

**BURSOR & FISHER, P.A.**

Scott A. Bursor (State Bar No. 276006)  
L. Timothy Fisher (State Bar No. 191626)  
1990 North California Boulevard, Suite 940  
Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: scott@bursor.com  
lrfisher@bursor.com

**FARUQI & FARUQI, LLP**

Barbara A. Rohr (State Bar No. 273353)  
10866 Wilshire Boulevard, Suite 1470  
Los Angeles, CA 90024  
Telephone: (424) 256-2884  
Facsimile: (424) 256-2885  
E-Mail: brohr@faruqilaw.com

*Attorneys for Plaintiffs and Co-Lead Class Counsel  
(Additional Counsel on Signature Page)*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KYLE DEI ROSSI and MARK LINTHICUM,  
on behalf of themselves and those similarly  
situated,

Plaintiffs,

v.

WHIRLPOOL CORPORATION,

Defendant.

Case No. 2:12-CV-00125-TLN-CKD

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

Date: May 18, 2017

Time: 2:00 p.m.

Courtroom: 2 - 15th Floor

Judge: Honorable Troy L. Nunley

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on May 18, 2017 at 2:00 p.m. before the Honorable  
3 Troy L. Nunley, United States District Court Judge for the Eastern District of California, 501 I  
4 Street, Sacramento, California 95814, Plaintiffs Kyle Dei Rossi and Mark Linthicum, by and  
5 through the undersigned counsel of record, will move and hereby do move, pursuant to Fed. R.  
6 Civ. P. 23(e), for entry of the [Proposed] Order Approving Class Action Settlement (“Final  
7 Approval Order”).

8 This motion is based on: (1) this Notice of Motion, Motion and Memorandum in support  
9 thereof, (2) the Declaration of L. Timothy Fisher in Support of Plaintiffs’ Motions for Final  
10 Approval of Class Action Settlement and for an Award of Attorneys’ Fees, Costs and Expenses,  
11 and Service Awards filed herewith, (3) the Supplemental Declaration of Kathleen Wyatt, filed  
12 herewith, (4) the papers and pleadings on file, and (5) the arguments of counsel at the hearing on  
13 the Motion.

14  
15 Dated: March 3, 2017

**BURSOR & FISHER, P.A.**

16  
17 By: /s/ L. Timothy Fisher  
L. Timothy Fisher

18 Scott A. Bursor (State Bar No. 276006)  
19 L. Timothy Fisher (State Bar No. 191626)  
1990 North California Boulevard, Suite 940  
20 Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
21 Facsimile: (925) 407-2700  
Email: scott@bursor.com  
ltfisher@bursor.com

22  
23 **FARUQI & FARUQI, LLP**  
24 Barbara A. Rohr (State Bar No. 273353)  
10866 Wilshire Blvd., Suite 1470  
25 Los Angeles, CA 90067  
Telephone: (424) 256-2884  
26 Facsimile: (424) 256-2885  
Email: brohr@faruqilaw.com

27 *Attorneys for Plaintiffs and Class Counsel*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**VOZZOLO LLC**  
Antonio Vozzolo (*pro hac vice*)  
345 Route 17 South  
Upper Saddle River, NJ 074578  
Tel: 201-630-8820  
Fax: 201-604-8400  
Email: avozzolo@vozzolo.com

*Additional Counsel for Plaintiffs*

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PAGE(S)**

I. INTRODUCTION ..... 1

II. BACKGROUND OF THE CASE ..... 2

    A. Pleadings and Motions ..... 2

    B. Discovery ..... 4

    C. Class Certification ..... 5

    D. Settlement ..... 6

III. THE STANDARD FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS ..... 7

IV. THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE AND REASONABLE ..... 8

    A. Terms of the Settlement ..... 8

        1. Monetary Relief for Class Members ..... 8

        2. Release and Discharge of Claims ..... 9

        3. Payment of Attorneys’ Fees and Expenses ..... 9

        4. Compensation for the Class Representatives ..... 10

        5. Payment of Notice and Administrative Fees ..... 10

    B. Strength of Plaintiffs’ Case ..... 10

    C. Risk of Continuing Litigation ..... 11

    D. Risk of Maintaining Class Action Status ..... 12

    E. Extent of Discovery and Status of Proceedings ..... 13

    F. Experience and Views of Counsel ..... 14

    G. Presence of a Governmental Participant ..... 14

    H. Reactions of Class Members ..... 15

V. NOTICE ..... 15

VI. CONCLUSION ..... 16

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PAGE(S)**

**CASES**

*Boyd v. Bechtel Corp.*,  
485 F. Supp. 610 (N.D. Cal. 1979)..... 7

*Churchill Village, L.L.C. v. Gen. Elec.*,  
361 F.3d 566 (9th Cir. 2004)..... 7, 8, 15

*Class Plaintiffs v. City of Seattle*,  
955 F.2d 1268 (9th Cir. 1992)..... 7, 10

*Curtis-Bauer v. Morgan Stanley & Co., Inc.*,  
2008 WL 4667090 (N.D. Cal. Oct. 22, 2008)..... 11, 12

*Ellis v. Naval Air Rework Facility*,  
87 F.R.D. 15 (N.D. Cal. 1980)..... 13

*Fulford v. Logitech, Inc.*,  
2010 U.S. Dist. LEXIS 29042 (N.D. Cal. Mar. 5, 2010)..... 12

*Garner v. State Farm. Mut. Auto. Ins. Co.*,  
2010 WL 1687832 (N.D. Cal. Apr. 22, 2010)..... 10

*Hanlon v. Chrysler Corp.*,  
150 F.3d 1011 (9th Cir. 1998)..... 8, 15

*In re Apple Computer Sec. Litig.*,  
1991 WL 238298 (N.D. Cal. Sept. 6, 1991)..... 12

*In re Mego Fin. Corp. Sec. Litig.*,  
213 F.3d 454 (9th Cir. 2000)..... 13

*In re Netflix Privacy Litig.*,  
No. 5:11-CV-00379 EJD, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013)..... 7, 12

*In re Omnivision Techs., Inc.*,  
559 F. Supp. 2d 1036 (N.D. Cal. 2008)..... 14

*In re Pac. Enterprises Sec. Litig.*,  
47 F.3d 373 (9th Cir. 1995)..... 14

*Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*,  
221 F.R.D. 523 (C.D. Cal. 2004)..... 15

*Officers for Justice v. Civil Serv. Comm’n*,  
688 F.2d 615 (9th Cir. 1982)..... 7, 10

*Petersen v. CJ Am., Inc.*,  
2016 U.S. Dist. LEXIS 140187 (S.D. Cal. Sept. 30, 2016)..... 14

1 *Rodriguez v. W. Publ'g Corp.*,  
2 563 F.3d 948 (9th Cir. 2009)..... 10, 11, 14

3 **STATUTES**

4 28 U.S.C. § 1715(b)..... 10, 14  
5 42 U.S.C. § 6295(b)..... 2

6 **RULES**

7 Fed. R. Civ. P. 8(a)..... 2  
8 Fed. R. Civ. P. 9(b)..... 2  
9 Fed. R. Civ. P. 12(b)(6) ..... 2  
10 Fed. R. Civ. P. 23 ..... 2, 7  
11 Fed. R. Civ. P. 23(e)..... 8  
12 Fed. R. Civ. P. 23(e)(2) ..... 7  
13 Fed. R. Civ. P. 23(f) ..... 6

14 **REGULATIONS**

15 10 C.F.R. § 430.32(a)..... 2

16 **OTHER AUTHORITIES**

17 *Manual for Complex Litigation*, Fourth § 13.11 ..... 7  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

1 Plaintiffs Kyle Dei Rossi and Mark Linthicum (collectively “Plaintiffs”) respectfully submit  
2 this memorandum in support of Plaintiffs’ Motion for Final Approval of Class Action Settlement  
3 (the “Motion”).

4 **I. INTRODUCTION**

5 This is a class action suit brought by Plaintiffs on behalf of themselves and all others  
6 similarly situated against Defendant Whirlpool Corporation (“Whirlpool”) for misrepresenting its  
7 refrigerators models KSRG25FV\*\* or KSRS25RV\*\* (collectively “Refrigerators”)<sup>1</sup> as Energy  
8 Star qualified and labeling them with the Energy Star logo.

9 This Court granted preliminary approval of the Settlement<sup>2</sup> on June 28, 2016. The  
10 Settlement Class encompasses all end-users who purchased the Refrigerators in California. Under  
11 the terms of the Settlement, Whirlpool has agreed to pay each member of the Settlement Class who  
12 submitted a valid claim either (1) a \$55 cash payment, less any voluntary payment paid by  
13 Whirlpool through Whirlpool’s Voluntary Customer Satisfaction Program, or (2) a 10% rebate of  
14 the purchase price of a new KitchenAid-brand major appliance. 2/5/2016 Fisher Decl., Ex. A §§  
15 IV.B-C (Dkt. No. 173-1). Plaintiffs’ damages expert calculated that Whirlpool’s conduct caused  
16 Class Members to face \$66.65 in increased energy expenses. See 7/31/14 Declaration of Colin  
17 Weir (“7/31/2014 Weir Decl.”) at 7. The Settlement thus provides Class Members with an 82.5%  
18 (55/66.65) recovery of the increased energy costs over the average life of the Refrigerator –  
19 without the delay or the risk of continued litigation.

20 In accordance with the notice program approved by the Court, direct mail and email notice  
21 was sent to end-user purchasers for whom Whirlpool had address information. See Declaration of  
22 Kathleen Wyatt (“Wyatt Decl.”), ¶¶ 1-10. To date, no Class Member has submitted an objection or

23 \_\_\_\_\_  
24 <sup>1</sup> The last two digits of KitchenAid models KSRG25FV\*\* and KSRS25RV\*\*, indicated by \*\*, merely describe their color, e.g., KSRG25FVMS (monochromatic stainless steel), KSRG25FVMT (monochromatic satina), KSRG25FVBL (black), and KSRG25FVWH (white-on-white).

25 \_\_\_\_\_  
26 <sup>2</sup> The Class Action Settlement Agreement and Release of all Claims (“Settlement” or “Settlement Agreement”) and its exhibits are attached as Exhibit A to the 2/5/2016 Declaration of L. Timothy Fisher (“2/5/2016 Fisher Decl.”), filed with the Motion for Preliminary Approval, Dkt. No. 173. All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement.

1 opted out. *Id.* ¶¶ 9-10; Declaration of L. Timothy Fisher in Support of Motion for an Award of  
2 Attorneys’ Fees, Costs and Expenses (“3/3/2017 Fisher Decl.”), ¶ 36. As shown below, the  
3 Settlement not only satisfies Rule 23’s “fair, reasonable, and adequate” standard, it is an  
4 outstanding result for Plaintiffs and the Settlement Class. The Court should grant final approval.

## 5 **II. BACKGROUND OF THE CASE**

### 6 **A. Pleadings and Motions**

7 On January 17, 2012, Plaintiffs filed their Class Action Complaint, which alleged that  
8 Whirlpool’s KSRG25FV\*\* and KSRS25RV\*\* model refrigerators were mislabeled as Energy Star  
9 qualified in violation of the federal standard for energy efficiency under the National Appliance  
10 Energy Conservation Act of 1987 (“NAECA”). *See* Dkt. No. 1; *see also* 42 U.S.C. § 6295(b); 10  
11 C.F.R. § 430.32(a). Plaintiffs alleged that although the Refrigerators were advertised and marketed  
12 as Energy Star qualified, the Refrigerators consumed significantly more energy than stated on the  
13 labels and in advertising. Plaintiffs brought claims for breach of express warranty, breach of the  
14 implied warranty of merchantability, unjust enrichment, violation of the Magnuson-Moss Warranty  
15 Act, violation of the California Consumer Legal Remedies Act (“CLRA”), violation of the  
16 California Unfair Competition Law (“UCL”), violation of the California False Advertising Law  
17 (“FAL”), and violation of the consumer protection laws of the various states.

18 On March 12, 2012, Whirlpool moved to dismiss Plaintiffs’ complaint pursuant to FRCP  
19 12(b)(6). Dkt. No. 18. Whirlpool alleged that Plaintiffs had failed to satisfy the requirements of  
20 FRCP 8(a) and 9(b). Dkt. No. 18-1. Whirlpool also claimed that Plaintiffs’ warranty claims were  
21 deficient because they had failed to adequately allege any warranty and the manufacturer’s limited  
22 written warranty had expired. *Id.* That same day, Whirlpool also moved to strike Count VIII of  
23 Plaintiffs’ complaint on the grounds that Plaintiffs had not separately asserted claims under the  
24 consumer protection laws of the 49 states (other than Ohio) and the District of Columbia. Dkt. No.  
25 17. Plaintiffs opposed Whirlpool’s motions to dismiss and to strike on July 11, 2012. Dkt. Nos. 36  
26 and 38.

27 On September 5, 2012, Judge Mendez held a hearing on Whirlpool’s motions. The Court  
28 granted the motion to dismiss with leave to amend except on Plaintiffs’ claim for unjust



1 enrichment, which was dismissed with prejudice. Dkt. No. 55. The Court denied Whirlpool's  
2 motion to strike as moot. *Id.* The Court requested that Plaintiffs include additional allegations in  
3 their amended complaint regarding Plaintiffs' understanding of the Energy Star logo and their  
4 reliance on the Energy Star logo in connection with their purchases of their refrigerators. The  
5 Court also requested that Plaintiffs add additional facts regarding Plaintiffs' 2008 purchases of  
6 their refrigerators and the disqualification of those refrigerators by the Department of Energy  
7 ("DOE") in 2011.

8 On September 25, 2012, Plaintiffs filed their First Amended Class Action Complaint. Dkt.  
9 No. 56. Plaintiffs' First Amended Complaint added 17 pages of additional allegations regarding  
10 the Energy Star program, statements made by Whirlpool regarding the Energy Star program and  
11 Plaintiffs' purchases of their refrigerators. *Id.* The amended complaint also removed Best Buy and  
12 Pacific Sales as Defendants.

13 On October 15, 2012, Whirlpool moved to dismiss Plaintiffs' amended complaint.  
14 Whirlpool again argued that the Energy Star logo could not be the basis for a breach of warranty  
15 claim because the logo "contains no affirmation of any specific fact." Dkt. No. 59-1 at 1.  
16 Whirlpool also claimed that many of the statements included in Plaintiffs' amended complaint  
17 could not be a basis for any of Plaintiffs' claims because there was no allegation that Plaintiffs saw  
18 or relied on those statements prior to purchasing their refrigerators. *Id.* On December 5, 2012,  
19 Plaintiffs filed their opposition to Whirlpool's motion to dismiss. Dkt. No. 62.

20 On March 28, 2013, Judge Mendez issued an order granting Whirlpool's motion to dismiss  
21 without prejudice. Dkt. No. 67. The Court held that Plaintiffs had "failed to plead the exact terms  
22 of the alleged warranty." *Id.* at 8. The Court also concluded that Plaintiffs had failed to cite "any  
23 misrepresentation that Defendant conveyed to them." *Id.* at 13. Nevertheless, the Court granted  
24 Plaintiffs leave to amend for a second time, but warned that "this is the second chance [the Court]  
25 has given Plaintiffs to properly plead their claims in this action and it is unlikely that the Court will  
26 permit any further chances to amend in order to avoid dismissal with prejudice of this case." *Id.* at  
27 17-18.

1 Plaintiffs filed their 77-page Second Amended Class Action Complaint on April 24, 2013.  
2 Dkt. No. 71. Plaintiffs added 26 additional pages of allegations detailing the precise  
3 representations made to Plaintiffs, the history and significance of the Energy Star logo and  
4 program, and Whirlpool's participation in the Energy Star program.

5 Whirlpool filed its third motion to dismiss on May 21, 2013. Dkt. No. 72. Whirlpool again  
6 argued that Plaintiffs failed to "plead what allegedly false or misleading information Plaintiffs  
7 personally understood the Energy Star logo to convey prior to purchasing their KitchenAid  
8 refrigerators." *Id.* at 1. Plaintiffs opposed Whirlpool's motion on August 5, 2013. Dkt. No. 77.

9 On October 25, 2013, this Court<sup>3</sup> issued an order granting Whirlpool's motion in part and  
10 denying it in part. Dkt. No. 81. The Court held that "Defendant's adherence of the Energy Star  
11 certification to its products falls within the statutory definition of an express warranty pursuant to  
12 California Law," and that "Plaintiffs have sufficiently pled their breach of express warranty claim."  
13 *Id.* at 7-8. The Court also held that Plaintiffs had properly alleged their claims under the CLRA,  
14 FAL and the unfair and fraudulent prongs of the UCL. *Id.* at 12-15, 17-19. The Court granted  
15 Whirlpool's motion to dismiss Plaintiffs' claims for breach of the implied warranty of  
16 merchantability, for violation of the Magnusson-Moss Warranty Act, and under the unlawful prong  
17 of the UCL. *Id.* at 9-12, 16-17.

18 On November 18, 2013, Whirlpool filed its answer to Plaintiffs' Second Amended Class  
19 Action Complaint. Dkt. No. 86. Whirlpool's answer ended a nearly two-year battle over the  
20 pleadings.

## 21 **B. Discovery**

22 On December 23, 2013, Plaintiffs served their First Set of Requests for Production of  
23 Documents. Over the next nine months, Whirlpool produced 17,629 pages of documents.  
24 Plaintiffs' counsel spent significant time reviewing and analyzing those documents in preparation  
25 for depositions and for their motion for class certification.

26  
27  
28 

---

<sup>3</sup> This case was re-assigned from Judge Mendez to Your Honor on April 3, 2013. Dkt. No. 68.

1 Plaintiffs also served nine interrogatories on Whirlpool seeking information about, among  
2 other things, the number of Refrigerators sold, the identity of all retailers who sold the refrigerators  
3 and the revenue generated from the sales of the refrigerators.

4 Whirlpool also served discovery on Plaintiffs. Plaintiffs responded to Whirlpool's  
5 interrogatories and document requests on February 12, 2014. Plaintiffs amended their responses on  
6 June 4, 2014. Whirlpool took the deposition of Plaintiff Linthicum in Los Angeles on June 9,  
7 2014. Whirlpool took the deposition of Plaintiff Dei Rossi on June 10, 2014, in Sacramento.

### 8 **C. Class Certification**

9 On July 31, 2014, Plaintiffs filed their motion for class certification. Dkt. No. 105.  
10 Plaintiffs submitted 35 exhibits totaling 325 pages of evidence with their motion. Dkt. Nos. 105-2-  
11 7. Plaintiffs Dei Rossi and Linthicum submitted declarations in support of the motion. Dkt. Nos.  
12 105-8 and 105-9. Additionally, Plaintiffs' damages expert Colin Weir of Economics and  
13 Technology, Inc., submitted a declaration in support of the motion. Mr. Weir proposed two  
14 methods of calculating classwide damages. First, Mr. Weir proposed a calculation of energy  
15 expense damages wherein consumers would receive payment for the additional expense associated  
16 with operating the Refrigerators at less energy-efficient levels. 7/31/14 Weir Decl. at 3-5. Mr.  
17 Weir estimated the energy expense damages at \$66.65 over the estimated lifespan of the  
18 Refrigerators. *Id.* Mr. Weir also proposed a regression analysis to determine the portion of the  
19 price attributable to the Energy Star logo. *Id.* at 6-16.

20 On September 18, 2014, Whirlpool filed its opposition to Plaintiffs' motion for class  
21 certification. Dkt. No. 111. Whirlpool submitted eight declarations in support of their opposition.  
22 Whirlpool submitted declarations from five expert witnesses as well as three Whirlpool employees.  
23 It also filed a motion to strike Mr. Weir's declaration in support of Plaintiffs' motion for class  
24 certification.

25 After Whirlpool filed its opposition to the motion for class certification, Plaintiffs took the  
26 depositions of Whirlpool's experts Dr. Laurentius Marais, Dr. Carol Scott and Dr. John Fessler on  
27 October 9, 2014, October 15, 2014 and October 17, 2014, respectively.  
28

1 Plaintiffs filed their reply in support of their motion for class certification on November 24,  
2 2014. Plaintiffs submitted 27 additional exhibits with their class certification reply brief as well as  
3 a declaration from Dr. Elizabeth Howlett regarding the significance of the Energy Star logo and its  
4 impact on consumers from a marketing perspective. Plaintiffs also filed an opposition to  
5 Whirlpool's motion to strike Mr. Weir's declaration.

6 Whirlpool subsequently filed a motion to strike Dr. Howlett's declaration. Plaintiffs filed  
7 an opposition to that motion on January 2, 2014. Dkt. No. 140.

8 On April 28, 2015, this Court granted Plaintiffs' motion for class certification in part and  
9 denied it in part. Dkt. No. 160. The Court certified a class of all persons who purchased the  
10 Refrigerators in California. *Id.* at 20. The Court denied Plaintiffs' motion to certify a class in any  
11 other state and Whirlpool's motions to strike the declarations submitted by Mr. Weir and Dr.  
12 Howlett. *Id.* at 1-2, fn. 1 and 20.

13 On May 12, 2015, Whirlpool filed a petition for permission to appeal pursuant to Fed. R.  
14 Civ. P. 23(f) with the Ninth Circuit Court of Appeals. Plaintiffs filed their response to Whirlpool's  
15 23(f) petition on May 22, 2015. 31. On July 29, 2015, the Ninth Circuit Court of Appeals denied  
16 Whirlpool's 23(f) petition.

17 **D. Settlement**

18 Shortly after the Court issued its order on class certification, the parties began to have  
19 informal discussions regarding settlement. 3/3/2017 Fisher Decl., ¶ 32. On October 8, 2015, the  
20 parties had a full-day settlement meeting in New York City. *Id.* At the conclusion of that meeting,  
21 the parties executed a preliminary term sheet setting forth the basic terms of the settlement. *Id.*  
22 Specifically, the parties agreed that the settlement would provide for a \$55 cash payment, or a 10%  
23 rebate on the purchase of another KitchenAid-brand appliance. *Id.* On October 28, 2015, the  
24 parties executed a binding term sheet that more fully memorialized the agreement reached at the  
25 October 8 meeting. *Id.*, ¶ 33.

26 For the next three months, the parties continued negotiating the terms of the settlement and  
27 working on preparing the settlement agreement and motion for preliminary approval. *Id.*, ¶ 34.  
28 The negotiations were difficult and fraught with challenges that imperiled the settlement several

1 times. *Id.* Ultimately, the parties executed the Class Action Settlement Agreement on February 5,  
2 2016. Exh. A to Dkt. No. 173-1. Plaintiffs filed their motion for preliminary approval of the  
3 settlement shortly thereafter. Dkt. No. 173.

4 On June 28, 2016, the Court granted Plaintiffs' motion for preliminary approval. Dkt. No.  
5 176.

### 6 **III. THE STANDARD FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS**

7 In evaluating a class action settlement under Rule 23, a district court must determine  
8 whether the settlement is fundamentally fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2).

9 In evaluating the fairness of a class action settlement, courts are mindful that the law favors the  
10 compromise and settlement of class action suits. *See, e.g., Churchill Village, L.L.C. v. Gen. Elec.*,  
11 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.  
12 1992); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). *The Manual*  
13 *for Complex Litigation* states:

14 The judge can encourage the settlement process by asking at the first pretrial  
15 conference whether settlement discussions have occurred or might be  
16 scheduled.

17 *Manual*, Fourth § 13.11 at 167. "Courts have afforded a presumption of fairness and  
18 reasonableness of a settlement agreement where that agreement was the product of non-collusive,  
19 arms' length negotiations by capable and experienced counsel." *In re Netflix Privacy Litig.*, No.  
20 5:11-CV-00379 EJD, 2013 WL 1120801, at \*4 (N.D. Cal. Mar. 18, 2013). Where, as here, the  
21 settlement negotiations were conducted at arm's-length by experienced class action counsel,  
22 counsel's assessment and judgment are entitled to a presumption of reasonableness, and the court is  
23 entitled to rely heavily upon counsel's assessment and judgment. *Boyd v. Bechtel Corp.*, 485 F.  
24 Supp. 610, 622 (N.D. Cal. 1979). Indeed, "the court's intrusion upon what is otherwise a private  
25 consensual agreement negotiated between the parties to a lawsuit must be limited to the extent  
26 necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
27 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a  
28 whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625.

1 Ultimately, however, the decision to approve a settlement is committed to the sound discretion of  
2 the trial judge. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

3 **IV. THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE AND REASONABLE**

4 In answering the question of whether a settlement is fair, adequate and reasonable as  
5 prescribed by Rule 23(e), district courts have been instructed to balance several factors: (1) the  
6 strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further  
7 litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered  
8 in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the  
9 experience and views of counsel; and (7) the reaction of the class members to the proposed  
10 settlement. *Hanlon*, 150 F.3d at 1026; *Churchill*, 361 F.3d at 575. Here, the balance of the factors  
11 demonstrates that settlement warrants final approval because it is fair, adequate and reasonable.

12 **A. Terms of the Settlement**

13 **1. Monetary Relief for Class Members**

14 Pursuant to the terms of the Settlement, Class Members can choose one of the following  
15 Settlement benefits:

16 **(1) Cash Option:** Whirlpool will provide a cash payment of \$55, less  
17 any voluntary payment paid by Whirlpool through Whirlpool's Voluntary Customer  
18 Satisfaction Program. Each Class Member is entitled to one cash payment of \$55  
19 for each Class Refrigerator that he or she purchased. For example, if a Class  
20 Member bought two Class Refrigerators, then that Class Member would be eligible  
21 to receive two cash payments of \$55 each, less any voluntary payment paid by  
22 Whirlpool through Whirlpool's Voluntary Customer Satisfaction Program;<sup>4</sup> or, in  
23 the alternative,

24 **(2) Rebate Option:** Whirlpool will provide a 10% rebate of the purchase  
25 price of a New KitchenAid-brand Major Appliance, without any cap as to the  
26 maximum amount of the rebate, to any member of the Class who submits a valid

27 <sup>4</sup> If a Class Member has already received compensation through Whirlpool's Voluntary Customer  
28 Satisfaction Program, and if that compensation exceeded \$55, then such Class Member is not  
entitled to any cash payment from Whirlpool.

1 claim. The rebate for the purchase of a New KitchenAid-brand Major Appliance  
2 will be 10% off the retail purchase price (not to include sales taxes, delivery fees,  
3 and installation charges). Such rebate shall be in addition to any other sales  
4 promotion that Whirlpool or any retailer or seller offers towards a New KitchenAid-  
5 brand Major Appliance. Each Class Member shall be entitled to one rebate for each  
6 Class Refrigerator that he or she purchased. If a Class Member bought two Class  
7 Refrigerators, for example, then that Settlement Class Member would be eligible to  
8 receive two rebates.

9 2/5/2016 Fisher Decl., Ex. A §§ IV.B-C (Dkt. No. 173-1).

10 Plaintiffs' damages expert Colin B. Weir calculated that Whirlpool's conduct caused Class  
11 Members to incur \$66.65 in increased energy expenses over the average lifespan of the  
12 Refrigerators. *See* 7/31/14 Declaration of Colin Weir at 7. The cash payment of \$55 thus provides  
13 Class Members with an 82.5% (55/66.65) recovery of the increased energy costs without the delay  
14 or the risk of continued litigation.

15 **2. Release and Discharge of Claims**

16 The Settlement Agreement provides for a specific release of all claims or causes of action  
17 that relate to any of the alleged defects, malfunctions, or inadequacies of the Refrigerators that are  
18 described and/or alleged in the Second Amended Class Action Complaint in this Action or that  
19 could have been alleged in this Action. *See* 2/5/2016 Fisher Decl., Ex. A § IX (Dkt. No. 173-1).  
20 The release will forever terminate this litigation involving Whirlpool and the Plaintiffs in this  
21 action, once the Settlement becomes effective as defined in the Settlement Agreement.

22 **3. Payment of Attorneys' Fees and Expenses**

23 The Parties have agreed to negotiate in good faith concerning the award of attorneys' fees  
24 and costs to be paid by Whirlpool to Class Counsel. *Id.* § VIII. Parties failed to reach an  
25 agreement on an amount of attorneys' fees and costs as of yet. Accordingly, Plaintiffs will move  
26 for an award of attorneys' fees, and Whirlpool will then have the opportunity to oppose that  
27 motion. Under the terms of the Settlement Agreement, the amount of attorneys' fees and costs to  
28

1 be paid to Class Counsel will be subject to Court approval and will be paid separate and apart from  
2 any amounts to be paid to the Class. *Id.*

3 **4. Compensation for the Class Representatives**

4 In addition to the relief discussed above, Whirlpool has also agreed to pay incentive awards  
5 to the Class Representatives, Mark Linthicum and Kyle Dei Rossi, in the amount of \$4,000 each.  
6 *Id.* § VIII.D.

7 **5. Payment of Notice and Administrative Fees**

8 Whirlpool shall pay directly to the administrator handling the administration of the  
9 Settlement the reasonable costs and expenses of providing notice to the Class and administering the  
10 settlement in accordance with the Settlement Agreement.<sup>5</sup> *Id.* § V.

11 **B. Strength of Plaintiffs' Case**

12 In determining the likelihood of a plaintiff's success on the merits of a class action, "the  
13 district court's determination is nothing more than an amalgam of delicate balancing, gross  
14 approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations  
15 omitted). The court may "presume that through negotiation, the Parties, counsel, and mediator  
16 arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery."  
17 *Garner v. State Farm. Mut. Auto. Ins. Co.*, 2010 WL 1687832, at \*9 (N.D. Cal. Apr. 22, 2010)  
18 (citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

19 When Plaintiffs' counsel engaged in arm's-length negotiations with Whirlpool's counsel,  
20 Plaintiffs' counsel was thoroughly familiar with the applicable facts, legal theories and defenses.  
21 3/3/2017 Fisher Decl., ¶¶ 2-36. Plaintiffs' theory of recovery is premised on the fact that the DOE  
22 and independent testing show that the Refrigerators did not meet Energy Star efficiency  
23 requirements for permitted energy use. SAC ¶ 73-98. On this basis, the DOE revoked the Energy  
24 Star status of these model refrigerators. *Id.* Plaintiffs claim that Whirlpool affixed Energy Star  
25 logos to the Refrigerators that substantially misrepresented the Refrigerators actual energy  
26

27 \_\_\_\_\_  
28 <sup>5</sup> Notice costs also include notification to the Attorney General of the United States and the  
Attorney General of California in accordance with the Class Action Fairness Act of 2005  
("CAFA"), 28 U.S.C. § 1715(b).



1 consumption. *Id.* As a result, Plaintiffs suffered a loss of money in the form of increased energy  
2 costs. SAC ¶ 97.

3 Although Plaintiffs believe their claims have merit, Whirlpool's defenses reduced  
4 Plaintiffs' likelihood of success and posed significant risk to them obtaining any recovery. For  
5 example, Whirlpool vigorously challenged Plaintiffs' theory of damages and asserted that there  
6 was no reliable method of calculating class wide damages. Whirlpool also argued that Energy Star  
7 qualification does not violate the CLRA, UCL, and FAL because it is not likely to deceive a  
8 reasonable consumer. Indeed, a trier of fact could conclude that a reasonable consumer would not  
9 rely on the Energy Star representation and decide the case in favor of Whirlpool. Since it is clear  
10 that Whirlpool would present a vigorous defense, and that there is no assurance that the Class  
11 would prevail at trial, the Settlement provides the Class the best opportunity to obtain significant  
12 relief. 3/3/2017 Fisher Decl., ¶ 54. The Settlement abrogates the risks that might have prevented  
13 the Class from obtaining relief. *Id.*

#### 14 **C. Risk of Continuing Litigation**

15 Proceeding in this litigation in the absence of settlement poses substantial risks to the Class.  
16 The Class could recover nothing if Whirlpool were to obtain summary judgment, obtain an order  
17 excluding one or more of Plaintiffs' experts on a motion in limine, obtain an order decertifying the  
18 class, or prevail at trial or on appeal. 3/3/2017 Fisher Decl., ¶ 54. Such considerations have been  
19 found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v.*  
20 *Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at \*4 (N.D. Cal. Oct. 22, 2008) ("Settlement  
21 avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a  
22 prompt, certain, and substantial recovery for the Plaintiff class."). Even assuming Plaintiffs  
23 survived Defendant's motions for summary judgment or to exclude Plaintiffs' experts, Plaintiffs  
24 would have to convince the jury to accept their expert's test for measuring energy efficiency and  
25 reject contrary testimony from Defendant's highly-qualified experts. 3/3/2017 Fisher Decl., ¶ 54.  
26 In this "battle of experts," it is virtually impossible to predict with any certainty which testimony  
27 would be credited, and ultimately, which expert version of energy efficiency would be accepted by  
28 the jury. *Id.* Even if Plaintiffs were to prevail on the issue of liability, there would still be risks in

1 establishing the existence of monetary damages based on increased energy use during the life of  
2 the Refrigerators. *Id.* The experience of Plaintiffs' counsel has taught them that the above-  
3 described factors can make the outcome of trial extremely uncertain. *Id.*

4 Moreover, even if Plaintiffs were to prevail at trial, risks to the class remain. For example,  
5 in *In re Apple Computer Sec. Litig.*, 1991 WL 238298 \*1 (N.D. Cal. Sept. 6, 1991), the jury  
6 rendered a verdict for plaintiffs after an extended trial. Based on the jury's findings, recoverable  
7 damages would have exceeded \$100 million. *Id.* However, weeks later, the trial court overturned  
8 the verdict, entering judgment n.o.v. for the individual defendants, and ordered a new trial with  
9 respect to the corporate defendant. *Id.* at \*2. By settling, Plaintiffs and the Class avoid these risks,  
10 as well as the delays and risks of the appellate process. Careful consideration of the above risks  
11 supports approval of the Settlement as fair, adequate and reasonable.

#### 12 **D. Risk of Maintaining Class Action Status**

13 In addition to the risks of continuing the litigation discussed above, Plaintiffs would also  
14 face significant risks in maintaining class status through trial. Whirlpool forcibly opposed class  
15 certification and continues to maintain that class certification is inappropriate. Even though the  
16 Court certified a class, the Class could be decertified at any time on Whirlpool's, or the Court's  
17 own, motion. *See In re Netflix Privacy Litigation*, 2013 WL 1120801, at \*6 ("The notion that a  
18 district court could decertify a class at any time is one that weighs in favor of settlement") (internal  
19 citations omitted).

20 While Plaintiffs maintain that class treatment is appropriate in this case, the fact that actual  
21 energy damages vary between Class Members creates a risk of decertification. 3/3/2017 Fisher  
22 Decl., ¶ 54. These energy damages can vary based on the energy costs where a Class Member  
23 lives and the way in which Class Members used their Refrigerators. The Settlement eliminates  
24 these risks by ensuring Class Members a recovery that is "certain and immediate, eliminating the  
25 risk that Class members would be left without any recovery...at all." *Fulford v. Logitech, Inc.*,  
26 2010 U.S. Dist. LEXIS 29042, at \*8 (N.D. Cal. Mar. 5, 2010). Indeed, the Settlement Agreement  
27 provides a *guaranteed* recovery of \$55 for Class Members who submit a Valid Claim form,  
28 regardless of the total number of claims submitted. 2/5/2016 Fisher Decl., Ex. A § IV.B (Dkt. No.

1 173-1). Since the risks of maintaining a class action and succeeding on the merits are substantial,  
2 this bird in the hand is worth two in the bush, and the Settlement should be given final approval.

3 **E. Extent of Discovery and Status of Proceedings**

4 Under this factor, courts evaluate whether class counsel had sufficient information to make  
5 an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d  
6 454, 459 (9th Cir. 2000).

7 In this case, there can be no doubt that Class Counsel had sufficient information to make an  
8 informed decision about the merits of this case. This case is more than five-years old. Plaintiffs  
9 survived a contentious battle over the pleadings, conducted extensive discovery and obtained an  
10 order certifying the Class. 3/3/17 Fisher Decl., ¶¶ 2-31. Moreover, prior to filing this case,  
11 Plaintiffs' counsel conducted an extensive investigation, including: FOIA requests; consultation  
12 with an independent expert who provided a detailed analysis of each product's energy consumption  
13 and associated costs; a thorough search of publicly available sources to locate and analyze all  
14 available documents related to Defendant's Refrigerators, including the U.S. Department of  
15 Energy's guidelines and notices of noncompliance with the applicable federal energy conservation  
16 standards; extensive discussions with an economic consultant; review of documents from putative  
17 class members relating to the practices described in the complaints; legal research and briefing into  
18 the sufficiency of the claims; and numerous interviews with witnesses and members of the putative  
19 class. *Id.*, ¶ 2-36. During their investigation, counsel received, examined and analyzed  
20 information, documents, and materials that enabled them to assess the likelihood of success on the  
21 merits, and to enter into arm's-length negotiations fully informed. *Id.*; *see Ellis v. Naval Air*  
22 *Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981) (there was  
23 sufficient evidence before the parties to allow them to consider the strengths and weaknesses of  
24 their respective cases). The parties reached agreement on the terms of the Settlement Agreement  
25 through counsel's vigorous debate of legal and factual theories, and extensive arm's-length  
26  
27  
28

1 negotiations.<sup>6</sup> 3/3/2017 Fisher Decl., ¶¶ 33-37. Thus, this factor weighs strongly in favor of  
2 approval.

3 **F. Experience and Views of Counsel**

4 The recommendations of Plaintiffs' counsel should be given a presumption of  
5 reasonableness. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008).  
6 Deference to Plaintiffs' counsel's evaluation of the Settlement is appropriate because "[p]arties  
7 represented by competent counsel are better positioned than courts to produce a settlement that  
8 fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967 (citing *In re*  
9 *Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

10 Here, the Settlement was negotiated by counsel with extensive experience in consumer  
11 class action litigation. 3/3/2017 Fisher Decl., ¶¶ 37-41. Indeed, this Court found that Faruqi &  
12 Faruqi, LLP, and Bursor & Fisher, P.A., are qualified to represent the settlement class as co-lead  
13 class counsel. Order Granting Class Certification in Part at 9, Dkt. No. 160; Preliminary Approval  
14 Order at 9, Dkt. No. 176. Based on their collective experience, Class Counsel concluded that the  
15 Settlement Agreement provides exceptional results for the Class while sparing the Class from the  
16 numerous uncertainties that would result from continued and protracted litigation. 3/3/2017 Fisher  
17 Decl., ¶ 54. This factor also supports a finding by the Court that the Settlement is fair, adequate  
18 and reasonable.

19 **G. Presence of a Governmental Participant**

20 The government need not be involved with a class action settlement. However, the Class  
21 Action Fairness Act ("CAFA") requires that notice of the settlement be delivered to the Attorney  
22 General of the United States, and to each attorney general of each state where class members  
23 reside. 28 U.S.C. § 1715(b). Here, no attorney general has objected. 3/3/2017 Fisher Decl., ¶ 36.  
24 The lack of government involvement weighs in favor of approving the Settlement as agreed to by  
25 the Parties. *See Petersen v. CJ Am., Inc.*, 2016 U.S. Dist. LEXIS 140187, at \*8 (S.D. Cal. Sept. 30,

26 \_\_\_\_\_  
27 <sup>6</sup> The material terms of the Settlement Agreement were only realized after nearly four months of  
28 negotiations, consisting of numerous in-person meetings, telephonic conferences and e-mail  
exchanges between counsel for the parties beginning in October 2015 and continuing through  
February 2016. Fisher Decl. ¶¶ 32-36.

1 2016) (granting final approval of a consumer class action settlement and acknowledged that  
2 appropriate notice regarding the settlement and that “no such objections or comments were  
3 received.”).

#### 4 **H. Reactions of Class Members**

5 To date, no Class Member has objected to, or opted out of, the Settlement.<sup>7</sup> 3/3/2017  
6 Fisher Decl., ¶ 36; *see also Churchill*, 361 F.3d at 577 (weighing the low number of objectors in  
7 favor of settlement). The absence of objections raises a strong presumption that the terms of the  
8 Settlement are favorable to the Class. *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221  
9 F.R.D. 523, 529 (C.D. Cal. 2004) (“[T]he absence of a large number of objections to a proposed  
10 class action settlement raises a strong presumption that the terms of the proposed class action  
11 settlement are favorable to the class members.”). As of March 3, 2017, despite the fact that Notice  
12 was successfully mailed to over 2,037 Settlement Class Members (98% of the total 2,084 notices  
13 mailed), no class member opted out. Supplemental Declaration of Kathleen Wyatt at ¶¶ 4, 9-10;  
14 *see also Hanlon*, 150 F.3d at 1027 (“[T]he fact that the overwhelming majority of the class  
15 willingly approved the offer and stayed in the class presents at least some objective positive  
16 commentary as to its fairness”). Since not a single Class Member has objected or opted out, this  
17 factors weighs heavily in favor of Settlement approval and the Court should find that the  
18 “presumption of fairness” applies in this case.

#### 19 **V. NOTICE**

20 The Parties agreed to a notice plan, which the Court approved in its Preliminary Approval  
21 Order. *See* Dkt. No. 173 at 5 (“The Court, having reviewed the proposed Prequalified Notice,  
22 FAQ, Publication Notice, Claim Form, and the proposed plan for distributing and disseminating  
23 each of them, finds and concludes that the proposed plan for distributing and disseminating each of  
24 them will provide the best notice practicable under the circumstances and satisfies all requirements  
25 of federal and California laws and due process.”). The approved notice plan informed the  
26 Settlement Class of their rights and followed a comprehensive plan for delivery of notice by U.S.

27 <sup>7</sup> The deadlines for filing objections or opting out have not yet occurred. The deadline to object or  
28 opt-out of the Settlement is March 10, 2017. After that deadline, Plaintiffs will submit a  
supplemental declaration attesting to the number of objections and opt-outs.

1 postal mail, e-mail, publication and Internet placement, and was the best notice practicable given  
2 the circumstances of this action. Furthermore, the notices accurately informed Class Members of  
3 the salient terms of the Settlement Agreement, the date of the final approval hearing and the rights  
4 of all parties, including the rights to file objections and to opt out of the Class. *See* Dkt. 176 at 4-5.  
5 Indeed, this method of giving notice (similar if not identical to the method used in countless other  
6 class actions) was appropriate because it provided a fair opportunity for members of the Settlement  
7 Class to learn about the Settlement Agreement and to make an informed decision regarding the  
8 proposed Settlement. Thus, the notices and the procedures embodied in the notices amply satisfy  
9 the requirements of due process.

10 **VI. CONCLUSION**

11 For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval  
12 to the Settlement Agreement and enter the Final Approval Order in the form submitted herewith.

13  
14 Dated: March 3, 2017

**BURSOR & FISHER, P.A.**

15  
16 By: /s/ L. Timothy Fisher  
L. Timothy Fisher

17 Scott A. Bursor (State Bar No. 276006)  
18 L. Timothy Fisher (State Bar No. 191626)  
19 1990 North California Boulevard, Suite 940  
20 Walnut Creek, CA 94596  
21 Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: scott@bursor.com  
ltfisher@bursor.com

22 **FARUQI & FARUQI, LLP**  
23 Barbara A. Rohr (State Bar No. 273353)  
24 10866 Wilshire Blvd., Suite 1470  
25 Los Angeles, CA 90067  
26 Telephone: (424) 256-2884  
27 Facsimile: (424) 256-2885  
28 Email: brohr@faruqilaw.com

*Co-Lead Class Counsel*

**VOZZOLO LLC**  
Antonio Vozzolo (*pro hac vice*)  
345 Route 17 South  
Upper Saddle River, NJ 07458

Tel: 201-630-8820  
Fax: 201-604-8400  
Email: [avozzolo@vozzolo.com](mailto:avozzolo@vozzolo.com)

*Additional Counsel for Plaintiffs*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28