

1 Joseph J. Tabacco, Jr. (SBN 75484)
 Christopher T. Heffelfinger (SBN 118058)
 2 Anthony D. Phillips (SBN 259688)
 3 **BERMAN DEVALERIO**
 One California Street, Suite 900
 4 San Francisco, CA 94111
 Telephone: (415) 433-3200
 5 Facsimile: (415) 433-6382
 Email: jtabacco@bermandevalerio.com
 6 cheffelfinger@bermandevalerio.com
 7 aphillips@bermandevalerio.com

8 *Counsel for Plaintiffs*

9 Simon Bahne Paris (admitted *pro hac vice*)
 Patrick Howard (admitted *pro hac vice*)
 10 **SALTZ, MONGELUZZI, BARRETT & BENDESKY, P.C.**
 One Liberty Place, 52nd Floor
 11 1650 Market Street
 Philadelphia, PA 19103
 12 Telephone: (215) 575-3986
 13 Facsimile: (215) 496-0999
 Email: sparis@smbb.com
 14 phoward@smbb.com

15 *Proposed Co-Lead Counsel for Plaintiffs*

16 [Additional Counsel on Signature Page]

17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**
SAN JOSE DIVISION

19 IN RE APPLE IN-APP PURCHASE
 20 LITIGATION

Master File No. 11-CV-1758-EJD

CLASS ACTION

21 This Document Relates to:

22 All Actions

23 **UNOPPOSED MOTION FOR**
 24 **PRELIMINARY APPROVAL OF**
 25 **CLASS ACTION SETTLEMENT;**
 26 **CERTIFICATION OF**
 27 **SETTLEMENT CLASS; AND**
 28 **APPROVAL OF FORM AND**
CONTENT OF PROPOSED
NOTICE

Date: March 1, 2013
 Time: 9:00 a.m.
 Court: Courtroom 4, 5th Floor
 Judge: Hon. Edward J. Davila

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ISSUES TO BE DECIDED

(Local Rule 7-4(a)(3))

1. Whether the Court should preliminarily approve the settlement set forth in the Stipulation of Settlement (a copy of which is submitted concurrently herewith).
2. Whether the Court should preliminarily certify the proposed settlement class and appoint co-lead counsel.
3. Whether the Court should approve the form and content of the proposed notice to be sent to the settlement class, advising them of their rights with respect to the settlement.

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on March 1, 2013 at 9:00 a.m., in the courtroom of the Honorable Edward J. Davila, located in Courtroom Number 4, on the 5th Floor of the San Jose Courthouse of the United States District Court for the Northern District of California, 280 South First Street, San Jose CA 95113, Plaintiffs Garen Meguerian, Lauren Scott, Kathleen Koffman, Heather Silversmith and Twilah Monroe (“Plaintiffs”) will and hereby do move the Court, unopposed by Defendant Apple Inc. (“Apple” or “Defendant”), for an order:

- (i) granting preliminary approval of the proposed settlement set forth in the Stipulation of Settlement;¹
- (ii) granting preliminary certification of the proposed settlement class and appointing co-lead counsel; and
- (iii) approving the form and manner of notice of the proposed settlement to the class.

This motion is made on grounds that the parties have reached a fair and reasonable settlement disposing of all claims in this action and that they reached that settlement after extensive negotiations, conducted at arm’s-length by experienced counsel with the assistance of respected mediators, the Honorable Daniel Weinstein (Ret.) and Catherine Yanni of JAMS. This motion is filed pursuant to the Court’s February 20, 2013 Order Extending Deadline to File Motion for Preliminary Approval of Class Action Settlement (ECF No. 92) and is based on this notice of motion and memorandum of law, the Declaration of Anthony D. Phillips in support thereof, to which a fully executed Stipulation of Settlement signed by the parties is attached as Exhibit 1, the pleadings and other filings herein, and such other written or oral argument as may be presented to the Court.

¹ The Stipulation of Settlement (“Stipulation of Settlement” or “S.A.”) is submitted concurrently herewith as Exhibit 1 to the Declaration of Anthony D. Phillips in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement; Certification of Settlement Class; and Approval of Form and Content of Proposed Notice (“Phillips Declaration” or “Phillips Decl.”).

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The parties have entered into a Stipulation of Settlement that will resolve all claims alleged in the above-captioned action. Plaintiffs respectfully submit this Memorandum in support of their unopposed motion for entry of an order: (i) granting preliminary approval of the settlement set forth in the Stipulation of Settlement; (ii) granting preliminary certification of the proposed settlement class and appointing co-lead counsel; and (iii) approving the form and content of the proposed notice to settlement class members. For the reasons set forth below, Plaintiffs respectfully request the Court grant the relief requested.

II. STATEMENT OF THE CASE**A. The Class Action**

This litigation, and proposed settlement, resolves Plaintiffs' allegations surrounding the In-App Purchases² of Game Currency, which Plaintiffs claim were charged by minor children without the knowledge or permission of the account holder in Game Apps offered for download from the App Store. Defendant Apple makes available third-party "Apps," i.e., software applications that users download for their iOS-based mobile computing devices, such as the iPhone, iPod touch or iPad devices, through the App Store. Consolidated Class Action Complaint ("CCAC"), ECF No. 28, ¶ 1. Among the Apps available on the App Store are Game Apps rated 4+, 9+ and 12+ that may offer "Game Currency" (i.e., virtual supplies, content or currency) inside the App. *Id.*

Plaintiff Meguerian filed the initial class action Complaint in the Northern District of California on April 11, 2011, in which he alleged that he discovered a series of In-App Purchases charged by his then eight-year-old daughter in third-party Apps between January and March 2011 without his knowledge or permission. ECF No. 1. At the time, Plaintiff Meguerian was unaware that these children's Apps offered Game Currency. On April 22 and May 16, 2011, Plaintiffs

² Unless otherwise specified, all capitalized terms herein that are defined terms in the Settlement Agreement shall have the same meaning as in the Settlement Agreement.

1 Scott, Koffman, Silversmith and Monroe lodged similar allegations regarding unknown and
2 unpermitted purchases by their minor children in certain third-party Game Apps downloaded
3 from the App Store.

4 The actions were later consolidated and on June 16, 2011, the Plaintiffs collectively filed
5 the CCAC. ECF No. 28. Along with seeking declaratory relief, the CCAC sought relief on
6 behalf of a Rule 23(b)(3) class under California Business and Professions Code section 17200,
7 damages under California's contract laws (including California law imposing a duty of good faith
8 and fair dealing on contracting parties), the Consumers Legal Remedies Act, and for Unjust
9 Enrichment. *Id.*

10 On August 5, 2011, Apple filed a motion to dismiss the CCAC in its entirety and with
11 prejudice. ECF Nos. 37-39. While this motion was pending, Plaintiffs prepared and served
12 document requests on Apple seeking information relevant to core factual issues in the case. In
13 response, on November 14, 2011, Apple filed a motion to stay all discovery (ECF No. 56), and,
14 on the same day, Apple also served written objections to Plaintiffs' document requests and cited
15 the pending motions to dismiss and for a stay as its basis for not responding to the requests.
16 Additional briefing ensued.

17 On February 15, 2012, the Court denied Apple's motion for a stay (ECF No. 63), and on
18 March 31, 2012, the Court granted-in-part and denied-in-part Apple's motion to dismiss (ECF
19 No. 66). The Court sustained all but one count in the CCAC (good-faith-and-fair dealing); but,
20 granted Plaintiffs leave to re-plead. *Id.* On April 3, 2012, Apple made an initial production of
21 documents to Plaintiffs. Thereafter, the parties discussed and reached an agreement to explore
22 resolution of the litigation through mediation before the Honorable Daniel Weinstein (Ret.) and
23 Catherine Yanni of JAMS.

24 **B. Mediation and Related Discovery**

25 In the months leading up to the first mediation session, the parties prepared, negotiated,
26 and exchanged discovery aimed at aiding their respective positions, including the production of
27 extensive data, documents, and responses to narrative requests served on one another.
28

1 With this discovery in hand, each side prepared and submitted extensive briefing for the
2 mediators' consideration. On October 23, 2012, the parties engaged in a full-day mediation
3 session at the JAMS offices in San Francisco. Although productive, a number of issues were left
4 unresolved following the session. The parties agreed to continue their discussion with one
5 another, as well as with the mediators, of the proposed settlement terms. The parties returned to
6 JAMS on January 17, 2013, for a second mediation session. After this second in-person session,
7 and vigorous arms-length negotiations, the parties agreed to the core terms of the proposed
8 settlement. Thereafter, the parties continued to negotiate the final terms of the settlement,
9 outlined below.

10 **III. SUMMARY OF THE PROPOSED SETTLEMENT**

11 **A. The Settlement Class**

12 Plaintiffs seek conditional certification of this action on behalf of a national settlement
13 class ("Settlement Class" or "Class"):

14 All United States residents who, prior to the date of the Conditional Approval
15 Order, paid for Game Currency charged to their iTunes account by a minor
16 without their knowledge or permission. The Settlement Class excludes Apple, any
17 entity in which Apple has a controlling interest; Apple's directors, officers, and
18 employees; Apple's legal representatives, successors, and assigns; and all persons
19 who validly request exclusion from the Settlement Class.

20 The parties propose that Plaintiffs Meguerian, Scott, Koffman, Silverman, and Monroe, be
21 appointed as representatives of the proposed Settlement Class, and that Simon B. Paris and
22 Patrick Howard of Saltz Mongeluzzi, Barrett & Bendesky, P.C., 1650 Market Street, 52nd Floor,
23 Philadelphia, PA 19103 and Michael J. Boni and Joshua D. Snyder of Boni & Zack LLC, 15 St.
24 Asaphs Road, Bala Cynwyd, PA 19004, be appointed as Co-Lead Counsel to represent the
25 interests of the proposed Settlement Class.

26 **B. Payments to Settlement Class Members**

27 The settlement provides exceptional relief to the class—namely, it provides full refunds
28 for Game Currency purchases made within a single forty-five (45) day period without the
knowledge or permission of the account holders. S.A. § V.A.2. In addition, Settlement Class

1 Members may request refunds for Qualified Game Currency Charges that occurred after the forty-
2 five (45) day period in a claim for Aggregate Relief if they furnish an explanation of the
3 circumstances that made it possible for a minor to make Qualified Game Currency Charge(s) after
4 forty-five (45) days, including specifically the circumstances that made it possible for the minor
5 to continue to charge Game Currency after they were notified of earlier Game Currency charges
6 through Apple emails and their credit card statement(s). S.A. § V.B.2.c.

7 **1. \$5 Credit Relief**

8 Pursuant to the terms of the Settlement Agreement, Settlement Class Members shall be
9 entitled to elect to receive an iTunes Store credit in the amount of five dollars (“\$5 Credit
10 Relief”). S.A. § V.A.1. Settlement Class Members seeking this \$5 Credit Relief must file a valid
11 electronic Claim Form, setting forth the Settlement Class Member’s name, address, and Apple ID.
12 Settlement Class Members must attest that they: (a) paid for Qualified Game Currency Charges
13 that a minor charged to their iTunes account without their knowledge or permission; (b) did not
14 knowingly enter their iTunes password to authorize any such purchases and did not give their
15 password to the minor to make such purchases; and (c) have not already received a refund from
16 Apple for those Qualified Game Currency Charges. *Id.*; S.A. § V.B.1.

17 **2. Aggregate Relief**

18 As an alternative to the \$5 Credit Relief, Settlement Class Members shall be entitled to
19 receive an iTunes Store credit (or, for any Settlement Class Member who no longer maintains an
20 iTunes account, a cash refund), in an amount equal to the aggregate total of all Qualified Game
21 Currency Charges within a single forty-five (45) day period for which they have not previously
22 received a refund (“Aggregate Relief”). S.A. § V.A.2. At their election, Settlement Class
23 Members who currently maintain an iTunes account and who are claiming Aggregate Relief
24 totaling \$30 or more may choose to receive a cash refund in lieu of an iTunes Store credit. *Id.*

25 Settlement Class Members seeking Aggregate Relief will be required to submit a properly
26 executed online Claim Form that sets forth, among other things, the Settlement Class Member’s
27 name, address, and Apple ID. S.A. § V.A.2. Settlement Class Members shall also be required to
28

1 identify the Qualified App, date of purchase, and purchase price for each Qualified Game
2 Currency Charge for which credit is sought, and attest that they: (a) paid for each claimed
3 Qualified Game Currency Charge; (b) did not knowingly enter their iTunes password to authorize
4 any such purchase and did not give their password to the minor to make such purchase; and (c)
5 have not already received a refund from Apple for the claimed Qualified Game Currency
6 Charges. *Id.*; S.A. § V.B.2. Settlement Class Members may obtain complete records of their In-
7 App Purchases in iTunes by: (1) selecting “View My Apple ID” from the iTunes “Store” menu,
8 (2) entering their Apple IDs and associated passwords, and (3) clicking “See All” under the
9 heading titled “Purchase History.” S.A. § V.B.2.d.

10 In addition, the Settlement Class Members may request refunds for Qualified Game
11 Currency Charges that occurred after the forty-five (45) day period in a claim for Aggregate
12 Relief if they furnish an explanation of the circumstances that made it possible for a minor to
13 make Qualified Game Currency Charges after forty-five (45) days, including specifically the
14 circumstances that made it possible for the minor to continue to charge Game Currency after they
15 were notified of earlier Game Currency charges through Apple emails and their credit card
16 statement(s). S.A. § V.B.2.c.

17 **C. Claims Period**

18 To be valid, Claim Forms must be submitted within one hundred and eighty (180) days
19 from the Notice Date (“Claims Period”). S.A. § V. C.

20 **D. Payment of Notice Costs, Costs of Administration, Attorneys’ Fees, Costs and 21 Service Awards**

22 Apple will pay all of the costs of notice and all costs associated with administering the
23 settlement, as set forth in section III.E below. Because these costs are being paid directly by
24 Apple, they do not reduce or affect the Class recovery. Apple also agrees not to oppose an award
25 to Class Counsel of attorneys’ fees and costs in the amount of \$1.3 million.³ S.A. § VIII.A.

26 _____
27 ³ Class Counsel will file a separate motion for approval of attorneys’ fees and expenses
28 concurrent with a motion for final approval of the settlement.

1 Apple also will pay a service award to each named Plaintiff in the amount of \$1,500 (not to
2 exceed \$7,500). *Id.* The Attorneys' Fees, costs and service awards are separate from and do not
3 in any way diminish the Settlement Class's recovery. *Id.*

4 **E. Notice and Settlement Administration**

5 Under Rule 23(e)(1) of the Federal Rules of Civil Procedure, notice of a proposed
6 settlement must be directed "in a reasonable manner to all class members who would be bound by
7 the proposal." Fed. R. Civ. P. 23(e)(1). Pending approval by the Court, the Settlement will
8 include three forms of notice to the Settlement Class, fully satisfying Rule 23(e)(1)'s notice
9 requirement:

- 10 • *Website Notice.* A copy of the Notice of Pendency and Proposed Settlement of Class
11 Action substantially in the form attached to the Stipulation of Settlement as Exhibit A
12 (the "Class Notice") (*see* Phillips Decl. Ex. 1, at Ex. A, thereto), together with the
13 Claim Form (including the Instructions, Claim Form and Release) substantially in the
14 form attached to the Stipulation of Settlement as Exhibit D (*see* Phillips Decl. Ex. 1, at
15 Ex. D, thereto), shall be posted and available for download on a settlement website
16 (the "Settlement Website"), and shall be mailed at no charge to Class Members who
17 call a toll-free number to be established at Apple's expense ("Toll-Free Number").
18 S.A. § VII.A. This information shall remain available on the Internet until the last day
19 of the Claims Period. *Id.* All costs and expenses associated with complying with this
20 provision shall be borne exclusively by Apple. *Id.*
- 21 • *Email Notice.* Apple shall e-mail a copy of the Summary Notice of Settlement
22 substantially in the form attached to the Stipulation of Settlement as Exhibit B
23 ("Summary Notice") (*see* Phillips Decl. Ex. 1, at Ex. B, thereto) to every individual
24 who paid for one or more purchase(s) of Game Currency in Qualified Apps prior to
25 the Notice Date ("Notified Individuals"). S.A. § VII.B. Apple can use its purchase
26 records to identify these purchases together with email addresses associated with the
27 iTunes account. *Id.* The Summary Email Notice shall inform members of the
28

1 Settlement Class of the fact of the settlement and that the Class Notice and Claim
2 Form are available on the Settlement Website or by calling the Toll-Free Number. *Id.*
3 • *Settlement Postcard.* Although Apple has active email addresses for the vast majority
4 of the Settlement Class, it shall mail a postcard notice substantially in the form
5 attached hereto as Exhibit C (“Settlement Postcard”) (*see* Phillips Decl. Ex. 1, at Ex.
6 C, thereto) to any For Notified Individuals for whom e-mailed notice is returned
7 undeliverable and for whom the Claims Administrator is unable to update or otherwise
8 identify a valid e-mail address. S.A. § VII.C. All costs and expenses associated with
9 complying with this provision shall be borne by Apple. *Id.*

10 Parental Controls. Importantly, the Notice provides instructions concerning the use of
11 Apple’s parental controls, which may be set to disable In-App Purchases on an iOS device or to
12 require a password before every In-App Purchase transaction. This information will assist
13 members of the Settlement Class in preventing minors from purchasing Game Currency without
14 their knowledge and permission in the future. *See* Phillips Decl. Ex. 1, at Exs. A & B, thereto.

15 Apple shall be solely responsible for making all arrangements necessary to effectuate the
16 notice set forth above and for payment of the costs and expenses of such notice. S.A. § VII.D.

17 **F. Exclusion Provisions and Objections**

18 Class Members who prefer not to be bound by the settlement may exclude themselves by
19 providing written notice of their intentions. S.A. § VII.E. The procedure for Class Members to
20 exclude themselves is described in the Class Notice, attached to the Stipulation of Settlement as
21 Exhibit A. *Id.* The Class Notice also provides a procedure for Class Members to object to the
22 proposed settlement, and/or to be represented by counsel of their choice at their own expense. *Id.*

23 By this Unopposed Motion for Preliminary Approval of Class Action Settlement, the
24 Plaintiffs ask the Court to issue a preliminary approval order in the form attached to the
25 Stipulation of Settlement as Exhibit E. *See* Phillips Decl. Ex. 1, at Ex. D, thereto. The Order
26 would authorize the tasks necessary to allow the settlement approval process to occur, including:
27 (1) conditionally certifying the proposed Settlement Class and appointing Class Representatives
28

1 and Class Counsel; (2) preliminarily approving the Settlement Agreement; (3) approving the
2 forms and methods of Class Notice; (4) establishing a schedule by which Settlement Class
3 Members may exclude themselves from the Settlement Class or object to the settlement; and (5)
4 setting a date for a Fairness Hearing. *Id.* The following sections of this memorandum explain
5 these issues in more detail.

6 **IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**
7 **AGREEMENT AS FAIR, ADEQUATE AND REASONABLE**

8 **A. The Standard for Preliminary Approval**

9 Federal Rules of Civil Procedure, rule 23(e) requires a district court, when considering
10 whether to give *final* approval to a proposed class action settlement, to determine whether a
11 proposed settlement is “fundamentally fair, adequate, and reasonable.” *In re Mego Fin. Corp.*
12 *Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). The Court may grant *preliminary* approval of a
13 settlement if the settlement: “appears to be the product of serious, informed, non-collusive
14 negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to
15 class representatives or segments of the class, and falls within the range of possible approval.” *In*
16 *re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citation and internal
17 quotation marks omitted).

18 The first step in district court review of a class action settlement is a preliminary, pre-
19 notification hearing to determine whether the proposed settlement is within the range of possible
20 approval. Its purpose is to ascertain whether there is any reason to notify the class members of
21 the proposed settlement and to proceed with a fairness hearing. If the district court finds that a
22 proposed settlement is “within the range of possible approval,” the next step is the fairness
23 hearing. Class members are notified of the proposed settlement and the fairness hearing in which
24 they and all interested parties have an opportunity to be heard. The goal of the final fairness
25 hearing is to adduce all information necessary for the judge to rule intelligently on whether the
26 proposed settlement is “fair, reasonable, and adequate.” *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d
27 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th
28 Cir. 1998); *In re Mego Fin Corp. Sec Litig.*, 213 F.3d at 458; *Gautreaux v. Price*, 690 F.2d 616,

1 621 n.3 (7th Cir. 1982); *see also In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227
2 F.R.D. 553, 556 (W.D. Wash. 2004) (noting that in the first stage of the approval process, “the
3 court preliminarily approve[s] the Settlement pending a fairness hearing, temporarily certifie[s]
4 the Class ..., and authorize[s] notice to be given to the Class”).

5 Preliminary approval requires only that the Court evaluate whether the proposed
6 settlement: (1) was negotiated at arm’s-length, and (2) is within the range of possible litigation
7 outcomes such that “probable cause” exists to disseminate notice and begin the formal fairness
8 process. *See Manual for Complex Litigation (Fourth)*, § 1.632-33; *In re Shell Oil Refinery*, 155
9 F.R.D. 552, 555-56 (E.D. La. 1993). The Ninth Circuit has identified a number of factors used to
10 assess whether a settlement proposal is fundamentally fair, adequate and reasonable. The factors
11 applicable to a motion for preliminary approval are: (1) the strength of the Plaintiffs’ case and the
12 risk, expense, complexity, and likely duration of further litigation; (2) the amount offered in
13 settlement; (3) the extent of discovery completed and the stage of the proceedings; (4) the
14 experience and views of counsel; and (5) arm’s-length negotiations (i.e., absence of collusion)
15 between the parties. *See In re Mego Fin. Corp. Sec.*, 213 F.3d at 458-60. Here, each relevant
16 factor supports the conclusion that the proposed settlement is squarely within the range of
17 fairness, adequacy and reasonableness for approval.

18 **1. The Strength of Plaintiffs’ Case and the Risk, Expense, Complexity,**
19 **and Likely Duration of Further Litigation**

20 Plaintiffs’ claims were principally two fold. First, under California’s consumer protection
21 laws, Plaintiffs alleged Apple failed to adequately disclose that these third-party Game Apps,
22 largely available for free and rated as containing content suitable for children, contained the
23 ability to make In-App Purchases. CCAC ¶¶ 55-64. While Plaintiffs believed they had strong
24 liability claims against Apple, it was clear that Apple has a number of strong arguments on the
25 merits and would vigorously oppose class certification.

26 Secondly, under basic contract law, Plaintiffs alleged that each In-App Purchase charged
27 by a minor constitutes a separate sales contract that may be disaffirmed (i.e., rendered voidable)
28 by the minor (through the minor’s legal guardians), and if the minor’s guardians elect to disaffirm

1 these purchase contracts, the class members will be entitled to restitution. CCAC ¶¶ 45-54.
2 While Plaintiffs' CCAC withstood Apple's motion to dismiss, the Court noted in its March 31
3 Order that it was skeptical of Plaintiff's ability to recover. *See In re Apple In-App Purchase*
4 *Litig.*, 855 F. Supp. 2d 1030, 1036 (N.D. Cal. 2012) (denying Apple's motion to dismiss the
5 Declaratory Judgment Act claim and noting that "a well-pleaded complaint may proceed even if it
6 strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is remote
7 and unlikely'" (citations omitted)).

8 The proposed settlement eliminates the risks of continued litigation, including the risk of
9 no recovery from Apple. It immediately provides the certainty of valuable benefits to the Class
10 Members. Most importantly, the proposed settlement provides a recovery to every iTunes
11 account holder who paid for a Qualified Game Currency Charge, if the charge was made without
12 the account holder's knowledge or consent. If this case is not settled, it would be necessary to
13 continue prosecuting the litigation against Apple through class certification, trial, and appeal.
14 Thus, any potential benefits to the class would likely be delayed for years if the case proceeds in
15 litigation. In addition, Apple implemented additional passwords and parental controls in iOS 4.3
16 (released in March 2011). Thus, the class will best be served by a settlement that ensures full
17 recovery of past Qualified Game Currency Charges, achieving resolution and finality with respect
18 to these concerns

19 In determining whether the terms of this Settlement Agreement are sufficiently fair,
20 adequate, and reasonable to justify the dissemination of class notice and the scheduling of a
21 fairness hearing, the Court need only inquire at this juncture whether the consideration provided
22 to the Settlement Class falls within the range of possible outcomes were the case to proceed to
23 final judgment after full litigation. The answer to that question is most certainly "yes."

24 A reasonable person could conclude that continued litigation may well achieve no greater
25 benefit for the Settlement Class and could result in no benefit at all. With this in mind, the
26 advantages to the Settlement Class Members of approving the proposed settlement and quickly
27 distributing to them the consideration provided therein, clearly exceed what is likely to occur
28 should this case proceed on a litigation track. For this reason, the strength of Plaintiffs' case and

1 the risk, expense, complexity, and likely duration of further litigation suggest that the proposed
2 Settlement Agreement is fair, adequate, and reasonable.

3 **2. The Amount Offered in Settlement**

4 In light of the uncertainties of trial and continued litigation, the value of the settlement is
5 certainly adequate, as Apple is making full refunds available to all members of the Settlement
6 Class.

7 First, Apple has agreed to provide each Settlement Class member the option of claiming
8 an iTunes Store credit in the amount of five dollars. S.A. § V.A.1. To obtain the \$5 credit, the
9 Settlement Class Member need only fill out a valid electronic Claim Form and attest that they:
10 (a) paid for a Qualified Game Currency Charge; (b) did not knowingly enter their iTunes
11 passwords to authorize that purchase and did not give their passwords to the minor to make any
12 such purchase; and (c) have not received a refund from Apple for that Qualified Game Currency
13 Charge. *Id.*; S.A. § V.B.1. . Because a significant majority of In-App Purchases in Qualified
14 Apps are under \$5, this option provides a simplified claims process to Class Members that would
15 result in complete relief to most members of the Class.

16 Second, as an alternative to the \$5 Credit Relief, Settlement Class Members can receive
17 an iTunes Store credit (or, for any Settlement Class Member who no longer maintains an iTunes
18 account, a cash refund), in an amount equal to the aggregate total of all Qualified Game Currency
19 Charges within a single forty-five (45) day period, for which they have not previously received a
20 refund. S.A. § V.A.2. At their election, Settlement Class Members who are claiming Aggregate
21 Relief totaling \$30 or more may choose to receive a *cash* refund in lieu of an iTunes Store credit.
22 *Id.* Moreover, Settlement Class Members request refunds for Qualified Game Currency Charges
23 that occurred after the forty-five (45) day period in a claim for Aggregate Relief if they furnish an
24 explanation of the circumstances that made it possible for a minor to make Qualified Game
25 Currency Charges after forty-five (45) days, including specifically the circumstances that made it
26 possible for the minor to continue to charge Game Currency after they were notified of earlier
27 Game Currency charges through Apple emails and their credit card statement(s). S.A. § V.B.2.
28

1 Thus, the Settlement Agreement provides the Settlement Class Member the ability to obtain a
2 100% cash refund for all Qualified Game Currency Charges totaling \$30 or more. S.A. § ___.

3 **3. The Extent of Discovery Completed and the Stage of Proceedings**

4 Here, the parties reached settlement relatively early in the litigation, obviating the need for
5 a continuation of expensive and time-consuming fact and expert discovery in litigation.

6 Nonetheless, in connection with the mediation, Apple produced, and Plaintiffs reviewed,
7 thousands of pages of documents, including extensive information about, among other things, the
8 App Store, its approval process, refund protocols and data, and customer complaints. Plaintiffs
9 and their counsel had more than sufficient information to make an informed decision about the
10 settlement.

11 **4. The Experience and Views of Counsel**

12 Class Counsel supports the approval of the settlement—a fact that confers a presumption
13 of fairness on the proposed settlement. *See Hughes v. Microsoft Corp.*, No. C98-1646C, 2001
14 U.S. Dist. LEXIS 5976, at *20 (W.D. Wash. Mar. 26, 2001) (“In determining whether to approve
15 a settlement, the Court keeps in mind the unique ability of class counsel to assess potential risks
16 and rewards of litigation.”). Proposed Co-lead Counsel are experienced class-action litigators
17 who have successfully settled complex, consumer class-action cases in the past. *See Firm*
18 *Resumes of Saltz, Mongeluzzi, Barrett & Bendesky, P.C. and Boni & Zack LLC attached hereto*
19 *as Exhibits 2 and 3 to the Phillips Declaration. After weighing the risks and benefits associated*
20 *with class certification, trying this case or settling it according to the terms of the proposed*
21 *settlement, Class Counsel has reached the opinion that settlement is in the best interest of the*
22 *Settlement Class. The Court should afford that determination considerable weight.*

23 **5. Arm’s-Length Negotiation Between the Parties**

24 The trial court’s evaluation of the settlement “must be limited to the extent necessary to
25 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
26 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
27 reasonable and adequate to all concerned.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d
28

1 615, 625 (9th Cir. 1982). Here, the proposed settlement is the product of extensive arm's-length
2 negotiations among well-informed and sophisticated counsel. Both sides demonstrated by their
3 actions that they were fully prepared to litigate this case through final judgment, if no acceptable
4 resolution could be reached. In addition, the fact that the settlement was mediated with the active
5 involvement of the Honorable Daniel Weinstein (Ret.), further demonstrates the non-collusive
6 nature of the settlement. Indeed, the settlement is based on the substantive terms facilitated by
7 Judge Weinstein. *See Hughes*, 2001 U.S. Dist. LEXIS 5976, at *17 (settlement mediated with
8 assistance of settlement judge demonstrates lack of fraud or collusion).

9 **V. THE COURT SHOULD PRELIMINARILY CERTIFY THE PROPOSED**
10 **SETTLEMENT CLASS AND APPOINT CO-LEAD COUNSEL**

11 At this stage of the settlement approval process, the Court must satisfy itself, at least
12 conditionally, that the requirements of Fed. R. Civ. P. 23 are met, that the named Plaintiffs may
13 properly be appointed to serve as Class Representatives, and that counsel for Plaintiffs may be
14 properly appointed to serve as Class Counsel. *See Manual for Complex Litigation (Fourth)*,
15 § 21.632 (“The judge should make a preliminary determination that the proposed class satisfies
16 the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).”); 4 Herbert
17 Newberg & Alba Conte, *Newberg on Class Actions*, § 11.25 (4th ed. 2002). Every requirement of
18 Fed. R. Civ. P. 23 is satisfied with respect to this proposed Settlement Class.

19 **A. The Numerosity Requirement Is Met**

20 The numerosity requirement is met if the class is so large that joinder of all members is
21 impracticable. Fed. R. Civ. P. 23(a)(1). The precise size of the proposed Settlement Class is
22 currently unknown, although the Notice will be distributed to over 23 million iTunes account
23 holders who made a Game Currency purchase in one or more Qualified Apps. Joinder will be
24 impracticable, and the numerosity requirement is satisfied. *See Hanlon v. Chrysler Corp.*, 150
25 F.3d 1011, 1019 (9th Cir. 1998).

26 **B. The Commonality and Typicality Requirements Are Met**

27 Federal Rules of Civil Procedure, rule 23(a)(2) allows a class action to be maintained if
28 “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Rule 23(a)(3)

1 requires that “the claims or defenses of the representative parties [must be] ... typical of the claims
2 or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The requirement of commonality is satisfied
3 here because the Plaintiffs’ allegations stem from a claim that Apple failed to adequately disclose
4 the availability of In-App Purchases of Game Currency in Game Apps rated 4+, 9+, and 12+. *See*
5 *Chamberlan v. Ford Motor Co.*, 223 F.R.D. 524, 526 (N.D. Cal. 2004); *see also Parra v.*
6 *Bashas’, Inc.*, 536 F.3d 975, 978 (9th Cir. 2008) (commonality is a “permissive[]” and “flexible
7 standard”).

8 The typicality requirement is also met in this case. Like commonality, the typicality
9 standard is “permissive,” and requires only that the named Plaintiffs’ claims be “reasonably
10 coextensive with those of absent class members; they need not be substantially identical.”
11 *Stanton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003) (citing *Hanlon*, 150 F.3d at 1020). The
12 Class Representatives have claims similar to and typical of the rest of the Settlement Class
13 because they all claim—and all have the same interest in redressing—injury similar to other
14 members of the Class.

15 **C. The Named Plaintiffs and Class Counsel Are Adequate Class Representatives**

16 Federal Rules of Civil Procedure, rule 23(a)(4) requires that the named Plaintiffs and
17 proposed Class Counsel be able to “fairly and adequately protect the interests of the class.” Fed.
18 R. Civ. P. 23(a)(4). In this case, the parties are not aware of any conflicts of interest between the
19 named Plaintiffs and the absent Class Members from the standpoint of assessing the fairness of
20 the proposed Settlement. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.
21 1978). The record shows that Plaintiffs and Class Counsel have vigorously prosecuted this action
22 on behalf of the Class. The attorneys who represent the proposed Class Representatives are well-
23 qualified to serve as Co-Lead Counsel. *See Phillips Decl. Exs. 2 & 3; see also Hanlon*, 150 F.3d
24 at 1020.

25 **D. Certification Under Fed. R. Civ. P. 23(b)(3) Is Appropriate for Settlement**
26 **Purposes**

27 In addition to meeting the requirements of Fed. R. Civ. P. 23(a), an action must satisfy one
28 of the requirements of Rule 23(b) to be certified for class treatment for settlement purposes. *See*

1 *Hanlon*, 150 F.3d at 1022; *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir.
2 2004). Rule 23(b)(3) requires predominance (common questions predominate over individual
3 ones) and superiority (class resolution is superior to other methods of adjudication). As discussed
4 above in section V.B, there are common class-wide issues as to Apple’s distribution of Game
5 Apps rated 4+, 9+, and 12+ and that also offer Game Currency, which predominate over any
6 questions affecting only individual members. In determining superiority, the Rule provides four
7 nonexclusive factors: (1) the interest of individual members of the class in individually
8 controlling the prosecution of the action; (2) the extent of litigation commenced elsewhere by
9 class members; (3) the desirability of concentrating claims in a given forum; and (4) the
10 management difficulties likely to be encountered in pursuing the class action. Fed. R. Civ. P. 23
11 (b)(3).

12 The superiority requirement is satisfied where there are “multiple claims for relatively
13 small individual sums.” *Local Joint Exec. Bd. v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th
14 Cir. 2001). Here, because the financial loss to any individual Class Member is relatively small,
15 very few would have an interest or ability to pursue their own individual case. Also, it is unlikely
16 that individual Class Members would have the resources to pursue successful litigation on their
17 own.

18 In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the Supreme Court recognized
19 that while a proposed settlement class must meet all the requirements of Fed. R. Civ. P. 23, the
20 court need not assess whether the manageability requirement of Rule 23(b)(3) is met, because the
21 parties do not propose to litigate the case. 521 U.S. at 620 (“Confronted with a request for
22 settlement-only class certification, a district court need not inquire whether the case, if tried,
23 would present intractable management problems, ... for the proposal is that there is no trial.”).

24 Accordingly, recognizing that the parties here propose a nationwide Settlement Class—
25 not a nationwide litigation class—this Court need only inquire whether the proposed Settlement
26 Class is sufficiently cohesive with respect to the relevant factual and legal issues as to make a
27 classwide settlement process fair. *See Amchem*, 521 U.S. at 623; *In re Warfarin*, 391 F.3d at 528.
28

1 The standards for certification of a nationwide Settlement Class in the context of granting
2 preliminary settlement approval are satisfied here.

3 **VI. THE PROPOSED NOTICE IS ADEQUATE AND SHOULD BE APPROVED**

4 Rule 23(e) provides that “notice of the proposed dismissal or compromise shall be given
5 to all members of the class in such manner as the court directs.” The *Manual for Complex*
6 *Litigation (Fourth)* recommends that: “[o]nce the judge is satisfied as to the certifiability of the
7 class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the
8 settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members.” *Manual*
9 *for Complex Litigation (Fourth)*, § 21.633. To grant preliminary approval of the proposed
10 settlement, the Court need only find that the settlement is non-collusive and within “the range of
11 possible approval.” *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 U.S. Dist. LEXIS
12 81077, at *12-13 (N.D. Cal. Oct. 25, 2006) (quoting *Schwartz v. Dallas Cowboys Football Club,*
13 *Ltd.*, 157 F. Supp. 2d 561, 570 n.12 (E.D. Pa 2001)). “For economy, the notice under Rule
14 23(c)(2) and the Rule 23(e) notice are sometimes combined.” *Manual for Complex Litigation*
15 *(Fourth)*, § 21.633. Combined notice helps to avoid confusion that separate notifications of
16 certification and settlement may produce.

17 Here, a Summary Notice (Stipulation of Settlement Ex. B; *see* Phillips Decl. Ex. 1, at Ex.
18 B, thereto) containing the terms of the settlement and benefits offered by it will be e-mailed
19 directly to the Class Members using the email addresses associated with each Class Member’s
20 iTunes account. *See* section III.E above (regarding the extensive manner and form in which
21 notice will be disseminated). The Summary Notice will contain a dynamic link to the Settlement,
22 a toll-free number to request copies of the Class Notice and Claim Form, and the address of the
23 Class Counsel to whom class members may write for information concerning the Settlement. The
24 Class Notice and Claim Form (Stipulation of Settlement Exs. A & C; *see* Phillips Decl. Ex. 1, at
25 Exs. A & C, thereto) will also be made available via the Internet on a Settlement Website.

26 Email is a particularly effective form of notice here. Apple routinely relies on the email
27 addresses associated with customers’ iTunes accounts to send those customers, including Class
28

1 Members, important information regarding their use of iTunes and the App Store. Such
2 information includes electronic receipts for every purchase a customer makes in iTunes or the
3 App Store (including In-App Purchases). Accordingly, Class Members expect that important
4 notifications about their iTunes account activity, including payments and refunds, will be
5 delivered to the email addresses that they have associated with their iTunes accounts. And, for
6 any Class Members whose emails bounce back or are otherwise undeliverable, Apple will send a
7 direct postcard notice to the physical address associated with their iTunes accounts. *See* section
8 III.E, above.

9 Notice is satisfactory if it “generally describes the terms of the settlement in sufficient
10 detail to alert those with adverse viewpoints to investigate and to come forward and be heard.”
11 *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v.*
12 *United States*, 623 F.2d 1338, 1352 (9th Cir. 1980)). Here, the forms of notice are modeled on
13 the Federal Judicial Council’s suggested notice forms. Each section of the Class Notice and
14 Summary Notice is preceded by a heading that clearly indicates the section topic and why the
15 Class member should read it. The Class Notice strikes the appropriate balance between
16 thoroughness and clarity by including brief, simple and accurate descriptions of all of the
17 following: (1) what the lawsuit is about; (2) the basic terms of the settlement and release of
18 Apple; (3) the definition of the Class; (4) the identity of Plaintiffs’ counsel; (5) the res judicata
19 effect of the settlement and final judgment on Class Members; (6) the options available to Class
20 Members, including remaining a Class Member by doing nothing, objecting to the Settlement, or
21 opting out of the Settlement; (7) the procedures for exercising the various options, including the
22 time deadlines and method of appearing, opting out, or filing objections; (8) the date, time,
23 location and purpose of the final fairness hearing; and (9) how to get additional information
24 and/or review the complete Settlement Agreement. The Court should therefore approve the
25 proposed Class Notice.

26 //

27 //

28 //

1 **VII. CONCLUSION**

2 For all the reasons stated above, Plaintiffs respectfully request that this Court preliminarily
3 approve the proposed Settlement, certify the Settlement Class as a national class for purposes of
4 this Settlement, and approve the plan to provide notice to the Settlement Class.

5 Dated: February 22, 2013

Respectfully submitted,

6 **SALTZ, MONGELUZZI, BARRETT &**
7 **BENDESKY, P.C.**

8 By: /s/ Simon Bahne Paris
9 Simon Bahne Paris

10 Patrick Howard
11 One Liberty Place, 52nd Floor
12 1650 Market Street
13 Philadelphia, PA 19103
14 Telephone: (215) 575-3986
15 Facsimile: (215) 496-0999
16 Email: sparis@smbb.com
17 phoward@smbb.com

Proposed Co-Lead Counsel for Plaintiffs

18 Michael J. Boni
19 Joshua D. Snyder
20 **BONI & ZACK LLC**
21 15 St. Asaphs Road
22 Bala Cynwyd, PA 19004
23 Telephone: (610) 822-0200
24 Facsimile: (610) 822-0206
25 Email: mboni@bonizack.com
26 jsnyder@bonizack.com

27 Joseph J. Tabacco, Jr.
28 Christopher T. Heffelfinger
Anthony D. Phillips
BERMAN DEVALERIO
One California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200
Facsimile: (415) 433-6382
Email: jtabacco@bermandevalerio.com
cheffelfinger@bermandevalerio.com
aphillips@bermandevalerio.com

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Jonathan Shub
SEGER WEISS LLP
1515 Market Street
Philadelphia, PA 19102
Telephone: (215) 564-2300
Facsimile: (215) 851-8029
Email: jshub@segerweiss.com

Benjamin G. Edelman
LAW OFFICES OF BENJAMIN EDELMAN
27A Linnaean Street
Cambridge, MA 02138
Telephone: (617) 359-3360
Email: edelman@pobox.com

Roberta D. Liebenberg
Jeffrey S. Istvan
Gerard A. Dever
FINE, KAPLAN AND BLACK, R.P.C.
1835 Market Street, 28th Floor
Philadelphia, PA 19103
Telephone: (215) 567-6565
Facsimile: (215) 568-5872
Email: rliebenberg@finekaplan.com
jistvan@finekaplan.com
gdever@finekaplan.com

Shanon J. Carson
Sarah R. Schalman-Bergen
BERGER & MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-4604
Email: scarson@bm.net
sschalman-bergen@bm.net

Counsel for Plaintiffs

E-Filing Attestation

I, Anthony D. Phillips, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that Simon Bahne Paris has concurred in this filing.

/s/ Anthony D. Phillips
Anthony D. Phillips