified at a bench trial concerning Samsung's Motion to Compel Arbitration. Finally, Plaintiff attended each of the four mediation and settlement conference sessions telephonically despite recovering from serious surgery from a ski incident that shattered his leg. Over the last six years, Daniel Norcia estimates that she devoted in excess of one hundred hours assisting Class Counsel in this case. (Roy Decl., ¶75.)

The amount of incentive payment sought by Plaintiff is in-line with incentive payments awarded in other class actions. *See Cicero v. DirecTV, Inc.*, Case No. EDCV 07-1182, 2010 WL 2991486, at *7 (C.D. Cal. July 27, 2010) (approving incentive awards of $5,000 and $7,500

where the class representatives "actively participated in the action by assisting counsel and responding to discovery"); *see* Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1333 (2006) (an empirical study of incentive awards to class action plaintiffs has determined that the average aggregate incentive award within a consumer class action case is $29,055.20, and that the average individual award is $6,358.80.); *see also Smith v. CRST Van Expedited, Inc.*, Case No. 10-cv-1116- IEG (WMC), 2013 WL 163293, *6 (S.D. Cal. Jan. 14, 2013) (finding the amount of the incentive payments requested, $15,000, is well within the range awarded in similar cases); *Embry v. Acer America Corp.*, Case No. 5:09-cv-01808-JW, Dkt.# 218 (N.D. Cal. Feb. 14, 2012) (awarding $15,000 incentive award).

Based on the foregoing, Plaintiff respectfully requests that the Court award Plaintiff Daniel Norcia a $7,500 incentive payment, as provided under the Settlement Agreement.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court issue an order: (a) awarding attorneys' fees in the amount of $1,398,861.24; (b) reimbursing the reasonably incurred litigation costs of this action of $101,138.76; and (c) awarding an incentive payment of $7,500 to Plaintiff Daniel Norcia.

Dated: August 24, 2020

Respectfully submitted,

PROMETHEUS PARTNERS L.L.P.

By /s/ EDUARDO G. ROY
EDUARDO G. ROY
Attorneys for Plaintiff
DANIEL NORCIA