1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
NOV 02 2018
Clerk of the Court
Superior Court of CA County of Santa Clara
BY ____________ DEPUTY
Jee Jee Vizconde

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

FRANK SICILIANO and MELISSA BLEAK, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

APPLE, INC., a California corporation,

Defendants.

Case No.: 2013-1-CV-257676

ORDER AFTER HEARING ON NOVEMBER 2, 2018

Final Fairness Hearing

The above-entitled matter came on regularly for hearing on Friday, November 2, 2018 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued by the Court on November 1, 2018. No party contested the tentative ruling and no party appeared; therefore, the Court orders that the tentative ruling be adopted and incorporated herein as the Order of the Court, as follows:

This is a class action arising from the automatic renewal of "In-App Subscriptions" for digital content through defendant Apple Inc.'s "App Store." The parties have reached a settlement, which the Court preliminarily approved on July 20, 2018.

Before the Court are plaintiffs' motions (1) for final approval of the settlement and (2) for approval of attorney fees, costs, and service awards. One class member has submitted an objection to various aspects of the settlement, and this objector also opposes plaintiffs' motions.

I. Factual and Procedural Background

According to the allegations of the Third Amended Complaint ("TAC"), consumers enter into transactions for In-App Subscriptions with Apple, and Apple both delivers and charges subscribers for associated content. (TAC, ¶ 21.) However, Apple does so without complying with various provisions of Business & Professions Code sections 17600-17604, which govern automatic renewal and continuous service offers to consumers in California (the "Automatic Renewal Law" or "ARL").

In order to make purchases from Apple's online store, consumers are first required to set up an account with Apple's iTunes service, which includes creating an "Apple ID" and password, providing payment information, and consenting to three legal agreements (collectively, the "Legal Agreements"). (TAC, ¶ 23.) Paragraph 45 of the "MAC App Store, App Store and iBooks Store Terms and Conditions" (the "App Store Legal Agreement") establishes terms and conditions pertaining to In-App Subscriptions. (*Id.*, ¶ 29.) However, the Legal Agreements fail to state that In-App Subscriptions continue until cancelled or specify the recurring charges associated with automatic renewals as required by the Automatic Renewal Law, and they also fail to display the disclosures that are presented in a clear and conspicuous fashion. (*Id.*, ¶¶ 33-34.)

When consumers later open one of the various software applications (or "Apps") that offer In-App Subscriptions, Apple makes an automatic renewal offer by displaying a button labeled "subscribe" or "upgrade." (TAC, ¶¶ 20, 31.) Clicking on this button causes a screen to appear, which subscribers use to enter their desired subscription period, along with their Apple

ID and password linked to their payment method. (*Id.*, ¶ 31.) The Legal Agreements are not accessible on the checkout page and are not located anywhere in the App Store, and there is no mechanism that requires subscribers to consent to the Legal Agreements or any other agreement containing automatic renewal terms during the checkout process for In-App Subscriptions. (*Id.*, ¶¶ 34, 36.) This practice violates the Automatic Renewal Law's requirements that businesses (1) display the renewal terms in visual proximity to the offer and (2) obtain subscribers' affirmative consent to an agreement containing the terms. (*Id.*, ¶¶ 32, 38.) In addition, while Apple sends subscribers a confirmation email, this email fails to meet the requirement that businesses (3) provide an acknowledgement that includes the terms, cancellation policy, and information about how to cancel in a manner that is capable of being retained by the subscriber. (*Id.*, ¶ 39.)

Plaintiffs Frank Siciliano and Kelila Green (who are married) ordered a one-week free In-App Subscription to Hulu Plus using their Apple TV on October 9, 2013. (TAC, ¶ 9.) Beginning one week later, on October 16, 2013, Apple charged and continues to charge plaintiffs Siciliano and Green $7.99 per month on a recurring basis. (*Ibid.*) Plaintiff Melissa Bleak purchased a one-year In-App Subscription to Woman's Health Magazine in February 2013. (*Id.*, ¶ 10.) In or about February 2014, Apple again charged plaintiff Bleak for this subscription in accordance with the payment method associated with her iTunes account. (*Ibid.*)

Plaintiffs filed this action on December 13, 2013. On April 30, 2015, they filed a second amended complaint ("SAC"), asserting claims for: (1) violation of the Automatic Renewal Law; (2) violations of the Unfair Competition Law ("UCL") (Bus. & Prof. Code, §§ 17200-17204); (3) injunctive relief and restitution pursuant to Business and Professions Code section 17535 (the False Advertising Law or "FAL"); (4) violation of the Consumer Legal Remedies Act ("CLRA") (Civ. Code, § 1750 et seq.); and (5) common count for money had and received. On January 3, 2016, the Court (Hon. Kirwan) overruled Apple's demurrer to the SAC. On May 16, 2016, it granted Apple's motion for judgment on the pleadings as to the first cause of action, holding that the Automatic Renewal Law does not provide a direct, private right of action. Pursuant to the

parties' stipulation, plaintiffs filed the operative TAC on June 15, 2016, which re-alleges the four causes of action that survived Apple's motion for judgment on the pleadings and adds a fifth cause of action for declaratory relief.

On April 21, 2017, the Court denied Apple's motion for summary judgment and granted plaintiffs' motion for class certification in part as to plaintiffs' theory that any subscription purchased under conditions that violate the Automatic Renewal Law must be deemed a "gift" under section 17603 of the statute. Certification was denied as to the third cause of action under the CLRA and as to the other claims insofar as they were based on a fraud or reliance theory: the Court found that plaintiffs did not show commonality regarding class members' exposure to the assertedly material disclosures or articulate an appropriate basis for restitution under this theory.

Class notice was issued, and the notice period closed on October 25, 2017. The class administrator received about 400 timely opt-outs. The parties subsequently discovered that the original class list had omitted approximately 8,000 class members, and issued a second round of notices on February 2, 2018. In total, direct notice was sent to about 4 million class members.

After the class was certified, Apple moved for summary adjudication of the class claims on the ground that section 17603 does not apply to digital subscriptions. Following a hearing on March 23, 2018, the Court denied Apple's motion.

The parties have now reached a settlement, which the Court preliminarily approved on July 20, 2018. Plaintiffs' motions (1) for final approval of the settlement and (2) for approval of attorney fees, costs, and service awards have now come on for hearing.

1 II. Legal Standard for Approving a Class Action Settlement

2

3 Generally, "questions whether a settlement was fair and reasonable, whether notice to
4 the class was adequate, whether certification of the class was proper, and whether the attorney
5 fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v.*
6 *Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.*
7 (1996) 48 Cal.App.4th 1794, disapproved of on another ground by *Hernandez v. Restoration*
8 *Hardware, Inc.* (2018) 4 Cal.5th 260.)

9

> 10 In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case,
> 11 the risk, expense, complexity and likely duration of further litigation, the risk of
> 12 maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience
> 13 and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

14

15 (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and
16 quotations omitted.)

17

18 The list of factors is not exclusive and the court is free to engage in a balancing and
19 weighing of factors depending on the circumstances of each case. (*Wershba v. Apple Computer,*
20 *Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement
21 agreement to the extent necessary to reach a reasoned judgment that the agreement is not the
22 product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
23 settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting
24 *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1801, internal quotation marks omitted.)

25

> 26 The burden is on the proponent of the settlement to show that it is fair and
> 27 reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are
> 28 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1802.)

The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

III. Settlement Process

Plaintiffs' counsel declares that, in addition to the substantial motion practice summarized above, there has been nearly three years of formal discovery in this action. Plaintiffs propounded, and defendant responded to, numerous written discovery requests, and Apple produced more than 150,000 pages of records. Plaintiffs deposed six Apple witnesses. They also responded to Apple's discovery requests, including sitting for their own full-day depositions.

After Apple's motion for summary adjudication of the class claims was denied, the parties agreed to mediate their dispute. They exchanged detailed mediation briefs and attended a full-day mediation with Randall W. Wulff on April 4, 2018. The case did not settle at that time, but the parties returned for a second session with Mr. Wulff on May 2. A settlement was achieved following these efforts.

IV. Settlement Class

The Court previously certified a class of "all persons in California who purchased a third-party developer's automatically renewing In-App subscription from Apple, Inc., billed through

the Apple iTunes Store from December 1, 2010 to September 13, 2016," excluding plaintiffs' counsel and any employees of their firms. At preliminary approval, the Court further excluded Apple employees, employees of defendant's counsel, the Court, and the Court's staff. Also excluded from the class are those individuals who filed a timely and valid request for exclusion in response to the notices that issued following class certification and in response to the notice of settlement.

V. Terms and Administration of the Settlement

The non-reversionary $16.5 million settlement includes attorney fees and expenses not to exceed $4 million, settlement administration expenses not to exceed $290,500, and service awards of up to $2,500 each to the named plaintiffs.

The net settlement of approximately $12 million will be distributed automatically to class members, pro rata, through non-expiring credits to their iTunes accounts, or, for class members without active iTunes accounts, through checks sent by mail. Funds allocated to class members with neither an active iTunes account nor a mailing address on record will be redistributed to the class. Funds associated with checks mailed to class members that are not cashed within 180 calendar days will be equally split between the National Center for Youth Law and Public Counsel. Based on the 3.9 million class members estimated at preliminary approval, each class member will receive approximately $3.

Class members who do not opt out of the settlement will release all claims, including claims against third-party developers, "(a) as they were alleged in the complaints, including those based on alleged violations of the Automatic Renewal Law, including claims for Unfair Competition Laws, money had and received, and declaratory and injunctive relief, or (b) that arise from the factual allegations in Plaintiffs' Third Amended Complaint," including unknown claims.

The notice process has now been completed. There are approximately 4.1 million iTunes accounts included in the class, with 3.9 million that have an associated email address. After excluding invalid and duplicate email addresses, as well as Apple employees and others expressly excluded from the class, there were 3,709,218 accounts with valid and unique e-mail addresses to which notice was sent. The administrator began emailing these notices on July 31, 2018. On August 1, it determined that, due to a vendor error, approximately 2.1 million notices were sent without the claim ID number required to opt out of the settlement class. The administrator and its vendor immediately worked to correct the error and updated the settlement web site so that class members could opt out using just their e-mail address. On August 3, an updated class notice including class members' claim ID was sent to affected class members. Notice was also posted to a publicly-accessible web site, which received 119,377 visits.

There is one objection, which is discussed below, and 146 new requests for exclusion from the class were received. (These requests are in addition to those submitted following class certification.) Of the 3,709,218 emails sent, 134,076 were permanently undeliverable, representing 3.62 percent of the emails. Since fewer than 10 percent of the emails were undeliverable, the settlement provided that postcard notice would not be attempted. The claims administrator continues to estimate that the payment to each class member will be around $3.

VI. Fairness of the Settlement

A detailed and reasonable assessment of the risks and merits of plaintiffs' claims is set forth in declarations by Julian Hammond filed in support of plaintiffs' motions for preliminary and final approval. In plaintiffs' view, after all three plaintiffs admitted that they saw "pop-ups" informing them that their subscriptions would renew before they subscribed, the case focused on Apple's alleged failure to (1) provide the full cancellation policy pre-purchase, in that Apple did not disclose the fact that subscriptions cannot be cancelled during a subscription term, and (2) disclose the minimum purchase obligation, in that Apple failed to disclose that no refund would

issue, in whole or part, if the subscription was cancelled during a subscription term. Apple, however, argued that it had made all the required disclosures, including that subscriptions would auto-renew and the description of the cancellation policy. Apple urged that the requirement that a business describe its cancellation policy does not require the business to disclose that ongoing subscriptions cannot be cancelled for a refund. Finally, Apple might argue that the specific violations at issue here did not trigger "gift" treatment under section 17603 based on that the language of that section.

Notably, plaintiffs explain that Apple would argue that any recovery in this action should be limited to a portion of the value of class members' first automatic subscription renewal. This is because the ARL is concerned with disclosures regarding such renewals, and class members were arguably on notice that their subscriptions would continue to renew after this point. Further, class members likely obtained some value from the subscriptions that they received. Plaintiffs indicate that the net pro rata recovery per class member (approximately $3) falls "roughly between" the value of class members' initial subscription terms and a portion of their first automatic renewal payments. The gross benefit to class members (approximately $4 each) is greater than the average amount Apple retained for the first subscription term per unique subscription, and the net benefit is greater than the average amount Apple retained for the first renewal.[1]

Plaintiffs believe that estimating realistic recovery based on the value of one subscription term is in line with other ARL settlements, and submit evidence of similar settlements consistent with this conclusion. Finally, plaintiffs explain that the parties agreed to a pro rata distribution of the settlement due to the prohibitive administrative costs that would result from more precisely accounting for variations in subscription prices.

---

[1] While subscriptions primarily ranged from $1.99 to $18.99 per subscription term, Apple itself retained only a portion of these payments.

A. The Court's View

Based on the analysis outlined above, the Court found at preliminary approval that the settlement is fair and reasonable to the class. The parties reached agreement following years of hard-fought litigation and months of focused arms-length bargaining. While plaintiffs had cleared significant hurdles in their attempt to obtain a recovery for the class at trial, substantial risks and costs remained. Following substantial motion practice, plaintiffs' case was narrowed to one theory of liability, the gift theory under section 17603, a provision which has yet to be interpreted by the California courts. In the Court's view, the settlement represents a good result for the class. Further, given that counsel here are experienced in similar litigation and only one of the millions of class members has raised an objection, the settlement is entitled to a presumption of fairness. (See *Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245 [a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small].)

B. The Issues Raised by the Objector

The objection, which is attached to the administrator's declaration as Exhibit D, states that neither the objector nor her attorneys intend to appear at the final fairness hearing to discuss the settlement with the Court.[2] The objector also filed an opposition to the instant motions, which expands on the issues raised in the objection.

---

[2] Plaintiffs and the objector spend significant portions of their respective briefing addressing other courts' characterizations of the objector's attorneys as "serial" or "professional" objectors. Ultimately, the Court's duty at the present time is to evaluate the settlement before it with the best interests of the class in mind and to thoroughly consider the merits of any objections, whatever their source. However, counsel's history of and motivations regarding the filing "serial" objections may become relevant at a later juncture.

The main issue raised by the objector is that the settlement will be largely paid to class members in the form of iTunes credits. While the objector acknowledges that many products are available for purchase from iTunes for $3 or less,[3] she argues that many class members will spend more money with Apple as a result of the settlement because they will purchase more expensive products. The objector further argues that class members who receive their $3 in the form of a check (because no valid email was associated with their iTunes account) are unlikely to cash their checks.[4]

In response to this argument, plaintiffs urge that mailing settlement checks to millions of class members would significantly and unnecessarily deplete the settlement fund. The claims administrator estimates that the costs of printing and mailing checks alone would be around $2.8 million, while the costs of related administrative tasks would bring the total to $3.4 to $4.4 million. The Court agrees with plaintiffs that these costs, which the objector does not address, are undesirable. The class will enjoy a greater benefit by receiving iTunes credits, particularly considering that the credits will not expire and will be automatically applied to class members' next iTunes purchases. As the objector herself notes, class members may never cash a check for the small sum at issue, so issuing iTunes credits can be expected to maintain or even increase settlement participation rates. Finally, while Apple may benefit from the settlement through increased sales as the objector posits, the Court does not find this problematic where any such benefit will result from class members' voluntary decisions to purchase more expensive products. (See *Dunk v. Ford Motor Co.*, *supra,* 48 Cal.App.4th at p. 1805, fn. 4 ["win-win" settlements benefiting the defendant along with the class members are not per se unreasonable].) Unlike in true "coupon settlements," class members are being offered a genuine option to obtain

---

[3] The objector does not challenge plaintiffs' representations that such products include millions of movies, songs, games, TV shows, and non-renewing apps.

[4] The objector also contends that class counsel's fee should be reduced since many credits may go unredeemed, an issue that the Court anticipated in its order granting preliminary approval and which is addressed in connection with plaintiffs' motion for attorney fees below.

products valued up to a certain amount at no additional charge. (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 53-54 ["While it is possible that some existing customers might be induced by the free rentals to purchase a higher level of service and some past customers might be induced to resume their lapsed subscriptions, the potential for Netflix to actually benefit financially from the settlement is much reduced compared to a pure coupon discount program."].) The qualities of "coupon settlements" that courts have identified as troubling are largely not present here. (See *Dunk v. Ford Motor Co.*, *supra*, 48 Cal.App.4th at p. 1805 ["[q]uestions arise as to the value of a settlement where … the coupon relates to a 'big ticket item,' is not transferable, represents only a tiny percentage of the purchase price, and is valuable to the defendant as an inducement to promptly purchase the defendant's product" because it expires]; *In re Online DVD-Rental Antitrust Litigation* (9th Cir. 2015) 779 F.3d 934, 950 [settlement paid in Walmart gift cards was not a coupon settlement].) For these reasons, the Court concludes that the settlement is best paid in the form of iTunes credits where possible.

The objector also contends that the settlement should not be approved without a requirement that Apple will discontinue the allegedly unlawful automatic renewal practices at issue. However, Apple has changed its practices since this action was filed, and plaintiffs concluded that these changes addressed their allegations.[5] The objector does not contend otherwise, but insists that other settlements have included formal promises to maintain voluntary changes resulting from a lawsuit. While the objector's approach might have improved the settlement, plaintiffs' choice to accept voluntary changes must be evaluated in light of their ability to obtain superior relief at trial. Ultimately, injunctive relief is not available where the challenged conduct has been discontinued and there is no indication that it will be repeated in the future. (See *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 462-466 [sustaining demurrer to UCL complaint on this ground].) Consequently, the settlement is reasonable even without Apple's formal promise not to revive its old practices.

[5] The class was consequently defined to include only In-App subscribers who made a purchase before Apple's practices changed, and only the claims of these subscribers are released by the settlement.

Finally, to the extent the objector contends that the amount of the settlement is too low, the Court disagrees. The objector provides no analysis regarding the potential value of the settlement, and for the reasons discussed above and in counsel's declarations, the Court finds that a recovery representing a significant portion of class members' first automatic renewal subscription fee is a reasonable compromise in this case and a good result for the class. Even assuming that the overall settlement value should be somewhat discounted for purposes of the attorney fee analysis due to potential non-participation by class members, participating class members will receive fair compensation for their release of claims and the Court finds no reason to conclude that the use of iTunes credits will reduce participation. While the objector speculates that the attorney fee award could exceed the value of the settlement to the class assuming a ten percent participation rate, the Court sees no reason to expect such low participation where class members need only make a purchase using their existing iTunes accounts to receive the benefit of their credits. (See *Chavez v. Netflix, Inc., supra,* 162 Cal.App.4th at pp. 48-49 [more than twelve percent of class members participated in a similar settlement that required them to submit an online claim form before they could redeem their free DVD rentals].)

For these reasons, the objector's challenges to the relief provided by the settlement lack merit.

VII. Attorney Fees

Plaintiffs seek a fee award of $3,824,356, consistent with the $4 million combined fee and cost award that was disclosed in the class notice. The fee request amounts to 23 percent of the full settlement fund and is roughly equivalent to the lodestar figure provided by plaintiffs' counsel, who submit billing summaries in support of their request.

At preliminary approval, the Court directed counsel to address whether and how the distribution of the settlement through iTunes credits impacts the attorney fees analysis. The

objector contends that iTunes credits are not equivalent to cash and should not be assigned their face value; accordingly, she urges the Court to adopt the lodestar method rather than the common fund method of awarding attorney fees, and to apply no multiplier or a negative multiplier. The objector also contends that the Court should more carefully scrutinize the fee request here because it is the subject of a "clear sailing" provision, and that plaintiffs' counsel should be required to file their detailed billing records publicly for class members' review.

A. Appropriate Measure of Fees in This Case

As an initial matter, plaintiffs contend that class counsel are entitled to an award of fees under Code of Civil Procedure section 1021.5. However, plaintiffs do not request that the Court require Apple to pay additional attorney fees, but that it determine what fees are appropriately paid from the common fund created by the settlement. An award under section 1021.5 would be inappropriate under these circumstances. (See *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1422 [to obtain attorney fees under section 1021.5, it must be shown that fees "should not in the interest of justice be paid out of the recovery"].) The Court accordingly looks to the methodologies employed by California courts to evaluate fee awards in connection with similar class action settlements.

"Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (*Wershba v. Apple Computer, Inc.*, *supra,* 91 Cal.App.4th at p. 254.) In *Dunk v. Ford Motor Co.*, *supra*, 48 Cal.App.4th 1794, a true coupon case where class members received a coupon redeemable for $400 off a new car purchased within one year, the Court of Appeal held that it was inappropriate for the trial court to use the common fund method because "the true value [of the settlement] cannot be ascertained until the one-year coupon redemption period expires." (At p. 1809.) The court reversed the trial court's order in this regard and directed that it re-calculate the attorney fee award using the lodestar method. (*Ibid.*) Consistent with *Dunk*, in *Wershba*, where coupons

1 were a component of the settlement, the Court of Appeal approved the use of the lodestar method
2 to evaluate a fee award. (See *Wershba v. Apple Computer, Inc., supra,* 91 Cal.App.4th 224.)
3
4 Also consistent with this approach is *Chavez v. Netflix, Inc., supra,* 162 Cal.App.4th 43.
5 *Chavez* addressed a settlement that, like the settlement here, was paid in the form of free online
6 purchases but avoided the most problematic aspects of coupon settlements such as expiration
7 dates and limitations to "big ticket" items. The court valued the settlement by multiplying the
8 retail price of the service to be received by class members by the number of settlement claims
9 (which class members were required to submit in order to receive compensation in that case).
10 (*Id.* at pp. 49-50.) The court awarded fees in the range of twenty to twenty-five percent of that
11 sum, based on the market for contingency fee agreements. (*Ibid.*) However, it also calculated a
12 lodestar award and appears to have used its valuation of the settlement as a cross-check on the
13 lodestar award. (*Id.* at pp. 49-50, 60-66.)
14
15 Here, while the percentage of recovery method might also be appropriate, particularly if
16 the Court had a better indication of how many class members are likely to use their iTunes
17 credits, in the absence of reliable information about participation rates, the Court finds that
18 applying the lodestar method is a better approach. As in *Chavez*, however, it is appropriate for
19 the Court to consider the overall value of the settlement as a cross-check on the lodestar award.
20 (See *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557 ["It may be appropriate in some
21 cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to
22 "cross-check" or adjust the lodestar in comparison to a percentage of the common fund to ensure
23 that the fee awarded is reasonable and within the range of fees freely negotiated in the legal
24 marketplace in comparable litigation."].)
25
26 B. Lodestar Analysis
27 As an initial matter, the objector suggests that the fee request here is suspect because it is
28 made pursuant to a "clear sailing" provision whereby Apple agreed not to oppose plaintiffs'

request for up to $4 million in fees. While it is true that the propriety of such agreements has been debated (and federal courts may view them more critically than California courts have), "clear sailing" provisions are nevertheless typically included in class action settlement agreements, and many commentators view them as generally proper. (See *Consumer Privacy Cases, supra,* 175 Cal.App.4th at p. 553.) Here, while the Court is mindful of the argument that the settlement should not be valued at the full $16.5 million, warning signs of collusion such as attorney fees paid from a separate fund than the settlement or a reversion of unapproved fees to the defendant are not present. Ultimately, the Court has a duty "to assure that the amount and mode of payment of attorneys' fees are fair and proper, and may not simply act as a rubber stamp for the parties' agreement." (*Id.* at p. 555.) This duty to the class exists regardless of any "clear sailing" provision and independent of any objection (*ibid.*), and the Court will fulfill it in this case as in any other.

The objector also urges the Court to order plaintiffs to publicly file their complete billing records for review, not only by the Court, but by the objector and other class members. While it would be within the Court's discretion to issue such an order, it declines to do so here. The declarations and billing summaries submitted by counsel are adequate to enable the Court's review of the fees requested. (See *Chavez v. Netflix, Inc., supra,* 162 Cal.App.4th at p. 64 ["detailed time sheets are not required of class counsel to support fee awards in class action cases"]; *Wershba v. Apple Computer, Inc., supra,* 91 Cal.App.4th at p. 255 ["California case law permits fee awards in the absence of detailed time sheets."].)

Turning to the substance of the lodestar analysis, the objector contends that "[c]lass counsel should be limited to the $3.3 million lodestar submitted in their motion for preliminary approval, with a negative multiplier applied to account for the limited benefit provided by the iTunes credits that may be rendered worthless." The objector does not challenge counsel's hourly rates, which the Court deems reasonable. She also does not challenge any specific aspect of the pre-settlement time reflected on counsel's summary. In the Court's view, the time

reflected on counsel's summary is reasonable for a complex class action such as this one. The approximately $500,000 in post-settlement time is also reasonable. In particular, the Court finds that the time plaintiffs' counsel spent defending the settlement from the objector benefitted the class.

Even assuming that time spent preparing the motion for attorney fees should not be included in the lodestar, the 1.03 multiplier requested by plaintiffs is on the low end of what the Court would approve considering the novelty of ARL class action litigation and the contingent and highly uncertain nature of a recovery in such an action. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 [discussing factors justifying an adjustment to the lodestar]; *Pellegrino v. Robert Half Internat., Inc.* (2010) 182 Cal.App.4th 278, 291 [approving a 1.75 multiplier based on the novelty, difficulty, and contingent risk of the case].) Even if *all* of the $500,000 in post-settlement time challenged by the objector were deducted from the lodestar of $3,716,624, the $3,824,356 requested by plaintiffs would result in a multiplier of 1.19. This multiplier is fully justified by the record in this case, and the Court accordingly finds that the fees requested by plaintiff are properly awarded under the lodestar method.

Finally, as a cross-check, the Court finds that a recovery of around 23 percent of the full settlement fund is reasonable in this case. Contrary to the objector's argument, the Court finds that the iTunes credits to be awarded here provide real value to the class. While some class members who are no longer using their iTunes accounts may forgo the option to use them, the Court sees no reason to value unused credits as "worthless" considering they will never expire. Moreover, the majority of class members can be expected to promptly benefit from their credits, considering they will be automatically applied to class members' next iTunes purchases. Thus, while the uncertain participation rate might warrant a modest discount to the value of the settlement, it is reasonably certain that it will ultimately have a value near to its face value.

VIII. Costs and Incentive Awards[6]

Plaintiffs also request $175,643.91 in litigation costs, which, when combined with the attorney fee award approved above, will equal the $4 million estimate provided at preliminary approval. The costs are reasonable based on the summaries provided and are approved. The $175,000 in administrative costs, below the estimated $290,500, are also approved.

Finally, the named plaintiffs request service awards of $2,500 each. To support their requests, they submit declarations in which they describe their efforts on the case. The Court finds that the class representatives are entitled to enhancement awards and the amounts requested are reasonable.

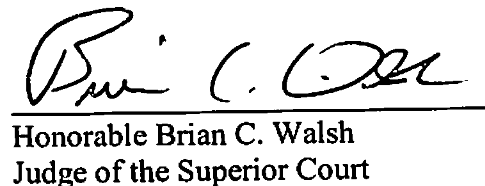
IX. Conclusion and Order

The motion for final approval of the settlement is GRANTED. The motion for approval of attorney fees, costs, and service awards is also GRANTED.

The objector has filed an application for leave to intervene, which will be heard on November 30, 2018. Pursuant to the stipulation of the parties made in open court, the five-year limitation in Code of Civil Procedure Section 583.310 is extended until May 2, 2019 or until further order of the Court.

IT IS SO ORDERED.

Dated: November 2, 2018



Honorable Brian C. Walsh
Judge of the Superior Court

[6] The objector does not challenge any of these requests.