Sophia M. Rios (SBN 305801)
BERGER MONTAGUE PC
401 B Street, Suite 2000
San Diego, CA 92101
Tel: (619) 489-0300
srios@bm.net

Shanon J. Carson*
Glen L. Abramson*
Jeffrey L. Osterwise*
Amey J. Park*
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel: (215) 875-4656
scarson@bm.net
gabramson@bm.net
josterwise@bm.net
apark@bm.net
*admitted *pro hac vice*

Attorneys for Plaintiffs and the Settlement Class

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

MAX WEISS, LEZLEY HOLMES, SEBASTIEN TARDIF, and JOHN MACZYNSKI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SUNPOWER CORPORATION,

Defendant.

Case No.: 21-cv-384151

CLASS ACTION

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Hon. Sunil R. Kulkarni

Date: March 24, 2022
Time: 1:30 PM
Location: Department 1

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I. INTRODUCTION

Plaintiffs Max Weiss, Lezley Holmes, Sebastien Tardif, and John Maczynski (collectively, "Plaintiffs" or "Class Representatives"), individually and as representatives of the Settlement Class,[1] seek final approval of the proposed Settlement Agreement with Defendant SunPower Corp. ("SunPower" or "Defendant") that resolves this class action. At the preliminary approval stage, this Court found the Settlement to be fair, adequate and reasonable, and worthy of approval.[2] The response from the Settlement Class Members confirms the Court's judgment. The Settlement Administrator sent the Notice of Settlement ("Notice") to 17,091 potential Settlement Class Members. Only 12 Settlement Class Members—0.07% of the Settlement Class—requested exclusion from the Settlement. Conversely, 2,484 Settlement Class Members—14.53% of the Settlement Class—have submitted a Claim Form thereby choosing to participate in the Settlement.[3] In addition, only one Settlement Class Member submitted a written objection to the Settlement. As explained below, that objection is meritless. Thus, Plaintiffs request, and Defendant does not oppose, that the Court grant final approval of the Settlement.

II. BACKGROUND

The litigation history, settlement negotiations, and terms of the Settlement are set out in the Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement and are incorporated herein by reference, and, therefore, will be only briefly summarized here.

A. SUMMARY OF CLAIMS AND PROCEDURAL HISTORY

Class Counsel began investigating and analyzing Plaintiffs' claims almost three years ago, in early June 2019, including conferring with solar industry experts and interviewing SunPower customers and dealers. *See* Declaration of Shanon J. Carson in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Carson Decl.") ¶ 6. After conducting their initial investigation, Class Counsel drafted a detailed class action complaint asserting claims against SunPower on behalf of

[1] Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as those set forth in the Parties' Settlement Agreement, attached as Exhibit A to the Declaration of Sophia M. Rios, filed October 29, 2021.

[2] *See* Order Concerning Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, entered October 21, 2021 (hereinafter, "Prelim. Approval Order").

[3] The deadline for Settlement Class Members to submit a Claim Form is March 10, 2022. In its Declaration is support of Plaintiffs' motion for preliminary approval of the Settlement, the Settlement Administrator projected that 10 to 20 percent of the Settlement Class Members would submit a claim.

Plaintiff Weiss and a proposed nationwide class of SunPower customers. (Carson Decl. ¶ 7.) In July 2019, Class Counsel sent a letter and a copy of the complaint to SunPower to provide SunPower with statutorily required pre-suit notice of the claims. (Carson Decl. ¶ 8.) After SunPower's counsel responded to the pre-suit notice, the parties discussed a framework for ADR, mediation, and corresponding discovery. (Carson Decl. ¶ 9.) In October 2019, the parties agreed to mediate the claims, and jointly selected the Hon. Ronald Sabraw (Ret.), a well-known and highly respected California mediator, and former California state court judge, as mediator. (Carson Decl. ¶ 10.)

Class Counsel attended a full-day, in-person mediation session on February 20, 2020, which did not result in a settlement. (Carson Decl. ¶ 12.) The parties continued engaging in settlement negotiations, and Class Counsel and SunPower participated in a second full-day mediation session on August 21, 2020. (Carson Decl. ¶ 13.) Although that mediation session also did not result in settlement, the parties continued their efforts to negotiate through the mediator. In December 2020, after numerous conferences with Judge Sabraw and the exchange of several counterproposals, the parties ultimately accepted Judge Sabraw's Mediator's Proposal, which outlined the core terms to resolve the case on a class-wide basis. (Carson Decl. ¶ 14.)

The parties then negotiated and executed a formal settlement agreement. (Carson Decl. ¶ 15.) On July 9, 2021, Class Counsel filed the Class Action Complaint in this action on behalf of Plaintiffs.

Plaintiffs moved for preliminary approval of the settlement on July 16, 2021. On October 21, 2021, this Court preliminarily approved the Settlement Agreement and authorized the dissemination of Notice to the Settlement Class. (Prelim. Approval Order.)

B. THE SETTLEMENT PROVIDES SUBSTANTIAL RELIEF TO THE CLASS.

Plaintiffs' claims sought the Settlement Class Members' lost benefit of the bargain from purchasing the Covered Solar Modules with an undisclosed defect that can cause the Subject Microinverters to underperform. The Settlement Agreement alleviates Plaintiffs' and the Settlement Class Members' injuries by: (1) obtaining a commitment from SunPower that it will replace all of the Subject Microinverters by a date certain (even if the microinverters have not malfunctioned or shown evidence of underperformance) (Settlement Agreement ¶ 3.6); (2) establishing a dedicated customer care program to assist Settlement Class Members in obtaining such microinverter replacements

(Settlement Agreement ¶ 3.5); and (3) creating a $4,750,000 non-reversionary common fund (Settlement Agreement ¶ 3.2) to compensate Plaintiffs and the Settlement Class Members for energy production lost due to the defective Subject Microinverters, as well as for any property damage or other consequential losses resulting from the microinverters and/or the retrofitting of the microinverters (Settlement Agreement ¶¶ 3.3, 3.4). As of the date of this motion, SunPower has replaced the Subject Microinverters at approximately 16,260 of the approximately 17,077 residential sites where the Covered Solar Modules were installed.[4]

C. NOTICE AND CLASS MEMBERS' REACTIONS

Notice of the Settlement was given to Settlement Class Members in the form and by the procedures approved by the Court in the Preliminary Approval Order. On November 10, 2021, the Settlement Administrator, A.B. Data, sent the Notice of Settlement and an individualized Claim Form with prepopulated information to each of the 17,091 potential Settlement Class Members identified in SunPower's records. *See* Declaration of Eric Schachter of A.B. Data, Ltd.'s Class Action Administration Company, filed herewith, ("Schachter Decl."), ¶¶ 5-6. The Settlement Administrator also emailed the Notice of Settlement to the 11,821 Settlement Class Members for whom SunPower had email addresses. (Schachter Decl. ¶ 7.) In addition, the Settlement Administrator activated the Settlement Website (https://www.microinvertersettlement.com) and a toll-free telephone line. (Schachter Decl. ¶¶ 9-10.)

On January 14, 2022, A.B. Data sent an additional notice, via email to the 11,821 Settlement Class Members for whom it had valid email addresses and via post card to the other 5,270 Settlement Class Members, providing certain information to Settlement Class Members, including their Notice ID numbers, the new date for the Final Approval Hearing, and the extended deadline to submit Claim Forms. (Schachter Decl. ¶ 11.) *See also* Declaration of Jeffrey L. Osterwise, filed January 10, 2022.

[4] SunPower's obligation to complete the replacement of the Subject Microinverters at the remaining sites is subject to the customer cooperating and providing SunPower's authorized service personnel access to the site and reasonable scheduling windows for dates/times for SunPower to complete the replacement work, and subject to the other exceptions stated in footnote 1 of Section 3.6 of the Settlement Agreement. SunPower has reported that the 817 sites at which Subject Microinverters have not been replaced fall within the exceptions set forth in the Settlement Agreement; most are sites where the homeowner has failed to respond to SunPower's notifications to arrange for the replacement. (Carson Decl. ¶ 21.)

To date, A.B. Data has received approximately 998 telephone calls, 367 voicemails, and 352 emails from potential Settlement Class Members. (Schachter Decl. ¶¶ 8, 10.) A.B. Data has promptly addressed all of these inquiries. (*Id.*) Class Counsel also has received and promptly responded to inquiries from Settlement Class Members.

As of March 2, 2022, Settlement Class Members have submitted 2,484 Claims covering, per SunPower's records, approximately 52,164 Covered Solar Modules. (Schachter Decl. ¶¶ 13-14.)[5] The current 14.53% claim rate is in line with A.B. Data's projection that the claim rate would likely fall between 10 and 20 percent. (Prelim. Approval Order. at 6.) While Settlement Class Members have until March 10, 2022 to submit a Claim Form, as it stands today, Claimants will receive $56.49 per Covered Solar Module, after deducting the maximum estimated amounts disclosed in the Notice for Class Counsel's fees and expenses, Plaintiffs' Service Awards, and notice and administration costs. (Carson Decl. ¶ 20.) Based on the claims submitted to date, the average claimant has 21 Covered Solar Modules (Schachter Decl. ¶ 14) and thus would receive a check for approximately $1,186, a substantial amount.

Only 12 Settlement Class Members have requested to be excluded from the Settlement (a mere 0.07% of the Settlement Class).[6] And, only one Settlement Class Member submitted a written objection to the Settlement. (Schachter Decl. ¶ 21.) As discussed below, that single objection lacks merit, and the Court should overrule the objection and grant final approval of the Settlement.

III. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND ADEQUATE.

A class action may not be settled or compromised without "the approval of the court after

[5]A.B. Data has begun review of the claims and has determined that 371 Claim Forms state that the Settlement Class Members purchased or own a different number of Covered Solar Modules than reflected in the data provided to A.B. Data by SunPower. (Schachter Decl. ¶ 15.) A.B. Data will seek additional information from the Settlement Class Members to resolve any discrepancies. (*Id.*)

[6] An additional 123 purported SunPower customers requested exclusion from the Settlement Class via a January 10, 2022 letter from attorney Steven Marchbanks of Premier Legal Center, APC. (Schachter Decl. ¶ 19.) However, the Settlement Administrator and the parties have determined that these 123 individuals likely are not part of the Settlement Class. (*Id.*) Based on information in their opt-out requests, many of these individuals *leased*, rather than *purchased*, their solar panels, and/or their solar panels were installed before the manufacture of the Covered Solar Modules. (*Id.*) In addition, none of these 123 individuals are identified in the Settlement Class data set furnished by SunPower which is further proof that these individuals are not part of the Settlement Class. (*Id.*) Regardless, no individual who submitted a timely request for exclusion will be bound by the terms of the Settlement.

hearing." Cal. Rules of Court, rule 3.769. The purpose of this requirement is "[t]o prevent fraud, collusion or unfairness to the class," and the court must determine whether "the settlement is fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800–01 (1996), *as modified* (Sept. 30, 1996) (citations omitted). "Public policy generally favors the compromise of complex class action litigation." *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009) (citation omitted).

On a motion for final approval, the trial court is charged with determining whether, in light of the total circumstances of the action and the response of the class members to the notice, the settlement is fair, reasonable, and adequate. *Dunk*, 48 Cal. App. 4th at 1801; *see also Wershba v. Apple Computer, Inc*., 91 Cal. App. 4th 224, 245 (2001), *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc*., 4 Cal. 5th 260 (2018). The Court has broad discretion in making that determination and may consider all relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1117 (citation omitted). "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Kullar v. Foot Locker Retail, Inc*., 168 Cal. App. 4th 116, 130 (2008) (citation omitted). "The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1117–18 (citation omitted).

Because of the strong judicial policy favoring the settlement of class actions, there is a presumption of fairness where: "(1) the settlement 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." *Id.* at 1118 (citation omitted). As discussed further below, all these factors supporting the presumption are present

here, and the Settlement is fair to the Settlement Class and warrants final approval.

A. THE SETTLEMENT PROVIDES A SUBSTANTIAL RECOVERY FOR THE CLASS.

The Settlement provides a $4.75 million monetary benefit and additional non-monetary benefits for the Settlement Class. This is a substantial recovery, especially in light of Settlement Class Members' estimated damages, Defendant's potential defenses, and the number of hurdles Plaintiffs would have faced to achieve class certification and a favorable final judgment. *See Kullar*, 168 Cal. App. 4th at 133 (court should consider "the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed."); *see also Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010) (finding *Kullar* "requires a record which allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.'" (quoting *Kullar*, 168 Cal. App. 4th at 120)).

Plaintiffs' claims sought the Settlement Class Members' lost benefit of the bargain from purchasing the Covered Solar Modules with an undisclosed defect that can cause the Subject Microinverters to underperform. The Settlement alleviates Plaintiffs' and the Settlement Class Members' lost benefit of the bargain by: (1) obtaining a commitment from SunPower that it will complete replacement of all Subject Microinverters by a date certain; (2) establishing a dedicated customer care program to assist Settlement Class Members in obtaining such microinverter replacements; and (3) creating a $4,750,000 non-reversionary common fund to compensate Plaintiffs and the Settlement Class Members for energy production lost due to the defective Subject Microinverters, as well as for any property damage or other consequential losses resulting from the allegedly defective microinverters and/or the retrofitting of the microinverters.

Replacing the Subject Microinverters at each site is a great benefit to Class Members. There is a substantial cost to SunPower to replace the Subject Microinverters at each site. (Carson Decl. ¶ 22.) Also, there is significant value for the Settlement Class receiving not only the commitment that SunPower will complete replacement of all Subject Microinverters, but also that SunPower will do so by a date certain. (*Id.*) Without the Settlement, SunPower could contend that its limited warranty does not require repair or replacement of the microinverters unless a customer demonstrates that the

microinverters fail to conform to the warranty. (Carson Decl. ¶ 22 & Ex. A.) Completing the replacement of the Settlement Class Members' Subject Microinverters in an expeditious manner has also prevented future harm, such as lost energy production, to the Settlement Class Members from the allegedly defective Solar Modules.[7]

The Settlement further provides substantial monetary recovery compared to a reasonable estimate of the energy production that Settlement Class Members may have lost due to malfunctioning Subject Microinverters. As the Court noted in its Preliminary Approval Order, Class Counsel obtained information from Settlement Class Members and SunPower supporting an estimate of the value of the Settlement Class Members' lost energy production being between $5,094,300 and $17,830,050 ($300 - $1,050 per Settlement Class Member). (Prelim. Approval Order at 7; *see also* Carson Decl. ¶¶ 16-19.) "The [$4.75 million] monetary portion of the settlement thus represents between 93 and 27 percent of the value of the case, an excellent result for the class." (Prelim. Approval Order at 7.) *See also Wershba*, 91 Cal. App. 4th at 250 ("A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable . . . . [T]he public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." (internal quotations omitted)); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *In Re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453-54 (C.D. Cal. 2014) ("Viewed from the perspective of each class member, had the class member sued Toys individually and proved that it acted wil[l]fully, he or she could have recovered between $100 and $1,000 in statutory damages . . . . A $5 or $30 award, therefore, represents 5% to 30% of the recovery that might have been obtained. This is not a *de minimis* amount. Given the likelihood that plaintiffs would have been unable to prove actual damages and the risk that

[7] Settlement Class Members have also benefited from the dedicated customer care program provided by Settlement. SunPower activated the program in June 2021, in anticipation of Settlement Class Members calling SunPower in reaction to Plaintiffs filing the motion for preliminary approval of the Settlement. (Carson Decl. ¶ 23.) The program remains active, pending final approval of the Settlement. (*Id.*) To date, the customer care program has received approximately 230 calls. (*Id.*)

they would have been unable to prove willfulness and recover any damages at all, the court finds that the amount of the settlement weighs in favor of approval.").

Also important, the $4,750,000 monetary settlement benefit is non-reversionary, and thus the entire Net Settlement Fund will be distributed to Settlement Class Members making valid claims. As it stands today, the average claimant has approximately 21 Covered Solar Modules (Schachter Decl. ¶ 14), and will receive approximately $1,186, after all requested deductions from the Settlement Fund. This is an excellent outcome for the Settlement Class given all relevant circumstances and the risks of further litigation.

Taken all together, the monetary and non-monetary relief are an excellent result for the Class and therefore the Settlement is fair, reasonable, and adequate, and warrants final approval.

B. THERE WERE SIGNIFICANT RISKS TO RECOVERY.

There were a number of specific risks that Plaintiffs faced that could have resulted in no recovery whatsoever. These risks are detailed in Plaintiffs' motion for preliminary approval and motion for fees, costs, and class representative service awards, but are briefly restated here.

Litigation to judgment before a jury carries intangible risks with which the Court is certainly familiar. In this case, Plaintiffs faced not only the generic litigation risk that is present in any case, but also specific risks relating to the novel claims and factual scenario that are particularly worthy of consideration by this Court in its evaluation of the fairness of the Settlement.

In continued litigation, SunPower would have made a number of challenges to Plaintiffs' claims. For example, on Plaintiffs' fraud-based claims, SunPower likely would have challenged the sufficiency of Plaintiffs' allegations or evidence that SunPower had sufficient pre-sale knowledge of the alleged defect to give rise to a duty to disclose. As for Plaintiffs' warranty-based claims, SunPower would have argued that its limited warranty only requires repair or replacement of defective parts, and expressly excludes any responsibility for lost energy production or other consequential damages. (Carson Decl. ¶ 16 & Ex. A.) SunPower would also likely have argued that certain Plaintiffs' and Settlement Class Members' claims are subject to arbitration.

Plaintiffs also would have confronted risks on class certification, including arguments that issues common to the class do not predominate over individual issues based on the manifestation rate of the

alleged defect, class members' interactions with their solar dealers, and property-specific factors impacting the performance of each class member's Solar Modules. If class certification were granted, these issues would be litigated on summary judgment and ultimately presented to a jury at trial, where Plaintiffs would have faced a difficult task of proving causation and damages, given that factors such as the weather, the position of panels on a property, shading from trees, and solar module maintenance can impact the performance of solar modules, even if Plaintiffs were able to prove the existence of the defect.

Given these risks, and the attendant delays that would have impacted any judgment, the Settlement represents a meaningful result for the Class and should be approved.

C. THE PROPOSED SETTLEMENT WAS REACHED AFTER SUBSTANTIAL INVESTIGATION AND DISCOVERY, AND ARMS-LENGTH NEGOTIATIONS BETWEEN EXPERIENCED COUNSEL.

As extensively detailed in Plaintiffs' motion for preliminary approval of the Settlement and Plaintiffs' motion for an award of attorneys' fees, costs, and class representative service awards, the Settlement was reached only after substantial investigation, discovery, and vigorous arms'-length settlement negotiations, including two full-day mediation sessions and numerous conferences with an experienced class action mediator. (*See also* Carson Decl. ¶¶ 5-15.) Both Plaintiffs and Defendant are represented by counsel who have significant experience in class action litigation and settlements. Counsel for the Parties have litigated numerous class action cases involving alleged fraud and warranty claims.[8] As a result, the judgment of Class Counsel is entitled to deference. *See Kullar*, 168 Cal. App. 4th at 129 ("The court . . . should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.").

D. THE CLASS HAS REACTED FAVORABLY TO THE SETTLEMENT.

Notice of the Settlement, including the proposed amounts to be requested in fees, costs, and service awards, was mailed on November 10, 2021, to 17,091 potential Settlement Class Members and emailed to 11,821 of those Settlement Class Members for whom emails addresses were available. (Schachter Decl. ¶¶ 5-7.) Further notice providing additional and updated information was mailed and emailed on January 14, 2022. (Schachter Decl. ¶ 11.) While 14.53% of the Settlement Class has already

[8] (*See, e.g.,* Declaration of Shanon J. Carson in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Class Representative Service Awards, filed December 10, 2021, ¶¶ 3-10 & Ex. A.)

submitted Claims, only 0.07% Settlement Class Members (12 in total) have submitted requests for exclusion from the Settlement Class. (Schachter Decl. ¶¶ 13, 18-19.) And only one Settlement Class Member submitted a written objection to the Settlement. (Schachter Decl. ¶ 20.) As discussed below, that objection lacks merit. Accordingly, the reaction from the Settlement Class weighs decidedly in favor of final approval. *See 7-Eleven Owners for Fair Franchising v. Southland Corp*., 85 Cal. App. 4th 1135, 1152–53 (2000) (describing class reaction as "overwhelmingly positive" where eighty out of 5,454 class members opted out and nine class members objected).

The claim rate of 14.53% is well in line with, and in fact significantly exceeds, claim rates in other consumer cases and in settlements that are commonly approved in California. This also supports final approval. *See Shames v. Hertz Corp.*, No. 07-cv-2174, 2012 WL 5392159, at *14 (S.D. Cal. Nov. 5, 2012) (granting final approval of settlement with 4.9% claims rate); *Zepeda v. PayPal, Inc.*, No. 10-cv-1668, 2017 WL 1113293, at *15–16 (N.D. Cal. March 24, 2017) (finding in consumer protection case that a 3.8% claims rate indicated that the email "notice process has been remarkably successful – and the Settlement Class's reaction to the Settlement has been overwhelmingly positive"); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (approving settlement and finding 5.9% claims rate to indicate an overall positive reaction to the settlement); *White v. Experian Info. Solutions, Inc.*, 803 F. Supp. 2d 1086, 1100 (C.D. Cal. 2011) (approving settlement with 5% response rate); *Tait v. BSH Home Appliances Corp.*, No. 10-cv-0711, 2015 WL 4537463, at *8 (C.D. Cal. July 27, 2015) (approving settlement with 3% claims rate); *Touhey v. U.S.*, No. 08-cv-01418, 2011 WL 3179036, at *7–8 (C.D. Cal. July 25, 2011) (approving settlement with 2% claims rate). Here, the claims rate of 14.53% is two to three times higher than the claim rates in other approved settlements, and therefore weighs strongly in favor of approval of the Settlement.

E. THE COURT SHOULD OVERRULE THE LONE OBJECTION TO THE SETTLEMENT.

Settlement Class Member Linda Tonoli, via a written objection dated January 10, 2022, objects: (1) to the sufficiency of information provided to Settlement Class Members for them to determine how much they will receive from the Settlement; (2) that the Settlement does not provide an additional benefit to the Settlement Class requiring SunPower to provide Settlement Class Members the ability to monitor the performance of each solar panel individually, as opposed to collectively; (3) that the Settlement does

not provide Settlement Class Members with sufficient monetary benefits; and (4) to the amount of the Service Awards requested for the Class Representatives. (Schachter Decl. Ex. C, hereinafter "Tonoli Obj.") Each of these objections lacks merit and none warrants denying Plaintiffs' motion for final approval. The Court should overrule Ms. Tonoli's objections.

First, Ms. Tonoli's objection that she was unable to calculate how much she will receive from the Settlement is completely misplaced. The Notice clearly states that the average payment per Settlement Class Member would be $173.52 if the Court awards the maximum amount for the requested deductions from the Settlement Fund. (Schachter Decl. Ex. A at 6.) The Notice also informs Ms. Tonoli that additional information about the Settlement is available at the Settlement Website, www.MicroinverterSettlement.com. (*Id.*) A copy of the Court's Order preliminarily approving the Settlement was posted to that website. (Schachter Decl. ¶ 9.) The Court's Order recites detailed information submitted by Plaintiffs concerning their estimates of the total monetary value of the energy losses suffered by the Settlement Class. (Prelim. Approval Order at 7.) The Court's Order also states the estimated number of Settlement Class Members and the average number of panels at each site. (*Id.*) Ms. Tonoli knows the number of solar panels at her own site. In short, all of the information that Ms. Tonoli claims she was missing was available and/or provided to her and the Settlement Class Members.

Second, Ms. Tonoli's objection that the Settlement does not provide her access to individual panel monitoring data is not part of this case nor related to the fairness of the Settlement. The Settlement provides Settlement Class Members with certainty that SunPower will replace all of the allegedly defective Subject Microinverters and financial compensation for prior consequential damages (*i.e.*, energy losses) caused by the Subject Microinverters. In exchange, the Settlement Class Member will release claims related to the Subject Microinverters *without* releasing claims related to the *future* performance of the Covered Solar Modules. (Settlement Agreement ¶ 6.1.) The Settlement need not prevent future underperformance of the Covered Solar Modules, because the Settlement Class Members retain any rights that they otherwise have to pursue claims against SunPower should the Covered Solar Modules underperform.

Additionally, Ms. Tonoli fails to identify any contractual obligation or presale promise by SunPower that it would provide Ms. Tonoli the ability to personally monitor the performance of her

panels individually. While Ms. Tonoli would like such monitoring ability to be provided by SunPower, she did not bargain for it, and therefore she would not be able to obtain it by successfully litigating the claims brought in the Complaint. Indeed, panel level monitoring is not something that she or any of the Settlement Class Members would achieve even if they fully litigated this case and fully prevailed following a trial and appeals. In addition, the fact that Ms. Tonoli did bargain for twenty-five years of monitoring of her solar system by Rayah Power Integration Corp., the company that sold and installed her Covered Solar Modules (Tonoli. Obj., Enclosure 1, ¶ 9), further undermines Ms. Tonoli's contention that fairness requires that the Settlement Class be provided monitoring capability at the individual panel level by SunPower.

Third, Ms. Tonoli objects that the monetary benefits provided by the Settlement are unfairly low. (Tonoli. Obj. at 2.) Notably, if Ms. Tonoli were to submit a claim in the Settlement, based on her system having 32 panels and the current claim rate, she would receive approximately $1,920, or over 58% of her claimed losses of $3,302.26. (*Id.*) That would be a very significant and meaningful compromise settlement amount here. Also, the amount Ms. Tonoli would receive from the Settlement is over 2.26 times what SunPower previously offered to reimburse Ms. Tonoli for her claims. (*Id.*) Thus, far from showing that the Settlement is insufficient, Ms. Tonoli's individual facts illustrate precisely why this Settlement should be granted final approval.

Ms. Tonoli's objection to the Settlement's monetary benefits is based on her belief that class-wide damages related to energy losses exceed $60 million. (*Id.*) However, Ms. Tonoli's damages estimate is flawed. For example, even though Ms. Tonoli concedes that she has more Covered Solar Modules than the average Settlement Class Member, she assumes that the average Settlement Class Member suffered greater damages than she did. (*Id.*) Ms. Tonoli bases this assumption on the sole fact that her Subject Microinverters were replaced before some other Settlement Class Members had their Subject Microinverters replaced. (*Id.*) However, Ms. Tonoli is incorrect to assume that all or even most Covered Solar Modules owned by other Settlement Class Members failed before SunPower replaced the Subject Microinverters. In fact, Ms. Tonoli's assumption that the average Settlement Class Member had

greater energy losses than she experienced is contrary to data provided by SunPower. (Carson Decl. ¶ 17.)[9]

Similarly, Ms. Tonoli's class-wide damages estimate is inflated because she generates the estimate by extrapolating from her own claimed losses, which include the value of her lost Solar Renewable Energy Credits ("SRECs"). (Tonoli. Obj. at 2.) However, SRECs are only available in a few states and for only approximately 10% of the Settlement Class Members. (Carson Decl. ¶ 24.) Ms. Tonoli's estimate is also inflated because her claimed losses are based on the electric rates of her local utility, which appear from the context of her letter to be higher than the national average. (Tonoli. Obj. at 2.) If the average Settlement Class Member had the same losses that SunPower calculated for Ms. Tonoli (even though Ms. Tonoli has over 50% more Solar Modules than the average Settlement Class Member), then the Settlement Class Members' aggregate damages would be approximately $14.5 million. This is well within the range of damages Plaintiffs considered and presented to the Court and would entirely support granting final approval of a non-reversionary settlement fund of $4.75 million.

Moreover, even if Ms. Tonoli is correct that the Settlement Class Members' damages are $60 million, then the Settlement recovers 7.9% of those damages. This is still well within the range for approval, based on the authority cited above, which recognizes that the recovery must be weighed against the risks of the case. Ms. Tonoli has not met her burden of showing that the Settlement is unreasonable because she does not even mention the risks of the case, nor the real risk of a zero recovery from continued litigation, except to admit that the underperformance of her Covered Solar Modules would be "near impossible to prove." (Tonoli. Obj. at 1.) Because she fails to evaluate the risks of the case, she fails to recognize that "the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation." *Kullar*, 168 Cal.App.4th at 129; *7-Eleven*, 85 Cal. App. 4th at 1153 (rejecting challenges to the amount in settlement where only 9 of 5,454

[9] Ms. Tonoli notes that SunPower estimated her energy losses to be 6,522 kWh. (Tonoli. Obj. at 2.) SunPower's data shows that, during the twelve-month period leading up to replacement of the Subject Microinverters, the average customer lost at most 761 kWh. (Carson Decl. ¶ 17 n. 1.) Thus, only if the average Settlement Class Member's Covered Solar Modules underperformed at that level for over 8.5 years would that Settlement Class Member have energy losses equal to Ms. Tonoli's losses. However, the Subject Microinverters were first manufactured fewer than seven years ago.

class members objected, finding the "objectors ha[d] failed to overcome" presumption that settlement was fair based on the four *Dunk* factors).

Fourth, Ms. Tonoli's contention that the requested Class Representative Service Awards are a conflict of interest is unfounded. As described in Plaintiffs' Motion for Attorneys' Fees, Costs, and Class Representative Service Awards at pages 18-19, the Service Awards requested are well in line with awards granted in other complex litigation. *See, e.g.*, *Mount v. Wells Fargo Bank, N.A.*, 2016 WL 537604, at *4 (Cal. App. 2d Dist. Feb. 10, 2016) (approving incentive award of $10,000 each for both named plaintiffs); *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1395 (2010), as modified (July 27, 2010) (finding no abuse of discretion in a $10,000 award); *Ralston v. Mortg. Investors Grp., Inc.*, No. 08-cv-536, 2013 WL 5290240, at *5 (N.D. Cal. Sept. 19, 2013) (approving service payment of $12,500); *Vedachalam v. Tata Consultancy Servs. Ltd.*, No. 06-cv-0963, 2013 WL 3929129, at *7 (N.D. Cal. July 18, 2013) (approving service payments of $25,000 and $35,000). The Service Awards are only approximately five times the $1,920 (based on the current claim rate) that Ms. Tonoli would receive by submitting a Claim for compensation from the Settlement. This relationship between the values of Ms. Tonoli's claim and the Service Awards belies her contention that the Service Awards are a conflict of interest. Moreover, Ms. Tonoli's assertion of a conflict of interest is predicated on her belief that the Settlement is not "right for the class." But as is evident from this motion and the overall reaction of the Settlement Class to the Settlement after receiving notice as approved by the Court, Ms. Tonoli has misjudged the best interests of the Settlement Class.

Finally, the Class Representatives have substantiated their significant involvement in the litigation in their declarations submitted to the Court. Ms. Tonoli, who was represented by Class Counsel prior to the filing of the Complaint and participated in the mediation process, does not disagree with these declarations and herself asserts that she "spent countless hours on this case." (Tonoli. Obj. at 1.)

Accordingly, the Court should overrule Ms. Tonoli's objections.

IV. CONCLUSION

Based on the foregoing, the Court should find that the Settlement is fair, reasonable, and adequate, and grant final approval of the Settlement.

Respectfully submitted,

BERGER MONTAGUE PC

Dated: March 3, 2021

/s/ Sophia M. Rios

Sophia M. Rios
401 B Street, Suite 2000
San Diego, CA 92101
Tel: (619) 489-0300
srios@bm.net

Shanon J. Carson*
Glen L. Abramson*
Jeffrey L. Osterwise*
Amey J. Park*
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel: (215) 875-4656
scarson@bm.net
gabramson@bm.net
josterwise@bm.net
apark@bm.net
*admitted *pro hac vice*

Attorneys for Plaintiffs and the Settlement Class