UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHAIM LERMAN, ROSLYN WILLIAMS, and JAMES VORRASI, individually and on behalf of others similarly situated, Plaintiffs, v. APPLE INC., Defendant.	Hon. Sterling Johnson, Jr. 15-cv-07381 (SJ) (LB)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Chaim Lerman, Roslyn Williams and James Vorrassi (collectively "Plaintiffs") respectfully submit this Memorandum of Law in support of their Unopposed Motion for Preliminary Approval of Class Action Settlement. Plaintiffs assert that Defendant Apple Inc. ("Apple" or the "Company") misrepresented how its iOS 9 operating system would perform on the iPhone 4S. They bring class action claims for false advertising under the New York General Business Law ("NYGBL") and the New Jersey Consumer Fraud Act ("NJCFA") based on Apple's representations that iOS 9 would enhance the performance of Plaintiffs' iPhone 4S devices when it allegedly slowed them down significantly. The proposed settlement of this action (the "Settlement") is the culmination of significant negotiations and debate regarding Plaintiffs' claims and was achieved through mediation before The Honorable Diane M. Welsh (Ret.). On May 3, 2022, the Parties entered into the Settlement Agreement and Release (the "Settlement Agreement," Exhibit 1 to the Declaration of Michael Grunfeld in Support of Plaintiffs' Motion for Preliminary Approval ("Grunfeld Decl.")).[1]

After over six years of hard-fought litigation, counsel recognize the substantial risks the Parties would face if the action progressed. The Parties have a comprehensive understanding of the strengths and weaknesses of their positions, as they have litigated Apple's Motion to Dismiss, Plaintiffs' Motion for Class Certification, and Apple's Rule 23(f) Petition, and have engaged in extensive discovery at both the class certification and merits stages of this action. Discovery in this case has included over 48,000 documents that Apple produced spanning over 539,000 pages, over 15 depositions (including of Plaintiffs, 11 Apple employees, and the Parties' class certification experts), expert reports totaling over 770 pages, and three motions to compel the

[1] Terms not defined herein have the same meaning as in the Settlement Agreement.

production of documents or information. The Settlement is the result of vigorous advocacy and arms'-length negotiations by counsel for all parties, who are experienced in complex class actions and litigation involving claims of false and deceptive advertising and unfair business practices. *See* Grunfeld Decl. ¶ 1.

The Settlement provides significant economic consideration to the Settlement Class: $20 million to resolve this litigation. Under the terms of the Settlement, class members who submit valid claims will receive $15 per eligible iPhone 4S device, which may vary on a pro rata basis depending on how many valid claims are submitted. This is a favorable result because Apple argued throughout the litigation that even if Plaintiffs succeeded in proving their claims, which Apple vigorously contested, actual damages as measured by the secondary market price did not exceed $15 per device.

On the other hand, if the Settlement is not approved, the Parties would resume complex, costly, and time-consuming litigation. The parties would need to complete merits expert discovery, brief summary judgment and related *Daubert* briefing, brief Apple's contemplated motion to decertify the Class, prepare for trial, conduct a complex trial, and prosecute appeals. These litigation efforts would be costly, require significant judicial oversight, and take a substantial amount of time. Plaintiffs would also risk obtaining a recovery for the Class that is less than the Settlement amount, or even no recovery at all. The Settlement allows the Parties to avoid the costs, delay, and risk of continuing to litigate this action.

Preliminary approval "requires only an 'initial evaluation' of the fairness of the proposed settlement" that supports "submit[ting] the [settlement] proposal to class members and hold[ing] a full-scale hearing as to its fairness."' *Victoria Perez v. Allstate Ins. Co.*, 2019 WL 1568398 at *1 (E.D.N.Y. Mar. 29, 2019). Based on an informed evaluation of the facts and governing legal

principles, and their recognition of the substantial risk and expense of continued litigation, the Parties respectfully submit that the proposed Settlement is fair, reasonable, and adequate under Rule 23, for the reasons explained fully below.

II. BACKGROUND

A. Summary of the Litigation.

Apple is a manufacturer and retailer of iPhones and its corresponding iOS operating system. Plaintiffs represent a class of consumers in New York and New Jersey that updated their iPhone 4S devices from Apple's iOS 7 or iOS 8 operating system to iOS 9 and allege that they subsequently suffered decreased performance on their devices. On December 29, 2015, the initial class action complaint in this matter was filed by Plaintiff Chaim Lerman. On March 28, 2016, Plaintiffs collectively filed the operative Complaint ("Complaint") in this action alleging that the Class was harmed when consumers downloaded iOS 9 onto their iPhone 4S devices after being exposed to Apple's allegedly false description of the new operating system. Plaintiffs contend that Apple misrepresented that iOS 9 was compatible with the iPhone 4S and that it would improve or "enhance performance" for its customers that downloaded the software update. Instead, Plaintiffs contend, iOS 9 significantly slowed down the performance of their iPhone 4S devices.

As described more fully in the Grunfeld Declaration, this litigation has been pending for more than six years and involves complex factual and legal issues. The Parties have investigated the facts and analyzed the relevant legal issues regarding the claims and defenses asserted in this action through briefing and decisions on Apple's Motion to Dismiss, Plaintiffs' Motion for Class Certification and related *Daubert* briefing, Apple's Rule 23(f) petition to the Second Circuit Court of Appeals, and extensive facts and expert discovery at the class certification and merits phases of this litigation. *See* Grunfeld Decl. ¶¶ 11-17.

B. Settlement Negotiations and Mediation

Following service of Plaintiffs' merits expert reports, and after more than six years of hard-fought litigation, the Parties entered mediation to explore whether they could resolve this action. The Parties engaged in a full day mediation on February 16, 2022, before the Honorable Diane M. Welsh (Ret.). Following significant negotiations and debate regarding the veracity of Plaintiffs' claims, the Parties reached a Settlement Agreement and executed a Settlement Term Sheet. *See* Grunfeld Decl. ¶ 22.

III. SUMMARY OF THE SETTLEMENT

A. The Settlement Class

On October 6, 2020, the Court granted Plaintiffs' Motion for Class Certification and certified the following classes for monetary relief only (ECF No. 127, the "Class Certification Order"): all individuals and entities in New York (Class One) and New Jersey (Class Two) 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.

Under the terms of the Settlement, the Settling Parties agreed to specify the definition of the Settlement Classes as follows:

> 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.

This definition of the Settlement Class is the same as how the Court defined the Class in the Class Certification Order, with the only difference being additional details in the Settlement

Agreement that seek to further define the Classes for settlement purposes in terms of who is excluded from the Class and what it means to "own" an iPhone 4S.

For purposes of the Settlement Class, the term "own" shall include all individuals or entities that owned, purchased, leased, or otherwise received an iPhone 4S, and individuals who otherwise used an iPhone 4S for personal, work, or any other purposes. *See* Settlement Agreement Exhibit F (Preliminary Approval Order) at ¶4. 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; (d) any other individuals whose claims already have been adjudicated to a final judgment; and (e) those individuals who timely and validly request exclusion. Settlement Agreement Section 1.34.

B. The Settlement Consideration and Release of Claims, Anticipated Class Recovery, and Potential Class Recovery

The Settlement, as described more fully in the Settlement Agreement, 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. Under the terms of the Settlement, members of the Settlement Class who submit a declaration under the penalty of perjury that, to the best of their knowledge, (1) they downloaded iOS 9, or any version thereof, onto their iPhone 4S; (2) they lived in New York or New Jersey at the time that they first downloaded any version of iOS 9; and (3) their iPhone 4S experienced a significant decline in performance as a result, are entitled to a payment of $15 per applicable device (that may be pro rated). *See* Settlement Agreement at Section 6.3.

If the total amount of valid claims submitted by members of the Settlement Class results in an amount below the Net Settlement Amount, the amount per device will increase on a pro rata

basis, up to a cap of $150 per device.[2] *See* Settlement Agreement at Section 5.3.1. If the total amount of valid claims submitted by members of the Settlement Class exceeds the Net Settlement Amount, the value of each valid claim (per applicable device) will be decreased on a pro rata basis. *Id.* at Section 5.2. Additionally, if multiple Settlement Class Members submit Claims pertaining to the same eligible device, the payment amount for that device shall be divided equally among those submitting Approved Claims regarding that particular device. *Id.* at Section 5.1. If the amount does not reach the Net Settlement Amount following the pro rata adjustment described herein, the remaining Residual shall be distributed to the cy *pres* recipient to be selected by the Parties before a hearing on final approval and approved by the Court. *Id.* at Section 5.3.2.

In making this Settlement, Class Counsel considered the risks of going to trial, including the possibility that a trial could result in a smaller or zero recovery for the Class, the time and resources that would be expended by the Parties and the Court, and the possibility of delay caused by an appeal if Plaintiffs did prevail.

C. Notice to the Settlement Class

The Parties have negotiated and agreed upon a notice program which provides the best practicable notice under the circumstances. Within thirty (30) days of the Court's entry of the Preliminary Approval Order, Apple agrees to provide the Settlement Administrator with the following information for each Settlement Class Member: (1) names, (2) e-mail addresses, (3) mailing addresses (where available), and (4) serial numbers (where available). No later than thirty (30) days after receipt of the Settlement Class contact information from Apple, the Settlement Administrator shall disseminate the appropriate notice by either (1) e-mail to the last known e-

[2] Section 1.20 of the Settlement Agreement provides: "'Net Settlement Amount' means the Gross Settlement Amount, less any amounts paid for Class Counsel's Attorneys' Fees and Expenses, administrative and notice costs, any Named Plaintiff Service Awards, and any other costs associated with resolving the claims asserted against Apple."

mail address of the Class Member; or (2) mail to the last known postal address of the Class Member, if (i) the Class Member did not provide an e-mail address or (ii) the e-mail is undeliverable. *See* Settlement Agreement at Section 6.2.3.

Additionally, the Settlement Administrator will create and maintain a website, which will provide, among other things, a copy of the Class Notice, together with the Claim Form, the Settlement Agreement, the Motion for Preliminary Approval and associated papers, and Court orders pertaining to the Settlement. The Settlement Website will also have copies of the motions for Final Approval and Final Judgment, Attorneys' Fees and Expenses, and Named Plaintiff Service Awards after those motions have been filed with the Court. In addition, the Settlement Website will include a section for frequently asked questions and procedural information regarding the status of the Court-approval process, such as an announcement when the Final Approval Hearing is scheduled, deadlines for opting out and objecting, when the Final Order and Judgment has been entered, and when the Effective Date is expected or has been reached. Also prior to the Settlement Administrator's dissemination of the notice, the Settlement Administrator shall set up and operate a case-specific toll-free telephone number that will have recorded information answering frequently asked questions about certain terms of the Settlement Agreement, including, but not limited to, the claim process and instructions about how to request a Claim Form, Class Notice, and/or Summary Notice. *See* Settlement Agreement at Section 6.2.

The Settlement Administrator will also be responsible for determining whether a submitted Claim Form meets the requirements set forth in the Settlement Agreement. It will use best practices and reasonable efforts and means to identify and reject duplicate and/or fraudulent claims. This will ensure each member of the Settlement Class with valid claims receive the full reward they are entitled to. *See* Settlement Agreement at Section 6.7.

IV. ARGUMENT

A. Conditional Class Certification of the Settlement Class is Warranted

Before granting preliminary approval of a class action settlement, the Court should determine that the proposed Settlement Class is a proper class for settlement purposes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006).

Here, the Court already certified the Class described in its Class Certification Order. ECF No. 127. The proposed Settlement Class is entirely consistent with the Class that has already been certified, with the only difference being that the description of the Settlement Class adds more detail to set out who is excluded from the Class and what it means to "own" an iPhone 4S. *See supra* at Section III.A. (citing Settlement Agreement Section 1.34 and Exhibit F (Preliminary Approval Order) ¶ 4). The individuals excluded from the Class are the standard types of parties excluded from participating in class action settlements because of their personal involvement in the litigation. Similarly, the definition of the term "own" that the Settlement provides is a common-sense explanation of the plain meaning of the term. These clarifications of the Class definition would not alter in any way the Court's rigorous analysis in its Class Certification Order approving of the Class that Plaintiffs proposed earlier in this litigation. The Court should therefore conditionally certify the Settlement Class.

B. The Court Should Preliminarily Approve the Settlement

The Court reviews proposed class action settlements in two stages. Preliminary approval is "the first step in the settlement process, through which the district [court] determines 'whether notice of the proposed settlement pursuant to Rule 23(e) should be given to class members . . . and an evidentiary hearing scheduled to determine the fairness and adequacy of the settlement.'" *Chin v. RCN Corp.*, 2010 WL 1257586 at *2 (S.D.N.Y. Mar. 12, 2010) (internal citation omitted).

"Fairness is determined upon review of both the terms of the settlement and the negotiating process that led to such agreement. *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Id.*; *see also Victoria Perez*, 2019 WL 1568398 at *1 (approving settlement that was "the result of extensive arms'-length negotiations by counsel).

Preliminary approval "requires only an 'initial evaluation' of the fairness of the proposed settlement" that supports "submit[ting] the [settlement] proposal to class members and hold[ing] a full-scale hearing as to its fairness."' *Victoria Perez*, 2019 WL 1568398 at *1; *see also Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 179 (S.D.N.Y. 2014) (same). There is a "strong judicial policy in favor of settlements, particularly in the class context" and "compromise" 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); *see also Ortega v. Uber Technologies, Inc.*, 2018 WL 4190799 at *2 (E.D.N.Y. May 4, 2018) ("In evaluating the substantive fairness of the terms of a proposed settlement for preliminary approval, the court should give weight to the parties' consensual decision to settle class action cases because they and their counsel are in unique positions to assess potential risks."); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 33 (E.D.N.Y. 2019) (applying amended Rule 23 but noting "Courts should remain mindful, however, of the 'strong policy in favor of settlement, particularly in the class action context'" (citation omitted)). Indeed, "absent evidence of fraud or overreaching, courts consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901 at *5 (S.D.N.Y. Dec. 18, 2019) (citation omitted). Notice to a proposed class should be directed by the Court "if giving notice is justified by the parties' showing

that the court will likely be able to" approve the settlement under Rule 23(e)(2) and certify the class for purposes of settlement. Fed R. Civ. P. 23(e)(1).

In deciding if a proposed settlement is "fair, reasonable and adequate," the amended Rule 23(e)(2) requires that the Court 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; (iii) the terms of any proposed award of attorneys' 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.

See also In re Payment Card Interchange 330 F.R.D. at 30 n.24 (holding the Court need not "exhaustively consider the factors applicable to final approval" since "[c]ritical information as to whether a proposed settlement is fair, reasonable, and adequate, will be obtained through the notice and opt-out process, and the final fairness hearing).

Furthermore, the Second Circuit has articulated a "fair, reasonable, and adequate" standard that effectively requires parties to show that a settlement is both procedurally and substantively fair. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013). This Court has routinely recognized that the amendment to Rule 23(e) supplements rather than displaces the prior Second Circuit jurisprudence. *See Chen v. XpresSpa at Terminal 4 JFK LLC*, 2021 WL 4487835 at *5 (E.D.N.Y. Oct. 1, 2021) (finding that the Rule 23(e) factors supplement, rather than displace, the Second Circuit's *Grinnell* factors); *see also In re Grana y Montero S.A.A. Sec. Litig.*, 2021 WL 4173684 at *15 (E.D.N.Y. Aug. 13, 2021), *report and recommendation adopted*, 2021 WL 4173170 (E.D.N.Y. Sept. 14, 2021); and *Mikhlin v. Oasmia Pharm. AB*, 2021 WL 1259559 at *3 (E.D.N.Y. Jan. 6, 2021).

In determining whether the substantive terms of a settlement are fair, reasonable, and adequate, courts in the Second Circuit routinely look to the *Grinnell* factors. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). The *Grinnell* factors, some of which overlap with the Rule 23(e)(2) factors, are as follows:

> (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.[3]

In re Lehman Bros. Sec. & ERISA Litig., 2012 WL 1920543 at *2 (S.D.N.Y. May 24, 2012) (applying the *Grinnell* factors to determine whether a settlement was substantively fair, reasonable, and adequate). "Not every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004).

C. The Proposed Settlement Meets the Requirements of Rule 23(e)(2)

The Settlement will satisfy the Rule 23(e)(2) factors for the following reasons.

1. Plaintiffs and Class Counsel Have Adequately Represented the Class

Plaintiffs are similarly situated to all Class Members in that they all downloaded iOS 9 onto their iPhone 4S devices. Indeed, the Court has already certified the Class in this action with Plaintiffs as the Class Representatives. ECF No. 127. The Court has therefore already found that Plaintiffs have no conflicts of interest with the remainder of the Class and share the Class's interest

[3] At the preliminary approval stage, *Grinnell* Factor Two is not analyzed as Class Members are provided with notice after this stage. *See In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904 at *2 (S.D.N.Y. 2008) (finding consideration of the second *Grinnell* factor as premature where notice of the settlement had not been sent out).

in obtaining recovery for themselves and others who were impacted by the performance that iOS 9 had on the iPhone 4S. Moreover, Plaintiffs were extensively involved in litigating this action, including by reviewing the key case materials, providing responses to Apple's discovery requests, being deposed for a full day for each Plaintiff, and communicating extensively with Class Counsel regarding the status of the case. *See* Grunfeld Decl. ¶ 27. Plaintiffs fulfilled their responsibility of advancing and protecting the interests of the Class and evaluating the proposed Settlement to determine that it is in the best interests of the Settlement Class.

Class Counsel has also more than adequately represented the Settlement Class. In *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. at 33, the Court stated: "a court reviewing a proposed settlement must pay close attention to the negotiating process, to ensure that . . . plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." A district court "must evaluate adequacy of representation by considering . . . whether class counsel is qualified, experienced, and generally able to conduct the litigation." *Id.* Class Counsel surpasses this standard because they investigated the claims at issue, engaged in hard-fought litigation for over six years, participated in mediation before the Honorable Diane M. Welsh (Ret.), and conducted vigorous settlement negotiations. They therefore have sufficiently represented the Class in this case.

Furthermore, Class Counsel is highly experienced in complex class-action litigation. Pomerantz LLP ("Pomerantz") and Bronstein, Gewirtz & Grossman, LLC have extensive experience and a stellar reputation in class actions and consumer litigation. *See* Grunfeld Decl., Ex. 2 and 3; *see, e.g.*, *In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 362 (S.D.N.Y. 2016) ("[O]n the basis not only of [the Firm's] prior experience but also the Court's observation of its advocacy over the many months since it was appointed lead counsel, the Court concludes that Pomerantz,

the proposed class counsel, is qualified, experienced and able to conduct the litigation."); *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354 at *6 (E.D.N.Y. June 24, 2010) ("The court also notes that, throughout this litigation, it has been impressed by [Pomerantz's] acumen and diligence. The briefing has been thorough, clear, and convincing, and as far as the court can tell, [Pomerantz] has not taken short cuts or relaxed its efforts at any stage of the litigation."). Class Counsel have recovered substantial amounts of money for clients and class members in many complex class actions. Based on Class Counsel's experience, and their work in skillfully litigating this matter through class certification and extensive discovery, the Court should conclude that Class Counsel has satisfied the adequacy requirements under Rule 23(e)(2).

2. The Settlement was Reached After Arm's Length Negotiations and Private Mediation

There is a "presumption of fairness, reasonableness, and adequacy as to the settlement where a 'class settlement is reached in arm's length negotiations between experienced, capable counsel after meaningful discovery.'" *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (citation omitted). The Settlement here was negotiated at arm's length following lengthy, hard-fought litigation and a mediation session with the Honorable Diane M. Welsh (Ret.). The Parties did not agree to enter mediation until over six years into the litigation, after the Class was certified, fact discovery was complete, and Plaintiffs served their expert reports at the merits phase of the litigation. *See* Grunfeld Decl. ¶ 21. Courts hold that a settlement achieved through mediation is procedurally fair. *See e.g., Elkind v. Revlon Consumer Prod. Corp.*, 2017 WL 9480894 at *17 (E.D.N.Y. Mar. 9, 2017) (recognizing that participation by a "neutral third party supports a finding that the agreement is non-collusive"). Plaintiffs also sought and obtained through discovery extensive information regarding the scope of the Class's claims and damages. *See* Grunfeld Decl. ¶ 17. Finally, the parties did not negotiate the amount of attorneys' fees and

the overarching terms of the Settlement were resolved without any agreement on any attorneys' fees, which Class Counsel will apply for in advance of the Final Approval Hearing. *See* Grunfeld Decl. ¶ 29.

3. The Substantial Monetary Relief Provided for the Settlement Class is Adequate

a. The Costs, Risks, and Delay of Trial and Appeal Weigh in Favor of Preliminary Approval

For the reasons set forth in the discussion of *Grinnell* factors 1, 4, 5 and 7 below, the costs, risks, and delay of trial and appeal weigh in favor of preliminary approval.

b. The Effectiveness of Any Proposed Method of Distributing Relief to the Settlement Class and Processing Class-Member Claims Weighs in Favor of Preliminary Approval

As explained by the 2018 Committee Notes, a "claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." The proposed method of processing claims here strikes that delicate balance and weighs in favor of preliminary approval.

The Parties recommend a very experienced Settlement Administrator, JND Legal Administration ("JND"), who is highly skilled in processing class claims and distributing the proceeds to Claimants. As described above, the Settlement Agreement provides that Apple will produce the names, e-mail addresses, addresses (if available), and device serial numbers (if available) of members of the Settlement Class to the Settlement Administrator. The Settlement Administrator will then make payments to all Claimants who submit a valid Claim Form. *See supra* Section III.C. The Settlement Administrator will exercise all usual and customary steps to prevent fraud and abuse and take reasonable steps to prevent fraud and abuse in the claims process *See* Settlement Agreement Ex. G.

c. The Terms of the Proposed Award of Attorney's Fees Weigh in Favor of Preliminary Approval

The proposed terms of Class Counsel's attorneys' fees and expenses are fair and support preliminary approval because they must be approved by the Court following review by the Settlement Class. No later than thirty-five (35) days prior to the Final Approval Hearing, Class Counsel will submit papers in support of the Settlement, as well as the request for the awards of attorney fees, expenses, and Plaintiffs' service awards. Settlement Agreement at Section 8.1. Those papers will explain why the Settlement should be approved, as well as Class Counsel's efforts on behalf of the Class (including the time and rates of each attorney and paralegal who contributed to the outcome), and the expenses they have incurred to prosecute this action. *See* Grunfeld Decl. ¶ 29.

Class Members will therefore have adequate time to review the motion for attorneys' fees and expenses, and frame any objections they may have, prior to the deadline for objections so they may be addressed at the Final Approval Hearing. Moreover, approval of the fee award is separate from approval of the rest of the Settlement. Settlement Agreement Section 8.8. This factor therefore weighs in favor or preliminary approval.

d. Agreements Required to be Identified under Rule 23(e)(3)

Apart from the Settlement Agreement and other materials associated with the negotiation of the Settlement (and disclosed herein), there are no additional agreements between the Parties or with others made in connection with the Settlement. *See* Grunfeld Decl. ¶ 30. Accordingly, this factor weighs in favor of preliminary approval of the Settlement.

4. The Settlement Treats Class Members Equitably Relative to Each Other

The 2018 Committee Notes to Rule 23 explain that this factor "calls attention to a concern that may apply to some class action settlements-inequitable treatment of some class members vis-

a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed R. Civ. P. 23(e)(2)(D), advisory committee's note to 2018 amendment.

None of the concerns raised by the 2018 Committee Notes are present here. Each member of the Settlement Class is treated in the same manner with respect to the claims they are releasing, their eligibility for a reward, and the size of their reward per applicable device based on the amount of claims submitted. As such, this factor weighs in favor of preliminary approval of the Settlement.

D. The Proposed Settlement Also Satisfies the *Grinnell* Factors

The Settlement satisfies the *Grinnell* factors that Courts in the Second Circuit use to analyze the fairness of settlements.

1. The Complexity, Expense, and Likely Duration of Litigation (Grinnell Factor No. 1)

Consumer class action lawsuits, like this action, are complex, expensive, and lengthy. *See e.g., Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010) (finding the complexity, expense and likely duration of class action litigation weigh in favor of Settlement approval). Should the Court decline to approve the Settlement, litigation would resume. As the discussion of the action's procedural history above shows, litigation to date, which has spanned over six years, has been costly and complicated; further litigation would add additional cost, complexity, and time to this action. *See* Grunfeld Decl. ¶¶ 18-19. Such litigation would include the completion of merits expert discovery (including the completion of Apple's expert reports, Plaintiffs' reply expert reports, and expert depositions), summary judgment and related *Daubert* briefing, Apple's contemplated motion to decertify the Class, trial preparation, and a complex trial. *Id.* Each step towards trial would be subject to Apple's vigorous objections. *Id.* Even if the case

were to proceed to a judgment on the merits, any final judgment, as well as the Court's earlier rulings, would likely be appealed, which would take significant time and resources. These litigation efforts would be costly to all parties and would require significant judicial oversight. *Id*. This *Grinnell* factor therefore weighs in favor of preliminary approval.

2. The Stage of the Proceedings and the Amount of Discovery Completed (Grinnell Factor No. 3)

Under this factor, "[t]he pertinent question is whether counsel had an adequate appreciation of the merits before negotiating." *Torres v. Gristede's Oper. Corp.*, 2010 WL 5507892 at *5 (S.D.N.Y. Dec. 21, 2010) (citation omitted). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . but an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (citation omitted).

Here, as discussed above, the Parties have conducted substantial discovery prior to Settlement and have fully briefed, and received decisions on, Apple's Motion to Dismiss, Plaintiffs' Motion for Class Certification and related *Daubert* motions, and Apple's Rule 23(f) Petition. Over the course of more than six years of hard-fought litigation, Class Counsel reviewed over 48,000 documents—spanning over 539,000 pages—most of which contain highly technical language and data produced by Apple, and conducted depositions of eleven different Apple employees across several departments. Furthermore, Class Counsel retained experts at the class certification and merits stages who studied the functionality of the subject iPhone 4S device, the impact of iOS 9 on the iPhone 4S on consumers, and damages. These experts drafted extensive reports, which have been produced to Apple, explaining their findings. In addition, Apple retained rebuttal experts and produced their reports at the class certification stage. The expert reports that were produced in this case spanned over 770 pages. The Parties also conducted depositions of all

four experts that produced reports at the class certification stage. In addition, Apple received discovery from Plaintiffs and took their depositions at the class certification stage. *See* Grunfeld Decl. ¶ 17.

Moreover, Class Counsel's experience in similar matters, as well as the efforts made by counsel on both sides, confirms that they are sufficiently well apprised of the facts of this action, and the strengths and weaknesses of their respective cases, to make an intelligent analysis of the Settlement. Class Counsel is absolutely confident that they have a thorough appreciation of the facts—favorable and unfavorable—that bear upon the merits of the claims in this litigation. This *Grinnell* factor thus weighs in favor of preliminary approval.

3. The Risks of Establishing Liability, Damages and Maintaining the Class Action through Trial (Grinnell Factors Nos. 4, 5 and 6)

Although Plaintiffs believe their case is strong, they recognize it is not without risk. *See Willix v. Healthfirst, Inc.*, 2011 WL 754862 at *4 (E.D.N.Y. Feb 18, 2011) (noting that "litigation inherently involves risks."); *see also Banyai v. Mazur*, 2007 WL 927583 at *9 (S.D.N.Y. Mar. 27. 2007) (explaining the purpose of settlement is to "avoid a trial on the merits because of the uncertainty of the outcome."). Apple has made it clear that it will move for summary judgment of various issues, will move to decertify the Class, and will continue to strenuously contest this case through trial and appeals. *See Tal Educ. Grp.*, 2021 WL 5578665 at *10 (finding the risks attendant to defending a decertification motion support approval of a settlement). For example, Apple made clear that it believes that it did not misrepresent the performance of iOS 9 on the iPhone 4S, that iOS 9 did enhance the performance of the iPhone 4S, that the Class should not have been certified, that no class can be maintained for litigation purposes, that Apple would move to decertify the Class if the case proceeded, that the Class did not suffer any damages at all, and even if they did, there is a significant chance that a jury would not award statutory damages, and that Plaintiffs are

subject to defenses that preclude this case from proceeding. *See* Grunfeld Decl. ¶ 18. While Plaintiffs strongly disagree with Apple about these arguments and would vigorously contest them at all remaining stages of this litigation, there is no guarantee as to which party would ultimately prevail. *Id.* For these reasons, there are substantial risks in maintaining this class action through trial and appeals. These *Grinnell* factors therefore weigh in favor of preliminary approval.

4. The Ability of the Defendant to Withstand a Greater Judgment (Grinnell Factor No. 7)

"Courts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement." *In re Sinus Buster Prods. Consumer Litig.*, 2014 WL 5819921 at *11 (E.D.N.Y. Nov. 10, 2014). A "defendant's ability to withstand a great judgment, standing alone, does not suggest that the settlement is unfair." *Viafara v. MCIZ Corp.*, 2014 WL 1777438 at *7 (S.D.N.Y. May 1, 2014) (citation omitted). Although Apple here may be able to withstand a greater judgment, the agreed-to Settlement is fair and adequate when weighed against the likelihood of success and overall value of each Settlement Class Member's individual claims if this Action were to proceed to trial. For these reasons, at worst, this factor is neutral.

5. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of the Attendant Risks of Litigation (Grinnell Factor Nos. 8 and 9)

The determination of whether a settlement amount is reasonable "does not involve the use of a mathematical equation yielding a particularized sum." *Willix*, 2011 WL 754862 at *5. "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes 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.* (citation omitted). Since a settlement provides certain and immediate recovery, courts often approve settlements even where

the benefits obtained as a result of the settlement are less than those originally sought. The Second Circuit stated in *Grinnell* that "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." 495 F.2d at 455 n. 2.

Here, the relief that the Settlement Agreement provides is within the range of reasonableness, especially in light of the best possible recovery and in light of all attendant risks of litigation. At minimum, provided that claims do not exceed the Net Settlement Amount, Settlement Class Members will be compensated $15 per applicable device. *See* Settlement Agreement at Section 5.1. If there are excess funds available from the Net Settlement amount after all valid claims are made, Settlement Class Members can receive up to $150 per applicable device. *See Id.* at Section 5.3.1. This is an outstanding result for the Settlement Class, especially considering Apple's position that even if Apple were liable (which Apple vehemently contested), damages would not exceed $15 per applicable device because that was the secondary market price for an iPhone 4S when iOS 9 was released to the public in September 2015. *See* Grunfeld Decl. ¶ 25. While Plaintiffs argued that damages were much higher, both in terms of actual damages and the applicable statutory damages, there is no guarantee that any of Plaintiffs' measures of damages would have prevailed even if they achieved a judgment of liability. *Id.*

As discussed above, while Plaintiffs believe their claims are strong, continuation of this litigation poses significant risks. While continuation of the litigation might not result in an increased benefit to the Settlement Class, it necessarily would lead to substantial expenditures by the Parties and a lengthy delay until the resolution of this action. Taking into account the risks and benefits that Plaintiffs have outlined above, the Settlement falls within the "range of

reasonableness." Class Counsel has achieved the best possible recovery considering the merits of the Settlement weighed against the cost and risks of further litigation.

In sum, collectively and independently, the *Grinnell* factors support the conclusion that the Settlement is fair, reasonable, and adequate. Plaintiffs therefore respectfully request that the Court grant preliminary approval of the Settlement.

V. THIS COURT SHOULD APPOINT THE SETTLEMENT ADMINISTRATOR AGREED UPON BY THE PARTIES AND APPROVE THE PROPOSED NOTICE PLAN

If the Court preliminarily approves the Settlement, it must separately consider whether the proposed notice plan is appropriate. See 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 substance of the notice plan also satisfies Rule 23. "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." *Visa*, 396 F. 3d at 113 (citations omitted). The Court is given broad power over which procedures to use for providing notice so long as the procedures are consistent with the standards of reasonableness that the Constitution's due process guarantees impose. *See Handschu v. Special Services Div.*, 787 F.2d 828, 833 (2d Cir. 1986) (recognizing that the district court "has virtually complete discretion" with regard to the manner class members are given notice of a settlement)

"When a class settlement is proposed, the court must direct to class members the best notice that is practicable under the circumstances." *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26 (2d Cir. 2014) (summary order) (internal quotation marks omitted). The notice must include: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the

time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B). “There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement 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.” *Visa*, 396 F.3d at 114 (internal citation omitted). Additionally, the recent amendment to Rule 23(c)(2)(B) makes explicit that notice may be provided by “electronic means” and through the mail—the two methods of notice here—or “other appropriate means.” *See* Settlement Agreement Section 6.2.3.

The robust notice plan, described in more detail in Section 6.2 and Exhibit G of the Settlement Agreement, easily meets the requirements of due process and the Federal Rules of Civil Procedure. In addition, the Class Notice and Summary Notice are provided as Exhibits C and H to the Settlement Agreement. Here, the Parties have agreed to use JND Legal Administration (“JND”), an experienced administrator of class action settlements, as the claims administrator for this Settlement. Additionally, the amendment to Rule 23(c)(2)(B) makes explicit that notice may be provided by “electronic means” and through the mail—the two methods of notice here—or “other appropriate means.” *See* Settlement Agreement Section 6.2.3. The proposed notice plan also provides that if the claims rate is below five (5) percent twenty-one (21) days after the emailing of the notice, the parties will meet and confer about whether to send a second email notice, with the matter to be resolved by the Mediator if necessary (*id.*); the notice will be available on a website maintained by the Settlement Administrator (*id.* at Section 6.2.1); the Settlement Administrator shall establish a toll-free telephone number to field questions about the Settlement (*id.* at Section 6.2.2); the Claim Form will be available on the Settlement Website via a link provided in the notice

(*id.* at Section 6.2.3); and that there will be a 42-day period for Settlement Class Members to submit Claims, opt out of, or object to the Settlement (*id.* at Sections 6.4, 6.5, 6.6). The notice plan therefore satisfies Rule 23(c)(2)(B)'s requirement of being "the best notice that is practicable under the circumstances." As such, Plaintiffs respectfully request the Court appoint JND as the Settlement Administrator and approve the proposed notice plan.

VI. CONCLUSION

Plaintiffs respectfully request that this Court grant preliminary approval and enter the Preliminary Approval Order submitted herewith for all of the reasons explained above.

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/s/ Michael Grunfeld

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