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20 UNITED STATES DISTRICT COURT  
 21 NORTHERN DISTRICT OF CALIFORNIA

22 JOSEPH CARLOTTI, individually and on behalf of  
 23 all others similarly situated,

24 Plaintiff,

25 v.

26 ASUS COMPUTER INTERNATIONAL; ASUSTEK  
 27 COMPUTER INC., and DOES 1-50,

28 Defendants.

CASE NO. 18-CV-03369-DMR

**PLAINTIFF’S REPLY IN SUPPORT OF  
 MOTION FOR APPROVAL OF CLASS  
 SETTLEMENT**

Date: June 11, 2020  
 Time: 1:00 p.m.  
 Courtroom: 7, 19<sup>th</sup> Floor  
 Judge: Hon. Donna M. Ryu

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1 **INTRODUCTION**

2 Class Members' reactions to the Settlement have been overwhelmingly positive. The  
 3 settlement website has been viewed 218,766 times, thousands of claim forms were submitted, and  
 4 997 Class Members will receive compensation. The number of approved claims equates to a  
 5 validated claim rate of 4%, which is customary for claims requiring substantiation. Further, only  
 6 one Class Member<sup>1</sup> has opted out, and no objections were filed. This positive response weighs  
 7 strongly in favor of final approval of the settlement and the requested fees, costs, and incentives.  
 8 *See In re: Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (low number of  
 9 objectors and opt-outs supported finding that settlement was "fair, adequate and reasonable");  
 10 *Vasquez v. Kraft Heinz Foods Co.*, No. 3:16-cv-2749-WQH-BLM, 2020 U.S. Dist. LEXIS 57272,  
 11 at \*18-19 (S.D. Cal. Apr. 1, 2020) (finding that the settlement is fundamentally "fair, adequate and  
 12 reasonable" in part because no objections to the settlement were submitted"); *In re Nexus 6P*  
 13 *Prods. Liab. Litig.*, No. 17-cv-02185-BLF, 2019 U.S. Dist. LEXIS 197733, at \*32 (N.D. Cal. Nov.  
 14 12, 2019) (finding that a positive response from class members, as evidenced by the lack of  
 15 objections, "confirms that the settlement is fair and reasonable").

16 For the reasons set forth below, Plaintiff respectfully requests that the Court find that the  
 17 Settlement satisfies Rule 23, grant final approval of the Settlement, and approve Plaintiff's request  
 18 for attorneys' fees, litigation costs, and an incentive award.

19 **SUMMARY OF SETTLEMENT**

20 The settlement terms are described more fully in Plaintiff's Brief in Support of Motion to  
 21 Approve the Settlement (ECF No. 59) and Plaintiff's Supplementary Brief in Support of Motion to  
 22 Approve the Settlement (ECF No. 68), but Plaintiff provides a brief summary here for ease of  
 23

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 27  
 28 <sup>1</sup> The Claim Administrator reported that a total of 28 individuals filed an opt-out form but was only able to confirm one of these individuals is a Class Member.

1 reference. Defendants will provide an extended warranty (“Extended Warranty”) on all ASUS  
2 Rog Strix GL502VS laptops (hereafter referred to as the “VS Laptops”) to cover certain repairs,  
3 which include repairs to, or replacement of, the motherboard and/or providing a new AC power  
4 adapter (“Qualifying Repairs”). ECF No. 70 (“Settlement Agreement”) ¶¶ 2.48, 5.1. The Extended  
5 Warranty will last until the latest of (1) three years from the date of purchase; (2) 90 days after  
6 final approval of the class action settlement; or (3) 180 days after the date Defendants previously  
7 replaced the VS Laptop’s internal power supply and/or AC power adaptor. *Id.* ¶ 5.1. The value of  
8 the Extended Warranty, covering approximately 13,500 VS Laptops, is estimated at  
9 \$16,110,225.00. Plaintiff’s Supp. Br., ECF No. 68 at 9.

11 Additionally, all Class Members were entitled to submit a claim for monetary relief,  
12 including those who are eligible for Qualifying Repairs under the Extended Warranty. The amount  
13 of the settlement benefits is not limited by the number of claims submitted or any fees or costs in  
14 the case, all of which are covered by Defendants. The amount of benefits to which each Class  
15 Member is entitled depends on (1) whether the Class Member previously complained about one of  
16 the defects addressed in this case and (2) proof of purchase with his/her Claim:

- 18 • **Group A** includes Class Members who registered their laptop with Defendants, bought the  
19 laptop from the ASUS website, or submit a proof of purchase. Members of this group who  
20 submit a Claim have the option to select either a \$110 cash payment or a \$210 credit  
21 certificate, which is freely transferable, stackable, and is valid for at least two years after  
issuance. Settlement Agreement ¶ 6.1(a).
- 22 • **Group B** includes Class Members who complained to Defendants, prior to March 19, 2019,  
23 about the defects. Members of this group will automatically receive a \$210 credit certificate  
24 without filing a claim. Members can elect to file a claim instead and receive a \$110 cash  
25 payment. *Id.* ¶ 6.1(b). From records provided by Defendants, the Claim Administrator  
26 determined that 399 people qualify for Group B.
- 27 • **Group C** includes any other member of the Class (i.e., those that do not have the proof  
28 required to be in Group A or did not file a prior complaint to qualify for Group B).  
Although this group does not have to submit the proof that is required to be part of Group  
A, they still must provide the serial number of their laptops. Members of this group have the

1 option to submit a claim for either a \$55 cash payment or a \$105 credit certificate. *Id.* ¶  
2 6.1(c).

3 The highest potential monetary value of the cash and credit benefits of the Settlement is  
4 about \$5,208,000. *See* ECF No. 62 ¶ 19. While members of Group B are entitled to a credit  
5 certificate without submitting any claim form, all claimants submitting claim forms (including  
6 members of Group B who request cash payment) were required to certify several statements under  
7 penalty of perjury; members of Groups A and C had to certify that their laptop suffered from the  
8 Power Defect and/or Overheating Issue. *See* Settlement Agreement ¶ 6.6, Exs. A, A1. For Group  
9 A claims only, Defendants retain the right to demand an inspection of the Laptop to verify that it  
10 suffers from either defect.

11  
12 Ultimately, based on the records provided by Defendants and the Claim Administrator's  
13 review of the Claims submitted, 997 Class Members will receive compensation. Declaration of  
14 Steven Weisbrot ("Weisbrot Dec.") ¶ 34. Credit Certificates will be sent to 528 Class Members  
15 (including 110 in Group A, 390 in Group B, and 28 in Group C) and Cash Payments will be sent  
16 to 469 Class Members (including 334 in Group A, 27 in Group B, and 108 in Group C). *Id.* These  
17 benefits are worth a total of \$153,590 (*id.*; Settlement Agreement ¶ 6.1 (providing cash benefits of  
18 \$110 to Groups A and B and \$55 to Group C and credits of \$210 to Groups A and B and \$105 to  
19 Group C)), and are in addition to the Extended Warranty for all Class Members who purchased a  
20 VS Laptop (an estimated value of \$16,110,225.00) (*see* ECF No. 68 at 9).

21  
22 On July 18, 2019, Angeion served upon the Attorney General of the United States and the  
23 appropriate officials of the states in which the Class Members reside a notice of the Settlement  
24 consisting of: a copy of the complaint in this action; a notice of the scheduled judicial hearing in  
25 this class action, copies of the Settlement, and the proposed notice. *Id.* ¶ 5 & Ex. A. No state  
26 officials have provided any comments to the Parties. *Id.* ¶ 6. The Final Approval Hearing, set for  
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1 June 11, 2020, is being held more than 90 days after the issuance of the CAFA notice, such that  
2 the final approval order may be entered in accordance with CAFA’s notice requirements if the  
3 Court finds that all other requirements are met. 28 U.S.C. § 1715(d).

4 **ARGUMENT**

5 **I. The Settlement Is Fair, Adequate, and Reasonable.**

6  
7 At the final approval stage, the primary inquiry is “whether a proposed settlement is  
8 fundamentally fair, adequate, and reasonable.” *Mego Fin. Corp.*, 213 F.3d at 458. In making this  
9 determination, the Court must balance numerous factors, including:

10 (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity,  
11 and likely duration of further litigation; (3) the risk of maintaining class  
12 action status throughout the trial; (4) the amount offered in settlement;  
13 (5) the extent of discovery completed and the stage of the proceedings;  
14 (6) the experience and views of counsel; (7) the presence of a  
governmental participant; and (8) the reaction of the class members to  
the proposed settlement.

15 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)

16 Under recently-revised Rule 23(e) and this District’s Procedural Guidance for Class Action  
17 Settlements, searching scrutiny of proposed class settlements occurs up front, at the preliminary  
18 stage; the court must find it will be likely to approve the settlement and certify the Class for  
19 settlement purposes before Class Notice is sent. Fed. R. Civ. P. 23(e).

20 Here, the Court has concluded that the Settlement satisfies both the *Churchill* factors and  
21 the Rule 23(e) requirement. It analyzed all Rule 23(e), 23(a)(1)-(4), and 23(b)(3) settlement and  
22 certification factors, found that settlement approval and certification would likely be granted, and  
23 concluded in its preliminary Rule 23(e) Order that the proposed settlement between the parties is  
24 “fair, adequate, and reasonable.” Order Granting Preliminary Approval of Class Action Settlement  
25 (“Preliminary Approval Order”), ECF No. 71 at 31. As the parties demonstrated in their filings in  
26 support of preliminary approval, the Settlement easily satisfies all relevant factors under the  
27  
28



1 Federal Rules and Ninth Circuit law. *See* ECF Nos. 59-63, 68, 70, 71; *see also In re Bluetooth*  
2 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). Here, in support of final approval  
3 of the Settlement, Plaintiff summarizes the substantial benefits of the Settlement and provides an  
4 update regarding the overwhelmingly positive response of the Class to the Settlement.

5  
6 **A. The Settlement Fairly Compensates Class Members.**

7 The proposed settlement entitles all Class Members to submit a claim for monetary relief.  
8 Class members in Group A and B have the option of receiving either a \$110 cash payment or a  
9 \$210 credit voucher, while Class Members in Group C can choose between a \$55 cash payment  
10 and a \$105 credit voucher. Given that approximately 24,800 class laptops were sold during the  
11 class period, the monetary recovery provided to Class Members could be as much as \$5,208,000.

12 In addition to monetary relief, Class Members who purchased VS Laptops are entitled to  
13 receive an extended warranty for the replacement of the power adapter and motherboard to  
14 address the Power Defect. As approximately 13,500 VS Laptops were sold during the class  
15 period, the total value of the repairs under the extended warranty could be as much as  
16 \$16,110,225.

17  
18 This Court has found that “looking at the relief provided to any individual Class Member,  
19 the amount offered in the settlement appears reasonable...[C]lass member[s] who were affected  
20 by the defects can receive a full an equitable remedy in the form of repairs while still recovering a  
21 significant monetary benefit.” Preliminary Approval Order at 9-10.

22  
23 **B. The Positive Response of the Class to the Settlement Strongly Supports Final**  
24 **Approval.**

25 The notice here was the “best notice that is practicable under the circumstances,” Fed. R.  
26 Civ. P. 23(c)(2)(B), and was provided “in a reasonable manner to all Class Members who would  
27 be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). The notice program included direct email and  
28

1 postcard notice as well as extensive online and print publication notice. Weisbrot Dec. ¶¶ 7-22. In  
2 addition, Class Counsel participated in and improved the notice program by reviewing and  
3 revising drafts of the advertisements and notices to be distributed and ensuring deadlines were  
4 met. Third Supp. Gutride Dec. ¶ 2; Second Joint Supp. Migliaccio & Nafisi Dec. ¶ 3.

5  
6 There is a maximum of 24,798 Class Members.<sup>2</sup> Weisbrot Dec. ¶ 16. From Defendants'  
7 records, the Claim Administrator was able to identify 13,322 email addresses and 2,194 physical  
8 addresses for Class Members. *Id.* On January 10, 2020, Angeion caused 13,322 Email Notices and  
9 2,194 Postcard Notices to be sent to Class Members per the procedures approved by the Court. *Id.*  
10 ¶¶ 19-20; *see also* Preliminary Approval Order at 4, 15. Only 191 Postcard Notices and 55 Email  
11 Notices were undeliverable. Weisbrot Dec. ¶¶ 19, 22. In addition to this direct notice, there were  
12 multiple other ways notice of the Settlement was broadcast to the Class. Defendants posted a link  
13 to the Settlement Website on the homepage of Defendants' website ([www.asus.com/us](http://www.asus.com/us)) and in  
14 posts to Defendants' Facebook and Twitter social media accounts. *Id.* ¶ 12. Notice of the  
15 Settlement was published in *People Magazine* and *USA Today*, and Angeion issued a press  
16 release, which was picked up by 143 media outlets with a total potential audience of  
17 approximately 125 million. *Id.* ¶ 15. The Settlement was featured on class action websites and  
18 newsletters such as Top Class Actions, which alone has 900,000 subscribers. *Id.* ¶ 13. The digital  
19 banner ads ran for four consecutive weeks on desktop and mobile devices on websites where Class  
20 Members were likely to shop and browse. *Id.* ¶¶ 7-8. To help ensure delivery of the internet  
21 banner ads to the most appropriate audience, multiple targeting layers were used, including search  
22 targeting, category contextual targeting, keyword contextual targeting, and site retargeting. *Id.* ¶ 9.

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28 <sup>2</sup> ASUS sold 24,798 Laptops (collectively, to retailers and consumers), but some individuals may  
have purchased more than one Laptop and some of the units sold to retailers may not ultimately  
have been sold to consumers.

1 The online ad program resulted in 17,140,450 ad impressions, exceeding Angeion's  
2 original estimate of 16,660,000 impressions. *Id.* ¶ 7. The media program was designed to reach  
3 76.75% of the target audience, with an average frequency of 3.03 times, but the program  
4 ultimately over-delivered, resulting in a 76.75% reach with an average frequency of 3.11 times  
5 each. *Id.* Those statistics do **not** include (a) the direct notices provided to known Class Members,  
6 (b) the notices provided by Defendants on the ASUS homepage and on Defendants' social media  
7 accounts, (c) the notices featured on class action websites, (d) the publications in *USA Today*,  
8 (e) media earned as a result of the press release, (f) the informational settlement website, or (g) the  
9 toll-free hotline, all of which are difficult to measure in terms of reach percentage. *Id.*

11 Pursuant to the Court's direction, on January 10, 2020, the Claim Administrator, Angeion,  
12 established a dedicated website ("Settlement Website") in which Class Members could file a claim  
13 and upload supporting documents and established a toll-free hotline to provide Class Members  
14 with responses to frequently asked questions regarding the Settlement. Weisbrot Dec. ¶ 23. Class  
15 Counsel reviewed, tested, and requested many changes to the Settlement Website before it went  
16 live, including improving the clarity and operation of the claim forms, creating a separate page for  
17 repair information and requests, correcting certain passages and adding links on the home page, in  
18 the FAQs, and in the notices, and adding documents to the Important Documents page. Third  
19 Supp. Gutride Dec. ¶ 2; Second Joint Supp. Migliaccio & Nafisi Dec. ¶ 3.

22 The traffic to the Settlement Website makes it clear that the notice program was effective  
23 in reaching ASUS customers and that the terms of the Settlement were attractive. As of May 28,  
24 2020, the Settlement Website had 119,100 unique visitors and a total of 218,766 page-views.  
25 Weisbrot Dec. ¶ 24. The toll-free hotline received 141 calls, and Angeion responded to 431  
26 inquiries (submitted by telephone and email) about the Settlement. *Id.* ¶ 25. Moreover, Angeion  
27 received a total of **31,932** timely Claim Form submissions. *Id.* ¶ 26. However, the Settlement  
28

1 provides cash and credit benefits only to Class Members who can substantiate both that (1) they  
2 purchased one of the particular models at issue (by serial number, proof of purchase, or prior  
3 communication with ASUS) **and** (2) they suffered from the Power Defect and/or Overheating  
4 Issue (by prior complaint or by attestation). ECF No. 70 §§ 6.1-6.6. The need for such  
5 substantiation was expected to result in a single-digit valid claims rate. *See, e.g.*, ECF No. 68 at  
6 13-14 (noting that the validated claims rate in *In re: Arctic Sentinel, Inc. [f/k/a Fuhu, Inc.], et al.*,  
7 Case No. 15-12465-CSS (Bankr. Del.) (the “*Fuhu* case”), where the product had a higher defect  
8 rate but which also required claimants to aver defects, was 4.7% of the known Class Members).  
9 Angeion initially validated **1,399** of the submissions based on the information provided (in  
10 addition to the Class Members in Group B who Angeion identified as entitled to benefits without  
11 having to submit a Claim Form). Weisbrot Dec. at ¶ 32. After deduplication, a total of 635 Claim  
12 Forms were approved (*id.* at ¶ 33), which is consistent with the expected claims rate (*see* ECF No.  
13 68 at 13).

14  
15  
16 The large number of deficient Claims suggested that people were trying to make claims  
17 who had not purchased the specific Laptops at issue. Nevertheless, Class Counsel was concerned  
18 that there could be Class Members who misidentified serial numbers or mistakenly failed to  
19 include serial numbers or proofs of purchase with their Claims.. To ensure that Class Members  
20 who might have mistakenly failed to substantiate their claims had another opportunity to do so,  
21 Class Counsel—at their own expense—directed Angeion to establish a cure process to send  
22 deficiency notices to the claimants whose claims lacked substantiation. *See* Third Supp. Gutride  
23 Dec. ¶ 3; Weisbrot Dec. ¶ 29.<sup>3</sup> The deficiency notices gave those claimants another week to  
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26 <sup>3</sup> When Class Counsel was proposing and developing the cure process, Defendants informed Class  
27 Counsel that they would not agree to pay for the additional notice and cure process because it was  
28 not a term in the Settlement Agreement. Class Counsel agreed to foot the bill itself, if necessary,

1 submit a valid serial number or proof of purchase, and included a direct link to a new page on the  
2 Settlement Website where the claimants could sign in and provide the requested information.  
3 Weisbrot Dec. ¶¶ 29-30. Angeion received 1,603 timely responses to the deficiency notices, and  
4 validated 143 of those claims. *Id.* ¶ 31.

5  
6 In sum, as a result of the Settlement, Class Members who purchased a VS Laptop will  
7 automatically receive an extended warranty (an estimated value of \$16,110,225.00) (ECF No. 68-  
8 2 ¶ 5), 37 Class Members have already requested repairs (Weisbrot Dec. ¶ 36), and 997 Class  
9 Members will receive additional compensation worth a total of \$153,590 (Weisbrot Dec. ¶ 34).  
10 Credit Certificates will be sent to 528 Class Members (including 110 in Group A, 390 in Group B,  
11 and 108 in Group C) and Cash Payments will be sent to 469 Class Members (including 334 in  
12 Group A, 27 in Group B, and 108 in Group C). *Id.* ¶ 34. The 997 approved compensation claims  
13 of Class Members, which were supported by information such as a prior complaint, Proof of  
14 Purchase, or validated Serial Number, equates to a validated claim rate of 4%, which is within the  
15 anticipated response rate of 4%-8% and more than sufficient where substantiation is required and  
16 where the best notice practicable was provided. *See* Preliminary Approval Order at 17-18; *see also*  
17 *Shin v. Plantronics, Inc.*, No. 18-cv-05626-NC, 2020 U.S. Dist. LEXIS 19956, at \*10 (N.D. Cal.  
18 Jan. 31, 2020) (approving class action settlement concerning allegedly defective wireless  
19 headphones in which there was a claims rate of 3.8%, where claimants seeking cash benefits had  
20 to substantiate both their purchases and the occurrence of the defects); *Corzine v. Whirlpool*  
21 *Corp.*, Case No. 15-cv-05764-BLF, 2019 U.S. Dist. LEXIS 223341, at \*17-18 (N.D. Cal. Dec. 31,  
22 2019) (approving settlement where the number of submitted claim forms (about 18,000) was only  
23 about 1.7% of the class, but where the benefits to the class were substantial (an extended warranty  
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27 \_\_\_\_\_  
28 to ensure that the Class received a final opportunity to submit a valid claim. *See* Third Supp.  
Gutride Dec. ¶ 3.

1 and benefits up to \$150 for Class Members, depending on their situation) and where only 18  
2 objections and 199 requests for exclusion (representing 0.017% of the products sold) were  
3 received); *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 214-15 (W.D. Mo. 2017) (noting  
4 that “[c]ourts around the country have approved settlements where the claims rate was less than  
5 one percent,” because a low claims rate does not mean that notice was not the “best notice  
6 practicable” and “does not govern whether the settlement is fair, reasonable, or adequate”).

8 As further evidence of the fairness, adequacy, and reasonableness of this Settlement, there  
9 was only **one** known Class Member who opted out<sup>4</sup> and **no** objections were filed. Weisbrot Dec.  
10 ¶ 35. This positive response weighs strongly in favor of final approval of the Settlement and the  
11 requested fees, costs, and incentive award. *See, e.g., Mego Fin. Corp.*, 213 F.3d at 459 (low  
12 number of objectors and opt-outs supported trial court’s finding that settlement was “fair, adequate  
13 and reasonable”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (upholding  
14 approval of settlement where only 971 Class Members, or 0.1% of the class, opted out and only a  
15 few objected); *De Leon v. Ricoh USA, Inc.*, No. 18-cv-03725-JSC, 2020 U.S. Dist. LEXIS 56285,  
16 at \*34 (N.D. Cal. Mar. 31, 2020) (granting final approval where only one Class Member opted out  
17 and no objections were received, and noting “Courts have repeatedly recognized that the absence  
18 of a large number of objections to a proposed class action settlement raises a strong presumption  
19 that the terms of a proposed class settlement action are favorable to the Class Members.”) (internal  
20 quotation marks and citation omitted); *Shin*, 2020 U.S. Dist. LEXIS 19956, at \*10 (approving  
21 settlement where only one Class Member objected and only three opted out); *Chun-Hoon v.*  
22 *McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (holding that “the absence of a  
23  
24  
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26

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27 <sup>4</sup> The Claim Administrator received a total of 28 opt-out requests but could only confirm one as  
28 from a Class Member.

1 negative reaction[] strongly supports settlement” and approving a settlement with an opt-out rate  
2 of 4.86% and zero objections).

3 **II. The Uncontested Fee, Costs, and Service Award Requests Are Fair,**  
4 **Reasonable, and Appropriate.**

5 Plaintiff requests the payment of attorneys’ fees and expenses in the amount of  
6 \$787,500.00. As of September 12, 2019, Class Counsel’s lodestar was approximately  
7 \$648,373.71. *See* ECF No. 68 at 6; ECF No. 68-1 ¶¶ 4-6; ECF No. 68-2 ¶ 6. Since that time, Class  
8 Counsel has incurred additional fees of approximately \$199,563.01, resulting in a current lodestar  
9 of approximately \$847,936.72. Third Supp. Gutride Dec. ¶¶ 4-5; Second Joint Supp. Migliaccio &  
10 Nafisi Dec. ¶ 4. To date, Class Counsel has also incurred a total of \$14,386.05 in unreimbursed  
11 expenses in connection with the prosecution of this case. Third Supp. Gutride Dec. ¶¶ 7-8; Second  
12 Joint Supp. Migliaccio & Nafisi Dec. ¶ 6.

13 As with approving a class action settlement, the Court’s role in evaluating Class Counsel’s  
14 fee request is to determine whether the amount requested is “‘fundamentally fair, adequate, and  
15 reasonable.’” *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P.  
16 23(e)). Class Counsel’s requested fees and costs—all of which will be paid in addition to the  
17 benefits available to the Class—easily meet this standard for all the reasons set forth in Plaintiffs’  
18 previous filings. *See* ECF No. 59 at 24-34; ECF No. 68 at 3-10.

19 Because the requested sum of Attorneys’ Fees and Expenses of \$787,500 includes  
20 attorneys’ fees *and* costs, and Plaintiff has incurred \$14,386.05 in costs, Plaintiff is requesting  
21 \$773,113.95 in attorneys’ fees (assuming all costs are applied against the \$787,500).<sup>5</sup> Dividing the  
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<sup>5</sup> Should the Court deem any of the requested costs to not be reimbursable, Plaintiff requests that  
the Court increase the attorneys’ fee award such that the net amount of \$787,500 in Attorneys’  
Fees and Costs provided via the Settlement Agreement is awarded. Plaintiff notes that additional  
attorney fees will continue to be incurred until the ultimate conclusion of this matter.

1 requested fee award by Class Counsel’s current lodestar results in a *negative* multiplier of about  
2 0.91, which is significantly below the average for comparable cases. *See* ECF No. 59 at 31 (citing  
3 multiple cases where multipliers of 2 and above were approved). A negative lodestar multiplier  
4 “strongly suggests the reasonableness of the requested fee.” *Rosado v. Ebay Inc.*, No. 5:12-cv-  
5 04005-EJD, 2016 U.S. Dist. LEXIS 80760, at \*26 (N.D. Cal. June 20, 2016); *see also Rivas v. BG*  
6 *Retail, LLC*, No. 16-cv-06458-BLF, 2020 U.S. Dist. LEXIS 8712, at \*22-23 (N.D. Cal. Jan. 16,  
7 2020) (negative multiplier was evidence of the reasonableness of the fee request by class counsel,  
8 as “Class Counsel would have normally been entitled to a positive multiplier due to the contingent  
9 nature of this case”).

11 While the Court may make its fee award based entirely on Class Counsel’s lodestar, *see*  
12 *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547–48 (9th Cir. 2016) (explaining that  
13 where “classwide benefits are not easily monetized, a cross-check is entirely discretionary”),  
14 cross-checking the lodestar with the percentage-of-recovery method confirms that Plaintiff’s  
15 attorneys’ fee request is reasonable. The value of the monetary benefits made available to the  
16 Settlement Class was between \$2.77 million (if all Class Members had requested a Cash Payment)  
17 and \$5.20 million (if all Class Members had requested a Credit Certificate). ECF No. 62, ¶ 19; *see*  
18 *also Young v. Polo Retail, LLC*, No. C-02-4546 WRW, 2007 U.S. Dist. LEXIS 27269, at \*23  
19 (N.D. Cal. Mar. 28, 2007) (explaining that courts in the Ninth Circuit consider the total benefits  
20 being made available to class members rather than the amount actually claimed) (citing *Williams*  
21 *v. MGM-Pathe Commc’ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (“district court abused its  
22 discretion by basing the fee on the class members' claims against the fund...” instead of the  
23 amount being made available)). The requested attorneys’ fee here of \$773,113.95 represents only  
24 14.9% of the \$5.2 million value of the Settlement or 19.3% of a midpoint value of \$4 million, both  
25 of which are well below the Ninth Circuit’s 25% benchmark, and even further below the higher  
26  
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28



1 percentages allowed when the common fund is below \$10 million. *See, e.g., Alvarez v. Farmers*  
2 *Ins. Exch.*, No. 3:14-cv-00574-WHO, 2017 U.S. Dist. LEXIS 119128, at \*6-10 (N.D. Cal. Jan. 17,  
3 2017) (explaining that “[i]n the Ninth Circuit, attorneys’ fees constituting 25% of a common fund  
4 are considered presumptively reasonable” but that “[f]ee award percentages generally are higher in  
5 cases where the common fund is below \$10 million”); *Van Vranken v. Atl. Richfield Co.*, 901 F.  
6 Supp. 294, 297-98 (N.D. Cal. 1995) (explaining that awards of 30-50% of a common fund are  
7 often approved).

9 The requested award of fees and costs is more than justified given the quality of the work,  
10 and most importantly, the results achieved. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d  
11 1036, 1046 (N.D. Cal. 2008) (the relief obtained for the class is the single most important factor in  
12 evaluating the reasonableness of a requested fee). The Class agrees, as not a single Class Member  
13 objected to the Settlement. *See De Leon*, 2020 U.S. Dist. LEXIS 56285, at \*43 (noting the fee  
14 award was “further supported by the lack of any objections to the settlement amount or the  
15 requested attorneys’ fees”).<sup>6</sup> Critically, the fees sought by Plaintiff’s attorneys will not be  
16 deducted from the recovery of the Class. Defendant will pay these fees in addition to the benefits  
17 of the Class as outlined in the Settlement.

19 Finally, the modest incentive award request for the Settlement Class Representative—to be  
20 paid by Defendants in addition to the Class compensation—is likewise reasonable. *See In re Wells*  
21 *Fargo & Co. S’holder Derivative Litig.*, No. 16-cv-05541-JST, 2020 U.S. Dist. LEXIS 63631, at  
22 \*59 (N.D. Cal. Apr. 7, 2020) (“An incentive award of \$5,000 is presumptively reasonable ....”);

24  
25 <sup>6</sup> While counsel’s fee here represents a negative multiplier, the Court would be on solid footing approving  
26 the fee request even if there were a positive multiplier since evidence that “no objections have been  
27 received supports an upward adjustment.” *In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185-BLF, 2019  
28 U.S. Dist. LEXIS 197733, at \*39 (N.D. Cal. Nov. 12, 2019); *see also Jarrell v. Amerigas Propane, Inc.*,  
No. 16-cv-01481-JST, 2018 U.S. Dist. LEXIS 58619, at \*8 (N.D. Cal. Apr. 5, 2018) (awarding an upward  
adjustment to 30% of the common fund where, amongst other accomplishments, no Class Member  
objected to the proposed award).

1 *Hayes v. MagnaChip Semiconductor Corp.*, No. 14-cv-01160-JST, 2016 U.S. Dist. LEXIS  
2 162120, at \*30 (N.D. Cal. Nov. 21, 2016) (“In this Circuit, an award of \$5,000 is presumptively  
3 reasonable.”).

4 **CONCLUSION**

5 As set forth in the Preliminary Rule 23(e) Order and Plaintiff’s Motion, the proposed  
6 Settlement Class satisfies all requirements of Rule 23 and should be certified. ECF No. 71. No  
7 Class Member argues otherwise. Accordingly, and for the additional reasons stated above,  
8 Plaintiff Joseph Carlotti and Class Counsel respectfully request that this Court certify the  
9 Settlement Class and confirm the appointment of Settlement Class Counsel and the Settlement  
10 Class Representative; enter final judgment approving the Settlement; grant Mr. Carlotti’s  
11 application for a Class Representative Incentive Award of \$5,000; and award Class Counsel  
12 \$787,500 in attorneys’ fees and costs.  
13

14 Dated: May 29, 2020

Respectfully submitted,

15 /s/ Adam A. Gutride

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