BETSY C. MANIFOLD (182450)
manifold@whafh.com
RACHELE R. BYRD (190634)
byrd@whafh.com
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
750 B Street, Suite 1820
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

MARK C. RIFKIN (*pro hac vice*)
rifkin@whafh.com
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, New York 10016
Telephone: 212/545-4600
Facsimile: 212/545-4653

LEE SHALOV (*pro hac vice*)
lshalov@mclaughlinstern.com
MCLAUGHLIN & STERN LLP
260 Madison Avenue
New York, New York 10016
Telephone: 646/278-4298
Facsimile: 212/448-0066

JANINE L. POLLACK (*pro hac vice*)
jpollack@calcaterrapollack.com
CALCATERRA POLLACK LLP
1140 Avenue of the Americas, 9th Floor
New York, NY 10036-5803
Telephone: 212/899-1765
Facsimile: 332/206-2073

C. MARIO JARAMILLO
cmj@access.law
C. MARIO JARAMILLO, PLC (dba ACCESS LAWYERS GROUP)
527 South Lake Ave., Suite 200
Pasadena, CA 91101
Telephone: 866/643-9099
Facsimile: 866/686-5590

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

IN RE: RENOVATE AMERICA FINANCE CASES	Case No. RICJCCP4940
THIS DOCUMENT RELATES TO: ALL ACTIONS	**PLAINTIFFS' FIFTH SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE AWARDS**
	DATE: Feb. 3, 2022 TIME: 9:00 a.m. JUDGE: Hon. Sunshine Sykes DEPT.: 6

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I. INTRODUCTION

Plaintiffs George Loya, Judith Loya, Richard Ramos, Michael Richardson and Shirley Petetan (collectively, "Plaintiffs") submit this fifth supplemental memorandum in further support of their Motion for Final Approval of Class Action Settlement ("Final Approval Motion") and Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Awards ("Fee Motion"). Over five years ago, Class Counsel undertook three separate cases seeking redress for persons or entities who were deceived in connection with obtaining Property Assessed Clean Energy ("PACE") tax assessment financing through Renovate America, Inc.'s ("Renovate" or "Defendant") Home Energy Renovation Opportunity ("HERO") program in several respects related to specific disclosures in their tax assessment contracts. The three original complaints included as defendants Renovate and, respectively, each of the governmental entities involved in the HERO program for each region, namely the Western Riverside Council of Governments ("WRCOG"), the San Bernardino Associated Governments ("SANBAG"), and the County of Los Angeles ("LAC"). Plaintiffs generally alleged that certain of the fees and features of the tax assessment contracts were misrepresented and unfair. These were risky and hard-fought cases, as demonstrated by the fact that they were litigated through dismissal proceedings in both federal and state court. Through the hard work of Class Counsel and the dedication to the case of the Plaintiffs, a $2,255,000.00 Settlement was achieved, and through determination and negotiations by Class Counsel the Settlement was saved from bankruptcy proceedings. Plaintiffs now seek final approval of the Settlement, and Class Counsel seek fees and expenses for their work in achieving that Settlement, as well as Class Representative Awards for the Plaintiffs.

After multiple interim proceedings, the Court originally scheduled the Final Approval Hearing for February 11, 2021. But on December 23, 2020, Renovate and its related entities filed a Notice of Stay of Proceedings in this Court due to the filing of a voluntary petition under chapter 11 of Title 11 of the United States Code in the District of Delaware (the "Bankruptcy Action"). As a result, in accordance with 11 U.S.C. § 362, all proceedings in this Court were stayed pending further order. Class Counsel did not know if they would be able to save the Settlement given that the committee of unsecured creditors had a justiciable claim that the settlement funds in escrow,

in the amount of $1.7 million (the "Escrowed Funds"), were "property of the bankruptcy estate" pursuant to 11 U.S.C. § 341. Upon retention of bankruptcy counsel, a motion for relief from the automatic stay was filed on behalf of the Class Representatives and a Class Claim was filed in the Bankruptcy Action. The Debtors-in-Possession elected to not challenge the position of the Class regarding ownership rights to the Escrowed Funds but reserved the right to do so pending resolution of the stay relief motion. As with most chapter 11 proceedings as large as Renovate, the Class was required to reach an agreement with the Committee of Unsecured Creditors in addition to reaching an agreement with the Debtors-in-Possession concerning ownership rights to the Escrowed Funds. After more than a year of hearings and negotiations with counsel for both the Debtors and the Committee of Unsecured Creditors, an agreement was reached whereby $250,000 was remitted to the Debtors and the Committee of Unsecured Creditors as a "carve-out" (the "Carveout"). In addition, the Debtors-in-Possession requested that bankruptcy counsel actively support the Debtors concerning certain motions and objections so that a chapter 11 Plan could be confirmed by the Bankruptcy Court. The Debtors were able to confirm their chapter 11 Plan, which specifically provided for the treatment of the Class Claim as a "Class Claim" under the Bankruptcy Code (F. R. Bankr. P. 7023). While the Class was only preliminarily certified prior to the filing of the chapter 11 petition by Renovate, bankruptcy counsel and counsel for the Debtors and the Committee of Unsecured Creditors all agreed that the "Class Proof of Claim" filed by bankruptcy counsel should be considered as a perfected Class so that further litigation in the bankruptcy court would not be needed. Through close collaboration with bankruptcy counsel, Class Counsel submit that the Settlement, including the requested attorneys' fees, expenses and Class Representative Awards, is fair, reasonable and adequate and should be approved.

The total amount of the Settlement was originally $2,550,000 and, pursuant to the parties' agreement, Renovate deposited the Escrowed Funds in March 2020, prior to Plaintiffs' filing of the Motion for Final Approval. As such, Class Counsel currently seek an award of attorneys' fees in the amount of $561,000.00, which represents 33% of the $1.7 million in Escrowed Funds. As noted above, as part of the negotiations in the Bankruptcy Action, the Class Proof of Claim in the Bankruptcy Action was "allowed" in the amount of $1,100,000 and is now part of the liquidation

trust established by the confirmed chapter 11 Plan. Accordingly, Class Counsel and bankruptcy counsel have provided a potential avenue for the Class to receive additional monies out of the Bankruptcy Action, in addition to the balance of the Escrowed Funds remaining after payment of the $250,000 Carveout. While Class Counsel cannot guarantee the collection of Class Claims beyond the net Escrowed Funds, bankruptcy counsel and Class Counsel are hopeful that at least a portion of the Class Claim amount remaining will be paid from the activities of the Bankruptcy Court's Liquidating Trustee in pursuing claims of the bankruptcy estate against other third parties. Should the Court approve the Settlement and fee request, Class Counsel also request permission to distribute any additional monies to the Class obtained in the Bankruptcy Action through the Class Proof of Claim, less the same percentage of attorneys' fees and any additional appropriate and reasonable expenses. Should that occur, Class Counsel will submit a motion for distribution to effectuate same.

While there were objections to the Settlement, they were proportionally small compared to the number of Class Members (0.14%); moreover, they lack merit and should be overruled. In fact, this Court has already overruled in its first review of the Settlement and request for attorneys' fees all categories of objections received. Most of the objections were complaints about the HERO program itself, the contractors or the work performed, which are not complaints about the Settlement. Others were complaints that the Settlement was too small, which is not a valid basis for denying approval of a settlement that was negotiated at arm's-length. While there were a few objections about Class Counsel's attorneys' fees, they have already been overruled by the Court. The single objection to the Representative Awards to Plaintiffs should be overruled.

In short, in spite of Defendant's bankruptcy and through the diligence of Class Counsel, there are Settlement funds remaining to distribute, and possibly additional funds to distribute at a later date through the Bankruptcy Action. Class Counsel thus ask the Court to approve the Settlement of $2,550,000 as fair, reasonable and adequate, and approve the requested attorneys' fees of $561,000.00 and expenses of $82,914.59[1] as fair and reasonable (as well as the right to a

[1] The Amended Notice stated that the expenses would not exceed $80,000; however, the Bankruptcy Action was totally unforeseen at that point and the additional expenses relate to the

33% attorneys' fee and expenses for any additional sums obtained through the Class Proof of Claim in the Bankruptcy Action).

II. PROCEDURAL HISTORY OF THE SETTLEMENT AND PROCEEDINGS

Given the extensive briefing to date, Plaintiffs refer the Court to the prior Memoranda and will recount the procedural history only as necessary for context given the Bankruptcy Action.[2] Pursuant to the Preliminary Approval Order, Plaintiffs filed their Motion for Final Approval on May 26, 2020 and a supplemental memorandum on June 15, 2020, which addressed the objections the parties had received and the number of requests for exclusion. Thereafter, the parties received five (5) additional requests for exclusion and four (4) additional objections, which Plaintiffs addressed in their second supplemental memorandum dated July 1, 2020. One such objection was by four legal services organizations, the Public Law Center, University of California at Irvine Consumer Law Clinic, East Bay Community Law Center and Legal Aid Society of San Diego (collectively, the "Nonprofits"), which raised objections to, among other things, the sufficiency of the Notice. On July 7, 2020, the Court issued its Tentative Ruling, which tentatively granted the Final Approval Motion and the Fee Motion. The Nonprofits requested oral argument and, on July 8, 2020, the Court held the Final Approval Hearing and heard argument from the Nonprofits. One of the arguments centered on the sufficiency of the Notice to the Class in which the Nonprofits presented arguments not previously contained in their Objection. Given the various concerns raised at the Final Approval Hearing regarding the Notice, the Court adjourned the hearing and scheduled a status conference for July 15, 2020. In advance of that status conference, Class Counsel submitted supplemental briefing and recommended that supplemental notice be mailed to the Class. At the status conference on July 15, the Court heard argument about the proposed supplemental notice program and about the clarity of the Release language in the First Amended Settlement Agreement. The Court set a schedule for further briefing on these issues. Class Counsel

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Bankruptcy Action. As such the small overage of $2,914.59 is fair and reasonable and should be approved by the Court.

[2] *See also* Joint Declaration of Janine L. Pollack and Rachele R. Byrd in Support of Plaintiffs' Fifth Supplemental Brief in Further Support of Motion for Final Approval of Class Action Settlement and Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Class Representative Awards ("Joint Decl. II"), filed concurrently herewith, §§ II-IV.

proposed to implement the supplemental notice program described below and in the Fourth Supplemental Declaration of Cameron R. Azari, Esq. on Implementation and Adequacy of Settlement Notices and Notice Plan, filed July 29, 200 (the "Fourth Azari Decl."), and the parties agreed to amend the Release language to more clearly identify the claims being released by the Settlement. Class Counsel thus addressed all the issues raised by the Nonprofits regarding the notice program and the release and the Court approved the proposed supplemental notice program.

III. THE SUPPLEMENTAL NOTICE PROGRAM AND ITS COSTS

The supplemental notice to the Class (the "Supplemental Notice Program") entailed:

1) The Long Form Notice was amended (the "Amended Notice") to include, among other things identified below, amended Release language (*see* section IV, *infra*), and was sent by U.S. Mail to every Class Member in both English and Spanish, including the Exclusion and Objection Forms. *See* **Exhibit A** to the Declaration of Cameron R. Azari, Esq. on Implementation and Adequacy of Supplemental Settlement Notice Plan dated Jan. 20, 2022 ("Fifth Azari Decl."), filed herewith;

2) The Amended Notice identified a new deadline for opting out of or objecting to the Settlement and provided instructions on how Class Members could withdraw a previously submitted objection or exclusion;

3) The entire Settlement Website and Interactive Voice Response (IVR) system available at the toll-free telephone number was translated and available in Spanish;

4) Class Members were permitted to submit objections and exclusions by email, and the Amended Notice so advised and specified an email address to do so;

5) The Amended Notice advised Class Members that when they called the Settlement toll-free telephone number they could request a Spanish-speaking representative or assistance in any other language as needed; and

6) The Amended Notice specified the continued Final Approval Hearing date/time.

See Second Amended Settlement Agreement ("SASA") reflecting these changes.

This Supplemental Notice Program and second chance to object/opt-out addressed all objectors' concerns regarding the notice program, namely, that some Notices sent by email were not delivered, that Spanish-speaking Class Members did not have access to the Notice in their language, and that the elderly and others either do not have internet access or do not use or review email. Due process requires that reasonable notice of the settlement be given to all potential class members. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Reasonable notice is understood to be the best notice that is practicable under the circumstances. Plaintiffs submit that

the Supplemental Notice Program and amended Release met all constitutional requirements.

Epiq agreed to waive approximately $6,000 in administration costs associated with printing and mailing the Amended Notices and to coordinate the translation. *See* Fourth Azari Decl., ¶ 11. The cost to the Class of printing and mailing the long form Amended Notice was approximately $51,000. *Id.* Epiq estimated that the translation costs would be approximately $2,100, which included translating the following Settlement materials into Spanish: long form Amended Notice, amended Exclusion Request Form, amended Objection Form, Settlement Website and toll-free telephone number IVR. *Id.* Epiq estimated that the cost for undeliverable and re-mail activities associated with the Amended Notice as described in paragraph 7 of the Fourth Azari Decl. would approximately $4,400. *Id.*. Epiq further estimated that the cost for the development, testing and deployment of the existing Settlement Website and toll-free telephone number IVR in Spanish, described in paragraph 8 of the Fourth Azari Decl., would be approximately $3,500. *Id.*. In total, the costs to the Class associated with the foregoing Supplemental Notice Program and Spanish-translation activities was estimated to be approximately $61,000. *Id*. In light of the foregoing, the total cost of administration is currently estimated to be approximately $196,000 ($135,000 original cap plus $61,000 in new costs associated with the Supplemental Notice Program) (*id.*), which was stated in the Amended Notice. Epiq has deducted its costs on an ongoing basis from the Escrowed Funds and has, to date, deducted $173,053.94 with $22,946.06 remaining to be deducted. Fifth Azari Decl., ¶ 20.

It is appropriate for the Class to bear such costs from the Settlement Fund. These are costs that would have been properly incurred by the Class had these notice activities been implemented at the outset of the notice program. There are no additional administration costs associated with the Supplemental Notice Program because Epiq waived those, as described above. Class Counsel took the new costs into account in computing the likely refunds to Class Members, and such amounts are reflected in the Amended Notice.

IV. THE AMENDED RELEASE

Class Counsel and Defendant's counsel amended the Release language for clarity following the various proceedings discussed above. *See* Joint Decl. II at ¶ 32; SASA, ¶¶ 5.01,

5.02. Class Counsel believe that this amended Release addressed the Court's concerns yet honored the agreement the parties entered into when they settled the Actions as well as this Court's standard language regarding releases that has been used in thousands of class action settlements over the course of many years. As such, the amended Release should be approved by the Court.

V. THE RENOVATE BANKRUPTCY

As noted above, on December 23, 2020, following dissemination of the mailed notice in the Supplemental Notice Program but prior to the deadline for opt-outs and objections, all proceedings in this Court came to a halt due to Renovate's Bankruptcy Action. Certain parties in the Bankruptcy Action took the position that the Escrowed Funds were part of the bankruptcy estate and could not be used for the Settlement in this case, and Class Counsel were forced to hire bankruptcy counsel and local Delaware counsel ("Bankruptcy Counsel") to protect the Class and the Escrowed Funds. For nearly a year, Bankruptcy Counsel fought to save the Escrowed Funds, and the only way to do so and proceed with the Settlement was to negotiate a compromise, which would allow the majority of the funds in escrow to be paid to the Class. That compromise was the Carveout of $250,000 from the Escrowed Funds to be paid to Renovate or the Liquidating Trustee, which was approved by the Bankruptcy Court and this Court. *See* Stipulation and Order Approving Bankruptcy Payment to Defendant and Resetting Final Approval Hearing, entered Nov. 29, 2021. However, because, as part of the negotiations in the Bankruptcy Action, Class Counsel, through Bankruptcy Counsel, was able to negotiate that the Class Proof of Claim in the Bankruptcy Action will be deemed allowed in the amount of $1,100,000, Class Counsel has provided a potential avenue for the Class to receive additional monies out of the Bankruptcy Action, should there be any monies available. If the Court approves the instant Settlement, Class Counsel seeks attorneys' fees and expenses for any additional funds obtained through the Class Proof of Claim in the Bankruptcy Action and will submit a motion for distribution regarding same. For this reason, Class Counsel seeks final approval of the entire amount of the Settlement of $2,550,000.

VI. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

Plaintiffs seek final approval for the Settlement in the amount of $2,550,000, with the remaining Escrowed Funds after deduction of all approved fees, expenses and awards to be

distributed upon final approval (after any appeals) and any other recovered funds to be distributed at a later date.[3] Plaintiffs' previously-filed Final Approval Motion demonstrates why the Settlement amount of $2,550,000 was fair, reasonable and adequate. Now that Renovate has filed for bankruptcy, further recovery against Renovate is highly challenging at best. Under the SASA, all Class Members will receive a partial refund of certain monies paid in connection with their tax assessment contracts. *See* Joint Decl. II, Ex. A (SASA), ¶ 4.03. Plaintiffs respectfully submit that under the current circumstances, the terms of the Settlement are fair, reasonable and adequate and that the requirements for final approval are satisfied.[4]

A class action settlement should be approved where the court finds it is fair, adequate, and reasonable to the class members. *See Kullar v. Foot Locker Retail, Inc*., 168 Cal. App. 4th 116, 127, 133 (2008). Moreover, a class action settlement is presumed to be fair if: (1) it is "'reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" *Chavez v. Netflix*, 162 Cal. App. 4th 43, 52 (2008) (quoting *Dunk v. Ford Motor Co*., 48 Cal. App. 4th 1794, 1802 (1996)).

As shown below, the Settlement meets these standards and the Court should grant it final approval. First, to assess the fairness, adequacy, and reasonableness of a class action settlement, the Court should consider "the strength of plaintiffs' case, the risk, expense, complexity and likely

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[3] Regarding the injunctive relief, SANBAG's HERO Loan program ceased to exist as of June 30, 2017, and LAC's HERO Loan program ceased to exist in or around May 2020 (*see* https://www.latimes.com/homeless-housing/story/2020-05-21/la-fi-pace-home-improvement-loans-la-county).

[4] The Amended Notice stated that the average Class Member is expected to receive approximately $18.80 but that the amount could vary from a range of approximately $4.07 to approximately $226.88, depending on a variety of factors, including the size of the Class member's financing contract. Given that at this time it is unknown whether there will be any further recovery from the Bankruptcy Action, Class Counsel cannot predict with precision the average amount a Class Member is likely to receive. Analyzed from the current funds available for distribution, the average Class Member is expected to receive approximately $7.74, but that the amount could vary from a range of approximately $1.67 to approximately $93.35, depending on a variety of factors, including the size of the Class Member's financing contract. Moreover, Class Counsel filed a Class Claim, which is an unsecured claim, in the Bankruptcy Action and the Class is entitled to recover the amount of its claim from the Liquidating Trust should sufficient funds become available.

duration of further litigation, [and] the risk of maintaining class action status. . . ." *See Dunk*, 48 Cal. App. 4th at 1801. Moreover, as previously demonstrated, the Settlement was reached after an exchange of informal discovery and several months of arm's-length, non-collusive bargaining between counsel, including an all-day mediation on November 20, 2018, with the Honorable Jeffrey King (Ret.) at JAMS. While the parties were unable to reach agreement at the mediation, they continued to negotiate for several months, which culminated in an agreement.[5] In addition, as previously demonstrated, Class Counsel is highly experienced in class actions. Finally, as addressed more fully below, the number of objectors relative to the number of Class Members is small (just 0.14%). Moreover, most of those objections were interposed before the bankruptcy, are without merit, and have already been overruled by the Court. *See* Section IX, *infra*.

VII. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

This Court's Preliminary Approval Order conditionally certified the Settlement Class and appointed Plaintiffs as class representatives and their counsel as Class Counsel. The Court should now finally certify the Settlement Class for purposes of this Settlement and appoint Plaintiffs as Class Representatives and their undersigned counsel as Class Counsel.

There are two requirements to certify a class: (1) the class must be ascertainable; and (2) there must be a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. *See Daar v. Yellow Cab Co*., 67 Cal. 2d 695, 704 (1967). California courts apply a "lesser standard of scrutiny" to certification of settlement classes. *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003). Each of the criteria for class certification is clearly satisfied in this case.

A. An Ascertainable Settlement Class Exists and Is Numerous

The Class is defined by objective characteristics and common transactional facts, *i.e*., (i) all persons or entities who received residential PACE tax assessment financing from WRCOG through the HERO program where the underlying assessment contract was executed by the person

[5] *See* Joint Declaration of Janine L. Pollack and Rachele R. Byrd in Support of: (1) Plaintiffs' Motion for Final Approval of Class Action Settlement; and (2) Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Awards, filed May 26, 2020 ("Joint Decl. I"), Ex. D (Newman Decl.) at ¶ 2.

or entity between January 1, 2012 and July 7, 2016; and (2) all persons or entities who received residential PACE tax assessment financing from LAC or SANBAG through the HERO program where the underlying assessment contract was executed by the person or entity between January 1, 2012 and June 15, 2017. *See* Joint Decl. II, Ex. A (SASA), ¶ 1.27. Therefore, Class Members are readily ascertainable. Moreover, it is undisputed that there were approximately 74,000 HERO assessments during the relevant period and therefore the Settlement Class is also sufficiently numerous. *See* Joint Decl. I, Ex. D (Newman Decl.), ¶ 3.

B. There is a Community of Interest

"The community of interest requirement involves three factors: '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).

The first factor means that it would be more efficient to jointly try the issues in the action, rather than requiring "each member . . . to individually litigate numerous and substantial questions to determine his or her right to recover following the class judgment . . . ." *Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 913 (2001). The central questions behind the claims in this litigation are: (1) whether Defendant violated Business & Professions Code, § 17200, *et seq*. by engaging in unlawful, unfair and/or deceptive activities with respect to the HERO loans; (2) whether Plaintiffs and the Class would be entitled to relief by reason of Defendant's wrongful conduct; (3) what is the proper measure of damages; and (4) whether Plaintiffs and the Class would be entitled to injunctive relief by reason of Renovate's wrongful conduct. The answers to these questions depend on common evidence that does not vary by Class Member, and so can be fairly resolved—whether through litigation or settlement—for all Class Members at once.

The second factor, typicality, requires only that the named plaintiff's interests in the action be similar to those of other class members. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470, 478 (1981). Here, typicality is satisfied because the claims of the Settlement Class arise from the same misconduct that Plaintiffs seek to remedy – common misrepresentations and omissions contained in standardized documents across the entire Class.

With respect to the third factor, the representative plaintiff must adequately protect the interests of the class: (1) there must be no disabling conflict of interest between the class representative and the class; and (2) the class representative must be represented by counsel who are competent and experienced in the kind of litigation to be undertaken. *See McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976). Plaintiffs have no conflicts with the Settlement Class, and during the more than five years that this action has been pending, Plaintiffs have participated actively in the case. *See* Plaintiffs' Decls., filed May 26, 2020, ¶¶ 3-10.

Moreover, Class Counsel have diligently litigated this case and have successfully prosecuted numerous class actions across the country in both state and federal courts in recent years, recovering billions of dollars for injured class members. *See Richmond*, 29 Cal. 3d at 479 (counsel adequate where they had "substantial experience in class action litigation"); Class Counsel Decls., filed May 26, 2020, Ex. B.

VIII. THE ATTORNEYS' FEES, EXPENSES AND REPRESENTATIVE AWARDS ARE FAIR AND REASONABLE AND SHOULD BE APPROVED

The Attorneys' Fees: In their Fee Motion filed in May 2020, Class Counsel sought an award of $841,500.00 in attorneys' fees. Given the Bankruptcy Action and the consequent reduction in funds available for distribution to the Class, Class Counsel now seek an award of only $561,000.00, which represents 33% of the $1.7 million in Escrowed Funds. Should the Court approve the Settlement and fee request, Class Counsel seek permission to distribute any additional monies to the Class obtained through the Bankruptcy Action, less the same percentage of attorneys' fees and any additional expenses Class Counsel incur and will file a motion for distribution regarding same. As noted in their Fee Motion, the common fund doctrine is generally held applicable "where plaintiffs' efforts have effected the creation or preservation of an identifiable fund of money out of which the fees will be paid." *Jordan v. Dep't of Motor Vehicles*, 100 Cal. App. 4th 431, 446-47 (2002) (citing *Serrano v. Priest*, 20 Cal. 3d 25, 37-38 (1997)). Here, the Settlement resulted in creation of an identifiable fund of $2,550,000, $1.7 million of which constitutes the Escrowed Funds, from which refunds, notice and administration costs, attorneys' fees and expenses, the Carveout, and any Representative Awards have been or will be paid.

Courts have noted that fees awarded in class actions average around 33% of the recovery.

See, e.g., Consumer Privacy Cases, 175 Cal. App. 4th 545, 557, n.13 (2009) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."). In *Laffitte*, for example, the Supreme Court of California affirmed a fee award representing 33.33% of a $19 million common fund, plus expenses. *Laffitte*, 1 Cal. 5th 480; *Laffitte v. Robert Half Int'l Inc.*, 231 Cal. App. 4th 860, 869-71 (2014). Courts thus routinely award a one-third fee in contingency cases such as this.[6] As such, here the 33% fee sought falls squarely within the average commonly approved. The requested fees of 33% are based upon the Escrowed Funds unless and until any additional funds are secured from the Bankruptcy Action, at which time the same percentage for fees would be applied. Under prevailing case law, this request is fair and reasonable.

The requested fees are also appropriate under the lodestar method. Previously, in their original Fee Motion, Class Counsel reported that they had spent 2,862.40 hours with a collective lodestar of $1,890,867.75 for work performed over the course of nearly four years, which equated to a "negative multiplier" of 0.45. *See* Joint Decl. I, ¶¶ 35-36. Since that time and through the bankruptcy, Class Counsel have incurred an additional 575.70 hours and lodestar of $463,510.00 for a total of 3,483.10 hours and lodestar of $2,354,377.75—***a negative multiplier of 0.24***. *See* Joint Decl. II, ¶ 53. Moreover, the contingency bankruptcy counsel spent 68 hours with a lodestar of $33,250.00, which will be paid from the attorneys' fees awarded to Class Counsel.[7] *Id*. As such, the "negative multiplier" is even more "negative" at this point, almost two years later. Courts routinely hold that a negative multiplier strongly supports the reasonableness of the requested fee. *See, e.g.*, *Oxina v. Lands' End, Inc.*, No. 14cv2577-MMA (NLS), 2016 U.S. Dist. LEXIS 191738, at *13 (S.D. Cal. Dec. 2, 2016) ("Class Counsel's request for fees is reasonable, given that the requested fees are a negative multiplier of Class Counsel's lodestar to date."); *In re Amgen Sec. Litig.*, No. CV 7-2536 PSG (PLAx), 2016 U.S. Dist. LEXIS 148577, at *27 (C.D. Cal. Oct. 25, 2016) ("Moreover, courts have recognized that a percentage fee that falls below counsel's lodestar strongly supports the reasonableness of the award") (citation omitted).

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[6] *See* Fee Motion at n.4 and Joint Decl. I, Ex. E for a non-exhaustive list of other cases awarding a percentage of the common fund of one-third or more.

[7] Class Counsel negotiated a reduced hourly rate. *See* Joint Decl. II, ¶ 53.

Class Counsel are highly-regarded members of the bar and have extensive experience in class actions and complex litigation. Their rates are squarely in line with prevailing rates in this jurisdiction and Southern California and are paid by hourly paying clients of their firms and/or have been approved by numerous other courts. *See* Class Counsel Decls., filed May 26, 2020. Class Counsel's rates of $700 to $1,025 for partners and $465 to $595 for associates and Of Counsel are within the prevailing market rates in the Southern California area for attorneys of comparable skill, experience, and reputation.[8] *See, e.g., Granados v. County of L.A.*, No. BC361470, 2018 Cal. Super. LEXIS 7789, at *81 (Nov. 14, 2018) ("Class Counsel's hourly rates [of $625 to $965 for partners and $445 to $530 for associates] are reasonable for their skill and the work they performed."); *Bergstein v. Stroock & Stroock & Lavan*, No. BC483164, 2013 Cal. Super. LEXIS 593, at *12 (L.A. Cnty. Super. Ct. Feb. 14, 2013) (approving rates up to $920 per hour and noting that "in the Los Angeles legal community, attorney billing rates of $1000 per hour and above are no longer unheard of"); *Rodriguez v. Cnty. of Los Angeles*, 96 F. Supp. 3d 1012, 1022-23 (C.D. Cal. 2014) (approving attorney rates from $500 to $975 in a case against County of Los Angeles). Likewise, Class Counsel's rates for paralegals, which range from $210 to $340, are reasonable. *See Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB (SHx), 2015 U.S. Dist. LEXIS 54063, at *65 (C.D. Cal. Mar. 24, 2015) (approving paralegal rates of $240 to $345).

Given the time and effort that Class Counsel has expended over the course of more than five years to obtain a Settlement and to protect that Settlement in the Bankruptcy Action, which threatened to destroy it entirely, Class Counsel respectfully submit that the request for attorneys' fees (which equates to a negative multiplier) should be granted.

The Expenses: Class Counsel also seek a total of $82,914.59 in unreimbursed expenses, which include, *inter alia*, legal research, necessary travel and other reasonable expenses. Class Counsel previously reported on May 26, 2020 that their total expenses were $58,423.6. Since that time, Class Counsel and contingency bankruptcy counsel have incurred an additional $24,490.93

[8] The use of current rates is proper since such rates compensate for inflation and loss of use of funds. *Mo. v. Jenkins*, 491 U.S. 274, 283-84 (1989). That is particularly apt here, where the case has lasted more than five years. *See also Mackinnon v. Imvu, Inc.*, No. 111-cv-193767, 2016 Cal. Super. LEXIS 175, at *2-3 & n.1 (Santa Clara Cnty. Super. Ct. Feb. 22, 2016) (citing *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998)).

in expenses, consisting of Delaware bankruptcy counsel's retainer in the amount of $5,000 along with invoices due and owing of $15,370.50 (all non-contingent), legal research, attorney services, postage, document reproduction, court fees, telephone and secretarial overtime. As noted *supra*, while the additional expenses bring the total for the case to slightly more than the $80,000 stated in the Amended Notice, the expenses related to bankruptcy counsel were unexpected at that time. However, these expenses were necessary and reasonable. Class Counsel also anticipate incurring additional expenses through the end of the claims process. There were no objections to the expenses of $58,423.66 delineated in the initial application and Class Counsel submit that the newly incurred expenses of $24,490.93 were necessary and reasonable to the prosecution of the case and should be approved, bringing the total to $82,914.59.

The Class Representative Awards: Class Counsel request a $5,000 Class Representative Award for each of three Class Representatives (Plaintiffs Richardson, Ramos, and Petetan) and a single $5,000 award for the Loyas, an amount which is less than the amounts often awarded. *See, e.g., Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393-95 (2010) (affirming $10,000 awards); *Blacksher*, 2008 Cal. Super. LEXIS 1464, at *10-11 ($10,000 award). The efforts of the Class Representatives in assisting Class Counsel to achieve this excellent Settlement are described in the declarations submitted by each Class Representative. *See* Plaintiff Decls., filed May 26, 2020.

IX. THE OBJECTIONS SHOULD BE OVERRULED

By Order dated September 29, 2020, as a result of the analysis the Court performed when previously evaluating the Settlement, the Court held that "[a]ll objections other than those expressly adopted by the Court related to the Supplemental Notice Program, the Amended Notice or the release are hereby OVERRULED." *See* Order Approving Supplemental Notice Plan, Continuing Final Approval Hearing, dated October 1, 2020.[9] The objections overruled by the Court fell into the following categories: complaints about the HERO program in general or about specific aspects of the program; complaints about the potential amount of payments due Settlement Class Members or the amount of attorneys' fees sought; and objections that were procedurally

[9] To the extent there were objections to the notice or release, those were addressed. *See supra*.

improper, or did not appear to be objections at all (the "Overruled Objections"). With one exception relating to the Representative Awards, the objections received after implementation of the Supplemental Notice Program all fall into those same categories and, as such, should similarly be overruled as they do not provide a basis to deny Plaintiffs' Final Approval Motion or Fee Motion. The current objections received from the Supplemental Notice Program should thus similarly be overruled.

Specifically, there were 95 objections received after the initiation of the Supplemental Notice Program. Some objections contained more than one assertion and thus fall into more than one category. There were 48 complaints about the HERO program in general, or about specific aspects of the program; 28 complaints about the potential amount of payments due Settlement Class Members; nine complaints about the amount of attorneys' fees sought; and 20 that were procedurally improper (*e.g.*, blank) or did not appear to be objections at all (this category technically reduces the total number of objections down to 75). As noted above, these categories of objections were all rejected by the Court in the Overruled Objections and should be rejected again. As to the objection regarding the Representative Awards, as discussed above, such awards are well within the range of such awards typically granted in cases such as this, and the awards are warranted for the efforts of the Class Representatives in assisting Class Counsel to achieve this Settlement. As such this objection should be overruled.

In total, there were 107 objections through both notices, which amounted to a minuscule percentage (0.14%) of the Class. None presents a valid reason for denying final approval of the Settlement. *See Dandan Pan v. Qualcomm Inc.*, No. 16-cv-01885-JLS-DHB, 2017 U.S. Dist. LEXIS 120150, at *30 (S.D. Cal. July 31, 2017) (small number of objections to a proposed class action settlement "raises a strong presumption [of fairness].") (internal quotations omitted).

X. CONCLUSION

Class Counsel respectfully submit that the Court should approve the Settlement and the award of $561,000.00 in attorneys' fees, reimbursement of $82,914.59 in expenses, and Class Representative Awards of $20,000, to be paid from the Settlement Fund.

DATED: January 20, 2022 By: Rachele R. Byrd
RACHELE R. BYRD

BETSY C. MANIFOLD
manifold@whafh.com
RACHELE R. BYRD
byrd@whafh.com
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
750 B Street, Suite 1820
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

MARK C. RIFKIN
rifkin@whafh.com
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Ave., 10th Fl.
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212/545-4653

JANINE L. POLLACK (*pro hac vice*)
jpollack@calcaterrapollack.com
CALCATERRA POLLACK LLP
1140 Avenue of the Americas, 9th Floor
New York, NY 10036-5803
Telephone: 212/899-1765
Facsimile: 332/206-2073

LEE SHALOV
lshalov@mclaughlinstern.com
MCLAUGHLIN & STERN LLP
260 Madison Avenue
New York, New York 10016
Telephone: 646/278-4298
Facsimile: 212/448-0066

C. MARIO JARAMILLO
cmj@access.law
C. MARIO JARAMILLO, PLC (dba ACCESS LAWYERS GROUP)
527 South Lake Ave., Suite 200
Pasadena, CA 91101
Telephone: 866/643-9099
Facsimile: 866/686-5590

Attorneys for Plaintiffs George Loya, Judith Loya, Richard Ramos, Michael Richardson, and Shirley Petetan

28011v3