

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: APPLE INC. DEVICE
PERFORMANCE LITIGATION

Case No. [5:18-md-02827-EJD](#)

**ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES, EXPENSES, AND
SERVICE AWARDS**

Re: Dkt. No. 468

This Document Relates to:

ALL ACTIONS

This multi-district consumer class action settled. The \$310 million settlement is among the largest class action settlements in this Circuit, and one of the largest class action settlements under the California Data Access and Fraud Act ("CDAFA"), California Penal Code § 502, and the federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030. Pending before the Court is Named Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Mot."). Dkt. No. 468. Named Plaintiffs seek (i) attorneys' fees in the amount of \$87,730,000, which is 28.3% of the \$310,000,000 non-reversionary Minimum Class Settlement Amount; (ii) unreimbursed expenses totaling \$995,244.93 that Class Counsel and JCCP Counsel incurred in furtherance of the prosecution of this Action; and (iii) Service Awards for Named Plaintiffs in the amount of \$3,500 to each of the nine Named Plaintiffs who were deposed and \$1,500 to each of the remaining Named Plaintiffs. On October 6, 2020, Defendant Apple Inc. ("Defendant" or "Apple") filed an Opposition to Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Opp'n").

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Dkt. No. 522. On November 20, 2020, Named Plaintiffs filed a Reply in Further Support of Motion for Attorneys' Fees, Expenses, and Service Awards ("Reply"). Dkt. No. 550. The Court has also received approximately seventy-five objections. The Court conducted a hearing on February 17, 2021. Based on all pleadings filed to date, as well as the comments of counsel and objectors, the Court grants in part Plaintiffs' Motion as explained below.

I. ATTORNEYS' FEES

The background of the case is set forth in the Court's Order Granting Named Plaintiffs' Motion for Final Approval of Class Action Settlement (Dkt. No. 608) filed concurrently with this Order, and will not be restated herein.

In approving a settlement, "courts have an independent obligation to ensure that the award [of attorneys' fees], like the settlement itself, is reasonable." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The Ninth Circuit has approved two different methods for calculating a reasonable attorneys' fee depending on the circumstances: the lodestar method or the percentage-of-recovery method. *Id.* at 942. The lodestar method "is appropriate in class actions brought under fee-shifting statutes (such as federal civil rights, securities, antitrust, copyright, and patent acts), where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized." *Id.* The lodestar method is also appropriate for "claims-made" settlements." *Gray v. BMW of N. Am., LLC*, 2017 WL 3638771, at *5 (D.N.J. Aug. 24, 2017).

In contrast, "[w]here 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." *Id.* (citing *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010)). "Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *Id.* Although courts have discretion to choose which methodology to use, "their discretion must be exercised in a way that achieves a reasonable

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result.” *Id.* (citing *In re Coordinated Pretrial Proceedings*, 109 F.3d 602, 607 (9th Cir. 1997)).

Thus, the first question is whether to employ the lodestar or percentage-of-recovery method.

A. Method of Fee Calculation

Named Plaintiffs and almost all of the objectors assert that this case involves a common fund. Apple, however, argues that the parties negotiated a claims-made settlement and that there is no common fund. Opp’n at 3. Accordingly, Apple urges the Court to focus on a reasonable lodestar.¹ The Court finds that the Settlement involves a common fund as explained below, and therefore the Court will award fees based on a percentage of the \$310 million Settlement amount.

For purposes of awarding attorneys’ fees, a common fund is generally understood as one where “each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf.” *Id.* at 479; *see also Bodon v. Domino’s Pizza, LLC*, 2015 WL 3889577, at *3 (E.D.N.Y. June 4, 2015) (“A common fund is a settlement ‘fund from which members of a class are compensated for a common injury inflicted on the class.’”).

Here, the Settlement provides for a minimum lump-sum of \$310 million. Under no circumstances will any of the \$310 million revert to Apple. Thus, the Settlement has the characteristics of a common fund insofar as the \$310 million is fixed, certain, and non-reversionary.

There is an additional provision in the Settlement that requires Apple to pay up to \$500 million depending on the number of valid claims submitted. Thus, each class member’s claim to the Settlement is not mathematically ascertainable until after the claims process has been

¹ Named Plaintiffs assert that Apple lacks standing to object to the proposed award of fees. Reply at 3. In general, “a settling defendant in a class action has no interest in the amount of attorney fees awarded when the fees are to be paid from the class recovery rather than the defendant’s coffers.” *Tennille v. Western Union Co.*, 809 F.3d 555, 559 (10th Cir. 2015) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481, n. 7 (1980)). The Court agrees that Apple lacks standing because the fees are to be paid from the class recovery, not from Apple’s coffers. Nevertheless, the Court finds it appropriate to consider whether there is a common fund, consistent with the Court’s discretion to decide which methodology should be applied in calculating the award of attorneys’ fees in this case.

completed. The inclusion of this additional provision in the Settlement lends some support to the argument that the Settlement should be characterized as a claims-made settlement rather than a common fund settlement.

Nevertheless, the Court finds that the Settlement is more appropriately characterized as a common fund for purposes of the instant motion. That Named Plaintiffs' fee request is based on the fixed, certain, and non-reversionary minimum Settlement amount of \$310 million, rather than the potential but uncertain \$500 million amount, supports application of the percentage-of-the-fund method. *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) ("Because this case involves a common settlement fund with an easily quantifiable benefit to the Class, the Court will primarily determine attorneys' fees using the percentage method . . ."); *see also Thomas v. MagnaChip Semiconductor Corp.*, 2018 WL 2234598, at *3 (N.D. Cal. May 15, 2018). Further, "[t]he use of the percentage-of-the-fund method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, 2013 WL 7985367, at *1 (C.D. Cal. Dec. 23, 2013). The percentage-of-the-fund method confers "significant benefits . . . including consistency with contingency fee calculations in the private market, aligning the lawyers' interests with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires." *Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, at *11 (C.D. Cal. July 27, 2015).

The cases relied upon by Apple do not dictate a different result. In *Brazil v. Dell Inc.*, 2012 WL 1144303, at *1 (N.D. Cal. Apr. 4, 2012), the parties' settlement provided for a \$50 per claimant monetary award, with no class-wide cap or ceiling on recovery, and the court awarded fees using the lodestar method. Unlike the settlement in *Brazil*, the Settlement in this case has an established minimum of \$310 million as well as a \$500 million cap or ceiling on recovery.

In *Create-A-Card, Inc. v. Intuit, Inc.*, 2009 WL 3073920, at *1 (N.D. Cal. Sept. 22, 2009),

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the settlement did not create a common fund, the attorneys' fees and costs were to be paid directly from defendant as opposed to the fund, and the amount of attorneys' fees awarded did not have any impact on the recovery available to the class. Because there was no common fund, the *Create-A-Card* court concluded that the percentage-of-the-fund was not available as a way to calculate attorneys' fees. *Id.* Unlike in *Create-A-Card*, the Settlement in this case provides a minimum fund of \$310 million from which attorneys are to be paid and which can be used to calculate a percentage-of-the-fund award.

Apple also relies on *Gray v. BMW of N. Am., LLC*. In *Gray*, plaintiffs alleged certain BMW vehicles were produced with defects that prevented the convertible top from functioning properly. 2017 WL 3638771, at *1. The settlement provided three forms of relief: software updates for class vehicles; (2) a one-year unlimited-mileage extended warranty; and (3) reimbursement for out-of-pocket expenses. *Id.* The parties agreed that attorneys' fees and costs would be paid separate and apart from any relief provided to the settlement class. *Id.* at *4. The *Gray* court held that the settlement was not a common fund because no specific monetary figure was set aside to provide relief to the class. *Id.* at *5. Unlike in *Gray*, the Settlement in this case provides a specific monetary figure to provide relief to the class.

In *Bodon*, also relied on by Apple, the parties' settlement of the wage and hour suit called for monetary relief on a claims-made basis. The settlement did not include a fixed total sum to be allocated to the class, nor did the settlement require that defendant pay a minimum amount into a settlement fund. 2015 WL 3889577, at *2. Further, the settlement did not provide for the payment of attorneys' fees and costs. *Id.* Instead, the parties agreed that attorneys' fees and costs would be separately negotiated. *Id.* The parties were unable to resolve their dispute, and ultimately, the *Bodon* court applied a "modified lodestar method." *Id.* at *6. Unlike in *Bodon*, the Settlement in this case includes a fixed minimum amount for the Class, without regard to the number of claims.

The Court finds that all of the above supports applying the percentage-of-the-fund method

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