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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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARDS

Judge: Hon. Ronald L. Styn
Dept.: C-74
Date: March 20, 2020
Time: 2:00 p.m.

Filed: July 2, 2013

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INTRODUCTION

Pursuant to the Parties' Settlement Agreement, and in accordance with California Civil Code Section 1780 and Code of Civil Procedure Section 1021.5, Class Counsel submits this memorandum in support of their application for an award of attorneys' fees, reimbursement of expenses, and compensation to the Class Representatives in connection with the settlement reached with Defendant Apple, Inc. ("Defendant" or "Apple").[1] The requested attorneys' fees and expenses reflect the significant, and to date uncompensated, work of Class Counsel during more than six years of prosecuting and successfully resolving this litigation, which did not settle until the eve of trial, and only after vigorous and highly contentious litigation with a highly regarded, well-resourced Defendant represented by experienced, highly capable, and nationally known counsel who spared no effort in zealously defending their client.

The amounts requested are reasonable compensation in this case for Class Counsel's work on Class Members' behalf. Since filing the initial action on June 2, 2013, Class Counsel expended significant effort and resources litigating and preparing this case for trial. This includes obtaining, investigating and understanding millions of pages of complex documents, taking and defending dozens of fact witness and expert depositions, significant resource expenditure on experts for class certification and for trial, significant work on document discovery, including reviewing more than four million pages of complex documents and filing multiple motions to compel additional productions, defending multiple appeals to the California Appellate Court concerning class certification and concerning the qualifications of experts under California law, and preparing this case for trial—which was scheduled to begin within weeks of the Settlement being reached. Only after these tasks were completed did the Parties reach a resolution of the Certified Class's claims, one tailored to the specific issues this litigation sought to address. Class Counsels' work included, among other things:

a) significant pre-complaint research, including satisfaction of CLRA and warranty demand requirements, and thereafter drafting and filing four well-researched initial and amended pleadings, relying on Class Counsel's significant deposition and document discovery efforts, which began shortly after suit was filed, to bolster the allegations;

[1] Capitalized terms have the same meaning as in the Settlement Agreement and Release dated October 24, 2019.

b) opposing Defendants' repeated motions to stay the litigation;

c) opposing three of Defendants' demurrers and multiple motions to strike the initial and amended pleadings;

d) significant and contentious document production and interrogatory efforts, which continued throughout the six years of litigation, including through the eve of trial;

e) taking and defending more than 35 fact and expert witness depositions;

f) reviewing and analyzing more than four million pages of Defendant and third party documents, including detailed technical documents, manufacturing documents, customer service records, consumer complaints, warranty returns, sales information, warranty documentation, phone specifications, service records, and wireless carrier records concerning consumer complaints and warranty repairs;

g) submitting five expert reports in support of class certification and in support of Plaintiffs' causes of action at trial;

h) successfully certifying two classes on behalf of California class iPhone purchasers;

i) opposing Defendant's repeated appeals of the Court's class certification decisions to the California Court of Appeal;

j) significant work and effort in preparing this case for trial, including mock jury panels, draft jury instructions and verdict forms, in limine motions to exclude evidence at trial, preparing deposition testimony for trial, preparing witness examinations for trial, and preparing both exhibits and demonstratives for trial before the jury;

k) engaging in multiple formal mediation sessions with Defendant, with the assistance of the Hon. Irma Gonzalez (ret.); and

l) participating in lengthy, highly contentious, and often unsuccessful settlement negotiations, as this matter did not settle until just before trial; and thereafter documenting the settlement and preparing the preliminary approval application; Class Counsel will submit final approval papers, which currently are due February 27, 2020, however Class Counsel will not seek reimbursement for hours expended on final approval.

(Declaration of Deborah S. Dixon ("Dixon Decl.") ¶¶ 4-6; Declaration of William J. Doyle and John A. Lowther ("Doyle Decl.") ¶¶ 4-7.

The goal of counsel's effort was to (i) prepare this case for trial, and (ii) once settlement was reached, ensure this Settlement produced, as it does, a certain and substantial benefit to certified Class Members. As reflected in Class Counsel's Declarations in Support of Attorney's Fees and Expenses, Class Counsel have jointly expended 14,672.8 hours litigating the Action, representing a collective lodestar of $7,423,165.00, and incurred $844,706.26 in expert costs and litigation expenses, exclusive

of payment of Class Administrator's costs of $1,213,131 owed by Class Counsel for class notice and settlement notice and administration.

Class Counsel is not seeking full reimbursement of its lodestar, nor will Class Counsel seek reimbursement for time not yet billed, including the necessary additional work for final approval of the Settlement in March 2020. (Dixon Decl. ¶33.) Instead, Class Counsel is seeking approval of less than its lodestar and a total of $7,000,000 in fees. If approved, Class Counsel's fee award of $7,000,000 would compensate counsel for most of their time, but not result in any multiplier. (Dixon Decl. ¶33.)

On these facts, and for the reasons explained below and in the accompanying Class Counsel Declarations, Plaintiffs' Counsel respectfully request an attorneys' fee award of $7,000,000, reimbursement of $844,706.26 in litigation expenses, payment of $1,213,131 to the Claims Administrator (KCC) for class notice ($518,821) and settlement notice and payments ($694,310), as well as service payments of $10,000 to each Class Representative (total $20,000) be approved by the Court.

I. BACKGROUND

A. Litigation Efforts by Class Counsel

On July 2, 2013, Plaintiffs filed this class action lawsuit. Two weeks later, Plaintiff filed document discovery requests, special interrogatories, and form interrogatories. (Doyle Decl. ¶¶ 8, 85.) Six weeks after the initial complaint was filed, Defendant moved to stay this action. On August 20, 2013, Defendant filed the first of multiple demurrers against Plaintiffs' complaint, seeking to dismiss all claims. Defendant also served its discovery responses. (Doyle Decl. ¶¶ 9, 85.) Following Defendants' demurrer, on October 25, 2013, Plaintiff filed his amended complaint, this time including the alleged iPhone 5 sleep/wake button defect. (Doyle Decl. ¶10.) One month later, on November 25, 2013, Defendant filed its second demurrer. (Doyle Decl. ¶12.) Plaintiffs opposed Defendants' motion to stay on December 5, 2013, and opposed the second demurrer on December 9, 2015. (Doyle Decl. ¶13.)

In January 2014, a second set of discovery was served. (Doyle Decl. ¶14.) The Court heard argument on Defendant's second demurrer on March 7, 2014. (Doyle Decl. ¶15.) One month later, on April 7, 2014, Plaintiff Shamrell filed his second amended complaint, and Class Representative Daryl Rysdyk joined the matter. (Doyle Decl. ¶16.) Defendant demurred for a third time on May 7, 2014, which Plaintiffs opposed on June 6, 2014. At the same time the parties vigorously contested the pleadings,

Plaintiffs pursued discovery, including document production requests as well as seeking a May 5, 2014 person most knowledgeable deposition concerning the iPhone 5 sleep/wake button replacement program. (Doyle Decl. ¶20.) On May 29, 2014, Plaintiffs moved to compel the production of documents and to compel further responses to Plaintiffs' interrogatories. (*Id*.)

Vigorous and contentious discovery efforts continued. Concurrent with these early discovery efforts, Plaintiffs continued to refine their pleadings and their allegations. A second motion to compel was filed on June 10, 2014, an amended deposition notice was filed, and on June 30, 2014, Plaintiffs deposed a customer service division employee. (Doyle Decl. ¶20.)

With discovery ongoing, Plaintiffs sought leave to amend the pleadings, which Defendant vigorously opposed. (Doyle Decl. ¶¶21-22.) On July 11, 2014, oral argument was had on Plaintiffs' motion to compel. (Doyle Decl. ¶23.) Additional discovery was taken, the parties worked through their discovery disagreements, and on October 29, 2014, Plaintiffs' third amended complaint was lodged with the Court. (Doyle Decl. ¶¶24-25.) On December 2, 2014, Defendant filed its second motion to strike Plaintiffs' third amended complaint. (Doyle Decl. ¶26.)

Plaintiffs lodged their fourth amended complaint on January 28, 2015, and one week later, on February 4, 2015, Defendant again moved to strike the allegations and the classes from the pleadings. (Doyle Decl. ¶28.) Following the Court's February 27, 2015 order granting in part and denying in part Defendant's motion to strike, on March 9, 2015 Defendant answered the fourth amended complaint. (Doyle Decl. ¶¶28-29.) Concurrent with these litigation efforts, experts were retained to both assist in preparing the case and to examine allegedly defective sleep/wake buttons. By this time, multiple hearings had been held by the Court, who considered lengthy and voluminous declarations and exhibits accompanying the demurrers, motions to stay, and motions to strike, together with voluminous statements of fact lodged by both sides.

Plaintiffs' Fourth Amended Complaint alleged for a particular time Defendant manufactured and sold iPhone 4, 4s and 5 (the "Class iPhones") with a known latent defect which would cause the sleep/wake button to improperly function, including intermittent failure, before full button failure. *See* ROA #246, Fourth Amended Complaint ("4AC"). Vigorous and significant litigation efforts followed. From 2015 until 2017, Plaintiffs sought discovery to support their claims and class allegations. (Doyle

Decl. ¶¶6-7, 97-115; Dixon Decl. ¶5.) Plaintiffs successfully opposed most of Defendant's Motion for Summary Judgment and Summary Adjudication. (ROA #496.) Plaintiffs and Defendant went through three separate rounds of class certification briefing and three hearings on class certification. (Doyle Decl. ¶¶32-35,42-44, 48-53, 56-59; Dixon Decl. ¶19.) The Court granted class certification on April 14, 2017. Defendant filed a Writ of Mandate and requested the case be stayed. (ROA #850.) Despite Plaintiffs' objection, the Court of Appeal stayed the case and Plaintiffs and Defendant engaged in full appellate briefing on the class certification order. (Dixon Decl. ¶3.) Following oral argument, the Court of Appeal remanded the case. (*Id.*) Plaintiffs refiled their motion for class certification, which Defendant opposed. The Court again heard lengthy oral argument, and thereafter entertained limited supplemental briefing. (*Id*.)

On January 7, 2019, the Court entered an Order granting Plaintiffs' Motion for Class Certification in its entirety. ROA #936. The two certified 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.* Defendant filed another Writ of Mandate, which was rejected following an informal submission by Plaintiffs. From the time the litigation commenced, and following class certification, the parties have zealously, vigorously, and extensively litigated the case.

During more than six years of litigation, the parties have filed and opposed 20 major motions, issued 32 separate written discovery requests between the parties, 14 third-party subpoenas, 36

depositions, and retained 11 expert witnesses. (Doyle Decl. ¶¶6, 80-82, 140-141; Dixon Decl. ¶5.) Defendant produced nearly 4 million pages of discovery throughout the six years of litigation in response to Plaintiffs' discovery demands, which Class Counsel reviewed individually. (Doyle Decl. ¶¶70-71; Dixon Decl. ¶5.) The parties completed discovery, including expert discovery, regarding the merits of Plaintiffs' claims and the amount of restitution and damages at issue. (Doyle Decl. ¶¶80-81; Dixon Decl. ¶5.) The parties had fully briefed *Sargon* challenges to experts, where Defendant filed a challenge to each of Plaintiffs' five trial experts and Plaintiffs challenged two of Defendant's testifying trial experts. (Dixon Decl. ¶6.) 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, as well as preparing exhibits for trial. (*Id*.) The Plaintiffs 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. (*Id*.)

B. History of Settlement Negotiations

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.). (Dixon Decl. ¶9.) These significant efforts did not result in a settlement. 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, simultaneously with their trial preparation efforts. (*Id*.)

C. The Proposed Settlement Provides Exceptional Relief to the Class

The total relief awarded to the class will ensure every Class Member may make a claim. (Dixon Decl. ¶34.) Defendant has agreed to pay $20,000,000 to a Settlement Fund to pay all Class claims, notice and Claims Administration, attorneys' fees and costs, and incentive awards awarded by this Court. (*Id*.)

Under the Settlement's terms, Class Members will receive a cash payment of up to $24.00 for each eligible Class iPhone and class members who bought more than one class iPhone can submit a claim for each device. (Dixon Decl. ¶35.) For those Class Members who previously contacted Defendant

about the sleep/wake button defect and did not receive a free repair or replacement from Defendant, a Claim Form will *not* be required, and instead Defendant will *automatically* and *directly* pay all Class Members who previously contacted Defendant about the sleep/wake button defect on their Class iPhones. (Dixon Decl. ¶36.) These hard-fought settlement terms will ensure the settlement relief is timely received by affected Class Members. For those Class Members who never contacted Defendant 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 that experienced the sleep/wake button defect within the applicable warranty period, which will be identified on the form. (Dixon Decl. ¶37.)

Based on expert testimony and on the underlying documentary evidence throughout this case's pendency, Class Counsel estimates the class size to be approximately 500,000 Class iPhones. (Dixon Decl. ¶38.) If every single class member makes a claim, the Settlement Fund is robust enough to pay every claim. (*Id*.) If actual claims dramatically exceeds the number of claims estimated by the experts and more than 500,000 *valid* claims are received, each class member's claim *may* be reduced pro rata. However, based on (i) information provided by the experts, (ii) Defendant's own calculations, and (iii) the Claims Administrator's experience with claims rates in comparable litigations, Class Counsel does not believe any Class Member's claim will be reduced. (Dixon Decl. ¶39.)

II. CLASS COUNSELS' FEE PETITION SHOULD BE APPROVED BY THE COURT

Plaintiffs are entitled to fees under the provisions of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1780(e), and the Private Attorney General Statute, Cal. Code Civ. Proc. § 1021.5, which "are designed to incentivize counsel to pursue consumer interests through publicly beneficial litigation …." *Milano v. Interstate Battery Sys. Of Am., Inc.* (N.D. Cal. July 5, 2012) 2012 U.S. Dist. LEXIS 93192, at *2; *accord also Serrano v. Priest* (1977) 20 Cal. 3d 25, 43, 47 ("*Priest*"). Plaintiffs also have an equitable claim for payment of attorney fees. *Tract 19051 Homeowners Ass'n v. Kemp* (2015) 60 Cal. 4th 1135, 1142 n. 2.

A. The CLRA Requires Fees be Awarded to a "Prevailing Plaintiff"

The CLRA provides the "court ***shall*** award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section." Cal. Civ. Code § 1780(e) (emphasis added). "The provision for recovery of attorney's fees allows consumers to pursue remedies in cases … where the compensatory

damages are relatively modest." *Hayward v. Ventura Volvo* (2003) 108 Cal. App. 4th 509, 512. A fee award to a prevailing plaintiff in a CLRA action is thus mandatory, even when resolved before trial. *Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal. App. 4th 170, 178-79, 181. Nor may the fee award be limited to an "amount less than reasonably incurred in prosecuting such a case," for this "would impede the legislative purpose underlying section 1780" of the CLRA. *Hayward*, 108 Cal. App. 4th at 512. Given the Settlement's terms and the relief provided to the Class, Class Counsel seeks attorneys' fees as the prevailing party under the CLRA.

B. The Private Attorney General Statute Separately Entitles a "Successful Party" to Fees in Public Interest Cases

California Code of Civil Procedure Section 1021.5 "authorizes an award of attorney fees to a 'private attorney general,' that is, a party who secures a significant benefit for many people by enforcing an important right affecting the public interest." *Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal. 4th 1018, 1020 ("*Stefan*"). Consistent with the policies underpinning the statute, the entitlement to fees and expenses belongs both to Plaintiffs and to their counsel. *Lindelli v. Town of San Anselmo* (2006) 139 Cal. App. 4th 1499, 1509; *see also Serrano v. Priest* (1977) 20 Cal. 3d 25, 44 ("*Priest*").

"Although the section 'is phrased in permissive terms … the discretion to deny fees to a party that meets its terms is quite limited,' and generally requires a full fee award unless special circumstances would render such an award unjust." *Fitzgerald v. City of Los Angeles* (C.D. Cal. Apr. 7, 2009), 2009 WL 960825, at *3 (quoting *Lyons v. Chinese Hosp. Ass'n* (2006) 136 Cal. App. 4th 1331, 1344). Fees are awarded when: (1) the action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons," and (3) "the necessity and financial burden of private enforcement … are such as to make the award appropriate…." *Stefan*, 52 Cal. 4th at 1026. The key question is "whether the financial burden placed on the party [claiming fees] is out of proportion to its personal stake in the lawsuit." *Lyons,* 136 Cal. App. 4th at 1352.

The Settlement meets all factors for awarding fees. First, the action resulted in enforcement of an important right affecting 500,000 California consumers. Second, Class Members are receiving a pecuniary benefit. Without the class action, hundreds of thousands of Californians would not be entitled

to relief in the form of monetary reimbursement for a defect in their Class iPhones. Third, Plaintiffs' phones costs less than $800, but this litigation has continued for six years, this litigation has been hard fought against exceptional defense counsel and a determined litigation opponent, and it has cost more than $1,000,000 in out-of-pocket expenses to properly prosecute this action. Accordingly, Class Counsel have acted as true attorneys general and are entitled to fees pursuant to California Code of Civil Procedure Section 1021.5.

C. The Court's Equitable Basis

The Court also may award attorneys' fees and reimbursement of expenses for equitable reasons. *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal. 5th 480, 503; *Tract 19051 Homeowners Ass'n*, 60 Cal. 4th at 1142 n. 2. Class actions serve the policy goal of efficient judicial management by setting a procedure whereby one judgment covers all claimants, and the rights of citizens are protected even where, as here, their individual claims are relatively small. *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 469. This settlement provides significant monetary relief to Class Members, who otherwise would have insufficient financial stakes to pursue individual cases.

D. The Settlement Agreement Provides for Payment of Attorneys' Fees, Costs, and Incentive Awards

Defendant Apple has agreed to pay incentive awards to each Class Representative Plaintiff of up to $10,000. (Dixon Decl. ¶40.) The Settlement allows Class Counsel to seek reimbursement of costs and reasonable attorneys' fees. (*See* Ex. 1, to the Declaration of Deborah Dixon filed with Preliminary Approval, Settlement Agreement §2.5.) Where, as here, the Parties have negotiated an arm's length settlement, "[a] court should refrain from substituting its own value for a properly bargained-for agreement." *In re Apple Computer, Inc. Derivative Litig.* (N.D. Cal Nov. 5, 2008) 2008 WL 4820784, at *3; *see also Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128 ("The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator."); *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1802 as modified (Sept. 30, 1996) (holding "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").

III. THE COURT SHOULD APPLY THE LODESTAR METHOD TO DETERMINE CLASS COUNSEL'S REASONABLE FEES

Traditionally, "a court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney ... involved in the presentation of the case.'" *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131- 32 (*quoting Priest*, 20 Cal.3d at 48); *see also Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1808, *as modified* (Sept. 30, 1996) (holding the lodestar calculation is preferred over the 'percentage of the fund' approach). "[T]he 'lodestar method' is appropriate in class actions brought under fee-shifting statutes ... where the legislature has authorized the award of fees to ensure compensation for counsel undertaking socially beneficial litigation." *In re Bluetooth Headset Prods. Liab. Litig* (9th Cir. 2011) 654 F.3d 935, 941; *see also Manual for Complex Litigation* (Fourth) §21.7 at 334-35 (2004) ("Statutory awards are generally calculated using the lodestar method."). Several times, in fee-shifting cases, the California Supreme Court has "endorsed the lodestar or lodestar-multiplier method of calculating an attorney fee award." *Laffitte*, 1 Cal. 5th at 500.

In cases such as this one, where the class recovery's value can be determined with a reasonable degree of certainty, the trial court may cross check the reasonableness of a fee by calculating the amount to be awarded as a percentage of the benefit received by the class. *Laffitte*, 1 Cal. 5th at 504. The "historical range" of percentage awards goes to "50 percent of a common fund" (*Laffitte*, 1 Cal. 5th at 487), and California courts have made fee awards of above 40%. *Wren v. RGIS Inventory Specialists* (N.D. Cal., April 1, 2011) 2011 WL 1230826, at *29 (awarding 42%); *see also Laffitte*, 1 Cal. 5th at 488, 505-06 (upholding 33.33% award); *In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 463 (same).

Class Counsel's lodestar is summarized in the declarations attached hereto. This lodestar is based on 14,672.8 total hours of work through December 10, 2019 and is supported by fair and reasonable rates and hours. (Doyle Decl. ¶¶159-163). [Doyle Lowther expended 10,428.1 hours over their six years in the case; Dixon Decl. ¶13 [Gomez Trial Attorneys expended 4,244.7 hours over their four years in the case].)

/ / /

A. Class Counsel's Rates are Reasonable

Class Counsel's rates are reasonable because they conform to hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *See Ketchum*, 24 Cal. 4th at 1133; *see also Blum v. Stenson* (1984) 465 U.S. 886, 895. To determine the reasonable rate, courts look to prevailing market rates in the community in which the court sits. *PLCM Grp. v. Drexler* (2000) 22 Cal. 4th 1084, 1095, *as modified* (June 2, 2000) ("The reasonable hourly rate is that prevailing in the community for similar work."); *Manual for Complex Litigation* §14.122.

Here, Class Counsel's requested hourly rates ranging from $300.00 to $1,000 (averaging $635.00 for partners, exclusive of John Gomez, and $365.00 for associates). (Doyle Decl. ¶161; Dixon Decl. ¶14.) Class Counsel have submitted firm resumes detailing their respective experience. (Doyle Decl., Ex. B; Dixon Decl., Ex. 2.) When compared to other Southern California law firms, this evidence demonstrates Class Counsel's attorney rates fall within the average prevailing market rates within the community.

Class Counsel also seeks compensation for its support staff, such as paralegals and law clerks, which is permitted:

> The key … is the billing custom in the "relevant market." Thus, fees for work performed by non-attorneys such as paralegals may be billed separately, at market rates, if this is "the prevailing practice in a given community," . . . Indeed, even purely clerical or secretarial work is compensable if it is customary to billed such work separately…

Trustees of the Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co. (9th Cir. 2006) 460 F. 3d 1253, 1257. In *Salton Bay Marina v. Imperial Irrigation Dist.* (1985) 173 Cal. App. 3d 914, 951, the Court of Appeals held: "necessary support services for attorneys, e.g., secretarial and paralegal services are includable within an award of attorney fees." *See also Priest*, 20 Cal. 3d at 35; *Ketchum*, 24 Cal. 4th at 1122. Class Counsel's support staffs' hourly rates average $246.00 with a range from $185.00 to $275.00. (Doyle Decl. ¶161; Dixon Decl. ¶14.) These rates are commensurate with the rates in the community. (Dixon Decl. ¶21.)

Rates Other Courts Have Awarded. "Generally, the courts will look to equally difficult or complex types of litigation to determine which market rates to apply." *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal. App. 4th 691, 700. Class Counsel's rates are reasonable and consistent with the rates

charged by both plaintiffs' and defense firms who practice complex, class-action litigation in San Diego County. *See, e.g. Makaeff v. Trump Univ., LLC* (S.D. Cal. Apr. 9, 2015) 2015 WL 1579000, at *4-5 (approving rates of $600-$825 for partners and $410 for associates); *Reed v. 1-800 Contacts, Inc.* (S.D. Cal. Jan. 2, 2014) 2014 WL 29011, at *8-9 (approving partner rates of $650 and associate rate of $400); *Beck-Ellman v. Kaz USA, Inc.* (S.D. Cal. June 11, 2013), 2013 WL 10102326, at *9 (approving rates of $200 for paralegals, and $400 for associates, and $700 for partners); *Dennis v. Kellogg Co.* (S.D. Cal. Nov. 14, 2013), 2013 WL 6055326, at *7 (approving rates of $145 for law clerks to $950 for partners).

Survey Data. Courts have frequently used survey data in evaluating the reasonableness of attorneys' fees. *Cleo D. Mathis & Vico Prods. Mfg. Co. v. Spears* (9th Cir. 1988) 857 F.2d 749, 755-56. The 2014 *National Law Journal* confirms Counsel's rates are reasonable and consistent with the rates charged by firms in Southern California. (*See* Dixon Decl., Ex. C [law firms in Southern California bill between $975 and $310 per partner and $750 to $255 per an associate in 2014].) The 2014 National Law Journal found rates increase by an average of 3.7% each year. This would be from 2014 to 2019 the rates would increase 18.5% from the averages in 2014. Therefore, 2019 rates would be: partners $1,155.37 to $367.35 and associates: $888.75 to $302.17. (Dixon Decl. ¶22.)

Blended Rate. The reasonableness of Class Counsel's rates is additionally supported by the blended lodestar, calculated by taking the total lodestar and dividing it by the total hours of all attorney timekeepers and one staff person who would be in charge of assisting on this case post-Motion. The blended rate in this case for Class Counsel is $477 ($7,000,000 divided by 14,672.8 total hours). (Doyle Decl. ¶¶161; Dixon Decl. ¶28.) This is in-line with the average rate listed in the Peer Monitor Report. (*See* Dixon Decl., Ex. 3 at p. 4 [In 2013, an attorney's rates averaged $476 per hour].)

B. Class Counsel's Hours Expended are also Reasonable

Class Counsel is entitled to be compensated for reasonable time spent at all junctures in the litigation. Courts should avoid engaging in an "*ex post facto* determination of whether attorney hours were necessary to the relief obtained." *Grant v. Martinez* (2d Cir. 1992) 973 F.2d 96, 99. The issue "is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Id.*

Here, over the past six years, Class Counsel have expended a total of 14,672.8 attorney, law clerk, and paralegal/legal assistant hours, excluding the to-be-drafted Motion for Final Approval, its supporting declarations, and other post-application work, which will conservatively add at least 100 post-application hours, if not more. (Dixon Decl. ¶28.)[2] This case was extremely hard fought, involved oppositions to class certification, a motion for summary judgment, and multiple *Sargon* challenges. In addition, discovery included multiple motions to compel, out-of-state subpoenas, the review of nearly 4,000,000 pages and undertaking 36 percipient and expert witness depositions. (Doyle Decl. ¶¶8, 70-72, 77, 80-82; Dixon Decl. ¶4.) Accordingly, the 14,672.8 hours spent on this case is not excessive when compared to the effort expended. (Doyle Decl. ¶161, 165, 168; Dixon Decl. ¶4; *Hensley v. Eckerhart* (1983) 461 U.S. 424, 435 (prevailing plaintiff's counsel "should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.")[3]

C. Class Counsel's Requested Fees are Reasonable in this Case

The lodestar calculation is not limited to hours expended and the hourly rate. This base amount "may then be increased or reduced by application of a 'multiplier' after the trial court has considered other factors concerning the lawsuit." *Press v. Lucky Stores, Inc.* (1983) 34 Cal. 3d 311, 322. "Multipliers can range from 2 to 4 or even higher." *Wershba*, 91 Cal. App. 4th at 255. Of course, "the result achieved is a major factor to be considered in making a fee award." *In re Heritage Bond Litig.* (C.D. Cal. June 10, 2005) 2005 WL 1594389, at *8. Other factors the Court can consider are:

[2] Providing more than hours worked and billing rates is unnecessary. *Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559 ("Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records."). Class Counsel's declarations suffice to assess the fee's reasonableness. *See Margolin v. Regional Planning Com.* (1982) 134 Cal. App. 3d 999, 1006-07; *Trustees of Cent. States Se. & Sw. Areas Pension Fund v. Golden Nugget, Inc.* (C.D. Cal. 1988) 697 F. Supp. 1538, 1558-59; *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. 2015) 306 F.R.D. 245, 264 ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean counting ... [courts] may rely on summaries submitted by the attorneys.'"). California authorities likewise "permit[] fee awards in the absence of detailed time sheets," since "[a]n experienced trial judge is in a position to assess the value of the professional services rendered in his or her court." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 255 (citing *Sommers v. Erb* (1992) 2 Cal. App. 4th 1644, 1651; *Dunk*, 48 Cal. App. 4th at 1810; *Nightingale v. Hyundai Motor America* (1994) 31 Cal. App. 4th 99, 103), *disapproved on other grounds Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal. 5th 260, 268.

[3] The Register of Actions has over 1,100 entries, confirming the zealous and conscientious effort expended by counsel. (Dixon Decl. ¶4, Ex. 1.)

> (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award.

Priest, 20 Cal. 3d at 49 *accord Ketchum*, 24 Cal. 4th at 1132. "[A]bsent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for all the hours reasonably spent." *Ketchum*, 24 Cal. 4th at 1133.

1. The Results Achieved for the Class

The Settlement's substantial benefits support an appropriate lodestar, particularly where, as here, Class Counsel achieved "exceptional success" for Class Members. *In re Washington Pub. Power Supply Sys. Sec. Litig.* (9th Cir. 1994) 19 F.3d 1291, 1304. Indeed, "[t]he fundamental focus is the result actually achieved for Class Members." *Manual for Complex Litigation* §21.71 at 336.

In light of the risks and uncertain outcome, the results obtained for the Class are outstanding.[4] As discussed, 500,000 potential Class Members will be eligible to obtain up to $24.00, some without even filling out a claim form. (Dixon Decl. ¶¶35-36.) Plaintiffs' expert testified in deposition the Class damages based on a diminution in value would range from $99.40 to $194.41 depending on the Class iPhone, and "launch" time versus the iPhone's "date of sale." (Dixon Decl. ¶41.) On the other hand, Defendant's experts testified the Class suffered zero damage for several reasons, including the warranty program's existence and the "free repair" offered to Class Members. (Dixon Decl. ¶41.)

If Plaintiffs were able to successfully keep the Classes certified through trial, protect all of their testifying experts from Defendant's *Sargon* challenges, and then prevail at trial and obtain full damages, the verdict could have been between $49,700,000 and $97,205,000. (Dixon Decl. ¶42.) A $20,000,000 Settlement Fund represents a substantial percentage of maximum potential damages and compares favorably to the "typical recovery in most class actions," which "generally is three-to-six cents on the dollar." *In re Enron Corp. Sec., Derivative & ERISA Litig.* (S.D. Tex. 2008) 586 F. Supp. 2d 732, 804. Moreover, the settlement amount is consistent with the range of damages assessed during focus groups and trial preparation, based on Plaintiffs' case presentation. Even assuming Plaintiffs were successful at

[4] *See* Plaintiffs' Motion for Preliminary Approval (ROA ## 1122-1128) (describing the remaining obstacles in proving the merits of Plaintiffs' claims and damages); *see also Rebney v. Wells Fargo Bank* (1990) 220 Cal. App. 3d 1117, 1140 ("[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.").

trial, Defendant's conduct in this litigation demonstrates appeals would surely follow to the California Appellate Court at least, if not beyond. (Dixon Decl. ¶43.)

The immediacy and certainty of recovery in this case is a benefit by itself to Class Members, and is another factor for the Court to consider. *See In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 458 (considering the expense and possible litigation duration in evaluating a settlement's reasonableness). If settlement efforts had been unsuccessful, the Parties would have continued to litigate the case through trial, while at trial there is no certainty Class Members would receive any relief. Taking into account the likelihood of appeals, absent this Settlement this action would continue for many years. *Cf. In re Chambers Dev. Sec. Litig.* (W.D. Pa. 1995) 912 F. Supp. 822, 837.

2. The Effort, Skill, and Experience of Class Counsel

Class Counsel has extensive experience litigating complex consumer class actions. (Doyle Decl. Ex. B; Dixon Decl. Ex. 2.) The quality of work in this case, we believe, reflects the effort, skill, and zealous representation Class Counsel brought to this case, *see id.*, and the substantial hurdles that had to be overcome. Defendant retained outstanding attorneys to defend it in this litigation, and the skill and competence of opposing counsel should be considered when awarding a fee. *Quezada v. Schneider Logistics Transloading & Distr., Inc.* (C.D. Cal. May 12, 2014) 2014 WL 12584436, at *9. A cursory review of the extensive record here shows how hard fought this case has been. Class Counsel devoted 14,672.8 attorney and staff hours over the course of over six years to this litigation and are committed to overseeing the Settlement through to its successful conclusion. (Doyle Decl. ¶161, 168; Dixon Decl. ¶28.) Their skill in overcoming this litigation's difficulties supports the requested fee. *Priest*, 20 Cal. 3d at 49.

3. The Complexity of the Issues

This was not a simple case that resolved on the initial pleadings. Rather, Defendant vigorously denied any wrongdoing and disputed liability throughout this protracted litigation. As just one example, Defendant filed oppositions to three rounds of class certification between 2016 and 2017, following summary judgment. (Dixon Decl. ¶4.) Then, following remand on the Writ of Mandate filed by Defendant, Plaintiffs filed an amended class certification motion addressing the issues on remand, which Defendant opposed. (Dixon Decl. ¶4.) Following the 2019 Order granting class certification and

completing expert discovery, Defendant filed *Sargon* motions challenging all of Plaintiffs' experts. (Dixon Decl. ¶6.) The procedural issues in this case were complex and resolution of class certification took years of active litigation.

Additionally, this case involved issues of law that are far from settled. The gravamen of Plaintiffs' complaint alleged Defendant failed to notify its consumers of a known defect in the sleep/wake button. Not only did Defendant contest notice of the defect, but it also contested the alleged severity of the defect, and always asserted every consumer had a free warranty repair option, negating any damage. (Dixon Decl. ¶7.) In addition, Defendant contested the methodology and calculation of Plaintiffs' damages theory, the diminution of value of the Class iPhones. (*Id*.) Defendant vigorously defended against the allegations and attacked the damages theory presented. Not only did Defendant's experts deny the existence of the Classes and deny the defect, but Defendant's experts testified and denied the Classes suffered any damage at all. (*Id*.) Despite these difficulties, Class Counsel was able to successfully obtain Class certification on two different occasions.

4. Risk of Non-Payment, Preclusion of Other Employment, and Ongoing Work

From the outset, Class Counsel litigated this matter on a contingent basis and committed their own resources to do so. (Dixon Decl. ¶16.) Because the fee in this matter was entirely contingent, the only certainty was that Class Counsel would not get paid unless they obtained a successful result, and that such result would only be realized after significant time, skill, effort, and financial resources had been expended. Class Counsel's hourly rates do not reflect any contingent-fee risk, and the risks in this litigation were substantial. A contingent fee that is limited to the hourly rate a fee-paying client would pay, win or lose, falls short of being reasonable under market standards. *Cazares v. Saenz* (1989) 208 Cal. App. 3d 279, 287-88; *see also McKittrick v. Gardner* (4th Cir. 1967) 378 F.2d 872, 875 ("Charges on the basis of a minimal hourly rate are surely inappropriate… when payment of any fee is so uncertain."). A contingent fee therefore:

> must be higher than a fee for the same legal service paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than conventional loans.

Ketchum, 24 Cal. 4th at 1132 (quoting Posner, *Economic Analysis of Law* 534, 567 (4th ed. 1992)).

Class Counsel expended 14,672.8 attorney and staff hours and $846,118.01 solely in costs, exclusive of class notice of $518,821, with no assurance of payment whatsoever. (Dixon Decl. ¶28.) There was no guarantee Plaintiffs would succeed on class certification, summary judgment, trial, or appeal. At no time have Defendants conceded liability, the appropriateness of class certification, or the existence of causation or damages. Despite this uncertainty, Class Counsel obtained an excellent result on the Class's behalf.

D. A Percentage Cross-Check Demonstrates the Requested Fee is Reasonable

Applying the above framework to the instant facts, the lodestar fee requested represents 35% of the total Class recovery. Courts have found greater amounts to be a reasonable award of attorneys' fees. *Wren*, 2011 WL 1230826, at *29. The fees will not reduce the Class recovery or Class payments. (Dixon Decl. ¶44.) The Settlement Fund is large enough to pay the requested lodestar fees and Class claims, as well as attorney costs, notice costs and Claims Administration. (Dixon Decl. ¶44.)[5] And the 35% amounts to a negative multiplier, rather than the 2x to 4x range courts have routinely awarded. *Wershba*, 91 Cal. App. 4th at 255.

E. Reaction of the Classes

To date, no Class member has objected to the Settlement. There are four requests for exclusion. (Dixon Decl. ¶45.) While the objector deadline is not until December 31, 2019, "[t]he absence of any objector" to this point "strongly supports the fairness, reasonableness, and adequacy of the settlement." *Martin v. AmeriPride Servs.* (S.D. Cal. June 9, 2011) 2011 WL 2313604, at *7. The Classes' reaction to the Settlement, including its fee provision, supports finding the requested fees are reasonable.

IV. THE REQUESTED COSTS ARE FAIR AND REASONABLE

Under California Code of Civil Procedure Sections 1033.5 (a)(1), (3), (4), and (7), the Court must award costs for court fees; deposition costs for transcribing, recording and travel; service of process fees; and witness fees. In addition, Section 1033.5(c) provides discretion to award reimbursement of other costs if they are "reasonably necessary to the conduct of the litigation, rather than merely convenient or beneficial to its preparation." *Science App. Int'l Corp. v. Super. Ct.* (1995) 39 Cal. App 4th 1095, 1103.

[5] It is expected the Settlement Fund is so robust, there may be *cy pres* to be distributed. (Dixon Decl. ¶44.)

Class Counsel incurred $844,706.26 in costs, exclusive of $518,821 for class notice, that were necessary to zealously and properly conduct this litigation against exceptional opponents, which are summarized in the accompanying declarations. (Doyle Decl. ¶164; Dixon Decl. ¶29.) The vast majority of accrued costs were for Expert Witness fees ($597,042.76), Hearing, Deposition Reporting, and Transcript Fees ($83,298.66), and Filing and Service of Process fees ($10,360.92), which are common and necessary costs associated with a complex class litigation. *Id.* Class Counsel also incurred $518,821 in costs for class notice. (Dixon Decl. ¶29.) Class Counsel also bore a number of its own costs as overhead, and is *not* charging all costs to the Class, including internal copy costs, research costs and postage, as well as meals during depositions or meetings and the focus group costs. (*Id*.) Accordingly, the Court should grant Class Counsel's request for reimbursement of costs expended totaling $846,118.01 and $518,821 for class notice. *See* Cal. Civ. Proc. Code § 1033.5.

V. THE INCENTIVE AWARDS ARE FAIR AND REASONABLE

Plaintiffs respectfully request the Court approve incentive awards of $10,000.00 each for Plaintiff Class Representatives Shamrell and Rysdyk. Incentive awards "are typical in class action cases," (*Cellphone Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393; *Rodriguez v. West Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 950), and "serve an important function in promoting class action settlements." *Sheppard v. Consol. Edison Co. of N.Y., Inc.* (E.D.N.Y. Aug. 1, 2002) 2002 WL 2003206, at *5. Incentive awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities of representing the class and recognize the time and effort spent for the case. *See Cellphone,* 186 Cal. App. 4th at 1394. Such awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez,* 563 F.3d at 958-959.

Plaintiffs request modest service awards in recognition of recipients' contributions over the past six years that contributed to the successful prosecution of this case. Plaintiffs Shamrell and Rysdyk devoted considerable time and assistance to this case from its inception to settlement. This included reviewing court filings; continuous communications and input with Class Counsel throughout the litigation; preparing for and sitting for their depositions; responding to substantial discovery; being

available during negotiations; reviewing and approving the Settlement; and being committed to secure substantive relief on the Class's behalf. The proposed awards are nominal compared to routinely approved awards by other courts.[6] The proposed service awards are well justified. *Cellphone*, 186 Cal. App. 4th at 1393-95 (upholding $10,000 incentive award per plaintiff).

VI. CONCLUSION

Class Counsel's request for attorneys' fees less than lodestar in the amount of $7,000,000 and reimbursement of costs expended in the amount of $844,706.26, and to pay Settlement Administrator KCC the cost of class notice in the amount of $518,821, is reasonable and justified given the substantial discount to actual lodestar and the results achieved. Further, service award totaling $20,000, to be split between the Class Representatives who have stayed vigilant in this matter since its inception, is fair and reasonable. Accordingly, Class Counsel respectfully request the Court award the requested attorney's fees and costs, notice costs and Settlement Administration fees, and Class Representative incentive awards.

Dated: December 13, 2019

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[6] *See, e.g.*, *Singer v. Becton Dickinson & Co.* (S.D. Cal. June 1, 2010) 2010 WL 2196104 ($25,000 award); *Beck-Ellman*, 2013 WL 10102326, at *9 ($20,000 award); *Barcia v. Contain-A-Way, Inc.* (S.D. Cal. Mar. 6, 2009) 2009 WL 587844 ($12,000 award).