IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

PAUL LUKIS, ERIC WADE, KRISTOPHER PACHECO, QUINN HAINE, and MARLON SIGUENZA, individually and on behalf of all others similarly situated, Plaintiffs, v. ONEPLUS USA CORP., Defendant.	Civil Action No. 2023LA000573

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs Paul Lukis, Eric Wade, Kristopher Pacheco, Quinn Haine, and Marlon Siguenza (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their Motion for Preliminary Approval of Class Action Settlement, seeking approval of the Settlement reached between Plaintiffs and Defendant OnePlus USA Corp. ("OnePlus" or "Defendant" and collectively with Plaintiffs, the "Parties").

The present matter results from a lawsuit action originally brought in the U.S. District Court for the Northern District of California on July 28, 2021, captioned *Wade v. OnePlus USA Corp.*, No. 5:21-cv-05811-BLF, that was later expanded to include additional plaintiffs and filed in this Court on June 8, 2023, regarding the design, manufacturing, marketing, and sale of Defendant's OnePlus 9 and OnePlus 9 Pro-brand smartphones (the "Devices"). *See* Class Action Compl. ("Compl."), ¶ 1. Specifically, Plaintiffs allege that the Devices contain a "Secret Setting" that restricts – or "throttles" – access to the Devices' processing power and other resources. *Id.*

Plaintiffs further allege that, while the Devices will *appear* to run at full power under test conditions, in real-world applications they receive throttled and reduced performance. *Id.* Plaintiffs further allege that, when this secret throttling was uncovered, researchers noted that it not only applied to "a handful of apps, but applies to pretty much everything that has any level of popularity in the Google's Play App Store, including the whole of Google's app suite, all of Microsoft's Office apps, all popular social media apps, and any popular browser such as Firefox, Samsung Internet, or Microsoft Edge." *Id.* As such, Plaintiffs contend that there exists "a large disconnect between the performance that's exhibited in the most popular applications out there and the experience that users will be having within the most popular applications on the market." *Id.*

Plaintiffs allege that, due to this purported throttling, Plaintiffs have been led to believe that the Devices are much faster and more powerful than they actually perform. *Id.* ¶ 6. Thus, Plaintiffs allege they are not getting the full advertised performance of their phones, paying a significant price premium for characteristics (*i.e.*, speed, power, and performance) that they are not receiving. *Id.* Defendants deny any and all allegations or that it is liable in any way to Plaintiffs and the members of the class.

Plaintiffs assert their claims individually and on behalf of a nationwide class for: (1) violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a)(5); (2) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq.; (3) violation of California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, et seq.; (4) violation of California's Computer Data Access and Fraud Act ("CCDFA"), Cal. Penal Code § 502; (5) trespass to chattels; (6) fraud; (7) fraudulent omission or concealment; (8) negligent misrepresentation; and (9) quasi-contract / unjust enrichment. *Id.* ¶ 7.

Throughout the litigation, the Parties have anticipated several legal and factual issues that may be contested should this matter proceed to discovery. After nearly two years of hard-fought litigation and motion practice – and *two* full-day mediation sessions (on February 18, 2022 with The Honorable Daniel Weinstein (Ret.) of JAMS and on November 21, 2022 with the Honorable Brian C. Walsh (Ret.) of JAMS) – the Parties have agreed to a proposed Settlement that provides significant relief to the Settlement Class. Under the terms of the Settlement, class members who purchased a OnePlus Device from March 23, 2021 through July 6, 2021 may receive a cash payment of $15.50 *plus* a voucher in the amount of $20.50 usable towards the purchase of any OnePlus cellular phone; class members who purchased a OnePlus Device from July 7, 2021 through January 23, 2022 may receive a cash payment of $12.00 *plus* a voucher in the amount of $15.00. *See* Settlement § 3.2. If approved, the Settlement will bring certainty, closure, and significant relief to Class Members. Absent approval of the Settlement, the Parties face extended and costly litigation, and there is a considerable risk that Class Members would ultimately receive no relief whatsoever.

Plaintiffs seek preliminary approval of the Settlement, approval of the form and method of Notice, certification of the Settlement Class, appointment of Plaintiffs as Class Representatives, and appointment of Class Counsel. This memorandum describes in detail the reasons why preliminary approval is in the best interests of the Class and is consistent with 735 ILCS 5/2-801, *et seq.* As discussed in more detail below, the most important consideration in evaluating the fairness of a proposed class action settlement is the strength of Plaintiffs' case on the merits balanced against the relief obtained in the settlement. *See Steinberg v. Software Assocs., Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999); *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990); *see also Am. Int'l Grp., Inc. v. ACE INA Holdings*, Nos. 07 CV 2898, 09 C 2026, 2012

WL 651727 (N.D. Ill. Feb. 28, 2012). While Plaintiffs reasonably believe they could obtain class certification and prevail on the merits at trial, success is certainly not guaranteed. Additionally, Defendant is prepared to vigorously defend this case and oppose certification of a litigated class. The Settlement includes robust monetary relief providing Settlement Class Members with meaningful cash compensation, which meets and exceeds the applicable standards of fairness. Accordingly, this Honorable Court should preliminarily approve the Settlement so that Settlement Class Members can receive notice of their rights and the claims administration process may begin.

I. FACTUAL & PROCEDURAL BACKGROUND

On July 28, 2021, Plaintiff Eric Wade, by and through his counsel Bursor & Fisher, P.A., filed a 33-page Class Action Complaint in the U.S. District Court for the Northern District of California, captioned *Wade v. OnePlus USA Corp.*, No. 5:21-cv-05811-BLF. On October 15, 2021, Bursor & Fisher, P.A. and Gary Klinger, then with Mason Lietz & Klinger, now a Partner at Milberg Coleman Philips Bryson Grossman, filed a 45-page First Amended Complaint ("FAC"), on behalf of Plaintiffs Eric Wade, Kristopher Pacheco, Esteban Bernal, Quinn Haine, and Marlon Siguenza. The Parties then negotiated a Protective Order, which the court entered on February 3, 2022. OnePlus then filed a 23-page motion to dismiss the *Wade* matter on April 7, 2022. Plaintiffs filed a 25-page opposition on May 9, 2022, and OnePlus filed a 15-page reply on May 27, 2022. The *Wade* court held a fulsome oral argument before The Honorable Beth Labson Freeman on August 11, 2022, and on August 17, 2022 the court issued an Order granting Defendant's motion to dismiss with leave to amend. The *Wade* plaintiffs then filed a 46-page Second Amended Complaint on August 3, 2022.

In the midst of litigation, the Parties attended two full-day, arms'-length mediations sessions, the second of which resulted in an agreement in principle as to a term sheet subject to

negotiation of complete settlement terms. As part of these mediations, OnePlus exchanged information regarding, among other things, its sales data such that Class Counsel could assess the amount in controversy as well as the size and composition of the Settlement Class. First, on February 18, 2022, the Parties mediated with The Honorable Daniel Weinstein (Ret.) of JAMS. Second, on November 21, 2022, the Parties mediated with The Honorable Brian C. Walsh (Ret.) of JAMS. On June 1, 2023, after an additional six months of hard fought, arm's length negotiations following the second mediation, the Parties executed the operative Settlement Agreement, attached hereto as **Exhibit 1**. Pursuant to these discussions, the Parties agreed to proceed with the case, and seek approval of the Settlement in DuPage County. Accordingly, on June 8, 2023, the present Plaintiffs (now including Paul Lukis) filed the operative Class Action Complaint in the Eighteenth Judicial District, Du Page County, Illinois, Case No. 2023LA000573.

II. THE PROPOSED SETTLEMENT

A. The Settlement Class

The Settlement Class is defined to include "two Settlement Sub-Classes: (i) Settlement Subclass 1, which means the settlement sub-class defined as 'all individuals who purchased a OnePlus 9 or OnePlus 9 Pro smartphone device in the United States between March 23, 2021 and July 6, 2021,' and (ii) Settlement Subclass 2, which means the settlement sub-class defined as 'all individuals who purchased a OnePlus 9 or OnePlus 9 Pro smartphone device in the United States between July 7, 2021 and January 23, 2022.'" Settlement § 1.35. Specifically excluded from the Settlement Class are officers and directors of OnePlus and its parents, subsidiaries, affiliates and any entity in which OnePlus has a controlling interest; all judges assigned to hear any aspect of the Action, as well as their staff and immediate family and Settlement Class Counsel, their staff members and their immediate family. *Id.*

B. The Settlement

For Settlement Subclass 1 members, the Settlement provides: "a Payment of $15.50 and a Voucher in the amount of $20.50 usable toward the purchase of any OnePlus cellular phone sold on www.oneplus.com for each OnePlus Device purchased within the Settlement Subclass 1 time period, from March 23, 2021 through July 6, 2021, for which a timely and valid Claim Form is submitted that includes a timely and valid Proof of Purchase," whereby "[t]he Vouchers shall expire twenty-four (24) months after issuance and shall be freely transferable." *Id.* § 3.2.

For Settlement Subclass 2 members, the Settlement provides: "a Payment of $12.00 and a Voucher in the amount of $15.00 usable toward the purchase of any OnePlus cellular phone sold on www.oneplus.com for each OnePlus Device purchased within the Settlement Subclass 2 time period, from July 7, 2021 through January 23, 2022, for which a timely and valid Claim Form is submitted that includes a timely and valid Proof of Purchase," whereby, again, "[t]he Vouchers shall expire twenty-four (24) months after issuance and shall be freely transferable." *Id.*

C. Notice & Settlement Administration

A third-party Settlement Administrator[1] will handle all Settlement Notices, establish the Settlement Website, establish a toll-free telephone hotline, establish a system for the collection of Claim Forms, provide an address and collect Settlement Exclusions, respond to any inquiries from Settlement Class Members, provide interim reports, review submitted Claim Forms, process and transmit the Settlement Payments, and handle other Settlement logistics. Settlement § 2.2. Defendant will provide a list of Settlement Class Members to the Settlement Administrator. Settlement § 4.2. Notice will consist of (i) direct notice, by mail, (ii) a settlement website

[1]The Settlement Administrator will be selected by OnePlus, subject to approval by Settlement Class Counsel, whose consent shall not be unreasonably withheld, and approved by the Court. Settlement § 1.34.

maintained by the Settlement Administrator, and (iii) notice by publication that the Parties deem appropriate to effectively give notice to Settlement Class Members. *Id.*

D. Claims, Exclusion, & Objection Procedures

The timeline as set forth in the Settlement Agreement is designed to give individuals in the Settlement Class sufficient time to receive Notice, review the relevant documents, and to determine if they would like to opt-out from or object to the Settlement. Within 30 days of entry of the Preliminary Approval Order, the Parties shall promulgate Notice to the Settlement Class. Settlement § 4.2. Then, individuals in the Settlement Class will have at least 90 days from the date the Court enters the Preliminary Approval Order to exclude themselves from the Settlement or object to its approval. *Id.* § 1.9. Further, the Final Approval Hearing will take place no sooner than 200 days after the Court enters the Preliminary Approval Order. *Id.* § 1.10.

E. Form & Scope of the Release

In exchange for the relief described herein, Plaintiffs and all Settlement Class Members who do not exclude themselves will, upon the Effective Date, provide the Released Parties a full release of all Released Claims. The Released Claims include any "claims related to or arising from the Action, the allegations therein, or the settlement thereof." *Id.* § 1.30.

III. LEGAL STANDARD

"Certification of a class action in Illinois is governed by section 2-801 of the Code." *Lee v. Buth-Na-Bodhaige, Inc.*, 2019 Ill. App. (5th) 180033, ¶53. To satisfy §2-801, a plaintiff must establish that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and

adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy.

Further, the proponents of a class action settlement must show that the settlement "is fair, reasonable, and in the best interest of all who will be affected by it, including absent class members." *Lee* at ¶54. Illinois courts generally favor class action settlements because the settlement of class action litigation serves the public interest. *See, e.g., Langendorf v. Irving Trust Co*., 244 Ill. App. 3d 70, 78 (1st Dist. 1992), *abrogated on other grounds*, *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235 (1995). Indeed, Illinois courts have recognized the strong public policy favoring settlement and the avoidance of costly and time-consuming litigation. *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co*., 2016 Ill. App. (5th) 150111-U, ¶41. To that end, courts have wide discretion in deciding whether to approve a settlement as "fair, reasonable and adequate." *People ex rel. Wilcox v. Equity Funding Life Ins. Co*., *Inc.*, 61 Ill. 2d 303, 317 (1975). "Since the result is a compromise, the court in approving it should not judge the legal and factual questions by the same criteria applied in a trial on the merits. Nor should the court turn the settlement approval hearing into a trial. To do so would defeat the purposes of a compromise such as avoiding a determination of sharply contested issues and dispensing with expensive and wasteful litigation." *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 493 (1st Dist. 1992).[2] In making a reasonableness determination, courts typically consider the following factors: "(1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement;

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

(6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed." *Id.*

Courts review proposed class action settlements using a well-established two-step process. *See* Conte & Newberg, NEWBERG ON CLASS ACTIONS §11.25 at 38-39 (4th ed. 2002); *see also Kaufman v. Am. Express Travel Related Servs. Co., Inc.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009); *GMAC*, 236 Ill. App. 3d at 492; *Fauley v. Metro. Life Ins. Co.*, 2016 Ill. App. (2d) 150236, ¶¶4, 7, 15. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." NEWBERG §11.25 at 38-39; *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998). The preliminary approval hearing is not a final fairness hearing, but rather a hearing to ascertain whether there is any reason to notify the class members of the proposed settlement based on the written submissions and informal presentation from the settling parties. MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.632 (2002). If the Court finds the settlement proposal "within the range of possible approval," the case proceeds to the second step in the review process: the final approval hearing. NEWBERG §11.25 at 38-39.

Because the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide complete victory, given that parties to a settlement "benefit by immediately resolving the litigation and receiving some measure of vindication for [their] position[s] while foregoing the opportunity to achieve an unmitigated victory." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010); *GMAC*, 236 Ill. App. 3d at 493 ("The court in approving [a class action settlement] should not judge the legal and factual questions by the same criteria applied in a trial on the merits."). There is a strong judicial and public policy

favoring the settlement of class action litigation, and such a settlement should be approved by a court after inquiry into whether the settlement is "fair, reasonable and adequate." *Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3rd Dist. 2010); *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996). "Although this standard and the factors used to measure it are ultimately questions for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same inquiry takes place at the preliminary phase." *Kessler v. Am. Resorts Int'l*, Nos. 05 C 5944, 07 C 2439, 2007 WL 4105204, at *5 (N.D. Ill. Nov. 14, 2007) (citing *Armstrong*, 616 F.2d at 314).

IV. DISCUSSION

A. The Settlement Is Fair, Reasonable, & Warrants Preliminary Approval

The Settlement is a fair and reasonable resolution of this case and is worthy of notice to and consideration by the individuals in the Settlement Class. Most fundamentally, the Settlement will provide significant and timely relief to participating Settlement Class Members as compensation for their Released Claims and will relieve the Parties of the burdens, uncertainties, costs, and risks of continued litigation.

1. The Settlement Agreement Provides Substantial Relief to the Settlement Class, Particularly in Light of the Uncertainty of Prevailing on the Merits

As to the first factor, the Settlement in this case provides substantial material benefits to the Settlement Class. Namely, each Settlement Class Member will receive, after submitting a simple claim form, either $15.50 in cash *plus* a $20.50 voucher (if in Settlement Class 1), or $12.00 in cash *plus* a $15.00 voucher (if in Settlement Class 2).

While Plaintiffs believe they would likely prevail on their claims, they are also aware that Defendant may pursue several legal and factual defenses, including but not limited to whether the alleged "throttling" actually results in a noticeable slowdown in real-world use, and whether Class

Members paid a price premium as a result. If successful, Defendant's defenses would result in Plaintiffs and the proposed Settlement Class Members receiving no payment or relief whatsoever. Thus, the unsettled nature of potentially dispositive threshold issues in this case poses a significant risk to Plaintiffs' claims and would add to the length and costs of continued litigation. Taking these realities into account and recognizing the risks involved in any litigation, the relief available to each Settlement Class Member in the Settlement represents a truly excellent result for the Settlement Class.

In addition to any defenses on the merits Defendants would raise, should litigation continue Plaintiffs would also be required to prevail on a class certification motion, which would be highly contested and for which success is certainly not guaranteed. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation"). "If the Court approves the [Settlement], the present lawsuit will come to an end and [Settlement Class Members] will realize both immediate and future benefits as a result." *Id*. Approval would allow Plaintiffs and the Settlement Class Members to receive meaningful and significant payments now, instead of years from now or never. *See id*. at 582.

The result here is a Settlement that is certainly fair, reasonable, and adequate, and warrants preliminary approval.

2. Defendant's Ability to Pay Is Not at Issue Here

The second factor to be considered is the defendant's ability to pay the settlement sum. Defendant's financial standing has not been placed at issue here.

3. Continued Litigation Is Likely to Be Complex, Lengthy, and Expensive

Without a settlement, it is certain that the expense, duration, and complexity of the protracted litigation that would result would be substantial. Not only would the Parties have to

undergo significant motion practice before any trial on the merits is even contemplated, but evidence and witnesses from throughout the nation would have to be assembled for any trial. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal both any decision on the merits as well as on class certification. As such, the immediate and considerable relief provided to the Settlement Class under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn-out litigation, trial, and appeal. Protracted and expensive litigation is not in the interest of any of the Parties or Settlement Class Members.

4. There Has Been No Opposition to the Settlement

While this factor is best examined after notice has been provided to the Settlement Class Members, and the deadline to file an objection to the Settlement has not been set, there is presently no known opposition to the Settlement. Thus, this factor weighs in favor of approval.

5. The Settlement Agreement Was the Result of Arm's-Length Negotiations Between the Parties After a Significant Exchange of Information

There is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. Newburg, §11.42; *see also Fauley*, 2016 Ill. App. (2d) 150236, ¶21 (finding no collusion where there was "no evidence that the proposed settlement was not the product of 'good faith, arm's-length negotiations'"). Here, there is no evidence of collusion. The Settlement was only reached on June 1, 2023, entailing months of additional negotiations following two full-day, arms'-length mediations on February 18, 2022 and November 21, 2022. Moreover, settlement negotiations began only after an exchange of information regarding, among other things, sales data such that Class Counsel could assess the amount in controversy as well as the size and composition of the Settlement Class. Such an involved process underscores the non-collusive nature of the proposed Settlement. Finally, given the fair result for the Settlement Class

in terms of their recovery, it is clear that this Settlement was reached as a result of good-faith negotiations rather than any collusion between the Parties. Accordingly, this factor weighs in favor of preliminary approval.

6. While It Is Premature to Weigh Class Support Before Notice Has Been Provided to the Class, Counsel Has No Reason to Believe There Will Be Any Opposition

As with factor number four, Plaintiffs' Counsel are aware of no opposition to the Settlement, and due to the strength of this Settlement and the amount of the award that Settlement Class Members can claim, Plaintiffs and their counsel expect little to no opposition to the Settlement by any Settlement Class Member in the future. Plaintiffs strongly support the Settlement and believes that it is fair and reasonable, particularly because of the defenses raised by Defendant and the potential risks involved with continued litigation.

7. The Settlement Agreement Has Support of Experienced Proposed Class Counsel

Plaintiffs' Counsel believe that the proposed Settlement is in the best interests of the Settlement Class Members because they will receive an immediate payment instead of having to pursue lengthy litigation and likely subsequent appeals. Further, the benefit of this Settlement is not just in the Class Members' receipt of money now as opposed to later – in addition, the Settlement avoids the possibility of a defense verdict or a favorable defense decision on class certification or summary judgment wiping out all recovery for the Class. Defendant has indicated that it would raise several potentially dispositive defenses if the case proceeds and it is therefore possible that the Settlement Class Members would receive no benefit whatsoever without this Settlement. Given Plaintiffs' Counsel's extensive experience litigating similar class action cases in federal and state courts across the country, this factor also weighs in favor of granting preliminary approval. *See*

GMAC, 236 Ill. App. 3d at 497 (finding that the court should give weight to the fact that class counsel supports the class settlement in light of its experience prosecuting similar cases).

8. While Still at an Early Stage of Litigation, the Parties Exchanged Information Sufficient to Assess the Strengths and Weaknesses of the Claims and Defenses

The eighth factor is designed to permit the Court to consider the extent to which the Court and Counsel were able to evaluate the merits of the case and to assess the reasonableness of the Settlement. *See*, *e.g.*, *City of Chi.*, 206 Ill. App. 3d at 972. Here, in advance of a Settlement being reached, the Parties exchanged information that enabled Settlement Class Counsel to thoroughly investigate the facts and law and assess the strengths and weaknesses of Plaintiffs' claims, and to assess the size and scope of the Settlement Class and the amount in controversy. Accordingly, this factor weighs in favor of Preliminary Approval.

B. The Proposed Class Notice Should Be Approved

Under 735 ILCS 5/2-803, a court may provide class members notice of any proposed settlement to protect the interests of the class and the parties. *See*, *e.g.*, *Cavoto v. Chi. Nat'l League Ball Club, Inc.*, No. 1–03–3749, 2006 WL 2291181, at *15 (1st Dist. July 28, 2006) (collecting authorities & noting that "section 2-803 makes it clear that the statutory requirement of notice is not mandatory"). Notice must be provided to absent class members to the extent necessary to satisfy requirements of due process. *See id*., at *15 (citing *Frank v. Tchrs. Ins. & Annuity Assoc. of Am.*, 71 Ill.2d 583, 593 (1978)); *see also* Fed. R. Civ. P. 23(d)(2) (advisory committee note) ("mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject"). As explained by the United States Supreme Court, due process requires that notice be the "best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections'" as well as "'describe the action and the plaintiffs' rights in it.'" *Fauley*, 2016 Ill. App. (2d) 150236, ¶36 (citing *Phillips Petroleum Co. v. Shuts*, 472 U.S. 797, 812 (1985)).

The proposed Notice in this case satisfies both the requirements of 735 ILCS 5/2-803 and due process. As set forth above, the Settlement Agreement contemplates a Notice Plan that provides an avenue of direct notice, via mail, tailored to reach as many potential Settlement Class Members as possible. Settlement § 4.2. The direct Notice process should be very effective because some of the Settlement Class Members provided the Defendant with email and U.S. Mail addresses. Therefore, Defendant already possesses contact information for some Settlement Class Members, and will provide the Settlement Administrator with a list of email and U.S. Mail addresses associated with those Settlement Class Members. *Id.* Further, the Settlement also provides that Notice shall be promulgated by publication to the extent the Parties deem appropriate to effectively give notice to Settlement Class Members. *Id.*

The Notice program also requires that the Settlement Administrator establish a settlement website and toll-free phone number to which Settlement Class Members may refer for information about the Action and Settlement and submit online Claim Forms and inquiries. The Settlement Administrator will post the Claim Form on the website as well as other important documents and deadlines, in consultation with counsel for the Parties. Additionally, the Settlement Administrator will disseminate the Notices and the Claim Form; will respond to inquiries or requests from Settlement Class Members, in consultation with Plaintiffs' Counsel and Defendant's Counsel; and will respond to inquiries or requests from Class Counsel, Defendant's Counsel, and the Court.

The proposed Notice and Claim Form, which are attached as Exhibits A-C to the Settlement Agreement, should be approved by the Court. The proposed methods of Notice comport with 735 ILCS 5/2-803 and the requirements of due process.

C. The Court Should Grant Class Certification for Settlement Purposes

For settlement purposes only, the Parties have agreed that the Court should make preliminary findings and enter an Order granting provisional certification of the Settlement Class and appointing Plaintiffs and their Counsel to represent the Settlement Class. "The validity of use of a temporary settlement class is not usually questioned." NEWBERG §11.22. The MANUAL FOR COMPLEX LITIGATION explains the benefits of settlement classes:

> Settlement classes – cases certified as class actions solely for settlement – can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits. Settlement classes also permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved[.] . . . An early settlement produces certainty for the plaintiffs and defendants and greatly reduces litigation expenses.

MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.612.

Prior to granting preliminary approval of a class action settlement, a court should determine that the proposed settlement class is a proper class for settlement purposes. *Id*. §21.632; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). A class may be certified under Section 2-801 of the Illinois Code of Civil Procedure if the following "prerequisites" are satisfied: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (iii) the representative parties will fairly and adequately protect the interest of the class; and (iv) the class action is an appropriate method for the fair and efficient adjudication of the controversy. *See* 735 ILCS 5/2-801; *see also CE Design Ltd. v. C & T Pizza, Inc.*, 2015 Ill. App. (1st Dist.) 131465, ¶10. In this case, the proposed Settlement Class meet all the applicable certification requirements.

1. The Class Is Sufficiently Numerous and Joinder Is Impracticable

Numerosity is met where "the class is so numerous that joinder of all members is impracticable." 735 ILCS 5/2-801(1). "Although there is no bright-line test for numerosity, a class of forty is generally sufficient." *Hinman v. M & M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 805-6 (N.D. Ill. 2008); *Kulins v. Malco, A Microdot Co., Inc.*, 121 Ill. App. 3d 520, 530 (1st Dist. 1984) (finding that 47 class members was sufficient to satisfy numerosity). Here, the members of the proposed Settlement Class includes tens of thousands of individuals. Thus, there is no question numerosity is satisfied.

2. Common Questions of Law & Fact Predominate

Commonality, the second requirement for class certification, is met where there are "questions of fact or law common to the class" and those questions "predominate over any questions affecting only individual members." 735 ILCS 5/2-801(2). Common questions of law or fact exist when the members of the proposed class have been aggrieved by the same or similar misconduct. *See*, *e.g.*, *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 673-74 (2nd Dist. 2006); *Steinberg v. Chi. Med. Sch*., 69 Ill. 2d 320, 340-42 (1977); *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). Further, where "the defendant allegedly acted wrongfully in the same basic manner as to an entire class . . . the common class questions predominate the case[.]" *Walczak*, 365 Ill. App. 3d at 674 (citing *Clark v. TAP Pharma. Prods., Inc.*, 343 Ill. App. 3d 538, 548 (5th Dist. 2003)).

In this case, all members of the Settlement Class hold claims that raise many common issues regarding the design, manufacturing, marketing, and sale of the OnePlus 9 and OnePlus 9 Pro smartphones, namely Defendant's alleged conduct of "throttling" access to the Devices' processing power and other resources. *See* Compl. ¶¶ 1-7. Proving these claims would require the resolution of many similar factual and legal issues, including: (i) whether Defendant designed, manufactured,

advertised, and sold Devices that it knew contained Defects and withheld that information from consumers or purposefully misrepresented the Devices to consumers; (ii) whether Defendant designed the throttling to affect the speed, performance, and power of the OnePlus Devices; (iii) whether and to what extent Defendant disclosed the effect of the throttling to consumers before July 7, 2021; (iv) whether Defendant used the throttling to profit from Plaintiffs and the other class members by inducing them to buy new replacements for their Devices; (v) whether Defendant is subject to liability for fraudulently concealing the material facts from Plaintiffs and the other class members; (vi) whether Defendant's conduct violated the CFAA; (vii) whether Defendant has violated the Consumer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq*.; (viii) whether Defendant's conduct has violated any additional federal or state law; (ix) whether Defendant has been unjustly enriched as a result of its fraudulent conduct, such that it would be inequitable for it to retain the benefits conferred upon them by Plaintiffs and the other class members; (x) whether compensatory or consequential damages should be awarded to Plaintiffs and the other class members; (xi) whether punitive damages should be awarded to Plaintiffs and the other class members; and (xii) whether other, additional relief is appropriate, and what that relief should be. *Id.* ¶ 57.

Predominance is satisfied "when there exists generalized evidence that proves or disproves an element on a simultaneous, class-wide basis. … Such proof obviates the need to examine each class member's individual position." *Golon v. Ohio Savs. Bank*, No. 98-cv-7430, 1999 WL 965593, at *4 (N.D. Ill. Oct. 15, 1999). Here, in the context of the Settlement Class, the common questions resulting from Defendant's alleged conduct predominate over any individual issues that may exist and can be answered on a class-wide basis based on common evidence maintained by Defendant. Accordingly, the commonality factor is satisfied.

3. The Class Representatives Have & Will Continue to Provide Adequate Representation for Settlement Class Members

The third element of Section 2-801 requires that "[t]he representative parties will fairly and adequately protect the interests of the class." 735 ILCS 5/2-801(3). The class representative's interests must be generally aligned with those of the class members, and class counsel must be "qualified, experienced and generally able to conduct the proposed litigation." *Miner v. Gillette Co.*, 87 Ill. 2d 7, 14 (1981). "The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Walczak*, 365 Ill. App. 3d at 678 (citing *P.J.'s Concrete Pumping Serv., Inc. v. Nextel W. Corp*., 345 Ill. App. 3d 992, 1004 (2nd Dist. 2004)); *Purcell & Wardrope Chtd. v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1078 (1st Dist. 1988). The adequacy requirement is satisfied where "the interests of those who are parties are the same as those who are not joined" such that the "litigating parties fairly represent [them]," and where the "attorney for the representative party '[is] qualified, experienced and generally able to conduct the proposed litigation.'" *CE Design Ltd.*, 2015 Ill. App. (1st) 131465, ¶16 (citing *Miner*, 87 Ill. 2d at 14).

Here, Plaintiffs' interests are entirely representative of and consistent with the interests of the proposed Settlement Class Members: all have purchased OnePlus 9 or OnePlus 9 Pro smartphones and have allegedly used applications subject to Defendant's throttling, and each alleges that he or she paid a price premium for their Device as a result. Compl. ¶¶ 8-21 (Plaintiffs' personal allegations and usage history). Plaintiffs' pursuit of this matter has demonstrated that they have been, and will remain, zealous advocates for the Settlement Class. Thus, Plaintiffs have the same interests as the Settlement Class, and are suitable representatives. Furthermore, proposed Class Counsel, Milberg Coleman Bryson Phillips Grossman, LLC and Bursor & Fisher, P.A., are all experienced class litigators.[3]

[3] *See* firm resumes, attached hereto as **Exhibits 2-3**.

4. Certifying the Settlement Class Will Allow for a Fair and Efficient Adjudication of the Controversy

The final prerequisite to class certification is met where "the class action is an appropriate method for the fair and efficient adjudication of the controversy." ILCS 5/2-801(4). "In applying this prerequisite in a particular case, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain." *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1st Dist. 1991). In practice, a "holding that the first three prerequisites of section 2-801 are established makes it evident that the fourth requirement is fulfilled." *Id*. at 204; *Purcell & Wardrope Chtd.*, 175 Ill. App. 3d at 1079 (stating that the "predominance of common issues [may] make a class action . . . a fair and efficient method to resolve the dispute"). Thus, the fact that numerosity, commonality and predominance, and adequacy of representation have all been demonstrated in the instant case for settlement purposes only makes it "evident" that the appropriateness requirement is satisfied.

This case is well-suited for class treatment because the claims of Plaintiffs and the proposed Settlement Class Members involve alleged violations of state statutes and common law proscribing the allegedly unauthorized "throttling" of OnePlus 9 and OnePlus 9 Pro smartphones. It is highly unlikely that individuals would invest the time and expense necessary to seek relief through individual litigation. Moreover, because the action will now settle, the Court need not be concerned with issues of manageability relating to trial. When "[c]onfronted with a request for settlement-only class certification," a "court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Nor should the Court "judge the legal and factual questions" regarding certification of the

proposed Settlement Class by the same criteria as a proposed Class being adversely certified. *See GMAC*, 236 Ill. App. 3d at 493.

A class action is the superior method of resolving large-scale claims if it will "achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615. Accordingly, a class action is the superior method of adjudicating this action for settlement purposes only and the proposed Settlement Class should be certified.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court enter the proposed Preliminary Approval Order,[4] which (i) preliminarily approves the Settlement as being within the range of possible final approval; (ii) conditionally certifies the Settlement Class for settlement purposes and appoints Plaintiffs as Class Representatives; (iii) appoints Gary M. Klinger of Milberg Coleman Bryson Phillips Grossman, LLC and Neal J. Deckant of Bursor & Fisher, P.A. as Settlement Class Counsel; (iv) approves the proposed Notice and claims program to be administered by a mutually agreed upon Settlement Administrator; and (v) schedules a Final Approval Hearing.

Dated: July 3, 2023

s/ Gary M. Klinger
Gary M. Klinger (6303726)
Russell Busch (6329500)
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
227 W. Monroe Street, Suite 2100
Chicago, IL 60606
Tel.: (866) 252-0878
gklinger@milberg.com
rbusch@milberg.com

[4] A proposed Preliminary Approval Order is attached to the Settlement Agreement as Exhibit D.