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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE HP PRINTER FIRMWARE UPDATE LITIGATION

Case No. 5:16-cv-05820-EJD-SVK

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Date: April 25, 2019
Time: 9:00 a.m.
Place: Courtroom 4
Judge: Hon. Edward J. Davila

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I. INTRODUCTION

HP devised Dynamic Security technology to protect its aftermarket profits, and then used the technology to disable inkjet printers fitted with competing print cartridges, causing tens of thousands of consumers to lose time and money. Plaintiffs prosecuted this case to end HP's unfair practice and recover damages for the injured consumers. Plaintiffs prevailed. Although HP previously qualified its apology with the statement that it "will continue to use" Dynamic Security, it now has agreed in writing not to use the offending technology in the class printers. HP's promise achieves the main goal of this litigation: ensuring that the two million class members can use third-party cartridges free from outside interference. Those with documented out-of-pocket losses will be fully reimbursed out of the $1.5 million fund, and those without documentation will receive about $36 each. Because Plaintiffs prevailed, the law entitles their counsel to compensation for their professional time reasonably expended in securing the result.

HP opposes the fee application despite acknowledging in the Settlement that Plaintiffs are prevailing parties under California law. Dkt. 133 ("Opp.").[1] HP's argument for the percentage method is fatally flawed. There is no common fund, constructive or otherwise. The parties negotiated for payment of notice and administrative expenses, and payment of attorneys' fees and costs, separately from the $1.5 million fund, which will be fully paid out to the class. Without a common fund or a reasonable way to value HP's promise not to redeploy Dynamic Security, the percentage method simply cannot be used.

HP cites common fund cases but no case supporting its request to slash Class Counsel's lodestar, which Class Counsel already reduced, by 90%. There is nothing unreasonable about Class Counsel recovering for their hours worked when they prevailed in the case and achieved their litigation objectives. Rote application of the percentage method to prevent compensation for their time is not appropriate with this settlement structure, and would benefit only HP. Worse, it would undermine enforcement of the consumer protection laws by penalizing Class Counsel for taking on a novel, highly complex case. The requested fees and costs should be awarded in their entirety.

II. ARGUMENT

A. California Law Applies to the Fee Request in This Case.

HP urges the Court to apply federal common law in determining a reasonable fee because

[1] HP does not oppose the requested $5,000 service awards for the class representatives.

Plaintiffs sued under both state and federal law. Opp. at 8-9. But HP is bound by the Settlement Agreement, which provides that California law will govern Class Counsel's fee request. *See* Dkt. 110-2 at 17, 22 (providing that HP will not dispute that Plaintiffs are prevailing parties under California Code of Civil Procedure section 1021.5, and further providing that California law applies). A choice of law provision is enforceable in connection with a request for attorneys' fees. *See, e.g.*, *Browne v. American Honda Motor Co.*, 2010 WL 9499073, at *5 (C.D. Cal. Oct. 5, 2010) (applying California law where the settlement agreement contained a California choice of law provision); *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 894 (C.D. Cal. 2016). Having agreed to provisions that assume and anticipate a fee petition under California law, including section 1021.5, HP should not be heard to dispute that California fee jurisprudence applies.

Even absent the parties' agreement, California law would govern because where "Class Counsel are seeking fees and costs under California statutes, California law applies to their request." *Aarons v. BMW of N. Am., LLC*, 2014 WL 4090564, at *15 (C.D. Cal. Apr. 29, 2014). In *Aarons*, for example, the court applied California law to a fee request after the plaintiffs prevailed under both state and federal law. *See id.* Plaintiffs here sued under the UCL and CLRA, and as prevailing parties seek attorneys' fees under two California fee-shifting provisions: Code of Civil Procedure section 1021.5, and Civil Code section 1780(e). Mot. at 2, 7-9. "Plaintiffs brought and prevailed in both federal and California state law claims; the Court applies California state law in calculating the appropriate fees." *PQ Labs, Inc. v. Qi*, 2015 WL 224970, at *1 (N.D. Cal. Jan. 16, 2015) (citing *Mangold v. California Pub. Util. Comm'n*, 67 F.3d 1470, 1478-79 (9th Cir. 1995)). HP's cited authority took the same approach. *See Montano v. Bonnie Brae Convalescent Hosp. Inc.*, 2015 WL 12698407, at *2 (C.D. Cal. Sept. 14, 2015), *aff'd*, 686 F. App'x 479 (9th Cir. 2017) ("[T]he court adopts the state approach to calculating reasonable attorney's fees."). Accordingly, the Court should apply California attorney fee law in this case.

B. A Percentage Cross-Check Is Not Appropriate Because There Is No Common Fund and HP's Promise Not to Disable the Class Printers Cannot Be Easily Valued.

1. The Case Is Not Amenable to the Percentage Method.

HP states that this Court should not take a "mechanical or formulaic approach"—but then proceeds to insist on a mechanical percentage cross-check. Opp. at 6 (citation omitted). HP ignores that

the percentage-of-the-fund method cannot be used when there is no common fund and a significant component of the relief is non-monetary and difficult to value. For the Court to apply the percentage method in these circumstances would contravene the requirement that a prevailing party be fully compensated for all reasonably expended hours. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001); *Cunningham v. County of Los Angeles*, 879 F.2d 481, 488 (9th Cir. 1988).

To be sure, the percentage method may be applied in a common fund case, i.e., when "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money *out of which . . . the fees are to be paid*." *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977) (emphasis added). But here, attorneys' fees will be paid separately by HP—not out of $1.5 million fund—and will not affect the relief for the class. Because "th[is] litigation did not result in the creation or preservation of a fund from which attorney fees could be paid," "[t]he common fund doctrine plainly does not apply here." *Northwest Energetic Servs., LLC v. California Franchise Tax Bd.*, 159 Cal. App. 4th 841, 878 (2008).

The lodestar method "[m]ust be [a]pplied" when there is no common fund from which fees will be paid. *Elhilu v. Quizno's Franchising Co., LLC*, 2009 WL 10671939, at *4 (C.D. Cal. Dec. 8, 2009) (citing *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 39 (2000)). Furthermore, it is "improper" to use the percentage method when the value of the settlement is not easy to ascertain. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1810 (1996) (reversing and finding abuse of discretion in use of percentage method). In this case, there is no common fund and the Settlement provides significant non-monetary relief that is not easily valued. Therefore, the lodestar method must be applied. Application of the lodestar method is also consistent with the intention of the parties, as reflected in their agreement.

HP is incorrect that "the Ninth Circuit requires" the Court to undertake a percentage cross-check. Opp. at 7. In both of the cases HP cites, the Ninth Circuit held that a lodestar cross-check is discretionary. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011) (encouraging but not requiring a lodestar cross-check in common fund cases); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) (reiterating that a lodestar cross-check may ensure that applying the percentage benchmark for common fund cases does not result in an exorbitant hourly rate). So HP's argument invites error.

2. The Lodestar Method Is the Appropriate Method for Determining a Reasonable Fee in This Case.

Attorneys' fee awards under section 1021.5 "must be calculated using a lodestar analysis." *Collado v. Toyota Motor Sales, U.S.A., Inc.*, 550 F. App'x 368, 370 (9th Cir. 2013). Such awards "should be fully compensatory" and "ordinarily include compensation for all the hours reasonably spent, including those relating solely to the fee." *Ketchum*, 24 Cal. 4th at 1133 (emphasis and citation omitted); *see Pearson v. Green Tree Servicing, LLC*, 2015 WL 632457, at *4 (N.D. Cal. Feb. 13, 2015) ("Plaintiffs typically receive fully compensatory attorneys' fees under Section 1021.5—that is, courts award the entire amount spent regardless of determining whether the amount was 'reasonable.'") (citing *Serrano v. Unruh*, 32 Cal. 3d 621, 632 (1982)). Similarly, a key purpose of the CLRA is to "allow[] consumers to pursue remedies in cases as here, where the compensatory damages are relatively modest." *Hayward v. Ventura Volvo*, 108 Cal. App. 4th 509, 512 (2003). Thus, "[t]o limit the fee award to an amount less than that reasonably incurred in prosecuting such a case, would impede the legislative purpose underlying section 1780." *Id.*

HP argues that section 1021.5 allows counsel to be fully compensated only in the presence of a mandatory fee-shifting provision. Opp. at 11. HP's argument is self-defeating because Plaintiffs seek fees under the CLRA, which mandates fee-shifting. Cal. Civ. Code § 1780(e); *see also Guttmann v. Ole Mexican Foods, Inc.*, 2016 WL 9107426, at *5 (N.D. Cal. Aug. 1, 2016). Moreover, a fully compensatory fee may be awarded under section 1021.5 alone. *See, e.g., Gottlieb v. Conseco Senior Health Ins. Co.*, 2013 WL 12075980, at *4 (C.D. Cal. July 2, 2013); *Building a Better Redondo, Inc. v. City of Redondo Beach*, 203 Cal. App. 4th 852, 870 (2012).

HP insists the fee be capped by reference to the $1.5 million set aside to compensate the class, but "the size of Plaintiffs' recovery as compared to the fees award sought does *not* determine whether a deduction should be taken from the lodestar; on the contrary, the state courts are clear in explaining that consumer protection may require precisely the outcome that Defendant challenges of a disproportionate award." *Jefferson v. Chase Home Fin.*, 2009 WL 2051424, at *3 (N.D. Cal. July 10, 2009) (emphasis added); *see, e.g., Garcia v. Resurgent Capital Servs., L.P.*, 2012 WL 3778852, at *10 (N.D. Cal. Aug. 30, 2012) (stating that "[i]t is not uncommon for a fee award to exceed the damages award," and awarding

attorneys' fees amounting to over four times the plaintiff's recovery); *Lopez v. CIT Bank, N.A.*, 2016 WL 3163175, at *9 (N.D. Cal. June 7, 2016) (similar); *Warren v. Kia Motors Am., Inc.*, 30 Cal. App. 5th 24, 37 (2018) (reversing for abuse of discretion where trial court reduced lodestar-based fee by reference to damages amount) (citing *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 164 (2006)); *Garcia v. Stanley*, 2017 WL 897429, at *4 (N.D. Cal. Mar. 7, 2017) (noting that the Legislature declared consumer protection statutes "serve an important public purpose disproportionate to their cash value") (citation omitted). Courts in this District have awarded fully compensatory fees in consumer cases that produced no monetary relief at all. *See, e.g.*, *In re Yahoo Mail Litig.*, 2016 WL 4474612, at *9-11 (N.D. Cal. Aug. 25, 2016); *Lilly v. Jamba Juice Co.*, 2015 WL 2062858, at *5 (N.D. Cal. May 4, 2015); *Guttmann v. Ole Mexican Foods, Inc.*, 2016 WL 9107426, at *6 (N.D. Cal. Aug. 1, 2016).

HP's percentage argument attributes no value to its promise not to use Dynamic Security on the 3.5 million class printers.[2] That promise has considerable value, however, because it guarantees class members the ability to use generic ink cartridges that are much more affordable than HP's. At the same time, the monetary value of the promise is not easily ascertained because in its absence, the likely scope, duration, and effects of future Dynamic Security events would be uncertain. As a result, "[a] percentage-of-recovery cross-check is unlikely to be helpful . . . ." *Chambers*, 214 F. Supp. 3d at 904.

There is "no common fund against which to apply a benchmark percentage," and "the non-monetary benefits conferred under the settlement cannot be quantified with precision, if at all." *Id.* (citing *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016) (concluding relief was "difficult to monetize because it include[d] injunctive relief and intangible benefits, including the peace of mind that comes with the enhanced warranty and streamlined claims process")); *see also* Opp. at 12 (HP itself admits that a pure lodestar calculation is warranted "where it is inherently difficult to quantify the benefit"); *In re HP Laser Printer Litig.*, 2011 WL 3861703, at *5 (C.D. Cal. Aug. 31, 2011) (finding it "appropriate to base the attorney fees on a lodestar calculation rather than any sort of common fund calculation" and "unnecessary to attempt to quantify the value of the injunctive relief where a lodestar calculation provides a reasonable way to determine attorney fees"). Attempting a percentage cross-check

[2] In addition to this equitable relief benefiting all class members and the $1.5 million for people with concrete losses, HP paid for the class notice and is paying for ongoing claims administration, at a total estimated cost of $400,000. HP's argument does not account for these expenditures benefiting the class.

in this case would be neither "simple" nor "intuitive." Opp. at 7. It would instead create "more opportunity for error through guesswork of the 'true' value of the settlement," given the obvious difficulty of valuing HP's promise not to disable an unspecified number of printers. *Kacsuta v. Lenovo (U.S.) Inc.*, 2014 WL 12585787, at *11 (C.D. Cal. Dec. 16, 2014).

The punitive reduction HP seeks is not only inconsistent with the settlement structure agreed upon; it would also undermine "the fundamental objective" of California's fee-shifting statutes—"to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases." *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 565 (2004) (citation omitted); *see also Graciano*, 144 Cal. App. 4th at 164 ("[B]ecause this matter involves an individual plaintiff suing under consumer protection statutes involving mandatory fee-shifting provisions, the legislative policies are in favor of [plaintiff's] recovery of all attorney fees reasonably expended, without limiting the fees to a proportion of her actual recovery."); *Thayer v. Wells Fargo Bank*, 92 Cal. App. 4th 819, 839 (2001) (California law is "sensitive to the need to encourage 'private attorneys general' willing to challenge injustices in our society. Adequate fee awards are perhaps the most effective means of achieving this salutary goal."); *Lealao*, 82 Cal. App. 4th at 47 ("Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law . . . attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior.").

For these reasons, numerous courts have declined to attempt a percentage cross-check in this type of situation. HP offers no grounds to depart from these precedents. *See, e.g.*, *Brazil v. Dell Inc.*, 2012 WL 1144303, at *1 (N.D. Cal. Apr. 4, 2012) (employing lodestar method without a cross-check where there was no common fund, a key benefit was changes to the defendant's business practices, and fees would be paid separately by the defendant); *Wahl v. Yahoo! Inc.*, 2018 WL 6002323, at *5 (N.D. Cal. Nov. 15, 2018) (employing lodestar method without a cross-check where the settlement provided cash payments to class members and effected changes to the defendant's business practices); *Carr v. Tadin, Inc.*, 51 F. Supp. 3d 970, 978 (S.D. Cal. 2014) (refusing to conduct a percentage cross-check and holding that "because there is no common fund, the lodestar analysis applies").

3. HP's Cited Cases Do Not Support Its Argument.

HP claims that in *Laffitte v. Robert Half International Inc.*, 1 Cal. 5th 480 (2016), the California Supreme Court held that courts should rely on a cross-check when awarding attorneys' fees. But the *Laffitte* court did *not* hold that courts should conduct a cross-check; it granted review to resolve whether its prior fee jurisprudence allows use of the percentage method in the *common fund* setting. *Id.* at 503. The court held "that use of the percentage method to calculate a fee in a common fund case . . . does not in itself constitute an abuse of discretion." *Id*. Contrary to HP's claim, the court stopped short of requiring a cross-check, regardless of method, in all cases. *See id.* at 506 (holding that in common fund cases, trial courts "retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee."). *Laffitte* does not supply the rule of decision in this case and lends no support to HP's position.

Apparently conceding that this Settlement does not establish a common fund, HP contends that "*Laffitte*'s holding is not strictly limited to 'common fund' settlements" but also applies to a so-called "constructive common fund." Opp. at 10 n.3 (citing *Bluetooth*, 654 F.3d at 943). Setting aside that the *Laffitte* court specifically declined to address whether the percentage method is appropriate in a constructive common fund situation, *see* 1 Cal. 5th at 503, no constructive common fund exists here.

That HP will pay $1.5 million to class members and separately pay attorneys' fees does not give rise to a constructive common fund. Rather, a constructive common fund exists when the parties have attempted to "structure artificially separate fee and settlement arrangements" in order "to circumvent the 25% benchmark" that applies in the common fund context. *Bluetooth*, 654 F.3d at 943 (citation omitted); *see also Lealao*, 82 Cal. App. 4th at 37 (explaining that a constructive common fund exists "where the monetary value of the benefit conferred on the class is reasonably ascertainable" such that the defendant "has a fairly good idea of the range of fees that will be sought" and, consequently, the total value of the settlement will "invariably be influenced by the amount of fees" the defendant would pay). HP's opposition to the fee motion confirms the absence of any attempt by the settling parties here to circumvent the percentage benchmark.

And HP's reliance on *Bluetooth* is misplaced. Faced with the prospect of obtaining no monetary relief, plaintiffs' counsel in that case negotiated a settlement that secured up to $800,000 in attorneys'

fees but no compensation for the class, a disparity that, together with other factors, indicated counsel had put their own interests before class members' interests. 654 F.3d at 939-40. By contrast, Class Counsel and HP did not reach any agreement on the amount of attorneys' fees, and the Settlement will deliver $1.5 million to the class, none of which will revert to HP. Class Counsel should not be penalized for placing relief for the class ahead of an agreement on fees. This Court has already found that "[t]he Settlement is the product of non-collusive arm's-length negotiations between experienced counsel who were thoroughly informed of the strengths and weaknesses of the Action, including through discovery and motion practice." Preliminary Approval Order ¶ 4, Dkt. 116.

True v. American Honda Motor Company is also inapposite. 749 F. Supp. 2d 1052 (C.D. Cal. 2010). In *True* there was no guarantee that the defendant would pay any money other than attorneys' fees, and not even the plaintiff argued that the injunctive relief provided any real value to the class. *Id*. at 1078. In further contrast to this case, class counsel in *True* negotiated attorneys' fees and a clear sailing agreement "at the same time as the substantive relief to the class." *Id*.; *compare* Reply Declaration of Elizabeth A. Kramer, ¶ 15 ("Kramer Reply Decl.").

HP cites *Stovall-Gusman v. W.W. Granger, Inc*. without disclosing that the court there did *not* conduct a cross-check. 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015). And HP's other cases involve common funds or readily quantifiable injunctive relief.[3] No case supports HP's self-serving request for a 90% fee reduction.

C. There Is No Basis for Reducing the Lodestar Request.

Far from "blindly adher[ing] to their lodestar" (Opp. at 1), Class Counsel's fee request reflects a 7% reduction in their lodestar as of February 2019. *See* Declaration of Elizabeth A. Kramer, ¶ 63 ("Kramer Decl."), Dkt. 120. HP presents no legitimate justification for any further downward adjustment.

1. The Settlement Provides Significant Benefits to the Class.

To begin with, HP's support for the Settlement as fair and adequate contradicts its assertion that

[3] *See, e.g.*, *Rosado v. eBay Inc.*, 2016 WL 3401987, at *6-8 (N.D. Cal. June 21, 2016) (percentage method with lodestar cross-check applied to common fund); *Mendoza v. Hyundai Motor Co., Ltd.*, 2017 WL 342059, at *13 (N.D. Cal. Jan. 23, 2017) (fees awarded from common fund); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 590 (N.D. Cal. 2015) (same); *Bottoni v. Sallie Mae, Inc.*, 2013 WL 12312794, at *7 (N.D. Cal. Nov. 21, 2013) (monetary value of debt relief was readily ascertainable); *Rainbow Bus. Sols. v. MBF Leasing LLC*, 2017 WL 6017844, at *1 (N.D. Cal. Dec. 5, 2017) (settlement reaffirmed injunction prohibiting defendant from deducting $25 from bank accounts, so injunctive relief was easily valued).

the litigation was "unnecessary" and served "no public purpose." Opp. at 11 (quoting *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1173 (1998)). The successful resolution of this action protects two million consumers from HP's injurious technology, vindicating their rights to use their printers free from unfair and deceptive practices and post-sale interference with their property. *See* Mot. at 8. An absent class member who made a claim has submitted a declaration describing his experience and supporting Class Counsel's fee request "because they stopped HP's unfair business practice and got money for people HP harmed." *See generally* Declaration of Marv Berkowitz; *see also* Declaration of Anthony Noe (describing his experience and supporting Class Counsel's fee request). HP does not address these points other than to assert—with no support or explanation for why it did not sue the purportedly infringing competitors—that it was merely protecting its intellectual property. *See* Opp. at 3 (complaining, in the abstract, about "reverse engineer[ing]" even though uniform trade secret law gives competitors wide latitude to reverse engineer, *see, e.g.*, Cal. Civ. Code § 3426.1(a)).

HP does not suggest, moreover, that it would have agreed to any greater relief, that any deserving claimant will be uncompensated, that Class Counsel left anything "on the table," or that the case could have been settled earlier. Nor does HP demonstrate that Class Counsel could have successfully prosecuted and resolved this case—involving HP's highly advanced, proprietary technology—without incurring well in excess of $375,000 in attorneys' fees. HP's position should therefore be rejected, as denying Class Counsel reasonable compensation for their services would impair the ability of victims of unfair business conduct to obtain effective representation, by rendering their claims economically infeasible to pursue. *See Hayward*, 108 Cal. App. 4th at 512 (noting that fee-shifting statutes allow consumers to pursue cases where "compensatory damages are relatively modest"); *Lealao*, 82 Cal. App. 4th at 53 (stating that "awards that are too small . . . chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims").

While the $1.5 million recovery (with HP separately paying notice and administrative expenses) would by itself justify awarding Plaintiffs their attorneys' fees in full, HP fails entirely to account for the equitable relief prohibiting future use of Dynamic Security. Such non-monetary relief should be considered in evaluating the benefit a settlement confers. *See Linney v. Cellular Alaska P'ship*, 151 F.3d

1234, 1240 (9th Cir. 1998) (stressing that the value of the injunctive relief "outweighs the value of the settlement fund"); *In re Ferrero Litig.*, 583 F. App'x 665, 668 (9th Cir. 2014) (injunctive relief that requires changes to business practices "is meaningful" relief for purposes of determining a reasonable fee); *Miller v. Ghirardelli Chocolate Co.*, 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015) ("[C]ourts consider both the monetary and nonmonetary benefits.").[4] HP devised and deployed Dynamic Security, cautioned that it intended to use it again, and absent the Settlement (subject to any enforcement actions) would be free to reenable Dynamic Security on the class printers at any time, exposing hundreds of thousands of people to unexpected product failure. The Settlement allows consumers to use their printers with affordable ink and without fear of further shenanigans by HP. *See* Dkt. 91 at 16 (an injunction was "[t]he primary relief" Plaintiffs highlighted in their motion for class certification).

HP asks the Court to disregard the equitable relief in assessing the Settlement benefits because HP did not agree to an "injunction." Opp. at 13. Yet HP's agreement not to reactivate Dynamic Security has the same effect as an injunction. *See* 11/8/18 Hrg. Tr. at 5:19-21, Dkt. 117 (the Court referred to this agreement as "the injunctive relief, if you will"). Similarly, the Ninth Circuit held that a settlement in which a defendant agrees to refrain from certain conduct is "the equivalent of an injunction" entitling the plaintiff to attorneys' fees as a prevailing party. *Saint John's Organic Farm v. Gem Cty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1060 (9th Cir. 2009); *see also La Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, 2011 WL 13273498, at *5 (C.D. Cal. Aug. 31, 2011). HP's focus on the label rather than the substance of relief should thus be rejected. Accepting HP's argument also would make it harder to settle class actions, abridging the strong policy favoring settlements, *see Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), because, as HP's argument shows, defendants may be reluctant to characterize their litigation concessions as an injunction.

HP's claim that it did not intend to reactivate Dynamic Security at the time of the Settlement

[4] HP's benefit argument relies on two non-class cases, neither involving California fee-shifting law, in which plaintiffs only obtained one dollar in nominal damages. *See Mahach-Watkins v. Depee*, 593 F.3d 1054, 1063 (9th Cir. 2010) (civil rights plaintiff obtained one dollar in nominal damages); *Branco v. Credit Collection Servs., Inc.*, 2011 WL 6003877, at *1 (E.D. Cal. Dec. 1, 2011) (court awarded statutory damages of one dollar under the Fair Debt Collection Practices Act after finding defendant's actions not abusive or harassing). A nominal one-dollar recovery is a far cry from the relief obtained here, which includes a judicially enforceable agreement securing the key litigation objective and a $1.5 million fund that will fully compensate people with documented out-of-pocket losses.

(Opp. at 13) does not detract from the value of its promise. Class Counsel secured a judicially enforceable promise prohibiting the defendant from reinstating an allegedly unlawful practice, thereby conferring a substantial benefit. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th Cir. 2012) (defendant's promise not to reactivate a program was not "illusory" because "absent a judicially-enforceable agreement, Facebook would be free to revive the program whenever it wanted"); *Bostick v. Herbalife Int'l of Am., Inc.*, 2015 WL 12731932, at *23 (C.D. Cal. May 14, 2015); *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (a judicially enforceable settlement agreement that alters the legal relationship between the parties "may serve as the basis for an award of attorney's fees"); *Vasquez v. State of Cal.*, 45 Cal. 4th 243, 261 (2008) (a "judicially recognized change in the parties' legal relationship" supports a fee award under section 1021.5). Class Counsel invested many hours to secure HP's formal promise to refrain from the challenged conduct. HP cannot evade its obligations under the Settlement and the fee-shifting statutes by claiming it intended all along to reform its ways, particularly when its spokesman professed the exact opposite.

In a public apology following the September 2016 disablements, HP's Chief Operating Officer said that HP "*will continue* to use security features to . . . protect our IP . . . that may prevent some third-party supplies from working." Dkt. 91 at 11 (emphasis added).[5] While HP maintains that it "had no intention of reactivating" Dynamic Security (Opp. at 13), intentions can change and are categorically different from an injunction or enforceable agreement. This is why "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). HP has not met that standard here.

2. The Case Involved Complex and Novel Issues of Law and Fact.

HP's argument that this case was not complex and novel is equally meritless. Opp. at 14. HP's own previous stipulations record the "complexity of discovery," recognizing that its document productions "concern highly technical security protocols, firmware development, and printer and cartridge functionality." Dkt. 87. This case raised cutting-edge issues in which established tort, property,

[5] HP's curated description of its "patch" (Opp. at 4) omits the fact that HP did not disclose it except on its own website, and that unlike Dynamic Security, which was a "push" update that HP imposed on users, the patch had to be affirmatively pulled by users in spite of the lack of notice.

and unfair competition law concepts intersected with the developing "internet of things." Before this Court issued its memorandum order and opinion, *see San Miguel v. HP Inc.*, 317 F. Supp. 3d 1075 (N.D. Cal. 2018), little case law addressed software like Dynamic Security or a manufacturer's right to unilaterally disable features in products it had already sold. *See, e.g.*, Opp. to Mot. to Dismiss, Dkt. 29 at 3-15 (addressing HP's challenges to Plaintiffs' standing and whether its alleged conduct violates the unfair competition laws). HP's contention that it could disable printers to protect its intellectual property also required Class Counsel to expend considerable time and effort studying HP's prior patent and trade secret litigation. *See* Kramer Decl., ¶ 29.

Dynamic Security is highly technical to the point of being nearly impenetrable. Kramer Reply Decl., ¶ 10. The documents HP produced were challenging to review and analyze because they concerned complex, advanced technologies—both Dynamic Security and related technologies like firmware and printer driver software, as well as technical components like cartridge microchips and microcontrollers. Kramer Reply Decl., ¶¶ 10-12. Making it even harder to decipher the documents, HP used shorthand and code names to describe various technologies and their characteristics. Kramer Reply Decl., ¶¶ 10. Class Counsel thus faced a challenge in understanding how Dynamic Security worked, how it was implanted on printers, how, when, and why updates were triggered, and their effects. Class Counsel located and consulted with a technical expert and tailored their work, including in deposition practice, to understand technology to which HP ascribed trade secret status. Kramer Decl., ¶¶ 26, 31, 34-35. As a result of these efforts Class Counsel were able to grasp the workings of this complex technology and describe it in as simple terms as possible in their motion for class certification. *See* Dkt. 91. The motion analogized HP's firmware updates to the tort of trespass to chattels, requesting a hybrid Rule 23(b)(2) and 23(c)(4) certification based on a trial plan tailored to the facts of this case and informed by the Court's motion to dismiss ruling.

The Settlement provides all the relief that a class trial could have provided, vindicating consumer rights in an emerging area that will increase in importance as more and more products are connected to the internet. *See National Fed'n of the Blind v. Target Corp.*, 2009 WL 2390261, at *9 (N.D. Cal. Aug. 3, 2009) ("Some important benefits are difficult to quantify, such as clarifying a certain area of law, forcing changes in corporate policies affecting thousands of individuals . . . . These are more than merely

'technical' victories; they are the very heart of what plaintiffs sought to accomplish."). Class Counsel designed a successful claims procedure, notice program, and plan of allocation to remedy a problem of HP's making. HP reported that it could not identify printer owners who experienced a print interruption attributable to Dynamic Security and Class Counsel found no evidence to the contrary. Kramer Reply Decl., ¶ 17. The notice program, funded by HP, used email, U.S. mail, and a social media campaign in an effort to reach all class members and encourage those with economic losses to come forward. Kramer Decl., ¶¶ 53-55; Dkt. 130 at ¶¶ 11-17 (Azari Declaration); Declaration of Lindsey Marquez, ¶¶ 5, 11-12 ("Marquez Decl."). The claims process enabled those who experienced a print interruption while using generic ink to make a claim either for reimbursement of out-of-pocket losses (if documented) or for a uniform payment (with a simple attestation). Kramer Reply Decl., ¶ 17.

This process is nearly identical to what Plaintiffs proposed for an individual prove-up procedure after a liability verdict. Kramer Decl., ¶¶ 56-57. And the results of the claims process show that it worked as planned. *See* Marquez Decl., ¶ 13. The number of class printers claimed is about 32,295, which falls in between the parties' competing estimates. Kramer Reply Decl., ¶ 18. All documented out-of-pocket costs will be reimbursed in full. *Id.* The remaining amount in the fund will be distributed *pro rata* to all claimants, with each printer that was the subject of a claim receiving around $36. *Id.*

D. Class Counsel's Fee and Expense Request Is Adequately Supported and Reasonable.

HP further contends that Plaintiffs have not substantiated their fees and expenses because they have not filed time sheets and invoices. Opp. at 15-18. But Class Counsel's declarations detail the work they performed over the course of this litigation, as summarized from contemporaneous time records. Nothing more is required. *See* Mot. at 10 n.2. "[D]etailed time sheets are not necessary" for Plaintiffs to recover their fees. *Oxina v. Lands' End, Inc.*, 2016 WL 7626190, at *6 (S.D. Cal. Dec. 2, 2016) (citing *Fox v. Vice*, 563 U.S. 826, 838 (2011)); *see also, e.g.*, *Kim v. Space Pencil, Inc.*, 2012 WL 5948951, at *8 (N.D. Cal. Nov. 28, 2012) (relying on declarations from counsel). Nor are expense invoices necessary. *See, e.g., Sadowska v. Volkswagen Grp. of Am., Inc.*, 2013 WL 9600948, at *9 (C.D. Cal. Sept. 25, 2013) ("Plaintiffs provided declarations from Plaintiffs' Counsel to verify these figures, which is sufficient evidence to substantiate their request for fees and expenses.").

Class Counsel's descriptions of the work they performed are sufficiently detailed and provide the

Court with a more meaningful way to assess the hours expended than voluminous chronological entries. The descriptions need only "identify the general subject matter" of the legal work performed. *Perfect 10, Inc. v. Giganews, Inc.*, 2015 WL 1746484, at *26 (C.D. Cal. Mar. 24, 2015), *aff'd*, 847 F.3d 657 (9th Cir. 2017). Significantly, breaking down the work into five discrete categories, as Class Counsel did, complies with this District's Procedural Guidance for Class Action Settlements: "Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed." Class Counsel organized their chronological time records by timekeeper and task category in firm-by-firm tables, and narratively described the work performed in detailed declarations. Kramer Reply Decl., ¶ 23. Based on Class Counsel's experience, the information submitted provides a complete and accurate basis for the Court to evaluate the reasonableness of the lodestar, and in a format less burdensome than the underlying time records. Kramer Reply Decl., ¶¶ 23-25. As previously noted (Mot. at 10 n.2), Class Counsel will provide those records at the Court's request.

HP—without divulging any details about its own legal bill—questions the amount of time Class Counsel spent on discovery and pretrial motions. Opp. at 16-18. The Ninth Circuit has cautioned that "lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Thus, before the number of hours worked may be reduced, "it must appear that the time claimed is obviously and convincingly excessive under the circumstances." *Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1123 (C.D. Cal. 2012) (internal quotation marks omitted). HP's bald accusations of inefficient case management (Opp. at 10 n.3) and "exceedingly high" hours (Opp. at 14) are unfounded.

As to the amount of time spent on discovery and document review, HP ignores the dozens of meet-and-confer sessions, several sets of interrogatories, responses, and supplemental responses, broad range of matters covered in the Rule 30(b)(6) depositions, and extensive negotiations surrounding document productions, privilege logs, deposition topics, and inspection of Plaintiffs' printers and computers. Kramer Decl., ¶¶ 28-35; Kramer Reply Decl., ¶¶ 9-14. Moreover, as discussed above, a thorough technical understanding of Dynamic Security was crucial to Plaintiffs' claims and their ability to prepare an informed class certification motion. Class Counsel had to analyze discovery regarding the

layers of computer code associated with Dynamic Security; how HP's servers communicate with HP printers; how Dynamic Security was delivered onto HP printers via firmware updates; the so-called "patch" to deactivate Dynamic Security; the mechanisms by which HP detected what kind of ink cartridge was installed and which cartridges would be disabled; how disablement occurred; and how HP generated the "missing or damaged" error message that users saw. Kramer Decl., ¶¶ 26-27. Adding to the complexity, the class printers encompassed many different models that connect to different types of computers with different operating systems. While HP of course had the relevant technical materials on hand and access to its engineering teams to explain them, Plaintiffs did not. Almost no information about Dynamic Security was publicly available, and extensive work in discovery—including close analysis of HP's documents in conjunction with expert consultation—was necessary to prosecute the action. Kramer Decl., ¶¶ 22-23, 26-31; Kramer Reply Decl., ¶¶ 9-14.

Likewise, the time Class Counsel spent on pretrial motions and hearings was reasonable and necessary to the successful case prosecution. The separate actions were vigorously litigated from their inception. Kramer Reply Decl., ¶¶ 3-8. In December 2016, HP separately moved to dismiss *San Miguel* and *Doty*, and Plaintiffs in those actions opposed HP's motions. Dkts. 19, 29; *Doty* Dkts. 17, 20. HP also moved to stay or transfer *San Miguel* pursuant to the first-to-file rule, and the *San Miguel* Plaintiffs opposed that motion. Dkts. 18, 28. Class Counsel's pre-consolidation work was not a squabble over representation, as HP asserts. Opp. at 17 n.5. Instead, counsel for Plaintiffs in separate cases aligned and negotiated with HP about the organization of and the proper venue for this litigation, leading to voluntary transfers of the related cases on file in different jurisdictions, thereby streamlining the issues and conserving judicial resources. That only two motions (until this one) were litigated after consolidation shows Class Counsel's negotiating skill. Class Counsel should not be penalized for doing the hard work needed to secure a favorable result. *See, e.g.*, *Charlebois*, 993 F. Supp. 2d at 1125 ("[T]he Court sees no reason why it should punish the attorney that researches the law and facts before putting paper to pen.").

III. CONCLUSION

For the reasons set forth above and in the motion, Plaintiffs respectfully request that the Court award attorneys' fees and costs in the amount of $2,833,011.78, together with a $5,000 service award for each of the five class representatives.

Dated: April 11, 2019

Respectfully submitted,

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ATTESTATION

I, Jordan Elias, am the ECF user whose identification and password are being used to file this motion. I hereby attest under penalty of perjury that concurrence in this filing has been obtained from all counsel listed above.

DATED: April 11, 2019

/s/ *Jordan Elias*
Jordan Elias

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to all counsel of record registered in the CM/ECF system.

/s/ *Jordan Elias*
Jordan Elias