

1 JOSEPH W. COTCHETT (SBN 36324)  
 jcotchett@cpmlegal.com  
 2 MARK C. MOLUMPY (SBN 168009)  
 mmolumphy@cpmlegal.com  
 3 ELLE D. LEWIS (SBN 238329)  
 elewis@cpmlegal.com  
 4 BRIAN DANITZ (SBN 247403)  
 bdanitz@cpmlegal.com  
 5 **COTCHETT, PITRE & McCARTHY LLP**  
 840 Malcolm Road, Suite 200  
 6 Burlingame, CA 94010  
 Telephone: 650.697.6000

7 LAURENCE D. KING (SBN 206243)  
 lking@kaplanfox.com  
 8 MARIO M. CHOI (SBN 243409)  
 mchoi@kaplanfox.com  
 9 **KAPLAN FOX & KILSHEIMER LLP**  
 10 1999 Harrison Street, Suite 1560  
 Oakland, CA 94612  
 11 Telephone: 415.772.4700

12 FREDERIC S. FOX (*pro hac vice*)  
 ffox@kaplanfox.com  
 13 DONALD R. HALL (*pro hac vice*)  
 dhall@kaplanfox.com  
 14 DAVID A. STRAITE (*pro hac vice*)  
 dstraite@kaplanfox.com  
 15 MAIA C. KATS (*pro hac vice pending*)  
 mkats@kaplanfox.com  
 16 **KAPLAN FOX & KILSHEIMER LLP**  
 850 Third Avenue  
 17 New York, NY 10022  
 Telephone: 212.687.1980

18 *Interim Co-Lead Counsel for Plaintiffs*

19 **UNITED STATES DISTRICT COURT**  
 20 **NORTHERN DISTRICT OF CALIFORNIA**  
 21 **SAN JOSE DIVISION**

22 IN RE: APPLE INC. DEVICE  
 PERFORMANCE LITIGATION

Case No. 5:18-md-02827-EJD

23 This Document Relates to:  
 24 ALL ACTIONS

**SUPPLEMENTAL 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**

Judge: Hon. Edward J. Davila  
 Courtroom: 4, 5th Floor  
 Hearing Date: December 4, 2020  
 Hearing Time: 10:00 a.m.

1 We, Joseph W. Cotchett and Laurence D. King, declare and state as follows:

2 1. I, Joseph W. Cotchett, am a member of the bar of the State of California and a partner  
3 at the law firm of Cotchett, Pitre & McCarthy LLP (“CPM”).

4 2. I, Laurence D. King, am a member of the bar of the State of California and a partner  
5 at the law firm of Kaplan Fox & Kilsheimer LLP (“Kaplan Fox”).

6 3. We are interim co-lead counsel (“Class Counsel”) for the Named Plaintiffs.<sup>1</sup> We  
7 have personal knowledge of the facts stated below and with the proceedings in this case. If called  
8 as witnesses, we would and could competently testify thereto to all facts within our personal  
9 knowledge.

10 4. Apple’s Opposition to Plaintiffs’ Motion for Attorneys Fees, Expenses and Service  
11 Awards asserts that, in considering a fee award in this case, the Court should exclude time spent by  
12 co-lead counsel appointed in the coordinated JCCP California state court action (“JCCP Counsel”).  
13 Dkt. 522 at 23. However, early in this litigation, Apple asked our firms to coordinate with JCCP  
14 Counsel to ensure efficiency and reduce duplication, including coordinated efforts regarding the  
15 review of documents and deposition of Apple witnesses. We were also informed that the Honorable  
16 Anne-Christine Massullo ordered JCCP Counsel to coordinate efforts as well. Indeed, Apple would  
17 not even agree to produce witnesses for deposition unless co-lead counsel in both actions agreed to  
18 coordinate examination, so that witnesses were not deposed twice. Similarly, the JCCP action was  
19 included in the global settlement, and the Settlement Agreement explicitly provided that JCCP  
20 Counsel would participate in any fee request made in this Court, rather than filing an independent  
21 motion in this or the California state court. As stated in the Supplemental Joint Declaration of  
22 Andrew J. Brown and Thomas J. Brandi in Support of Motion for Approval and Motion for  
23 Attorneys’ Fees, attached hereto as **Exhibit 3**, JCCP Counsel had the same understanding.

24 5. Apple’s Opposition also attached an Appendix purporting to list “Plaintiffs’ Counsel  
25 in Attendance” at court hearings, discovery hearings and depositions in this case. Dkt. 522-5. The  
26

27 \_\_\_\_\_  
28 <sup>1</sup> All capitalized words are defined in the Stipulation of Settlement unless otherwise noted.

1 Appendix inaccurately includes non-attorneys as “counsel.” Moreover, only attorneys from our  
 2 two firms, and Mark Dearman from Robbins Geller, Chair of the Plaintiffs’ Executive Committee,  
 3 included time at court hearings in our lodestar. Since the Court was present at these hearings, it can  
 4 best evaluate whether such time is appropriately considered. Moreover, for discovery hearings held  
 5 outside of Court, which almost always covered a number of contested issues with the Special  
 6 Master, as well as deposition, Apple’s Appendix omits its own representation. Attached hereto as  
 7 **Exhibit 4** is a true and correct copy of a revised appendix prepared from discovery hearing and  
 8 deposition transcripts and listing the number of counsel representing both Apple and Plaintiffs, and  
 9 reflecting virtually identical representation.

10 6. In reaching the Settlement, Named Plaintiffs considered multiple factors including  
 11 the analysis of documents produced by Defendants, which support the level of estimated economic  
 12 damages. Here, the calculation of potential damages is based on actual sales data of used eligible  
 13 devices in the secondary market. Based on available data, Class Counsel, with assistance from a  
 14 consultant, were able to compare the value of the eligible devices in the secondary market prior to  
 15 the release of the relevant iOS and the value after the disclosure of information that the iOS might  
 16 slow the device’s performance. The difference in the two values, while taking into account the  
 17 normal drop in value of a used device, was the basis of the estimated damages. This damages  
 18 calculation model was recently approved by Judge Koh in *Grace v. Apple, Inc.*, 328 F.R.D. 320,  
 19 337-43 (N.D. Cal. 2018).

20 7. On November 18, 2020, Steven Helfand e-mailed Class Counsel to communicate  
 21 that he withdrew his objection. Attached hereto as **Exhibit 5** is a true and correct copy of Steven  
 22 Helfand’s e-mail withdrawing his objection.

23 We declare under penalty of perjury under the laws of the United States of America that the  
 24 foregoing is true and correct. Executed this 20<sup>th</sup> day of November 2020 in Oakland, and  
 25 Burlingame, California.

26  
 27 /s/ Laurence D. King

Laurence D. King

/s/ Joseph W. Cotchett

Joseph W. Cotchett

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 20<sup>th</sup> day of November 2020 in Burlingame, California.

*/s/ Joseph W. Cotchett*

Joseph W. Cotchett

# **EXHIBIT 3**

1 THE BRANDI LAW FIRM  
THOMAS J. BRANDI, #53208  
2 TERENCE D. EDWARDS, #168095  
354 Pine Street, Third Floor  
3 San Francisco, CA 94104  
Telephone: (415) 989-1800  
4 Facsimile: (415) 989-1801

5 THE LAW OFFICES OF ANDREW J. BROWN  
6 ANDREW J. BROWN, #160562  
501 W. Broadway, Ste. 1490  
7 San Diego, CA 92101  
Telephone: (619) 501-6550  
8 andrewb@thebrownlawfirm.com

9 *Interim Co-Lead Counsel for Plaintiffs in*  
10 *Judicial Council Coordination Proceeding No. 4976*

11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN JOSE DIVISION**

14 IN RE: APPLE INC. DEVICE  
PERFORMANCE LITIGATION

Case No. 5:18-MD-02827-EJD

15 THIS DOCUMENT RELATES TO:  
16 ALL ACTIONS

**SUPPLEMENTAL JOINT  
DECLARATION OF ANDREW J.  
BROWN AND THOMAS J. BRANDI IN  
SUPPORT OF MOTION FOR (1) FINAL  
APPROVAL OF SETTLEMENT; AND (2)  
MOTION FOR AWARD OF  
ATTORNEYS' FEES AND EXPENSES**

Judge: Hon. Edward J. Davila  
Courtroom: 4, 5th Floor  
Hearing Date: December 4, 2020  
Hearing Time: 10:00 a.m.

1 We, Andrew J. Brown and Thomas J. Brandi, declare and state as follows:

2 1. I, Andrew J. Brown, am a member of the bar of the State of California and the  
3 principal attorney at the law firm of the Law Offices of Andrew J. Brown (“LOAJB”).

4 2. I, Thomas J. Brandi, am a member of the bar of the State of California and the principal  
5 attorney at the Brandi Law Firm (“Brandi Firm”).

6 3. LOAJB and the Brandi Firm were appointed interim co-lead counsel for the Plaintiffs  
7 (“JCCP Plaintiffs”) in the action titled, *Apple OS Cases*, Judicial Council Coordination Proceeding  
8 No. 4976 (San Francisco Superior Court) (“JCCP Action”). See, Order Granting Rosalia Plaintiffs’  
9 Motion To Appoint Lead Counsel and Denying Krueger Plaintiffs’ Motion to Appoint Lead Counsel  
10 (Dec. 21, 2018), attached to the Joint Declaration of Andrew J. Brown and Thomas J. Brandi, filed  
11 on August 26, 2020. Dkt. No. 471 – 2 (Exhibit A).

12 4. LOAJB and the Brandi Firm (and their agents) are referred throughout herein as  
13 “JCCP Counsel.” We have personal knowledge of the facts stated below and with the proceedings  
14 in this case. If called as witnesses, we would and could competently testify thereto to all facts within  
15 our personal knowledge.

16 5. We received and reviewed the numerous briefs, letters and other filings in response to  
17 Plaintiffs’ Motion for Attorneys’ Fees, Expenses, and Service Awards. We supplement our  
18 declaration therein in order to address Defendant Apple Inc.’s assertion that all of the work  
19 conducted by JCCP Counsel in the JCCP Action was duplicative and that, under the Settlement, the  
20 lodestar submitted by JCCP Counsel should not be considered by the Court in its decision to award  
21 fees. Both assertions are incorrect.

22 **JCCP Counsel Actively Litigated the JCCP Action, Coordinating with Class Counsel**

23 6. Apple attempts to minimize the work performed in the JCCP Action and any  
24 contribution to the global settlement reached between the Parties. Specifically, Apple states “[t]here  
25 was no separate discovery in the JCCP” and implies that the only law and motion that took place in  
26 the case over the course of two years was “one round of demurrer briefing . . .” *Id.* at 6. Both of  
27 these statements misrepresent the facts.

1           7.       There was separate discovery in the JCCP Action. However, Plaintiffs in both the  
2 JCCP Action and the MDL action went to great lengths not to duplicate the work required by Apple.  
3 Apple can hardly fault Plaintiffs counsel for the time spent accommodating Apple.

4           8.       For example, JCCP Plaintiffs served their own discovery requests. For the document  
5 production by Apple, JCCP Plaintiffs did not require Apple to do additional searches for documents  
6 beyond what they were completing for the MDL Action. However, JCCP Plaintiffs did review those  
7 documents and it was a substantial and time consuming effort. In coordination with the MDL, JCCP  
8 Plaintiffs also shared time in depositions of Apple witnesses – again solely to reduce the burden on  
9 Apple. But counsel for both cases had to prepare for those depositions, and the inquiries and  
10 testimony were not duplicative.

11           9.       Moreover, where the JCCP Action differed from the MDL, JCCP Plaintiffs served  
12 their own discovery. For example, JCCP Plaintiffs sought case-specific discovery concerning Class  
13 Certification, and sought a “Person Most Qualified” deposition of Apple which the MDL Plaintiffs  
14 did not join in. Ironically, Apple refused to provide such a witness because the MDL Plaintiffs were  
15 not participating in the deposition, thereby requiring JCCP Counsel to engage in law and motion  
16 practice (which Apple lost).

17           10.      There was also law and motion activity in the JCCP Action, including contested  
18 demurrers to the consolidated complaint, motions to stay, and discovery motions.

19       **Apple Agreed that JCCP Counsel’s Time Should be Considered by this Court**

20           11.      Apple’s claim that the “plain terms of the settlement” permit JCCP Counsel to be  
21 allocated a portion of any fee awarded by this Court, but somehow preclude the Court from  
22 considering JCCP Counsel’s lodestar in determining that fee award, completely misstates the terms  
23 and meaning of the Settlement.

24           12.      Apple correctly notes that, under the Settlement, the Parties agreed that JCCP Counsel  
25 would not “mak[e] an independent claim for attorneys’ fees or expenses.” Defendant Apple Inc.’s  
26 Opposition to Plaintiffs’ Motion for Attorneys’ Fees, Expenses, and Service Awards (Dkt. 522 at 2  
27 and 23). However, that merely reflects the Parties’ agreement that JCCP Counsel would participate  
28



1 in the fee approval process in this Court and not make an independent claim in its case pending in  
2 California Superior Court.

3 13. Contrary to Apple’s characterization, JCCP Counsel have not submitted “an  
4 independent claim for attorneys’ fees,” either in state or federal court. Rather, JCCP Counsel’s  
5 request for fees is combined with Class Counsel in one joint motion.

6 14. At no time did Class Counsel or JCCP Counsel agree that an attorney could receive  
7 a fee in this case without consideration of the extent of their efforts on behalf of the Class. Moreover,  
8 any request for the Court to award attorneys’ fees to attorneys who do not submit time (or expenses)  
9 would run afoul of Ninth Circuit precedent. See, e.g. *In re Bluetooth Headset Prod. Liab. Litig.*, 654  
10 F.3d 935 (9<sup>th</sup> Cir. 2011).

11 15. Indeed, the agreement by JCCP Counsel not to make an independent claim for  
12 attorneys’ fees was to accommodate Apple. It evidences the agreement that any motion for  
13 attorneys’ fees would take place in one courtroom, in front of one judge, to avoid duplication,  
14 competing motions, and ensure consistent results on behalf of overlapping classes. Apple knows  
15 this.

16 We declare under penalty of perjury under the laws of the United States of America that the  
17 foregoing is true is true and corrected. Executed this 19th of November, 2020 in San Diego, and San  
18 Francisco, California.

19  
20 /s/ Andrew J. Brown

Andrew J. Brown

/s/ Thomas J. Brandi

Thomas J. Brandi

# **EXHIBIT 4**

*In Re Apple Inc. Device Performance Litigation***Appendix**

	<b>Plaintiffs' Counsel in Attendance</b>	<b>Apple's Counsel in Attendance</b>
Jan. 24, 2019 Discovery Hearing	3	2
Feb. 7, 2019 Discovery Hearing	2	5
Feb. 28, 2019 Discovery Hearing	5	4
Mar. 14, 2019 Discovery Hearing	6	4
Mar. 19, 2019 Discovery Hearing	5	5
Mar. 28, 2019 Discovery Hearing	6	6
Apr. 11, 2019 Discovery Hearing	5	6
May 9, 2019 Discovery Hearing	6	7
May 23, 2019 Discovery Hearing	7	8
May 24, 2019 Discovery Hearing	5	9
June 20, 2019 Discovery Hearing	9	7
June 28, 2019 Discovery Hearing	9	7
July 3, 2019 Discovery Hearing	6	7
July 11, 2019 Discovery Hearing	8	5
July 15, 2019 Discovery Hearing	6	6
July 31, 2019 Discovery Hearing	11	7
Aug. 8, 2019 Discovery Hearing	11	6
Aug. 9, 2019 Discovery Hearing	2	6
Aug. 15, 2019 Discovery Hearing	8	6
Aug. 22, 2019 Discovery Hearing	8	7
Sept. 26, 2019 Discovery Hearing	7	8
June 27, 2019 Deposition of Apple Witness	5	6
July 10, 2019 Deposition of Apple Witness	7	5
July 19, 2019 Deposition of Apple Witness	4	5
July 24, 2019 Deposition of Apple Witness	2	3
Aug. 2, 2019 Deposition of Apple Witness	6	3
Aug. 14, 2019 Deposition of Apple Witness	1	3
Aug. 16, 2019 Deposition of Apple Witness	4	4
Aug. 20, 2019 Deposition of Apple Witness	3	3
Aug. 23, 2019 Deposition of Apple Witness	3	3
Sept. 6, 2019 Deposition of Apple Witness	2	4
Aug. 12, 2019 Deposition of Named Plaintiff	4	3
Aug. 19, 2019 Deposition of Named Plaintiff	2	3
Aug. 22, 2019 Deposition of Named Plaintiff	3	3
Aug. 23, 2019 Deposition of Named Plaintiff	3	3
Aug. 26, 2019 Deposition of Named Plaintiff	3	2
Sept. 6, 2019 Deposition of Named Plaintiff	3	3
Sept. 9, 2019 Deposition of Named Plaintiff	3	3
Sept. 20, 2019 Deposition of Named Plaintiff	2	3
Sept. 23, 2019 Deposition of Named Plaintiff	3	3
<b>TOTAL</b>	<b>198</b>	<b>193</b>

# **EXHIBIT 5**

## Mark Molumphy

---

**From:** Mark Molumphy  
**Sent:** Friday, November 20, 2020 5:24 PM  
**To:** Mark Molumphy  
**Subject:** FW: Apple Settlement

---

**From:** Steven Helfand <[1400steven.helfand@gmail.com](mailto:1400steven.helfand@gmail.com)>  
**Sent:** Wednesday, November 18, 2020 10:30 AM  
**To:** Mark Molumphy <[MMolumphy@cpmlegal.com](mailto:MMolumphy@cpmlegal.com)>  
**Subject:** Re: Apple Settlement

Please advise the Court. Thanks, Steve

On Wed, Nov 18, 2020 at 1:03 PM Mark Molumphy <[MMolumphy@cpmlegal.com](mailto:MMolumphy@cpmlegal.com)> wrote:

Understood. Unfortunately, we are not permitted to withdraw the objection ourselves, but are permitted to advise the court of your decision. Thank you for your clarification.

---

**From:** Steven Helfand <[1400steven.helfand@gmail.com](mailto:1400steven.helfand@gmail.com)>  
**Sent:** Wednesday, November 18, 2020 8:41 AM  
**To:** Mark Molumphy <[MMolumphy@cpmlegal.com](mailto:MMolumphy@cpmlegal.com)>  
**Subject:** Re: Apple Settlement

To provide further clarification, my primary objection was that COVID should require an extension of deadlines. Both you and the Class Administrator have examined the record and deemed my claim timely. I appreciate this. Other than the Settlement Administrator taking a second look at the timeliness of my claim, I have been offered no compensation or promises from you for the withdrawal of the objection. Indeed, the withdrawal of my objection was not conditioned on, anything, including the acceptance of my claim. Rather, and quite simply, the Class Administrator has mooted my objection.

Steve Helfand

On Wed, Nov 18, 2020 at 8:18 AM Steven Helfand <[1400steven.helfand@gmail.com](mailto:1400steven.helfand@gmail.com)> wrote:

Thank you for the update. Can you file a document withdrawing my objection in your case, at my instruction. I'm happy with the settlement and Apple. I will not oppose the fee request.

On Tue, Nov 17, 2020 at 9:53 PM Mark Molumphy <[MMolumphy@cpmlegal.com](mailto:MMolumphy@cpmlegal.com)> wrote:

Mr. Helfand, you will likely hear from the administrator soon, but wanted to let you know that I followed up and your claim has been deemed timely and eligible.

---

**From:** Steven Helfand <[1400steven.helfand@gmail.com](mailto:1400steven.helfand@gmail.com)>  
**Sent:** Tuesday, November 17, 2020 9:01 AM  
**To:** Joseph Cotchett <[JCotchett@cpmlegal.com](mailto:JCotchett@cpmlegal.com)>; [lking@kaplanfox.com](mailto:lking@kaplanfox.com); [wsze@gibsondunn.com](mailto:wsze@gibsondunn.com); [dfeinstein@gibsondunn.com](mailto:dfeinstein@gibsondunn.com); [rdoren@gibsondunn.com](mailto:rdoren@gibsondunn.com); [tboutrous@gibsondunn.com](mailto:tboutrous@gibsondunn.com); Mark Molumphy <[MMolumphy@cpmlegal.com](mailto:MMolumphy@cpmlegal.com)>; Elle Lewis <[ELewis@cpmlegal.com](mailto:ELewis@cpmlegal.com)>; Brian Danitz <[BDanitz@cpmlegal.com](mailto:BDanitz@cpmlegal.com)>; [mchoi@kaplanfox.com](mailto:mchoi@kaplanfox.com); [ffox@kaplanfox.com](mailto:ffox@kaplanfox.com); [dhall@kaplanfox.com](mailto:dhall@kaplanfox.com); [dstrait@kaplanfox.com](mailto:dstrait@kaplanfox.com);

[mkats@kaplanfox.com](mailto:mkats@kaplanfox.com)

**Subject:** Re: Apple Settlement

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Today, I received a rejection from the claims administrator. APP-REJ; APHC0075143. My claim was timely submitted and directed contemporaneously with my objection, received by the Court on October 5, 2020. The settlement administrator admits that it is tardy. Please rectify this submission. My claim is valid and timely.

Steve Helfand