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10 *Attorneys for Plaintiffs and*
 11 *the Proposed Class*

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION

15 DEAN SHEIKH, JOHN KELNER, TOM
 16 MILONE, DAURY LAMARCHE, and MICHAEL
 17 VERDOLIN, on behalf of themselves and all others
 similarly situated,

18 Plaintiffs,

19 v.

20 TESLA, INC. d/b/a TESLA MOTORS, INC., a
 21 Delaware corporation,

22 Defendant.

No. 5:17-cv-02193-BLF

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION FOR SERVICE
 AWARDS, ATTORNEYS' FEES, AND
 COSTS AND EXPENSES**

Date: October 17, 2018
 Time: 9:00 a.m.
 Judge: Hon. Beth Labson Freeman
 Dept.: Courtroom 3, 5th Floor

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. STATEMENT OF ISSUES TO BE DECIDED	1
III. STATEMENT OF RELEVANT FACTS	1
A. Introduction	1
B. Plaintiffs and their claims	3
C. Proceedings to-date	4
D. The Settlement.....	5
1. Settlement Class definition, class period, and claims period.....	5
2. Relief to the Settlement Class	6
a. Generally	6
b. Direct payments to Settlement Class Members.....	6
c. Non-Monetary Benefit.....	7
d. Service awards and attorneys’ fees, costs, and expenses	7
E. Preliminary approval of the settlement.....	8
IV. ARGUMENT	8
A. Applicable standards for attorneys’ fee request.....	9
B. The Court should award 17.7% of the gross settlement fund as attorneys’ fees.....	11
1. Results achieved.....	11
2. The risk of litigation.....	11
3. Skill required and quality of the work performed.....	12
4. Contingent nature of the fee and the financial burden.....	13
5. Awards made in similar cases	13
C. Under a lodestar cross-check, Plaintiffs’ attorneys’ fee request is fair and reasonable.....	13
1. Counsels’ hourly rates are reasonable.....	15

1
2
3
4
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6
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2. The number of hours that counsel has worked, and will need to work, is reasonable.18

3. Counsels’ fees are reasonable pursuant to the *Kerr* factors subsumed in the lodestar analysis.19

(1) Novelty and complexity of the litigation19

(2) Skill and experience of class counsel and quality of representation19

(3) Favorability of result.....20

4. The presence of a reasonable multiplier further supports the reasonableness of Plaintiffs’ fee request.....20

D. Costs and expenses20

E. The class representatives each should receive \$4,800 incentive awards.21

V. CONCLUSION.....23

TABLE OF AUTHORITIES

Page(s)

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1

2

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4 643 F. Supp. 836 (N.D. Cal. 1986).....14

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6 654 F.3d 935 (9th Cir. 2011) 14, 19

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8 465 U.S. 886 (1984)15

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13 *Deatrick v. Securitas Sec. Servs. USA, Inc.*,

14 2016 WL 5394016 (N.D. Cal. Sept. 27, 2016) 9, 10

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16 2016 WL 537946 (N.D. Cal. Feb. 11, 2016)*passim*

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18 2013 WL 12308314 (N.D. Cal. July 22, 2013)9

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20 307 F.3d 997 (9th Cir. 2002)16

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Ingram v. Coca-Cola Co.,

200 F.R.D. 685 (N.D. Ga. 2001)23

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376 P.3d 672 (Cal. 2016)..... 9, 10

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2009 WL 1626376 (N.D. Cal. June 9, 2009).....15

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559 F. Supp. 2d 1036 (N.D. Cal. 2007) 19, 21

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2016 WL 613255 (N.D. Cal. Feb. 16, 2016) 10, 12, 13

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211 F. Supp. 3d 1244 (S.D. Cal. 2016)10

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2017 WL 1047834 (N.D. Cal. Mar. 17, 2017)..... 16, 20

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2013 WL 6531177 (C.D. Cal. Nov. 23, 2011)22

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2015 WL 685994 (N.D. Cal. Feb. 12, 2015)20

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2008 WL 3854963 (C.D. Cal. Aug. 13, 2008)22

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Fed. R. Civ. P. 23(h).....8

NOTE FOR MOTION AND MOTION

PLEASE NOTE that on October 17, 2018, at 9:00 a.m., or as soon thereafter as may be heard in the courtroom of the Hon. Beth Labson Freeman, U.S. District Court for the Northern District of California, San Jose Division, Plaintiffs Dean Sheikh, John Kelner, Tom Milone, Daury Lamarche and Michael Verdolin, pursuant to Fed. R. Civ. P. 23(h) and the parties’ settlement agreement, will and do hereby move for an order:

1. Granting to each of them, as named Plaintiffs, a \$4,800 service award;
2. Granting Plaintiffs’ request for a reasonable attorneys’ fee in the sum of \$961,018.00, which is 17.7% of the gross settlement sum in this matter; and
3. Granting Plaintiffs’ request for reimbursement of costs and expenses in the sum of \$14,981.95.

This motion is based on the declarations of their lawyers, including exhibits; the records and files in this matter; the argument below; and oral argument at the upcoming hearing.

I. SUMMARY OF ARGUMENT

Plaintiffs, Tesla owners who purchased Enhanced Autopilot in connection with their purchase or lease of a Tesla Hardware 2 Model S or Model X vehicle delivered to them on or before September 30, 2017, move for service awards and reasonable attorneys’ fees, costs, and expenses. As Plaintiffs will demonstrate, their requests are justified under the facts of this case and applicable law.

II. STATEMENT OF ISSUES TO BE DECIDED

Should the Court grant Plaintiffs’ request for service awards in the sum of \$4,800 per named Plaintiff, reasonable attorneys’ fees in the sum of \$961,018.00, and reasonable costs and expenses in the sum of \$14,981.95?

III. STATEMENT OF RELEVANT FACTS

A. Introduction

Tesla sells battery-powered electric vehicles in the United States and throughout the world. Beginning in or about October 2016, Tesla announced its new Hardware 2 (“HW2”) Model S and Model

1 X vehicles. Tesla also announced that it would release the next generation Enhanced Autopilot for
2 HW2 vehicles, which consumers had the option to purchase for \$5000.¹

3 Enhanced Autopilot added new capabilities. As Tesla's website explained: "Your Tesla will
4 match speed to traffic conditions, keep within a lane, automatically change lanes without requiring driver
5 input, transition from one freeway to another, exit the freeway when your destination is near, self-park
6 when near a parking spot and be summoned to and from your garage."

7 When Tesla announced Enhanced Autopilot in October 2016, the company stated that software
8 for these features was "expected to complete validation and be rolled out to your car via an over-the-air
9 update in December 2016, subject to regulatory approval." (Tesla autopilot webpage, available at
10 <http://web.archive.org/web/20170123045718/https://www.tesla.com/autopilot> (capture from Jan. 23,
11 2017) (last visited Mar. 20, 2017).) On January 24, 2017, Tesla updated its website to state that "Tesla's
12 Enhanced Autopilot software has begun rolling out and features will continue to be introduced as
13 validation is completed, subject to regulatory approval."

14 Beginning in January 2017, Tesla began rolling out the Enhanced Autopilot features. The
15 Enhanced Autopilot features were improved and augmented over time. Tesla released updates in
16 February, March, May, June, and July. As of September 2017, Tesla had delivered all of the Enhanced
17 Autopilot features with the exception of On-ramp to Off-ramp and Smart Summon.

18 All Tesla HW2 vehicles are equipped with standard safety features. Tesla's website describes its
19 "standard safety features" to include: (1) Automatic Emergency Braking; (2) Front Collision Warning; (3)
20 Side Collision Warning; and (4) Auto High Beams. In October 2016, Tesla's website stated that the
21 safety features would "become available in December 2016 and roll out through over-the-air updates."
22 On January 24, 2017, Tesla's updated its website to state that the standard safety features "have begun
23 rolling out through over-the-air updates." The standard safety features were not available in December
24 2016, but were rolled out beginning in January 2017; the rollout was completed in May 2017.²

25
26
27 ¹ Consumers could also purchase Enhanced Autopilot later for \$6,000.

28 ² The speed at which Automatic Emergency Braking was enabled was increased in June 2017.

B. Plaintiffs and their claims

1 Plaintiff Dean Sheikh is a resident of Denver, Colorado. He placed an order for his Model S 60
2 D on November 20, 2016, paying a \$2,500 deposit. On November 24, 2016, his vehicle design was
3 confirmed with a purchase price of \$81,200, inclusive of a \$5,000 payment for Enhanced Autopilot. He
4 took delivery of his Model S 60 D on December 27, 2016.

5 Plaintiff John Kelner is a resident of Davie, Florida. On December 10, 2016, he placed an order
6 for a Model S 90 D through Tesla's online system, paying a \$2,500 deposit. On December 14, 2016, he
7 paid a \$24,333.57 initial lease payment. His vehicle design was confirmed with a purchase price of
8 \$108,700.00, inclusive of a \$5,000 payment for Enhanced Autopilot. He took delivery of his Tesla on
9 December 16, 2016.

10 Plaintiff Tom Milone is a resident of Jackson, New Jersey. He placed an order for his Model S
11 90 D on November 23, 2016, paying a \$2,500 deposit. His vehicle design was confirmed with a
12 purchase price of \$113,200.00, inclusive of a \$5,000 payment for Enhanced Autopilot. He took delivery
13 of his Model S 90 D on December 29, 2016.

14 Plaintiff Daury Lamarche is a resident of Marlton, New Jersey. In the fall of 2016, he placed an
15 order for a Model S 75 D and paid a \$2,500 deposit. His vehicle design was confirmed on December 3,
16 2016, with a purchase price of \$94,950, inclusive of a \$5,000 payment for Enhanced Autopilot. Plaintiff
17 Lamarche took delivery of his Model S 75 D on December 14, 2016.

18 Plaintiff Michael Verdolin is a resident of Chula Vista, California. He placed an order for his
19 Model X P100D on June 26, 2016, paying a \$2,500 deposit. His vehicle design was confirmed on July 3,
20 2016, with a purchase price of \$146,950, inclusive of a \$2,500 payment for original Autopilot. When
21 Plaintiff Verdolin was told his car was ready, he learned that it would include the Enhanced Autopilot
22 system instead of the original Autopilot system. Plaintiff Verdolin took delivery of his Model X P100 D
23 on December 23, 2016.

24 At the time the Plaintiffs took delivery of their cars, the Enhanced Autopilot and standard safety
25 features of the cars were not operational. The features became operational and were improved as the
26 software for the features was rolled out over time. As of May 2017, the full suite of standard safety
27

1 features was operational. As of September 2017, Enhanced Autopilot was fully functional, with the
2 exception of On-ramp to Off-ramp and Smart Summon.

3 Plaintiffs alleged that Tesla's delay in providing the features violated California's Unfair
4 Competition Law (UCL), Consumers Legal Remedies Act (CLRA), and False Advertising Law (FAL) on
5 behalf of a nationwide class of Tesla owners and lessees. (*E.g.*, Dkt. No. 24 ¶¶ 121-28; 129-143; 144-51.)
6 Plaintiffs also asserted claims under California's common law. Alternatively, Plaintiffs pled consumer
7 protection and other claims under the laws of the states of each of the Class Representative Plaintiffs.
8 (*E.g.*, Dkt. No. 24 ¶¶ 165-341.)

9 **C. Proceedings to-date**

10 Following an extensive investigation into the technology and real-world performance of Tesla
11 vehicles and Enhanced Autopilot that spanned over three months and included the review of hundreds
12 of documents, reports and consumer complaints, Plaintiffs filed their original Complaint on April 19,
13 2017. (Dkt. No. 1.) On April 26, 2017, Plaintiffs filed an Amended Complaint, adding a California
14 Plaintiff and causes of action under California law. (Dkt. No. 6.) After extensive further investigation,
15 including review of Plaintiffs' actual experiences with Enhanced Autopilot, Plaintiffs filed their Second
16 Amended Complaint on July 19, 2017. (Dkt. No. 24.)

17 Following Plaintiffs' Second Amended Complaint, Tesla agreed to provide preliminary discovery
18 to Plaintiffs as a prerequisite to possible early mediation discussions. (*See* Declaration of Thomas E.
19 Loeser In Support of Plaintiffs' Motion for Preliminary Approval of Settlement ("Loeser PA Decl.")
20 (Dkt. No. 44), ¶ 2.) Following review of this discovery material, and further investigation of the claims
21 and then-current status of Enhanced Autopilot and the standard safety features, Plaintiffs and Tesla
22 agreed to engage in an early mediation, which was set for November 2, 2017, with Randall Wulff at Mr.
23 Wulff's Oakland, California offices. (*See id.*, ¶ 3.)

24 The parties exchanged detailed mediation briefing and attended a full-day mediation session with
25 Mr. Wulff on November 2, 2017. (*See* Loeser PA Decl., ¶ 4.) Through intensive discussions and with
26 the active assistance of the mediator, the parties agreed on the contours of a settlement that would
27 provide payments to owners and lessees of affected Model S and Model X Tesla vehicles who purchased
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1 Enhanced Autopilot with their vehicles based upon the dates such vehicles were ordered and the dates
 2 they were delivered. In essence, the agreed settlement would provide a variable payment based upon
 3 Tesla's website representations at the time a car was ordered, and the amount of time that the owner had
 4 the car prior to September 2017, when Enhanced Autopilot was substantially delivered. (*See id.*)

5 As is often the case in complex settlements involving complex products and legal claims, the
 6 devil was in the details. The parties spent months following the initial mediation in detailed discussions,
 7 often several days per week, including reviewing and assessing confirmatory discovery concerning Tesla's
 8 technologies. (*See* Loeser PA Decl., ¶ 5.) Additionally, Plaintiffs' counsel engaged in multiple extended
 9 discussions with Plaintiffs and other Tesla owners and lessees concerning improvements and
 10 developments of the Enhanced Autopilot and standard safety features, as these were periodically rolled
 11 out "over-the-air" to their cars. (*See id.*) Importantly, each time a new update was rolled out to Tesla
 12 vehicles, counsel and Plaintiffs extensively researched the effects of such updates and evaluated the
 13 changes to the performance of the features at issue in this case. Ultimately, on April 27, 2018, the
 14 Settlement was finalized and sent to Plaintiffs and Defendant for execution. (*See id.*, ¶ 6.)

15 **D. The Settlement**

16 **1. Settlement Class definition, class period, and claims period**

17 On May 15, 2018, following much negotiation and discussion, including numerous email
 18 exchanges; requests for, and production of, further data; telephone conferences; exchanges of drafts and
 19 terms; and consultation with clients, the Parties signed their Settlement Agreement. (Loeser PA Decl., ¶
 20 7.)

21 The Settlement Agreement defines the Settlement Class as:

22 All U.S. residents who purchased Enhanced Autopilot in connection with their
 23 purchase or lease of a Tesla Hardware 2 Model S or Model X vehicle delivered to them
 on or before September 30, 2017.

24 (*Id.*, Ex. A, § I.A.)

25 The Settlement Class is the Nationwide Enhanced Autopilot Subclass proposed in the Second
 26 Amend Complaint with the addition of the end date for delivery of September 30, 2017. (*Compare*
 27 Loeser PA Decl., Ex. A, § I.A., *with* Dkt. No. 24, ¶ 110.) Based on discovery and analysis, including

1 recent representations by Tesla, the Parties estimate that the proposed Settlement Class consists of
2 approximately 32,905 members. (Loeser PA Decl., ¶ 9.)

3 The class period runs from the date the first HW2 Model S or Model X was ordered through
4 September 30, 2017, the date by which the parties agree that Enhanced Autopilot was substantially
5 delivered. (*Id.*, Ex. A, § I.A.) The Settlement does not require a claims process, all Settlement Class
6 members who do not opt-out of the Settlement will be sent a check for their portion of the Settlement
7 fund. (*Id.*, § II.B.)

8 **2. Relief to the Settlement Class**

9 **a. Generally**

10 The Settlement provides for a Settlement Fund of \$5,415,280.00 in non-reversionary monetary
11 relief. (*Id.*, § II.A.) Based on discovery and analysis, including representations by Tesla, the features
12 were continuously rolled out and updated commencing in January 2017. Rollout of the standard safety
13 features was complete in May 2017. As of September 30, 2017, Enhanced Autopilot features were
14 substantially complete on all HW2 Tesla Model S and Model X vehicles. As part of the Settlement,
15 Tesla has affirmed its commitment to release the remaining Enhanced Autopilot features (On-ramp to
16 Off-ramp and Smart Summon). The Settlement Agreement provides payments intended to compensate
17 Tesla owners for the delay between the delivery of their vehicles and the implementation of the
18 Enhanced Autopilot features. The Settlement fund will be distributed to the Settlement Class net of:
19 attorneys' fees, costs, and expenses (if approved); and Service Awards to the five proposed Class
20 Representatives (if approved). (*Id.*, Ex. A, §§ II.A.1; II.A.3; V.) Separately and in addition to the
21 Settlement Fund, Tesla will pay the costs of Class Notice and settlement administration. (*Id.*, Ex. A,
22 § II.A.3). Plaintiffs and their counsel endorse the value and reasonableness of this proposed Settlement.
23 (*Id.*, ¶ 11.)

24 **b. Direct payments to Settlement Class Members**

25 The proposed Settlement is claims-paid—that is, Settlement Class members need not submit
26 claims for Settlement benefits. (Loeser PA Decl., Ex. A, §§ II.B; IX.C.) Instead, the Settlement
27 Administrator will send checks to Class members who do not opt-out without any further action on
28 Class members' part. (*Id.*) Settlement Class Members will be paid a portion of the Settlement Fund

1 based upon the date that they ordered their affected vehicle and the date that they took delivery of the
 2 vehicle. The Settlement Agreement provides a payment table that sets forth Settlement Class Members'
 3 payment amounts as follows:

Month class member took delivery	Oct-16	Nov-16	Dec-16	Jan-2017	Feb-2017	Mar-2017	Apr-2017	May-2017	Jun-2017	Jul-2017	Aug-2017	Sep-2017
Class members who purchased prior to January 24, 2017	\$280	\$280	\$280	\$280	\$225	\$200	\$150	\$125	\$100	\$75	\$50	\$25
Class members who purchased January 24, 2017 or later	NA	NA	NA	\$210	\$170	\$150	\$115	\$95	\$75	\$55	\$40	\$20

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 9 The payments set forth in the table above are approximate and could change based upon
 10 whether and the extent to which the Court approves Plaintiffs' requests for service awards and
 11 attorneys' fees and costs.

12 **c. Non-Monetary Benefit**

13 Tesla also reaffirms its commitment to release any Enhanced Autopilot features that as of the
 14 Effective Date are not already released in Tesla HW2 Vehicles. (Loeser PA Decl., Ex. A, §II.C.)

15 **d. Service awards and attorneys' fees, costs, and expenses**

16 The Parties have agreed that Plaintiffs may apply for Service Awards of no more than \$4,800 for
 17 each of the five Plaintiffs. (*Id.*, § V.B.) Plaintiffs have provided extensive information to counsel
 18 concerning their Tesla vehicles; assisted counsel with the preparation of complaints in this matter;
 19 worked with counsel on the multiple over-the-air rollouts of updates and changes to the software on
 20 their vehicles; consulted with counsel as requested, and on their own initiative, throughout the pendency
 21 of this case; monitored the proceedings on their own behalf and on behalf of the putative class; worked
 22 with counsel to prepare for mediation; gathered and reviewed documents, in consultation with counsel;
 23 and monitored various Tesla owner websites and blogs concerning the issues in this case. (Loeser PA
 24 Decl., ¶ 15.) Also, Plaintiffs have consulted with counsel regarding the terms of the proposed
 25 Settlement and reviewed and approved the Settlement Agreement on their behalf and that of members
 26 of the proposed Settlement Class. (*Id.*, ¶ 16.) Finally, each Plaintiff will be entitled to the same
 27 Settlement benefits, subject to the same conditions, as any other Settlement Class Member. (*Id.*, ¶ 17.)

1 As for Plaintiffs' attorneys' fees, costs, and expenses, the parties addressed the recovery of these
 2 following negotiation of the substantive terms of the proposed class settlement. (Loeser PA Decl., ¶ 18.)
 3 The parties then agreed that class counsel could request attorneys' fees, costs, and expenses payable
 4 from the gross settlement fund not to exceed \$976,000 in total. (*Id.*, Ex. A, §V.A.)

5 **E. Preliminary approval of the settlement**

6 On June 7, 2018, the Court held a hearing on Plaintiffs' motion for preliminary approval of the
 7 proposed settlement. The Court granted preliminary approval on June 8, 2018. (Dkt. No. 50.) The
 8 Court also appointed Plaintiffs as class representatives for the proposed settlement class and Hagens
 9 Berman as class counsel for that proposed class. (*Id.*)

10 **IV. ARGUMENT**

11 The settlement agreement provides that Plaintiffs would make their request for service awards,
 12 fees, costs, and expenses by motion. (Loeser PA Decl., Ex. A, § V.A.) Plaintiffs now request service
 13 awards in the amount of \$4,800 per named Plaintiff, as well as a reasonable attorneys' fee at the rate of
 14 17.7% of the gross settlement fund, or \$961,018.00. *See, e.g.*, Fed. R. Civ. P. 23(h) (permitting such
 15 awards when authorized by law or the parties' agreement in certified class actions). They also request
 16 reimbursement of costs and expenses in the sum of \$14,981.95.

17 Plaintiffs make these requests 14 days in advance of the deadline for objections and exclusions,
 18 which is September 6, 2018. They are supported by each of the named Plaintiffs. (Declaration of Dean
 19 Sheikh in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Costs, Expenses, and Service
 20 Awards to Class Representatives (Sheikh Decl.), ¶¶ 9-10; Declaration of John Kelner in Support of
 21 Plaintiffs' Motion for Award of Attorneys' Fees, Costs, Expenses, and Service Awards to Class
 22 Representatives (Kelner Decl.), ¶¶ 9-10; Declaration of Tom Milone in Support of Plaintiffs' Motion for
 23 Award of Attorneys' Fees, Costs, Expenses, and Service Awards to Class Representatives (Milone Decl.),
 24 ¶¶ 8-9; Declaration of Daury Lamarche in Support of Plaintiffs' Motion for Award of Attorneys' Fees,
 25 Costs, Expenses, and Service Awards to Class Representatives (Lamarche Decl.), ¶¶ 10-11; Declaration
 26 of Michael Verdolin in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Costs, Expenses, and
 27 Service Awards to Class Representatives (Verdolin Decl.), ¶¶ 6-7.)

1 **A. Applicable standards for attorneys' fee request**

2 Because this case was brought pursuant to CAFA diversity jurisdiction, and because the
3 settlement agreement contains California law provisions (*see* Loeser PA Decl., Ex. A, § X.D), California
4 law applies to Plaintiffs' request for attorneys' fees. *E.g.*, *Petersen v. CJ Am., Inc.*, 2016 WL 5719823, at *1
5 (S.D. Cal. Sept. 30, 2016) (citations omitted); *accord, e.g.*, *Ferrington v. McAfee, Inc.*, 2013 WL 12308314, at
6 *2 (N.D. Cal. July 22, 2013). Moreover, Tesla is located in California, its vehicles are manufactured in
7 California, vehicle ordering takes place through Tesla's websites and servers located in California, and
8 the decisions underlying the allegations in the Complaint all emanated from Tesla's offices in California.

9 This is a common-fund case. Plaintiffs seek an attorneys' fee award of 17.7% of the \$5.4 million
10 settlement fund, *i.e.*, \$961,018.00. (*See* Loeser PA Decl., Ex. A, § V.A (contemplating that a fee petition
11 may be filed seeking a fee and costs award from the Settlement Fund in an amount "not to exceed Nine
12 Hundred Seventy-Six Thousand Dollars (\$976,000)".)

13 The California Supreme Court has recently and emphatically clarified that the percentage-of-fund
14 method is an available, venerable, and desirable way under California law to determine fee awards in
15 common-fund cases such as this one. *Laffitte v. Robert Half Int'l Inc.*, 376 P.3d 672, 686 (Cal. 2016) ("The
16 recognized advantages of the percentage method—including relative ease of calculation, alignment of
17 incentives between counsel and the class, a better approximation of market conditions in a contingency
18 case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily
19 prolonging the litigation . . . —convince us the percentage method is a valuable tool that should not be
20 denied our trial courts.") (citations omitted).

21 Likewise, in situations where state law does not apply to a fee request, the Ninth Circuit has held
22 that district courts have the discretion in common-fund cases "to choose either the percentage-of-the-
23 fund or the lodestar method" for fee awards. *E.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th
24 Cir. 2002); *see also, e.g.*, *Deatrick v. Securitas Sec. Servs. USA, Inc.*, 2016 WL 5394016, at *6 (N.D. Cal. Sept.
25 27, 2016); *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *16 (N.D. Cal. Feb. 11, 2016) ("Under the
26 percentage of the fund method, the court may award class counsel a given percentage of the common
27 fund recovered for the class.") (citing *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1007
28 (9th Cir. 2002)).

1 In fact, the percentage method is especially suitable here, given the easily quantified, non-
2 reversionary common fund provided by the settlement. *See, e.g., Deatrick*, 2016 WL 5394016, at *6
3 (“Despite its primacy, the lodestar method is not necessarily utilized in common fund cases. . . . Because
4 the benefit to the class is easily quantified in common-fund settlements, courts can award attorneys a
5 percentage of the common fund in lieu of the often more time-consuming task of calculating the
6 lodestar.”) (citations and internal quotations omitted); *Destefano*, 2016 WL 537946, at *16 (citations
7 omitted); *Laffitte*, 376 P.3d at 686-87 (approving the use of the percentage method in the “true common
8 fund” case before it).

9 California has no specific, longstanding percentage benchmark like the Ninth Circuit’s. But
10 California courts have recognized that 25% and even percentages considerably above that figure are well
11 within the range of reasonableness. *E.g., Peterson*, 2016 WL 5719823, at *1 (“California has recognized
12 that most fee awards based on either a lodestar or percentage calculation are 33 percent and has
13 endorsed the federal benchmark of 25 percent.”) (citation omitted); *Spann v. J.C. Penney Corp.*, 211 F.
14 Supp. 3d 1244, 1262-63 (S.D. Cal. 2016) (same, and citing additional cases). As for common-fund cases
15 where state law is not the governing authority, the benchmark award is 25 percent of the recovery
16 obtained. *Messineo v. Ocwen Loan Servicing, LLC*, 2017 WL 733219, at *8 (N.D. Cal. Feb. 24, 2017)
17 (“Applying this calculation method, courts [in the Ninth Circuit] typically calculate 25% of the fund as
18 the ‘benchmark’ for a reasonable fee award, providing adequate explanation in the record of any ‘special
19 circumstances’ justifying a departure.”) (citations omitted) (alteration in original).

20 When the percentage-of-fund method is chosen, whether pursuant to California law or Ninth
21 Circuit precedent, the Court may, but is not required to, use a lodestar cross-check to further examine
22 the reasonableness of the requested award. *See, e.g., Laffitte*, 376 P.3d at 687; *Perkins v. LinkedIn Corp.*,
23 2016 WL 613255, at *13 (N.D. Cal. Feb. 16, 2016) (citing *Vizcaino*, 290 F.3d at 1050-51). However, a
24 lodestar cross-check normally does not involve inspecting and scrutinizing each hour attested-to by
25 counsel. *E.g., Laffitte*, 376 P.3d at 687-88 (“With regard to expenditure of judicial resources, we note that
26 trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each
27 claimed attorney-hour, but have instead used information on attorney time spent to ‘focus on the general
28

1 question of whether the fee award appropriately reflects the degree of time and effort expended by the
 2 attorneys.”) (citations omitted).

3 **B. The Court should award 17.7% of the gross settlement fund as attorneys’ fees.**

4 As stated above, Plaintiffs seek an award of 17.7% of the \$5.415 million gross settlement fund,
 5 *i.e.*, \$961,018.00.

6 “As there is no definitive set of factors that California courts mandate or endorse for
 7 determining the reasonableness of attorneys’ fees in the context of a common-fund percentage-of-the-
 8 benefit approach, the Court [may] consider[] the reasonableness of the percentage request in light of the
 9 factors endorsed by the Ninth Circuit, with a 25% award as a starting point.” *Richardson v. THD At-*
 10 *Home Serv., Inc.*, 2016 WL 1366952, at *7 (E.D. Cal. Apr. 6, 2016).

11 The Ninth Circuit factors are as follows:

12 In assessing whether the percentage requested is fair and reasonable, courts generally
 13 consider the following factors: (1) the results achieved; (2) the risk of litigation; (3) the
 14 skill required and the quality of the work performed; (4) the contingent nature of the fee
 15 and the financial burden; and (5) the awards made in similar cases.

16 *Destefano*, 2016 WL 537946, at *17 (citing *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55
 17 (9th Cir. 2015); *Vizcaino*, 290 F.3d at 1047). Plaintiffs will now address these factors.

18 **1. Results achieved**

19 The results achieved for the class are the most significant factor to be considered as the Court
 20 considers whether a fee request is fair and reasonable. *Id.* (citations omitted). Here, after much
 21 investigation, research, and analysis; an in-person mediation session helmed by a well-respected
 22 mediator, and many follow up discussions, Plaintiffs, facing a determined opponent, achieved a \$5.415
 23 million, non-reversionary, claims-paid, cash settlement for the Class. Plaintiffs’ hard-won Settlement will
 24 directly result in the distribution of millions of dollars to class members who otherwise would not have
 25 had the ability to wage a case on their own, and no Class member will need to complete a claim form in
 26 order to get his or her share of the settlement fund.

27 **2. The risk of litigation**

28 The foregoing results were obtained notwithstanding the significant legal hurdles facing
 Plaintiffs. Plaintiffs and their experienced counsel engaged in settlement discussions after having

1 undertaken extensive research to support their original and two amended complaints. Major
2 contributing factors to the risk of the litigation were Tesla’s essentially limitless resources, its
3 unprecedented customer loyalty, and its advanced technology that allowed Tesla vehicles to be updated
4 and improved “over-the-air.” This capability meant that the deficiencies in delivery of Enhanced
5 Autopilot features could be, and ultimately were, corrected by Tesla, rendering Plaintiffs’ damages
6 increasingly less severe as time went by.

7 Moreover, Tesla promised to continue to contest this case vigorously—a consideration not to be
8 taken lightly given its resources and the caliber of its attorneys. Even so, it was only after mediation with
9 Mr. Wulff (preceded by briefing on both sides), numerous discussions with Tesla’s counsel (aided by
10 further writings), and extensive further research, that Plaintiffs could agree to a settlement they
11 considered reasonable under all the circumstances. *See, e.g., LinkedIn*, 2016 WL 613255, at *15 (the
12 defendant “contested its liability, and intended to contest class certification as well,” such that the risk
13 factors at issue “favor[ed] granting Class Counsel’s request” for fees).

14 **3. Skill required and quality of the work performed**

15 As courts have recognized, the “prosecution and management of a complex national class action
16 requires unique legal skills and abilities.” *Destefano*, 2016 WL 537946, at *17 (citation omitted).

17 Counsel in this matter has litigated vigorously against one of the best-financed corporations in
18 the world, in a case involving complicated technical issues. Counsel worked closely with five named
19 Plaintiffs from across the United States (California, Colorado, New Jersey and Florida). The highly
20 technical nature of this case required extensive research and analysis into the software and hardware
21 underlying one of the most complex and technologically advanced machines available for public
22 consumption.

23 The qualifications of class counsel are set forth in Mr. Loeser’s declaration submitted with the
24 motion for preliminary approval. (*See* Loeser PA Decl., ¶ 19 and Ex. D thereto). Where, as here,
25 counsel are highly experienced in class action litigation, shepherded the case to a prompt resolution,
26 have a record of success in this type of litigation, and faced high caliber opposing counsel throughout,
27 this factor, too, “supports the fee award sought.” *Destefano*, 2016 WL 537946, at *17 (citations omitted).

4. Contingent nature of the fee and the financial burden

Further, Plaintiffs' counsel undertook this matter on a contingent fee basis, with all of the financial risk that arrangement entailed, including the risk of no recovery. *See LinkedIn*, 2016 WL 613255, at *15. Given the complexities, difficulties, and size of individual claims, which, unfortunately, made it difficult to engage representation, this case could not have gone forward except as a class action, with lawyers experienced in complex class actions to lead it. *See Destefano*, 2016 WL 537946, at *18. This is particularly true here, where Tesla's extraordinarily high brand loyalty and owner enthusiasm made many buyers, even if dissatisfied with Enhanced Autopilot, reluctant to step up and serve as class representatives. Here, class counsel began investigating the claims underlying this case in January 2017; and after months of research, they filed their original complaint in April 2017. A settlement was not finalized until May 8, 2018, such that class counsel have accrued significant (and reasonable) lodestar, costs, and expenses along the way. *See id.*

"Additionally, Class Counsel was, to an extent, precluded from taking and devoting resources to other cases or potential cases, with no guarantee that the time expended would result in any recovery or recoupment of costs." *LinkedIn*, 2016 WL 613255, at *15. "Thus, that Lead Counsel here have significant experience in this field and took on this matter on a contingent basis further indicates that the 25 percent benchmark fee request is reasonable." *See Destefano*, 2016 WL 537946, at *18. Here, of note, class counsel seeks less than 18%, well below the benchmark 25% rate.

5. Awards made in similar cases

Finally, the 17.7% award sought here is substantially below that awarded in other similar cases involving contract and commercial issues in an advanced technology setting, including in the automotive field. *See, e.g., LinkedIn*, 2016 WL 613255, at *14-17 (25% award) (citing *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1128, 1132 (N.D. Cal. 2015) (granting 25% benchmark attorney's fees)); *Fraley v. Facebook, Inc.*, 2013 WL 4516806, at *3 (N.D. Cal. Aug. 26, 2013) (same); *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *9-10 (N.D. Cal. Mar. 18, 2013) (same).

C. Under a lodestar cross-check, Plaintiffs' attorneys' fee request is fair and reasonable.

If the Court chooses to perform a lodestar cross-check, which is discretionary, Plaintiffs believe that it will confirm that the instant attorneys' fees request is fair and reasonable. "The lodestar figure is

1 calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation
2 (as supported by adequate documentation) by a reasonable hourly rate for the region and for the
3 experience of the lawyer.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011)
4 (citation omitted). “[T]he court may adjust it upward or downward by an appropriate positive or
5 negative multiplier reflecting a host of ‘reasonableness’ factors, ‘including the quality of representation,
6 the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of
7 nonpayment.” *Id.* at 941-42 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (citing
8 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975))). Such factors, which are included in the
9 so-called *Kerr* factors, many of which are “subsumed within the initial calculation of hours reasonably
10 expended at a reasonable rate,” only warrant a departure from “the lodestar figure in ‘rare and
11 exceptional cases.”” *Id.* at 942 n.7 (citations omitted). The *Kerr* factors themselves “largely subsume[]”
12 California factors and are similar to state law factors, *Ackerman v. W. Elec. Co.*, 643 F. Supp. 836, 860-61
13 (N.D. Cal. 1986), so Plaintiffs discuss the *Kerr* factors below.

14 Here, 17.7% of the common fund, *i.e.*, \$961,018, represents a reasonable multiplier of 2.36 to the
15 lodestar of Plaintiffs’ counsel. (*See* Declaration of Thomas E. Loeser In Support of Plaintiffs’ Motion
16 for Award of Attorneys’ Fees, Costs, Expenses, and Service Awards to Class Representatives (“Loeser
17 Decl.”), ¶¶ 2, 6 and Ex. A (submitting post-review lodestar of \$406,912.50).) This multiplier is well
18 within the range of multipliers awarded by California and Ninth Circuit courts. *E.g.*, *Petersen*, 2016 WL
19 5719823, at *1 (noting that in *Vizcaino*, 290 F.3d at 1051-54, the Ninth Circuit upheld a 3.65 multiplier
20 and stated that “the majority of fee awards in the district courts in the Ninth Circuit are 1.5 to 3 times
21 higher than lodestar”) (citation omitted). In light of class counsel’s ability to reach a prompt, claims-paid
22 resolution of this matter and counsel’s request for a percentage of the fund far below the 25%
23 benchmark, a 2.36, within-range multiplier is appropriate under the facts of this case.

24 Further, Plaintiffs should suffer no penalty for reaching a fair and reasonable settlement without
25 engaging in years of litigation first. While protracted litigation might have generated a larger fee for class
26 counsel, it would have only delayed a fair resolution of, and settlement benefits to satisfy, Plaintiffs’
27 claims. Here, the underlying facts had played out; the defendant produced pre-mediation discovery,
28

1 which counsel reviewed and analyzed; counsel had fully evaluated Plaintiffs' claims; and a settlement was
 2 achieved with the aid of a well-respected, thoroughly seasoned mediator, Mr. Wulff. (Loeser PA Decl.,
 3 ¶¶ 2-7.) Under these circumstances, there should be no deduction due to early settlement. *See, e.g.,*
 4 *Vizcaino*, 290 F.3d at 1050 n.5 (“We do not mean to imply that class counsel should necessarily receive a
 5 lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel
 6 achieved a timely result for class members in need of immediate relief. The lodestar method is merely a
 7 cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar
 8 method creates incentives for counsel to expend more hours than may be necessary on litigating a case
 9 so as to recover a reasonable fee, since the lodestar method does not reward early settlement.”) (citations
 10 omitted); *Munoz v. UPS Ground Freight, Inc.*, 2009 WL 1626376, at *3 (N.D. Cal. June 9, 2009) (awarding
 11 fees constituting a 2.87 multiplier and holding: “Second, plaintiffs’ counsel argue that the fact they have
 12 spent only about 300 hours on this case should not result in a reduction of the percentage of fees
 13 awarded. Early settlement promotes the efficient resolution of disputes and is to be encouraged, not
 14 discouraged. These arguments are well taken, and they justify awarding plaintiffs’ counsel some
 15 substantial amount beyond what they have spent in prosecuting the case.”).

16 **1. Counsels’ hourly rates are reasonable.**

17 For purposes of the lodestar method, reasonable hourly rates are determined by “prevailing
 18 market rates in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984). “[T]he relevant
 19 community is the forum in which the district court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973,
 20 979 (9th Cir. 2008). The rates applied should be in line with those commanded by lawyers of reasonably
 21 comparable skill, experience, and reputation. *Blum*, 465 U.S. at 895 n.11. Here, class counsel has
 22 extensive experience in prosecuting complex litigation, including consumer class actions. (*See* Loeser PA
 23 Decl., ¶ 19 and Ex. D thereto.)

24 Declarations of counsel regarding prevailing fees in the community and rate determinations in
 25 other cases “are satisfactory evidence of the prevailing market rate.” *United Steelworkers of Am. v. Phelps*
 26 *Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). The district court also may consider evidence of
 27 counsel’s customary hourly rate. *See People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir.

1 1996) (holding that an attorney’s actual billing rate for similar work is presumptively appropriate). Here,
2 a declaration from counsel provides such evidence. (*See* Loeser Decl., ¶¶ 8-9.)

3 Counsel’s declaration sets forth their current professional and para-professional rates. This is so
4 because courts generally apply each biller’s current rates for all hours of work performed, regardless of
5 when the work occurred, as a means of compensating for the deferred nature of counsel’s work. *See, e.g.,*
6 *Fischel*, 307 F.3d at 1010; *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994).

7 Class counsel’s rates are reasonable and appropriate for complex, nationwide litigation conducted
8 in the Northern District of California. For example, in the *In Re Volkswagen “Clean Diesel” Marketing,*
9 *Sales Practices, and Products Liability Litigation*, the Court found reasonable “billing rates ranging from \$275
10 to \$1600 for partners, \$150 to \$790 for associates, and \$80 to \$490 for paralegals.” *In re Volkswagen*
11 *“Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 1047834, at *8 (N.D. Cal. Mar. 17,
12 2017).

13 The hourly rates of the attorneys involved in this case compare favorably to those rates. And
14 they fall within the range of other rates awarded by other courts in this judicial district. *See, e.g., Stuart v.*
15 *RadioShack*, 2010 WL 3155645, at *6-7 (N.D. Cal. Aug 9, 2010) (approving 25% percentage-of-fund
16 award with rates at and exceeding \$800 per hour, where average hourly rate was \$708); *G.F. v. Contra*
17 *Costa Cty.*, 2015 WL 7571789, at *14 (N.D. Cal. Nov. 25, 2015) (referring to Bay Area litigation where
18 rates “of between \$475-\$975 for partners, \$300-\$490 for associates, and \$150-\$430 for litigation support
19 and paralegals” were found reasonable) (citation omitted); *see also* Loeser Decl., ¶ 9 (describing other
20 instances of rates approved in this district at up to \$900 and \$975 per hour for attorneys, and even up to
21 \$1,200 per hour for senior partners, as well as rates at up to \$430 per hour for para-professionals).

22 In their supporting declaration, Loeser Decl., ¶¶ 6-7 and Ex. A thereto, class counsel submit
23 categorized summaries of time reasonably accrued, together with a chart showing time multiplied by the
24 working professionals’ hourly rates. *Cf. Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000)
25 (concluding that a “summary of the time spent on a broad category of tasks such as pleadings and
26 pretrial motions” met “basic requirement” of documentation). This chart is reproduced here:
27
28

Category	Timekeeper	Hours	Rate	Total
Investigation/Research/ Preparation of Complaints	Berman, Steve	3.5	\$975.00	\$3,412.50
	Flexer, Carrie	1.0	\$250.00	\$250.00
	Grueneich, Nicolle	23	\$200.00	\$4600.00
	Haegele, Robert	0.5	\$200.00	\$100.00
	Loeser, Thomas	114.8	\$700.00	\$80,360.00
	Lopez, Robert	119.6	\$575.00	\$68,770.00
	Salonga, Joseph	2.5	\$200.00	\$500.00
Total Investigate/Research/Complaints		264.9		\$157,992.50
Case Management & Client Contact	Grueneich, Nicolle	4.9	\$200.00	\$980.00
	Haegele, Robert	1.2	\$200.00	\$240.00
	Loeser, Thomas	29.1	\$700.00	\$20,370.00
	Lopez, Robert	2.0	\$575.00	\$1,150.00
Total Case Mgmt. & Client Contact		37.2		\$22,740.00
Ongoing Research	Grueneich, Nicolle	0.3	\$200.00	\$60.00
	Loeser, Thomas	12.6	\$700.00	\$8,820.00
	Lopez, Robert	42.0	\$575.00	\$24,150.00
	Stevens, Jessica	0.2	\$200.00	\$40.00
Total Ongoing Research		55.1		\$33,070.00
Discovery	Lopez, Robert	5.2	\$575.00	\$2,990.00
Total Discovery		5.2		\$2,990.00
Settlement/Mediation	Berman, Steve	24.5	\$975.00	\$23,887.50
	Garcia, Adrian	6.0	\$175.00	\$1,050.00
	Grueneich, Nicolle	7.4	\$200.00	\$1,480.00
	Loeser, Thomas	121.1	\$700.00	\$84,770.00
	Lopez, Robert	74.6	\$575.00	\$42,895.00
	Salonga, Joseph	4.9	\$200.00	\$980.00
Total Settlement/Mediation		238.5		\$155,062.50
Motion/Settlement Approval/Hearings	Garcia, Adrian	3.0	\$175.00	\$525.00
	Grueneich, Nicolle	0.7	\$200.00	\$140.00
	Haegele, Robert	16.7	\$200.00	\$3,340.00
	Loeser, Thomas	37.5	\$700.00	\$26,250.00
	Lopez, Robert	6.5	\$575.00	\$3,737.50
	O'Hara, Chris	1.0	\$625.00	\$625.00
	Salonga, Joseph	2.2	\$200.00	\$440.00
Total Motion/Stlmt. Approval/Hearings		67.6		\$35,057.50
Grand Total		668.5		\$406,912.50

Class counsel's reasonable rates, when multiplied by the number of hours expended on the tasks described in the immediately following section of this memorandum, and in counsel's supporting declaration, result in a reviewed, adjusted lodestar of \$406,912.50. (See Loeser Decl., ¶¶ 6-14 and Ex. A thereto.)

1 **2. The number of hours that counsel has worked, and will need to work, is**
 2 **reasonable.**

3 The number of hours worked by class counsel to-date also is reasonable. (*See* Loeser Decl., ¶¶
 4 10-14 (summarizing reasonableness factors).) As discussed in the declaration of counsel submitted with
 5 this motion, *see* Loeser Decl., ¶¶ 6-7 and Ex. A thereto, reasonable and necessary work on this matter has
 6 included:

- 7 a. **Investigation, research, and preparation of complaints:** Investigation and
 8 analysis of fact, legal, and technical issues pertaining to Plaintiffs' claims; legal and
 9 factual research, including analysis of publicly available statements; extensive
 10 review and analysis of technical documents; and drafting of the initial and
 11 subsequent versions of the complaint.
- 12 b. **Case management and client contact:** Consultation with the named Plaintiffs
 13 and members of the putative class throughout the pendency of the case;
 14 innumerable telephone conferences and emails with opposing counsel regarding
 15 case issues; coordination among counsel and staff re: work assignments and
 16 needed projects and tasks; case management efforts with the Court; and
 17 coordination regarding assignments, time maintenance, and recordkeeping.
- 18 c. **Ongoing research:** Ongoing fact and legal research in aid of Plaintiffs' claims
 19 and potential claims.
- 20 d. **Discovery:** Discussions with the defendant regarding pre-mediation discovery;
 21 pre-mediation discovery requests and production; and review and analysis of
 22 material produced.
- 23 e. **Settlement:** Consultation with the named Plaintiffs regarding settlement issues;
 24 settlement negotiations and mediations, and the drafting of mediation briefing, as
 25 well as an in-person mediation with Mr. Wulff; continuing negotiations following
 26 the in-person mediation, with and without the aid of the mediator; drafting and
 27 analysis of term sheets; drafting and revision of further writings for use in
 28 negotiations; drafting and revision of settlement-related documents, including the
 first and amended settlement agreements; drafting and revising a suitable notice
 program in this case; research regarding suitable potential *cy pres* recipients; and
 working with the settlement administrator and Tesla on notice documents and
 the claim form.
- f. **Motion/settlement approval/hearings:** Research for, and drafting of, the
 motion for preliminary approval and related papers; further negotiation and
 follow-up in response to the Court's requests regarding changes to the proposed
 order; working with Tesla on revisions to the proposed order; working with the
 five Plaintiffs in support of the settlement approval process; and research toward,
 and drafting of, the motion for preliminary approval and the instant motion; and
 preparation for and argument at the preliminary approval hearing.

 Further, additional work remains to be performed. The final approval hearing is scheduled for
 October 17, 2018, and class counsel presently estimates that before then, they will need to work
 approximately 30 additional hours to answer questions posed by class members or the settlement

1 administrator, to draft and file final approval papers, to review and analyze objections from class
 2 members and to draft responses to those objections as appropriate, and to prepare for argument.
 3 (Loeser Decl., ¶ 15.)

4 Beyond the final approval hearing, assuming final approval is granted, class counsel presently
 5 estimates an additional 30-40 hours of work will be necessary to attend to the issues that will arise during
 6 administration of the settlement, to field inquiries from class members regarding the settlement and their
 7 claims and benefits, to work with Tesla as appropriate to address any class-member appeals or concerns
 8 under the settlement, and potentially the preparation of filings with the Court in the possible (though
 9 unlikely) event that funds remain to be distributed to a proposed *cy pres* recipient instead of to individual
 10 class members. (*Id.*) These are conservative projections; counsel could be required to spend much more
 11 time on any or all of these tasks, as matters develop.

12 **3. Counsels' fees are reasonable pursuant to the *Kerr* factors subsumed in the**
 13 **lodestar analysis.**

14 In considering the reasonableness of Plaintiffs' lodestar figure, courts also may consider the
 15 quality of representation, the benefit obtained for the class, and the complexity and novelty of the issues
 16 presented, among other factors. *Bluetooth*, 654 F.3d at 941-42. Each of these factors supports Plaintiffs'
 17 lodestar here.

18 **(1) Novelty and complexity of the litigation**

19 Given the foregoing history and lack of precedent on several issues; Tesla's many defenses and
 20 deep resources; and questions regarding individual issues, this case was novel and complex. (*See* Loeser
 21 Decl., ¶ 10.)

22 **(2) Skill and experience of class counsel and quality of representation**

23 The "prosecution and management of a complex national class action requires unique legal skills
 24 and abilities." *In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005). The courts
 25 consider counsel's skill alongside the quality of work performed by counsel. *See In re Omnivision Techs.,*
 26 *Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007). In this case, success required experienced and skilled
 27 class-action attorneys. As attested in the declarations cited above, class counsel are members of the bar

1 with extensive experience in consumer class-action litigation, which they utilized to obtain the best
2 recovery for the class.

3 The Court also should consider the quality of opposing counsel in evaluating the quality of class
4 counsel's work. *In re Heritage Bond Litig.*, 2005 WL 1594403, at *20. Class counsel faced renowned and
5 highly skilled defense attorneys in this matter, with well-deserved reputations for vigorous advocacy in
6 the defense of their clients, including Tesla. *See id.*

7 **(3) Favorability of result**

8 In a case with numerous legal and technical complexities, and facing a determined, well-financed,
9 and well-represented defendant, Plaintiffs and their counsel were able to achieve a settlement including a
10 \$5.4 million cash component and non-monetary relief. This result was genuinely favorable to the class,
11 the vast majority of whose members, given practical realities, truly needed dedicated counsel to advocate
12 for them in a class setting. (*See, e.g.*, Loeser Decl., ¶ 13)

13 **4. The presence of a reasonable multiplier further supports the reasonableness of Plaintiffs' fee request.**

14 Furthermore, Plaintiffs seek a reasonable multiplier to reach the overtly reasonable 17.7% of the
15 common fund they seek. Lodestar is presently at \$406,912.50 for class counsel, such that the multiplier
16 is 2.36. The presence of this reasonable multiplier further supports the reasonableness of Plaintiffs'
17 request. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 1047834,
18 at *5 (awarding fees in automotive case where settlement was achieved prior to dispositive motions or
19 class certification, with a lodestar cross-check multiplier of 2.63 calculated on the basis of "hours and
20 average billing rate"); *Williams v. SuperShuttle Int'l Inc.*, 2015 WL 685994, at *2 (N.D. Cal. Feb. 12, 2015).

21 **D. Costs and expenses**

22 The settlement agreement provides that Plaintiffs may seek the recovery of costs and expenses in
23 a combined fee/cost award not to exceed \$976,000. (Loeser PA Decl., Ex. A, § V.A.)

24 Class counsel have incurred costs and expenses in the amount of \$14,981.95. These costs and
25 expenses are set forth in the declaration of counsel submitted with this motion, and class counsel's chart
26 is reproduced here. (*See* Loeser Decl., ¶ 16 and Ex. B thereto.)

Expense Category	Total
10 – Airfare	\$ 1,592.80
15 – Printing/Copies	\$ 928.75
50 – Overnight Shipping	\$ 57.89
52 – Filing Fees	\$ 400.00
53 – Hotel	\$ 673.70
55 – Online Services/Legal Research	\$ 510.30
59 – Meals	\$ 59.96
60 – Messenger/Process Services	\$ 1,353.24
61 – Mediation	\$ 8,500.00
70 – Transportation/Travel Expenses	\$ 199.68
71 – Parking	\$ 30.00
72 – Court Fees	\$ 645.63
90 – Telephone	\$ 30.00
Grand Total	\$14,981.95

Class counsel will expend more on behalf of the settlement class before the close of this matter, including airfare and lodging to attend the final approval hearing, and other costs associated with the final approval papers and post-settlement administration costs. Because these sums are unclear at this time, Class counsel will absorb these out of pocket costs from their fee.

All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable. *See Missouri v. Jenkins*, 491 U.S. 274, 286 (1989); *accord Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 580 (9th Cir. 2010); *see also Omnivision*, 559 F. Supp. 2d at 1048 (“[a]ttorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters”). As detailed in the declaration of counsel, Plaintiffs incurred substantial costs on travel (including to hearings and a California mediation), computer-aided research, photocopies, postage, court fees, and telephone charges. These costs were necessarily and reasonably incurred to bring this case to a successful outcome.

E. The class representatives each should receive \$4,800 incentive awards.

Finally, Plaintiffs seek service awards to the named Plaintiffs in this matter, as contemplated by the settlement agreement. (*See* Loeser PA Decl., Ex. A, § V.B.) “Incentive awards are fairly typical in class action cases.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958 (2009) (citing 4 ALBA CONTE ET AL., NEWBERG ON CLASS ACTIONS § 11:38 (4th ed. 2008)). These awards, generally sought after a settlement has been reached, “compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Id.* at 958-59. The Court has discretion to approve

1 incentive awards, and its consideration includes factors such as the amount of time and effort spent by
2 the class representatives, the duration of the litigation, and the personal benefit (or lack thereof) enjoyed
3 by the class representatives as a result of the litigation. *Wilson v. Airborne, Inc.*, 2008 WL 3854963, at *12
4 (C.D. Cal. Aug. 13, 2008).

5 Broadly speaking, the named Plaintiffs have assisted counsel with counsel's investigation,
6 analysis, and prosecution of their potential and actual claims; they have served as field testers and
7 reviewers of the many roll-outs of updates to the Autopilot features, they have assisted in the
8 preparation of pleadings (including the complaints filed in this matter and declarations); settlement
9 negotiations and considerations; and review and analysis of the parties' settlement papers. (Loeser PA
10 Decl., ¶¶ 15-16; Sheikh Decl., ¶¶ 3-8; Kelner Decl., ¶¶ 3-8; Milone Decl., ¶¶ 3-7; Lamarche Decl., ¶¶ 3-9;
11 Verdolin Decl., ¶¶ 3-5.) Importantly, Plaintiffs spent extensive time reviewing and reporting on the
12 numerous "over-the-air" updates that Tesla sent to their cars during the pendency of this case, including
13 through to the present. (*See id.*) They also have monitored this case on behalf of their fellow putative
14 class members. (*See id.*) And some faced obloquy from Tesla's numerous fans. Sheikh Decl., ¶¶ 5-6;
15 Kelner Decl., ¶ 6; Milone Decl., ¶ 6; Lamarche Decl., ¶ 5; Verdolin Decl., ¶ 5.)

16 \$5,000 service awards are presumptively reasonable in this judicial district. *See, e.g., Camberis v.*
17 *Ocwen Loan Serv. LLC*, 2015 WL 7995534, at *3 (N.D. Cal. Dec. 7, 2015) ("As this Court has recognized,
18 . . . as a general matter, \$5,000 is a reasonable amount [for service awards].") (citation and internal
19 quotations omitted). This is so even in cases when there were relatively expected or small recoveries by
20 individual settlement class members. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 947-48
21 (approving \$5,000 incentive awards where class members would receive \$12); *Weeks v. Kellogg Co.*, 2013
22 WL 6531177, *3, 34-37 (C.D. Cal. Nov. 23, 2011) (approving incentive awards of \$5,000 per named
23 plaintiff, where settlement provided for the recovery by class members of \$5 per box of cereal purchased
24 during the class period, up to a maximum of \$15 per class member, all subject to proportional reduction
25 if all eligible claims exceeded the settlement fund); *see also Wren v. RGIS Inventory Specialists*, 2011 WL
26 1230826, at *31-37 (N.D. Cal. Apr. 1, 2011) (making \$5,000 service awards to 20 named plaintiffs where
27 "average award to class members [was] \$207.69"). Here, where Plaintiffs seek less (\$4,800), and the

1 average recovery is approximately \$134, the argument is even stronger than in cases such as *Online DVD*
 2 and *Weeks* where the expected class-member benefit was expected to be much smaller. Also, the awards
 3 sought in this case are modest compared with incentive awards in other cases. *See, e.g., Singer v. Becton*
 4 *Dickinson & Co.*, 2010 WL 2196104, at *9 (S.D. Cal. June 1, 2010) (\$25,000 award); *Ingram v. Coca-Cola*
 5 *Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (\$300,000 award).

6 Here, given the valuable and time-consuming aid rendered to the settlement class by each of the
 7 named Plaintiffs in this complex case, Plaintiffs respectfully submit that the requested awards are fair
 8 and reasonable, and that they ought to be awarded.

9 V. CONCLUSION

10 For all of the foregoing reasons, Plaintiffs respectfully ask that the Court grant the foregoing
 11 requests for reasonable service awards, attorneys' fees, costs, and expenses.

12 DATED: August 23, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

13 By /s/ Thomas E. Loeser

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24 *Attorneys for Plaintiffs and*
 25 *the Proposed Class*

CERTIFICATE OF SERVICE

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I hereby certify that on August 23, 2018, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

By /s/ Thomas E. Loeser
THOMAS E. LOESER

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DEAN SHEIKH, JOHN KELNER, TOM
MILONE, DAURY LAMARCHE, and MICHAEL
VERDOLIN, on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

TESLA, INC. d/b/a TESLA MOTORS, INC., a
Delaware corporation,

Defendant.

No. 5:17-cv-02193-BLF

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
SERVICE AWARDS, ATTORNEYS'
FEES, AND COSTS AND EXPENSES**

1 The Court, having reviewed the motion of Plaintiffs Dean Sheikh, John Kelner, Tom Milone,
2 Daury Lamarche, and Michael Verdolin's for Service Awards, Attorneys' Fees, and Costs and Expenses;
3 the declarations of the foregoing named Plaintiffs respectively; the declaration of Class Counsel, by
4 Thomas E. Loeser; the memorandum in support of Plaintiffs' motion; the pleadings and papers on file
5 in this action, including any response to, or reply in further support of, Plaintiffs' motion; and the oral
6 argument of counsel, if any, presented at the hearing on this motion, hereby finds that Plaintiffs' motion
7 should be GRANTED.

8 NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

9 1. For purposes of this order, except as otherwise set forth herein, the Court adopts and
10 incorporates the definitions contained in the Settlement Agreement and Release (Dkt. No. 44-1)
11 ("Settlement Agreement").

12 2. The Court finds that a percentage-of-fund award to Plaintiffs for their attorneys' fees of
13 \$_____ is fair and reasonable in light of the results obtained by Class Counsel, Hagens
14 Berman Sobol Shapiro LLP, in this case; the risks and complex issues involved, and the skill and high-
15 quality work required to overcome them; the burdens borne by counsel in pursuing this litigation on a
16 pure contingency basis; and the range of awards made in similar cases. The Court finds that their fee
17 award, which represents ____% of the \$5,415,280.00 gross Settlement Fund created by the Settlement
18 Agreement, comports with applicable California and Ninth Circuit law and is justified by the
19 circumstances of this case.

20 3. The Court has confirmed the reasonableness of Plaintiffs' fee request by conducting a
21 lodestar cross-check. The Court finds that Class Counsel's reasonable lodestar as of the date they filed
22 their Motion for Service Awards, Attorneys' Fees, and Costs and Expenses, was \$406,912.50 based on
23 their current hourly rates as set forth in the Loeser Declaration. The multiplier of Class Counsel's
24 lodestar, when compared to the award referenced in paragraph 2 above, is _____. This multiplier further
25 justifies the award sought, given the novelty and difficulty of this litigation, counsel's skillful handling of
26 the difficult factual and legal issues presented, the significant contingent risks in this case, and the quality
27 of the result achieved. Furthermore, Class Counsel have advised by way of the Loeser Declaration that
28

1 they expect to perform more work after filing Plaintiffs' instant motion, and even after entry of the
2 instant order.

3 4. The Court also finds that Class Counsel has incurred \$_____ in reimbursable
4 litigation costs and expenses as of the date Plaintiffs filed their instant motion. The Court finds that
5 these costs and expenses were reasonably incurred in the ordinary course of prosecuting this case and
6 were necessary given the complex nature and nationwide scope of the case. Accordingly, the Court
7 approves a payment to Class Counsel in the amount of \$_____ to reimburse them for these
8 costs and expenses.

9 5. Finally, the Court approves an incentive award of \$4,800.00 each to current named
10 Plaintiffs and class representatives Dean Sheikh, John Kelner, Tom Milone, Daury Lamarche, and
11 Michael Verdolin. These incentive awards are reasonable and justified given: the time and effort
12 expended and the work performed and the active participation in the litigation and settlement processes
13 by the class representatives on behalf of the members of the Settlement class; the time the class
14 representatives spent away from family, friends, relationships, and work and other responsibilities while
15 working on this matter on behalf of the Settlement class; the benefit to Settlement class members of the
16 named Plaintiffs' actions on their behalf; the length of this case; and the other or more particular factors
17 faced by the class representatives in bringing this lawsuit, as described in each of their declarations.

18 6. The attorneys' fees, costs, expenses, and service awards set forth in this order shall be
19 paid from the gross settlement fund and distributed at Class Counsel's sole discretion per the terms of
20 the Settlement Agreement. (*See* Dkt No. 44-1, §§ II.A.1; II.A.3; V.)

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IT IS SO ORDERED.

DATED this _____ day of _____, 2018

Honorable Beth Labson Freeman
United States District Judge