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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE APPLE IPHONE 4 PRODUCTS LIABILITY LITIGATION	MDL Docket No. 10-2188 (RMW)
THIS DOCUMENT RELATES TO: All Actions	MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT DATE: July 13, 2012 TIME: 9:00 A.M. CTRM: 6 - 4th Floor Judge: Hon. Ronald M. Whyte

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Plaintiffs[1] respectfully submit this memorandum in support of their Motion for an Order and Final Judgment approving this Class Action Settlement under Federal Rules of Civil Procedure 23(c)(2) and (e). On February 17, 2012, the Court entered an order that appointed Co-Lead Class Counsel and Class Representatives, conditionally certified a settlement class under Federal Rule of Civil Procedure 23(b)(3), preliminarily approved the parties' Settlement Agreement,[2] approved and directed a plan for giving notice to class members, and appointed the Settlement Administrator. (Dkt. No. 47). That preliminary approval order also set deadlines for objecting to the proposed Settlement and for requesting exclusion from the Settlement Class, as well as other interim deadlines leading up to the final approval hearing, set for July 13, 2012.

In compliance with the Court's order, Defendant Apple, Inc. ("Apple") has caused notice of this proposed Settlement to be sent directly to millions of Settlement Class members. The parties and their counsel now respectfully request final approval of the proposed Settlement that entirely resolves the claims brought by the named Class Representatives on behalf of themselves and the Settlement Class, against Apple. This Motion for Final Approval is supported by the Declarations of Ira P. Rothken; Stuart A. Davidson, Jennifer Sarnelli, Behram V. Parekh, and William Audet, as well as other evidence, filed herewith.

As the record reveals, millions of Class members have already received free cases for their iPhone 4s as a result of this litigation.[3] Use of the case allows Class members to alleviate the antenna reception problem that forms the basis for this lawsuit. To date, $75 million dollars

[1] Named plaintiffs are: Stacey Milrot, Christopher DeRose, Steve Tietze, Jeffrey Rodgers, Hung Michael Nguyen, Anthony Cologna, Joy Bearden, David Popik, Charles Fasano, Greg Aguilera II, Thomas Gionis, Christopher Bensberg, David Purdue, Michael James Goodglick, Karen Young, Joshua Gilson, Brandon Ellison Reininger, Trevor Antunez, Jessica Lares, Jaywill Sands, Bryan Colver, Jaclyn Badolato, Nicole Stankovitz, Vinny Curbelo, Kevin McCaffrey, Sam Balooch, Donald Garcia, Arcelia Hurtado, Mark Musin, Matt Vines, James Blackwell, and Jethro Magat.

[2] All terms are given the same meaning as defined in the Parties' Settlement Agreement, which is attached as Exhibit 1 to the Notice of Motion.

[3] Following the filing of Plaintiffs complaints, Apple help a press conference announcing that it would provide a free case to all iPhone 4 owners upon request. One of the case options was Apple's own "bumper" which is a case that wraps around the exterior of the iPhone 4. Throughout this motion, Plaintiffs refer to Apple's free case offer as the "Bumper Program."

worth of cases have been provided to Class members. As a result of the proposed Settlement, the Bumper Program has been extended for an additional 18 months, so that all iPhone 4 owners have the opportunity to obtain a free bumper.[4] The proposed Settlement also provides immediate economic benefits to the Settlement Class members in the form of a $15.00 cash payment if a Class member is not satisfied with the bumper solution or does not wish to compromise the "design" integrity of iPhone 4.

The proposed Settlement occurred after considerable investigation, pretrial activities (including an MDL proceeding and coordination with parallel cases pending in Santa Clara Superior Court) and a meaningful exchange of information. As the record also establishes, the agreement was aggressively negotiated between the parties through arm's length negotiations under the supervision of by the Honorable Daniel Weinstein, a retired California judge, and assisted by mediator Catherine Yanni, Esq. Furthermore, the proposed Settlement represents an outcome for the Settlement Class that provides immediate benefits and removes the risk, delay, and significant expense of further litigation. This is especially important in a case of this kind because many Class members upgrade their phones after their two-year service contract expires. Thus, Plaintiffs were mindful that a quick resolution of the litigation would be in the best interests of Class members. Finally, the parties have received minuscule objections to the proposed Settlement from the over 27 million Settlement Class members (indeed, less than 0.000022% the overall Class as of the date of this filing), underscoring the obvious fairness and adequacy of the proposed Settlement recovery to Settlement Class Members.[5] These factors, combined with many others described below, support this Court's final approval of the proposed Settlement.

I. BACKGROUND OF LITIGATION AND PROPOSED SETTLEMENT

Plaintiffs brought this consolidated nationwide class action[6] pursuant to Federal Rules of

[4] Under the terms of the proposed Settlement, Class members can request a free bumper for their iPhone 4.

[5] The deadline for filing objections is June 15, 2012. Plaintiffs intend to file a supplemental submission after this date addressing any valid objections that have been made to the Settlement

[6] Eighteen (18) substantially similar cases were consolidated by the Judicial Panel on Multidistrict Litigation in the Northern District of California pursuant to 28 U.S.C. § 1407 of into a single action entitled, *In re Apple iPhone 4 Products Liability Litigation*, Master File No. 5:10-

Civil Procedure 23, on behalf of themselves and all others similarly situated as members of the following class (the "Class"): all persons who purchased an iPhone 4 in the United States between June 24, 2010 and the date of final approval. In these consolidated cases, Plaintiffs challenge Defendants' actions in connection with their marketing, advertising and sale of the Apple iPhone 4 cellular telephone ("iPhone 4"), which Plaintiffs alleged was defectively designed. As alleged in the various complaints, and later in the Master Consolidated Complaint filed by the Plaintiffs, Apple designed, manufactured, marketed, advertised, and warranted the iPhone 4 to consumers nationwide. In conjunction with each sale, Apple marketed, advertised and warranted that each iPhone 4 would work, at the very least, for the primary purpose a consumer buys a cellular phone – namely, making and receiving telephone calls. *See* Master Consolidated Complaint [Dkt. No. 14].

Plaintiffs allege that Apple knew or should have known that the iPhone 4 was defective in design and/or manufacture. More specifically, Plaintiffs allege that the iPhone 4 contains a defect that results in the attenuation of cellular reception when handling the phone as a reasonable, ordinary person would handle a mobile telephone while making phone calls, browsing the Internet, sending text messages, or utilizing other iPhone 4 features, and in the same manner as depicted in numerous Apple advertisements. In short, Plaintiffs allege that when a Class member uses an iPhone 4 as a normal person would, reception significantly degrades.

On this basis, Plaintiffs alleged 21 causes of action in their Master Consolidated Complaint [Dkt. No. 14], including violations of various common laws, California consumer protection laws, and violation of the consumer protection statutes of other states.

Procedural History of the Federal Actions and the Parallel California Actions

On June 25, 2010, the first of a number of class action complaints were filed in this Court arising out of the problems associated with the iPhone 4's telephone reception. All cases pending in this Court were 'related over' by order of this Court. On September 30, 2010, the Judicial

md-02188-RMW on November 9, 2010 with two other cases added subsequently. On February 7, 2011, Plaintiffs filed a Master Consolidated Complaint in the consolidated action. [Dkt. No. 14].

Panel on Multidistrict Litigation ("MDL") heard Apple's Motion for MDL consolidation and transfer to the Northern District of California of the then pending 18 similar class actions. On October 8, 2010, the MDL panel issued it orders consolidating all actions and transferring them to this Court. On January 14, 2011, this Court signed Pretrial Order No. 1, consolidating the federal cases into a single action entitled, *In re Apple iPhone 4 Products Liability Litigation*, Case No. 5:10-md-02188-RMW ("Federal Action"), appointing Plaintiffs' Interim Co-Lead Counsel,[7] and ordering the filing of a Master Consolidated Complaint to administratively govern the Federal Action. In compliance with this Order on February 7, 2011, the federal Plaintiffs filed a Master Consolidated Class Action Complaint.

Concurrently, four California state actions were also consolidated by the California Judicial Panel and transferred to the Superior Court of Santa Clara. The actions were subsequently assigned to one judge and, by agreement of the parties and Court order, William M. Audet of Audet & Partners, LLP., was appointed as Liaison counsel for the plaintiffs in the consolidated state action. The State Court order also included a provision that coordinated the state actions with the federal MDL, including any mediation efforts.

Procedural History of the Mediation

After an initial exchange of information, on February 15, 2011, Plaintiffs and Apple agreed to mediate the issues set forth in the Master Consolidated Complaint before the Honorable Daniel Weinstein (Ret.) and Catherine Yanni, Esq. of JAMS. As a condition of the proposed mediation, Apple was obligated to provide Co-Lead Counsel critical information regarding the core issues of the case, including documents relating to alleged causation and the design of the iPhone 4 antenna. The parties proceeded with settlement discussions, which included multiple rounds of in-person mediation along with numerous telephonic calls in between such in-person mediation sessions. On June 23, 2011, July 13, 2011 and August 4, 2011, the parties (represented by Co-Lead Counsel and state liaison counsel for the Plaintiffs) and Apple and its counsel, met for full

[7] Co-Lead Counsel in the Federal Action are: Rothken Law Firm; Robbins, Gellar, Rudman & Dowd LLP; Gardy & Notis, LLP; and, Kirkland & Packard, LLP.

day, contentious meditation sessions. Only after reaching an agreement on all the material terms of the proposed Settlement did the parties engage in an arms-length discussion, again with the assistance of the mediators, to seek to reach agreement on the payment of attorneys' fees. On January 24, 2012, the parties again met in-person with the mediators to draft and finalize the Settlement Agreement and exhibits. The Settlement Agreement was finalized late that evening and was previously filed with the Court. [Dkt. No. 45-1]

Summary of the Proposed Settlement

The parties' Settlement Agreement proposes certification of a Settlement Class consisting of:

> All United States residents who are or were the original owners of an iPhone 4. The Settlement Class excludes Apple; any entity in which Apple has a controlling interest; Apple's directors, officers, and employees; and Apple's legal representatives, successors, and assigns.[8]

The parties estimate that there are well over twenty-seven (27) million members of the Settlement Class.

Individual Class Member Benefits

As the record establishes, Plaintiffs' lawsuits were a catalyst for Apple's initiation of its Bumper Program, pursuant to which approximately 2.61 million protective bumpers valued at $29 each (*i.e.*, over $75 million in products) were provided to Class members for their iPhone 4s between July 2010 and April 2012. The proposed Settlement provides, as more fully set forth in the Settlement Agreement, substantial benefits to Settlement Class, including, both economic and injunctive relief. Specifically, the proposed Settlement provides:

i. All 27 million Class members are eligible to seek a cash payment of $15.00. Apple has agreed to pay all eligible claimants $15.00 cash with no limit.

ii. Apple is extending its Bumper Program, and will continue to offer Class members the protective bumper for their iPhone 4 for at least 18 months subsequent to the

[8] The Court provisionally certified the class for all original owners of an iPhone4 as of February 17, 2012. Dkt No. 47, paragraph 3.

discontinuation of the iPhone 4 as described at http://support.apple.com/kb/HT4389. The proposed Settlement included a narrow release of claims by Class members, which ensured that any of Class members' unrelated claims would not be waived. In addition, Apple has agreed to pay for notice, the claims administration costs and expenses, and to not oppose separately negotiated attorneys' fees and expense reimbursement to Class Counsel, as awarded by the court, up to $5.9 million.[9]

II. THE PARTIES HAVE SATISFIED THEIR NOTICE OBLIGATIONS UNDER THE PRELIMINARY APPROVAL ORDER

On February 17, 2012, upon application of the parties, this Court preliminarily approved the proposed Settlement and directed the parties to issue notice to the Class. (Dkt. No. 47). The Order provides that "proposed settlement set forth in the Agreement is hereby preliminarily approved as being fair, reasonable, and adequate such that notice thereof should be given to members of the Settlement Class." (Dkt. No. 47 at ¶ 2), and defined the Settlement Class which has not been altered for this final approval motion. The Order also appointed the Co-Lead Counsel as Class Counsel and appointed Plaintiffs Stacey Milrot, Christopher DeRose, Steve Tietze, Jeffrey Rodgers, Hung Michael Nguyen, Anthony Cologna, Joy Bearden, David Popik, Charles Fasano, Greg Aguilera II, Thomas Gionis, Christopher Bensberg, David Purdue, Michael James Goodglick, Karen Young, Joshua Gilson, Brandon Ellison Reininger, Trevor Antunez, Jessica Lares, Jaywill Sands, Bryan Colver, Jaclyn Badolato, Nicole Stankovitz, Vinny Curbelo, Kevin McCaffrey, James Blackwell, and Jethro Magat to serve as Class Representatives. (Dkt. No. 47 at ¶ 4). The Order also approved the Claim Forms, the Notice of Pendency and Proposed Settlement of Class Action, and the Summary Notice of Settlement, finding that "the forms of notice to the Settlement Class regarding the pendency of the Action and of this settlement and Class Counsel's fee and expense application and application for a stipend set forth above, and the methods of dissemination to members of the Settlement Class in accordance with the terms of this Order, constitute the best notice practicable under the circumstances and constitute valid, due, and

[9] Plaintiffs seek the Court's approval of attorneys' fees and expenses in a separate motion filed simultaneously.

sufficient notice to all members of the Settlement Class, complying fully with the requirements of Rule 23(c)(2)(B) and the United States Constitution." *Id*. at ¶10.

The required notice provisions were successfully carried out. In particular:

> 1. Posting the above noted documents on the Settlement Website, www.iPhone4settlement.com (Order ¶ 7).
>
> 2. Publication by Apple of the Summary Notice once in *USA Today* and once in *Macworld* with such notices being no smaller than ¼ page size. (Order ¶ 9).
>
> 3. Emailing each Class Member for whom Apple has an email address in its warranty registration database an electronic copy of the Summary Notice. (Order ¶ 8).

An official settlement Website, www.iPhone4settlement.com, which posted the Long-Form Notice and other settlement documents, became operational on March 28, 2012. Declaration of Claims Administrator Jeffrey Gyomber ("Gyomber Decl.") [10] ¶7 . Publication notice appeared in the daily issue of the national edition of *USA Today* on April 2, 2012, and in the May, 2012 edition of *Macworld*. See Declaration of Sissie Twiggs in Support of Final Approval. Between March 30, 2012 and April 13, 2012, email notices were disseminated directly to more than 15.7 million Class Members. Gyomber Dec., ¶8. Each of the above notices was in the form approved by the Court.

Under the Court's preliminary approval order, and as stated in the class notices, Class members have until June 15, 2012 to request exclusion from the proposed Settlement class by sending such request by first class mail, to Robbins Geller Rudman & Dowd LLP, Attn: Rick Nelson, Class Member Relations, 655 West Broadway, Suite 1900, San Diego, CA 92101.

Class members also have until June 15, 2012, to object to the proposed Settlement. As of this filing, of the approximately 27 million Class members who were provided direct and/or publication notice,[11] only 8 have objected to the settlement as of the date of this brief. (A discussion of the objections will be presented by June 29, 2012 as outlined in the Court's order).

[10] On June 1, 2012, Apple filed Gyomber Decl. with the Court.

[11] Many households and businesses have more than one iPhone 4 device registered to a single email address thus accounting for the disparity between the number emailed notices sent as compared to the total number of iPhone 4s sold.

III. THE PROPOSED SETTLEMENT SHOULD BE APPROVED

A. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

The law favors voluntary settlement of disputes, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (C.A. Wash. 9th Cir. 1976); *Newberg on Class Actions* § 11.41 (Alba Conte & Herbert B. Newberg eds., 4th ed. 2002) (and cases cited). Indeed, settlement of complex cases contributes greatly to the efficient utilization of scarce judicial resources and achieves the speedy resolution of justice, for "[a] just result is often no more than an arbitrary point between competing notions of reasonableness." *In re Corrugated Container Anti-Trust Litig. II*, 659 F.2d 1322, 1325 (5th Cir. 1981). Pursuant to Federal Rule of Civil Procedure 23(e), "[A] class action shall not be dismissed or compromised without the approval of the Court. . . ." District courts are afforded broad discretion in determining whether to approve a proposed class action settlement. Indeed, "evaluation of [a] proposed settlement in this type of litigation . . . requires an amalgam of delicate balancing, gross approximations and rough justice," and the trial court's ruling on the adequacy of a proposed compromise is given great deference. *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1385 (S.D.N.Y. 1972), *aff'd in part and rev'd in part on other grounds*, 495 F.2d 448 (2d Cir. 1974). Although the court possesses "broad discretion" in determining that a proposed class action settlement is fair, the court's role "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625 (internal quotation marks and citation omitted). Accordingly, the court should give due regard to what is otherwise a "private consensual agreement" between the parties. *See id.*; *Church v. Consolidated Freightways, Inc.*, Nos. C–91–4168–DLJ, C–90–2290–DLJ, 1993 WL 149840, at *2 (N.D. Cal. May 3, 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989), *aff'd sub nom., Class Plaintiffs v. City of Seattle*, 955 F.2d

1268 (9th Cir. 1992) ; *Manual for Complex Litigation*, Fourth, § 21.61 at 309 ("The judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement."). A court's approval of a class action settlement will only be reversed for a clear abuse of discretion. *See Officers for Justice*, 688 F.2d at 626 ("[W]e reverse only upon a strong showing that the district court's decision was a clear abuse of discretion"); *City of Seattle*, 955 F.2d at 1276; *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998).

On a motion for final approval of a class action settlement, a court's inquiry is whether the settlement is "fair, adequate and reasonable." Fed. R. Civ. Pro. 23(e)(1)(C); *Officers for Justice*, 688 F.2d at 625. A settlement is fair, adequate and reasonable, and therefore merits final approval, when "the interests of the class are better served by the settlement than by further litigation." *Manual for Complex Litigation*, Fourth, § 21.6 at 309.

In conducting this analysis, however, the district court should not require the proponents of a settlement to stage a mini-trial on the merits, the very event that settlement aims to preclude. *See In re Armored Car Anti-Trust Litig.*, 472 F. Supp. 1357, 1367 (N.D. Ga. 1979), *aff'd in part and rev'd in part on other grounds*, 645 F.2d 488 (5th Cir. 1981). Moreover, the court should not seek to substitute its judgment of what is fair for that reached by the parties in their arm's-length negotiations. *See* 7B Charles Alan Wright, *et. al.*, *Federal Practice & Procedure* § 1797.5 (3d ed. 2012); *see also Manual for Complex Litigation*, Fourth, § 21.61 at 309. Where adversarial negotiation by capable counsel is evident, it is presumed that the resulting class settlement is fair. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005), *cert. denied sub nom., Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044, 125 S. Ct. 2277 (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'") (quoting *Manual for Complex Litigation*, Third § 30.42 (1995)); *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 695 (D. Colo. 2006); *Newberg on Class Actions* § 11.41 (Alba Conte & Herbert B. Newberg eds., 4th ed. 2002).

Finally, in evaluating a settlement, the court is not to reach the merits of the case or to form conclusions about the underlying questions of law or fact. *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit has established the following factors to consider in determining whether a settlement is fair, reasonable and adequate: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement [presumably in comparison to comparable cases]; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the proposed settlement. *Churchhill Village, L.L.C v. General Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *Officers for Justice*, 688 F.2d 625 (numbers added); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1040-41 (N.D. Cal. 2008). Judge Walker in this District, relying upon the *Manual for Complex Litigation*, Fourth § 21.6, has also proposed as a ninth factor "the procedure by which the settlement was arrived at." *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007).

Under these standards, the proposed Settlement is fair, reasonable and adequate.

1. The Strength of Plaintiffs' Case

"An important consideration in judging the reasonableness of a settlement is the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement." 5 *Moore's Federal Practice* § 23.85[2][b] (Matthew Bender 3d. ed.). However, in balancing these factors, "a proposed settlement is not to be judged against a speculative measure of what might have been awarded in a judgment in favor of the class." *Id.* As noted by the Ninth Circuit:

> [T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor [the Court of Appeals] is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wastefulness and expensive litigation that induce consensual settlements.

Officers for Justice, 688 F.2d at 625.

Although Plaintiffs believe strongly in the underlying merits of their case, consumer

product class action cases are difficult to prove on a classwide basis. Specifically, Plaintiffs argue that a common design defect results in the iPhone 4 exhibiting extensive signal attenuation and failure problems. Apple, however, would counter that this problem is a person by person issue, not suitable for class wide determination. Furthermore, Apple would argue that Plaintiffs could not produce evidence regarding whether the failure was attributed to the iPhone 4's design or poor signal quality because of the iPhone 4's service provider. While Plaintiffs would intend to show that a common design defect is adequate to prove a violation of California law, they would face an uphill battle in so doing. There are clear uncertainties surrounding Plaintiffs' ability to prove their claims given the unpredictability of a lengthy and complex jury trial. Given the nature of the claims, this factor weighs in favor of proposed Settlement.

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

Another relevant factor in the present matter is the risk of continued litigation balanced against the certainty and immediacy of recovery from the proposed Settlement. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Newberg on Class Actions* § 11.50 (Alba Conte & Herbert B. Newberg eds. 4th ed. 2002). As observed in *Oppenlander v. Standard Oil Co. (Ind.)*, 64 F.R.D. 597 (D. Colo. 1974)

> The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, "It has been held proper to take the bird in hand instead of a prospective flock in the bush."

64 F.R.D. at 624.

Hence, the Court must balance the risks of continued litigation against a certain and immediate recovery for the Plaintiff Class. There are significant risks in continued litigation as outlined above. There is no guarantee of class certification relating to a myriad of separate experiences with the iPhone 4. And, if a class was certified there is no guarantee that Plaintiffs would prevail at trial or what damages they would expect to receive from a jury.

Although Co-Lead Counsel believes that the case is meritorious, their collective (and considerable) class action experience has taught them how the outcome of a trial is extremely uncertain. Clearly, any complex litigation is difficult. Even if Plaintiffs were to prevail at trial, risks to the Class remain. For example, in *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991), a case litigated and tried in this District, the jury rendered a verdict for plaintiffs after an extended trial, but later, the trial court overturned the verdict, entering judgment n.o.v. for the individual defendants, and ordered a new trial with respect to the corporate defendant. In another case in the Middle District of Florida, the jury returned a verdict of approximately $81 million in favor of the class. The verdict was reversed on appeal, leaving the class with nothing. *Robbins v. Koger Props, Inc..*, 116 F.3d 1441 (11th Cir. 1997); *see also Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (the class won a large jury verdict and a motion for j.n.o.v. was denied, but on appeal the judgment was reversed and the case dismissed); *State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (D.C.N.Y. 1970) ("[i]t is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced"), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversing $87 million judgment after trial).

Furthermore, mobile telephones are subject to substantial turnover. Most service providers require consumers to sign a two-year contract with the purchase of a mobile phone at a promotional price. Frequently, after a two-year contract has expired consumers will upgrade their current model mobile telephone to obtain the latest technological features. The available features on mobile telephones are rapidly changing providing consumers with a larger array of choices. In fact, since the release of the iPhone 4, Apple has release a new model, the iPhone 4S and an iPhone 5 is rumored to be in the making. This proposed Settlement gives Class members a meaningful benefit during the time when they actually use their iPhone 4s.

Against all of these uncertainties, an immediate and certain cure and compensation program, as set up here, while most of the iPhone 4s are still in use, is a better option than

continuing litigation. *See also Chiaramonte v. Pitney Bowes, Inc.*, No. 06 CV 1507 JM (NLS), 2008 WL 510765, at *2 (S.D. Cal. Feb. 25, 2008).

3. The Risk of Maintaining Class Action Status

Although Plaintiffs are confident in their abilities to prosecute and manage this case, there is significant risk that the case would not survive a contested class certification proceeding. For example, while Plaintiffs contend that common issues of a uniform design defect predominate, Apple argues that any alleged signal attenuation issues result from the service provided by the cellular carriers. Further, Apple would argue that Plaintiffs could not prove that each Class member held the iPhone 4 in the same manner, therefore, Apple would argue that individual issues predominate and class certification should fail. While Plaintiffs contend that they would ultimately prevail on class certification, Plaintiffs did face significant risks in obtaining and maintain class certification through trial.

4. The Amount Offered in Proposed Settlement

Plaintiffs believe that the recovery obtained consisting of monetary amounts for consumers and continuation of the iPhone 4 Bumper Program constitutes a substantial recovery for the class. Furthermore, after class action complaints were filed, Apple established its free Bumper Program. As a direct result of this litigation, over 2.61 million Class members have already received a free bumper (each with a retail value of $29). This portion of the relief alone is valued at over $75 million.

While it is not designed to provide the fullest possible recovery, the Ninth Circuit has noted, "the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.'" *Linney*,151 F.3d at 1242 (citation and internal quotation marks omitted). As such, there is no suggestion that for a settlement to be approved, the settlement amount has to consist of a full and complete recovery of all claims.

Here, the proposed Settlement consists of two types of relief. First and foremost, the proposed Settlement provides simple direct relief in the form of a $15.00 cash award. The second provides for a continuation of the Bumper Program, in which class members may obtain a free

protective bumper for their iPhone 4. Accordingly, the proposed Settlement provides customers with a direct remedy for the allegations of the complaint.

5. The Extent of Discovery Completed, and the Stage of the Proceedings

In determining the adequacy of the parties' knowledge of the case, it may be relevant to consider the extent of discovery. A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair. *See City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). Here, Plaintiffs reviewed a significant number of confidential documents and disclosures from Apple relating to the claims asserted, including research and testing data. Further, the Co-Lead Counsel and other Plaintiffs counsel obtained data directly from hundreds of Class members regarding their individual experiences with the iPhone 4. Co-Lead Counsel also retained an expert consultant to provide an analyses of the iPhone 4 and the alleged signal attenuation issues. Thus, Plaintiffs' litigation and mediation of this case was informed by a thorough review of these non-public documents and based on Class member interviews and expert analyses. Further, by the time the proposed Settlement was reached, the litigation had proceeded to a point in which both Plaintiffs and Defendant "ha[d] a clear view of the strengths and weaknesses of their cases." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986). Nonetheless, Plaintiffs made their agreement to settle subject to further discovery. (Plaintiffs report that the discovery obtained further confirmed that the proposed Settlement was fair, reasonable and adequate.)

6. The Experience and Views of Counsel

The Settlement Agreement was presented to the Court after extensive negotiations among the settling parties. In reviewing the opinions of counsel, "great weight" is accorded to the recommendation of the attorneys. *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997). They are the ones who are most closely acquainted with the facts of the underlying litigation. *Id.* "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *In re Pacific. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Thus, "the trial judge, absent

fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Hanrahan v. Britt*, 174 F.R.D. 356, 366-68 (E.D. Pa. 1997) (presumption of correctness applies to a class action settlement reached in arms'-length negotiations between experienced, capable counsel after meaningful discovery) (citing *Manual for Complex Litigation*, Second, § 30.41 (1985), *and Ratner v. Bennett*, No. 92-4701, 1996 WL 243645, at *5 (E.D. Pa. May 8, 1996)).

Here, Plaintiffs' Co-Lead Counsel was in the thick of the litigation and understood the complex weighing of risks and delay inherent in any settlement. It was Co-Lead Counsel's conclusion that providing an opportunity for approximately 27 million people to obtain a cash award and the extension of the Bumper Program could likely be the best result that might be obtained even after several years of litigation. Thus, based on their years of class action experience, Co-Lead Counsel, after consultation with their clients, agreed to the proposed Settlement and strongly recommend its approval by this Court.

7. The Presence of a Governmental Participant

This litigation did not have a governmental participant. Yet, Plaintiffs obtained an excellent result without any 'assistance' by any governmental agency.

8. The Reaction of the Class Members to the Proposed Settlement

"The reactions of the members of a class to a proposed settlement is a proper consideration for the trial court." 5 *Moore's Fed. Practice* § 23.85[2][d]. Class Representative's opinion of the proposed Settlement are especially important as "[t]he representatives' views may be important in shaping the agreement and will usually be presented at the fairness hearing; they may be entitled to special weight because the representatives may have a better understanding of the case than most members of the class." *Manual for Complex Litigation*, Third, § 30.44 (1995).

a. Class Representative Reaction

The Class Representatives are strongly in support of the proposed Settlement. Each of these Class Representatives and their attorneys have an extensive understanding of the merits of this settlement having participated extensively in the strategy, formulation, filing, litigation and

negotiation process. Each of these Class Representatives consider many of the same issues raised by objectors during the settlement process but ultimately came to the conclusion that the settlement was in the best interest of the class.

b. Objecting Class Members

The Court should carefully weigh the number and nature of objections while keeping in mind that a proposed Settlement can be fair even if a large number of class members oppose it. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 174 (5th Cir. 1983). The Ninth Circuit has approved settlements over objections if the settlement otherwise meets the fairness requirements. *See, e.g.*, *Churchill Village*, 361 F.3d at 577 (500 opt-outs and 45 objections out of approximately 90,000 notified class members); *In re Mego Fin. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000) (one objection out of a potential class of 5400); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (one percent of the class disapproved).

The deadline for objections of June 15, 2012 has not yet arrived. (Plaintiffs note that, as of the date of this filing, only 8 persons have filed and served objections, less than .00003% of the Settlement Class) A full response to any valid objection will be dealt with in a separate brief, filed on or before June 29, 2012.

9. The Procedure By Which the Proposed Settlement was Arrived Supports the Proposed Settlement

As noted by the Ninth Circuit, the eight listed factors is "by no means an exhaustive list of relevant considerations." *Officers for Justice*, 688 F.2d at 625. As such, in conformance with the *Manual for Complex Litigation*, Fourth, §21.6, Courts have indicated that the procedure by which the settlement was arrived is an important fact in determining whether a settlement should be approved. The parties engaged in several day-long mediations. These mediations were highly contentious. The mediation sessions were led by not one, but two, well-respected mediators – the Honorable Daniel Weinstein (Ret.) and Cathy Yanni, President of the Academy of Court-Appointed Masters. Judge Weinstein details the nature of the mediation notes that in his opinion "this settlement is fair, reasonable, and adequate for the proposed class" based upon his conclusion that the parties negotiated vigorously and at arm's length. See Declaration of Honorable Daniel Weinstein ("Weinstein Decl.") attached. Similar testimony is found in each of the Co-Lead Counsel's contemporaneously filed declarations.

For all of the above reasons, Final Approval of the proposed Settlement should be granted.

B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

To complete the formal settlement approval process, the Court must satisfy itself that the requirements of Federal Rule of Civil Procedure 23 are met. Every requirement of Rule 23 is satisfied with respect to this proposed Settlement class. This Court, in its preliminary-approval order, held that:

> WHEREAS, this Court preliminarily finds, for the purposes of settlement only, that the class alleged in the Action meets all the prerequisites of Federal Rules of Civil Procedure Rule 23 for class certification, including numerosity, commonality, typicality, ascertainability, predominance of common issues, superiority, and that the Class Representatives and Class Counsel are adequate representatives of the Settlement Class

Plaintiffs recount their previous showing and demonstrate that this Court should issue a final order approving certification of the Settlement Class.

1. The Numerosity Requirement Is Met

Rule 23(a)(1) allows a class action to be maintained if "joinder of all members is impracticable" owing, in primary part, to the large number of people in the proposed class. Fed.

R. Civ. P. 23(a)(1); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Generally, the numerosity requirement is satisfied when the class comprises 40 or more members. *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007). In this case, the parties estimate that the Settlement Class includes over 27 million persons residing throughout the United States. Size renders joinder impracticable here and, Plaintiffs believe, satisfies the numerosity requirement. *See Hanlon*, 150 F.3d at 1019.

2. The Commonality Requirement is Met

Rule 23(a)(2) allows a class action to be maintained if "there are questions of law or fact common to the class." "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019. Here, all Settlement Class members are Apple iPhone 4 owners.

Plaintiffs allege the same legal theories for all proposed Class members:

a) Whether Apple advertised and sold the iPhone 4 by promoting the product's speed and performance, when in fact, the actual performance was materially different, and worse, than promised;
b) Whether the iPhone 4 was defective;
c) Whether Apple was negligent in the design, manufacturing, and distribution of the iPhone 4;
d) Whether Apple's representations amounted to an express warranty;
e) Whether Apple breached the warranty;
f) Whether Apple breached the implied warranty of merchantability;
g) Whether Apple breached the implied warranty of fitness for a particular purpose;
h) Whether Apple intentionally and/or negligently misrepresented material facts relating to the character and quality of the iPhone 4;
i) Whether Apple failed to disclose material facts about limitations in the speed and performance characteristics of the iPhone 4 to consumers;
j) Whether Apple forced Class members to pay unjust charges for the goods and services they were sold by Apple, as well as whether that failure violates statutory and common law prohibitions against such conduct;
k) Whether Apple violated state consumer protection laws; and
l) Whether Plaintiffs and the Class members are entitled to relief, and the nature of such relief.

Accordingly, commonality requirement is satisfied.

3. The Typicality Requirement is Met

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [must be] … typical of the claims or defenses of the class." "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs and whether other class members have been injured by the same conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal citations omitted). "[U]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020.

Here, each proposed Class Representative experienced the Apple iPhone 4 signal attenuation as a result of a uniform design defect and all share an interest in redressing those claims with all proposed Class members. Thus, Plaintiffs believe their claims are typical of those of the Settlement Class, and Fed. R. Civ. P. 23(a)(3) is met.

4. The Named Plaintiffs and Class Counsel Are Adequate Class Representatives

Finally, Rule 23(a)(4) and Rule 23(g) together require that the named plaintiff and proposed class counsel be able to "fairly and adequately protect the interests of the class." "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

Here, neither Plaintiffs nor their counsel have any interests antagonistic to the Settlement Class. Furthermore, Plaintiffs and Co-Lead Counsel have vigorously prosecuted this action on behalf of the Settlement Class, including filing and service of the lawsuits, self-organizing the various cases and counsel, filing a Master Consolidated Complaint, filing initial disclosures, initiating settlement negotiations with defense counsel, requesting confidential documents and data from Apple, analyzing the documents and data Apple provided, and moving the action forward to resolution. The attorneys who represent the Class Representatives are well-qualified

to serve as Class Counsel and indeed have handled similar nationwide high technology class actions to successful resolution in the past. The qualifications and experience of counsel are set forth in the Declarations of Ira P. Rothken, Stuart A. Davidson, Jennifer Sarnelli and Behram V. Parekh, attached to the Declaration of Ira P. Rothken in Support of Motion for Final Approval of Class Action Settlement ("Rothken Decl.") as Exhibits A through E.

5. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)

Once the subsection (a) prerequisites are satisfied, Federal Rule of Civil Procedure 23(b)(3) provides that a class action can be maintained where the questions of law and fact common to members of the class predominate over any questions affecting only individuals, and the class action mechanism is superior to the other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P 23(b)(3); *Pierce v. County of Orange*, 526 F.3d 1190, 1197 n.5 (9th Cir. 2008). Because a settlement is being proposed, the Court need not consider manageability. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (citation omitted) ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial").

The predominance inquiry looks to whether a proposed class is sufficiently cohesive to warrant adjudication by representation. *Id*. at 623. Common issues predominate where a common nucleus of facts and potential legal remedies dominate the litigation. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005). Here, Plaintiffs' claims arise out of the same set of operative facts and are premised on the same legal theories. For settlement purposes, where the manageability of trying the case need not be considered, the predominance requirement is satisfied.

In addition, a class action is superior to any other method available to fairly, adequately, and efficiently resolve the Settlement Class members' claims. Without a class action, most would find litigation costs prohibitive, and if they did sue in large numbers, multiple individual actions would be an inefficient use of the Court's and parties' resources. Accordingly, Plaintiffs believe

a class action is the superior method of adjudicating this controversy.

IV. CONCLUSION

After preliminary approval of this Settlement Class, Apple caused the Court-approved notice — which constituted the best notice practicable under the circumstances, producing a very low number of objectors and exclusions from this proposed Settlement – to be provide to the Settlement Class. The proposed Settlement has and will continue to provide a tangible benefit to Class Members. It was recommended by Co-Lead Counsel as being in the best interest of the Settlement Class and the Honorable Daniel Weinstein also confirmed based on his years of experience hat he believed the proposed Settlement was fair, reasonable and adequate. As such, Plaintiffs respectfully request the Court grant final approval of the proposed Settlement. Furthermore, the Settlement Class meets the Rule 23 requirements for class certification. Consequently, the parties respectfully move this Court grant final certification of the Settlement Class and issue an Order finally approving this proposed Settlement.

Respectfully submitted,

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Dated: June 1, 2012 By: 

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Certificate of Service

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 1st day of June, 2012, with a copy of this document via the Court's CM/ECF system. I certify that all parties who have appeared in this case are represented by counsel who are CM/ECF participants.

/s/ Jared R. Smith
Jared R. Smith