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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

GEOFFREY PECOVER and ANDREW OWENS, on behalf of themselves and a class of person similarly situated, Plaintiffs, v. ELECTRONIC ARTS INC., a Delaware Corporation, Defendant.	No. 08-cv-02820 CW UNOPPOSED NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT Date: September 27, 2012 Time: 2:00 p.m. Dept: Courtroom 2, 4th Floor Judge: Hon. Claudia Wilken ACTION FILED: June 5, 2008

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 27, 2012, at 2:00 p.m. or as soon thereafter as the matter may be heard by the Honorable Judge Claudia Wilken of the United States District Court of the Northern District of California, Oakland Division, located at 1301 Clay Street, Oakland, California, Courtroom 2, 4th Floor, Plaintiffs will and hereby do move the Court pursuant to Federal Rules of Civil Procedure 23 for an order: 1) preliminarily approving the proposed class action settlement; 2) appointing Hagens Berman Sobol Shapiro LLP and The Paynter Law Firm PLLC as Class Counsel; 3) approving and directing the dissemination of the Notice of Proposed Settlement in a form substantially similar to the forms attached hereto; 4) approving the proposed methods and procedures for providing notice; 5) adopting the proposed schedule for the Final Approval Hearing (the "Fairness Hearing") and other deadlines related to the administration of the settlement; and 6) temporarily barring and enjoining the institution or continued prosecution by Plaintiffs or other class members of any action asserting the claims released in this proposed settlement.

This motion is based on this Unopposed Notice of Motion and Motion for Preliminary Approval of Class Action Settlement, the following memorandum of points and authorities, the Stipulation and Agreement of Class Action Settlement and Release ("Settlement Agreement") filed herewith, the pleadings and the papers on file in this action and such other matters as the Court may consider.

STATEMENT OF COURT ACTION SOUGHT

Plaintiffs request that the Court enter an order: 1) preliminarily approving the proposed class action settlement; 2) appointing Hagens Berman Sobol Shapiro LLP and The Paynter Law Firm PLLC as Class Counsel; 3) approving and directing the dissemination of the notice of proposed settlement in a form substantially similar to the forms attached hereto; 4) approving the proposed methods and procedures for providing notice; 5) adopting the proposed schedule for the Final Approval Hearing (the "Fairness Hearing") and other deadlines related to the administration of the settlement; and 6) temporarily barring and enjoining the institution or continued prosecution by Plaintiffs or other class members of any action asserting the claims released in this proposed settlement.

Defendant Electronic Arts Inc. does not oppose the relief sought by the motion, although it does not agree in all respects with Plaintiffs' characterizations of the (i) applicable procedural and substantive law or (ii) the facts at issue.

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11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION 1
II. BACKGROUND 1
  A. This Litigation 1
  B. The Parties' Efforts to Settle the Case 4
III. THE PROPOSED SETTLEMENT 5
  A. The Settlement Class 5
  B. The Settlement Consideration 6
  C. Allocation of Settlement Funds 7
  D. Release of Claims 8
  E. Notice and Implementation of the Settlement 9
IV. ARGUMENT 10
  A. The Court's Role in Approving a Class Action Settlement 10
  B. The Proposed Settlement Merits Preliminary Approval Because It Provides Substantial Value to the Class in a High-Risk Case, and Is the Product of Informed and Non-Collusive Negotiation. 11
    1. The Parties Can Identify the Strengths and Weaknesses of Their Positions. 12
    2. The Settlement Confers a Substantial Benefit to the Class and Is Appropriately Balanced Against the Risks of Continued Litigation. 13
      a. Plaintiffs Face a Significant Risk of Not Being Able to Litigate Their Claims on a Class-Wide Basis. 13
      b. Continued Litigation Poses Substantial Risks and Costs in Establishing Liability and Damages. 15
    3. The Settlement Is the Result of Non-Collusive Negotiations and Is Fair to the Class. 16
    4. The Recommendation of Experienced Counsel Weighs in Favor of Approval. 18
  C. The Court Should Reaffirm the Appointment of Class Counsel 19
  D. The Proposed Class Notice and Deadlines for Implementation of the Settlement Should Be Approved. 20
V. CONCLUSION 21

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

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Churchill Vill., LLC v. Gen. Elec.,
361 F.3d 566 (9th Cir. 2004) 20

Cohen v. District of Columbia Nat'l Bank,
59 F.R.D. 84 (D.D.C. 1972) 13

Collins v. Cargill Meat Solutions Corp.,
274 F.R.D. 294 (E.D. Cal. 2011) 10

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 14

Ferrington v. McAfee, Inc.,
2012 U.S. Dist. LEXIS 49160 (N.D. Cal. April 6, 2012) 17

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 12

Harris v. Vector Mktg. Corp.,
2011 U.S. Dist. LEXIS 117927 (N.D. Cal. Oct. 12, 2011) 17

In re Bluetooth Headset Prods. Liability Litig.,
654 F.3d 935 (9th Cir. 2011) .... *passim*

In re Tableware Antitrust Litig.,
484 F. Supp. 2d 1078 (N.D. Cal. 2007) 10, 12, 20

Kirkorian v. Borelli,
695 F. Supp. 446 (N.D. Cal. 1988) 18

Linney v. Cellular Alaska P'ship,
151 F.3d 1234 (9th Cir. 1998) 12

Mazza v. American Honda Motor Co.,
666 F.3d 581 (9th Cir. 2012). 13

Pecover v. Elec. Arts Inc.,
2010 U.S. Dist. LEXIS 140632 (N.D. Cal. Dec. 21, 2010) 19

The Officers for Justice v. Civil Serv. Comm'n,
688 F.2d 615 (9th Cir. 1982) 11, 13

United States v. Armour & Co.,
402 U.S. 673 (1971) 13

Wal-Mart Stores, inc. v. Dukes,
_U.S._, 131 S.Ct. 2541 (2011) 14

Walsh v. Great Atl. & Pac. Telectronic Arts Co.,
726 F.2d 956 (3d Cir. 1983) 20

Williams v. Vukovich,
720 F.2d 909 (6th Cir. 1983) 10

Wininger v. SI Mgmt. L.P.,
301 F.3d 1115 (9th Cir. 2002) 18

FEDERAL STATUTES

Sherman Act, 15 U.S.C. § 2 2

FEDERAL RULES

Federal Rule of Civil Procedure 23 .... *passim*

STATE STATUTES

California Business & Professions Code § 16720, *et seq.* 2

California Business & Professions Code § 17200, *et seq.* 2

OTHER AUTHORITIES

Manual for Complex Litigation (Fourth) § 21.632, 320-21 (2004) 10

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs bring this unopposed motion seeking the Court's preliminary approval of a proposed class action settlement. The terms of the settlement provide substantial injunctive relief in the form of an agreement by Electronic Arts Inc. ("Electronic Arts") to refrain from renewing or otherwise entering into an exclusive trademark license with the Arena Football League ("AFL") for five years from the final date of approval of the proposed settlement. Moreover, Electronic Arts agrees not to renew its current collegiate football trademark license with the Collegiate Licensing Company ("CLC") on an exclusive basis after that license expires in 2014, or seek any new exclusive trademark license regarding football video games with the National Collegiate Athletic Association ("NCAA"), the CLC, or any NCAA member institution covered by the current exclusive license for a period of five years thereafter.

The terms of the settlement also provide a substantial monetary value to the class, establishing a $27 million Settlement Fund to be distributed to Settlement Class Members who purchased Electronic Arts' *Madden NFL*, *NCAA Football* or *Arena Football League* brand interactive software – excluding software for mobile devices – with a release date of January 1, 2005 to June 21, 2012. This settlement comes after over four years of litigation, and represents the result of a serious, informed and non-collusive negotiation between Defendant and Plaintiffs and their counsel, aided by experienced mediators. Given the uncertainties associated with continuing litigation, this settlement is a significant victory for the class and merits preliminary approval by the Court.

II. BACKGROUND

A. This Litigation

Plaintiffs filed this action (the "Lawsuit") on June 5, 2008, alleging generally that Electronic Arts monopolized an alleged market for interactive football software by entering into a series of exclusive license agreements with the NFL Properties LLC ("NFL"), NFL Players

Association ("NFLPA"), AFL, NCAA, and CLC (the "Licensors").[1] Plaintiffs believe that subsequent discovery revealed the importance of Electronic Art's trademark license with ESPN, Inc. and that agreement, too, became a focal point of Plaintiffs' claims.

Plaintiffs alleged that by entering into that series of exclusive agreements, Electronic Arts had unreasonably restrained trade and monopolized an alleged market for interactive football software, in violation of California's Cartwright Act, Cal. Bus. & Prof. Code § 16720, *et seq.*; California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*; and the federal Sherman Act, 15 U.S.C. § 2.[2] The original complaint also contained claims for violations of various state antitrust and restraint of trade laws, as well as claims for violations of various state consumer protection and unfair competition laws – included in the event the Court did not apply California law to the nationwide class.[3]

In essence, Plaintiffs alleged that when faced with significant competition from Take-Two Interactive Software, Inc. ("Take-Two," a rival video game maker), rather than compete on the quality of its games, Electronic Arts proceeded to enter into exclusive agreements with the Licensors for the express purpose of achieving a "licensing lockout" that would allow Electronic Arts to effectively exclude competitors from the lucrative football video game market, permitting Electronic Arts to maintain supra-competitive pricing on its league-branded interactive football software.[4] Plaintiffs' complaint sought injunctive relief, as well as restitution and/or damages to class members who purchased the league-branded interactive football software at prices inflated by Electronic Arts' ability to exclude competitors from the market.[5]

Electronic Arts denies the allegations in the Lawsuit, denies that it engaged in any wrongdoing, denies that there is a relevant market limited to "interactive football video games,"

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[1] First Amended Complaint ("FAC"), May 9, 2011, ECF No. 252.

[2] *Id.*

[3] Class Action Complaint, ¶¶ 49-92, June 5, 2008, ECF No. 1.

[4] FAC, ¶¶ 9-18, 20-21.

[5] FAC, at 8-9.

denies that the challenged trademark licenses were obtained in response to Take-Two's discount pricing, denies that it approached the Licensors and induced them to give Electronic Arts exclusive licenses (asserting, to the contrary, that it was the Licensors – not Electronic Arts – that decided to adopt exclusive licensing), and denies that it ever charged supra-competitive prices for its video games.

Once the case was filed, both parties litigated the case vigorously. The parties fully briefed Electronic Arts' motion to dismiss the claims,[6] and on June 5, 2009, Chief Judge Walker denied the motion as to the federal claims as well as the California and District of Columbia claims, but granted it as to the other state law claims. [7] Chief Judge Walker reasoned that although the named Plaintiffs, who lived in California and the District of Columbia, had standing under California's and the District of Columbia's state antitrust and consumer laws, they had alleged no basis for standing to bring claims under the other state laws.

Approximately six months after the motion to dismiss was denied, Plaintiffs filed their motion to certify the class.[8] The parties filed extensive briefs and evidence relating to the motion for class certification, including declarations from two economists, one industry expert, multiple fact witnesses and thousands of pages of exhibits.[9] Chief Judge Walker certified a nationwide class under Federal Rule of Civil Procedure 23(b)(3) consisting of "[a]ll persons in the United States who purchased Electronic Arts' Madden NFL, NCAA or Arena Football League brand interactive football software, excluding software for mobile devices . . . with a release date of January 1, 2005 to the present."[10]

The class certification records represented only a fraction of the extensive discovery

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[6] Defendant Electronic Arts Inc.'s Motion to Dismiss Class Action Complaint, Aug. 25, 2008, ECF No. 17.

[7] Order, June 5, 2009, ECF No. 40.

[8] Notice of Motion and Motion for Class Certification, Nov. 9, 2009, ECF No. 75 (Redacted Version / Original Filed Under Seal).

[9] Declaration of Steve W. Berman in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement ("Berman Decl."), ¶ 2, filed concurrently herewith.

[10] Order at 52, Dec. 21, 2010, ECF No. 198 ("Class Certification Order").

eventually conducted by the parties. In connection with their investigation into the allegations of wrongdoing in the Lawsuit, Electronic Arts produced, and Class Counsel analyzed, approximately 1,987,345 pages of documents. Third parties produced an additional 227,325 pages of documents. Class Counsel made additional inquiry as to pertinent facts, including through depositions and consultations with experts and consultants.[11] Indeed, the parties have conducted twenty-five depositions of fact and expert witnesses.[12]

Class Counsel served twenty-nine interrogatories and thirty requests for production of documents upon Electronic Arts, reviewed and analyzed Electronic Arts' responses to those interrogatories and requests, responded to approximately 1,295 requests for admission, took twenty-two depositions, and altogether reviewed and analyzed over two million pages of documents produced in this Lawsuit.[13] Moreover, Plaintiffs were served with and responded to twenty-three interrogatories and twenty-eight requests for production of documents, and defended three depositions.[14] The parties also engaged experts and developed expert testimony and reports in support of their relative positions, producing two lengthy reports involving economic analyses of the parties' claims and defenses, including the relevant market definition, the effects of Electronic Arts' exclusive licenses on the price of video games in the alleged market, and the extent of damages the Plaintiffs would seek to prove at trial.[15]

B. The Parties' Efforts to Settle the Case

The efforts to settle this case have involved extensive informal discussions between the parties as well as two mediations. The first mediation occurred on July 15, 2011 before Mr. Antonio Piazza of the firm Gregorio, Haldeman, Piazza & Rotman.[16] At the time, Electronic Arts' motion to dismiss had been denied, the class had been certified, and the parties were in the midst of

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[11] Berman Decl., ¶ 2.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at ¶ 3.

[16] *Id.* at ¶ 4.

discovery. The parties could not come to agreement, and no issues were resolved.[17]

Between the first and second mediations, the parties continued to discuss settlement options, exchanging correspondence in early 2012 on the topic.[18]

Then, on May 4, 2012, the parties participated in a mediation before former U.S. District Court Judge Layn R. Phillips.[19] The mediation, like the settlement discussions before it, was conducted at arms' length; but this time the mediation resulted in the settlement agreement described below.[20] The length of the case and the settlement negotiations is reflective of the zealous advocacy of both sides on behalf of their clients, and of Plaintiffs' efforts to reach an agreement that they believe to be fair, adequate, reasonable, and in the best interests of the class – an agreement they believe they have come to with the proposed settlement described below.

III. THE PROPOSED SETTLEMENT

A. The Settlement Class

The proposed settlement has been reached on behalf of substantially the same class previously certified in the thoughtful and thorough Class Certification Order issued by Chief Judge Walker after the parties had engaged in a lengthy battle resulting in a 7,000-page record.[21] The proposed settlement class consists of all persons in the United States who purchased Electronic Arts' *Madden NFL*, *NCAA Football* or *Arena Football League* brand interactive software, excluding software for mobile devices, with a release date of January 1, 2005 to June 21, 2012. The end of the proposed settlement class is the day on which Electronic Arts extracted contact information for users of Electronic Arts' video games to provide to the notice administrator. Excluded from the proposed settlement class are (1) persons purchasing directly from Electronic

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[17] *Id.*

[18] *Id.* at ¶ 5.

[19] *Id.* at ¶ 6.

[20] *Id.*

[21] Berman Decl., Ex. A, 9 ¶ 1(ee). The only difference between the class definition in the Settlement Agreement and the class definition in Judge Walker's Class Certification Order is the end date of the class period, which in the Order is defined as "the present," and in the Settlement Agreement is defined as "June 21, 2012." *See id.*; Class Certification Order at 52.

Arts; (2) persons purchasing used copies of the relevant video games, and (3) Electronic Arts' employees, officers, directors, legal representatives, and wholly or partly owned subsidiaries or affiliated companies. Also excluded from the proposed settlement class are any class members who previously filed a timely request for exclusion on or prior to June 25, 2011, and were included on the class member exclusion list filed with the Court on July 25, 2011.

B. The Settlement Consideration

As consideration for the settlement, Electronic Arts has agreed to refrain from renewing or otherwise entering into an exclusive trademark license with the AFL for five years from the final date of approval of the proposed settlement.[22] Moreover, Electronic Arts agrees not to renew its current collegiate football trademark license with the CLC on an exclusive basis after that license expires in 2014, or seek any new exclusive trademark license regarding football video games with the NCAA, the CLC, or any NCAA member institution covered by the current exclusive license for a period of five years thereafter. [23]

As further consideration, Electronic Arts has agreed to pay $27 million into a Settlement Fund.[24] This amount represents the total amount that Electronic Arts will pay, and includes all payments to class members, any attorney's fees and costs, costs of class administration, and potential participation awards to the Named Plaintiffs.[25]

There is no reversion allowed under the Settlement Agreement unless the settlement does not become final; the full amount of the settlement, after costs and fees, will be distributed to Settlement Class Members.[26] In the event that funds cannot be distributed to Settlement Class Members, or checks remain uncashed six months after mailing, the Settlement Agreement provides for the funds to be distributed to a mutually acceptable *cy pres* recipient, consistent with California

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[22] Berman Decl., Ex. A, 15, ¶ 15(a).

[23] *Id*. at 15, ¶ 15(b).

[24] *Id*. at 11-12, ¶ 8.

[25] *Id*.

[26] *Id*.

law and approval by this Court.[27]

The agreement further states that any request for fees from counsel for Plaintiffs will not exceed thirty percent of the fund and that any request for costs will include the amount of costs actually incurred, but not to exceed $2,000,000.[28] Electronic Arts agrees not to oppose a request for attorney's fees and costs within these limits.[29] Electronic Arts also agrees not to oppose a request for a participation award to Plaintiffs Geoffrey Pecover and Andrew Owens up to a maximum of $5,000 each, and Class Counsel agrees not to seek an award in excess of that amount.[30] Class Counsel will file a separate motion requesting the award of fees and costs in accordance with recent Ninth Circuit case law. This Court retains the discretion to approve or deny these amounts, and the Court's ultimate decision as to the amounts awarded cannot serve as a basis to invalidate the settlement.[31]

C. Allocation of Settlement Funds

Payments will be made to Settlement Class Members on a pro rata basis out of the Net Settlement Fund (the amount available after deducting payment of the costs of administering the settlement, including the costs of notice, attorney's fees, costs of the litigation and any payments allowed by the Court to the Named Plaintiffs).[32] Payments will differ depending on the type of video game title purchased. Settlement Class Members who purchased Sixth Generation Titles will (upon filing a valid and timely Claim Form) be entitled to a cash payment of up to $6.79 per unit purchased, up to a maximum of eight units ($54.32).[33] Settlement Class members who purchased

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[27] *Id*. at 15, ¶ 14(c).

[28] Berman Decl., Ex. A, 14 ¶ 13.

[29] *Id.*

[30] *Id*. at 13-14, ¶ 12.

[31] *Id*. at 14, ¶ 13.

[32] *Id*. at 14-15, ¶ 14.

[33] *Id*. at 14-15, ¶ 14(a). Sixth Generation Title means a unit of the following video game titles sold new in the United States, for play on the video game platforms identified, between January 1, 2005 and June 21, 2012: any *Madden NFL*, *NCAA Football* or *Arena Football* video game released for play on the Xbox, PlayStation 2, PC, or GameCube platforms. *Id.*

Seventh Generation Titles will be entitled (upon filing a valid and timely Claim Form) to a cash settlement payment of up to $1.95 per unit purchased, up to a maximum of eight units ($15.60).[34] If the timely and valid claims exceed the Net Settlement Fund, the Claims will be reduced pro rata so that all claims may be paid from the Net Settlement Fund.[35]

In the event the Net Settlement Fund is not exhausted by timely and valid Claims paid, the parties will attempt in good faith to identify Sixth Generation purchasers who have provided Electronic Arts with a physical address but have not submitted a claim, and send payments to such individuals on a pro rata basis, without the necessity of a Claim Form.[36]

If six months after the mailing of the checks described above, the Net Settlement Fund is still not exhausted, a *cy pres* payment shall be made to Child's Play, a 501(c)(3) entity, in the amount that will exhaust the Net Settlement Fund.[37]

D. Release of Claims

In exchange for the above consideration, members of the Settlement Class will release all "Released Claims" relating to or arising from the allegations in this action, including any allegations that customers were overcharged for interactive football video games because of Electronic Arts' exclusive licensing agreements with the NFL, the NFLPA, the AFL, the CLC, the NCAA, and/or ESPN.[38] In light of the ongoing relationship between Electronic Arts and class

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[34] Berman Decl., Ex. A, 14-15, ¶ 14(a). Seventh Generation Title means a unit of the following video game titles sold new in the United States, for play on the video game platforms identified, between January 1, 2005 and June 21, 2012: any *Madden NFL*, *NCAA Football* or *Arena Football* video game released for play on the Xbox 360, PlayStation 3, or Wii platforms. *Id.*

[35] *Id.*

[36] *Id.* at 15, ¶ 14(b).

[37] *Id.* at 15, ¶ 14(c).

[38] *Id.* at 16-18*, ¶* 20-25. "Released Claims" means any and all actions, causes of action, claims, demands, liabilities, obligations, damage claims, restitution claims, injunction claims, declaratory relief claims, fees (including attorneys' fees), costs, sanctions, proceedings and/or rights of any nature and description whatsoever, whether legal or equitable, including, without limitation, violations of any state or federal statutes and laws, rules or regulations, or principles of common law, whether known or unknown, suspected or unsuspected, had, possessed, owned or held, in law, equity, arbitration or otherwise, that were or could have been asserted by the Named Plaintiffs and/or the Settlement Class against Releasees based on, arising out of, or related to the allegations in the Lawsuit, including but not limited to any allegations that customers were overcharged for interactive football video games because of EA's exclusive agreements with

members, Electronic Arts has expressly agreed not to insist on a general release of liability.

E. Notice and Implementation of the Settlement

Under the Settlement Agreement, Class Counsel will provide direct notice to Settlement Class Members where possible by (1) e-mail notice (where available) or (2) postcard notice (if an e-mail address is not available, but a physical address is), in forms substantially similar to the forms filed with this motion.[39] The parties believe that 53 percent of class members will receive direct notice.[40] In addition, the Settlement Agreement provides for a content-neutral settlement website (www.easportslitigation.com) managed by a third-party administrator, which will provide further information about the settlement, including relevant pleadings and settlement documents.[41] Notice will also be given by publication to the extent necessary to meet Constitutional or statutory requirements, substantially in the form filed with this motion.[42] Electronic Arts will also provide notice by mail to state agencies and the U.S. Attorney General pursuant to the Class Action Fairness Act.[43]

The Settlement Agreement requires Settlement Class Members who wish to object to any aspect of the Settlement to file with the Court, and serve on Class Counsel, a written statement containing their objection by the Exclusion/Objection Deadline, as provided in the Class Notice.[44] Class Counsel will fax or e-mail each objection to counsel for Electronic Arts upon receipt. Settlement Class Members who wish to exclude themselves from the Settlement Agreement must

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trademark licenses with the National Football League and its Players' Association, the Arena Football League, the Collegiate Licensing Company, the National Collegiate Athletic Association, and/or ESPN. *Id.* at 8, ¶ 1(aa).

[39] *Id*. at 16, ¶ 17; *see also* Berman Decl., Exs. B, C, D & E.

[40] Declaration of Daniel Burke re Dissemination of Class Notice ("Burke Declaration"), ¶ 15, filed concurrently herewith.

[41] Berman Decl., Ex. A, at 16, ¶ 17.

[42] Berman Decl., Exs. B, C, D & E.

[43] Berman Decl., Ex. A, 16, ¶ 17.

[44] Berman Decl., Ex. A, 18 ¶ 26; *see also*, Berman Decl., Ex. B.

serve on Class Counsel a written request for exclusion by the Exclusion/Objection Deadline.[45] Class Counsel shall provide a copy of all requests for exclusion to counsel for Electronic Arts on a biweekly basis, and shall submit to the Court the name, city and state of residence of all Settlement Class Members requesting exclusion with the motion for final approval.[46]

Plaintiffs' proposed schedule for Class Notice and for deadlines for the motion for attorney's fees and/or incentive awards, Exclusions/Objections, claim forms, the Motion for Final Approval, and the final Fairness Hearing are filed concurrently with this motion.

IV. ARGUMENT

A. The Court's Role in Approving a Class Action Settlement

Federal Rule of Civil Procedure 23(e) requires judicial approval of any compromise or settlement of class action claims. Approval of a settlement is a multi-step process, beginning with preliminary approval, which then allows notice to be given to the class and objections to be filed, after which there is a motion for final approval and Fairness Hearing.[47] Preliminary approval is thus not a dispositive assessment of the fairness of the proposed settlement, but rather determines whether it falls within the "range of possible approval."[48] Preliminary approval establishes an "initial presumption" of fairness,[49] such that notice may be given to the class and the class may have a "full and fair opportunity to consider the proposed [settlement] and develop a response."[50]

Preliminary approval is appropriate if: "1) the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, 2) has no obvious deficiencies, 3) does not improperly grant preferential treatment to class representatives or segments of the class, and 4)

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[45] Berman Decl., Ex. A, 18 ¶ 27.

[46] *Id.*

[47] *See* Manual for Complex Litigation (Fourth) § 21.632, 320-21 (2004). All internal citations and quotations omitted and all emphasis added, unless otherwise indicated.

[48] *Id.*; *see also Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-02 (E.D. Cal. 2011).

[49] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

[50] *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

falls with[in] the range of possible approval."[51] Only after the class has received notice and had the opportunity to respond, opt-out and/or object to the settlement, does the case proceed to final approval and a final fairness hearing.

In making the decision on final approval, the Court must find that the settlement, "taken as a whole is fair, reasonable, and adequate."[52] In so doing, courts weigh the following factors:

> 1) the strength of the plaintiff's case; 2) the risk, expense, complexity, and likely duration of further litigation; 3) the risk of maintaining class action status throughout the trial; 4) the amount offered in settlement; 5) the extent of discovery completed and the stage of the proceedings; 6) the experience and views of counsel; 7) the presence of a governmental participant; and 8) the reaction of the class members of the proposed settlement.[53]

Before final approval can be granted, the Court must also satisfy itself that the settlement and negotiations were free from collusion.[54] In particular, the Court must consider the provisions relating to an award of attorney's fees or incentive awards to class representatives and the benefits to the class together to ensure that class counsel have not "allowed pursuit of their own self-interests and that of certain class members to infect the negotiations."[55] "[I]t is the settlement ***taken as a whole, rather than the individual component parts***, that must be examined for overall fairness."[56] The decision to approve a proposed settlement rests within the sound discretion of the Court.[57]

B. The Proposed Settlement Merits Preliminary Approval Because It Provides Substantial Value to the Class in a High-Risk Case, and Is the Product of Informed and Non-Collusive Negotiation.

The settlement proposed in this case easily clears the hurdles for preliminary approval. It

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[51] *Collins*, 274 F.R.D. at 301-02.

[52] *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

[53] *Id.*

[54] *Id.* at 946-47.

[55] *Id.* at 947.

[56] *Id.* at 948 (emphasis in the original, internal alteration omitted).

[57] *The Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624-25 (9th Cir. 1982).

secures significant injunctive relief for the class in the form of Electronic Arts' agreement to refrain from entering into certain exclusive licensing arrangements at the heart of this litigation for a period of five to seven years (depending on the licensor). Moreover, as an all-in settlement with no reversion, it secures a significant common fund for the Settlement Class Members and will ensure a recovery on their claims that is proportionate to the risks and delay they would face if the litigation continued. In addition, the settlement was reached through informed arms-length negotiation, in a mediation conducted before former U.S. District Court Judge Layn R. Phillips, with no evidence of collusion or conflict with the interests of the class.

1. The Parties Can Identify the Strengths and Weaknesses of Their Positions.

The stage of the litigation is one factor in weighing the fairness and adequacy of a proposed settlement.[58] When litigation has proceeded to the point where "the parties have sufficient information to make an informed decision about settlement," this factor weighs in favor of approval.[59] This case has been extensively litigated in the over four years since it was filed. The parties conducted formal discovery over the course of nearly three years. They have produced and reviewed over 2,000,000 pages of documents, responded to over fifty written interrogatories, and conducted twenty-five depositions.[60] Plaintiffs have thus had access to significant information concerning Electronic Arts' conduct with respect to the exclusive licenses. Plaintiffs' expert also had access to this information, sufficient to allow the development of his opinion and report on the claims and defenses related to liability and damages.[61]

The parties had further opportunities to test the legal and factual strengths of their case during their two mediations – the most recent before a retired U.S. District Court Judge. Based on years of litigating the case and engaging in extensive formal discovery, the parties understood the strengths and weaknesses of their cases and had sufficient information to support their decision

[58] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

[59] *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998).

[60] Berman Decl., ¶ 2.

[61] *Id.* at ¶ 3.

regarding the fairness and adequacy of the proposed settlement.

2. The Settlement Confers a Substantial Benefit to the Class and Is Appropriately Balanced Against the Risks of Continued Litigation.

In evaluating the substantive fairness and adequacy of a proposed settlement, courts look at the "plaintiffs' expected recovery balanced against the value of the settlement offer."[62] In so doing, courts must bear in mind that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'"[63] "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation."[64] This consideration is consistent with and reflects the final fairness factors concerning the strength of the plaintiffs' claims; the risk, expense, complexity and likely duration of further litigation; and the risk of maintaining class action status throughout trial.[65]

Here, the class has already been waiting through over four years of litigation, the continuation of which poses significant risks related to the continuing viability of the class certification, and to the merits of the claims and damages. Each of these factors weighs in support of the current settlement.

a. Plaintiffs Face a Significant Risk of Not Being Able to Litigate Their Claims on a Class-Wide Basis.

Another factor courts consider in weighing the fairness of a proposed settlement is the risk of being able to maintain class action status through the trial of the matter.[66] Because each class member's claim in this case is small – the case centers around potential overcharges of between $1.95 and $6.79 – the inability to proceed as a class would have a significant impact on individuals' likelihood of recovering at all, as one of the benefits of a class action is to allow

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[62] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080.

[63] *Officers for Justice*, 688 F.2d at 624.

[64] *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)

[65] *See In re Bluetooth*, 654 F.3d at 946.

[66] *Id.*

1 pursuit of claims that would be cost-prohibitive on an individual basis.[67]

2 Here, although a nationwide class was already certified under California law, in the time
3 since certification, the Ninth Circuit issued its opinion in *Mazza v. American Honda Motor Co.*, in
4 which the court held that, under the facts in that case, California's consumer protection and unjust
5 enrichment laws could not be applied to a nationwide class.[68] Electronic Arts has said that if this
6 litigation proceeds, it intends to file a motion to decertify the class in part on the basis of *Mazza*'s
7 holding. An additional basis for Electronic Arts' decertification motion will be the Supreme
8 Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,[69] and the Ninth Circuit's subsequent decision
9 in *Ellis v. Costco Wholesale Corp.*,[70] in which those courts held that a district court judge is
10 required, on a class certification motion, to "resolve any factual disputes necessary to determine"
11 whether the requirements of Rule 23 have been met.[71] Electronic Arts claims that these cases
12 undermine Chief Judge Walker's certification decision in this case because Judge Walker certified
13 the class based on Plaintiffs' expert's "conceivable" theory of common impact, rather than
14 engaging in a full "battle of the experts" on the issue.[72]

15 While Class Counsel believe they have a reasonable chance of overcoming Electronic Arts'
16 threatened motion to decertify the class – primarily on the arguments that (1) the facts of this case
17 are distinguishable from *Mazza* and (2) Electronic Arts lost its opportunity to bring any
18 decertification motion based on *Dukes* and *Ellis* – Class Counsel cannot ignore the fact that the
19 cases raised by Electronic Arts pose significant risk that the Court may decide to decertify the
20 class. And, because of the small size of their individual claims, such a ruling could foreclose
21 recovery completely for most – if not all – class members. In addition, engaging in a second full
22 battle regarding class certification would only lead to further delays for a class that has already

23 [67] *See, e.g.*, *Cohen v. District of Columbia Nat'l Bank*, 59 F.R.D. 84, 90 (D.D.C. 1972).
24 [68] 666 F.3d 581, 590-94 (9th Cir. 2012).
25 [69] _U.S._, 131 S.Ct. 2541 (2011).
26 [70] 657 F.3d 970 (9th Cir. 2011).
[71] *Id.* at 982-83.
27 [72] Class Certification Order at 5, 48-49.
28

been waiting over four years for a resolution.

b. Continued Litigation Poses Substantial Risks and Costs in Establishing Liability and Damages.

In addition to the threat of class decertification, Electronic Arts has vigorously challenged Plaintiffs' ability to prove liability and damages, and Plaintiffs face multiple additional challenge points if this case continues. *First*, Electronic Arts has challenged a key element of Plaintiffs' antitrust claims: the definition of the "relevant market." Electronic Arts claims that Plaintiffs' characterization of a market for interactive football video games does not reflect the reality of the video game industry, and that instead, the "relevant market" should be much broader – perhaps even as broad as all video games. Although Plaintiffs believe they have sufficient evidence to defend their narrower market definition, there is a risk that Electronic Arts could prevail on this challenge, either at summary judgment or at trial, undercutting Plaintiffs' entire theory of liability.

Second, Electronic Arts has further challenged Plaintiffs' ability to prove liability on the basis that Electronic Arts was not the driving force behind the exclusive licenses at the heart of this litigation, arguing that instead it was the Licensors themselves who drove the adoption of the exclusive licensing agreements that produced the alleged antitrust injury to the class. Although Plaintiffs believe there is evidence to the contrary (in addition to believing the question is legally irrelevant), there is a risk that either the Court or the jury will credit Electronic Arts' version over Plaintiffs' version of events.

Even if Plaintiffs prevail on liability, however, there is a risk that Electronic Arts could prevail on two damages-related contentions. As an initial matter, Electronic Arts contends that Plaintiffs' class definition is fundamentally flawed because it includes both Sixth Generation and Seventh Generation purchases – when (even according to Plaintiffs' expert) the provable overcharge on Seventh Generation purchase was substantially less. Although Plaintiffs believe that Electronic Arts' supra-competitive pricing existed on both Sixth and Seventh Generation, there is a risk that Electronic Arts could succeed in convincing the Court that Seventh Generation purchasers should not be included in the class at all. The proposed settlement thus offers a clear benefit to class members in that it includes Seventh Generation purchases and thus avoids the risk that class

members would recover nothing for Seventh Generation purchases.

In addition, Electronic Arts has challenged the basic premise of the alleged antitrust injury, claiming that Plaintiffs have no proof that Electronic Arts ever charged above-market prices for its football video games since market conditions in the video game industry lead to "standardized" launch pricing for all "premium" games. Plaintiffs believe they have evidence that where Electronic Arts continued to face competition from Take-Two, Electronic Arts launched its games at below "premium" prices on Sixth Generation consoles, as well as expert economic analysis showing that the class was damaged by paying higher prices than they would have absent the exclusive agreements at issues. However, there is a risk that either the Court or the jury will disagree and that Electronic Arts could prevail on this issue, effectively eliminating any damages for the class.

Thus, if this litigation proceeds, in addition to the assured additional delay, there is a risk that the class members will walk away empty-handed, or with a significantly reduced recovery. The proposed settlement eliminates this risk and secures a multi-million dollar recovery for the class now.

3. The Settlement Is the Result of Non-Collusive Negotiations and Is Fair to the Class.

This settlement also arises out of extended, informed, arms-length negotiations. As described above, the parties reached this agreement only after nearly four years of litigation, discovery and investigation, two formal mediations, and multiple conferrals of counsel and the parties concerning settlement constructs and amounts. Both mediations were run by neutral mediators, which is a factor in favor of a finding of non-collusiveness,[73] and one mediator was a retired U.S. District Court Judge. This prolonged process reflects the vigor with which both sides represented their interests, including those of the class as whole.

In addition, the settlement itself, taken as a whole, bears no signs of collusion or conflict. In its opinion in *In re Bluetooth*, the Ninth Circuit admonished that courts must, at the final approval

[73] *See In re Bluetooth*, 654 F.3d at 948.

1 stage, ensure that the settlement, taken as a whole, is free of collusion or any indication that the
2 pursuit of the interests of the class counsel or the named plaintiffs "infected" the negotiations.[74] In
3 that case, the proposed settlement provided no monetary relief to the class and only a $100,000 *cy*
4 *pres* award, but set aside up to $800,000 for attorney's fees for class counsel, with amounts not
5 awarded reverting back to the defendant.[75] While there was no overt evidence of collusion, the
6 court noted that three factors were particularly troubling as signs of a potential disregard for the
7 class' interests during the course of negotiation:

8 > 1) when counsel receive a disproportionate distribution of the
9 > settlement, or when the class receives no monetary distribution but
> class counsel are amply rewarded;
10
> 2) when the parties negotiate a 'clear sailing' arrangement providing
11 > for payment of attorneys' fees separate and apart from class funds,
> which carries 'the potential of enabling a defendant to pay class
12 > counsel excessive fees and costs in exchange for counsel accepting
> an unfair settlement on behalf of the class'; and
13
> 3) when the parties arrange for fees not awarded to revert to
14 > defendants rather than be added to the class fund.[76]

15 District courts applying *In re Bluetooth* have refused to approve settlements where the class
16 counsel's compensation exceeds that of the class or far outstrips the benchmark, where the final
17 payout to the class is limited by opt-in procedures while the class counsel's recovery is unaffected,
18 and where undistributed or unawarded funds revert to the defendant.[77] In those cases, courts have
19 found that the interests of counsel were no longer coincident with the interests of class, and
20 therefore approval was not warranted.
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22 [74] *Id*. at 946-48.

23 [75] *Id*. at 938.

[76] *Id*. at 947.

24 [77] *See, e.g.*, *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2012 U.S. Dist. LEXIS
49160 (N.D. Cal. April 6, 2012) (claim-in class where low participation rate yielded an actual
25 payout of $67,825, compared to attorney fees of $350,000); *Harris v. Vector Mktg. Corp.*, No. C-
08-5198, 2011 U.S. Dist. LEXIS 117927 (N.D. Cal. Oct. 12, 2011) (settlement provided for $4
26 million dollar award to class counsel, but required class members to claim in with unclaimed funds
reverting to the defendant, and the actual payout to the class was only $999,138 due to the low
27 claims rate).

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Here, none of those signs are present. The proposed settlement here is a common fund, all-in settlement with no possibility of reversion. The entire fund will be used to cover costs and fees and compensate Settlement Class Members based on a pro rata formula. In the event that some funds cannot be distributed, they do not revert to Defendant, but are to be distributed to a *cy pres* entity. In addition, while Defendant agreed not to object to a request for attorney's fees within certain limits, there is no provision for a payment of fees separate and apart from the class funds; to the contrary, Class Counsel must apply to the Court for fees as a percentage of the total fund. Moreover, there is no "kicker" provision like the one in *In re Bluetooth* which would allow unawarded fees to revert to the defendant. Instead, the settlement directs the benefit of Electronic Arts' "overall willingness to pay" to the class as a whole, in the form of a comprehensive $27 million settlement fund, and only allows Class Counsel the opportunity to apply for a portion of those funds as fees and costs.[78]

Finally, the provisions in the Settlement Agreement allowing counsel to apply, without objection from Electronic Arts, for up to thirty percent of the fund is well within accepted guidelines for a proportional distribution. In cases involving a common fund, twenty-five percent of the fund is typically considered the "benchmark" for an award of attorney's fees.[79] Courts may deviate up or down from the benchmark to reflect the special circumstances of the case, including the length and complexity of the litigation and the degree of success.[80] While there is no request yet pending before the Court, the Settlement Agreement's provision allowing counsel to apply for an amount slightly above the benchmark is reasonable in light of this case law. And of course, the Court retains the ability to deny or modify Class Counsel's request for fees and expenses.

4. The Recommendation of Experienced Counsel Weighs in Favor of Approval.

In the context of a non-collusive settlement like this one, the belief of experienced counsel that settlement is in the best interests of the class and accurately reflects the strengths and

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[78] *See In re Bluetooth*, 654 F.3d at 948-49.

[79] *Id.* at 942.

[80] *Id.*; *see also Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1127 (9th Cir. 2002).

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weaknesses of the claims also favors approval of the settlement.[81] Counsel for Plaintiffs in this case are experienced in class actions and fully support the settlement.[82] It is their informed opinion that, given the uncertainty and expense of pursuing this case through trial, the settlement is fair, reasonable and adequate and in the best interests of the Settlement Class.[83]

C. The Court Should Reaffirm the Appointment of Class Counsel

At the class certification stage, Judge Walker appointed Hagens Berman Sobol Shapiro LLP and The Paynter Law Firm PLLC as Class Counsel.[84] Class Counsel requests that this appointment be reaffirmed. Under Rule 23, the appointment of class counsel, to "fairly and adequately represent the interests of the class" is required.[85] In making this determination, the Court must consider counsels': (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class.[86]

Here, Hagens Berman Sobol Shapiro LLP and The Paynter Law Firm PLLC have spent a significant amount of time both identifying the potential claims in this action and pursuing the relevant discovery. Class Counsel are recognized experts in consumer law and class action litigation, and both firms have been previously appointed class counsel in major consumer class action cases.[87] Class Counsel have, historically, committed their full resources to representing this class, and will continue with that commitment in resolving this case and administering the settlement. Class Counsel requests that they be allowed to continue representing the class.

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[81] *See Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988).

[82] Berman Decl., ¶ 7, and Exs. F & G.

[83] *Id.*

[84] *Pecover v. Elec. Arts Inc.*, No C 08-2820, 2010 U.S. Dist. LEXIS 140632, at *69 (N.D. Cal. Dec. 21, 2010).

[85] Fed. R. Civ. P. 23(g)(1)(A), (B).

[86] Fed. R. Civ. P. 23(g)(1)(A).

[87] *See* Berman Decl., Exs. F&G.

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D. The Proposed Class Notice and Deadlines for Implementation of the Settlement Should Be Approved.

Rule 23(e)(1) requires that a court approving a class action settlement must "direct notice in a reasonable manner to all class members who would be bound by the proposal." In addition, for Rule 23(b)(3) class, the Rule requires the court to "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 effort."[88] A class action settlement notice "is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard."[89]

The proposed plan of notice is supported by an experienced notice and claims administrator – Gilardi & Co. – who has worked cooperatively with counsel to develop the proposed plan of notice. Gilardi submits a declaration in support of the proposed notice plan attesting to its adequacy and constitutionality.[90] The proposed form of notice provides all information required by Rule 23(c)(2)(B) to the settlement class, in language that is plain and easy to understand. In addition, the parties have identified and will provide personal notice to class members where possible through direct mail and e-mail. The parties believe that 53 percent of class members will receive direct notice.[91] Further, the use of a settlement website, combined with personal notice and publication in a newspaper, is recognized as a valid and effective method for providing notice to class members.[92] In addition, these forms of notice will be supported by an online campaign that will provide sponsored links to the settlement website on major search engines, including Google, Bing and Yahoo, alerting individuals conducting searches on relevant terms about the settlement. These

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[88] Fed. R. Civ. P. 23(c)(2)(B).

[89] *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *see also* Fed. R. Civ. P. 23(c)(2)(B) (describing specific information to be included in the notice).

[90] *See* Burke Decl., ¶¶ 1-49.

[91] *Id.*, ¶ 15.

[92] *See e.g. Walsh v. Great Atl. & Pac. Telectronic Arts Co.,* 726 F.2d 956, 962-64 (3d Cir. 1983) (affirming notice where direct mailing to most recent address and publication in two newspapers); *In re Tableware Antitrust Litig*., 484 F. Supp. 2d at 1080 (approving notice via publication in a newspaper and website as best notice practicable).

notice provisions meet the requirements of Rule 23 and will allow the class a full and fair opportunity to review and respond to the proposed settlement.

The proposed schedule also allows adequate time for the class to file any objections to the settlement or fee application. After consultation, the parties propose the following schedule, presuming that this Court will preliminarily approve the settlement at the September 27, 2012 hearing or shortly thereafter:

Event	Due Date
Complete e-mail notice	October 19, 2012
Post long form notice to website	October 19, 2012
Complete mail notice	October 29, 2012
Complete notice by publication in newspapers	November 5, 2012
Motion for Attorney Fees and Incentive Awards Due	November 26, 2012
Exclusions deadline	December 10, 2012
Objections deadline	December 10, 2012
Motion for Final Approval and Responses to Any Objections	January 3, 2013
Final Fairness Hearing	Thursday, February 7, 2013 at 2:00pm
Claim form deadline	March 5, 2013

V. CONCLUSION

Wherefore, Plaintiffs respectfully request that this Court enter an order: 1) preliminarily approving the proposed class action settlement; 2) appointing Hagens Berman Sobol Shapiro LLP and The Paynter Law Firm PLLC as Class Counsel; 3) approving and directing the dissemination of the Notice of Proposed Settlement in a form substantially similar to the forms attached hereto; 4) approving the proposed methods and procedures for providing notice; 5) adopting the proposed

1 schedule for the Final Approval Hearing and other deadlines related to administration of the
2 settlement; and 6) temporarily barring and enjoining the institution or continued prosecution by
3 Plaintiffs or other class members of any action asserting the claims released in this proposed
4 settlement.
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6 DATED: July 20, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2012, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

/s/ Steve W. Berman
STEVE W. BERMAN