UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Adam S. Levy, et al.

v. Civil No. 14-cv-443-JL

Thomas Gutierrez, et al.

MEMORANDUM ORDER GRANTING FINAL APPROVAL OF APPLE SETTLEMENT AND CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES

This securities law class action concerns allegedly untrue or misleading statements made to investors about an agreement to manufacture sapphire for the screen of the Apple iPhone. On March 3, 2020, this court preliminarily approved a Stipulation and Agreement between court-appointed class representatives Douglas Kurz and Palisade Strategic Master Fund (Cayman) and the last remaining defendant, Apple Inc. ("Apple Settlement"), which resolves all claims against Apple in exchange for a $3.5 million cash payment ("Apple Settlement Fund").[1] On May 11, 2020, Kurz and Palisade moved for final approval of the Apple Settlement.[2] In filing that motion, lead counsel for the class, Bernstein Litowitz Berger & Grossman LLP, also moved for an order awarding plaintiffs' counsel their attorneys' fees and the reimbursement of expenses for litigating this case.[3]

This court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal questions) and § 1332(d) (class actions). After conducting a fairness hearing on these motions and independently assessing the plaintiffs' requests for relief, the court grants final approval of the Apple Settlement, but denies in part the requests for fees and costs.

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[1] Doc. no. 252-1.

[2] Doc. no. 256.

[3] Doc. no. 257.

I. Background

The court has provided a more thorough accounting of the factual allegations underlaying this class action in prior orders, including its order granting in part and denying in part the defendants' motions to dismiss and its order granting class certification.[4] The following draws from those prior accounts, restating the facts most pertinent to the current motions, and also recounts the pertinent procedural history.

A. Commencement of this action

In October 2014, investors of the New Hampshire-based manufacturer GT Advanced Technologies Inc. ("GTAT") began filing putative securities class action complaints against GTAT's officers, its securities underwriters, and Apple, for allegedly untrue or misleading statements made about GTAT's ability to produce sapphire materials exclusively for Apple. Three days before plaintiffs began filing complaints, GTAT filed for Chapter 11 bankruptcy, which prevented it from being named as a defendant.[5] Although Apple did not make any of the alleged false statements to investors, the class plaintiffs alleged that Apple, through its relationship with GTAT, exerted control over GTAT's officers, making it statutorily liable as a "control person."

In early 2015, the court consolidated the resulting litigations into one proceeding, appointed Kurz as lead plaintiff for the putative class, and approved Bernstein Litowitz as lead counsel for the putative class.[6] In July 2015, Kurz filed and served a consolidated class action complaint asserting violations of the Securities Act of 1933 ("Securities

[4] See doc. nos. 150 and 245.

[5] In March 2016, GTAT emerged from bankruptcy as a restructured entity. As part of GTAT's bankruptcy plan, the bankruptcy court deemed all claims against GTAT prior to March 2016, including claims arising in this action, to be satisfied, discharged, and released in full.

[6] Consolidation Order (doc. no. 72); Order Granting Mot. for Appointment of Lead Plaintiff, Approval of Selection of Lead Counsel, and Consolidation of All Related Actions (doc. no. 77).

Act"), the Securities Exchange Act of 1934 ("Exchange Act"), and SEC Rule 10b-5, see 17 C.F.R. § 240.10b–5.

In October 2015, Apple and the other defendants filed multiple motions to dismiss the consolidated complaint.[7] Before the court issued an order on these motions, Kurz, Palisade, and former-named plaintiff Highmark Ltd. reached a settlement in principle with the underwriter defendants agreeing to resolve all class claims against the underwriter defendants with prejudice in exchange for a $9.7 million cash payment. (These parties did not file their memorandum of understanding with the court.)

In May 2017, the court entered an order granting in part and denying in part the individual defendants and Apple's motions to dismiss and denying the underwriter defendants' motion to dismiss. Following this order, the then-putative class plaintiffs retained seven claims: (1) untrue statement claims against the individual defendants under Section 10(b) of the Exchange Act; (2) control person claims against the individual defendants under Section 20(a) of the Exchange Act; (3) a control person claim against Apple under Section 20(a) of the Exchange Act; (4) false registration statement claims against the individual and underwriter defendants under Section 11 of the Securities Act; (5) false registration statement claims against the underwriter defendants under Section 12(a)(2) of the Securities Act; (6) control person claims against the individual defendants under Section 15 of the Securities Act; and (7) a control person claim against Apple under Section 15 of the Securities Act.

B. Settlements with the individual and underwriter defendants

In August 2017, Kurz, Palisade, Highmark, and the underwriter defendants finalized their settlement in principle in a Stipulation and Agreement, which they filed

[7] Doc. no. 87.

with the court.[8] Then, in October 2017, lead counsel for the then-putative class, counsel for the individual defendants, and counsel for Apple participated in a full day mediation session before retired U.S. District Judge Layn R. Phillips. As a result of this arm's-length mediation session, Kurz and the individual defendants reached an agreement in principle to settle all claims against the individual defendants for $27 million in cash. In January 2018, these parties (which excluded Apple) entered into a Stipulation and Agreement of Settlement setting forth the final terms and conditions of the individual-defendant settlement.[9] The court preliminarily approved both the individual- and underwriter-defendant settlements in February 2018,[10] and entered final judgments approving both the individual- and underwriter-defendant settlements in July 2018.[11]

C. Discovery

In March 2018, the class plaintiffs and Apple commenced fact discovery on class and merits issues, which included extensive productions and reviews of documents, as well as the taking of multiple fact and expert witness depositions.[12] The class representatives represent that: the plaintiffs' class "sought, received, and reviewed" over 400,000 documents from Apple and GTAT (a non-party), totaling over 2.3 million pages; produced over 20,000 documents, totaling nearly 200,000 pages in response to Apple's discovery requests; and, with Apple, collectively deposed more than 20 fact witnesses,

[8] Doc. no. 158 (filed in September 2017, after the parties conducted due diligence discovery).

[9] Doc. no. 176.

[10] Doc. no. 179.

[11] Doc. nos. 193-94.

[12] See also Ormsbee Decl. (doc. no. 258-5) ¶¶ 47-62 (thoroughly recounting the parties' discovery efforts and disputes).

including current and former employees of GTAT and Apple involved with the sapphire manufacturing project.[13] The parties substantially completed discovery in April 2019.

D. Class certification

In September 2018, Kurz, as lead plaintiff, and Palisade, as a Securities Act plaintiff, together moved for certification of the proposed Apple Class, appointment of themselves as class representatives, and approval of Bernstein Litowitz as counsel for the certified class. Apple opposed the motion with an objection, to which the plaintiffs replied, and surreply. The court held oral argument on the motion in July 2019, after the parties completed their briefing. In September 2019, the court granted the motion, and thus certified the Apple class under Fed. R. Civ. P. 23(b)(3), appointed Kurz and Palisade as class representatives, and appointed Bernstein Litowitz as class counsel.[14]

E. Settlement negotiation

The same month, Apple moved for summary judgment and filed two memoranda challenging GTAT's control person and primary liability theories under federal securities laws.[15] Apple also filed a related motion to exclude the opinions of the class plaintiffs' damages expert.[16] Opposition to these motions were due on November 25, 2019.

Before this response deadline, however, the class representatives reached an agreement with Apple under which they would settle all claims in this action against

[13] Pls. Mot. for Preliminary Approval of Apple Settlement (doc. no. 252) at 6; see also Ormsbee Decl. ¶¶ 9-11.

[14] Doc. no. 245.

[15] Doc. no. 243.

[16] Doc. no. 244.

Apple in exchange for a cash payment of $3.5 million.[17] This proposed settlement would be in addition to the two prior settlements approved by the court for $27 million and $9.7 million, resulting in an aggregate cash recovery of $40.2 million for the plaintiff class. Class counsel maintains that if the court approves the Apple Settlement, the combined settlements in this case "will result in the third-largest securities class action recovery in the history of the District of New Hampshire."[18]

F. Preliminary approval and notice provided to class members

In March 2020, the court preliminarily approved the class plaintiffs and Apple's stipulation and agreement resolving this case and approved the plaintiffs' notice to the class. Thereafter, class counsel supervised the provision of notice to potential class members, informing them of the proposed settlement terms and class counsel's intent to apply for an award of attorneys' fees not to exceed 20% of the Apple Settlement Fund, as well as reimbursement of expenses not to exceed $800,000. The notice also apprised potential class members of their right to object to the proposed Apple Settlement and the request for fees and expenses, as well as their right to request exclusion from the class and thus the prejudicial effects of the Apple Settlement and related judgments.

As outlined in the preliminary approval order, the court-approved claims administrator, Epiq, mailed more than 212,000 copies of the Apple Settlement Notice to all potential class members who were identifiable with reasonable effort, including class members identified during the process and distribution of the earlier class settlements in

[17] Doc. no. 247. On November 22, the class representatives and Apple filed a joint notice of settlement and motion to stay summary judgment schedule, pending the filing of their stipulation and agreement in January 2020. Id.

[18] Pls. Mot. for Final Approval of Apple Settlement Mem. (doc. no. 256-1) at 2.

this action.[19] A summary settlement notice, which informed readers of the proposed settlement and how to obtain copies of the full settlement notice, was also published in Investor's Business Daily and over the PR Newswire.[20] Downloadable versions of the full settlement notice, as well as other important documents for the litigation, were posted on this litigation's website: www.gtatsecuritieslitigation.com.[21]

Under the court's preliminary approval order, persons intending to object to the proposed settlement or opt out of the class were required to do so by May 25, 2020. To date, Epiq has received only nine requests for exclusion from individual investors who collectively purchased approximately .003% of the estimated affected GTAT shares during the class period.[22] Additionally, class counsel represents that no late objections or requests for exclusions have been filed.

G. Reaction of the Class

The court received one objection to the proposed settlement with Apple from Mr. John Huddleston, an individual class member who purchased 17.4652 shares of GTAT common stock during the Class Period.[23] Huddleston contends that Apple should "recompense all stock holders who lost money when GTAAT became Apple company" by paying GTAT investors shares of Apple stock equal in amount to their shares of GTAT stock "with no consideration of the GTAT price per share at the time . . . just shares for

[19] In March 2018, Epiq established a case-specific, toll-free telephone helpline, 1-866-562-8790, to accommodate potential Class Members with questions about this action and the earlier settlements. On March 31, 2020, Epiq updated the helpline to include information regarding the Apple Settlement. Firenze Decl. (doc. no. 258-3) ¶ 9.

[20] Firenze Decl. ¶ 8.

[21] Id. ¶ 10.

[22] Supp. Firenze Decl. (doc. no. 264-2) ¶ 5.

[23] See Apr. 21, 2020 Ltr. Obj. from John Huddleston (doc. no. 255).

shares . . . ."[24] No individual or institutional class members expressed any objection to class counsel's motion for attorneys' fees and reimbursement of litigation expenses.

H. Fairness Hearing

On June 15, 2020, the court held a fairness hearing on the class plaintiffs' motion for final approval of the class action settlement and class counsel's motion for attorneys' fees. This hearing was conducted via the court's online video conferencing platform due to health and safety restrictions imposed on in-person hearings by the COVID-19 pandemic. Class counsel and counsel for Apple virtually appeared, as did several non-participating class members and interested parties.

II. Applicable legal standard

Under Federal Rule of Civil Procedure 23(e), "[t]he claims, issues, or defenses of a certified class . . . may be settled, voluntarily dismissed, or compromised only with the court's approval." Before granting such approval, the parties and the court must comply with the following procedures.

First, "[t]he parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Id. 23(e)(1)(A). If the parties show that "the court will likely be able to approve the proposal," then "[t]he court must direct notice in a manner to all class members would be bound by the proposal." Id. (e)(1)(B).

"If the proposal would bind class members, the court may approve [a proposed settlement] only after a hearing and only on finding," in its sound discretion, that the proposed settlement "is fair, reasonable, and adequate." Id. 23(e)(2); see also City P'Ship Co. v. Atlantic Acquisition Ltd. P'Ship, 100 F.3d 1041, 1043 (1st Cir. 1996) (noting that

[24] Id.

this determination is within the sound discretion of the trial court). "Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." Id. 23(e)(5).

"In a certified class action," like the case here, "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Id. 23(h). The following procedures apply:

> (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.
>
> (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

Id.

III. Analysis

This Order incorporates by reference the definitions in the January 10, 2020 Apple Settlement. All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Apple Settlement.

A. Final Settlement Approval

The class plaintiffs seek final approval of the proposed Apple Settlement, which, if approved, will resolve all outstanding claims in this case with prejudice. Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of

class action claims. Fed. R. Civ. P. 23(e). A court may approve a proposed class action settlement only after finding that the proposed settlement is "fair, reasonable, and adequate" and that the plaintiffs have complied with all applicable notice requirements. See id. 23(e)(2). The court considers each requirement in turn.

1. Adequacy of the settlement

"The First Circuit [Court of Appeals] has not established a fixed test for evaluating the fairness of a settlement." New England Carpenters Health Benefits Fund v. First Databank, Inc., 602 F. Supp. 2d 277, 280 (D. Mass. 2009) (Saris, J.); see also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249 (D.N.H. 2007) (Barbadoro, J.) (noting that the court's review "relies on neither a fixed checklist of factors nor any specific litmus test). Many courts in the First Circuit look to the Second Circuit Court of Appeal's Grinnell factors in conducting a fairness analysis:

> (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

First Databank, 602 F. Supp. 2d at 280-81 (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974)); In re StockerYale, Inc. Sec. Litig., No. 1:05-cv-177, 2007 WL 4589772, at *3 (D.N.H. Dec. 18, 2007) (McAullife, J.) (same); In re Relafen Antitrust Litig., 231 F.R.D. 52, 72 (D. Mass. 2005) (Young, C.J.) (same).

Other courts in this Circuit have considered smaller, modified versions of the Grinnell factors. In Tyco, for example, Judge Barbadoro found that a more concise list of factors—specifically, "(1) risk, complexity, expense and duration of the case;

(2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations"—"best fit[] the facts of the case." 535 F. Supp. 2d at 259-60. See also In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 203 (D. Me. 2003) (Hornby, J.) (using a similar list of factors).

In 2018, the Supreme Court amended Rule 23 to include a separate, but somewhat overlapping list of criteria for courts to consider, including whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
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> (C) the relief provided for the class is adequate, taking into account:
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> > (i) the costs, risks, and delay of trial and appeal;
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> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
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> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2)(A)-(D). The advisory committee notes indicate that the goal of the 2018 amendment was "not to displace any factor" developed by any circuit, "but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."

The court, in its discretion, finds the list of considerations in the Federal Rules suitable. As such, it focuses on those four considerations in addition to a more concise list of the Grinnell factors that best fits this case.

Adequacy of representation

In determining whether to approve a class action settlement, the court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A); see also Tyco, 535 F. Supp. 2d at 259-60 (assessing quality of counsel). As noted by the court in its order granting class certification, class representatives Kurz and Palisade have actively participated in this litigation and share the common goal of all class members of maximizing recovery.[25] Class counsel, in turn, is qualified and well-versed in prosecuting and resolving complex securities litigation, including the prior settlements reached in this case. As such, the court repeats its previous class certification finding that the class representatives and class counsel have adequately represented, and will continue to adequately represent, the Apple class.

Arm's-length negotiation

Rule 23 calls on the court to consider the procedural fairness of the settlement, that is, whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts have found "the absence of any indicia of collusion" to be an "important indici[um] of the propriety of settlement negotiations." See Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982). Relatedly, courts applying the Grinnell factors, or a modified version thereof, have also considered counsel's understanding of the strengths and weaknesses of the case in negotiating the settlement amount.

[25] Order Granting Motion to Certify (doc. no. 245) at 42.

Here, the parties reached a settlement after extensive discovery and motion practice, including full briefing on class certification and partial briefing on a motion for summary judgment against the class. Class counsel represents that it has conducted "an extensive investigation into the alleged fraud by, among other things, reviewing the voluminous public record (including relevant SEC filings, earnings announcements and press releases, transcripts of analyst conference calls, investor presentations, and news articles), and conducting interviews with multiple potential witnesses (including 132 former GTAT employees)."[26] After reaching a settlement with the GTAT-individual and underwriter defendants, class counsel (and Apple) engaged in extensive discovery, consisting of the production and review of millions of pages of documents, the taking or defending of 28 fact, class, and expert depositions, and the preparation of several expert reports. At this advanced stage, the parties "have most of the crucial facts in their possession, making them well-positioned to understand the merits of their case[s]" and negotiate a fair and reasonable settlement that accounts for the risks of further litigation. Tyco, 535 F. Supp. 2d at 261.

Additionally, the court finds no indicia of collusion between the parties. In October 2017, class counsel and counsel for Apple and the individual defendants participated in a full-day mediation before retired U.S. District Court Judge Layn R. Phillips. While the plaintiffs were able to reach an agreement with the individual defendants, they did not achieve a settlement with Apple, thus launching an additional two years of vigorous pre-trial litigation. Class counsel represents that they began exploring the possibility of settlement in September 2019—after the close of discovery and in the same month this court certified the Apple class and Apple moved for summary

[26] Pls. Mot. for Final Approval of Apple Settlement Mem. (doc. no. 256-1) at 9.

judgment. See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (a class action settlement is entitled to a "presumption of fairness, adequacy, and reasonableness" when "reached in arms' length negotiations between experienced, capable counsel after meaningful discovery") (citation omitted). The parties reached an agreement at least two months later, in November 2019, on the eve of the class plaintiffs' deadline to oppose Apple's motion for summary judgment. See Bussie v. Allmerica Fin. Corp., 50 F. Supp. 2d 59, 77 (D. Mass. 1999) (Gorton, J.) ("settlement negotiations . . . conducted at arms' length over several months . . . support 'a strong initial presumption' of the Settlement's substantive fairness" (internal citation omitted)). Had the parties not agreed on the proposed settlement, they likely would have fully briefed the motion for summary judgment and (assuming the plaintiffs' case survived) begun preparation for a civil jury trial. The court thus finds that the proposed settlement is the result of arm's-length negotiations.

Adequacy of relief

Under Rule 23, the court should also consider whether "the relief provided for the class is adequate, taking into account" among other factors, "the costs, risks, and delay of trial and appeal."[27] Fed. R. Civ. P. 23(e)(2)(C). In doing so, this court also considers many of the Grinnell and modified-Grinnell factors, including the complexity, expense,

[27] Rule 23(e)(2)(C) provides three other factors for considering the adequacy of the relief. The second and fourth factors—the effectiveness of proposed distribution methods and whether the agreement restricts further opt-outs—are neutral factors in this case. See Order Preliminarily Approving the Apple Settlement (doc. no. 254) (approving the plaintiffs' distribution plan); Hefler v. Wells Fargo & Co., No. CV-02-1510, 2018 WL 6619983, at *7 (N.D. Cal. Dec. 18, 2018) (finding that side agreements setting forth conditions for termination, like the Supplemental Agreement between the class plaintiffs and Apple, have no negative impact on the fairness of a settlement). And for the third factor—the terms of any proposed award of attorney's fees—the court finds below that class counsel's request for fees is reasonable. See Part III.B, infra, at 22.

and duration of the case and a comparison of the proposed settlement with the likely result of continued litigation. See Tyco, 535 F. Supp. 2d at 259-60. It finds the relief adequate.

From the outset, the class plaintiffs' "control-theory" claims against Apple presented several risks in terms of proving their case. Securities litigation presents an ever-changing legal environment, as evidenced by multiple recent Supreme Court decisions in the area, creating risk and uncertainty for plaintiffs. See, e.g., Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175 (2015); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014). Few securities cases in the First Circuit have resulted in substantial trial verdicts for plaintiffs. See Backman v. Polaroid Corp., 910 F.2d 10, 13 (1st Cir. 1990) (en banc) (reversing a jury verdict of $40 million after eight years of litigation). And even fewer federal courts, if any, have sustained control person claims against companies, like Apple, who are unrelated to the securities issuer at the core of a complaint.

In order to prove the control person theory asserted against Apple, class representatives would have to establish at least three things: First, they would have to establish the primary liability of the individual GTAT defendants—specifically that they knowingly or recklessly made statements to investors and in securities registration statements that were materially false. See, e.g., ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58 (1st Cir. 2008) (discussing elements of a primary violation of Section 10(b) of the Exchange Act); Aldridge v. A.T. Cross Corp., 284 F.3d 72, 85 (1st Cir. 2002) (articulating three-part test). Second, they would need to establish loss causation and damages with respect to one or both of the "corrective disclosures" that allegedly revealed the truth regarding the alleged fraud. See Bricklayers & Trowel Trades Int'l

Pension Fund v. Credit Suisse First Bos., 853 F. Supp. 2d 181, 193 (D. Mass. 2012) (Gorton, J.). Finally, if the class plaintiffs established both primary liability and loss causation and damages, they would still need to prove that Apple exercised sufficient control over GTAT to be found liable for GTAT's misrepresentations, and that in doing so, Apple did not act in good faith. See Aldridge, 284 F.3d at 85.

As noted in the motion for final approval and supporting affidavits, the class representatives faced difficult challenges from Apple on all three of these fronts.[28] For example, on the issue of primary liability, Apple contends that GTAT and the individual defendants fully disclosed the risks of the Apple-GTAT venture, that the allegedly false and misleading statements were not false when made, and that at the time the venture was formed, GTAT's directors genuinely believed that GTAT could fulfill the terms of the GTAT-Apple Agreement.[29] If the court at summary judgment or a jury at trial embraced any of these defenses, the class plaintiffs would receive no damages award whatsoever.

Similar challenges would arise in establishing loss causation and damages throughout the Class Period. In its motion for summary judgment, Apple credibly argues that a rational factfinder likely would not conclude that GTAT and Apple intended for their agreement to fail from day one, and would likely find that GTAT's bankruptcy filing was a manifestation of known risks about GTAT's performance rather than a corrective disclosure of a concealed fact.[30] If the jury, when faced with conflicting expert testimony about GTAT's performance and disclosures, chose to embrace a more conservative estimation of loss causation and damages, the jury could have awarded damages less than the amounts agreed to in the combined settlements in this case. Apple has raised further

[28] See Pls. Mot for Final Approval of Apple Settlement Mem. (doc. no. 256-1) at 13-18.

[29] See Apple Mot. for Summ. J. Mem. re: Primary Liability (doc. no. 243-1) at 2-3.

[30] See id. at 11-16.

defenses as to their actual control, which if believed, could have resulted in only a small apportion, if any, of the proportionate liability for the alleged securities law violations.[31]

In addition, continued litigation would impose substantial costs and delay of recovery that might not be justifiable given the risks identified by the class plaintiffs. While fact and expert discovery is complete in this action, class plaintiffs would still have to fully oppose summary judgment, engage in substantial pre-trial practice include Daubert motions and motions in limine, convince a jury, and also litigate any post-trial motions for relief or appeals to the First Circuit Court of Appeals, all before recovering a possible judgment against Apple. At each of these stages, the class representatives would have faced significant risks related to proving their case. The cost and length of this process, when combined with the uncertainty of any result, thus weighs in favor of approving the Apple Settlement.

Equitable treatment of class members

Rule 23(e)(2)(D) requires that the proposed Apple Settlement "treats class members equitably relative to each other." The proposed settlement satisfies this criterium.

Under the terms of the Apple Settlement, eligible members of the Apple Class that previously submitted or now submit claims approved for payment will receive a pro rata share of the Apple Settlement based on their transactions in GTAT Securities during the Class Period. Claims of the Apple Class will be calculated in the same manner as under the allocation plan approved by the court for members of the Individual Defendant Settlement Class.[32] And the class representatives will receive the same level of pro rata

[31] See Apple Mot. for Summ. J. Mem. re: Control Liability (doc. no. 243-2) at 1-3.

[32] See doc. no. 191, at ¶ 9(a).

recovery based on their Recognized Claims before factoring in their requested reimbursements for reasonable expenses, which the court grants below.[33]

Reaction of the class to the settlement

In addition to the Rule 23(e)(2) factors, the court also considers the reaction of the class as an important factor in evaluating the fairness and adequacy of the proposed Apple Settlement. See, e.g., Hill v. State St. Corp., No. 09-cv-12146, 2015 WL 127728, at *8 (D. Mass. Jan. 8, 2015) (O'Toole, J.) (finding that the "favorable reaction of class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval" (internal citation omitted)); Tyco, 535 F. Supp. 2d at 259-60.

As discussed below, class counsel and the independent claims administrator have employed a sweeping direct-mail, print-and-audio-media, and digital-notice program, which was the "best notice" practicable under the circumstances. See Part 2, infra, at 19. To date, the court has been made aware of only one objection to the Apple Settlement and nine requests for exclusion from individual investors.

In April 2020, Objector John Huddleston submitted a handwritten objection to the fairness of the Apple Settlement. In his view of the case, "Apple did not want to risk investing in the R&D" for sapphire materials "so they used investor's money, then just dumped the GTAT (shell) company at stock holders[']s expence (sic)."[34] He further asks "[i]f this is what happen (sic), and it is true, why not insist that Apple recompense all stock holders who lost money when GTAT became Apple company" by paying GTAT investors shares of Apple stock equal in amount to their shares of GTAT stock "with no

[33] See Part III.B.3, infra, at 30.

[34] Doc. no. 255.

consideration of the GTAT price per share at the time . . . just shares for shares . . . ."[35] Huddleston did not appear at the fairness hearing. Class counsel has orally represented that Huddleston relayed he would not be attending and had nothing further to add.

Huddleston's objection is overruled for two reasons. First, Huddleston's request for shares, by its plain terms, assumes that certain underlying facts, which have not been proven at this stage of the litigation, are in fact true. Additionally, the court cannot force Apple to agree to settlement terms other than the one proposed by the parties. The court thus finds that the class's reaction to the Apple Settlement supports the proposed negotiated resolution.

2. Notice of settlement

Under Rule 23, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable means," for any class certified under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2)(B). "The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (viii) the binding effect of a class judgment on members under Rule 23(c)(3)." Id.

In addition to Rule 23, Due Process similarly requires that notice be sent in a manner "reasonably calculated to reach potential class members." Tyco, 535 F. Supp. 2d at 249; see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174 (1974); Compact Disc,

[35] Id.

216 F.R.D. at 203. The Private Securities Litigation Reform Act ("PSLRA") separately requires that in private securities litigation, the notice of settlement state the amount of the settlement proposed to be distributed, the potential outcome of the case had the plaintiff prevailed, the amount of any attorneys' fees or costs sought, contact information for plaintiffs' counsel, and a brief explanation of the reasons for settlement. 15 U.S.C. § 78u–4(a)(7).

Here, class counsel and the third-party claims administrator employed an effective notice program involving direct mail, publications in relevant financial media, and the establishment of a class litigation website that provided potential class members with information concerning the Apple settlement.[36] The court-approved Apple Settlement Notice includes all the information required by Rule 23(c)(2)(B) and the PLSRA. And the plaintiffs have regularly updated the website with downloadable copies of important case documents, including the Apple Settlement Notice, the Apple Settlement, the court's order preliminarily approving the Apple settlement, and the court-approved plans of allocation and claim forms previously mailed in connection with the earlier settlements in this case.[37]

This combination of individual mailing, supplemented by publication in widely-circulated media and on a litigation website, tracks closely with the notice programs previously approved by this court in this case, and compares favorably with programs employed in other securities litigations. See, e.g., In re Advanced Battery Techs., Inc.

[36] In its Order Preliminarily Approving the Apple Settlement, the court found that these procedures for distribution and publication of notice and the form of such notice constituted the best notice practicable under the circumstances. See doc. no. 254.

[37] The court also observes that class counsel continued to monitor the phone numbers listed in the class notice after the outbreak of COVID-19 by forwarding these numbers to their personal cellular devices, to the extent they could no longer work in the office due to the pandemic.

Sec. Litig., 298 F.R.D. 171, 182-83 (S.D.N.Y. 2014) (approving a notice program for a relatively small settlement administered through post-card mailings, publication over PR Newswire and in Investor's Business Daily); Schwartz v. TXU Corp., No. 3:02-cv-2243-K, 2005 WL 3148350, at *10-11 (N.D. Tex. Nov. 8, 2005) (finding that notice by first-class mail to all members identifiable by reasonable effort, supplemented by publication on settlement website and in a national newspaper "more than satisfie[d]" notice requirements); In re Cabletron Sys., Inc. Sec. Litig., 239 F.R.D. 30, 35-36 (D.N.H. 2006) (approving a notice program that distributed notice packets to individual investors and nominees, published a summary notice in one national newspaper, and provided a toll-free telephone hotline). The notice program thus met or exceeded all relevant notice requirements.

B. Attorneys' fees and litigation expenses

Class counsel also seek an award of attorneys' fees in the amount of 20% of the $3.5 million Apple Settlement Fund, $700,000 in total, as well as $596,646.05 in reimbursements for litigation expenses. They also ask that the court approve a $6,937.50 incentive payment from the Apple Settlement Fund to Kurz to reimburse his reasonable costs and expenses directly related to his representation of the Apple Class, and a $24,713.75 incentive payment to Palisade for similarly incurred costs and expenses. As discussed herein, the court grants counsel's request for reasonable attorneys' fees and grants in part and denies in part its request for reimbursed costs and expenses.

1. Notice

"In a certified class action," notice of a motion for attorneys' fees and nontaxable costs by class counsel "must be . . . directed to class members in a reasonable manner."

Fed. R. Civ. P. 23(h)(1). As discussed above,[38] the court finds that the notice of the Apple Settlement, which included class counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses, was sent to all class members who could be identified with reasonable effort. It also finds that the form and method of notifying the Apple Class of the motion for an award of attorneys' fees and expenses (1) satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the PSLRA, as amended, and all other applicable law and rules, (2) constituted the best notice practicable under the circumstances, and (3) constituted due and sufficient notice to all persons and entities entitled thereto.

2. Reasonableness of requested fees

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client" may be "entitled to a reasonable attorney's fee from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980); see In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 305 (1st Cir. 1995); Tyco, 535 F. Supp. 2d at 265. In assessing the reasonableness of fees awarded from a common fund, courts may employ either a percentage-of-the-fund ("POF") method or a "lodestar" method.[39] See Thirteen Appeals, 56 F.3d at 307. The court finds that the requested POF fee is reasonable when cross-checked with the lodestar approach. See Tyco 535 F. Supp. 2d at 265.

[38] See Part III.A.2 supra.

[39] The lodestar ordinarily is calculated by multiplying the number of hours reasonably incurred by the reasonable hourly rate for the services rendered. Gisbrecht v. Barnhart, 535 U.S. 789, 802 (2002). "Using a lodestar cross-check ensures that the fees are also reasonable in light of the actual amount of work performed." Tyco, 535 F. Supp. 2d at 265 (citing Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1050 (9th Cir. 2002)).

Both the Supreme Court and the Court of Appeals have approved of the POF method in common fund cases, noting that, as the prevailing method, it "offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace." Id. at 308; see also Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984). District courts in the First Circuit have "extremely broad" latitude to determine an appropriate fee award under the POF method. Id. at 309.

"Unlike the Second and Third Circuits, the First Circuit [Court of Appeals] does not require courts to examine a fixed laundry list of factors." Tyco, 535 F. Supp. 2d at 256-66 (citing Thirteen Appeals, 56 F.3d at 307–09; In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305–06 (3d Cir.2005); Goldberger v. Integrated Res., Inc., 209 F.3d 43, 47 (2d Cir. 2000)). As such, the court "draw[s] loosely" on the factors employed by other circuits that are most relevant here, including: "fee awards in similar cases, the complexity, duration, and risk involved in the litigation, . . . the reaction of the class, and public policy considerations," if any. See Tyco, 535 F. Supp. 2d at 266 (original numeration omitted).

Comparison to similar cases

Class counsel contends that "a review of attorneys' fees awarded in securities class actions with comparably sized settlements in the District of New Hampshire strongly supports the reasonableness of the 20% fee request." In Braun v. GT Solar Int'l., Inc., for example, this court awarded attorneys' fees in the amount of 25% of a $10.5 million settlement.[40] Similarly, in Sloman v. Presstek, Inc., the court awarded 30% of a $1.25 million settlement as attorneys' fees.[41] See also StockerYale, 2007 WL 4589772, at *6-7

[40] See Order and Final Judgment (doc. no. 139), No. 1:08-cv-312-JL, at *3 (D.N.H. Sept. 27, 2011).

[41] Judgment (doc. no. 139), No. 06-cv-377-JL, at *7 (D.N.H. July 20, 2009).

(awarding 33% of $3.4 million settlement); In re Cabletron Sys., Inc. Sec. Litig., 239 F.R.D. 30, 45 (D.N.H. 2006) (Smith, J., by designation) (awarding 21.5% of $10.5 million settlement).

The court also observes that in 2018, it approved counsel's free request for 22% of the $36.7 million aggregate amount reached under the then-putative class plaintiffs' settlements with the GTAT individual defendant and underwriter defendants.[42] The court approved such a fee request towards the beginning of fact discovery and well-before the parties litigated the motion for class certification. When compared with the POF awards in these similar cases, class counsel's current request for a fee of 20% "does not stand out as unusual." Tyco, 535 F. Supp. 2d at 268.

Complexity, duration, and risk

The parties to this litigation litigated a considerably complex case, for which counsel assumed substantial risk in pursuing. To succeed in their claims against Apple, class plaintiffs would have to prove the primary liability of the individual defendants, who have already settled, and the fact that Apple "controlled" these defendants' actions. In sustaining the class plaintiffs' control person claims at the Rule 12(b) stage, the court found the plaintiffs allegations against Apple were "thin" and "barely sufficient" to withstand Apple's motion to dismiss.[43] Additionally, in Apple's motion for summary judgment, it asserted multiple defenses against the merits of the class plaintiffs' case, which presented additional difficulties for proving the merits of the class plaintiffs' claims.[44]

[42] See Order awarding attorneys' fees (doc. no. 196) (awarding nearly $8 million in total fees).

[43] Doc. no. 150 at 74.

[44] See Apple Mot. for Summ. J. Mems. (doc. nos. 243-1 & 243-2).

Plaintiffs' counsel conducted the litigation and achieved the Apple Settlement with skill, perseverance, and diligent advocacy. In connection with the prosecution and settlement of the claims against Apple, class counsel, among other things:

- successfully moved for certification of the Apple Class;[45]
- obtained, reviewed, and analyzed nearly half a million documents totaling over two million pages produced in discovery by Apple and multiple non-parties subpoenaed by class counsel, including GTAT;[46]
- conducted, defended, or actively participated in 28 fact, class, and expert depositions, including depositions of the Lead Plaintiff and three employees of the Securities Act Plaintiff, numerous Apple executives, former GTAT employees, directors, and executives, and expert witnesses;[47] and
- negotiated, at arms-length, the final terms of the Apple Settlement with Apple's Counsel and filed the related Settlement documents.[48]

As discussed in greater detail both above and in the class plaintiffs' filings, the class plaintiffs' case faced substantial risks with respect to liability, loss causation and damages. While class counsel maintains that it had sufficient responses and evidence to rebut each of Apple's arguments, it also faced many uncertainties regarding the outcome of the case. Had counsel not achieved the Apple Settlement, there would remain a significant risk that the Apple Class may have recovered less than the $3.5 million proposed settlement or worse, nothing, from Apple in this Action. Counsel's extensive litigation in the face of these risks, coupled with its assumption of a contingency fee providing no guarantee of compensation, support the reasonableness of the requested fee. See CVS, 2016 WL 632238, at *9 ("Where, as here, lead counsel undertook this action

[45] Decl. ¶¶ 4, 37-47.

[46] Decl. ¶¶ 4, 9-10, 54-56.

[47] Decl. ¶¶ 4, 11, 40, 42, 57-58.

[48] Ormsbee Decl. (doc. no. 258) ¶ 70-71.

on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel."); see also In re OCA, Inc. Sec. & Derivative Litig., No. 05-2165, 2009 WL 512081, at *22 (E.D. La. Mar. 2, 2009) (where counsel faced challenges in establishing scienter and loss causation and in proving liability and damages at trial, "the risk plaintiffs' counsel undertook in litigating this case on a contingency basis must be considered in its award of attorneys' fees, and thus an upward adjustment is warranted"); Maley v. Del Glob. Techs. Corp., 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) ("Class counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated." (internal quotation marks and citation omitted)).

Reaction of the class to date

According to class counsel, the claims administrator has disseminated over 200,000 copies of the Apple Settlement Notice to potential class members informing them, among other things, of class counsel's intention to apply for an award of attorneys' fees not to exceed 20% of the Apple Settlement Fund and reimbursement of up to $800,000 in litigation expenses.[49] Copies of class counsel's motion for attorneys' fees and supporting documents are also available on the class litigation website. Class counsel reports that it has received only nine requests for exclusion from the class.

The court accepts that the fee sought by class counsel has been reviewed and approved as reasonable by the court-appointed class representatives, who have overseen the prosecution and resolution of the claims asserted against in the Action against Apple, on behalf of the Apple Class. Moreover, it finds that to date, neither class counsel nor the court have received objections to the amount of fees and expenses requested. The lack of

[49] Ormsbee Decl. re: Fees (doc. no. 258-5) ¶¶119, 129.

objections from class members to date weighs in favor of approving the requested award. See Roberts v. TJX Cos., Inc., No. 13-cv-13142, 2016 WL 8677312, at *11 (D. Mass. Sept. 30, 2016) (Burroughs, J.); CVS, 2016 WL 632238, at *9; Tyco, 535 F. Supp. 2d at 261. The absence of objections by institutional investors further bolsters the case for approving the fee request. See In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005) ("Moreover, . . . a significant number of investors in the class were 'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive. The District Court did not abuse its discretion in finding the absence of substantial objections by class members to the fee requests weighed in favor of approving the fee request.").

Public policy considerations

The Supreme Court has emphasized that private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" Bateman, 472 U.S. at 310 (citation omitted); see also Medoff v. CVS Caremark Corp., No. 09-cv-554-JNL, 2016 WL 632238, at *9 (D.R.I. Feb. 17, 2016) ("[P]ublic policy supports rewarding counsel for prosecuting securities class actions, especially where counsel's dogged efforts—undertaken on a wholly contingent basis—result in satisfactory resolution for the class." (citing Tyco, 535 F. Supp. 2d at 270)); In re Flag Telecom Holdings, Ltd. Sec. Litig., No. 02-cv-3400 CM PED, 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Class Counsel for the value of their efforts, taking into account the enormous risks they undertook"). Accordingly, the court finds that granting

class counsel's application for fees and expenses furthers public policies favoring private enforcement of federal securities laws.

Lodestar cross-check

Class counsel's fee request also appears reasonable when cross-checked under the lodestar approach. "The lodestar approach (reasonable hours spent times reasonable hourly rates, subject to a multiplier or discount for special circumstances, plus reasonable disbursements) can be a check or validation of the appropriateness of the percentage-of-funds fee, but is not required." New England Carpenters, 2009 WL 2408560, at *1 (citation omitted); accord Thirteen Appeals, 56 F.3d at 307.

Several circuit courts have encouraged district judges to use the lodestar method as a cross-check on proposed POF awards.[50] See, e.g., Rite Aid, 396 F.3d at 305; Vizcaino, 290 F.3d at 1043; Goldberger, 209 F.3d at 43. "When the lodestar is used in this way, the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." Tyco, 535 F. Supp. 2d at 270 (citing Thirteen Appeals, 56 F.3d at 307. Such a results-oriented focus "lessens the possibility of collateral disputes [regarding time records] that might transform the fee proceeding into a second major litigation." Thirteen Appeals, 56 F.3d at 307.

Here, class counsel represents that it has spent a total of 7,574.60 hours of attorney and other professional support time prosecuting and resolving the claims asserted against

[50] See also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122, at 193 (2004) ("[T]he lodestar is . . . useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.").

Apple from May 19, 2018—the date the court last approved fees in this case—through and including April 30, 2020.[51] They further contend that, based on counsel's 2018 hourly rates (approved by the court in connection with the 2018 fee award), their collective lodestar for their present motion for fees is $4,035,034.25[52]—an amount greatly exceeding the value of class counsel's $700,000 POF request. In light of class counsel's detailed submissions, the courts familiarity with the work this case required, and the court's prior findings for the 2018 Fee Award, the court finds that hours and hourly rates asserted in class counsel's fee application are reasonable.

Taking the lodestar amount as an accurate indication of the work reasonably necessary to produce the Apple Settlement, the resulting lodestar multiplier of 0.17 reflects that counsel have assumed a very significant discount on the value of their time.[53] This "negative" multiplier is significantly below multipliers commonly awarded in securities class actions and comparable litigations. See, e.g., In re Comverse Tech., Inc. Sec. Litig., No. 06-CV-1825 (NGG), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (awarding fee representing a 2.78 multiplier and noting that, "[w]here, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar") (citation omitted); New England Carpenters, 2009 WL 2408560, at *2 (awarding 8.3 multiplier); Tyco, 535 F. Supp. 2d at 271 (awarding 2.7 multiplier). The fact the multiplier is negative, that is, below 1, also shows the requested POF fee is reasonable. See, e.g., In re Bear Stearns Cos. Sec., Deriv., & ERISA Litig.,

[51] See Ormsbee Decl. re: Fees (doc. no. 258-5) ¶ 110.

[52] Id. (Bernstein Litowitz, counsel for Kurz); Savett Decl. (doc. no. 258-6) (Berger Montague PC, counsel for Palisade); Eber Decl. (doc. no. 258-7) (Orr & Reno, as local counsel); Summary of Lodestar and Expenses (doc. no. 258-4).

[53] The 0.17 lodestar multiple results from dividing the $700,000 POF request by the $4,035,034.25 in total lodestar fees.

909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (approving fee with negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee"); FLAG Telecom, 2010 WL 4537550, at *26 ("Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request.").

3. Expenses

Class counsel has also requested reimbursement of $596,646.05 in expenses. "[D]istrict courts enjoy wide latitude in shaping the contours of such awards." In re Fid./Micron Sec. Litig., 167 F.3d 735, 736–37 (1st Cir. 1999) (citing Thirteen Appeals, 56 F.3d at 309). "Such awards are permissible in 'common fund' cases—but the district court, called upon to make awards of fees and/or expenses in such a case, functions as a quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class." Id. (internal citation omitted). "Consequently, a reviewing court has the right, if not the obligation, to view skeptically efforts by attorneys to charge substantial expenses to that account." Id.

In the exhibits to its fee and expense request, class counsel has provided detailed breakdowns of their expenses, including summary tables, breaking the expenses down by category. According to the tables, it seeks reimbursement for legal research, travel and lodging, printing, court reporting, experts, online document hosting, and certain other miscellaneous expenses. No class members have objected to the expense request. Given the legitimate needs arising from the size and complexity of this case, these expense requests are generally reasonable. See Fid./Micron, 167 F.3d at 737 ("[L]awyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund . . . expenses, reasonable in amount,

that were necessary to bring the action to a climax."); Latorraca v. Centennial Techs. Inc., 834 F. Supp. 2d 25, 28 (D. Mass. 2011) (Gorton, J.) ("In addition to attorneys' fees, lawyers who recover a common fund for a class are entitled to reimbursement of out-of-pocket expenses incurred during the litigation." (citation omitted)).

The court expresses reservation, however, at the amount of expenses requested in light of the size of the Apple Settlement Fund and class counsel's request for fees. Counsel's request for reimbursement of nearly $600,000 in expenses approaches the pre-interest value of its $700,000 request for attorneys' fees. When combined, these requests—totaling nearly $1.3 million—comprise over 37% of the $3.5 million in funds obtained from Apple for the benefit of members of the Apple Class.[54] Thus, while class counsel's request for reimbursement, at first glance, appears reasonable given the number of depositions taken and the expert issues at play, the court finds that the request, when viewed in context of this case, "promises to yield an unreasonable," or at the very least, an inequitable result and must be "trimmed back." Fid./Micron, 167 F.3d at 737.

For these reasons, the court, in its discretion, approves a capped reimbursement of $400,000 from the Apple Settlement Fund for class counsel's litigation expenses. This reduced reward, when combined with awarded attorneys' fees, totals $1.1 million or nearly 31.5% of the Apple Settlement Fund—a division the court finds more equitably treats the interests of the Apple Class. Additionally, the capped reimbursement award is reasonable when viewed in combination with the total settlements and fee awards

[54] The court also observes that as part of the prior settlements reached with the individual and underwriter defendants, it awarded class counsel attorneys' fees in the amount of 22% of the aggregate $40.2 million settlement fund, and only $227,402.76 in reimbursement of litigation expenses from the settlement funds.

achieved in this litigation—by this court's math, $43.7 million and $10.17 million respectively.

Finally, the court finds that the requests for reimbursements for class representatives Kurz and Palisade's costs and expenses directly related to their representation of the Apple Class is reasonable and thus, approves the reimbursements in the amounts requested by class counsel's motion.

IV. Conclusion

For the above-stated reasons, the court:

- overrules the sole objection to the proposed Apple Settlement;
- approves the Apple Settlement (consisting of the terms and conditions of the Stipulation and Agreement dated January 10, 2020) and the plan of allocation;
- approves an award of attorneys' fees in the amount of 20% of the Apple Settlement Fund, plus $400,000 in reimbursement of litigation expenses;
- approves incentive awards in the amounts of $6,937.50 and $24,713.75 from the Apple Settlement Fund to class representatives Kurz and Palisade, respectively;
- grants the motion for final approval of the Apple Settlement;[55] and
- grants in part and denies in part class counsel's motion for fees and costs.[56]

The court shall retain exclusive jurisdiction over the Settling Parties and the "Class Members," as defined in the Apple Settlement, for all matters relating to this Action, including the administration, interpretation, effectuation, or enforcement of the Apple Settlement and this Order.

[55] Doc. no. 256.

[56] Doc. no. 257.

Class counsel shall allocate the attorneys' fees awarded amongst Plaintiffs' Counsel in a manner which it, in good faith, believes reflects their respective contributions to the initiation, prosecution, and settlement of the claims asserted in the Action against Apple.

In the event that the Apple Settlement is terminated or the Effective Date of the Apple Settlement otherwise fails to occur, this Order and any subsequent judgment shall be rendered null and void to the extent provided by the Apple Settlement.

A separate judgment as against Apple shall follow.

SO ORDERED.

Joseph N. Laplante
United States District Judge

Dated: August 27, 2020

cc: Counsel of record