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United States District Court  
Northern District of California

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

### 6 I. ATTORNEYS' FEES

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

10 In approving a settlement, "courts have an independent obligation to ensure that the award  
 11 [of attorneys' fees], like the settlement itself, is reasonable." *In re Bluetooth Headset Prod. Liab.*  
 12 *Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The Ninth Circuit has approved two different methods  
 13 for calculating a reasonable attorneys' fee depending on the circumstances: the lodestar method or  
 14 the percentage-of-recovery method. *Id.* at 942. The lodestar method "is appropriate in class  
 15 actions brought under fee-shifting statutes (such as federal civil rights, securities, antitrust,  
 16 copyright, and patent acts), where the relief sought—and obtained—is often primarily injunctive  
 17 in nature and thus not easily monetized." *Id.* The lodestar method is also appropriate for "claims-  
 18 made" settlements." *Gray v. BMW of N. Am., LLC*, 2017 WL 3638771, at \*5 (D.N.J. Aug. 24,  
 19 2017).

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

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

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

### 3 A. Method of Fee Calculation

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

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

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

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

22  
23 <sup>1</sup> Named Plaintiffs assert that Apple lacks standing to object to the proposed award of fees. Reply  
24 at 3. In general, “a settling defendant in a class action has no interest in the amount of attorney  
25 fees awarded when the fees are to be paid from the class recovery rather than the defendant’s  
26 coffers.” *Tennille v. Western Union Co.*, 809 F.3d 555, 559 (10th Cir. 2015) (citing *Boeing Co. v.*  
27 *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.

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

4 Nevertheless, the Court finds that the Settlement is more appropriately characterized as a  
5 common fund for purposes of the instant motion. That Named Plaintiffs' fee request is based on  
6 the fixed, certain, and non-reversionary minimum Settlement amount of \$310 million, rather than  
7 the potential but uncertain \$500 million amount, supports application of the percentage-of-the-  
8 fund method. *Destefano v. Zynga, Inc.*, 2016 WL 537946, at \*17 (N.D. Cal. Feb. 11, 2016)  
9 (“Because this case involves a common settlement fund with an easily quantifiable benefit to the  
10 Class, the Court will primarily determine attorneys’ fees using the percentage method . . .”); *see*  
11 *also Thomas v. MagnaChip Semiconductor Corp.*, 2018 WL 2234598, at \*3 (N.D. Cal. May 15,  
12 2018). Further, “[t]he use of the percentage-of-the-fund method in common-fund cases is the  
13 prevailing practice in the Ninth Circuit for awarding attorneys’ fees and permits the Court to focus  
14 on showing that a fund conferring benefits on a class was created through the efforts of plaintiffs’  
15 counsel.” *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, 2013 WL 7985367, at \*1 (C.D. Cal.  
16 Dec. 23, 2013). The percentage-of-the-fund method confers “significant benefits . . . including  
17 consistency with contingency fee calculations in the private market, aligning the lawyers’ interests  
18 with achieving the highest award for the class members, and reducing the burden on the courts that  
19 a complex lodestar calculation requires.” *Tait v. BSH Home Appliances Corp.*, 2015 WL  
20 4537463, at \*11 (C.D. Cal. July 27, 2015).

21 The cases relied upon by Apple do not dictate a different result. In *Brazil v. Dell Inc.*,  
22 2012 WL 1144303, at \*1 (N.D. Cal. Apr. 4, 2012), the parties’ settlement provided for a \$50 per  
23 claimant monetary award, with no class-wide cap or ceiling on recovery, and the court awarded  
24 fees using the lodestar method. Unlike the settlement in *Brazil*, the Settlement in this case has an  
25 established minimum of \$310 million as well as a \$500 million cap or ceiling on recovery.

26 In *Create-A-Card, Inc. v. Intuit, Inc.*, 2009 WL 3073920, at \*1 (N.D. Cal. Sept. 22, 2009),  
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1 the settlement did not create a common fund, the attorneys' fees and costs were to be paid directly  
2 from defendant as opposed to the fund, and the amount of attorneys' fees awarded did not have  
3 any impact on the recovery available to the class. Because there was no common fund, the  
4 *Create-A-Card* court concluded that the percentage-of-the-fund was not available as a way to  
5 calculate attorneys' fees. *Id.* Unlike in *Create-A-Card*, the Settlement in this case provides a  
6 minimum fund of \$310 million from which attorneys are to be paid and which can be used to  
7 calculate a percentage-of-the-fund award.

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

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

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

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