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Co-Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE APPLE IPHONE 4 PRODUCTS LIABILITY LITIGATION THIS DOCUMENT RELATES TO: All Actions	MDL Docket No. 10-2188 (RMW) **MEMORANDUM IN SUPPORT OF CLASS COUNSELS' MOTION FOR AN ORDER AWARDING ATTORNEYS' FEES, REIMBURSEMENT OF COSTS, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES** DATE: July 13, 2012 TIME: 9:00 A.M. CTRM: 6 - 4th Floor Judge: Hon. Ronald M. Whyte

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Court-appointed Co-Lead Counsel ("Co-Lead Counsel") respectfully submit this Memorandum of Points and Authorities in support of their motion for an order awarding class counsel attorneys' fees and for reimbursement of expenses in the amount of $5,900,000.00 ($140,676.22 of which is intended to reimburse plaintiffs' counsel for their out-of-pocket expenses). Apple has agreed not to oppose payment of fees and costs up to this amount. Co-Lead Counsel also seeks a stipend in the amount of $500 for each representative plaintiff in recognition of their service to the Class.

The amount set forth above and in the Settlement Agreement, as this Court is aware, is to be paid directly by Defendant Apple, Inc. ("Apple") and independent of the Class recovery and benefits provided to the Class in the Settlement Agreement. As set forth in the record, and detailed in the accompanying declarations to this motion, the fees and cost reimbursement does not reduce any of the proposed Settlement benefits provided to the Class, but in fact was the product of arm's-length negotiations between Co-Lead Counsel and Apple, with the assistance of two highly qualified mediators, after the parties reached an agreement on the substantive terms of the proposed Settlement.

As the record before this Court establishes, the Co-Lead Counsel and State JCCP Liaison Counsel have devoted almost two years to the litigation and nationwide classwide resolution of the MDL and parallel state actions. Only after engaging in extensive and rigorous investigation of Apple's iPhone 4 antenna technology, review of thousands of pages of confidential documents, and after consideration of the relevant law, were Co-Lead' Counsel in this case able to submit to this Court their proposed Settlement. Through this investigation, research and discovery, along

with extensive, arm's-length negotiations, under the auspices of the Hon. Daniel Weinstein (Retired) and Catherine A. Yanni, Plaintiffs and their counsel obtained a proposed Settlement designed to ensure that over 15 million Class members who purchased the over 27.1 million defective iPhone 4s would be able to obtain free phone bumpers valued at $29 each and a $15.00 cash award.

Pursuant to Rule 23 jurisprudence, Ninth Circuit precedent, and the rulings in the Northern District of California, Co-Lead Class Counsel respectfully seek an award of attorneys' fees pursuant to a "lodestar" analysis under California law. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (noting that lodestar method is used more often in cases where "there is no way to gauge the net value of the settlement or any percentage thereof."). As Co-Lead Counsel demonstrate, the modest "multiplier" on Plaintiffs' Counsel's[1] collective fee, which Apple has agreed not to oppose, is reasonable, well supported by the facts and the law and should be granted by this Court.

II. OVERVIEW OF ACTION AND STATEMENT OF RELEVANT FACTS

This proposed Settlement seeks to resolve a class action lawsuit on behalf of individuals and entities that allege that Apple made misrepresentations and concealed material information in the marketing, advertising, sale and servicing of its iPhone 4 smartphones (the "iPhone 4"). As alleged in the Master Consolidated Complaint pending before this Court, the iPhone 4 was, at the time of sale, inherently defective, experienced unreasonable signal attenuation and dropped calls, and was not of merchantable quality and workmanship. Plaintiffs claim that the iPhone 4 antenna was defectively designed and as a result, Plaintiffs sought appropriate monetary and injunctive relief. Plaintiffs seek relief under the California Unfair Competition Law, Cal. Bus. & Prof. Code

[1] All counsel representing plaintiffs in the consolidated federal action and state actions are referred to herein as "Plaintiffs' Counsel."

§§ 17200, *et seq*., (the "UCL"); the California False Advertising Law; Cal. Bus. & Prof. Code §§ 17500, *et seq*., (the "FAL"); the California Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. (the "CLRA"); for alleged breaches of express warranty; and for alleged breaches of the Song-Beverly Act, Cal. Civ. Code § 1790, *et seq*., and other laws.[2]

As has been previously noted in the prior briefs, a parallel California state coordinated action is pending in Santa Clara Superior Court asserting similar claims, and resolution of these claims are included with the consent of the California State Plaintiffs' Counsel in the proposed Settlement pending before this Court.

As detailed in the Plaintiffs' submissions regarding final approval, after an initial exchange of core relevant documents and information, the parties determined that an early mediation attempt would be beneficial. After Co-Lead Counsel served a formal demand for discovery on Apple, and the parties appeared to be an impasse with respect to a proposed Settlement, the parties agreed to try to mediate the Class members' claims by the engagement of The Honorable Daniel Weinstein (Ret.), one of the nation's most respected and well regarded class action mediators, and Catherine A. Yanni, President of the Academy of Court-Appointed Masters, in hopes of continuing to explore resolution for the Class on a class wide basis. While the parties began the mediation process extremely far apart in their respective views of the value of the case, after further investigation and discovery, four (4) in-person mediation sessions and numerous follow-up telephone conferences, Judge Weinstein and Ms. Yanni assisted in bridging the gap and bringing the parties together. The ultimate resolution of the claims and defenses culminated in the execution of a stipulation of settlement now before this Court for final approval. As the record submitted to this Court establishes, the proposed Settlement agreement was the result of arduous and arms' length negotiations amongst highly experienced counsel. *See*

[2] Since inception of the litigation, until this day, Apple has denied that the iPhone 4 was defective in any manner and has aggressively maintained this position during all phases of this litigation.

Declaration of Hon. Daniel Weinstein (Ret.) and Catherine A. Yanni in Support of Final Approval ("Weinstein/Yanni Decl."), attached as Exhibit F to Declaration of Ira P. Rothken in Support of Motion for Final Approval of Class Action Settlement ("Rothken Decl."). As the record also establishes, only after the parties reached agreement on the substantive terms of the proposed Settlement did they then turn to the issue of payment of attorneys' fees and reimbursement of costs. Instead of "agreeing to disagree," the parties, following well established law of this Circuit, again engaged the services of the mediators to reach an agreement that Apple would not oppose and would separately pay to Co-Lead Counsel fees and costs not to exceed $5.9 million, subject to Court approval. *See Staton v. Boeing Co.*, 327 F.3d 938, 966 (9th Cir. 2003) ("Since the proper amount of fees is often open to dispute parties are compromising to avoid litigation, the court need not inquire into the reasonableness of the fees at the high end with precisely the same level of scrutiny as when the fee amount is litigated."); *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142 (9th Cir. 2000) (affirming award of fees and expenses, where defendant had agreed not to oppose request for fees and expenses up to a negotiated ceiling and to be paid separately from class settlement benefits).

III. THE PROPOSED SETTLEMENT BENEFITS OBTAINED

A more detailed description of the benefits obtained through the proposed Settlement is included in Plaintiffs' Motion for Final Approval of the Settlement and in the Declarations of Ira Rothken, Stuart A. Davidson, Jennifer Sarnelli, Behram Parekh, and William Audet, in Support of Final Approval of Settlement and in Support of Application for Fees and Reimbursement of Expenses (the "Attorney Declarations"). For purposes of this motion, without detailing all aspects of the proposed Settlement, the benefits provided to Class members include:

i. Apple is offering a $15.00 cash award to all 21 million members of the class;

ii. Apple's Bumper Program, commenced after Plaintiffs' filed their complaints, has so far resulted in Class members receiving approximately 2.61 million protective bumpers valued at $29 each (*i.e.*, over $75 million in products for their iPhone 4s between July 2010 and April 2012; and

iii. 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 discontinuation of the iPhone 4.

Having conferred these and other benefits (*e.g.*, Apple's payment of notice and administration of the proposed Settlement) on the Class, as set forth in the Settlement Agreement, Co-Lead Counsel now seek an award of attorneys' fees and reimbursement of expenses in the amount that Apple agreed not to oppose as part of the overall resolution of the MDL and parallel California state actions.

IV. THIS COURT SHOULD GRANT CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND REIMBURESMENT OF COSTS INCURRED IN THE APPLE IPHONE4 LITIGATION

A. The Standard for Approval of Attorneys' Fees in a Class Action.

Federal Rule of Civil Procedure 23(h) provides that in a class action, "the court may award reasonable attorney's fees and nontaxable costs authorized by law or by agreement of the parties." In re *Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1297 (9th Cir. 1994); *Drucker v. O'Brien's Moving & Storage, Inc.*, 963 F.2d 1171, 1172 (9th Cir. 1992). In a case in which plaintiffs have obtained a benefit for the class, and the parties separately negotiate the fees for class counsel, the District Court must consider whether the fees requested are "reasonable" and, as long as they are not so unreasonably high to appear to provide a defendant with other concessions, the Court should approve of the agreed upon amount. *Staton*, 327 F.3d at 966; *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 954 (9th Cir. 2011).

B. The Court's Role in Review of Separately Negotiated Fees.

An important factor, and perhaps the most important in connection with the present application, is the fact that the attorneys' fees issue was negotiated by the parties. As many courts have recognized, separately negotiated attorneys' fee provisions, such as those negotiated by the parties in this action, are accepted as appropriate and are encouraged in consumer class actions. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (Cal. App. 4th Dist. 1996). The court

should accord great weight to the parties' agreement on what constitutes a reasonable fee. *See Wing v. Asarco, Inc.*, 114 F.3d 986, 988-89 (9th Cir. 1997); *Dunk*, 48 Cal. App. 4th at 1801.

In settling a class action it is proper for the parties to negotiate the amount of attorneys' fees separately from negotiating the benefits to be given to the class. *See generally*, Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 267 (3d Cir. 1985). The task force approved of defendants making a settlement offer conditioned on a later, satisfactory resolution of the issue of attorneys' fees. "This type of offer, assuming the fee question is pursued in good faith, usefully separates the issues of settlement of the merits and resolution of the fees in a way that should minimize the defendant's reluctance to negotiate." *Id.* at 269. Agreeing on the maximum amount of a fee request that defendant will pay separately and above the benefits made available to the class, after agreeing on those class benefits, similarly minimizes the danger that the interests of the class will be compromised to increase the fee payable to plaintiffs' counsel, and creates the attraction of certainty for defendants by establishing precisely the limit of their liability. *Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985) .") ("[W]here . . . the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems to the author of this opinion that an agreement 'not to oppose' an application for fees up to a point is essential to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged. It is difficult to see how this could be left entirely to the court for determination after the settlement.)[3]

Here, the Court's role in overseeing the fee application in the present context is substantially different from that in the traditional "common fund" case, in which the awarded fee is subtracted from the total amount of money and/or benefits made available to the class, thereby diminishing those benefits. The requested fees and expenses do not affect the recovery by the Class at all. This case is also very different from a "statutory fee shifting" case, in which the

[3] *See also Johnson v. Ga. Hwy. Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees.").

defendant has not agreed to pay plaintiff's counsel's fees and thus reserves the right to challenge every item of work performed that underlies the requested fee. Apple has agreed with Co-Lead Counsel not to oppose fees and expenses not to exceed $5.9 million, and to pay that sum, subject to Court approval. Because Apple has agreed to pay the fees and expenses in addition to the proposed Settlement benefits, the Court need only approve the overall proposed Settlement package – including its fee and expense provisions – as fair, reasonable, and adequate. *See, e.g.*, *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *In re M.D.C. Holdings Sec. Litig.*, No. CV 89-0090 E(M), 1990 U.S. Dist. LEXIS 15488, at *12-*13 (S.D. Cal. Aug. 30, 1990).

The court in *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL No. 901, 1992 WL 226321, at *4 (C.D. Cal. June 10, 1992), articulated three factors courts should consider in evaluating a fee award made on the basis of the fact that it was negotiated: (1) whether there was a conflict of interest or self-dealing on the part of plaintiff's counsel; (2) whether the fee was negotiated at arm's-length with sophisticated defendants; and (3) whether the fee was negotiated by attorneys who were intimately familiar with the case, the risks, the amount and value of their time, and the nature of the result obtained for the class.

In the present case, there has been no conflict of interest or self-dealing, nor is there any alleged. Instead, there has been only arm's length, adversarial negotiation. Co-Lead Counsel and Defendant agreed on substantive terms of the proposed Settlement before discussing attorneys' fees. *See* Rothken Decl. ¶24 and Weinstein/Yanni Decl. ¶6. Moreover, the parties engaged the services of the mediators to assist with the arm-length fee negotiations. Relying on past precedent and benefits obtained for the Class the mediators were able to assist the parties to arrive at a fee request that was fair and reasonable and would not in any way impact the benefit provided to the Class.

There is no evidence of conflict of interest or self-dealing on the part of Co-Lead Counsel, because there is none. No class benefits were traded for increased fees. *Id.* ¶24. Co-Lead Counsel had been prosecuting Plaintiffs' claims for almost two years and were familiar with the

case, the risks, the amount and value of their time, and the nature of the benefits obtained for the Class. *Id*. The record establishes that there was ample information on which to assess the adequacy and reasonableness of the proposed Settlement. This factor "weigh[s] strongly in favor of approval" of the negotiated fee that is being requested in the Application. *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006). *See also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 945 (in determining fee award in class action settlements, "district court should (1) decide whether to treat the settlement as a common fund; (2) choose the lodestar or percentage method for calculating a reasonable fee and make explicit calculations; (3) ensure that the fee award is reasonable considering, *inter alia*, the degree of success in the litigation and benefit to the class; and (4) if standard calculations yield an unjustifiably disproportionate award, adjust the lodestar or percentage accordingly.").

C. As the Complaint Contains California Claims, California Law Controls the Issue of Attorneys' Fees and Costs.

Jurisdiction in this action is premised on 28 U.S.C. § 1332(d)(2) as revised under the Class Action Fairness Act, 28 U.S.C. §§ 1711, *et seq*. ("CAFA"). The causes of action alleged in the amended complaint are state law causes of action: breach of warranty, and violation of the CLRA and the UCL and the FAL. There is one federal law claim alleged in this action, Federal Communications Act, 47 U.S.C. §§ 201 and 207, but the state law claims vastly predominate.

Accordingly, California state law dictates both the determination of the right to an attorneys' fee and the method of its calculation.[4] *Vizcaino v. Microsoft*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Mangold v. Cal. Pub. Utilities Comm'n*, 67 F.3d 1470, 1479 (9th Cir. 1995); *Kern Oil & Refining Co. v. Tenneco Oil Co*., 792 F.2d 1380, 1388 (9th Cir. 1986) (state law applies in determining not only the right to fees, but also in determining the method of calculating the fees). *See also Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985) ("The rule in this

[4] Co-Lead Class Counsel's entitlement to fees under California law is derived from two sources: the substantial benefit theory under Section 1021 of the California Code of Civil Procedure and the prevailing party theory under section 1780(d) of the Civil Code. *See Serrano v. Unruh*, 32 Cal. 3d 621, 629 (1982).

circuit requires that federal courts in diversity actions apply state law with regard to the allowance (or disallowance) of attorneys' fees."). Furthermore, CAFA's provisions regarding attorneys' fees must also be considered by this Court. Under 28 U.S.C. §§ 1712 (b)(1) and (c)(2), where, as here, a portion of the settlement benefit consists of equitable relief (*i.e.*, the free Bumper Program imposed by Court order once proposed Settlement approved), and a portion of the settlement consists of cash award to class members, any fees awarded relating to the equitable relief must be based on the "time reasonably expended in working on the action."

Under California law, it is well established that the Courts generally apply a lodestar/multiplier approach in class action fee requests. Under this methodology, a two step process is undertaken by the court: the lodestar of the attorneys (reached by multiplying the reasonable hours spent on the litigation by the applicable hourly rate) is then adjusted upwards to take into account risk and other factors. *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-57 (Cal. App. 1st Dist. 2009). The lodestar/multiplier approach is generally used by California Courts, where, as here, no "common fund" has been created under the settlement. *See, e.g.*, *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19 (Cal. App. 1st Dist. 2000) (lodestar is the proper methodology for calculating reasonable attorneys' fee in the absence of an identifiable common fund); *see also Hanlon*, 150 F.3d at 1029 (noting that lodestar method is used more often in cases where "there is no way to gauge the net value of the settlement or any percentage thereof.") Further, because the attorneys' fees will be paid solely by the Defendant Apple, and the Class does not incur any separate fees or costs to obtain the benefits of the settlement, the lodestar method is more appropriate.

Given the technical and otherwise complex nature of this case, the number of hours expended by Plaintiffs' Counsel (5,061.35) is entirely reasonable. Co-Lead Counsel along with State JCCP Liaison Counsel performed the majority of the work in the actions so as to avoid duplication. Thus, Co-Lead and State JCCP Liaison Counsel's efforts in prosecuting the case amount for the majority of the number of lodestar hours and are described in detail in the Attorney Declarations. *See generally*, *Winterrowd v. Am. Gen. Annuity Ins. Co*., 556 F.3d 815,

827 (9th Cir. 2009) (when awarding fees under California law, declarations of an attorney as to the number of hours and time devoted to the case is "sufficient evidence to support an award of attorney fees.") Indeed, the number of hours devoted to a particular case is necessarily a subjective judgment, involving questions of strategy and approach that are unique to each case. Here, Co-Lead Counsel effectively led the litigation to ensure all tasks were streamlined and the hours expended in prosecution of the case was efficient. Thus, unless on its face the amount of hours submitted appears unreasonable, generally courts accept as true the submission of class counsel. *See Jacquette v. Black Hawk County*, 710 F.2d 455, 460 (8th Cir. 1983) ("the difficulty with [appraising whether hours were reasonably necessary to the litigation involved] is that a judge is seldom able to make adequate appraisal of what is necessary for counsel to do or not do in a given case. This appraisal turns on so many subjective factors that it seldom should be the basis for reduction of an attorney fee.").

Further, the rates submitted by Plaintiffs' Counsel are their normal hourly rates, and more importantly, these rates are in line with the prevailing rates in this District. *See, e.g., Buccellato v. AT&T Operations, Inc.*, No. C10–00463–LHK, 2011 WL 4526673 (N.D. Cal. June 30, 2011) (rates for attorneys approved between $290.00 per hour up to $740.00 per hour for attorneys) (Koh, J.); *In re Nuvelo, Inc. Sec. Litig.*, No. C 07–04056 CRB, 2011 WL 2650592 (N.D. Cal. July 6, 2011) (approved rates for attorneys between $350.00 per hour to $700.00 per hour for attorneys) (Breyer, J.); *see also Stratton v. XTO Energy Inc.*, No. 02-10-00482-CV, 2012 Tex. App. LEXIS 1089, at *18-*19 (Tex. Ct. App. Feb. 9, 2012) (holding that rates submitted by class action plaintiffs' counsel were reasonable and customary, and federal citing cases). As detailed in the accompanying Attorney Declarations, the hours and the rates charged are reasonable and should be approved by the Court and, as discussed below, an appropriate multiplier applied to this collective lodestar of the Co-Lead Class Counsel should also be approved.

D. The Court Should Grant Co-Lead Counsel's Fee Application Since it Represents a Reasonable Lodestar and Multiplier

In support of the current motion, Co-Lead Counsel have submitted declarations

evidencing the reasonable current hourly rates for their services and establishing the number of hours spent litigating the case over the past two years. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) ("The district court has discretion to compensate delay in payment in one of two ways: (1) by applying the attorneys' current rates to all hours billed during the course of the litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement."). Plaintiffs' attorneys' hourly rates are reasonable and customary. *See, e.g., Bihun v. AT&T Info. Sys., Inc.*, 13 Cal. App. 4th 976, 997 (Cal. App. 2d Dist. 1993).

As previously noted, after the Court has considered Plaintiffs' Counsel's lodestar (*i.e.*, the hours spent using the attorneys' rates), the Court then applies a multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented. *Thayer v. Wells Fargo Bank, N.A.*, 92 Cal. App. 4th 819, 833 (Cal. App. 1st Dist. 2001) (*citing Lealao*, 82 Cal. App. 4th at 26). "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001).

In *Serrano v. Priest*, 20 Cal. 3d 25 (1977), the California Supreme Court set forth the following factors that the trial court may consider in adjusting the lodestar figure:

> (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; [and] (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed.

Id. at 49. Of these factors, only factors 1, 2, and 3 apply to class actions vindicating consumer rights. *See Thayer*, 92 Cal. App. 4th at 834 (deeming factors 4, 5 and 6 "inapplicable" to court's

review of attorneys' fee award in consumer-protection class action).

At this juncture, all counsel with filed state and federal actions have a reported lodestar in the amount of $2,809,021.50. *See* Rothken Decl. ¶25. Of this amount, the collective total lodestar of Co-Lead Counsel and State JCCP Liaison Counsel is $2,163,292.25. *Id.*, Exs. A through E (Attorney Declarations). Total expenses of Co-Lead Counsel and State JCCP Liaison Counsel is $126,926.43. Co-Lead Counsel requested and subsequently received the lodestar and expenses incurred in this action and the state court action by other, non-lead plaintiffs' counsel (19 different law firms). The total reported lodestar of non-lead plaintiffs' counsel in the federal and state actions is $645,729.25 and the reported expenses of these firms is $13,749.79. *Id*, ¶26. In this case, Co-Lead Counsel seek a mid-level, 2.1x multiplier on the reported and collected lodestar of Plaintiffs' Counsel. *Id*, ¶27.

When viewed in the context of the risks and complexity inherent in this case and the benefits obtained in light of these risks, Co-Lead Counsel's request is well within the range of reason. The fee request is not a windfall, particularly in light of the benefit obtained for the Class. As detailed below, in view of the applicable *Serrano* factors, the request should be approved by this Court.

1. The novelty and difficulty of the questions involved, and the skill displayed in presenting them.

This case involves technical issues regarding cellular phone design and construction. Plaintiffs dedicated significant time and effort to analyzing and understanding the nature of the defect and Apple's related conduct. *See* Rothken Decl. ¶¶5-8. In particular, Plaintiffs dedicated significant time to testing the smartphones at issue to analyze the defect. *Id*.

Moreover, because of the unique circumstances surrounding the defect, this case is not one in which Co-Lead Counsel could simply stand on the shoulders of other lawyers who were litigating similar cases in other jurisdictions, or simply piggyback onto a governmental agency's investigation. *See In re Vitamin Cases*, 110 Cal. App. 4th 1041, 1056 (Cal. App. 1st Dist. 2003) (noting the risk involved in the case was not as great as plaintiffs' counsel portrayed it because the case "was similar to litigation filed throughout the country" and Plaintiffs' counsel benefitted

from defendants' guilty pleas in other, related cases). To the contrary, Co-Lead Counsel had to forge the path in analyzing and developing the factual basis and liability claims in this case. Moreover, the product defect issues here, because they involve iPhone 4 antenna design, are beyond the ordinary case involving an ordinary defective product, requiring substantial technical knowledge and substantial expense in order to test and validate the liability claims.

Accordingly, in analyzing an appropriate fee the Court should take into account the unique and complex qualities of this case and the skill shown in achieving meaningful benefits in a time-sensitive context with evolving smartphone technology. In the end, a genuine recovery, highly favorable to Settlement Class Members, was attained.

2. The extent to which the nature of the litigation precluded other employment by the attorneys.

Co-Lead Counsel and State JCCP Liaison Counsel have devoted over 3,500 hours to this case over a period of almost two years. Rothken Decl. ¶25. Like other law firms (and in particular, those that primarily handle contingent fee work), Co-Lead Counsel and State JCCP Liaison Counsel have limited time and resources—as a result, they are restricted in the number of other cases it can take on and still provide effective representation. This factor also weighs heavily in favor of approving Co-Lead Counsel's agreed upon attorneys' fees.

3. The contingent nature of the fee award.

The purpose of increasing an attorneys' lodestar figure by a multiplier is "to compensate for the risk of loss generally in contingency cases as a class." *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1419 (Cal. App. 1st Dist. 1991), *overruled on other grounds Olson v. Auto Club of S. Cal.*, 42 Cal. 4th 1142 (2008). Rather than overcompensating class action attorneys or providing them with a windfall, increasing the lodestar in class action cases does nothing more than "approximate market level compensation for [an attorneys'] services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." *Ketchum*, 24 Cal. 4th at 1138. Refusal to apply a multiplier to an attorney's lodestar fails to compensate the attorney "for contingent risk, extraordinary skill, or any other factors a trial court may consider

under [*Serrano*]." *Id.*

A modest multiplier of 2.1x in this particular case is reasonable in awarding Co-Lead Counsel's fee request is in this case, given the risk they necessarily assumed in taking on this litigation on a contingent basis. Upward multipliers are common. *Grannan v. Alliant Law Group, PC*, No. C10–02803 HRL, 2012 WL 216522, at *10 (N.D. Cal. Jan. 24, 2012) ("In class actions, where counsel works on a contingency basis and risks receiving nothing for the time and effort expended, it is reasonable to apply a multiplier to the lodestar value."). Co-Lead Counsel prosecuted this case since mid-2010 without compensation and without assurance that it would be successful on the merits. Co-Lead Counsel also paid all of their own expenses to pursue this litigation and expenses related to obtaining and testing the iPhone 4 smartphones, without any guarantee of recouping those funds by prevailing in the case. Typically, expenses such as these are billed to a client and are not included as overhead in the hourly rates attorneys charge. *See Beasley*, 235 Cal. App. 3d at 1421-22. Despite the significant danger of their efforts going for naught, Co-Lead Counsel provided its considerable litigation experience and expertise to this case and was able to achieve a genuine, tangible recovery for the Class. Accordingly, this factor weighs in favor of approving Co-Lead Counsel's fee and expense request.

4. The results obtained by Co-Lead Counsel.

California law recognizes that lodestar enhancement is appropriate where, as here, "an exceptional effort produced an exceptional benefit." *Thayer*, 92 Cal. App. 4th at 838. Multipliers are justified because, typically, "high quality work may produce greater results in less time than would work of average quality." *Id.* In spite of the complexities involved and the contentious nature of the litigation, this case was brought to a timely conclusion with a result that places a highly favorable benefit into the hands of Settlement Class members. *See Lundell v. Dell, Inc.*, No. CIVA C05-3970 JWRS, 2006 WL 3507938, at *4 (N.D. Cal. Dec. 5, 2006) (explaining that a repair right obtained in a settlement is very valuable benefit) (Ware, J.).

Moreover, as the Ninth Circuit has repeatedly made clear, a settlement's value should be analyzed in terms of the total benefit made available to the class, not on the total number of class

members that decide to avail themselves of the benefit. *See Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (ruling that a district court abused its discretion in basing attorney fee award on actual distribution to class); *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *16 (N.D. Cal. Jan. 26, 1997) (district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount of the fund actually claimed by the class) (Chesney, J.); *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2007 WL 951821, at *8 (N.D. Cal. Mar. 28, 2007) (noting that the Ninth Circuit bars consideration of class' actual recovery in assessing a fee award) (Walker, J.). This is consistent with Supreme Court precedent. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) ("[The Class'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel."). *See also* Herbert B. Newberg & Alba Conte, 4 Newberg on Class Actions §14:6 (4th ed. 2002) ("In *Boeing Co. v. Van Gemert*, the Supreme Court settled this question by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed.").

Given that California courts place such a high value on settlement, lodestar enhancement is particularly appropriate in a case such as this one. *See Lealao*, 82 Cal. App. 4th at 52 ("Considering that our Supreme Court has placed an extraordinarily high value on settlement, it would seem counsel should be rewarded, not punished, for helping to achieve that goal.") (citations and footnote omitted). Despite the complexity of the issues involved here, Co-Lead Counsel achieved a genuine, tangible benefit for a Settlement Class of over 15 million people owning over 27 million iPhone 4s. This recovery constitutes a substantial benefit conferred on the members of this nationwide Settlement Class.

5. Continuing obligations of Co-Lead Counsel.

Should any challenges or appeals arise regarding the Court's final approval decision, Co-Lead Counsel will be required to expend additional time and energy to research, brief and argue those challenges or appeals. In addition, Co-Lead Counsel have spent numerous hours

responding to individual telephone calls, emails and letters after the Notice of Proposed Settlement was sent out to the Class. This process can be expected to continue, and Co-Lead Counsel intend to continue to provide assistance to the Class whenever possible. Co-Lead Counsel also have undertaken to review the claims process, and is taking the opportunity to review any rejected claims, to ensure that the process is fair to the Class. Co-Lead Counsel's unwavering commitment to the Settlement Class further supports approval of its reasonable request for fees and expenses.

6. The multiplier is within the range of reason and in the mid-level for cases of this nature.

The above facts support the requested multiplier of 2.1x. Indeed, courts in California, in this District and in this Circuit have awarded fees with similar and even greater, upward adjustments. *See, e.g.*, *Vizcaino*, 290 F.3d at 1051 (finding a multiplier of 3.65 appropriate); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3–4 range are common in lodestar awards for lengthy and complex class action litigation."); *In re Charles Schwab Corp. Sec. Litig.*, No. C 08–01510 WHA, 2011 WL 1481424, at *8 (N.D. Cal. Apr. 19, 2011) (finding a risk multiplier of 2.68 to be fair and reasonable, citing to *Van Vranken* (multipliers of 3-4 range deemed reasonable in the Ninth Circuit)) (Alsup, J.); *In re Trilogy Sec. Litig.*, C-84-20617(A) (N.D. Cal. Mar. 14, 1986) (awarding a multiplier of 4.37); *In re Veritas Software Corp. Sec. Litig.*, No. C-03-0283 MMC, 2005 WL 3096079, at *13 (N.D. Cal. Nov. 15, 2005) (awarding a multiplier of 4) (Chesney, J.); *In re Cadence Design Sys., Inc. Sec. & Derivative Litig.*, C-08-4966 SC, 2012 WL 1414092, at *5 (N.D. Cal. Apr. 23, 2012) (finding a lodestar multiplier of 3.8 to be one "not necessarily outside the norm"); *In re Calif. Indirect Purchaser X-Ray Film Antitrust Litig.*, No. 960886, 1998 WL 1031494, at *10 (Cal. Super. Ct. Oct. 22, 1998) ("Cases from California and other jurisdictions reflect that multipliers of two or more are commonplace in class actions.") (citation omitted); *Wilson v. Bank of America Nat'l Trust & Sav. Ass'n*., No. 643872 (Cal. Super. Ct. Aug. 16, 1982) (multiplier of 10 times the hourly rate awarded); *Glendora Comm. Redev. Agency v. Demeter*, 155 Cal. App. 3d 456, 465 (Cal. Ct. App. 1984) (affirming a 12-times multiplier of counsel's hourly rate and expressly

rejecting the argument that the requested fee was exorbitant or unconscionable).

E. The Court Should Also Award Plaintiffs' Counsel Their Reasonable Costs And Expenses

Plaintiffs' Counsel incurred expenses and costs in the amount of $**140,676.22**. *See* Rothken Decl., ¶25 (summarizing expenses of Co-Lead Counsel); ¶26(summarizing expenses of non-lead plaintiffs' counsel and state counsel). Under California law, these costs would be allowed as reasonable. However, because the agreement with Apple includes a lump sum for fees and expenses, the amount of will have to be deducted from the fee award, further justifying the loadstar multiplier. Accordingly, Co-Lead Counsel request the Court reimburse Plaintiffs' Counsel in the MDL and in the State JCCP their expenses in the amount of $**140,676.22**.

F. The Class Representatives' Incentive Award is Appropriate and Reasonable.

Courts routinely award "service" or "incentive" fees or stipends to named plaintiffs in class actions. For example, the Ninth Circuit has recognized that rewarding class representatives for their participation is commonplace, having "approved incentive awards of $5,000 each to the two class representatives of 5,400 potential class members in a settlement of $1.725 million." *Staton*, 327 F.3d at 976-77. In *Staton*, the court also referenced three cases in which the service fees ranged from $2,000 to $5,000. *Id.* (*citing In re U.S. Bancorp Litig*., 291 F.3d 1035, 1038 (8th Cir. 2002); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *In re SmithKline Beckman Corp. Sec. Litig*., 751 F. Supp. 525, 535 (E.D. Pa. 1990)). The Court should award the unopposed service fees in this case.

Each of the Plaintiffs consistently and responsibly met their obligations as class representatives and contributed to the successful resolution of this matter. Each produced documents and stood ready to be deposed. Each of these Class Representatives raised issues with Co-Lead Counsel, and felt free to question, if not challenge, Co-Lead Counsel's opinions concerning the litigation. In the opinion of Co-Lead Counsel, these Class Representatives, all of whom were responsive, inquisitive and willing to participate, epitomized the role of the class representative in this type of litigation and, therefore, should each be awarded the $500 service fee, which Apple does not oppose. As with the attorneys' fee, this award would not in any way

diminish the recovery for the Class.

V. ONE OBJECTION OUT OF MILLIONS OF CLASS MEMBERS TO THE FEE REQUEST IS AN IMPORTANT FACTOR

Of the over 15 million class members owning over 27 million iPhone 4s who received notice of this proposed Settlement and the amount of Co-Lead Counsel' fee application, as of the date of the filing of this motion, Co-Lead Counsel are aware of only one class member who objected to the amount of the fee application. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378 (9th Cir. 1993); *see also In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3rd Cir. 2005) (finding that district court did not abuse its discretion by finding that the absence of substantial objections by class members to fee request weight in favor of approval); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005) (approving fee request despite four objections); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) ("The reaction by members of the Class is entitled to great weight by the Court.").

On March 29, 2012, Mr. Jordan D. Maglich, an attorney in Tampa, Florida, mailed an objection to the proposed Settlement and the fee application, believing that the proposed Settlement is not fair, reasonable and adequate, and that the fee application is unjustified. Mr. Maglich's belief that the fees requested are "wholly undeserved" and "shock the conscience" is without merit. As indicated in this memorandum, the request for fees based on a modest multiplier to lodestar is well founded and consistent with the law of this District and this Circuit. Indeed, Mr. Maglich, it appears, seems simply to disagree with the class action procedure in general. Our Supreme Court, however, disagrees. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'") (citation omitted). Accordingly, Mr. Maglich's singular objection to the fee motion should respectfully be overruled. To the extent any additional objections are filed by the

objection date, they will be addressed in Plaintiffs' reply papers.

VI. CONCLUSION

For all the foregoing reasons, Co-Lead Counsel respectfully request that this Court grant its Application and award it $5,900,000.00 for fees, reimbursement of litigation costs, and awarding each of the representative Plaintiffs a modest service award in the sum of $500.00.

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