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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 OAKLAND DIVISION

19 IN RE LITHIUM ION BATTERIES
ANTITRUST LITIGATION,
20

Case No. 13-MD-02420 YGR (DMR)

MDL No. 2420

21
22 This Documents Relates to:
23 ALL INDIRECT PURCHASER ACTIONS

MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT WITH LG CHEM

Date: January 10, 2017
Time: 2:00 p.m.
Judge: Hon. Yvonne Gonzalez Rogers
Location: Courtroom 1- 4th Floor

DATE ACTION FILED: Oct. 3, 2012

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on January 10, 2017 at 2:00 p.m. or as soon thereafter as the matter may be heard by the Honorable Yvonne Gonzalez Rogers of the United States District Court of the Northern District of California, located in Courtroom 1, at 1301 Clay Street, Oakland, CA 94612, Indirect Purchaser Plaintiffs will and hereby do move the Court pursuant to Federal Rules of Civil Procedure 23 for an order:

- 1) preliminarily approving the proposed class action settlement with the LG Chem defendant family;
- 2) certifying the settlement class;
- 3) appointing Hagens Berman Sobol Shapiro LLP; Cotchett, Pitre & McCarthy, LLP; and Lief, Cabraser, Heimann & Bernstein LLP as Class Counsel; and
- 4) approving the manner and form of notice and proposed plan of allocation to class members.

This motion is based on this Notice of Motion and Motion for Preliminary Approval of Settlement with the LG Chem defendant family, the following memorandum of points and authorities, the accompanying settlement agreement, the pleadings and the papers on file in this action, and such other matters as the Court may consider.

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I. INTRODUCTION

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2 Indirect Purchaser Plaintiffs (IPPs) seek preliminary approval under Federal Rule of Civil
3 Procedure 23 of a settlement with the LG Chem defendant family.¹ The proposed settlement with
4 this defendant family totals \$39 million – approximately 31.6 percent of the indirect purchaser
5 class’s estimated damages attributable to LG Chem’s sales.

6 The recovery to the class is outstanding for this stage of the case – the class has not been
7 certified and discovery has not yet closed. The proposed settlement requires certification by this
8 Court of a settlement class co-extensive with the proposed nationwide class in the pending motion
9 for class certification – purchasers in the United States of the following products that contained a
10 lithium-ion cylindrical battery: (i) portable computers; (ii) power tools; (iii) camcorders; or (iv) a
11 replacement battery for any of these products. The proposed settlement here was reached after
12 intense negotiations between experienced and informed counsel, and it easily meets the standards
13 for preliminary approval. The settlement also provides that LG Chem will cooperate with IPPs in
14 the prosecution of their claims against the remaining defendants.

15 IPPs propose a comprehensive notice program designed by an experienced notice
16 administrator – Gilardi & Co. LLC – a program this Court approved of and was utilized for IPPs’
17 notice to class members of the preliminarily approved settlement with the Sony defendants. Direct
18 notice will be sent to class members wherever possible – IPPs have collected approximately 15.8
19 million email addresses. Supplementing a direct notice campaign, IPPs propose a robust print
20 publication notice campaign and an online publication campaign that will ensure over 70 percent of
21 class members receive notice (and likely closer to 80 percent).² The proposed notices are written in
22 plain English, and mirror prior notices approved by this Court.

23 IPPs propose that distribution of the \$39 million be held pending further settlements. Six
24 defendant families (Hitachi Maxell, NEC, Panasonic, Samsung/SDI, Sanyo, and Toshiba) remain

25
26 ¹ “LG Chem” refers to LG Chem, Ltd. and LG Chem America, Inc. *See* Declaration of Jeff D.
27 Friedman in Support of Motion for Preliminary Approval of Settlement with LG Chem (“Friedman
Decl.”), Ex. A, concurrently filed herewith.

28 ² Declaration of Alan Vasquez Regarding Implementation of Class Notice Plan (“Vasquez
Decl.”), ¶ 32, concurrently filed herewith.

1 in the indirect purchaser case, including two of the largest defendants by market share –
 2 Samsung/SDI and Sanyo.³ Claims against these remaining defendants are not released by the IPPs’
 3 settlement with LG Chem. Given the expense associated with distribution, IPPs believe that it is in
 4 the best interests of the class to wait before distributing the funds.

5 Accordingly, IPPs respectfully request an order: (1) preliminarily approving a proposed
 6 class action settlement with the LG Chem defendant family; (2) certifying the settlement class;
 7 (3) appointing Hagens Berman Sobol Shapiro LLP, Cotchett, Pitre & McCarthy, LLP, and Lieff,
 8 Cabraser, Heimann & Bernstein LLP as Class Counsel; and (4) approving the manner and form of
 9 notice and proposed plan of allocation to class members.

10 II. PROCEDURAL HISTORY

11 This litigation has been pending for approximately four years. The parties have briefed
 12 multiple motions to dismiss, as well as a pending motion for class certification.⁴ Defendants have
 13 filed *Daubert* motions to exclude the expert testimony of IPPs’ experts, which IPPs opposed.⁵ This
 14 litigation also has required the assistance of Magistrate Judge Donna Ryu to manage and adjudicate
 15 many discovery disputes, and extensive discovery has provided the parties with a thorough
 16 understanding of the claims and defenses.

17 IPPs and LG Chem have discussed possible resolution of this litigation over the past two
 18 months. The terms of the final settlement agreement were agreed to on November 14, 2016 and the
 19 agreement itself was signed on that same day, the day before the hearing on IPPs’ motion for class
 20 certification.

22 ³ The remaining defendants in the IPP case are: Samsung SDI Co. Ltd.; Samsung SDI America,
 23 Inc.; Panasonic Corporation; Panasonic Corporation of North America; Sanyo Electric Co., Ltd.;
 24 Sanyo North America Corporation; Hitachi Maxell, Ltd.; Maxell Corporation of America; NEC
 Corporation; NEC Tokin Corporation; and Toshiba Corporation.

25 ⁴ See Indirect Purchaser Plaintiffs’ Motion for Class Certification (“Class Cert. Mot.”),
 originally filed Jan. 22, 2016, ECF No. 1599-2; Defendants’ Memorandum of Points and
 26 Authorities in Opposition to Indirect Purchaser Plaintiffs’ Motion for Class Certification, originally
 filed May 24, 2016, ECF No. 1551.

27 ⁵ Defendants’ Notice of Motion and Motion to Exclude the Proposed Expert Testimony of Dr.
 Edward E. Leamer (“Leamer *Daubert* Mot.”), originally filed May 24, 2016, ECF No. 1553;
 Defendants’ Notice of Motion and Motion to Exclude the Proposed Expert Testimony of Dr. Rosa
 28 M. Abrantes-Metz (“Abrantes-Metz *Daubert* Mot.”), originally filed May 24, 2016, ECF No. 1554.

1 **III. SUMMARY OF SETTLEMENT TERMS**

2 **A. The Settlement Class**

3 The proposed settlement class is substantively identical to the class and subclass proposed
4 in the IPPs' motion for class certification – a nationwide, cylindrical-only class of purchasers of
5 portable computers, power tools, camcorders, or replacement batteries. That class is as follows:

6 All persons and entities who, as residents of the United States and
7 during the period from January 1, 2000 through May 31, 2011,
8 indirectly purchased new for their own use and not for resale one of
9 the following products which contained a lithium-ion cylindrical
10 battery manufactured by one or more defendants or their co-
11 conspirators: (i) a portable computer; (ii) a power tool; (iii) a
12 camcorder; or (iv) a replacement battery for any of these products.
Excluded from the class are any purchases of Panasonic-branded
computers. Also excluded from the class are any federal, state, or
local governmental entities, any judicial officers presiding over this
action, members of their immediate families and judicial staffs, and
any juror assigned to this action, but included are all non-federal and
non-state governmental entities in California.⁶

13 Thus, "Class Member" means any person or entity, including California local government entity,
14 that falls within the class definition and does not elect to be excluded from the settlement.⁷

15 **B. The Settlement Consideration**

16 This is the second proposed settlement in the IPPs' case. The first was the proposed
17 settlement with the Sony defendants for \$19.5 million. The Court heard argument on IPPs' motion
18 for final approval on November 8, 2016, and the motion remains pending. The settlement with LG
19 Chem totals \$39 million for the indirect purchaser class. That is approximately 31.6 percent of the
20 indirect purchaser class's estimated damages attributable to LG Chem's sales.⁸

21 The settlement also provides that LG Chem will cooperate with IPPs in the prosecution of
22 this action against the remaining defendants.⁹

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25
26 ⁶ *Id.*, Ex. A, ¶ 1(d).

27 ⁷ *Id.*, Ex. A, ¶ 1(f).

28 ⁸ *See* Friedman Decl., ¶ 4, Ex. A, ¶ 1(dd).

⁹ *Id.*, Ex. A, ¶¶ 28-34.

1 **C. Release of Claims**

2 Plaintiffs and class members will release claims against LG Chem if the settlement
3 becomes final, relating to the conduct alleged in IPPs' complaint, including "claim[s] of restraint of
4 competition relating to Lithium Ion Batteries . . . whether under federal, state, local, or foreign law"
5 that are or could be asserted against LG Chem.¹⁰ The release does not preclude plaintiffs from
6 pursuing their claims against the other defendants.¹¹ The settlement releases claims relating to
7 alleged conduct pertaining to any indirect purchase or sale of cylindrical, prismatic, or polymer
8 battery cells or packs. That includes cylindrical, prismatic, or polymer battery cells or packs
9 contained in finished products, such as laptop PCs, notebook PCs, netbook computers, tablet
10 computers, mobile phones, smart phones, cameras, camcorders, digital video cameras, digital audio
11 players, and power tools.¹²

12 **D. Notice and Implementation of the Settlement**

13 IPPs submit proposed notices and a plan for the dissemination of notice. IPPs have obtained
14 approximately 15.8 million email addresses for potential class members.¹³ The direct notice
15 campaign will be supplemented with an online campaign and publication notice. The notice
16 administrator, Gilardi, estimates that over 70 percent of class members will receive notice (and
17 likely closer to 80 percent).¹⁴ Notice and administration costs will not exceed \$750,000 pursuant to
18 the terms of the settlement with LG Chem.¹⁵

19 **E. Plan of Distribution**

20 IPPs propose to distribute the funds *pro rata* to class members based on: (1) the number of
21 approved purchases per class member of products containing cylindrical lithium-ion batteries
22 (LIBs) during the settlement class period; and (2) the number of valid claims filed.¹⁶ There will be

23 _____
24 ¹⁰ *Id.*, Ex. A, ¶¶ 1(z), 1(aa), 7, 11.

25 ¹¹ *Id.*

26 ¹² *Id.*, Ex. A, ¶ 1(z).

27 ¹³ Declaration of Eric Schacter re Dissemination of Notice of Sony Settlement and Requests for
28 Exclusion, Sept. 29, 2016, ECF No. 1492-1.

¹⁴ *See* Vasquez Decl., ¶¶ 11-32, Exs. 1-8.

¹⁵ Friedman Decl., Ex. A, ¶ 13.

¹⁶ *Id.*, ¶ 5.

1 no reversion of unclaimed funds to LG Chem. To the extent that there is any balance remaining in
 2 the Net Settlement Fund and money is not able to be reasonably redistributed to class members,
 3 IPPs propose that remaining funds will escheat to state governments.¹⁷

4 **F. Class Action Fairness Act (“CAFA”)**

5 The Settlement Agreement provides that LG Chem will provide the notices required by the
 6 Class Action Fairness Act.¹⁸

7 **IV. ARGUMENT**

8 **A. The Court’s Role in Approving a Class Action Settlement**

9 Federal Rule of Civil Procedure 23(e) requires judicial approval of any compromise or
 10 settlement of class action claims. Approval of a settlement is a multi-step process, beginning with
 11 preliminary approval, which then allows notice to be given to the class and objections to be filed,
 12 after which there is a motion for final approval and a fairness hearing.¹⁹ Preliminary approval is
 13 thus not a dispositive assessment of the fairness of the proposed settlement, but rather determines
 14 whether it falls within the “range of possible approval.”²⁰ Preliminary approval establishes an
 15 “initial presumption” of fairness,²¹ such that notice may be given to the class and the class may
 16 have a “full and fair opportunity to consider the proposed [settlement] and develop a response.”²²

17 Preliminary approval of a settlement and notice to the proposed class is appropriate if the
 18 proposed settlement: (1) appears to be the product of serious, informed, non-collusive negotiations;
 19 (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class
 20 representatives or segments of the class; and (4) falls within the range of possible approval.²³ The

21
 22 ¹⁷ *Id.*, Ex. A, ¶ 22.

23 ¹⁸ *Id.*, Ex. A, ¶ 4.

24 ¹⁹ See Manual for Complex Litigation (Fourth) § 21.632, 320-21 (2004). All internal citations
 and quotation marks omitted and all emphases added, unless otherwise indicated.

25 ²⁰ *Id.*; see also *Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-02 (E.D. Cal.
 2011).

26 ²¹ *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

27 ²² *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

28 ²³ See *Zepeda v. Paypal, Inc.*, No. C 10-2500 SBA, 2015 U.S. Dist. LEXIS 150577, at *14
 (N.D. Cal. Nov. 5, 2015); *Fraleay v. Facebook, Inc.*, No. C 11-1726 RS, 2012 U.S. Dist. LEXIS
 116526, at *4 n.1 (N.D. Cal. Aug. 17, 2012) (same); *Tableware*, 484 F. Supp. 2d at 1079 (same).

1 “initial decision to approve or reject a settlement proposal is committed to the sound discretion of
2 the trial judge.”²⁴

3 **1. The Settlement Is the Result of Arm’s-Length Negotiations**

4 This settlement arises out of informed, arm’s-length negotiations between counsel for the
5 parties. The parties reached agreement after four years of litigation, discovery, and investigation,
6 and multiple conferrals of counsel and the parties concerning settlement constructs and amounts.

7 The settlement itself bears no signs of collusion or conflict. In its opinion in *In re Bluetooth*
8 *Headset Prods. Liability Litig.*, the Ninth Circuit admonished that courts must, at the final approval
9 stage, ensure that the settlement, taken as a whole, is free of collusion or any indication that the
10 pursuit of the interests of the class counsel or the named plaintiffs “infected” the negotiations.²⁵

11 The Ninth Circuit has pointed to three factors as troubling signs of a potential disregard for the
12 class’s interests during the course of negotiation: (a) when class counsel receive a disproportionate
13 distribution of the settlement; (b) when the parties negotiate a “clear sailing” arrangement that
14 provides for the payment of attorneys’ fees separate and apart from class funds; or (c) when the
15 parties arrange for fees not awarded to plaintiffs’ counsel to revert to the defendants rather than the
16 class.²⁶

17 Here, none of those signs are present. The proposed settlement is a common fund, all-in
18 settlement with no possibility of reversion. The funds will be used to cover costs and fees and
19 compensate the class based on a *pro rata* formula. There is no “clear sailing” provision, no
20 payment of fees separate and apart from the class funds, and no “kicker” provision like the one in
21 *Bluetooth*, which would allow unawarded fees to revert to LG Chem. The proposed class notices
22 inform class members that class counsel will make a request for attorneys’ fees up to 30 percent of
23 the settlement fund.²⁷ In short, this settlement is entitled to a presumption of fairness.

24 ²⁴ *Officers for Justice v. Civ. Serv. Comm’n of the City and Cnty. of San Francisco*, 688 F.2d
25 615, 625 (9th Cir. 1982).

26 ²⁵ *See In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 946-48 (9th Cir. 2011).

27 ²⁶ *Id.* at 947.

28 ²⁷ *Vasquez Decl.*, Ex. 3.

1 **2. The Settlement Has No Obvious Deficiencies When Considered in Relation to**
 2 **the IPPs' Case**

3 The proposed settlement easily clears the hurdles for preliminary approval. This Court is
 4 aware of the risk of no recovery faced by the class. IPPs' motion for class certification is pending
 5 with the Court, and if it is denied, the class may receive nothing. This settlement represents an
 6 outstanding recovery for the class – ensuring \$39 million cash in recovery for the class, while
 7 preserving IPPs' claims against large defendants such as Samsung/SDI and Sanyo. The settlement
 8 preserves the rights of IPPs to pursue their claims against the other defendants for the entire
 9 amount of IPPs' damages based on joint and several liability to the extent permitted under the law.
 10 It also provides that LG Chem will cooperate with IPPs in the prosecution of this action against the
 11 remaining defendants.

12 At class certification, IPPs' damages expert estimated that, nationwide, indirect purchaser
 13 damages totaled \$967,034,890 for the period of January 2000 through May 31, 2011.²⁸ Considering
 14 the market shares of LG Chem and Sony, the defendants with whom there are proposed settlements
 15 thus far, the percent of recovery is as follows:

Defendant Family	Damages Attributed to Defendant Family	Percent Share of Total Damages	Contribution to Settlement Fund	Percent Recovery for IPPs (of Damages Attributed to Defendant Family)
LG Chem	\$123,312,217.00	12.8%	\$39,000,000	31.6%
Sony	\$239,725,760.00	24.8%	\$19,500,000	8.1% ²⁹
TOTAL	\$363,037,977	37.60%	\$58,500,000	16.1%

20 These two settlements would result in recovery of \$58.5 million of the estimated \$967
 21 million damages – an estimated 6 percent of the damages suffered by the IPP class in total, with
 22 non-settling defendants representing 62 percent of the market remaining in this litigation.

24 _____
 25 ²⁸ See [Corrected] Expert Report of Edward E. Leamer (“Leamer Report”) at 78, originally
 filed January 22, 2016, ECF No. 1599-4.

26 ²⁹ The Sony settlement included all types of lithium-ion batteries (prismatic, polymer and
 27 cylindrical), making the percent recovery somewhat different than the model proposed by IPPs in
 support of the motion for class certification. To make a meaningful comparison across settlements,
 28 however, IPPs provide the estimated recovery for the Sony settlement against the current damages
 model.

1 Compared more generally against other similar litigation, in *In re TFT-LCD (Flat Panel)*
 2 *Antitrust Litig.*, after settlements with all defendants, the indirect purchasers recovered
 3 approximately 50 percent of potential damages, and virtually all of these settlements were reached
 4 after class certification was granted.³⁰ In *In re Cathode Ray Tube (CRT) Antitrust Litig.*, the
 5 indirect purchasers recovered 20 percent of potential single damages after settlements with all
 6 defendants.³¹ Notably, besides the fact that these reflect total recoveries at the end of the case,
 7 indirect purchaser claims in those cases faced fewer challenges. In both *CRT* and *LCD*, defendants
 8 pled guilty to market-wide conspiracies spanning years and involving many routine and
 9 documented group meetings of competitors. In both cases, the component at issue also generally
 10 formed a much larger percentage of the finished products purchased by the class. In *In re Static*
 11 *Random Access Memory (SRAM) Antitrust Litig.*, there were no guilty pleas, and the total
 12 settlements for indirect purchaser claims represented approximately 15% of the estimated
 13 damages.³² None of these cases or settlements is apples-to-apples with this one, but together they
 14 show that recoveries in this case are on track to be of the appropriate order of magnitude given the
 15 general basket of risks involved.

16 Here, the decision to settle is also based on a thorough understanding of the strengths and
 17 weaknesses of IPPs' case. IPPs have propounded and responded to multiple sets of discovery,
 18 conducted numerous (lengthy) meet and confers, and engaged in multiple rounds of motion
 19

20 ³⁰ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2013 U.S. Dist. LEXIS 49885,
 21 at *70 (N.D. Cal. Apr. 1, 2013). See also *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538
 22 (3d Cir. 2004) (approving \$44.5 million settlement, recovery of 33% of single damages); *In re*
 23 *Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 124 (S.D.N.Y. 2009) (approving \$336
 24 million settlement, recovery of 31% of single damages), *aff'd*, *Priceline.com, Inc. v. Silberman*,
 25 405 F. App'x 532 (2d Cir. 2010).

26 One *LCD* settlement, with Chunghwa, was agreed as to the majority of terms in 2008 (before
 27 class certification), but then modified and finalized in 2011.

28 ³¹ *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 (JST), 2016 U.S. Dist. LEXIS
 88665, at *185 (N.D. Cal. July 7, 2016).

³² *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M 07-1819 CW, ECF No.
 918 (Oct. 6, 2010) (approving settlements of \$25,422,000); *In re Static Random Access Memory*
(SRAM) Antitrust Litig., No. M 07-1819 CW, ECF No. 1408 (Oct. 14, 2011) (approving
 settlements of \$15,900,000); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M
 07-1819 CW, ECF No. 1375-1, ¶67 (July 17, 2011) (Micheletti fee declaration citing damages of
 \$276,000,000).

1 practice in front of Magistrate Judge Ryu on various discovery issues.³³ Defendants produced more
 2 than eight million pages of documents from 273 document custodians and centralized files, and
 3 produced voluminous electronic transactional data.³⁴ Plaintiffs have taken 23 depositions of
 4 defendants' witnesses to date (both individual percipient witness depositions, as well as corporate
 5 depositions pursuant to Federal Rule of Civil Procedure 30(b)(6)).³⁵ Every class representative
 6 identified in the Fourth Amended Class Action Complaint has been deposed.³⁶ Interim Co-Lead
 7 Counsel and supporting counsel prepared the class representatives for, and defended them in, these
 8 depositions.³⁷

9 The parties have fully briefed IPPs' motion for class certification, which included IPPs'
 10 submission of the expert reports of Dr. Edward Leamer and Dr. Rosa Abrantes-Metz.³⁸ Defendants
 11 submitted opposition expert reports, filed two *Daubert* motions, and deposed IPPs' experts for a
 12 total of sixteen and a half hours.³⁹ IPPs' expert performed extensive analysis of defendants'
 13 transactional data and proposed a multi-variate regression model, in addition to using a regression
 14 model to measure pass-through on data from 71 non-parties, and from each defendant.⁴⁰ Weighing
 15
 16

17 ³³ See Order on Joint Discovery Letter (ECF No. 805); Order on Plaintiffs' Motion to Continue
 18 Deposition of Hiroshi Kubo (ECF No. 822); Order re Plaintiffs' Motion to Compel Deposition of
 19 Seok Hwan Kwak (ECF No. 836); Order re Plaintiffs' Motion to Compel Deposition of Jae Jeong
 20 Joe (ECF No. 1143); Order Granting Plaintiffs' Motion to Compel Deposition of Jae Jeong Joe
 21 (ECF No. 1177); Minute Order [re Motion to Compel Walmart] (ECF No. 1411); Order on Joint
 Letter Regarding Subpoena to Robert Bosch Tool Corporation (ECF No. 1509); Order on Joint
 Letter Regarding Subpoena to [Canon] (ECF No. 1510); Minute Order [re Motion to Compel
 Canon and Bosch] (ECF No. 1530); Order re Joint Letter Brief re Production of Canon USA, Inc.'s
 Data (ECF No. 1540); Minute Order Granting in Part Plaintiffs' Motion to Compel Production of
 ESI (ECF No. 1547).

22 ³⁴ Friedman Decl., ¶ 6.

23 ³⁵ *Id.*

24 ³⁶ *Id.*

25 ³⁷ *Id.*

26 ³⁸ Class Cert. Mot. (ECF No. 1599-2), Leamer Report (ECF No. 1599-4) and Expert Report of
 Rosa M. Abrantes-Metz, Ph.D. (ECF No. 1599-6).

27 ³⁹ Expert Report of Margaret Guerin-Calvert, originally filed May 24, 2016, ECF No. 1551-17;
 Declaration of Daniel J. Moe in Opposition to Indirect Purchaser Plaintiffs' Motion for Class
 Certification, originally filed May 24, 2016, ECF No. 1551-18; Leamer *Daubert* Mot. (ECF No.
 1553), Abrantes-Metz *Daubert* Mot. (ECF No. 1554).

28 ⁴⁰ Friedman Decl., ¶ 7.

1 the developed stage of litigation against the risk that IPPs face in this case, there are no obvious
2 deficiencies regarding the settlement.

3 **3. The Settlement Does Not Provide Preferential Treatment for Segments of the**
4 **Class or the Class Representatives**

5 The third factor to be considered by this Court in determining whether the settlement should
6 be preliminarily approved is whether the settlement grants preferential treatment to class
7 representatives or segments of the class.⁴¹

8 **a. All Class Members Will Recover Their *Pro Rata* Share of the Settlement**

9 A plan of distribution of class settlement funds is subject to the “fair, reasonable and
10 adequate” standard that applies to approval of class settlements.⁴² A plan of distribution that
11 compensates class members based on the type and extent of their injuries (including on a *pro-rata*
12 basis) is generally considered reasonable.⁴³

13 IPPs propose to distribute the funds *pro rata* to class members based on: (1) the number of
14 approved purchases per class member of products containing cylindrical lithium-ion batteries
15 (LIBs) during the settlement class period; and (2) the number of valid claims filed.⁴⁴ There will be
16 no reversion of unclaimed funds to LG Chem.

17 The proposed claims form requests class members to identify the total number of products
18 containing LIBs purchased between January 1, 2000 through May 31, 2011 (portable computers,
19 power tools, camcorders, or replacement batteries for any of these products).⁴⁵ Although a class
20 member will not be required to submit proof of purchase, the claims form informs class members
21

22 ⁴¹ *Zepeda*, 2015 U.S. Dist. LEXIS 150577, at *14.

23 ⁴² *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001).

24 ⁴³ *Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-cv-01663-JST, 2015 U.S. Dist. LEXIS 159020,
25 at *23 (N.D. Cal. Nov. 23, 2015) (“Such a plan ‘fairly treats class members by awarding a pro rata
26 share’ to the class members based on the extent of their injuries.”) (internal citation omitted); *Noll*
27 *v. eBay, Inc.*, No. 5:11-cv-04585-EJD, 2015 U.S. Dist. LEXIS 123147, at *10, *50 (N.D. Cal. Sept.
28 15, 2015) (approving *pro-rata* distribution as fair and reasonable); *In re High-Tech Emp. Antitrust*
Litig., No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 118051, at *29-*30 (N.D. Cal. Sept. 2,
2015) (approving *pro-rata* distribution of fractional share based upon class member’s total base
salary as fair and reasonable).

⁴⁴ Friedman Decl., ¶ 5.

⁴⁵ Vasquez Decl., Ex. 8.

1 to retain all purchase documentation until the claim is closed. For large claims, proof of purchase
2 may be required.⁴⁶

3 In order to maximize the number of class members who have the opportunity to submit
4 claims, IPPs plan to open up the claims period and allow class members to make claims using the
5 proposed claim form immediately through this process. The proposed notices explain to class
6 members how to make claims and the due date for submitting claim forms (July 31, 2017).⁴⁷

7 **b. Service Awards for Class Representatives Reflect the Work They Have**
8 **Undertaken on Behalf of the Class**

9 IPPs will request service awards for the class representatives in the amount of \$1,500
10 each.⁴⁸ As the Ninth Circuit has recognized, service awards “that are intended to compensate class
11 representatives for work undertaken on behalf of a class ‘are fairly typical in class action cases.’”⁴⁹
12 Although IPPs will request these awards alongside final approval of the settlement, IPPs will defer
13 the payment of these awards until the distribution of funds to other class members takes place.

14 The representatives of the IPP class have been actively involved in the litigation of this
15 case. Each representative has responded to over 22 interrogatories and 28 document requests.⁵⁰
16 Defendants have also deposed each representative at length.⁵¹ In the face of this extraordinary
17 service and perseverance, awards of \$1,500 for each class representative are reasonable.

18 **4. The Settlement Falls Within the Range of Possible Approval**

19 To grant preliminary approval, this Court must decide that the settlement falls within the
20 range of possible approval.⁵² The amount of the recovery for the class (\$39 million) certainly falls
21 within a reasonable range given that the class faces the possibility of no recovery if class
22

23 ⁴⁶ *Id.*

24 ⁴⁷ *Id.*, Exs. 3, 4.

25 ⁴⁸ Friedman Decl., ¶ 8.

26 ⁴⁹ *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. Cal. 2015).

27 ⁵⁰ Friedman Decl., ¶ 8.

28 ⁵¹ *Id.*

⁵² *See Zepeda*, 2015 U.S. Dist. LEXIS 150577, at *14; *Fraley*, 2012 U.S. Dist. LEXIS 116526, at *4 n.1; *Tableware*, 484 F. Supp. 2d at 1079.

1 certification is denied. Moreover, recovery of an estimated 31.6 percent of damages attributable to
 2 LG Chem represents an outstanding recovery by any measurement.

3 **B. The Proposed Settlement Class Satisfies Rule 23**

4 Certification is appropriate where the proposed class and the proposed class representatives
 5 meet the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of
 6 representation. In addition, certification of a class action for damages requires a showing that
 7 “questions of law or fact common to class members predominate over any questions affecting only
 8 individual members, and that a class action is superior to other available methods for fairly and
 9 efficiently adjudicating the controversy.”⁵³

10 IPPs’ motion for class certification demonstrates that the proposed class satisfies all of the
 11 elements needed for class certification. IPPs review this evidence briefly.

12 **1. Rule 23(a): Numerosity**

13 The first requirement for maintaining a class action is that its members are so numerous that
 14 joinder would be “impracticable.”⁵⁴ No minimum number has been established, but courts
 15 generally find numerosity where class membership exceeds forty.⁵⁵ Geographic dispersal of
 16 plaintiffs also supports a finding that joinder is impracticable.⁵⁶ In this case, the class of end-users
 17 of LIBs in many different states is vast and geographically dispersed, and certainly satisfies the
 18 numerosity requirement, as do the many local government entities that comprise the California
 19 local government portion of the class.

20 **2. Rule 23(a): The Case Involves Questions of Law or Fact Common to the Class**

21 The second requirement of Rule 23 is the existence of common questions of law or fact.⁵⁷
 22 This requirement is to be “construed permissively,”⁵⁸ and a single issue has been held sufficient to
 23 satisfy the commonality requirement.⁵⁹ Here, issues of law and fact are common to the class.

24
 25 ⁵³ Fed. R. Civ. P. 23(b)(3).

26 ⁵⁴ Fed. R. Civ. P. 23(a)(1).

27 ⁵⁵ Alba Conte & Herbert B. Newberg, 4 Newberg on Class Actions § 18:4 (4th ed. 2002).

28 ⁵⁶ *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350-51 (N.D. Cal. 2005); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 300 (N.D. Cal. 2010).

⁵⁷ Fed. R. Civ. P. 23(a)(2).

1 Numerous questions of law and fact common to the class are at the heart of this case. These
 2 common questions of law and fact include the overriding issue of whether defendants engaged in a
 3 price-fixing agreement that injured the class. Common questions of law and fact include:

- 4 (1) Whether defendants and their co-conspirators conspired to raise, fix, stabilize or
 5 maintain the prices of cylindrical LIBs sold in the United States;
- 6 (2) Whether the alleged conspiracy violated Section 1 of the Sherman Act and the
 7 unfair competition and consumer protection laws of California;
- 8 (3) The duration and extent of the conspiracy;
- 9 (4) Whether defendants' conduct caused prices of cylindrical LIBs to be set at
 10 artificially high and non-competitive levels; and
- 11 (5) Whether defendants' conduct injured plaintiffs and other members of the class and,
 12 if so, the appropriate class-wide measure of damages.

11 Similar common questions have been routinely found to satisfy the commonality
 12 requirement in other antitrust class actions.⁶⁰

13 3. Rule 23(a): Plaintiffs' Claims Are Typical of the Claims of the Class

14 The "claims . . . of the representative parties [must be] typical of the claims . . . of the
 15 class."⁶¹ "Under the rule's permissive standards, representative claims are 'typical' if they are
 16 reasonably co-extensive with those of absent class members; they need not be substantially
 17 identical."⁶² Typicality is easily satisfied in cases involving allegations of horizontal price-fixing
 18 because "in instances wherein it is alleged that the defendants engaged in a common scheme
 19 relative to all members of the class, there is a strong assumption that the claims of the
 20 representative parties will be typical of the absent class members."⁶³ In this case, the claims of the
 21 representative plaintiffs are typical of the claims of the class members because they all indirectly

22 ⁵⁸ *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

23 ⁵⁹ *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000); *Haley v. Medtronic, Inc.*, 169
 F.R.D. 643, 647 (C.D. Cal. 1996).

24 ⁶⁰ *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006
 25 WL 1530166, at *3 (N.D. Cal. June 5, 2006) ("the very nature of a conspiracy antitrust action
 26 compels a finding that common questions of law and fact exist"); *accord Rubber Chems.*, 232
 F.R.D. at 351; *TFT-LCD*, 267 F.R.D. at 300.

26 ⁶¹ Fed. R. Civ. P. 23(a)(3).

27 ⁶² *Hanlon*, 150 F.3d at 1020.

28 ⁶³ *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss. 1993); *In re Citric Acid
 Antitrust Litig.*, No. 95-1092, 1996 WL 655791, at *3 (N.D. Cal. Oct. 2, 1996).

1 purchased – at inflated prices – cylindrical LIBs or products containing cylindrical LIBs
2 manufactured by the defendants.

3 **4. Rule 23(a): Plaintiffs Will Fairly and Adequately Represent the Interests of the**
4 **Class**

5 The final requirement of Rule 23(a) is that the representative plaintiffs will fairly and
6 adequately represent the interests of the class. This consists of two separate inquiries. *First*, this
7 requires that class representatives do not have interests that are antagonistic to or in conflict with
8 the interests of the class. *Second*, plaintiffs must be represented by counsel of sufficient diligence
9 and competence to fully litigate the case.⁶⁴

10 Here, the class representatives have been actively involved in the litigation of this case.
11 Each representative has responded to over 22 interrogatories and 28 document requests.⁶⁵
12 Defendants have also deposed each representative at length.⁶⁶ The interests of all plaintiffs and
13 class members are aligned because they all suffered similar injury in the form of higher cylindrical
14 LIB prices and the prices of products containing cylindrical LIBs due to the conspiracy, and all
15 class members seek the same relief. By proving their own claims, plaintiffs will necessarily be
16 proving the claims of their fellow class members.

17 Plaintiffs also have retained highly capable and well-recognized counsel with extensive
18 experience in antitrust cases. Plaintiffs' interim co-lead counsel, Cotchett, Pitre & McCarthy, LLP,
19 Hagens Berman Sobol & Shapiro, LLP, and Lief, Cabraser, Heimann & Bernstein, LLP were
20 appointed by the Court as IPPs' interim Class Counsel on May 17, 2013. They have undertaken the
21 responsibilities assigned to them by the Court and have directed the efforts of other plaintiffs'
22 counsel in vigorously prosecuting this action. Plaintiffs' counsel have each successfully prosecuted
23 numerous antitrust class actions on behalf of injured purchasers throughout the United States.
24 Plaintiffs' counsel are capable of, and committed to, prosecuting this action vigorously on behalf of

25
26 ⁶⁴ *Hanlon*, 150 F.3d at 1020; *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th
27 Cir. 1978).

⁶⁵ Friedman Decl., ¶ 8.

⁶⁶ *Id.*

1 the class. Plaintiffs' counsel's prosecution of this case, and, indeed, the settlement, demonstrates
2 their diligence and competence. The named plaintiffs satisfy the requirements of Rule 23(a)(4).

3 **5. Rule 23(b)(3): Common Questions of Fact or Law Predominate**

4 Predominance, under Rule 23(b)(3), "is a test readily met in certain cases alleging
5 consumer or securities fraud or violations of the antitrust laws."⁶⁷ The weight of authority holds
6 that in horizontal price-fixing cases like this one, the predominance requirement is readily met. The
7 existence of a conspiracy is the overriding issue common to all plaintiffs, sufficient to satisfy the
8 Rule 23(b)(3) predominance requirement.⁶⁸ The second element of plaintiffs' claims, proof of
9 impact, similarly predominates in this case. "Courts have long held that a plaintiff can demonstrate
10 antitrust impact by showing that the conspiracy caused an increase to the standard market price of
11 the product at issue,"⁶⁹ which plaintiffs have done.⁷⁰

12 In this case, common issues relating to the existence of the alleged cylindrical LIB
13 conspiracy and defendants' acts in furtherance of the alleged conspiracy predominate over any
14 questions arguably affecting only individual class members because they are the central issue in the
15 case and proof is identical for every member of the class. If separate actions were to be filed by
16 each class member in the instant case, each would have to establish the existence of the same
17 alleged conspiracy and would depend on identical evidence, and each would prove damages using
18 identical "textbook" economic models. The evidence needed to prove how defendants implemented
19 and enforced their alleged conspiracy to set the prices of LIBs at supra-competitive levels will be
20 common for all class members. These issues pose predominant common questions of law and fact.

22 ⁶⁷ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

23 ⁶⁸ *See, e.g., Rubber Chems.*, 232 F.R.D. at 352 ("[T]he great weight of authority suggests that
24 the dominant issues in cases like this are whether the charged conspiracy existed and whether
price-fixing occurred.").

25 ⁶⁹ *See Kleen Prods. LLC v. Int'l Paper*, 306 F.R.D. 585, 595 (E.D. Ill. 2015); *see also In re*
26 *Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014) ("The inference of class-wide
27 impact is especially strong where, as here, there is evidence that the conspiracy artificially inflated
the baseline for price negotiations."); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383
(S.D.N.Y. 1996) ("[I]f a plaintiff proves that the alleged conspiracy resulted in artificially inflated
list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price
suffered some injury.").

28 ⁷⁰ *See* Leamer Report at 32-59, 62-77, ECF No. 1599-4.

1 Moreover, the Court need not concern itself with questions of the manageability of a trial
 2 because the settlement disposes of the need for a trial as to LG Chem, along with any “thorny
 3 issues” that might arise. The Supreme Court has explained that the “predominance” inquiry is
 4 relaxed in the settlement context. “Confronted with a request for settlement-only class certification,
 5 a district court need not inquire whether the case, if tried, would present intractable management
 6 problems . . . for the proposal is that there be no trial.”⁷¹ As Judge Posner has explained,
 7 manageability concerns that might preclude certification of a litigated class may be disregarded
 8 with a settlement class “because the settlement might eliminate all the thorny issues that the court
 9 would have to resolve if the parties fought out the case.”⁷² Issues common to the class predominate
 10 in this case.

11 **C. The Court Should Reaffirm the Appointment of Class Counsel**

12 Federal Rule of Civil Procedure 23(c)(1)(B) states that “[a]n order certifying a class action .
 13 . . must appoint class counsel under Rule 23(g).” Rule 23(g)(1)(C) states that “[i]n appointing class
 14 counsel, the court (A) must consider: [i] the work counsel has done in identifying or investigating
 15 potential claims in the action, [ii] counsel’s experience in handling class actions, other complex
 16 litigation, and claims of the type asserted in the action, [iii] counsel’s knowledge of the applicable
 17 law, and [iv] the resources counsel will commit to representing the class.”

18 This Court considered the submissions and arguments of all parties before appointing
 19 Cotchett, Pitre & McCarthy, LLP, Hagens Berman Sobol & Shapiro LLP, and Lief Cabraser
 20 Heimann & Bernstein, LLP as interim co-lead counsel for the indirect purchaser class. Since that
 21 time, interim co-lead counsel has capably managed this complex antitrust class action, and the
 22 settlement with LG Chem is one product of that representation that will provide real and
 23 meaningful benefits to the class. The work they have done to date supports the conclusion that they

25 ⁷¹ *Amchem*, 521 U.S. at 620 (discussing manageability, which is a sub-part of Rule 23(b)(3)
 26 predominance); *see also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 68 (D. Mass. 2005)
 (discussing settlement exception to rigorous analysis of predominance).

27 ⁷² *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004); *see also In re Initial*
 28 *Public Offering Sec. Litig.*, 226 F.R.D. 186, 190, 195 (S.D.N.Y. 2005) (settlement class may be
 broader than litigated class because settlement resolves manageability/predominance concerns).

1 should be appointed as Class Counsel for purposes of the settlement.⁷³ The firms meet the criteria
2 of Rule 23(g)(1).⁷⁴

3 **D. The Proposed Class Notice and Plan for Dissemination Meet the Strictures of Rule 23**

4 Rule 23(e)(1) requires that a court approving a class action settlement must “direct notice in
5 a reasonable manner to all class members who would be bound by the proposal.” In addition, for a
6 Rule 23(b)(3) class, the Rule requires the court to “direct to class members the best notice that is
7 practicable under the circumstances, including individual notice to all members who can be
8 identified through reasonable effort.”⁷⁵ A class action settlement notice “is satisfactory if it
9 generally describes the terms of the settlement in sufficient detail to alert those with adverse
10 viewpoints to investigate and to come forward and be heard.”⁷⁶

11 The proposed plan of notice is supported by an experienced notice and claims administrator
12 – Gilardi – who has worked cooperatively with counsel to develop the proposed plan of notice.
13 Gilardi’s Alan Vasquez submits a declaration in support of the proposed notice plan attesting to its
14 adequacy and constitutionality.⁷⁷ The proposed forms of notice provides all information required
15 by Rule 23(c)(2)(B) to the settlement class, in language that is plain and easy to understand. IPPs
16 have followed, as closely as possible, the language for settlements recommended by this District’s
17 Procedural Guidance for Class Action Settlements.⁷⁸ With this motion, IPPs provide proposed
18 forms for publication notice, email notice, and online banner notices.⁷⁹

19 The proposed plan of notice includes several components. The direct notice component will
20 include email notice to approximately 15.8 million potential class members for whom IPPs have
21

22 ⁷³ See, e.g., *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 520 (D.N.M. 2004).

23 ⁷⁴ Cf. *Farley v. Baird, Patrick & Co., Inc.*, No. 90 Civ. 2168 (MBM), 1992 WL 321632, at *5
24 (S.D.N.Y. Oct. 29, 1992) (“Class counsel’s competency is presumed absent specific proof to the
25 contrary by defendants.”).

26 ⁷⁵ Fed. R. Civ. P. 23(c)(2)(B).

27 ⁷⁶ *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); see also Fed. R. Civ. P.
28 23(c)(2)(B) (describing specific information to be included in the notice).

⁷⁷ See Vasquez Decl., ¶¶ 30-32.

⁷⁸ See <http://www.cand.uscourts.gov/ClassActionSettlementGuidance> (last visited Dec. 6,
2016).

⁷⁹ Vasquez Decl., ¶¶ 11-29, Exs. 2-7.

1 collected direct contact information.⁸⁰ To supplement this direct notice campaign, Gilardi will also
 2 undertake a publication notice program consisting of print publication, online publication (through
 3 banner advertising, Facebook advertising, Twitter advertising), and a press release.⁸¹ In addition,
 4 IPPs have established a website, www.batteriesconsumerlitigation.com, where class members will
 5 be able to find additional, detailed information, including “Frequently Asked Questions,” important
 6 case documents, and contact information for both class counsel and the notice and claims
 7 administrator. A toll-free telephone number will also be established to answer questions from class
 8 members.⁸² Gilardi estimates that this notice campaign will reach in excess of 70 percent of class
 9 members (and likely closer to 80 percent).⁸³ IPPs have worked with Gilardi to draft a simple claims
 10 form for class members, which will be available in electronic and hard copy form.⁸⁴ Class members
 11 will be able to make claims starting immediately for their purchases of LIBs. These notice
 12 provisions meet the requirements of Rule 23 and will allow the class a full and fair opportunity to
 13 review and respond to the proposed settlement.

14 **E. Proposed Schedule for Dissemination of Notice and Final Approval**

15 IPPs propose the following schedule for the dissemination of class notice and final
 16 approval:

Event	Proposed Deadline
Notice campaign to begin, including website, email, publication and internet notice	March 1, 2017
Last day for motion for attorneys’ fees, costs, expenses, and service awards	April 17, 2017 (14 days before objection deadline)
Last day for objections and requests for exclusion from the class	May 1, 2017 (61 days from notice)
Last day for motion in support of final approval of settlements	May 16, 2017 (15 days after objection deadline)
Fairness Hearing	June 20, 2017 (35 days from motion for final approval), unless otherwise ordered by the Court.
Close of Claims Period	July 31, 2017

25 ⁸⁰ *Id.*, ¶ 11.

26 ⁸¹ *Id.*, ¶¶ 17-28, Exs. 4-7.

27 ⁸² *Id.*, ¶ 31.

28 ⁸³ *Id.*, ¶ 32.

⁸⁴ *Id.*, Ex. 8.

V. CONCLUSION

With this settlement, IPPs have guaranteed recovery of \$39 million for the indirect purchaser class. This settlement was reached only after intense negotiations that followed several years of hard-fight litigation. Respectfully, IPPs request that this Court enter an order:

- (1) preliminarily approving the proposed class action settlement with the LG Chem defendant family; (2) certifying the settlement classes; (3) appointing Cotchett, Pitre & McCarthy, LLP, Hagens Berman Sobol & Shapiro LLP, and Lieff Cabraser Heimann & Bernstein, LLP as Class Counsel; and (4) approving the manner and form of notice and proposed plan of allocation to class members.

DATED: December 6, 2016

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DATED: December 6, 2016

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