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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 CLASS;**
2. **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH SONY DEFENDANTS;**
3. **DIRECTING NOTICE TO CLASS; AND**
4. **MEMORANDUM IN SUPPORT THEREOF.**

Date: March 22, 2016
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 March 22, 2016, 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 94612, the Direct Purchaser Plaintiffs will move this Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for entry of an Order:

(i) granting preliminary approval of the settlement agreement Direct Purchaser Plaintiffs have executed with Defendants Sony Corporation, Sony Energy Devices Corporation and Sony Electronics Inc. (collectively "Sony");

(ii) certifying a settlement class;

(iii) appointing Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio as Settlement Class Counsel;

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

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

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

The grounds for this motion are that: (a) the settlement is in the range of possible final approval to justify issuing notice of the settlement to class members 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 FRCP 23 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 Order, the complete files and records in this action, and such other written or oral arguments that may be presented to the Court. The settlement agreement is attached as Exhibit 1 to the Saveri Declaration. The proposed long-form notice is attached to the Saveri Declaration as Exhibit 2. The proposed short-form notice is attached to the Saveri Declaration as Exhibit 3.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Direct Purchaser Plaintiffs ("Plaintiffs") have reached a settlement ("Settlement") with Defendants Sony Corporation, Sony Energy Devices Corporation and Sony Electronics Inc. (collectively "Sony"). In return for a full release, Sony will pay the class $19,000,000 and will cooperate in the prosecution of the case against the remaining Defendants. The Settlement was the product of thorough and hard-fought negotiations between experienced and informed counsel and provides substantial benefits to the class. Plaintiffs now move the Court for an order preliminarily approving the Settlement, provisionally certifying a settlement class in accordance with the terms of the Settlement, approving the form and manner of notice to the class, appointing class counsel, preliminarily approving a plan of allocation, and establishing a schedule for final approval.

At this time, this Court is not being asked to determine whether the Settlement and the related plan of allocation are fair, reasonable, and adequate. Rather, the question is only whether it is sufficiently within the range of possible approval to justify sending and publishing notice to class members and to schedule a final approval hearing. Plaintiffs respectfully submit that the Court should grant this motion, because the Settlement is well within the range of possible final approval.

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 (Apr. 8, 2014) (ECF No. 415) ("SCAC") ¶¶ 110, 112–180. 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 the use of trade associations. Saveri Decl. ¶ 5. Two Defendants—LG Chem and Sanyo—have pleaded guilty to

criminal price fixing of Li-Ion Cells. *Id.* This is the first settlement in Plaintiffs' action. *Id.* ¶ 6.

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

III. THE TERMS OF THE SETTLEMENT

The Settlement (attached as Exhibit 1 to the Saveri Declaration) requires the certification of a nationwide class of direct purchasers of Li-Ion Batteries and Lithium Ion Battery Products ("Li-Ion Products") from January 1, 2000 until May 31, 2011 ("Settlement Class"), consistent with the class allegations in the SCAC. Settlement ¶ 1(d). Li-Ion Batteries are defined to mean a cylindrical, prismatic, or polymer battery that is rechargeable and uses lithium ion technology. Li-Ion Products are defined to mean "products manufactured, marketed and/or sold by Defendants, their divisions, subsidiaries or Affiliates, or their alleged co-conspirators that contain one or more [Li-Ion] Cells manufactured by Defendants or their alleged co-conspirators. [Li-Ion] Products include, but are not limited to, notebook computers, cellular (mobile) phones, digital cameras, camcorders and power tools." Settlement ¶ 1(u). Upon the Settlement becoming final, Plaintiffs and Class Members will relinquish any claims they have against Sony relating to any conduct, act, or omission by Sony 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 Class Period from Defendants or their subsidiaries and affiliates. Settlement ¶¶ 1(z), 6(e), 8. The release excludes claims for product defects or personal injury, breach of contract, foreign purchases, and claims against parties other than Sony for sales by those parties, or their alleged co-conspirators, of Li-Ion Products which contain Sony's Li-Ion Cells or Sony's Li-Ion Battery Packs. *Id.* ¶ 1(z). The release is thus limited to the subject matter of this lawsuit. *See Procedural Guidelines for Class Action Settlements*, U.S.D.C.,

N.D. Cal. (Feb. 11, 2016), http://www.cand.uscourts.gov/ClassActionSettlementGuidance ("*Guidelines*") ¶ 1(c).

The Settlement also requires Sony 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. Settlement ¶ 27. Sony's sales remain in the case for purposes of computing damages against the remaining Defendants. Saveri Decl. ¶ 10; Settlement ¶ 1(z).

The 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 Sony; and (ii) the expiration of the time for appeal or, if an appeal is taken, the affirmance of the judgment with no further possibility of appeal. Settlement ¶¶ 1(l), 1(o).

Subject to the approval and direction of the Court, the Settlement proceeds, plus accrued interest, will be used to: (1) make a distribution to Class members in accordance with a proposed plan of allocation (*id.* ¶¶ 20(e)); (2) pay Notice costs and costs incurred in the administration and distribution of the Settlement (*id.* ¶ 20(a–b)) of up to $500,000 (*id.* ¶ 14); (3) pay Class counsel's attorneys' fees, costs, and expenses as may be awarded by the Court (*id.* ¶¶ 20(d)); and (4) pay taxes associated with any interest earned on the escrow account (*id.* ¶ 20(c)).

Sony has the right to terminate the agreement if purchasers amounting to 35% or more of Sony's sales request exclusion from the Class. *Id.* ¶ 33.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. Approval of Class Action Settlements

Rule 23(e) requires court approval of class action settlements. 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. (footnotes omitted).

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. In addition, 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. *In re Zynga Inc. Sec. Litig.*, No. 12-CV-04007-JSC, 2015 WL 6471171, at *8 (N.D. Cal. Oct. 27, 2015) ("*Zynga*"); *see also, In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2014 WL 6851096, at *2 (S.D.N.Y. Dec. 1, 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 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 Settlement Is Within the Range of Possible Approval

1. The Settlement Is the Product of Serious, Informed, Noncollusive Negotiations

This settlement was the product of good faith, arm's-length negotiations among experienced and well-informed counsel. Plaintiffs' negotiations with Sony occurred over a span of several months and involved face-to-face meetings. The parties exchanged written briefs and were guided by an experienced and effective mediator, Hon. Vaughn R. Walker (retired). Saveri Decl. ¶ 8. Further, the parties were informed by extensive documentary and other discovery, as well as expert analysis. These circumstances support the conclusion that the settlement was 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) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.").

In addition, counsel's judgment that the settlement is fair and reasonable (Saveri Decl. ¶ 9) is entitled to significant weight. *See Nat'l Rural Telcoms. 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.*, No. 3:07-cv-01413-W-AJB, 2008 WL 5458986, at *6–7 (S.D. Cal. Dec. 10, 2008); *Officers for Justice v. Civil Service Comm'n of the City and Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

2. The Settlement Has No Obvious Deficiencies

The second factor addresses whether there is any reason to believe the Settlement is the product of collusion. Here, none of *Bluetooth*'s warning signs are present. 654 F.3d at 946. The settlement does not provide that class counsel receive a disproportionate amount of the settlement consideration. *Id.* Rather, it specifies that the Court will determine the amount of attorneys' fees, and that that determination shall have no bearing on the Settlement. Settlement ¶ 24. Second, the Settlement contains no "clear sailing" provision. *See id.* Third, the Settlement does not allow any part of the $19 million consideration to revert to Sony unless the entire Settlement is terminated. Settlement ¶¶ 13, 36. The absence of these warning signs is a further indication of the Settlement's fairness. *See Zynga*, 2015 WL 6471171, at *9. Nor is there any other indication that the Settlement is anything other than the product of an informed, arm's-length negotiation.

3. The Settlement Treats All Class Members Fairly

As set forth *infra* in Section VII, the Settlement proceeds will be distributed to the Class on a *pro rata* basis according to the dollar amount of each class member's purchases. The Settlement does 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 class members that submit a claim. Saveri Decl. ¶ 14. This factor therefore also supports preliminary approval. *See Zynga*, 2015 WL 6471171, at *10.

4. The Settlement Is 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, 456 (9th Cir. 2000). Sony's payment of $19 million, along with the other benefits, put the Settlement within the range of possible final approval when compared to other cases, and when the risks, expense, and delay of further litigation are considered.

First, the cash consideration is a significant sum in its own right and compares favorably to settlements in other cases. It represents approximately 10% of the overcharge on Sony's U.S. sales indicated by Plaintiffs' preliminary damage study. Saveri Decl. ¶ 15. This is within the range other

courts have found sufficient for final approval in antitrust cases. *See e.g.*, *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (settlement amounting to approximately 11% of damages asserted by objector and 33% of maximum recovery estimated by plaintiffs' expert fair and reasonable); *Fisher Bros. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985) (recoveries equal to .1%, .2%, 2%, .3%, .65%, .88%, and 2.4% of defendants' total sales); *Four in One Co. v. S.K. Foods, L.P.*, No. 2:08-cv-3017 KJM EFB, 2014 WL 28808, at *9 (E.D. Cal. Jan. 2, 2014) (settlement amounting to 1% of defendants' sales). *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 resulted in recovery between 5.5 and 6.2% of estimated losses). Moreover, these figures do not account for potential class members who exclude themselves from the Settlement. Because it is likely that some class members will opt-out—the Settlement allows for customers accounting for anything less than 35% of Sony's sales to do so (Settlement ¶ 33)—the percentages above will increase. Nor do the percentages account for the risks of continued litigation.

Second, while the Settlement allows Plaintiffs to bank a substantial sum, it does not reduce their potential total recovery because it preserves their ability to recover for damages based on Sony's sales from the remaining Defendants based on joint and several liability. Saveri Decl. ¶ 10 (released claims do not preclude Plaintiffs from pursuing any and all claims against the remaining Defendants for the sales attributable to Sony); Settlement ¶ 1(z). "Thus, this settlement provides increased value in another pending class action suit in this case by creating added incentive for the remaining defendants to settle or allowing greater recovery for the Plaintiffs at trial." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-CV-2058 JST, 2015 WL 9266493, at *6 (N.D. Cal. Dec. 17, 2015) ("*CRT II*").

Third, the Settlement requires Sony to cooperate with Plaintiffs in their case against the remaining Defendants. The mandated cooperation includes identifying documents; providing employees for interviews, depositions, and/or trial testimony; authenticating documents; clarifying transactional data; and producing all discovery produced by Sony to any other plaintiff.

Settlement ¶ 27. This is a valuable benefit because it will save time; reduce costs; and provide access to information, witnesses, and documents regarding the conspiracy that might otherwise not be available to Plaintiffs. *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, because this is the first settlement in the case, it will likely encourage other settlements:

> The Court also notes that this settlement has significant value as an 'icebreaker' settlement—it is the first settlement in the litigation—and should increase the likelihood of future settlements. An early settlement with one of many defendants can 'break the ice' and bring other defendants to the point of serious negotiations.

In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003).

For these reasons, Plaintiffs respectfully submit that the settlement is well within the range of possible final approval and, therefore, worthy of preliminary approval.

V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

The Court should provisionally certify the settlement class required by the settlement. Settlement ¶ 1(d). Sony has agreed that the class defined in the Settlement should be certified. Settlement ¶ 6(a).

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 I*"); *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. 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 05-00037JW, 2011 WL 5864036 (N.D. Cal. Nov. 22, 2011); *In re Online DVD Rental Antitrust Litig.*, No. M 09-2029 PJH, 2010 WL 5396064 (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 (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*").

The class definition is consistent with the class definition in Plaintiffs' operative complaint:

> 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 alleged co-conspirator in the United States from January 1, 2000 through May 31, 2011. Excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any alleged 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.

Settlement ¶ 1(d). The Settlement definition adds the word "alleged" before "co-conspirator" and strikes the words "during the Class Period" after "States." *See* SCAC ¶ 287.[1]

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

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 "an action may be maintained as a class action" if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The "predominance" requirement, however, is relaxed in the settlement context: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the

[1] *See Guidelines* ¶ 1(a)–(b). The settlement class definition is different from the class Plaintiffs seek to certify in their motion for class certification in that the settlement class definition includes purchasers of polymer Li-Ion cell batteries and products and begins on January 1, 2000 instead of May 1, 2002. *See* ECF No. 1038. The settlement class is consistent with the definition in the SCAC, which was the operative class definition at the time Sony and Plaintiffs reached their agreement. Saveri Decl. ¶ 11. The difference in definitions is no impediment to settlement approval. *See, e.g.*, *Zynga*, 2015 WL 6471171, at *3 (approving settlement class with a longer class period than in the operative complaint); *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); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 538 (N.D. Ga. 1992) ("The settlement class is somewhat different from but includes the certified class").

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*"). As the Seventh Circuit has explained, manageability concerns that might preclude certification of a litigated class may be disregarded with a settlement class "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) (Posner, J.). *See also IPO*, 226 F.R.D. at 190, 195 (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. The Class Is so Numerous that Joinder of All Members Is Impracticable

The first requirement for class certification 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)). *See also Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 536 (N.D. Cal. 2012). In this case, the transactional data produced indicates that the Class contains thousands of members dispersed across the country. Saveri Decl. ¶ 12. Thus, the proposed Class readily satisfies "numerosity."

2. This Case Involves Questions of Law and Fact Common to the 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*, 131 S. Ct. 2541, 2556 (2011) ("*Wal-Mart*"); *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) ("*Rubber Chems.*")). *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.

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

The third requirement for maintaining a class action under Rule 23(a) is that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Plaintiffs 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 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 v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

"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 I*, 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.

Here, each proposed Class representative purchased at least one Li-Ion Battery and/or Li-Ion Product directly from at least one named Defendant or its wholly-owned subsidiary during the proposed Class Period and allegedly paid higher prices as a result of Defendants' allegedly unlawful actions. The claims of the proposed Class representatives mirror the members of the Proposed Class.

Plaintiffs here 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 the Class

The fourth requirement, Rule 23(a)(4), mandates that the representative plaintiffs fairly and adequately represent the class. Plaintiffs satisfy Rule 23(a)(4). 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) ("*Auto Lighting*") (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 Class members. Plaintiffs allege that all Class members were injured by the same conspiracy in the same way. All Plaintiffs and Class members 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. Order Appointing Interim Lead Counsel (May 17,

2013) (Dkt. No. 194). 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 proposed Class. 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. The 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.

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); *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*. at 1196 (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 Class as a whole.

Finally, as explained above, the Court need not concern itself with questions of the manageability of a trial 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. Here, it would be incredibly inefficient to litigate the predominating common issues 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 Class members. Most Class members would be effectively foreclosed from pursuing their claims absent class

certification. *Hanlon*, 150 F.3d at 1023 ("[M]any claims [that] could not be successfully asserted individually . . . would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs."). The proposed class satisfies 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 certifying a class action . . . must appoint class counsel under Rule 23(g)." Rule 23(g)(1)(C) states that "[i]n appointing class counsel, the court (i) must consider: [1] the work counsel has done in identifying or investigating potential claims in the action, [2] counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, [3] counsel's knowledge of the applicable law, [4] the resources 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 settlement. *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)(C)(i). *Cf. Farley v. Baird, Patrick & Co., Inc.*, 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. They recently described their work in representing the class in connection with the motion for class certification. 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 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:

- the nature of the action;
- the definition of the class certified;
- the class claims, issues, or defenses;
- that a class member may enter an appearance through counsel if the member so desires;
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

Id.

Notice to the class 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 that a long-form notice in the form attached as Exhibit 2 to the Saveri Declaration be given by mail or email to each Class Member who may, by reasonable efforts, be identified. Plaintiffs request that the Court order all Defendants to produce within fourteen days from the entry of the order preliminarily approving the Settlement an electronic list of all class members with their U.S.-mail and electronic-mail addresses.

In addition, Plaintiffs propose that a short-form notice in the form attached as Exhibit 3 to the Saveri Declaration be published in the national edition of the *Wall Street Journal*, and that both notices, along with the Settlement, 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 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 settlement. Saveri Decl., Ex. 2 at p. 3–5. It provides a clear description of who is a member of the class and the binding effects of class membership. *Id.* at p. 4–5. It explains how to exclude oneself from the class, how to object to the settlement, how to obtain copies of papers filed in the case and how to contact class counsel. *Id.* at p. 4–5.

The short-form notice also identifies class members and explains the basic terms of the settlement and the consequences of class membership. Saveri Decl., Ex. 3. It also explains how to obtain more information about the settlement. *Id.* The short-form notice will be published after the long-form notice is mailed and e-mailed to class members.

The content of the notices fulfills the requirements of Rule 23 and due process. Accordingly, the Court should preliminarily approve them. They also satisfy the *Guidelines*. *See Guidelines* ¶¶ 3–5. Plaintiffs have chosen Epiq Systems to act as settlement administrator. *See id.* ¶ 2. Plaintiffs estimate that administration costs will be no more than $350,000, depending upon the number of Class members identified by Defendants.

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 Moore's Federal Practice* § 23.63[8][a], § 23.63[8][b] (3d ed. 2003); *Fraley 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. ¶ 13 (describing similar notice plans that were approved in the *ODD*, *CRT*, and *LCD* cases).

VII. PROPOSED PLAN OF ALLOCATION

Plaintiffs propose that distribution of the settlement proceeds 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) (Order Approving *Pro Rata* 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 Lloyds' 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 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 fund.

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 settlement. At that hearing, members of the settlement class, or their counsel, may be heard in support of or in opposition to the settlement. Plaintiffs propose the following schedule:

Date	**Event**
14 Days[2]	All Defendants produce list(s) of all class members;
28 Days	Long-form notice sent to class members by U.S. mail or electronic mail, publication of website, and activation of telephone information system;
32 Days	Short-form notice published in *Wall Street Journal*;
73 Days	Deadlines to request exclusion from the class, object to the settlement, and/or file a notice of intention to appear at the fairness hearing;
87 Days	Deadline to file a list of requests for exclusion;
101 Days	Deadline for filing motion for final approval of settlement; and
136 Days	Hearing on final approval of settlement

[2] "___ Days" refers to the number of days after the Court enters the [Proposed] Order Granting Class Certification and Preliminary Approval of Class Action Settlement with Sony Defendants.

If preliminary approval is granted, the proposed Class members will be notified of the terms of the settlement and informed of their rights in connection therewith, including their right to appear and be heard at the hearing.

IX. CONCLUSION

For the foregoing reasons Plaintiffs respectfully submit that the Court should enter an order granting the relief requested by this motion: (i) granting preliminary approval of the settlement and the related plan of allocation; (ii) certifying a settlement class; (iii) appointing Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio as Settlement Class Counsel; (iv) approving the manner and form of giving notice to settlement class members of the matters in this motion, (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: February 16, 2016

Respectfully submitted,

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