UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CHRISTINA GRACE, et al.,

Plaintiffs,

v.

APPLE, INC.,

Defendant.

Case No. 17-CV-00551-LHK

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR ATTORNEYS' FEES

Re: Dkt. No. 429

Before the Court is Class Counsel's motion for attorneys' fees, ECF No. 429. The Court held a hearing on the motion on February 8, 2021. ECF No. 445 ("Mot."). In response to the Court's questions at the hearing, Class Counsel filed four supplemental declarations regarding attorneys' fees on February 19, 2021. ECF Nos. 450–53. On February 26, 2021, Defendant Apple, Inc. filed an opposition to Class Counsel's supplemental declarations; and Class Counsel filed a reply on March 5, 2021. ECF Nos. 454 ("Supp. Opp'n"), 455 ("Supp. Reply"). Having considered all the briefing, the oral arguments, the relevant law, and the record in this case, the Court hereby GRANTS IN PART and DENIES IN PART Class Counsel's motion for attorneys' fees.

Specifically, the Court orders that fees in the amount of $5.04 million and expenses in the amount of $1,083,045.14 be paid to Class Counsel, and that service awards of $7,500 be paid to each Class Representative.

I. LEGAL STANDARD

"Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). To guard against an unreasonable result, the Ninth Circuit encourages district courts to "cross-check[] their calculations against a second method." *Id.* at 944. Accordingly, the Court calculates the attorneys' fees using the percentage-of-recovery method and then cross-checks its calculations against the lodestar method. *See id.* at 944–45.

"Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." *In re Wa. Pub. Power Supply System Sec. Litigation (WPPSS)*, 19 F.3d 1291, 1302 (9th Cir. 1994). Thus, "fee applications must be closely scrutinized." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002). "Rubber-stamp approval, even in the absence of objections, is improper." *Id.*

Where the percentage-of-recovery method is used, it is well-established that 25% of a common fund is a presumptively reasonable amount of attorneys' fees. *In re Bluetooth*, 654 F.3d at 942 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award . . . ."). However, the Ninth Circuit has emphasized that "[t]he 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases." *Vizcaino*, 290 F.3d at 1048. "Selection of the benchmark or any other rate must be supported by findings that take into account all the circumstances of the case." *Id.*; *see also WPPSS*, 19 F.3d at 1298 ("[C]ourts cannot

rationally apply any particular percentage . . . in the abstract, without reference to all the circumstances of the case.").

II. DISCUSSION

Class Counsel moves for fee award substantially greater than the 25 percent benchmark rate. Specifically, Class Counsel seeks 30 percent of the settlement fund ($5.4 million). In addition, Class Counsel seeks reimbursement of $1,090,393.14 in expenses and $7,500 service awards to each of the two Class Representatives.

The Court ultimately concludes that an award between the 25 percent benchmark and Class Counsel's 30 percent request is appropriate. Specifically, the Court awards 28 percent of the settlement fund, which yields fees of $5.04 million and an adjusted multiplier of 0.72. As for expenses, the Court concludes that nearly all of Class Counsel's requested reimbursement is reasonable. The Court orders reimbursement of $1,083,045.14—an amount which excludes $7,348 in unreasonable hotel expenses. Lastly, the Court approves $7,500 service awards for both Class Representatives. Below, the Court analyzes the fee award, expenses, and service awards in turn.

A. The Court awards 28 percent of the settlement fund in attorneys' fees.

The Court awards 28 percent of the settlement fund in attorneys' fees—a moderate increase to the 25 percent benchmark rate. The Court reaches this award based on consideration of the following factors: (1) the skills displayed by Class Counsel; (2) the risks taken by Class Counsel; (3) the result achieved for the class; and (4) a lodestar cross-check. *See Vizcaino*, 290 F.3d at 1048–49 (weighing the risks taken by counsel and the result achieved for the class); *see also Serrano v. Priest*, 20 Cal. 3d 25, 49 (Cal. 1977) (stating factors under California law). The Court discusses each factor in turn.

1. Class Counsel displayed skill by bringing a novel claim and analyzing technical subject matter.

The skills displayed by Class Counsel merit a moderate upward adjustment from 25 percent. Class Counsel's skills were displayed in two ways. To start, Class Counsel achieved an

$18 million settlement based in part on a novel claim: trespass to chattels. *See* ECF No. 57 at 12:14–15 (stating that "this trespass to chattels claim seems novel"). Before the instant case, the Court "ha[d]n't seen a trespass case of action in [a] consumer class action." *Id.* at 5:15–18.

Moreover, the instant case's subject matter was technical. The case required analyzing the source code for Apple's FaceTime product. *See, e.g.*, ECF No. 71 (source code protective order). Specifically, Class Counsel alleged that Apple disabled FaceTime for iOS 6 and earlier operating systems by prematurely terminating a digital certificate. *See Grace v. Apple, Inc.*, 328 F.R.D. 320, 328 (N.D. Cal. 2018) (background). Class Counsel further analyzed different technical methods to connect FaceTime calls, namely "peer-to-peer" versus "relay." *Id.* at 327. The characteristics of these distinct methods allegedly motivated Apple's conduct. *Id.*

In short, the novel nature of the trespass to chattels claim and the technical subject matter of the instant case support a moderate upward adjustment from a 25 percent fee award. However, these considerations do not support the 30 percent fee award requested by Class Counsel. The weakness of Class Counsel's case on the merits supports a 28 percent fee award instead. Specifically, the trespass to chattels claim, though novel, was not compelling and not particularly meritorious. To survive the motion to dismiss, the trespass to chattels claim required the Court to assume that "FaceTime was *permanently* disabled on iOS6 and earlier operating systems, and that Plaintiffs could not transition to iOS7." *Grace v. Apple Inc.*, No. 17-CV-00551, 2017 WL 3232464, at *13 (N.D. Cal. July 28, 2017) (emphasis in original). However, in fact, class members chose not to transition to, and declined, a free software update (iOS7) that would re-enable FaceTime—and thus redress class members' injury—because the update would allegedly "significantly impair" class members' iPhones. *Grace v. Apple, Inc.*, 328 F.R.D. 320, 328 (N.D. Cal. 2018). If the case had proceeded to adjudication on the merits, it is possible that Apple would have prevailed. *Cf. WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 472 F. Supp. 3d 649, 685 (N.D. Cal.

2020) (dismissing trespass to chattels claim for failure to "detail any actual harm caused by defendants' program or access").

Despite the potential weakness of their claims, Class Counsel cite *Hopkins v. Stryker Sales Corporation* to support a 30 percent fee award. Mot. at 15 (citing No. 11–CV–02786–LHK, 2013 WL 496358 (N.D. Cal. Feb. 6, 2013)). Yet the claims in *Hopkins* were more meritorious than the claims here. In *Hopkins*, class counsel clearly "brought to light evidence of Defendants' violations of California labor and unfair competition laws." *Hopkins*, 2013 WL 496358, at *2. Accordingly, the skills displayed by Class Counsel support a 28 percent fee award, not a 30 percent fee award.

2. Class Counsel assumed significant risk.

The significant risks assumed by Class Counsel also support a moderate upward adjustment from the 25 percent benchmark. These risks arose in extensive motion practice and trial preparation. Specifically, in motion practice, Apple threatened (1) zero recovery for Plaintiffs through several case-dispositive arguments in a motion to dismiss and motion for summary judgment; and (2) denial of class certification. In trial preparation, Class Counsel risked proceeding to trial without expert opinions because, at the time the parties settled, the Court had not yet resolved Apple's *Daubert* motion. ECF No. 333. These significant risks support a 28 percent fee award. *Cf. Vizcaino*, 290 F.3d at 1048 (approving a 28 percent fee where the case was "extremely risky" since plaintiffs had lost twice in district court, forcing counsel to have to revive the claim on appeal), *WPPSS*, 19 F.3d at 1302 (noting that the case was "fraught with risk and recovery was far from certain").

3. Class Counsel achieved a significant monetary result for the class.

Class Counsel achieved a significant monetary result: a $18 million non-reversionary common fund. This fund compensates for about 20 percent of the total average damages initially estimated by Plaintiffs' expert, Professor Justine S. Hastings. ECF No. 174-85 at 31 (expert report); *see* Mot. at 11 (summarizing damages range). Class members will receive, for each

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.