

1 JOSEPH W. COTCHETT (SBN 36324)
 jcotchett@cpmlegal.com
 2 MARK C. MOLUMPY (SBN 168009)
 mmolumphy@cpmlegal.com
 3 BRIAN DANITZ (SBN 247403)
 bdanitz@cpmlegal.com
 4 ANYA THEPOT (SBN 318430)
 athepot@cpmlegal.com
 5 **COTCHETT, PITRE & McCARTHY LLP**
 840 Malcolm Road, Suite 200
 6 Burlingame, CA 94010
 Telephone: 650.697.6000
 7 Facsimile: 650.697.0577

8 LAURENCE D. KING (SBN 206243)
 lking@kaplanfox.com
 9 MARIO M. CHOI (SBN 243409)
 mchoi@kaplanfox.com
 10 **KAPLAN FOX & KILSHEIMER LLP**
 1999 Harrison Street, Suite 1560
 11 Oakland, CA 94612
 Telephone: 415.772.4700
 12 Facsimile: 415.772.4707

13 FREDERIC S. FOX (*pro hac vice*)
 ffox@kaplanfox.com
 14 DONALD R. HALL (*pro hac vice*)
 dhall@kaplanfox.com
 15 DAVID A. STRAITE (*pro hac vice*)
 dstraite@kaplanfox.com
 16 **KAPLAN FOX & KILSHEIMER LLP**
 850 Third Avenue
 17 New York, NY 10022
 Telephone: 212.687.1980
 18 Facsimile: 212.687.7714

19 *Interim Co-Lead Counsel for Plaintiffs*

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

22 IN RE: APPLE INC. DEVICE
 PERFORMANCE LITIGATION

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

23
 24 This Document Relates to:
 25 ALL ACTIONS

**NOTICE OF MOTION AND MOTION
 FOR PRELIMINARY APPROVAL OF
 PROPOSED SETTLEMENT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF**

Judge: Hon. Edward J. Davila
 Courtroom: 4, 5th Floor
 Date: April 3, 2020
 Time: 1:30 p.m.

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 3, 2020, at 1:30 p.m., in Courtroom 4 of the United States District Court for the Northern District of California, Robert F. Peckham Federal Building & United States Courthouse, 280 South First Street, San Jose, California 95113, the Honorable Edward J. Davila, presiding, Named Plaintiffs¹ will and hereby do move for an Order pursuant to Rule 23 of the Federal Rules of Civil Procedure (“Rule”): (i) preliminarily approving the proposed Settlement; (ii) certifying a class for settlement purposes (“Settlement Class”); (iii) approving the form and manner of notice to the Settlement Class; (iv) approving the selection of the Settlement Administrator; and (iv) scheduling a Final Hearing before the Court.

The proposed Settlement is within the range of what is fair, reasonable, and adequate such that notice of its terms may be disseminated to Settlement Class Members and a Final Hearing to finally approve the proposed Settlement scheduled.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the accompanying Joint Declaration of Joseph W. Cotchett and Laurence D. King in Support of Plaintiffs’ Motion for Preliminary Approval of Proposed Settlement, dated February 28, 2020 (“Joint Declaration”), and the exhibits attached thereto, the Stipulation of Settlement dated February 28, 2020 (“Stipulation” or “Settlement”), and the exhibits attached thereto, the pleadings and records on file in this Action, and other such matters and argument as the Court may consider at the hearing of this motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the proposed Settlement is within the range of fairness, reasonableness, and adequacy as to warrant: (a) the Court’s preliminary approval; (b) certification of a Settlement Class for settlement purposes; (c) the dissemination of Notice of its terms to Settlement Class Members; and (d) setting a hearing date for final approval of the Settlement as well as application of attorneys’ fees, service awards, and reimbursement of expenses;

¹ All capitalized words are defined in the Stipulation unless otherwise noted.

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2. Whether the proposed Notice adequately apprises the Settlement Class Members of the terms of the Settlement and their rights with respect to it;
3. Whether the selection of Angeion Group as Settlement Administrator should be approved;
4. Whether the proposed Plan to Allocate Settlement proceeds should be preliminarily approved; and
5. Whether the Claim Forms are sufficient.

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Named Plaintiffs respectfully submit this Memorandum of Points and Authorities in support
3 of their Motion for Preliminary Approval of the Settlement in the above-captioned action (“Action”),
4 and entry of the [Proposed] Order Certifying Settlement Class; Granting Preliminary Approval of
5 Class Action Settlement; and Approving Form and Content of Class Notice (“Preliminary Approval
6 Order”), attached as Exhibit D to the Stipulation. The Preliminary Approval Order will: (i) grant
7 preliminary approval of the proposed class action settlement on the terms set forth in the Stipulation;
8 (ii) certify a provisional Settlement Class; (iii) approve the form and manner of notice of the proposed
9 Settlement to the Settlement Class; and (iv) schedule a hearing date for the final approval of the
10 Settlement (“Final Approval Hearing”) and a schedule for various deadlines in connection with the
11 Settlement.

I. INTRODUCTION

12
13 After two years of hard-fought and contentious litigation, the Parties have reached an
14 agreement to resolve the proposed Settlement Class’s claims against Defendant Apple Inc.
15 (“Defendant” or “Apple”) pursuant to the accompanying Stipulation. The Settlement was reached
16 only after extensive, aggressive litigation and prolonged, well-informed, and extensive arm’s-length
17 negotiations—including several in-person mediation sessions and additional negotiations—between
18 experienced and knowledgeable counsel facilitated by mediator Judge Layn R. Phillips (Ret.) of
19 Phillips ADR. The Settlement, based upon a mediator’s proposal, was reached after extensive
20 motion practice and discovery.

21 During the course of the litigation, Named Plaintiffs, through co-lead counsel Cotchett,
22 Pitre & McCarthy, LLP, and Kaplan Fox & Kilsheimer LLP (“Class Counsel”), and/or their agents
23 had, among other things: (i) conducted a wide-ranging investigation into the Settlement Class’s
24 claims; (ii) filed two comprehensive complaints; (iii) successfully opposed Defendant’s motions to
25 dismiss as to certain theories of liability; (iv) engaged in a comprehensive discovery program,
26 including 19 depositions, responding to hundreds of discovery requests, reviewing more than
27 7 million pages of documents, and engaging in extensive motion practice over discovery issues; and
28 (v) consulted with expert consultants. As a result, Named Plaintiffs and Class Counsel had a

1 thorough understanding of the relative strengths and weaknesses of the claims asserted at the time
2 the Settlement was reached.

3 Named Plaintiffs submit that, as demonstrated below, this is an excellent recovery for the
4 Settlement Class considering the substantial risks at class certification and trial. Based on an
5 informed evaluation of the facts and governing legal principles, and their recognition of the
6 substantial risk and expense of continued litigation, the Parties respectfully submit that the proposed
7 Settlement is fair, reasonable, and adequate under Rule 23. Accordingly, Named Plaintiffs move for
8 preliminary approval and submit this Memorandum of Points and Authorities in support thereof.

9 **II. THE PROPOSED SETTLEMENT**

10 The Settlement provides for a non-reversionary Minimum Class Settlement Amount of
11 \$310 million, with a Maximum Class Settlement Amount of \$500 million, in cash, for the benefit of
12 the proposed Settlement Class, comprised of all former or current U.S. iPhone² owners.³

13 For a release of their claims, Settlement Class Members will receive \$25.00 for each iPhone
14 owned, the amount of which may increase or decrease depending on the amount of any Attorneys'
15 Fees and Expenses, Named Plaintiff Service Awards, notice expenses, and the aggregate value of
16 Approved Claims. If payment of \$25.00 for each iPhone device identified as Approved Claims, plus
17 the payment of Attorneys' Fees and Expenses, Named Plaintiff Service Awards, and notice and
18 administration fees would not reach the Minimum Class Settlement Amount, the Residual will be
19 allocated according to the Stipulation, including increasing payments to Settlement Class Members
20 on a pro rata basis up to a maximum of \$500. Conversely, if the number of iPhone devices identified
21 as Approved Claims, multiplied by \$25.00, exceeds the Maximum Class Settlement Amount, then
22 the cash payment for each iPhone will be reduced on a pro rata basis in order to not exceed the
23 Maximum Class Settlement Amount.

24
25 ² "iPhone" means Apple iPhone 6, 6 Plus, 6s, 6s Plus, 7, 7 Plus, and SE devices. Stip. § 1.16.

26 ³ This Settlement will also encompass the California JCCP Action, captioned *In re Apple OS Cases*,
27 JCCP No. 4976 (Cal. Super. Ct., S.F. Cty.). If the Court approves the proposed Settlement, the
28 California JCCP Action will be dismissed. Stip. § 9.1. There will not be a classwide settlement for
non-U.S. Named Plaintiffs, who will be releasing their individual claims only. Because Non-U.S.
iPhone owners' claims will not be released, they may pursue their own claims outside the Settlement.

1 Named Plaintiffs will also seek Service Awards of \$3,500 for those who were deposed in
2 the Action and \$1,500 for all others. Finally, Class Counsel intend to seek up to 30% of the Minimum
3 Class Settlement Amount, or \$93 million, as reasonable attorneys' fees, and no more than
4 \$1.5 million for out-of-pocket expenses. The Settlement is not conditioned upon the Court's
5 approval of the full (or any) amount of Service Awards or Attorneys' Fees and Expenses.

6 **III. BACKGROUND**

7 **A. Summary of the Litigation**

8 On December 20, 2017, Apple released a statement regarding a performance management
9 feature in its iOS 10.2.1 and iOS 11.2 software to avoid unexpected power-offs ("UPOs") from
10 occurring in its devices. Between December 2017 and June 2018, the Federal Actions, consisting of
11 66 underlying class action complaints, were filed against Apple. Beginning on April 4, 2018, the
12 Federal Actions were consolidated by the U.S. Judicial Panel on Multidistrict Litigation in the
13 Northern District of California pursuant to 28 U.S.C. § 1407, into MDL proceedings captioned *In re*
14 *Apple Inc. Device Performance Litigation*, No. 18-md-2827-EJD [Dkt. 1].

15 After their appointment [Dkt. 99], on July 2, 2018, Class Counsel filed a Consolidated
16 Amended Complaint ("CAC") in the Action [Dkt. 145]. On October 1, 2018, the Court granted in
17 part and denied in part Apple's motion to dismiss the CAC [Dkt. 219]. *See In re: Apple Inc. Device*
18 *Perf. Litig.*, 347 F. Supp. 3d 434 (N.D. Cal. 2018).

19 On November 30, 2018, Class Counsel filed the operative Second Consolidated Amended
20 Complaint ("2CAC") [Dkt. 244]. The 2CAC asserted claims for fraud, breach of contractual
21 relations, violation of the consumer protection laws, "trespass to chattels," and violations of the
22 California Computer Data Access and Fraud Act ("CDAFA") and the federal Computer Fraud Abuse
23 Act ("CFAA"). *Id.* On April 22, 2019, the Court granted in part and denied in part Apple's motion
24 to dismiss the 2CAC [Dkt. 331]. *See In re: Apple Inc. Device Perf. Litig.*, 386 F. Supp. 3d 1155
25 (N.D. Cal. 2019).⁴ The Court dismissed, with prejudice, claims that the iPhones were "defective,"
26 claims based on certain iPhone devices, and common law and statutory fraud claims (whether based

27 _____
28 ⁴ Defendant also sought reconsideration of the Court's first motion to dismiss order as to issues
concerning a worldwide class [Dkt. 236], which the Court resolved in this order. *Id.*

1 on a theory of affirmative misrepresentation or omission). *Id.* The Court also dismissed, without
 2 prejudice, claims related to Named Plaintiffs' theory that Apple had breached contractual
 3 obligations. *Id.* The Court upheld the claims for trespass to chattels and claims under the CDAFA
 4 and CFAA. *Id.* Defendant answered the 2CAC on July 31, 2019 [Dkt. 365].

5 The Parties engaged in extensive discovery in the Action. Class Counsel served more than
 6 170 document requests on Apple, in response to which Apple produced more than seven million
 7 pages of documents. Apple served written discovery and document requests to each of the Named
 8 Plaintiffs, who produced more than 6,000 pages of documents. The Parties deposed 19 individuals,
 9 including 10 Apple witnesses and nine Named Plaintiffs. The Parties also litigated several discovery
 10 motions before the Hon. Rebecca Westerfield (Ret.) as Special Discovery Master, as well as before
 11 this Court. *See, e.g., In re Apple Inc. Device Perf. Litig.*, No. 5:18-md-02827-EJD, 2019 WL
 12 1993916 (N.D. Cal. May 6, 2019); *id.*, 2019 WL 3973752 (N.D. Cal. Aug. 22, 2019).

13 **B. Settlement Negotiations and Mediation**

14 The Parties engaged in extensive, arms-length negotiations over the course of many months,
 15 including several all-day, in-person mediation sessions and numerous additional discussions with
 16 Judge Phillips, a former United States District Judge and highly respected mediator. After the third
 17 in-person mediation with Judge Phillips on September 27, 2019, Judge Phillips made a mediator's
 18 proposal to the Parties. The Parties accepted the proposal, with continued involvement by the
 19 mediator throughout the process of negotiating a term sheet and long-form settlement agreement.

20 **IV. SUMMARY OF AND REASONS FOR THE SETTLEMENT**

21 It is respectfully submitted that the Settlement meets the legal standards for preliminary
 22 approval and the Northern District of California's Procedural Guidance for Settlement of Class
 23 Action Settlements (the "Guidance").⁵ Based upon their investigation, Named Plaintiffs and Class
 24 Counsel concluded that the terms and conditions of the Stipulation are fair, reasonable, and adequate
 25 to the Settlement Class and in their best interests. The Parties agreed to settle the Action pursuant to
 26 the terms and provisions of the Stipulation, after considering: (i) the substantial benefits that

27 _____
 28 ⁵ <https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/> (last
 visited Feb. 10, 2020).

1 Settlement Class Members will receive from resolution of the Action; (ii) the risks of continued
2 litigation; and (iii) the desirability of permitting the Settlement to be consummated as provided by
3 the terms of the Stipulation. *See* Stip. § 2.

4 The Parties accepted the mediator’s proposal and settled the claims with an understanding
5 of the strengths and weaknesses of their claims and defenses. Because the Settlement easily falls
6 within the range of possible approval and is otherwise fair and reasonable, the Court should grant
7 preliminary approval of the Settlement.

8 **V. ARGUMENT**

9 **A. Legal Standards on Preliminary Approval**

10 In deciding whether to approve a proposed settlement, the Ninth Circuit has a “strong
11 judicial policy that favors settlements, particularly where complex class action litigation is
12 concerned.” *In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539, 556 (9th Cir. 2019); *Officers*
13 *for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982); *In re Heritage Bond Litig.*, No.
14 02-ML-1475 DT, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005). “[T]here is an overriding
15 public interest in settling and quieting litigation,” and this is “particularly true in class action suits.”
16 *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

17 When the parties to a putative class action reach a settlement agreement prior to class
18 certification, “courts must peruse the proposed compromise to ratify both the propriety of the
19 certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.
20 2003). First, the Court must assess whether a Rule 23 class exists. *Id.* (citing *Amchem Prods. Inc. v.*
21 *Windsor*, 521 U.S. 591, 620 (1997)).

22 If the Court determines that a Rule 23 class exists, the Court must then determine whether
23 the proposed Settlement “is fundamentally fair, adequate, and reasonable.” *Hanlon v. Chrysler*
24 *Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). At this stage, the Court “evaluate[s] the terms of the
25 settlement to determine whether they are within a range of possible judicial approval.” *Wright v.*
26 *Linkus Enters., Inc.*, 259 F.R.D. 468, 472 (E.D. Cal. 2009). The Court does not need to “specifically
27 weigh[] the merits of the class’s case against the settlement amount and quantif[y] the expected value
28 of fully litigating the matter.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

1 Instead, the Court may only evaluate whether the Settlement is “the product of an arms-length, non-
2 collusive, negotiated resolution[.]” *Id.*

3 The Court may grant preliminary approval of the Settlement and direct notice to the
4 Settlement Class if “the proposed settlement appears to be the product of serious, informed, non-
5 collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment
6 to class representatives or segments of the class, and falls within the range of possible approval.” *In*
7 *re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citing MANUAL FOR
8 COMPLEX LITIGATION, 2d § 30.44 (2d ed. 1985)). The Court will also “schedule[] a fairness hearing
9 where it will make a final determination of the class settlement.” *In re Haier Freezer Consumer*
10 *Litig.*, No. 5:11-CV-02911-EJD, 2013 WL 2237890, at *3 (N.D. Cal. May 21, 2013) (citation
11 omitted).

12 **B. Conditional Class Certification of the Settlement Class is Warranted**

13 The Settlement is conditioned upon the approval, for settlement purposes only, of the
14 following Settlement Class definition:

15 “Settlement Class” means all former or current U.S. owners of iPhone 6, 6 Plus, 6s,
16 6s Plus, 7, 7 Plus, and SE devices running iOS 10.2.1 or later (for iPhone 6, 6 Plus,
17 6s, 6s Plus, and SE devices) or iOS 11.2 or later (for iPhone 7 and 7 Plus devices),
18 and who ran these iOS versions before December 21, 2017. For purposes of this
19 definition, “U.S. owners” shall include individuals who owned, purchased, leased,
20 or otherwise received an eligible device, and individuals who otherwise used an
21 eligible device for personal, work, or any other purposes. An individual qualifies as
22 a “U.S. owner” if his or her device was shipped to the United States, its territories,
23 and/or its possessions. The Settlement Class shall not include iPhone owners who
24 are domiciled outside of the United States, its territories, and/or its possessions.
25 Additionally, excluded from the Settlement Class are (a) directors, officers, and
26 employees of Apple or its subsidiaries and affiliated companies, as well as Apple’s
27 legal representatives, heirs, successors, or assigns, (b) the Court, the Court staff, as
28 well as any appellate court to which this matter is ever assigned and its staff, (c) any
of the individuals identified in paragraph 1.36, as well as their legal representatives,
heirs, successors, or assigns, (d) Defense Counsel, as well as their immediate family
members, legal representatives, heirs, successors, or assigns, and (e) any other
individuals whose claims already have been adjudicated to a final judgment.

25 Stip. § 1.32.

26 Class certification under Rule 23 is a two-step process. First, the plaintiff must demonstrate
27 that numerosity, commonality, typicality, and adequacy are met. Fed. R. Civ P. 23(a). “Class
28 certification is proper only if the trial court has concluded, after a ‘rigorous analysis,’ that Rule 23(a)

1 has been satisfied.” *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013) (quoting
2 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). A plaintiff must then establish that one
3 of the bases for certification in Rule 23(b) is met. Here, Named Plaintiffs must demonstrate that
4 “questions of law or fact common to Class Members predominate over any questions affecting only
5 individual members, and . . . [that] a class action is superior to other available methods for fairly and
6 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

7 **1. Named Plaintiffs Satisfy Rule 23(a) Prerequisites**

8 Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is
9 impracticable.” Here, it is undisputed that millions of iPhones have been purchased and/or sold in
10 the United States. There can be no doubt that numerosity is satisfied in this litigation.

11 Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” For
12 the purposes of Rule 23(a)(2), even a single common question is satisfactory. *Wal-Mart*, 564 U.S.
13 at 359. The common contention, however, “must be of such a nature that it is capable of classwide
14 resolution—which means that determination of its truth or falsity will resolve an issue that is central
15 to the validity of each one of the claims in one stroke.” *Id.* at 350. “What matters to class certification
16 . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide
17 proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.* (citation
18 omitted); *see also Noll v. eBay, Inc.*, 309 F.R.D. 593, 603 (N.D. Cal. 2015). Here, the proposed
19 Settlement Class satisfies the commonality requirement because, at a minimum, it is a common issue
20 whether the UPOs and the performance management feature that Apple introduced in iOS 10.2.1 and
21 iOS 11.2 to avoid UPOs affected the iPhones. Commonality is satisfied.

22 Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical
23 of the claims or defenses of the class.” “The purpose of the typicality requirement is to assure that
24 the interest of the named representative aligns with the interests of the class.” *Ebarle v. Lifelock,*
25 *Inc.*, No. 15-cv-00258-HSG, 2016 WL 234364, at *4 (N.D. Cal. Jan. 20, 2016) (quoting *Hanon v.*
26 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). “The test of typicality is whether other
27 members have the same or similar injury, whether the action is based on conduct which is not unique
28 to the named plaintiffs, and whether other class members have been injured by the same course of

1 conduct.” *Hanon*, 976 F.2d at 508 (internal quotation marks omitted). Here, Named Plaintiffs are
2 typical of the Settlement Class they seek to represent. Like other Settlement Class Members, Named
3 Plaintiffs purchased Apple’s iPhones, and were affected by the UPOs and the performance
4 management feature Apple introduced in iOS 10.2.1 and iOS 11.2 to avoid the UPOs. 2CAC ¶¶ 31-
5 270. Named Plaintiffs’ claims arise from Defendant’s iPhones and, as such, Named Plaintiffs are
6 typical of the Settlement Class Members.

7 Finally, under Rule 23(a)(4), Named Plaintiffs must demonstrate that they and their counsel
8 do not have any conflicts of interest with other Settlement Class Members and, further, that Named
9 Plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *See Ebarle*,
10 2016 WL 234364, at *4 (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000)).
11 Here, Named Plaintiffs have no conflicts of interest with other Settlement Class Members; indeed,
12 Named Plaintiffs are equally interested in demonstrating Apple’s alleged violations. Moreover,
13 Class Counsel, who also do not have any conflicts with Settlement Class Members, have substantial
14 experience prosecuting class actions. *See Joint Decl., Exs. 1 and 2.* Named Plaintiffs and Class
15 Counsel have prosecuted this Action vigorously, and successfully, on behalf of the Settlement Class,
16 and will continue to do so.

17 **2. Plaintiffs Satisfy Rule 23(b) Standards**

18 Named Plaintiffs seek conditional certification under Rule 23(b)(3), which provides that a
19 class action can be maintained where: (1) the questions of law and fact common to members of the
20 class predominate over any questions affecting only individuals; and (2) the class action mechanism
21 is superior to the other available methods for the fair and efficient adjudication of the controversy.
22 *eBay*, 309 F.R.D. at 604. Here, every Settlement Class Member alleged that they were subjected to
23 the performance management feature that slowed down their iPhone and otherwise caused harm to
24 each Settlement Class Member. This common question can be resolved for all members of the
25 proposed Settlement Class in a single adjudication.

26 Named Plaintiffs must also demonstrate that a class action is the “most efficient and
27 effective means of resolving the controversy.” *eBay*, 309 F.R.D. at 604 (quoting *Wolin v. Jaguar*
28 *Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010)). A “class action mechanism is

1 superior to individual actions in consumer cases with thousands of members as ‘Rule 23(b)(3) was
 2 designed for situations such as this . . . in which the potential recovery is too slight to support
 3 individual suits, but injury is substantial in the aggregate.’” *Id.* (quoting *Holloway v. Full Spectrum*
 4 *Lending*, No. 06–cv–5975, 2007 WL 7698843, at *9 (C.D. Cal. June 26, 2007)). Here, the class
 5 action mechanism is superior for resolving this matter given the very large size of the proposed class
 6 weighed against the expense and burden of individual actions. Any Settlement Class Member who
 7 wishes to opt out may do so.⁶

8 Because Named Plaintiffs satisfy the Rule 23 requirements, the Court should grant
 9 conditional certification of the Settlement Class.

10 **C. The Proposed Settlement Should Be Preliminarily Approved**

11 As the Ninth Circuit has articulated, “the very essence of a settlement is compromise, ‘a
 12 yielding of absolutes and an abandoning of highest hopes.’” *Officers for Justice*, 688 F.2d at 624
 13 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

14 [I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and
 15 expensive litigation that induce consensual settlements. The proposed settlement is
 16 [thus] not to be judged against a hypothetical or speculative measure of what might
 have been achieved by the negotiators.

17 *Id.* at 625. As demonstrated below, Named Plaintiffs submit that the proposed Settlement is fair and
 18 just. Given the complexity of this litigation, the potential difficulty of proving certain elements of
 19 the Settlement Class’s claims, and the continued risks if the Parties proceeded to class certification,
 20 dispositive motions, and trial, the Settlement provides an immediate and substantial cash benefit to
 21 Settlement Class Members, represents a favorable resolution of this Action, and eliminates the risk
 22 that the Settlement Class might otherwise recover nothing.

23
 24
 25 _____
 26 ⁶ “[I]n the context of settlement, the other requirements of Rule 23(b)(3) such as ‘the desirability or
 27 undesirability of concentrating the litigation of the claims in the particular forum’ and ‘the likely
 28 difficulties in managing a class action[.]’ see Fed. R. Civ. P. 23(b)(3)(C)–(D), ‘are rendered moot
 and are irrelevant.’” *Spann v. JC Penney Corp.*, 314 F.R.D. 312, 323 (C.D. Cal. 2016) (quoting
Barbosa v. Cargill Meat Solutions Corp., 297 F.R.D. 431, 444 (E.D. Cal. 2013); *Amchem Prods.*,
 521 U.S. at 620).

1 **1. The Proposed Settlement is the Product of an Arms-Length, Non-**
2 **Collusive, Negotiated Resolution**

3 **a. The Proposed Settlement is the Product of a Mediator’s**
4 **Proposal and is Supported by Experienced Counsel**

5 Courts recognize that the opinion of experienced counsel supporting settlement after
6 vigorous arm’s-length negotiations is entitled to considerable weight. *See, e.g., Ellis v. Naval Air*
7 *Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff’d*, 661 F.2d 939 (9th Cir. 1981) (“the fact
8 that experienced counsel involved in the case approved the settlement after hard-fought negotiations
9 is entitled to considerable weight”); *Spann*, 314 F.R.D. at 323-24. Courts also recognize that
10 agreements based upon a mediator’s proposal demonstrate non-collusive conduct. *See, e.g., Ebarle*,
11 2016 WL 234364, at *6 (finding that acceptance of a mediator’s proposal following mediation
12 sessions “strongly suggests the absence of collusion or bad faith”); *Spann*, 314 F.R.D. at 324 (same).

13 Here, the Parties actively and aggressively litigated the Action, and Class Counsel
14 conducted an extensive investigation into and prosecution of the alleged claims. Class Counsel also
15 engaged in a rigorous negotiation process with Defense Counsel, and fully considered and evaluated
16 the fairness of the Settlement to the Settlement Class. The Parties’ settlement negotiations were
17 protracted and hard-fought and included the determined assistance of an experienced mediator. At
18 Judge Phillips’ direction, the Parties submitted comprehensive mediation and supplemental
19 statements. After submitting their statements, counsel for all Parties attended in-person mediations
20 before Judge Phillips on January 7, 2019, August 28, 2019, and on September 27, 2019. The Parties
21 gave detailed and thoughtful presentations of their respective cases. And, Judge Phillips gave the
22 Parties a reasonable assessment of the strengths and weaknesses of their case. It was only after
23 several months of intense discussions and a mediator’s proposal that the Parties were ultimately able
24 to reach an agreement, and several more months of further negotiations and the mediator’s
25 intervention that the Parties were able to agree on the terms of the Settlement.

26 Additionally, throughout the Action and settlement negotiations, Apple has been vigorously
27 represented by Gibson, Dunn & Crutcher LLP and Covington & Burling LLP, their representation
28 of Defendant being no less rigorous than Class Counsel’s representation of the Settlement Class.
Because the Settlement is the product of serious, informed, and non-collusive negotiations among

1 experienced counsel and the product of a mediator’s proposal, it deserves preliminary approval. *See*
2 *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09–00261 SBA (EMC), 2012 WL 5878390, at *6
3 (N.D. Cal. Nov. 21, 2012) (noting that private mediation “tends to support the conclusion that the
4 settlement process was not collusive”).

5 **b. The Stage of the Proceedings and the Discovery Completed**
6 **Support the Settlement**

7 In a class action setting, courts also look for indications that the parties carefully
8 investigated the claims before reaching a resolution, including propounding and reviewing discovery.
9 *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB
10 (JSC), 2016 WL 6248426, at *14 (N.D. Cal. Oct. 25, 2016) (“extensive review of discovery materials
11 indicates [Plaintiffs have] sufficient information to make an informed decision about the Settlement.
12 As such, this factor favors approving the Settlement.”); *see also In re Portal Software Sec. Litig.*,
13 No. C-03-5138 VRW, 2007 WL 4171201, at *4 (N.D. Cal. Nov. 26, 2007).

14 As discussed above, Class Counsel (or their agents) engaged in extensive investigation,
15 research, and analysis of the Settlement Class’s claims, resulting in the Court upholding in part the
16 CAC and 2CAC. Named Plaintiffs thereafter aggressively pursued discovery from Apple through
17 multiple requests for production of documents and interrogatories, intensive meet and confers, and
18 discovery motion practice before Judge Westerfield and this Court. Apple produced over seven
19 million pages of fact-related material for review. Named Plaintiffs also took the depositions of 10
20 Apple witnesses, the presumptive limit under Rule 30(a). The witnesses included software and
21 hardware engineers who had detailed knowledge of the relevant issues. In addition, Named Plaintiffs
22 subpoenaed documents from several non-parties, such as cell phone carriers, engaged in multiple
23 discussions concerning the subpoenas with both the non-parties as well as with Apple, and obtained
24 documents in connection with the subpoenas. This discovery allowed Named Plaintiffs to adequately
25 evaluate the merits of their claims.

26 Moreover, as set forth above, the Parties engaged in no less than three in-person mediations
27 and received a reasonable assessment of the strengths and weaknesses of their case and a mediator’s
28

1 proposal. Considering this, the litigants had sufficient bases to make informed decisions about the
2 relative merits of the case and the fairness of the Settlement.

3 **2. The Procedural Guidance for Class Action Settlements Factors are**
4 **Satisfied**

5 On November 1, 2018, the Northern District of California adopted the Guidance, which is
6 applicable to this Action. We set forth below, in the order of the Guidance for the Court's
7 convenience, a discussion of how the Guidance applies to the proposed Settlement.

8 **a. Guidance 1: Differences, Range, and Plan of Allocation**

9 **i. Guidance 1a.-d.: Differences in the Proposed Settlement**
10 **Class and the Class Proposed in the 2CAC**

11 Section 1 of the Guidance requires a discussion as to any differences between the Settlement
12 Class and that proposed in the operative complaint, as well as any differences between the claims to
13 be released and the claims to be certified for class treatment. Courts have routinely approved such
14 changes between the proposed settlement class definition and that proposed in the complaint, or
15 changes between the claims to be released in the settlement and claims to be certified for class
16 treatment. *See, e.g., In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2012 WL 2598819, at *1
17 (N.D. Cal. July 5, 2012) (different settlement class definition than that in the Consolidated Class
18 Action Complaint, filed Sep. 12, 2011 [Dkt. 61]).⁷

19 Here, the proposed Settlement Class is different from that proposed in the 2CAC.
20 Specifically, while the 2CAC included non-U.S. owners, the proposed Settlement Class is defined
21 as to only include former or current U.S. owners of the relevant Apple devices, and does not include
22 non-U.S. owners. But importantly, the non-U.S. owners will NOT release any class claims in this
23

24 ⁷ *See also, e.g., Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-cv-02200-HSG, 2020 WL 511953,
25 at *5-6 (N.D. Cal. Jan. 31, 2020) (approving modified settlement class definition from classes
26 certified); *Spann*, 314 F.R.D. at 318-25 (same); *In re Chrysler-Dodge-Jeep Ecodiesel Mktng, Sales*
27 *Practices, and Prods. Liab. Litig.*, No. 17-md-02777-EMC, 2019 WL 536661, at *3-7 (N.D. Cal.
28 Feb. 11, 2019) (approving settlement class definition that was different from complaint); *Peel v.*
Brooksamerica Mortg. Corp., No. SACV 11-00079-JLS (RNBx), 2014 WL 12589317, at *3-4 (C.D.
Cal. Nov. 13, 2014) (approving modified settlement class definition from classes certified);
Cohorst v. BRE Properties, Inc., No. 3:10-cv-2666-JM-BGS, 2011 WL 13356361, at *2 (S.D. Cal.
May 6, 2011) (approving settlement class definition that was different from complaint).

1 Settlement.⁸ Stip. § 1.32.

2 The reason for this difference in the scope of the class in the 2CAC and the proposed
3 Settlement Class is the substantial uncertainty as to the propriety of a worldwide class. To Named
4 Plaintiffs' knowledge, a court has not certified a worldwide class in any U.S. litigation. And, as
5 Apple argued, among other things, Named Plaintiffs are not entitled to pursue claims on behalf of
6 non-U.S. claimants, that California law does not apply nationwide (or beyond U.S. borders), and that
7 Named Plaintiffs and the putative class are not entitled to any relief. Indeed, in multiple motions,
8 Defendant argued that the claims brought by Non-U.S. Plaintiffs should be dismissed for lack of
9 jurisdiction, contending that the contracts at issue require that the law of the country of purchase
10 govern, that California and federal law do not apply extraterritorially, and that "fundamental policy
11 interests" and choice-of-law principles require dismissal.⁹

12 Specifically, Defendant has argued that the laws of the various countries should apply
13 because each country has "fundamental policy interests" that are different from California's interests
14 and that the laws of the foreign country should apply. *See* Dkt. 176 at 7-13; Dkt. 236-1 at 13-20;
15 Dkt. 272 at 34-35. Citing to a number of scholars' declarations, Apple contends that there are a
16 number of substantive and procedural differences between the laws of the foreign countries and that
17 of California's, and that the foreign jurisdictions have an interest in applying their laws to the alleged
18 injuries that occurred within their borders. *See id.*

19 The Court took notice of Apple's arguments. In its April 22, 2019 Order Granting Motion
20 for Reconsideration; Granting in Part and Denying in Part Motion to Dismiss (Dkt. 315), the Court
21 denied the motion to dismiss on conflict-of-laws grounds without prejudice, finding that it was
22 "premature to conduct a detailed choice-of-law analysis at this stage of the litigation. Courts have
23 declined to conduct such an analysis at the motion to dismiss stage where further development of the
24 record is necessary to property decide the choice-of-law question." *In re Apple Inc.*, 386 F. Supp.

25 ⁸ With the exception that Non-U.S. Named Plaintiffs will release their claims to receive a Service
26 Award.

27 ⁹ *See* Def. Apple Inc.'s Not. of Mot. and Mot. to Dismiss Pls' 2d Consol. Am. Compl, filed Jan. 24,
28 2019 [Dkt. 272]; Def. Apple Inc.'s Mot. for Reconsideration or, in the Alt., for Cert. of Interlocutory
Appeal, filed Nov. 15, 2018 [Dkt. 236-1]; Def. Apple Inc.'s Not. of Mot. and Mot. to Dismiss Pls'
Consol. Am. Compl., filed Aug. 9, 2018 [Dkt. 176].

1 3d at 1170 (citation omitted). However, the Court pointed out that the declarations submitted by
2 Apple “appear to show a conflict with fundamental policies of a foreign jurisdiction.” *Id.* Indeed,
3 the Court noted the conflicts such as “(1) whether foreign countries would enforce a choice-of-law
4 provision that points to the law of a country with less robust consumer protection laws, (2) whether
5 foreign countries use the preponderance of the evidence standard, and (3) whether foreign countries
6 recognize punitive damages.” *Id.* And although the Court denied the motion to dismiss, the Court
7 determined and “reiterated its earlier conclusion that the practical and constitutional ‘concerns that
8 Apple raises are substantially and potentially well-founded.’” *Id.*

9 As the Court itself foreshadowed, whether Named Plaintiffs would have succeeded in
10 obtaining class certification or surviving a motion for summary judgment as to the Non-U.S.
11 Plaintiffs and for the countries they seek to represent is questionable at best. *Id.* Thus, the proposed
12 Settlement Class agreed to by the Parties does not include non-U.S. residents. While the non-U.S.
13 *Named Plaintiffs* will be releasing their individual claims, no other claims will be released on behalf
14 of non-U.S. residents, and they will be free to pursue their own claims outside the Settlement if they
15 wish to do so.

16 **ii. Guidance 1e.: The Proposed Settlement Provides a**
17 **Favorable Recovery and Falls Within a Range of**
18 **Possible Approval**

19 The Guidance also requires an analysis of the anticipated class recovery under the
20 Settlement and the potential class recovery if Named Plaintiffs fully prevailed on their claims, and
21 an explanation as to the differences. Here, the non-reversionary Minimum Class Settlement Amount
22 of \$310 million (and Maximum Class Settlement Amount of \$500 million) is substantial by any
23 measure, and certainly falls within a range of possible approval. Based on a damage analysis by
24 Named Plaintiffs’ consultant, had Named Plaintiffs fully prevailed on every one of their remaining
25 claims, Named Plaintiffs anticipate that damages would have amounted to between \$18 and \$46 per
26 iPhone. As such, a \$25 per iPhone recovery is considerable by any degree, amounting to about a
27 54% recovery per iPhone.

28 However, there is the real and substantial risk that Named Plaintiffs would not be able to
obtain any recovery at all. Because class certification had not been briefed, and no dispositive

1 motions had been made, there is the possibility that the Court may ultimately determine that either
2 class certification is unwarranted or find for Defendant at summary judgment. For example, Apple
3 has argued throughout the litigation that even if a plaintiff downloaded iOS 10.2.1 software on his
4 or her iPhone, it does not automatically follow that that individual experienced any problems
5 whatsoever. That is because, according to Apple, whether a particular iPhone user was damaged
6 depended upon how that person used the iPhone. And given the above arguments concerning, among
7 other things, the viability of a worldwide class, although Named Plaintiffs firmly believe that their
8 liability case is strong and that class certification is warranted, it is uncertain whether the Court would
9 ultimately grant certification of a litigation class, deny Defendant's motion for summary judgment,
10 or make a finding that Named Plaintiffs are entitled to any damages. *See Vizcaino v. U.S. Dist. Ct.*
11 *for W.D. Wash.*, 173 F.3d 713, 721 (9th Cir. 1999). Even if Named Plaintiffs were able to obtain
12 class certification for trial and could successfully oppose any motion for summary judgment, and
13 even if Named Plaintiffs could have successfully proven liability at trial, Named Plaintiffs could still
14 recover nothing because the fact and amount of damages that could be recovered in this case are still
15 uncertain. *Accord Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986 (9th Cir. 2015).

16 Compared with cases where courts have preliminarily approved settlements with amounts
17 lower than potential damages, the Class Settlement Amounts here constitute a substantial percentage
18 of recoverable damages in this Action. *See, e.g., Linney v. Cellular Alaska P'ship*, 151 F.3d 1234,
19 1242 (9th Cir. 1998) ("The fact that a proposed settlement may only amount to a fraction of the
20 potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate
21 and should be disapproved.") (citation omitted); *Schaffer v. Litton Loan Serv., LP.*, No. CV 05-07673
22 MMM (JCx), 2012 WL 10274679, at *11 (C.D. Cal. Nov. 13, 2012) ("Estimates of a fair settlement
23 figure are tempered by factors such as losing at trial, the expense of litigating the case, and the
24 expected delay in recovery (often measured in years)."); *Roe v. Frito-Lay, Inc.*, No. 14-cv-00751-
25 HSG, 2016 WL 4154850, at *7 (N.D. Cal. Aug. 5, 2016) (noting that "the risks and costs associated
26 with class litigation weigh strongly in favor of settlement" where "Plaintiff would [have been]
27 required to successfully move for class certification under Rule 23, survive summary judgment, and
28 receive a favorable verdict capable of withstanding a potential appeal").

1 pro rata to ensure that the aggregate cash payment does not exceed \$500 million. *Id.* § 5.2. In the
2 unlikely event that the total amount calculated does not reach the Minimum Class Settlement Amount
3 following any pro rata adjustments up to \$500 per Device, the Parties would confer on the
4 distribution of the remaining amount. *Id.* § 5.3.3. In no event would any of the Residual revert to
5 Apple. The Plan has a reasonable and rational basis for distribution and provides a cash payment to
6 any Settlement Class Member who purchased an iPhone.

7 Courts have approved similar settlement terms and allocation plans in class actions alleging
8 consumer deception. For instance, this Court has approved a settlement with terms similar to those
9 the Parties are entering into here. In *In re Haier*, the plaintiffs there alleged that the defendant's
10 product allegedly had a defect and asserted claims under, among others, the state consumer protection
11 acts. *Id.*, 2013 WL 2237890, at *1. This Court approved the proposed allocation plan whereby the
12 defendant guaranteed a minimum settlement amount but would contribute up to a maximum
13 settlement amount, basing actual payments "on the number and amount of authorized claims
14 submitted." *Id.* at *2. The defendant further agreed to pay for the costs and expenses for notice and
15 for settlement administration, and for reasonable attorneys' fees and expenses. *Id.*

16 Similarly, in *Beck-Ellman v. Kaz USA, Inc.*, No. 3:10-CV-02134-H-DHB, 2013 WL
17 1748729, at *3 (S.D. Cal. Jan. 7, 2013), the court approved a settlement in which the plaintiffs
18 brought claims under California's consumer protection acts for misleading product information. The
19 defendants there, in addition to injunctive relief, guaranteed a minimum settlement amount for class
20 members who submitted valid and timely claims, up to a maximum settlement amount. *Id.* at *2-3.
21 The defendants also agreed to pay the costs of providing notice and for the administration of the
22 settlement, separate and apart from the settlement amount. *Id.* at *3.

23 Other cases where courts have approved similar minimum and maximum settlement amount
24 terms as in this Action include *Lewis v. Green Dot Corporation*, No. CV 16-3557 FMO (AGR_x),
25 2017 WL 4785978 (C.D. Cal. June 12, 2017), *McNeal v. RCM Technologies USA Inc.*, No. 2:16-cv-
26 05170-ODW(SS_x), 2017 WL 1807595 (C.D. Cal. Mar. 16, 2017), *Lemus v. H & R Block Enterprises*
27 *LLC.*, No. C 09-3179 SI, 2012 WL 3638550 (N.D. Cal. Aug. 22, 2012), and *In re TD Ameritrade*
28 *Account Holder Litigation*, No. C 07-2852 SBA, 2011 WL 4079226 (N.D. Cal. Sept. 13, 2011).

1 Concerning claims rates, a recent study by the Federal Trade Commission, based on data
 2 from 124 consumer class actions gathered from claims administrators, calculated the weighted mean
 3 claims rate between 4%-5%.¹¹ Here, Class Counsel expect the claims rate to be at the high end of
 4 the range, or greater, taking into consideration not only Defendant's brand recognition, but also the
 5 fact that the Settlement Administrator will be providing direct notice to Settlement Class Members,
 6 as well as the substantial media coverage of the issues in the case.

7 **b. Guidance 2: The Proposed Settlement Administrator**

8 In connection with preliminary approval, the Parties request that the Court authorize the
 9 retention of Angeion Group ("Angeion") as Settlement Administrator for the Settlement. Stip.
 10 § 1.29. Angeion—which is currently serving as administrator in two of Class Counsel's class action
 11 settlements¹²—is a nationally recognized notice and claims administration firm and has extensive
 12 experience in class actions and on notice issues. Based on information obtained from Defendant,
 13 Angeion was selected over two other administrators that submitted bids.

14 Based on information provided by Apple, it will cost up to \$12.75 million for Angeion to
 15 fully administer the Settlement in this Action. Pursuant to the Settlement, Apple will pay the
 16 reasonable costs and expenses of notice and administration. *Id.* § 6.1. Angeion's costs and expenses
 17 will not affect the amount to be paid to Settlement Class Members in the Settlement unless the
 18 Minimum Class Settlement Amount is not reached, whereupon Angeion's costs and expenses may
 19 come from the Minimum Class Settlement Amount. *Id.* § 5.3.1.

20 **c. Guidance 3: The Proposed Notices to the Settlement Class are**
 21 **Adequate**

22 Under Rule 23(c)(2)(B), settlement notice must be "the best notice that is practicable under
 23 the circumstances, including individual notice to all members who can be identified through

24 ¹¹ See Federal Trade Commission, CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND
 25 ANALYSIS OF SETTLEMENT CAMPAIGNS (Sept. 2019) at p. 21. Accessible at
 26 [https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-
 analysis-settlement-campaigns/class_action_fairness_report_0.pdf](https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf) (last reviewed Feb. 9, 2020).

27 ¹² Kaplan Fox & Kilsheimer LLP recently retained Angeion as claims administrator in connection
 28 with the settlement that was preliminarily approved by the court in *Schneider*, 2020 WL 511953.
 Cotchett, Pitre & McCarthy, LLP had retained Angeion as claims administrator in connection with
 the settlement approved by the court in *In re: Lenovo Adware Litig.*, No. 15-md-02624-HSG, 2018
 WL 6099948 (N.D. Cal. Nov. 21, 2018).

1 reasonable effort.” *See also* Rule 23(e)(1) (“The court must direct notice in a reasonable manner to
2 all class members who would be bound by the propos[ed settlement].”). Notice “must generally
3 describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to
4 investigate and to come forward and be heard.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir.
5 2012) (citation omitted).

6 The proposed direct notice procedure and the information to be posted on a Settlement
7 Website meet the requirements under Rules 23(c)(2)(B) and 23(e)(1). Specifically, Apple will
8 provide the Settlement Administrator with the email address of record on the Apple ID account of
9 the members of the Settlement Class, as well as names, mailing addresses, and relevant iPhone serial
10 numbers. Stip. § 6.2.2. Emails of the Summary Notice will be sent by the Settlement Administrator
11 to those whose email addresses are valid; otherwise, the Settlement Administrator will mail a copy
12 of the Summary Notice to that Settlement Class Member. *Id.*; *see also id.*, Ex. C. A copy of the
13 Class Notice, together with the Claim Form and various Court orders and other filings, will be posted
14 and available for download on the Settlement Website. *Id.* § 6.2.1. Finally, the Parties may jointly
15 agree to provide additional notice with approval from the Court. *Id.* § 6.2.5.

16 Rule 23(h)(1) requires that “[n]otice of the motion [for attorneys’ fees] must be served on
17 all parties and, for motions by class counsel, directed to class members in a reasonable manner.” The
18 proposed Class Notice satisfies the requirements of Rule 23(h)(1), as it notifies Settlement Class
19 Members that Class Counsel will apply to the Court for attorneys’ fees and costs as a percentage of
20 the Minimum Class Settlement Amount and its impact on Settlement Class Members, if any. *See*
21 Stip., Ex. B. The proposed Class Notice further describes the proposed Settlement and sets forth,
22 among other things: (1) the nature, history, and status of the litigation; (2) the definition of the
23 Settlement Class and who is excluded from the Settlement Class; (3) the reasons the Parties propose
24 the Settlement; (4) the Minimum and Maximum Class Settlement Amounts; (5) the estimated
25 reimbursement per individual; (6) the Settlement Class’s claims and issues; (7) the Parties’
26 disagreement over damages and liability; (8) the amount of Service Awards for Named Plaintiffs;
27 (9) the plan for allocating the Settlement proceeds to the Settlement Class; and (10) the date, time,
28 and place of the Final Hearing. *See id.*

1 The notice program proposed in connection with the Settlement and the form and content
 2 of the Class Notice and Claim Form, therefore, satisfy the requirements of Rule 23. *Accord eBay*,
 3 309 F.R.D. at 604-5. Courts routinely find that comparable notice procedures meet the requirements
 4 of due process and Rule 23. *See id.*; *see Williamson v. McAfee, Inc.*, No. 5:14-cv-00158-EJD, 2016
 5 WL 4524307, at *7-8 (N.D. Cal. Aug. 30, 2016); *Russell v. Kohl's Dept. Stores, Inc.*, No. ED CV
 6 15-1143 RGK (SPx), 2016 WL 6694958, at *5 (C.D. Cal. Apr. 11, 2016). Accordingly, in granting
 7 preliminary approval of the Settlement, Named Plaintiffs similarly request that the Court approve
 8 the proposed form and method of giving notice to the Settlement Class.

9 **d. Guidance 4 and 5: Opt-Outs and Objections**

10 The proposed Class Notice complies with Rule 23(e)(5) in that it discusses the rights
 11 Settlement Class Members have concerning the Settlement. The proposed Class Notice includes
 12 information on a Settlement Class Member's right to: (1) request exclusion and the manner for
 13 submitting such a request; (2) object to the Settlement, or any aspect thereof, and the manner for
 14 filing and serving an objection; and (3) participate in the Settlement and instructions on how to
 15 complete and submit a Claim Form to the Settlement Administrator. *See Stip.*, Ex. B. The Notice
 16 also provides contact information for Class Counsel, as well as the postal address for the Court. *Id.*

17 **e. Guidance 6: The Intended Attorneys' Fees and Expenses**
 18 **Request**

19 As set forth in the proposed Notice, Class Counsel anticipate seeking attorneys' fees up to
 20 30% of the Minimum Class Settlement Amount, or \$93 million, plus out-of-pocket expenses of up
 21 to \$1.5 million.

22 As of January 31, 2020, Class Counsel and committee members have devoted
 23 approximately 56,533 hours to litigating this Action, for a lodestar of \$29,465,005. *See Joint Decl.*

24 ¶ 8.¹³ Class Counsel's request for a fee up to 30% of the Minimum Class Settlement Amount thus

25 _____
 26 ¹³ These hour and lodestar figures include the time spent by all Court-appointed counsel in the MDL
 27 from the date of appointment through November 30, 2019, the latest quarterly reporting period.
 28 These figures do not include time spent since December 1, 2019, certain pre-appointment time
 deemed compensable by the Court's July 3, 2018 Case Management Order No. 3 [Dkt. 148], or time
 spent by counsel in the JCCP Action. Similarly, the expenses do not include those advanced by
 JCCP Counsel. Class Counsel will provide this information in their reply brief.

1 represents a multiplier of 3.16 on their current lodestar. *See Vizcaino v. Microsoft Corp.*, 290 F.3d
2 1043, 1051 n.6 (9th Cir. 2002) (noting multipliers of between 1.0 and 4.0 are “frequently awarded”);
3 *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 WL 163293, at *5 (S.D.
4 Cal. Jan. 14, 2013) (“Under the percentage method, California has recognized that most fee awards
5 based on either a lodestar or percentage calculation are 33 percent.”) (citing *In re Consumer Privacy*
6 *Cases*, 175 Cal. App. 4th 545, 556 n. 13 (2009)). The Court has been provided quarterly reports with
7 precise information about the hours and lodestar for Class Counsel and committee members, which
8 Class Counsel and others carefully reviewed prior to their submission. And Class Counsel will
9 continue to submit quarterly reports with such information to the Court. Prior to submission of Class
10 Counsel’s request for an award for Attorneys’ Fees and Costs, Class Counsel will disclose their
11 lodestar and the amount of fees they intend to seek to Apple, which Apple reserves the right to object
12 and oppose. Stip. §§ 8.1-8.2.

13 Class Counsel will also seek reimbursement for expenses that are necessarily incurred in
14 litigation and routinely charged to clients billed by the hour. These expenses include, among others,
15 court fees, service of process, consultant fees, mediation costs, online legal and factual research,
16 travel costs, reproduction costs, database expenses, and messenger, courier, and overnight mail
17 expenses. These expenses were critical to Class Counsel’s success in achieving this Settlement.

18 **f. Guidance 7: The Proposed Settlement and Proposed Service**
19 **Awards Do Not Unjustly Favor Any Class Members, Including**
20 **Named Plaintiffs**

21 Class Counsel intends to seek a Service Award of \$1,500 for each Named Plaintiff who was
22 not subjected to deposition and \$3,500 for the nine Named Plaintiffs who were deposed in the Action.
23 Stip. § 8.4. The Service Awards do not unjustly favor any Settlement Class Members.

24 In evaluating whether the Settlement grants preferential treatment to Named Plaintiffs, the
25 Court may consider whether there is a “significant disparity between the incentive award[] and the
26 payments to the rest of the class members” such that it creates a conflict of interest. *Radcliffe v.*
27 *Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013). Important considerations are
28 “the number of class representatives, the average incentive award amount, and the proportion of the
total settlement that is spent on incentive awards.” *In re Online DVD-Rental Antitrust Litig.*, 779

1 F.3d 934, 947 (9th Cir. 2015) (quoting *Staton*, 327 F.3d at 977). A court may also consider “the
2 actions the plaintiff has taken to protect the interests of the class, the degree to which the class has
3 benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing
4 the litigation.” *Staton*, 327 F.3d at 977; *In re Magsafe Apple Power Litig.*, No. 5:09-CV-01911-EJD,
5 2015 WL 428105, at *15 (N.D. Cal. Jan. 30, 2015). Finally, the Court must evaluate whether a
6 conflict exists due to the incentive award being conditioned on the class representative’s approval
7 and support of the Settlement. *Radcliffe*, 715 F.3d at 1161.

8 The Service Awards requested here for most of the Named Plaintiffs are below the accepted
9 range. “Incentive awards typically range from \$2,000 to \$10,000.” *Bellinghausen v. Tractor Supply*
10 *Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015) (collecting cases). Courts in the Northern District of
11 California have found that a \$5,000 incentive award is presumptively reasonable. *In re LinkedIn*
12 *User Privacy Litig.*, 309 F.R.D. 573, 592 (N.D. Cal. 2015); *Rosado v. Ebay Inc.*, No. 5:12-cv-04005-
13 EJD, 2016 WL 3401987, at *9 (N.D. Cal. June 21, 2016). And, because the Settlement is not
14 conditioned on the Court’s approval of the full (or any) amount of a Service Award, the Settlement
15 does not grant preferential treatment to Named Plaintiffs. Stip. § 8.6.

16 While the amount requested per Named Plaintiff represents several times more than the
17 estimated monetary benefit per Settlement Class Member, this does not rise to the level of unduly
18 preferential treatment. Courts have approved similar or greater disparities between incentive awards
19 and individual class member payments. *See LinkedIn*, 309 F.R.D. at 582 (approving a \$5,000
20 incentive award where class members would receive approximately \$14.81); *Cox v. Clarus Mktg.*
21 *Group, LLC*, 291 F.R.D. 473, 483 (S.D. Cal. 2013) (approving a \$5,000 incentive award where class
22 members would receive a maximum payment of \$36); *Fulford v. Logitech, Inc.*, No. 08-cv-02041
23 MMC, 2010 WL 807448, at *3 n.1 (N.D. Cal. Mar. 5, 2010) (collecting cases awarding incentive
24 award payments ranging from \$5,000 to \$40,000).

25 More importantly, Named Plaintiffs seek, at most, only \$216,000 (0.0007%) of the
26 \$310 million Minimum Class Settlement Amount. This amount is reasonable considering how
27 minuscule the award is in relation to the full amount of the Settlement Fund. *See Online DVD-*
28 *Rental*, 779 F.3d at 947-948 (approving incentive awards that were roughly 417 times larger than

1 \$12 individual awards because the awards were reasonable, the number of representatives were
2 relatively small, and the total amount of incentive awards “ma[d]e up a mere 0.17% of the total
3 settlement fund”); *cf. Staton*, 327 F.3d at 976-77 (reversing approval of incentive awards that
4 averaged \$30,000 each for 29 class representatives, totaling \$890,000, or roughly 6% of a potential
5 \$14.8 million settlement). Thus, the Settlement does not improperly grant preferential treatment to
6 Named Plaintiffs or segments of the Settlement Class. *In re Portal Software, Inc. Sec. Litig.*, No. C-
7 03-5138 VRW, 2007 WL 1991529, at *6 (N.D. Cal. June 30, 2007).

8 The amount requested is also appropriate given the time and risk of Named Plaintiffs’
9 participation in this Action. Named Plaintiffs spent more two years prosecuting this Action, and
10 have spent many hours reviewing pleadings, responding to hundreds of discovery requests,
11 reviewing and producing documents, and, for some, preparing for, traveling from out of state to, and
12 sitting for all-day depositions in Palo Alto, California. These factors further support and justify the
13 amount requested. *See, e.g., Eddings v. Health Net, Inc.*, No. CV 10-1744-JST (RZX), 2013 WL
14 3013867, at *7 (C.D. Cal. June 13, 2013) (approving \$6,000 service award from \$600,000 settlement
15 to compensate the named plaintiff for her time, effort and risk in prosecuting the action).

16 Named Plaintiffs’ interests do not conflict with or diverge from the interests of the
17 Settlement Class. *Radcliffe*, 715 F.3d at 1161. Accordingly, the Court should preliminarily approve
18 the request for Service Awards.

19 **g. Guidance 8: Cy Pres Awardees**

20 The Parties will confer on the distribution of any remaining amount in the unlikely event
21 the Minimum Class Settlement Amount is not reached, even at payments of \$500 per device. Stip.
22 § 5.3.3. Based on the manner in which payments will be made, including potentially a pro rata
23 increase of payments for each Approved Claim up to \$500, the Parties do not anticipate any Residual
24 funds remaining in the otherwise non-reversionary Minimum Class Settlement Amount.
25 Nonetheless, if the total amount calculated does not reach the Minimum Class Settlement Amount
26 following the pro rata adjustment, the Parties will confer further, “with resolution subject to Court
27 approval.” *Id.* However, none of any Residual would revert to Apple under any circumstances.
28

1 **h. Guidance 9: Proposed Timeline**

2 In connection with preliminary approval of the Settlement, the Court must also set dates for
3 certain events. The Parties suggest a schedule based on the following intervals:

4 Event	Proposed Time for Compliance
5 Deadline for Apple to provide names, emails, addresses, mailing addresses, and serial numbers to Settlement Administrator.	Not later than thirty (30) days following entry of the Preliminary Approval Order (<i>see</i> Preliminary Approval Order, ¶ 6).
6 Deadline for Settlement Administrator to complete email and/or postcard notice (the "Notice Date").	Not later than seventy-five (75) days of receipt of information from Apple (<i>see</i> Preliminary Approval Order, ¶ 7).
7 Deadline for Class Members to submit Proof of Claim and Release Forms.	Postmarked or submitted no later than forty-five (45) days from the Notice Date (<i>see</i> Preliminary Approval Order, ¶ 10).
8 Deadline for objectors to either deliver written objections by hand or postmarked/sent by First Class Mail.	Postmarked or submitted no later than forty-five (45) days from the Notice Date (<i>see</i> Preliminary Approval Order, ¶ 11).
9 Deadline for Class Members to submit a Request for Exclusion, if desired.	Postmarked or submitted no later than forty-five (45) days from the Notice Date (<i>see</i> Preliminary Approval Order, ¶ 12).
10 Deadline to submit opening briefs and supporting documents in favor of Final Approval of Settlement.	Not later than sixty-five (65) days before the Final Hearing (<i>see</i> Preliminary Approval Order, ¶ 15)
11 Deadline to submit opening briefs and supporting documents for motion for attorneys' fees and incentive awards.	Not later than sixty-five (65) days before the Final Hearing (<i>see</i> Preliminary Approval Order, ¶ 15)
12 Final Hearing	The Court's discretion (<i>see</i> Preliminary Approval Order, ¶ 13).

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17 **i. Guidance 10: Class Action Fairness Act**

18 Pursuant to Section 10 of the Guidance, and as required by the Class Action Fairness Act,
19 28 U.S.C. § 1711, *et seq.*, notice will be borne and provided for by Apple upon the filing of this
20 motion. Stip. § 7.3.

21 **j. Guidance 11: Past Distributions**

22 Pursuant to Section 11 of the Guidance, Class Counsel submits that the settlements in *In re:*
23 *Pre-Filled Propane Tank Marketing and Sales Practices Litigation*, No. 4:09-md-02086-GAF (W.D.
24 Mo.), and *In re: Vizio, Inc., Consumer Privacy Litigation*, No. 8:16-ml-02693-JLS-KES (C.D. Cal.),
25 provide useful comparisons to this Settlement.

	<i>In re: Pre-Filled Propane Tank Mktg and Sales Practices Litig.</i> No. 4:09-md-02086-GAF (W.D. Mo.)	<i>In re: Vizio, Inc., Consumer Privacy Litig.</i> No. 8:16-ml-02693-JLS-KES (C.D. Cal.)
Settlement Fund	\$15 million (min) - \$35 million (max); injunctive relief	\$17 million
Number of Class Members	Unknown	16 million devices
Number of Class Members Notice Was Sent	234,282 (via direct mail notice)	7,828,308 via direct email notice; 5 million via direct notice on Vizio Smart TVs
Methods of Notice	Direct mail notice; summary notice publication; circulation on product; press release; website; toll-free information line	Direct display on TVs; email notice; digital media campaign; nationwide press release; settlement website
Claim Forms Submitted (Number and %)	11,175+ (4+%) (timely submissions were also submitted after final approval)	511,562 (3.2%)
Avg. Recovery	Unknown; \$7.50/product, up to \$150 maximum	\$18/device
Amounts Distributed to Class Members	None	To be determined
Administrative Costs	Unknown (paid by defendants, separate and apart from settlement fund)	\$200,000 estimated total, \$122,823 incurred as of Dec. 2019
Attorneys' Fees and Costs	\$9.45 million (separate and apart from settlement fund)	\$5,610,000 and \$181,808.59

As noted above, given Defendant's name recognition and the manners of notice in which Settlement Class Members will be informed of this Settlement, Class Counsel expects a higher claims rate than those in *In re Pre-Filled Propane* and *In re Vizio*.

VI. CONCLUSION

For the reasons discussed herein, Named Plaintiffs respectfully request the Court certify a Class for settlement purposes, preliminarily approve the proposed Settlement, approve Notice and the selection of the Settlement Administrator, and set a hearing for final approval.

Respectfully submitted,

KAPLAN FOX & KILSHEIMER LLP

DATED: February 28, 2020

s/ Laurence D. King
Laurence D. King

Laurence D. King (SBN 206423)
Mario M. Choi (SBN 243409)
1999 Harrison Street, Suite 1560
Oakland, CA 94612
Telephone: 415-772-4700
Facsimile: 415-772-4707

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lking@kaplanfox.com
mchoi@kaplanfox.com

KAPLAN FOX & KILSHEIMER LLP

Frederic S. Fox (*pro hac vice*)
Donald R. Hall (*pro hac vice*)
David A. Straite (*pro hac vice*)
850 Third Avenue
New York, NY 10022
Telephone: 212-687-1980
Facsimile: 212-687-7714
ffox@kaplanfox.com
dhall@kaplanfox.com
dstraite@kaplanfox.com

COTCHETT, PITRE & MCCARTHY, LLP

DATED: February 28, 2020

s/ Joseph W. Cotchett
Joseph W. Cotchett

Joseph W. Cotchett (SBN 36324)
Mark C. Molumphy (SBN 168009)
Brian Danitz (SBN 247403)
Tyson Redenbarger (SBN 294424)
Anya Thepot (SBN 318430)
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000
Facsimile: 650-697-05777
jcotchett@cpmlegal.com
mmolumphy@cpmlegal.com
bdanitz@cpmlegal.com
tredenbarger@cpmlegal.com
athepot@cpmlegal.com

Interim Co-Lead Counsel for Plaintiffs

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

I, Laurence D. King, attest that concurrence in the filing of this document has been obtained from the other signatory. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28th day of February 2020, at Oakland, California.

/s/ Laurence D. King

Laurence D. King