UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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CHAIM LERMAN, ROSLYN WILLIAMS, and JAMES VORRASI, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

APPLE INC.,

Defendant.
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MEMORANDUM AND ORDER
15-CV-7381 (LB)

BLOOM, United States Magistrate Judge:

The Honorable Sterling Johnson Jr. preliminarily approved the settlement of this class action on May 19, 2022. Plaintiffs allege that defendant Apple Inc. engaged in deceptive trade practices and false advertising in violation of New York General Business Law ("NYGBL") and the New Jersey Consumer Fraud Act ("NJCFA"). ECF No. 157. Plaintiffs now move for final approval of the proposed class action settlement ("Settlement"). ECF No. 160. The Court held a fairness hearing on September 22, 2022.[1] For the reasons set forth below, I find that the Settlement is fair, adequate, and reasonable under Federal Rule of Civil Procedure 23(e) and the Grinnell factors, and I therefore approve it. The Clerk of Court is directed to enter final judgment in accordance with the accompanying Order granting final approval of the Settlement, awarding service awards to the named plaintiffs, and awarding attorney's fees and expenses.

BACKGROUND

Plaintiffs filed the Second Amended Class Action Complaint ("Complaint") on March 28, 2016, alleging that defendant harmed the class when consumers downloaded iOS 9 onto their iPhone 4S devices after receiving Apple's allegedly false description of the new operating system.

[1] The parties consented to a magistrate judge for all purposes, and the case was reassigned to me on September 1, 2022. ECF No. 166.

ECF No. 18. On October 7, 2020, the Court certified a litigation class of iPhone 4S owners from New York and New Jersey who downloaded iOS9 onto their devices from a version of iOS 7 or iOS 8. ECF No. 127 ("Order Granting Class Certification"). After six years of "hard fought" litigation, including serial motion practice and substantial expert discovery, the parties reached an agreement to settle this matter for $20 million at a mediation before the Honorable Diane M. Welsh (Ret.). ECF No. 155-3 ("Settlement Agreement").

The parties moved for preliminary approval of the proposed settlement on May 3, 2022, ECF No. 155, and Judge Johnson granted preliminarily approval on May 19, 2022. ECF No. 157 ("Preliminary Approval Order"). Notice was disseminated to all class members by the Court-approved settlement administrator in accordance with the Preliminary Approval Order, and plaintiffs moved for final approval of the settlement on August 11, 2022. ECF No. 160. Plaintiffs also moved for attorney's fees, costs, and service awards to the named plaintiffs. ECF No. 161. The Court held the fairness hearing pursuant to Federal Rule of Civil Procedure 23(e)(2) on September 22, 2022. No objections to the settlement were timely filed, and no objectors appeared at the fairness hearing.[2]

SETTLEMENT SUMMARY

The Settlement releases Apple from all claims based on the facts alleged in the Complaint in exchange for a non-reversionary common fund of $20,000,000. The Preliminary Approval Order granted preliminary certification of two settlement classes:

> Class One: all individuals and entities in New York who currently own or have owned an iPhone 4S that was updated to any version of iOS 9 from any version of iOS 7 or iOS 8

[2] Kris Lord filed a letter with the Court after the deadline on August 30, 2022, stating he intended to object; however, he failed to appear at the fairness hearing and his letter did not clearly state his objection. ECF No. 167; see Fed. Prac. & Proc. Civ. § 1797.4 (3d ed.) ("class members may be deemed to have waived their objections if they fail to provide the court with unambiguous, clear reasons for their objections").

> Class Two: all individuals and entities in New Jersey who currently own or have owned an iPhone 4S that was updated to any version of iOS 9 from any version of iOS 7 or iOS 8

ECF No. 157. The settlement class is identical to the litigation class that was certified in October 2020, except that it excludes certain individuals, including Apple's directors, officer, and employees, Court staff, and defense counsel. See Order Granting Class Certification at 53; Settlement Agreement Section 1.34. Valid claims[3] will be paid from the net settlement amount, which is the $20 million total, less fees, costs, and expenses (including attorney's fees and expenses, administrative and notice costs, and plaintiffs' service awards). Settlement Agreement Section 5.1, 5.3. The value of each claim is determined by the formula set out in Section 5.3.1 of the Settlement Agreement. Each class member will receive a minimum of $15 for each valid claim, increasing on a *pro rata* basis depending on the number of claims and the remaining settlement fund to a maximum of $150 per claim.

Notice was disseminated to the class by the Court-approved settlement administrator, JND Legal Administration. The robust notice program included three rounds of email notice and two rounds of paper mail notice sent directly to class members, as well as a settlement website and a toll-free information line. ECF No. 171 at 11. The settlement administrator successfully delivered 1,309,139 copies of the email notice and 334,287 copies of postcard mail notice.[4] ECF No. 160-1 at 7. In addition, there have been over 60,000 page views on the case website, 735 calls to the toll-free information line, and 447 e-mails to the settlement administrator. Id.

There were a total of 232,547 claims filed within the 42-day period, representing approximately 16% of the class. ECF No. 171 at 5. Of the approximately 1.5 million potential

[3] To file a claim, class members must submit a declaration that they downloaded iOS 9 to their 4S device while a resident of New York or New Jersey and experienced a significant decline in performance. Settlement Agreement Section 6.3.

[4] The settlement administrator sent an additional 41,641 email notices and 55,585 post card notices which were undeliverable.

class members, only 8 members requested to be excluded[5] and no objections were filed. Id. at 4. Subject to auditing by the settlement administrator, the number of claims will result in at least $41.70 per valid claim, and class members will receive payments in approximately 90 days of this Order.[6] Id. at 6.

DISCUSSION

I. Final Approval of the Settlement

A. Legal Standard

There is a "strong judicial policy in favor of settlements, particularly in the class context" and "compromise of complex litigation is encouraged by the courts and favored by public policy." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116-117 (2d Cir. 2005). Federal Rule of Civil Procedure 23(e)(2) provides that the Court may only approve the proposed settlement after a hearing and a finding that settlement "is fair, reasonable, and adequate." The Rule, as amended in December 2018, requires the Court to consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class including the method of processing class-member claims, if required;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Courts in this Circuit also evaluate a settlement for substantive fairness under the nine Grinnell factors:

[5] Two of the eight requests to be excluded were made after the deadline. ECF No. 171 at 4. However, the parties consented at the fairness hearing to exclude all eight class members.
[6] Although this Settlement names potential *cy pres* recipients, the number of claims filed by class members will exhaust the settlement fund.

> (1) the complexity, expense and likely duration of the litigation;
> (2) the reaction of the class to the settlement;
> (3) the stage of the proceedings and the amount of discovery completed;
> (4) the risks of establishing liability;
> (5) the risks of establishing damages;
> (6) the risks of maintaining the class action through the trial;
> (7) the ability of the defendants to withstand a greater judgment;
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 459 (2d Cir. 1974), abrogated by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000). The Grinnell factors are applied in tandem with those under Rule 23 to guide the Court's assessment of the procedural and substantive fairness of the Settlement. In re Namenda Direct Purchaser Antitrust Litig., 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020); see In re Patriot Nat'l, Inc. Sec. Litig., 828 F. App'x 760, 762-63 (2d Cir. 2020) (summary order) (endorsing the use of the Grinnell factors following the 2018 amendment).

Additionally, before approving a class settlement agreement, the Court also must determine "whether the requirements for class certification in Rule 23(a) and (b) have been satisfied." In re American Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 238 (2d Cir. 2012). "The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. Finally, the Court must ensure that notice was reasonable and conformed to the requirements of Rule 23(e)(1) and due process.

B. The Settlement is Approved

1. Final Certification of the Settlement Class

As a preliminary matter, the plaintiffs have satisfied the requirements for class certification outlined in Rule 23(a) and (b). "'To obtain certification of a class action for money damages, a plaintiff must satisfy prerequisites of numerosity, commonality, typicality, and adequacy of representation,' pursuant to Rule 23(a), and 'must also establish that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy,' pursuant to Rule 23(b)(3)." In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11, 50 (E.D.N.Y. 2019) (citing Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 460 (2013); Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 80 (2d Cir. 2015).

The proposed settlement defines two settlement classes under Rule 23(b)(3):

- Class One: all individuals and entities in New York who currently own or have owned an iPhone 4S that was updated to any version of iOS 9 from any version of iOS 7 or iOS 8
- Class Two: all individuals and entities in New Jersey who currently own or have owned an iPhone 4S that was updated to any version of iOS 9 from any version of iOS 7 or iOS 8

The Court previously certified a nearly identical class in this case before settlement was contemplated, and the Court has since clarified categories of individuals excluded from the class, such as Apple employees. The parties submitted extensive briefing at the class certification stage, including expert witness reports. See Order Granting Class Certification. I adopt and incorporate Judge Johnson's detailed analysis in the Order Granting Class Certification, finding the settlement class satisfies the requirements of Rule 23(a) and the predominance and

superiority requirements of Rule 23(b)(3). I therefore grant final certification of the settlement class.

2. The Settlement is Procedurally Fair

The Court must review the negotiating process leading up to the settlement for procedural fairness. Charron v. Wiener, 731 F.3d 241, 247 (2d Cir. 2013). In evaluating a proposed settlement for procedural fairness, the Court has a "'fiduciary responsibility of ensuring that the settlement is ... not a product of collusion, and that the class members' interests [were] represented adequately. Chen v. XpresSpa at Terminal 4 JFK LLC, No. 15 CV 1347, 2021 WL 4487835, at *4 (E.D.N.Y. Oct. 1, 2021) (quoting McDowall v. Cogan, 216 F.R.D. 46, 48 (E.D.N.Y. 2003)).

Rules 23(e)(2)(A) and (B) set forth the procedural inquiry and require the Court to ensure that class counsel adequately represented the class and that the proposed settlement was negotiated at arm's length. In re Namenda, 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020); see Charron, 731 F.3d at 247 ("The Court must review the negotiating process leading up to the settlement for procedural fairness, to ensure that the settlement resulted from an arm's-length, good faith negotiation between experienced and skilled litigators."). "A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to counsel's recommendation." Guevoura Fund Ltd. v. Sillerman, No. 15 CV 7192, 2019 WL 6889901, at *6 (S.D.N.Y. Dec. 18, 2019) (citing Wal-Mart, 396 F.3d 96, 116 (2d Cir. 2005)).

That presumption applies here. The proposed settlement was reached by highly experienced counsel who investigated and litigated the claims for over six years. The record

herein includes defendant's motion to dismiss, plaintiffs' motion for class certification, the related Daubert briefing, and the Rule 23(f) petition to the Second Circuit. The parties conducted extensive fact and expert discovery on both class certification and the merits of the claims. The parties ultimately reached settlement after a 13-hour mediation facilitated by an experienced mediator, retired Judge Diane M. Welsh. This litigation history establishes the procedural fairness leading up to the Settlement. See Guevoura, 2019 WL 6889901, at *6; In re Namenda, 462 F. Supp. 3d at 311; see also Zaslavskiy v. Weltman, Weinberg & Reis Co., LPA, No. 18-CV-4747, 2022 WL 1003589, at *4 (E.D.N.Y. Jan. 5, 2022) ("There is no question here that adequacy of representation is satisfied. … Plaintiff seeks the same relief as all other class members… and there is no indication whatsoever that Plaintiff has any interests that are antagonistic to those of the class. Further, class counsel are capable, qualified, and experienced in litigating consumer cases, including as class counsel. Rule 23(e)(2)(A) is satisfied.") Therefore, the Settlement meets the procedural fairness requirements of Rule 23(e)(2)(A)-(B).

3. The Settlement is Substantively Fair

The Court must also assess the Settlement for substantive fairness. Courts in this Circuit use the Grinnell factors to guide their analysis. The requirements assessing substantive fairness under Rule 23(e)(2)(C)-(D) supplement the Court's Grinnell analysis. See In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., No. 18 MD 2819, 2022 WL 3043103 at *5 (E.D.N.Y. Aug. 2, 2022); Chen, 2021 WL 4487835 at *5 (E.D.N.Y. Oct. 1, 2021).

a. The Complexity, Expense and Likely Duration of the Litigation

The first Grinnell factor evaluates whether continuing the litigation would be complex, expensive, and lengthy. This action would win the trifecta were it to continue. The parties have

already spent six years litigating this case. If not for the Settlement, the parties would continue litigating complex technical issues requiring further expert discovery and Daubert briefing. ECF No. 155-2 ¶¶ 18-19. There would be summary judgment motion practice, Apple's contemplated motion to decertify the class, and likely a lengthy trial. Id. Moreover, the subject matter of this lawsuit is especially technical and complex, requiring ongoing use of experts. See Order Granting Class Certification. Given the length and complexity of this litigation, the first Grinnell factor strongly favors settlement. See Dupler v. Costco Wholesale Corp., 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010) (applying the Grinnell factors to a class action settlement for deceptive business practices under NYGBL).

b. The Reaction of the Class to the Settlement

The second factor requires the Court to assess the reaction of the class to the settlement. "It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy. In fact, the lack of objections may well evidence the fairness of the Settlement." In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05 MD 1720, 2019 WL 6875472, at *16 (E.D.N.Y. Dec. 16, 2019), judgment entered, No. 05 MD 1720, 2022 WL 2803352 (E.D.N.Y. July 18, 2022). "A favorable reception by the class constitutes 'strong evidence' that a proposed settlement is fair." In re Citigroup Inc. Sec. Litig., 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013). There were 232,547 claims filed and no objections. Only eight class members requested to be excluded. Accordingly, the second Grinnell factor strongly supports approval of the Settlement. See In re Namenda, 462 F. Supp. 3d at 312 (approving settlement where there were no objections).

c. The Stage of the Proceedings and the Amount of Discovery Completed

The third factor evaluates the stage of discovery, focusing on "whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." Id. (quoting Fleisher v. Phoenix Life Ins. Co., No. 11 CV 8405, 2015 WL 10847814, at *7 (S.D.N.Y. Sept. 9, 2015)). Here, the parties conducted substantial discovery and have fully briefed and received decisions on Apple's motion to dismiss, plaintiff's motion for class certification and the related Daubert motions, and Apple's Rule 23(f) petition. ECF No. 155-2 ¶¶ 14-17. Over the course of six years, class counsel reviewed over 500,000 pages of documents, took the depositions of eleven Apple employees, and retained experts who produced reports on the functionality of the iPhone 4S spanning over 770 pages. Id. Throughout the litigation and mediation, class counsel has shown a thorough appreciation of both the favorable and unfavorable facts necessary to evaluate plaintiffs' claims. See ECF No. 160-6 at ¶ 13. Accordingly, the third factor strongly supports approval of the Settlement.

d. The Risks of Establishing Liability, Damages, and Maintaining the Class

The fourth, fifth, and sixth factors require the Court to assess the risks plaintiffs face in maintaining the action. To assess the risks of establishing liability, "the Court need not decide the merits," but should weigh the "risks of litigation against the certainty of recovery under the settlement. In re Namenda, 462 F. Supp. 3d at 313 (internal quotations omitted). "Litigation inherently involves risks." Wal-Mart, 396 F.3d at 118. However, plaintiffs' submissions and the statements of the parties at the fairness hearing make clear that plaintiffs would face substantial opposition from Apple if the litigation continues. Apple will move for summary judgment and to decertify the class. See ECF No. 155-2 ¶¶ 18. Additionally, Apple continues to dispute the basic elements of plaintiffs' claims, including that it misrepresented the performance of iOS 9 and that

plaintiffs suffered any damages. Id. Given the obstacles that remain before this case can proceed to trial, and the risks of establishing both liability and damages at trial, the fourth, fifth, and sixth factors support approval of the Settlement. See Lea v. Tal Educ. Grp., 18 CV 5480, 2021 WL 5578665, at *10 (S.D.N.Y. Nov. 30, 2021) (finding the risks attendant to defending a decertification motion support approval of a settlement).

e. The Ability of the Defendants to Withstand a Greater Judgment

The seventh factor asks whether defendant is able to withstand a greater judgment. Although Apple could withstand a greater judgment, courts have recognized that this factor is less important when the other factors weigh in favor of approving the Settlement. In re Sinus Buster Prods. Consumer Litig., 12 CV 2429, 2014 WL 5819921 at *11 (E.D.N.Y. 2010). "This factor is typically relevant only when a settlement is less than what it might otherwise be but for the fact that the defendant's financial circumstances do not permit a greater settlement." In re Namenda, 462 F.Supp.3d at 314. This factor does not weigh either way in the Court's consideration of the instant action.

f. The Reasonableness of the Settlement Fund

Courts typically evaluate the final two factors together. Guevoura, 2019 WL 6889901, at *9 n.1. The Court should determine whether the Settlement is in a range of reasonableness, recognizing "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." Id. "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." In re Payment Card, 2019 WL 6875472 at *29 (quoting Grinnell). Here the relief provided by the Settlement to the class is within the range of reasonableness. Apple has argued that plaintiffs'

damages, if they can establish liability, would be limited to the minimum recovery under the Settlement of $15 per applicable device, because that was the secondary market price of an iPhone 4S when iOS 9 was released in September 2015. ECF No. 155-2 ¶ 25. As the value of each class member's valid claim is now at least $41.70, and in light of the risks plaintiffs face establishing their damages at trial, this represents a substantial economic recovery for the settlement class that is within the range of reasonableness.

g. *Proposal Treats Class Members Equitably*

Rule 23(e)(2)(D) requires the Court to assess whether the Settlement treats the class members equitably. The Settlement allocates the funds among class members on a *pro rata* basis, which courts uniformly approve as equitable. In re Namenda, 462 F.Supp.3d at 316.

h. *The Relief Provided for the Class is Adequate*

In assessing whether the settlement provides adequate relief for the class under Rule 23(e)(2)(C), the Court must take into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). The costs and risks of further litigation are assessed as part of the first, fourth, fifth, and seventh Grinnell factors and support the approval of the Settlement.

The Settlement Agreement provides that the claims will be distributed through the settlement administrator JND. The "claims processing method should deter or defeat unjustified claims, but the Court should be alert to whether the claims processing is unduly demanding." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. Section 6 of the Settlement Agreement lays out the notice and distribution plan. An allocation formula "need only have a

reasonable, rational basis, particularly if recommended by experienced and competent class counsel." In re Namenda, 462 F.Supp.3d at 316. Here, the distribution plan is reasonable as it distributes the Settlement to class members on a *pro rata* basis within 90 days of the effective date of the Settlement. See id.

The reasonableness of attorney's fees is addressed in further detail in Section II *supra*. The Second Circuit routinely awards attorney's fees as a percentage amount in common fund cases. In addition, NYGBL and NJCFA both provide for the award of reasonable attorney's fees. Finally, there are no additional agreements made in connection to the Settlement. For all of the reasons stated above, I find that the Grinnell factors and the Rule 23(e)(2) requirements strongly support approval of the Settlement.

4. Notice was Reasonable

The Court must also ensure that notice was reasonable under Fed. R. Civ. P. 23(e)(1) ("explaining that the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal"). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." Wal-Mart, 396 F.3d at 113. To meet this standard, "notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." Id.

The Court approved plaintiffs' notice program at the preliminary approval stage. ECF No. 157. In accordance with that plan, the claims administrator delivered direct notice by email and paper mail to class members. ECF No. 160-1 at 25. Apple provided its records of iPhone 4S owners to the settlement administrator to identify the potential class members. Settlement Agreement Section 6.2.3. Over 1.3 million class members were reached by direct email over three rounds of

email notice and 389,872 class members were reached by the two rounds of paper mail. ECF No. 160-1 at 25.

Notice contained information on how to object to and be excluded from the settlement and provided the forty-two-day deadline. Id. The notice also provided the terms of the Settlement Agreement and information that class counsel intended to seek one-third of the settlement fund as attorney's fees, reimbursement of expenses, and service awards for the named plaintiffs in the amount of $15,000 each. ECF No. 155-6 at 9. As the notice was successfully distributed to the class members and informed them of the Settlement terms and their options in connection to the settlement proceedings, notice was adequate and conformed to the requirements of Rule 23(e)(1).

II. Attorney's Fees, Expenses, and Service Awards

Class counsel seeks 33 and 1/3 percent of the settlement fund, a total of $6,666,000, in attorney's fees and reimbursement of a total of $2,809,371.74 in litigation costs and expenses. ECF No. 161-1 at 1. Class counsel also seeks a total of $45,000 ($15,000 each) as service awards for the named plaintiffs. Id.

A. Legal Standard

"In a certified class action, the Court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "Courts in this Circuit may utilize two methods in assessing the reasonableness of a requested fee: the lodestar method or the percentage method." In re Colgate-Palmolive Co. ERISA Litig., 36 F. Supp. 3d 344, 347 (S.D.N.Y. 2014) (citing Goldberger, 209 F.3d at 50). "Under the lodestar method, the Court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." Dupler, 705 F. Supp. 2d at 242. "Courts in their discretion may increase the lodestar by applying

a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys." Wal-Mart, 396 F.3d at 121. "Under the percentage method, courts set the fee at a percentage of the common fund established under the settlement agreement." Pearlman v. Cablevision Sys. Corp., No. 10 CV 4992, 2019 WL 3974358, at *3 (E.D.N.Y. Aug. 20, 2019) (citing Wal-Mart, 396 F.3d at 121). "Courts often use the lodestar figure as a "cross-check" to ensure the reasonableness of the percentage based fee." Id. (citing In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014)). Under either method, courts use the Goldberger factors to guide the analysis, inquiring into: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." 209 F.3d 43, 50 (2d Cir. 2000). In addition to attorney's fees, class counsel may recover "nontaxable costs." Fed. R. Civ. P. 23(h).

B. Attorney's Fees

Reasonable "attorney's fees from a common fund serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature." In re Veeco Instruments Inc. Sec. Litig., No. 5 MDL 1695, 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007). Additionally, both the NYGBL and NJCFA provide for the award of reasonable attorney's fees. NYGBL §§ 349, 350-e ("The court may award reasonable attorney's fees to a prevailing plaintiff."); NJCFA § 56:8-19 ("the court shall also award reasonable attorneys' fees"). "The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." Wal-Mart, 396 F.3d at 121 (internal quotation omitted). "To arrive at the proper percentage, the Court considers

the effort expended and the risks undertaken by plaintiffs' counsel and the results of those efforts, including the value of the benefits obtained for the class." Kindle v. Dejana, No. 14 CV 6784, 2018 WL 179079, at *5 (E.D.N.Y. Apr. 12, 2018). Indeed, "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" Torres v. Gristede's Operating Corp., 519 F. App'x 1, 5 (2d Cir. 2013) (summary order) (quoting Farrar v. Hobby, 506 U.S. 103, 114 (1992)).

Here, class counsel seeks $6,666,000, or one-third of the settlement fund, in attorney's fees. A percentage award of $33^{1}/_{3}$% is in line with fees awarded in common fund class action settlements of this magnitude and complexity. See e.g. In re Restasis, 22 WL 3043103, at *9 (granting one-third of the settlement amount for a total of $10,000,000 in attorney's fees in an antitrust class action settlement). "Courts have significant discretion in awarding attorney's fees." Chen, No. 15 CV 1347, 2021 WL 4487835, at *6 (E.D.N.Y. Oct. 1, 2021) (finding courts in this circuit routinely grant attorney's fees of 30% to 33.33%). The fee award must be based on a scrutiny of the unique circumstances of each case. McDaniel v. County of Schenectady, 595 F.3d 411, 426 (2d Cir. 2010); see Torres, 519 F. App'x at 5 (Upholding the award of an attorney's fee that deviated from the usual percentage because, "although the district court was permitted to cap the fee request at standard contingency-fee levels, it was not required to do so where, as here, it concluded that higher fees were reasonably incurred.).

The effort expended and the risks undertaken by class counsel as well as the value obtained for the class support an award of one-third the settlement fund. Simply put, class counsel worked long and hard to reach Settlement in this case. Defendants were not amenable to mediation until after the class was certified, fact discovery was complete, and plaintiffs served their expert reports at the merits phase of the litigation. ECF No. 155-2 ¶ 21. Litigation of this

matter has required persistent effort by class counsel, who successfully overcame Apple's motion to dismiss; moved for class certification, which included related Daubert motions; and withstood Apple's Rule 23(f) petition to the Second Circuit. ECF No. 160-2 at 5. Class counsel engaged in extensive discovery at both the class certification and merits stage, requiring review of highly technical language and data, taking and defending numerous depositions, and retaining experts. Id. at 5-6. The subject of the litigation also required extensive legal work from class counsel as this case involved the novel application of the New York General Business Law, the New Jersey Consumer Fraud Act, and consumer class action principles to smart phone updates, which required investment of significant resources in time and money at the contested Daubert briefing at the class certification stage. Id. at 7-8.

As a result of their efforts, class counsel was able to obtain a favorable settlement despite substantial risks. Litigation risk is measured at the time the case is filed. In re Glob. Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 467 (S.D.N.Y.). This action represented substantial risk for class counsel, given the technical nature of the claims and the related challenges of establishing and measuring damages, which resulted in sharply-contested and comprehensive expert reports. ECF No. 155-2 ¶¶ 20-22. Moreover, as counsel understood, complex class action litigation such as this may take years to conclude. Class counsel faced substantial economic risk, incurring over $2.8 million in expenses prosecuting the action over six years without any guarantee of compensation. ECF No. 161-1 at 12. See Pearlman, 2019 WL 3974358, at *4.

Just as the proof is in the pudding, the quality of class counsel's representation is evident in the Settlement. Plaintiffs faced substantial risks to establish not only liability, but damages. $20,000,000 is a substantial settlement amount, resulting in over $40 per valid claim for class members. In light of this, the first four Goldberger factors weigh heavily in favor of approving

class counsel's fee application. See In re Restasis, 2022 WL 3043103, at *9 (approving requested fees where class counsel diligently prosecuted a "complex, discovery-intensive, and expert-dependent action").

Apple opposes the attorney's fees sought.[7] Apple states that when the fees requested are added to the expenses, administrative costs, and service awards, approximately $9.8 million of the $20 million settlement fund is left for class members' claims. ECF No. 164 at 6 n.2. However, this fact alone does not make plaintiffs' request for fees unreasonable. See Torres, 519 F. App'x at 5 ("the $3.86 million total award of costs and fees here represents 52.2% of the entire $7.39 million recovered by plaintiffs. Such an award does not constitute an abuse of discretion"); Kassim v. City of Schenectady, 415 F.3d 246, 252 (2d Cir. 2005) ("we have repeatedly rejected the notion that a fee may be reduced merely because the fee would be disproportionate to the financial interest at stake in the litigation."). Class counsel's request for attorney's fees in the amount of one-third of the $20 million settlement fund was agreed to by the named plaintiffs, ECF Nos. 160-7 ¶ 9, 160-8 ¶ 9, 160-9 ¶ 9, and was disclosed in the notice to class members. ECF No. 155-6. No class members objected to the requested award of fees.

Finally, courts have recognized that fee awards in cases like this, enforcing consumer protection statutes, serve the purpose of encouraging "private attorney[s] general" to "vindicate[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980); see In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (explaining that

[7] Apple identifies that that class counsel's engagement letter included a request for 30% of a potential settlement. ECF Nos. 160-7 ¶ 9, 160-8 ¶ 9, 160-9 ¶ 9. However, the named plaintiffs subsequently agreed to a 33.33% attorney's fees award, id., and the settlement was negotiated on the request for one-third of the total Settlement, which the mediator supported as reasonable based on the complexity of the action and counsel's efforts on behalf of the class. ECF No. 160-6 ¶¶ 17.

fees "must …serve as an inducement for lawyers to make similar efforts in the future"). Thus, the Goldberger factors support awarding the requested fee.

The fee request is also supported by the lodestar cross-check. Class counsel represents that they expended 10,172.48 hours on this case, amounting to a lodestar of $5,896,792.50. ECF No. 160-2 ¶ 40; ECF No. 160-4 ¶¶ 5-6; ECF No. 160-5 ¶¶ 5-6. Based on the requested fee, the lodestar multiplier is 1.13, which is lower than multipliers in similar cases. See Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm., 504 F. Supp. 3d 265, 271 (S.D.N.Y. 2020) (holding 5.85 multiplier "is within the range of acceptable multipliers"); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 991 F. Supp. 2d 437, 447-48 (E.D.N.Y. 2014) (holding the lodestar multiplier of 3.41 is "comparable to multipliers in other large, complex cases"). Plaintiffs have submitted a summary of hours spent on this matter and affidavits supporting the rates of each attorney in support of the lodestar cross-check. ECF Nos. 160-2, 160-4, 160-5. Accordingly, the lodestar cross-check supports an award of one-third the settlement fund. See Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000) ("where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.").

In addition to attorney's fees, the Court grants class counsel's request for litigation expenses in the amount of $2,809,371. See Chen, 2021 WL 4487835, at *7 (awarding expenses with are clearly necessary to the action.). A significant portion of counsel's expenses, $2.56 million, were incurred "as a result of the expert-driven nature of this case." In re Restasis, 2022 WL 3043103, at *9 (awarding $3.1 million in expenses for expert fees). The remaining expenses include primarily computer charges, depositions, and travel expenses, ECF No. 160-4 at 5, which are necessary to litigating the action and regularly reimbursed in this district. Pearlman, 2019

WL 3974358, at *7 ("Costs may include items such as 'photocopying, travel, telephone costs, witness fees, … and costs of necessary depositions."); In re GSE Bonds Antitrust Litig., No. 19 CV 1704, 2020 WL 3250593, at *6 (S.D.N.Y. June 16, 2020) (awarding "expenses for travel and meal costs, copying costs, and online research"). In support of counsel's expenses, they submit attorney declarations that the unreimbursed expenses are reflected in the books maintained by the firms. Accordingly, the Court grants plaintiffs' request for litigation expenses in the amount of $2,809,371. Pearlman, 2019 WL 3974358, at *7 ("The Attorney Declarations … provide the details of the unreimbursed expenses incurred by the attorneys/firms representing the Plaintiffs in this action. The declarations and records show that those expenses were incurred on behalf of the Class and that they are reflected on the books and records maintained by those firms."); In re KeySpan Corp. Sec. Litig., No. 01 CV 5852, 2005 WL 3093399, at *19 (E.D.N.Y. Sept. 30, 2005) ("Since district courts are not required to engage in the tedious nit-picking of requested fees in common fund cases, scrutiny of requested expenses, which ordinarily comprise a fraction of fees, is even less necessary.") (quoting Goldberger, 209 F.3d at 51) (internal citation omitted).

Finally, class counsel requests that the Court approve service awards to the named plaintiffs for their time and effort committed to the action in the amount of $15,000 each. ECF No. 161-1 at 24. "Service awards are common in class-action cases. They are 'important to compensate plaintiffs for the time and effort expended in assisting the prosecution of litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiff." Pearlman, 2019 WL 3974358, at *7 (quoting Khait v. Whirlpool Corp., No. 6 CV 6381, 2010 WL 2025106, at *9 (E.D.N.Y. Jan. 20, 2010) (awarding $15,000 service awards to each of five named plaintiffs). Class counsel's declarations attest that plaintiffs have devoted a substantial amount of time to this case, preparing for depositions, responding to Apple's

discovery requests,[8] reviewing materials, and corresponding with class counsel over the course of six years. ECF Nos. 160-2 ¶ 47, 160-7, 160-8, 160-9. These service awards were negotiated with the rest of the Settlement under the mediator's supervision, "which carries a presumption that the amounts are reasonable and the result of arm's-length negotiations." Pearlman, 2019 WL 3974358, at *7. Plaintiffs' stamina in maintaining this litigation, despite the risks of no recovery should be compensated, and the private enforcement of consumer protection statutes should be encouraged. See In re Restasis, 22 WL 3043103, at 10. I am satisfied that plaintiffs' work during the litigation benefitted the class as a whole. Class counsel's request for service awards is granted.

CONCLUSION

Accordingly, the settlement class is certified under Rule 23(a). The Settlement is fair, reasonable, and adequate under Rule 23(e) and the Grinnell factors. Notice was consistent with Rule 23(e)(1). Plaintiffs' instant motion for final approval of the settlement is therefore granted. Likewise, plaintiffs' motion for attorney's fees, reimbursement of litigation expenses, and service awards to the plaintiffs is also granted. I approve the following payments for distribution from the settlement fund: (1) attorney's fees of $6,666,000; (2) reimbursement of class counsel's expenses of $2,809,371.74; and (3) service awards of $15,000 to each of the named plaintiffs, for a total of $45,000. The Settlement shall be consummated in accordance with its terms as set forth in the Settlement Agreement and the Attached Order.

SO ORDERED.

/S/
LOIS BLOOM
United States Magistrate Judge

Dated: October 4, 2022
Brooklyn, New York

[8] Plaintiffs were required to collect information from third parties, provide supplemental responses, and provide personal information to Apple. ECF No. 171 at 19. Ultimately, one plaintiff dropped out of the case due to the burden of the discovery demands. See ECF No. 51 at 10:6-8.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
CHAIM LERMAN, ROSLYN WILLIAMS, and JAMES VORRASI, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

APPLE INC.,

Defendant.
----------X

MEMORANDUM AND ORDER
15-CV-7381 (LB)

ORDER GRANTING APPROVAL OF CLASS ACTION SETTLEMENT; AWARDING ATTORNEYS' FEES, EXPENSES, AND NAMED PLAINTIFF SERVICE AWARDS; AND ENTERING FINAL JUDGMENT

WHEREAS, the Court held a Final Approval Hearing to consider approval of this class action settlement on September 22, 2022. The Court has considered the Settlement Agreement (ECF No. 155-3), the record in the Action, and the Parties' arguments and authorities.

NOW THEREFORE IT IS HEREBY ORDERED, AND JUDGMENT IS HEREBY ENTERED, AS FOLLOWS:

1. For purposes of this Order, the Court adopts the terms and definitions set forth in the Settlement Agreement.

2. The Court has jurisdiction over the subject matter of the Action, the Named Plaintiffs, the Settlement Class Members, and Defendant Apple Inc.

NOTICE

3. The Court finds that the Class Notice constituted the best notice practicable under the circumstances to all Settlement Class Members and fully complied with the requirements of Federal Rule of Civil Procedure 23 and due process.

CERTIFICATION OF THE SETTLEMENT CLASS

4. The Court finds that, for purposes of the Settlement only, all prerequisites for maintenance of a class action set forth in Federal Rule of Civil Procedure 23(a) and (b)(3) are satisfied. The Court certifies the following Settlement Class for purposes of Settlement only:

> All individuals and entities in New York and New Jersey who currently own or have owned an iPhone 4S that was updated to any version of iOS 9 from any version of iOS 7 or iOS 8.

For purposes of this definition, "own" shall include all individuals or entities that owned, purchased, leased, or otherwise received an eligible device, and individuals who otherwise used an eligible device for personal, work, or any other purposes. Excluded from the Settlement Class are (a) directors, officers, and employees of Apple or its subsidiaries and affiliated companies, as well as Apple's legal representatives, heirs, successors, or assigns; (b) the Court, the Court staff, as well as any appellate court to which this matter is ever assigned and its staff; (c) Defense Counsel, as well as their immediate family members, legal representatives, heirs, successors, or assigns; and (d) any other individuals whose claims already have been adjudicated to a final judgment; and (e) those individuals who timely and validly request exclusion.

5. Pursuant to Federal Rule of Civil Procedure 23(e), the Court hereby grants final approval of the Settlement and finds that the Settlement is fair, reasonable, and adequate and in the best interests of the Settlement Class Members based on the following factors, among other things:

a. There is no fraud or collusion underlying this Settlement, and it was reached as a result of extensive arm's-length negotiations, occurring over the course of a full day mediation session with a respected mediator and former federal Magistrate Judge, warranting a presumption in favor of approval.

b. The complexity, expense, and likely duration of the litigation favor settlement—which provides meaningful benefits on a much shorter time frame than otherwise possible—on behalf of the Settlement Class Members. Based on the stage of the proceedings and the amount of investigation and discovery completed, the Parties have developed a sufficient factual record to evaluate their chances of success at trial and the proposed Settlement.

c. The support of Class Counsel and the Named Plaintiffs, who have participated in this litigation and evaluated the proposed Settlement, also favor final approval.

d. The Settlement provides meaningful relief to the Class, including cash relief, and certainly falls within the range of possible recoveries by the Settlement Class Members.

RELEASES

6. As of the Effective Date, the Named Plaintiffs and each of the members of the Settlement Class who have not timely requested exclusion from the Settlement Class, and each of their respective successors, assigns, legatees, heirs, and personal representatives, will be deemed to have released the Released Parties of all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known claims or unknown claims, in law or equity, fixed or contingent, which they have or may have arising out of or relating to any of the acts, omissions, or other conduct that was or could have been alleged or otherwise referred to in this Action, relating to iOS 9, or any version thereof, on the iPhone 4S, including, but not limited to, any and all acts, omissions, or other conduct asserting claims (including, without limitation, any unknown claims) arising out of, relating to, or in connection with, the defense, settlement or resolution of the Action.

7. As of the Effective Date, the Settlement Class Members and the Named Plaintiffs shall have fully, finally, and forever released, relinquished, and discharged all claims of abuse of process, malicious prosecution, violations of Federal Rule of Civil Procedure 11, and any other claims arising out of the defense of the Action that are known to the Settlement Class Members and/or the Named Plaintiffs as of the Effective Date, against Apple's attorneys, legal representatives, and advisors, including Defense Counsel. Notwithstanding the foregoing, this release shall not include any future claims relating to the continued enforcement of the Settlement, the Protective Orders, and all orders construing the Stipulated Protective Order, including but not limited to ECF No. 46. This release does not constitute a general release.

8. After entering into this Settlement, the Settlement Class Members and/or Named Plaintiffs may discover facts other than, different from, or in addition to, those that they know or believe to be true with respect to the claims released by this Settlement, but they intend to release fully, finally and forever any and all such claims. The Settlement Class Members and Named Plaintiffs expressly agree that, upon the Effective Date, they waive and forever release any and all provisions, rights, and benefits conferred by: Section 1542 of the California Civil Code; and any law of any state, territory, or possession of the United States or principle of common law, which is similar, comparable, or equivalent to Section 1542 of the California Civil Code.

9. As of the Effective Date, the Released Parties shall have fully, finally, and forever released, relinquished, and discharged all claims of abuse of process, malicious prosecution, violations of Federal Rule of Civil Procedure 11, and any other claims arising out of the initiation, prosecution, or settlement of the Action, including both known claims and unknown claims, against the Named Plaintiffs and Class Counsel. Notwithstanding the foregoing, this release shall not include any future claims relating to the continued enforcement of the Settlement, the

Stipulated Protective Order, and all orders construing the Stipulated Protective Order, including but not limited to ECF No. 46. This release does not constitute a general release.

REQUESTS FOR EXCLUSION

10. The individuals identified in Exhibit 1 hereto timely and validly requested exclusion from the Settlement Class. These individuals shall not share in the monetary benefits of the Settlement, and this Order does not affect their legal rights to pursue any claims they may have against Apple.

ATTORNEY'S FEES AND NAMED PLAINTIFF SERVICE AWARDS

11. The Court finds that an award of attorney's fees in the amount of $6,666,000, and expenses in the amount of $2,809,371.74, to Class Counsel is fair and reasonable and therefore approves such award.

12. The Court finds that the payment of Named Plaintiff Service Awards is fair and reasonable and therefore approves such payment as follows: $45,000.

OTHER PROVISIONS

13. The Action, and all claims asserted in the Action, is settled and dismissed on the merits with prejudice.

14. Payments to Settlement Class Members under the Settlement Agreement shall be made as outlined in the Settlement Agreement.

15. Consummation of the Settlement shall proceed as described in the Settlement Agreement, and the Court reserves jurisdiction over the subject matter and each Party to the Settlement with respect to the interpretation and implementation of the Settlement for all purposes, including enforcement of any of the terms thereof at the instance of any Party and resolution of any disputes that may arise relating to the implementation of the Settlement or this Order.

16. Without affecting the finality of this Order in any way, the Court shall retain jurisdiction over this Action, the Named Plaintiffs, the Settlement Class Members, and Apple to enforce the terms of the Settlement, the Court's order preliminarily certifying the Settlement Class (ECF No. 157), and this Order. In the event that any applications for relief are made, such applications shall be made to the Court. To avoid doubt, the Final Judgment applies to and is binding upon the Parties, the Settlement Class Members, and their respective heirs, successors, and assigns.

17. The Settlement and this Order are not admissions of liability or fault by Apple or the Released Parties, or a finding of the validity of any claims in the Actions or of any wrongdoing or violation of law by Apple or the Released Parties. To the extent permitted by law, neither this Order, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be offered as evidence or received in evidence in any pending or future civil, criminal, or administrative action or proceeding to establish any liability of, or admission by, the Released Parties. Notwithstanding the foregoing, nothing in this Order shall be interpreted to prohibit the use of this Order in a proceeding to consummate or enforce the Settlement or this Order, or to defend against the assertion of released claims in any other proceeding, or as otherwise required by law.

18. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, there is no just reason for delay in the entry of this Final Approval Order and Judgment and immediate entry by the Clerk of the Court is expressly directed.

NOW, THEREFORE, the Court hereby enters judgment in this matter pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED AND JUDGMENT IS ENTERED.

SO ORDERED.

Lois Bloom

LOIS BLOOM
United States Magistrate Judge

Dated: October 4, 2022
Brooklyn, New York

Exhibit 1

Valid Requests for Exclusion

1. Nicole Colamarino (ECF 160-3)
2. Susan Masluk (ECF 160-3)
3. Karen Araujo (ECF 160-3)
4. Gary Kevin (ECF 160-3)
5. Paul J. Damore (ECF 160-3)
6. Cristiano Capuzzi (ECF 160-3)
7. Elizabeth Fischi (ECF 171-3 p. 22)
8. Gloria Polacko (ECF 171-3 p. 24)