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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

ANTHONY SHAMRELL and DARYL RYSDYK, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. APPLE, INC., Defendant.	Case No. 37-2013-00055830-CU-PL-CTL **CLASS ACTION** **MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR AN ORDER (1) GRANTING PRELIMINARY APPROVAL OF SETTLEMENT, (2) APPROVING NOTICE PLAN, AND (3) SETTING FINAL APPROVAL HEARING** Judge: Hon. Ronald L. Styn Dept.: C-74 Date: November 1, 2019 Time: 8:30 a.m. Filed: July 2, 2013

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I. INTRODUCTION

After over six years of hard-fought litigation, Plaintiffs Anthony Shamrell and Daryl Rysdyk ("Plaintiffs") seek preliminary approval of a class action settlement with Defendant Apple Inc. ("Defendant" or "Apple"). The settlement provides meaningful relief to members of the certified Classes and finally resolves this vigorously contested and prosecuted consumer class action.

Under the settlement's terms, Class Members will receive a cash payment of up to $24.00 for each eligible Class iPhone, with no cap on how many valid claims can be submitted by a Class Member. For those Class Members who previously contacted Apple about the sleep/wake button defect and did not receive a free repair or replacement from Apple, a Claim Form will *not* be required, and instead Apple will *automatically* and *directly* pay all Class Members who previously contacted Apple about the sleep/wake button defect on their Class iPhones. These hard-fought settlement terms will ensure the settlement relief is timely and accurately received by affected Class Members. For those Class Members who never contacted Apple directly about the sleep/wake button defect, they will be required to complete a simple Proof of Claim form declaring under penalty of perjury they had a Class iPhone and experienced the sleep/wake button defect within the applicable warranty period, which will be identified on the form. (*See* Ex. A, Proposed Proof of Claim Form.)

The proposed Settlement is the result of serious, informed, arm's-length, non-collusive negotiations conducted over years, the first several of which failed to resolve this matter. The negotiations were assisted by Judge Irma Gonzalez (Ret.), and on multiple occasions protracted settlement discussions broke down and a resolution could not be reached. Only after trial was a month away, and the final round of expert challenges had been fully briefed and was before the Court, were a final round of prolonged settlement negotiations between counsel restarted, lasting many weeks. Only this last round of negotiations, immediately before trial, produced the agreed-to Settlement.

The Settlement provides the remedies initially sought in this litigation—recouping the diminution in value of the Class iPhones based on the sleep/wake button defect, and speeding relief to Class Members. The Settlement does not grant preferential treatment to segments of the Class or to the Class Representatives, and the Settlement falls well within the range of proper final judicial approval. *See* Newberg on Class Actions § 13:13 (quoting Manual for Complex Litigation ("MCL") (Second) § 30.44).

Upon preliminary approval, Class Members will be informed of this settlement through a robust notice program. The settlement notice program is consistent with the notice procedure already approved by this Court. *See* ROA 962. For the initial class notice already approved by the Court, Apple provided to the Claims Administrator the contact information for all *potential* Cass Members, based on the serial number of Class iPhones with the alleged defect during specific weeks of manufacturing. Apple also concurrently provided to the Claims Administrator the corresponding contact information of the registered Class iPhone user.

Settlement notice will be distributed by two methods: (1) direct email notice to all those *potential* class members whose contact information the Claims Administrator already has based on initial class notice; and (2) direct mail notice to any *potential* class member whose email "bounced back" after initial attempt during class notice. Additionally, information about the Settlement will be posted on a designated Class website. The Settlement website will contain the long-form notice, will provide Class Members with the parties' pleadings and relevant settlement documents, and will provide Class Members with all necessary opt-out forms and claim form which Class Members must submit through the Settlement Website within 120 days after the Court enters the Preliminary Approval Order. After notice is circulated, Class Members will have more than sufficient time to make claims, opt-out, or object to the Settlement.

The proposed Settlement achieves the goals of the litigation, is both reasonable and appropriate, ensures recovery by Class Members, and quiets significant uncertainty concerning the outcome of trial and many rounds of appeals. Further, the Settlement's terms will speed relief to those consumers who previously contacted Apple via automatic and direct payments of Settlement proceeds. The proposed Settlement notice program is reasonable, appropriate, and will provide more than sufficient notice of the proposed Settlement to Class Members. Preliminary approval is warranted.

II. INFORMATION BACKGROUND

A. The Litigation History

On July 2, 2013, Plaintiffs filed this class action lawsuit. Thereafter, significant litigation efforts followed, including Apple's first demurrer on November 8, 2013, a motion to dismiss all claims, and Apple's motion to indefinitely stay all proceedings pending other litigations which Apple argued were

similar. Several amended pleadings were filed, as were additional demurrers, a motion to strike the pleadings, as well as Plaintiffs' motion to compel discovery documents concerning the Class iPhones, including the iPhone 5. Multiple hearings were held by the Court, who also considered lengthy and voluminous declarations and exhibits accompanying the demurrers, motion to dismiss, motion to strike, and Apple's repeated efforts to indefinitely stay this litigation.

Plaintiffs subsequently filed their Fourth Amended Complaint on January 28, 2015 alleging for a particular time Apple manufactured and sold iPhone 4, 4s and 5 (Class iPhones) with a known latent defect which would cause the sleep/wake button to not function properly, including intermittent failure before full failure of the button. *See* ROA # 246, Fourth Amended Complaint ("4AC"). Vigorous and significant litigation efforts followed, as discussed below.

On January 7, 2019, the Court entered an Order granting Plaintiffs' Motion for Class Certification, in its entirety. ROA 936. The Classes were defined as:

> *iPhone 4 and 4S Class*
>
> All California Citizens who purchased one or more iPhone 4 or 4S smartphones from Apple or a third-party retailer, from June 24, 2010 thru October 10, 2011 for the iPhone 4, and from October 11, 2011 through September 20, 2012 for the iPhone 4S, and whose sleep/wake (power) button stopped working or worked intermittently during a one year period from date of purchase.
>
> *iPhone 5 Class*
>
> All California citizens who purchased one or more iPhone 5 smartphones from Apple or a third-party retailer prior to April 1, 2013, and whose sleep/wake (power) button stopped working or worked intermittently during a three year period from date of purchase.
>
> Excluded from both classes are persons whose Class iPhone was repaired or replaced by Apple due to a non-working sleep/wake button.

ROA 936, Order on Class Certification. Additionally, the Court appointed Plaintiffs as Class Representatives, and the undersigned counsel as Class Counsel. *Id.*

From the time the litigation commenced, and following class certification, the parties have extensively litigated the case. Plaintiffs successfully opposed multiple rounds of demurrers, motions to strike, a motions to indefinitely stay the case, motions to reconsider, and a Motion for Summary Judgment. Plaintiffs filed three rounds of Class Certification motions during which the Court held

hearings and considered voluminous evidence, and the Court ultimately certified the Classes. Then Apple filed a Writ of Mandate and following full briefing the Writ with the Court of Appeal, upon a remand, Plaintiffs successfully obtained class certification again. Apple filed another Writ of Mandate, which was rejected following an informal submission by Plaintiffs.

During more than six years of litigation, the parties have filed and opposed 20 contested motions, issued 32 written discovery requests, 14 subpoenas, 36 depositions, and retained 11 expert witnesses. Apple produced nearly 4 million pages of discovery throughout the six years of litigation in response to Plaintiffs' discovery demands. Apple filed two Writs of Mandate, one of which the Court of Appeal accepted and the parties fully briefed and argued resulting in a remand, another which the Court of Appeal rejected without full briefing but following an information submission by Plaintiffs. The parties completed discovery, including expert discovery regarding the merits of Plaintiffs' claims and the amount of restitution and damages at issue. The parties had fully briefed *Sargon* challenges to experts, where Apple filed a challenge to each of Plaintiffs' five experts and Plaintiffs challenged two of Apple's experts. The parties were actively preparing for trial when the case settled, including having completed initial rounds of drafting and editing jury instructions, and meeting and conferring on same, drafting and editing the Joint Trial Readiness Conference report, including identifying witnesses, statement of the case and had initially discussed proposed stipulations and motions in limine. The parties had independently conducted mock trials/focus groups in preparation for trial, which ultimately assisted in the settlement negotiations. Under *any* measure, this litigation has been vigorously contested and hard-fought.

B. Settlement Negotiation History

The parties engaged in settlement negotiations prior to class certification in 2016 and again after class certification in 2017, completing multiple mediation sessions with Judge Gonzalez (Ret.). These significant efforts failed to yield an agreed-to resolution. On August 30, 2019, the parties reengaged in settlement discussions and a settlement was finally reached on September 18, 2019, following weeks of intense settlement discussions and negotiations.

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C. Key Terms of the Settlement Agreement

As detailed in the proposed Class Notices submitted as Exhibits B, C, and D and E to the Settlement Agreement, under the terms of the Settlement, all persons who fall within the Settlement Class definitions are entitled to the following relief:

> Participating Class Members who do not seek exclusion pursuant to paragraph 3.6 below and either (i) submit a valid claim pursuant to paragraph 2.3 below, or (ii) qualify as a Direct-Payment Class Member as defined in paragraph 2.4 below, will receive a Settlement Award in the form of a check, to be issued by the Settlement Administrator and paid from the Settlement Fund. The final amount of the Settlement Award for each Participating Class Member shall be calculated and distributed based on the number of Direct-Payment Class Members identified and the number of valid Claim Forms received from Claims-Made Class Members, subject to a cap of twenty-four dollars ($24.00) per eligible Class Device. Should the number of valid claims submitted (at $24.00 per eligible Class Device) exceed the total amount of funds remaining in the Settlement Fund after all approved payments of Service Awards, Settlement Administration Expenses, and Class Counsel's Attorneys' Fees have been made, Claims-Made Class Members shall receive a pro rata distribution of those remaining funds. Under no circumstances shall any Settlement Award paid exceed twenty-four dollars ($24.00) per eligible Class Device.

Declaration of Deborah S. Dixon ("Dixon Decl."), filed concurrently herewith, ¶2, Ex. 1 Settlement Agreement ("S.A."), at §2.2.

In exchange for these benefits, the Class will release Defendant from the following claims:

> Upon entry of the Final Order and Judgment following the Final Approval Hearing, all Class Members who have not timely requested exclusion pursuant to paragraph 3.6, and each of their successors, assigns, heirs, and personal representatives, in consideration of the settlement obligations set forth herein, hereby finally and irrevocably compromise, settle, release and forever discharge with prejudice any and all claims, demands, rights, causes of action, suits, petitions, complaints, damages of any kind, liabilities, debts, punitive or statutory damages, penalties, losses and issues of any kind or nature whatsoever, asserted or unasserted, known or unknown (including, but not limited to, any and all claims relating to or alleging deceptive or unfair business practices, false or misleading advertising, intentional or negligent misrepresentation, negligence, concealment, omission, unfair competition, promise without intent to perform, unsuitability, unjust enrichment, or breach of warranty (implied or express) and any and all claims or causes of action arising under or based upon any statute, act, ordinance, or regulation governing or applying to business practices generally, including, but not limited to, any and all claims relating to or alleging violation of Cal. Bus. & Prof. Code § 17200 *et seq.*; Cal. Bus. & Prof. Code § 17500 *et seq.*; Cal. Civ. Code § 1750 *et seq.*; Cal. Civ. Code §§ 1792 et seq.; and 15 U.S.C. §§ 2301 et seq., arising out of or related to the Action, including the alleged omissions and warranties at issue in the Action, that were asserted or reasonably could have been asserted in the Action against the Released Parties, whether

> individual, class, representative, legal, equitable, administrative, direct or indirect, or any other type or in any other capacity, against the Released Parties (the "Released Claims").

Id., at §4.2. The Class Representatives each will provide a broader general release to Defendant. *Id.* at §4.2.

D. Proposed Class Settlement Notice

1. Activation of Notice Plan

The Notice Plan and the schedule for the Fairness Hearing shall be approved by the Court in the Preliminary Approval Order. Defendant will activate the Notice Plan no later than 10 days after the Court enters the Preliminary Approval Order.

2. Notice

The Form of Notice of the Settlement will be substantially similar to that in Exhibits B, C, D, and E attached to the Settlement Agreement. The Notice shall be maintained until 120 days after the Court enters the Preliminary Approval order. The Settlement Website shall be maintained for 90 days after the Court enters the Final Approval Order and Judgement and the Final Approval Order and Judgment shall be posted to the Settlement Website thereby providing notice of final judgment of the Class.

3. Confirmation of Notice

The Settlement Administrator shall prepare a declaration attesting to compliance with the Notice requirements set forth above. The declaration will be provided to Class Counsel and Defendant's Counsel and filed with the Court no later than 5 days prior to the Fairness Hearing.

4. Notice Complies with Applicable Law

Notice to the Settlement Classes of the pendency of the Action, certification of the Settlement Classes, the terms of the Agreement, and the Fairness Hearing satisfy the requirements of the Consumer Legal Remedies Act in Civil Code section 1781, subdivisions (d) and (e), the California Rules of Court, the California Code of Civil Procedure, the Constitution of the State of California, the United States Constitution, and other applicable law.

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5. Toll-Free Telephone Number

The Settlement Administrator will establish a toll-free telephone number that will be included in the Notice. The toll-free telephone number will provide pre-recorded information, agreed to by the Parties, of the following: (1) a statement on the status of the Class Settlement and its terms; (2) a reference to the Settlement Website for further information; and (3) the address of Class Counsel to whom Class Members may write for additional information. The Settlement Administrator's obligation to maintain the toll-free telephone number will continue until the Agreement receives final approval by the Court.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SATISFIES THE CRITERIA FOR PRELIMINARY APPROVAL

A. Applicable Legal Standard

"Public policy generally favors the compromise of complex class action litigation." *In re Cellphone Termination Fee Cases* (2009) 180 Cal. App. 4th 1110, 1118. The California Rules of Court set forth a two-step process for settlement of class actions:

> First, the court preliminarily approves the settlement and the class members are notified as directed by the court. (CRC, rule 3.769(c)-(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (CRC, rule 3.769(f).) Second, the court conducts a final approval hearing to inquire into the fairness of the proposed settlement.

CRC, rule 3.769(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1118.

Preliminary approval is the first step for resolving this class action. CRC, rule 3.769(c)-(g). At the preliminary approval stage, the Court "need only find that the settlement is within 'the range of reasonableness' to justify publishing and sending of the settlement to class members and the scheduling of a final approval hearing." *Pataky v. The Brigantine, Inc.* (S.D. Cal. June 18, 2018) 2018 WL 3020159, at *2; *see also Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 821 (California courts examine the Federal Rules of Civil Procedure for guidance in interpreting state class action procedure in absence of controlling state jurisprudence). Final analysis of the settlement's merits is not required at this time. *Pataky*, 2018 WL 3020159, at *2. Here, preliminary approval of settlement and notice to the certified classes are appropriate because: (1) the proposed settlement appears to be the product of serious,

informed, non-collusive negotiations; (2) the settlement has no obvious deficiencies; (3) it does not grant preferential treatment to the class representatives or to segments of the classes; and (4) the proposed settlement falls within the range of possible approval. *Id.* at *2-4; *see also Dunk v. Ford Motor Co*. (1996) 48 Cal. App. 4th 1794, 1802 as modified (Sept. 30, 1996) (noting that "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation… .").

B. The Proposed Settlement is Superior to Other Available Methods for Fairly and Efficiently Adjudicating the Controversy

1. The Settlement was only Reached after Extensive Arms' Length Negotiations

At preliminary approval, a presumption of fairness attaches to a proposed class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery. *See Dunk*, 48 Cal. App. 4th at 1802. Moreover, if the terms of the settlement are fair, courts generally assume the negotiations were proper. *See In re GM Pick-up Truck Fuel Tank Prods. Liab. Litig.* (3d Cir. 1995) 55 F. 3d 768, 786-86.

In the instant case, Settlement was negotiated while the parties were engaged in trial preparation. Indeed, the parties' settlement discussions were punctuated by the parties' respective motions to strike experts. *See* ROA 979, 981, 985, 987, 995, 997, 999. Additionally, all discovery, including expert discovery, was concluded before the parties agreed to terms. Dixon Decl. ¶19. Summary judgment had been decided. ROA 496. The parties neither rushed to settlement nor suffered from any information asymmetries that would render the Settlement suspect. *See Dunk*, 48 Cal. App. 4th at 1802 (holding fact that litigation was over three years old and involved extensive discovery and pretrial litigation when settled supported a finding of fairness).

Finally, Plaintiffs and the class were represented in the negotiations by two law firms with extensive class action experience. Dixon Decl. ¶22; ROA 502, Ex. 89. The Settlement was a product of arm's length negotiations over the course of many weeks, after years of litigation and attempted mediations before Judge Gonazalez (ret), by counsel well versed in consumer class litigation. Under

these circumstances, a presumption of fairness applies to the Settlement. *See Dunk*, 48 Cal. App. 4th at 1802.

2. The Proposed Settlement is Fundamentally Fair and Reasonable

Courts strongly favor and encourage settlements, particularly in class actions and other complex matters where the inherent costs, delays and risk of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1118 ("Public policy generally favors the compromise of complex class action litigation."). A settlement of a class action lawsuit must be reviewed and approved by the trial court. *See* Cal. R. Ct. 3.769(a); *see also Dunk*, 48 Cal. App. 4th at 1800-01. Approval occurs in two steps: (1) an early review by the trial court (preliminary); and (2) a subsequent review after notice has been provided to class members (final).

In deciding whether to grant final approval, California courts have considered several factors, including the following: (1) the value of the settlement; (2) the inherent risk in continued litigation; (3) the extent of discovery completed and the state of the proceedings when settlement was reached; (4) the complexity, expense, and likely duration of the litigation in absence of settlement; (5) the experience and views of class counsel; and (6) the reaction of the class members. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 244-45; *Dunk*, 48 Cal. App. 4th at 1801. "Ultimately, the court's determination is simply an amalgam of delicate balancing, gross approximations and rough justice." *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 743. [1]

i. The Value of the Settlement

Defendant agreed to pay $20,000,000 to a common fund for payment of $24.00 per claim for each Class Member who submits a valid proof of claim, or direct payment without need to submit a proof of claim to any Class Member who contacted Apple about the sleep/wake button defect. This recovery is beneficial to the Class Members. Additionally, the Settlement provides a sufficient portion of the amount Class Members could have obtained if the Class was successful at trial. Dixon Decl. ¶23. The amount is also well within the range of values presented during mock trials/focus groups, given the age of the Class iPhones and the component at issue. Dixon Decl. ¶23. Further, given the fact that Apple's

[1] While the standards for final approval may provide guidance to the Court, at the preliminary approval stage, class counsel does not need to address the reaction of class members which will be addressed during final approval.

experts intended to testify the Class deserved zero damages, there was a real potential the Class could have recovered nothing at trial. By this Settlement, the Class is receiving a substantial benefit through a guaranteed payment. Dixon Decl. ¶24.

The Common Fund is robust enough to cover all claims by Class Members. Dixon Decl. ¶25. Given the class definitions as certified by the Court, Plaintiffs anticipate, based on the percentage defects within the warranty period as calculated by Plaintiffs' expert Fred Schenkelberg, a maximum size of approximately 500,000 Class Members. Dixon Decl. ¶25. Moreover, the Common Fund is expected to be large enough to cover the cost of notice and Claims Administration, as well as reimbursement of costs and payment of attorneys' fees, which will be subject of a motion to be filed following preliminary approval. Dixon Decl. ¶25.

The settlement agreed to by Apple, after several years of meaningful negotiations, is substantial and will provide each Class Member an opportunity to obtain a guaranteed amount of money to cover alleged damages to phones bought between 2010 and 2012. Dixon Decl. ¶26.

ii. The Settlement is Fair for All Claimants

The Settlement Agreement provides the same relief to all Class Members, including the Class Representatives. Dixon Decl. ¶14. All Class Members will benefit equally from the settlement terms. Accordingly, the Settlement Agreement does not give preferential treatment to any subset of the class.

The Settlement Agreement, however, does grant the Class Representative Plaintiffs the right to apply to the Court for an incentive award, or service award. *Id.* at §2.6. Service awards "are fairly typical in class action cases," *In re Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1394, *as modified* (July 27, 2010). "It is appropriate for courts to award enhancements to representative plaintiffs who undertake the risk of personal or financial harm as a result of litigation. Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit …" *Misra v. Decision One Mortg., Co.* (C.D. Cal. Apr. 13, 2009, No. 07-cv-0994) 2009 WL 4581276, at *8; *see also Cellphone Fee Termination Cases*, 186 Cal. App. 4th at 1394 "An incentive award is appropriate if it is necessary to induce an individual to participate in the suit."). The amount of any award is within the Court's reasoned discretion. *Cellphone Fee Termination Cases*, *supra*, at 1394.

Here, the Settlement Agreement allows Plaintiffs to seek a service award of up to $10,000 each, which is reasonable given the duration of this case, which began in 2013, requiring six years of participation from the Class Representatives, including sitting for deposition, responding to discovery, and monitoring the litigation's progress. *Cellphone Fee Termination Cases*, 186 Cal. App. 4th at 1394 (approving a $10,000 incentive award). Prior to final approval, evidence will be submitted to support the incentive awards.

iii. Extent of Discovery Completed

Plaintiffs completed all discovery, including all expert discovery, and were prepared to try their case. This case resolved less than six weeks before trial. In total, the Plaintiffs served 14 separate sets of document requests, special interrogatories, request for admissions, conducted over 19 depositions, and issued subpoenas to third parties. Dixon Decl. ¶19. Plaintiffs' counsel reviewed over four million pages of documents. *Id.* And the parties presented competing experts regarding the asserted damages. *Id*. The class certification was successful after four rounds of attempts spanning nearly three years and one trip to the Court of Appeal, and only after Plaintiffs defeated Apple's motion for summary judgment. As a result, Plaintiffs were fully informed when negotiating the settlement.

iv. The Risk, Exposure, Complexity, and Likely Duration of Further Litigation Favors Settlement

In the "exercise of business judgment" (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 133), class counsel believes the Settlement is reasonable as compared to the anticipated costs of trial, which involved numerous experts, all of whom were subject to pending *Sargon* challenges, the risk of a defense verdict, and the potential monetary relief the Class could receive at trial. Although Plaintiffs remain confident in the strength of their claims, it is simply too difficult to ascertain with precision the likelihood of success at trial. Plaintiffs recognize that Defendant has factual and legal defenses that, if successful, could potentially defeat or substantially impair the value of their claims.

For example, Plaintiffs might not have been able to: (1) prove Apple had adequate notice *prior* to the sale of the Class iPhones to meet their prima facie burden; or (2) convince the jury of the correct size of the class or prevalence of the defect; or (3) overcome Apple's affirmative defense that all Class Members were provided an adequate remedy through the warranty program and therefore suffered no

actual damages; or (4) retain class certification through trial; or (5) convince the jury to award monetary damages to Class iPhones that were defective eight or nine years earlier. Dixon Decl. ¶20. Even had Plaintiffs prevailed with the jury, it was a foregone conclusion, in our view, Apple would challenge any judgment for the Class, including through post-trial motions and protracted appeals. Apple already filed two writs against the Court's class certification orders and even got one heard by the appellate court. It is likely that any appeal of a Plaintiff verdict would also include an appeal of the Court's class certification order. Dixon Decl. ¶21. The settlement eliminates the risk of those post-trial motions and appeals and further delay of class compensation.

"The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation." *In re Nvidia Deriv. Litig.*, (N.D. Cal. Dec. 22, 2008, No. C-06-06110), 2008 WL 5382544, at *3. Indeed, litigating a complex case such as this one through trial is perilous regardless of the merits of the claims:

> [N]othing is assured when litigating against commercial giants with vast litigative resources, particular in such complex litigation as this, which would strain the cognitive capacities of any jury. Defense judgments were hardly beyond the realm of possibility. Accordingly, this factor weighs in favor of preliminary approval.

Rebney v. Wells Fargo Bank (1990) 220 Cal. App. 3d 1117, 1140, *opinion modified* (June 18, 1990) *rev'd on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal. 5th 260.

v. Complexity, Expense, and Likely Duration of Litigation

The costs and risks associated with continuing to litigate this action would require extensive resources and Court time to complete the trial, post-trial motions and appeal. "Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation." *Nat'l Rural Telecomms. Coop. v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527. Thus, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Id.* at 526.

vi. The Experience and Views of Counsel

Before reaching the final settlement terms, the Parties engaged in extensive settlement negotiations under the guidance of Judge Gonzalez. Dixon Decl. ¶26. Many factual and legal issues in this litigation were considered and weighed during the process of evaluating the strengths and

weaknesses of the Settlement Class's claims. Dixon Decl. ¶27. Each side's attorneys are experienced litigators and understand the complexities of class litigation. *Id*. "The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct." *Kullar*, 168 Cal. App. 4th at 129. *Accord In re Pacific Enters. Secs. Litig.* (9th Cir. 1995) 47 F. 3d 373, 378 ("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.").

vii. The Reaction of the Class Members to the Proposed Settlement

At the preliminary approval stage, the reaction of the class to the proposed settlement is not known because notice has not yet been distributed. As such, this factor is not as meaningful a consideration as it may be at the fairness hearing, where Class Members will have had a chance to object to the proposed settlement.

C. The Proposed Form of Class Notice and Notice Plan Will Apprise the Class Members of the Terms of the Proposed Settlement and Class Members Rights

The purpose of class notice in the context of a settlement is to give class members sufficient information to decide whether to accept the benefits, opt out and pursue their own remedies, or object. *Trotsky v. Los Angeles Fed. Savings and Loan Assoc.* (1975) 48 Cal. App. 3d 134, 151-52. The notice program must be "reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections." *In re Vitamin Cases* (2003) 107 Cal. App. 4th 820, 829. Under California Rule of Court 3.769(f) the "notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." Courts have broad discretion in fashioning an appropriate notice program. *See* Civ. Code § 1781; Cal. R. Ct. 3.766 (e)-(f). Under California law, "in determining its particulars, the trial court 'has virtually complete discretion as to the manner of giving notice to class members.'" *7-Eleven Owners v. The Southland Corp.*, 85 Cal. App. 4th 1125, 1164 (Cal. Ct. App. 2000).

The proposed Notice and Notice Plan are adequate, constituting the best possible notice under the circumstances. *See* Dixon Decl., Ex. 1 (S.A.) at Exs. B, C, D, and E. The Notices are neutral, written in easy-to-understand and plain language. The notice tell Class Members: (1) basic information about the lawsuit; (2) a description of the benefits provided by the settlement; (3) an explanation of how Class Members can exercise their right to object to the settlement or opt-out of the settlement; (4) an explanation that any claims against Defendant that could have been litigated in this action will be released; (5) the names of counsel for the Class and information regarding attorneys' fees and incentive awards; (6) the fairness hearing date, along with an explanation of eligibility for appearing; and (7) the settlement website. *Id.*

The proposed Notice Plan involves (1) creation and maintenance of a dedicated Settlement Website with online claims form submission, posted court documents regarding the case, Frequently Asked Questions, other pertinent case information, and downloadable claim form[2]; (2) a toll-free telephone number that potential Class Members may use to obtain further information; and (3) respond to inquiries via telephone or email. This same notice process was approved by the Court and successfully implemented after the Court approved Plaintiffs' Motion for Class Certification. Order on Class Notice, ROA 962. Notice that directs class members to a website for additional information and alerts readers to significant issues and advises them where to go to learn more about the Settlement Agreement and their options is a "perfectly acceptable" manner of giving class notice. *Chavez v. Netflix*, 162 Cal. App. 4th 43, 58 (Cal. Ct. App. 2008) (affirming class action settlement approval and fee award). Here, the proposed dedicated Settlement Website makes particular sense, because "the class members conducted business with defendant over the Internet, and can be assumed to know how to navigate between the summary notice and the Web site. Using the capability of the Internet in that fashion" is a "sensible and efficient way of providing notice." *Id. Accord 7-Eleven*, 85 Cal. App. 4th at 1164 (trial court has virtually complete discretion). The form and substance of the Notice Plan is appropriate for Court approval.

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[2] If Class Members do not have access to a computer, the Claims Administrator will provide a written form or assist with completing the form to ensure all Class Members can make a claim, even without a computer.

D. Proposed Timeline for Events Should be Adopted

Event	Date	Date
Preliminary Approval Granted	Day 1	11/1/19
Class Settlement Website Activated & Direct Notice to Begin	10 Days After Preliminary Approval Order	11/11/19
Email Notice to Begin	14 Days After Preliminary Approval Order	11/15/19
Postcard Notice to Begin	21 Days After Preliminary Approval	11/22/19
Class Counsel to File Motion for Attorney's Fees and Costs and Incentive Award	57 days before Final Approval Hearing	12/13/19
Last Day to Postmark or Submit Objection Online/Request Exclusion	40 days before Final Approval Hearing	12/31/19
Plaintiffs to File Motion for Final Approval	23 days before Final Approval Hearing	1/15/20
Plaintiffs to Respond to Objectors	14 days before Final Approval Hearing	1/24/20
Final Approval Hearing	98 Days after Prelim Approval issued	2/7/20
Last Day for Claimants to Participate in Settlement	120 days from Notice	3/22/20
Last Day to Pay Claimants	120 Days After Final Approval Order	6/7/20

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' respectfully request this Court grant the relief requested.

Dated: October 25, 2019

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