R. Alexander Saveri (Bar No. 173102)
Geoffrey C. Rushing (Bar No. 126910)
Cadio Zirpoli (Bar No. 179108)
SAVERI & SAVERI, INC.
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813

Bruce L. Simon (Bar No. 96241)
Aaron M. Sheanin (Bar No. 214472)
Benjamin E. Shiftan (Bar No. 265767)
PEARSON, SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008

Joseph J. Tabacco, Jr. (Bar No. 75484)
Todd A. Seaver (Bar No. 271067)
Jessica Moy (Bar No. 272941)
BERMAN DEVALERIO
44 Montgomery Street, Suite 650
San Francisco, CA 94104
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs
[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION

This Document Relates To:

ALL DIRECT PURCHASER ACTIONS

Case No. 13-md-02420-YGR
MDL No. 2420

DIRECT PURCHASER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR:

1) CERTIFICATION OF SETTLEMENT CLASSES;

2) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENTS WITH MAXELL, NEC, PANASONIC AND TOSHIBA DEFENDANTS;

3) DIRECTING NOTICE TO CLASS; AND

4) MEMORANDUM IN SUPPORT THEREOF.

Date: April 25, 2017
Time: 2:00 p.m.
Judge: Hon. Yvonne Gonzalez Rogers
Location: Courtroom 1

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 25, 2017, at 2:00 p.m. or as soon thereafter as counsel can be heard, before the Honorable Yvonne Gonzalez Rogers, United States District Courthouse, 1301 Clay Street, Courtroom 1, 4th Floor, Oakland, California, Direct Purchaser Plaintiffs ("Plaintiffs") will move this Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for entry of orders:

(i) granting preliminary approval of the settlement agreements Plaintiffs have executed with 1) Defendants Hitachi Maxell, Ltd., and Maxell Corporation of America (collectively "Maxell"); 2) Defendant NEC Corporation ("NEC"); 3) Defendant Panasonic Corporation ("Panasonic"); and 4) Defendant Toshiba Corporation ("Toshiba") (collectively "Settling Defendants");

(ii) certifying a settlement class with respect to each settlement;

(iii) appointing Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio as Settlement Class Counsel with respect to each settlement class;

(iv) approving the manner and form of giving notice of the settlements to class members as well as the plan of allocation with respect to the settlements;

(v) establishing a timetable for publishing class notice and lodging objections to the terms of the settlements; and

(vi) setting a date for a hearing regarding final approval of the settlements.

The grounds for this motion are that: (a) the settlements are in the range of possible approval to justify issuing notice of the settlements to members of the proposed settlement classes and to schedule final approval proceedings; and (b) the form and manner of providing notice regarding the matters set forth above satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process.

This motion is based upon this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the Declaration of R. Alexander Saveri ("Saveri Declaration" or "Saveri Decl."), the Proposed Orders, the complete files and records in this action, and such other written or oral arguments that may be presented to the Court. The settlement agreements are attached to the Saveri Declaration as Exhibit 1 (Maxell), Exhibit 2 (NEC), Exhibit 3 (Panasonic) and Exhibit 4 (Toshiba). The proposed long-form notice is Exhibit 5. The proposed short-form notice is Exhibit 6.

ISSUES TO BE DECIDED

1. Whether Direct Purchaser Plaintiffs' settlement agreements with Defendants Maxell, NEC, Panasonic, and Toshiba should be preliminarily approved.

2. Whether a settlement class should be certified with respect to each settlement.

3. Whether Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio should be appointed as Settlement Class Counsel with respect to each settlement.

4. Whether the manner and form of notice of the settlements to class members as well as the plan of allocation should be approved.

5. Whether a timetable for publishing class notice and lodging objections to the terms of the settlements should be established.

6. Whether a date for a final approval hearing should be set.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Direct Purchaser Plaintiffs ("Plaintiffs") have reached settlements with 1) Defendants Hitachi Maxell, Ltd., and Maxell Corporation of America (collectively "Maxell"); 2) Defendant NEC Corporation ("NEC"); 3) Defendant Panasonic Corporation ("Panasonic"); and 4) Defendant Toshiba Corporation ("Toshiba") (collectively "Settling Defendants"). In return for releases of the claims asserted in this case, Settling Defendants will pay the proposed settlement classes a total of $49,850,000 and will cooperate in the prosecution of the case against the remaining Defendants. All four settlements (collectively the "Settlements" and attached as Exhibits 1–4 to the Saveri Declaration) were the product of thorough and hard-fought negotiations between experienced and informed counsel and provide substantial benefits to the proposed settlement classes. In accordance with the well-established procedure for the approval of class action settlements, Plaintiffs now move the Court for orders preliminarily approving the Settlements, provisionally certifying settlement classes in accordance with the terms of the Settlements, approving the form and manner of notice to the settlement classes, appointing counsel for the settlement classes, preliminarily approving a plan

of allocation, and establishing a schedule for final approval.[1]

Apart from the settlement payments, the Settlements are substantially similar to the $19 million Sony settlement the Court has already approved, *see* ECF No. 1182 (preliminary approval), ECF No. 1438 (final approval),[2] with the only material differences discussed below.

At this time, the Court is not being asked to determine whether the Settlements and plan of allocation are fair, reasonable, and adequate. *In re Zynga Inc. Sec. Litig.*, No. 12-cv-04007-JSC, 2015 WL 6471171, at *8 (N.D. Cal. Oct. 27, 2015) ("*Zynga*"). Rather, the question is whether they are sufficiently within the range of possible approval to justify sending and publishing notice to members of the settlement classes and to schedule a final approval hearing. Plaintiffs respectfully submit that they are well within that range, and, therefore, that the Court should grant this motion.

II. FACTUAL AND PROCEDURAL HISTORY

This Multi-District Litigation arises from an alleged conspiracy to fix the prices of Lithium Ion Battery Cells ("Li-Ion Cells"). Li-Ion Cells are the main components in Lithium Ion Batteries ("Li-Ion Batteries"). Li-Ion Batteries are the predominant form of rechargeable batteries used in portable consumer electronics, powering devices including smartphones, laptop computers, digital cameras, and cordless power tools. Plaintiffs' complaint alleges that Defendants' price-fixing conspiracy began at least as early as January 1, 2000 and continued until at least May 31, 2011. Direct Purchaser Plaintiffs' Second Consolidated Amended Complaint ¶¶ 110, 112–180, ECF No. 415 (Apr. 8, 2014) ("SCAC"). Plaintiffs allege that the conspiracy has been carried out through agreements to fix prices and restrict output and has been facilitated in a variety of ways, including face-to-face meetings and other communications, customer allocation, and trade associations. Saveri Decl. ¶ 8. Two Defendants—LG Chem, Ltd. and SANYO Electric. Co., Ltd.—pleaded guilty to criminal price fixing of cylindrical Li-Ion Cells for use in notebook computer battery packs. *Id.*

[1] In accordance with established practice in this District and in similar technology cases, Plaintiffs do not now ask the Court to authorize a claims procedure for or distribution of the settlement funds collected to date. Instead, Plaintiffs will petition the Court at a later date for such distribution in order to limit administrative costs and thereby maximize class members' recovery.

[2] The settling defendants were Sony Corporation, Sony Energy Devices Corporation, and Sony Electronics, Inc. (collectively "Sony").

This litigation has progressed significantly. Plaintiffs filed a motion for class certification on January 22, 2016. ECF No. 1038. Plaintiffs' motion was supported by expert analysis of the Li-Ion industry, evidence of the conspiracy produced to date, a preliminary damage study and a reply brief. Plaintiffs have reviewed millions of pages of documents, obtained responses to interrogatories, and taken dozens of depositions. Saveri Decl. ¶ 9. Plaintiffs have also survived two rounds of motions to dismiss. *See* Omnibus Order re: Motions to Dismiss the Second Consolidated Amended Complaints of Direct and Indirect Purchaser Plaintiffs, ECF No. 512 (Oct. 2, 2014). Although some discovery remains, Plaintiffs have a solid grasp of the factual and legal issues in the case.

III. THE TERMS OF THE SETTLEMENTS

Each Settlement requires the certification of a nationwide class of direct purchasers of Li-Ion Cells, Li-Ion Batteries and Lithium Ion Battery Products ("Li-Ion Products"). Maxell Settlement ¶ A.1; NEC Settlement ¶ A.1; Panasonic Settlement ¶ A.1; Toshiba Settlement ¶ A.2. Three of the Settlements—Maxell, NEC and Toshiba—require the certification of the class set forth in the SCAC. *See* SCAC ¶ 287. The Panasonic Settlement utilizes the proposed litigated class, *see* ECF No. 1038 at 3 & n.4, which does not include purchasers of polymer cells, batteries or products, and is two years and four months shorter. The following chart summarizes each agreement:

Defendant	**Amount**	**Class Period**	**Li-Ion Cells / Batteries / Products included in Class**	**Class Definition**
Sony *previously approved*	$19,000,000	January 1, 2000–May 31, 2011	Cylindrical, prismatic, polymer	SCAC class (slightly altered; *see* n.6, *infra*)
Maxell	$3,450,000	January 1, 2000–May 31, 2011	Cylindrical, prismatic, polymer	SCAC class
NEC	$1,000,000	January 1, 2000–May 31, 2011	Cylindrical, prismatic, polymer	SCAC class
Panasonic	$42,500,000	May 1, 2002–May 31, 2011	Cylindrical, prismatic	Proposed litigated class
Toshiba	$2,900,000	January 1, 2000–May 31, 2011	Cylindrical, prismatic, polymer	SCAC class
Total	**$68,850,000**			

For the purposes of the Settlements, Li-Ion Batteries, Li-Ion Cells and Li-Ion Products have the meanings as defined in the SCAC. Maxell Settlement ¶ A.2; NEC Settlement ¶ A.2; Panasonic

Settlement ¶ A.2; Toshiba Settlement ¶ A.4. Upon the Settlements becoming final, Plaintiffs and members of the settlement classes will relinquish any claims they have against Settling Defendants relating to any conduct, act, or omission by Settling Defendants that was or could have been alleged in the SCAC or preceding direct purchaser complaints relating to their purchases of Li-Ion Cells, Batteries, and/or Products during the settlement class periods from Defendants or their subsidiaries and affiliates.[3] Maxell Settlement ¶ C.13; NEC Settlement ¶ C.13; Panasonic Settlement ¶ C.13; Toshiba Settlement ¶ C.15. The releases exclude indirect purchaser claims, as well as claims for product defects or personal injury, breach of contract, foreign purchases, and claims against parties other than Settling Defendants. Maxell Settlement ¶ C.13; NEC Settlement ¶ C.13; Panasonic Settlement ¶ C.13; Toshiba Settlement ¶ C.15. The releases are thus limited to the subject matter of this lawsuit. *See Procedural Guidance for Class Action Settlements* ¶ 1(c), U.S.D.C., N.D. Cal. (undated), http://www.cand.uscourts.gov/ClassActionSettlementGuidance ("*Guidelines*").

The Settling Defendants also agree to cooperate in the prosecution of the case against non-settling Defendants by, *inter alia*, producing employees for interviews, depositions, and/or testimony at trial and additional discovery. Maxell Settlement ¶ F.24; NEC Settlement ¶ F.24; Panasonic Settlement ¶ F.24; Toshiba Settlement ¶ F.26.[4] The Settling Defendants' sales remain in the case for purposes of computing damages against the remaining Defendants. Maxell Settlement ¶ H.33; NEC Settlement ¶ H.33; Panasonic Settlement ¶ H.33; Toshiba Settlement ¶ H.34.

Each Settlement becomes final upon: (1) the Court's approval pursuant to Rule 23(e) and the entry of a final judgment of dismissal with prejudice as to each of the Settling Defendants; and (ii) the expiration of the time for appeal or, if an appeal is taken, the affirmance of each of the judgments with no further possibility of appeal. Maxell Settlement ¶ B.11; NEC Settlement ¶ B.11; Panasonic Settlement ¶ B.11; Toshiba Settlement ¶ B.13.

[3] The Panasonic Settlement also resolves claims against Defendants Panasonic Corporation of North America, SANYO Electric. Co., Ltd., and SANYO North America Corporation. *See* Panasonic Settlement ¶ A.3. The settlement with NEC Corporation does not implicate, or release Plaintiffs' claims against, NEC Tokin Corporation, which will remain a defendant in this case.

[4] These provisions differ as to each Settling Defendant.

Subject to the approval and direction of the Court, the proceeds of the Settlements, plus accrued interest, will be used to: (1) make a distribution to members of the settlement classes in accordance with a proposed plan of allocation (Maxell Settlement ¶ E.21; NEC Settlement ¶ E.21; Panasonic Settlement ¶ E.21; Toshiba Settlement ¶ E.23); (2) pay notice costs and costs incurred in the administration and distribution of the Settlements (Maxell Settlement ¶ E.19(a) (up to $500,000); NEC Settlement ¶ E.19(a) (up to $100,000, and up to an additional $200,000); Panasonic Settlement ¶ E.19(a) (up to $500,000); Toshiba Settlement ¶ E.21(a) (up to $200,000)); (3) pay class counsel's attorneys' fees, costs, and expenses as may be awarded by the Court (Maxell Settlement ¶ E.23; NEC Settlement ¶ E.23; Panasonic Settlement ¶ E.23; Toshiba Settlement ¶ E.25); and (4) pay taxes associated with any interest earned on the escrow account (Maxell Settlement ¶ D.17(g); NEC Settlement ¶ D.17(g); Panasonic Settlement ¶ D.17(g); Toshiba Settlement ¶ D.19(g)).

Maxell, Panasonic and Toshiba have the right to terminate their Settlements if purchasers amounting to a certain percentage or more of their sales request exclusion from the their settlement class. Maxell Settlement ¶ D.18(a) (35%); Panasonic Settlement ¶ D.18(a) (35%); Toshiba Settlement ¶ D.20(a) (50%). There is no such provision in the NEC Settlement.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENTS

A. Approval of Class Action Settlements

Rule 23(e) requires court approval of class action settlements. As the Court is aware from its approval of the Sony settlement, settlement approval is a three step process: preliminary approval, notice, and final approval. William B. Rubenstein, 4 *Newberg on Class Actions* § 13:10 (5th ed. 2014) ("*Newberg*"). This motion concerns the first two steps:

- *First*, the parties present a proposed settlement to the court for so-called "preliminary approval." If a class has not yet been certified, typically the parties will simultaneously ask the court to "conditionally" certify a settlement class. . . .
- *Second*, if the court does preliminarily approve the settlement (and conditionally certify the class), notice is sent to the class describing the terms of the proposed settlement, class members are given an opportunity to object or, in Rule 23(b)(3) class actions, to opt out of the settlement, and the court holds a fairness hearing at which class members may appear and support or object to the settlement.

Id.

B. Standard for Settlement Approval

"There is a strong policy favoring compromises that resolve litigation, and case law in the Ninth Circuit reflects that strong policy. 'There is an overriding public interest in settling and quieting litigation.'" *In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA (JCS), 2008 WL 5382544, at *2 (N.D. Cal. Dec. 22, 2008) (quoting *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986)). "[T]he general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions." *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000). Compromise is particularly favored in antitrust litigation, which is notoriously difficult and unpredictable. *See In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003).

Final approval "may be granted only after a fairness hearing and a determination that the settlement taken as a whole is fair, reasonable, and adequate." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). While the inquiry in different cases may vary, in general a court must weigh eight factors in making a fairness determination:

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

Id. As the Ninth Circuit explained in *Bluetooth*, if the settlement is reached before class certification, it "must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required." *Id.* at 946–47. Final approval is entrusted to the court's discretion. *Id.* at 940 ("we review a district court's approval of a class action settlement for clear abuse of discretion").

The question at preliminary approval, however, is simply whether the settlement is within the range of possible approval. *Zynga*, 2015 WL 6471171, at *8; *see also In re LIBOR-Based Fin. Instruments Antitrust Litig.*, Nos. 11 MDL 2262(NRB), 11 Civ. 2613(NRB), 2014 WL 6851096, at *2 (S.D.N.Y. Dec. 2, 2014) (question is "whether the terms of the Proposed Settlement are at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be

heard" (internal quotation marks omitted)). "Preliminary approval of a settlement and notice to the proposed class is appropriate if: [1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with[in] the range of possible approval." *Civil Rights Educ. and Enforcement Ctr. v. RLJ Lodging Trust*, No. 15-cv-0224-YGR, 2016 WL 314400, at *11 (N.D. Cal. Jan. 25, 2016) (brackets and internal quotation marks omitted); *Zynga*, 2015 WL 6471171, at *8.

These factors support granting preliminary approval here.

C. The Proposed Settlements Are Within the Range of Possible Approval

1. The Settlements Are the Product of Serious, Informed, Non-Collusive Negotiations

The Settlements were the product of good faith, arm's-length negotiations among experienced and well-informed counsel. Plaintiffs' negotiations with each of the Settling Defendants occurred over a span of several months and involved face-to-face meetings. Further, the parties were informed by two rounds of motions to dismiss and the fruits of years of discovery as well as the impact and damages analysis of Dr. Roger Noll, Plaintiffs' econometric expert. The negotiations were conducted in the utmost good faith. Saveri Decl. ¶ 11. These circumstances support the conclusion that the Settlements were reached in an informed and non-collusive fashion. *See Zynga*, 2015 WL 6471171, at *9 (although not conclusive, use of mediator and fact that some discovery had occurred, indicates procedural fairness); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("*Rodriguez*") ("[w]e put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution"). Plaintiffs and Maxell exchanged written mediation statements and were guided by an experienced and effective mediator, the Honorable Vaughn R. Walker (retired). Saveri Decl. ¶ 11.

In addition, counsel's judgment that the settlements are fair and reasonable, *id.* ¶ 12, is entitled to significant weight. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."); *accord Bellows v. NCO Fin. Sys.,*

Inc., No. 3:07-cv-01413-W-AJB, 2008 WL 5458986, at *6–7 (S.D. Cal. Dec. 10, 2008); *Officers for Justice v. Civil Serv. Comm'n of the City and Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982) ("*Officers for Justice*"). *But see In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-cv-2058-JST, 2017 WL 565003, at *4 & n.11 (N.D. Cal. Feb. 13, 2017) ("*CRT I*") ("The Court considers this factor, as it must, but gives it little weight.")

2. The Settlements Have No Obvious Deficiencies

The second factor addresses whether there is any reason to believe the Settlements are the product of collusion. Here, none of *Bluetooth*'s warning signs are present. 654 F.3d at 946. The Settlements do not provide that class counsel receive a disproportionate amount of the settlement consideration. *Id.* at 947. Rather, it specifies that the Court will determine the amount of attorneys' fees, and that that determination shall have no bearing on the Settlements. Maxell Settlement ¶ E.23; NEC Settlement ¶ E.23; Panasonic Settlement ¶ E.23; Toshiba Settlement ¶ E.25. Second, the Settlements do not allow any part of the $49,850,000 consideration to revert to any of the Settling Defendants. Maxell Settlement ¶¶ D.17(c), (h), D.18(a), (b); NEC Settlement ¶ D.17(c), (h); Panasonic Settlement ¶¶ D.17(c), (h), D.18(a), (b); Toshiba Settlement ¶¶ D.18(c), (h), D.20(a), (b). Third, the Settlements contain no "clear sailing" provision of the kind condemned in *Bluetooth*. *See* Maxell Settlement ¶ E.23; NEC Settlement ¶ E.23; Panasonic Settlement ¶ E.23; Toshiba Settlement ¶ E.25; *see also In re High-Tech Emp. Antitrust Litig*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *14 (N.D. Cal. Sept. 2, 2015) ("a 'clear sailing' provision 'does not signal the possibility of collusion' where, as here, Class Counsel's fee will be awarded by the Court from the same common fund as the recovery to the class"). The absence of these warning signs is further indication of the Settlements' fairness. *See Zynga*, 2015 WL 6471171, at *9. Nor are there other indications that they are anything but the product of informed, arm's-length negotiations.

3. The Settlements Treat All Class Members Fairly

As set forth *infra* in Section VII, the proceeds of the Settlements will be distributed to the members of the settlement classes on a *pro rata* basis according to the dollar amount of each class member's purchases. The Settlements do not provide for preferential treatment of any class member or group of class members. Class representatives' claims will be paid according to the

same *pro rata* basis as all other members of the settlement classes that submit a claim.[5] Saveri Decl. ¶ 13. This factor therefore also supports preliminary approval. *See Zynga*, 2015 WL 6471171, at *10.

4. The Settlements Are Within the Range of Possible Approval

When considering this factor, courts generally focus on how the settlement consideration compares to the expected recovery in the case. *See id.* However, "a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (quoting *Officers for Justice*, 688 F.2d at 628). Settling Defendants' payments totaling $49,850,000, along with the other benefits, put the Settlements well within the range of possible approval when compared to other cases, and when the risks, expense, and delay of further litigation are considered.

First, the cash consideration for each settlement is significant. The payments required by three of the Settlements amount to 58%, over 400% and 30% of the single damages attributable to their U.S. sales during the class period indicated by Plaintiffs' preliminary damage study. Saveri Decl. ¶ 14. Each is substantially higher than amounts other courts have found sufficient for final approval in antitrust cases. *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 1998 (2015) (survey of 71 settled cartel cases revealed the weighted mean—weighting settlement according to their sales—was 19% of single damages recovery), *noted in In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-cv-05944, 2016 WL 3648478, at *7 n.19 (N.D. Cal. July 7, 2016) and *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-cv-2058 JST, 2015 WL 9266493, at *5 n.9 (N.D. Cal. Dec. 17, 2015) ("*CRT II*"). *See also Zynga*, 2015 WL 6471171, at *11 (approving settlement of 14% of estimated damages in securities class action, because, *inter alia*, it substantially exceeded average recovery in securities actions); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (citing studies noting that the average securities fraud class action settlement between 1995 and 2001

[5] The proposed notice does not include a claims procedure. Plaintiffs propose that the claims procedure occur at a later date in order to save on administrative costs and ensure the maximum recovery for class members.

resulted in recovery between 5.5 and 6.2% of estimated losses). *See also CRT II*, 2015 WL 9266493, at *5 (citing *Fisher Bros. v. Mueller Brass Co.*, 630 F. Supp. 493, 498–99 (E.D. Pa. 1985) (settlements equal to .1%, .2%, 2%, .3%, .65%, .88%, and 2.4% of defendants' total sales were reasonable). Moreover, these figures do not account for class members who exclude themselves from the Settlements. Because it is likely that some will opt-out, the percentages above will increase.

Second, the Settlements do not reduce Plaintiffs' potential total recovery. Each agreement preserves Plaintiffs' ability to recover for damages for Settling Defendants' sales from the remaining Defendants based on joint and several liability. Maxell Settlement ¶ H.33; NEC Settlement ¶ H.33; Panasonic Settlement ¶ H.33; Toshiba Settlement ¶ H.34. "Thus, this settlement provides increased value . . . by creating added incentive for the remaining defendants to settle or allowing greater recovery for the Plaintiffs at trial." *CRT II*, 2015 WL 9266493, at *6.

Third, the Settlements require Settling Defendants to cooperate with Plaintiffs in their case against the remaining Defendants. The mandated cooperation varies by Defendant, but includes identifying documents; providing employees for interviews, depositions, and/or trial testimony; and authenticating documents and/or transactional data. Maxell Settlement ¶ F.24; NEC Settlement ¶ F.24; Panasonic Settlement ¶ F.24; Toshiba Settlement ¶ F.26. This is a valuable benefit because it improves Plaintiffs' case against the remaining Defendants. *See CRT II*, 2015 WL 9266493, at *6 (settlement requiring cooperation "may save time, reduce the DPPs' costs, and provide information, witnesses, and documents that the DPPs may otherwise not be able to access").

Finally, as discussed in greater detail below, the risk, expense and delay of continued litigation demonstrates that the Settlements represent excellent recoveries for the class members. *See* Section IV.C.5, *infra*.

a. Maxell Settlement

The $3,450,000 Maxell Settlement represents a recovery of approximately 58% of the single damages attributable to Maxell's U.S. sales of cells, batteries and finished products. *See* Saveri Decl. ¶ 15.

b. NEC Settlement

The $1,000,000 NEC Settlement represents a recovery of over 400% of the single damages attributable to NEC's U.S. sales. NEC had no U.S. sales of cells or packs; the single damages attributable to its finished product sales per Plaintiffs' damage study are $238,358. *See id.* ¶ 16.

c. Panasonic Settlement

The $42,500,000 Panasonic Settlement represents a recovery of approximately 30% of the single damages attributable to the U.S. cell, pack and finished product sales of both Panasonic and SANYO. *See id.* ¶ 17.

d. Toshiba Settlement

The $2,900,000 Toshiba Settlement represents a recovery of approximately 4.2% of the single damages attributable to its U.S. sales of cells, packs and finished products for the entire class period. *See id.* ¶ 18. The case against Toshiba, however, is not as strong as that against other Defendants. It is undisputed that Toshiba ceased manufacturing Li-Ion Cells and Batteries in 2004. Toshiba denies that it ever joined the alleged conspiracy, and that, in any event, its withdrawal from Li-Ion manufacture would operate as a withdrawal from the conspiracy. Proof of either contention could preclude, or drastically reduce, Toshiba's damages. Further, the Court has suggested that, as to Toshiba's withdrawal defense, "plaintiffs' evidence is hardly robust." *See In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420-YGR, 2016 WL 1054584, at *4 (N.D. Cal. Mar. 16, 2016). In light of these potential defenses, it is appropriate to evaluate the Toshiba Settlement amount as a percentage of the damages attributable to its sales through 2004, when it ceased manufacturing Li-Ion Cells and Batteries. In that context, the Toshiba settlement is within the range of reasonableness, amounting to 30% of the damages attributable to Toshiba's sales during that time period. *See* Saveri Decl. ¶ 18.

5. The Risk, Expense and Delay of Continued Litigation Support Approval of the Settlements

The "risk, expense, complexity, and likely duration of further litigation" are also relevant to the Court's preliminary approval analysis. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988) ("*Hanlon*"). First, while Plaintiffs believe they have a strong case, there are substantial

risks involved with further litigation. As noted, class action antitrust litigation is complex and uncertain and this case is no exception. *See Linerboard*, 296 F. Supp. 2d at 577. While, as the Court has noted, the guilty pleas establish that a conspiracy existed at least for a short period, the duration of the conspiracy, its participants, and the products it embraced are all hotly contested. A result contrary to Plaintiffs' allegations on any of these issues could substantially reduce the value of their case. In addition, even if Plaintiffs prove their liability case in full, there is no guarantee that the jury will agree with their damage analysis. In the *LCD* case, for example, the plaintiffs' expert concluded that class wide single damages were $870 million; the jury awarded $87 million. Saveri Decl. ¶ 19. *See also CRT I*, 2017 WL 565003, at *4.

Second, further litigation against these Defendants will involve substantial delay and expense. Because any judgment in favor of Plaintiffs is almost certain to be appealed, a litigated recovery is likely years away. And further litigation against these Defendants will be expensive. For these reasons, as well, the Settlements represent excellent recoveries for the class and should be approved. As courts in this district have observed: "it is not unreasonable for a plaintiff to receive less in settlement than her total potential recovery at trial. *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1042 (N.D.Cal. 2008). The lesser amount reflects the risk associated with trial, and also the time and effort that must be invested to go to trial." *Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-cv-01663-JST, 2015 WL 4463650, at *5 (N.D. Cal. July 21, 2015); *see also CRT II*, 2015 WL 9266493, at *4–5 (risk of continued litigation "strongly favors granting final approval"). Moreover, as noted, the Settlements allow the class to make certain of a substantial recovery without reducing their total potential judgment.

For all of these reasons, Plaintiffs respectfully submit that the Settlements are well within the range of possible approval and, therefore, worthy of preliminary approval.

V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASSES

As it did with respect to the Sony settlement class, the Court should provisionally certify the proposed settlement classes. *See* ECF No. 1182 ¶ 4. Each Settling Defendant has agreed that the class defined in, and required by, its settlement should be certified. Maxell Settlement at 2, ¶ A.1; NEC Settlement at 2, ¶ A.1; Panasonic Settlement at 2, ¶ A.1; Toshiba Settlement at 2, ¶ A.2.

The Maxell, NEC and Toshiba settlement classes are materially identical to the Sony settlement class. *See* ECF No. 1438 ¶ 4. Each of these settlements utilizes the class definition contained in the SCAC:

> All persons and entities that purchased a Lithium Ion Battery or Lithium Ion Battery Product from any Defendant, or any division, subsidiary or affiliate thereof, or any co-conspirator in the United States during the Class Period from January 1, 2000 through May 31, 2011. Excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any Co-Conspirators, federal governmental entities and instrumentalities of the federal government, states and their subdivisions, agencies and instrumentalities, and any judge or jurors assigned to this case.

SCAC ¶ 287; Maxell Settlement ¶ A.1; NEC Settlement ¶ A.1; Toshiba Settlement ¶ A.2.[6]

The Panasonic settlement class uses the proposed class definition contained in Plaintiffs' motion for class certification:

> All persons and entities that purchased a cylindrical or prismatic Lithium Ion Battery Cell or a Lithium Ion Battery or Lithium Ion Battery Product containing a cylindrical or prismatic Lithium Ion Battery Cell from any Defendant, or any division, subsidiary or affiliate thereof, or any co-conspirator in the United States from May 1, 2002 through May 31, 2011. Excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any Co-Conspirators, federal governmental entities and instrumentalities of the federal government, states and their subdivisions, agencies and instrumentalities, and any judge or jurors assigned to this case.

ECF No. 1038 at 3. While not identical to the Sony settlement class—the class period begins two years and five months later and the class does not include purchasers of polymer cells, batteries or products—it raises no new issues.

It is well-established that price-fixing actions like this one are appropriate for class certification and many courts have so held. *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 630 (N.D. Cal. 2015) ("*CRT III*"); *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555, 587 (N.D. Cal. 2013); *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1229 (N.D.

[6] The Maxell and NEC Settlements specify the use of the SCAC definition. *See* Maxell Settlement ¶ A.1; NEC Settlement ¶ A.1. The class definition set forth in the Toshiba Settlement is identical to the SCAC definition. *See* Toshiba Settlement ¶ A.2. The Sony settlement made slight alterations to the SCAC language as follows: the class definition in the Sony settlement twice refers to "any ***alleged*** co-conspirator" (emphasis added), as opposed to "any co-conspirator" in the SCAC; and deletes the phrase "during the Class Period" before the specified date range. *See* ECF No. 1438 ¶ 4.

Cal. 2013); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 315 (N.D. Cal. 2010) ("*LCD*"), *abrogated in part on other grounds by In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 756 (9th Cir. 2012); *In re Apple iPod iTunes Antitrust Litig.*, No. C 05-00037 JW, 2011 WL 5864036, at *4 (N.D. Cal. Nov. 22, 2011); *In re Online DVD Rental Antitrust Litig.*, No. M 09-2029 PJH, 2010 WL 5396064, at *12 (N.D. Cal. Dec. 23, 2010) ("*Online DVD*"); *Pecover v. Elec. Arts, Inc.*, No. C 08-2820 VRW, 2010 WL 8742757, at *26 (N.D. Cal. Dec. 21, 2010); *In re Apple iPod iTunes Antitrust Litig.*, No. C 05-00037 JW, 2008 WL 5574487, at *8–9 (N.D. Cal. Dec. 22, 2008), *amended by* No. C 05-00037 JW, 2009 WL 249234, at *1 (N.D. Cal. Jan. 15, 2009; *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2008 WL 4447592, at *7 (N.D. Cal. Sept. 29, 2008) ("*SRAM*").

A. The Requirements of Rule 23 in the Context of the Settlement Classes

Rule 23 provides that a court must certify a class where, as here, plaintiffs satisfy the four prerequisites of Rule 23(a) (numerosity, commonality, typicality, and adequacy), and one of the three criteria set forth in Rule 23(b). Rule 23(b)(3) provides that "a class action may be maintained" if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As the Court found regarding the Sony settlement, *see* ECF No. 1438 ¶ 5, each requirement is satisfied here.

The "predominance" requirement is relaxed for settlement classes: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("*Amchem*") (citation omitted). As the Seventh Circuit has explained, manageability concerns that might preclude certification of a litigated class may be disregarded "because the settlement might eliminate all the thorny issues that the court would have to resolve if the parties fought out the case." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004) ("*Carnegie*") (Posner, J.). *See also In re Initial Public Offering Sec. Litig.*, 226 F.R.D. 186, 190, 195 (S.D.N.Y. 2005) ("*IPO*") (settlement class may be broader than litigated class because settlement resolves manageability/predominance concerns).

B. The Requirements of Rule 23(a) Are Satisfied in this Case

1. Each Class Is so Numerous that Joinder of All Members Is Impracticable

The first requirement is that the class be so numerous that joinder of all members would be "impracticable." Fed. R. Civ. P. 23(a)(1). Where the precise size of the class is unknown, but "'general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.'" *SRAM*, 2008 WL 4447592, at *3 (quoting 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3:3 (4th ed. 2002)). In this case, Defendants' transactional data indicates that each settlement class contains thousands of members dispersed across the country, Saveri Decl. ¶ 20, and therefore satisfies this requirement. The Court has already found that the Sony settlement class satisfied "numerosity." *See* ECF No. 1438 ¶ 5 ("there are hundreds of geographically dispersed class members, making joinder of all members impracticable").

2. This Case Involves Questions of Law and Fact Common to Each Class

The second requirement for class certification, Rule 23(a)(2), requires that class members share common issues of law or fact. Only one significant issue is necessary to satisfy commonality. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010). It is well established that allegations of a price-fixing conspiracy satisfy commonality: "'the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006) ("*DRAM*") (quoting *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 351 (N.D. Cal. 2005)). *See also Online DVD*, 2010 WL 5396064, at *3. Other common questions include whether the conspiracy caused the prices of Li-Ion Cells to be set at supra-competitive levels, the measure of classwide damages, and whether the conspirators concealed the conspiracy. Again, the Court has previously found this requirement satisfied. *See* ECF No. 1438 ¶ 5.

3. Representative Plaintiffs' Claims Are Typical of Each Class's Claims

The third requirement is that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). As the Court previously found with respect to the substantially similar Sony settlement class, *see* ECF No. 1438 ¶ 5, Plaintiffs also satisfy

the typicality requirement. Rule 23(a)(3) "does not require that the claims of the representative party be identical to the claims of class members." *Online DVD*, 2010 WL 5396064, at *4. "Rather, typicality results if the representative plaintiffs' claims arise from the same event, practice or course of conduct that gives rise to the claims of the absent class members and if their claims are based on the same legal or remedial theory." *Id.* (internal quotation marks and brackets omitted). *See also SRAM*, 2008 WL4447592, at *3. Class representatives' claims "need not be substantially identical" to those of absent class members, as "[s]ome degree of individuality is to be expected in all cases." *Cifuentes v. Red Robin Int'l, Inc.*, No. C-11-5635-EMC, 2012 WL 693930, at *5 (N.D. Cal. Mar. 1, 2012). *See also Hanlon*, 150 F.3d at 1020.

"Typicality requirements are often satisfied wherein it is alleged that the defendants engaged in a common price-fixing scheme relative to all members of the class. In such cases, there is a strong assumption that the claims of the representative parties will be typical of the absent class members." *CRT III*, 308 F.R.D. at 613 (internal quotation marks, brackets, and citations omitted). "This is true even where 'the plaintiff followed different purchasing procedures, purchased in different quantities or at different prices, or purchased a different mix of products than did the members of the class.'" *Id.* (quoting *LCD*, 267 F.R.D. at 300). *See also Online DVD*, 2010 WL 5396064, at *4 (inquiry focuses on the conduct of the defendants, not on their individual dealings or transactions with plaintiffs); *DRAM*, 2006 WL 1530166, at *4–6.

Here, each proposed class representative purchased at least one Li-Ion Battery or Product directly from at least one named Defendant or its wholly-owned subsidiary during the relevant settlement class period and allegedly paid higher prices as a result of Defendants' allegedly unlawful actions. The claims of the proposed class representatives mirror those of the members of the proposed settlement classes. They allege a conspiracy to fix, raise, maintain and stabilize the price of Li-Ion Batteries. Class members' claims are based on the same legal theories and Plaintiffs would have to prove the same elements that absent members would have to prove: the existence, scope, and efficacy of the conspiracy. Plaintiffs respectfully submit that the typicality requirement of Rule 23(a)(3) is satisfied here.

4. The Representative Plaintiffs Will Fairly and Adequately Protect the Interests of Each Class

The fourth requirement, Rule 23(a)(4), mandates that the representative plaintiffs fairly and adequately protect the interests of the class. The Court found that Plaintiffs satisfied Rule 23(a)(4) for the purposes of the Sony settlement. *See* ECF No. 1438 ¶ 5. Plaintiffs also satisfy it here. Adequacy requires that Plaintiffs (1) have no interests that are antagonistic to or in conflict with the interests of the class; and (2) retain counsel able to vigorously prosecute the interests of the class. *See SRAM*, 2008 WL 4447592, at *4. "[T]he adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative." *Rodriguez*, 563 F.3d at 961.

Courts have regularly found this requirement satisfied in price-fixing cases. *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 374 (C.D. Cal. 2011) (where plaintiffs have "alleged a broad conspiracy, courts have not required that the representative has purchased from all of the defendants or that he has been adversely affected by all of the means and methods by which the alleged conspiracy was implemented" (brackets and ellipsis in original omitted)). Class representatives "will be found to be adequate when the attorneys representing the class are qualified and competent, and the class representatives are not disqualified by interests antagonistic to the remainder of the class." *Online DVD*, 2010 WL 5396064, at *4. Moreover, "[t]he mere potential for a conflict of interest is not sufficient to defeat class certification; the conflict must be actual, not hypothetical." *SRAM*, 2008 WL 4447592, at *4. Here, Plaintiffs' interests do not conflict with those of absent members of the proposed settlement classes. Plaintiffs allege that all class members were injured by the same conspiracy in the same way. All Plaintiffs and members of the proposed settlement classes seek the same relief in the form of overcharge damages, and share an identical interest in proving Defendants' liability.

Plaintiffs have also retained skilled counsel with extensive experience in prosecuting antitrust class actions. The Court has appointed Saveri & Saveri, Inc., Pearson, Simon & Warshaw, LLP, and Berman DeValerio as Interim Co-Lead Counsel, and as Class Counsel for the Sony settlement class. Order Appointing Interim Lead Counsel, ECF. No. 194 (May 17, 2013); ECF No. 1182 ¶ 7. Interim Co-Lead Counsel have undertaken the responsibilities assigned to them and—with other able

Plaintiffs' counsel—have vigorously pursued the litigation on behalf Plaintiffs and the members of the proposed settlement classes. Interim Co-Lead Counsel have devoted the substantial time, resources, and leadership necessary to prosecute this action, and will continue to do so. Plaintiffs satisfy the adequacy requirement of Rule 23(a)(4).

C. Each Proposed Class Satisfies the Requirements of Rule 23(b)(3)

To be certified under Rule 23(b)(3) a class must meet two additional requirements: "[c]ommon questions must predominate over any questions affecting only individual members; and class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem*, 521 U.S. at 615 (internal quotation marks omitted). As noted by the Supreme Court: "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Id.* at 625. Plaintiffs satisfy both requirements here, as they did for the Sony settlement class. *See* ECF No. 1438 ¶ 5.

1. Common Questions of Law and Fact Predominate Over Individual Questions

Courts commonly find the "predominance" requirement of Rule 23(b) satisfied in direct purchaser horizontal price-fixing cases. *See, e.g.*, *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 814–15 (7th Cir. 2012) ("*Messner*"); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 300 (3d Cir. 2011); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 167 (C.D. Cal. 2002) ("In price-fixing cases, courts repeatedly have held that the existence of the conspiracy is the predominant issue and warrants certification even where significant individual issues are present." (internal quotation marks omitted)).

Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof. What the rule does require is that common questions *predominate* over any questions affecting only individual class members." *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (internal quotation marks, citation, and brackets omitted). The focus of the predominance inquiry is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Id.* (quoting *Amchem*, 521 U.S. at 623).

> Rule 23(b)(3)'s predominance requirement is satisfied when "common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication." Or, to put it another way, common questions can predominate if a "common nucleus of operative facts and issues" underlies the claims brought by the proposed class. . . . Individual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole.

Messner, 669 F.3d at 815 (internal citations omitted).

Here, common issues predominate with respect to Plaintiffs' proof of the three elements of their claim: (1) that Defendants participated in a conspiracy to fix prices in violation of the antitrust laws; (2) that Class members suffered antitrust injury (*i.e.*, "impact") as a result of the conspiracy; and (3) the damages they sustained. *See LCD*, 267 F.R.D. at 310; *DRAM*, 2006 WL 1530166, at *7. Common questions predominate because the Plaintiffs will establish each of the above elements through "generalized proof" applicable to the proposed settlement classes as a whole.

Finally, as explained above, the Court need not address questions of manageability, because the settlement disposes of the need for a trial, along with any "thorny issues" that might arise. *See Amchem*, 521 U.S. at 620; *Carnegie*, 376 F.3d at 660; *IPO*, 226 F.R.D. at 190, 195.

2. A Class Action Is Superior to Other Available Methods for the Fair and Efficient Adjudication of this Case

Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." If common questions are found to predominate in an antitrust action, courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied. *LCD*, 267 F.R.D. at 314–15. Here, it would be incredibly inefficient to litigate class members' claims in multiple individual proceedings. In addition, "[i]n antitrust cases such as this, the damages of individual direct purchasers are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful redress." *SRAM*, 2008 WL 4447592, at *7. The prosecution of separate actions would also create the risk of inconsistent rulings, and could result in prejudice to the named Plaintiffs and members of the proposed settlement classes. Most members of the proposed settlement classes would be effectively foreclosed from pursuing their claims absent class certification. *Hanlon*, 150 F.3d at 1023 ("many claims [that] could

not be successfully asserted individually . . . would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs"). The proposed settlement classes satisfy the requirements of Rule 23(b)(3).

D. The Court Should Appoint Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio as Settlement Class Counsel

Rule 23(c)(1)(B) states that "[a]n order that certifies a class action . . . must appoint class counsel under Rule 23(g)." Rule 23(g)(1)(A) states that "[i]n appointing class counsel, the court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class."

The law firms of Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio seek to be appointed as Settlement Class Counsel. The firms are willing and able to vigorously prosecute this action and to devote all necessary resources to obtain the best possible result. The work done to date supports the conclusion that they should be appointed as class counsel for purposes of the Settlements. *See, e.g.*, *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 520 (D.N.M. 2004). The firms meet the criteria of Rule 23(g)(1)(A). *Cf. Farley v. Baird, Patrick & Co.*, No. 90 Civ. 2168 (MBM), 1992 WL 321632, at *5 (S.D.N.Y. Oct. 28, 1992) ("Class counsel's competency is presumed absent specific proof to the contrary by defendants").

The Court has already appointed Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio as Interim Co-Lead Counsel for the Direct Purchaser Plaintiffs, ECF No. 194 ¶ 1, and as Settlement Class Counsel for the purposes of the Sony settlement. ECF No. 1182 ¶ 7. They also described their work in representing the class in connection with the motion for class certification. *See* ECF Nos. 1038-9 ¶¶ 3–4, 1038-10 ¶¶ 3–4, 1038-11 ¶¶ 3–5. There is no reason not to appoint these same three firms as Settlement Class Counsel.

VI. PROPOSED PLAN OF NOTICE

Rule 23(e)(1) states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement, voluntary dismissal, or compromise.

Class members are entitled to the "best notice that is practicable under the circumstances" of any proposed settlement before it is finally approved by the Court. Fed. R. Civ. P. 23(c)(2)(B). The notice must state in plain, easily understood language:

> (i) the nature of the action;
> (ii) the definition of the class certified;
> (iii) the class claims, issues, or defenses;
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
> (v) that the court will exclude from the class any member who requests exclusion;
> (vi) the time and manner for requesting exclusion; and
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Id. Notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem*, 521 U.S. at 617.

Plaintiffs propose a notice plan that is substantially identical to the one the Court approved for the Sony Settlement. Plaintiffs propose that a long-form notice in the form attached as Exhibit 5 to the Saveri Declaration be given by mail or email to members of the settlement classes who may, by reasonable efforts, be identified.[7] In addition, Plaintiffs propose that a short-form notice in the form attached as Exhibit 6 to the Saveri Declaration be published in the national edition of the *Wall Street Journal*, and that both notices, along with the Settlements, be posted on a website accessible to class members. Publication notice is an acceptable method of providing notice where the identity of specific class members is not reasonably available. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007).

The content of the proposed notices is also similar to the Sony notice and complies with the requirements of Rule 23(c)(2)(B). The long-form notice clearly and concisely explains the nature of the action and the terms of the Settlements. Saveri Decl., Ex. 5 at 3–5. It provides a clear description of who is a member of the settlement classes and the binding effects of class membership. *Id.* at 4–5. It explains how to exclude oneself from the settlement classes, how to object to the Settlements, how to obtain copies of papers filed in the case and how to contact class counsel. *Id.* at 4–6.

[7] Pursuant to the Court's order regarding the Sony settlement, Defendants have provided lists of their customers to Plaintiffs, and Plaintiffs' notice provider Epiq Systems, Inc. has created a class list. See ECF No. 1357-3 ¶ 5.

The short-form notice also identifies members of the settlement classes and explains the basic terms of the Settlements and the consequences of class membership. Saveri Decl., Ex. 6. It also explains how to obtain more information about the Settlements. *Id.* The short-form notice will be published after the long-form notice is mailed and e-mailed to members of the settlement classes.

The content of the notices fulfills the requirements of Rule 23 and due process. *See* ECF No. 1438 ¶ 9. Accordingly, the Court should preliminarily approve them. They also satisfy the District's *Procedural Guidance for Class Action Settlements*. *See Guidelines* ¶¶ 3–5. Plaintiffs have chosen Epiq Systems to act as settlement administrator. *See id.* ¶ 2.

Such notice plans are commonly used in class actions like this one and constitute valid, due, and sufficient notice to class members, and constitute the best notice practicable under the circumstances. *See* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1786 (3d ed. 2005) ("Wright & Miller"); 7B Wright & Miller § 1797.6; *Fraley ex rel. Duval v. Facebook, Inc.*, No. CV-11-01726 RS, 2012 WL 6013427, at *2 (N.D. Cal. Dec. 3, 2012). Similar notice plans have been recently approved by several courts in the Northern District of California. *See, e.g.*, *CRT II*, 2015 WL 9266493, at *3–4; Saveri Decl. ¶ 21 (describing similar notice plans that were approved in the *ODD*, *CRT*, and *LCD* cases).

VII. PROPOSED PLAN OF ALLOCATION

Plaintiffs propose a plan of allocation identical to that already approved by the Court for the Sony Settlement. *See* ECF No. 1438 ¶ 11. Plaintiffs propose that distribution of the proceeds of the Settlements be made on a *pro rata* basis. A plan of allocation of class settlement funds is subject to the "fair, reasonable and adequate" standard that applies to approval of class settlements. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1045 (N.D. Cal. 2008); *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001). A plan of allocation that compensates class members based on the type and extent of their injuries is generally considered reasonable. Here the proposed distribution will be on a *pro rata* basis, with no class member being favored over others. This type of distribution has frequently been determined to be fair, adequate, and reasonable. *CRT II*, 2015 WL 9266493, at *8. *See also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486 PJH, ECF No. 2093 at 2 (Oct. 27, 2010) (final plan of allocation order approving

pro data distribution); *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members have repeatedly been deemed fair and reasonable."); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ.1262 RWS, 2002 WL 31663577, at *19 (S.D.N.Y. Nov. 26, 2002) ("*pro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to be the fairest method of allocating the settlement benefits").

Plaintiffs propose that settlement funds be allocated on a *pro rata* basis based on the dollar value of each class member's purchase(s) of Li-Ion Cell, Li-Ion Batteries or Li-Ion Products in proportion to the total claims filed. In determining the *pro rata* allocation of settlement funds, class members' purchases will be valued according to the proportionate value of the Li-Ion Cells contained in the product. The resulting percentages will be multiplied against the net settlement fund (total settlements minus all costs, attorneys' fees, and expenses) to determine each claimant's *pro rata* share of the settlement funds.

The proposed plan of allocation is similar to recently approved plans of allocation in other cases in this district. *See*, *e.g.*, *CRT II*, 2015 WL 9266493, at *7–8 (approving *pro rata* plan of allocation based upon proportional value of price-fixed component in finished product).

VIII. THE COURT SHOULD SET A FINAL APPROVAL SCHEDULE

The last step in the settlement approval process is the final approval hearing, at which the Court may hear all evidence and argument necessary to evaluate the proposed Settlements. At that hearing, members of the settlement classes, or their counsel, may be heard in support of or in opposition to the Settlements. Plaintiffs propose the following schedule:

Days from Entry of Preliminary Approval Orders	**Event**
14 Days	Long-form notice sent to class members by U.S. mail or electronic mail, publication of website, and activation of telephone information system
18 Days	Short-form notice published in *Wall Street Journal*

59 Days	Deadlines to request exclusion from the settlement classes, object to the Settlements, and/or file a notice of intention to appear at the fairness hearing
73 Days	Deadline to file a list of requests for exclusion
87 Days	Deadline for filing motion for final approval of Settlements
122 Days	Hearing on final approval of Settlements

IX. CONCLUSION

For the foregoing reasons Plaintiffs respectfully submit that the Court should enter orders granting the relief requested by this motion: (i) granting preliminary approval of the Settlements and the related plan of allocation; (ii) certifying a settlement class with respect to each settlement; (iii) appointing Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio as Settlement Class Counsel with respect to each settlement; (iv) approving the manner and form of giving notice to members of the settlement class, (v) establishing a timetable for issuing such notice, filing objections, requesting exclusion, and filing briefs; and (vi) setting a date for a hearing on final approval of the Settlement.

Dated: March 17, 2017

Respectfully submitted,

/s/Bruce L. Simon
Bruce L. Simon
Aaron M. Sheanin
Benjamin E. Shiftan
PEARSON SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
asheanin@pswlaw.com
bshiftan@pswlaw.com

Clifford H. Pearson
PEARSON SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400
Sherman Oaks, CA 91403
Telephone: (818) 788-8300
Facsimile: (818) 788-8104
cpearson@pswlaw.com

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

/s/R. Alexander Saveri
R. Alexander Saveri
Geoffrey C. Rushing
Cadio Zirpoli
SAVERI & SAVERI INC.
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813
rick@saveri.com
geoff@saveri.com
cadio@saveri.com

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

/s/Joseph J. Tabacco, Jr.
Joseph J. Tabacco, Jr.
Todd A. Seaver
Jessica Moy
BERMAN DEVALERIO
44 Montgomery Street, Suite 650
San Francisco, CA 94104
Telephone: (415) 433-3200
Facsimile: (415) 433-6382
jtabacco@bermandevalerio.com
tseaver@bermandevalerio.com
jmoy@bermandevalerio.com

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

/s/Judith A. Zahid
Judith A. Zahid
Qianwei Fu
Heather T. Rankie
ZELLE LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Telephone: (415) 693-0700
Facsimile: (415) 693-0770
jzahid@zelle.com
qfu@zelle.com
hrankie@zelle.com

Interim Liaison Counsel for Direct Purchaser Plaintiffs

DIRECT PURCHASER PLAINTIFFS' STEERING COMMITTEE

Jeffrey B. Gittleman
Beth T. Seltzer
BARRACK, RODOS & BACINE
One Gateway Center, Suite 2600
Newark, NJ 07102
Telephone: (973) 297-1484
Facsimile: (973) 297-1485
jgittleman@barrack.com
bseltzer@barrack.com

Douglas A. Millen
FREED KANNER LONDON & MILLEN LLC
2201 Waukegan Road, Suite 130
Bannockburn, IL 60015
Telephone: (224) 632-4500
Facsimile: (224) 632-4521
dmillen@fklmlaw.com

Gerald J. Rodos
William J. Ban
BARRACK, RODOS & BACINE
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
Telephone: (215) 963-0600
Facsimile: (215) 963-0838
grodos@barrack.com
wban@barrack.com

Susan G. Kupfer
GLANCY PRONGAY & MURRAY LLP
1808 Sixth Street
Berkeley, CA 94710
Telephone: (415) 972-8160
Facsimile: (415) 972-8166
skupfer@glancylaw.com

Jay Eisenhofer
Peter Barile III
GRANT & EISENHOFER P.A.
485 Lexington Avenue, 29th Floor
New York, NY 10017
Telephone: (646) 722-8500
Facsimile: (646) 722-8501
jeisenhofer@gelaw.com
pbarile@gelaw.com

Lee Albert
Brian P. Murray
Gregory Linkh
GLANCY PRONGAY & MURRAY LLP
122 E. 42nd Street
New York, NY 10168
Telephone: (212) 682-5340
lalbert@glancylaw.com
bmurray@glancylaw.com
glinkh@glancylaw.com

Jack Brady
Daniel D. Owen
G. Gabriel Zorogastua
POLSINELLI PC
900 W. 48th Place, Suite 900
Kansas City, MO 64112
Telephone: (816) 753-1000
Facsimile: (816) 753-1536
jbrady@polsinelli.com
dowen@polsinelli.com
gzorogastua@polsinelli.com

Elizabeth C. Pritzker
PRITZKER LEVINE LLP
180 Grand Avenue, Suite 1390
Oakland, CA 94612
Telephone: (415) 692-0772
Facsimile: (415) 366-6110
ecp@pritzkerlevine.com