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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 FINAL APPROVAL OF PROPOSED SETTLEMENT** Judge: Hon. Edward J. Davila Courtroom: 4, 5th Floor Hearing Date: December 4, 2020 Hearing Time: 10:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF CONTENTS (cont'd.)

TABLE OF CONTENTS (cont'd.)

Page

Statutes

Rules

Other Authorities

I. INTRODUCTION

On August 26, 2020, Named Plaintiffs moved for final approval of this class action settlement providing a non-reversionary minimum payment of $310 million to affected consumers ("Final Approval Motion"). Dkt. 470.[1] This historic result—one of the largest consumer class action settlements involving a non-automotive product—has been lauded by many of the Named Plaintiffs who filed suit.[2] In addition, retired U.S. District Judge Layn R. Phillips, who mediated the Settlement, submitted a declaration in support. Dkt. 470-1. October 6, 2020 was the Court approved deadline for members of the Settlement Class to file a Claim, request exclusion, or to object to the. *See* Order Certifying Settlement Class; Granting Preliminary Approval of Class Action Settlement; and Approving Form and Content of Notice, dated May 27, 2020 ("Preliminary Approval Order"). Dkt. 429. As this deadline has passed, Named Plaintiffs submit this reply to update the Court on the Claims and notice process and to respond to the small number of objections that were timely filed with the Court.[3]

As fully explained herein, the notice program was well executed, far-reaching and fulfilled or exceeded the due process requirements under the law. *Noll v. eBay, Inc.*, 309 F.R.D. 593, 604-5 (N.D. Cal. 2015). The notice program resulted in millions of claims filed and a relatively small number of exclusions and objections. After years of hard-fought, contentious litigation, and with the assistance of Judge Phillips, an experienced, impartial mediator, the Parties were able to reach this Settlement which received an overwhelmingly favorable reaction from Settlement Class Members. Named Plaintiffs and Class Counsel, who through a wide-ranging investigation of the issues in this Action and a comprehensive discovery process which included frequent motion practice before this Court and the Honorable Rebecca Westerfield, the Court-appointed Special Discovery Master, had a thorough understanding of the relative strengths and weaknesses of the claims asserted at the time the Settlement was reached. Considering the substantial risks that lay ahead at class certification and

[1] The Settlement provides a Maximum Settlement Amount of $500 million. All capitalized terms herein, unless otherwise defined, are defined in the Stipulation of Settlement Agreement filed February 28, 2020 ("Settlement Agreement" or "Stipulation"). Dkt. 416.

[2] *See* Dkt. 471-1 (letters from Settlement Class Members who support the Settlement).

[3] Plaintiffs filed a motion for attorneys' fees, expenses, and service awards ("Fees Motion") on October 26, 2020 (Dkt. 468) and will file a reply in further support of their Fees Motion to respond to any objections regarding fees, expenses, and service awards.

trial, Named Plaintiffs submit that the Settlement is "fair, reasonable, and adequate." *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 945 (9th Cir. 2015). Named Plaintiffs respectfully request that the Court grant final approval of the Settlement.

II. ADMINISTRATION UPDATE

A. Notice Program

The Court-authorized notice program was wide ranging, robust, and well executed. Beginning on August 6, 2020, Angeion Group, the Court-approved Settlement Administrator ("Angeion"), directed notice via email to 90,119,272 email addresses and mailed 5,609,281 million postcard notices via regular mail to potential Settlement Class Members. *See* Suppl. Decl. of Settlement Administrator ("Angeion Decl."), at ¶¶ 3, 11.[4] Although not required by the Settlement, the Parties agreed to an additional notice process. Beginning August 28, 2020, Angeion followed up with a second email notice to 89,395,480 potential Settlement Class Members and 5,609,277 postcard notices by regular mail. *Id.* ¶¶ 17-18. Those who had not already responded through claims, opt-out requests, or other contacts to Angeion, the Court, and/or the Parties, were part of the additional notice process. *Id.* ¶ 16. Additionally, as of November 16, 2020, there were over 16.4 million-page views of the Settlement Website and over 31,600 calls made to the toll-free information line. *Id.* ¶¶ 22, 24. The proposed Settlement also received widespread coverage in the media. Based on research, Angeion reported an estimated "earned media" reach of 7.31 million coverage views via 2,670 pieces of coverage, and 1.21 billion in online readership through website visits where the Settlement received coverage, approximately 51,800 shares across popular social media platforms, and 166,000 YouTube views. *Id.* ¶ 26. In other words, the Settlement received an extraordinary amount of publicity across different media channels *in addition to* the Court-ordered notice program.

B. Number of Claims

The deadline to file claims was October 6, 2020. *See* Dkt. 429. Angeion received 3.149 million timely claims.[5] *Id.* ¶ 27. Of the 3.149 million claims, 2.152 million were submitted

[4] Of the over 90 million email notices, hundreds of thousands were sent to corporate email addresses. *Accord* ¶ 35.

[5] This translates to approximately 3.5% of the number of notices directed to Settlement Class Members. *See Theodore Broomfield v. Craft Brew Alliance, Inc.*, No. 17-cv-01027-BLF, 2020 WL

online, and close to 75,000 were submitted on paper. *Id.* This included close to 923,000 timely claims that were submitted by large and recognized U.S. corporations.

Based on conversations with Angeion, 70% of claims have thus far been preliminarily approved for payment. Angeion has also sent out approximately 59,900 deficiency notices with the opportunity to contest and cure. *Id.* ¶ 31; *see* Stip., § 6.8. While the Claims Administration process continues, the Parties, assuming the Court finally approves the proposed Settlement, and as contemplated by the Stipulation, will submit a proposed distribution order after final approval.

In addition to the 3.149 million timely claims, Angeion received approximately 14,900 late claims, of which over 8,700 are corporate submissions. Angeion Decl., ¶ 27. Because the Court "has discretion to accept late claims," and since Apple will not be prejudiced by accepting these otherwise late claims nor will it affect the Minimum Class Settlement Amount, Class Counsel recommends accepting the late-filed claims as "fair and reasonable." *Dickerson v. Cable Commc'ns, Inc.*, No. 3:12-CV-00012-PK, 2013 WL 6178460, at *3 (D. Or. Nov. 25, 2013) (citing *In re Gympsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977)).

C. Exclusion Requests

The deadline to seek exclusion from the Settlement was October 6, 2020. Dkt. 429. Angeion received 314 timely requests for exclusion. Angeion Decl., ¶ 33; *id.*, Ex. K.[6] The number of requests for exclusion when viewed either as compared to the number of notices sent (0.00035%) or claims filed (0.01%) is miniscule and attests to the excellent result the Settlement represents for the Settlement Class. *See Churchill Vill.*, 361 F.3d at 577 (affirming final approval of settlement with 45 objections and 500 opt-outs out of approximately 90,000 notified class members).

1972505, at *7 (N.D. Cal. Feb. 5, 2020) (finding sufficient notice to class even with "about a two percent" claims rate) (citing *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990); *Moore v. Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2013 WL 4610764, at *8 (N.D. Cal. Aug. 28, 2013)); *see also*)Federal Trade Commission, CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS (Sept. 2019 at p. 21, accessible at https: //www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf (last reviewed Nov. 18, 2020) (noting means claims rate from 124 consumer class actions at between 4%-5%).

[6] 47 requests for exclusion were received after the October 6, 2020 deadline. *Id.*; *see id.*, Ex. L. Class Counsel recommends that the Court accept the late requests. There are an additional 308 requests submitted by Davis & Norris LLP, the sufficiency of which is subject to motion practice. *Id.*

D. CAFA Notices

As required by the Class Action Fairness Act, 28 U.S.C. § 1715, Apple provided timely notice of the Settlement to federal and state officials on March 9, 2020. Stipulation at § 7.3. The Parties have not received any objections from any federal or state official concerning the Settlement.

III. REACTION OF THE SETTLEMENT CLASS

In the August 26, 2020 Joint Declaration of Joseph W. Cotchett and Laurence D. King in Support of Motion for (1) Final Approval of Settlement; and (2) Motion for Award of Attorneys' Fees and Expenses (the "Joint Declaration") (Dkt. 471), Named Plaintiffs detailed the history of this Action, including, among other things, investigating the Settlement Class's claims, holding multiple meet-and-confers with Defense counsel as well as conferences with the Special Discovery Master, collecting and reviewing over seven million pages of documents, taking and defending multiple depositions, and engaging in frequent motion practice. *See id.* at 1-19. In their Final Approval Motion, Named Plaintiffs summarized the terms of the Settlement and explained why the Settlement was fair, reasonable, and adequate, thus meriting final approval under the relevant legal standards. *See id.* at 6-22; *see also* Joint Decl., at 20-24.

Named Plaintiffs address below the only settlement factor that has evolved since the Final Approval Motion was filed – the reaction of Settlement Class Members to the Settlement.

A. The Overwhelmingly Positive Reaction of Settlement Class Members Favors Final Approval

The Court should consider the reaction of Settlement Class Members in evaluating the Settlement's fairness. *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, the reaction of the Settlement Class has been overwhelmingly positive. Settlement Class Members registered their approval of the Settlement by filing more than 3.14 million claims. *See* Angeion Decl., ¶ 27. Named Plaintiffs registered their support and approval of the Settlement when they personally signed the Settlement Agreement and additionally submitted letters in support of the Settlement. *See* Dkt. 471-1.

The number of exclusions and objections to the Settlement is miniscule compared with the number of notices disseminated and the number of Claims made. Of the over 90.1 million notices

sent to potential Settlement Class Members,[7] 55 timely objections were made to the Settlement, or 0.000061% of the Settlement Class, and 699 timely requests for exclusion, or 0.00069%, were submitted. The "low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2005); *see also Churchill Vill.*, 361 F.3d at 577; *In re Toyota Motor Corp. Unintended Acceleration Mkting, Sales Pract., and Prods. Liab. Litig.*, No. 8:10ML02141 JVS (FMOx), 2013 WL 3224585, at *12 (C.D. Cal. June 17, 2013) (finding the terms of the settlement favorable to class members where, out of 22 million class notices sent, "fewer than 2,000" sought exclusion and "fewer than 100" objected to the settlement).

In their Final Approval Motion, Named Plaintiffs responded to objections that had been filed with the Court at that time. *Id.* at 15-18. Named Plaintiffs respond herein to the remaining 38 objections concerning the Settlement that were received by the October 6, 2020 deadline.

B. The Court Should Overrule All Objections

1. Those Who Did Not Demonstrate Membership in the Settlement Class Have No Standing to Object

To satisfactorily object to the Settlement, a Settlement Class Member must timely file a detailed statement of the specific objection, the grounds for such objections, and proof of membership in the Settlement Class by October 6, 2020. *See* Prelim. Appr. Order, ¶¶ 11, 14, 16. Here, a number of objections were filed with the Court without any proof that the objector owned a relevant iPhone at issue in this litigation.[8] Because "only class members may object to a class action settlement," the Court should overrule these objections for lack of standing.[9] *Moore*, 2013 WL 4610764, at *9; *Kim v. Tinder, Inc.*, No. CV 18-3093-JFW(ASx), 2019 WL 2576367, at *10 (C.D.

[7] Apple provided Angeion the "names, email addresses, mailing addresses, and serial numbers" of the devices at issue in this litigation. Stip., § 6.2.2. However, not all claims made will be eligible for payment due to the requirements set forth in the Settlement, including that the relevant iOS be running on the device "before December 21, 2017" and that the device must have "experienced diminished performance." *Id.* § 6.3.

[8] Ms. Belko (Dkt. 464); Mr. Welch (Dkt. 476); Ms. Diaz (Dkt. 485); Mr. Whitfield (Dkt. 486); Mr. Ritchie (Dkt. 490); Ms. O'Neal King (Dkt. 491); Ms. Cassedy (Dkt. 499); Ms. Fager (Dkt. 502); Ms. Campbell-Cote (Dkt. 507); Ms. Rosetta (Dkt. 524); Ms. Ponsler (Dkt. 539); Mr. Ryan (Dkt. 542).

[9] For the sake of completeness, Named Plaintiffs respond to the substance of each objection.

Cal. June 19, 2019).

2. Objections Concerning the Notice Program Should be Dismissed

Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure ("Rule") requires that notice be the "best notice that is practicable under the circumstances." And Rule 23(e)(1) requires the Court to "direct notice in a reasonable manner." Here, and not including the substantial media that was garnered by the Settlement, the notice plan approved by the Court provided *direct* notice to over 99% of the Settlement Class. *See* Final Appr. Mot. at 19. Furthermore, pursuant to the Parties' joint direction, though not required, Angeion directed a second notice to the Settlement Class. Angeion Decl., ¶ 16. In addition, Angeion created and managed the Settlement Website and toll-free phone line for the benefit of the Settlement Class. *Id.* ¶¶ 21, 23. As set forth below, certain objectors claim the Notice program was insufficient but their timely objections and even some claims were timely filed, belying their argument.[10] Indeed, the notice program satisfies due process by any reasonable measure. *Williamson v. McAfee, Inc.*, No. 5:14-cv-00158-EJD, 2016 WL 4524307, at *7-8 (N.D. Cal. Aug. 30, 2016) (finding similar notice program to have satisfied due process).

Ms. Ponsler (Dkt. 539) points out that there were no postcards mailed but, as she concedes, she received notice and, in fact, tried to make claims. Ms. Cassedy (Dkt. 499) objects to the language on the Settlement Website because it is "not friendly to most consumers," but the information on the Settlement Website was written in plain language and, among other things, "clearly stated the nature of the action," "the class claims, issues, and defenses," and the "binding effect of a class judgment on class members." *Rose v. Bank of Am. Corp.*, No. 11-CV-02390-EJD, 2014 WL 4273358, at *2 (N.D. Cal. Aug. 29, 2014). The Settlement Website also alerted Settlement Class Members of the opportunity to opt out or object. *See Lane v. Facebook, Inc.*, 696 F3d 811, 826 (9th Cir. 2012) (noting that notice "must generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard").

[10] Mr. Helfand objected to the Settlement for myriad reasons (Dkt. 530), including, among others, that he did not receive Zoom information concerning the upcoming court hearing, that the demand for address information was improper, that the claims process was burdensome, that the Settlement Amount per iPhone is too low, that Class Counsel have a conflict of interest, and that an extension of time was warranted. Mr. Helfand has since informed Class Counsel that he is withdrawing the objection.

Mr. Saunders (Dkt. 513) argues that Settlement Class Members did not receive sufficient data such as the number of class members or the expected response rate, but this is not correct. Named Plaintiffs provided more than sufficient information in their Motion for Preliminary Approval of Proposed Settlement, including expected response rate and other calculations (Dkt. 415). To the extent Mr. Saunders argues that the Notice is misleading because the amount Apple will pay will not exceed the non-reversionary $310 million minimum, this was not known and could not be known at the time the Notice was disseminated. But the Notice made it abundantly clear the circumstances under which amounts over the $310 million minimum would be available and that Apple was obligated to pay up to $500 million if the level of claims received so required. Mr. Saunders also maintains that it was unclear where objections should be sent. However, the Preliminary Approval Order, Class Notice, and Settlement Website all clearly required Settlement Class Members to file their objections with the Court. There was no need to send objections to counsel as Court-filed documents are automatically served on Class Counsel and Defense Counsel.

Best Companies (Dkt. 517) and Spectrum (Dkt. 541) object to the notice program because companies allegedly did not receive any direct notice. First, any claim that these objectors did not receive notice rings hollow: these objectors were clearly aware of the Settlement *because they timely filed objections and Spectrum even filed claims*. *See Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1017 (E.D. Cal. 2019) (pointing out that the objector "must have received notice of the settlement in some way, as his objection was filed with the Court prior to the claims deadline"). Notice was disseminated to hundreds of thousands of corporate email addresses, and more than 920,000 corporate claims were made. But, importantly, "[d]ue process does not require that every class member receive notice." *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 968 (N.D. Ill. 2011) (citations omitted). Indeed, in *AT & T Mobility*, the court rejected the argument that each Class Member should have "received personal notice," finding that notice was adequate where notice was, among other things, texted and emailed to customers based on the defendant's records. *Id.*

Further, any argument that companies did not receive notice is belied by the undisputed fact that, not including earned media, over 99% of potential Settlement Class Members, which includes

companies, received direct notice, making this plan the best notice practicable. *Carlin*, 380 F. Supp. 3d at 1016-17 (noting that "absent class members are entitled not to perfect notice, but to the 'best notice practicable'"). The Settlement covers all eligible devices whether they were owned by an individual or a corporation. Prelim. Appr. Order ¶ 2. And Angeion received from Defendant the names, email addresses, mailing addresses, and serial numbers for the person or entity that registered an eligible device. *Id.* ¶ 6. Accordingly, a company that registered an eligible iPhone *would* have received direct notice of the Settlement, whether by email or by postcard. And, as objectors must concede, there was also massive media publicity of the Settlement. *See* Angeion Decl., ¶¶ 25-26; *see also Perkins v. Linkedin Corp.*, No. 13-CV-04303-LHK, 2013 WL 613255, at *7 (N.D. Cal. Feb. 16, 2016) (noting that "additional notice was provided to the Class through extensive media coverage of the Settlement and Notice, which further supports a finding that Class Members received adequate notice of the Settlement"). Contrary to the objectors' arguments, there is no reason for companies not to have received notice or not to have known about the Settlement.

3. Claims Process Objections Should be Rejected

Some objectors argue that it is too burdensome to require serial numbers.[11] Others argue that the attestation requirement that the eligible device be impacted is too onerous.[12] The Best Companies (Dkt. 517) argues that the Class definition is broader than that in the Claim Form, while Mr. Jan and Ms. Feldman object to having to declare under penalty of perjury that an owner owns an eligible device (Dkt. 512). Ms. Pantoni (Dkt. 519), Mr. Jan and Ms. Feldman (Dkt. 512), and Mr. Saunders (Dkt. 513) suggest that Settlement Class Members should be "provide[d] automatic payment" instead of having to go through the Claims Process due to what Ms. Pantoni argues is a "low percentage of class members who will be eligible for payment given the claims-made structure."

But as the Ninth Circuit in points out, "some sort of claims process is necessary in order to verify … that the claimant is a current owner, former owner, or current or former lessee of a

[11] *See* Dkt. 464 (Ms. Belko); Dkt. 465 (Mr. Dietrich); Dkt. 499 (Ms. Cassedy); Dkt. 502 (Ms. Fager); Dkt. 512 (Mr. Jan and Ms. Feldman); Dkt. 513 (Mr. Saunders); Dkt. 517 (Best Companies); Dkt. 518 (66 companies); Dkt. 519 (Ms. Pantoni); Dkt. 536 (Mr. Worthington); Dkt. 539 (Ms. Ponsler); Dkt. 541 (Spectrum).

[12] *See* Dkt. 512 (Mr. Jan and Ms. Feldman); Dkt. 513 (Mr. Saunders); Dkt. 517 (Best Companies); Dkt. 518 (66 companies); Dkt. 519 (Ms. Pantoni).

qualifying [device]." *In re Hyundai and Kia Fuel Eco. Litig.*, 926 F.3d 539, 568 (9th Cir. 2019); *see also Kacsuta v. Lenovo (U.S.) Inc.*, No. SACV 13-00316-CJC(RNBx), 2014 WL 12585787, at *4 (C.D. Cal. Dec. 16, 2014) (requiring a declaration under penalty of perjury is "widely accepted procedure of claims-based class action settlements"). "[C]ourts frequently approve settlements that require class members to submit receipts or other documentation; they conclude such a requirement is reasonable and fair given the defendant's need to avoid fraudulent claims." *Asghari v. Volkswagen Grp. of Am., Inc.*, No. CV 13-02529 MMM (VBKx), 2015 WL 12732462, at *29 (C.D. Cal. May 29, 2015). "Class members must usually file claims forms providing details about their claims and other information needed to administer the settlement." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT, 2020 WL 256132, at *30 (N.D. Ga. Mar. 17, 2020) (citing MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.66)). "[R]equiring documentation does not make the settlement unfair or unreasonable in comparison to litigating the claim." *Friedman v. Guthy-Renker, LLC*, No. 2:14-cv-06609-ODW(AGRx), 2017 WL 6527295, at *8 (C.D. Cal. Aug. 21, 2017).

Here, it is extremely important that potential class members provide information of how that are entitled to claim. First, the Class definition requires that the iPhones at issue must have been running iOS 10.2.1 or later (for iPhone 6, 6 Plus, 6s, 6s Plus, and SE devices), or iOS 11.2 or later (for iPhone 7 and 7 Plus devices) and must have run these iOS versions before December 21, 2017. *See* Prelim. Appr. Order ¶ 2. Undoubtedly, some potential class members may have owned one of the listed devices but failed to install the appropriate iOS and would thus not be covered by the Settlement. Moreover, as Defendant continues to contend, not all devices were impacted. In fact, the claims upheld by the Court not only require that potential class members to have installed the required iOS but also that the iOS caused harm to the device, *i.e.*, diminished the performance of the device. *In re Apple Inc. Device Perf. Litig.*, 386 F. Supp. 3d 1155, 1173-74, 1182 (N.D. Cal. 2019). Thus, unless a potential class member installed the iOS and suffered diminished performance they are not entitled to a claim.[13] The Claim Form reflects those requirements and the necessity for

[13] Thus, some Settlement Class Members will not receive payment under the proposed Plan of Allocation. Such allocation is warranted where it is "based on the extent of their injuries or the strength of their claims on the merits." *Gaudin v. Saxon Mortg. Servs., Inc.*, No. 2015 WL 7454183, at *8 (N.D. Cal. Nov. 23, 2015) (quoting *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1045

Settlement Class Members to attest to the fact that they experienced diminished performance. *See* Stip., § 6.3 (requiring that a Settlement Class Member must certify that their device ran the applicable iOS and that they "experienced diminished performance on the eligible device"). Arguments to the contrary, including the 66 companies' argument that requiring attestation as to damages is unnecessary under certain causes of action (Dkt. 518), should be rejected because they fail to acknowledge these central elements of Named Plaintiffs' claims that were upheld by the Court. *Apple Inc. Device*, 386 F. Supp. 3d at 1173-74, 1182.

Certain objectors noted that they were unable to submit a claim or had a claim rejected for not having a serial number or other information.[14] First, claims administration issues will be finalized after the Court rules on the Settlement. Assuming the Court approves the Settlement, it is only then that the Parties will submit a proposed order to the Court detailing which claims are recommended to be approved or rejected. However, the Court should be assured that to the extent there were any issues in submitting a claim, the Parties have been flexible in the submission of information, including allowing Settlement Class Members to submit a claim by a written claim form, utilizing the search tool on the Settlement Website, or allowing other identifying information to be used. The Parties also spent and will continue to spend significant time and resources working with Claimants to resolve any issues Claimants may have had in this regard.

Mr. Jan and Ms. Feldman argue that the Claim Form requires that the devices must be currently owned (Dkt. 512), but that argument is contradicted by the Notice, which clearly states that an owner does not need to a current owner, but "is someone who owned, purchased, leased, or otherwise received an eligible device…." And the objections by the Best Companies (Dkt. 517), the 66 companies (Dkt. 518), and Spectrum (Dkt. 541) concerning the inability for companies to submit claims is belied by the fact that *almost one-third of the claims were made by companies*. Thus, many companies, including the objectors, were aware of the Settlement and submitted more than 922,000 claims. Indeed, the objectors concede that when inquiries were made to Class Counsel, Class Counsel

(N.D. Cal. 2008)); *California v. IntelliGender, LLC*, 771 F.3d 1169, 1179 (9th Cir. 2014); *In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185-BLF, 2019 WL 6622842, at *9 (N.D. Cal. Nov. 12, 2019) (finding that allocating funds "based on type and extent of their injuries is generally reasonable").

[14] *See* Dkt. 518 (66 companies); Dkt. 536 (Mr. Worthington); Dkt. 539 (Ms. Ponsler).

informed companies to make their claims, which they did. So long as a company met the requirements to submit a claim, no company would be turned away.

4. Objections Concerning the Settlement Amount Should be Dismissed

Many of the objections disagree with the Settlement Amount per iPhone as being too low.[15] Objectors urge the Court to require Apple to reimburse Settlement Class Members in larger amounts,[16] while others seek to negotiate their own amounts or file their own lawsuits.[17] However, Settlement Class Members will likely receive significantly more than the $25 per iPhone base that the Parties agreed to. Indeed, at present, it is estimated that each Settlement Class Member will receive $65 or more per Approved Claim. And there is no basis to support a larger recovery, especially given Defendant's argument that not all devices were affected and where Settlement Class Members received substantial use out of the devices. There is simply "no guarantee that the class would receive a better deal" than the one reached in this Settlement. *See Hanlon*, 150 F.3d at 1027. "[T]o the extent a Class Member concludes the settlement amount is insufficient, that Class Member [i]s free to opt out and pursue separate claims against Defendants." *Kim*, 2019 WL 2576367, at *11.

Mr. Saunders claims without basis that there was not enough information to evaluate damages, while at the same time stating that Apple would be liable for $4 billion based on "basic math" (Dkt. 513). First, as discussed above, 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. Mr. Saunders' argument does not take into consideration any

[15] *See* Dkt. 473 (Mr. Franklin); Dkt. 480 (Mr. Lowe); Dkt. 483 (Mr. Mohlenbrok); Dkt. 486 (Mr. Whitfield); Dkt. 489 (Mr. Slota); Dkt. 490 (Mr. Ritchie); Dkt. 493 (Ms. Gerke); Dkt. 494 (Ms. Duncan); Dkt. 495 (Ms. Won); Dkt. 497 (Mr. Suminski); Dkt. 499 (Ms. Cassedy); Dkt. 501 (Mr. Wetz); Dkt. 506 (Mr. Lasky); Dkt. 507 (Ms. Campbell-Cote); Dkt. 509 (Ms. Cioi); Dkt. 513 (Mr. Saunders); Dkt. 532 (Ms. Weisgram); Dkt. 534 (Mr. Franco); Dkt. 537 (Ms. Bohnert); Dkt. 540 (the Zahnstechers).

[16] *See, e.g.*, Dkt. 495 (Ms. Won); Dkt. 493 (Mr. Franklin); Dkt. 497 (Mr. Suminski); Dkt. 506 (Mr. Lasky); Dkt. 509 (Ms. Cioi).

[17] *See, e.g.*, Dkt. 488 (Mr. Weingart); Dkt. 491 (Ms. O'Neal King); Dkt. 507 (Ms. Campbell-Cote).

of Apple's defenses and the requirements of the claims upheld, including Apple's argument that not all devices were installed with the relevant iOS or experienced diminished performance. *See* Final Appr. Mot. at 9-10, 17; *see also* Prelim. App. Mot. at 12-16. The recovery here is well within the range of reasonableness, as "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, No. CV09-5457PSG (JCx), 2016 WL 5938722, at *5 (C.D. Cal. May 16, 2016) (granting final approval where recovery was as low as 3.21% of potential recovery).

Mr. Saunders' other argument concerning the cap on individual payments is not only moot as the cap is not being applied but should also be rejected as "[c]aps on a maximum pro rata distribution are a commonly employed aspect of class action distributions" and does "not render the Settlement inadequate." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486-PJH, 2013 WL 12333442, at *82 (N.D. Cal. Jan. 7, 2013) (citing cases). To the extent Mr. Saunders seeks discovery, objectors "are not automatically entitled to discovery." *In re Wells Fargo Mortgage-Backed Certs. Litig.*, No. 09-CV-0376-LHK, 2011 WL 13240287, at *2 (N.D. Cal. Nov. 14, 2011). "The fundamental question is whether the District Judge has sufficient facts before him to intelligently approve or disapprove the settlement." *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 619-20 (S.D. Cal. 2005). Here, because there are more than sufficient facts before the Court, Mr. Saunders' request for discovery should be denied.

Ms. West argues that Named Plaintiffs' damages consultant should have been made available to Settlement Class Members (Dkt. 514). However, there is no authority, nor does Ms. West cite to any, that requires such information be produced.[18] In any case, given the stage at which the Parties agreed to settle this Action, such information is neither warranted nor necessary. *See* Fed. R. Civ. P. 26(a)(2)(D) (time to disclose expert testimony). Named Plaintiffs also considered multiple factors in reaching this Settlement including the analysis of documents produced by Defendant, which support

[18] Ms. West's citation to *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016), is inapposite. The Sixth Circuit there found that the district court was incorrect in sealing the records concerning the settlement. *Id.* at 306-08. Here, none of the documents related to the Settlement have been sealed and are available for review without cost on the Settlement Website.

the level of estimated economic damages. Here, the calculation of potential damages is based on actual sales data of used eligible devices in the secondary market. Based on available data, Class Counsel, with assistance from a consultant, were able to compare the value of the eligible devices in the secondary market prior to the release of the relevant iOS and the value after the disclosure of information that the iOS might slow the device's performance. The difference in the two values, while taking into account the normal drop in value of a used device, was the basis of the estimated damages. This damages calculation model was recently approved by Judge Koh in *Grace v. Apple, Inc.*, 328 F.R.D. 320, 337-43 (N.D. Cal. 2018).

Importantly, the proposed Settlement was the product of a mediator's proposal, taking into consideration issues such as the Court's decision on Defendant's motions to dismiss and whether the Court would grant class certification or, at a later stage, summary judgment. "[P]arties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value." *Rodriguez v. W. Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, the Settlement Amounts had been subject to extensive investigation and discovery by Named Plaintiffs prior to accepting the proposal, including the review and analysis of more than seven million pages of documents, the deposition testimony of senior Apple witnesses, and consultation with experts in the field.

Certain objectors assert that the lawsuit is baseless or that Apple was right to throttle.[19] Ms. Fager suggests that the Settlement Amount should be donated (Dkt. 502). While Class Counsel believe such assertions are belied by the facts of this case, these differing opinions only demonstrate the risks of litigation. In any case, "class members do not have standing to object that the settlement is unfair to *Defendants* rather than the class." *Friedman*, 2017 WL 6527295, at *8 (emphasis in original) (citation omitted).

While Spectrum contends that the Settlement is a "windfall" for individuals to the detriment of companies and that a "subset" of class members is being ignored (Dkt. 541), these arguments are

[19] *See* Dkt. 479 (Mr. Fisher); Dkt. 484 (the Waltons); Dkt. 492 (Mr. Mendoza); Dkt. 501 (Mr. Wetz); Dkt. 531 (Mr. Ochroch).

belied by the number of companies that timely made claims and will be entitled to the same compensation per device as any individual. Angeion Decl., ¶ 27. To the extent that both a company and an individual lay claim to a particular eligible device, there is a set procedure to split the value, Stip., § 6.10, and the company may otherwise seek repayment from its employee. *See AT & T Mobility*, 789 F. Supp. 2d at 967 (noting that "the question whether such Class Members must in turn reimburse their employers is a separate matter"). And while Mr. Saunders (Dkt. 513) and Ms. Pantoni (Dkt. 519) object to the breadth of the release, the release is "rooted in the factual allegations of Plaintiffs' Complaint" concerning iOS 10.2.1 or later (for iPhone 6, 6 Plus, 6s, 6s Plus, and SE devices), and iOS 11.2 or later (for iPhone 7 and 7 Plus devices), running these operating systems prior to December 21, 2017. *Cody v. SoulCycyle Inc.*, No. CV 15-6457 MWF (JEMx), 2017 WL 6550682, at *7 (C.D. Cal. Oct. 3, 2017); *Rodriguez*, 563 F.3d at 957 (affirming settlement that provided for "release [of] all claims ... related to conduct alleged in the complaint"); *Bey v. Mosaic Sales Solutions US Operating Co., LLC*, No. 16-6024 FMO (RAOx), 2019 WL 7940584, at *11 (C.D. Cal. June 20, 2019) (approving settlement which released defendant "from all claims … and any additional claims that could have been brought based on the facts alleged in the 5AC…").

5. Miscellaneous Objections Should be Overruled

Ms. Diaz (Dkt. 485) and Mr. Ryan (Dkt. 542) complain about the amount of private information that must be provided. The requested information is no more than what is necessary for Angeion to determine whether a potential Settlement Class Member is entitled to payment and prevent fraudulent claims. And the Stipulated Protective Order (Dkt. 224) and the Stipulation (§ 6.2.3) provide that the information provided by Settlement Class Members will remain private and used "solely for the purposes of providing notice, processing requests for exclusion, and administering payment."

Certain objectors complain about the Court-ordered deadlines to file a claim, object, or seek exclusion, or otherwise seek an extension of those deadlines.[20] While Named Plaintiffs understand that the Claims Period occurred during COVID-19, there is no reason to extend the deadlines given that the Court specifically took COVID-19 into account in setting the deadlines set forth in the

[20] Dkt. 524 (Ms. Rosetta); Dkt. 536 (Mr. Worthington); Dkt. 541 (Spectrum).

Notice,[21] that Settlement Class Members twice received direct notice, had clear deadline information, and that claims were able to be submitted online. *See Friedman*, 2017 WL 6527295, at *10 (noting that "the length of the opt out period [is] adequate for a diligent class member to evaluate their injury and compare it to the benefits that the settlement has to offer"). Ms. Rosetta argues that she should receive an American with Disabilities Act accommodation (Dkt. 524) but does not provide any specificity as to what her disability is that would otherwise require an accommodation.[22]

To the extent any individual sought exclusion,[23] the Settlement Administrator has listed them. But objections made by opt-outs should be overruled (Dkt. 445, 485, 507). *See* Notice § 14 ("If you are excluded, you will not receive any settlement payment, and you cannot object to the settlement.").

The Best Companies (Dkt. 517) argues that Named Plaintiffs are inadequate class representatives because they cannot represent companies, but fails to demonstrate how Named Plaintiffs, who are "former or current U.S. owners of" the Devices at issue, do not adequately represent owners, including companies.[24] *See* Prelim. Appr. Order ¶ 2.

IV. CONCLUSION

Because the Settlement is "fair, reasonable, and adequate," and because the objections are without merit, the Court should overrule all objections, grant final approval of the Settlement, enter final judgment dismissing Named Plaintiffs' claims, and approve Named Plaintiffs' plan of allocation.

[21] *See In re: Apple Inc. Device Perf. Litig.*, No. 18-MD-2827, Tr. of Zoom Proceedings before the Hon. Edward J. Davila, dated May 15, 2020, at 31-35, 36-38.

[22] As noted above, Class Counsel recommends accepting the late-filed claims.

[23] Mr. Ibrahim (Dkt. 439), Ms. Kolbaba (Dkt. 442), Mr. Greenberg (Dkt. 445), Ms. Diaz (Dkt. 485), Ms. Campbell-Cote (Dkt. 507), Mr. Strickland (Dkt. 529), Mr. Rousseau (Dkt. 525), and Ms. Hernandez-Maldonado (Dkt. 544).

[24] Neither of the cases the Best Companies cites is apposite. The court denied class certification in *In re Milk Products Antitrust Litigation*, 195 F.3d 430, 436 (8th Cir. 1999), because the sole remaining named plaintiff's claim was dismissed for lack of standing and thus was not a typical class representative. And, in *In re Graphics Processing Units Antitrust Litigation*, 253 F.R.D. 478, 489-90 (N.D. Cal. 2008), the court found that the claims of the representative plaintiffs were not typical because they purchased the products at retail and without the ability to negotiate, while the remaining 99.5% of defendants' business was comprised of wholesale purchasers who had the ability to negotiate prices. Here, there is no suggestion that the Best Companies' purchases were different in any way from individual purchasers other than the number of iPhones purchased.

Respectfully submitted,

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

I, Laurence D. King, 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 Pleasanton, California.

/s/ Laurence D. King
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