

**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)

**DECLARATION OF MICHAEL GRUNFELD IN SUPPORT OF  
PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT AND APPROVAL OF NOTICE PLAN**

Pursuant to 28 U.S.C. § 1746, I, Michael Grunfeld, declare:

1. I am a partner at Pomerantz LLP, Class Counsel for Plaintiffs in the above matter. Pomerantz LLP has significant experience in complex class actions and litigation involving claims of false and deceptive advertising and unfair business practices.

2. I submit this Declaration in support of Plaintiffs Chaim Lerman, Roslyn Williams and James Vorrassi's (collectively "Plaintiffs") Motion for Preliminary Approval of Class Action Settlement. Except as otherwise noted, the facts set forth in this declaration are based in part upon my personal knowledge, and I would competently testify to them if called upon to do so.

3. Because this declaration is submitted in support of the Settlement, it is inadmissible in any subsequent proceedings, other than in connection with the Settlement. In the event the Settlement is not approved by the Court, this declaration and the statements contained herein are without prejudice to the Plaintiffs' position on the merits of the Action.

4. Annexed hereto as Exhibit 1 is a true and correct copy of the fully executed Settlement Agreement with all Exhibits attached.

5. Attached hereto as Exhibit 2 is the firm resume of Pomerantz LLP.

6. Attached hereto as Exhibit 3 is the firm resume of Bronstein, Gewirtz & Grossman, LLC.

**I. SUMMARY OF CLAIMS AND THE PROCEDURAL HISTORY OF THE LITIGATION**

7. The following is a summary of the nature of Plaintiffs' claims and the principal events that have occurred in the litigation to date.

8. On December 29, 2015, Plaintiff Chaim Lerman filed the initial Complaint (ECF No. 1). The initial Complaint alleged that that Mr. Lerman upgraded his iPhone 4S devices to iOS 9 as a result of Apple Inc.'s ("Apple") supposedly false and deceptive representations about iOS

9, and that Apple allegedly violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8–1 et seq., and New York General Business Law §§ 349 and 350.

9. The First Amended Class Action Complaint was filed on January 18, 2016, on behalf of plaintiffs Roslyn Williams, Chaim Lerman, Christina Gonzalez, and James Vorrasi.

10. On March 28, 2016, Plaintiffs Roslyn Williams, Chaim Lerman, Christina Gonzalez, and James Vorrasi filed the Second Amended Class Action Complaint, which is the Operative Complaint (“Complaint,” ECF No. 18) in this action on behalf of a class of consumers in New York and New Jersey who updated their iPhone 4S devices to Apple’s iOS 9 operating system. The Complaint alleges 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 in violation of the New York General Business Law (“NYGBL”) and the New Jersey Consumer Fraud Act (“NJCFA”). Plaintiffs contend that Apple misrepresented that iOS 9 would enhance the performance of the iPhone 4S for its customers that downloaded the software update. Instead, Plaintiffs contend, iOS 9 significantly slowed down the performance of their devices.

11. On July 29, 2016, Apple filed a Motion to Dismiss the Complaint (ECF Nos. 29 and 30). However, on November 1, 2017, the Court denied Apple’s Motion to Dismiss ruling that the complaint successfully pled that Apple made material misrepresentations and omissions in connection with iOS 9 for several independently sufficient reasons. (ECF No. 35). The Court also concluded that a reasonable consumer would interpret Apple’s statements as describing iOS 9 as improving the performance of their iPhone 4S devices and encouraging consumers to download iOS 9. In addition, the complaint adequately alleged injury and causation under both the NYGBL and NJCFA.

12. On December 12, 2017, Apple filed an Answer denying each allegation of alleged misconduct in the Complaint (ECF No. 37).

13. On May 15, 2018, the Court granted the Parties' stipulation to the dismissal with prejudice of the claims brought by Plaintiff Christina Gonzalez (ECF No. 55).

14. At the class certification stage of this litigation, Plaintiffs put forth a computer expert, Dr. Scott Nettles, who opined on the performance of iOS 9 on the iPhone 4S, and Dr. Andreas Groehn, a damages expert, who conducted a conjoint analysis to assess any injury and damages associated with the slowdown in iOS 9 that Dr. Nettles preliminarily identified. At this stage of the litigation, Class Counsel deposed four Apple employees from across several departments, Apple deposed each of the Plaintiffs after they responded to Apple's document requests and interrogatories to each of them, and each side deposed the other side's two experts. Further, during this stage of the litigation, Apple filed two motions to compel the production of documents or information and received discovery from Plaintiffs.

15. On September 27, 2019, Plaintiffs served a motion to certify the class, appoint themselves as Class Representatives, and appoint Pomerantz LLP and Bronstein, Gewirtz & Grossman, LLC as Class Counsel (ECF Nos. 98 and 99). Apple served its opposition on November 15, 2019 (ECF Nos. 100 and 101) and Plaintiffs served their reply on December 16, 2019 (ECF Nos. 102 and 103).

16. On October 7, 2020, Judge Johnson granted Plaintiffs' motion for class certification and certified the following classes for monetary relief only: 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 (ECF No. 127). The Court ruled that the three Plaintiffs' claims "are typical of those of the putative class members

because they arise from Apple’s single course of allegedly unlawful conduct” and that they are adequate class representatives. The Court also rejected Apple’s *Daubert* challenges to both of Plaintiffs’ experts, ruling that their analyses were “relevant, reliable, and admissible.” On February 22, 2021, the Second Circuit denied Apple’s Rule 23(f) Petition seeking interlocutory review of Judge Johnson’s class certification decision (ECF No. 133).

17. Following Certification of the Class, the Parties engaged in substantial merits discovery, including Apple’s responding to Plaintiffs’ requests for documents and interrogatories (in addition to Plaintiffs’ document requests and interrogatories that Apple had already responded to at the class certification stage). Plaintiffs also filed a motion to compel Apple to, among other things, apply various search terms to Apple’s document collection process. The Court granted this motion in part. In total, Apple produced more than 48,000 documents—spanning over 539,000 pages—in response to Plaintiffs’ discovery requests across the class certification and merits stages. Plaintiffs thoroughly reviewed these documents, which included highly technical language and data, in preparation for conducting depositions. Plaintiffs proceeded to conduct the depositions of eight of Apple’s employees across several departments. Following depositions, Plaintiffs produced a second round of reports prepared by their computer and damages experts (who had already produced reports at the class certification stage). Additionally, Plaintiffs produced an initial report prepared by their human factors expert. The Parties produced expert reports totaling over 770 pages, across class certification and merits discovery.

18. As the discussion of the action’s procedural history above shows, litigation to date has been costly and complicated; certainly, further litigation would add even more cost, complexity, and time to this action. While Plaintiffs and Class Counsel believe their claims are strong on the merits, Apple has made it clear that it will move for summary judgment on multiple

issues, will move to decertify the Class, will vigorously challenge the admissibility of Plaintiffs' experts under *Daubert*, and will continue to vigorously contest this case through trial and appeals. For example, Apple has made clear that it will argue that Plaintiffs do not have standing to pursue their claims, they are subject to individual defenses that preclude this case proceeding as a class action, Apple did not misrepresent the performance of iOS 9 on the iPhone 4S (both from a technical perspective and in terms of how consumers would understand Apple's description of iOS 9), and that the Class did not suffer any damages. 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.

19. Further, the costs and amount of time associated with continuing the litigation, including the completion of merits expert discovery, summary judgment and related *Daubert* briefing, Apple's contemplated motion to decertify the Class, trial preparation, a complex trial, and appeals, would be substantial and require significant judicial oversight.

20. Based on the above risks and exponential costs associated with continuing litigation, both Parties expressed a willingness to go to mediation in an effort to settle the action in the most effective and cost-efficient manner.

21. 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.

22. On February 16, 2022, the Parties participated in full day mediation before the Honorable Diane M. Welsh (Ret.), a JAMS Mediator. Following significant negotiations and debate regarding the veracity of Plaintiffs' claims, the Parties reached a Settlement Agreement and

executed a Settlement Term Sheet. The comprehensive Settlement Agreement was executed on May 3, 2022.

## **II. THE SETTLEMENT**

23. The Settlement is an excellent result for the Settlement Class, as it provides the type of substantial financial relief Plaintiffs sought in their Complaint. Specifically, the Settlement provides that Apple shall establish a Settlement Fund in the amount of \$20,000,000, which shall be used to pay eligible claims. In exchange for this substantial monetary relief, the Settlement Class agreed to release and waive any and all claims against Apple related to the claims that were asserted or could have been asserted related to the allegations in this action.

24. Under the Settlement, Class Members who submit a valid claim will receive \$15 per applicable device. If the total amount of claims submitted by members of the Settlement Class results in an amount below the Net Settlement Amount, which excludes all 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, the amount of recovery per device will increase on a pro rate basis, up to a cap of \$150 per device. If the total of validated claims submitted by members of the Settlement Class exceeds the Net Settlement Amount, then the cash payment for each applicable device will be reduced on a pro rata basis. If multiple Settlement Class Members submit Claims pertaining to the same eligible device, the payment amount for that device will be divided equally among those submitting Approved Claims regarding that particular device.

25. 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 is the price at which Apple argued that

an iPhone 4S could be purchased on the secondary market when iOS 9 was released to the public in September 2015. While Plaintiffs argued that damages were much higher, both in terms of actual damages and the applicable statutory damages, there is no guarantee that Plaintiffs' measure of damages would have prevailed even if they achieved a judgment of liability. In fact, without a settlement, Plaintiffs would risk obtaining a recovery for the Class that is less than the Settlement amount, or even no recovery at all.

26. In negotiating and evaluating the Settlement, Plaintiffs and Class Counsel have taken the costs and uncertainties involved in continuing this litigation, as described *supra*, into account, as well as the risks and delays inherent in complex class action litigation. Additionally, in the process of investigating and litigating the Action, Class Counsel conducted significant research on the consumer protection statutes at issue, as well as the overall legal landscape to determine the likelihood of success and reasonable parameters under which courts have approved settlements in comparable cases. Further, Class Counsel has obtained an understanding of the strengths and weaknesses of this action through extensive factual and expert discovery, and the litigation of Plaintiffs' claims. In light of the foregoing, Class Counsel believes the present Settlement provides significant relief to Settlement Class Members and is fair, reasonable, adequate, and in the best interests of the Settlement Class.

27. Moreover, Plaintiffs have been 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. Based on their substantial involvement in this Action, Plaintiffs have evaluated the proposed Settlement, with Class Counsel, in fulfillment of their responsibility



of advancing and protecting the interests of the Class and, for the reasons described *supra*, have determined that it is in the best interests of the Settlement Class.

28. To submit a valid claim and be compensated through the Settlement Fund, Class Members must submit a declaration under the penalty of perjury that, to the best of their knowledge, they downloaded iOS 9 onto their iPhone 4S from any version of iOS 7 or iOS 8 while living in New York or New Jersey and, as a result, experienced a significant decline in their device's performance. Claimants will be able to submit their claims online on the settlement website through a form that allows them to attest to the items described above.

29. 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, in addition to expenses, advance of the Final Approval Hearing. Additionally, each Lead Plaintiff may request for the Court to approve a service award, for their efforts in furthering the litigation, to be paid out of the Gross Settlement Amount. All awards of attorneys' fees, costs, expenses and service awards will be determined by the Court.

30. 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.

### **III. SETTLEMENT ADMINISTRATION**

31. Class Counsel, subject to the approval of the Court and following submission of competitive proposals from alternative potential providers, have retained JND Legal Administration ("JND") as the Settlement Administrator. Apple will provide JND with the names and contact information for members of the Settlement Class. JND will use adequate and

customary procedures and standards to administer the Settlement and prevent the payment of fraudulent claims.

32. Likewise, subject to approval by the Court, the Settlement Administrator will administer the Settlement funds in an account held at Huntington National Bank. Both JND and the Huntington National Bank have track records of performing class-action settlement services in a highly professional, efficient, and cost-effective fashion.

I certify under penalty of perjury under the laws of the United States of America that the forgoing is true and correct. Executed May 3, 2022, in New York, NY.

*/s/ Michael Grunfeld*  
Michael Grunfeld