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15 Attorneys for Plaintiffs

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 JAMES P. BRICKMAN, individually and as a
19 representative of all others similarly situated,

20 Plaintiff,

21 v.

22 FITBIT, INC.,

23 Defendant.

Case No. 3:15-cv-2077-JD

**~~PROPOSED~~ ORDER GRANTING
PLAINTIFFS' MOTION FOR AN
AWARD OF ATTORNEYS' FEES,
COSTS, AND INCENTIVE
COMPENSATION**

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28 ~~PROPOSED~~ ORDER GRANTING PLAINTIFFS' MOTION FOR AN AWARD OF
ATTORNEYS' FEES, COSTS, AND INCENTIVE COMPENSATION
Case No. 3:15-cv-2077-JD

1 **ORDER GRANTING PLAINTIFFS’ MOTION FOR AN AWARD OF ATTORNEYS’**
2 **FEES, COSTS, AND INCENTIVE COMPENSATION**

3 The matter before the Court is Class Counsel’s request for attorneys’ fees and costs.

4 **A. The lodestar.**

5 In moving for an award of fees, Class Counsel submitted a lodestar of \$3,851,425. In
6 response, Defendants asked for the following reductions:

- 7 • \$518,979.50 for excessive conference and internal emailing;
- 8 • \$139,758.50 for block billing;
- 9 • \$279,278.75 for vague entries;
- 10 • \$213,590.00 for travel between Ohio and California;
- 11 • \$39,232.50 for clerical work billed by attorneys; and
- 12 • additional reductions for unreasonable billing in .1 hour increments.

13 The total reduction in Class Counsel’s lodestar sought by Defendant is \$1,218,942.25.

14 At the hearing on attorneys’ fees, the Court offered to have Class Counsel’s lodestar
15 subjected to a forensic accounting, or the parties could to agree to a certain percentage of reductions
16 sought by Defendant. Both sides waived the forensic accounting, Plaintiffs elected for a reduction
17 by approximately 90% of the amount sought by Defendant, so that Class Counsel’s lodestar is
18 hereby reduced by \$1,085,692.95 to \$2,765,732.05 (Dkt. Nos. 299, 302), and Defendant did not
19 object (Dkt. No. 301).

20 **B. The multiplier.**

21 Class Counsel requests a multiplier on their lodestar. The Court finds that a multiplier of
22 2.5 is appropriate. The predicted maximum value of the individual claims was \$15 per class
23 member. Class Counsel recovered \$12.50 for every Class Member who filed a claim. In the Court’s
24 experience, this was an unusually good recovery for class members in a settlement, all the more so
25 in that the claim relating to devices intended to measure sleep was novel, legally and factually. In
26 addition, Class Counsel structured the settlement so that the claimants’ recoveries were not reduced
27 by attorneys’ fees or costs. Class Counsel voluntarily offered to bear a significant amount of the
28 costs for additional notice to increase the claims rate. The result achieved by Class Counsel was

1 substantial and weighs favorably in determining the multiplier, which is largely driven by assessing
2 “the benefit obtained for the class.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942
3 (9th Cir. 2011). An increase in the multiplier for risk is also appropriate. *Rodriguez v. West Pub.*
4 *Corp.*, 563 F.3d 948, 967 (9th Cir. 2009).

5 A multiplier of 2.5 is well within the range that has been approved in similar cases by this
6 Court and the Ninth Circuit. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002)
7 (approving award that resulted in multiplier of 3.65); *In re Capacitors Antitrust Litig.*, Master File
8 No. 14-cv-03264-JD, 2017 WL 9613950, at *6 (N.D. Cal. June 27, 2017) (noticing that a “lodestar
9 multiple of around 4 times has frequently been awarded”). Defendant had previously objected to
10 application of common fund case multipliers to this case because of a sub-5% class participation
11 rate (Dkt. No. 284 at 1). However, after the Court-approved reminder campaign, the claims rate is
12 somewhere between 7.69% and 9.11%, depending on how class size is estimated (Dkt. No. 309 at
13 p. 18). Accordingly, common fund precedents are applicable here and applying a percentage of
14 recovery cross-check, the resulting awarding, after application of the 2.5 multiplier is 25.5% (Dkt.
15 No. 282 at p. 19 for minimum value of constructive common fund). This is practically
16 indistinguishable from the Ninth Circuit’s “benchmark” of 25% under the percentage-of-recovery
17 method. *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019). This confirms
18 that a multiplier of 2.5 is appropriate in this case.

19 **C. Costs.**

20 In reviewing Class Counsel’s requests for costs, the Court finds that Class Counsel should
21 not be reimbursed for expert witness fees, jury consultants, a mock trial, and any deposition travel
22 for more than two attorneys.

23 **D. Incentive compensation.**

24 The Court disfavors incentive payments to representative plaintiffs for reasons discussed at
25 length in prior orders. In this case, the proposed incentive compensation is de minimis and will not
26 reduce the funds available to Class Members because the incentive compensation is not paid from
27 a common fund. It is awarded in the amount discussed below.

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E. Conclusion.

After a searching review of Plaintiffs’ Motion for an Award of Attorneys’ Fees, Costs, and Incentive Compensation (“Motion”), Dkt. No. 282, Class Counsel’s agreement on August 9, 2019 (Dkt. No. 302) to the fee option proposed on August 1, 2019 (Final Approval Hearing Transcript, August 1, 2019, at pp. 8, 10 and 14) of a reduction in lodestar awarded from \$3,851,425 to \$2,765,732.05, with a multiplier of 2.5, and Class Counsel’s agreement on August 7, 2019 (Dkt. No. 300) to reduce costs from \$366,944.48 to \$151,610.80, the following amounts shall be paid by Defendant:

1. The Court awards \$6,914,330.13 in attorneys’ fees and \$151,610.80 in costs to Class Counsel for a total award to Class Counsel of \$7,065,940.93.
2. 25% of the \$7,065,940.93 awarded to Class Counsel will be paid promptly after counsel have filed the Post-Distribution Accounting paperwork required by the N.D. Cal. Procedural Guidance for Class Action Settlements.
3. The Court awards \$5,000 in incentive compensation to Plaintiffs Brickman and Clingman, each, for their efforts in litigating and settling this Action for the Settlement Class Members. Fitbit shall pay these sums pursuant to the terms and conditions and at the time set forth in the Agreement.
4. The Court awards \$500 in incentive compensation to Plaintiffs Carissa Ray, Stephanie Curtis, Michael Landis, Carolyn Ciavarella, Erica Wathey, James E. Gau, II, and Amanda Samy, each, for their efforts in litigating and settling this Action for the Settlement Class Members. These sums shall be paid by Fitbit pursuant to the terms and conditions and at the time set forth in the Agreement.

Dated: March 20, 2020



JAMES DONATO
United States District Judge