THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Chaim Lerman, individually and on behalf of others similarly situated, Plaintiffs, v. Apple Inc., Defendant.	:	15-cv-07381 (SJ) (LB)

DEFENDANT APPLE INC.'S STATEMENT IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

Defendant Apple Inc. "Apple" respectfully submits this statement in support of the plaintiffs' Motion for Preliminary Approval of Class Action Settlement (the "Motion"). (ECF No. 155.) While the Motion demonstrates that the proposed settlement is fair, reasonable, and adequate, Apple writes separately to emphasize the risks to the settlement class from a liability and class certification perspective had the case proceeded to trial, which further emphasizes the fairness of the proposed settlement.

The plaintiffs allege that they upgraded their iPhone 4S devices to iOS 9 as a result of Apple's supposedly false representation that iOS 9 enhanced the performance of the iPhone 4S. The plaintiffs assert that Apple's conduct violated the New Jersey Consumer Fraud Act and New York consumer protection statutes. As the plaintiffs acknowledge in their Motion, continuation of this litigation would pose "significant risks." (ECF No. 155-1 at 20.) Had the matter not settled, the parties would have had to complete merits expert discovery, brief summary judgment and related *Daubert* motions, brief Apple's motion to decertify the Class, prepare for trial, conduct a complex trial, and prosecute and defend appeals. Moreover, the plaintiffs recognize that even if they could prove liability at trial, which Apple believes they could not, they "would also risk

obtaining a recovery for the Class that is less than the Settlement amount, or even no recovery at all." (*Id.* at 2.)

Apple is confident that if this litigation were to continue, it would prevail on its defense of all of the plaintiffs' claims. Apple originally released the iPhone 4S in October 2011 running iOS 5. When Apple released iOS 9 four years later, Apple had stopped selling the iPhone 4S in the U.S. a year earlier. Nevertheless, Apple did not want to leave iPhone 4S users without important enhancements, including security protections, an extra hour of battery life, and numerous other improvements. As a result, in 2015, Apple delivered its customers a high-quality, fifth upgrade to the iPhone 4S's mobile operating system known as iOS 9—at a time when no other smartphone manufacturer provided anything near five years of continuous software support. Apple engineers worked very hard to deliver a great experience to iPhone 4S owners—*for free*. And they did.

The plaintiffs have been searching for a viable theory since the beginning of this case—without success. They survived a motion to dismiss by alleging that iOS 9 completely destroyed their iPhone 4Ss, but then they and their experts were forced to admit that iOS 9 did no such thing. A neutral expert also took videos showing that the phones work. And, if iOS 9 had destroyed everyone's iPhone, one would expect widespread complaints, but that did not occur. Only approximately 0.2% of the class—less than one percent—complained to Apple and only four named plaintiffs joined this lawsuit (one later withdrew).

The plaintiffs fell back to a theory that iOS 9 caused a massive slowdown in the performance of the iPhone 4S. The Court certified a class (which Apple strongly believes is subject to decertification should the case proceed), but it put the plaintiffs to the test. To prevail at trial, they would have to demonstrate that the "slowdown" was of such a magnitude, for every

class member, that it outweighed or rendered meaningless iOS 9's numerous enhancements and features. The plaintiffs could not do so, particularly using common proof.

As a result, while certification is appropriate for settlement, if the matter continued, Apple would have filed a decertification motion. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for a settlement-only class certification, a district court need not inquire whether the case if tried, would present intractable management problems . . . for the proposal is that there be no trial."); *accord In re Am. Int'l Grp. Inc. Sec. Litig.*, 689 F.3d 229, 239 (2d Cir. 2012) (same) and *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 51 (E.D.N.Y. 2019) ("consideration of problems that would occur in managing the class are relaxed in the settlement context"). While the Court had certified a class based upon the plaintiffs' proffers, there was a substantial risk that trial would have demonstrated that the plaintiffs could not prove their claims using common proof and individual issues would have predominated.

Moreover, Apple had strong arguments at summary judgment that it would have advanced if the case proceeded.

While Apple vigorously denies that it did anything wrong, it has agreed to resolve this case solely to avoid the expenses, uncertainties, delays, and other risks inherent in continued litigation. This proposed settlement was the product of extensive, arms-length negotiations facilitated by an experienced mediator, and the proposed settlement provides substantial, non-reversionary monetary compensation to the plaintiffs and the putative class through a claims-made settlement structure. Apple also agrees to certification of the proposed class for settlement purposes only. It reserves all objections to the continued certification for litigation purposes and does not consent to certification of the proposed class for any purpose other than to effectuate the settlement.

Finally, the parties have not agreed to any award of attorneys' fees and/or expenses, and instead they have agreed to submit this issue to the Court for decision. Apple expressly reserves its right to object to and oppose Class Counsel's request for attorneys' fees and/or expenses on all grounds.

Apple respectfully requests that the Court enter the Proposed Preliminary Approval Order. (ECF No. 155-8.) It reserves its right to respond to any objections and/or opposition briefs to the Motion.

Dated: May 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this day, May 3, 2022, a true and correct copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Keara M. Gordon
Keara M. Gordon