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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL EDENBOROUGH and PATRICIA WILSON, individually and on behalf of all others similarly situated, Plaintiffs, vs. ADT, LLC d/b/a ADT SECURITY SERVICES, INC. a Florida limited liability company, and THE ADT CORPORATION, a Delaware corporation, Defendants.	Case No: 16-2233 JST **CLASS ACTION** **PLAINTIFFS' NOTICE OF MOTION, MOTION AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS** Judge: Hon. Jon S. Tigar Ctrm: 9 – 19th Floor Date: February 1, 2018 Time: __2:00 p.m.

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NOTICE AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 1, 2018, at 2:00 p.m., or as soon thereafter that the matter may be heard, in Courtroom 9 of the U.S. District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA, Plaintiffs and Settlement Class Representatives (collectively, "Plaintiffs") will and they hereby do move the Court for an order approving the payment of reasonable attorneys' fees, reimbursed litigation expenses, and service awards from the $16 million non-reversionary common fund generated by the proposed nationwide class settlement currently before the Court for final approval. This Motion is supported by the Court's file in this case and by the following documents filed herewith:

- the Declaration of Thomas A. Zimmerman, Jr. ("Zimmerman Decl.");
- the Declaration of Francis J. Balint, Jr. ("Balint Decl.");
- the Declaration of Mark A. Chavez ("Chavez Decl.");
- the Declaration of Adam Warden ("Warden Decl.");
- the Declaration of William C. Wright ("Wright Decl.");
- the Declaration of Michael Edenborough ("Edenborough Decl.");
- the Declaration of Patricia Wilson ("Wilson Decl.");
- the previously filed Declarations of Thomas A. Zimmerman, Jr. dated March 23, 2017 [Doc. 94-1 ("Zimmerman PA Decl.")] and July 24, 2017 [Doc. 112 ("Zimmerman Supp. Decl.")]; and
- the following Memorandum of Points and Authorities.

RELIEF REQUESTED

As discussed below, the Parties have entered into a Settlement Agreement (the "Settlement") that resolves five separate actions pending in federal and state courts on behalf of a nationwide settlement class of all current and former ADT customers who between November 13, 2009 and August 15, 2016 entered into a contract with ADT or an ADT dealer for installation of a residential security system, or who had ADT or an ADT dealer install a residential security system, that includes at least one wireless peripheral sensor (the "Settlement Class"), and establishes a $16 million common fund for the benefit of the Settlement Class Members. After lengthy consideration, and following the Plaintiffs' submission of supplemental materials, the

Court on October 16, 2017, preliminarily approved the Settlement. [Doc. 114.] In accordance with the timetable set forth in the Preliminary Approval Order, Plaintiffs now respectfully move the Court for: (1) an award to Plaintiffs' Counsel of attorneys' fees in the amount of $4 million (25% of the $16 million common fund); (2) an award to Plaintiffs' Counsel for reimbursement of litigation expenses incurred in this litigation in the amount of $261,825.54; and (3) an award to Plaintiffs of service awards in amounts tailored to their respective contributions to the litigation, not to exceed $10,000 to any one Plaintiff.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After nearly three years of litigation before federal courts in Illinois, Arizona, and California and a state court in Florida, and through a two-day mediation session conducted by highly regarded JAMS mediator and retired judge Edward A. Infante, Plaintiffs and Defendants ADT LLC d/b/a ADT Security Services, Inc. and The ADT Corporation (collectively, "ADT") reached a Settlement Agreement that has created a $16 million non-reversionary common fund for the benefit of a Settlement Class of those ADT customers whose residential security system utilized wireless peripherals allegedly vulnerable to electronic hacking, while simultaneously preserving any individual property damage claim or personal injury claim that any such Settlement Class Member may have.

Lawyers in a class action who recover a common fund or benefit for persons other than their client are entitled to a fair and reasonable award of attorneys' fees paid from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also*, Rule 23(h), *Federal Rule of Civil Procedure* ("[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law …"). The successful generation of a common fund also entitles the attorneys to reimbursement of reasonably incurred litigation expenses. *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). Finally, the Court may, in appropriate circumstances, approve the payment of service awards to the class representatives in recognition of "work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney

general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009).

Plaintiffs' Counsel's efforts throughout this litigation have been wholly without compensation of any sort, and their entitlement to fees and expenses has been completely contingent upon a favorable resolution of the alleged Class claims. Fee requests in common fund cases, such as this one, are generally evaluated using a "percentage-of-recovery" approach followed by a lodestar cross-check. *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). Furthermore, 25% is the well-established "benchmark" percentage in the Ninth Circuit for common fund fee awards. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Although Plaintiffs' Counsel may, under the mediated Settlement Agreement, seek an award as high as one-third of the common fund (and while awards of that magnitude have been approved by courts within the Ninth Circuit), Plaintiffs' Counsel here have voluntarily limited their request to $4 million to conform to the Ninth Circuit's "benchmark" percentage. As shown below, ***all*** of the factors that courts within the Ninth Circuit use to assess the reasonableness of a fee request support approval of the $4 million fee as fair and reasonable given the risks and recovery in this litigation, including application of the lodestar "cross-check."

Plaintiffs' Counsel also seek Court approval of the payment of $261,825.54 in unreimbursed litigation expenses from the common fund, the back-up for which is set forth in the respective attorney declarations submitted in support of this Motion. Each category of expense for which Plaintiffs' Counsel seek reimbursement is of the type generally charged to hourly paying clients. Because these expenses were incurred without any assurance of reimbursement, Plaintiffs' Counsel had a powerful incentive to economize.

Finally, given their years of service in bringing and overseeing the prosecution of this action on behalf of the Class, Plaintiffs also request Court approval of service awards ranging from $2,500 to $10,000 to the named Plaintiffs. As shown below, Plaintiffs have taken to heart the Court's admonishment in the Preliminary Approval Order that the amount of such awards must be fully justified, particularly when contrasted with the anticipated share of the net Settlement Amount that can be expected by the absent Settlement Class Members. [Doc. 114, at 11 n.5 & 13-14.] However, as explained below, Plaintiffs are confident that the requested service

awards are, indeed, commensurate with the efforts and responsibilities of each recipient whose efforts led to the creation of the $16 million common fund.

II. THE COMMON FUND WAS GENERATED PURELY THROUGH THE EFFORTS OF PLAINTIFFS AND PLAINTIFFS' COUNSEL

The genesis and procedural history of this case are set forth at length in Plaintiffs' Motion for Preliminary Approval [Doc. 94, at ECF 10-12], in the Zimmerman PA Declaration [Doc. 94-1, ¶¶ 8-18], and in Plaintiffs' Motion for Final Approval filed concurrently herewith.

On November 9, 2014, an Illinois resident filed *Baker v. ADT* (the "Illinois Action") on behalf of putative nationwide and Illinois state classes. In September 2015, an Arizona resident filed *Cheatham v. ADT* (the "Arizona Action") on behalf of a putative class of Arizona residents. In March 2016, a California resident filed *Edenborough v ADT* (the "California Action") on behalf of a putative class of California residents. Two related cases have also been filed by Florida residents in Florida state court, *Wilson v. ADT* and *Hernandez v. ADT*, both on behalf of putative classes of Florida residents (the "Florida Actions"). Zimmerman PA Decl. ¶¶ 8-14.

Each of the settled cases (collectively, the "Actions") share common factual allegations regarding ADT's alleged failure to disclose to residential customers the alleged vulnerability of the wireless peripheral sensors in its residential security systems to evasion and jamming using electronic devices, which ADT allegedly knew of but failed to disclose to its customers. Zimmerman Supp. Decl. ¶¶ 6-7. Plaintiffs further allege that ADT's concealment of the "security hole" was threatened when, in July 2014, Logan Lamb, an employee at the Oak Ridge National Laboratories, planned to reveal publicly his findings about how ADT's wireless sensors could be disabled. Zimmerman PA Decl. ¶ 24; Zimmerman Supp. Decl. ¶ 7. Plaintiffs contend that a consumer class may recover under an out-of-pocket theory where a seller's nondisclosure allowed it to command a price premium. Zimmerman Supp. Decl. ¶ 24.

Plaintiffs' statutory consumer fraud claims in the Arizona, California, and Illinois Actions survived ADT's motions to dismiss. Zimmerman PA Decl. ¶¶ 10-12. ADT's motions to dismiss in the Florida Actions were briefed, argued and awaiting ruling when the Actions were settled through the two-day mediation process. *Id.* ¶¶ 13-14.

After the Actions were filed, ADT in August 2016 added express language ***disclosing*** the vulnerability into its standardized contracts on its website and in its SEC filings. Zimmerman Supp. Decl.¶ 7. Plaintiffs undertook a vigorous discovery program voluntarily coordinated among Plaintiffs' Counsel: ADT produced and Plaintiffs' Counsel reviewed over 45,000 pages of documents; most of the Plaintiffs and seventeen (17) fact witnesses were deposed; and upon the close of fact discovery, Plaintiffs submitted detailed expert declarations regarding liability and a proposed methodology for calculation of damages as part of the class certification briefing. Zimmerman PA Decl. ¶ 17; Zimmerman Decl. ¶ 23. ADT likewise filed numerous materials and expert declarations in opposition to class certification in the Arizona, California, and Illinois Actions. [*Cheatham*, Docs. 125 through 130; *Edenborough*, Docs. 85 through 85-5].

The completion of fact discovery and briefing on class certification afforded the parties an informed and clear-eyed assessment of the strengths and weaknesses of their respective claims and defenses. Zimmerman PA Decl. ¶ 22. Informal negotiations ultimately led to two mediation sessions, months apart, overseen by retired Judge Infante. *Id.* ¶ 20. The parties reached the Settlement Agreement during the second mediation session. *Id.* After reaching an agreement in principle on monetary relief to a settlement class of ADT customers whose residential security systems utilized wireless peripheral sensors, the parties agreed that the Settlement would be presented for approval to this Court. *Id.* ¶ 16. Each of the other Actions was subsequently stayed in their respective courts pending completion of the class settlement approval process. *Id.*, ¶¶ 10-14.

The Settlement provides significant monetary relief to current and former ADT customers who used wireless sensors in their residential security system. Zimmerman PA Decl. Ex. A, at ECF 16. Under the Settlement, ADT will pay $16,000,000 in exchange for a Class release which ***expressly excludes*** all property damage and personal injury claims. *Id.* at ECF 16 &17:27-28. None of the $16 million can revert to ADT. *Id.* at ECF 1:8-13 & 24:8-13.

III. PAYMENT OF A 25% FEE TO PLAINTIFFS' COUNSEL IS APPROPRIATE AND WARRANTED

A. Plaintiffs' Counsel Are Entitled to an Award of Attorneys' Fees under the

Common Fund Doctrine.[1]

When plaintiff's counsel in a class action generates a common fund for the benefit of persons other than their client, they are entitled to a fair and reasonable award of attorneys' fees paid from that common fund. *Boeing*, 444 U.S. at 478; *see also*, *In re Omnivision Technologies*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2008) ("a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees") (citing *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir.1977)). This approach assesses the litigation expenses against the entire fund so that the burden is spread proportionally among those who have benefited. *Boeing*, 444 U.S. at 478. In deciding whether a requested fee amount is appropriate, the Court's role is to determine whether the requested amount is "fundamentally 'fair, adequate, and reasonable.'" *Staton*, 327 F.3d at 963 (quoting Fed. R. Civ. P. 23(e)); *see also, In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294-95 n.2 (9th Cir. 1994) (the overriding principle is that the fee award be "reasonable under the circumstances").

B. The Percentage Method Is the Preferred Means of Calculating a Reasonable Common Fund Fee Award.

The Ninth Circuit has long recognized two different methods for determining reasonable attorneys' fees "depending on the case": the percentage method and the lodestar method. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). Where the class settlement creates a common fund for distribution to the class, the courts generally award attorneys' fees from the fund using the percentage method. *Vizcaino*, 290 F.3d at 1047; *accord*, *In re Bluetooth*, 654 F.3d at 942 ("Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more

[1] California law governs the determination of attorneys' fees in this diversity action. *Vizcaino*, 290 F.3d at 1047. California law authorizes percentage fee awards in common fund cases. *Laffitte v. Robert Half Intern. Inc.*, 376 P.3d 672, 686 (Cal. 2016). The Court may also look to federal authority for guidance in awarding attorneys' fees. *See, e.g.*, *MacDonald v. Ford Motor Co.*, 13-CV-02988-JST, 2016 WL 3055643, at *2 (N.D. Cal. May 31, 2016), *appeal dismissed*, 16-16252, 2017 WL 4011879 (9th Cir. Feb. 22, 2017) (quoting *Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253, 1264 n.4 (2005) ("California courts may look to federal authority for guidance on matters involving class action procedures.").

time-consuming task of calculating the lodestar."); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("Although statutory awards of attorneys' fees are subject to 'lodestar' calculation procedures, a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery."); *see generally, Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (the percentage method "is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure'") (citation & quotations omitted).[2] On the other hand, the lodestar method is appropriate in class actions brought under fee-shifting statutes, and "where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized[.]" *In re Bluetooth*, 654 F.3d at 941. Courts within the Ninth Circuit have the option of conducting a lodestar cross-check on the reasonableness of a percentage award from a common fund. *Id.*

Here, the $16 million value of the common fund is readily and objectively determined, for it is to be paid in cash: $1.5 million upon Preliminary Approval, and the remaining $14.5 million paid seven days after the Effective Date. Doc. 114, ¶ 7(a) & (j). Again, no portion of the common fund will revert to ADT after the Settlement's Effective Date. *Id.* ¶ 7(i).

C. The Ninth Circuit's 25% "Benchmark" is a Fair and Reasonable Percentage Award in this Case.

In the Ninth Circuit, the long-established "benchmark" for an award of attorneys' fees in common fund cases is 25%. *In re Bluetooth*, 654 F.3d at 942 ("courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure"). A 25% common fund fee award is, therefore, deemed "presumptively reasonable." *Ching v. Siemens Industry, Inc.*, No. 11-cv-04838-

[2] California courts have likewise expressed a preference for the percentage method in common fund cases. *See, Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 27 (2000) ("Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." [cited in *Bennett v. SimplexGrinnell LP*, 11-CV-01854-JST, 2015 WL 12932332, at *5 (N.D. Cal. Sept. 3, 2015)]); *Serrano v. Priest*, 20 Cal.3d 25, 35 (1977) ("the 'common fund' exception has ... been applied by the courts of this state in numerous cases"); *Melandres v. City of Los Angeles*, 45 Cal.App.3d 267, 283-84 (1975) (awarding fees as a percentage of a common fund).

MEJ, 2014 WL 2926210, at *7 (N.D. Cal. June 27, 2014) (citing *Bluetooth*, 654 F.3d at 942). Where the 25% benchmark fee is requested, the percentage is appropriately applied to the gross settlement amount. *Edwards v. Natl. Milk Producers Fedn.*, 11-CV-04766-JSW, 2017 WL 3616638, at *9 (N.D. Cal. June 26, 2017), *objections overruled*, 11-CV-04766-JSW, 2017 WL 3623734 (N.D. Cal. June 26, 2017).

Courts typically consider five factors when determining whether to depart from the 25% benchmark: (1) the results achieved; (2) the complexity of the case and risks the case involved; (3) the contingent nature of the fee and financial burden carried by counsel; (4) the skill required and the quality of the work of plaintiffs' counsel; and (5) the customary fees for similar cases. *Smith v. Am. Greetings Corp.*, No. 14-CV-02577-JST, 2016 WL 2909429, at *8 (N.D. Cal. May 19, 2016); *see also*, *Vizcaino*, 290 F.3d at 1048-50; *Omnivision*, 559 F.Supp.2d at 1046. As shown below, none of the pertinent factors "requires departure from the 25 percent standard award." *Six (6) Mexican Workers*, 904 F.2d at 1311.

1. Plaintiffs' Counsel Obtained Excellent Results, both Monetary and Catalytic.

The benefit obtained for the class is, in some sense, the single most important factor. *In re Bluetooth*, 654 F.3d at 942; *Omnivision*, 559 F.Supp.2d at 1046. Appropriately considered in this respect is the lack of supporting precedent, the presence of contractual disclaimers, and the vigorousness of the defendant's opposition. *Vizcaino*, 290 F.3d at 1048 (finding results were "exceptional" based on those factors).

Here, Plaintiffs' Counsel achieved a $16 million common fund in the face of forceful arguments by ADT that the undisclosed information was immaterial, because: (a) there had been no real-world example of an intrusion found attributable to the alleged vulnerability; and (b) there was no appreciable difference in sales or pricing for ADT's wireless residential security systems after ADT began disclosing the previously undisclosed vulnerability. Zimmerman Supp. Decl. ¶¶ 7, 14. And, since Plaintiffs did not purport to assert property damage or personal injury claims, the claimed damages theory was nuanced—particularly given the lack of competitive wireless products on the market which protected against the alleged vulnerability. *Id.* ¶¶ 9-20. Given the

lack of competitive market data, Plaintiffs' Counsel could not simply rely on traditional hedonic pricing analysis to calculate damages, but, instead, had to construct a novel alternative damages model based on stated preferences obtained through properly constructed consumer surveys. *Id.*; *see also*, Declaration of Dwight J. Duncan, MS CFA [Doc. 81-2], ¶¶ 14-32. There was no unequivocal case precedent supporting Plaintiffs' approach; indeed, similar attempts by other class counsel had foundered. *See, e.g.*, *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F.Supp.3d 1050, 1121 (C.D. Cal. 2015) (rejecting damages model as it looked only "to the demand side of the market equation," converting what is properly "an objective evaluation of relative fair market values into a seemingly subjective inquiry of what an average consumer wants" (internal quotation marks omitted)); *Saavedra v. Eli Lilly and Co.*, No. 2:12-cv-9366-SVW(MANx), 2014 WL 7338930, at *6 (C.D. Cal. Dec. 18, 2014) (same).

Furthermore, Plaintiffs' Counsel undertook the litigation notwithstanding ***extensive*** express disclaimer and limitation of liability language in ADT's customer contracts and on ADT's website. *See, e.g.*, ADT's Answer to First Amended Complaint [Doc. 71], at 24 ("Certain materials that ADT provides to its customers – such as its web site, user manuals and contracts – disclose that wireless signals can be interrupted, and that some criminals may have the sophistication to evade an alarm sensor."); *id*. at 25 ("The claims asserted by Plaintiff and/or the proposed class are barred or limited in whole or in part by contractual limitations of liability contained in their Alarm Services Contract with ADT, including but not limited to the Contract's integration clause, and those limitations stated in the section of the Contract entitled, "Important Terms and Conditions."); *see also*, Doc. 85, at ECF 20-21 & n.9 (ADT emphasizes purported disclosures in its opposition to class certification).

In addition, as the voluminous briefing in opposition to Plaintiffs' motion for class certification makes clear, Plaintiffs' Counsel took on an adversary with deep resources, capable of and obviously motivated to conduct an exceptionally vigorous defense—retaining no less than four top-shelf expert witnesses. *See, e.g.*, Doc. 85 (opposition memo); Doc. 85-1 (declaration of economics expert); Doc. 85-2 (declaration of economic statistician expert); Doc. 85-3 (declaration of consumer scientist and electrical engineering expert); Doc. 85-4 (declaration of consumer

privacy expert). In the face of this intrepid and resourceful opposition, generating a $16 million common fund while simultaneously preserving any and all personal injury and property damages claims is, indeed, an exceptionally favorable monetary outcome.

In fact, the creation of class benefits ***beyond*** the settlement payout can justify an upward departure from the Ninth Circuit's 25% benchmark. *Vizcaino*, 290 F.3d at 1049 (increase from 25% justified in part based on catalytic actions defendant took during the litigation); *see, e.g.*, *Smith*, 2016 WL 2909429, at *8 (finding that defendant's changing some of the practices the plaintiffs challenged in the litigation counted as additional benefits to the total "recovery" beyond the payment of past monetary damages, and granting preliminary approval to the settlement); *Larsen v. Trader Joe's Company*, No. 11-cv-05188-WHO, 2014 WL 3404531, at *9 (N.D. Cal. July 11, 2014) (granting request for 28% in attorneys' fees when the litigation convinced the defendant to stop the offending practice that led to the suit). Here, in addition to providing the agreed monetary compensation, Plaintiffs' Counsel have caused ADT to change its practices. Specifically, well into the litigation, ADT revised its disclosures on its website, in its contracts, and in SEC filings, to specifically disclose the risk of hacking of wireless communications to and from peripheral sensors. For example, beginning in August 2016, ADT's contracts with its customers now disclose:

> THE ALARM SYSTEM WILL NOT FUNCTION IF WIRELESS COMMUNICATION FOR THE DEVICES IS IMPAIRED. THESE WIRELESS DEVICES MAY OR MAY NOT USE ENCRYPTION AND/OR AUTHENTICATION TECHNOLOGY AND ARE VULNERABLE TO INTENTIONAL OR UNINTENTIONAL INTERRUPTION, INTERCEPTION, CORRUPTION AND TAMPERING.

Doc. 80-5, at ECF 12:26-13; *id.* at ECF 13:7-18. Although Plaintiffs' Counsel do *not* seek an upward adjustment from the benchmark, these additional catalytic benefits generated by the Actions underscore the reasonableness of a $4 million benchmark award.

2. Plaintiffs' Claims Against ADT Were Complicated and Involved Significant Risk.

A common fund attorneys' fee award should take into account the risk of representing a class action plaintiff on a contingency basis over a period of years. *Vizcaino*, 290 F.3d at 1048-49;

Willner v. Manpower Inc., No. 11-CV-02846-JST, 2015 WL 3863625, at *6 (N.D. Cal. June 22, 2015). At the Court's request, Plaintiffs set forth in great detail the many complications and risks encountered in this litigation. Zimmerman Supp. Decl. ¶¶ 6-25.

The risks relating to Plaintiffs' class-wide damages analysis are noted above. *See also* Zimmerman Supp. Decl. ¶¶ 9-20. In addition to ADT's attacks on our damages assumptions, Plaintiffs' Counsel faced overarching risks to any class recovery based on (a) ADT's staunch opposition to class certification (challenging standing, predominance, typicality and adequacy), and (b) ADT's substantive legal defenses on the merits (challenging materiality, exposure and reliance), including in particular its alleged lack of knowledge of the "security hole" before July 23, 2014 (when ADT learned of the Logan Lamb paper). *Id.* ¶ 22. At no time did ADT ever concede liability, the appropriateness of class certification, or the existence of causation or damages. No court certified a class in any of the Actions, and although Plaintiffs had successfully survived motions to dismiss in three of the Actions, ADT was expected to move for summary judgment on the issues of materiality, disclosure and disclaimer. *In re Omnivision*, 559 F.Supp.2d at 1047. Despite the significant risks and uncertainty, Plaintiffs' Counsel obtained a $16 million fund for the benefit of ADT customers nationwide who contracted for residential security systems using the vulnerable wireless sensors.

3. Plaintiffs' Counsel Diligently Prosecuted the Case Despite Substantial Financial Risks of Zero Recovery

As discussed below, Plaintiffs' Counsel and their litigation support staff have expended 5,591.75 hours prosecuting the Actions, totaling $3,135,560.75 in lodestar, and have invested some $261,825.54 in potentially unrecoverable litigation expenses. Zimmerman Decl. ¶¶ 29-30, 40; Balint Decl. ¶¶ 16, 18; Chavez Decl. ¶¶ 15-17, 20; Warden Decl. ¶¶ 15-17, 19; Wright Decl. ¶¶ 13, 15. Again, this time was incurred as part of a voluntarily coordinated prosecution among Plaintiffs' Counsel, who, among other things, negotiated agreements with ADT for non-duplicative deposition and document production. *Id.* Meanwhile, Plaintiffs' Counsel vetted and retained technical experts, survey experts and forensic accounting experts, all of whom were paid in advance by Plaintiffs' Counsel without any assurance of reimbursement. *Id.*; Zimmerman PA

Decl. ¶ 17. All of the foregoing efforts were undertaken on a contingent basis, despite the risks described above and without ***any*** assurance of recovery absent ultimate success.

Additionally, and significantly, Plaintiffs' Counsel did not ride the coattails of any governmental investigation or regulatory action. *Rodriguez*, 563 F.3d at 964; *see, e.g.*, *In Re Flonase Antitrust Litig*., 291 F.R.D. 93, 104-05 (E.D. Pa. 2013) 951 F.Supp.2d 739, 749 (E.D. Pa. 2013) (lack of assistance by government investigation is an "important consideration" that weighs in favor of a proposed fee, where—much like here—counsel "led joint litigation efforts, taking the lead in discovery and development of … experts, significant motion practice, and trial preparation.").

Plaintiffs' Counsel will furthermore continue to expend many more hours (and additional expense) on behalf of the Class, which is not included in their current lodestar and will not entitle them to additional compensation under the Settlement Agreement. Zimmerman Decl. ¶ 31. Plaintiffs' Counsel must engage in post-approval work, such as assisting with claims administration, communicating with Class members, and addressing any claims dispute, appeal, or other issue that may arise in effectuating the Settlement. *Id.* This future work is substantial and could potentially last for years. *Id.*

4. Plaintiffs' Counsel Are Highly Skilled and Experienced in Large and Complex Class Action Litigation.

In determining the reasonableness of a fee, the Court should also consider the experience, skill and reputation of Plaintiffs' Counsel. *See In re Omnivision*, 559 F.Supp.2d at 1047 (the "prosecution and management of a complex national class action requires unique legal skills and abilities") (quotation omitted). Plaintiffs' Counsel are highly experienced in the fields of consumer and class action litigation. *See*, Zimmerman PA Decl. Exs. 2-6 (firm resumes); *see also*, Zimmerman Decl. ¶¶ 5-16; Balint Decl. ¶ ¶ 5-11; Chavez Decl. ¶¶ 5-11; Warden Decl. ¶¶ 5-10; Wright Decl. ¶¶ 5-10. As explained above, Plaintiffs' Counsel competently and successfully survived three motions to dismiss, conducted a thorough examination of the relevant facts throughout formal discovery and informal investigation, and retained numerous experts to coordinate and conduct the prosecution of nationwide consumer claims against ADT.

Defense counsel's quality and skill are also relevant in determining the quality and skill required of class counsel. *Destefano v. Zynga, Inc.*, 12-CV-04007-JSC, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013); *see also, Wing v. Asarco*, 114 F.3d 986, 989 (9th Cir. 1997) (affirming fee award and noting that the court's evaluation of class counsel's work considered "the quality of opposition counsel and [defendant's] record of success in this type of litigation"). Counsel for ADT is a Chicago-based law firm nationally recognized in the defense of class actions. Zimmerman Decl. ¶ 48. Given the significant risks and uncertainty associated with this complex class action, the $16 million common fund is a testament to Plaintiffs' Counsel's skill, creativity and determination.

5. The Fees Sought Here Are Well Within the Range of Those Awarded in Similar Consumer Class Actions.

Plaintiffs' Counsel's 25% fee request is also reasonable in light of fees awarded in other similar consumer class action cases. Zimmerman Decl. ¶ 51; *see also, Vizcaino*, 290 F.3d at 1049 (proper for district court to credit class counsel's evidence showing that the retainer agreements reflected the standard contingency fee for similar cases); *accord, Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1210 (S.D. Fla. 2006) ("federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases")*; see, e.g., Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 335–36 (N.D. Cal. 2014)

(awarding 25% of $14,743,101 common fund, which was a multiplier of 2.83 to the lodestar); *Bennett v. SimplexGrinnell LP*, 11-CV-01854-JST, 2015 WL 12932332, at *6 (N.D. Cal. Sept. 3, 2015) (awarding 38.8% of the common fund); *Willner v. Manpower Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625 (N.D. Cal. June 22, 2015) (awarding 30% of $8.75 million common fund, which was a multiplier of 2.1 to the lodestar).

6. The Reasonableness of Class Counsel's Fee Request Is Confirmed by a Lodestar Cross-Check.

Courts within the Ninth Circuit may (but are not required to) apply a lodestar analysis to "cross-check" the reasonableness of a percentage fee. *Vizcaino*, 290 F.3d at 1050 ("while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful

perspective on the reasonableness of a given percentage award); *see, e.g., Deatrick v. Securitas Sec. Servs. USA, Inc.*, No. 13-CV-05016-JST, 2016 WL 5394016, at *7 (N.D. Cal. Sept. 27, 2016); *but see, Craft v. Cty. of San Bernardino*, 624 F.Supp.2d 1113, 1122 (C.D. Cal. 2008) ("A lodestar cross-check is not required in this circuit, and in some cases is not a useful reference point."); *Aichele v. City of L.A.*, No. CV-12-10863-DMG, 2015 WL 5286028, at *6 (C.D. Cal. Sept. 9, 2015) (same).

Under the lodestar method, a reasonable attorneys' fee is determined by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *In re Bluetooth*, 654 F.3d at 941-42.[3] In addition, courts then frequently apply a multiplier in recognition of the contingent nature of plaintiffs' counsel's retention and the resulting risks associated with the litigation and non-payment. *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("A district court generally has discretion to apply a multiplier to the attorney's fees calculation to compensate for the risk of nonpayment."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299-1300 (9th Cir. 1994) ("[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases.").

Hourly rates should be guided by the prevailing market rates for similar work performed by attorneys of comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Stewart v. Applied Materials, Inc.*, 15-CV-02632-JST, 2017 WL 3670711, at *10 (N.D. Cal. Aug. 25, 2017); *see also, Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (the relevant community for the purposes of determining the prevailing market rate is generally the "forum in which the district court sits") (citation omitted). Here, Plaintiffs'

[3] It is not necessary for an attorney to provide more information other than the number of hours worked and the hourly billing rates. *Winterrowd v. Am.Gen.Annuity Ins. Co.*, 556 F.3d 815, 827 (9th Cir. 2009) (quoting *Martino v. Denevi*, 182 Cal.App.3d 553, 559 (Cal. Ct. Appl. 1986) ("Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.")); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . [courts] may rely on summaries submitted by the attorneys and need not review actual billing records." (citation omitted) (internal quotation marks omitted)).

Counsel's hourly rates are consistent with those charged by similarly experienced counsel within the San Francisco legal markets[4] and have been specifically accepted by other courts in recent class action settlements. Zimmerman Decl. ¶¶ 32-39; Balint Decl. ¶ 17; Chavez Decl. ¶ 19; Warden Decl. ¶ 18; Wright Decl. ¶ 14.

The manner in which Plaintiffs' Counsel categorized the number of hours that they spent on this litigation is also reasonable. Zimmerman Decl. ¶ 29; Balint Decl. ¶ 16; Chavez Decl. ¶ 16; Warden Decl. ¶ 16; Wright Decl. ¶ 13. Task-based summaries, such as those submitted by Plaintiffs' Counsel here, obviate the onerous judicial burden of wading through thousands of pages of time records, and are a commonplace and well-recognized tool for the Court to assess the reasonableness of a requested fee award in class action proceedings like this litigation. *Hensley*, 461 U.S. at 437 n.12 (class counsel "is not required to record in great detail how each minute of his time was expended," but should "identify the general subject matter of his time expenditures."); *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (quoting same). Plaintiffs' Counsel are mindful of their responsibility to exercise sound "billing judgment," *Hensley*, 461 U.S. at 433-34, and, accordingly, they have taken care to ensure: (a) that the reported lodestar does not include any contract lawyers, and (b) duplicative or *de minimus* time has been eliminated. Zimmerman Decl. ¶ 28; Balint Decl. ¶ 15; Chavez Decl. ¶ 14; Warden Decl. ¶ 14; Wright Decl. ¶ 12.

After such voluntary exercise of billing judgment, Plaintiffs' Counsel's aggregate lodestar in the Actions as of November 30, 2017, is $3,135,560.75, yielding a cross-check multiplier of 1.275 when compared to the 25% percentage fee. Considering the time and labor required to successfully prosecute this matter, the novelty and complexity of the issues, the significant risks

[4] *See e.g.*, *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (district court did not abuse its discretion in awarding 2008 hourly rates for Bay Area attorneys of up to $875 for a partner, $700 for an attorney with 23 years of experience, $425 for an attorney with approximately five years of experience, and $190 for paralegals); *Guerrero v. California Dept. of Corrs. and Rehabilitation*, No. C 13-05671 WHA, 2016 WL 3360638 (N.D. Cal. June 16, 2016) (awarding hourly rates between $750-$775 for partners and lead counsel in complex federal litigation case with approximately thirty years of experience, $658 per hour for a partner with eighteen years of experience, and $325-$358 per hour for associates with five and six years of experience, respectively); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015) (finding reasonable rates for Bay Area attorneys of between $475-$975 for partners, $300-$490 for associates, and $150-$430 for litigation support and paralegals).

to any recovery at all, the skill and experience of counsel, the quality of the representation, the results obtained, the inevitability of future work, and awards in similar cases, the resultant multiplier of 1.275 is eminently fair and reasonable. *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.") (citation omitted); *compare Vizcaino*, 290 F.3d at 1051 n.6 (upholding multiplier of 3.65, while noting that the majority of class action settlements approved had fee multipliers that ranged between 1 and 4); *Edwards*, 2017 WL 3616638, at *11 (cross-check multiplier "just over 2"); *Dyer*, 303 F.R.D. at 335–36 (cross-check multiplier of 2.83); *Willner*, 2015 WL 3863625, at *7 (cross-check multiplier of 2.1); *Reyes v. CVS Pharm., Inc.*, 1:14-CV-00964-MJS, 2016 WL 3549260, at *13 (E.D. Cal. June 29, 2016) (cross-check multiplier of 1.93); *In re Google Referrer Header Privacy Litig.*, No. 5:10–CV–04809–EJD, 2015 WL 1520475, at *10 (N.D. Cal. Mar. 31, 2015) (lodestar multiplier of 2.2); *In re Wachovia Corp, etc.*, No. 5:09-md-02015-JF, 2011 WL 1877630 at *7 (N.D. Cal. May 17, 2011) (multiplier of 2.2 "is well within the acceptable range"); *In re Mercury Interactive Sec. Litig.*, No. 05-cv-03395-JF, 2011 WL 826797 at *2 (N.D. Cal. Mar. 3, 2011) (multiplier of 3.08 "is within the acceptable range").

IV. PAYMENT OF $261,825.54 IN LITIGATION EXPENSES TO CLASS COUNSEL IS APPROPRIATE AND WARRANTED

Both California and the Ninth Circuit allow the recovery of pre-settlement litigation costs in the context of class action settlements. *See Bennett v. SimplexGrinnell LP*, 11-CV-01854-JST, 2015 WL 12932332, at *7 (N.D. Cal. Sept. 3, 2015) (citing *Rider v. Cnty. of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992) ("the recovered 'common fund' shall also serve as the source from which the Taxpayers recover their trial costs and their costs on appeal"); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *accord*, *Wakefield v. Wells Fargo & Co.*, No. 3:13-cv-05053 LB, 2015 WL 3430240, at *6 (N.D. Cal. May 28, 2015) ("Class counsel are entitled to reimbursement of reasonable out-of-pocket expenses."); *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014) ("There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.")

(citations omitted). All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable. *Bennett*, 2015 WL 12932332, at *7 (allowing expenses incurred in connection with research, filing fees, travel, mediation, postage, copying, expert witnesses, and document management and processing); *Willner v. Manpower Inc.*, No. 11-cv-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (quoting *Harris*); *see generally, S.E.C. v. Sunwest Mgmt., Inc.*, 524 Fed. Appx. 365, 368 (9th Cir. 2013) (applying Harris's rule to an award of attorneys' fees in a class action).

Plaintiffs' Counsel respectfully request Court approval for the reimbursement of $261,825.54 in appropriately documented out-of-pocket litigation expenses. Zimmerman Decl. ¶ 40; Balint Decl. ¶ 18; Chavez Decl. ¶ 20; Warden Decl. ¶ 19; Wright Decl. ¶ 15. They include expert fees, filing fees, postage, transportation, printing, electronic research, consultant fees, and Plaintiff's share of the mediator's fees. *Id.* Plaintiffs' Counsel's incurrence of litigation expenses––especially in connection with experts retained by Plaintiff—was critical to the diligent prosecution of the Class claims. *Id.* Once again, because Plaintiffs' Counsel incurred these expenses with absolutely no assurance of recovery, they were highly motivated to proceed in the most cost-effective manner possible. Zimmerman Decl. ¶ 41; Balint Decl. ¶ 19; Chavez Decl. ¶ 21; Warden Decl. ¶ 20; Wright Decl. ¶ 16. In addition, Plaintiffs' Counsel have not marked-up any of the actual out-of-pocket or internal expenses that they advanced on behalf of Plaintiffs and the Class over the many years of this litigation. *Id.*

V. PAYMENT OF $30,000 IN SERVICE AWARD IS APPROPRIATE AND WARRANTED

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977; *see also*, *Rodriguez*, 563 F.3d at 958 ("Incentive awards are fairly typical in class action cases."). In the Ninth Circuit, such incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958-59; *see, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, M 07-1827

SI, 2013 WL 1365900, at *17 (N.D. Cal. Apr. 3, 2013) (approving as reasonable incentive awards from $7,500 to $15,000 in recognition of "the contribution these class representatives and named plaintiffs made to this litigation"). Here, the Settlement Agreement set ***explicit caps*** of $10,000 and $2,500 on the amount of the incentive award that could be requested, depending upon the degree of assistance rendered by a given Plaintiff. Settlement Agreement, Doc. 94-1, at ECF 25.

Service awards generally run between $2,500 to $10,000, and can run to $25,000 or more. *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 299 (N.D. Cal. 1995) (approving $50,000 award from a $76,723,213.26 common fund). In this district, however, a $5,000 award is deemed "presumptively reasonable." *Smith*, 2016 WL 362395, at *10; *accord*, *Isquierdo v. W.G. Hall, LLC*, 15-CV-00335-BLF, 2017 WL 4390250, at *9 (N.D. Cal. Oct. 3, 2017); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947-48 (9th Cir. 2015); *Moore v. Verizon Communications Inc.*, No. C 09–1823 SBA, 2013 WL 4610764, at *15 (N.D. Cal. Aug. 28, 2013) (citations omitted); *Harris v. Vector Marketing Corp.*, No. C-08-5198, 2012 WL 381202, at *7 (N.D. Cal. Feb. 6, 2012) (collecting cases holding that an award of $5,000 has been found to be presumptively reasonable in this Circuit). Nevertheless, "Courts will … grant an award that exceeds $5,000 when warranted." *Dyer*, 303 F.R.D. at 335.

Accordingly, awards of $10,000 are not uncommon in this district in the proper circumstances, even from common funds significantly less than the $16 million common fund generated in this case. *See, e.g.*, *Wakefield v. Wells Fargo & Co.*, No. 3:13-CV-05053 LB, 2015 WL 3430240, at *6 (N.D. Cal. May 28, 2015) (two named plaintiffs received $10,000 each as an incentive award, paid out of $7.42 million settlement fund); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 336 (N.D. Cal. 2014) ($10,000 for each of two named plaintiffs, out of $14.7 million settlement fund); *Bolton v. U.S. Nursing Corp.*, No. C 12-4466 LB, 2013 WL 5700403, at *6 (N.D. Cal. Oct. 18, 2013) ($10,000 incentive award, out of $1.7 million common fund); *Schulken v. Washington Mut. Bank*, No. 09-CV-2708-LHK, 2012 WL 12921069, at *3 (N.D. Cal. Nov. 13, 2012) ($10,000 incentive award, out of $2.56 million common fund); *Chu v. Wells Fargo Invs., LLC*, Nos. C 05-4526 MHP, C 06-7924 MHP, 2011 WL 672645, at *5 (N.D.Cal. Feb. 16, 2011) (awarding $10,000 incentive awards to two active plaintiffs, paid out of $6.9 million settlement

fund); *Navarro v. Servisair*, No. C 08-02716 MHP, 2010 WL 1729538, at *4 (N.D. Cal. Apr. 27, 2010) (due to "active participation, an incentive award of $10,000 is reasonable," out of $900,000 settlement fund).

"Courts may consider the following criteria in determining whether to provide incentive awards: '(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.'" *Walsh v. Kindred Healthcare*, No. 11–cv–00050–JSW, 2013 WL 6623224, at *4 (N.D.Cal. Dec. 16, 2013) (quoting *Van Vranken*, 901 F.Supp. at 299); *see, e.g., Boring v. Bed Bath & Beyond*, No. 12-CV-05259-JST, 2014 WL 2967474, at *3 (N.D. Cal. June 30, 2014) (finding $7,500 was a reasonable enhancement award even though the average payment to class members was approximately $170.80, where class representative traveled to, and attended mediation, risked backlash from defendant (his employer), contributed a significant amount of time and energy to the litigation, and signed a broader release than did other class members); *Harris v. Vector Mktg. Corp.*, C-08-5198 EMC, 2012 WL 381202, at *7-8 (N.D. Cal. Feb. 6, 2012) (granting $12,500 award from a $13 million settlement fund; though the average payment was approximately $100, the class representative signed a broader general release than did her fellow class members, spent more than 100 hours on the litigation, had her friends and family subpoenaed, and was compelled to release private information).

Here, Plaintiffs' Counsel propose service awards that vary—higher and lower—from the presumptive $5,000 based on the respective contributions of the recipients to the success of the litigation. *See, e.g., In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) ("Importantly, a court need not award all named plaintiffs the same incentive payment. * * * 'Courts recognize that a differentiation among class representatives based upon the role that each played may be proper in given circumstances.'" [citations omitted]); *Wren v. RGIS Inventory Specialists*, C-06-05778 JCS, 2011 WL 1230826, at *37 (N.D. Cal. Apr. 1, 2011), supplemented, C-06-05778 JCS, 2011 WL 1838562 (N.D. Cal. May

13, 2011) (awarding varying amounts). In their respective declarations, the Class Representatives have each set forth the amount of time and effort they devoted to this litigation, and, as set forth in Class Counsels' declarations, certain of the other named Plaintiffs have gone significantly above and beyond the typical oversight role. Zimmerman Decl. ¶¶ 52-54; Balint Decl. ¶ 22. Plaintiffs have furthermore attested that the proposed service awards in this case neither involve an *ex ante* agreement between the class representatives and Plaintiffs' Counsel, nor are they conditioned on the class representatives' support for the settlement.[5] Zimmerman Decl. ¶ 52; Balint Decl. ¶ 22; Warden Decl. ¶ 23; Edenborough Decl. ¶ 12; Wilson Decl. ¶ 12.

Plaintiffs further note that the total amount of the service awards requested is $30,000, which represents approximately .187 % of the $16 million gross Settlement Amount—at or below the aggregate incentive award payments found to be acceptable in other recent class actions. *See, e.g., Wren*, 2011 WL 1230826, at *37 (approving 0.45% in incentive payments of the $27 million gross Settlement Amount); *Sandoval v. Tharaldson Employee Mgmt., Inc..*, No. EDCV 08-482-VAP (OPx), 2010 WL 2486346, at *10 (C.D. Cal. Jun. 15, 2010) (awarding $7,5000 incentive payment to named plaintiff, comprising 1.0% of gross settlement amount); *see also*, *Dyer*, 303 F.R.D. at 335–36 (awarding 0.14% of $14.743 million settlement fund); *Willner*, 2015 WL 3863625, at *9 (awarding 0.08% of $8.75 million settlement fund); *Boring*, 2014 WL 2967474, at *3 (awarding 1.8% of $415,000 gross settlement amount).

In the Preliminary Approval Order (and in other recent cases), the Court has expressed concern regarding proportionality when the proposed incentive awards are compared to the anticipated individual recovery of each Class member. Doc. 114, at 13-14; *Deatrick v. Securitas Sec. Services USA, Inc.*, 13-CV-05016-JST, 2016 WL 5394016, at *8 (N.D. Cal. Sept. 27, 2016) (citing *Smith*, 2016 WL 2909429, at *10) ("[T]o determine the reasonableness of a requested incentive payment, courts consider the proportionality between the incentive payment and the range of class members' settlement awards."); *see also*, *Ko v. Natura Pet Prods., Inc.*, No. C 09-02619 SBA, 2012 WL 3945541, at *14-15 (N.D. Cal. Sept. 10, 2012) (reducing incentive award

[5] Plaintiff Dale Baker previously intended to exclude himself from the Settlement and pursue his individual claims against ADT. However, Mr. Baker's circumstances have since changed, and he now intends to remain a part of the Settlement Class.

to $5,000, where the average award to class members was $35); *accord, Staton*, 327 F.3d at 978 (cautioning that where there is a "very large differential in the amount of damage awards between the named and unnamed class members," that differential must be justified by the record).

Here, the differential is justified because: (a) the well-documented record supports an upward adjustment from the presumptive $5,000 award in two selected instances; and (b) the Settlement was reached by extremely experienced Class Counsel under the auspices of an extraordinarily reputable mediator, and was unconditionally and independently accepted by the Plaintiffs without regard to the receipt of any incentive award at all. Zimmerman Decl. ¶ 53; Balint Decl. ¶ 22; Warden Decl. ¶ 23; Edenborough Decl. ¶ 12; Wilson Decl. ¶ 12; *see also*, Settlement Agreement, Doc. 94-1, at ECF 25 ("Plaintiffs' support for the Settlement Agreement as fair and reasonable is not conditioned upon the Court's award of the requested Service Awards."). Because the majority of consumer class actions involve class damages that are too small to warrant individual litigation but collectively amount to large profits for the defendant, requiring strict proportionality between incentive awards and class relief would preclude meaningful service awards in most of these cases. *See, e.g., In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 472 (C.D. Cal. 2014) (approving $5,000 incentive awards to each of three named plaintiffs in consumer class action providing class members with vouchers of $5 to $30).

Therefore, the Court should focus the propriety of an enhancement on the specific contribution of each proposed recipient in securing the ultimate $16 million benefit for the Settlement Class, as this Court did in approving enhancements over the $5,000 presumptive award in *Boring*, 2014 WL 2967474, at *3 ($7,500), *Dyer*, 303 F.R.D. at 336 ($10,000), and *Willner*, 2015 WL 3863625, at *9 ($7,500).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court at the Fairness Hearing enter an Order awarding payment from the common fund of (a) $4 million to Plaintiffs' Counsel as attorneys' fees, (b) $261,825.54 to Plaintiffs' Counsel as reimbursed litigation expenses, and $30,000 as incentive awards, to be allocated, as follows: $ 10,000 to Plaintiff

Baker, $ 10,000 to Janet Cheatham, $5,000 to Plaintiff Edenborough, $2,500 to Plaintiff Wilson, and $2,500 to Plaintiff Hernandez.

Dated: December 19, 2017

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