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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: APPLE INC. DEVICE PERFORMANCE LITIGATION	Case No. 5:18-md-02827-EJD
This Document Relates to: ALL ACTIONS	**PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS** Judge: Hon. Edward J. Davila Courtroom: 4, 5th Floor Hearing Date: December 4, 2020 Hearing Time: 10:00 a.m.

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I. INTRODUCTION

After an extensive notice program, successfully reaching over 90 million device owners throughout the United States, class members overwhelmingly approved the proposed Settlement and Plaintiffs' Counsel's request for an award of attorneys' fees and expenses.[1] Indeed, only 40 class members – less than 0.00004% of the class – objected to the proposed attorneys' fee award of 28.3% of the $310 million Minimum Class Settlement Amount, and only 22 objected to reimbursement of $995,244.93 in advanced litigation expenses. As discussed below, the objections do not warrant reduction to the proposed awards.

First, the vast majority of responses from individual class members support the settlement and requested fee award. *See* Dkt. 471-1. Individuals objecting to fees overwhelmingly asked that more funds be paid to class members without addressing the work performed to obtain the funds. Plaintiffs' Counsel are certainly mindful of class members' desire to maximize their recovery, though class members who submitted eligible claims will receive $65 or more per device, ***more than 100%*** of the maximum estimated damages. Moreover, Plaintiffs' Counsel's request is appropriately premised on a percentage of the common fund obtained for ***all*** class members.

Second, while most class members agree that the Court should exercise its discretion to apply the percentage-of-the-fund methodology to evaluate fees given the common fund recovered, several ask the Court to award fees at or below the Ninth Circuit's 25% benchmark to avoid a "windfall" due to Plaintiffs' Counsel's success negotiating a "megafund" recovery. However, in proposing lesser awards – ranging from 10.2% to 25% – these objectors largely ignore factors used to evaluate departures from the benchmark and unfairly minimize the work performed and risks undertaken by Plaintiffs' Counsel. There is no windfall. Rather, Plaintiffs' Counsel devoted substantial time during this extraordinarily contentious litigation, without any assurance of recovery. Consideration of these factors support an upward departure from the benchmark.

Third, the Court should treat Apple's objections, allegedly driven by its sudden concern for class members, with extreme skepticism. Apple lacks standing to object since all fees and expenses

[1] Plaintiffs' Counsel includes co-lead counsel ("Class Counsel") and other firms appointed by the Court to leadership committees in the MDL Action (collectively, "MDL Counsel"), as well as co-lead counsel appointed in the California state court JCCP Action ("JCCP Counsel"). All capitalized words are defined in the Stipulation of Settlement unless otherwise noted.

will be paid from a common fund, and even if considered the objections border on frivolous. For example, Apple asks the Court to apply the lodestar method to any fee request, rather than percentage-of-the-fund, claiming "there is no 'common fund.'" Dkt. 522 at 14. Yet, Apple agreed to a ***non-reversionary*** common fund payable to class members. Apple alternatively attacks Plaintiffs' Counsel's lodestar and characterizes its own adversary's time as "excessive" or "unnecessary." Apple's opinion on the necessity of work is irrelevant and its examples actually support the reasonableness of the proposed awards. For example, Apple complains about time spent by named plaintiffs responding to interrogatories and document demands, ignoring that it served discovery on every plaintiff. While Apple asks that JCCP Counsel's time be excluded in its entirety, Apple required that JCPP Counsel participate in the global settlement and include its time in any joint fee motion filed in this Court (rather than independently). Even Apple's appendix, evidently used to illustrate overstaffing at hearings and depositions, conveniently omits Apple's almost identical attendance and shows the time was reasonable.

Finally, only six class members objected to the proposed Service Awards to Named Plaintiffs, several relying on a recent, out-of-circuit decision that has not been applied by any other district. Under controlling Ninth Circuit law, the Court has discretion to approve service awards to plaintiffs who provide valuable services benefitting the Class. That is certainly the case here, and the proposed Service Awards should be approved.

II. THE COURT SHOULD AWARD ATTORNEYS' FEES REPRESENTING A PERCENTAGE OF THE COMMON FUND RECOVERED FOR THE CLASS

A. The Settlement Provides A Common Fund Recovery

In settling this case, Apple agreed to pay class members a ***non-reversionary*** Minimum Class Settlement Amount of $310 million, regardless of the number of claims submitted, and up to $500 million if enough claims were submitted. Thus, the Settlement provides a ***common fund*** to be distributed through the claims process.

Not a single class member argues to the contrary. Nonetheless, despite the explicit terms of the deal, Apple asserts that "this is a claims-made settlement" and "there is no 'common fund.'" Dkt. 522 at 14. Apple's motivation is obvious, as it relies on this false premise to support its

standing to object and then ask the Court to exercise its discretion and award fees under the lodestar method, not the percentage-of-the-fund method. Apple's argument is flawed.

First, Apple lacks standing to object to the proposed award of fees and expenses which will be paid out of a non-reversionary common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481, n. 7, 100 S.Ct. 745 (1980) ("Boeing had no cognizable interest in further litigation between the class and its lawyers over the amount of fees ultimately awarded from money belonging to the class."); *Tennille v. Western Union Co.*, 809 F.3d 555, 559-563 (10th Cir. 2015) (Western Union lacked standing to challenge attorney fee award and no injury since no "reversionary interest" in settlement funds used to pay award); *Adtrader, Inc. v. Google LLC*, 2020 U.S. Dist. LEXIS 71654 (N.D.Cal. March 16, 2020) (distinguishing *Boeing* and holding Google had standing since "attorneys' fees would be paid separate from the common fund and directly from Google").

Second, even assuming Apple had standing, there can be no serious dispute that a common fund has been created by the Settlement. A settlement is a "common fund" "when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. … Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery." *Boeing*, 444 U.S. at 479. Here, Apple agreed to pay a minimum of $310 million to class members and "[u]nder no circumstances shall any portion of the Minimum Class Settlement Amount revert to Apple." *See* Settlement § 1.19. Regardless of the number of claims, the $310 million Minimum Class Settlement Amount is a fixed, certain, non-reversionary common fund. *See* 4 Newberg on Class Actions § 13:7 (5th ed.)

B. The Court Should Exercise its Discretion to Apply the Percentage-of-the-Fund Method to Evaluate an Award of Attorneys' Fees

This Court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *see also Williamson v. McAfee, Inc.*, No. 5:14-cv-00158-EJD, 2017 WL 6033070, at *1 (N.D. Cal. Feb. 3, 2017). While there is no presumption in favor of one method over the other, the percentage-of-the-fund method "is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits

the Court to focus on showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, No. CV 07-05107 SJO AGRX, 2013 WL 7985367, at *1 (C.D. Cal. Dec. 23, 2013). Indeed, most objectors agree that the percentage-of-the-fund method is most appropriate here. *See, e.g.,* Objection of Anna St. John, Dkt. 521 at 12 ("awarding fees on percentage-of-the-fund basis is superior to employing a base lodestar methodology because it better 'align[s] the lawyers' interests' with the class's interest").

C. The Proposed Fee of 28.3% Represents a Modest Adjustment to the 25% Benchmark and Will Not Result in a Windfall

The Ninth Circuit has recognized 25% of a common fund is the "benchmark" for a reasonable fee award, regardless of which method employed. *Stanger v. China Electric Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016). This benchmark may be adjusted depending on the circumstances of a case, provided there is adequate explanation in the record justifying a departure. *Vizcaino*, 290 F.3d at 1047-49; *Powers v. Eichen*, 229 F.3d 1249, 1257 (9th Cir. 2000); *Hanlon v. Chrysler Group, Inc.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *In re Celera Corp. Secs. Litig.*, No. 5:10-cv-02604-EJD, 2015 WL 7351449 at *24-25 (N.D. Cal. Nov. 20, 2015).

Plaintiffs' Counsel seek 28.3% of the Minimum Settlement Fund of $310 million, and demonstrated in their moving papers and supporting Joint Declaration why a modest upward adjustment was justified based on the work performed, risks undertaken, skill required, contingent representation, and substantial recovery obtained in this case. Dkt. 468, 471; *In re Celera* at *8.

In response, a small number of class members, representing a tiny percentage of the overall Class, object to the proposed fee award.[2] Most of these objections were submitted by individual class members who ask the Court to distribute more of the common fund recovery to the class without addressing either the work performed by Plaintiffs' Counsel to obtain that fund or suggesting an alternative fee they believe is more appropriate. As to these objections, Plaintiffs' Counsel acknowledge that, as in any common fund recovery, the award of attorneys' fees will necessarily reduce the amount of funds available to class members. However, it is well recognized that class counsel should be paid a reasonable attorneys' fee from the common fund they helped to create. *See*

[2] Dkt. Nos. 435, 437, 438, 443, 451, 453, 455, 460, 461, 462, 463, 472, 474, 475, 478, 480, 481, 485, 489, 492, 493, 496, 498, 501, 503, 505, 506, 510, 511, 512, 513, 514, 519, 521, 522, 528, 523, 530, 531, 534, 535. While several of these objections were untimely, they are addressed here.

Vincent v. Hughes Air W., Inc., 557 F.2d 759, 769 (9th Cir. 1977).

Four objectors acknowledge the Ninth Circuit's 25% benchmark, but ask the Court to award fees either at or below the benchmark, noting cases where courts reduced fees as the recoveries got larger. These objectors propose various lesser awards, ranging from 25% (Dkt. 513) to 17.8% (Dkt. 512, 521) to 10.2% (Dkt. 514) of the $310 million Minimum Settlement Amount.[3] The Court should reject these alternative fee percentages.

First, the sliding scale (or "megafund" reduction) is meant to protect against unreasonable fees that would result in a windfall. *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 942 (9th Cir. 2011). The quintessential example in which "windfall profits" might result is when "class counsel is being paid 25 times their hourly billing rate," embodying "a multiplier of 25." Newberg on Class Actions § 15:81 (5th ed. June 2017) ("Given that a high multiplier is the best measuring stick of a windfall, courts ought to use the high multiplier to police windfalls . . . rather than use the size of the fund as a policing mechanism."). Similar "high multiplier" results occurred in cases cited by objectors. *See, e.g.*, *Gutierrez v. Wells Fargo*, No. C 07–05923 WHA, 2015 WL 2438274, (N.D. Cal. May 21, 2015) (multiplier of 10.38 reduced to 5.5 and 2 for co-lead counsel, respectively.)

This is not such a situation, and a lodestar cross-check here readily confirms there is nothing unreasonable about the award "in light of the hours spent on the case." *Bluetooth*, 654 F.3d at 942. Indeed, if the Court grants the pending fee request, Plaintiffs' Counsel will receive a multiplier of 2.42 of their post-appointment lodestar, well within the range of multipliers approved by courts in other large settlements. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Antitrust Litig.*, 768 F. App'x 651, 653 (9th Cir. 2019) (approving 3.66 multiplier in $200 million settlement); *Vizcaino*, 290 F.3d at 1051-52 (applying multiplier of 3.65 and noting a majority of cases apply a multiplier between 1.0 and 3.0).

Second, the selected cases cut-and-paste by professional objectors, without any analysis

[3] Objector St. John acknowledges this Court's discretion to base a fee award on the gross or net fund recovered (*Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000), but asks to use the net fund to incentivize Class Counsel to keep down expenses. However, Plaintiffs' Counsel's modest expenses to date, and its close work with the Administrator, already demonstrate that commitment.

about why they apply to this case, are not particularly meaningful.[4] Plaintiffs' Counsel could just as easily identify cases where courts adjusted the 25% benchmark upward in similar and arguably less complex cases.[5] Objectors conveniently ignore Plaintiffs' Counsel's evidence submitted for each of the well-established factors used by district courts to evaluate departures from the 25% benchmark, and how they apply to the ***unique circumstances of this case***, i.e., (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *Vizcaino*, 290 F.3d at 1050-51. Careful consideration of these factors supports the upward adjustment of the benchmark to 28.3%.

1. The Results Achieved

The Settlement creates a Minimum Class Settlement Amount of $310 million, a non-reversionary common fund, with a Maximum Class Settlement Amount of $500 million. This is an exceptional result under any measure, and Plaintiffs' Counsel are unaware of any computer intrusion case with a larger settlement. The recovery also compares favorably with Plaintiffs' valuation of their own claims. Based on Plaintiffs' damages analysis, had Plaintiffs prevailed on every one of their remaining claims, their maximum damages would have amounted to between $18 and $46 per iPhone. Thus, with an estimated 90 million devices potentially at issue, even if one assumed ***every*** device downloaded and installed the subject software during the relevant time and ***every*** single user then experienced diminished performance, the maximum classwide damages would range from $1.6-4.1 billion. Here, the minimum $310 million recovery represents about 7.5-19.4% of damages and the maximum $500 million recovery represents about 12.2-31.3% of damages, both exceptional results. Additionally, Class Members who submitted eligible claims are estimated to recover over $65 or more per device, exceeding the anticipated damages that could have been potentially

[4] Indeed, St. John and her attorney Theodore Frank, professional objectors who work together at Center for Class Action Fairness, literally "cut and paste" objections from a different case into their objection here. *See,* St. John Objection referring to unnecessary work performed "***after the Federal Reserve served letters on the directors***." Dkt. 521 at 1 (emphasis added).

[5] *See, e.g. In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-02420-YGR, 2018 WL 3064391, at 1* (N.D. Cal. May 16, 2018) (30% of $139,000,000 recovery); *In re TFT-LCD Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 149692 at *2 (N.D.Cal. Jan. 14, 2013) (30% of $68,000,000 recovery); *Carlin v. DairyAmerica, Inc.,* 380 F.Supp.3d 998, 1022 (E.D.Cal. 2019), *appeal dismissed sub nom. Carlin v. Spooner,* 808 F.App'x571 (9th Cir.2020) (33% of $40,000,000 recovery).)

recovered at trial. Of course, Apple contended that its software update caused no damages.

In evaluating the results obtained, courts also consider the Class reaction to the recovery. Here, there were only 79 objections to the Settlement, and only 40 of those objected to the proposed fee request. The small number of objections is telling in light of the extensive notice of the Settlement given to the Class in this litigation, as well as the large number of class members, many of whom support the Settlement. Dkt. 417-1, 457. Numerous courts have observed that "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Larsen*, 2014 WL 3404531, at *5 (N.D. Cal. July 21, 2014) (internal quotes omitted) (citing *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)); *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, at *29 (N.D. Cal. Apr. 1, 2011), supplemented, 2011 WL 1838562 (N.D. Cal. May 13, 2011) ("overwhelming participation in the settlement and the minimal number of objections suggest that counsel obtained a favorable result for the class and support an increase from the standard award.")

Despite this success, Apple cites *Gutierrez v. Wells Fargo Bank* for the proposition that its massive payment was driven by "the large size of the class rather than counsel's specialized skill and efforts." Apple's position is curious since it continues to claim that its software update actually helped Class members and caused no damages, and one assumes that Apple didn't agree to pay hundreds of millions of dollars merely because it had a lot of customers. Moreover, *Gutierrez* is distinguishable since class counsel there requested fees of 25% of the $203 million settlement, or $50 million, while their lodestar was only $4.89 million, which equated to a multiplier of 10.38. *Gutierrez,* 2015 WL 2438274, at *4. Even then, the district court awarded fees representing a multiplier near or above what is sought here (5.5 for Lieff Cabraser and 2 for McCune Wright). *Id.* at *7. Apple also claims that Plaintiffs' Counsel's fees should be reduced because certain claims were dismissed, citing *Stonebrae, L.P. v. Toll Bros.*, No. C-08-0221-EMC, 2011 WL 1334444, at *9 (N.D. Cal. Apr. 7, 2011), *aff'd*, 521 F. App'x 592 (9th Cir. 2013). But in *Stonebrae*, the Court focused on whether plaintiffs prevailed on other claims related to those that did not go forward or had success otherwise supporting the hours reasonably expended. Here, there can be no question

that all claims were related to the same alleged diminished performance, and Class Counsel achieved a high level of success with the claims that survived pleading challenges.

Apple also argues that its battery replacement program and certain updates to iOS software somehow diminish the significance of results achieved in this case. Dkt. 522 at 12. Quite the contrary, Plaintiffs' Counsel obtained an exceptional monetary recovery ***in addition to*** Apple's own (and largely unsuccessful) efforts to appease its loyal customers. Thus, Apple's attempt to analogize this Settlement, where the proposed fees represent a percentage of the common fund recovered, to the situation in *In re HP Printer Firmware Update Litig.*, No. 5:16-CV-05820-EJD, 2019 WL 2716287, at *4 (N.D. Cal. June 28, 2019), where class counsel requested fees representing 200% more than the amount recovered, is inapt.

2. Risk of Continued Litigation

Like critics on the sidelines, objectors downplay the litigation risks faced by Plaintiffs' Counsel after the fact, without any analysis of the actual claims and defenses in the case. However, as this Court is aware from overseeing this case, there were complex (and often novel) questions presented at virtually every turn – involving legal claims that lie at the intersection of technology, privacy, disclosure, and product defect law, and privacy and computer intrusion statutes that had not been widely litigated. Naturally, Plaintiffs faced substantial risk of success at the pleading stage, including challenges to Article III standing, and would face challenges later at the class certification, summary judgment, and trial stages. Indeed, the Court's rulings on any number of issues had potentially dispositive impact on the case. All the while, Plaintiffs' Counsel advanced thousands of hours of professional time nearly a million dollars in expenses, all on a contingency basis.

Objectors respond that "there is always a risk in picking on Apple by way of a civil filing," but conclude that the number of cases filed against Apple shows the risk of recovery was low. Dkt. 512 at 14; 523 at10. Such a simplistic analysis completely ignores the very real risks to recovery. *See e.g., In re iPhone App. Litig.*, 6 F. Supp. 3d 1004, 1007 (N.D. Cal. 2013) (granting summary judgment and denying class certification as moot in case involving Apple's data collection practices); *Yastrab v. Apple Inc.*, 173 F. Supp. 3d 972, 976 (N.D. Cal. 2016) (dismissing with prejudice claims based on software updates that purportedly removed features from iPhones); *See*

Noll v. eBay, Inc., 309 F.R.D. 593, 606 (N.D. Cal. 2015) (Davila, J.) (finding substantial risk was present under comparable circumstances.); *Eashoo v. Iovate Health Sciences U.S.A., Inc.*, No. CV-01726-BRO (PJWx), 2016 WL 6205785, at *9 (C.D. Cal. Apr. 5, 2016) ("The risk that further litigation might result in no recovery is a significant factor in assessing the fairness and reasonableness of an award of attorneys' fees.")

3. Plaintiffs' Counsel's Skill and Quality of Work

While objectors don't address this factor, the skill and quality of work performed by Plaintiffs' Counsel supports an upward adjustment to the benchmark. There can be no doubt that the Settlement negotiated was the product of years of aggressive litigation by highly skilled and determined counsel, experienced in the intricacies of privacy and consumer litigation. *See* Joint Declaration, Dkt. 471¶¶ 7-44 (detailing the significant amount of work successfully performed by Class Counsel). Such skill and determination were absolutely necessary here, against a well-resourced adversary, represented by scores of in-house and outside legal counsel. As expected, Apple contested liability at every stage, requiring an equally determined team of attorneys to prosecute claims against such experienced adversaries. *See In re Am. Apparel, Inc. S'holder Litig.*, No. CV-1006352 MMM (JCGx) 2014 WL 10212865, at *22 (C.D. Cal. July 28, 2014) ("In addition to the difficulty of the legal and factual issues raised, the court should also consider the quality of opposing counsel as a measure of the skill required to litigate the case successfully."); *In re Heritage Bond Litig.,* No. 02-ML-1475 DT, 2005 WL 1594403, at *20 (C.D. Cal. June 10, 2005) ("plaintiffs in this litigation were opposed by highly skilled and respected counsel with well-deserved local and nationwide reputations for vigorous advocacy in the defense of their clients.").

4. Fully Contingent Representation

Objectors do not dispute, nor could they, that Plaintiffs' Counsel advanced all time and expenses for years on this case on a fully contingent basis. "When counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 261 (N.D. Cal. 2015). Rewarding attorneys who assume representation on a contingent basis with an enhanced fee serves the "public interest" and "fairly compensates them for the risk that they might be paid

nothing at all for their work." *Ching v. Siemens Indus. Inc.*, No. 11-cv-04838-MEJ, 2014 WL 2926210, at *8 (N.D. Cal. June 27, 2014); *see also In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases.").

5. Awards in Similar Cases

This class action presented novel legal issues, including application of statutory computer intrusion and common law trespass to chattel claims to millions of devices widely held by Americans nationwide. The software updates at issue required highly technical analysis, discovery and expert testimony. While there are few cases similar to this one, courts in the Ninth Circuit have awarded fees at or above the 25% benchmark in other large-scale, complex class actions. *See e.g.*, *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068 (N.D. Cal. Aug. 17, 2018) (district court awarded 27% of $115 million settlement fund in class action involving technical issues about cybersecurity and industry best practices, citing *Vizcaino*, where Ninth Circuit's survey of awards in common-fund cases with recoveries from $50-200 million between 1996 and 2001 found majority were between 20-30%).

III. PLAINTIFFS' COUNSEL'S LODESTAR DEMONSTRATES THE EFFICIENT AND EFFECTIVE WORK PERFORMED

A. Objectors Falsely Suggest the Lodestar is Inflated with Contract Attorneys

Plaintiffs' Counsel's collective lodestar reflects both the extensive work required in this hotly contested class action, as well as the careful and deliberative approach utilized to maximize the efficiency of the team of professionals. Beginning early in this case, Class Counsel put procedures in place to enable leadership to closely supervise and assign tasks to team members. Dkt. 148. They also closely monitored compliance with efficiency protocols and the time spent on assigned projects with required monthly reports, reviewed by Class Counsel and counsel appointed by the Court, and provided quarterly reports broken down by firm, biller, and project to the Court. *Id*. In short, this case served as a model of efficiency and productivity and the total lodestar reflects a fair and accurate summary of time reasonably spent on this case.

Unfortunately, several objectors invent the argument that the lodestar is inflated with substantial time, and inappropriate billing rates, from contract attorneys. These objections lack any factual basis and should be rejected on their face. *See In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1137 (N.D. Cal. 2015) ("[O]bjectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement."). The exact opposite is true. Even though the Court's appointment order permitted the use of contract attorneys (Dkt. 100), Class Counsel utilized virtually no contract attorneys in this case. *See* Supp. Decl. of Mark Dearman in Support of Motion for Award of Attorneys' Fees and Expenses, dated Nov. 20, 2020 ("Supp. Dearman Decl."). For the same reasons, claims that attorneys charged "exorbitant billing rates" for document review is false; Class Counsel even set a $350 per hour cap on document review work, regardless of an attorney's otherwise higher hourly rate. Excluding all contract attorney time and applying the $350 per hour cap to document review results in only minor reductions to the lodestar. *Id*.

Certain objectors acknowledge that Class Counsel submitted regular billing records to the Court throughout this case, but challenge Class Counsel to supplement their declarations with additional billing records. While a district court may rely on attorney fee summaries rather than actual billing records, Class Counsel have now filed summaries showing the time spent by every professional for each of the Court-approved activity codes. *See* Supp. Dearman Decl. Ex. A.

B. Apple Mischaracterizes Time Spent by Class Counsel and Committees

Apple asks the Court to draw negative conclusions from declarations submitted by certain PEC member firms about time spent in this case. For example, Apple implies that too much time was spent by law firms appointed to the Third-Party Discovery Committee and Trial Preparation Committee, since the case settled before any trial date was set and with few documents produced by third parties. Dkt. 522 at 9. Conversely, Apple claims that too little time was spent by counsel on the Law and Briefing Committee, raising questions as to who else was performing the briefing work. However, the fact that Apple disagrees with the allocation of time does not somehow mean that the time was unreasonable. Quite the contrary, Class Counsel closely managed their own time and the time of supporting counsel and audited the time entries, assigning work to maximize the

resources available, and all of these Committee members performed substantial and valuable work. The activity summaries also support this efficient approach.

For example, while Apple falsely claims there was "virtually no third-party discovery" (Dkt. 522 at 9), both firms appointed to the Third-Party Discovery Committee, Levin Sedran & Berman ("LSB") and Saveri & Saveri ("Saveri"), spent substantial time on such discovery, investigating over 40 potential targets ranging from equipment manufacturers to service providers to retailers that sold and refurbished Class Devices with consumers. Dkt. 469-30 at ¶ 2. Eventually, 24 subpoenas were issued, each of which Apple and the third-party objected to, almost uniformly *in toto*. The subpoena recipients often retained major outside counsel firms to defend them, including the likes of Alston & Bird, K&L Gates, Lews Brisbois, and Davis Wright & Tremaine. Needless to say, the subpoenaed entities comprised of Apple's business partners, suppliers, and major retailers were reluctant to produce documents or data to Plaintiffs that could hurt Apple in litigation, necessitating lengthy and protracted negotiations that included dozens of meet and confers. *Id*. Additionally, Class Counsel often tasked attorneys to assist with duties outside their assigned committees. For example, while this case was not yet set for trial, members of the Trial Preparation Committee spent substantial time assisting on document review, a massive and time-consuming task. LSB represented 31 of the Named Plaintiffs and spent substantial time coordinating written discovery, device inspections, and depositions for their clients. *See* Dkt. 469-30. These and other committees were managed efficiently to avoid duplication by having lead counsel give discrete assignments to particular firms and, where appropriate, the bulk of this work was given to junior associates. The Class benefitted both from these efficiencies and the substantive work performed.

Finally, much of the work performed by Plaintiffs' Counsel was a direct result of Apple's own vigorous defense and aggressive positions. For example, negotiations over Apple's production of electronically stored information or "ESI" literally lasted nine months after Apple refused to provide necessary custodial and search term information, and ultimately resulted in discovery motions resolved by the Special Master. This difficult work produced much of the key evidence used in this case. Apple also demanded to conduct full, forensic inspections of every iPhone owned by every one of the 110 Named Plaintiffs, impacting privacy rights of these individuals, as well as

family and friends, whose private information, including medical, financial, and other personal information, was found on these devices. Plaintiffs engaged forensic experts to guide the extraction, storage, and use of metadata segments stored on the iPhones and unique inspection protocols to protect individual privacy rights, a process lasting over a year. Apple's privilege log was massive and overinclusive, requiring extensive negotiations and threatened motions before Apple voluntarily revised its entries and additional information was produced. Plaintiffs do not fault Apple for its vigorous defense, but it directly correlates to the work necessary in this case.

C. The Lodestar Should Account for JCCP Counsel's Time and Efforts

Apple claims the Settlement allows JCCP Counsel to receive a fair allocation of any fee awarded, but somehow precludes the Court from considering their lodestar in determining that award. Apple's argument contorts the plain terms of the Settlement and the Parties' intentions. Apple relies on language in the Settlement providing that JCCP Counsel would not "mak[e] an independent claim for attorneys' fees or expenses." Dkt. 522 at 2, 23. However, that language merely reflects the Parties' agreement that JCCP Counsel would participate in the fee approval process in this Court with Class Counsel, rather than making an independent claim in state or federal court. *See* Supp. Joint Decl. of Andrew J. Brown and Thomas J. Brandi, at ¶12. Indeed, Apple required that process, and all Parties agreed that any motion for attorneys' fees should only take place once, in one courtroom, in front of one judge, avoiding duplication and ensuring consistent results. *Id*. at ¶15. JCCP Counsel's time was appropriately included and should be considered.

D. A Positive Lodestar Multiplier is Appropriate

The requested award of fees of $87.73 million represents a multiplier of 2.42 of Plaintiffs' Counsel's $36,103,148.05 lodestar amount, including $32,109,993.50 from MDL Counsel (Supp. Dearman Decl. at 5) and $3,993,154.55 from JCCP Counsel (Brown/Brandi Decl., Dkt 471-2 at ¶42). This time reflects all adjustments described above, including removal of contract attorneys and capping document review rates for all MDL Counsel. This time does not include pre-appointment efforts, or significant work over the past five months associated with approval, notice, claims and distribution. As noted in our opening memorandum and Joint Declaration (Dkt. 468, 471), many of the same factors supporting an adjustment to the benchmark fee percentage also support a positive

multiplier to the lodestar here, including the tremendous amount of work performed, the novelty of issues presented, and the immense risk of non-recovery. Dkt. 471 ¶¶ 7-44. Thus, the requested fee award is supported by a cross-check against the lodestar and applying a positive multiplier. *Bluetooth*, 654 F.3d at 941–42; *Hanlon*, 150 F.3d at 1029.

IV. THE QUICK PAY TERM DOES NOT RETURN CLASS FUNDS TO APPLE

Alexis West objects to the Settlement's "quick pay" provision, suggesting that it improperly permits funds awarded as attorneys' fees to be paid back to Apple if the award is later modified or reversed on appeal. Dkt. 514. West misreads the Settlement's quick pay terms, which explicitly require that any fee award be paid from the non-reversionary Minimum Settlement Amount. Thus, if a fee is approved and the Settlement and Judgment are later approved on appeal, but the fee award is overturned or reversed, the attorneys' fees will be paid back to the common fund and distributed to the Settlement Class and not reverted to Apple. *See* Dkt. 416 at § 8.1 ("Any award of Attorneys' Fees and Expenses shall be decided by the Court and payable from the Minimum Class Settlement Amount") and § 1.19 ("'Minimum Class Settlement Amount' means Three Hundred Ten Million U.S. Dollars ($310,000,000.00). Under no circumstances shall any portion of the Minimum Class Settlement Amount revert to Apple.") Apple is only paid back if the entire Judgment is overturned.

West also asks that any fee award be placed in a trust account, pending appeal, raising the hypothetical risk that Class Counsel will improperly retain settlement funds. However, that risk is already addressed by the parties, giving the Court authority to enforce the quick pay terms and impose fees in the event funds are not returned. *See* Dkt. 416 at § 8.3. For this reason, this Court and others in this District routinely approve similar quick pay provisions. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *40 (N.D. Cal. July 22, 2020) ("With respect [to] the 'quick pay' provisions, Federal courts, including this Court and others in this District, routinely approve settlements that provide for payment of attorneys' fees prior to final disposition in complex class actions.")

V. THE LITIGATION EXPENSES WERE NECESSARY AND REASONABLE

In a case of this magnitude and activity, the minimal costs incurred by Class Counsel (and JCCP Counsel in the state action) is a testament to their efficiency. Combined expenses were less

than $1 million, and all were necessary to the recovery. Thus, Class and JCCP Counsel should be reimbursed from the common fund proportionately by those class members who benefitted from the advanced expenses. *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995). While a small number of class members object to reimbursing counsel, none dispute that the expenses are typical for this type of class litigation, including for experts, mediations, legal research, court reporting services, travel, and copying. Dkt. 469, Exhs. 41-42; 471-2 Exh. C. *See, e.g.*, *In re LendingClub Sec. Litig.*, No. C 16-02627 WHA, 2018 WL 4586669, at *3 (N.D. Cal. Sept. 24, 2018). Similarly, while Apple challenges certain categories of expenses advanced by Class Counsel, these costs included travel outside the district for multiple mediations, expert and deposition preparations, and copying charges that could not be outsourced due to Apple's insistence on restricting access from third parties. They were all necessarily incurred to advance the case.

VI. SERVICE AWARDS ARE AUTHORIZED BY NINTH CIRCUIT AUTHORITY

Two objectors claim a recent Eleventh Circuit decision interpreting Supreme Court caselaw precludes such awards. *See* Dkt. 512, 519, citing *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020). However, controlling Ninth Circuit precedent applies and supports awarding plaintiff service awards. *See Noll v. eBay, Inc.*, 309 F.R.D. 593, 611 (N.D. Cal. 2015) (Davila, J.) ("$5,000 for class representative is presumptively reasonable.") *Johnson* is an outlier case that has not been applied by a single court outside of the Eleventh Circuit. *See Hart v. BHH, LLC*, No. 15CV4804, 2020 WL 5645984, at *5, fn 2 (S.D.N.Y. Sept. 22, 2020) (approving incentive award and declining to follow *Johnson*); *Somogyi v. Freedom Mortg. Corp.*, No. CV 17-6546 (RMB/JS), 2020 WL 6146875, at *9 (D.N.J. Oct. 20, 2020) (same). While other class members object to providing special treatment to the Named Plaintiffs, the law permits service awards in recognition of the substantial assistance that class representatives provide in securing a recovery for the Class. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009).

VII. CONCLUSION

For all the reasons described above, Plaintiffs' Counsel respectfully request an award of $87,730,000 in attorneys' fees, reimbursement of $995,244.93 in advanced expenses, and Service Awards to each of the Named Plaintiffs.

Respectfully submitted,

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DATED: November 20, 2020

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

I, Joseph W. Cotchett, attest that concurrence in the filing of this document has been obtained from the other signatory. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 20th day of November 2020, at Burlingame, California.

/s/ Joseph W. Cotchett
Joseph W. Cotchett