Daniel J. Mogin (95624, dmogin@moginlaw.com)
Jodie M. Williams (247848, jwilliams@moginlaw.com)
THE MOGIN LAW FIRM, P.C.
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: (619) 687-6611
Facsimile: (619) 687-6610

Co-Lead Counsel for Plaintiffs
and the Certified Plaintiff Class
(Additional Counsel Appear on Signature Page)

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JOEL I. ROOS and TOM SANTOS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

HONEYWELL INTERNATIONAL, INC. and DOES 1-100, inclusive,

Defendants.

Case No. CGC-04-436205

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS

Date: May 2, 2014
Time: 9:00 a.m.
Dept: 304
Judge: Hon. Curtis E.A. Karnow

TABLE OF CONTENTS **PAGE**

TABLE OF AUTHORITIES **PAGE**

California Cases

Federal Cases **PAGE**

Statutes and Rules

I. INTRODUCTION

The results achieved in this case and the efforts by Class Counsel to achieve them were extraordinary. Class Counsel fought hard for nearly nine years on behalf of the Plaintiffs, a certified class of indirect purchasers ("Plaintiffs" or "Class") of Defendant Honeywell International, Inc.'s ("Honeywell's" or "Defendant's") Round Thermostats. Over the near-decade of litigation, Class Counsel engaged in numerous and lengthy substantive law and motion, produced and analyzed millions of pages of documents and data, propounded and reviewed copious discovery and depositions, and conducted substantial independent investigation. Class counsel's efforts enabled them to successfully negotiate a Settlement that, if approved by the Court,[1] will finally resolve Plaintiffs' claims against Honeywell while compensating them for approximately 78% of their estimated damages.

In exchange for these significant achievements, Class Counsel seeks a modest reimbursement of fees in the amount of $3,056,250 plus accumulated interest, and related costs totaling approximately $711,212.72. Since this case's inception in 2004, Class Counsel have spent nearly 36,000 hours on this case and their lodestar exceeds $15 million.[2] Class Counsel seek reimbursement of only a fraction of their fees and costs.

The fee award also contemplates incentive awards to the three named Class representatives in the amount of $2,500 each. The Class representatives have conscientiously performed their duties and expended a significant amount of time in aiding the prosecution of this case. The incentive awards are provided for in the Settlement and well-deserved.

The requested fee award is reasonable and fair in light of the results obtained and the efforts necessary to obtain them. It represents approximately 20% of the total fees incurred on this case, or approximately 37.5% of the Settlement Fund. Class Counsel will not recover their lodestar

---

[1] Plaintiffs' Motion for Final Approval of the Class Action Settlement was filed concurrently herewith.

[2] The attorneys' fees and costs figures are cumulative and represent all fees and costs incurred in litigating this and the related cases. As discussed in n.7, below, the parties stipulated to reduce redundancies where possible among the cases.

and will receive a negative multiplier. The percentage sought is is consistent with attorneys' fees awarded by California courts and the award sought is well below the market level.

II. STATEMENT OF FACTS[3]

In this antitrust and unfair competition case, Plaintiffs, on behalf of a certified class of indirect purchasers (end-users), allege that Honeywell engaged in a long-running and continuous course of conduct that foreclosed competitors from manufacturing and selling circular thermostats. Succinctly, Plaintiffs allege that Honeywell misrepresented the status of and fraudulently procured and defended its trademark for the iconic Honeywell Round Thermostat ("HRT"), which excluded competitors from participating in the market and allowed Honeywell to charge supra-competitive prices for the HRT to Class Members.

In November 2004, former Class representative Bryan Brock brought this action against Honeywell for alleged violations of the Cartwright Act (Cal. Bus. & Prof. Code § 16720, *et seq.*), the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*), and California's common law of monopolization based on the aforementioned conduct. Declaration of Daniel J. Mogin in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs ("Mogin Decl.") ¶9. A similar indirect purchaser class action was filed in Vermont pursuant to its Consumer Fraud Act ("CFA"), 9 V.S.A. §2451 et seq., fashioned *Wright v. Honeywell International, Inc.*, Vermont Superior Court, Orange County Case No. 201-11-04 Oecv ("*Wright*"). The allegations in the *Wright* case are substantially similar to those in the California case. Declaration of Christine Craig in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Craig Final Approval Decl.") ¶2. Related indirect purchaser cases were also filed in New York, Maine and Tennessee.[4] Mogin Decl. ¶10.

---

[3] This section is adopted from the comprehensive Statement of Facts section included in Plaintiffs' Motion for Final Approval of Class Action Settlement, filed concurrently herewith. *See* Section II, Memorandum in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, filed April 25, 2014.

[4] The related cases were: *Thomas Fullum, et al. v. Honeywell International Inc.*, Case No. 04603748 (New York); *John McKinnon, et al. v. Honeywell International Inc.*, Docket No. ALFSC-CV 2004-00353 (Maine); *R. Sadler Bailey, et al. v. Honeywell International Inc.*, Case No. C 05-3025 WHA (Tennessee); and *Vincent Faga, et al. v. Honeywell International. Inc.*,

After filing an Answer on December 16, 2004, Honeywell removed this case (as well as the other related cases) to the United States District Court for the Northern District of California and filed a Petition to the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. §1407. Mogin Decl. ¶11. Plaintiffs contested both the MDL proceedings and federal jurisdiction. Mogin Decl. ¶11. Over Plaintiffs' objections, the JPMDL initiated MDL Proceedings and assigned the matter to the Northern District of California.[5] Mogin Decl. ¶11. In a rare occurrence, Plaintiffs succeeded in breaking the MDL and, on August 24, 2005, each case was remanded to its respective state court. Mogin Decl. ¶¶12-13. On October 21, 2005, this case was assigned to this Department as a complex matter. Mogin Decl. ¶13.

After remand, Plaintiffs successfully opposed, in part, Honeywell's motion for judgment on the pleadings or, in the alternative, motion to strike. Mogin Decl. ¶14. Plaintiffs subsequently filed a First Amended Complaint, which withstood Honeywell's demurrer and motion to strike. Mogin Decl. ¶16. After seeking leave to amend, Plaintiffs filed a Second Amended Complaint on or about February 8, 2008, substituting Plaintiffs Joel I. Roos and Tom Santos as the new class representatives for Mr. Brock. Mogin Decl. ¶17. Over the next several years, Plaintiffs participated in contentious court proceedings and substantial motion practice and writ proceedings in this case, as well as in the *Wright* case, including opposing Defendants' Anti-SLAPP motion and related Petition for Writ of Mandate, both of which were denied. Mogin Decl. ¶¶5, 6, 9-26; Craig Final Approval Decl. ¶¶11-19.

On September 13, 2005, Honeywell filed a motion for summary judgment against the *Wright* plaintiffs, which was summarily denied by the Vermont court on May 15, 2008. Craig Final Approval Decl. ¶¶14-16. On November 12, 2009, Honeywell filed a Motion for Summary Judgment, or, in the Alternative, Summary Adjudication, in this case, contending that Plaintiffs'

Docket No. 04-4903 (Massachusetts). On August 18, 2005, the Tennessee case was voluntarily dismissed at the request of the class representative. The Maine case was dismissed after class certification was denied, summary judgment granted, and an appeal to the Maine Supreme Court. The New York and Massachusetts claims were likewise voluntarily dismissed, the latter after class certification was denied.

[5] *In Re Circular Thermostat Litigation*, 2005 WL 2043022 (N.D. Cal., Aug. 24, 2005).

claims were barred by the litigation privilege under Civil Code section 47(b), the *Noerr-Pennington* doctrine, and the *Walker Process* doctrine, that Plaintiff Roos did not adequately demonstrate antitrust injury or "impact", and that Plaintiff Roos' claims were barred by the statute of limitations. Mogin Decl. ¶21. On March 15, 2011, the Court denied Defendant's motion with respect to the litigation privilege, the *Noerr-Pennington* doctrine, and the *Walker Process* doctrine, but granted their motion with respect to Plaintiff Roos, stating that he failed to demonstrate sufficient antitrust injury and that his claims were barred by the statute of limitations. Mogin Decl. ¶21. Honeywell contested the decision in a Petition for Writ of Mandate and/or Prohibition filed in the Court of Appeal on April 4, 2011, which was summarily denied after extensive briefing by the parties. Mogin Decl. ¶21.

Plaintiffs' motion for class certification in the *Wright* case was initially denied by the Vermont trial court on May 15, 2008. Craig Final Approval Decl. ¶¶12, 16. Plaintiffs appealed the decision to the Supreme Court of Vermont which, on December 10, 2009, reversed the lower court and ordered the Vermont class to be certified. Craig Final Approval Decl. ¶¶17-18. Notice of pendency to Vermont Class Members was completed by January 31, 2012, and only seven Class Members chose to be excluded from the lawsuit. Craig Final Approval Decl. ¶20.

On November 7, 2011, this Court held a hearing on Plaintiffs' Renewed Motion for Class Certification at which time Defendant vigorously contested Plaintiffs' ability to demonstrate impact on a class-wide basis. Mogin Decl. ¶24. Despite significant opposition from Honeywell, the Court certified the Class on February 21, 2012. Mogin Decl. ¶24. Notably, the Class period dates back 28 years, to 1986.[6] Defendant contested certification by filing a Petition for Writ of

[6] The complete definition of the California Certified Class is:

> All persons residing in California who purchased one or more Honeywell Round Thermostats ("HRT") indirectly from Defendant Honeywell International Inc., in California during the Class Period for their own use and not for resale.
>
> Specifically excluded from the Plaintiff Class are persons who purchased a building with a HRT pre-installed and who have not otherwise acquired an HRT.
>
> Also specifically excluded are the Defendant herein; officers, directors, or employees of any Defendant; any entity in which any defendant has a controlling

Mandate and/or Prohibition with the Court of Appeal on April 23, 2012, and a Petition for Review with the California Supreme Court on July 30, 2012, all of which were fully briefed. Although both courts ultimately denied Honeywell's petitions, the proceedings signaled Honeywell's continued resolve to challenge class certification and Plaintiffs' ability to prove injury. Mogin Decl. ¶¶21-24.

Plaintiffs' counsel thoroughly investigated the various factual and legal issues involved in this case and became familiar with the strengths and weaknesses of Plaintiffs' position. Mogin Decl. ¶32. Plaintiffs also engaged in extensive discovery and investigation.[7] Plaintiffs commissioned expert analyses, reviewed copious documentary evidence, defended and took multiple depositions (including expert depositions), and propounded approximately seven sets of Requests for Production of Documents, seven sets of Interrogatories, and two sets of Requests for Admission. Mogin Decl. ¶¶7, 13, 27-32.

Cognizant of the inherent risks of litigation, the parties attempted formal and informal negotiations on several occasions. Mogin Decl. ¶¶20, 22, 25, 39, 44. Despite these efforts, which included a private mediation session in 2010, the parties could not reach an agreement. Mogin Decl. ¶22. At the Court's suggestion, the parties attended a settlement conference on July 9, 2013, before the Honorable Judge John E. Munter, a San Francisco Superior Court Judge in the Complex Civil Litigation Division. Mogin Decl. ¶25. With Judge Munter's substantial assistance, the parties reached an agreement in principle on July 17, 2013, which, after further extended negotiations, was memorialized on November 8, 2013, in the Settlement Agreement.

> interest; the affiliates, legal representatives, attorneys, heirs or assigns of any defendant. Also excluded are any federal, state or local governmental entity, and any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staffs.
>
> The Class Period is defined as June 30, 1986 through and including December 5, 2013.

[7] On or about December 22, 2005, Plaintiffs and Honeywell stipulated that discovery conducted in one case shall be deemed to have been conducted and may be used in all related cases. Mogin Decl. ¶13.

Mogin Decl. ¶25. Plaintiff Tom Santos and Class Counsel have reviewed the Settlement Agreement and believe it to be fair, adequate, and reasonable to settle the instant litigation according to the terms set forth herein. Declaration of Tom Santos In Support of Motion for Preliminary Approval of Class Action Settlement ("Santos Decl.") ¶10.

Plaintiffs initially sought preliminary approval of the Settlement Agreement through a properly noticed motion, heard on December 5, 2013. Mogin Decl. ¶26. The Court denied Plaintiffs' Motion without prejudice in light of some concerns with the proposed notice plan and proposed Order. Mogin Decl. ¶26. Having fully addressed the Court's concerns, preliminary approval of the Settlement Agreement was granted on February 4, 2014.[8] Mogin Decl. ¶26. Notice of the Settlement was disseminated to Class Members pursuant to the notice plan approved by the Court on February 4, 2014. Mogin Decl. ¶26.

III. CLASS COUNSEL IS ENTITLED TO THE REQUESTED ATTORNEYS' FEES AND COSTS

The California Supreme Court has determined that "when a number of persons [are] entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys' fees out of the fund." *In Re California Indirect Purchaser X-Ray Film Antitrust Litigation*, Alameda County Superior Court Case No. 960886, 1998 WL 1031494, at *3, 1998-2 Trade Cases ¶72, 336 (Oct. 22, 1998) ("*X-Ray Film*") (*quoting Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977)). *See also Lealao v. Beneficial California Inc.*, 82 Cal. App. 4th 19, 27 (2000). California recognizes two methods for calculating attorneys' fees in class action lawsuits: the "lodestar" approach and the percentage of recovery method. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001). Under the lodestar approach, the Court multiplies the hours class counsel reasonably expended by counsels' reasonable hourly rates, which may be enhanced by a multiplier. *Wershba*, 91 Cal. App. 4th at 254. *See also Lealao*, 82 Cal. App. 4th at 26. For the

[8] The Vermont court granted preliminary approval of the Settlement on December 23, 2013. Final approval of the Class Settlement is set to be heard by the Vermont court on May 16, 2014. Craig Final Approval Decl. ¶¶24, 25.

percentage of recovery method, the Court determines fees based on a percentage of the common benefit bestowed on the class. *X-Ray Film*, 1998 WL 1031494, at *3. Under either method, the Court considers a variety factors to determine the fee award, including: (1) the results class counsel obtained; (2) the time and labor required of the attorneys; (3) the contingent nature of the case and the delay in payment to class counsel; (4) the extent to which the nature of the litigation precluded other employment by class counsel; (5) the experience, reputation and ability of the attorneys who performed the services, the skill displayed in the litigation, and the novelty, complexity and difficulty of the case; and (6) the informed consent of the clients to the fee agreement. *X-Ray Film*, 1998 WL 1031494, at *3. *See also Serrano*, 20 Cal. 3d at 49; *Dunk v. Ford Motor Company*, 48 Cal. App. 4th 1794, 1810 n.21 (1996).

The Court has "wide latitude" in assessing the value of an attorneys' services, and there is "'no mechanical formula [that] dictate[s] how the trial court should evaluate all these factors.'" *Lealao*, 82 Cal. App. 4th at 41 (*quoting Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 639 (1998)). *See also Wershba*, 91 Cal. App. 4th at 245 ("The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case.") However, the fee award should "mimic the market" as much as possible. *See Lealao*, 82 Cal. App. 4th at 47. "Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior." *Lealao*, 82 Cal. App. 4th at 47. Courts should be mindful that class action fee awards that are too small "chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." *Lealao*, 82 Cal. App. 4th at 52-53.

Class Counsel here request a fee award in the amount of $3,056,250, plus the pro rata share of interest accumulated into the Settlement Escrow Account, as well as reimbursement of approximately $711,212.72 in costs. Mogin Decl. ¶46. The fee request equates to approximately

20% of the lodestar with no multiplier or enhancement, or approximately 37.5% of the Settlement Fund, and the costs reimburse Class Counsel for the significant out-of-pocket expenditures associated with litigating this case for nearly nine years. At just a fraction of the fees actually incurred by Class Counsel to litigate this extremely complex case, the requested fees are appropriate under both the lodestar and the percentage of recovery methods and should be awarded in total.

A. Class Counsel's Fee Request is Reasonable Under the Lodestar Method

"'The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and courts.'" *Serrano*, 20 Cal. 3d at 48 n.23 (*quoting City of Detroit v. Grinnell Corp.*, 495 F. 2d 448, 470 (2d Cir. 1974) (*abrogated in Goldberger v. Integrated Resources, Inc.*, 495 F. 3d 448, 470 (2d Cir. 1974)).

The lodestar method, including the Court's discretion to award fee enhancements, is well-established under California law. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1137 (2001). Under this method, the court assessing fees begins with a touchstone, or "lodestar" figure which is "based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney … involved in the presentation of the case.'" *Ketchum*, 24 Cal. 4th at 1131-32 (*quoting Serrano*, 20 Cal. 3d at 48). The lodestar is the basic fee for comparable legal services in the community, and may be adjusted by the Court based on a variety of factors. *Ketchum*, 24 Cal. 4th at 32. The purpose of the adjustments is to set the fees according to the fair market value of a particular action [*Ketchum*, 24 Cal.4th at 1132], and courts frequently enhance the lodestar amount by employing multipliers from 2 to 4, sometimes even higher. *Wershba*, 91 Cal. App. 4th at 254-55. Fee awards that request a multiplier of less than two are typically reasonable. *See X-Ray Film*, 1998 WL 1031494, at *10 (a lodestar enhanced by a multiplier of approximately 1.2 was both modest and reasonable). Regardless of the multiplier used, the fee award should compensate the attorneys for

all the hours reasonably spent on the case, including those related solely to the fee. *Ketchum*, 24 Cal. 4th at 1133 (*citing Serrano v. Unruh*, 32 Cal. 3d 621, 624, 639 (1982)).

Class Counsel here are seeking a fee award that in fact does not adequately compensate them for all hours reasonably spent on this case and actually discounts their fees significantly. Based on the requested fee award, Class Counsel will be recovering an hourly rate of approximately $86 per hour for the hours incurred litigating this case, which is drastically reduced from the market rate for antitrust actions as well as the hourly rate that Class Counsel has regularly been awarded for litigating complex antitrust matters. *See* Mogin Decl. ¶52. Further, an analysis of the factors discussed above demonstrates that the requested fraction of the lodestar is reasonable and that counsel should be awarded the total fee request.

1. Class Counsel Obtained Remarkable Results

The record in this case demonstrates that settlement of this action is a remarkable result. As a threshold matter, pursuing an indirect purchaser antitrust action in state court based on common law monopolization, without the aid of government investigations, presents its own challenges. *See X-Ray Film*, 1998 WL 1031494 at *6. *See also In re Static Random Access Memory Antitrust Litigation*, 264 F.R.D. 603, 612 (N.D. Cal. 2009) ("The 'problem of proof in an indirect purchaser case is intrinsically more complex [than a direct purchaser case], because the damage model must account for the actions of innocent intermediaries who allegedly passed on the overcharge.'" (*quoting* William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 Antitrust L.J. 4, 12, (1999))); *Somers v. Apple, Inc.*, 258 F.R.D. 354, 358 (N.D. Cal. 2009) ("Recovery in an indirect purchaser case under state law requires a demonstration that a defendant 'overcharged [its] direct purchasers for [the product at issue] and that those direct purchasers passed on the overcharges to [the] plaintiffs.' [Citation.] As a consequence, 'the problem of proof in an indirect purchaser case is intrinsically more complex, because the damage model must account for the actions of innocent intermediaries who allegedly passed on the overcharge.'" (*quoting In re Graphics Processing Units Antitrust*

Litigation, 253 F.R.D. 478, 499 (N.D. Cal. 2008)).[9] Further, the number of indirect purchaser monopolization certified class actions is practically infinitesimal relative to other types of class cases.

In addition to the "ordinary" challenges associated with prosecuting a complex indirect purchaser antitrust action, this case in particular has been in active, highly-contentious litigation since it was initiated in 2004. Mogin Decl. ¶¶5, 9-26. The case was vigorously defended by skilled defense counsel backed by the resources of a Fortune 100 company. Plaintiffs withstood several rounds of dispositive law and motion, including a demurrer, a motion to strike, a motion for judgment on the pleadings, a particularly difficult Anti-SLAPP motion, and a motion for summary judgment and related appeal. Mogin Decl. ¶¶9-26. Plaintiffs succeeded in having this case remanded to state court after being removed to federal court and empaneled before the Judicial Panel on Multi-District Litigation, a remarkable feat. Mogin Decl. ¶¶11-13. Plaintiffs engaged in additional, contentious court proceedings and substantial motion practice and writ proceedings, including opposing Defendants' Anti-SLAPP motion and related Petition for Writ of Mandate, both of which were denied. Mogin Decl. ¶¶9-26. Plaintiffs even succeeded in certifying a class dating back 28 years, over significant opposition from Honeywell including another related appeal. Mogin Decl. ¶24. In fact, Honeywell's vigorous defense of class certification signaled its continued resolve to challenge Plaintiffs' case at every step of these proceedings. *See* Mogin Decl. ¶24.

Notwithstanding the tenacious litigation described above, the efforts of Class Counsel produced a Settlement that is both fair and reasonable. The Settlement was the product of arms-length negotiations, reached at with substantial assistance of a well-respected neutral sitting judge, with significant experience in antitrust cases, after several prior unsuccessful attempts at formal and informal settlement negotiations. Mogin Decl. ¶25. Extensive discovery and investigation was conducted which allowed counsel, highly-experience antitrust lawyers, to thoroughly

[9] "California courts may look to federal authority for guidance on matters involving class action procedures." *Cellphone Termination Fee Cases*, 180 Cal. Ap. 4th 1110, 1119, n.4 (2009} (*quoting Apple Computer, Inc. v. Superior Court*, 124 Cal. App. 4th 1253, 1264, n.4 (2005) (internal quotations omitted).

evaluate the Settlement, all of whom deemed it to be fair. Mogin Decl. ¶32; Declaration of Adam C. Belsky in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs ("Belsky Decl.") ¶5; Declaration of Christine M. Craig in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs ("Craig Decl.") ¶5; Declaration of Stephen T. Rodd in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs ("Rodd Decl.") ¶5; Declaration of Alexander M. Schack in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs ("Schack Decl.") ¶5; Declaration of Robert Taylor-Manning in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs ("Taylor-Manning Decl.") ¶5. Importantly, the Settlement captures nearly 78% of the estimated damages in this case, a particularly large percentage in an indirect-purchaser antitrust action, and sufficiently compensates Class Members who choose to file claims.

In addition, the record shows that the class's response to the Settlement has been positive. To date, no member of this extremely large class, spanning 28 years, has requested to be excluded from the Settlement, and only three Class Members submitted objections which, for reasons discussed in Plaintiffs' Response to Objections, filed concurrently herewith, lack any merit. *See* Declaration of April Hyduk In Support of Plaintiffs' Motion for Final Approval ("Hyduk Decl.") ¶9. Based on the foregoing, this factor weighs in favor of awarding Class Counsel the requested fees. *See X-Ray Film*, 1998 WL 1031494, at *4.

2. Class Counsel Successfully Litigated Novel Issues

Since its inception, prosecuting this indirect purchaser antitrust class action lawsuit involved litigating novel issues and claims. The antitrust theory of harm was based on abuse of trademarks, an intellectual property issue. One class action attorney with no affiliation to this case recognized the "creative use" of this legal theory to bring consumers some benefit from Honeywell's alleged monopolization. *See Honeywell International: Eco Suit Spawns Outbreak of Litigation,* Bankrupt.com Class Action Reporter, Vol. 7, No. 32 (Feb. 15, 2005), *available at* http://bankrupt.com/CAR_Public/050215.mbx (last viewed Apr. 10, 2014). In addition, and as Honeywell emphasized throughout the course of this litigation, there was little authority supporting a common law monopolization claim when this lawsuit was first filed, and while this

lawsuit was pending some trial courts held that California in fact does not recognize such a claim. *See Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1305-1306 (S.D. Cal. 2009) (determining that a common law monopoly claim is not cognizable under California law). In fact, the number of California state court class action lawsuits based on monopolization that have succeeded in certifying a class of indirect purchasers for any duration, let alone 28 years, is miniscule. In addition, Plaintiffs did not have the assistance of government investigations to bolster their case. *See X-Ray Film*, 1998 WL 1031494 at *6. Finally, the standard of proof to be applied to a fraudulent trademark claim was never settled and the standard as to fraudulent patents – assuming an analogy – shifted throughout the course of this litigation. Class Counsel was able to successfully navigate through these issues and recover approximately 78% of Plaintiffs' estimated damages.

3. Litigating This Case Was Extremely Time and Labor Intensive

The declarations from Class Counsel demonstrate that they invested a tremendous amount of time and effort in this case.[10] Class Counsel report a total lodestar of $15,162,020.50 based on approximately 36,000 hours for nine years of litigation. *See* Mogin Decl. ¶45; Belsky Decl ¶¶7-8; Craig Decl. ¶¶7-8; Rodd Decl. ¶¶7-8; Schack Decl. ¶¶7-8; Taylor-Manning ¶¶7-8. While these figures may appear to be large, they accurately reflect the amount of time necessary to properly prosecute and ultimately settle this extremely complex case.

At the time the Settlement was reached, Class Counsel had propounded approximately seven sets of Requests for Production of Documents, seven sets of Interrogatories, and two sets of Requests for Admissions, in addition to taking and defending multiple fact witness depositions, commissioning expert analyses, taking and defending expert witness depositions, reviewing millions of pages documentary evidence, and thoroughly investigating the various factual and legal issues involved in this case. Mogin Decl. ¶¶27-32. A significant amount of time was spent determining the credibility of transactional data produced by Honeywell in discovery which, *inter*

[10] "'Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorneys' fees, even in the absence of detailed time records.'" *X-Ray Film*, 1998 WL 1031494, at *10 (*quoting Martino v. Denevi*, 182 Cal. App. 3d 553 (1986)).

alia, led to additional expert work and revisions to Plaintiffs' damages model. Mogin Decl. ¶28. This discovery was conducted in addition to the protracted litigation described above. *See* Sections II, III.A.1, above. The records submitted by Class Counsel contain an accurate description of all of the work performed, carefully documenting each attorneys' involvement in this case throughout the past nine years. *See* Mogin Decl. ¶56; Belsky Decl ¶14; Craig Decl. ¶14; Rodd Decl. ¶14; Schack Decl. ¶14; Taylor-Manning ¶14.

4. Class Counsel Represented Plaintiffs Purely on a Contingent Basis

"Pursuing an antirust claim without an indictment or government investigation, based on circumstantial and economic evidence, is a risky undertaking." *X-Ray Film*, 1998 WL 1031494, at *6. Since its inception, prosecution of this indirect purchaser class action involved significant risk for counsel, who undertook the matter solely on a contingent basis with no guarantee of recovery. The novelty of the issues presented in this case is described above [*See* Section III.A.2.], and Class Counsel continued to vigorously litigate this case, including through the appellate courts.

To date, Class Counsel have not been compensated for their efforts and, even if the Court were to award the entire fee request, a substantial amount of Class counsel's fees will remain unpaid. For instance, lead counsel The Mogin Law Firm alone incurred approximately $7,560,941.25 in fees, more than double the entire requested fee award. *See* Mogin Decl. ¶52. Apart from the risks posed by agreeing to prosecute this case, Class Counsel will have been waiting for almost a decade to be reimbursed for just a fraction of their fees, which further demonstrates the reasonableness of the fee request.

5. Class Counsel was Precluded from Accepting other Employment

Class counsel's declarations, filed concurrently with this motion, demonstrate that all were precluded from accepting and/or performing other work as a result of their commitment to this case. Mogin Decl. ¶50; Belsky Decl. ¶6; Craig Decl. ¶6; Rodd Decl. ¶6; Schack Decl. ¶6; Taylor-Manning Decl. ¶6. This litigation was highly active over the entire duration of its nine year lifespan, and significant participation from all involved was necessary in order to reach the Settlement, necessarily precluding counsel from pursuing other endeavors.

6. Class Counsel are Experienced, Highly Regarded Antitrust Attorneys

As discussed more extensively in their corresponding declarations, Class Counsel are highly experienced attorneys, with decades of experience in litigation and antitrust law. *See* Mogin Decl. ¶2; Belsky Decl. ¶2; Craig Decl. ¶2; Rodd Decl. ¶2; Schack Decl. ¶2; Taylor-Manning Decl. ¶2. They are well-regarded among their peers, and their skill was critical to developing the evidence in this case and negotiating the Settlement. Class Counsel's history of aggressive, successful prosecution of antitrust cases led to remarkable achievements in this case, such as breaking a multi-district litigation empanelment and certifying a 28 year class, and gave counsel the credibility to negotiate a fair resolution for the Class.

7. Plaintiffs Consented to the Fee Agreement

At the outset, the named Plaintiffs in this case each agreed to enter into a contingency fee arrangement for the benefit of the Class, subject to Court approval, cognizant that counsel would be seeking a portion of their recovery, if any, to reimburse attorneys' fees and costs. Mogin Decl. ¶50. This agreement alone substantiates the reasonableness of the requested attorney fee award. *See X-Ray Film*, 1998 WL 1031494 at *8 (citing *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal. App. 3d 465, 472 (1984)).

As noted above, only three Class Members objected to the Settlement. Two of the objections erroneously contest the plan of distribution, and the third concerns the notice to Class Members and mistakenly asserts, *inter alia*, that the notice should have provided a "credible explanation" as to why Class Counsel should recover the requested percentage of the settlement fund in attorneys' fees. *See* Plaintiffs' Response to Objections, filed concurrently herewith. As discussed in more detail in Plaintiffs' Response to Objections, the objection to the proposed *cy pres* benefit is premature, the distribution per Class Member sufficiently compensates each members' estimated damages in this case, and California law does not require the notice to Class Members to include information justifying the requested fee award. *See Wershba*, 91 Cal. App. 4th at 252; Plaintiffs' Response to Objections. Thus, these objections do not present sufficient grounds to deny Class Counsel the requested fee award.

///

B. The Percentage of Recovery Method Supports Class Counsel's Fee Request

California courts have also frequently awarded attorneys' fees calculated as a percentage of the common fund. *See X-Ray Film*, 1998 WL 1031494, at *8-9. *See also Lealao*, 82 Cal. App. 4th at 30-31. In addition to being reasonable based on the factors discussed above, the percentage of the fund requested here, 37.5%, is within the range of what California courts typically award counsel for work done in indirect purchaser antitrust class actions. *See X-Ray Film*, 1998 WL 1031494 at *9 (collecting cases). *See also Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1047 (9th Cir. 2002) (although 25% of the common fund is the "benchmark" for percentage of recovery calculations, "'in many cases awards fall outside the "typical" range'") (*quoting In re Wash. Pub. Power Supply sys. Sec. Litig.*, 19 F. 3d 1291, 1297 (9th Cir. 1994)). Other courts have traditionally awarded fees in the 20%-50% range of class actions. *See In Re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 749-750 (S.D.N.Y. 1985) (collecting cases). Thus, the requested percentage here is within what is normally considered market rate for contingency complex antitrust class action lawsuits. *See generally Chavez v. Netflix, Inc*., 162 Cal. App. 4th 43, 65 (2008) (marketplace contingency fee contracts contain fee percentages in the range of 20% - 40%). *See also Ketchum*, 24 Cal. 4th at 1132-33 (counsel should be awarded the "basic fee for comparable legal services in the community", and the requested amount may be enhanced to "fix a fee at the fair market value for the particular action", particularly in contingent fee cases).

In other cases, courts have awarded higher percentages than that sought here. *See, for example, Abzug v. Kerkorian*, L.A. Superior Court Case No. CA-000981 (Nov. 1990) (awarding 45% fee of a $35 million class action settlement); *Haitz v. Meyer, et al.*, Alameda Superior Court Case No. 572698-3 (Aug. 20 1990) (awarding 45% of the common fund as fees). *See X-Ray Film*, 1998 WL 1031494 at *9 (collecting cases). Accordingly, an award of 37.5% here is reasonable and Class Counsel should be awarded the requested fee amount.

C. Class Counsel's Request for Reimbursement of Costs is also Reasonable

In total, Class Counsel expended approximately $711,212.72 in costs associated with litigating this case. *See* Mogin Decl. ¶¶46, 54; Belsky Decl. ¶11; Craig Decl. ¶11; Rodd Decl. ¶11; Schack Decl. ¶11; Taylor-Manning Decl. ¶11. Reimbursement of costs incurred during the

"ordinary course" of prosecuting a case, in addition to attorneys' fees, is reasonable. *See X-Ray Film*, 1998 WL 1031494, at *11 (request for reimbursement of $29,051.40 in costs was reasonable). As with the fees incurred, counsel has not been reimbursed for any of these costs and will not be reimbursed absent the Court's award. *See* Mogin Decl. ¶54; Belsky Decl. ¶11; Craig Decl. ¶11; Rodd Decl. ¶11; Schack Decl. ¶11; Taylor-Manning Decl. ¶11.

The costs requested were incurred as part of vigorously prosecuting this case for nine years. They include costs associated with bringing and defending against a host of law and motion and related writs and appeals, conducting discovery (including electronic discovery during its infancy), compensating expert witnesses, making photocopies, serving defendants with process, as well as paying court fees, postage charges, and telephone charges. Mogin Decl. ¶54. *See also* Sections II, III.A., above. Class Counsel worked diligently to manage costs and exercised tight cost controls throughout the duration of this litigation. For instance, counsel used in-house resources to conduct economic analyses and manage electronic discovery, rather than outsource these cost-intensive projects. Mogin Decl. ¶47. These efforts allowed Class Counsel to contain costs throughout the near-decade of litigation. Mogin Decl. ¶47. In addition, Class Counsel's request for reimbursement of costs has not been objected to by any Class Members. *See* Plaintiffs' Response to Objections, filed concurrently herewith. In light of the number of years in active, highly contested litigation, the procedural posture of this case prior to settlement, and settlement obtained, Class Counsel's request for reimbursement of costs is reasonable.

D. The Named Class Representatives are Entitled to Incentive Awards

Class Counsel also seek service awards in the amount of $2,500 for each of the named Plaintiffs in this case, as provided for in the Settlement Agreement, in light of the considerable time and effort they invested in this litigation. Incentive awards are "'fairly typical in class action cases'". *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1393 (2010) ("*Cellphone Fee*") (*quoting Rodriguez v. West Publishing Corp*., 563 F. 3d 9487, 958 (9th Cir. 2009)). Although discretionary, courts recognize that named plaintiffs "should be compensated for the expense and risk they have incurred in conferring a benefit on other members of the class." *Cellphone Fee*, 186 Cal. App. 4th at 1394 (approving $10,000 service awards for each of the four

class representatives). *See also X-Ray Film*, 1998 WL 1031494 at *11 ("They are intended to advance public policy by encouraging individual to come forward and perform their civic duty in protecting the rights of the class and to compensate class representatives for their time, effort and inconvenience") (approving an award of $1,000 to each of the nine class representatives). In determining whether a service award is appropriate, courts may consider the following factors: (1) the risk to class representatives in commencing the suit; (2) the personal difficulties encountered by the class representatives; (3) the amount of time and effort spent by the plaintiffs; (4) the duration of the litigation; and (5) the personal benefit or lack thereof enjoyed by the class representative as a result of the litigation. *Cellphone Fee*, 189 Cal. App. 4th at 1394-95.

In this case, the last three factors particularly weigh in favor of approving the proposed service award given the length of the litigation, the involvement of the named Plaintiffs, and the lack of benefit conferred for the efforts expended. For instance, Plaintiff Tom Santos spent approximately 60 hours reviewing the complaint, reviewing discovery requests, producing and reviewing various documents, attempting to locate purchase records and conducting related investigation, preparing and sitting for a deposition, preparing declarations, and meeting with counsel on numerous occasions over the course of the litigation. Santos Decl., at ¶ 6-7. Plaintiff Joel Roos spent a comparable amount of time fulfilling his obligations as a Class representative and but for his participation, the lawsuit might have been terminated after the original plaintiff, Mr. Brock, withdrew. *See generally* Declaration of Joel I. Roos in Support of Plaintiffs' Motion for Attorneys' Fee and Reimbursement of Costs. Plaintiff Alfred Wright, named plaintiff for the *Wright* action pending in Vermont, has been involved in this case since its inception in 2004 and estimates that he spent approximately 90 hours over the years to assist in the prosecution of this case. *See* Declaration of Alfred Wright ¶¶6-7. To date, none of the plaintiffs have received any benefit for subjecting themselves to this lengthy litigation or for performing these demanding tasks on behalf of the Class. Given the considerable time and risks involved with this litigation, a $2,500 service award is appropriate to compensate Plaintiffs Santos and Roos. *See Cellphone Fee*, 186 Cal. App. 4th at 1394.

VI. CONCLUSION

Payment of the full amount of the requested fee award helps promote the policy of encouraging attorneys to pursue risky actions on a contingent basis for the common benefit, and reasonably compensates Class Counsel for the expenses and costs incurred as a result of vigorously prosecuting this action. Additionally, the payment of the incentive awards will reasonably compensate the named Plaintiffs here for their efforts in this case. Class Counsel therefore respectfully request that the Court grant their motion for attorneys' fees and reimbursement of costs in its entirety, as well as award each named Plaintiff $2,500 as an incentive payment.

Respectfully Submitted,

Dated: April 25, 2014

By: _____

Daniel J. Mogin (95624)
Jodie M. Williams (247848)
THE MOGIN LAW FIRM, P.C.
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: (619) 687-6611
Facsimile: (619) 687-6610

Plaintiffs' Class Co-Lead Counsel (California)

Stephen T. Rodd
ABBEY SPANIER, LLP
212 East 39th Street
New York, NY, 10016
Telephone: (212) 889-3700
Facsimile: (212) 684-5191

Plaintiffs' Class Co-Lead Counsel (California and Vermont)

Christine Craig
SHAHEEN & GORDON
140 Washington Street
P.O. Box 977
Dover, NH 03821
Telephone: (603) 749-5000
Facsimile: (603) 749-1838

Plaintiffs' Class Co-Lead Counsel (Vermont)

Terry Gross (103878)
Adam C. Belsky (147800)
Monique Alonso (127078)
GROSS & BELSKY LLP
One Sansome St. Suite 3670
San Francisco, CA 94104
Telephone: (415) 544-0200
Facsimile: (415) 544-0201

Alexander M. Schack, Esq. (99126)
LAW OFFICES OF ALEXANDER M. SCHACK
16870 West Bernardo Drive, Suite 400
San Diego, CA 92127
Telephone: (858) 485-6535
Facsimile: (858) 485-0608

Plaintiffs' Class Counsel