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9 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 **OAKLAND DIVISION**

11 IN RE: LITHIUM ION BATTERIES
12 ANTITRUST LITIGATION

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

MDL No. 2420

13 This Document Relates to:

The Honorable Yvonne Gonzalez Rogers

14 INDIRECT PURCHASER ACTIONS

15 All Indirect Purchaser Actions
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22 **GORDON MORGAN RESPONSE TO PLAINTIFFS' MOTION FOR FINAL**
23 **APPROVAL AND SUPPORTING EXHIBITS, INCLUDING EXHIBIT 2**
24 **ADDRESSING ARGUMENTS OF OBJECTORS**
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1 **I. The Court Should Not Award IPPs’ Counsel the Same Percentage Fee as**
 2 **DPPs’ Counsel.**

3 It’s class counsel, not Morgan, who disregard the Ninth Circuit’s standard of
 4 “reasonableness” for attorneys’ fees in class action settlements. Awarding the same fee
 5 percentage to attorneys who achieve dramatically different results is manifestly
 6 unreasonable.

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 8 IPPs’ counsel ask for the same 30% fee for capturing less than 1/3 of what DPPs’
 9 counsel obtained in terms of percentage of class damages. Remarkably, IPPs’ counsel ask
 10 for a greater lodestar multiplier.

	Settlement Value	Potential Damages	Settlement Return on Damages	Attorneys’ Fees	Lodestar Multiplier
DPP	\$139.3 million	\$362 million ¹	39%	\$41.7 million (30%)	.54
IPP	\$113.4 million	\$967 million ²	11%	\$34.5 million (30%)	.82

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 17 The result obtained for the class is the most important factor to be considered in
 18 awarding fees. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*,
 19 4:14-MD-2541-CW, 2017 WL 6040065, at *3 (N.D. Cal. Dec. 6, 2017), *aff’d*, 18-15054,
 20 2019 WL 1752610 (9th Cir. Apr. 17, 2019). DPPs’ counsel obtained more than *three times*
 21 the return on damages as did IPPs’ counsel. So why should they get paid the same
 22 percentage? And why should IPPs counsel receive 82% of their lodestar when DPPs’
 23 counsel get 54%?
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 28 ¹ Dkt. 2172-2 at 20.

² Dkt. 2487 at 13.

1 These are not just matters of equity among counsel. The excess fee sought by
 2 IPPs' counsel is money that should rightfully be returned to the IPP class by the Court
 3 in its fiduciary capacity. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir.
 4 2010). "As a fiduciary for the class, the district court must 'act with a jealous regard to
 5 the rights of those who are interested in the fund' in determining what a proper fee
 6 award is." *Id.*

8 Class counsel remain silent on why they are now entitled to 30% when they
 9 believed 25% was appropriate in May 2017. Dkt. 1814. Since then, the return on class
 10 damages has only dipped from 17.5%³ to 11.7%.⁴ If the only justification is that's what
 11 DPP's counsel got, it should be rejected out of hand.

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 14 **II. The Modest Return on Class Damages for IPPs Separates this Case from**
 15 **Cases Cited by Class Counsel Where Courts Awarded Higher Fees.**

16 The gross settlement fund provides IPPS with 11% of single damages. If class
 17 counsel are awarded 30% in attorneys' fees, IPPs will get 8% of their damages with the
 18 net fund.⁵ That is hardly a result worth exceeding typical recovery for a mega-fund
 19 settlement, which "is substantially less than the 25% benchmark applicable to class
 20 settlements in this Circuit." *Alexander v. FedEx Ground Package Sys., Inc.*, 05-CV-00038-
 21 EMC, 2016 WL 3351017, at *2–3 (N.D. Cal. June 15, 2016).⁶ Certainly, it cannot support

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 25 ³ Dkt. 1814 at 9.

26 ⁴ Dkt. 2487 at 1.

27 ⁵ \$113.4 million - \$34.5 million = \$78.9. \$78.9 is 8.1 % of \$967 million.

28 ⁶ Class counsel distinguish *In re High-Tech Employee Antitrust Litigation*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015) because it involved a higher common fund. Yet, they ignore *Alexander*, where Judge Chen discussed mega-fund settlements

1 a push above the 25% benchmark.

2 Class counsel cherry-pick antitrust cases where courts allowed a similar percentage
3 fee or a higher lodestar multiplier. But they omit that these cases involve far superior
4 results. For example, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, class counsel secured
5 50% of potential recovery for end-payors. No. M 07-1827 SI, 2013 WL 1365900 (N.D.
6 Cal. Apr. 3, 2013). That “exceptional” recovery supported a 28.6% fee. In *In re*
7 *Polyurethane Antitrust Litig.*, a 30% fee was appropriate when the settlement recouped “48
8 percent of ... overcharges Direct Purchasers might prove following a best-case outcome
9 at trial.” *In re Polyurethane Foam Antitrust Litig.*, 1:10 MD 2196, 2015 WL 1639269, at *1
10 (N.D. Ohio Feb. 26, 2015). Similarly, in *In re Lidoderm Antitrust Litig.*, and end-payor class
11 recovered “46% of the highest single damages estimate[,]” which supported a high fee.
12 14-MD-02521-WHO, 2018 WL 4620695, at *2 (N.D. Cal. Sept. 20, 2018); *see also In re*
13 *Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 4126533 (N.D. Cal.
14 Aug. 3, 2016) (20% recovery of single damages supported “modest increase over the
15 Ninth Circuit benchmark”).⁷ To be sure, the predicate for a high-end fee in this case
16 cannot be that class counsel secured an exceptional recovery.
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23 and recognized that a 22% fee for a \$49 million settlement “is well above the typical
24 recovery in mega-fund settlement.” *Alexander*, 2016 WL 3351017, at *2.

25 ⁷ Class counsel note that in *In re Omnivision Technologies, Inc.*, the court held that the court
26 found a 9% award of damages supported a 28% fee. 559 F.Supp.2d 1036 (N.D. Cal. Jan.
27 9, 2008). But, that recovery was exceptional because it was “more than triple the average
28 recovery in securities class action settlements.” *Id.* at 1046. There is no evidence that this
11% recovery of IPPs’ damages is above the average recovery for antitrust class action
settlements.

1 **III. 30% is Not a Typical Fee for a Mega-Fund Settlement.**

2 Class counsel offer a misleading account of empirical studies to give the false
3 impression that a 30% fee is typical of a \$113 million mega-fund. As recognized in this
4 District, even 25% for this large of a fund is above the norm. *See e.g., Alexander v. FedEx*
5 *Ground Package Sys., Inc.*, 05-CV-00038-EMC, 2016 WL 3351017, at *2–3 (N.D. Cal. June
6 15, 2016).
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8 Class counsel look at percentages from antitrust cases in the Eisenberg study
9 without focusing attention to mega-fund recoveries like this one. The authors of that
10 study explained that “[l]ooking only at cases with recoveries larger than \$100 million, we
11 see that mean and median fee percentages varied from a low of 16.6% in 2009 to a high
12 of 25.5% in 2011--variation that is probably due to the significantly smaller number of
13 very large cases in our data set.” Theodore Eisenberg et. al., *Attorneys' Fees in Class*
14 *Actions: 2009-2013*, 92 N.Y.U.L. Rev. 937, 947 (2017).
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17 Table 4 of the Eisenberg does list the mean settlement recovery as \$501.09 million
18 and mean fees as 27%. However, it identifies mean fees for antitrust settlements as \$64.1
19 million, which is 12.7% of the \$501.09 mean settlement recovery. *Id.* at 952.
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22 Otherwise, class counsel rely on a report authored by an attorney, Professor
23 Joshua Davis, formerly employed by one of the firms seeking fees in this case. Dkt.
24 2501-8. On the subject of fees, the report is unclear on the data set upon which it relies,
25 as it doesn't purport to analyze all antitrust settlements during the relevant period. *Id.* at
26 23 (“[a]mong the *analyzed* antitrust settlements from 2013-2018”) (emphasis added). The
27 report excluded “settlements that are awaiting the court order on fees and expenses,
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1 settlement that order partial attorney fee awards, and settlements with orders of
2 attorneys' fees and expenses on appeal." Dkt. 2501-8 at 23. Given the lack of clarity on
3 the underlying data, the conclusions on fees from this report should be given no weight.

4 **IV. This Court Should Unseal Hagens Berman's Bid.**

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6 As a matter of transparency, Morgan called for the unsealing of Hagens Berman's
7 bid to secure co-lead counsel status filed on March 28, 2013.⁸ Class counsel now indicate
8 they do not oppose unsealing. Dkt. 2501-2 at 15. Accordingly, this Court should order
9 the bid unsealed and allow the objectors time to review and file supplemental briefing in
10 light of its contents.

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12 As class counsel note, one factor the Ninth Circuit has identified for determining
13 the reasonableness of fees is the market rate for class counsel in the "particular field of
14 law[.]" Dkt. 2501-2 at 3 (citing *de Mira v. Heartland Emp't Serv., LLC*, No.12-CV-04092 LHK,
15 2014 WL 1026282, at *1 (N.D. Cal. Mar. 13, 2014)). Nothing could be more influential in
16 assessing the market rate for fees in this case than an actual bid one of the firms used to
17 secure co-lead counsel status. According to Hagens, the bid "provide[d]for fair
18 compensation while minimizing the impact on the proposed class."⁹

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20 With no compelling reason to keep the bid sealed and class counsel not in
21 opposition to its unsealing, Morgan again urges the Court to unseal the bid.

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23 Further, to the extent Hagens promised a lower fee, this Court in its fiduciary role
24 on behalf of the class should hold the firm to its bid. *Dugan v. Lloyds TSB Bank, PLC*,

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28 ⁸ Dkt. 108-1, ¶¶ 17-18.

⁹ *Id.* at ¶ 18.

1 No. 12-2549 WHA, 2014 WL 1647652 (N.D. Cal. April 24, 2014) (“When attorneys
2 promise to restrict the fees to be sought in a fee petition, that ex ante promise should be
3 honored, absent special circumstances”); *In re Oracle Secs. Litig.*, 131 F.R.D. 688, 692
4 (N.D. Cal. 1990) (Walker, J.).
5

6 **Conclusion**

7 Morgan renews his request for the Court to award class counsel for IPP no more
8 than 20% of the \$113.45 million settlements. This would allow an aggregate \$22,690,000
9 fee, or an additional \$18,195,000, minus the interim \$4,495,000.00 already awarded. A
10 20% award would produce a .54 lodestar multiplier, comparable to DPPs’ counsels’ .58
11 multiplier for a recovery that awarded the DPPs more than three times as much in terms
12 of percentage of single damages. Mr. Morgan also renews his request that Hagens
13 Berman bid to secure co-lead class counsel status to be unsealed. Further, the Court
14 should allow objectors time to review and file supplemental briefing in light of the
15 unsealed bid.
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20 DATED: June 25, 2019

Respectfully submitted,

/s/ Timothy R. Hanigan

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Certificate of Service

The undersigned certifies that today he filed the foregoing document on ECF which will send electronic notification to all attorneys registered for ECF-filing.

DATED: June 25, 2019

/s/ Timothy R. Hanigan
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