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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re SONY PS3 "OTHER OS" LITIGATION

Case No. 4:10-CV-01811-YGR

PLAINTIFFS' RENEWED NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF CLASS; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF

Date: May 29, 2018
Time: 2:00 p.m.
Judge: Honorable Yvonne Gonzalez Rogers
Courtroom: 1, 4th floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

NOTICE OF MOTION AND MOTION

TO THE CLERK, AND ALL PARTIES AND THEIR COUNSEL OF RECORD, AND ALL INTERESTED PERSONS:

PLEASE TAKE NOTICE that on May 29, 2018 at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 1, 4th Floor of the United States District Court, 1301 Clay Street, Oakland, California, 94612, before the Honorable Yvonne Gonzalez Rogers presiding, Plaintiffs Derrick Alba, Jason Baker, James Girardi, Jonathan Huber, and Anthony Ventura, ("Plaintiffs") will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for final approval of the class action settlement before it, and for an order:

1. Granting final approval of the new Stipulation of Class Action Settlement and Release ("New Settlement" or "New Agreement") they have reached with Defendant in this matter;

2. Certifying the Class and Settlement Class; and

3. Entering Judgment in this matter.

The grounds for this motion are that the proposed New Settlement is fair, reasonable and adequate, as set forth in the accompanying memorandum of points and authorities. Plaintiffs' motion is based on this notice; the attached memorandum of points and authorities; the accompanying declaration of Gordon M. Fauth, Jr., and the exhibits thereto; the accompanying declaration of Brandon Schwartz, the Director, Notice & Media of Garden City Group, LLC, and the exhibits thereto; the accompanying [Proposed] Order Granting Final Approval of Class Settlement; the accompanying [Proposed] Judgment; all documents and records on file in this matter; the argument and presentations of counsel at the hearing; and all other matters that the Court may deem to consider.

DATED: May 8, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Derrick Alba, Jason Baker, James Girardi, Jonathan Huber, and Anthony Ventura, hereby submit their renewed motion for final approval of the Stipulation of Class Action Settlement and Release ("New Settlement" or "New Agreement")[1] they reached on or around August 24, 2017 with Defendant Sony Computer Entertainment America LLC, currently known as Sony Interactive Entertainment America LLC (referred to herein as "Defendant," "Sony" or "SCEA"). Plaintiffs also request that the Court certify the class provisionally certified in its preliminary approval order ("Settlement Class" or "Class") for settlement purposes.

This action arose out of SCEA's marketing and sale of certain versions of the Sony PlayStation®3 game consoles that were sold between November 1, 2006 and April 2010 ("Fat PS3"). Plaintiffs allege SCEA marketed Fat PS3 as having the ability to run an alternative operating system such as Linux in addition to the native game operating system ("Other OS"), and that SCEA subsequently removed the "Other OS" functionality via firmware update 3.21, harming PS3 purchasers.[2] Throughout the pendency of the case, Defendant has denied any liability, arguing that it had the right to remove the Other OS pursuant to its terms of service and other agreements, and that the Other OS was not a material functionality for the vast majority of purchasers.

After nearly seven years of litigation that included the appeal of the dismissal of the entire case, partially reversed in the Ninth Circuit Court of Appeals, subsequent litigation including transfer to two additional judges, a denial of final approval of the initial settlement, a third mediation under the auspices of the Honorable James Lambden (Ret.), and many additional months of negotiations, the parties entered into a New Settlement which the Court preliminarily approved on November 21, 2017. In rejecting the prior settlement, the Court expressed concerns about the proof required to submit a claim under the

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[1] Unless otherwise stated, capitalized terms have the same meaning as in the New Agreement, attached as Exhibit A to the accompanying Declaration Of Gordon M. Fauth In Support Of Plaintiffs' Renewed Motion For Final Approval Of Class Action Settlement And Certification Of Settlement Class ("Fauth Decl.").

[2] The ability to run Linux allowed the Fat PS3 to be used as a general purpose computer to run thousands of available business and personal applications and programs.

settlement, the overall low claims rate, and the disproportionality of attorneys' fees versus the payout to the Class. The New Settlement addresses each of these concerns. Indeed, as of this writing, not a single objection has been lodged against the New Settlement.

Unlike the prior claims-made settlement, the New Settlement establishes a settlement fund of $3.75 million, from which will be paid compensation to Class members on a pro rata basis, as well as notice and administration costs, attorneys' fees and expenses, and any court-approved service awards. Unlike the previous settlement, there is a single Class instead of two. Extrinsic proof of use of Other OS is no longer required, and each Class member who believes that he or she was financially harmed by the removal of the Other OS functionality through the PS3 firmware update may receive up to $65 (subject to a pro rata reduction, which, as discussed herein, will be the case). Claimants who previously submitted claims were *not* required to submit new claims; rather, they were automatically deemed claimants under the New Settlement.

As ordered by the Court, notice of the New Settlement was provided to Class members. Class member response has been enthusiastic, with a dramatic rise in claims rate. Under the Prior Settlement, approximately 11,300 claims were submitted. (*See* Fauth Decl. ¶ 20.) Under the New Settlement, with a claim deadline of April 15, 2018, to date, 263,841 new claims have been received by the settlement administrator. (*See* Declaration of Brandon Schwartz Regarding Notice and Settlement Administration ("Schwartz Decl.") ¶ 29 (New Settlement claims statistics) for a total of 275,169 timely claims when the previously submitted claims are added. While some claims have been deemed ineligible for various reasons (e.g., foreign submissions, duplicate claims, ineligible PS3 units), it appears that more than 197,000 claims will be paid from this Settlement. (*see id.* ¶¶ 29-30.) The claims administrator has received only 40 opt-out requests; and there have been no objections to the Settlement. (*Id.* ¶ 32.) The number of claims and proportion to opt-outs/objections reflects a highly favorable reaction from the Class.

The restructuring of the settlement provides a much higher ratio of Class benefit to attorneys' fees. As set forth in their pending motion for attorneys' fees, the attorneys now are seeking only one-third of the Settlement Fund, or $1.25 million, for both fees and expenses. This is approximately half of what they had sought in the previous claims-made settlement, and far less than their collective lodestar of over $5.6 million. Assuming the Court awards fees and expenses of $1.25 million, service awards of $17,500, and notice/administration costs of approximately $495,650, that will leave almost $2 million

that will be given directly to claimants. That is, there will be a nearly ten-fold increase in the amount of the total payout to the Class as a whole compared to the previous settlement where, because of a low claims rate, Sony would have paid only some $209,700 to class members.

In sum, by creating a fund, eliminating the extrinsic proof requirements, and raising the potential payout per claim, the number of claims has been multiplied by a factor of 20; and the total payout to the Class as a whole will be some ten times higher than under the Prior Settlement. The New Settlement, if approved, will provide cash payments to more than 197,000 Class Members who would not otherwise have received *any* compensation for the alleged wrongdoing by SCEA, while vindicating consumer rights under California's consumer protection statutes.

For these and other reasons set forth herein, the New Settlement is fair, reasonable and adequate, and Plaintiffs respectfully request that the Court grant final approval to the Settlement.

II. BACKGROUND AND PROCEDURAL SUMMARY.

A. The Consolidated Action.

On April 1, 2010, Defendant SCEA issued firmware update 3.21, which removed the "Other OS" functionality of the Sony "Fat" PS3. Loss of the Other OS capability meant that owners of the Fat PS3 could no longer run the Linux operating system and use the thousands of business and personal applications and programs available under Linux. Thereafter, various plaintiffs filed class action cases against SCEA, beginning on April 27, 2010.[3] The Honorable Richard Seeborg consolidated the cases as *In re Sony PS3 "Other OS" Litigation* and appointed the firms of Finkelstein Thompson LLP, Hausfeld LLP and Calvo & Clark LLP (now Calvo Fisher & Jacob LLP) as Interim Co-Lead Counsel. (Dkt. No. 65.)

Plaintiffs filed the Consolidated Class Action Complaint ("Consolidated Complaint") on July 30, 2010, alleging causes of action for statutory violations of the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"); the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. ("CLRA"); the False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq*. ("FAL"); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq.*; and the Magnuson-Moss Warranty Act, 15 U.S.C. §

[3] On April 27, 2010, the case titled *Ventura v. Sony Computer Entertainment America Inc.* ("*Ventura*"), 3:10-cv-01811-RS was filed in the United States District Court for the Northern District of California. Several additional plaintiffs filed cases in the weeks thereafter.

2301, *et seq.* (*See* Dkt. No. 76.) Plaintiffs also alleged common law claims for breach of express warranty; breach of the implied warranty of merchantability; breach of the implied warranty of fitness for a particular purpose; conversion and unjust enrichment. (*Id.*) Plaintiffs sought damages, restitution and injunctive relief. (*Id.*)

B. SCEA's Challenges to the Pleadings and Subsequent Appeal.

On September 10, 2010, SCEA moved to dismiss the Consolidated Complaint on several grounds and moved to strike the class allegations. (Dkt. Nos. 96-97.) Plaintiffs filed oppositions to SCEA's motions on October 12, 2010, and SCEA filed its reply briefs on October 21, 2010. (Dkt. Nos. 103-106.) Judge Seeborg heard the motions on November 4, 2010, and on February 17, 2011, entered an order granting in part, and denying in part, the motion to dismiss (with leave to amend), and denied the motion to strike. (Dkt. Nos. 108, 161.)

Plaintiffs filed the First Amended Consolidated Class Action Complaint on March 9, 2011. (Dkt. No. 165.) On April 28, 2011, SCEA again moved to dismiss. (Dkt. No. 168.) Judge Seeborg heard SCEA's motion to dismiss on July 21, 2011. (Dkt. No. 179.) On December 8, 2011, Judge Seeborg entered an order dismissing the action without leave to amend. (Dkt. No. 185.)

Plaintiffs filed a Notice of Appeal on December 22, 2011. (Ninth Circuit Case 11-18066; Dkt. No. 193.) The Ninth Circuit heard oral argument on October 11, 2013. (Dkt. No. 32.) On January 6, 2014, the Ninth Circuit affirmed in part, and reversed in part, the dismissal of Plaintiffs' case. *See In re Sony PS3 "Other OS" Litig. v. Sony Computer Entm't Am., Inc.,* 551 Fed. Appx. 916 (9th Cir. 2014). The Ninth Circuit held that the district court erred in dismissing the UCL claims for violations of the fraud and unfair prongs, the FAL claim, and the CLRA claims for violations of Sections 1770(a)(5) and (a)(7). The Ninth Circuit affirmed the district court's dismissal of the remaining claims and remanded the case back to the district court.

Plaintiffs filed the Second Consolidated Class Action Complaint on May 29, 2014, which SCEA answered on June 27, 2014. (Dkt. Nos. 213, 219.)

C. The Parties Took Significant Discovery in the Case.

The Parties engaged in extensive discovery both before and after the appeal. (*See* Fauth Decl., ¶¶ 10-13, 16.) While SCEA's motions to dismiss and strike were pending, each party served written discovery. (*Id.*) Having reached an impasse on several discovery issues, such as whether Plaintiffs had to produce their PS3s and personal computers for SCEA's inspection, Plaintiffs moved for a protective

order and filed a motion to compel other discovery on December 15, 2010. (Dkt. No. 111-12.) SCEA opposed Plaintiffs' motions to compel and for a protective order on January 18, 2011, and Plaintiffs filed reply briefs on January 26, 2011. (Dkt. Nos. 124-125, 142.) SCEA filed a motion to compel discovery on December 15, 2010. (Dkt. Nos. 116, 131,139.)

After hearing oral argument, (then Magistrate) Judge Edward M. Chen issued an order granting in part and denying in part Plaintiffs' motion to compel and motion for a protective order. (Dkt. No. 152.) Judge Chen ordered the Plaintiffs to produce their PS3s for imaging, but not their personal computers as requested by SCEA, and that Plaintiffs could direct focused discovery at SCEA's Japanese parent corporation. (*Id.)* Further discovery disputes arose, however, surrounding the details of the PS3 imaging process, the depositions of the named plaintiffs, and the scope of discovery to be served on SCEA's parent company. Judge Chen issued an order regarding the disputes on April 11, 2011. (Dkt. No. 172.) SCEA also deposed two of the named plaintiffs before the case was dismissed with prejudice by Judge Seeborg. (*See* Fauth Decl. ¶ 10.)

After the appeal was resolved in 2014, the Parties restarted discovery. (*Id.* ¶ 16.) SCEA deposed the remaining three named plaintiffs and inspected the PS3s of all of the named plaintiffs. (*Id*.) Plaintiffs also responded to interrogatories and document requests propounded by SCEA. (*Id*.) Plaintiffs deposed six SCEA witnesses, three of whom were designated to testify on behalf of SCEA pursuant to Fed. R. Civ. P. 30(b)(6). (*Id*.) Plaintiffs also reviewed tens of thousands of pages of documents produced by SCEA, as well as SCEA's responses to their interrogatories. (*Id.*)

D. <u>The Prior Settlement.</u>

While SCEA's second motion to dismiss was pending in 2011, the Parties participated in an initial private mediation before the Honorable James L. Warren (Ret.) of JAMS on July 7, 2011. (Fauth Decl. ¶¶ 12-13.) The Parties were unable to reach a settlement that day, and Judge Seeborg's order dismissing the case ended those settlement discussions. (*Id.*)

After the successful appeal, and after completing additional discovery, the Parties renewed their settlement efforts. (*Id.* ¶ 17.) The Parties participated in a second mediation before the Honorable Howard Weiner (Ret.) on August 20, 2015. (*Id*.) In preparation for the mediation, the Parties again prepared detailed mediation briefs that took into account the Ninth Circuit's decision from 2014 as well as key evidence that had been discovered in the case in support of the Parties' respective positions. (*Id*.)

While the parties were unable to reach an agreement on all terms that day, they did make substantial progress and continued to engage in discussions. (*Id*.)

Over the next months, the parties had numerous teleconferences until they finally signed a Memorandum of Understanding ("MOU") in January 2016. (*Id.*) Once the MOU was fully executed, the Parties proceeded to negotiate and finalize the prior settlement ("Prior Settlement") that was ultimately denied final approval by this Court. This process was arduous as the details of many key terms required further negotiation. (*Id*.) Indeed, it took nearly five months for the Parties to negotiate and execute the Stipulation of Class Action Settlement and Release ("Prior Settlement"), filed on June 17, 2016. (*Id.*)

Under the Prior Settlement, there were two Classes - A and B. SCEA agreed to pay $55 to each Class A member who utilized the Other OS functionality (Consumer Class A) and submitted a valid claim. (Fauth Decl. ¶ 18.) Class A claimants were required to attest under oath to their installation of Linux and submit proof of their use of the Other OS functionality; and also provide proof of their purchase or their PS3 unit's serial number and PlayStation Network Sign-in ID. (*Id.*) At the second level of compensation, SCEA agreed to pay $9.00 to each Class B member who, at the time of purchase, knew about the Other OS, relied upon the Other OS functionality, and intended to use the Other OS functionality. (*Id.*) Alternatively, a member of Consumer Class B could attest that he or she lost value and/or desired functionality or was otherwise injured as a consequence of Firmware Update 3.21. (*Id.*) Consumer Class B claimants were also required to attest to their purchases and provide proof of purchase or a PS3 serial number and PlayStation Network Sign-in ID. (*Id.*)

Plaintiffs' motion for preliminary approval of the Prior Settlement was heard on July 19, 2016; and, after requiring Plaintiffs to supplement the record, on September 8, 2016, the Court issued its Order preliminarily approving the Prior Settlement and ordering notice to the Class. (Dkt. Nos. 259, 263, 268, 270.)

E. Prior Claims Process Marked By Low Claims Rate.

The prior notice program was successful in reaching the target audience with a significant estimated reach, but nevertheless resulted in a low claims rate. (Fauth Decl. ¶ 20.) There were problems with required proof, and during the claims process it became clear that some Class Members had no proof of purchase and no longer had their PS3 units from which to obtain serial numbers. (*Id.*)

Class Members were required to submit a completed Claim Form to Garden City Group, LLC ("GCG"), the claims administrator, by December 7, 2016. GCG received 2,346 timely Consumer Class A Claim Forms and 8,970 timely Consumer Class B Claim Forms. (Fauth Decl. ¶ 20.) With respect to Consumer Class A claims, 589 of 2,346 claims (or approximately 25% of Consumer Class A) had potentially insufficient proof as to whether they used the Other OS functionality. (*Id.*) As to Consumer Class B, approximately 107 of 8,970 claims had issues (1.2%). (*Id.*) The settlement administrator received 27 requests to be excluded, and 7 objections to the Prior Settlement. (*Id.*)

F. Court's Rejection of Prior Settlement.

On January 31, 2017, after a fairness hearing, the Court issued an Order Denying Plaintiffs' Motion for Final Approval of Class Action Settlement Without Prejudice. (Fauth Decl., Exh. C.) The Order identified numerous concerns with "how the notice and claims process proceeded, the results it produced, and the disproportionality of the attorneys' fees versus the class recovery." (*Id.* at 1:13-14.) "Most significantly" to the Court, the claims rate appeared "quite low": 11,300 claims out of approximately 10 million Fat PS3 units sold (*id.* at 7:10-11); and the claims process was too burdensome, given the proofs claimants were required to submit with their claims and "the relatively small amount" the B-class claimants would receive for a valid claim (*Id.* at 6:17-19). While Plaintiffs and Sony believed that the number of class members was much lower than the number of all purchasers (approximately 200,000-600,000), the parties nevertheless understood the Court's concerns.

After issuance of the Order Denying Final Approval, and a case management conference on February 13, 2017, at which the Court indicated that it would not reconsider approval of the Prior Settlement structure with additional information in the record, counsel for the Parties agreed that any revised settlement needed to be entirely re-structured to address the Court's concerns. (Fauth Decl. ¶ 21.) Among other things, the Parties discussed the need for additional mediation under the auspices of a new mediator. (*Id.*)

G. Mediation with Justice Lambden and New Settlement.

On April 6, 2017, after submitting detailed mediation briefs, the parties attended a day-long mediation session with the Hon. James Lambden, Ret., of ADR Services, Inc. (*See* Fauth Decl. ¶ 22.) Although the parties did not reach an agreement that day, they did make substantial progress and thereafter continued to negotiate with Justice Lambden's assistance. (*Id.*)

It took numerous teleconferences and continuing vigorous negotiations over the course of

months, but the Parties eventually reached an agreement in principle on a settlement that they believed would address the Court's concerns and achieve a much higher claims rate, although certain outstanding issues required further negotiation and assistance from Justice Lambden. (*Id*.) One lingering dispute related to what cap to set on settlement benefit amounts to be paid to individual class members. (*Id*. ¶ 23.) Justice Lambden made a mediator's proposal that a cap should be set at $65 and both parties accepted his decision. (*Id*.)

The parties entered into the New Settlement on August 24, 2017. (*Id.* ¶ 24.)

H. Preliminary Approval of the New Settlement.

After Plaintiffs filed their Renewed Motion for Preliminary Approval, the Court held a preliminary approval hearing on November 7, 2017. At the hearing, the Court directed Plaintiffs to submit revised exhibits to the New Settlement and screen shots of the online claim form by November 14, 2017. (Dkt. No. 338.) On November 14, 2017, Plaintiffs submitted the requested materials to the Court. (Dkt. Nos. 342 and 342-1 – 342-6.)

On November 21, 2017, the Court issued its Order preliminarily approving the New Settlement and ordering notice to the Class. (Fauth Decl., Exh. B [Dkt. No. 344].) The Court provisionally certified a Class and found that the requirements of Rule 23(a) and Rule 23(b)(3) were provisionally satisfied for that purpose. (*Id*. at ¶¶ 3-5.) The Court preliminarily approved the New Settlement "as fair, reasonable, and adequate, entered into in good faith, free of collusion, and within the range of possible judicial approval." (*Id*. at ¶ 6.) The Court approved the Notice Program, as modified in the Preliminary Approval Order, finding that it was "the best notice practicable under the circumstances, constitutes valid, due, and sufficient notice to the Class in full compliance with the requirements of applicable law, including Federal Rule of Civil Procedure 23 and the Due Process Clause of the United States Constitution, and is the only notice to the Class of the Settlement that is required." (*Id.* at ¶ 10.)

In the Order, the Court appointed James J. Pizzirusso of Hausfeld LLP, Gordon M. Fauth of Finkelstein Thompson LLP, and Kathleen V. Fisher of Calvo Fisher & Jacob LLP as Class Counsel. (*Id*. at ¶ 7.) The Court appointed Plaintiffs Anthony Ventura, Jason Baker, James Girardi, Derek Alba, and Jonathan Huber as class representatives for the provisionally-approved Class. (*Id*. at ¶ 8.)

Based on the Preliminary Approval Order, the deadline for claims, objections and opt-out was determined to be April 15, 2018; the deadline for the motion for final approval of the New Settlement was May 8, 2018; and the fairness hearing was set for May 29, 2018. (*Id.* at ¶¶ 20, 22, 24, 31, and 33.)

Pursuant to the Court's Order, on March 6, 2018, Class Counsel filed their Renewed Motion for Award of Attorney's Fees, Costs, and Incentive Awards. (Dkt. No. 346).

III. THE NEW SETTLEMENT TERMS, AND RESULTS ACHIEVED.

A. The Class.

By its November 21, 2017 Order, the Court preliminarily certified a Class of:

> [A]ny and all persons in the United States who purchased a Fat PS3 in the United States between November 1, 2006 and April 1, 2010, from an authorized retailer for family, personal, and/or household use and who: (1) used the Other OS functionality; (2) knew about the Other OS functionality; or (3) contends or believes that he or she lost value or desired functionality or was otherwise injured as a consequence of Firmware Update 3.21 and/or the disablement of Other OS functionality in the Fat PS3.

(*See* Fauth Decl., Exh. B at ¶ 3.)[4]

B. Benefits to the Class, and Claims Procedure.

Under the New Settlement, SCEA agreed to pay to the Settlement Administrator the sum of $3,750,000 to create the Settlement Fund. (*See* Fauth Decl., Exh. A at ¶ 71.) The Settlement Fund will be used to pay, in the following order: (1) Class Notice and Administration Costs; (2) Attorneys' Fees and Costs to Class Counsel; (3) Service Awards to the Plaintiffs; and (4) Valid Claims submitted by Settlement Class Members. (*Id.*)

To receive compensation from the Settlement Fund, each Settlement Class Member was required to submit a timely and complete Claim Form, either by mail or electronically. (*Id.* ¶ 72.) (The Claim Form is attached to the New Agreement as Exhibit 1.) To submit a valid claim, claimants were required to attest, under penalty of perjury, that they: "(1) used the Other OS functionality; (2) knew about the Other OS functionality; or (3) contend or believe that [they] lost value or desired functionality or were otherwise injured as a consequence of Firmware Update 3.21 and/or the disablement of Other OS functionality in the Fat PS3." (Agreement, Ex. 1.) Claimants were also required to provide at least one of the following: (1) their PS3 serial number; (2) the PlayStation Network Sign-In ID (email address)

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[4] Excluded from the Class are: "(a) any persons who are employees, directors, officers, and agents of SCEA or its subsidiaries and affiliated companies; (b) any persons who timely and properly exclude themselves from this Settlement; and (c) the Court, the Court's immediate family, and Court staff." (*Id.*)

they used to create a PlayStation account associated with their Fat PS3; or (3) the PlayStation Network Online ID (the handle they chose for communicating and game play on the PlayStation Network) associated with the PlayStation account they used with their Fat PS3. (*Id.*)

Claimants who previously submitted claims were *not* required to submit new claims forms. (*Id.* ¶ 72.) Rather, they were automatically deemed claimants under the New Settlement. (*Id.*)

The New Settlement provides that benefits will be distributed to Valid Claimants on a pro rata basis up to and including the sum of $65 per valid Claim. (*Id.*)[5]

C. Incentive Awards and Attorneys' Fees and Costs.

Pursuant to the New Settlement, SCEA agreed not to object to an incentive award that does not exceed $3,500 per Plaintiff. (Fauth Decl., Exh. A at ¶ 114.) On March 6, 2018, Class Counsel filed their renewed motion for attorneys' fees, costs and incentive awards, which requests an incentive award of $3,500 for each named Plaintiff, to recognize them for their efforts during the action that resulted in the New Settlement, including answering discovery, appearing for deposition, producing their PS3s for inspection, and assisting in the settlement process. (Dkt. No. 346.)

In their motion, Class Counsel also asked the Court for an award of attorneys' fees and reimbursement of costs in the amount of $1.25 million, or 33 1/3 percent of the $3.75 million common fund settlement Plaintiffs' counsel obtained. (*See* Dkt. No. 346). Any attorneys' fees and expenses awarded by the Court will be paid from the Settlement Fund (*See id.*; Fauth Decl., Exh. A at ¶ 111.) Class Counsel have worked on this case since 2010, and have committed significant time and expenses to the case, well above the $1.25 million that is being requested. (*See* Dkt. No. 346; Fauth Decl. ¶ 29.) The total lodestar by lead Class Counsel alone reported in the fee petition, which does not include the time spent on final approval briefing and settlement administration since the time of the Motion, was $3,327,090.500 (plus $138,944.72 in expenses). (*See* Dkt. No. 346; Fauth Decl., ¶ 29.) In addition, as reported in Class Counsel's motion, non-lead counsel have expended another 4,305.03 hours in

[5] The New Settlement further provides that if there is money remaining in the Settlement Fund after payment of the Settlement Administrator's costs, attorneys' fees and costs, service awards, and compensation to Class members, the parties will meet and confer as to how the leftover funds should be distributed and may move the Court for appropriate disposition of the leftover funds. (*Id.* ¶ 73.) The robust claims rate achieved renders this provision moot, as all settlement funds will be fully paid out.

professional time, equating to $2,335,561.75 in lodestar and $128,339.81 in expenses. (*See id.*) This yields a total lodestar of $5,662,652.25, resulting in a multiplier of approximately *negative* 5.75. In other words, assuming counsel's full expenses are awarded and the Court approves the full fee request, Plaintiffs' counsel will be paid only some 17.5% of their collective lodestar.

D. Release Provisions.

Under the New Settlement, each Class Member who did not timely submit a valid request to opt out of the Settlement releases "all claims, demands, rights, and liabilities," whether "known or unknown," that arise from the purchase of a relevant PS3 (i.e., a "Fat PS3") and/or "relate to, are based on, concern or arise out of the allegations, facts or circumstances that were asserted or could have been asserted (whether individually or on a class-wide basis) in the Action." (Fauth Decl., Exh. A at ¶ 35.) The Released Claims against SCEA include, but are not limited to, claims arising under the common laws and statutes of all fifty (50) states concerning: (a) whether SCEA falsely advertised or marketed the Fat PS3's Other OS functionality; (b) the disabling of the Other OS functionality in the Fat PS3; (c) the issuance of Firmware Update 3.21; and/or (d) whether the System Software License Agreement and/or PlayStation Network Terms of Service and User Agreement enable SCEA to alter, remove or modify the features and/or functions of the Fat PS3. (*Id.*)

E. Dissemination of Notice to the Class.

Pursuant to the Court's order, the Notice Program has been implemented. The Settlement Administrator, Garden City Group, LLC ("GCG"),[6] determined that the measured portion of the Notice Program reached approximately 79% of the target audience of people 18 years of age or older who own a PlayStation or web-enabled console, slightly higher than then 78% reach estimated in the Settlement Administrator's pre-notice declaration. (Schwartz Decl. ¶¶ 2, 8.)[7] The Notice Program agreed to by the parties, with expert assistance and endorsement, as modified and ordered by the Court, comports with due process and is the best notice practicable under the circumstances. (Fauth Decl., Exh. B at ¶ 10);

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[6] Given its familiarity with the case, the parties again selected Garden City Group, LLC as the claims administrator. (Fauth Decl. ¶ 26.)

[7] Additionally, the notice program implemented in connection with the Prior Settlement resulted in 11,316 claims which did not need to be resubmitted under the New Settlement.

Schwartz Decl. ¶ 32); *see also* FEDERAL JUDICIAL CENTER, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010) at 3 (stating that it is reasonable to reach between 70% and 95% of class members).

The Notice Program included the following:

Delivery of Data File and Confirmation of Email Address Validity. On December 4, 2017, SCEA provided GCG with an electronic data file with the email addresses of PS3 purchasers known by SCEA through its Playstation Network Database. (Schwartz Decl. ¶ 4.) The file contained 12,225,685 email addresses. (*Id*.) GCG integrated the 12,225,685 email addresses with those that existed in GCG's records from the previous administration. (*Id*. ¶ 5.) After controlling for duplicate email addresses, facially invalid email addresses, and email addresses for persons that had previously requested not to be contacted regarding the Other OS Settlement, GCG identified 12,273,317 potentially valid email addresses ("Class Data"), of which 7,719,582 were found to be potentially valid and 4,553,735 found to be invalid or no longer in existence. (*Id*. ¶¶ 5, 11).

First Round of Email Notice. Between December 19, 2017 and January 12, 2018, GCG sent email notice to the 7,719,582 potentially valid email addresses in the Class Data. (*Id*. ¶ 11.) Of these, 6,790,775 emails were successfully delivered, while 928,807 could not be delivered because of issues such as domain name problems, address error, or inactive accounts. (*Id*. ¶ 12.) The Email Notice contained the Court-approved Short Form Notice (also referred to as the Summary Notice), along with a link to the Settlement Website. (*Id*. ¶¶ 9-10 & Ex. C.) GCG was ultimately able to deliver Email Notice to approximately 55% of the email addresses in the Class Data. (*Id*. ¶ 12.)

Follow-up Round of Email Notice. Between March 7, 2018 and March 14, 2018, GCG delivered a Reminder Email Notice to the 6,785,622 potential Class Members who had received Email Notice but who had not yet submitted a Claim Form. (*Id*. ¶ 13.)

Settlement Website. On December 4, 2017, GCG launched the Settlement Website, www.otherossettlement.com, containing detailed information about the New Settlement and copies of key settlement documents, including the Long Form Class Notice, the Summary Notice, the Second Amended Class Action Complaint, the New Settlement Agreement, the Motion for Preliminary Approval, Plaintiffs' Renewed Motion for Award of Attorney's Fees, Costs, and Incentive Awards, and

various information about the Settlement, including an overview of the Settlement, important dates and deadlines, searchable answers to 26 frequently asked questions, and a contact information page for the Settlement Administrator. Class Members could also view and download a sample request for exclusion letter. (Schwartz Decl. ¶¶ 23-24.) Class Members could download paper copies of the Claim Form or submit a Claim Form online. (*Id*. ¶ 24.) As of May 8, 2018, the Settlement Website has received 1,189,605 visits. (*Id*. ¶ 25.)

Display, Social, and Gmail Advertisements, and Press Release. Pursuant to the Notice Plan approved by the Court, GCG caused display or banner advertisements, social media advertisements, and Gmail advertisements to commence on December 5, 2017, and to run through January 15, 2018. (*Id*. ¶¶ 15-20.) All three sets of advertisements allowed class members to click on a link that would take them directly to the Settlement Website. (*Id*.) Display or banner ads were published on digital networks including Google, Yahoo, Twitch.tv, and Pulpo. (*Id*.) The combined ad networks cover 92% of the U.S. population on the internet. (*Id*. ¶ 16.) Ads ran on thousands of English and Hispanic websites, including CNET, GameSpot, Gizmodo, ESPN, and Twitch.tv, which is the largest game-themed website in the United States. (*Id*.) A press release was distributed on December 6, 2017, over PR Newswire's US1 newsline and National Hispanic newslines, reaching more than 15,000 media outlets in all 50 states (US1 newsline) and over 7,000 U.S. Hispanic media contacts (National Hispanic newslines). (*Id*. ¶ 21.)

California Consumer Legal Remedies Act Publication. In compliance with the CLRA and the Court's Order, GCG caused the Short Form Notice to be published in USA Today California edition four times. (Schwartz Decl. ¶ 22 & Ex. G.)

Toll-free Number. Pursuant to Paragraph 19 of the Preliminary Approval Order, GCG launched a toll-free telephone number with an Interactive Voice Response system, which provided important information about the New Settlement and allowed callers to request copies of the Claim Form. (*Id*. ¶ 26.) The system let callers speak to a live operator during business hours. (*Id.)*

CAFA Notice. Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1715, GCG provided notice to the required public officials on September 8, 2017. (Schwartz Decl. ¶ 3, Exs. A & B.)

F. The Number of Claims Received, and Anticipated Valid Claims.

The response to the New Settlement has been overwhelmingly favorable. Class Members submitted claims during the claims period, which ran from January 15, 2018 until April 15, 2018. Class Members who wished to make a claim were required to submit a completed Claim Form to GCG via email, the Settlement Website online claims portal, or U.S. Mail. (Fauth Decl., Exh. B at ¶ 20; Schwartz Decl. ¶ 29.) As of May 8, 2018, GCG has received 263,841 timely claims and 27 late claims. (*Id.*) When the claims from the previous settlement are added, the total number of timely claims is 275,169.

Of the 263,841 timely new claims submitted to date, GCG and the Parties have determined that 77,957 claims should be rejected as duplicate, fraudulent or otherwise invalid: 22,267 duplicate claims; 60 fraudulent claims; and 55,630 claims that are otherwise invalid. (*See* Schwartz Decl. ¶ 30; Fauth Decl. ¶ 27.)[8] Given the additional administrative and postage costs associated with providing additional notice and deficiency process which would continue to deplete the fund for valid claimants, the Parties do not suggest implementing such a procedure.[9] Therefore, with the approximately 11,300 claims from the Prior Settlement claims process, there will be more than 197,000 valid claims.

G. Requests for Exclusions from Settlement and Objections.

Any Class Member who wished to be excluded from the Settlement needed only to make an opt-out request in writing. (Fauth Decl., Exh. B at ¶ 22); (Schwartz Decl. ¶ 31.) The procedures for opting-out were described in the Notices and a sample request for exclusion letter was included on the Settlement Website. (Schwartz Decl. ¶ 32, Exs. H, C.) The opt-out request had to be emailed or postmarked by April 15, 2018. (Fauth Decl., Exh. B at ¶ 22); Schwartz Decl. ¶ 31.) To date, GCG has received 40 timely requests for exclusion and 0 late requests for exclusion. (Schwartz Decl. ¶ 32.)

Class Members wishing to object to the fairness, reasonableness, or adequacy of the New Settlement or to the Fee Request were required to submit written objections to GCG, emailed or

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[8] Invalid claims include claims that, among other things, were from outside the United States, that provided information that did not match a PSN account or that were associated with a non-Fat PS3 (i.e., which never had the Other OS capability).

[9] The estimated approximate total administration cost would rise from $495,650 (without deficiency outreach) to $627,650, if a letter notice and deficiency process were performed. (*See* Fauth ¶ 27.)

postmarked by April 15, 2018. (Schwartz Decl. ¶ 31-32.) As of May 8, 2018, GCG has received 0 timely objections and 0 late objections to the New Settlement. (*Id.* ¶ 31).[10]

IV. FINAL APPROVAL SHOULD BE GRANTED.

A. The Settlement is Fair, Reasonable and Adequate.

Rule 23 requires judicial approval of a class action settlement. *See* Fed. R. Civ. P. 23(e). "In deciding whether to approve a proposed settlement, the Ninth Circuit has a 'strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.'" *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005) (quoting *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)); *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "By their very nature, because of the uncertainties of outcome, difficulties of proof, length of litigation, class action suits lend themselves readily to compromise." CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002); *see also Class Plaintiffs v. Seattle*, 955 F.2d at 1276.

A class action settlement must be "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). A settlement is fair, reasonable and adequate when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH § 30.42 (2004). The decision to approve or reject a proposed settlement is committed to the "sound discretion" of the Court. *Class Plaintiffs v. Seattle*, 955 F.2d at 1276.

The Ninth Circuit has identified a non-exhaustive list of factors to guide the final approval inquiry, including:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

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[10] One attorney, Sam Miorelli, who previously represented an objector to the Prior Settlement who was not in the class, has filed a Motion for Attorney's Fees. Plaintiffs will respond to that Motion separately.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Staton v. Boeing Co*., 327 F.3d 938, 959 (9th Cir. 2003).

The Ninth Circuit has observed that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624 (citation omitted). As such, "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Id.* at 625 (emphasis added). The issue instead is simply "whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027. Where, as here, the settlement is the product of arm's-length negotiations conducted by capable counsel with extensive experience in complex class action litigation, the Court begins with a presumption that the settlement is fair and should be approved. *See* CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS § 13.45 (5th ed.); *see also Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N. D. Cal. 1980) ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight"); *see also In re Omnivision Techs., Inc*., 559 F.Supp.2d 1036, 1043 (N. D. Cal. 2008). All the relevant factors support final approval here.

1. The Relief Obtained for the Class.

The New Settlement establishes a Settlement Fund of $3,750,000, unlike with the claims-made previous settlement. (*See* Fauth Decl., Exh. A at ¶ 71.) The Settlement Fund will be used to pay, in the following order: (1) Class Notice and Administration Costs; (2) Attorneys' Fees and Costs to Class Counsel; (3) Service Awards to the Plaintiffs; and (4) Valid Claims submitted by Settlement Class Members. (*Id*.) As set forth above, there will be an estimated 197,000 valid claims, once processing is completed. Assuming the Court awards fees and expenses of $1.25 million, service awards of $17,500 ($3,500 to each of the five Class Representatives), and notice/administration costs of approximately $495,650 that will leave approximately $2 million to be paid to claimants, or approximately $10 per valid claim. Thus, the Settlement will provide cash payments to over one hundred ninety thousand

Class Members who would not otherwise have received any financial compensation for the underlying actions by SCEA.[11]

The Class also benefits from the enforcement of important consumer protection statutes, such as California's CLRA and the UCL, which vindicate policies that are important in protecting both individual rights and the public good. Had it not been for this lawsuit and the proposed New Settlement, Class Members' claims, which are modest on an individual scale, would have likely gone without redress.

2. The Strength of Plaintiffs' Case Balanced Against the Risk, Expense, Complexity, and Likely Duration of Continued Litigation.

Courts recognize "that a settlement is in the interests of class members who otherwise may not be entitled to any relief should their claims fail on the merits." *Bayat v. Bank of the W.*, No. C-13-2376 EMC, 2015 WL 1744342, at *3 (N.D. Cal. Apr. 15, 2015) (citation omitted); *Nwabueze v. AT & T Inc.*, No. C 09–01529 SI, 2013 WL 6199596 at *4 (N.D. Cal. Nov. 27, 2013)). Where the strength of a plaintiff's claims is in doubt, this factor tips in favor of approval of settlement. *Id*. Further, avoiding the "expense, complexity and likely duration of further litigation" is an important settlement consideration. *Officers for Justice*, 688 F.2d at 625. While Class Counsel believe that the Class's claims are meritorious, SCEA disputed this vigorously.

SCEA has argued that Plaintiffs' claims cannot ultimately succeed because it had the contractual right to remove the Other OS pursuant to its terms of service and other purported agreements, and because the Other OS feature was not a core functionality of the Fat PS3 that was material to the vast majority of purchasers. (Fauth Decl. ¶ 30.) In support of this, SCEA has argued that it never advertised the Other OS functionality on the product box or its website. (*See id.*) SCEA has also argued that the relevant pool of Class Members is not composed of people who merely purchased Fat PS3s, but only those who actually relied on the Other OS in some manner or lost some degree of value or functionality as a consequence of SCEA's removal of the Other OS function. (*Id.*) SCEA

[11] After the settlement administrator has completed the evaluation process, and before the date of the fairness hearing, Plaintiffs anticipate providing the Court with more exact claims figures.

argues that the Other OS was not a core functionality of the Fat PS3 that was material to the vast majority of purchasers. (*Id.*)

Additionally, under the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. ("CLRA"); Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"); and False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq*. ("FAL"), a private claimant must among other things show injury-in-fact. *See, e.g., Hale v. Sharp Healthcare*, 183 Cal. App. 4th 1373, 1386–87 (2010) (CLRA); *Vasic v. PatentHealth, L.L.C.*, 171 F. Supp. 3d 1034, 1041 (S.D. Cal. 2016) (UCL); *Obesity Research Inst., LLC v. Fiber Research Int'l, LLC*, 165 F. Supp. 3d 937, 948–49 (S.D. Cal. 2016) (FAL). It was impossible in this case to predetermine how many eligible claimants existed since there was no way to discover how many Fat PS3 purchasers utilized or knew of the Other OS feature. Sony has argued the number is very small, and some evidence supports Sony's position. (Fauth Decl. ¶ 30.)

While Plaintiffs disagreed with SCEA's positions, based on the evidence available, Plaintiffs acknowledged that the Other OS function was geared more towards highly sophisticated computing specialists. (*Id.* ¶ 31.) Thus, the number of people who actually cared about SCEA's removal of this feature was likely relatively small. (*Id.*) Plaintiffs continue to dispute SCEA's positions, but recognize that there is a substantial degree of uncertainty as to how these issues would be resolved at trial.

Moreover, a trial and potential post-trial appeals would involve uncertainty in terms of both outcome and duration. Continued litigation would involve considerable costs and a significant investment of time by the named Plaintiffs, who have already committed considerable time and energy to this action over the last seven years, as well as Plaintiffs' counsel, who have collectively spent more than 10,580 hours of work on this action. (Fauth Decl. ¶ 29.) Even if the Class prevailed at trial, SCEA would likely appeal, which would delay recovery to Class Members for months or years.

Since the New Settlement avoids these risks and challenges and provides relief now for Class Members despite uncertainty regarding the strength of Plaintiffs' claims, these factors weigh in favor of final approval. *See City of Seattle*, 955 F.2d at 1291-92.

3. The Extent of Discovery Completed and the Stage of the Proceedings.

Prior to Settlement, Class Counsel gained a well-grounded understanding of the relative strength of the claims and defenses through discovery, independent investigation of public documents and formal discussions with SCEA's counsel. Specifically, as set forth above, in nearly seven years of litigation, Plaintiffs served written discovery, including document requests and interrogatories, deposed seven (7) SCEA witnesses (three of whom were Rule 30(b)(6) witnesses) and reviewed tens of thousands of pages of documents produced by SCEA as well as interrogatories responses. (*See* Fauth Decl. ¶¶ 10-13, 15-16.) Plaintiffs also responded to extensive discovery by SCEA, including producing the named Plaintiffs for deposition. (*Id*. at ¶¶ 10, 16.) Class Counsel gained further understanding of the issues through the research, briefs, arguments, and orders related to SCEA's motion to dismiss the case (which was granted) and Plaintiffs' efforts to secure a reversal of that dismissal by the Ninth Circuit (which was achieved in part). (*Id*. ¶ 14.) That understanding was deepened still further by the parties' exchange of three sets of mediation briefs and attendance at three in-person mediations led by retired judges highly experienced with complex litigation issues. (*Id*. at ¶¶ 12, 17, 22.) The parties additionally tested the case through many months of hard-fought negotiations. (*Id*. ¶¶ 17, 22.) Based on all of this, Class Counsel has been able to form an accurate assessment of the relative strength of the claims and defenses. (*Id*. ¶ 32.)

4. The Positive Reaction of the Class.

The Class response to the New Settlement has been very positive. The Settlement Administrator has received only 40 requests for exclusion from the Settlement. (Schwartz Decl. ¶ 31.) This is only 0.018 % of claims submitted. Such a small proportion of opt-outs weighs heavily in favor of the Court's finding that the Settlement is fair, reasonable and adequate. *See, e.g. Churchill Vill., L.L.C. v. Gen. Electr.*, 361 F.3d 566, 577 (9th Cir. 2004) (upholding district court's approval of class settlement where 500 members opted out from a class of 90,000); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977); *Murillo v. Pac. Gas & Elec. Co.*, No. 2:08-1974 WBS GGH, 2010 WL 2889728 at *9 (E.D. Cal. July 21, 2010) (approving settlement where "358 individuals opted-in to the settlement, and only 25 opted out").

Out of millions of potential Class Members notified and more than 260,000 claims filed, the Settlement Administrator has received no objections. (Schwartz Decl. ¶¶ 29-31.) This also reflects a highly favorable reaction from the Class. *Churchill Vill., L.L.C.*, 361 F.3d at 577 (approving settlement where "[t]he district court was informed that only 45 of the approximately 90,000 notified class members objected to the settlement"); *see also In re High-Tech Emp. Antitrust Litig.*, 2015 WL 5159441, at *3 (N.D. Cal. Sept. 2, 2015) (finding indicia of approval where 11 class members out of 64,466 submitted objections and where less than 0.9% opted out). Indeed, "[i]t is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1043 (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D. Cal. 2004)).

The favorable reaction of the Class weighs strongly in favor of approving the Settlement.

5. The Experience and Views of Counsel.

Class Counsel weighed all the foregoing factors and endorse the New Settlement. (*See* Fauth Decl ¶ 32.) Deciding whether to enter into a class action settlement necessarily requires the exercise of judgment by the attorneys for the parties based upon a comparison of "'the terms of the compromise with the likely rewards of litigation.'" *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). As courts have explained, the view of the attorneys actively conducting the litigation is "entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985).

There is no doubt that Class Counsel were fully informed before accepting the New Settlement terms, as shown above. Class Counsel are highly experienced in complex class action litigation, and their opinion that the settlement is fair, reasonable and adequate should be given weight. The settlement process itself confirms not just the judgment exercised by Class Counsel, but their diligent settlement efforts as well. For their part, Defendant's counsel are also highly experienced and respected. They zealously raised vigorous defenses to Plaintiffs' claims, and their support for the New Settlement likewise confirms the reasonableness of the New Settlement.

6. The New Settlement is the Product of Well-Informed, Vigorous and Thorough Arm's-Length Negotiations.

In considering final approval, the Court must ensure that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties . . . ." *Hanlon*, 150 F.3d at 1027 (internal quotes and citations omitted); *see also Officers for Justice*, 688 F.2d at 625.

Here, there can be no doubt that the New Settlement was the result of extensive arm's-length negotiations. As set forth above, the New Settlement was achieved only after nearly seven years of vigorous and contentious litigation. Far from being the product of collusion, the New Settlement is the result of long, hard-fought, adversarial work, such that it is worthy of approval by the Court. As the Supreme Court has held, "[o]ne may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining . . ." *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 852 (1999).

7. The Plan of Allocation and Requested Attorneys' Fees are Fair and Reasonable.

The New Settlement presents no apparent unfairness and no "unduly preferential treatment of class representatives or segments of the Settlement Class, or excessive compensation for attorneys." *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2012 WL 5055810, at *6 (D. Minn. Oct. 18, 2012). To the contrary, as set forth above, the New Settlement provides equal compensation to all valid claimants.

With respect to the proposed incentive awards, the Ninth Circuit has recognized that incentive awards to the named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable. *See Staton*, 327 F.3d at 977. As shown in the Renewed Motion for Attorneys' Fees, Costs and Incentive Awards, the proposed service fees of $3,500 to each Class Representative here is both warranted and lower than what is presumptively reasonable in the Ninth Circuit. (*See* Dkt. No. 346 at 23:1-24:9.) Moreover, it is the Court that will ultimately decide whether Plaintiffs are entitled to such an award and the reasonableness of the amount requested.

As for attorneys' fees, Class Counsel have applied for fees and reimbursement of expenses in the amount of $1.25 million, which is significantly less than their collective lodestar and expenses, as set forth above.

For all of the foregoing reasons, the Court should find that the proposed New Settlement is fair, reasonable and adequate.

V. NOTICE PROCEDURES FOLLOWED WERE ADEQUATE.

"Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise . . . [.]'" MANUAL § 21.312, at 293. In order to protect the rights of absent Class Members, the Court must direct the best notice practicable to Class Members. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974). Notice to the class must be "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." *Mullane v. Cent. Hannover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Plaintiffs consulted with a notice expert to devise a comprehensive Notice Program that was refined and approved by the Court. (Fauth Decl. ¶ 26.) *See In re HP Laser Printer Litig.*, No. SACV 07-0667AG (RNBx), 2011 WL 3861703 at *3 (C.D. Cal. Aug. 31, 2011) (approving a notice plan utilizing direct email notice, publication of the summary notice in print publications, banner advertisements on websites, and "providing a link on both notice forms to a settlement website").

As recounted above, the Notice Program involved nine multilayered elements, the measured portion of which reached approximately 79% of the prospective Class Members, which is a highly successful result. (Schwartz Decl. ¶ 8); *see also* FEDERAL JUDICIAL CENTER, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010), at 3. Accordingly, the Notice Program was "the best notice that is practicable under the circumstances" and accomplished "individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

VI. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

A. The Class May Be Certified Under Rule 23(a) and 23(b)(3).

On November 21, 2017, the Court provisionally certified the Class for settlement purposes and found that the requirements of Rule 23(a), as well as the predominance and superiority requirements of

Federal Rule of Civil Procedure Rule 23(b)(3), were provisionally satisfied for that purpose.[12] (Fauth Decl. Exh. B at ¶¶ 3-5.) Plaintiffs now submit that the Class may finally be certified for settlement purposes, as it continues to meet all the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). For settlement purposes only, Plaintiffs request that the Court certify the following proposed Class pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> [A]ny and all persons in the United States who purchased a Fat PS3 in the United States between November 1, 2006 and April 1, 2010, from an authorized retailer for family, personal, and/or household use and who: (1) used the Other OS functionality; (2) knew about the Other OS functionality; or (3) contends or believes that he or she lost value or desired functionality or was otherwise injured as a consequence of Firmware Update 3.21 and/or the disablement of Other OS functionality in the Fat PS3.

(*See* Fauth Decl., Exh. B at ¶ 3.)[13]

B. Certification Of A Nationwide Settlement Class Is Appropriate.

Fed. R. Civ. P. 23(b)(3) allows the certification of a nationwide class under California law on the facts of this case. For a state's substantive law to be selected in a constitutionally permissible manner and applied to citizens outside of that state, that state must have a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *See Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985)).

Here, SCEA's contacts with California are substantial. SCEA is an American corporation with its principal place of business in California, where SCEA's marketing department is located. Moreover, as set forth below, SCEA and each member of the Class agreed that California law applied to the agreement regulating their relationship. The agreement by Defendant and all Class members that California law applies distinguishes this case from the situation in *In re Hyundai and Kia Fuel Econ. Litig.*, 881 F.3d 679 (9th Cir. 2018), where the Ninth Circuit reversed certification of claims under

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[12] The arguments for certification presented in Plaintiffs' Renewed Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class, Dkt. No. 335, are incorporated by reference herein.

[13] Excluded from the Class are: "(a) any persons who are employees, directors, officers, and agents of SCEA or its subsidiaries and affiliated companies; (b) any persons who timely and properly exclude themselves from this Settlement; and (c) the Court, the Court's immediate family, and Court staff." (Fauth Decl., Exh. B at ¶ 3.)

California law because the district court had failed to carry out a choice-of-law analysis to determine whether California law could be applied to the claims of the nationwide class. In *Hyundai,* unlike here, there was no uniform agreement on applicable law and a contractual choice-of-law provision applied Virginia law to the claims of some class members. *Id.* at 699..

C. The Terms of Service Provides That California Law Applies.

"Federal courts sitting in diversity look to the law of the forum state when making choice of law determinations." *Hoffman v. Citibank (South Dakota), NA*, 546 F. 3d 1078, 1082 (9th Cir. 2008). "The California Supreme Court has held that 'a valid choice-of-law clause, which provides that a specified body of law `governs' the `agreement' between the parties, encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized, including tortious breaches of duties emanating from the agreement or the legal relationships it creates.'" *Hatfield v. Halifax PLC*, 564 F. 3d 1177, 1183 (9th Cir. 2009) (quoting *Nedlloyd Lines B.V. v. Superior Court,* 3 Cal.4th 459, 470 (1992).) "Once it determines the parties' intention, a California state court will next analyze whether: (1) the chosen jurisdiction has a substantial relationship to the parties or their transaction; or (2) any other reasonable basis for the choice of law provision exists. . . . If either one of these tests is met, then a California court will enforce the provision unless the chosen jurisdiction's law is contrary to California public policy." *Hatfield* at 1182.

Here, the Terms of Service and User Agreement ("TOS"), to which all Class members had to agree prior to signing into the PSN, and which SCEA contends binds all users, states: "Except as otherwise required by applicable law, this Agreement shall be construed and interpreted in accordance with the laws of the State of California applying to contracts fully executed and performed within the State of California." (Fauth Decl., Exh. D at ¶ 14.) In *Sony Gaming Networks & Cust. Data Sec. Breach Lit.*, 996 F. Supp. 2d 942, 976-79 (S.D.Cal. 2014), the court considered this same TOS language and found that California law applied to class members' claims. *See id.* ("the Court finds the choice-of-law clauses in the PSN and SOE User Agreements enforceable and each of the warranty claims not alleged under California law should be dismissed"). Thus, application of California law to the nationwide claims here is neither arbitrary nor unfair. *See Sullivan*, 662 F.3d at 1271 (application of California law to nonresidents appropriate where defendant was headquartered in California, defendant's alleged decision to deny plaintiffs overtime pay was made in California, and where alleged work at issue was performed in

California). Further, class members have selected the applicable law; and it cannot be against California public policy to enforce California law, which is the law they have selected. *See Consul Ltd. v. Solide Enterprises, Inc.*, 802 F. 2d 114, 1147 (9th Cir. 1986).

Thus, because under California's choice-of-law rules, Sony and all members of the Class have selected California law to govern their relationship, there is no need even to reach the 50-state analysis of law required in *Hyundai, supra*, into potential conflicts between state's laws, or to apply the governmental interest test. 881 F.3d at 701-702. Accordingly, potential variations in state's laws cannot defeat predominance.

Moreover, variations in the substantive laws of the various states do not preclude the certification of a nationwide settlement class. The nationwide settlement of a Rule 23(b)(3) action asserting California law claims is appropriate so long as there is a common nucleus of facts and potential legal remedies shared between resident and nonresident class members. *See Hanlon*, 150 F.3d at 1022-23 (nationwide settlement of consumer class action appropriate given that "although some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification."); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 589 (C.D. Cal. 2008). In any case, under *Hatfield, supra*, and *Nedlloyd Lines B.V., supra*, the parties have already chosen the applicable law.

Further support for certifying a nationwide class comes from the numerous approvals of class action settlements by California federal courts in which California law claims were asserted on a nationwide basis. *See, e.g., Arnold v. FitFlop USA*, LLC, No. 11-CV-0973 W (KSC), 2014 WL 1670133, at *6 (S.D. Cal. Apr. 28, 2014); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 WL 758094, at *4 (N.D. Cal. Feb. 20, 2015).

VII. CONCLUSION.

For the reasons set forth above, the Court should grant final approval of the Settlement and certify the Settlement Class for settlement purposes.

DATED: May 8, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on all counsel for all parties of record on May 8, 2018 via the Court's CM/ECF system.

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