THEODORE J. BOUTROUS, JR., SBN 132099
tboutrous@gibsondunn.com
RICHARD J. DOREN, SBN 124666
rdoren@gibsondunn.com
CHRISTOPHER CHORBA, SBN 216692
cchorba@gibsondunn.com
DIANA M. FEINSTEIN, SBN 302626
dfeinstein@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520

WESLEY SZE, SBN 306715
wsze@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
Telephone: 650.849.5300
Facsimile: 650.849.5333

Attorneys for Defendant Apple Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: APPLE INC. DEVICE PERFORMANCE LITIGATION

Case No. 5:18-md-2827-EJD

PUTATIVE CLASS ACTION

DEFENDANT APPLE INC.'S STATEMENT IN SUPPORT OF FINAL SETTLEMENT APPROVAL AND RESPONSE TO SETTLEMENT OBJECTIONS

Judge: Hon. Edward J. Davila
Courtroom: 4, Fifth Floor
Date: December 4, 2020
Time: 10:00 a.m.

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I. INTRODUCTION

Contrary to the media coverage about this lawsuit and proposed settlement, this case is *not* about any across-the-board slowing or "throttling" of all iPhone devices, or a systemic "defect" in iPhones, or any issues with iPad or iPhone 5/5c/5s devices, or any alleged "planned obsolescence." To be sure, some Plaintiffs have attempted to assert these allegations at one point or another, but following extensive fact discovery and legal briefing, this case is focused on "trespass to chattels" and "computer hacking" claims in which some customers assert that they did not provide adequate consent (through the download and installation of certain iOS updates in 2017) to a performance management feature that dynamically managed the maximum performance of some system components to prevent the device from unexpectedly shutting down.

Far from operating as a massive "fraud," this software update prolonged the life of devices with aged batteries and allowed loyal Apple customers to continue using the iPhone devices that they love. The performance management feature was only activated when the device was at risk of shutting down when power demands were high in some temporary conditions based on environmental temperature, state of charge, and customer usage. In such circumstances, some users may have noticed changes in performance, such as longer app launch times, lower speaker volume, gradual frame rate reductions in some apps, or other potential effects. Apple disputes that all devices were used in a way that would have activated the performance management feature; and even when it was activated, users may not have even noticed any differences in daily device performance.

Apple stands by the performance management feature as a solution to a complex technological problem that delivered a better experience for customers and prolonged the life of older iPhone devices. Many class members have written to the Court to defend Apple's conduct, understanding that the performance management feature was a way to "make sure their devices worked as well as they could" (Dkt. 441) and that Apple's "balanc[ing] of battery life … with operational efficiency" was in the "best interests of Apple's device users" (Dkt. 531). Nonetheless, many lawsuits ensued, and Apple recognized that some customers felt let down by the way it communicated with them about the performance management feature. After hard-fought litigation and several rulings by this Court narrowing Plaintiffs' claims, the parties agreed to resolve this litigation. Under the proposed

settlement, Apple has agreed to pay approximately $25 per device to class members who submit valid claims and attest, under penalty of perjury, that they experienced diminished performance while using an affected iPhone device during the relevant time period. Further, Apple has committed to a minimum, non-reversionary settlement amount of $310 million.

When the actual facts of this case—and not the misleading media reports and initial claims in this lawsuit (repeated by some uninformed objectors)—are considered, this settlement is extremely generous to eligible claimants. As this Court concluded in its Preliminary Approval Order, the proposed settlement is "fair, reasonable, and adequate and in the best interests of the Settlement Class Members." (Dkt. 429 ¶ 13.) The objectors cite no evidence to alter this conclusion. After preliminary approval, the parties implemented the extensive notice program that involved *two* rounds of individual direct notice that reached 99% of the settlement class members. This notice prompted a robust, positive response. Millions of class members submitted timely and valid claims, and the final amount of the settlement payment for each class device will be substantial—likely in the range of $80 to $100 per eligible device. The opt-out rate is historically low, and no government actor has objected to the settlement. All indicators confirm that the settlement is more than fair, reasonable, and adequate, and deserves final approval.

When contrasted against the 3.1 million claims submitted, only a miniscule fraction of class members (less than six *ten-thousandth* of one percent, ***0.0006%***) opted out, and an even tinier fraction (***0.00007%***) submitted any formal or informal objection. None of these objections raise any issue that should alter this Court's conclusion granting preliminary approval and prohibit final approval and delivery of the settlement benefits to class members. In fact, most of the objections do not take any issue with the adequacy of the settlement terms or the fairness of the process at all. Instead, the principal concern that has attracted the most objections (46 of the 77 objections that have been sent to this Court) relates to Plaintiffs' counsel's request for nearly $90 million in attorneys' fees and expenses, which Apple also has opposed. (*See* Dkt. 522.) The remaining objections either mischaracterize the settlement or attempt to renegotiate the requirements and benefits. None of these objections provides a valid basis for rejecting the settlement:

First, the Court should disregard objections about the adequacy of the settlement amount.

While the final per-device settlement payment is still subject to final calculation, it is anticipated to be $80 to $100, which is substantial under any measure—and well exceeds the $25 per-device estimate that was referenced in the class notice. The Ninth Circuit has held repeatedly that the possibility "the settlement could have been better … does not mean the settlement presented [is] not fair, reasonable, or adequate," and the question before this Court is "not whether the final product could be prettier, smarter or snazzier." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

Second, there were a few groundless objections to the requirement that each claimant provide a serial number or some method of determining whether their device is eligible. As Apple has explained throughout this process, not every iPhone 6, 6 Plus, 6s, 6s Plus, 7, 7 Plus, or SE device was eligible. Rather, it is only those devices that installed iOS 10.2.1 (for iPhone 6, 6 Plus, 6s, 6s Plus, or SE) or iOS 11.2 (for iPhone 7 or 7 Plus) before December 21, 2017 that are eligible. (Dkt. 416 ¶ 1.32.) Requiring claimants to provide a device identifier ensures that each claim can be matched to a device that appears in Apple's records as having downloaded the relevant iOS version during the applicable time period. Providing proof of eligibility thereby safeguards the integrity of the claims process by ensuring only claims for eligible devices are approved, and that those eligible claims are not diluted by ineligible claims. This requirement is neither burdensome nor unusual, particularly in large consumer class actions. Any complaints about supposed burden are also misguided because Apple worked with the Settlement Administrator to provide multiple methods to assist class members in locating the serial numbers for their eligible devices, including through an online search tool and through review of other device identifying information that some class members submitted to the Settlement Administrator.

Third, the Court should overrule related objections about the requirement that valid claims include an attestation, under penalty of perjury, that the claimants experienced diminished performance after running the relevant iOS version containing the performance management feature on their device. This attestation requirement is a material component of the parties' compromise regarding the acceptable level of proof to receive a payment under the settlement. Additionally, because the performance management feature was not activated on all eligible devices—and did not have *any* discernible impact on device performance for the vast majority of users, even for the devices in which the feature was activated—requiring an attestation ensures that settlement payments only go to those

who actually claim to have been injured. Even Plaintiffs conceded this point, after extensive discovery. (*See* Dkt. 470 at 16 (acknowledging that "not every iPhone device at issue was arguably impacted by the iOS software updates").)

Fourth, there are a few objections filed by corporations that attempt to challenge the class definition, notice campaign, or claims process. These objections misstate the settlement and suggest that corporations or "non-natural persons" are ineligible to participate. By its plain terms, the settlement does *not* exclude corporations, and claims for more than 922,000 devices were filed on behalf of non-natural persons (nearly one-third of the total). The notice campaign was comprehensive and provided direct notice to 99% of e-mail and/or mailing addresses in Apple's records for the eligible devices, including many that were sent directly to corporate-owned e-mail or mailing addresses. The claims process was administered evenly and fairly across all class members, and any complaints about the supposed burden of the claims process are belied by the fact that nearly a third of all the devices for which claims were received came from corporations.

In sum, none of the objectors raise meritorious arguments that undermine the fairness, reasonableness, or adequacy of the settlement. Apple respectfully requests that the Court overrule the objections and approve the settlement.

II. SUMMARY OF SETTLEMENT, NOTICE, AND CLAIMS PROCESS

On May 27, 2020, this Court granted preliminary approval of the proposed settlement, finding that it was fair, reasonable, and adequate. Pursuant to the proposed settlement, the Court preliminarily certified a settlement class of "[a]ll former or current U.S. owners" of iPhone 6, 6 Plus, 6s, 6s Plus, 7, 7 Plus, and SE devices that ran the applicable iOS 10.2.1 or 11.2 version before December 21, 2017. (Dkt. 429 ¶ 2.) The proposed settlement provides substantial, non-reversionary monetary compensation to the settlement class through a claims-made settlement structure. Under this claims-made structure, Apple has agreed to provide cash payments to class members who submit valid claims and attest, under penalty of perjury, that they experienced diminished performance while using an affected iPhone device. (*See* Dkt. 416 ¶¶ 5.1, 6.3.) Although Apple agreed to pay approximately $25 per device, the amount of the cash payment depends on multiple factors, including the number of valid claims submitted, the amount of settlement administration expenses, and any award of attorneys' fees,

costs, and service awards. (*Id.* ¶¶ 5.3–5.3.3.)

The proposed settlement also included a comprehensive notice plan, which was successfully executed. Specifically, the Settlement Administrator sent direct notice to ***99%*** of the class members by sending an e-mail notice to the e-mail address associated with each eligible device in Apple's records (and mailing a postcard notice where an e-mail address was invalid or undeliverable). (Dkt. 470-2 ¶ 12.) Although not required under the settlement, the parties provided a *second* round of direct notice to all class members who had not already submitted a claim or opted out. (*Id.* ¶¶ 13–16.) A settlement website and toll-free telephone number were established (which received millions of page views and thousands of calls, respectively), and the settlement was covered by over 2,600 media outlets (with an estimated 7.31 million coverage views and 1.21 billion online readership) and shared more than 51,000 times on social media. (*Id.* ¶¶ 17, 25; Dkt. 551 ("Suppl. Angeion Decl.") ¶ 26 & Ex. I.) Settlement class members had up to 92 days to submit a claim, object, or opt out. (*See* Dkt. 470-2 ¶ 6.)

Class members had multiple ways to submit claims. The settlement website featured an online claims submission tool, where class members could enter a valid serial number and submit an electronic claim form. (*Id.* ¶¶ 18–19.) For class members who could not locate a serial number, the website also included a search tool, which allowed users to look up their serial number and submit a claim by matching their name, Apple ID, mailing address, and device model to Apple's records. (*Id.* ¶¶ 20–23.) The claim form could also be printed out, completed, and mailed to the Settlement Administrator in hard copy. (*Id.* ¶ 23.) The Settlement Administrator also provided, upon request, a spreadsheet template that could be filled out to submit claims (including the serial numbers and attestations) for multiple devices at once. (*See* Suppl. Angeion Decl. ¶ 27.)

The claims period closed on October 6. In total, claims for more than 3.1 million devices were timely submitted, including 2.2 million that were submitted online, 74,527 that were submitted in hard copy, and 922,244 that were submitted on behalf of corporations. (*Id.* ¶ 27.) The Settlement Administrator's review of the claims (in consultation with the parties) is ongoing. The Settlement Administrator sent notices of deficiencies on November 5 and 6, which gave the claimants an

opportunity to cure deficiencies in their claim forms. (*Id.* ¶¶ 29–31.)[1] The Settlement Administrator also received 669 requests for exclusion, and 77 timely objections have been filed with the Court. (*Id.* ¶¶ 33–34.) The final per-device settlement payment is expected to be approximately $80 to $100, depending on the final award of attorneys' fees and other factors.

III. ARGUMENT

A. The Court Should Approve The Settlement As Fair, Reasonable, And Adequate

"The law favors the compromise and settlement of class action suits." *In re Netflix Privacy Litig.*, No. 11-379-EJD, 2013 WL 1120801, at *3 (N.D. Cal. Mar. 18, 2013). "[T]he decision to approve or reject a settlement is committed to the sound discretion of the trial judge." *Hanlon*, 150 F.3d at 1026. In exercising this discretion, the Court should give "proper deference to the private consensual decision of the parties," and the Court's role is "limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.* at 1027 (quotation marks omitted).

This settlement bears the hallmarks of a fair, reasonable, and adequate compromise that should be approved. It provides generous, non-reversionary cash compensation to the Plaintiffs and the class, totaling at least $310 million. Notwithstanding the vigorous claims activity, the parties anticipate that the final per-device payment will be significant under any measure. Where a settlement "is the product of arms-length negotiations conducted by capable and experienced counsel," as is the case here, the Court's analysis should begin with the "presumption that the settlement is fair and reasonable." *Wakefield v. Wells Fargo & Co.*, No. 13-5053-LB, 2015 WL 3430240, at *4 (N.D. Cal. May 28, 2015) (quotation marks and citations omitted). The reasonableness of the settlement is further supported by the fact that it was reached after extensive negotiations facilitated by an experienced mediator who was able to "develop[] a complete understanding of the full range of the dispute," assess the "relative

[1] The parties continue to confer regarding the treatment of certain deficiencies in the claims, including claims that were received by the Settlement Administrator after the deadline, and claims that lack sufficient information to verify the reliability of the attestations regarding diminished performance. If the parties are unable to agree on a resolution of such claims, the disputed claims will be "presented to the Court or a referee appointed by the Court for summary and non-appealable resolution." (Dkt. 416 ¶ 6.8.)

strengths" of each party's positions, and analyze "the risks, rewards, and costs of continued litigation." (*See* Dkt. 470-1 ¶ 11.) While Apple remains confident that it would have prevailed on its defense of all of Plaintiffs' claims if this litigation had continued, Apple agreed to resolve this case to avoid the expenses, uncertainties, delays, and other risks inherent in continued litigation of the MDL.

During the preliminary approval stage, this Court already analyzed the settlement's terms and determined it to be "fair, reasonable, and adequate." (Dkt. 429 ¶ 2.) Since receiving preliminary approval, the parties have worked diligently to implement the settlement, and the final tally confirms that the settlement should be approved. Direct notices were sent to 99% of class members *twice*, the settlement attracted significant media coverage and publicity, and millions of class members have submitted valid claims—each of whom will receive a substantial cash payment for each eligible device. Less than 0.0006% of the class members opted out, and an even smaller fraction (less than 0.00008%) objected. There were no objections from government actors.[2] All indicia point to a fair, reasonable, and adequate settlement that warrants final approval.

B. The Objections Do Not Provide A Basis For Rejecting This Settlement

Given the scope of this settlement and the significant media attention it has received, it is not at all surprising that it has prompted a robust response from class members, including the filing of several objections to this Court. However, "[a] settlement is not unfair simply because a large number or a certain percentage of class members oppose it, as long as it is otherwise fair, adequate, and reasonable." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979). Here, most objections take issue with Plaintiffs' counsel's request for attorneys' fees, expenses, and service awards of nearly $90 million—an objection which Apple has joined. As Apple explained, not only does Plaintiffs' counsel requested fee award exceed any reasonable lodestar, but every dollar that is awarded to Plaintiffs' counsel is a dollar taken away from the class, with their fee being the primary factor that will reduce the final per-device recovery. (*See* Dkt. 522 at 1.) However, because these objections to the request for fees, expenses, and service awards are considered separately from the fairness, reasonableness, and adequacy of the settlement, they do not bar final approval. (Dkt. 429 ¶ 17.) Accordingly, the Court can (and should) grant final approval of the proposed settlement, and separately

[2] There has been a separate settlement with state attorneys general that does not impact this MDL.

award Plaintiffs' counsel an amount equal to a reasonable, properly substantiated lodestar, which amount should then be reduced by at least $7.1 million to remove the excessive and duplicative sums that Apple identified. (*See* Dkt. 522.) Doing so would award counsel a reasonable fee and increase the per-device recovery by approximately $23 for each class device (and possibly even more).

The remaining objections—as summarized and addressed below, and also addressed in Plaintiffs' reply brief—do not bar final approval, either.

1. *The Court Should Reject Objections Regarding The Amount Of The Cash Payment.*

Several objections challenged that the $25 payment per eligible device is too low. (*See, e.g.*, Dkts. 433, 436–38, 457–60, 473, 480, 483, 486, 489–90, 494–95, 497, 506–09, 513–14, 519.) As an initial matter, the net payment per device will be materially higher, approximately $80 to $100 (depending on the amount of any attorneys' fees, among other factors). Any amount within that range is more than adequate in light of the minimal harm at issue, and commensurate with the risks that Plaintiffs faced if they continued to litigate their case. Ultimately, these objectors' complaints boil down to their opinion that "the settlement could have been better"—but "[s]ettlement is the offspring of compromise," and "the question … is not whether the final product could be prettier, smarter or snazzier." *Hanlon*, 150 F.3d at 1027. The Court should reject these arguments.

2. *Requiring Class Members To Identify An Eligible Device To Submit A Claim Is Appropriate And Is Not A Basis To Reject The Settlement.*

Several objections contend that requiring class members to provide a valid serial number in the claim form is unduly burdensome and onerous. (*See, e.g.*, Dkts. 432, 435, 438, 449, 452, 464–65, 476–77, 502, 517–19.) These objections misstate the requirements and lack merit.

First, it is not true that all class members were required to provide a serial number in order to submit a claim. Apple provided a list of all the owners associated with the eligible devices to the Settlement Administrator, which then used that information to distribute notice to 99% of the class. Class members who received a notice could enter their name, Apple ID, mailing address, and iPhone model on the settlement website. If the claimant was eligible, this webpage would then *pre-populate* the device serial number into the online claim form. (Dkt. 470-2 ¶¶ 20–23 (describing search tool functionality).) For those who did not receive a notice or could not use the search tool, eligible

claimants could nonetheless submit a claim online by providing a serial number, which can be readily ascertained from the device itself, the device packaging, and purchase receipts, as well as through cellular service carriers. *See* Apple Support, *Find the Serial Number or IMEI on Your iPhone, iPad, or iPod Touch*, https://support.apple.com/en-us/HT204073. The settlement website also provided detailed instructions on how to locate the serial number. Finally, even if a potential claimant did not receive a notice, could not use the search tool, and/or could not locate a serial number through any of the above means, that potential claimant still had the option of mailing in a paper claim form with additional documentation that they believed established their ownership of an eligible device. (Dkt. 470-2 ¶ 23.) Thus, it is simply incorrect for the objectors to assume that all claimants were required to provide a serial number.

Second, this verification process and requirement of some objective proof of ownership of an eligible device to submit a claim guarded against fraud and ensured that settlement payments only flow to actual class members with eligible devices. Importantly, as Apple has explained several times, not every iPhone 6, 6 Plus, 6s, 6s Plus, 7, 7 Plus, or SE device is eligible under the settlement. Rather, only those devices that had downloaded the relevant iOS version containing the performance management feature during the applicable time period are eligible. (*See* Dkt. 429 ¶ 2.) A substantial number of devices had *not* downloaded the relevant iOS update (and therefore would never have run the performance management feature at issue in this case), and it is critical to the integrity of the settlement process to ensure these non-class members do not submit claims that would dilute the value of the settlement for the true class members. Thus, by requiring claimants to identify ownership of an eligible device (whether that be through the search tool, by providing a serial number, or some other means), the Settlement Administrator could confirm whether the claimed device is associated with an eligible device that Apple's records confirm had ran the relevant iOS version during the applicable time period, which is a "reasonable measure to avoid fraud." *In re Apple iPhone 5 Prods. Liab. Litig.*, No. 10-2188-RMW, 2012 WL 3283432, at *3 (N.D. Cal. Aug. 10, 2012).[3]

[3] Several individuals, including an objector represented by Ted Frank, wrote to the Court with concerns that their device serial number was rejected as invalid, or that they were otherwise unable to locate their device using the online search tool. (*See, e.g.*, Dkt. 523 at 7; Dkts. 446, 449, 454, 464, 536.) These complaints stem from confusion about which devices are eligible—and not from

Third, requiring proof of eligibility to participate in a settlement is neither unreasonable nor burdensome, and courts in this District routinely approve settlements with similar requirements. *See, e.g.*, *In re Magsafe Apple Power Adapter Litig.*, No. 09-1911-EJD, 2015 WL 428105, at *4 (N.D. Cal. Jan. 30, 2015) (approving settlement requiring claimants to provide serial number); *Carlotti v. ASUS Comput. Int'l*, No. 18-3369-DMR, 2020 WL 3414653, at *3 (N.D. Cal. June 22, 2020) (same); *Corzine v. Whirlpool Corp.*, No. 15-5764-BLF, 2019 WL 7372275, at *2 (N.D. Cal. Dec. 31, 2019) (same). As noted, the objective verification steps ensure that the funds are directed to eligible claimants, and that eligible claims are not diluted with ineligible claims. The Court should therefore overrule the objections regarding this claim form requirement.

3. *Given The Allegations In This Case, The Settlement Also Properly Required Claimants To Attest To Diminished Performance.*

Some objectors complained about the requirement that class members provide an attestation, under penalty of perjury, of having experienced performance diminishment on their device. (*See* Dkt. 435, 444, 448, 519.) These objections are not well founded. To the contrary, it is well established in this Circuit that "[c]laim forms may require the claimant to attest to some fact under penalty of perjury." *Perkins v. LinkedIn Corp.*, No. 13-4303-LHK, 2016 WL 613255, at *9 (N.D. Cal. Feb. 16, 2016) (citing *California v. IntelliGender, LLC*, 771 F.3d 1169, 1175 (9th Cir. 2014)); *see also In re Sony PS3 "Other OS" Litig.*, No. 10-1811-YGR, 2017 WL 5598726, at *28 (N.D. Cal. Nov. 21, 2017) (approving settlement requiring class members to attest, under penalty of perjury, of injury as a result of a firmware update that disabled certain software functionalities); *Moore v. Verizon Commc'ns Inc.*, No. 09-1823-SBA, 2013 WL 4610764, at *12–13 (N.D. Cal. Aug. 28, 2013) (overruling objection complaining about requirement for claimants to "aver under penalty of perjury" that they were harmed).

In this case, a material part of the settlement is that all claimants were required to submit a statement, under penalty of perjury, attesting to the fact that they experienced diminished performance.

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a defect in the settlement. As noted above, not every single iPhone device downloaded the relevant iOS update during the relevant time period. Accordingly, there is a substantial number of iPhone 6, 6s, 6 Plus, 6s Plus, SE, 7 and 7 Plus devices that were not part of the class. Apple provided the Settlement Administrator with a list of all of the devices that matched the class definition, and confirmed that iPhone devices owned by some individuals, like Mr. Frank, did not qualify for the settlement because they did not download the relevant iOS version during the applicable time period. (*See* Chorba Decl. ¶¶ 2–6.)

(Dkt. 416 ¶ 6.3.) This requirement goes to the heart of Plaintiffs' theory of injury in the case, which rests on allegations that a performance management feature in certain iOS updates caused temporary diminishment of performance in some iPhone devices. (*See, e.g.*, Dkt. 244 ¶¶ 18, 433, 508, 535, 568 (alleging iOS update contained performance management feature that "diminish[ed] Device performance" and caused "diminishment of the Device functionality").) Moreover, as Apple has maintained throughout this litigation, the performance management feature did not affect every device, and a device triggered the feature only when certain conditions were met. The performance management feature was only included in certain iOS updates that some iPhone users downloaded during the relevant time period, and even when it was installed on a device, the feature was only activated in certain circumstances when the device was at risk of unexpectedly shutting down based on temporary factors like device temperature, battery state of charge, and battery impedance. *See* Apple Support, iPhone Battery and Performance, https://support.apple.com/en-us/HT208387. Moreover, even when it was activated, only certain users "noticed temporarily slowed performance … when running certain applications," and many users did not notice any differences in daily device performance at all. (Dkt. 176 at 5; *see also* Dkt. 272 at 3–4.) Accordingly, many devices were never used in ways that would have activated the performance management feature, and this Court's ruling on the surviving claims in this case required Plaintiffs to prove that iOS updates caused harm to device performance, such as "reduc[ing] the processing speed of their phones." (*See* Dkt. 331 at 19.) Whether anyone experienced diminished performance was a critical factual issue in dispute at the time of settlement. (*See* Dkt. 176 at 34–35 (disputing whether Plaintiffs had alleged adequate injury based on lack of allegations that "updates were actually harmful"); Dkt. 272 at 6–8 (disputing whether Plaintiffs pled adequate injury because "Plaintiffs allege that some iPhones experienced performance issues, but no Plaintiff alleges that *her* iPhone suffered").) Many class members actually wrote to the Court to explain that the performance management feature was "made to ensure good customer experiences [by] mak[ing] sure … devices worked as well as they could," and some stated they "never experienced any slowdown in performance." (Dkts. 441, 479; *see also* Dkts. 445, 456, 484, 492, 531.) In light of this factual dispute, the parties negotiated a settlement that requires proof of alleged harm before a claimant is eligible to receive payment. This requirement ensures that settlement payments are only made to

those class members who claim to have been injured. That some objectors think "the settlement could have been better" without this evidentiary requirement "does not mean the settlement [is] not fair, reasonable or adequate." *Hanlon*, 150 F.3d at 1027.

A few objectors have also raised concerns that the attestation requirement is problematic because it makes the settlement class broader than the subset of individuals who can submit claims for a settlement payment. (*See* Dkts. 512, 519.) These concerns are not well-founded. Individuals who cannot attest to having experienced any harm do not have any meritorious claim for relief, and to the extent they believe their inclusion in the settlement class deprives them of a legal claim, they had the opportunity to exclude themselves from the settlement. That "compensation [is] limited to those who [experienced diminished performance]" is simply "a reflection of the bargaining and compromise inherent in settling disputes." *IntelliGender*, 771 F.3d at 1179. Using an attestation to ensure payments are made to only those class members who are injured is common in settling disputes, and reflects a reasonable compromise between the parties regarding the appropriate level of proof that should be required to receive a settlement payment. It is not a reason to deny final approval. For example, in *IntelliGender*, the Ninth Circuit affirmed a settlement class that "covered anyone who purchased and used" a baby gender prediction test, even though "compensation was limited to those who obtained an incorrect result." 771 F.3d at 1179. The Ninth Circuit rejected the same objection presented here, ruling that it did not matter that class members who used a test "but did not obtain an incorrect result remain[ed] bound by the settlement, even though they w[ould] not receive any compensation." *Id.*; *see also, e.g.*, *Perkins*, 2016 WL 613255, at *9 (approving settlement where only class members who could attest to the fact that they were injured were eligible to receive payment).

4. *The Objections Submitted By Corporate Claimants Are Meritless.*

Three firms also filed objections on behalf of corporate owners of devices. (*See* Dkts. 517, 518, 541.) These objectors' filings raise three principal concerns about the settlement: (a) whether it is sufficiently clear that corporate-owned devices fall within the class definition; (b) the adequacy of the settlement notice to corporate owners of eligible devices; and (c) whether the claims submission process was unduly burdensome for corporate owners who sought to make claims. None of these concerns is well founded and the Court should overrule these objections.

(a) Corporate Claimants Were Able To Submit Claims, And They Are Covered By The Settlement. Several objectors question whether or not "corporations" or "non-natural persons" are part of the settlement. For example, Objector Yellen argues that "the status of businesses as members of the class entitled to compensation remains unsettled and the class definition is unacceptably vague." (Dkt. 541 at 5.) This is not a valid critique of the parties' settlement. By its plain terms, the Settlement Agreement provides that "former or current U.S. owners" of the *eligible iPhone devices* at issue are included in the settlement class. (Dkt. 429 ¶ 2.) The key criterion is therefore whether the *device* is "eligible" (*i.e.*, if it had installed iOS 10.2.1 / 11.2 or later on or before December 21, 2017). Thus, for purposes of determining eligibility to participate in this settlement, the owner of the eligible device—whether it be a natural or non-natural person—does not matter. Specifically, the Settlement Agreement broadly defines "U.S. owners" to include all "individuals who owned, purchased, leased, or otherwise received an eligible device, and individuals who otherwise used an eligible device for personal, work, or any other purposes." (Dkt. 416 ¶ 1.32.) Contrary to some of the objectors' suggestions, the term "individuals" can include both natural and non-natural persons—and this is the precise meaning that applies in this particular settlement where Plaintiffs have asserted claims under computer intrusion statutes that, they have argued, specifically apply to corporations. *See* Cal. Penal Code § 502(a) (CDAFA was enacted to "expand the degree of protection afforded to … businesses"); 18 U.S.C. § 1030(g) (CFAA defining "person" as including "any … corporation"); *United States v. Blinder*, 10 F.3d 1468, 1472 (9th Cir. 1993) (rejecting argument that statutory term "individual" did not include legal entities and corporations). The settlement applies to *owners* and is not limited to natural persons.

The settlement class members' actions over the last six months speak louder than the few objectors' words over the last few weeks, and corporations and non-natural persons submitted claims implicating more than ***922,000*** devices, which represents a substantial portion of the overall claims submitted. (Suppl. Angeion Decl. ¶ 27.) While these claims are undergoing review and validation by the Settlement Administrator, the actual evidence about claims activity refutes any suggestion that corporations were deterred from filing claims for eligible devices because they did not know whether they were eligible to participate in the settlement.

(b) The Settlement Notice Was More Than Adequate. Nor should the Court credit objections

about the notice program and its impact on corporations. (*See* Dkt. 517 at 4; Dkt. 541 at 5.) The notice campaign was extensive, thorough, and effective, and it complied with Rule 23(c)(2)(B) by delivering "the best notice that is practicable under the circumstances." The Settlement Administrator sent *direct* notice to 99% of the e-mail accounts or mailing addresses for all users of the devices at issue. The parties also provided a second round of notice in advance of the claims deadline, which led to a flurry of additional claims activity. (Dkt. 470-2 ¶¶ 13–16.)

The corporate objectors' complaints about the notice process are baseless. The notice did not discriminate between notices to natural and non-natural persons. Although the objectors suggest that notices were not sent to corporations (*see, e.g.*, Dkt. 517 at 3–5; Dkt. 541 at 5), that is not true: The Settlement Administrator sent direct notice to 99% of the individuals who registered the eligible devices in Apple's records, and a second round of notice to everyone who had not submitted a claim, objected, or opted out. (Dkt. 470-2 ¶ 13.) Apple has no control over how corporate owners and individuals chose to register the iPhone devices that they purchased. While some corporate owners may have allowed the individual device users to register the devices using their personal contact information, many other corporate devices were registered with corporate-owned e-mail and mailing address information, including e-mail addresses that were specifically set up to manage corporate-owned devices (e.g., devicemanagement@[company].com). The Settlement Administrator's records also indicate that more than 50,000 e-mail notices were sent to domains that could be identified as belonging to the corporate objectors. (Suppl. Angeion Decl. ¶ 35.) Further, the notice program provided that if e-mail notices bounced back, the Settlement Administrator sent a postcard to the mailing address on file. The Settlement Administrator mailed more than 12,000 postcard notices to records where the corporate objectors' domains were present in the class list. (*Id.* ¶ 32.) There is therefore no reason to believe that there has been any systematic exclusion of corporations from the notice effort. To the contrary, despite the Best Companies, Inc. and Yellen objections, <u>*all*</u> of the 66 corporate objectors represented by Crowell & Moring LLP acknowledge that they "received notice of the Settlement." (Dkt. 518 at 4 (citing Dkt. 518-1 ¶ 4).)

And while Best Companies tries to fault the notice program for lack of "backup publication notice," there was no requirement for publication notice—especially where its utility was questionable

given the availability of contact information to facilitate direct notice for more than 99% of the eligible devices. (Dkt. 517 at 3–4.) Publication notice would have been wasteful and confusing. The cost of publication would have diverted funds from the class recovery, and indiscriminately publishing notice would have created mass confusion to the many iPhone 6, 6s, 6 Plus, 6s Plus, 7, 7 Plus, and SE device users who did *not* download the relevant iOS versions during the relevant timeframe, and whose devices were therefore *not* eligible for the settlement. The Settlement Administrator already rejected many ineligible claims from claimants who learned of the settlement through other means. (*See* Suppl. Angeion Decl. ¶ 31.) Additionally, as Best Companies acknowledges, "there was significant free media" coverage of the settlement. (Dkt. 517 at 5.) According to the Settlement Administrator's analysis, the settlement was featured in over 2,600 articles, received an estimated 7.3 million page views, was shared through social media over 51,000 times, and garnered over 166,000 views on YouTube. (Suppl. Angeion Decl. ¶ 26 & Ex. I.) Spending additional funds for publication notice, where direct notice was not only possible but preferable, would have been both wasteful and confusing.

The notice campaign was thorough and effective, and the objectors have no basis to complain that notice to corporations was ineffective. Corporations timely filed claims for nearly a million devices—representing a third of the total claims submitted—confirming that the notice efforts were successful in reaching all members of the class, including corporate owners of eligible devices.

(c) Corporate Objectors Have No Basis to Complain About the Settlement Requirements and Claims Process. Non-natural persons have no cause to complain about the supposed "burden" of the claims process because of their status and/or their desire to file mass claims (sometimes tens of thousands by a single corporation). (*See* Dkt. 518.) The settlement's requirements are neutral and have been enforced equally across all class members who submit claims, each of whom is required to attest that they experienced "diminished performance" after running the relevant iOS version on an eligible device during the applicable time period. As explained above, the performance management feature did not affect every eligible device—and many times, the feature had no discernible effect on device performance at all. (*See supra*, p. 11.) The way the feature worked is no less true for corporate-owned devices, as it is for devices owned by natural persons.

This proof requirement is a material part of the settlement and "a reflection of the bargaining

and compromise inherent in settling disputes." *IntelliGender*, 771 F.3d at 1179. The settlement payment that will be paid for eligible devices submitted by corporate claimants will be calculated in the exact same way as for those submitted by individual people. It would be contrary to the terms of the settlement—and unfair to the class members who fulfilled the requirements—to give non-natural persons a free pass, simply because some of them own many devices. In essence, these corporate objectors are complaining that they are being forced to satisfy the same requirements that every other class member has satisfied. That is an untenable request, and one that is objectionable in its own right. As the Ninth Circuit has warned, a settlement should not "treat[] class members differently." *Cohen v. Resol. Tr. Corp.*, 61 F.3d 725, 729 (9th Cir. 1995); *Ferrington v. McAfee, Inc.*, No. 10-1455-LHK, 2012 WL 1156399, at *8 (N.D. Cal. Apr. 6, 2012) ("[D]isparate treatment between class members increases the likelihood that the settlement agreement does not meet the Rule 23(e) standard.").

Moreover, the objectors' complaints that the claims process is "too cumbersome" for non-natural persons is belied by the nearly 1 million claims submitted by corporations and non-natural persons. (Dkt. 517 at 7.) Best Companies has stated it is the owner of "at least ten iPhones ostensibly subject to the Settlement" (Dkt. 517-1 ¶ 8), and many corporations—including some with far more than 10 devices—submitted individual claims with a unique individual providing the attestation for each device. (Suppl. Angeion Decl. ¶ 27.) Non-natural claimants had many options to satisfy the attestation requirement. Most obviously, they could have asked the individual who used the device to confirm that he/she experienced performance diminishment. Several corporate claimants did just that. (*Id.*) Alternately, these claimants could have designated a corporate representative who could educate himself/herself about any performance issues and submit an attestation for each of the devices that he/she believed was eligible. Or, corporations that provided company-owned devices to employees/independent contractors could have made their own private arrangement on how any settlement payments from legal claims relating to the devices should be apportioned between an employer and employee. Given the multiple ways that corporate claimants could fully and accurately satisfy the settlement requirements, Best Companies's complaint that it was too much work to go

through that effort for its ten devices should not be credited.[4]

Crowell & Moring LLP also incorrectly argues that the attestation requirement was unnecessary because the performance management feature necessarily caused disruption to IT departments because the iOS updates "caused claimants to react to address any issues stemming from the software download." (Dkt. 518 at 13–14.) This argument is completely baseless. As explained above, the performance management feature at issue in this case did *not* uniformly cause performance impacts on all devices running the applicable software version. (*See supra*, p. 11.) To the contrary, many devices were never used in a manner that would have implicated the performance management feature, and the feature actually *improved* the user experience by reducing the incidence of unexpected power offs (which are far more disruptive than the temporary smoothing of certain system components). In fact, several class members expressly wrote to the Court to express their view that the performance management feature was a *valuable* software update (*see* Dkts. 441, 445, 456, 479, 484, 492, 531), and others have expressly stated that they could *not* submit a claim because they had not experienced any performance diminishment. (*See, e.g.*, Dkt. 444 ("I do not know if I experienced diminished device performance."); Dkt. 479 ("I never experienced any slowdown in performance, and I bet that most users who declare that they experienced diminished performance will be lying just to claim $25.").) To the extent any corporate objectors believe their devices experienced performance issues (e.g., Dkt. 518-5), those are precisely the reasons why they would be able to identify users to provide the attestation of diminished performance—and not a reason to be excused from the requirement. The attestation requirement is a material part of the settlement and corporations—just like any other claimant—must fulfill it, and if any class member disagreed with Plaintiffs' theory of injury and the settlement structure, they had every opportunity to opt out.[5]

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[4] Alternatively, the Settlement Administrator worked with corporations that submitted inquiries to provide streamlined methods to submit large numbers of claims. While not required, the Settlement Administrator, in good faith, eased the burden on these claimants, while preserving the integrity of the process and the equal treatment of all claimants. Many corporations took advantage of that process and submitted claims with the necessary information. (*See* Dkt. 518 at 4 n.9.)

[5] It is particularly inappropriate for Crowell & Moring LLP to raise these issues at this late stage. That firm initially attempted to engage in discussions regarding its clients' concerns in March 2020, but Apple flagged the conflict of interest presented by its inquiry. (*See* Chorba Decl. ¶ 7.) Crowell & Moring then remained silent for six months, until it tried to push through tens of thousands of

(d) Corporate Class Members Were Adequately Represented. Finally, the Court should reject the argument that the settlement class is invalid simply because "[t]here are no adequate representatives for [non-natural persons]." (Dkt. 517 at 6; *see also* Dkt. 541 at 4.) If anything, it is noteworthy that before the proposed settlement was announced, not a single U.S. non-natural person filed a claim against Apple.[6] That is because *all* of the claims are individual, based on diminished performance of an individual's device. But there is no requirement that the Named Plaintiffs include a non-natural person. Instead, the critical inquiry for analyzing adequacy is whether the Named Plaintiffs possess the same material characteristics that qualify them as members of the settlement class—which is that they are or were "U.S. owners" of eligible devices. (Dkt. 429 ¶ 2.) Here, several Named Plaintiffs were U.S. owners of devices that they purchased for other people (*see* Dkt. 244 ¶¶ 233, 85, 91, 109, 179, 193, 235), and several others testified that they had used their iPhone devices for work purposes (*see* Chorba Decl., Ex. A). "[T]he adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative." *Local Joint Exec. Bd. of Culinary/ Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 n.2 (9th Cir. 2001). Any argument that the settlement would have been more favorable to corporate claimants is unfounded speculation, especially given the significant participation of corporations in the notice and claims process.[7]

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claims at the very last minute, without any further consultation with the parties regarding its clients' concerns. (*Id.* ¶¶ 8–9.) The firm also did not identify any of its clients in response to the parties' inquiry. (*Id.* ¶ 8.) Had these objectors had valid concerns about the settlement, they had ample opportunity to discuss them with the parties well before the deadline. Similarly, the Yellen objection (Dkt. 541) is filed by the founder of a third-party claims filing company who profits by soliciting corporations to file settlement claims (usually in antitrust class action settlements). What Mr. Yellen's objection fails to mention is that his firm filed claims on behalf of 44 corporations—none of which joined in any of his objections. In sum, the corporate objectors appear to be motivated by agendas unrelated to the merits of the settlement, and their objections should be understood in this context.

[6] The *only* complaint filed by a U.S. non-natural person was filed by Best Companies on the same day as it filed its objection—making the identical claims in case the Court concludes that corporations were not included in the settlement. *See Best Cos., Inc. v. Apple Inc.*, No. 20-6971-EJD (N.D. Cal. filed Oct. 6, 2020).

[7] Finally, the settlement accounts for multiple claims involving the same device. One objector, Best Companies, makes the evidence-free and speculative statement that corporate owners will receive nothing, while their employees can make claims. (Dkt. 517 at 5–6.) In fact, the settlement expressly contemplates that multiple claims may be submitted for the same eligible device—as would be the case if both Best Companies and its employee filed a claim for the same device. (Dkt. 416 ¶ 5.1.) Apple encouraged Best Companies to submit claims, and the Settlement Administrator is currently processing these claims.

IV. CONCLUSION

The settlement is fair, reasonable, and adequate. The notice process was thorough and effective, and resulted in a settlement with the robust participation of the class. The settlement will provide generous compensation to millions of class members who have submitted claims for eligible devices. The Court should grant final approval.

Dated: November 20, 2020

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Christopher Chorba*
Christopher Chorba

Attorney for Defendant Apple Inc.

THEODORE J. BOUTROUS, JR., SBN 132099
tboutrous@gibsondunn.com
RICHARD J. DOREN, SBN 124666
rdoren@gibsondunn.com
CHRISTOPHER CHORBA, SBN 216692
cchorba@gibsondunn.com
DIANA M. FEINSTEIN, SBN 302626
dfeinstein@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520

WESLEY SZE, SBN 306715
wsze@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
Telephone: 650.849.5300
Facsimile: 650.849.5333

Attorneys for Defendant Apple Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: APPLE INC. DEVICE PERFORMANCE LITIGATION

Case No. 5:18-md-2827-EJD

DECLARATION OF CHRISTOPHER CHORBA IN SUPPORT OF DEFENDANT APPLE INC.'S STATEMENT IN SUPPORT OF FINAL SETTLEMENT APPROVAL AND RESPONSE TO SETTLEMENT OBJECTIONS

Judge: Hon. Edward J. Davila
Courtroom: 4, Fifth Floor
Date: December 4, 2020
Time: 10:00 a.m.

I, Christopher Chorba, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am a partner in the law firm of Gibson, Dunn & Crutcher LLP, and counsel for Defendant Apple Inc. in this matter. I submit this declaration in support of Apple's Statement in Support of Final Settlement Approval and Response to Settlement Objections. I have personal knowledge of the facts set forth in this Declaration, and if called as a witness, I could and would testify to those facts.

Apple's Efforts to Assist with Settlement Claims and Implement the Settlement

2. I worked closely with Apple to prepare a data set containing the names, email addresses, mailing addresses, and serial numbers associated with each eligible device in the settlement class. This data set was compiled by identifying from Apple's records the following devices: (a) all iPhone 6, 6 Plus, 6s, 6s Plus, and SE devices, shipped to addresses in the United States, that were running iOS 10.2.1 or later before December 21, 2017; and (b) iPhone 7 and 7 Plus devices, shipped to addresses in the United States, that were running iOS 11.2 or later before December 21, 2017. The data set included iPhones that had attempted to download the applicable iOS versions during the relevant time period, as well as devices that had the applicable iOS versions pre-installed during the relevant time period. However, the data did not include devices that updated to these iOS versions after December 21, 2017, because by the time those devices downloaded the iOS updates, Apple had already publicly released additional information regarding the performance management feature that was included in the iOS updates.

3. Pursuant to Section 6.2.2 of the Settlement Agreement, Apple transmitted this data set to the approved Settlement Administrator (Angeion Group) on or around May 28, 2020, and June 5, 2020, for purposes of facilitating distribution of notice to the settlement class members, establishing the online claims portal and search tool, and validating claims.

4. A small number of individuals have written to the Court and/or to Angeion Group to identify specific device serial numbers that they believe were improperly rejected from the online claim form. It is worth noting that settlement class members who received direct notice (99% of device owners), and/or those who owned devices on the class list, did *not* need to have the serial number to complete the online claim form. Rather, this field in the claim form would automatically populate for

claimants who entered their name, Apple ID, address, and device model. For those customers who did not have this information, Apple and the Angeion Group worked to gather serial numbers or other device-identifying information to ensure that valid claims could be processed.

5. I worked closely with Apple to make reasonable efforts to investigate Apple's internal records associated with serial numbers identified by these individuals. While it appears that some individuals' serial numbers were rejected due to user error (*e.g.*, typos or incomplete serial numbers), other individuals' serial numbers were rejected because they did not correspond to a device that was eligible to participate in the settlement. In particular, for devices that downloaded the applicable iOS updates after December 20, 2017, Apple had already publicly released additional information regarding the performance management feature that was included in the iOS updates at issue. (*See* Dkt. 470 at 2.)

6. For example, in the Declaration of Theodore H. Frank submitted in support of the objections filed on behalf of Objector Anna St. John, Mr. Frank identified two iPhone serial numbers that Mr. Frank indicated "did not work on the settlement website." (Dkt. 523-2 ¶ 11.) Although Mr. Frank did not object on this basis (instead focusing on Plaintiffs' counsel's requested attorneys' fees, *see* Dkt. 523), I investigated this claim to determine whether Mr. Frank's devices were eligible. Working with my client, we conducted a reasonable review of Apple's records relating to the two devices that Mr. Frank identified, and determined that the devices were *not* eligible under the settlement because they were not running the applicable iOS versions during the relevant period.

The Crowell & Moring LLP Objection (Dkt. 518)

7. In early March 2020, Deborah Arbabi contacted counsel for the parties with inquiries regarding the submission of claims on behalf of corporations represented by Ms. Arbabi's law firm, Crowell & Moring LLP. On March 13, 2020, I spoke with Ms. Arbabi and informed her that we could not further engage in discussions with Crowell & Moring LLP due to a conflict of interest, because her firm represented Apple in other legal matters. Ms. Arbabi initially disputed this, but then informed me she would look into the conflict of interest. There was no further discussion of the merits of her inquiries regarding potential corporate claimants. I did not hear any response from Ms. Arbabi for more than six months, and I assumed that the issue had been resolved.

8. On September 18, 2020, Ms. Arbabi contacted counsel for the parties with follow up inquiries on behalf of her clients seeking to make settlement claims. Counsel for the parties spoke with Ms. Arbabi on September 21, 2020. At the outset of the call, when I inquired about the conflict of interest, Ms. Arbabi said that Crowell & Moring LLP no longer represented Apple, and she then described her clients' concerns about the proposed settlement. I informed Ms. Arbabi that Apple would be willing to discuss her concerns further, and I asked her to identify Crowell & Moring LLP's clients to ensure there were no conflicts of interest on our side that could arise from my firm's participation in continued discussions. My firm sent a follow up request for the identities of Crowell & Moring LLP's clients on September 29, 2020 (a copy of which was attached as Exhibit C to the Declaration of Rosa M. Morales, *see* Dkt. 518-4); we did not receive a response at that time, and accordingly, we did not have any further substantive discussions regarding the settlement.

9. I understand from Angeion Group that Crowell & Moring LLP submitted claims on behalf of 131 corporations for more than 449,000 devices. I understand that all of Crowell & Moring LLP's claims were submitted to Angeion Group on October 5 or October 6.

Named Plaintiffs' Deposition Testimony

10. Attached hereto as **Exhibit A** are true and correct copies of excerpts from the deposition testimony of the following named plaintiffs: Romeo Alba, Denise Bakke, Loren Haller, and Trent Young. These excerpts contain the named plaintiffs' testimony regarding their use of devices for work purposes.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: November 20, 2020

/s/ Christopher Chorba
Christopher Chorba