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9

10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
11 **SAN JOSE DIVISION**

12 IN RE HP PRINTER FIRMWARE
UPDATE LITIGATION

Case No. 5:16-cv-05820-EJD-SVK

13 **REPLY DECLARATION OF ELIZABETH**
A. KRAMER IN SUPPORT OF
14 **PLAINTIFFS' MOTION FOR**
ATTORNEYS' FEES, COSTS, AND
15 **SERVICE AWARDS**

16 Date: April 25, 2019

17 Time: 9:00 a.m.

18 Place: Courtroom 4

Judge: Hon. Edward J. Davila

1 I, Elizabeth A. Kramer, hereby declare under penalty of perjury:

2 1. I am an associate at Girard Sharp LLP and one of the attorneys of record for Plaintiffs.
3 On February 7, 2019, I submitted a declaration in support of Plaintiffs' motion for an award of attorneys'
4 fees, reimbursement of litigation expenses, and service awards to the Class Representatives. Dkt. 120. I
5 make this declaration in further support of Plaintiffs' motion for final settlement approval and in reply to
6 HP's opposition to Plaintiffs' motion for an award of attorneys' fees. This declaration is based on my
7 personal knowledge, and if called to do so, I could and would testify to the matters discussed herein.

8 **I. BACKGROUND**

9 2. The background facts relating to this litigation are set forth in my initial declaration. Dkt.
10 120 at ¶¶ 3-48. The following facts are supplemental.

11 3. As of late 2016, four suits against HP had been filed in three federal districts.
12 Concurrently with a motion filed by the *San Miguel* Plaintiffs on December 7, 2016, to coordinate these
13 cases in a multidistrict litigation under 28 U.S.C. § 1407 (*see* MDL No. 2763), HP initiated motion
14 practice in the separate cases. HP moved to dismiss both *San Miguel* (Dkt. 19) and *Doty*, the Central
15 District of California action (*Doty* Dkt. 17), in December 2016.

16 4. In support of its motion to dismiss *San Miguel*, HP argued that Plaintiffs lacked both
17 Article III and statutory standing under the UCL. Dkt. 19 at 6-8. HP argued that the *San Miguel*
18 Plaintiffs did not suffer a cognizable injury because HP never promised that its printers would be
19 compatible with third-party ink cartridges. *Id.* at 7-8. HP further argued that the *San Miguel* Plaintiffs
20 failed to state a UCL claim under the unfair prong, contending that neither the balancing nor the
21 tethering test was satisfied. *Id.* at 9-14.

22 5. Plaintiffs in *San Miguel* and *Doty* opposed HP's motions to dismiss. Dkt. 29; *Doty* Dkt.
23 20. The *San Miguel* Plaintiffs, for example, argued that they had standing to sue because they suffered
24 concrete harm attributable to HP's decision to activate Dynamic Security. Dkt. 29 at 3-6. Additionally,
25 they argued that their complaint stated a UCL claim regardless of which test for unfairness applies. *Id.*
26 at 7-14.

1 6. HP also filed a motion to stay or transfer *San Miguel* pursuant to the first-to-file rule, in
2 favor of the *Bayse* action then pending in the Northern District of Alabama (which HP had already
3 moved to dismiss), and the *San Miguel* Plaintiffs opposed HP's motion to stay or transfer. Dkts. 18, 28.

4 7. HP opposed the MDL petition on December 27, 2016. MDL No. 2763, Dkt. No. 13.

5 8. As HP was actively litigating these actions in different jurisdictions, Girard Sharp led
6 discussions among Plaintiffs' counsel to reach agreement on how the litigation would proceed, including
7 with regard to organization and venue, in the hopes of avoiding the need for judicial intervention. These
8 discussions were successful, and the *San Miguel* Plaintiffs withdrew their MDL petition. MDL No.
9 2763, Dkt. No. 21.

10 9. Discovery in the consolidation action involved several rounds of Rule 34 requests for
11 production and Rule 33 interrogatories. Although the parties did not ultimately file discovery motions,
12 Plaintiffs contested the adequacy of HP's responses (and vice-versa), and both sides supplemented their
13 document productions and interrogatory answers. I estimate that over a dozen meet-and-confer calls and
14 many more follow-up emails and letters were necessary for Plaintiffs to get adequate discovery from HP
15 and avoid seeking judicial intervention.

16 10. The documents HP produced were challenging to review and analyze because the subject
17 matter involved complex technologies—Dynamic Security and related technologies like firmware and
18 printer driver software, as well as technical components like cartridge microchips and microcontrollers.
19 HP's documents also were hard to decipher because HP used internal shorthand or code names to
20 describe various technologies and their characteristics.

21 11. To ensure consistency and efficiency, and to maximize the reviewers' familiarity with the
22 technical subject matter, Class Counsel assigned two junior associates to conduct the bulk of the
23 document review.

24 12. Preparing for and taking the two Rule 30(b)(6) depositions required careful examination
25 and cross-referencing of documents, and development of lines of inquiry to establish a baseline
26 understanding and shared nomenclature.

1 13. Despite these challenges, over the course of discovery, Class Counsel figured out how
2 Dynamic Security worked, how it was implanted on printers, how, when, and why updates were
3 triggered, and their effects, and applied the legal framework of Plaintiffs' claims to this novel
4 technology.

5 14. HP's discovery of Plaintiffs involved an outside technical expert's inspection of
6 Plaintiffs' printers and personal computers. The inspection process required substantial research and
7 consultation with Class Counsel's own expert (to understand HP's proposed methods for collecting
8 Plaintiffs' data and the implications thereof), and numerous rounds of negotiation with HP to reach
9 compromises that addressed Plaintiffs' privacy and burden concerns. HP's expert and Plaintiffs' expert
10 each participated in the inspections, which in some cases took more than an hour, not including the
11 hours of "passive" time during which scanning or copying was happening automatically. I engaged in
12 10 to 15 meet-and-confer calls and follow-up written communications with HP related to these technical
13 inspections and the numerous rounds of revisions to the negotiated written inspection protocol. I
14 dedicated an estimated four to six hours consulting with Plaintiffs' technical expert in connection with
15 the inspections, not counting time spent during the inspections themselves.

16 **II. SETTLEMENT, NOTICE PROGRAM, AND DISTRIBUTION PLAN**

17 15. During settlement negotiations, the parties first negotiated the relief for the class before
18 discussing fees and expenses. HP ultimately agreed not to contest that Plaintiffs are successful parties
19 under California Code of Civil Procedure section 1021.5, but the parties did not agree on the amount of
20 attorneys' fees and litigation expenses to be paid by HP.

21 16. HP installed Dynamic Security in approximately 3.5 million printers. *See* Dkt. 91-15,
22 HP's Responses to Plaintiffs' First Set of Interrogatories at 5:14. Using HP's records, direct notice was
23 sent to more than 2 million email and physical addresses. Dkt. 130, Declaration of Cameron Azari, ¶ 11.

24 17. The manner in which HP applied Dynamic Security presented unique complexities in
25 designing an effective notice program and plan of allocation. HP maintained throughout the litigation
26 that there is no way to identify which customers experienced a print interruption as a result of Dynamic
27

1 Security. Plaintiffs were unable to disprove this contention in discovery. In response to this limitation,
2 Plaintiffs negotiated a robust notice program that relied on direct email, U.S. mail, publication, and a
3 social media campaign targeting all class printer owners. Class members who experienced a print
4 interruption could choose between providing documentation of their losses for reimbursement or
5 submitting a simple attestation to receive a smaller uniform payment.

6 18. Based on the information available to date,¹ Class members have filed eligible claims
7 attesting that they experienced print interruptions in 32,295 printers. The number of Class printers that
8 were the subject of a claim thus falls between what the parties initially estimated: HP maintained that
9 only 10,000 printers were affected; Plaintiffs estimated 50,000 were. Class members have made eligible
10 documented claims for 5,500 printers for total losses of about \$325,500. The \$1.5 million fund is
11 sufficient to pay all documented claims in full. The remaining amount in the fund will be distributed *pro*
12 *rata* among all participating claimants. Subtracting \$325,500 from the \$1,500,000 fund results in
13 \$1,174,500, which, when divided by 32,295 printers, results in a *pro rata* recovery of about \$36.

14 19. Of the over 2 million Class members who received direct notice, only two responses
15 styled as objections were received. True and correct copies of those responses are attached hereto as
16 **Exhibits A and B**. One response argues that the litigation should have addressed other HP practices not
17 at issue in the case, and the other response appears to reflect an inaccurate understanding of the
18 Settlement terms. Neither raises serious questions about any specific feature of the Settlement, the
19 incorporated plan of allocation, or the application for attorneys' fees and reimbursement of litigation
20 expenses.

21 20. Class member Patricia Brown writes that the litigation should have addressed HP
22 practices unrelated to Dynamic Security that she considers unfair and deceptive. Ms. Brown's
23 complaints are outside the scope of the litigation, and any claim arising from them will not be released if
24 the Settlement becomes final. Ms. Brown submits a declaration, filed concurrently, clarifying that she
25 supports the Settlement and does not object to Plaintiffs' motion for attorneys' fees and reimbursement

26
27 ¹ The Declaration of Lindsey Marquez, of claims administrator Epiq, is being filed concurrently.

1 of litigation expenses.

2 21. Class member Karen L. Smith states she experienced print interruptions and a series of
3 frustrating interactions with HP customer service, for which she believes an additional payment of \$150
4 “above the agreed settlement calculation and all costs associated with this request to be the
5 responsibility of HP Printer Firmware” is warranted. Ex. B. I spoke with Dr. Smith to explain the
6 Settlement terms and assist her in filing a claim. Dr. Smith was eligible for full reimbursement for her
7 out-of-pocket expenses, however, she ultimately decided to file a claim without documentation and will
8 receive the *pro rata* recovery. Dr. Smith does not contend that the options for relief under the Settlement
9 are inadequate, or object to Plaintiffs’ motion for attorneys’ fees and reimbursement of litigation
10 expenses.

11 22. I responded to many calls and emails from class members who expressed their frustration
12 with HP’s use of Dynamic Security and described the inconvenience caused by the print interruptions,
13 the aggravation of speaking with customer service and wasting their time in attempts to resolve the
14 problem, the unfairness of HP unilaterally preventing them from using generic ink cartridges, and their
15 concerns about the invasive nature of Dynamic Security. Class members have also communicated their
16 appreciation for the settlement, including the monetary relief and HP’s agreement to not interfere with
17 the ability of the class to use generic ink cartridges in the future. Based on our experience, our
18 interactions with Class members, the absence of meaningful objections to the Settlement, and the
19 insignificant number of opt-outs, the reaction of the Class has been exceptionally favorable.

20 **III. FEES AND EXPENSES**

21 23. The summaries of the work Class Counsel performed in this case are based on their
22 contemporaneous time records. Class Counsel organized their chronological time records by timekeeper
23 and task category in per-firm tables, and described the work performed in detailed declarations. *See*
24 Dkts. 120 (Kramer Declaration), 121 (Friedman Declaration), 122 (Saveri Declaration), 123 (Hood
25 Declaration), 124 (Karon Declaration). Based on Class Counsel’s experience, the information submitted
26 provides a complete and accurate basis for the Court to evaluate the reasonableness of the lodestar, in a
27

1 format less burdensome than the underlying time records.

2 24. Similarly, Class Counsel provided a narrative description of their litigation expenses,
3 itemized them by category in a table, and attested that the costs are accurate, reflected on their firm's
4 books, not marked up, and reasonably incurred in furtherance of prosecuting this case. *See* Dkts. 120-
5 124. Based on Class Counsel's experience, the information provided is sufficient documentation of the
6 litigation expenses, and submitting invoices, receipts, check records, or other source materials would
7 likely be burdensome and unhelpful to the Court.

8 25. As previously offered, if the Court wishes, Class Counsel will make their firms'
9 respective detailed time and expense records available for the Court's review.

10
11 I declare under penalty of perjury that the foregoing is true and correct. Executed in San
12 Francisco, California on April 11, 2019.

13 By: /s/Elizabeth A. Kramer
14 Elizabeth A. Kramer

Exhibit A

Patricia Brown

927 Tramway Lane NE

Albuquerque, New Mexico 87122

March 26, 2019

Att: Clerk of the Court

U.S. District Court for the Northern District, Ca.

280 South 1st Street, Room 2112

San Jose, CA 95113

CASE # 5:16-CV-05820-EJD

To Whom It May Concern:

I am objecting to the scope of the class action suit regarding HP Firmware Litigation. I did not file a claim regarding this class action suit because I feel that the claim is not broad enough in scope. Yet I do have a complaint and therefore an objection.

I have an HP Printer Office Jet Pro 8610. I faithfully purchased Genuine HP printer ink. I use primarily black ink. I rarely, if ever, use color. I was actually told to print with color by an HP supervisor when I first complained to HP and their response was that it would help keep my ink from drying out. Not the case! In fact, I feel HP holds the customer hostage in light of the fact that if a customer is printing in black ink only and one of the color cartridges is dry or low, HP Pro 8610 will not allow you to print! The customer must replace the color the printer claims is out of ink. The cartridge may not even be fully out of ink. I found out very recently, the cartridge might just need to be shaken! I was never told this "secret" detail! Also, if the customer, in good faith, replaces the color the printer "claims" is out of ink (the alert tells one in the tiny window on the machine) in order to continue the print job in black, the printer might STILL not print in black because another alert occurs in the window (after one drives to the store to replace the "claimed" empty cartridge) that the customer is out of a different color! The printer tells the customer one at a time! If the customer is working late on an important deadline, the printer will not print in black, expects the customer to replace the color or colors one at a time as the printer only states the alleged color ink empty cartridge (or dried empty cartridge, etc) ONE AT A TIME!

This, to me, is ridiculous, a burden on the customer, and HP is as said, holding the customer hostage and costing additional monies to replace what the customer is not even using.

I also have documentation of yet even another complaint regarding service with HP but since this suit is in regard to ink cartridges, I am only addressing the HP cartridge complaint but with the broader scope as addressed above.

Thank you for your time and attention regarding this issue. I would appreciate hearing from you as to the outcome of the suit and also whether my complaint has even been noted and addressed.

Patricia Brown

Patricia Brown

505-856-1872

(attachmt)

Patricia Brown
927 Tramway
Albuquerque, NM 87122

Case # 5:16-cv-05820 EJD

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1 INK RECYCLING LIMI * 0.00
725137
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Albuquerque, NM 87122

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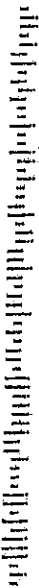
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Case # 5:16-cv-05820-EJD
Hewlett Packard Ink Cartridge

9511383095 0068



Clerk of the Court
U.S. District Court for
Northern District of California
280 South 1st Street
Room 2112
San Jose, Ca. 95113

Exhibit B

KAREN L SMITH MD PA
929 WEST PROSPECT AVENUE
RAEFORD, NC 28376
ksmith@karensmithmd.com
910-904-1695 TELEPHONE
910-904-1767 FAX

March 13, 2019

Clerk of the Court
U.S. District Court for the Northern District of California
280 South 1st Street
Room 2112
San Jose, CA 95113
Case No. 5:16-cv-05820-EJD SVK

Unique ID: 467C434374

REGARDING: Object to the proposed Settlement in *In re HP Printer Firmware Update Litigation*, Case 5:16-cv-05820-EJD SVK

To Presiding Judge Edward Davila,

I object to the proposed settlement and wish to receive payment in the additional amount of \$150.00 above the agreed settlement calculation and all costs associated with this request to be the responsibility of HP Printer Firmware.

As a small business owner, I purchased the HP Printer with need to have basic printer capabilities. During a very busy activity the printer ceased to work with unclear reason. I contacted the service center for assistance and then the most agonizing and stressful encounter resulted on the telephone for two hours after being sent from one technician to the next. I was instructed to perform various tasks with the printer, computer, lines, as well as provide serial numbers to the extent of information noted on my personal computer. Due to my need for the printer I complied with every request but to no avail. Finally it was concluded that a new printer was necessary. I was told the new one would be sent to me and I should track the progress of the delivery. Upon noting this shipment did not occur, I called again only to be told minimal record of the first event was documented. It was my misfortune since the horrible experience was repeated again due to my original claim not acknowledged in their file.

There was no revelation that the printer was actually designed to fail if I used a different product which is quite misleading and never expected as well as stripping me of my right to select another product which did not yield such an outcome.

In conclusion, I seek additional payment due to my loss of time, aggravation, technological anxiety, and loss of my right as a consumer to have transparent knowledge of all products purchased for my business and personal use.

Sincerely,

A handwritten signature in black ink that reads "Karen Smith" in a cursive, slightly slanted script.

Karen L. Smith, MD