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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CARL BARRETT, *et al.*, Plaintiffs, v. APPLE, INC., *et al.*, Defendants.	Case No. 5:20-cv-04812-EJD **REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS** Dept.: Courtroom 4 – 5th Floor Judge: Honorable Edward J. Davila Date: December 12, 2024 Time: 9:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Plaintiffs Michel Polston, Nancy Martin, Maria Rodriguez, and Andrew Hagene ("Plaintiffs") and Court-appointed Class Counsel respectfully submit this reply to Apple's opposition ("Apple's Opposition" or "Opp.") (ECF No. 275) to Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Plaintiffs' Motion") (ECF No. 273).

I. INTRODUCTION

Apple argues that Class Counsel should receive attorneys' fees equal to 25% of the common fund, rather than the 33% requested by Class Counsel. According to Apple, Plaintiffs do not establish "exceptional circumstances" warranting an upward adjustment from the Ninth Circuit benchmark of 25%. Several errors doom Apple's Opposition.

First, Apple lacks standing to object to Class Counsel's fee. The Settlement establishes a $35 million non-reversionary common fund. The fees will be paid from the fund, not by Apple. Here, Apple does not and cannot establish standing to object to fees to be paid from the common fund.

Second, none of Apple's arguments to limit Class Counsel to 25% of the common fund have merit. Apple argues that the pertinent factors do not support an upward adjustment from the 25% it claims should be awarded. As discussed below, Apple ignores the realities and outsized risks associated with bringing this novel litigation and litigating it to the point of an unprecedented settlement. Apple also fails to overcome the numerous cases, including consumer litigation cases, Class Counsel cited from this District and Circuit (including cases brought by Plaintiffs' Counsel here) where courts have awarded attorneys' fees above the 25% benchmark. *See, e.g.*, Appendix A, ECF No. 273, ECF No, 273-2, ¶¶44, 48, 52.

Apple also argues that Class Counsel should have submitted more detailed lodestar information. Apple ignores the detailed description of Class Counsel's work set forth in the Joint Declaration in Support of Plaintiffs' Motion (ECF No. 273-2, §II) and the timekeeper charts, broken down by firm, timekeeper, and billing year, submitted with Class Counsel's declarations. In any event, as set forth below, Class Counsel is providing additional detail in connection with this reply and remains willing to submit itemized billing records for the Court's *in camera* review.

Notably, Apple, without any factual support, claims that Class Counsel had more attorneys working on the matter and thus the time Class Counsel expended was too high. Apple ignores the fact that it retained two nationally recognized law firms to litigate this case. This does not include the many other attorneys and professionals who did not appear formally as well as Apple's own in-house legal department. Apple's argument has no merit.

Third, Apple's objections to the amount of the Service Awards requested for two of the named Plaintiffs are not well-founded. Apple does not dispute the time, effort, and hard work they put into this case. Instead, as set forth below, Apple erroneously asserts that they failed to protect the interests of the Class. Apple denied any recovery to Plaintiffs and the Class for years, forcing prolonged litigation, yet now seeks – without any standing – to discredit and downplay the role of Plaintiffs – gift-card scam victims who stood up to represent themselves and other victims – and Class Counsel who fought on their behalf. The Court should not countenance Apple's sudden desire to protect the interests of Class Members.

For the reasons set forth herein, Apple's Opposition should be overruled, and Plaintiffs' Motion should be granted in full.

II. ARGUMENT

A. Apple Has No Standing to Object

Apple lacks standing to object to the fee request. As Apple is aware, this is a common fund Settlement and any attorneys' fees awarded will come from the fund that Class Counsel created for the Class – not from Apple. In *In re Apple Inc. Device Performance Litig.*, No. 5:18-md-02827-EJD, 2023 WL 2090981, at *11, n.7 (N.D. Cal. Feb. 17, 2023), *appeal dismissed*, No. 23-15416, 2023 WL 10447843 (9th Cir. Aug. 8, 2023), this Court found that "that Apple lacks standing to object to the proposed fee awards as 'a settling defendant in a class action [that] 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.'" *Id.* (citing *Tennille v. Western Union Co.*, 809 F.3d 555, 559 (10th Cir. 2015); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481, n.7 (1980)).[1] Apple cannot establish

[1] Unless otherwise noted, citations are omitted, and emphasis is added.

that it has standing, and its arguments to reduce the requested fee should be rejected on that basis alone. In any event, as explained below, Apple's arguments are without merit.

B. The Court Should Award Fees Equal to 33% of the Common Fund

1. An Upward Adjustment from the Benchmark of 25% Is Warranted

Plaintiffs meet the criteria for an upward adjustment from the Ninth Circuit's 25% fee award benchmark. Courts assess special circumstances for such an adjustment by considering: (1) whether counsel secured outstanding results for the class; (2) whether the case posed significant risk for class counsel; (3) whether counsel's efforts led to benefits beyond the cash settlement fund; (4) the prevailing market rate for similar cases; and (5) the financial strain on counsel in litigating the matter. *Vizcaino v. Microsoft Corp*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). In this case, each factor supports an increase in fees above the 25% benchmark.

First, the Settlement is more than a "fair" result. It delivers an ***exceptional*** outcome for the Settlement Class and is the first of its kind to provide victims of gift card scams compensation. "In a common fund case, 'the size of the recovery constitutes a suitable measure of the attorneys' performance."' *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1303 (W.D. Wash. 2001), *aff'd*, 290 F.3d 1043. "Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award." *Marshall v. Northrop Grumman Corp.*, No. 16 Civ. 6794, 2020 WL 5668935, at *2 (C.D. Cal. Sept. 18, 2020); *see also Deaver v. Compass Bank*, No. 13 Civ. 0222, 2015 WL 8526982, at *11 (N.D. Cal. Dec. 11, 2015) (identifying recovery as "the most critical factor").

Here, the Settlement Fund represents approximately 21% of the estimated total actual losses of the Settlement Class. Apple seeks to minimize that figure and treat it in isolation. But not only does such a recovery put the Settlement solidly into the upper echelons of consumer settlements, *see, e.g.*, *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005) (finding a settlement representing approximately 23% of the class's claimed losses supported a one-third attorneys' fee award), but to assess whether it is exceptional, it must be considered in light of the lack of precedent and uphill battles faced by Class Counsel to achieve it. Here, there was no precedent when Class Counsel agreed to pursue the case, and it was

clear that Apple would argue that its disclaimers and warnings meant that Class members had no right to funds lost in a scam. Indeed, Apple dug in its heels and mediated the case only after three years of active litigation, full and highly contested discovery, and the filing of Plaintiffs' motion for class certification. *See Vizcaino*, 142 F. Supp. 2d at 1303 (finding recovery exceptional given the absence of controlling precedent, dispositive defenses relating to disclaimer agreements, and years spent vigorously pursuing action).

Apple also seeks to minimize the fact that class members who submit valid claims will almost certainly recover 100% of their losses. When negotiating the Settlement amount, Class Counsel anticipated – based on their experience in the field – that Settlement Class Members who submitted valid claims would receive 100% of their losses, in addition to *cy pres* benefits, and the satisfaction of knowing that Apple – which denied refunds to many of them – was finally being held accountable. Apple quibbles by pointing out this Court's observation that where a high percentage of recovery is not "guaranteed," it does not "necessarily" support an upward adjustment from the 25% benchmark, but Apple does not and cannot explain why it would not do so here, where experienced counsel before a knowledgeable and respected mediator obtained a settlement where class members could obtain 100% recoveries even after payment of fees, costs of litigation, service awards, and costs of settlement administration.

Apple similarly complains that a settlement "may not" be exceptional where benefits are limited to claimants who are able to provide a serial number and an attestation. *Id.* This ignores the fact that known claimants here (*i.e.*, those who contacted Apple to report the scam and provided documentation at that time) need not submit card numbers or documentary proof with their claims. *See* ECF No. 266-2 ("Settlement Agreement"), §6.3.2. It also ignores the fact that, in *Apple Device Performance*, the attestation could only be made by a limited subset of the class, *i.e.*, those who actually experienced degraded device performance. *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 781 (9th Cir. 2022). Here, there is no attestation requirement that narrows the field of class members who are eligible to file claims based on their experiences when they were scammed. Instead, all victims who fit the class definition are eligible regardless of their experiences, as long as they maintained adequate proof of those experiences, something which is

not only "fair and reasonable" in this case but downright necessary, given the known universe of gift card fraudsters who are sure to learn of the Settlement. *See* Settlement Agreement, §6.3.1 (permitting claims by any class members with the requisite proof).

Further, the Settlement Fund, as a percentage of the recovery, aligns with recoveries in other cases from this Circuit where attorneys' fees amounting to one-third of the common fund were granted. *See, e.g.*, *Northrop Grumman Corp.*, 2020 WL 5668935, at *2 (concluding that an award of 29% of plaintiffs' claimed damages at trial was an exceptional result justifying an attorney fee award of one-third of the settlement fund); *see also Cheng Jiangchen v. Rentech, Inc.*, No. 17 Civ. 1490, 2019 WL 5173771, at *7 (C.D. Cal. Oct. 10, 2019) (awarding one-third fees in $2.05 million settlement with 10% recovery of maximum damages); *Deaver*, 2015 WL 8526982, at *10 (awarding one-third fees in $500,000 settlement with 14.2% recovery of $3,512,000 in potential liability); *Heritage Bond*, 2005 WL 1594389, at *8 (awarding 33.33% in fees to counsel where the class recovered 23% of the total net loss after fees were deducted).

Second, this case presented elevated risk to Class Counsel throughout the litigation. Apple seeks to downplay the novelty of the case by characterizing the claims as "traditional consumer protection claims." Opp. at 3. Apple ignores not only the unprecedented application of Section 496 to gift card practices, but also the fact that, before Class Counsel undertook these claims on a contingency basis, no court had held an issuer of gift cards liable in connection with gift card scams. Class Counsel had to fight hard to convince the Court that causes of action – never before pursued in this context – plausibly fit the facts at hand. Class Counsel also had to fight hard to obtain the discovery needed to get the case ready for a meaningful mediation where the parties would discuss a meaningful – indeed, extraordinary – settlement. The fact that the case settled before trial, after Plaintiffs filed their motion for class certification, is a reflection of the risk, expense, complexity, and likely duration of further litigation – which also weighs in favor of an upward adjustment from the 25%. Indeed, this Court has recognized the avoidance of inherent "risk presented by continued litigation," as a factor in support of an upward adjustment from the fee award benchmark. *See, e.g.*, *In re Google Location History Litig.*, Case No. 5:18-cv-05062-EJD, 2024 WL 1975462, at *14 (N.D. Cal. May 3, 2024).

It is simply not true that the risks to Class Counsel were "largely dissipated following this Court's rulings that Plaintiffs had stated an actionable claim in response to Apple's motions to dismiss." Opp. at 3. Those rulings on the motion to dismiss said nothing about the intense litigation ahead. The risks associated with obtaining class certification, surviving summary judgment, and winning at trial remained palpable and significant throughout this litigation, including after the Court sustained the novel theories presented at the motion-to-dismiss stage.

Nor is it true that "the bulk of Class Counsel's investment – discovery and class certification – came *after* much of the risk they undertook was resolved." Opp. at 4 (emphasis in original). As noted, Class Counsel continued to face tremendous risk after the Court's decision sustaining several claims. Moreover, by the time any claims were sustained – on June 13, 2022 – the case had been on file for two years and had been in active discovery for approximately 18 months, during which time Class Counsel prosecuted the case vigorously. *See* ECF No. 38 (denying Apple's motion to stay discovery on October 22, 2020); *see also* Amended Joint Declaration ("Amended Joint Decl."), ¶15 (filed contemporaneously herewith).

The Settlement resulted from risky, hard-fought litigation and was only obtained after fact and expert discovery was complete and Plaintiffs filed their Motion for Class Certification. Class Counsel engaged in over three years of adversarial litigation, rounds of motion practice, dozens of meet and confers, months of contentious discovery, including several discovery disputes before Magistrate DeMarchi, a full day of mediation, and many hours to finalize the Settlement and draft the related documents. These efforts when considered holistically with the other *Vizcaino* factors support an upward adjustment from the benchmark. In fact, this Court has previously rejected Apple's arguments claiming that risks of continued litigation are not a basis to award fees above the benchmark. *See, e.g.*, *Apple Device Performance*, 2023 WL 2090981, at *14 ("Not one of Apple's stated reasons suggests Named Plaintiffs' risks were likely low if the litigation had continued. Based on the foregoing, this factor favors an upward adjustment to the benchmark."). Accordingly, the substantial and above-average risk faced by Class Counsel supports the fee requested.

Third, Class Counsel attached as Appendix A to the Motion a compendium of cases which have approved an upward adjustment from the 25% benchmark in common fund cases. *See* ECF No. 273, Appendix A. Apple claims consumer protection cases should be treated differently, but Apple cites to no authority prohibiting an upward adjustment for a consumer protection case, much less one with unique Section 496 claims. To the contrary, similar awards have been granted in consumer cases alleging claims under the California Consumers Legal Remedies Act ("CLRA") and the California Unfair Competition Law ("UCL"). *See, e.g.*, *In re Vizio, Inc., Consumer Priv. Litig.*, 2019 WL 12966638, at *6 (C.D. Cal. July 31, 2019), *judgment entered sub nom. In re VIZIO, Inc., Consumer Priv. Litig.*, No. 16-ml-3818854, 2019 WL 3818854 (C.D. Cal. Aug. 14, 2019) (awarding 33% in attorneys' fees in consumer case alleging, *inter alia*, consumer protection claims under California's CLRA and UCL); *see also Martinelli v. Johnson & Johnson*, No. 2:15-cv-01733, 2022 WL 4123874, at *9 (E.D. Cal. Sept. 9, 2022) (awarding attorneys' fees totaling approximately 33 1/3% of the settlement amount in consumer protection case asserting, *inter alia*, violations of the CLRA and UCL). Here, the comparable awards in common fund cases, including those asserting consumer protection claims, weigh in favor of Class Counsel's requested fee.

Fourth, the contingent nature of the representation supports an upward adjustment here. Apple's arguments boil down to a contention that the contingency basis does not "standing alone" support an upward adjustment, and that "more than atypical risk" is required before counsel's willingness to advance their time and money on behalf of a class can support an upward adjustment. Opp. at 5-6. As set forth in Plaintiffs' motion and above, Class Counsel certainly took on greater-than-average risk in this case. Even if they had not, courts have routinely found that the contingency nature of common fund cases is a factor in support of an upward adjustment from the benchmark. *See, e.g.*, *In re LinkedIn ERISA Litig.*, No. 5:20-cv-05704-EJD, 2023 WL 8631678, at *9 (N.D. Cal. Dec. 13, 2023) ("the contingent nature of representation in this case – in combination with the aforementioned factors – supports an award of attorneys' fees above the benchmark"); *see also Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) ("where recovery is uncertain, an award of one-third of the common fund as attorneys' fees has been found to be appropriate"); *see, e.g.*, *Singer v. Becton Dickinson and Co.*, No. CV 08-821,

2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (finding an award of 33.3% of the common fund reasonable because class counsel took the case on a contingent basis and litigated for two years, courts routinely award between 20% to 50% of the total settlement amount, and no class member objected to the award); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010) (factoring the contingency basis, "which presented considerable risk," in awarding attorneys' fees in the amount of 33.3% of $300,000 settlement);

Here, Class Counsel '"bore the financial burden of pursuing the litigation for an extended period of time."' *In re Nexus 6P Prod. Liab. Litig.*, No. 17-CV-02185-BLF, 2019 WL 6622842, at *13 (N.D. Cal. Nov. 12, 2019). This suit was filed more than four years ago. To date, Class Counsel has spent more than 16,622 hours litigating the case and advanced over half a million dollars in expenses without receiving any compensation. *See* Joint Decl. ("Joint Decl."), ECF No. 273-2, ¶¶38, 54. '"This substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees."' *Nexus 6P*, 2019 WL 6622842, at *13. In sum, applying the *Vizcaino* factors weigh heavily in favor of granting Class Counsel's requested fee.

2. Class Counsel Provides Sufficient Documentation to Support Their Request and Remains Willing to Provide the Court with Any Necessary Documentation

Class Counsel's Motion and accompanying declarations provide more than sufficient time detail to award the fees requested. *See Blackwell v. Foley*, 724 F. Supp. 2d 1068, 1081 (N.D. Cal. 2010) ("An attorney's sworn testimony that, in fact, [she] took the time claimed ... is evidence of considerable weight on the issue of the time required."). Here, Class Counsel provided declarations from each of the three Court-appointed firms which describe the work done over the course of the case in detail, set forth each firm's total hours, and break down the hours of work attributable to each attorney or other professional at the firm, with an additional breakdown by billing year to reflect the applicable historical rates for each attorney and supporting professional over time. *See* ECF Nos. 273-2, 273-3, 273-4, and 273-5.

Apple suggests that Class Counsel should have filed "itemized records of their time" with their motion. Opp. at 6. This position ignores the applicable procedural guidance of this District,

which requires only "[d]eclarations of class counsel as to the number of hours spent on various categories of activities by each biller, together with the hourly billing rate information." *See* U.S. District Court of the Northern District of California, Procedural Guidance for Class Action Settlements, https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/. In any event, Class Counsel have always been, and remain, willing to provide itemized time and expense reports to the Court for *in camera* review. *See* ECF No. 109 at 18 (offering same).

Moreover, Apple cites no authority supporting its request. Indeed, Apple claims that itemized records are necessary so that the Court can exclude hours that are excessive, redundant, or otherwise unnecessary and reduce the fee award accordingly, but neither of the cases it cites (*McCown* and *Hensley*) involved a common fund. Thus, fees were not being calculated as a percentage of a fund, and the lodestar calculation required much more precision than necessary for a simple "rough justice" cross check. In any event, to address any concerns about the sufficiency of the details submitted, Class Counsel submit amended declarations providing additional information concerning the "categories" of work performed. *See* Amended Declarations of Daryl F. Scott, Nyran Rasche, and Anthony Fata filed contemporaneously herewith. Additionally, Class Counsel are prepared to provide the Court its detailed time and expense records for *in camera* review if the Court believes such records would be necessary in evaluating Class Counsel's request for attorneys' fees and expenses.

Finally, Apple "suspects that a large portion" of Class Counsel's lodestar is unjustified. Opp. at 7. Apple does ***not*** dispute the reasonableness of Class Counsel's hourly rates. *Id.* Instead, it challenges the "hours" spent by Class Counsel. *Id.* In making the argument, Apple ignores relevant authority which holds that to reduce the number of hours worked, '"it must appear that the time claimed is obviously and convincingly excessive under the circumstances."' *Blackwell*, 724 F. Supp. 2d at 1081.

Apple "suspects" that a large portion of the lodestar was spent litigating or relitigating the fate of claims that were dismissed. *Id.* But the fact that some claims were dismissed is not grounds for reducing fees, and Apple cites to no authority suggesting otherwise. *See Hensley v. Eckerhart*,

461 U.S. 424 (1983); *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1142 (9th Cir. 1986)). Instead, Apple's own cases acknowledge that claims arising from the same "common core" of operative facts should be treated together for purposes of fees. *See McCown v. City of Fontana*, 565 F.3d 1097, 1103 (9th Cir. 2009) ("in a lawsuit where the plaintiff presents different claims for relief that 'involve a common core of facts' or are based on 'related legal theories,' the district court should not attempt to divide the request for attorney's fees on a claim-by-claim basis"). Here, all claims were based on the same operative facts and were colorable.

Apple also "suspects" that the fee may be unreasonable because the Court appointed three firms as Class Counsel, "making up a far larger team than Apple's." Opp. at 7. Apple does not disclose the number of attorneys and other legal professionals who worked in defense of Apple in this case – either at outside firms, as in-house counsel, or otherwise. Apple has been represented in this case by two nationally recognized firms – Weil, Gotshal & Manges LLP and Jenner & Block LLP – and nine attorneys have appeared in the action. Apple also likely had in-house counsel and legal professionals working on this matter, and non-legal employees gathering documents and information. And, even if the total hours across Apple and the two outside firms were somehow less than Class Counsel's hours, Apple cannot dispute, based on the record, it vigorously fought Plaintiffs' efforts to obtain data, documents, and provide testimony relating to gift card scams. In any event, Apple does not disclose the rates charged by its outside attorneys or attempt to provide an assessment of the market value of its in-house counsel's services. Class Counsel suspects that any fair assessment of the value of the work done on behalf of Apple would confirm the reasonableness of the requested fee.

As noted, Apple does not dispute the reasonableness of Class Counsel's hourly rates. In any event, in determining the appropriateness of the billing rates, courts also consider "the quality of opposing counsel as a measure of the skill required to litigate the case successfully." *In re American Apparel, Inc. S'holder Litig.*, No. 10 Civ. 6352, 2014 WL 10212865, at *22 (C.D. Cal. July 28, 2014); *see also Wing v. Asarco Inc.*, 114 F.3d 986, 989 (9th Cir. 1997). As noted, Apple was represented by experienced, aggressive, and capable counsel from Weil, Gotshal & Manges LLP and Jenner & Block LLP – prestigious and well-represented defense firms – that vigorously

and ably defended the Action.[2] Lastly, Apple also fails to acknowledge that Class Counsel's attorneys' fee request when compared to its lodestar, would result in a negative multiplier. Courts in this District have recognized that a request for attorneys' fees which results in a negative multiplier "supports the request for a greater-than-average common fund percentage award." *Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-02276, 2021 WL 837626, at *8 (N.D. Cal. Feb. 4, 2021). In fact, should the Court accept Apple's suggestion that Class Counsel be awarded 25%, Class Counsel's fees would be further discounted from a ***negative multiplier*** of .99 to .74 based on $11,701,465 in lodestar. Courts have held that a negative multiplier supports an upward adjustment from the 25% benchmark. *Terraza v. Safeway Inc.*, No. 16-cv-03994-JST, 2021 WL 11607173, at *3 (N.D. Cal. July 19, 2021) ("A 'negative multiplier' of this kind is another factor supporting an upward departure from the Ninth Circuit benchmark."); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 601 (N.D. Cal. 2020) ("Class Counsel is not seeking to recover the full lodestar amount. Accordingly, this negative multiplier suggests that the fee request is reasonable."). Here, Plaintiffs' lodestar does not include the work performed by Class Counsel since August 1, 2024, and is based on historical, rather than current, rates. Indeed, had Class Counsel used current rates, as they were allowed to, it would have increased the negative multiplier associated with the fee request.

C. All Named Plaintiffs Participated Fully and Should Receive Incentive Awards of $10,000

Apple argues, without citing any case law, that named Plaintiffs who are not proposed as class representatives should receive only nominal service awards. Apple is wrong – courts often award more than nominal service awards to individuals who were named plaintiffs and participated in discovery, even if they were not named as class representatives. *See, e.g.*, *Trujillo v. City of Ontario*, No. 04-cv-1015, 2009 WL 2632723, at *5 (C.D. Cal. Aug. 25, 2009) (awarding, over an

[2] Attached hereto as Appendix A is a table of recently submitted hourly rates by Apple's counsel and other defense firms. *See* Appendix A. This analysis shows that Class Counsel's rates are consistently lower than those of its opposing counsel.

objection, $10,000 payments to named plaintiffs who were not class representatives in light of their contributions to the prosecution to litigation and the risks they experienced which were not borne by unnamed class members); *Guang Tian v. Ma Labs., Inc.*, No. 1-11-CV-195373, 2015 WL 4878980, at *3 (Cal. Santa Clara Super. Ct. Aug. 7, 2015) (awarding service awards over the defendant's objection because "[t]here is authority providing for incentive payments to non-class representatives") (collecting cases).

Lacking legal authority, Apple turns instead to a strategy of maligning the named Plaintiffs who were not offered as representatives, going so far as to affirmatively assert that they "intentionally propagated false narratives." ECF No. 275 at 8. Although Michel Polston and Nancy Martin ultimately were unable to locate the gift card numbers for the cards they purchased, they participated fully in this litigation, expending numerous hours reviewing drafts of pleadings and discovery responses, participating in telephone calls with Class Counsel, retrieving documents to produce during discovery, responding to discovery requests from Defendants, and preparing for and sitting for full-day depositions. Joint Decl., ¶57. Indeed, they each spent significant additional time searching for documents following their depositions – after it became clear from aggressive questioning that Apple's new counsel intended not only to argue that Apple was not liable for gift card scams, but also to suggest that Mr. Polston and Ms. Martin had never been scammed in the first place. Amended Joint Decl., ¶57. Moreover, contrary to Apple's assertion, their participation benefitted the Class by highlighting issues of memory and proof that would ultimately contribute to settlement of the case. At the time of their depositions in 2023, their ages were typical of a class that skews older: Ms. Martin was approximately 65 years of age, and Mr. Polston was approximately 75 years of age, and each was trying to recall the details of a scam that had occurred prior to the filing of the case in July of 2020. With the passage of time, it is no surprise that memories were not perfect. Their difficulties recalling with certainty facts as important as the

precise amounts they lost[3] and the dates of the losses alerted counsel to issues that would need to be dealt with at the class certification (or settlement) stage.

Apple also relies on the police report relating to Mr. Polston's scam but takes significant and unsupported liberties with its description of the situation. Apple's language gives the impression not only that Mr. Polston had the report all along and failed to turn it over, but that Mr. Polston "took measures to conceal" it. ECF No. 275 at 8. In reality, Mr. Polston reported the scam to police by phone, and never obtained a copy of the report. ECF No. 145 at 2. He disclosed that he had contacted the police at the outset of the lawsuit, *id.*, and when Apple sought the report in written discovery, he explained that he had never received a copy. *Id.* Apple was satisfied and did not press further. *Id.* It was not until Mr. Polston's deposition near the end of the discovery period, when it became clear from Apple's attempts to undermine Mr. Polston's testimony, that Apple intended to call into doubt not just Apple's liability for the scam, but also whether the scam occurred at all. Subsequently, Mr. Polston's counsel contacted local enforcement agencies in Oregon and were able to obtain a copy of the report and immediately process and produce it to Apple. *Id.* at 3. Because the report clarified when the scam occurred, Plaintiffs renewed their request for certain electronic data from Apple, limiting it to just the data that would identify Mr. Polston's cards and confirm that those cards were involved in a scam. As set forth in the briefing

[3] Notably, and tending to support their credibility, neither of them claimed large losses. Unlike Andrew Hagene and the Rodriguez plaintiffs, each of whom lost $1,000 or more (ECF No. 59, ¶¶155, 171), Ms. Martin recalled losing $125, and Mr. Polston recalled losing $350. *Id.*, ¶¶122, 130.

on that dispute,[4] which Judge DeMarchi ultimately resolved in Apple's favor, the report corroborated much of Mr. Polston's testimony, and did not rule out his recollection that the scam involved Apple gift cards. *Id.* Indeed, following receipt of the report by his counsel, Mr. Polston engaged in significant additional effort to locate documents that would confirm his recollection and resolve the questions raised by the police report, but the case settled before he was able to do so. Amended Joint Decl., ¶57. Accordingly, all four named Plaintiffs should receive the requested service awards.

III. CONCLUSION

For the foregoing reasons, the Court should grant the Motion for an Award of Attorneys' Fees, Expenses, and Service Awards in full.

Dated: October 1, 2024

Respectfully submitted

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[4] The Court should take into consideration the fact that Apple refused to produce the narrow set of data which would have confirmed Mr. Polston's membership in the class. Apple should not be rewarded for stymying the search for discovery supporting Mr. Polston's claims, on one hand, and challenging Mr. Polston's credibility based on the lack of supporting documentation, on the other.

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APPENDIX A

Hourly Billing Rates Submitted by Apple's Defense Firms as Debtors' Counsel in Connection with Recent Bankruptcy Cases					
Case Name	**Law Firm**	**Partner Hourly Rates**	**Of Counsel / Counsel Hourly Rates**	**Associate Hourly Rates**	**Paralegal /Paraprofessional Hourly Rates**
In re: SVB Financial Group , No. 23 Bk. 10367 (Bankr. S.D.N.Y. Sept. 23, 2024) (ECF No. 1479)	Jenner & Block LLP	$1,460-$2,305	$1,200-$1,380	$1,370	
In re: Steward , No. 24 Bk. 90213 (Bankr. S.D. Tex. Sept. 16, 2024) (ECF No. 2582)	Weil, Gotschal & Manges LLP	$1,725-$2,350	$1,595-$1,650	$830-$1,470	$350-$595
In re: SAS AB , No. 22 Bk. 10925 (Bankr. S.D.N.Y. Jan. 31, 2024) (ECF No. 1882)	Weil, Gotschal & Manges LLP	$1,450-$2,095	$1,375-$1,540	$770-$1,315	$295-$530
In re: Internap Holding LLC , No. 23 Bk. 10529 (Bankr. D. Del. Aug. 21, 2023) (ECF No. 337)	Jenner & Block LLP	$1,110-$1,915		$670-$1,035	$280-$530
In re: USA Gymnastics , No. 18 Bk. 09108 (Bankr. S.D. Ind. May 4, 2022) (ECF No. 1892)	Jenner & Block LLP	$925-$1,700	$925-$1,700	$560-$920	$235-$405
In re: Fieldwood Energy LLC , No. 20 Bk. 33948 (Bankr. S.D. Tex. Oct. 12, 2021) (ECF No. 2093)	Weil, Gotschal & Manges LLP	$1,200-$1,795	$1,150-$1,225	$630-$1,100	$260-$460
In re: BBGI US, Inc. , No. 20 Bk. 11785 (Bankr. D. Del. May 20, 2021) (ECF No. 1242)	Weil, Gotschal & Manges LLP	$1,300-$1,795	$1,100-$1,405	$630-$1,215	$275-$460
In re: Rentpath Holdings, Inc. , No. 20 Bk. 10312 (Bankr. D. Del. Mar. 10, 2021) (ECF No. 845)	Weil, Gotschal & Manges LLP	$1,225-$1,795	$1,150-$1,175	$630-$1,100	$260-$440
In re: Exide Holdings, Inc. , No. 20 Bk. 11157 (Bankr. D. Del. Dec. 3, 2020) (ECF No. 1106)	Weil, Gotschal & Manges LLP	$1,125-$1,695	$1,100-$1,125	$595-$1,050	$250-$435
In re: CEC Entertainment Inc. , No. 20 Bk. 33163 (Bankr. S.D. Tex. Nov. 16, 2020) (ECF No. 1288)	Weil, Gotschal & Manges LLP	$1,200-$1,695	$1,100	$595-$1,050	$240-$435
In re: Firestar Diamond , No. 18 Bk. 10509 (Bankr. S.D.N.Y. Sept. 2, 2020) (ECF No. 1621)	Jenner & Block LLP	$775-$1,400		$465-$880	$340-$400
In re: PG&E Corp. , No. 19 Bk. 30088 (Bankr. N.D. Cal. Aug. 28, 2020) (ECF No. 8898)	Weil, Gotschal & Manges LLP	$1,075-$1,695	$1,050-$1,125	$560-$1,050	$160-$435