IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOANNE HART and SANDRA BUENO, on behalf of themselves and all others similarly situated, Plaintiffs, v. BHH, LLC d/b/a Bell + Howell and VAN HAUSER LLC Defendants.	Civil Action No. 1:15-CV-04804-WHP

DECLARATION OF YITZCHAK KOPEL IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND INCENTIVE AWARDS

I, Yitzchak Kopel, declare as follows:

1. I am an attorney at law licensed to practice in the State of New York. I am a member of the bar of this Court, and I am a Partner at Bursor & Fisher, Class Counsel in this Action. I respectfully submit this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Attorneys' Fees, Costs, Expenses and Incentive Awards. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would competently testify thereto under oath.

2. In this declaration, I describe the lengthy history of this case; the terms of the proposed Settlement and why they are fair and reasonable; my firm's background and experience in consumer class action litigation; the significant time, effort, and money invested by my firm in this case; the risks involved with the litigation; why our request for fees, costs, and expenses is fair and reasonable; and the critical role and significant efforts of the two Class Representatives.

3. This case has been pending in this Court for nearly five years. The case settled very shortly before trial.

4. I have been working on this matter since its inception and have been the attorney at my firm primarily responsible for this case throughout its five-year history. In my opinion, this litigation was extremely hard-fought by excellent counsel on behalf of all parties.

I. OVERVIEW OF THE LITIGATION AND THE SETTLEMENT

A. Class Counsel's Pre-Suit Investigation And The Pleading Stage

5. Prior to filing the complaints, Class Counsel conducted a substantial amount of investigation concerning the facts and law relating to the matters alleged in Plaintiffs' complaints. My firm's pre-suit investigation began in February 2015 and continued into June 2015. Our investigation included: (a) significant pre-complaint factual research, including investigating the Bell + Howell Ultrasonic Pest Repellers' (the "Repellers") packaging and labels, product specifications, advertisements, and retail pricing; (b) conferences with Joanne Hart and Amanda Parke, the two original plaintiffs in this case (the "Original Plaintiffs"), regarding their purchases and use of the Repellers; (c) review of documents provided by the Original Plaintiffs regarding their purchase and use of the Repellers; (d) interviews of putative Class Members; (e) review of customer complaints; (f) extensive review of technical, scientific, and legal materials regarding the efficacy of ultrasonic repellers, including scholarly articles, tests, previous FTC actions and other legal actions against manufacturers of ultrasonic products; (g) legal research regarding the elements and standards of the Original Plaintiffs' claims; and (h) satisfaction of pre-suit notice requirements.

6. Class Counsel gained a solid understanding of the strengths and weaknesses of the plaintiffs' claims and possible recoverable damages as a result of the pre-suit investigation.

Once completed, Class Counsel prepared a complaint for filing with the assistance of the Original Plaintiffs, Joanne Hart and Amanda Parke.

7. On June 19 2015, Original Plaintiffs Joanne Hart and Amanda Parke filed the initial class action complaint in this action, alleging causes of action for violation of the federal Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. §§ 2301, *et seq.*; California's Consumers Legal Remedies Act ("CLRA"), Cal. Civil Code §§ 1750, *et seq.*; California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq*.; Breach of Express Warranty; Breach of Implied Warranty of Merchantability; and unjust enrichment. The complaint asserted claims against BHH, LLC and Van Hauser LLC ("Defendants") on behalf of a putative nationwide class and California and Texas subclasses.

8. Following an exchange of letters by the parties, the Court held a pre-motion conference on September 11, 2015 to discuss Defendants' forthcoming motion to dismiss. At the pre-motion conference, the Court complemented the Original Plaintiffs' complaint, noting that it was "certainly eye-popping." On October 19, 2015, Defendants filed a Motion to Dismiss. The Original Plaintiffs opposed the motion on November 16, 2015, and Defendants submitted a reply on November 24, 2015. In a Memorandum and Order dated May 25, 2016, the Court granted, in part, and denied, in part, Defendants' Motions to Dismiss. The Order dismissed the claims under the MMWA and for unjust enrichment but allowed the other claims to proceed.

9. On November 20, 2015 Original Plaintiff Parke filed a notice of voluntary dismissal of her claims due to personal time constraints.

10. On May 25, 2016, Defendants answered the initial complaint, denying liability.

B. Fact Discovery

11. On August 24, 2015, Plaintiff Hart served discovery requests on Defendants immediately following the Rule 26(f) meeting of the parties.

12. The battle to obtain a complete document production from Defendants was extremely hard fought and required multiple motions to compel. On October 21, 2015, the Original Plaintiffs filed a letter motion seeking to compel discovery responses and production from Defendants. On November 6, 2015, the Court issued an order compelling production of a response and document production by one week later.

13. In response to the Court's order, Defendants made a document production totaling fewer than 400 pages. I expressed concern about the insufficiency of this production to defense counsel but was advised that Defendants had searched and could not locate any other responsive documents.

14. On February 3, 2016, I took the Rule 30(b)(6) deposition of Jeffrey Mishan, one of Defendants' principals. At the deposition, Mr. Mishan testified that Defendants had not conducted a good faith search for any of the documents requested. Moreover, it became apparent at the deposition that Defendants limited their document production to documents pertaining to just one variety of the Repellers. Defendants' discovery objections never noted this; the documents produced indicated that total sales of the product in the U.S. were less than $1.5 million for the class period. Ultimately, however, our continued efforts in discovery revealed that actual sales exceeded $52 million.

15. At the deposition, Mr. Mishan also estimated that there were a total of seven varieties of the Repellers. But here too, our continued efforts in discovery ultimately revealed there were actually 41 different varieties.

16. On February 26, 2016, I submitted our second motion to compel a complete production. On June 6, 2016, the Court once against issued an order compelling Defendants' production. Defendants produced several thousands of pages of documents as a result of this Order, but their production was still incomplete, and Defendants slowly produced more documents throughout the case and up until the eve of trial.

17. In late 2016, my firm took the deposition of Debbie Feuerstein, the inventor of the Repellers, who conceded that she had no scientific training and had conducted numerous tests showing that the Repellers were ineffective in a variety of real-world applications. We also took a second deposition of Mr. Mishan, who testified that the sales of the Repellers were orders of magnitude higher than they had disclosed earlier on. Finally, we also defended the deposition of Plaintiff Hart in California.

18. In September 2016, Class Counsel subpoenaed documents regarding sales data from the top five retailers that sold the Repellers. This evidence was later featured in our class certification briefing.

C. The *Steigerwald* Action And Its Impact On This Litigation: Defendants Seek To Stay This Action And Ms. Hart Moves To Intervene In Ohio

19. Two months before initiation of this action, a separate class action regarding the efficacy of the Bell + Howell Repellers was filed in the Northern District of Ohio. *See Steigerwald v. BHH, LLC*, No. 1:15-cv-00741 (N.D. Ohio).

20. On February 26, 2016, the court in *Steigerwald* certified a nationwide fraud class of purchasers of the Repellers, and a 25-state breach of express warranty class of Repeller purchasers. *Steigerwald v. BHH, LLC*, 2016 WL 695424, at *6 (N.D. Ohio Feb. 22, 2016).

21. On March 2, 2016, Defendants submitted a pre-motion letter to this Court to stay this action until resolution of the *Steigerwald* action. On March 9, 2016, I submitted a response letter on behalf of Ms. Hart stating that she would not pursue certification for her express

warranty claim in light of the overlap with the *Steigerwald* certification, but should be permitted to press ahead with her California consumer protection claims on behalf of a California-only class. On June 2, 2016, the Court held a pre-motion conference and offered its thoughts regarding the merits of Defendants' motion. In light of the Court's comments, Defendants elected to forgo the formal motion to stay.

22. The decision to press ahead with California-only claims at this juncture in the case was very risky for Ms. Hart and my firm. As noted *supra* ¶ 14, only approximately $1.5 million in *nationwide* sales for the product had been disclosed by Defendants at that time, making the California claims appear to be worth only a fraction of that. Nonetheless, we pressed forward with the litigation.

23. In August 2016, it came to my attention that Defendants had made the same *de minimis* document production in the *Steigerwald* action as they initially made in this action. Just as in this case, the *Steigerwald* production focused solely on a single model of Repellers, and the plaintiff in that action was therefore only aware of approximately $897,745 in sales for what ultimately became a case worth more than $52 million.

24. In contrast to our efforts in discovery in this case to compel a complete document production from Defendants, no such efforts were ever made in the *Steigerwald* action. Moreover, although the classes had been certified six months earlier in March 2016, no efforts to begin the process of disseminating class notice had taken place by August 2016.

25. These issues gave Ms. Hart and Class Counsel grave concern that the interests of class members were not being adequately represented in the *Steigerwald* action. In particular, we were concerned that the *Steigerwald* case could proceed through summary judgment and/or trial with Ms. Steigerwald's counsel only seeking a tiny fraction of the relief actually due to the Classes.

26. After unsuccessfully reaching out to Ms. Steigerwald's counsel with an offer to help them right their ship, Ms. Hart filed a motion to intervene in the *Steigerwald* action on August 16, 2016. Ms. Steigerwald opposed the motion on August 30, 2016, and Ms. Hart submitted a reply on September 8, 2016. Then, on September 9, 2016, Defendants submitted an untimely opposition to Ms. Hart's motion. Ms. Hart submitted a second reply on September 19, 2016.

27. On November 8, 2016, the court denied Ms. Hart's motion to intervene on the grounds that the litigation was too advanced to permit intervention and that Ms. Hart's interests were not sufficiently impaired because she was permitted to opt out of the certified class. *See Steigerwald,* 317 F.R.D. 615 (N.D. Ohio Nov. 8, 2016).

28. Shortly thereafter, on November 29, 2016, the court granted Defendants' *Daubert* motion in the *Steigerwald* action, precluding the testimony of Ms. Steigerwald's entomology expert. Consequently, the court also granted summary judgment in favor of Defendants. *See Steigerwald,* 2016 WL 6962593 (N.D. Ohio Nov. 29, 2016).

29. At this point, Ms. Hart and Class Counsel took note that the *Steigerwald* decision was not binding on class members since notice had not been dissemination and they therefore had no opportunity to opt-out of the classes. We therefore resolved to move for re-certification of the fraud and breach of express warranty classes in our action.

D. Plaintiffs File An Amended Complaint And Move For Class Certification

30. After receiving leave of court to amend, Ms. Hart, along with a new plaintiff, Sandra Bueno (collectively, "Plaintiffs"), filed a first amended complaint ("FAC") on January 23, 2017. This FAC added a single new claim for fraud.

31. Plaintiffs moved expeditiously to produce documents for Ms. Bueno. Thereafter, I defended her deposition on March 9, 2017.

32. On March 16, 2017, Plaintiffs filed a Motion to Certify Class, moving to certify three classes as follows:

> **Nationwide Fraud Class**: "All persons who purchased one or more Bell + Howell Ultrasonic Pest Repellers in the United States from April 20, 2011 to June 15, 2016 (the "Class Period"), excluding persons who purchased for purpose of resale."
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> **Multistate Breach of Express Warranty Class**: "[A]ll persons who purchased one or more Bell + Howell Ultrasonic Pest Repellers in the states of Alaska, California, Colorado, Delaware, Iowa, Kansas, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming during the Class Period, excluding persons who purchased for purpose of resale."
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> **California Class**: "[A]ll persons who purchased one or more Bell + Howell Ultrasonic Pest Repellers in the state of California during the Class Period, excluding persons who purchased for purpose of resale." Lowe's and Defendants opposed this motion on May 30, 2014.

On April 27, 2017, Defendants filed a motion to dismiss the FAC and an opposition to Plaintiffs' motion for class certification.

33. In an Opinion and Order dated July 7, 2017, the Court granted, in part, and denied, in part, Defendants' motion to dismiss the first amended complaint and granted Plaintiffs' Motion to Certify Class. The motion to dismiss was granted with respect to Plaintiffs' UCL and FAL claims but denied in all other respects. The certification motion was granted in full. The law firm of Bursor & Fisher, P.A. was appointed as Class Counsel, and Plaintiffs were appointed as Class Representatives.

34. On September 8, 2017, Defendants filed a letter motion requesting to continue dissemination of class notice until after the Court ruled on summary judgment motions. On September 13, 2017, Plaintiffs filed a letter opposing the request. The Court denied the request on October 2, 2017.

35. Following class certification, Plaintiffs subpoenaed documents identifying class members from the top retailers and distributors of the Repellers. This series of subpoenas allowed Plaintiffs to identify contact information for over one million class members.

36. On October 24, 2017, the Court approved Plaintiffs' proposed Notice of Pendency of Class Action, encompassing a Long Form Notice and Postcard Notice. Direct notice was disseminated to over one million identified class members in January 2018.

37. This notice program was very successful in reaching class members directly, but it came at a significant expense. Total costs of class notice at the certification stage were $292,033.80. This cost represented a very significant risk to class counsel that they could fail to recoup the funds if Plaintiffs lost the case.

E. Expert Disclosures And Discovery

38. Due to the highly technical nature of this case, Plaintiffs worked with their expert entomologist, Dr. Michael F. Potter to design and commission an extensive series of testing on the Repellers.

39. First, Plaintiffs commissioned testing of the Repellers' ultrasonic and electromagnetic properties with Dr. Richard Mankin at the U.S. Department of Agriculture's laboratory in Gainesville Florida.

40. Next, Plaintiffs commissioned testing of ants, roaches, and spiders at i2L Research, USA's laboratories in Baltimore, MD. Each of these tests needed to be designed separately to accommodate the needs of each critter. The tests were done with three experimental replicates and three control replicates for each of the critters, making for a total of six tests per critter, and eighteen total tests.

41. Finally, Plaintiffs commissioned testing of mice in six vacant apartments in Modesto, California. The video footage of the mice sitting on top of the repellers during testing in these apartments was ultimately featured in the Court's summary judgment order.

42. Plaintiffs also retained an economist, Colin Weir, to analyze the voluminous sales data in this case and provide damages estimates. Mr. Weir has submitted numerous declarations in this litigation.

43. During the expert discovery phase of this case, Class Counsel traveled to Chicago, Illinois, to take the depositions of Defendants' three expert witnesses in this case and defended the depositions of Plaintiffs' two expert witnesses in New York.

F. Summary Judgment And Pretrial Proceedings

44. On March 9, 2018, Defendants filed a motion for summary judgment and a *Daubert* motion. On the same date, Plaintiffs filed two additional *Daubert* motions.

45. In an Opinion and Order dated July 19, 2018, the Court granted, in part, and denied, in part, both of the *Daubert* motions filed by Plaintiffs. The Court also denied in full the Daubert motion filed by Defendants.

46. On August 13, 2018, Defendants filed a letter motion seeking again to preclude Dr. Potter's testimony pursuant to Fed. R. Civ. P. 37(c). On August 16, 2018, Plaintiffs submitted an opposition letter. On September 5, 2018, the Court denied this motion.

47. Also on September 5, 2018, the Court issued an Opinion and Order denying Defendants' motion for summary judgment, except with regard to limiting the time periods of the certified classes. The Parties submitted letters proposing new subclasses on September 26, 2018.

48. On September 19, 2018, Defendants filed a Motion for Reconsideration of the Court's summary judgment decision. Plaintiffs opposed the motion on October 10, 2018. In a

Memorandum & Order dated November 2, 2018, the Court denied Defendants' motion for reconsideration, and adopted the following new class definitions (the "Classes"):

> **Nationwide Fraud Class**: "all persons who purchased one or more Bell + Howell ultrasonic pest repellers in the United States from April 20, 2011 to June 15, 2016, excluding persons who purchased for purpose of resale."
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> - **Nationwide Subclass 1 (3 year statute)**: "all persons who purchased one or more Bell + Howell ultrasonic pest repellers in the states of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Maryland, Massachusetts, Mississippi, Nevada, New Hampshire, North Carolina, South Carolina, Tennessee, Utah and Washington from April 20, 2012 to June 15, 2016, excluding persons who purchased for purpose of resale."
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> - **Nationwide Subclass 2 (2 year statute)**: "all persons who purchased one or more Bell + Howell ultrasonic pest repellers in the states of Alabama, Alaska, Kansas, Montana, Oklahoma, Oregon, Pennsylvania, Virginia, and West Virginia from April 20, 2013 to June 15, 2016, excluding persons who purchased for purpose of resale."
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> **Multistate Breach of Express Warranty Class**: "all persons who purchased one or more Bell + Howell ultrasonic pest repellers in the states of Alaska, California, Colorado, Delaware, Iowa, Kansas, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming from April 20, 2011 to June 15, 2016, excluding persons who purchased for purpose of resale."
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> - **Multistate Subclass (3 year statute)**: "all persons who purchased one or more Bell + Howell ultrasonic pest repellers in the state of Colorado from April 20, 2012 to June 15, 2016, excluding persons who purchased for purpose of resale."
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> - **California Class (3 year statute)**: "all persons who purchased one or more Bell + Howell ultrasonic pest repellers in the state of California from April 20, 2012 to June 15, 2016, excluding persons who purchased for purpose of resale."

49. On December 20, 2018, Class counsel defended Mr. Weir's deposition for the second time, pursuant to a court order authorizing a second deposition by Defendants.

50. In December 2018 and January 2019, the Parties exchanged pre-trial disclosures and submitted a joint pretrial order on January 18, 2019.

51. On March 1, 2019, the Parties filed several motions *in limine*. These included two new, full-length *Daubert* motions against Plaintiffs' expert witnesses. The Court adjudicated the motions *in limine* on April 1 and April 4, orally and in a Memorandum & Order.

52. As a result of the Court's rulings on the motions *in limine*, additional depositions were authorized. In May 2019, Plaintiffs took one deposition and defended one deposition.

53. The Court set trial in this matter for September 9, 2019.

G. Settlement Negotiations

54. Negotiations regarding potential settlement were thorough, protracted, and exhaustive and involved multiple settlement conference and a mediation session. As early as April 8, 2019, the Parties participated in a full-day in-person settlement conference with a mediator, Hon. John S. Martin, Jr. Although the Parties were unsuccessful, the Parties left open the door for future resolution talks.

55. The Parties engaged in substantial discussions in June and July 2019 in an effort to resolve the Action.

56. On August 19, 2019, the Parties executed a Stipulation of Settlement. On September 3, 2019, Plaintiffs filed a motion for preliminary approval.

57. On January 17, 2020, the Court issued an order denying the motion for preliminary approval.

58. Thereafter, the parties reconvened discussions once again to revise the Stipulation of Settlement according to the guidance provided by the Court in its Order denying preliminary approval. On February 3, 2020, the Parties executed a new Stipulation of Settlement.

59. On February 5, 2020, Plaintiffs submitted a letter motion seeking preliminary approval of the new Stipulation of Settlement. On February 12, 2020, the Court issued an order granting preliminary approval.

E. The Settlement Terms

60. The settlement does not seek to broaden or alter the Classes previously certified by the Court, and simply creates one Settlement Class consisting of the same members of the three previously-certified Classes in this action.

61. The proposed Settlement provides substantial monetary benefits to the Settlement Class. No proof of purchase, other than a signed attestation on the Claim Form, is required. However, the amount of the payment available to Settlement Class members whose purchases are documented is greater. Settlement Class Members with Proof of Purchase showing the actual price paid for the Repellers will be paid a full refund of the purchase price for up to six units. Settlement Class Members with Proof of Purchase that does not show the actual price paid for the Repellers will receive a refund of up to $90, *i.e.*, $15.00 for per unit to six units. Finally, Settlement Class Members who submit a valid Claim Form without proof of purchase will be paid up to $30, *i.e.*, $15.00 per unit for up to two units. Notably, there is no limit to the total number of refunds that Defendants will pay to the Class as a whole, and Class Members' full refunds will not be prorated for any reason.

62. Furthermore, the costs of notice and administration, and any incentive awards or attorneys' fees, costs, and expenses that get awarded will be paid by Defendants separately from the refunds paid to Class Members. Thus, those costs will not affect the amount of refunds that will be paid to Class Members under the Settlement.

63. Since the Court granted preliminary approval, Class Counsel has worked with Digital Settlement Group ("DSG"), an experienced class action settlement administrator, to carry out the Court-ordered Notice Plan and to administer this Settlement. In particular, I reviewed the final claim and notice forms, and reviewed, tested, and made suggestions about the Settlement Website before it went live.

64. I understand that DSG has disseminated Notice of the Settlement in multiple formats consisting of: Email notice to all Class Members for whom email addresses have been identified; Post Card Notice via regular mail to all Class Members for whom the Parties do not have a valid email address but do have a mailing address; a Settlement Website with the capability to receive online submission of claim forms; and Internet banner ads, with embedded hyperlinks to the Settlement Website.

65. Class Counsel has continued to supervise DSG's administration of the settlement. We have worked with DSG on a weekly basis to monitor claims and other settlement details. We have also spent hours answering questions and providing information about the Settlement to inquiring Class Members and helped Class Members file their claims.

II. ANALYSIS OF SALES DATA AND CALCULATION OF TOTAL VALUE OF SETTLEMENT

66. In order to ensure that the terms of the Settlement would provide substantial relief to Settlement Class Members, I performed an analysis of the available purchase data to calculate the total amount of relief available to Settlement Class Members under the Settlement, and to ensure the fairness of the Settlement's terms.

67. First, I calculated the total dollar amount of sales of Repellers to Settlement Class Members during the Class Period. This calculation was already substantially performed by Plaintiffs' damages expert, Colin Weir, in his November 27, 2018 declaration (ECF No. 190). That declaration included three charts with Mr. Weir's estimates of total dollar sales, on a state-by-state basis, for each of the three certified Classes in this case. *Id.* at Tables 4-6.

68. However, because each of the three claims asserted by the Plaintiffs bear differing statutes of limitations, it was necessary for me to pick out the estimates corresponding to the claims with the *longest* statutes of limitations (and therefore highest amount of sales) for each claim and state.

69. I started this by taking Mr. Weir's estimates from the nationwide fraud class in Table 6. Next, I substituted in his estimates from Table 5 (the breach of express warranty class) for the states of Alaska, California, Kansas, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Utah, Virginia, Washington, and West Virginia, since those states bear longer statutes of limitations for breach of express warranty than for fraud. It was therefore appropriate to use the entries from Table 5 for those states because they had an expanded Settlement Class Membership, and higher dollar sales under the breach of express warranty class. As a result, my calculations for total dollar sales resulted in $52,531,664. A chart showing total sales on a state by state basis follows:

Total Repeller Sales	
States	**Damages**
Alabama	$618,435
Alaska	$60,421
Arizona	$636,444
Arkansas	$423,599
California	$5,128,551
Colorado	$513,310
Connecticut	$541,043
Delaware	$239,103
D.C.	$162,715
Florida	$3,779,793
Georgia	$1,742,789
Hawaii	$178,693
Idaho	$137,370
Illinois	$2,350,397
Indiana	$1,207,195
Iowa	$404,283
Kansas	$421,823
Kentucky	$838,329
Louisiana	$1,050,894
Maine	$244,474
Maryland	$1,161,308
Massachusetts	$811,487
Michigan	$1,994,138

Minnesota	$558,254
Mississippi	$485,350
Missouri	$1,063,346
Montana	$81,566
Nebraska	$265,064
Nevada	$360,818
New Hampshire	$231,553
New Jersey	$2,029,326
New Mexico	$390,971
New York	$4,604,947
North Carolina	$1,840,579
North Dakota	$110,568
Ohio	$2,310,414
Oklahoma	$655,244
Oregon	$546,223
Pennsylvania	$3,048,736
Rhode Island	$169,511
South Carolina	$741,367
South Dakota	$115,792
Tennessee	$918,002
Texas	$3,175,882
Utah	$257,745
Vermont	$110,394
Virginia	$1,630,795
Washington	$850,081
West Virginia	$495,814
Wisconsin	$747,138
Wyoming	$89,590
TOTAL	$52,531,664

70. Next, I analyzed the available data regarding the number of unit purchases made by each class member. In order to do this, I utilized purchaser sales data from the Harriet Carter Gifts Catalog which includes 80,284 entries of Bell + Howell Repeller sales between the years 2011 and 2016. This includes sales of 108,938 units to 69,714 unique persons for a total of $1,890,010.89. Due to this data's voluminous nature, it could not be attached to this declaration. However, it can be made available electronically to the Court, upon request.

71. After excluding a single unusable entry for "showroom sales" of 188 units, I analyzed the data to determine how many units of Repellers each consumer purchased. This analysis showed that 65.2% of consumers purchased one unit, while 24.7% of consumers purchased two units. Thus, approximately 89.97% of consumers purchased either one or two units.

72. The analysis also revealed that 99.33% of consumers purchased six or fewer units.

73. Next, I analyzed the quantity of Repellers purchased by the 0.67% (341 out of 69,713) of consumers who purchased 7 or more units. These 341 consumers purchased 4,478 units.

74. If these 341 consumers were limited to refunds of six units apiece (as provided by the Settlement), that would equal 2,046 units (341 x 6 = 2,046). Thus, if everyone in this data set submitted claims under the Settlement, that would result in claims for 2,432 units disallowed (4,478 – 2;046 = 2,432) out of 69,713 units, or 3.49% (2,432 / 69,713 = .0349).

75. Finally, to calculate the total amount of funds available to Settlement Class Members under the Settlement, I reduced the total sales amount noted earlier of $52,380,123 by 3.49% to account for disallowable claims due to the 6-unit maximum. Thus, I calculated the total amount of funds available under this settlement to be $50,698,308.93 ($52,531,664 x .9651 = $50,698,308.93).

76. In addition, Georgeann Ferragut, the Director of Operations at Digital Settlement Group ("DSG"), has represented to me that she estimates the cost of notice and administration of this Settlement to be approximately $525,000. This represents an additional benefit to the Settlement Class Members.

77. As discussed further in Section V of this declaration, the requested attorneys' fees in this case therefore represent approximately 10.05% of the $57,733,308.93 total benefit

provided to the Settlement Class, calculated as follows: $50,698,308.93 (total available monetary recovery to Class Members) + $525,000 (estimated settlement administration and notice costs) + $6,500,000 (attorneys' fees, costs, and expenses) + $10,000 (Class Representatives' incentive awards) = $57,733,308.93.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

78. Both Colin Weir, Plaintiffs' damages expert, and Stephan Boedeker, Defendants' damages expert, provided estimates of the average retail price for Repellers in the U.S. during the Class Period.

79. Per Mr. Weir's calculations, the average retail price of the Repellers in the U.S. during the Class Period was $24.10. *See* ECF No. 135-24 at 9. Per Mr. Boedeker's calculations, the average retail price of the Repellers in the U.S. during the class period was $21.61. *Id.* at 15. Thus, the average price for the Repellers was between $21.61 and $24.10.

80. Moreover, many units of the Repellers sold at retail for $15 or less, and sales data received in discovery shows that thousands of Settlement Class Members ultimately paid less than $15 for their Repellers. *Id.* at 9.

81. Thus the Settlement's terms, which provide full refunds with proof of purchase, and a $15 per unit refund without proof of purchase, represents an excellent result.

82. And, as noted *supra* ¶¶ 71-72, 89.97% of Settlement Class Members purchased two or fewer units, and 99.33% of Settlement Class Members purchased six or fewer units.

83. Accordingly, under the Settlement, 89.97% of Settlement Class Members can receive a refund for every single unit of the Repellers they purchased, even if they do not submit proof of purchase. Moreover, 99.33% of Settlement Class Members can receive a full refund for every unit of Repellers they purchased so long as they submit proof of purchase.

84. Thus, the Settlement's terms represent an excellent recovery for Settlement Class Members.

85. This is especially the case after considering that Plaintiffs faced a number of material risks and significant expenses if they sought relief for the Settlement Class through continued litigation. For example, the next step in litigation would have been a lengthy, complex, and expensive trial. Establishing liability at the trial would have been a risky course of action due to the technical and scientific nature of the allegations, as well as the large body of complex scientific evidence that would be introduced supporting each parties' claims or defenses, as the case may be. Also, Defendants played hardball in this litigation, and indicated that they would contest this case to the very end, including post-trial. Thus, even if the Classes were successful at trial, it is likely that Defendants would file post-trial motions and appeals. On top of that, there were serious questions about Plaintiffs' ability to collect the full amount of a judgment against the named defendant entities. However, the Settlement removes the risks and delay associated with continued litigation and it simultaneously provides monetary relief now for the Class Representatives and the Settlement Class.

86. The expertise and experience of Class Counsel and their views are other important factors to consider in assessing the reasonableness of the proposed Settlement, including the payment of attorneys' fees, costs, and expenses. As indicated by our firm resume, Class Counsel are experienced practitioners in the consumer class action field. It is the opinion of Class Counsel that the proposed Settlement is fair, reasonable, and adequate and should be approved by the Court. A copy of my firm's resume, which includes detailed information about our practice and qualifications of the lawyers who worked on this case is attached as **Exhibit A**.

IV. THE RISKS INVOLVED WITH THIS LITIGATION

87. Class Counsel undertook this representation on a wholly contingent basis recognizing the potential risk of non-payment for our work and not being reimbursed for our expenses. We expended substantial time and money to prosecute a class action suit with no guarantee of compensation or reimbursement in the hope of prevailing against sophisticated Defendants represented by high-caliber attorneys from prominent law firms.

88. There were substantial uncertainties in the viability of this case as a class action, as well as substantial uncertainties in the merits of the underlying claims. Although we believed the case to be meritorious, a realistic assessment shows that the risks inherent in the resolution of the liability issues were great. During the last five years, Defendants filed, *inter alia,* two motions to dismiss, a motion for summary judgment, motions to exclude Plaintiffs' experts, and several motions *in limine*. All of these motions posed tremendous risk. Defendants also vigorously opposed our motion for class certification. If Defendants had prevailed on any of these significant motions, it is likely that there would have been no recovery for the Class Members. This case also settled after the Parties had completed discovery and begun preparing for trial. Thus, we still faced the uncertainty of trial rulings from the Court that might have crippled the case. Moreover, even if we had been able to prevail at trial, we still faced the daunting prospect of affirming any verdict on post-trial motions in this Court and later on appeal. That process would have taken years and involved tremendous risk that a hard-fought victory could be lost. Based on my experience, I have concluded that the Settlement provides exceptional results for the Class while sparing the Class from the numerous uncertainties that would result from continued and protracted litigation.

89. In addition, this case required Class Counsel to develop expertise related to several areas that were largely new to us. In particular, this case required us to review and

understand complex scientific studies of Defendants' Repellers and other ultrasonic and pest control products. We also had to develop an understanding of the biology of ants, spiders, roaches, mice, and rats, elements of acoustical engineering. This case also required a significant amount of skilled legal work, *see supra* at ¶¶ 5-59. In my opinion, the work we performed in this case represents the highest caliber of legal work and strongly supports our request for fees, costs, and expenses.

90. There was additional risk that the summary judgment decision from the *Steigerwald* action could preclude the claims of class members outside the state of California for reasons completely outside the control of Plaintiffs and Class Counsel, as discussed *supra* § I.C. Indeed, if class notice had been disseminated in that case, it would have dramatically changed the course and results of the action, as Plaintiff would not have been able to certify their nationwide fraud class and multistate breach of express warranty class.

91. Further, the fact that two other recent class actions regarding the efficacy of ultrasonic pest repelling devices, *Steigerwald* and *Galoski*, were dismissed on summary judgment, also shows how risky this action was. Those cases were nearly identical to this case, but because the cases were dismissed, the counsel that represented the plaintiffs and the classes were neither compensated for their time nor reimbursed for their out-of-pocket costs. Class Counsel was able to avoid the same fate in this action through our hard work, legal acumen, and dedication to our duties to zealously represent the interests of the Classes.

92. Furthermore, this case required Class Counsel to invest a substantial amount of monetary resources. Indeed, given the need to advance reasonable expenses totaling

$698,526.06,[1] and certainly much more if the case proceeded to trial, Class Counsel have earned the monies being requested here.

93. Due to the commitment of time and capital investment required to litigate this action, my firm had to forego other work, including other class action matters.

V. CLASS COUNSEL'S LODESTAR AND EXPENSES ARE REASONABLE

94. In recognition of the efforts by Class Counsel and the benefits provided to the Settlement Class through the Settlement, I respectfully request that the Court approve a payment of an award of attorneys' fees, costs, and expenses in the amount of $6,500,000.00 (Six Million Five Hundred Thousand Dollars and Zero Cents). This request is within the range of fees customarily awarded in similar actions and is justified in light of the substantial monetary benefits conferred on the Settlement Class, the risks undertaken, and the quality and extent of the legal work performed, as set forth herein and in the accompanying moving papers. Moreover, the requested award of attorneys' fees, costs, and expenses is payable by the Defendants in addition to and not from the relief provided to the Settlement Class under the Settlement.

95. Attached hereto as **Exhibit B** are my firm's detailed billing diaries for this matter, including a summary of my firm's lodestar, and a rate sheet for our legal professionals. I have reviewed all of my firm's time entries associated with this case personally, and have used billing judgment to ensure that duplicative or unnecessary time has been excluded and that only time reasonably devoted to the litigation have been included. My firm's time entries were regularly and contemporaneously recorded by myself and the other timekeepers pursuant to firm policy and have been maintained in the computerized records of my firm.

[1] Local counsel from the *Steigerwald* action also advanced an additional $1,701.50 in connection with Ms. Hart's motion to intervene. *See* Simpkins Decl. Ex. A.

96. Through August 31, 2018, Bursor & Fisher worked 4,449.5 hours in this case. Bursor & Fisher's lodestar fee in this case, based on current billing rates, is $2,636,437.50.

97. Of the 4,449.5 hours Bursor & Fisher worked on this case, 496.3 hours (11.1%) were billed by paralegals, 2,291.6 hours (51.5%) were billed by associates (including summer associates/law clerks) and 1,661.6 hours (37.3%) were billed by partners.

98. Moreover, of the 4,449.5 hours Bursor & Fisher worked on this case, 2,108.2 hours (47.4%) were billed by me personally. Although I was promoted to partner in November 2018, I was just a third-year associate when this case commenced in June 2015.

99. In addition to the time enumerated above, I estimate that Class Counsel will incur an additional 50 to 60 hours of future work in connection with the fairness hearing, coordinating with the Settlement Administrator, monitoring settlement administration, and responding to Settlement Class Member inquiries.

100. To date, my firm has also expended $698,526.06 in out-of-pocket expenses in connection with the prosecution of this case. Attached as **Exhibit C** is an itemized list of those expenses. These expenses are reflected in the records of Bursor & Fisher and were necessary to prosecute this litigation. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

101. As noted in the Declaration of Scott D. Simpkins, our local counsel from Ohio, which was retained in connection with Ms. Hart's motion to intervene, had a lodestar of $14,737.50 and expenses of $1,701.51. *See* Simpkins Decl. Ex. A.

102. Combined, our total lodestar therefore comes out to $2,651,175.00. Our combined expenses totaled $700,227.57.

103. My firm worked on this case with tremendous efficiency. For comparison, it is our understanding that Defendants spent approximately $5 million in legal bills for defending

this action. The fact that our lodestar and costs were well below this makes the outstanding results achieved in this case that much more impressive and supports our request for fees, costs, and expenses.

104. The requested attorneys' fee award amounts to 10.05% of the total value of the Settlement and would represent a multiplier of 2.19 over Class Counsel's lodestar.

105. Based on my knowledge and experience, the hourly rates charged by my firm are within the range of market rates charged by attorneys of equivalent experience, skill, and expertise. These are the same hourly rates that we actually charge to our regular hourly clients who have retained us for non-contingent matters, and which are actually paid by those clients. As a matter of firm policy, we do not discount our regular hourly rates for non-contingent hourly work.

106. I have personal knowledge of the range of hourly rates typically charged by counsel in our field in New York, California, and throughout the United States, both on a current basis and in the past. In determining my firm's hourly rates from year to year, my partners and I have consciously taken market rates into account and have aligned our rates with the market.

107. Through my practice, I have become familiar with the non-contingent market rates charged by attorneys in New York, California, Florida, and elsewhere (my firm's offices are in New York City, Walnut Creek, California, and Miami, Florida). This familiarity has been obtained in several ways: (1) by litigating attorneys' fee applications; (2) by discussing fees with other attorneys; (3) by obtaining declarations regarding prevailing market rates filed by other attorneys seeking fees; and (4) by reviewing attorneys' fee applications and awards in other cases, as well as surveys and articles on attorneys' fees in the legal newspapers and treatises. The information I have gathered shows that my firm's rates are in line with the non-contingent market rates charged by attorneys of reasonably comparable experience, skill, and reputation for

reasonably comparable class action work. In fact, higher hourly rates have been found reasonable by various courts for reasonably comparable services, including:

i. *Kortright Cap. Partners LP v. Investcorp Invest. Advisers Ltd.*, 392 F. Supp. 3d 382, 407-08 (S.D.N.Y. 2019) (Pauley, J.) (applying partner rate of $1,200 and associate rate of $650 and citing supporting authority of prevailing market rates).

ii. *U.S. Bank Nat. Ass'n v. Dexia Real Estate Cap. Markets*, 2016 WL 6996176 at *8 (S.D.N.Y. Nov. 30, 2016) (approving application for "rates ranging from $250 per hour to $1,055 per hour").

iii. *Themis Cap. v. Democratic Republic of Congo*, 2014 WL 4379100, at *7 (S.D.N.Y. Sep. 4, 2014) ("[P]artner billing rates in excess of $1,000 an hour … are by now not uncommon in the context of complex commercial litigation").

108. The reasonableness of my firm's hourly rates are also supported by several surveys of legal rates, including the following:

i. In an article entitled "On Sale: The $1,150-Per Hour Lawyer," written by Jennifer Smith and published in the *Wall Street Journal* on April 9, 2013, the author describes the rapidly growing number of lawyers billing at $1,150 or more revealed in public filings and major surveys. The article also notes that in the first quarter of 2013, the 50 top-grossing law firms billed their partners at an average rate between $879 and $882 per hour. A true and correct copy of this article is attached hereto as **Exhibit D**.

ii. In an article published April 16, 2012, the *Am Law Daily* described the 2012 Real Rate Report, an analysis of $7.6 billion in legal bills paid by corporations over a five-year period ending in December 2011. A true and correct copy of that article is attached hereto as **Exhibit E**. That article confirms that the rates charged by experienced and well-qualified attorneys have continued to rise over this five-year period, particularly in large urban areas like the San Francisco Bay Area. It also shows, for example that the top quartile of lawyers bill at an average of "just under $900 per hour."

iii. Similarly, on February 25, 2011, the *Wall Street Journal* published an on-line article entitled "Top Billers." A true and correct copy of that article is attached hereto as **Exhibit F**. That article listed the 2010 and/or 2009 hourly rates for more than 125 attorneys, in a variety of practice areas and cases, who charged $1,000 per hour or more. Indeed, the article specifically lists *eleven* (11) Gibson Dunn & Crutcher attorneys billing at $1,000 per hour or more.

iv. On February 22, 2011, the *ALM*'s Daily Report listed the 2006-2009 hourly rates of numerous San Francisco attorneys. A true and correct copy of that article is attached hereto as **Exhibit G**. Even though rates have increased significantly

since that time, my firm's rates are well within the range of rates shown in this survey.

v. The Westlaw CourtExpress Legal Billing Reports for May, August, and December 2009 (attached hereto as **Exhibit H**) show that as far back as 2009, attorneys with as little as 19 years of experience were charging $800 per hour or more, and that the rates requested here are well within the range of those reported. Again, current rates are significantly higher.

vi. The *National Law Journal*'s December 2010, nationwide sampling of law firm billing rates (attached hereto as **Exhibit I**) lists 32 firms whose highest rate was $800 per hour or more, eleven firms whose highest rate was $900 per hour or more, and three firms whose highest rate was $1,000 per hour or more.

vii. On December 16, 2009, *The American Lawyer* published an online article entitled "Bankruptcy Rates Top $1,000 in 2008-2009." That article is attached hereto as **Exhibit J**. In addition to reporting that several attorneys had charged rates of $1,000 or more in bankruptcy filings in Delaware and the Southern District of New York, the article also listed 18 firms that charged median partner rates of from $625 to $980 per hour.

viii. According to the *National Law Journal*'s 2014 Law Firm Billing Survey, law firms with their largest office in New York have average partner and associate billing rates of $882 and $520, respectively. Karen Sloan, *$1,000 Per Hour Isn't Rare Anymore; Nominal Billing Levels Rise, But Discounts Ease Blow*, National Law Journal, Jan. 13, 2014. The survey also shows that it is common for legal fees for partners in New York firms to exceed $1,000 an hour. *Id.* A true and correct copy of this survey is attached hereto as **Exhibit K.**

109. My firm's rates, and our co-counsel's rates, have been deemed reasonable by Courts across the country, including other courts in this District, as well as other courts in New York, Michigan, California, Illinois, Missouri, and New Jersey. For example:

i. *Taylor v. Trusted Media Brands, Inc.*, Case No. 16-cv-01812 (KMK), S.D.N.Y. (Feb. 1, 2018 Final Judgment And Order Of Dismissal With Prejudice), approving rates of Bursor & Fisher's partners, associates, and paralegals.

ii. In *Rodriguez v. CitiMortgage, Inc.*, Case No. 11-cv-4718 (PGG), S.D.N.Y. (Oct. 6, 2015), the court concluded during the fairness hearing that Bursor & Fisher's rates for two of its partners, Joseph Marchese and Scott Bursor, and that Faruqi & Faruqi's rates for its partners, Nadeem Faruqi and Antonio Vozzolo, were "reasonable."

iii. *Moeller v. American Media, Inc.*, Case No. 16-cv-11367, E.D. Mich. (Sept. 28, 2017 Order And Judgment Of Dismissal With Prejudice), approving rates of Bursor & Fisher's partners, associates, and paralegals.

iv. *In re Haier Freezer Consumer Litig.*, Case No. C11-02911 EJD, N.D. Cal. (Oct. 25, 2013 Final Judgment And Order Granting Plaintiffs' Motion For Final Approval Of Class Action Settlement And For Award Of Attorneys' Fees, Costs And Incentive Awards), where Bursor & Fisher and Faruqi & Faruqi were Co-Class Counsel.

v. *In re Michaels Stores Pin Pad Litigation*, Case No. 11-cv-03350, N.D. Ill. (Apr. 17, 2013 Order Approving Settlement), where Bursor & Fisher and Faruqi & Faruqi were Co-Class Counsel.

vi. *In re Blue Buffalo Company, Ltd. Marketing and Sales Practices Litigation*, Case No. 14-md-02562, E.D. Mo. (June 16, 2016 Order Awarding Fees And Costs), approving rates of Bursor & Fisher's partners, associates, and paralegals.

vii. *Rossi v. The Procter & Gamble Co.*, Case No. 11-7238, D.N.J. (Oct. 3, 2013 Final Approval Order And Judgment), where Bursor & Fisher and Faruqi & Faruqi were Co-Class Counsel.

110. No court has ever cut my firm's fee application by a single dollar on the ground that our hourly rates were not reasonable.

111. Bursor & Fisher, P.A. and its attorneys have considerable experience in handling consumer class action litigation, which has provided counsel with extensive knowledge on the applicable law here. Bursor & Fisher regularly engages in complex litigation, and has extensive experience in consumer class action lawsuits that are similar in size, scope, and complexity to this case. The experience of Bursor & Fisher demonstrates that the Settlement Class Members were well-represented at the bargaining table. Class Counsel also have the requisite knowledge of the substantive and procedural law to prosecute this class action through trial, and they have committed substantial resources to the vigorous litigation of this case.

112. Additionally, my firm has been recognized by courts across the country for its expertise. *See* Ex. A (firm resume); *see also Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) (Rakoff, J.) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens

of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five class action jury trials since 2008.").

113. Lastly, my firm has served as trial counsel for class action plaintiffs in six jury trials and has won all six, with recoveries ranging from $21 million to $299 million.

VI. THE CLASS REPRESENTATIVES' ROLE IN THIS LITIGATION

114. In recognition of the efforts by the Class Representatives and the benefits provided to the Settlement Class through the Settlement, I respectfully request that the Court approve a payment of an incentive award to each Class Representative in the amount of $5,000.00. Defendants have agreed to pay this amount subject to Court approval. This request is within the range of fees customarily awarded in similar actions and is justified in light of the substantial monetary benefits conferred on the Settlement Class, the risks undertaken, and the substance and extent of the work they performed, as set forth in their accompanying declarations. Moreover, the requested award of attorneys' fees, costs, and expenses is payable by the Defendants in addition to and not from the relief provided to the Settlement Class under the Settlement.

115. The Class Representatives' active involvement in this case was critical to its ultimate success and resolution. They took their roles as class representatives seriously, devoting significant time and effort to protecting the interests of the Class Members. Without their willingness to assume the risks and responsibilities of serving as Class Representatives, I do not believe such a strong result would have been achieved.

116. Both Class Representatives equipped Class Counsel with critical details regarding their purchase, use, and experience with the Repellers. They assisted with the investigation of their claims and drafting the complaints. They also actively participated in responding to written discovery, searching for and producing documents and things in their possession, and being

deposed. The Class Representatives also consulted with Class Counsel throughout the case and during the settlement process.

117. In short, the Class Representatives' assistance and involvement was nothing short of essential.

I certify the foregoing statements made are true to the best of my knowledge, under penalty of perjury.

Executed on May 22, 2020 at Paramus, NJ.

/s/ Yitzchak Kopel
Yitzchak Kopel