

1 JONES DAY
2 ROBERT A. MITTELSTAEDT, SBN 60359
3 ramittelstaedt@jonesday.com
4 CRAIG E. STEWART, SBN 129530
5 cestewart@jonesday.com
6 555 California Street, 26th Floor
7 San Francisco, CA 94104
8 Telephone: (415) 626-3939
9 Facsimile: (415) 875-5700

7 JONES DAY
8 JEROME R. DOAK, admitted *pro hac vice*
9 jrdoak@jonesday.com
10 2727 North Harwood St.
11 Dallas, TX 75201-1515
12 Telephone: (214) 969-2977
13 Facsimile: (214) 969-5100

12 Attorneys for Defendants
13 INTERSTATE BATTERY SYSTEM OF AMERICA, INC.
14 INTERSTATE BATTERY SYSTEM INTERNATIONAL, INC.

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **OAKLAND DIVISION**

18 DENO MILANO,
19
20 Plaintiff,
21 vs.
22 INTERSTATE BATTERY SYSTEM OF
23 AMERICA, INC.; INTERSTATE BATTERY
24 SYSTEM INTERNATIONAL, INC.,
25 Defendants.

Case No. 10-CV-2125-CW

**SEPARATE MEMORANDUM OF
DEFENDANTS IN SUPPORT OF NEW
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: March 8, 2012
Time: 2:00 p.m.
Judge: Hon. Claudia Wilken

1 The Court has scheduled a hearing on March 8, 2012, at 2:00 p.m. to consider whether the
2 Amended Class Action Settlement Agreement should be preliminarily approved.

3 Pursuant to the terms of the Amended Class Action Settlement Agreement that Class Counsel is
4 filing today with the Court, the Settling Defendants request that the Court (1) preliminarily approve the
5 settlement proposed in the Amended Settlement Agreement; (2) confirm that the Amended Settlement
6 Agreement supersedes the Original Settlement Agreement as agreed by the Parties; (3) conditionally
7 certify the new Settlement Class in the Amended Settlement Agreement; (4) reconfirm the appointment
8 of Class Counsel; (5) approve and direct implementation of the Notice Plan in the Amended Settlement
9 Agreement; (6) reconfirm the appointment of the Settlement Administrator; and (7) order that the New
10 Preliminary Approval Order supersedes entirely the Court's earlier Order, dated December 1, 2011,
11 preliminarily approving the Original Settlement Agreement. Settling Defendants reserve all rights as
12 set forth in the Amended Settlement Agreement.

13 Defendants will rely on, but not repeat, the arguments made in the Separate Memorandum of
14 Defendants in Support of Preliminary Approval of Class Action Settlement. (Dkt. No. 50,
15 Oct. 31, 2011.) Settling Defendants request the following relief:

16
17 **1. Preliminary approval of the Amended Settlement Agreement and accompanying**
18 **exhibits:** As a result of Court-ordered mediation sessions before a retired California judge, the Parties
19 reached the originally proposed class action settlement, which this Court preliminarily approved on
20 December 1, 2011. (Dkt. No. 62.) Later events led the Parties to negotiate the Amended Settlement
21 Agreement. Settling Defendants urge the Court to preliminarily approve the Amended Settlement
22 Agreement. They believe the proposed amended settlement is fair, reasonable, and adequate, and
23 carefully tailored to the facts, circumstances, and law applicable to the underlying dispute in this
24 Litigation. For many reasons, including the following four, Settling Defendants believe the Amended
25 Settlement Agreement offers improvements over the Original Settlement Agreement that can further
26 benefit Settlement Class Members:

1 A. **Expanded Class Size:** Under the Amended Settlement Agreement, the size of the
2 Settlement Class has increased significantly, to approximately 34 million, allowing more Interstate
3 Batteries' customers to benefit from the negotiated relief offered under this proposed settlement.

4 The new proposed Settlement Class definition is expanded to include original purchasers of
5 Interstate Batteries trademarked batteries with unexpired Previous Interstate Batteries' Pro-Rata
6 Warranties, who will be eligible for settlement program product-voucher or check-card benefits when
7 they purchase a Replacement Battery under the Interstate Batteries' Pro-Rata Warranty through
8 December 31, 2019. Specifically, the expanded Settlement Class Members definition includes:

9 All original purchasers of an Interstate Batteries trademarked battery
10 (meaning the Interstate Batteries, Nationwide, Power Volt, and Quickstart
11 brands) that was covered by a Previous Interstate Batteries' Pro-Rata
12 Warranty and that was purchased from an Interstate Batteries authorized
13 dealer (but not from an All Battery Center Store), in the United States or
14 the District of Columbia, at any time from April 19, 2000 through April
15 30, 2012, and who:

16 (i) later presented that original battery, during the applicable pro-
17 rata-warranty-coverage period, to an Interstate Batteries authorized
18 warranty dealer for a pro-rata-warranty adjustment on the price of
19 a Replacement Battery, and who then purchased that Replacement
20 Battery from that dealer at an adjusted price on a date from May
21 19, 2006, through April 30, 2012 ("Replacement-Battery-
22 Purchaser Class Members"); or

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

29 While Replacement-Battery-Purchaser Class Members were included in the settlement class
30 under the Original Settlement Agreement, Unexpired-Warranty-Holder Class Members are also now
31 included in the Settlement Class definition. Replacement-Battery-Purchaser Class Members have
32 already purchased a Replacement Battery under the terms of a Previous Interstate Batteries' Pro-Rata
33 Warranty. They are immediately eligible to make a claim under the Interstate Batteries Settlement
34 Program. Under the Interstate Batteries' Pro-Rata Warranty, Unexpired-Warranty-Holder Class
35 Members have the right to purchase a Replacement Battery at an adjusted price, if their original battery

1 fails due to defect. The Parties currently dispute how the price of such a Replacement Battery should
2 be calculated under the Interstate Batteries' Pro-Rata Warranty.

3 The Amended Settlement Agreement resolves that dispute by making the Interstate Batteries
4 Settlement Program available to any Settlement Class Member who buys a Replacement Battery
5 through December 31, 2019. As described in the briefing on the Original Settlement Agreement, that
6 program provides an easy and streamlined claims program for Settlement Class Members to get a
7 product voucher or a check card. Consequently, any Interstate Batteries customer who purchases an
8 Interstate Batteries trademarked battery (with a Previous Interstate Batteries' Pro-Rata Warranty) by
9 April 30, 2012 will have protection through 2019. Just as Replacement-Battery-Purchaser Class
10 Members are immediately eligible for the Interstate Batteries Settlement Program, Unexpired-
11 Warranty-Holder Class Members will now be eligible to participate in that program if their original
12 battery fails and they use their pro-rata warranty to buy a Replacement Battery at an adjusted price.

13 **B. Improved Warranty Benefits:** Currently, Interstate Batteries offers a warranty with two
14 coverage periods: a free replacement period and a pro-rata period. Under the Original Settlement
15 Agreement, Interstate Batteries agreed to discontinue the pro-rata component of its warranty. Under
16 the Amended Settlement Agreement, however, Interstate Batteries will implement a new warranty that
17 will provide customers with a free replacement period, followed by an additional discount period on
18 certain battery models. That discount feature might be viewed as a pro-rata warranty, but the Parties
19 have agreed that if Interstate Batteries' new form of limited warranty includes a pro-rata component, it
20 will state clearly how any pro-rata-warranty-adjustment price would be calculated. Moreover, that
21 calculation in the new warranty will be based on Interstate Batteries' then-current "Suggested Retail
22 Price" for the replacement battery, and not based on Interstate Batteries' "List Price." (Amended
23 Settlement Agreement at § VI.B.1.)

24 This new warranty addresses every problem alleged in Named Plaintiff's First Amended
25 Complaint. The new warranty will be clearly written, more easily understood by customers, contain all
26 legally required terms, delivered to customers at the time of sale, and uniform everywhere it is posted.
27 Additionally, the calculation of the applicable discount will be clearly explained and based on a
28 uniform price—Interstate Batteries' Suggested Retail Price. According to Named Plaintiff's First

1 Amended Complaint, this was the alleged primary deficiency in the Previous Interstate Batteries' Pro-
2 Rata Warranty—where the calculation was based on “the ‘List Price’ and not the suggested retail
3 price.” (*See* Dkt. No. 13 at 7.) Moreover, the new warranty will not involve a complicated pro-rata
4 calculation but will instead provide customers with a percentage discount (such as 45% or 25%) on the
5 purchase price of a replacement battery, depending on how many years they owned their original
6 battery. Consumers will immediately understand a percentage-off discount.

7 **C. Treating All Interstate Batteries' Customers the Same:** The Interstate Batteries
8 Settlement Program established in the Amended Settlement Agreement, which will now continue
9 through 2019, provides two benefits. First, whether it is used or not, it provides a very easy,
10 streamlined resolution of the central issue in the Litigation: how to calculate the adjusted price of a
11 Replacement Battery under Interstate Batteries' Pro-Rata Warranty. Even for Unexpired-Warranty-
12 Holder Class Members who never buy a Replacement Battery, they now have a known resolution of
13 that alleged ambiguity. In effect, the Interstate Batteries Settlement Program is an insurance policy
14 against the primary dispute in this Litigation.

15 Second, if and when Settlement Class Members buy a Replacement Battery under Interstate
16 Batteries' Pro-Rata Warranty, they will all have the same Interstate Batteries Settlement Program to
17 obtain relief in the form of a \$5 product voucher without a receipt, or a \$8.50 check card or \$12 product
18 voucher with a receipt.

19 **D. Carefully Tailored Releases:** The Amended Settlement Agreement has releases that
20 are carefully tailored to the benefits received by Settlement Class Members.

21 Just as in the Original Settlement Agreement, Replacement-Battery-Purchaser Class Members
22 (who have already purchased a Replacement Battery at an adjusted price) release all claims for
23 injunctive relief, declaratory judgment relief, and any other non-monetary equitable relief, known or
24 unknown, that the Replacement Battery Purchasers either asserted or could have asserted in the
25 Litigation. Replacement Battery Purchasers specifically reserve the right to file an individual lawsuit
26 against any Released Party seeking monetary damages. (Amended Settlement Agreement at §
27 VII.A.3.) They waive, however, the right to use the class action procedural device in any future lawsuit
28 against the Released Parties that asserts any claim that was or could have been brought in the

1 Litigation. Having already used the class-action device once in this lawsuit and received the benefit of
2 a class-wide settlement, Replacement Battery Purchasers should not have a second bite with a second
3 class action.

4 Unexpired-Warranty-Holder Class Members (who hold unexpired pro-rata warranty rights but
5 have not purchased a Replacement Battery) will give only a narrow release under the Final Judgment
6 and Order. They will release only those claims for injunctive relief, declaratory judgment relief, and
7 any other non-monetary equitable relief that relate to how the adjusted price of a Replacement Battery
8 should be calculated. They will not waive their right to use the class-action device a second time.
9 (Amended Settlement Agreement at § VII.B.)

10 Any Replacement-Battery-Purchaser Class Member is immediately eligible to participate in the
11 Interstate Batteries Settlement Program. The Amended Settlement Agreement gives the Unexpired-
12 Warranty-Holder Class Members the same right to participate in the Interstate Batteries Settlement
13 Program, once that Settlement Class Member has purchased a Replacement Battery under the terms of
14 the Interstate Batteries' Pro-Rata Warranty. If any Settlement Class Member (either a Replacement-
15 Battery-Purchaser or Unexpired-Warranty-Holder Class Member) becomes a claimant and receives a
16 check card or product voucher under the Interstate Batteries Settlement Program, the claimant will
17 release all claims against the Released Parties. (Amended Settlement Agreement at § VII.E & Exs. D
18 & E.)

19 Because Interstate Batteries historically has a very low failure rate for its batteries during the
20 pro-rata-warranty periods, over 90% of Unexpired-Warranty-Holder Class Members will never need to
21 buy a Replacement Battery. Those Settlement Class Members will give only a narrow release—limited
22 to the specific issue of how the adjusted price for a Replacement Battery would be calculated. And
23 they will still be protected against any future dispute about the calculation of the adjusted price of a
24 Replacement Battery; Unexpired Warranty Holders who do buy a Replacement Battery, and make a
25 claim under the Interstate Batteries Settlement Program, will receive exactly the same benefit in
26 exchange for exactly the same release as Replacement-Battery-Purchaser Class Members who
27 participates in the Interstate Batteries Settlement Program.
28

1 **2. Confirmation that the Amended Settlement Agreement supersedes the Original**
2 **Settlement Agreement:** Settling Defendants ask the Court to confirm that the Amended Settlement
3 Agreement signed by the Parties on February 16, 2012, supersedes the Original Settlement Agreement
4 signed as of October 26, 2011, and that the Parties agree that the Original Settlement Agreement shall
5 have no further force or effect.

6
7 **3. Certification of the conditional Settlement Class under Federal Rule 23(b)(2):**
8 Defense counsel and Class Counsel jointly crafted a new proposed class definition for the conditional
9 Settlement Class under Federal Rule of Civil Procedure 23(b)(2), which is more accurate than the
10 proposed class definition in Plaintiff's First Amended Complaint and is precisely tailored for purposes
11 of this case and the proposed settlement. Settling Defendants agree that the Court should certify a
12 conditional Settlement Class under Federal Rule of Civil Procedure 23(b)(2). While Settling
13 Defendants believe that such a class could not be certified for trial purposes, and reserve all rights to
14 object to class certification under the Amended Settlement Agreement if this proposed settlement is not
15 finally approved and consummated, Settling Defendants request conditional class certification of the
16 proposed Settlement Class, under Rule 23(b)(2), as provided by the Amended Settlement Agreement.

17
18 **4. Appointment of Class Counsel:** Girard Gibbs was previously appointed Interim Counsel and
19 Class Counsel under this Court's December 1, 2011 Order preliminarily approving the Original
20 Settlement Agreement. Girard Gibbs should again be appointed Class Counsel for the Settlement Class
21 as provided by the Amended Settlement Agreement.

22
23 **5. Approval of class action settlement Notice and CAFA Notice:** The various forms of
24 notice were prepared by Class Counsel and Settling Defendants, with the professional guidance and
25 advice of the experienced proposed Settlement Administrator. Although this settlement involves a
26 Settlement Class under Federal Rule of Civil Procedure 23(b)(2), the Parties have prepared the New
27 Long-Form Settlement Notice in accordance with the more stringent requirements for the content of
28 notice in a Rule 23(b)(3) class and the Federal Judicial Center's guidelines. The notice required by the

1 Class Action Fairness Act meets the requirements of 28 U.S.C. § 1715, and will be served on the
2 appropriate federal and state governmental officials not later than 10 days after the Amended
3 Settlement Agreement is filed with the Court. Settling Defendants ask the Court to approve the
4 proposed forms of these notices, which are being filed by Class Counsel with the Court today as
5 Exhibits to the Amended Class Action Settlement Agreement.

6
7 **6. Appointment of the Settlement Administrator:** The respected settlement administration
8 company Garden City Group and Jennifer Keough are very experienced with all aspects of class action
9 settlements. They are experienced in providing advice on the form of class action notice, creating and
10 implementing class action notice programs, creating and mailing CAFA notice, and creating and
11 maintaining class action settlement websites. This Court previously appointed Jennifer Keough and
12 Garden City Group as Settlement Administrator in its December 1, 2011 Order preliminarily approving
13 the Original Settlement Agreement. The Settling Defendants ask the Court to again appoint Jennifer
14 Keough and Garden City Group as the Settlement Administrator, as provided by the Amended
15 Settlement Agreement.

16
17 **7. Order that the New Preliminary Approval Order supersedes the Court's earlier**
18 **approval Order:** Settling Defendants ask the Court to order that the New Preliminary Approval Order
19 supersedes entirely the Court's earlier Order, dated December 1, 2011, preliminarily approving the
20 Original Settlement Agreement.

21
22 While Settling Defendants do not join in Plaintiff's Motion for Preliminary Approval of Class
23 Settlement, and reserve all rights permitted by the Amended Settlement Agreement, the Settling
24 Defendants do agree with the relief requested in Plaintiff's motion. For the reasons stated above and in
25 the Amended Settlement Agreement, the Settling Defendants respectfully move the Court to enter an
26 order: (1) preliminarily approving the Amended Settlement Agreement and the accompanying
27 Exhibits; (2) confirming that the Parties have agreed that the Amended Settlement Agreement
28 supersedes the Original Settlement Agreement signed as of October 26, 2011; (3) certifying a new

1 conditional Settlement Class under Federal Rule of Civil Procedure 23(b)(2) composed of the
2 Settlement Class Members; (4) reconfirming the appointment of Girard Gibbs as Class Counsel for the
3 new Settlement Class as defined in the Amended Settlement Agreement; (5) approving the proposed
4 New Long-Form Settlement Notice to Settlement Class Members and the New CAFA Notice to
5 governmental officials in forms substantially similar to those attached to the Amended Settlement
6 Agreement; (6) reconfirming the appointment of Jennifer Keough and Garden City Group as the
7 Settlement Administrator for the proposed settlement contained in the Amended Settlement Agreement;
8 and (7) ordering that the New Preliminary Approval Order supersedes entirely the Court's earlier
9 Order, dated December 1, 2011, preliminarily approving the Original Settlement Agreement. A
10 proposed Order Granting Preliminary Approval of Amended Class Settlement is attached to Plaintiff's
11 Motion for Preliminary Approval of Class Settlement.

12
13 Dated: February 16, 2012

Respectfully submitted,

14
15 By: /s/ Craig E. Stewart

16 Robert A. Mittelstaedt
17 ramittelstaedt@jonesday.com
18 Craig E. Stewart
19 cestewart@jonesday.com
20 Jones Day
21 555 California Street, 26th Floor
22 San Francisco, CA 94104
23 Telephone: (415) 626-3939
24 Facsimile: (415) 875-5700

25 Jerome R. Doak, admitted *pro hac vice*
26 jrdoak@jonesday.com
27 Jones Day
28 2727 North Harwood St.
Dallas, TX 75201-1515
Telephone: (214) 969-2977
Facsimile: (214) 969-5100

Attorneys for Defendants

DLI-6389618v1