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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DENO MILANO,

Plaintiff,

vs.

INTERSTATE BATTERY SYSTEM OF AMERICA, INC.; INTERSTATE BATTERY SYSTEM INTERNATIONAL, INC.,

Defendants.

Case No. 10-CV-2125-CW

NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Date: June 28, 2012
Time: 2:00 p.m.
Judge: Hon. Claudia Wilken

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 28, 2012, at 2:00 p.m. before the Honorable Claudia Wilken in Courtroom 2, 4th Floor of the United States District Court for the Northern District of California, Oakland Division, located at 1301 Clay Street, California 94612, Plaintiff Deno Milano will and hereby does move for an order granting final approval of the parties' proposed class settlement.

Plaintiff brings this motion pursuant to Federal Rule of Civil Procedure 23(e). Plaintiff's motion is based on this notice; the accompanying Memorandum of Points and Authorities and Declaration of Eric H. Gibbs; and all other papers filed and proceedings had in this action.

DATED: May 4, 2012

Respectfully submitted,

GIRARD GIBBS LLP

By: /s/ Eric H. Gibbs

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Miscellaneous

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff filed suit to challenge allegedly unfair pro-rata warranty practices by Interstate Battery System of America, Inc., and its parent company, Interstate Battery System International, Inc. (collectively "Interstate"). Interstate's warranty employed a pro rata formula to calculate a discounted replacement price for a battery that failed during the warranty period. Rather than using the actual purchase price for the warranted battery or even the "Suggested Retail Price," the pro rata calculation used a seemly arbitrary "List Price" that resulted in higher replacement battery prices. Plaintiff alleged that the warranty terms were confusing and poorly communicated to consumers and that use of a "List Price" was unfair and deceptive.

Following two years of investigation, litigation, and settlement negotiations, Plaintiff is pleased to present for the Court's consideration a class settlement that fully resolves Plaintiff's concerns. Under the settlement, Interstate will reform and improve its battery warranty to eliminate the allegedly unlawful practices and provide reimbursements to consumers allegedly overcharged under the old warranty. In exchange, class members will automatically release only equitable—not monetary—claims upon approval of the settlement. Monetary claims will only be waived by those class members who voluntarily choose to participate in the settlement claims program and then only on an individual basis.

The settlement prescribes injunctive relief that will require Interstate to adopt a new form of limited warranty whose terms, language, and format will be more easily understood by consumers. The new limited warranty will clearly state how any pro-rata warranty adjustment price would be calculated. Moreover, that calculation would be based on Interstate's then-current "Suggested Retail Price" and not on the higher "List Price." Interstate's new limited warranty will include all statements and disclosures required by the Magnuson-Moss Warranty Act, and Interstate will take reasonable steps to ensure that any postings of the new limited warranty—such as on its website—will be uniform with the language included in the hardcopies provided to consumers at the point of sale. In addition, Interstate will improve its method of delivering its new limited warranty to consumers. Interstate's obligations to implement these improved business practices will persist until December 31, 2014.

The settlement also requires Interstate to implement a settlement claims program that gives class members two ways to seek recompense for past purchases. Class members who lack a receipt for their pro-rata battery purchase under the old warranty can claim a $5 product voucher by submitting a tier-one claim form. Class members who have valid receipts can submit tier-two claim forms to claim either a $8.50 check card or a $12 product voucher for each of up to ten replacement battery purchases. The amounts available with a tier-two claim form approximate the average amount allegedly overcharged under the old warranty, and the amount available with a tier-one claim—for which no receipt is required—is only slightly less. Both tier-on and tier-two claim forms require little more than a signature to complete and can be submitted electronically.

The Court preliminarily approved the proposed class settlement on March 8, 2012, finding that the terms appeared sufficiently fair, reasonable, and adequate to inform the class, provisionally certified under Federal Rule of Civil Procedure 23(b)(2), and proceed to a formal fairness determination. (*See* Dkt. No. 75 (Order).) Plaintiff now requests that the Court grant final approval of the class settlement.[1]

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Complaint

In March 2010, Plaintiff Deno Milano purchased a replacement car battery under Interstate's pro rata warranty. (Dkt. No. 80 (Milano Decl.) ¶ 2.) Interstate's pro-rata warranty promises that if a battery does not last for a designated period of time (85 months in the case of Mr. Milano's battery), the consumer can obtain a replacement battery at a discounted price that depends on how long the battery actually lasted. When Mr. Milano was charged more than he anticipated for the replacement battery, he became curious about the pro rata calculation that determined his discounted price. (*Id.*) Plaintiff's and class counsel's investigation ultimately revealed that the pro rata calculation was not based on a battery's actual sales price, or even the manufacturer's suggested retail price (MSRP), but rather a "List Price" which is about 20% higher than MSRP. While Interstate's website disclosed this pro-rata warranty calculation and provided the "List Price" for Interstate batteries, the warranty information distributed with Interstate batteries at the point of sale did not.

[1] While Plaintiff concurs with the requested outcome of Interstate's separate motion for final approval, he does not join that motion or necessarily adopt the statements made therein.

Plaintiff alleged that Interstate's warranty practices are unlawful under two principal theories of liability:

(i) By calculating the pro-rata warranty discount using a "List Price," Interstate violated the terms of its warranty, which states that the prorated charge will be based on the "then current published cost per month of the battery." (Dkt. No. 13 (Am. Compl.) ¶¶ 18.) Plaintiff alleged that the "published cost" is ambiguous and most reasonably interpreted as MSRP and that Interstate's use of another, higher cost (the "List Price") constitutes a breach of contract and violation of federal and state warranty law. (*See id.*, ¶¶ 60-61, 67-68, 86-87.)

(ii) If Interstate's prescribed calculation was permissible under the terms of its warranty, it was nonetheless confusing and misleading because a reasonable consumer would expect the pro-rata warranty discount to be calculated using MSRP or actual sales price. (*See id.*, ¶¶ 23.) Interstate therefore violated state consumer protection law, federal law requiring warranty terms to be clearly set forth in a single document, and the implied covenant of good faith and fair dealing. (*See id.*, ¶¶ 52, 75, 97, 104.)

Plaintiff asserted these claims on behalf of a proposed nationwide class of similarly situated consumers who also purchased an Interstate battery at a pro-rated price. (*See id.*, ¶ 35.) He asked that the Court enjoin Interstate's unlawful warranty practices on a class-wide basis and award class members damages or restitution. (*See id.* at 20.)

B. Investigation, Litigation, and Settlement Negotiations

Plaintiff's initial investigation of Interstate's warranty practices included review of transaction documents and information collected from Interstate's online materials, customer service department, and battery dealers. Following the filing of his complaint in May 2010, Plaintiff's investigation turned first to informal discovery efforts to learn about Interstate's corporate structure and electronically stored information, followed by formal discovery efforts to learn about those same topics and Interstate's warranty terms, pro rata calculation, and electronic databases. In all, Plaintiff analyzed over 20,000 pages of documents produced by Interstate. Plaintiff also conducted a survey of nationwide battery dealers to investigate replacement battery prices. Plaintiff's post-filing investigation and discovery proved to be particularly challenging due to the complex nature of both Interstate's warranty, its battery

distribution model, and its corporate structure. At the same time, Interstate was reticent to provide information about its electronically stored information and databases or its corporate relationships. While engaged in discovery, Plaintiff also worked through disputes with Interstate about the proper parties to the lawsuit and began drafting class certification and summary judgment motions. (Gibbs Decl. ¶¶ 3 & 5.)

As the case progressed, the parties were able to make some headway through their disputes via an on-going meet-and-confer process kept alive by copious amounts of letter and e-mail correspondence and at times daily telephone conferences. Interstate had provided an organization chart through informal discovery and later agreed that Plaintiffs could conduct additional discovery into Interstate's corporate structure. Interstate also stipulated that Interstate Battery System of America, Inc. was in possession, custody and control of all potentially responsive information, documents and witnesses Plaintiffs were likely to seek through discovery. (*See* Dkt. No. 31 (Stipulation) ¶ 3.)

As Interstate was beginning to share more information about the company and its warranty practices and Plaintiff's understanding of the underlying facts was developing apace, the parties remained cognizant of their obligation to complete private mediation by July 29, 2011. (*See* Dkt. No. 28 (Case Mgmt. Order).) Informed by Interstate's responses to two sets of interrogatories and document requests, the parties agreed that sufficient information had been exchanged to make mediation worthwhile and settlement negotiations began in February 2011. Following an initial informal meeting, the parties explored settlement possibilities in a full-day mediation session before Judge William J. Cahill (Ret.) of JAMS. Two more formal mediations with Judge Cahill, one in San Francisco and another in Dallas, were necessary before the parties reached the essential terms of the deal on March 31, 2011. (Gibbs Decl. ¶¶ 3& 6.)

The process of formalizing the terms of the parties' deal and, among other things, significantly modifying Interstate's warranty and warranty related-practices, proved quite complicated and time-consuming, requiring frequent exchanges of settlement documents and numerous telephone conferences until October 26, 2011, when the parties' initial settlement agreement was finalized and executed. (*Id.* ¶ 6.) Settlement negotiations resumed shortly after the Court preliminarily approved that agreement in December 2011, when Interstate encountered unexpected hurdles implementing the settlement's

injunctive elements. The parties successfully worked through the issues through continued negotiation, crafting an improved settlement that resolved Interstate's implementation problems and provided greater relief to an expanded class. (*See id.*)

Through this process, the parties were able to develop feasible reforms to Interstate's warranty practices that alleviate Plaintiff's concerns on behalf of consumers, and they were able to do so while avoiding the often extensive duration and excessive costs associated with these types of cases, where a corporate defendant is fighting to maintain its entrenched—and costly to dislodge—business practices against relatively small individual monetary losses. The parties ultimately agreed that Interstate could retain the industry-standard pro rata warranty format but with significant modification of the terms. Interstate's new pro rata warranty must be calculated using MSRP for the replacement battery rather than Interstate's "List Price," written in a way that is more easily understood by consumers, communicated to consumers through improved methods, and published with uniform language whether in hardcopy or posted online. In addition, the parties developed a claims process by which consumers who purchased replacement batteries under Interstate's old warranty can receive reimbursements.

C. Overview of the Settlement's Terms

The terms of the proposed settlement are set forth in the Amended Class Settlement Agreement attached as Exhibit 1 to the declaration of Eric H. Gibbs and cited hereafter as "Amended Settlement." The principal provisions are summarized below.

1. The Settlement Class

The settlement provides relief to a class of consumers provisionally certified under Federal Rule of Civil Procedure 23(b)(2) and defined as:

> All original purchasers of an Interstate Batteries trademarked battery (meaning the Interstate Batteries, Nationwide, Power Volt, and Quickstart brands) that was covered by a Previous Interstate Batteries' Pro-Rata Warranty and that was purchased from an Interstate Batteries authorized dealer (but not from an All Battery Center Store), in the United States or the District of Columbia, at any time from April 19, 2000 through April 30, 2012, and who:
>
> (i) later presented that original battery, during the applicable pro-rata-warranty-coverage period, to an Interstate Batteries authorized warranty dealer for a pro-rata-warranty adjustment on the price of a Replacement Battery, and who then purchased that Replacement Battery from that dealer at an adjusted price on a date from May 19, 2006, through April 30, 2012 ("Replacement-Battery-Purchaser Class Members"); or

> (ii) still had, on or before April 30, 2012, an unexpired contractual right under a Previous Interstate Batteries' Pro-Rata Warranty to purchase a Replacement Battery in a pro-rata-warranty-adjustment transaction if their original battery fails under the terms of the Previous Interstate Batteries' Pro-Rata Warranty ("Unexpired-Warranty-Holder Class Members").

(Amended Settlement at II.AA; Dkt. No. 75 (Order) 1-2.)

2. Changes to Interstate's Warranty Practices

Interstate consents to an injunction that requires it to implement a new form of limited warranty whose terms, language, and format will be more easily understood by consumers. (Amended Settlement at VI.B.1.) The new limited warranty will clearly state how any pro-rata warranty adjustment price would be calculated. Moreover, that calculation must be based on Interstate's then-current "Suggested Retail Price" and not on the higher "List Price" that was used in the previous pro-rata warranty. (*Id.*) Interstate's new limited warranty will include all statements and disclosures required by the Magnuson-Moss Warranty Act, and Interstate will take reasonable steps to ensure that any postings of the new limited warranty—such as on its website—will be uniform with the language included in the hardcopies provided to consumers at the time of sale. (*Id.*) In addition, Interstate will improve its method of delivering its new limited warranty to consumers: Interstate will publish the new limited warranty in writing and, through its distributors, provide copies of that written warranty to authorized dealers with instructions to deliver it to each customer who purchases an Interstate battery. (*Id.*) Interstate agreed to begin implementing these improved business practices in May 2012, and its obligation to maintain them will persist until December 31, 2014. (*Id.* at VI.B.3.)

3. Settlement Claims Program

Class members who lack receipts for their pro-rata replacement battery purchases can claim a $5 product voucher by submitting a tier-one claim form. (Amended Settlement Agreement at VI.B.2.i.) Using a pre-printed claim form, Class members must certify that they (1) purchased between April 19, 2000 and April 30, 2012 a battery covered by a previous, pro-rata Interstate Batteries' limited warranty; (2) then purchased a replacement battery pursuant to the warranty between May 19, 2006 and December 31, 2019; and (3) either the claim form is being submitted no later than December 31, 2012 (if the replacement battery was purchased on or before April 30, 2012) or the claim form is being submitted within one year of the date the replacement battery was purchased (if purchased on or after May 1,

2012). (*Id.*) No proof of purchase is necessary with a tier-one claim form. (*Id.*) Class members who have valid receipts can submit tier-two claim forms to claim either a $8.50 check card or a $12 product voucher for each of up to ten replacement battery purchases. (*Id.* at VI.B.2.ii.)

The claim forms are intentionally simple to complete, requiring only basic contact information, a signature, and, for tier-two claims only, inclusion of a receipt and a checkmark to select either the check card or the product voucher. Class members may submit completed claim forms by mail or electronically. (*Id.* at VI.B.2.i.2; VI.B.2.ii.2.) Interstate will pay all valid tier-one and tier-two claims within 30 days of receipt, and any consumer whose submission is rejected will be given an opportunity to cure (except for late claims). (*Id.* at VI.B.2.iii.) Claim forms for replacement battery purchases completed by April 30, 2012, must be submitted no later than December 31, 2012. (*Id.* at II.CC.) Claim forms for replacement battery purchases after April 30, 2012 must be submitted within one year of the replacement battery purchase and no later than December 31, 2020. (*Id.*)

4. Ongoing Class Notification of the Settlement Claims Program

Under the class notice program developed by the parties and Settlement Administrator and approved by the Court, Interstate battery consumers throughout the United States and the District of Columbia have been informed of the settlement claims program (i) by a dedicated Class Settlement Website, (ii) through keyword sponsorships at popular internet search engines, which will link to the Class Settlement Website, (iii) by Interstate's website, (iv) through press and radio news releases, (v) through fliers provided to Interstate dealers for distribution to retail locations authorized to carry Interstate batteries and (vii) via direct notice sent to customers who previously complained to Interstate about its pro-rata warranty or submitted a claim form under the original settlement on or before April 30, 2012. (Keough Decl., ¶¶5, 9, 11, 14-15, 17, 18-23.) In addition, consumers learned about the parties' first settlement agreement by print publication in *USA Today* and by internet banner ads on the automotive digital publication, *Car and Driver—Digital*. (*Id.* ¶¶ 4, 10.) As of April 22, 2012, the *Car and Driver* banner had resulted in over 2.2 million impressions (or opportunities for people to click on the ad and view the class website) and the keyword sponsorships had resulted in almost 10 million impressions. (*Id.* ¶¶ 11, 16 & 17.)

Due to the extended length of the claims period, the notice plan also provides for future components to provide on-going notice. The Settlement Administrator will maintain the settlement website until December 31, 2020, modifying it each year to maintain relevant information. (Amended Settlement at V.D.1.) The Settlement Administrator will also obtain new internet keyword/phrase sponsorships for two-week periods each March and September from 2013 through 2019. (*Id.* at V.D.2.) Interstate will maintain a settlement hyperlink on its website until December 31, 2020, continue to post the settlement handout in its Memo Binder until December 31, 2019, and periodically remind authorized dealers about the claims program so that retailers continue to distribute handouts notifying potential class members of the settlement claims program. (*Id.* at V.D.3-4.)

5. Class Member Releases

In exchange for the injunctive relief provided in the amended settlement, settlement class members who purchased a replacement battery no later than April 30, 2012 will release all equitable claims that were or could have been asserted in this litigation. (Amended Settlement at VII.A.1.) Settlement class members who, as of April 30, 2012, still had an unexpired right to purchase a replacement battery pursuant to a pro-rata warranty will release all equitable claims they had on the settlement's effective date relating to the calculation of the adjusted price. (*Id.* at VII.B.1.) Class members who purchased a replacement battery no later than April 30, 2012, will retain their right to bring an individual lawsuit for monetary damages but will release the right to bring another class action asserting claims that were or could have been asserted in this litigation. (*Id.* at VII.A.2 & 3.) Class members who had not purchased a replacement battery by April 30, 2012 retain their rights to assert new class claims. (*See id.* at VII.B.)

Monetary claims will only be released by those class members who voluntarily choose to participate in the settlement claims program. If a settlement class member submits a tier-one or tier-two claim form, that settlement class member will individually release all monetary claims that were or could have been asserted in this litigation. (*Id.* at VII.E.) Settlement class members who submit a claim form for a post-April 2012 replacement battery purchase will also release all monetary claims the individual has on the date the claim form is submitted that relate to the original battery or the replacement battery purchase. (*Id.*)

6. Attorneys' Fees, Litigation Expenses, and Service Award

The relief Plaintiff has obtained for the class gives rise to a claim for attorneys' fees and litigation expenses under California state fee-shifting statutes. The settlement reflects that class counsel has agreed to limit the amount of fees they are requesting to $1.05 million. (*See* Amended Settlement at IX.A.) Similarly, Plaintiff has agreed not to seek a service award of more than $1,250 as compensation for the time and effort he expended on behalf of the class in this action. (*See id.* at VIII.A.) The attorneys' fees, litigation expenses, and service award Plaintiff is requesting are addressed in Plaintiff's fee application, which Interstate has agreed not to oppose. (*See id.* at VIII.A, IX.A; Dkt. No. 78 (Fee Motion).)

III. ARGUMENT

A proposed class action settlement may be approved if the Court, after allowing absent class members an opportunity to be heard, finds that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). When assessing a proposed settlement, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)); *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . . .").

Although the decision whether to grant final approval of the parties' proposed settlement is committed to the sound discretion of the trial judge, the Ninth Circuit has set forth the following list of non-exclusive factors that a district court should consider:

(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 trial;

(4) The amount offered in settlement;

(5) The extent of discovery completed, and the stage of the proceedings;

(6) The experience and views of counsel;

(7) The presence of a governmental participant; and

(8) The reaction of the class members to the proposed settlement.

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) (referred hereafter as the "*Churchill* factors")

"Basic to the process of deciding whether a proposed settlement is fair, reasonable and adequate is the need to compare the terms of the compromise with the likely rewards of litigation." *In re TD Ameritrade Accountholder Litig.*, No. C-07-2852, 2009 WL 6057238, at *4 (N.D. Cal. Oct. 23, 2009) (quoting from *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)) (brackets and ellipsis removed). The first four *Churchill* factors are designed to assist the Court in making this comparison. By evaluating the strength of the Plaintiff's case; the risk, expense, complexity, and delay associated with further proceedings; and the risk of maintaining class certification through trial, the Court can get a good idea of the value of class members' claims. The Court can then evaluate the relief offered by the parties' proposed settlement in context to determine whether it provides fair compensation for those claims—or, stated another way, "whether the interests of the class are better served by the settlement than by further litigation." Manual for Complex Litigation (Fourth) § 21.61 (2004). The remaining *Churchill* factors offer additional perspective on whether the relief offered by the settlement is fair, with the fifth factor designed to ensure that the parties and the Court have sufficient information to intelligently assess the value of class members' claims, the sixth and eighth factors taking into account class counsel's and individual class members' opinions about the settlement, and the seventh factor accounting for the position or views of any governmental participant.

Evaluation of the *Churchill* factors in this case shows that the proposed settlement provides prompt relief to class members, in the form of improved warranty practices and a settlement claims program that will provide reimbursements to consumers over an 8-year period. This relief approximates what class members could realistically hope to obtain after several years of litigation through a successful trial, and is available immediately without running the gantlet of risks inherent in complex

litigation. The parties' proposed settlement should thus be approved as a fair, adequate, and reasonable resolution of the class claims against Interstate.

1. The Strength of the Plaintiff's Claims

Plaintiff asserted two types of claims in this lawsuit: (i) claims that Interstate breached the terms of its warranty by using its "List Price" to calculate pro-rata warranty discounts, and (ii) claims that Interstate's warranty practices are confusing and misleading to consumers. (*See supra* Section II.A.)

Plaintiff's breach-of-warranty claim hinges largely on a question of contract interpretation: What does it mean when Interstate promised in its warranty contract that any pro-rata discount would be "based on the then current published cost per month of the battery." (*See* Am. Compl., ¶ 18.) Interstate has argued that the "published cost per month" is the same as "List Price" and so its warranty practices comply with the warranty's plain language. (*See* Dkt. No. 25 (JCMS) 3.) The "List Price" is published in the sense that it appears on Interstate's website and is provided to Interstate's dealers and independent retailers. However, on the forum most readily available to consumers, the Interstate website, the "List Price" appears directly below another published amount—the MSRP. (*See* http://www.interstatebatteries.com/cs_eStore/CarsAndTrucks.) Neither the published "List Price" nor the published MSRP is a "cost per month," and so it is unclear whether either could be construed as the "published cost per month" referred to in Interstate's warranty.

If, as Plaintiff contends, the term "published cost per month" is ambiguous, the question then becomes "what a reasonable person would have believed the parties intended." *See Beard v. Goodrich*, 110 Cal. App. 4th 1031, 1038 (2003) ("Contract formation is governed by objective manifestations, not the subjective intent of any individual involved."). The "reasonable person standard" presents a factual issue, inherently introducing a degree of uncertainty and necessarily driving up the costs of the litigation as the parties engage experts and conduct consumer surveys to ferret out the expectations of the reasonable consumer. While Plaintiff believes he could present sufficient objective evidence to show that a reasonable person would expect "published cost" to refer or relate to actual sales price or MSRP—not a List Price that appears to exist solely for pro-rata warranty calculations—Interstate would strive to develop contradictory evidence that could persuade a jury. Rather than engage in a

costly and time-consuming battle of experts and consumer surveys, the parties were able to balance their respective beliefs regarding their ability to present convincing evidence against their understanding of the litigation risks (as informed by discovery), likely costs to litigate Plaintiff's claims to *any* resolution, and the value to Interstate's battery market—and the industry as a whole—to rid its warranty of the disputed term through compromise.

Even if the parties chose to litigate the "reasonable person" issue and Interstate were to establish that its warranty contract gave it the option to calculate pro-rata discounts using *any* published price (and thus Interstate did not technically breach its warranty), Interstate's decision to use the "List Price" could still lead to liability under Plaintiff's other claims—each of which independently impose liability for unreasonable or misleading conduct. For instance, the implied covenant of good faith and fair dealing precludes a warrantor or other contracting party from filling an open term in a contract or otherwise using its contractual discretion in an arbitrary and unreasonable way. *See Lazar v. Hertz Corp.*, 143 Cal. App. 3d 128, 141 (1983). Consumer protection laws in California more generally prohibit conduct likely to deceive a reasonable consumer. *See Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1125 (C.D. Cal. 2010) (reviewing elements of deceptive practices claims under California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act). And federal law imposes liability if a warrantor fails to communicate the essential terms of its warranty in simple and readily understood language. *See* 15 U.S.C. § 2302. For its part, Interstate would argue that its use of a "List Price" was a reasonable and non-arbitrary business decision and clearly disclosed to consumers, and thus not deceptive.

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

Plaintiff believes his claims, if prosecuted through trial, would warrant the relief he's secured through settlement, in particular, the injunction that stops Interstate from calculating pro-rata warranty discounts using its "List Price." In doing so, Plaintiff (and the Court) avoided complex and time-consuming litigation, which was hard-fought from the very beginning in this case. For instance, the parties devoted significant meet-and-confer efforts to working through disputes regarding the identification of the proper entities to be named as defendants. While the parties ultimately agreed that Plaintiffs could conduct the necessary discovery into Interstate's corporate structure and that one of the

two named parties had access to all discoverable matter, the issue of which Interstate entity should bear liability would have remained contentious had settlement negotiations not succeeded. The parties were also working through disputes about electronically stored information and the databases containing such information, with progress uncertain enough that Plaintiff found it necessary to engage an ESI expert for guidance. (*Id.* ¶ 5.) Had the parties continued to litigate rather than turning to settlement, these disputes would have endangered Plaintiff's ability to collect important information and slowed the progress of the case, thus increasing the risk of obtaining a successful verdict.

Also weighing against continued litigation is the complexity of proving monetary damages on an aggregate basis and the difficulty of distributing any such damages to class members. Interstate keeps records of the pro-rata warranty discounts it owes to retailers, but there are no direct records of the prices actually paid by individual class members. Through settlement, the parties were able to think creatively and cooperatively develop a solution that would inform consumers about available compensation through a comprehensive notice program and provide a simple submission process for self-identified class members to make claims, should they choose to do so.

In light of the intricate nature of Interstate's corporate structure and pro rata warranty, the discovery disputes engaged in between the parties, and the complexity of proving and distributing class-wide damages, this case would likely have proceeded for a significant period of time without final resolution. Such delay would have burdened the judicial system and reduced the value of the relief, if any, ultimately obtained. Whereas the parties' agreement would reform Interstate's warranty practices immediately and provide prompt access to reimbursements for replacement batteries purchased under the old warranty, any relief Plaintiff could obtain through trial would not go into effect for several years—after class certification, a trial featuring a number of experts, consumer surveys, and other relatively complex class-wide evidence, and possible appeals. During that time, absent class members would continue to be subjected to the allegedly deceptive warranty practices at issue.

3. The Risk of Maintaining Class Action Status Through Trial

Were litigation to continue, Plaintiff would also face risk at the class certification stage. Though Plaintiff believes that he would have obtained class certification independent of settlement and successfully maintained it through trial, every class case poses significant risk regarding certification.

See Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges 6 (Fed. Judicial Ctr. 2005) (20%-40% of all cases filed as class actions achieve certification, with the majority of those resolved by settlement). In this case, the large number of distributors and independent retailers who stand between Interstate and its consumers may have presented class certification issues, as might have the variety of Interstate batteries available to consumers at different price-points. Manageability concerns may also have caused the Court to limit the class to California consumers or to a small number of states. *See In re TD Ameritrade Account Holder Litig.*, C 07-2852 SBA, 2011 WL 4079226 (N.D. Cal. Sept. 13, 2011) ("The difficulties and risks in obtaining and maintaining class militate in favor of approving the Settlement.")

4. The Amount Offered in Settlement

The first three *Churchill* factors give the Court a perspective from which to assess the fourth and most important factor: the relief offered by the settlement. In general, if the settlement offers class members relief that appropriately responds to the claims asserted in the lawsuit—especially when the relative strength of those claims is weighed against the risk and delay associated with further litigation—the Court should find the settlement reasonable. *See* Manual for Complex Litigation, § 21.62 ("Reasonableness depends on an analysis of the class allegations and claims and the responsiveness of the settlement to those claims.").

Here, were Plaintiff to successfully prosecute his claims through class certification and trial, he could expect to obtain an injunction very similar to what Interstate has accepted by settlement. The primary difference is that the injunctive relief Plaintiff might obtain through continued litigation would be less valuable, as it would not go into effect for several years. Plaintiff's lawsuit alleges that Interstate's pro-rata warranty practices are confusing to consumers, and as a result the warranty is allegedly not as valuable as reasonable consumers would believe. By stopping those confusing warranty practices now, the parties' settlement prevents any continuing harm to consumers and ensures that Interstate competes with other automotive warranties on a level playing field.

The reimbursements available through the settlement also approximate what class members could expect to receive through a successful trial. On average, class members paid between $7.50 and $9.50 more per replacement battery under Interstate's old warranty than if the discounted price had

been calculated using MSRP rather than "List Price." (Gibbs Decl. ¶ 4.) The proposed settlement entitles class members to submit a claim for reimbursement of comparable amounts—$8.50 check cards or $12 product vouchers with a receipt, and a $5 product voucher without—without the risk and delay associated with trial.

A settlement that provides product vouchers to class members as compensation instead of cash can sometimes be viewed as deficient. In this case, however, the $12 product voucher is being offered as an option to those class members who would prefer it over a check card, and the $5 product voucher is being provided only to those class members who do not have a receipt and thus would have difficulty proving their entitlement to damages. In addition, the product voucher here carries value for almost anyone given the large array of battery products available at Interstate's on-line store—including batteries for cameras, laptops, cordless tools, flashlights, hearing aids, security systems, and watches, just to name a few. The vouchers carry value for class members in particular, many of whom are repeat Interstate customers. If for some reason a voucher is not of interest to certain class members, and they do not have a receipt, they will retain their right to seek monetary relief.

Another valuable element provided by the settlement is deterrence. Through this lawsuit, Interstate learned that consumers may consider its old warranty confusing and unfair. After initially fighting to prove the lawfulness of its prior warranty practices, a view it still maintains, Interstate recognized the value of avoiding further litigation and taking the necessary steps to design a new, unambiguous warranty that is more closely aligned with consumer expectations and broader market practices. Adjusting its warranty practices has not been an inexpensive process for Interstate, entailing extensive human and monetary costs to restructure its entire warranty program, including developing new warranty language, designing a warranty distribution process that will put hardcopies of the new warranty into the hands of consumers at the point of sale, and rolling out these changes across the numerous Interstate entities and hundreds of thousands of Interstate distributors and independent retailers. Interstate also incurred significant legal costs in assessing its prior warranty program and crafting and negotiating a revised program designed to comply with Federal and various states' warranty laws, while at the same time balancing the demands and expectations of millions of consumers and its many dealers with the necessity of remaining competitive in a highly competitive

market. On top of that, Interstate must abide by a federal court injunction for over two years, continue to implement and administer a class action claims program through 2020, and, if fees are ultimately awarded by the Court, pay class counsel for their time and efforts on behalf of the class. Taken as a whole, the risks associated with this lawsuit and any future litigation to challenge Interstate's warranty practices and the costs Interstate has incurred to reform and improve its warranty practices pursuant to this settlement provide sufficient deterrence to keep Interstate from implementing ambiguous and potentially misleading warranty terms in the future.

The settlement negotiated by the parties, in the view of Plaintiff and class counsel, provides a significant amount of relief to class members, and does so in exchange for very little. All of the relief described above is accomplished at virtually no cost to class members: while there is a class-wide release of equitable claims, which are resolved by the agreed-upon injunction, there is no class-wide release of monetary claims.[2] Class members may voluntarily chose to participate in the settlement claims program, in which case each individual will waive his or her monetary claims in exchange for a check card refund or product voucher, or else pursue larger amounts through litigation.

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

The parties' settlement was informed by Plaintiff's thorough investigation of the facts and both formal and informal discovery efforts. (*See supra* section II.B.) Plaintiff reviewed transaction documents and information collected from Interstate's online materials, customer service department, and battery dealers and conducted a survey of nationwide battery dealers to learn about replacement battery prices. Plaintiff served two sets of interrogatories and requests for production of documents and reviewed over 20,000 documents subsequently produced by Interstate, including warranties, pro rata transaction data, a large number and variety of price sheets, battery labels and shrink wrap materials, internal emails and memos, portions of Interstate's Distributor's Manual and All Battery Store Manual, marketing materials, market research and analysis, customer complaints and related correspondence, dealer complaints, distributor contracts and handbooks, and training manuals. The discovery

[2] While Replacement-Battery-Purchaser Class Members will retain their right to pursue monetary claims, they will waive use of the class action mechanism to do so. Unexpired-Warranty-Holder Class Members, on the other hand, will retain their right to pursue monetary claims and may use the class action mechanism to do so.

completed in this case prior to the parties' settlement negotiations allowed both sides to intelligently assess the merits of their respective positions, including the difficulty and low likelihood of recovering a larger common fund, and reach a sensible compromise. *See Rodriguez*, 563 F.3d at 967 (counsel should have a good grasp on the merits before settlement talks begin).

6. The Experience and Views of Counsel

Plaintiff and class counsel believe that the business changes Interstate has agreed to implement in the proposed settlement go to the root of the problem alleged in the lawsuit. Class members, all of whom have bought at least one Interstate battery and many of whom have bought two and may another, stand to benefit from an immediate change to Interstate's warranty practices, as does the general public at large. And, notably, class members will benefit in exchange for very little on their part. Only equitable claims are released on a class-wide basis, with monetary claims preserved for each individual class member until he or she voluntarily chooses to participate in the settlement claims program.

Class counsel specialize in class action litigation and have extensive experience litigating consumer law claims. In their experience, cases like this one can be very difficult to resolve: the defendant is often vested in protecting an entrenched business practice that would be costly to dislodge while consumers are allegedly being overcharged over time and in the aggregate, but by relatively small—and thus easily overlooked—amounts individually per transaction. Affected consumers can also be difficult to locate for purposes of distributing damages, as most retailers do not get or maintain contact information or individualized sales records for their customers. Where an entrenched defendant insists on "complete peace," common work-arounds include cy pres awards or product coupons, both of which are becoming increasingly disfavored by courts and commentators as providing inferior relief to aggrieved class members being forced to release their claims.

In this case, class counsel focused on addressing what they have found most consumers, like Mr. Milano, care most about in such cases: the principle involved and preventing the alleged wrong from recurring. Counsel thus negotiated for and achieved injunctive relief that addresses the foundation of Plaintiff's claims by replacing Interstate's allegedly confusing and unfair pro rata warranty with one that clearly, simply, and uniformly communicates its terms to consumers and utilizes MSRP, not a "List Price," to calculate replacement battery costs. And, faced with a defendant willing

to think outside the box to better serve its customers, class counsel were able to work cooperatively and creatively with Interstate to develop a settlement claims program that would provide real reimbursements—not discount coupons or a cy pres reward to a third party—to Interstate customers who purchased replacement batteries under the old warranty and care enough to seek a $5-$12.50 reimbursement. In light of the settlement's comprehensive injunctive relief which resolves Plaintiff's concerns about Interstate's old warranty and the availability of check card reimbursements and product vouchers in amounts comparable to the amounts allegedly overcharged under the old warranty—both available through a simple, streamlined process with the most minimal of releases—class counsel considers the proposed settlement to be in the best interest of the class. (*See* Gibbs Decl. ¶ 8); *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (the recommendation of plaintiffs' counsel weighs in favor of approval).

7. The Presence of a Governmental Participant

The Attorney General of the United States and Attorneys General of each of the States have been notified (twice) of the proposed settlement pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, and to date no governmental entity has raised objections or concerns about the proposed settlement with either Plaintiff or Interstate. (*See* Keough Decl, ¶¶ 6-7.)

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

While it is difficult to gauge an overall class reaction, the reaction so far seems positive. For instance, as of May 3, 2012, no formal or informal objections have been filed or received, the class settlement website has received approximately 19,700 hits, and class members have submitted over 200 claim forms. (Keough Decl., ¶¶ 9, 24 & 27.) In the calls class counsel has fielded, class members have expressed their desire to participate in the claims process and posed questions to clarify the process. *See Sugarman v. Ducati*, No. 5:10-CV-05246, 2012 WL 113361, at *3 (N.D. Cal. Jan. 12, 2012) ("[O]ut of the 38,774 class notices sent out regarding the proposed settlement, only twenty-eight class members have opted out, and only forty-two have submitted objections. The positive response from the class weighs strongly in favor of approving the settlement . . . ."). Should they encounter a contradictory reaction or receive any objections between now and the May 18 deadline for comments on

or objections to the settlement, class counsel will submit a reply filing to address any concerns raised by class members.

9. Evidence of Collusion or Other Conflicts of Interest

Where a proposed settlement is negotiated prior to class certification, as was the case here, the Ninth Circuit has recently emphasized that "consideration of th[e] eight *Churchill* factors alone is not enough to survive appellate review." *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). The Court must also scrutinize the settlement "for evidence of collusion or conflicts of interest," including "more subtle signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations." *Id.*

The proposed settlement before the Court is the product of over a year of effort, which included three full-day mediation sessions before Judge Cahill. (*See* Gibbs Decl., ¶ 6); *Satchell v. Fed. Exp. Corp., No.* C 03–2659 SI, 2007 WL 1114010, at *4 (N.D.Cal. Apr.13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.") Plaintiff was represented in the negotiations by counsel well-versed in consumer class actions, who, with the benefit of that experience and the discovery conducted into Interstate's records and business practices, had a strong understanding of the strengths and weaknesses of class members' claims. (*See supra* Section II.B). Under these circumstances, the procedure by which the parties reached their settlement may be viewed as non-collusive and the resulting settlement thus presumed to be fair. *See Linney v. Cellular Alaska P'ship*, No. C-96-3008, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair."), *aff'd*, 151 F.3d 1234 (9th Cir. 1998).

While the settlement includes a provision under which Interstate has agreed not to oppose class counsel's request for fees up to a capped amount, class counsel would have proceeded with the class settlement without an agreement regarding attorneys' fees. In other words, class counsel was prepared to submit a fee application that Interstate was free to oppose. Interstate, however, was not prepared to proceed without an agreement capping its total exposure on attorneys' fees and costs. Thus, upon reaching agreement on class relief and to preserve the negotiated class resolution, Plaintiff agreed to

negotiate the issue and ultimately settled on a reasonable amount that class counsel (and presumably Interstate) felt approximated is what the Court might award, thus resolving the matter in a fair and efficient manner. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.) To be clear, the parties did not discuss any award of attorneys' fees or expenses to class counsel or any service award to Mr. Milano until after agreement had been reached on relief for the class. Only then, and with Judge Cahill's express permission to proceed, did the parties begin negotiating attorneys' fees. (*See* Gibbs Decl., ¶ 7.); *see In re HP Laser Printer Litig.*, No. SACV-07-0667, 2011 WL 3861703, at *4 (C.D. Cal. Aug. 31, 2011) (finding fact that class counsel resolved settlement terms for the benefit of the class before negotiating for attorneys' fees supported finding of no collusion). Subject to Court approval, Interstate agreed to pay up to $1.05 million to class counsel in settlement of their claim for fees and expenses. (Amended Settlement at IX.A.) This fee amount is within the range likely to have been awarded by the Court under the lodestar-multiplier method, as it will basically compensate class counsel for their time and costs with almost no multiplier, particularly considering that counsel will continue to devote time to this case to complete the final approval process and monitor and address class member inquiries over the next 8-9 years. And, as explained, class members are giving up very little to receive the benefits available under the settlement. *See Walter v. Hughes Commc'ns, Inc.*, No. 09-2136, 2011 WL 2650711, at *11 (N.D. Cal. July 6, 2011) ("[B]ecause a defendant benefits from the largest possible release of liability, a settlement in which only class members who submit a claim form release their claims against a defendant aligns the interests of the defendant and the class members.")

IV. CONCLUSION

The proposed class settlement offers fair, adequate, and reasonable benefits that are comparable to what Plaintiff could reasonably expect to achieve through a successful trial verdict. There is little to no upside to enduring the risk, complexity, delay and expense of continued litigation, which Plaintiff and the class could potentially lose altogether or in significant respects. The class's interests are instead best served by prompt implementation of the proposed settlement. Plaintiff and class counsel

accordingly request that the Court grant final approval of the proposed settlement and enter final judgment in this case.

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Respectfully submitted,

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