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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND DIVISION**

13 DENO MILANO,

14 Plaintiff,

15 vs.

16 INTERSTATE BATTERY SYSTEM OF
17 AMERICA, INC.; INTERSTATE BATTERY
18 SYSTEM INTERNATIONAL, INC.,

19 Defendants.

Case No. 10-CV-2125-CW

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF AMENDED
CLASS SETTLEMENT**

Date: March 08, 2012

Time: 2:00 p.m.

Judge: Hon. Claudia Wilken

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1 **I. INTRODUCTION**

2 On December 01, 2011, this Court granted preliminary approval of the parties' Class Action
3 Settlement Agreement dated October 26, 2011. The preliminarily-approved settlement was focused on
4 injunctive relief that required Defendants to alter their warranty-related business practices, though a
5 claims program would also provide check cards or product vouchers to class members who had
6 purchased replacement batteries at prices adjusted under a pro-rata warranty. Pursuant to the Court's
7 December 1 Order, the parties' began implementing the approved notice plan and Defendants began
8 implementing the agreed-upon business changes, including elimination of the pro-rata warranty on
9 Defendants' trademarked batteries. However, as Defendants began implementing the warranty changes
10 following the Court's preliminary approval order, they encountered significant and unexpected
11 feasibility hurdles. Most importantly, Defendants' product dealers were deeply concerned about their
12 ability to remain competitive without a pro-rata warranty, a standard warranty format in the battery
13 industry. Consequently, Defendants approached class counsel about amending the settlement.

14 While class counsel were not inclined to re-craft a settlement that was difficult and time-
15 consuming to put together in the first place, they also recognized that renewed discussions presented an
16 opportunity to strengthen and expand the original settlement's terms. The parties thus renewed their
17 negotiations and subsequently agreed to re-craft the injunctive relief to allow Defendants to retain the
18 pro-rata warranty format while still addressing Plaintiff's concerns about the existing warranty. But as
19 part of the discussions to amend the parties' agreement on the warranty, class counsel insisted on
20 revisiting the settlement claims program, with the parties ultimately agreeing on a claims program that
21 offers benefits to a much broader class for a much longer period of time.

22 Plaintiff and class counsel believe the amended settlement provides greater benefits than those
23 offered under the original settlement and that implementation of the amended settlement is in the best
24 interests of the class. Plaintiff thus respectfully requests that the Court review the Amended Settlement
25 Agreement—attached as Exhibit 1 to the accompanying Declaration of Eric H. Gibbs—and enter an
26 order that:

- 27 1. Preliminarily approves the Amended Settlement Agreement;
- 28

1 2. Conditionally certifies the proposed settlement class under Federal Rule of Civil
2 Procedure 23(b)(2);

3 3. Re-appoints Mr. Milano as the class representative and his counsel, Girard Gibbs LLP, as
4 class counsel;

5 4. Approves the parties proposed Notice Plan, including the proposed New CAFA notice,
6 New Long-Form Settlement Notice, and Instructions and Handout to Interstate Batteries Authorized
7 Warranty Dealers in forms substantially similar to those attached to the Amended Settlement Agreement
8 as exhibits A-C;

9 5. Re-appoints Jennifer Keough and the Garden City Group as Settlement Administrator;
10 and

11 6. Sets a hearing date and briefing schedule for final approval of the amended settlement
12 and consideration of the Plaintiff's fee application.

13 **II. SUMMARY OF THE AMENDED SETTLEMENT**

14 Plaintiff included in the prior preliminary approval memorandum a detailed summary of the
15 litigation and settlement negotiations that culminated in the original settlement agreement preliminarily
16 approved by this Court on December 01, 2011. (*See* Dkt. No. 52 (Memo).) Rather than repeat those
17 details, Plaintiff here provides a summary of the settlement changes negotiated after that date, as set
18 forth in more detail in the Amended Settlement Agreement attached to the accompanying declaration of
19 Eric H. Gibbs. As in Plaintiffs' prior memorandum, Defendants Interstate Battery System of America,
20 Inc. and Interstate Battery System International, Inc. are referred to collectively as "Interstate."

21 **A. The Settlement Class**

22 The parties have re-defined the proposed settlement class to provide relief to a greater number of
23 class members. While the prior settlement class certified by the Court required purchase of a
24 replacement battery by November 17, 2011, the new proposed settlement class includes class members
25 who have purchased an Interstate battery but not yet purchased a replacement battery pursuant to its pro-
26 rata warranty. (Dec. 1, 2011 Order ¶ 1; Gibbs Decl., Exh. 1 (Amended Settlement Agreement) II.AA.)

27 The proposed amended settlement provides relief to a class of consumers defined as:

28 All original purchasers of an Interstate Batteries trademarked battery (meaning
the Interstate Batteries, Nationwide, Power Volt, and Quickstart brands) that was

1 covered by a Previous Interstate Batteries' Pro-Rata Warranty and that was purchased
2 from an Interstate Batteries authorized dealer (but not from an All Battery Center Store),
3 in the United States or the District of Columbia, at any time from April 19, 2000 through
4 April 30, 2012, and who:

5 (i) later presented that original battery, during the applicable pro-rata-warranty-
6 coverage period, to an Interstate Batteries authorized warranty dealer for a pro-rata-
7 warranty adjustment on the price of a Replacement Battery, and who then purchased that
8 Replacement Battery from that dealer at an adjusted price on a date from May 19, 2006,
9 through April 30, 2012; or

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

14 (Amended Settlement Agreement II.AA.)

15 Excluded from the class definition are Interstate Battery System of America, Inc., and Interstate
16 Battery System International, Inc.; affiliates, parents, or subsidiaries of Settling Defendants; entities in
17 which Settling Defendants have a controlling interest; predecessors, successors, or assigns of Settling
18 Defendants; any judges who preside over this Litigation before Final Judgment, their spouses, the
19 members of their staffs, and anyone within the third degree of relationship from the judges or their
20 spouses, as well as those persons' spouses; and persons employed by class counsel. (*Id.*)

21 The original class definition provided relief only to consumers who had suffered an Interstate
22 battery failure under warranty and purchased a replacement battery. The amended class definition
23 extends the original definition to also provide relief to consumers with unexpired warranties on their
24 still-functioning Interstate batteries; should these class members later need to purchase a replacement
25 battery pursuant to the pro-rata warranty, their inclusion in the class will allow them to participate in the
26 claims program. *Cf. Sugarman v. Ducati*, 5:10-Cv-05246, 2012 WL 113361, at *1, *7 (approving class
27 settlement providing extended warranties to owners of motorcycles prone to a particular issue, even
28 though some class members have not yet had—and may never have— cause to exercise the warranty).

29 **B. Changes to Interstate's Warranty Practice**

30 Interstate has agreed to implement improved business practices in May 2012. (Amended
31 Settlement Agreement VI.B.1.) While the original settlement agreement called for the elimination of
32 Interstate's pro-rata warranty, the Amended Settlement Agreement allows Interstate to maintain the pro-

1 rata warranty format. (Gibbs Decl., Exh. 2 (Original Settlement Agreement) at VI.B.1.iv; Amended
2 Settlement Agreement at VI.B.1.) However, Interstate will rewrite and begin using a new form of
3 limited warranty whose terms, language, and format will be more easily understood by consumers.
4 (Amended Settlement Agreement at VI.B.1.) The new limited warranty will clearly state how any pro-
5 rata warranty adjustment price would be calculated. Moreover, that calculation would be based on
6 Interstate's then-current "Suggested Retail Price" and not on the higher "List Price" that was used in the
7 previous pro-rata warranty. (*Id.*) Interstate's new limited warranty will include all statements and
8 disclosures required by the Magnuson-Moss Warranty Act. (*Id.*) In addition, Interstate will improve its
9 method of delivering its new limited warranty to consumers. (*Id.*) As under the original settlement,
10 Interstate's obligations to implement these improved business practices will persist until December 31,
11 2014. (*Id.* at VI.B.3.)

12 **C. Settlement Claims Program**

13 Under the original settlement agreement, Interstate agreed to provide product vouchers or check
14 cards to class members who had purchased replacement batteries from May 19, 2006 through November
15 17, 2011. (Original Settlement Agreement at VI.B.2.i.2 & VI.B.2.ii.2.) Benefits were to be provided
16 via a two-tier claims system: under tier one, class members could receive \$5 product vouchers without
17 presenting a replacement battery receipt; under tier two, class members could receive \$8.50 check cards
18 or \$12 product vouchers for up to ten replacement battery transactions supported by receipts. (Original
19 Settlement Agreement at VI.B.2.) The Amended Settlement Agreement retains this claims structure, but
20 expands the claims program to provide benefits to a much larger class.

21 Under the Amended Settlement Agreement, class members can claim a \$5 product voucher by
22 submitting a tier-one claim form. (Amended Settlement Agreement at VI.B.2.i.) Using a pre-printed
23 claim form, Class members must certify that they (1) purchased between April 19, 2000 and April 30,
24 2012 a battery covered by a previous, pro-rata Interstate Batteries' limited warranty; (2) then purchased
25 a replacement battery pursuant to the warranty between May 19, 2006 and December 31, 2019; and (3)
26 either the claim form is being submitted no later than December 31, 2012 (if the replacement battery was
27 purchased on or before April 30, 2012) or the claim form is being submitted within one year of the date
28 the replacement battery was purchased (if purchased on or after May 1, 2012). (*Id.*) No proof of

1 purchase is necessary with a tier-one claim form. (*Id.*) Class members who have valid receipts can
2 submit tier-two claim forms to claim either a \$8.50 check card or a \$12 product voucher for each of up
3 to ten replacement battery purchases. (*Id.* at VI.B.2.ii.)

4 As before, class members may submit claim forms by mail or electronically. (*Id.* at VI.B.2.i.2;
5 VI.B.2.ii.2.) Interstate will pay all valid tier-one and tier-two claims within 30 days of receipt, and any
6 consumer whose submission is rejected will be given an opportunity to cure (except for late claims).
7 (*Id.* at VI.B.2.iii.) Claim forms for replacement battery purchases completed by April 30, 2012, must be
8 submitted no later than December 31, 2012. (*Id.* at II.CC.) Claim forms for replacement battery
9 purchases after April 30, 2012 must be submitted no later than December 31, 2020. (*Id.*) This
10 represents an eight-year extension of the claims form submission period, as the original settlement
11 agreement required that all claims be submitted by the end of 2012. (*See* Original Settlement
12 Agreement at II.Z.)

13 **D. Settlement Class Notice**

14 Prior to the parties' re-negotiation of the settlement agreement, the parties' completed a
15 significant portion of the notice plan approved in the Court's December 1, 2011 order. (Amended
16 Settlement Agreement at V.B.) The previously-appointed settlement administrator (1) mailed CAFA
17 notice on November 9, 2011 (2) activated the settlement website on December 2, 2011 and has
18 maintained it since; (3) secured keyword/phrase sponsorships between December 6, 2011 and January 6,
19 2012; (4) published summary notice in *USA Today* on December 8, 2011; (5) published an online banner
20 advertisement in *Car and Driver—Digital* for one month beginning December 8, 2011; (6) disseminated
21 print press releases on December 8, 2011; and (7) disseminated audio press releases on December 12,
22 2011. (*Id.*) Interstate has posted a settlement hyperlink on its website since December 2, 2011, and
23 posted a handout to authorized dealers on its electronic Memo Binder on December 2, 2011. (*Id.*)

24 Under the Amended Settlement Agreement, these forms of notice will be updated and continued
25 or renewed as appropriate. (Amended Settlement Agreement at V.C.) The Settlement Administrator
26 will mail new CAFA notice to the appropriate federal and state officials, update the settlement website
27 with information about the amended settlement, purchase new internet keyword/phrase sponsorships,
28 and distribute new print and audio press releases. (*Id.*) Interstate will maintain its website hyperlink to

1 the settlement website and post a new handout on the Memo Binder. (*Id.*) In addition, Interstate will
2 direct notice of the amended settlement to customers who previously complained to Interstate about the
3 pro-rata warranty and to settlement class members who submitted a claim form under the original
4 settlement on or before April 30, 2012. (*Id.*)

5 Due to the extended length of the claims period under the amended settlement, the new notice
6 plan also provides for future components to provide on-going notice. The Settlement Administrator will
7 maintain the settlement website until December 31, 2020, modifying it each year to maintain relevant
8 information. (Amended Settlement Agreement V.D.1.) The Settlement Administrator will also obtain
9 new internet keyword/phrase sponsorships for two-week periods each March and September from 2013
10 through 2019. (*Id.* at V.D.2.) Interstate will maintain a settlement hyperlink on its website until
11 December 31, 2020, continue to post the settlement handout on its Memo Binder until December 31,
12 2019, and regularly remind authorized dealers about the claims program. (*Id.* at V.D.3-4.)

13 Interstate will pay all costs of the original and new notice plans, as well as all costs associated
14 with administering the settlement claims program. (*Id.* at V.E.)

15 **E. Class Member Releases**

16 The class member releases under the Amended Settlement Agreement are very similar to those
17 under the original settlement. (*See* Original Settlement Agreement at VII; Amended Settlement
18 Agreement at VII.) In exchange for the injunctive relief provided in the amended settlement, settlement
19 class members who purchased a replacement battery no later than April 30, 2012 will release all
20 equitable claims that were or could have been asserted in this litigation. (Amended Settlement
21 Agreement at VII.A.1.) Settlement class members who, as of April 30, 2012, still had an unexpired
22 right to purchase a replacement battery pursuant to a pro-rata warranty will release all equitable claims
23 they had on the settlement's effective date relating to the calculation of the adjusted price. (*Id.* at
24 VII.B.1.) As before, there will be no classwide release of monetary claims, and there will be no release
25 at all for claims for personal injury or property damage. (*Id.* at VII.A.1; VII.B.1.) Mirroring the original
26 settlement, class members who purchased a replacement battery no later than April 30, 2012 will retain
27 their right to bring an individual lawsuit for monetary damages but will release the right to bring another
28 class action asserting claims that were or could have been asserted in this litigation. (*Id.* at VII.A.2.)

1 Class members who have not purchased a replacement battery by April 30, 2012 will retain their rights
2 to assert new class claims.

3 However, if a settlement class member submits a tier-one or tier-two claim form, that settlement
4 class member will individually release all monetary claims that were or could have been asserted in this
5 litigation. (*Id.* at VII.E.) Settlement class members who submit a claim form for a post-April 2012
6 replacement battery purchase will also release all monetary claims the individual has on the date the
7 claim form is submitted that relate to the original battery or the replacement battery purchase. (*Id.*)

8 **F. Attorneys' Fees, Expenses and Service Payments**

9 The parties did not re-negotiate the original settlement terms regarding attorneys' fees, expenses
10 and service payments. Rather the original terms described in Plaintiff's previous preliminary approval
11 memorandum were carried over to the amended settlement: Interstate has agreed to pay \$1.05 million to
12 class counsel for attorneys' fees and expenses and \$1,250 to Mr. Milano as a service payment.
13 (Amended Settlement Agreement at VIII-IX; *see* Original Settlement Agreement at VIII-IX.)

14 **III. ARGUMENT**

15 **A. The Amended Settlement Warrants Preliminary Approval**

16 The arguments detailed in Plaintiff's preliminary approval memorandum for the original
17 settlement remain equally relevant to the Amended Settlement Agreement. (*See* Dkt. No. 52 (Memo).)
18 Rather than repeat those arguments in full, Plaintiff reviews each of the factors favoring preliminary
19 approval in light of the changes since the Court's December 1 Order.

20 **1. Review for an Informed, Non-Collusive Settlement Process**

21 The Court previously found that the parties' original settlement was "the product of serious,
22 informed, non-collusive negotiations." (Dec. 1, 2011 Order ¶ 5.) Building on those prior negotiations
23 and the original settlement, the parties continued to negotiate at arm's-length with full information about
24 the relevant law and underlying facts, producing the settlement adjustments described above. (Gibbs
25 Decl. ¶¶ 5 & 6.) The fact that the Amended Settlement Agreement offers benefits to a larger class and
26 over a greater time period than did the original settlement, and doesn't seek an increased amount of
27 attorney fees, demonstrates the non-collusive nature of the amended settlement.

1 **2. Review for Obvious Deficiencies**

2 The parties renewed negotiations did not introduce any obvious deficiencies into the settlement
3 agreement. (*See* Dec. 1, 2011 Order ¶ 5 (finding the original settlement agreement had no obvious
4 deficiencies).) The amended settlement offers the same \$8.50 check cards and \$5 and \$12 product
5 vouchers to class members who paid on average \$7.50 to \$9.50 more than expected for a replacement
6 battery. Indeed, the amended settlement offers these benefits to a much broader class than the original
7 settlement and greatly expands the claims submission period. (*See* Original Settlement Agreement at
8 II.X & II.Z (limiting the class to individuals who purchased replacement batteries no later than
9 November 17, 2011, and setting a December 31, 2012 claims submission deadline); Amended
10 Settlement Agreement at II.AA & II.CC (including in the class individuals with unexpired contractual
11 rights to replacement batteries as of April 30, 2012, and allowing class members to submit claims
12 through 2020).)

13 Nor do the agreed-upon attorneys' fees indicate that counsel compromised the class's claims to
14 secure greater relief for themselves. The relevant terms remain unchanged from those presented to the
15 Court in the original settlement agreement, despite class counsel doing more work and having secured
16 improved benefits for a larger class in the Amended Settlement Agreement. (*See* Original Settlement
17 Agreement at IX; Amended Settlement Agreement at IX.)

18 **3. Review for Preferential Treatment**

19 As before, the proposed amended settlement affords all class members the same injunctive relief,
20 including the right to participate in the claims program. Class members who have receipts can receive
21 greater benefits under the claims program, but the difference is justified by the greater strength of their
22 claims. The distinction between class members who have purchased replacement batteries as of April
23 30, 2012 and those with unexpired contractual rights on that date ensures that all class members will
24 have an opportunity to participate in the claims program, even if their Interstate battery has not yet failed
25 under warranty. Other than the ability to submit a claim in the future should his battery fail, the relief
26 available to Mr. Milano has not changed. (*See* Original Settlement Agreement at VIII; Amended
27 Settlement Agreement at VIII; Dec. 1, 2011 Order ¶ 5 (finding the original settlement agreement did
28

1 “not improperly grant preferential treatment to the Named Plaintiff or segments of the Settlement
2 Class”).)

3 **4. Review for Relief Falling within the Range of Possible Approval**

4 In light of the Court’s prior finding that the original settlement agreement fell within the range of
5 possible approval, the modified injunctive relief and expanded claims program provided under the
6 Amended Settlement Agreement also favor preliminary approval. (*See* Dec. 1, Order ¶ 5.) Plaintiff’s
7 primary concern with Interstate’s warranty business practices is that the warranty terms are confusing to
8 consumers and calculate the pro-rata adjustment for a replacement battery from an inflated and
9 undisclosed list price about which the average consumer is unlikely to know. (*See* Dkt. No. 1 (Compl.)
10 ¶¶ 2, 23-29.) Although the parties originally agreed that Interstate would eliminate its pro-rata warranty,
11 they have now determined that Plaintiff’s concerns can be adequately addressed through other warranty
12 changes. While Interstate may retain the industry-standard pro-rata warranty format, the new warranty
13 will be written and disclosed in a more consumer-friendly manner and, if pro-rata, must calculate the
14 warranty adjustment price using MSRP, not list price, and clearly state the method of calculation.
15 (Amended Settlement Agreement at VI.B.1; *see also* Compl. ¶ 13 (noting that warranties in the
16 automobile battery industry typically provide a pro-rated price for replacement batteries).) Were
17 Plaintiff to successfully litigate this action through trial, it is unlikely he would obtain a substantially
18 different injunction.

19 Though now available to a larger class, the benefits available to class members under the
20 settlement claims program are identical to those evaluated by the Court and approximate what Plaintiff
21 could hope to recover through a successful trial. Indeed, the benefits may exceed a potential judgment,
22 as the settlement establishes a claims program for class members who have not yet purchased a
23 replacement battery. Considering the Court’s finding in its December 1, 2011 Order, the benefits
24 offered under the Amended Settlement, and the benefits potentially obtainable through further litigation,
25 Plaintiff’s counsel believes the proposed amended settlement falls well-within the range of possible
26 approval and thus warrants preliminary approval.

1 **B. The Settlement Class Defined in the Amended Settlement Agreement Should be**
2 **Certified for Settlement Purposes, Plaintiff Re-Appointed as Class**
3 **Representative, and Plaintiff's Counsel Re-Appointed as Class Counsel.**

4 **1. The Proposed Settlement Class Meets the Requirements of Rule 23(a)**

5 The settlement class defined in the Amended Settlement Agreement expands the class described
6 in the original settlement and previously certified by this Court. (*See* Original Settlement Agreement at
7 II.X; Dec. 1, 2011 Order ¶ 1.) The amended settlement class also meets each of the prerequisites of
8 Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of
9 representation.

10 Numerosity: Interstate has sold millions of batteries from April 19, 2000 through April 30, 2012,
11 many of which remain under warranty. Over 750,000 replacement batteries have been sold in pro-rata
12 warranty transactions. Even considering that some class members may account for multiple battery
13 purchases, these figures demonstrate that the class is far too large to be practicably joined in this action.
14 *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (“The prerequisite of numerosity is
15 discharged if ‘the class is so large that joinder of all members is impracticable.’”). The proposed
16 amended class definition also “provides objective criteria by which prospective plaintiffs can identify
17 themselves as class members.” *See Sullivan v. Kelly Services, Inc.*, 268 F.R.D. 356,362 (N.D. Cal.
18 2010.)

19 Commonality: As under the original settlement class definition, the class members all suffered
20 the same alleged injury: each received or is entitled to receive a lower pro-rata discount under
21 Interstate’s warranty because the discount was calculated using a list price rather than MSRP. *See*
22 *Armstrong v. Davis*, 275 F.3d 849,868 (9th Cir. 2001) (commonality is satisfied where the lawsuit
23 challenges a system-wide practice or policy that affects all of the putative class members”). Because
24 neither Interstate’s standard warranty contract nor the legal concept of a “reasonable consumer” varies
25 between class members, the validity of the class claims—including Plaintiff’s contention that
26 Interstate’s pro-rata warranty calculation is either contrary to the warranty contract or misleading to a
27 reasonable consumer—depends on common questions. *See* Fed. R. Civ. P. 23(a)(2) (requiring common
28 questions of law or fact).

1 Typicality: Plaintiff and members of the proposed amended class have suffered a common
2 injury arising from Interstate’s common practice of employing a confusing warranty that calculates a
3 pro-rata adjustment using a list price rather than MSRP. Plaintiff’s claims are thus typical of the claims
4 of absent class members. *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168,1175 (9th Cir.
5 2010) (“The test of typicality is whether other members have the same or similar injury, whether the
6 action is based on conduct which is not unique to the named plaintiffs, and whether other class members
7 have been injured by the same course of conduct.”).

8 Adequacy of Representation: Plaintiff has no conflicts of interest with the proposed class and is
9 represented by qualified and competent counsel. *See Hanlon*, 150 F.3d at 1020 (adequacy is determined
10 by asking if the named plaintiff and his counsel have any conflicts of interest with the class and if they
11 will prosecute the action vigorously on behalf of the class); (*see also* Dec. 1, Order ¶ 3 (appointing
12 Girard Gibbs LLP class counsel in this action)). That Plaintiff and his counsel have negotiated an
13 improved settlement that provides benefits to a broader class than previously certified demonstrates that
14 they “will fairly and adequately protect the interests of the class.” *See* Fed. R. Civ. P. 23(a)(4); *see also*
15 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997) (the existence of a proposed settlement
16 is relevant to class certification, including whether absent class members’ interests are being adequately
17 represented).

18 **2. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(2)**

19 The Court previously found that a similarly-defined settlement class met the requirements of
20 Rule 23(b)(2). (Dec. 1, 2011 Order ¶¶ 1 & 4.) Although the amended class definition is broader, it
21 employs the same relief and similar release components as the original settlement agreement. The
22 injunctive relief provided under the Amended Settlement Agreement addresses Interstate’s class-wide
23 practice of employing confusing and potentially misleading warranties and will necessarily apply to the
24 entire class. *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (certification under Rule
25 23(b)(2) is a proper vehicle for challenging a common policy); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.
26 Ct. 2541, 2557 (2011) (“The key to the (b)(2) class is ‘the indivisible nature of the injunctive or
27 declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared
28 unlawful only as to all of the class members or as to none of them.”).

1 As with the original class definition, the presence of claims for monetary relief does not render
2 Rule 23(b)(2) certification inappropriate in this case. The amended settlement releases only equitable
3 claims on a class-wide basis; monetary claims will only be released on an individual basis by class
4 members who choose to participate in the settlement claims program by submitting a tier-one or a tier-
5 two claim form. (See Amended Settlement Agreement at VII.A.1, VII.B.1-2, VII.B.2.i.2, &
6 VII.B.2.ii.2). Furthermore, the monetary claims are incidental to Plaintiff's efforts to enjoin Interstate's
7 confusing and potentially misleading warranty practices and flow directly from any liability that might
8 be found as to the injunctive relief claims. See *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180,
9 1195 (9th Cir. 2001) (class seeking monetary damages may be certified pursuant to Rule 23(b)(2) where
10 such relief is 'merely incidental to [the] primary claim for injunctive relief.'").

11 **3. Plaintiff's Counsel Meet the Requirements of Rule 23(g)**

12 The Court previously appointed Plaintiff's counsel to serve as interim class counsel, finding that
13 they met Rule 23(g)'s requirements for fairly and adequately representing the putative class, and
14 appointed Girard Gibbs LLP as class counsel in its December 1, 2011 Order preliminarily approving the
15 original settlement. In light of the broader class definition included in the Amended Settlement
16 Agreement, Plaintiff's counsel now request that the Court re-appoint Girard Gibbs LLP as class counsel.
17 (See Dkt. No. 29-1 (Gibbs Decl. and Firm Resume).)

18 **C. Dissemination of Class Notice as Proposed is Warranted**

19 **1. The Proposed Notice Plan Will Adequately Inform Class Members of the** 20 **Settlement and their Right to Object.**

21 The parties' proposed notice plan is reasonably calculated to apprise interested parties of the
22 pendency of the proposed amended settlement and afford them an opportunity to present objections. See
23 Fed. R. Civ. P. 23(e) (requiring notice be directed in a reasonable manner to class members); *Torrissi v.*
24 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (the relevant question when evaluating a
25 notice campaign is "whether the class as a whole had notice adequate to flush out whatever objections
26 might reasonably be raised to the settlement."). While Interstate's records do not contain the
27 information necessary to identify individual class members, the parties have developed a notice plan
28 calculated to reach as many class members as reasonably possible. Notice will be disseminated at retail

1 locations authorized to carry Interstate Batteries and via a settlement website, a hyperlink to the
2 settlement website on the home page of Interstate's website, internet keyword/phrase sponsorships, and
3 print and audio press releases. (Amended Settlement Agreement at V.C.2); *see* Manual for Complex
4 Litigation (Fourth), § 21.311 (alternative techniques for providing notice when individual names or
5 addresses cannot be obtained through reasonable efforts include publication notice, internet notice, and
6 posting notice in places likely to be frequented by class members). To the extent contact information is
7 available, Interstate will also send direct notice to customers who complained to Interstate about the pro-
8 rata warranty or filed a claim under the original settlement before April 30, 2012.

9 The parties' proposed form of notice will provide information in neutral, plain language about
10 the settlement and class members' right to object. (*See, e.g.*, Amended Settlement Agreement, Exh. B
11 (New Long Form Settlement Notice); *id.*, Exh. C. (Instructions and Handout to Interstate Batteries
12 Authorized Warranty Dealers).) Each form of notice will direct class members to the settlement
13 website, where information will be available about the essential settlement terms, the benefits available
14 to the class representative, attorneys' fees, the method for objecting, the fairness hearing, and how to
15 contact class counsel. *See Colesberry v. Ruiz Food Products, Inc.*, No. CV-F-04-5516, 2006 WL
16 1875444, at *7 (E.D. Cal. June 30, 2006) (listing information appropriate to include in class notice).
17 The website will also provide access to the First Amended Complaint, the Amended Settlement
18 Agreement, and other important documents.

19 Plaintiff therefore requests that the Court approve the proposed notice plan, including the
20 proposed form of notice, re-appoint Jennifer Keough of Garden City Group Inc. to administer the plan,
21 and order that notice be disseminated as proposed.

22 **2. Notice of the Settlement Will also be Provided to Appropriate Federal and** 23 **State Officials**

24 Notice of the proposed amended settlement will be provided to the Attorney General of the
25 United States and regulatory officials of all 50 states, as required by the Class Action Fairness Act, 28
26 U.S.C. § 1715. (*See* Amended Settlement Agreement at V.C.2.) The notice, substantially in the form
27 attached to the amended settlement as Exhibit A, will permit the states and federal government to
28 evaluate the settlement and raise any concerns with the Court prior to final approval.

D. The Court Should Set a Schedule for Final Approval

The next steps in the settlement approval process are to notify the class of the proposed amended settlement, allow class members an opportunity to file any objections, and hold a final approval hearing.

Toward those ends, Plaintiff proposes the following schedule, to which Interstate has agreed:

Deadline to Update Class Settlement Website	March 30, 2012
Deadline to File Motion for Attorneys' Fees	April 13, 2012
Deadline to File Motion for Final Approval	May 04, 2012
Deadline to Mail Objections to the Settlement	May 18, 2012
Deadline to Mail Notices of Intent to Appear	May 18, 2012
Deadline to File Responses to Objections	June 07, 2012
Final Approval Hearing	June 28, 2012

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter the accompanying Proposed Order (i) preliminarily approving the parties' Amended Settlement Agreement, (ii) conditionally certifying the proposed settlement class under Federal Rule of Civil Procedure 23(b)(2), (iii) re-appointing Plaintiff Deno Milano as the class representative and his counsel, Girard Gibbs LLP, as class counsel, (iv) approving the parties' proposed notice plan (v) re-appointing Jennifer Keough and the Garden City Group as settlement administrator, and (vi) setting a hearing date and briefing schedule for final approval of the settlement and consideration of Plaintiff's fee application.

DATED: February 16, 2012

Respectfully submitted,

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By: /s/ Eric H. Gibbs

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