

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

In re SONY PS3 “OTHER OS” LITIGATION

Case No. 4:10-CV-01811-YGR

**[PROPOSED] ORDER AWARDING
ATTORNEYS’ FEES, COSTS, AND
INCENTIVE AWARDS**

Date: May 29, 2018
Time: 2:00 p.m.
Judge: Hon. Yvonne Gonzalez Rogers
Courtroom: 1 – 4th floor

1 1. This matter came before the Court on Plaintiffs’ Renewed Motion for Award of
2 Attorneys’ Fees, Costs, and Incentive Awards. By separate order, the Court has determined that the
3 proposed class action settlement reached by the Parties in the new Stipulation of Class Action
4 Settlement and Release is fair, reasonable and adequate and is finally approved.

5 2. Plaintiffs have secured a common settlement fund of \$3,750,000 for the Class,
6 and now request from that common fund an award of \$1,250,000 in attorneys’ fees and costs;
7 and incentive awards of \$3,500 for each of the five named plaintiffs--Derrick Alba, Jason
8 Baker, James Girardi, Jonathan Huber, and Anthony Ventura--totaling \$17,500. The Court finds
9 good cause to grant Plaintiffs’ motion.

10 3. The Court exercises diversity jurisdiction over this action pursuant to 28 U.S.C. §
11 1332(d). *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 571 (2005) (“CAFA
12 confers federal diversity jurisdiction over class actions . . . [.]”). As Plaintiffs’ claims in this lawsuit
13 are for alleged violations of California’s consumer protection statutes, including the Unfair
14 Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“UCL”); the Consumers Legal
15 Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* (“CLRA”); the False Advertising Law, Cal. Bus. &
16 Prof. Code §§ 17500, *et seq.* (“FAL”), California state law has governed Plaintiffs’ claims in this
17 action and thus applies to Plaintiffs’ motion for an award of attorney fees. *See Vizcaino v. Microsoft*
18 *Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002).

19 4. The Court finds that Plaintiffs are “prevailing plaintiff[s]” entitled to a fee award
20 under the CLRA because they obtained a net monetary recovery for the Proposed Class and
21 succeeded in achieving a major goal of the litigation. *Kim v. Euromotors West/The Auto Gallery*, 149
22 Cal. App. 4th 170, 179 (2007); *see also Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th
23 140, 150-51 (2006). The Court also finds that Plaintiffs have benefited the public by vindicating
24 consumer protection statutes and are a “successful party” under California Code of Civil Procedure §
25 1021.5, and otherwise meet its requirements, for the same reasons they qualify as “prevailing
26 plaintiff[s]” under the CLRA—they have achieved one of the primary benefits sought in bringing the
27

1 lawsuit. *See Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1346 (2006) (“A ‘successful’
2 party means a ‘prevailing’ party.”). Therefore, Plaintiffs’ counsel are entitled to a fee award.

3 5. In the Ninth Circuit, where the common fund approach predominates, district
4 courts may “choose either the percentage-of-the-fund or the lodestar method” in determining
5 the appropriate amount of attorney’s fees. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
6 1046 (9th Cir. 2002). In California courts, where the lodestar method of fee calculation
7 predominates, courts may also choose either the lodestar or common fund method of
8 calculating fees. *See Laffitte v. Robert Half Internat., Inc.*, 1 Cal. 5th 480, 487 (2016). “The
9 lodestar method better accounts for the amount of work done, while the percentage of the
10 fund method more accurately reflects the results achieved.” *Rawlings v. Prudential-Bache*
11 *Properties, Inc.* 9 F.3d 513, 516. (6th Cir. 1993). “Regardless of whether the court uses the
12 percentage approach or the lodestar approach, the main inquiry is whether the end result is
13 reasonable.” *Singer v. Becton Dickinson and Co.*, 2010 WL 219610, at *8 (S.D. Cal. June 1,
14 2010).

15 6. Plaintiffs’ attorneys’ efforts have resulted in a common settlement fund of \$3.75
16 million, and the \$1,250,000 fee and costs award they now request is reasonable using the common
17 fund method of calculating fees. Attorneys who recover a fund for the benefit of a class are “entitled
18 to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gernert*, 444 U.S. 472,
19 478 (1980); *see In re Omnivision Technologies*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008).
20 Plaintiffs request an award of 33 1/3 percent of the common fund. The Ninth Circuit’s
21 “benchmark” for common fund awards is twenty-five percent of the fund obtained for the
22 class, but that is “a starting point for analysis.” *See Vizcaino v. Microsoft Corp.*, 290 F.3d
23 1043, 1048 (9th Cir. 2002); *Omnivision*, 559 F. Supp. 23 at 1046 (“in most common fund
24 cases, the award exceeds that benchmark.”) The relevant factors courts consider include: (1)
25 the risks undertaken in the litigation, including the complexity and duration of the case; (2)
26 the skill and quality of the work performed; (3) the contingent nature of the fee and the
27

1 financial burden carried by Plaintiffs; (4) awards in similar cases; (5) a cross-check using the
2 lodestar-multiplier calculation; and (6) the results achieved for the class. *See id.*.

3 7. The relevant factors support the fee requested. Plaintiffs' counsel undertook the
4 case on contingency, assuming considerable risk of failure; the litigation has been ongoing for
5 nearly eight years; Plaintiffs' counsel demonstrated skill; and, obtaining a reversal by the
6 Ninth Circuit Court of appeals of the dismissal with prejudice of the entire case at one point
7 in the litigation, succeeded in obtaining a significant monetary recovery for the Class.

8 8. The fee award of 33 1/3 per cent sought by Plaintiffs is also within the
9 parameters of similar awards in other cases. *See e.g., Morris v. Lifescan, Inc.*, 54 Fed. Appx.
10 663, 664 (9th Cir. 2003) (affirming 33% fee award); *In re: Pacific Enterprises Securities*
11 *Litigation*, 47 F.3d 373, 379 (9th Cir. 1995) (33 1/3% fee award); *Laffitte v. Robert Half*
12 *Internat., Inc.*, 1 Cal. 5th 480, 487 (2016) (33 1/3% fee award); *In re Wachovia Corp. "Pick-A-*
13 *Payment" Mortg. Mktg and Sales Practices Litig.*, No. 5:09-md-02015, 2011 U.S. Dist.
14 LEXIS 55351, at *24 (N.D. Cal. May 17, 2011) (33 1/3 % fee award).

15 9. A cross-check using the lodestar method of calculating fees shows that the
16 requested award is reasonable. *See Vizcaino*, 290 F.3d at 1050. The lodestar/multiplier method
17 of fee calculation involves a two-step process under which the Court first determines the lodestar (or
18 touchstone) by "multiplying the number of hours reasonably expended by counsel by a reasonable
19 hourly rate." *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556 (2009). The Court may then
20 enhance or reduce the lodestar by applying a multiplier to take into account the contingent nature
21 and risk associated with the action, as well as other factors such as the degree of skill required and
22 the ultimate success achieved. *Id. See Moreno v. City of Sacramento*, 534 F.3d 1106, 1111-12
23 (9th Cir. 2008).

24 10. I have reviewed the sworn testimony of Gordon M. Fauth, James Pizzirusso, and
25 Kathleen Fisher as to the work conducted by Plaintiffs' counsel, their hourly rates, their lodestars,
26 and their expenses, and find them reasonable. Plaintiffs' counsel's total aggregate lodestar of
27 \$5,662,652 is greater than the requested award of fees and costs of \$1,250,000 and the requested fee
28 would, in fact, involve a negative lodestar. Accordingly, the cross-check shows that Plaintiffs'

1 requested award is reasonable.

2 11. Furthermore, the Court finds that the requested incentive awards of \$3,500 for each of
3 the Class Representatives--Plaintiffs Derrick Alba, Jason Baker, James Girardi, Jonathan Huber, and
4 Anthony Ventura--are reasonable and appropriate. The Court has the discretion to award class
5 representatives service payments for work they did on behalf of the class and the amount Plaintiffs
6 request is within the range of what has been approved in similar cases. *See Rodriguez v. West Publ'g*
7 *Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (“Incentive awards are fairly typical in class action
8 cases.”); *Morris v. Affinity Health Plan, Inc.*, 928 F. Supp. 2d 805, 812 (S.D.N.Y. 2013) (service
9 award of \$20,000 found reasonable); *Spicer v. Chi. Bd. Options Exchange, Inc.*, 844 F. Supp. 1226,
10 1266-68 (N.D. Ill.1993) (awarding \$10,000 to each named plaintiff and citing cases approving
11 service awards ranging as high as \$100,000). Accordingly, having reviewed the submissions of
12 Plaintiffs, including the declaration of Gordon M. Fauth as to the Plaintiffs’ efforts in the case, the
13 Court finds that each of the Class Representatives should each be awarded \$3,500.

14 12. Accordingly, the Court orders that Class Counsel shall be awarded \$1,250,000 out of
15 the settlement fund for counsels’ attorneys’ fees and costs; and that Derrick Alba, Jason Baker,
16 James Girardi, Jonathan Huber, and Anthony Ventura shall each be awarded \$3,500 out of the
17 settlement fund for their efforts in the case.

18 **IT IS SO ORDERED.**

19 Dated: _____

The Hon. Yvonne Gonzalez Rogers
United States District Court Judge