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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF LOS ANGELES, STANLEY MOSK COURTHOUSE**

14
15 CURT SCHLESINGER and
16 PETER LO RE on behalf of themselves and The
Class,

17 Plaintiffs,

18 v.

19 TICKETMASTER, a Delaware Corporation,

20 Defendants.
21

CASE NO.: BC 304565

Assigned to: Judge Kenneth R. Freeman
Department 64

22 **PLAINTIFFS' AND THE CLASS'**
MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY
APPROVAL OF PROPOSED CLASS
ACTION SETTLEMENT AGREEMENT

23 [Filed concurrently with Notice of Motion,
24 Declaration of W. Michael Hensley, and
25 Declaration of Paul Mulholland]

26 **DATE:** October 19, 2011
TIME: 8:30 a.m.
DEPT: 64

27 **TRIAL DATE:** November 9, 2011
ACTION FILED: October 21, 2003

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5 *7-Eleven Owners for Fair Franchising v. Southland Corp.*,
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6 *Cellphone Fee Termination Cases*
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7

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9 *Cho v. Seagate Technology Holdings, Inc.*,
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11 *Dunk v. Ford Motor Co.*,
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12 *Hertz Corp. v. Friend*,
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14 *In re Microsoft I-V Cases*,
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15 *In re Pharmaceutical Indus. Average Wholesale Price Litig.*,
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16

17 *In re Vitamin Cases*,
107 Cal.App.4th 820 (2003)..... 15

18 *Jones v. National Distillers*
56 F.Supp.3d 355 (S.D.N.Y. 1999)..... 15

19

20 *Liebman v. J. W. Petersen Coal & Oil Co.*,
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21 *Mars Steel Corp. v. Continental Ill. Nat’l Bank & Trust Co.*,
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23 *Officers for Justice v. Civil Svc Com.*,
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24 *State of California v. Levi Strauss & Co.*,
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26 *Superior Beverage Co., Inc. v. Owens-Illinois, Inc.*,
827 F.Supp. 477 (N.D. Ill. 1993)..... 15

27 *Wershba v. Apple Computer, Inc.*,
91 Cal.App.4th 224 (2001)..... 8, 16

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Statutes

Bus. & Prof. Code §17200..... 1
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Other Authorities

2 Newberg & Conte, Newberg on Class Actions, § 10:16 n. 1 (4th ed. 2002)..... 16
4 Conte & Newberg, Newberg on Class Actions, § 11.20, Ch. 11 (4th ed. 2002) 15
Newberg on Class Actions, §13.64..... 3, 5

1 Pursuant to California Rule of Court 3.769, Plaintiffs and the Class respectfully move for an
2 Order of the Court: (1) preliminary approving the Settlement Agreement reached between the parties
3 (the "Agreement") [Michael Hensley's Declaration (Hensley Decl.) ¶ 2, Ex.1], (2) amending the
4 prior class certification order, for settlement purposes only, to bring the class up to date through
5 October 19, 2011 and include persons who paid for, but then cancelled, ticket orders and paid an
6 OPF fee that was not refunded; (3) authorizing notice to be sent to the Class as set forth herein, and
7 (3) setting the matter for a Final Fairness Hearing on, or shortly after, March 15, 2012. The
8 Agreement was the result of arm's length negotiations, with the substantial involvement of a well
9 respected mediator, Hon. John Leo Wagner (Ret.), and was reached after years of protracted
10 litigation, and shortly before a bench trial scheduled to start on October 5, 2011.

11 **I. PREFATORY STATEMENT.**

12 Plaintiffs seek preliminary approval of a proposed settlement and plan of distribution that are
13 well within the range of possible approval under California law. The parties reached this Agreement
14 on the eve of trial, after eight years of active litigation (including multiple rounds of class
15 certification motions and extensive dispositive motion practice), and following arm's length
16 negotiations by experienced counsel who have determined that the settlement is in the best interests
17 of the Class.

18 This case falls into a category of cases that courts recognize are ideally suited for class
19 adjudication because it involves a large number of very small claims—more than 100 million
20 transactions, where only a few dollars per transaction are challenged. Specifically, two fees charged
21 by Ticketmaster over its website, www.ticketmaster.com (the "Website") are challenged in this case:
22 the Order Processing Fee ("OPF") and the UPS Delivery Fees ("UPS Fee") it charged to customers
23 who selected UPS delivery of their tickets. The OPF averaged about \$4.00 per transaction, while the
24 UPS ranged from about \$15 to \$20 per transaction. All of the transactions included an OPF charge,
25 while about 5% involved UPS delivery. Plaintiffs assert claims under California's Unfair
26 Competition Law, Bus. & Prof. Code §17200, *et seq.* (the "UCL"), which provides for "restitution,"
27 but not "damages." Accordingly, Plaintiffs seek the full amount of the OPF price and the difference
28

1
2 between what Ticketmaster charged consumers for UPS delivery of their tickets and the amount that
3 Ticketmaster actually paid to UPS as restitution for the Class.

4 Under the Agreement, for each purchase OPF class members made during the Class Period
5 they will automatically be emailed a \$1.50 credit code towards a future ticket purchase (up to a limit
6 of 17 purchases). The OPF credits can be “stacked” to two discounts per purchase (i.e, a \$3 discount
7 on a future purchase). Similarly, for each purchase they made using UPS delivery of their tickets
8 during the Class Period (up to 17 transactions), UPS subclass members will automatically be
9 emailed a \$5.00 credit towards UPS delivery of a future ticket purchase. Class members will have
10 four years to redeem their credits, and will be provided with periodic reminders to use the codes.

11 As explained in detail in § IV, *infra*, if Plaintiffs prevailed in full on the OPF claim, for an
12 average class member who made three purchases during the Class Period, the net recovery would
13 have been about \$4. Under the Agreement, for about 160 million transactions, the OPF class
14 members will receive \$1.50 discount for future purchases on the Website. Class members do not
15 have to do *anything* to take advantage of this relief other than use the discount codes, which will
16 automatically be emailed them. Likewise, if the UPS Subclass prevailed at trial, its approximately
17 4.5 million members would have obtained a maximum net recovery of about \$7.80 per order, and
18 under this Agreement, each member will receive a \$5 credit (per transaction) towards future UPS
19 delivery of tickets, again without being required to submit any claim form.

20 On June 3, 2011, this Court declined to grant preliminary approval to a proposed settlement
21 for the sole reason that the parties had not included a *cy press* component. [Hensley Decl., ¶ 23,
22 Exh. 5, June 3, 2011 Tr. at 21:19-22:7 (the Court: “the addition of an appropriate [*cy pres*] amount . .
23 . would eliminate the only impediment that I see to this settlement”).] Following that ruling, the
24 parties resumed discovery and trial preparation in earnest, ultimately reaching the proposed
25 settlement now before this Court. The Agreement resolves this Court’s concern with the prior
26 settlement because it provides for *cy press* contributions. Specifically, if less than \$45 million in
27 discount codes are redeemed, the deficiency will be given to appropriate organizations in a
28

1 combination of cash and free tickets as explained in detail in §IV.D, below. Moreover, as also
2 explained below, the Agreement also improves on the prior settlement in several in several key
3 respects, including increasing the value of the benefits to class members.

4 Finally, Ticketmaster will pay the cost of claims administration. Ticketmaster has also
5 agreed to pay any court-approved attorneys' fees and litigation expenses not to exceed \$15 million
6 and \$1.5 million, respectively, and to pay each of the two named Plaintiffs an incentive award of up
7 to \$20,000 (with a corresponding reduction to the attorneys' fee awards). In sum, the Court should
8 grant preliminary approval to the proposed settlement and plan of distribution because they are well
9 within the range of permissible approval under California law. *See Newberg on Class Actions*,
10 §13.64 (noting that the purpose of a motion for preliminary approval of a class action settlement is
11 for the Court "to determine only whether the proposed settlement and plan of distribution are within
12 the range of possible approval."). Accordingly, the court should direct notice to be sent to the class
13 members advising them: (i) of the terms of settlement, (ii) that a final approval hearing will be held,
14 and (iii) of what they must do to receive the benefits of the settlement or object to it. *See id.*

15 II. HISTORY OF THE CASE.

16 The history of this case covers a wide range of procedural, discovery, and substantive issues,
17 in both state and federal, trial and appellate courts. Plaintiffs had to litigate changes in the applicable
18 laws – the passage of Proposition 64 (modifying the UCL) in 2004, and enactment of the federal
19 Class Action Fairness Act ("CAFA") in 2005. Both parties vigorously litigated this case. For
20 example, Plaintiffs had to file multiple class certification motions, with the issue eventually being
21 decided by the Appellate Court in a Writ proceeding. And Ticketmaster was just as persistent.
22 Indeed, the Court has noted that Ticketmaster's counsel filed every motion possible on behalf of its
23 clients. A brief summary of the significant law and motion practice is as follows¹:

- 24 • 10/21/03 Plaintiffs file their initial complaint seeking disgorgement of
Ticketmaster's markup on the UPS delivery charges.
- 25 • 12/5/03 Ticketmaster moves to transfer the case to Chicago, Illinois on *forum*
26 *non conveniens* grounds. That motion is denied.

27
28 ¹ A copy of the pleadings index maintained by Plaintiffs' counsel is attached as Hensley Decl. ¶ 3, Ex.2.

- 1 • 4/28/04 Ticketmaster files its first motion to bifurcate discovery and trial. That
2 motion is denied.
- 3 • 7/20/04 Ticketmaster files its first motion for summary judgment (on the UPS
4 claim). That motion is denied.
- 5 • 12/7/04 Ticketmaster files a motion for judgment on the pleadings in response
6 to Plaintiffs' first amended complaint. That motion is denied.
- 7 • 8/31/05 Plaintiffs file their First Amended Complaint ("FAC") adding class
8 allegations in light of Proposition 64 and adding claims relating to the OPF.
- 9 • 9/1/05 Ticketmaster removes the case to federal court on the theory that the
10 FAC "commences" a new action pursuant to the newly enacted CAFA statute.
11 Plaintiffs file a motion to remand, which is granted on March 26, 2006.
- 12 • 4/4/06 Ticketmaster files an emergency motion and a petition with the Ninth
13 Circuit to stay the remand order and accept a permissive appeal from the district
14 court's order. The Ninth Circuit denies the emergency motion and the petition.
- 15 • 08/14/06 Plaintiffs file their initial motion for class certification. On September
16 20, 2007, the court announces a tentative opinion to certify a nationwide class. On
17 December 19, 2007, the motion is denied without prejudice, to be reconsidered when
18 the Supreme Court eventually was to rule in *Tobacco II*.
- 19 • 8/24/06 Having previously lost a motion to reclassify the case as a limited
20 jurisdiction case, Ticketmaster moves to reclassify the case as complex. That motion
21 is denied.
- 22 • 9/25/06 Ticketmaster files its second motion for judgment on the pleadings.
23 That motion is denied.
- 24 • 5/4/07 Plaintiffs file an amicus curiae brief in the California Supreme Court
25 in *Tobacco II*.
- 26 • 6/10/09 Plaintiffs file their Third Amended Complaint ("TAC").
- 27 • 7/2/09 Ticketmaster files a demurrer and motion to strike portions of the
28 TAC. Those motions are overruled or denied.
- 8/31/09 Plaintiffs re-file their motion for class certification. On February 5,
2010, the trial court grants the motion with respect to the deceptive practices claims
and denies it with respect to the unlawful / unfair practices claims. The Class is
limited to California purchasers.
- 3/8/10 Ticketmaster files a Writ Petition, asking the Appellate Court to
review the order granting class certification. That Petition is denied.
- 3/8/10 Plaintiffs file a motion for reconsideration of the Court's denial of
nationwide certification. That motion is denied on April 20, 2010.
- 4/22/10 Plaintiffs are required to file a motion to identify the class members.
That motion is granted on May 14, 2010.
- 6/1/10 Plaintiffs file a motion in limine to preclude Ticketmaster's
presentation of offset defense or, in the alternative, to compel restitution discovery.
The motions are granted in part, and denied in part, on June 24, 2010, resulting in
substantial restitution discovery.
- 6/4/10 Plaintiffs file a Writ Petition asking the Appellate Court to reverse the
decision limiting the Class to California purchasers. The Petition is granted with the
Appellate Court ordering recertification as a nationwide class on August 31, 2010.

- 1 • 3/16/10 Ticketmaster files another motion to bifurcate the trial and discovery
2 (into liability and damages phases). That motion is denied without prejudice.
- 3 • 6/11/10 Ticketmaster files its second motion for summary judgment. This
4 motion is substantially “amended” on September 28, 2010. The motion and
5 supporting materials are 2,902 pages. The motion was set for ruling on December 21,
6 2010.
- 7 • 9/28/10 Plaintiffs file a Motion for Summary Adjudication on Ticketmaster’s
8 affirmative defenses. Ticketmaster withdraws many of the defenses, and files an
9 opposition on the remaining defenses. The motion was set for hearing on December
10 21, 2010.
- 11 • 11/02/10 Ticketmaster files a motion to decertify the class, which was set for
12 hearing on December 21, 2010.
- 13 • 11/20/10 Both parties file motions *in limine*, followed by opposition briefs,
14 primarily directed at the other parties’ expert witnesses, which were to be ruled on at
15 the January 10, 2011 final pre-trial conference.
- 16 • 12/20/10 The parties inform the Court that they have reached a settlement
17 agreement after two days of mediations. The pending cross-motions for summary
18 judgment / adjudication and Defendant’s motion to decertify the class are taken off
19 calendar, as is the January 26, 2011 trial date.
- 20 • 6/3/11 The Court denies preliminary approval of the parties’ settlement
21 agreement, finding that the relief provided to the class members would be reasonable
22 for the class members who used it, but that if only a small percentage of class
23 members took advantage of the settlement then, in the absence of a *cy pres*
24 requirement, the overall settlement would not be adequate. The case is reset for an
25 October 5, 2011 trial.
- 26 • 6/3/11-9/2/11 Both parties vigorously proceed towards trial, conducting the
27 remaining expert and restitution discovery and putting the summary judgment and
28 decertification motions back on calendar.
- 9/2/11 The Court hears extensive arguments on Defendant’s motion for
summary judgment / adjudication and Plaintiffs’ motion for summary adjudication on
Defendant’s affirmative defenses. Although, the Court denied summary adjudication
on a majority of the “issues” asserted by both parties, it granted summary
adjudication with respect to certain issues, and thus created uncertainty and added
risks, especially relating to Plaintiffs’ Count II (the OPF claims). [Decl. Hensley, ¶ 4]

III. LEGAL STANDARDS FOR PRELIMINARY APPROVAL.

The purpose of a motion for preliminary approval of a class action settlement is for the Court “to determine only whether the proposed settlement and plan of distribution are within the range of possible approval.” Newberg on Class Actions, §13.64 (citing *Liebman v. J. W. Petersen Coal & Oil Co.*, 73 F.R.D. 531, 534 (N.D. Ill. 1973)). If the settlement falls within the range of potential approval, then the Court should direct notice to be sent to the class members advising them: (i) of the terms of settlement, (ii) that a final approval hearing will be held, and (iii) of what they must do to

1 receive the benefits of the settlement or object to it. *Id.* As shown below, this settlement easily
2 satisfies the criteria for both preliminary approval and, ultimately for, final approval.

3 Under California law, the primary consideration for evaluating the fairness of a class action
4 settlement is to ensure that it is reached as a result of arm's length negotiations by experienced
5 counsel after sufficient factual investigation to make informed decisions as to whether the settlement
6 is in the best interests of the Class. A presumption of fairness arises where this criteria is met.
7 Additionally, where, as here, the settlement is reached after the Class has been certified through the
8 adversarial process there is an enhanced presumption of fairness. The Court found that the prior
9 settlement agreement was the result of arm's length negotiations and entitled to a presumption of
10 fairness. [Hensley Decl. ¶ 23, Ex. 5, June 3, 2011 Tr. at 9:20-21, 12:12-13, 25:26-26:8]. That
11 remains true.

12 As the Court knows, after nearly eight years of presiding over this case, there is no collusion
13 between these parties. The settlement was reached shortly before trial, after years of discovery and
14 expert discovery, and extensive law and motion practice, including motions for summary judgment /
15 adjudication, and multiple class certification (and decertification) motions. After the Court denied
16 preliminary approval of the prior settlement agreement, the parties resumed their final discovery and
17 trial preparations in earnest, and were only able to reach another settlement agreement after months
18 of settlement discussions and further mediations.

19 **IV. TERMS OF THE SETTLEMENT AGREEMENT.**

20 In a nutshell, the settlement provides compensation for the OPF class members (i.e., the
21 entire class) with additional compensation available to the UPS subclass. All compensation to the
22 class is in the form of credits towards future purchases from the Website, and the class members do
23 not have to submit *any* claim form. Upon final approval, they will automatically receive the credits.
24 If all of the discount codes were redeemed, their value would be approximately \$265 million.² The
25 Agreement provides for the Court to expand the class, for settlement purposes, to include consumers
26

27 ² There are approximately 160 million OPF transactions (\$1.50 credit x 160 million = \$180 million) and 5
28 million UPS transactions (\$5.00 credit x 5 million = \$25 million).

1 who purchased between the prior class cut-off date (May 31, 2010) and the date of the preliminary
2 approval hearing (October 19, 2011) and also includes consumers who ordered tickets during the
3 Class Period and canceled those orders, but still paid an OPF fee that was not refunded. The
4 settlement also provides for *cy pres* contributions to be made if the class members redeem less than
5 \$45 million in discount codes. Additionally, Ticketmaster will make changes to the language on its
6 website describing certain fees challenged in this lawsuit and, at its expense, will make technological
7 changes to its website necessary to process the discount codes provided as a result of the Agreement.
8 Finally, Ticketmaster will pay for the costs of notices and claims administration and will pay, as
9 awarded by the Court, Plaintiffs' and the Class Attorneys' fees and expenses, and an incentive award
10 to the two named Plaintiffs / certified Class representatives (up to specified caps), as discussed in
11 §VI, *infra*. The attorneys' fees, expenses and incentive awards are in addition to the relief provided
12 to the class members, and will not in any way diminish that relief.

13 The Agreement provides almost double the benefits for the class members, on an individual
14 basis, than the same benefits in the prior settlement, which the Court found were "reasonable
15 because they would provide the class members with [] 50 to 60 percent of the total possible" net
16 restitution they could have recovered at trial." [Hensley Decl. ¶ 23, Ex. 5, June 3, 2011 Tr. at 12:7-
17 12] The Agreement also remedies the Court's sole reason for denying preliminary approval of the
18 prior settlement (the absence of a guaranteed redemption / *cy pres* fund) by providing for *cy pres*
19 contributions if less than \$45 million in benefits are redeemed by class members. [Hensley Decl., ¶
20 23, Ex. 5, June 3, 2011 Tr. at 14:19-24, 24:2-4].

21 At the most basic level, in assessing fairness, when Plaintiffs filed this case, their maximum
22 recovery (the UPS Claim) was approximately \$30 to \$35 million³, which, by the time of trial, would
23 been between \$65 and \$70 million. Through their persistence, Plaintiffs were able to reach a
24

25 ³ Throughout this Brief, Plaintiffs use approximate amounts for analysis of the potential damages. Nothing
26 asserted herein should be deemed in any way as a statement of damages for purposes of trial, etc. This
27 information is not intended to be a substitute for, or a waiver of, any expert testimony that Plaintiffs or
28 Ticketmaster would introduce if the case was tried. Rather, it is intended to give the Court, and the class
members, guidance in evaluating the settlement.

1 settlement with a guaranteed minimum value of far in excess of the initial value of the case.

2 **A. The Class Should Be Expanded For Settlement Purposes to Include All**
3 **Consumers Who May Have Claims Asserted In the Third Amended Complaint.**

4 The class certification order in this case, entered on September 27, 2010, certified a class of
5 consumers who purchased tickets from the Website between October 21, 1999 and May 31, 2010.
6 The parties do not agree as to whether that Order included as class members persons who purchased
7 tickets but then cancelled their ticket order without obtaining a full refund of the OPF. However, the
8 parties believe it is proper for the settlement to include, to the greatest extent possible, all persons
9 who could have asserted claims arising from the facts pleaded in Plaintiffs' Third Amended
10 Complaint. This would include consumers who placed, and then canceled ticket orders, but still paid
11 and OPF. The amended class definition also updates the class, to extend it through purchases made
12 on October 19, 2011 (the date scheduled for the Preliminary Approval Hearing). Accordingly, *for*
13 *settlement purposes only*,⁴ the Parties have agreed to request that the Court redefine the Class as:

14 all persons who placed ticket orders from Ticketmaster using the Website
15 during the period from October 21, 1999, through October 19, 2011, the date of the
16 Preliminary Approval Hearing (the "Class Period"), paid money to Ticketmaster for
17 an OPF (which was not refunded), and were residents of the fifty United States at the
18 time of the purchase, including persons who placed, and then cancelled, a ticket order
19 without obtaining a full refund of the OPF. Excluded from the Class are (a)
20 Defendant, (b) any entities in which Defendant has a controlling interest or which
21 have a controlling interest in Defendant, (c) the officers, directors, employees,
22 affiliates, and attorneys of Defendant, or (d) any employee or officer of the Court or
23 their immediate family members. Also excluded from the Class are those persons
24 who timely and validly requested exclusion from the Class pursuant to the prior class
25 notice sent to the Class following the Court's September 27, 2010 class certification
26 order, as identified on the list attached as Exhibit A to this Agreement.

27 [Hensley Decl. ¶ 2, Ex. 1, ¶¶ 1.2, 2.1]. Case law clearly allows the Court to make such an
28 amendment for settlement purposes. *See, e.g., Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1807
n.19 (1996) (holding trial courts have broad authority regarding class certification for settlement
purposes). *See also Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 239-240 (2001) [same].

29 **B. OPF Class Recovery.**

30 The OPF Class consists of consumers with approximately 56 million e-mail addresses used

31 ⁴ Neither party is waiving any arguments he or it may have in support of, or opposition to, class certification.

1 to make approximately 160 million transactions on the Website during the Class Period. Plaintiffs'
2 theory is that by representing the OPF as a separate "Order Processing Fee," in addition to the
3 "Convenience Charge" and other fees Ticketmaster charges on the Website, Ticketmaster misleads
4 consumers to believe that the OPF is based on or related to Ticketmaster's costs to process the ticket
5 orders. Ticketmaster has vigorously disputed this argument, both on liability and restitution. The
6 parties have hired experts who have conducted multiple consumer surveys (which each side believes
7 support their position). Ticketmaster has also argued that it does not make a profit on the OPF
8 (meaning that if Plaintiffs prevailed on liability, they should not be entitled to any restitution).
9 Plaintiffs dispute that assertion, and further argued that Ticketmaster's profit margin on the OPF is
10 irrelevant to the amount of restitution.⁵

11 The average OPF per order was around \$4.00. If Plaintiffs had prevailed at trial, they would
12 have sought the full amount of the charge as restitution under the UCL. Ticketmaster would have
13 argued that, even if Plaintiffs established liability, it would have been entitled to offset its actual
14 processing costs, which it would have argued (through its experts) exceeded the amounts charged to
15 class members, thus resulting in no restitution award. As a middle ground / fallback position, in the
16 event the Court found liability, but also found that Ticketmaster was entitled to an offset, Plaintiffs'
17 experts would have opined that the actual processing costs were about \$ 1.10 per order.⁶ Under this
18 middle ground, the *gross* restitution per class member would have been approximately \$8.70 (\$4.00
19 per order - \$1.10 cost = \$2.90 x 3 orders per class member).

20 _____
21 ⁵ Several other issues demonstrate the risks and potential exposure associated with the OPF claim. By way of
22 example only, Ticketmaster would argue that the Court's September 2, 2011 ruling on Issue 2 of its
23 Summary adjudication Motion removed the OPF claim from the case (Plaintiffs disagree with this), and
24 Plaintiffs have also argued that the OPF is unfair / unconscionable under the UCL (Counts III and IV).
25 While the Court has upheld Counts III and IV, it has not certified them for class treatment, meaning that
26 those claims would be tried, and both parties would be arguing the certification issue in the appellate court.
27 The only thing that can be said with certainty regarding the OPF claim is that it would have fostered years of
28 trial court and appellate litigation.

⁶ Plaintiffs' experts would likely have provided the Court with detailed opinions of which costs properly were,
or were not, attributed to order processing, which would have allowed the Court to make a determination
from a range of potential offsets. The \$1.10 figure is a middle of the range estimate and should not be
construed as an admission that Ticketmaster actually incurred such costs.

1 Other factors would have reduced the net recovery to class members. Although Plaintiffs
2 would have sought to impose the attorneys' fees and litigation costs on Ticketmaster pursuant to
3 CCP §1021.5 (or other theories), they cannot presume the Court would have shifted the fees.
4 Plaintiffs' counsel would have been entitled to a fee under the common fund doctrine. Given that
5 the fee would result from a case that was tried (after more than eight years), and the certainty of an
6 appeal, a fee of at least 33% would have been well justified. This would reduce the average
7 recovery to about \$5.75 per class member. The claims administration costs (determining each class
8 member's entitlement, writing, and mailing a check, plus follow-up for the checks that were
9 returned) would be about \$1.80 per class member. [Decl. of Paul Mulholland ¶ 3]. Thus, if
10 Plaintiffs prevailed at trial (and Ticketmaster was allowed a mid-range offset), the projected net
11 recovery per class member on the OPF claims would be about \$4.00 total.

12 Under the Agreement, for each transaction an OPF class member made from the website
13 during the Class Period (up to 17 transactions)⁷, he or she will *automatically* receive a discount code
14 for a \$1.50 discount on a future purchase made from the Website. [Hensley Decl. ¶ 2, Ex. 1 at ¶ 2.2].
15 Thus, the average class member will receive discounts of \$4.50 (3 transactions x \$1.50), which is
16 *more* than his or her potential net recovery if Plaintiffs prevailed at trial.

17 Other key features of the Agreement on the OPF include:

- 18 • Class members do not have to do anything to receive the discount codes. (Id. at ¶¶
19 2.2, 2.5; *see Chavez v. Netflix Inc.*, 162 Cal.App.4th 43, 52-52 (2008) (observing with
20 approval the ease of use of future discounts) and *id.* at 59 ("it is in the interests of
21 class members that procedures for claiming benefits be as simple and convenient as
22 possible").
- Class members do not have to self-identify their purchases. The claims administrator
23 will automatically determine what purchases each class member made during the
24 Class Period. *Id.* at ¶ 2.5.
- Class members are not required to make a purchase that they would not have
25 otherwise made.⁸ *Id.* at 2.5; *Chavez*, 162 Cal. App. 4th at 52-53 (observing with
26 approval the fact that future discounts did not require class members to make

25 ⁷ The cap of 17 transactions was a hard fought compromise.

26 ⁸ Although the discounts are good only towards future purchases, Ticketmaster typically has the exclusive
27 rights to sell internet tickets in the primary market for venues that contract with Ticketmaster. Thus, if a
28 class member wants to attend such an event, he or she would be purchasing through Ticketmaster if they
purchase their tickets on-line in the primary market (i.e., not a reseller).

1 additional purchases).

- 2 • The discount codes can be “stacked” twice, meaning that a class member who
3 receives two (or more) codes can redeem up to two codes per purchase, resulting in a
4 \$3.00 discount. *Id.* at ¶ 2.2.
- 5 • Ticketmaster bears all of the expenses, both in administering the claims and the
6 attorneys’ fees. *Id.* at ¶ 1.1; *Chavez*, 162 Cal. App. 4th at 64-65 (attorneys’ fees paid
7 by defendant added to the value of the settlement).
- 8 • The codes should be active within 30 days after final approval (because Ticketmaster
9 requires time to implement technology necessary to process the discount codes), and
10 if there is a delay in implementing the technology, the codes have to be resent. *Id.* at
11 ¶ 2.4-2.5; *Chavez*, 162 Cal. App. 4th at 55-56 (six month lag in class’ recovery is fair
12 where needed for defendant to implement the relief).
- 13 • Class members will have four years after receipt to redeem the discount codes. They
14 only need keep the email with the codes in their “inbox” (or elsewhere). Additionally,
15 every nine months Ticketmaster (or the Claims Administrator) will send a reminder
16 email to the class members, which will include the class members’ discount codes.
17 [Hensley Decl., ¶ 2, Ex. 1 at 2.7-2.9].

11 **C. UPS Subclass Recovery.**

12 The UPS subclass is considerably smaller -- approximately 4.5 million customers. Plaintiffs’
13 theory on that claim is that Ticketmaster misrepresents the UPS delivery fee it charges consumers as
14 a pass-through of the amounts Ticketmaster pays UPS to deliver the tickets, especially because the
15 UPS delivery fee is juxtaposed with the other fees, including the OPF, which Plaintiffs contend lead
16 consumers to believe they have already paid Ticketmaster to process the order. If Plaintiffs *fully*
17 prevailed on liability and restitution, they would recover approximately \$11.75 per order, based on
18 the evidence produced by Ticketmaster and the testimony their accounting experts would have
19 offered. Of course, in addition to disputing liability, Ticketmaster would have presented evidence
20 and its own accounting experts to argue that the amount of restitution should be substantially less
21 than the \$11.75 sought by Plaintiffs. Again deducting for attorneys’ fees would reduce the net
22 recovery to about \$7.80 per order. If Plaintiffs had prevailed on the OPF claim too, then there would
23 be only minimal additional claims administration costs associated with the UPS claims. However, if
24 Plaintiffs prevailed *only* on the UPS claims, the administration costs would have further reduced the
25 UPS recovery. Assuming, for purposes of evaluation that Plaintiffs had a 50% chance of success on
26 the OPF claim, and that the average UPS subclass member made three purchases during the Class
27 Period, this reduces the maximum net recovery to about \$7.50 per transaction. Under the

1 Agreement, UPS class members will receive two-thirds of that amount.

2 Like the OPF class members, UPS subclass members are not required to submit a claim form
3 or to identify the purchases they made during the Class Period. For each transaction they made
4 during the Class Period (up to 17 transactions), they will receive a discount code for \$5.00 off a
5 future Ticketmaster purchase using UPS delivery. The UPS discount codes will be sent in the same
6 manner, and be valid for the same time period, as the OPF discount codes. (Hensley Decl. ¶ 2, Ex. 1
7 at ¶¶ 2.3, 2.4, 2.5, 2.7, 2.8).

8 **D. Minimum Redemption – Cy Pres Guarantee.**

9 In addition to the increased benefits to the class members, the Agreement remedies the only
10 deficiency the Court found in the prior agreement – i.e, the absence of a *cy pres* fund to guarantee a
11 minimum value of the settlement. [Hensley Decl., ¶ 23, Ex. 5, June 3, 2011 Tr. at 12:26-15:1, 17:5-
12 7, 21:19-22:7]. The Court explained that without a *cy pres* fund “everything was up in the air” in
13 terms of valuing the benefits of the settlement, and that the addition of “an appropriate [cy pres]
14 amount . . . would eliminate the only impediment that I see to this settlement.” *Id.* at 21:19-22:7.

15 The Agreement provides for a robust guaranteed minimum redemption amount of \$45
16 million, with a provision that if the redemption of discount codes is less than \$45 million the
17 difference will be given to appropriate charities. [Hensley Decl. ¶ 2, Ex. 1 at ¶¶ 2.9, 2.10]. The
18 codes are redeemable over four years. At the end of each year⁹, if less than \$11.25 million in codes
19 have been redeemed, then Ticketmaster shall make the required charitable contributions in the
20 following year.¹⁰ Charitable contributions will be made in a combination of 25% cash and 75% free
21 tickets to concert events. *Id.* at ¶ 2.10. The parties are working together to prepare more detailed
22 guidelines, and establish a mechanism, for distributing the cash payments and free tickets. However,
23 at this point the parties can provide the Court key information regarding key aspects of the charitable
24 distributions:

25 _____

26 ⁹ The year is based on the date the codes are issued and first usable, not a calendar year.

27 ¹⁰ Ticketmaster is allowed to carry a credit over from a prior year if more than \$11.25 million in codes were
28 redeemed. [Hensley Decl. ¶ 2, Ex. 1, ¶ 2.9].

1 **Types of Charities.** The California Code of Civil Procedure and case law direct that *cy pres*
2 contributions should “to the extent possible” be made to organizations that “further the purposes of
3 the underlying” litigation, and also provide that “child advocacy programs” are appropriate
4 beneficiaries of *cy pres* funds. Cal. Code Civ. Proc., §384. Consistent with the purposes of this
5 litigation, the parties believe that charities (including potentially public schools) that benefit
6 disadvantaged children, and families, and members of the armed services and their families would be
7 appropriate beneficiaries for *cy pres* distributions in this case. Cash contributions have an obvious
8 benefit to these charities, and free tickets to concert events will also have real value to these
9 organizations.

10 **Procedure for Providing Free Tickets to Organizations.** In order to ensure that the tickets
11 provided to charities have real value, the Agreement sets forth certain guidelines. Foremost, the
12 charities will have to be approved by the Court, and parties will jointly select and work with the
13 charities to ensure they desire and can use the tickets. [Hensley Decl. ¶ 2, Ex.1, ¶ 2.10]. The tickets
14 will be for concert events at Live Nation venues throughout the United States.¹¹ Tickets will be
15 provided for concert events for established recording artists.¹² Ticketmaster will receive credit
16 towards the *cy pres* contributions for the full value of the tickets that the charities accept. [Hensley
17 Decl. ¶ 2, Ex. 1 at ¶¶ 2.9, 2.10.) The Court can be assured that the tickets will have value to the
18 charity. Indeed, a charity is in the best position to determine if tickets to a certain event are
19 beneficial to it. While Ticketmaster receives credit for the tickets once they are given to and
20 accepted by a charity, it cannot force tickets on a charity. The parties will work with the charities to
21 determine what events would be appropriate. If a charity does not believe the tickets to a certain
22 event would be beneficial, it does not have to accept them. Additionally, the Agreement provides

23
24 ¹¹ A list of the Live Nation venues is attached to the Hensley Declaration as Exhibit 6. The parties are not
25 representing that tickets will be provided for events at every one of these venues. Rather, the list is
26 provided to inform the Court (and the class members) of the types of venues for which tickets will be
27 provided.

28 ¹² As part of the settlement process, and subject to the settlement confidentiality requirements, Ticketmaster
provided Lead Class Counsel with a list of artists for which tickets would have been made available had
this program been in place during the prior two years, and that list includes many well known and popular
artists.

1 that if a charity is selected to receive a ticket donation, Ticketmaster must provide the tickets at least
2 two weeks prior to the concert, which ensures the charity will have time to get the tickets into the
3 hands of appropriate recipients and/or organize an outing for the concert. Simply put, providing
4 disadvantaged children and adults, and members of the military and their family with free tickets to
5 see rock, pop, jazz, and other concert events, is certainly a valuable contribution and very much in-
6 line with the claims asserted in this case.

7 **Case Law Supports This Redemption / Cy Pres Distribution Plan.** Numerous cases have
8 approved the type of hybrid settlement involved here, with benefits both to the class and then
9 building value for unclaimed benefits through *cy pres* arrangements.¹³

10 *In re Microsoft I-V Cases*, 135 Cal.App.4th 706 (2006), *rev'd*, is a California case approving
11 a similar hybrid settlement, although it actually involved coupons with claim forms rather than the
12 automatically provided, and easier-to-use discount codes, provided for here. There, plaintiff sued to
13 recoup software overcharges allegedly passed on by Microsoft to class members, with the matter
14 being certified as to two different software consumer classes. Eventually, a settlement was reached
15 with these salient features: (1) consumers who submitted claims forms would receive coupons as
16 compensation for the alleged overcharges (*id.* at 712-713); (2) vouchers were redeemable for a four-
17 year period akin to the promotional code use period in the proposed Agreement ¶ 2.7 (*id.* at 713);
18 and (3) a multi-tier *cy pres* distribution arrangement was established by which Microsoft retained
19 one-third of the unclaimed portion, two-thirds went to a “first *cy pres* amount” to issue vouchers for
20 use by eligible public schools with low-income students, and a “second *cy pres* amount” was set up
21 by which unused vouchers were distributed one-third back to Microsoft and two-thirds through
22

23 ¹³ The *cy pres* doctrine originated as means to save testamentary charitable gifts that would have otherwise
24 failed. Under this doctrine, a court looks for an alternative recipient of the testator’s gift that would best
25 effectuate the testator’s intent. Recently, this doctrine has “become more flexible” and has found
26 increasing application in the class action context, allowing “unclaimed” settlement funds to be paid to
27 charitable organizations under arrangements agreed to by the parties and approved by the court. (*In re*
28 *Linerboard Antitrust Litig.*; 2008 WL 4542669 at *3 (E.D. Pa. Oct. 3, 2008).)

1 another voucher arrangement that could allow for further distributions to other needy California
2 organizations jointly selected by the parties with court approval (*id.* at 713-715).¹⁴ This settlement
3 was approved as a final settlement by the lower court, but appealed by an objector on the *cy pres*
4 element of the compromise.

5 The appellate court rejected the objector's challenge, determining that the *cy pres*
6 arrangement was compliant with California class action statutes and decisional law. (*Id.* at 717-
7 722.) The *cy pres* fund also helped establish the value of the settlement. (*Id.* at 728-729.) Other
8 state court decisions are to the same effect, even validating settlements having far less (or no) direct
9 value to the certified classes. (*See, e.g., In re Vitamin Cases*, 107 Cal.App.4th 820, 826, 832 (2003),
10 *rev. den.* [approving distribution of the entire consumer class settlement to charitable, governmental
11 and non-profit organization].)¹⁵

12 Federal courts have also acknowledged that courts should consider the value established
13 through both direct and fallback *cy pres* arrangements in evaluating the fairness of class action
14 settlements. (*See, e.g., Superior Beverage Co., Inc. v. Owens-Illinois, Inc.*, 827 F.Supp. 477, 478-
15 479 (N.D. Ill. 1993) (*cy pres* doctrine has "become more flexible" and permits distributions to
16 charitable organizations whether or not such organizations have any direct or indirect relationship to
17 the specific law or subject matter of the litigation); *Jones v. National Distillers* 56 F.Supp.3d 355,
18 358-359 (S.D.N.Y. 1999) (same); *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 588
19 F.3d 24, 34 (1st Cir. 2009) (courts allow *cy pres* funds where money remains after damages have

20
21 ¹⁴ The pending proposed settlement is even better, because there is a mandated cash component not at issue in
22 the *Microsoft I-V* settlement. (*See Hensley*, ¶ 2, Ex.1, ¶¶ 2.9-2.10.) In addition, the settlement here has an
injunctive component--Ticketmaster will make additional website disclosures regarding the UPS and OPF
charges, something missing in *Microsoft*. (*Id.* at ¶ 2.11.)

23 ¹⁵ As the Court previously noted, *In re Vitamin Cases* also concerned a case where the class members could
24 not be identified, unlike the present case. As such, a *cy pres* only settlement (offering no direct benefit to
25 class members) would be inappropriate here. Further, our state Supreme Court has noted that the
26 disposition of the residue of a class fund (with *cy pres* arrangements being akin to fluid recoveries) is a
27 discretionary matter for the trial court, which "should have the full range of alternatives at [its] disposal."
28 (*State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 479-480 (1986).) As well summed up by leading
class action treatise writers, "the use of a *cy pres* distribution remains controversial and unsettled in an
adjudicated class action context [but is] proper in connection with a class settlement, subject to court
approval of the particular application of the funds." (4 Conte & Newberg, *Newberg on Class Actions*,
§ 11.20, Ch. 11 (4th ed. 2002).)

1 been distributed to class members); *see also* 2 Newberg & Conte, Newberg on Class Actions, §
2 10:16 n. 1 (4th ed. 2002) (courts have utilized *cy pres* distributions “where there are unclaimed
3 funds” and is generally limited to situations where plaintiffs have had a full opportunity to make a
4 claim and be compensated.)

5 Here, the settlement provides benefits that are first made available directly to the Class
6 Members, with a requirement for *cy pres* distributions if Class Members do not redeem at least \$45
7 million in discount codes. The minimum value of the settlement is demonstrably established by this
8 guaranteed redemption / *cy pres* requirement, in addition to the other settlement benefits.

9 **V. THE SETTLEMENT READILY SATISFIES THE PRESUMPTION OF FAIRNESS.**

10 Under California law, a class action settlement is “presumed to be fair” where: (1) it is
11 “reached through arm’s length bargaining; (2) investigation and discovery are sufficient to allow
12 counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the
13 percentage of objectors is small.” *Chavez v. Netflix, Inc.*, *supra*, 162 Cal.App.4th at 52 (quoting
14 *Dunk v. Ford Motor Co.* 48 Cal.App.4th 1794, 1802 (1996)). The gist of these requirements is to
15 ensure that a settlement is non-collusive and the result of an informed decision by counsel who are
16 knowledgeable of the law and the facts (and thus the strengths and weaknesses) of the case. As *Dunk*
17 explained, in evaluating a class action settlement, “due regard should be given to what is otherwise a
18 private consensual agreement between the parties.” *Dunk, supra*, 48 Cal.App.4th at 1801.

19 Accordingly, “[t]he inquiry ‘must be limited to the extent necessary to reach a reasoned judgment
20 that the agreement is not the product of fraud or overreaching by, or collusion between, the
21 negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all
22 concerned.’” *Id.* (quoting *Officers for Justice v. Civil Svc Com.*, 688 F.2d 615, 625 (9th Cir. 1982).

23 Where, as here, the class certification decision was adversarial (as compared to a settlement
24 class) and predated the settlement negotiations, there is a stronger presumption of fairness. *Dunk,*
25 *supra*, 48 Cal.App.4th at 1803 & fn. 9 (citing *Mars Steel Corp. v. Continental Ill. Nat’l Bank &*
26 *Trust Co.*, 834 F.2d 677, 681 (7th Cir. 1987)); *Cho v. Seagate Technology Holdings, Inc.*, 177
27 Cal.App.4th 734, 743 (2009); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 240 (2001).

1 Additionally, Plaintiffs filed with the Court a motion to enforce the term sheet, and Ticketmaster had
2 prepared an opposition to that motion, both of which were mooted a week before the motion was
3 scheduled for hearing, when the parties were finally able to resolve all of the issues relating to the
4 long form, class notice, and claims administration. However, after all of this, on June 3, 2011, the
5 Court denied Plaintiffs' Motion for Preliminary Approval of that settlement. [Hensley Decl. ¶ 10]

6 Thereafter, the parties continued to prepare for trial, while continuing with their mediation
7 efforts. The parties had a day-long mediation, again with Judge Wagner, in late June, but were
8 unable to reach a settlement. The parties continued working with Judge Wagner, and held another
9 mediation conference, which went until after midnight, on September 2, 2011, at which time they
10 again reached a settlement in principle. However, this settlement also required substantial work
11 between the parties, with the help of the mediator, in order to work out the details. In fact, the final
12 long form was not agreed upon until September 26, 2011. [Hensley Decl. ¶ 11]

13 Simply put, this settlement agreement was reached only as a result of extensive, contentious,
14 arm's-length negotiations by knowledgeable counsel who had the benefit of having completed years
15 of discovery and law and motion practice in this case.

16 **B. Investigation and Discovery in this Case Were Extensive and Virtually Complete,
17 Allowing the Parties and the Court to Make Highly Informed Decisions.**

18 As the Court is aware, the discovery and the law and motion practice in this case were
19 thorough, hard fought, and virtually complete –important factors supporting the settlement. *Chavez,*
20 *supra*, 162 Cal.App.4th at 52. The discovery in this case vastly exceeds the amount of discovery
21 routinely held to be adequate to make an informed settlement decision. *Id.* at 53 (characterizing as
22 “extensive” discovery which included “written discovery, document production and depositions of
23 key Netflix employees.”).

24 The discovery undertaken by both parties in this case was exhaustive. Plaintiffs / Class
25 representatives were *personally* required to respond to extensive discovery.¹⁶ On merits discovery

26
27 ¹⁶ Mr. Schlesinger was deposed three times. Mr. Lo Re was deposed twice (traveling half way across the
28 country for one deposition). The two Plaintiffs each answered: (i) four sets of special interrogatories
totaling 226 interrogatories; (ii) three sets of form interrogatories (iii) four sets of document requests

1 alone Plaintiffs propounded full discovery necessary to try their case including filing three motions
2 to compel discovery.¹⁷ Plaintiffs took and defended more than 20 depositions, including depositions
3 of Ticketmaster's current and former CEOs (one of which required Plaintiffs to bring a motion to
4 compel), its former President, several officers and key employees, and experts. [Hensley Decl. ¶
5 14]. The extent and costs of the expert discovery in this case are telling. On the liability issues,
6 Plaintiffs retained four marketing experts, three of whom conducted independent nationwide
7 consumer surveys (which would be strong evidence of consumer deception at trial) relating to
8 Ticketmaster's OPF and/or UPS charges, and one who provided independent analysis rebutting the
9 marketing experts retained by Ticketmaster (both of whom conducted consumer surveys for
10 Defendant). [Hensley Decl. ¶ 15]. Likewise, Ticketmaster retained an additional expert to rebut
11 Plaintiffs' marketing experts. Both parties also retained accounting experts who engaged in
12 extensive analysis to determine the proper measure of any restitution. [Hensley Decl. ¶ 16].
13 Plaintiffs' experts analyzed gigabytes of data¹⁸, involving more than 150 million transactions, and
14 Ticketmaster's financial records to determine the allocation of any restitution among the class
15 members and the amounts that Ticketmaster paid UPS for ticket delivery and what amounts, if any,
16 were actually attributable to order processing costs. Plaintiffs spent in excess of \$800,000 on
17 restitution, liability, and trial experts. [Hensley Decl. ¶¶ 17-18]. Before the mediation, the liability
18 expert reports had been exchanged (in fact, Plaintiffs had deposed all but one of Ticketmaster's
19 liability experts), and the restitution expert reports were due only a few days away, such that
20 Plaintiffs had solid information on their range of potential recovery.

23 totaling 116 requests for production of documents; (iv) and four sets of requests for admission totaling 157
24 requests. [Hensley Decl. ¶ 12]

25 ¹⁷ This included 14 sets of special interrogatories and five sets of form interrogatories, eight sets of document
26 requests, resulting in thousands of pages of hard copies of documents and gigabytes of electronic
information. [Hensley Decl. ¶ 13]

27 ¹⁸ For example, in response to one of Plaintiffs' discovery requests, Ticketmaster provided a hard drive with
28 27 gigabytes of data.

1 Cal.App.4th 734, 743-745 (2009). The Agreement provides Lead Counsel may apply to the Court
2 for: (1) an award of attorneys' fees award not to exceed \$15 million; (2) reimbursement of expenses
3 not to exceed \$1.5 million; (3) and incentive awards to the two named Plaintiffs / Class
4 representatives not to exceed \$20,000 each (to be offset by a corresponding reduction to the
5 attorneys' fees). [Hensley Decl. ¶ 2, Ex. 1 ¶ 4.1]. Ticketmaster will pay any fees and expenses
6 awarded by the Court up to the aforementioned limits. The payments will not diminish the benefits
7 to the Class and, likewise, any reductions in the awards would be kept by Ticketmaster, and would
8 not benefit the Class.

9 Viewed on a lodestar-multiplier basis, and cross-checked as a percentage-of-recovery, the
10 fees are very reasonable considering the complexity and quantity of work that has been (and remains
11 to be done) in this case. As of September 26, 2011, Plaintiffs' counsel's lodestar is approximately
12 \$6.5 million, which would be a multiplier of approximately 2.3. Notably, the cap on attorneys' fees
13 has not increased from the prior agreement, despite the fact that counsel for the class has provided
14 substantial additional legal services since the first settlement agreement was reached last December.
15 The fees are well justified, either on a lodestar-multiplier basis, or viewed as a percentage of the
16 recovery,¹⁹ given the unique and demanding history of this case – including extensive changes to the
17 UCL, the creation of CAFA, Plaintiffs being required to litigate in five different courts (this Court,
18 the Appellate Court, the California Supreme Court [as an amicus], the Federal District Court, and the
19 Ninth Circuit). *See, e.g., Chavez, supra*, 162 Cal.App.4th at 66 [multipliers “range from 2 to 4 or
20 even higher”]. Lead Counsel was required to shoulder the financial burdens of this case for nearly
21 eight years (and running), have expended nearly \$1.5 million out-of-pocket.

22 The incentive award to the two named Plaintiffs is well justified, especially in light of their
23 extensive efforts on behalf of the Class over the past eight years. *See, §V.B, supra*. California law

24 _____
25 ¹⁹ As a percentage of recovery, the fees in this case are about well below the typical range, given that they are
26 approximately 5% of the maximum value of the settlement and only 25% of the minimum value. *Chavez,*
27 *supra*, 62 Cal.App.4th at 65-66 & fn. 11 (observing that 20-40% is the typical contingency fee range, and
evaluating the amount of the attorneys' fees and expenses to be paid by the defendant in
evaluating the amount of the recovery).

1 allows for such incentive awards. *Cellphone Fee Termination Cases* 186 Cal.App.4th 1380, 1393-
2 96 (2010) (affirming incentive awards of \$10,000 each to four class representatives). Further, here
3 the incentive awards will not reduce the class members' recovery. [Hensley Decl. ¶ 2, Ex. 1, ¶ 4.1
4 (incentive award to be offset against attorney's fees)].

5 **VII. PLAINTIFFS' REQUEST THAT NOTICE AND AN OPT-OUT OPPORTUNITY BE**
6 **PROVIDED IN THE SAME MANNER AS WAS PREVIOUSLY APPROVED BY**
7 **THE COURT.**

8 Pursuant to CRC § 3.769(f), Plaintiffs request that the Court authorize and approve notice to
9 be given to the members of the class informing them of: (i) the fact that a proposed settlement has
10 been reached; (ii) the terms of the settlement; (iii) that they will automatically receive benefits under
11 the settlement unless they opt-out; (iv) how to opt-out of the class; (iv) the date and location of the
12 final approval hearing; and (v) what they must do if they wish to file an objection. The parties
13 request that the notice be provided in the same manner as was previously authorized in connection
14 with the notice and opt-out information, as described herein and provided for in the Agreement
15 [Hensley Decl. ¶ 2, Ex. 1, ¶ 7.2 a-b].

16 The "trial court has virtually complete discretion as to the manner of giving notice to class
17 members." *Cellphone Fee Termination Cases, supra*, 186 Cal.App.4th at 1390. The parties have
18 agreed to provide direct notice via email, additional notice via publication in the USA Today
19 (national, weekend edition), and by posting information on the same website
20 (www.ticketfeelitigation) previously used in connection with the notice and opt-out information after
21 the class was certified. (*Id* at ¶ 7.2 (a)-(c).)

22 Specifically, the proposed Claims Administrator (the Garden City Group) will send emails to
23 all of the members of the class, as amended for settlement purposes, except those who previously
24 opted-out. [Hensley Decl. ¶ 2, Ex. 1, ¶ 1.2 and Ex. A (copy of the list of opt-out lodged under seal)
25 and ¶ 7.2].²⁰ The email will be in the substantially in the form and substance as set forth in the

26 ²⁰ While this motion and its exhibits will be put into the public file upon approval of the motion, and posted
27 on the class website www.ticketfeelitigation.com, Plaintiffs request that the opt-out list remain sealed, as it
28 consists almost entirely of personal information regarding those class members. Accordingly, the proposed
Order provides that this exhibit be filed under seal.

1 “Notice of Proposed Settlement of Class Action” [Hensley Decl. ¶ 2, Ex. 1, ¶ 7.2 (a) and Ex. C].
2 The email will inform class members of their ability to opt-out of the class, and will direct them to
3 the website if they wish to obtain more information or file an opt-out request. Additionally, the
4 Claims Administrator will cause a Copy of the Publication Notice to appear in the national,
5 weekend, edition of the USA Today. [Hensley Decl. ¶ 2, Ex. 1 ¶ 7.2 (b), *see* Ex. D].

6 Email notice is particularly well suited here, as the class was limited to internet purchasers,
7 and their primary means of communicating with Ticketmaster for the transactions was via email.
8 Notice will be emailed, and published, in a manner to ensure its completion by sixty days after
9 granting of this Preliminary Approval Motion. Any objections will be due ninety days after granting
10 of this same Motion. This will allow the parties time to conduct discovery of the objectors, if any,
11 [Hensley Decl. ¶ 2, Ex. 1, ¶¶ 3.2, 5.1-5.5] and file their moving papers in support of final approval
12 pursuant to Code. At the Preliminary Approval Hearing, the parties will request that the Court set
13 the case for a Final Fairness Hearing on March 15, 2012, or as soon thereafter as is convenient for
14 the Court. (*Id.* at ¶ 3.2.)

15 Plaintiffs also request that the Court approve the use of the Garden City Group as the Claims
16 Administrator in this case, both for purposes of sending notice to the class members and to process
17 the claims after final approval. [Hensley Decl. ¶ 2, Ex. 1, ¶¶ 1.1, 7.1- 7.5, and Hensley Decl., ¶ 20,
18 Ex. 4].

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VIII. CONCLUSION.

Because the Settlement Agreement was negotiated at arm's length by experienced and informed Lead counsel, and is well within the bounds of potential fairness, preliminary approval should be GRANTED and Plaintiffs' and the Class' Proposed Order should be Entered.

DATED: September 26, 2011

Respectfully submitted,

ALVARADOSMITH, A.P.C.

By: 
William M. Healey
Robert J. Stein III
Claire M. Schmidt

MUCH SHELIST DENENBERG AMENT &
RUBENSTEIN, P.C.
Steven P. Blonder, Pro Hac Vice.

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CURT SCHLESINGER and PETER LO RE on behalf
of themselves and The Class

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE
Curt Schlesinger v. Ticketmaster
Superior Court of Los Angeles County, Central District
Case No. BC 304565

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is **ALVARADOSMITH, APC, 1 MacArthur Place, Santa Ana, CA 92707.**

On **September 27, 2011**, I served the foregoing document described as **PLAINTIFFS' AND THE CLASS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AGREEMENT** on the interested parties in this action.

by placing the original and/or a true copy enclosed in (a) sealed envelope(s), addressed as follows:

SEE ATTACHED SERVICE LIST

BY REGULAR MAIL: I deposited such envelope in the mail at 1 MacArthur Place, Santa Ana, California. The envelope was mailed with postage fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

BY THE ACT OF FILING OR SERVICE, THAT THE DOCUMENT WAS PRODUCED ON PAPER PURCHASED AS RECYCLED.

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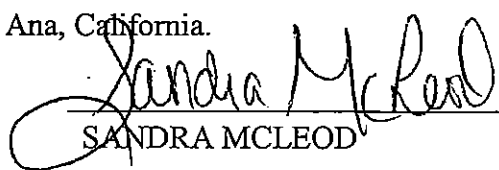
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(State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **September 27, 2011** at Santa Ana, California.


SANDRA MCLEOD

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SERVICE LIST

Curt Schlesinger v. Ticketmaster
Superior Court of Los Angeles County, Central District
Case No. BC 304565

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