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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NEW CENTURY INTERNATIONAL CORPORATION, a Nevada corporation d/b/a NATURAL AREA RUGS, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VALUECLICK, INC., a Delaware Corporation, Its Wholly-Owned Subsidiary COMMISSION JUNCTION, INC., and Its Wholly-Owned Subsidiary BE FREE, Defendants.	No. 07-cv-02638-FMC (CTx) CLASS ACTION NOTICE OF MOTION AND PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT Judge: Hon. Florence-Marie Cooper Date: January 5, 2009 Time: 10:00 a.m. Place: Courtroom 750 (Roybal) ACTION FILED: April 20, 2007

NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on January 5, 2009 at 10:00 a.m. or as soon thereafter as counsel may be heard at the United States District Court, located at 255 East Temple Street, Los Angeles, California in Courtroom 750, the Honorable Florence-Marie Cooper presiding, Plaintiffs will and hereby do make a motion for final approval of the settlement set forth in the Agreement for Settlement of Carrier and NAR Litigation, filed herewith. Plaintiffs' motion is based on this notice of motion, the memorandum of points and authorities, the Settlement Agreement, the Declaration of Jeff D. Friedman, the declarations of the named plaintiffs and such additional evidence or argument as may be considered by the Court.

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I. INTRODUCTION

Plaintiffs submit this motion for final approval of a settlement in two consolidated class actions brought on behalf of certain advertisers and publishers who entered into agreements with Defendants for affiliate marketing services on Defendants' networks.

After months of intensive, arm's-length negotiations, conducted with the assistance of the Honorable Edward Panelli (Ret.), the parties to the case – including Plaintiffs Mireille Carrier and New Century International Corporation d/b/a Natural Area Rugs ("Natural Area Rugs"), acting on their own behalf and on behalf of two proposed classes of similarly-situated persons, and Defendants ValueClick, Inc., Commission Junction, Inc. ("Commission Junction") and Be Free (collectively "Defendants") – have agreed to a settlement of all claims asserted against Defendants.

The Settlement Agreement will produce real and substantial benefits for the affected Advertiser and Publisher classes, and constitutes an excellent resolution of a case of substantial complexity.[1] Among other terms, the settlement provides for an immediate payment of $1 million to the Advertiser and Publisher classes and adoption of extensive and sophisticated online corporate governance measures, including: (1) the appointment of an independent auditor to perform an audit of Commission Junction's practices, systems and network quality efforts; (2) implementation of a proprietary automated software investigative tool designed to detect the use of known malicious software applications; and (3) a mandatory requirement that Defendants shall maintain, for a period of no less than 3 years, certain data related to publisher investigations, publisher terminations and publisher

[1] "Settlement Agreement" refers to the Agreement for Settlement of Carrier and NAR Litigation, attached as Exhibit A to the Declaration of Jeff D. Friedman in Support of Motion for Final Approval of Settlement, An Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards ("Friedman Decl."), filed concurrently herewith. Unless otherwise indicated, all terms used herein shall have the same meaning as set forth in the Settlement Agreement.

software application testing. In addition, Defendants have agreed to pay fees and expenses to Plaintiffs' Counsel separately, without any reduction in recovery to the Settlement Classes, subject to Court approval.

Plaintiffs hereby move the Court for final approval of the settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. The settlement is eminently fair, reasonable and adequate to the Advertiser and Publisher classes, and was reached after months of intensive negotiations and review of Defendants' process of investigating publishers for the use of prohibited software on the Defendants' online affiliate marketing network. Accordingly, Plaintiffs ask the Court to enter the [Proposed] Order (a) granting final approval of the proposed settlement; (b) certifying the proposed plaintiff classes pursuant to Rule 23(b)(3) for purposes of the settlement; and (c) appointing the petitioning Plaintiffs and their counsel as lead plaintiffs and class counsel, respectively.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Brief Summary of Facts and Claims

Defendants own and operate online affiliate marketing networks. Affiliate marketing is a practice by which an online publisher agrees to place an advertiser's advertisement or hyperlink in the publisher's material in exchange for receiving a commission whenever a consumer end user clicks on the hyperlinked advertisement and consummates a transaction on the advertiser's Web site. Publishers place advertisers' offers (and links to the advertisers' Web sites) on their own Web sites in order to drive consumers to the advertisers' Web sites. Advertisers then compensate publishers, typically through a commission, whenever these consumers make a purchase on the advertisers' Web sites. Defendants' affiliate marketing network tracks and accounts for legitimate transactions so that advertisers can compensate publishers for the successful "click-throughs" that lead to consummated transactions.

As part of the services offered to advertisers and publishers, Defendants promise to track consumers' clicks and actions as those consumers move from publishers' Web sites to advertisers' Web sites. Depending upon the terms of the specific contract, Defendants may also be responsible for: (1) calculating the commissions owed by advertisers to publishers; (2) providing a complete accounting to advertisers and publishers; and (3) collecting and distributing commission payments from advertisers to publishers.

Adware is a significant threat to Defendants' business model. Adware refers to software programs designed to interfere with affiliate marketing tracking systems, and ultimately, to steal or divert affiliate commissions. Adware programs are installed on consumers' computers by third parties, usually surreptitiously and without the consumers' knowledge.

In a typical adware transaction, an end-user visits a legitimate publisher's page, clicks on an advertisement, and passes through to the advertiser's page (the "click-through"). At the time of the click-through, a cookie is dropped identifying, among other things, the end-user, the advertiser, the publisher and the date and time.[2] After this initial cookie has been dropped, adware forces or hijacks the end-user's computer and inserts its own publisher identification number into the cookie on the end-user's computer. As a result, an adware entity can steal the legitimate publisher's commission. *See, e.g.*, FAC, ¶ 16.[3]

To foster trust between advertisers and publishers (and thereby market its services), Defendant Commission Junction affirmatively represented that it prohibits the use of adware on its networks, and that any party violating those prohibitions

[2] A cookie is a parcel of text sent by a server to a Web client (usually a browser) and then sent back unchanged by the client each time it accesses that server. *See* http://en.wikipedia.org/wiki/HTTP_cookie (last accessed Oct. 9, 2008).

[3] "FAC" refers to First Amended Complaint for: (1) Breach of Contract; (2) Unjust Enrichment; and (3) Unfair Business Practices (California Business & Professions Code 17200, *et seq.* (filed Nov. 13, 2008, Ct. Rec. 37).

would be terminated. In December 2002, Defendants instituted a Code of Conduct to codify their stated policy. Defendants required all publishers and advertisers to enter into agreements requiring, among other things, that they adhere to restrictions contained in those agreements and in the Code of Conduct prohibiting the use of adware. Yet, despite Defendants' purported efforts at monitoring their networks and ensuring compliance with these agreements, adware on the Defendants' affiliate networks persisted. *See id.*, ¶ 47.

B. The Litigation

On April 20, 2007, after extensive pre-filing factual investigation, Plaintiffs Settlement Recovery Center, LLC ("Settlement Recovery Center") and Mireille Carrier filed two separate class action lawsuits in this Court against Defendants. The complaints were filed on behalf of: (1) advertisers whom Defendants allegedly caused to improperly pay commissions to adware entities; and (2) publishers whom Defendants allegedly deprived of rightful commissions. *Id.*, ¶ 79; *Carrier* FAC, ¶ 79.[4]

Plaintiffs contended that Defendants breached their primary obligation to Plaintiffs by improperly accounting for transactions and causing advertisers to pay commissions to parties other than the publishers who originated those transactions. *Id.*, ¶¶ 37-47. Plaintiffs alleged Defendants failed to detect and identify transactions that were hijacked by adware entities, despite being the only parties to the transactions capable of detecting and identifying the fraud. *Id.*, ¶¶ 31-36, ¶¶ 56-60. Plaintiffs also alleged that Defendants breached their promise to enforce the Code of Conduct and other adware prohibitions. *Id.*, ¶¶ 87-98.

On June 13, 2007, Defendants moved to dismiss the complaints. Defendants argued that they had no legal obligation or duty to detect particular instances of commission theft because the contracts between Defendants and Plaintiffs expressly

[4] "*Carrier* FAC" refers to the First Amended Complaint, filed in *Carrier v. ValueClick Inc, et al.*, No. 2:07-cv-02641-FMC-CTx (filed Sept. 12, 2008, Ct. Rec. 33).

disclaimed such liability.[5] Notwithstanding the lack of a duty, Defendants represented they did make efforts to investigate non-compliant behavior and either educated or removed violators from their networks, such that any remaining instances of adware or commission theft were trivial. *Id.* at 21.

On August 27, 2007, this Court denied in part and granted in part Defendants' motions to dismiss, dismissing the claim for negligence but upholding all other claims in the *Settlement Recovery Center* action, and upholding all claims in the *Carrier* action. Defendants' motions to strike were denied in their entirety. On November 13, 2007, Plaintiff Settlement Recovery Center filed a first amended complaint, alleging breach of contract, unjust enrichment and violations of California's Unfair Practices Act, and also added Plaintiff Natural Area Rugs. On November 15, 2007, Plaintiff Carrier filed a first amended complaint alleging breach of contract, negligence and violation of California's Unfair Competition Law. On January 14, 2008, the two actions were consolidated by order of this Court.

C. Settlement Negotiations

In or about November 2007, the parties began to discuss informally exchanging information to better assess the merits and potential damages in the case. In exchange for Defendants' agreement to provide specific information, Plaintiffs agreed to a stay of formal discovery. Friedman Decl., Ex. A at ¶¶ 27, 83. On February 12, 2008, the parties held an all-day settlement meeting at Defendants' offices in Santa Barbara. At all times these discussions were at arm's length and hard fought. Attending the meeting were counsel for all parties, Todd Miller, Commission Junction's Director of Support Operations, Anders Bjoras, Commission Junction's Vice President of Engineering and Plaintiffs' non-testifying technical consultant. The parties' primary concern during the course of these intensive and lengthy arm's-length discussions was to evaluate each other's positions and to

[5] *See* Notice of Motion and Motion to Dismiss Class Action Complaint; Memorandum of Points and Authorities in Support (filed June 13, 2008, Ct. Rec. 11), at 10.

identify changes in Defendants' business operations that would reduce the risk of commission theft and other harms to publishers and advertisers resulting from the use of adware on Defendants' affiliate networks. Friedman Decl., ¶ 10.

After these extensive discussions concerning the facts, merits and potential damages in the case, on February 25, 2008, the parties engaged in mediation in San Francisco before the Honorable Edward Panelli (Ret.). At the conclusion of the all-day session, Justice Panelli made a "mediator's proposal" for settlement and asked that the parties either accept or reject the proposal within one week. After subsequent negotiations regarding the terms of the injunctive relief, each party accepted Justice Panelli's proposal and agreed to a settlement of all claims asserted against the Defendants. *Id.*, ¶ 11.

As part of these discussions, and over the course of more than four months, Defendants produced to Plaintiffs two preliminary damages analyses, one for each action, an additional set of disclosures in response to questions posed by Plaintiffs, and the deposition and subsequent declaration of Anders Bjoras and a declaration from a member of Defendants' Network Quality department describing Defendants' adware detection efforts prior to this settlement. *Id.*, ¶ 8.

D. The Settlement Agreement

This settlement is laudable not only because of the substantial amount of monetary relief, notwithstanding the difficulty of proving damages, but also because it is structured to provide for significant reforms to Defendants' practices. In exchange for said monetary and injunctive relief, members of two Settlement Classes will release all "Released Claims" relating to or arising from Non-Compliant Software use on Defendant Commission Junction's networks. *Id.*, Ex. A at ¶ 17.

1. The Settlement Classes

The proposed settlement has been reached on behalf of two separate settlement classes, one consisting of Advertisers and the other consisting of Publishers, defined in the Settlement Agreement as follows:

a. Advertiser Settlement Class:

> All Advertisers who, between April 20, 2003 and July 22, 2008, had ads hosted by Publishers on and/or paid commissions for ads placed through, Defendants' online affiliate marketing network.

b. Publisher Settlement Class:

> All Publishers who, between April 20, 2003 and July 22, 2008, hosted ads on behalf of Advertisers in, and/or received commissions for participating as a publisher in, Defendants' online affiliate marketing network.

Id., Ex. A at ¶¶ 2, 16.

2. Monetary Benefits to Class Members

As consideration for the settlement, Defendants have agreed to provide a broad package of settlement benefits to the Settlement Classes. The settlement benefits include Common Funds of approximately $1 million, to be distributed as follows:[6]

- Approximately 70% of the Common Funds will be allocated to the Publisher Fund. The pro rata share of the Publisher Fund owed to each eligible Publisher shall be equal to that Publisher's received commissions as a percentage of total commissions received by all Publishers during the class period.
- Approximately 30% of the Common Funds will be allocated to the Advertiser Fund. The pro rata share of the Advertiser Fund owed to

[6] The Settlement Agreement provides for certain costs to be paid out of Common Funds prior to any distributions to the Settlement Classes. Friedman Decl., Ex. A at ¶ 42. To minimize administrative costs, the parties have agreed that all claims of less than $1.00 will revert to the common fund and will be distributed to the remaining class members. *Id.*, Ex. A at ¶¶ 43-44.

> each eligible Advertiser shall be equal to that Advertiser's paid commissions as a percentage of the total commissions paid by all Advertisers during the class period.

Id., Ex. A at ¶ 42.

The settlement fund is also non-reversionary, such that any amount remaining after distribution of the total claim amount would be distributed *cy pres* to a charitable organization designated by the parties. *Id.*, Ex. A at ¶ 46.

3. Injunctive Component

The settlement also contains substantial injunctive relief requiring certain corporate governance reforms and increased detection of malicious adware on Defendants' affiliate networks. Among these reforms, Defendants have agreed to do the following:

Independent Audit: Defendants will retain, at their own expense, a qualified, independent auditor to perform an audit of Defendants' practices, systems and network quality efforts with respect to the prevention and detection of, and response to, third parties' use of adware. The auditor shall provide a report to counsel for all parties containing his or her findings and proposing recommendations for improving or enhancing Commission Junction's prevention, detection and response to adware use. *Id.*, Ex. A at ¶ 48.

Automated Software Investigative Tool: Defendants will implement an automated testing protocol utilizing a proprietary software tool designed to detect particular publishers' use of known malicious software applications. The tool will run on a continuous basis, and the independent auditor will be permitted to evaluate the automated tool and to make recommendations concerning the design and implementation of the automated tool in his or her report. *Id.*, Ex. A at ¶ 51.

Preservation of Information During Fraud Investigations: Defendants will implement an automated system for preserving all "click data" associated with a

particular publisher while that publisher is under investigation for the potential use of malicious software on Commission Junction's network. *Id.*, Ex. A at ¶ 52.

Tracking of Information Related to Fraud Investigations: Defendants shall maintain, for a period of no less than 3 years, certain data related to publisher investigations, publisher terminations and publisher software application testing. These data will allow for a more robust audit of Defendants' efforts to prevent, detect and respond to adware. *Id.*, Ex. A at ¶ 49.

Additional Investigative Tools: Defendants will assign a member of the Network Quality department to be "principally responsible" for reviewing reports related to adware usage. Defendants will also circulate a weekly "high conversion report" to all members of its Network Quality team in an effort to discover potential forced clicks and commission theft caused by adware. *Id.*, Ex. A at ¶ 50.

Finally, after implementation of the above-described terms, and subject to the Court's final determination, Defendants have agreed to pay Plaintiffs' Counsel fees and expenses up to $500,000, representing $475,000 in fees and $25,000 in expenses. *Id.*, Ex. A at ¶ 55. This payment is separate and apart from the Common Funds and will not reduce the amount of funds available to the Settlement Classes.

E. Notice to Class Members

The parties disseminated to the Settlement Classes a Long-Form Notice, an E-mail Notice and a Postcard Notice, notifying them of the terms of the settlement and of their rights in connection therewith. Friedman Decl., Exs. B-D. The parties agreed, and this Court concurred, that because all members of the Settlement Classes necessarily maintained an e-mail address to communicate with Defendants during the class period, notice by electronic mail was especially appropriate here. In the event that e-mail notice to any class member "bounced back" or was otherwise identified as having been undeliverable to the recipient's e-mail server, or if no

e-mail address could be located, the Claims Administrator sent Postcard Notice by standard U.S. mail or Priority Mail International, postage prepaid. *Id.*, Ex. A at ¶ 61.

Defendants also established a designated Web site that contains the full text of the Settlement Agreement, the Long-Form Notice, the Preliminary Approval Order and other relevant orders of the Court, and contact information for Plaintiffs' counsel.[7] Defendants secured nationwide access to the settlement Web site by registering the site with Google so that appropriate queries on Google would yield a link to the Web site. The Web site was also referenced on the E-mail and Postcard notices. Friedman Decl., Exs. C-D. Notice by e- mail, U.S. mail and publication on the Internet, as preliminarily approved by this Court, satisfies the requirements of due process. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993).

F. Claims and Settlement Administration

Administration of the class claims was designed with the expertise of Epiq Systems ("Epiq"), an experienced claims administrator, familiar with administering classes with over 100 million class members. In the administration of the settlement, Epiq was required to, and did, maintain a list of all class members who opted-out of the settlement, and a list of all opt-out requests that were rejected as duplicates, late, or otherwise invalid. Friedman Decl., Ex. A at ¶ 65.

On information and belief, the Settlement Claims Administrator sent notice to approximately 839,926 Class Members. *Id.*, ¶ 16. As of November 14, 2008, on information and belief, there have a total of 332 requests for exclusion. *Id.*[8] In contrast, only six (6) Class Members submitted objections. *Id.*; Exs. E-J.

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[7] *See* http://www.cjsettlement.com (last accessed Nov. 23, 2008).

[8] These numbers are estimates, based on the information available to date. According to the Settlement Agreement, Defendants will cause proof of the mailing of notice to be filed on or before December 8, 2008 (30 days before the Final Approval Hearing), which will contain the final numbers regarding notice, requests for exclusion and class members. *Id.*, Ex. A at ¶¶ 60-62.

III. ARGUMENT

A. The Settlement Should be Approved as Fair, Reasonable and Adequate

The Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).[9] Federal Rule of Civil Procedure 23(e) dictates that a court should consider the fairness, adequacy and reasonableness of a settlement by balancing many factors, which include: (1) the strength of the plaintiffs' 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; and (7) the reaction of the class members to the proposed settlement. *Churchill Vill., L.L.C. v. Gen. Elect.*, 361 F.3d 566, 576 (9th Cir. 2004).[10] The Court may also consider the absence of collusion in the settlement process. *Id.* at 575. This list is not exclusive and different factors may predominate in different factual contexts. *Torrisi*, 8 F.3d at 1376. The relative degree of importance of each of these factors varies according to the circumstances of each case and is dictated by the nature of the claim and the type of the relief sought. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

When reviewing these factors, the settlement is entitled to a ***presumption of fairness*** because it was negotiated at arm's length by experienced counsel after significant discovery, a mediation and months of intense settlement discussions. *See In re Heritage Bond Litig.*, MDL No. 02-ML-1475-DT, 2005 U.S. Dist. LEXIS 13555, at *11 (C.D. Cal. June 10, 2005). A proposed settlement shall not "be judged against a hypothetical or speculative measure of what might have been achieved by

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[9] All internal citations and quotations omitted, unless otherwise indicated.

[10] A separate factor is the presence of a governmental participant, which is not relevant here. *Id.*

the negotiators." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). The Court must consider the settlement terms "as is" and cannot rewrite terms or conditions drafted by the parties. *Id.* at 630; *see also Hanlon*, 150 F.3d at 1026 ("The settlement must stand or fall in its entirety.").

As described above, the settlement was reached only after extensive discovery had been conducted. Negotiations occurred at arm's length over four months with the assistance of the Honorable Edward Panelli (Ret.) and the Settlement Agreement was not reached until Defendants committed to significant corporate reform. Class Counsel are experienced in class actions. Friedman Decl., Ex. K; Nassiri Decl., Ex. A.[11] Moreover, only six out of the approximate 839,000 class members to whom notice was sent, submitted objections – a total of .001% of the aggregate classes combined. Friedman Decl., ¶ 16. Thus, the Settlement Agreement enjoys a presumption of fairness. *See Rodriguez v. West Pub. Corp.*, No. 05-cv-3222 R (MCx), 2007 WL 2827379, at * 7 (C.D. Cal., Sept. 10, 2007).

1. The Strength of Plaintiffs' Case

Although Plaintiffs largely prevailed on Defendants' motions to dismiss and believe they would prevail on any future dispositive motion filed by Defendants, whether Plaintiffs would obtain a favorable unanimous jury verdict was far from guaranteed.

Significant obstacles existed to proving liability. There was a risk that the Court would agree with Defendants that the contract language precluded the classes' claims, or the Defendants' actions were sufficient to discharge their duty (if any) to the class. Furthermore, even if Plaintiffs prevailed on liability, Plaintiffs might not prevail on damages because Defendants' practice was not to retain the raw transaction data for most of the class period. Friedman Decl., Ex. L at ¶ 2.

[11] "Nassiri Decl." refers to the Declaration of Kassra Nassiri in Support of Motion for Final Approval of Settlement, An Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards, filed concurrently herewith.

(Declaration of Anders Bjoras). These data were important to track and properly account for each transaction and to establish damages through the class period. Defendants have also represented that they never historically analyzed – on a macro, systemic level – the size and scope of the illegal adware activities on their network. *Id.*, Ex. L at ¶ 15. In doing so, Defendants effectively blocked two direct avenues of proof of Defendants' liability and class damages.

Although Plaintiffs might be able to draw an adverse inference from Defendants' behavior, an adverse inference alone is in no way a guarantee of proving causation.

> The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document . . . .

Akiona v. U.S., 938 F.2d 158, 161 (9th Cir. 1991).

If Plaintiffs could not establish damages with requisite certainty, their claims would fail, and they would walk away from the litigation empty-handed. The proposed settlement not only eliminates these risks associated with continued litigation, but also assures that the Settlement Classes will benefit from the prospective injunctive relief contained in the Settlement Agreement.

2. The Risk, Expense, Complexity and Likely Duration of Further Litigation

The risk, expense, complexity and duration of continued litigation also favors settlement. The Court should consider "the probable costs, in both time and money, of continued litigation." *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002). In most cases, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecom. Coop. v. Directv*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). Indeed, the Ninth Circuit has noted that settlement is encouraged

in class actions where possible: "there is an overriding public interest in settling and quieting litigation . . . particularly . . . in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir.1976).

If not for this settlement, the case would likely continue to class certification, discovery, summary judgment and trial. While counsel for Plaintiffs believe they have a reasonable chance of prevailing on the merits of Plaintiffs' claims, the incursion of additional and very substantial expenses due to extensive and technical discovery, retention of experts, summary judgment and trial would severely deplete even the best-case recovery. Defendants are represented by a nationally-recognized and prestigious law firm that would mount a vigorous and thorough defense. Defendants are a well-capitalized, public company and one of the largest Internet affiliate marketing companies in the world. The cost to litigate against such capable and well-funded Defendants would unquestionably be large. If litigation continues, Plaintiffs reasonably anticipate a hotly-contested motion for class certification, expensive and protracted discovery, competing motions for summary judgment and a lengthy trial. Appeals could potentially follow, thereby causing further expense, delays and the uncertainties which are inherent in litigating an appeal. Settlement of the litigation at this time, under the proposed terms, will ensure an immediate recovery for the Settlement Classes, and immediate and ongoing benefits from Defendants' operational reforms, without any further expense incurred on behalf of the Settlement Classes. Accordingly, final approval of the settlement is warranted. *See Directv*, 221 F.R.D. at 527 ("Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation").

3. The Risk of Maintaining Class Action Status Throughout the Trial

As part of the settlement, the parties have agreed to stipulate to certification of the two settlement classes. Friedman Decl., Ex. A at ¶ 36. Should the settlement not be approved, however, no doubt exists that any future certification effort would be a vigorously and highly contested battle. Defendants have already indicated as much to Plaintiffs, and have also disputed whether these actions would be manageable for trial. Friedman Decl., ¶ 12. Because the most straight-forward identification of those publishers and advertisers who were harmed by adware would require analysis of the raw transaction data, Defendants' policies of destroying that data presented a significant obstacle to class certification.

While Plaintiffs are confident that they would eventually succeed on any such certification effort, even if a class were certified and the matter proceeded to trial there is no guarantee that Defendants would not move for and obtain decertification of the classes before or during trial. As noted by one court, if "insurmountable management problems were to develop at any point, class certification can be revisited at any time under Fed. R. Civ. P. 23(c)(1)." *See In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y.1998).

Finally, even if the Class remained certified throughout the trial and Plaintiffs prevailed, Defendants would surely challenge class certification on appeal. "If at any point the Class were decertified or certification were reversed on appeal, the Class would recover nothing." *Rodriguez*, 2007 WL 2827379, at *8. Thus, this factor also weighs in favor of approving the settlement.

4. The Amount Offered in Settlement

In considering the amount offered in settlement, the Court may also look at the difficulties Plaintiffs would face if litigation proceeds. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). This is a case where even Plaintiffs recognize it would be unusually difficult to estimate damages. The difficulties are

twofold: (1) Defendants' pre-lawsuit data retention policies were to destroy the historical data important to proving damages; and (2) it is highly unlikely a perfect system could be devised to detect all adware transactions and give proper credit for those transactions to the rightful publishers. Friedman Decl., ¶ 13.

The potential risks Plaintiffs faced in proving damages certainly underscores the great result Plaintiffs achieved in negotiating a settlement fund which creates a $1 million non-reversionary cash settlement. Because of the lack of reliable data, it is hard to estimate how much the Settlement Classes were actually harmed. In light of the difficulties Plaintiffs would face if litigation proceeded, however, and in addition to the substantial and valuable corporate reform obtained for the benefit of the Settlement Classes, the consideration offered here is clearly adequate and fair. "[S]ettlement is about compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re Warfarin*, 212 F.R.D. at 257 (finding settlement amount representing 33% of maximum possible recovery was well within a reasonable range when compared with recovery percentages in other class action settlements); s*ee also Officers for Justice*, 688 F.2d at 624 ("the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes").

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

Significant discovery was conducted in this action up to and through the point where settlement was reached. Friedman Decl., ¶¶ 7-10. Plaintiffs conducted formal discovery before the parties agreed to a standstill of formal discovery pending settlement discussions, conditioned on receiving information discovery. The parties exchanged initial disclosures. Plaintiffs served a combined total of 197 document requests and 27 special interrogatories. Plaintiffs deposed Anders Bjoras, Commission Junction's Vice President of Engineering, on a variety of technical topics, for which Defendants designated Ander Bjoras. Defendants received

responses to special interrogatories from Plaintiffs Carrier and Settlement Recovery Center. *Id.*, ¶ 7.

During negotiations, Defendants provided substantial informal discovery to Plaintiffs. This included detailed descriptions of Defendants' business operations, such as its systems and processes related to prevention, detection and response to adware. Defendants provided Plaintiffs with several thousand pages of sample transaction data, two separate analyses of liability and damages, and one set of disclosures in response to Plaintiffs' follow-up inquiries. Plaintiffs' technical expert was allowed access to all of this information and worked closely with Plaintiffs' counsel in assessing Defendants' existing systems and processes to prove liability, assessing the available historical data to establish damages, and proposing certain changes in Defendants' systems and processes to prevent future harm from adware. Plaintiffs' technical expert was also allowed to attend an all-day settlement meeting at Defendants' corporate headquarters and participate directly in a highly-technical question-and-answer discussion with high-level employees in charge of Defendants' technical operations. *Id.*, ¶ 8.

"[T]here is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst*, 529 F.2d at 950. Settlement spares the parties the costs of protracted litigation and eases the congestion of judicial calendars. *See id.* at 943. In light of the extensive discovery and independent factual research conducted by Plaintiffs, and the public policy favoring resolution of class actions by settlement to avoid protracted litigation, this factor also weighs in support of approval.

6. The Experience and Views of Counsel

Plaintiffs have considerable experience in litigating class actions, and other complex litigation. Friedman Decl., Ex. K; Nassiri Decl. Ex. A. Counsel Hagens Berman Sobol & Shapiro LLP has a strong history of success in consumer class

actions and complex litigation, and has numerous multi-million dollar settlements similar to this case. Friedman Decl., Ex. K.

In assessing the adequacy of the terms of a settlement, the trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties. *See Directv*, 221 F.R.D. at 528 ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation"). The basis for such reliance is that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Indeed, when evaluating a proposed settlement, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel. *See Hanrahan v. Britt*, 174 F.R.D. 356, 366-368 (E.D. Pa.1997) (finding that a presumption of correctness applies to a class action settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery).

Plaintiffs' counsel fully support the settlement, and it is their informed opinion that, given the uncertainty and expense of pursuing Defendants through trial, the settlement is fair, reasonable and adequate and in the best interests of the Settlement Classes. Friedman Decl., ¶ 17. The settlement is the product of a mediation conducted by a qualified and experienced former judge, whose informed "mediator's proposal" served as the basis for the settlement. Based on months of litigating the cases and engaging in formal and informal discovery, the parties understood the strengths and weaknesses of their cases and had sufficient information to support a decision regarding the fairness of the Settlement Agreement. *Id.* Approval of the settlement will mean a present recovery for class members. It will also result in Defendants' immediate implementation of a suite of operational changes aimed at reducing the ongoing harm caused to the Settlement Classes by adware.

This factor weighs in favor of approving the settlement.

7. The Reaction of the Class Members to the Proposed Settlement

Notice was delivered by e-mail, first class U.S. mail and Priority Mail International to approximately 839,000 Class Members. Friedman Decl., ¶ 16. As of November 14, 2008, there have been approximately 332 requests for exclusion, and only six (6) objections, which amounts to less than .001% of the aggregate classes combined. *Id.* The fact that the Settlement Agreement enjoys overwhelming support from the Class supports a finding that the Settlement Agreement is fair, adequate and reasonable. *See Wilson v. Airborne, Inc.*, No. EDCV 07-770 VAP (OPx), 2008 WL 3854963, at *7 (C.D. Cal. Aug. 13, 2008) (230 opt-outs and 17 objections out of a class of 419,606 weighs in favor of approval); *Directv*, 221 F.R.D. at 529 ("It 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").

Further, only one of the six objectors, Jeffery A. Redding, arguably challenged the settlement terms. *See* Friedman Decl., Ex. E (Redding Obj.) Mr. Redding's objection is based on a misconception of the Settlement Agreement's terms. Mr. Redding states that "I hereby object to this Class Action Settlement because all you are offering to Publishers like me is credit with the Commission Junction." The Settlement Agreement does provide that publishers with active accounts will be credited amounts due under the settlement. The credit, however, is equivalent to a credit for an earned commission and entitles the publisher to a cash payment in the full amount of the credit. Friedman Decl., Ex. A at ¶ 45. Further, if the publisher's account activity level is insufficient to result in a payout within 180 days of issuance of the credit or the account is inactive, the publisher will receive a check from Defendants in the full amount of the credit. *Id.*, Ex. A at ¶¶ 45-46. Thus, the settlement will result in cash payments to publishers.

Three remaining objectors raised only procedural matters, such as choice of venue for the lawsuit (Switzer Obj.), the particular claims brought (Chanbanyong Obj.) or the amount of a personal damage claims against Defendant Commission Junction (Martins Obj.). Friedman Decl., Exs. F-H. Each of these objections does not address the fairness or adequacy of the settlement terms, and the Court should overrule the objections. *Airborne, Inc.*, 2008 WL 3854963 at *8. Another would-be objector complains that she did not receive notice of the suit. *Id.*, Ex. I (Lafrance Obj.). If she did not receive notice, she is not a class member and therefore has no standing to object. Another objector requests the repair of her computer, given the damage caused by adware programs. *Id.*, Ex. J (Ware Obj.). Claims for damage caused to a computer by adware, however, would lie against the adware affiliate who released the software and not against the Defendants here, who simply provided marketing network services.

The relatively low number of objectors supports a finding that the settlement is adequate. The objection rate here, less than .001%, is exceedingly small when compared with objections rates in other class actions. *See, e.g., Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (finding that objections from only 16% of the class was persuasive that the settlement was adequate); *Glass v. UBS Fin. Services, Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007) (approving settlement with opt-out rate of approximately 2%). Accordingly, this factor weighs in favor of approving the settlement.

8. Absence of Collusion in the Settlement Process

There was no collusion in the settlement of this action. The parties entered into the Settlement Agreement in good faith, following arms-length negotiation by counsel, including a mediation session with the assistance of the Honorable Edward Panelli (Ret.). Negotiations took place over many months, were fervent and exhaustive, especially with regards to discovery. Friedman Decl. ¶¶ 7-14.

Defendants' agreement to pay up to a certain amount of attorneys' fees and expenses was negotiated separately, at arm's length, and only after the material terms of the settlement had been agreed upon. Friedman Decl., ¶ 14; Ex. A at ¶ 55. As a result, this factor also supports approval of the settlement.

B. The Settlement Class Should Be Finally Certified

1. The Settlement Classes Satisfy the Prerequisites of Rule 23(a)

In order to grant final certification of a settlement class, the requirements of Rule 23 must generally be satisfied. *See* Fed. R. Civ. P. 23; *Hanlon*, 150 F.3d at 1019. As the Court preliminarily found with respect to approval of the Settlement Classes, certification is warranted where, as here, it is demonstrated that the four prerequisites of Rule 23(a), numerosity, commonality, typicality, and adequacy of representation, and one of three requirements of Rule 23(b), are satisfied. *Id.* In certifying a settlement class, the Court is not required to determine whether the action, if tried, would present intractable management problems. *Amchem Prods. v. Windsor, Inc.*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."). Rather, the Court has great discretion in determining whether to certify a settlement class. *Id.* at 624.

As set forth in the proposed Settlement Agreement, the parties seek to resolve claims relating to the following two settlement classes, representing both (a) advertisers who had advertisements hosted and (b) publishers who hosted advertisements on Defendants' networks between April 20, 2003 and July 22, 2008. Friedman Decl., Ex. A at ¶¶ 2, 16.

The proposed Settlement Classes satisfy the requisite elements of Rule 23(a) – numerosity, commonality, typicality and adequacy of representation. *See In re*

United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig., 122 F.R.D. 251, 253 (C.D. Cal. 1988).

Plaintiffs of each class easily satisfy the ***numerosity*** requirement. Fed. R. Civ. P. 23(a)(1). Defendants' records indicate that it had over a half million Publishers and approximately 5,000 Advertisers who either hosted ads or had their ads hosted, respectively, during the class period. Friedman Decl., ¶ 16. Plaintiffs therefore contend that each of the proposed Advertiser and Publisher Settlement Classes satisfies the numerosity requirement of Rule 23(a).

Each class of Plaintiffs also meets the ***commonality*** requirement. Fed. R. Civ. P. 23(a)(2). Commonality exists when there is either a common legal issue stemming from divergent factual predicates or a common nucleus of facts resulting in disparate legal remedies within the class. *Hanlon* 150 F.3d at 1019-20; *see also Amchem*, 521 U.S. at 625 ("[p]redominance is a test readily met in certain cases alleging consumer fraud . . . ."). Where a complaint alleges a "common course of conduct" that affects members of the class in the same manner, common questions predominate. *Blackie v. Barrack*, 524 F.2d 891, 905-908 (9th Cir. 1975). Here, Defendants' conduct – improperly calculating commissions, failing to enforce Defendants' own rules prohibiting adware and failing to take appropriate measures to prevent commission theft – is equally relevant to each class member's claims and damages. That different members of the Settlement Classes may have been harmed in different amounts, at different times, or by different types of adware, does not preclude a finding that common issues predominate, because a ***continuous and common course*** of conduct has been alleged. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 914-15 (9th Cir. 1964); *Blackie*, 524 F.2d at 902 (endorsing the approach taken by the court of appeals in *Harris*); *see also In re Indep. Energy Holdings PLC, Sec. Litig.*, 210 F.R.D. 476, 486 (S.D.N.Y. 2002) (holding that predominance requirement was easily satisfied in cases where claims were based on

a common theory of misrepresentations and omissions, even though damage amounts might vary).

Plaintiffs' claims are also ***typical*** of those of their respective Settlement Classes because, like all members of the Settlement Classes, they arise from a single course of conduct and are based on the same legal theories. Fed. R. Civ. P. 23(a)(3). In *Hanlon*, the Ninth Circuit explained that "[u]nder [Rule 23's] permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." 150 F.3d at 1020.

Here, the same course of conduct gave rise to the proposed Class Representatives' and proposed Settlement Class members' claims. *See, e.g.*, FAC, ¶¶ 2, 79. Plaintiff Carrier was a publisher who successfully hosted ads for her Advertisers and thus earned commissions. *Carrier* FAC, ¶ 37. Plaintiff Natural Area Rugs was an Advertiser who engaged Publishers to host its ads and paid commissions to those Publishers. FAC, ¶¶ 71, 73-74. Both named Plaintiffs allege that they were damaged by Defendants' failure to properly account for transactions and enforce the rules and policies regarding adware. All members of the Settlement Classes were affected by Defendants' common course of conduct. As a result, the named Plaintiffs' claims are typical of those of the Settlement Classes.

Finally, the proposed Class Representatives have "fairly and adequately protect[ed] the interests of the class." Fed. R. Civ. P. 23(a)(4). The ***adequacy*** prong is satisfied where a "suit [is not] collusive and plaintiff's interests [are not] antagonistic to those of the remainder of the class." *United Energy*, 122 F.R.D. at 257. Here, the proposed settlement does not present any antagonism or disabling conflict between the proposed representative plaintiffs and the absent class members. *See Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1461 (S.D. Cal. 1988); *Weinberger v. Jackson*, 102 F.R.D. 839, 844-45 (N.D. Cal. 1984). Each of the proposed class

representatives has the same claims as the members of the settlement class they seek to represent. Accordingly, Plaintiffs believe the interests of the Settlement Classes will be fairly and adequately protected. Fed. R. Civ. P. 23(a)(4).

2. The Settlement Classes Satisfy the Prerequisites of Rule 23(b)(3)

The class action device proposed here "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). As described above, common issues predominate throughout both of the settlement classes. To determine superiority, pertinent factors for the court to consider include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Here, each Settlement Class is far too numerous, and the typical claim is likely too small for each individual member to maintain a separate action, especially given the sheer volume of highly-technical data analysis that would be required to support the claims. Further, the nationwide geographical dispersion of class members makes it desirable that litigation of the claims involved be concentrated in this forum to mitigate the risk of inconsistent judgments. Courts have recognized the superiority of the class action device in cases, like the ones here, involving "complicated and imaginative rather than straightforward" allegations. *Blackie*, 524 F.2d at 904 n.19.

Employing the class device here will not only achieve economies of scale for Class members, but will also conserve the resources of the judicial system and preserve public confidence in the integrity of the system by avoiding the waste and delay of repetitive proceedings and prevent the inconsistent adjudications of similar issues and claims. *See Hanlon*, 150 F.3d at 1023. There is no other mechanism by

which all of the Settlement Class members' claims will be as fairly, adequately and efficiently resolved as through a class action.

C. The Court Should Appoint Plaintiffs' Counsel as Class Counsel

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(A), (B). In making this determination, the Court must consider:

> [W]ork counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). As detailed in the firm resumes presented to the Court, Plaintiffs' co-counsel have significant experience in litigating class actions. *See* Friedman Decl., Ex. K; Nassiri Decl., Ex. A. Plaintiffs' co-counsel have diligently investigated, prosecuted, and settled this litigation, dedicated substantial resources to the investigation and prosecution of the claims at issue in the litigation, and demonstrated their knowledge of the contract and consumer protection laws at issue. Accordingly, Plaintiffs request that this Court appoint Hagens Berman Sobol Shapiro LLP and Nassiri & Jung LLP as Class Counsel for both the Advertiser and the Publisher Settlement Classes.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court (a) grant final approval of the proposed settlement, (b) certify the Advertiser and Publisher Settlement Classes for settlement purposes, and (c) appoint the petitioning Plaintiffs and their Counsel as Lead Plaintiffs and Class Counsel, respectively.

DATED this 26th day of November, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on November 26th, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses registered, as denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

/s/ Jeff D. Friedman
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Manual Notice List

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