

1 **GUTRIDE SAFIER LLP**
ADAM J. GUTRIDE (State Bar No. 181446)
2 SETH A. SAFIER (State Bar No. 197427)
835 Douglass Street
3 San Francisco, California 94114
Telephone: (415) 336-6545
4 Facsimile: (415) 449-6469

5 Attorneys for Plaintiff KEVIN EMBRY

6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8 SAN FRANCISCO DIVISION

9 KEVIN EMBRY, an individual, on behalf
of himself, the general public and those
10 similarly situated

11 Plaintiff,

12 v.

13 ACER AMERICA CORPORATION;
AND DOES 1 THROUGH 50

14 Defendants
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASE NO. CV-09-1808 (JW)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: September 12, 2011
Time: 9:00 am
Place: Courtroom 15, 18th Floor
Judge: Hon. James Ware

TABLE OF CONTENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. BACKGROUND FACTS AND DETAILS OF SETTLEMENT 4

 A. LITIGATION HISTORY 4

 B. SETTLEMENT NEGOTIATIONS 5

 C. THE PROPOSED SETTLEMENT 7

 1. Free Replacement Disks, Computer Equipment and Monetary Relief 7

 2. Administrative Expenses, Attorneys’ Fees and Costs, Incentive Awards 8

 3. Notice 9

III. ARGUMENT 9

 A. PRELIMINARY APPROVAL IS WARRANTED 9

 1. The Settlement is Presumed Fair 10

 2. Other Factors Also Demonstrate the Fairness of the Settlement 11

 B. THE SETTLEMENT CLASS SHOULD BE PRELIMINARILY CONDITIONALLY CERTIFIED 13

 C. THE PROPOSED NOTICE IS ADEQUATE 17

IV. DATES FOR THE FINAL APPROVAL PROCESS 19

V. CONCLUSION 19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001) 14

Bert v. AK Steel Corp., 2008 WL 4693747 (S.D. Ohio 2008)..... 10

Carter v. Anderson Merchandisers, L.P., 2010 WL 1946784 (C.D. Cal. 2010) 10

Chavez v. Netflix, Inc., 162 Cal. App. 4th 43 (2008) 18

Churchill Village, LLC v. Gen. Elec., 361 F.3d 566 (9th Cir. 2004). 10

Class Plaintiff v. City of Seattle, 955 F.2d 1268 (9th Cir. 1992) 9

Clothesrigger v. GTE Corp., 191 Cal. App. 3d 605 (1987)..... 16

Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974)..... 17

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998)..... 14, 15, 16

In re Apple & AT&TM Antitrust Litig., 596 F.Supp.2d 1288 (N.D. Cal. 2008) 16

In re Juniper Networks, Inc., 264 F.R.D. 584 (N.D. Cal. 2009)..... 16

In re M.L. Stern Overtime Litigation, 2009 WL 995864 (S.D. Cal. 2009)..... 12

In re NVIDIA Corp. Derivative Litig., 2008 WL 5382544 (N.D. Cal. 2008) 12

In re Tobacco II Cases, 46 Cal.4th 298 (2009)..... 16

In re Wireless Facilities, Inc. Sec. Litig., 253 F.R.D. 630 (S.D. Cal. 2008)..... 9, 13

Linney v. Cellular Alaska Partnership, 151 F.3d 1234 (9th Cir. 1998)..... 11, 12

Miletak v. Allstate Ins. Co., 2010 WL 809579, *11 (N.D. Cal. 2010)..... 14, 16

Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc., 221 F.R.D. 523 (C.D. Cal. 2004) passim

Norwest Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214(1999) 16

Officers for Justice v. Civil Serv. Comm’n, 688 F.2d 615 (9th Cir. 1982) 11

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)..... 17

Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) 14

Rosenburg v. I.B.M., 2007 WL 128232 (N.D. Cal. 2007) 17

Ross v. Trex Co., Inc., 2009 U.S. Dist. LEXIS 69633 (N.D. Cal. July 30, 2009) 3, 9

Satchell v. Federal Express Corp., 2007 WL 1114010 (N.D. Cal.) 10

1 *Simpao v. Gov't of Guam*, 369 Fed. Appx. 837 (9th Cir. 2010) 18
2 *Stewart v. Abraham*, 275 F.3d 220 (3d Cir. 2001)..... 14
3 *United Steel v. Conocophillips Co.*, 593 F.3d 802 (9th Cir. 2010) 15
4 *Valentino v Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir 1996) 16
5 *Vasquez v. Coast Valley Roofing, Inc.*, 670 F.Supp.2d 1114 (E.D. Cal. 2009) 18
6 *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008)..... 16
7 *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087 (9th Cir. 2010) 16

8 **RULES**

9 Fed. R. Civ. Proc., Rule 23(c)(2)(B) 17

10 **TREATISES**

11 4 A CONTE & H. NEWBERG, NEWBERG ON CLASS ACTIONS (“Newberg”) § 11.50 at
12 155 (4th ed. 2002) 9, 10, 14, 15
13 7A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1786 (3d ed. 2008)..... 17
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a proposed global settlement of a class action that has been pending for nearly two-
4 and-one-half years. Plaintiff Kevin Embry (“Plaintiff” or “Embry”) and Defendant Acer America
5 Corporation (“Defendant” or “Acer”) have jointly moved for preliminary approval.

6 In his March 2009 complaint, Plaintiff alleged that while Acer advertised each of its com-
7 puters as including a particular version of Microsoft Windows (e.g., Windows Vista Home Pre-
8 mium), users could not access the native Windows recovery tools in certain circumstances.
9 Plaintiff noted that when sold at retail, Microsoft Windows includes a CD containing the recovery
10 tools that can be used when the hard drive fails. Acer did not provide the CD. While Acer al-
11 lowed users to burn an “eRecovery” CD (or buy one from Acer for a additional fee), this eRecov-
12 ery CD did not enable a user to run the Windows recovery tools. Thus, if the hard drive failed,
13 class members typically could only restore their computers to a “factory default” setting, losing
14 all user-installed applications and, for computers purchased prior to a 2008 partial fix, all user
15 data.¹ Further, the eRecovery CD, unlike a retail Windows disk, could only be used with the
16 original hard drive installed by Acer, meaning that no recovery could be made to a replacement
17 drive. Acer failed to disclose these differences between its version of Windows and the retail ver-
18 sion, even while stating on its website that “Included Software” *other* than Windows was “OEM,
19 not full-featured, version.” Although the version of Windows supplied by Microsoft to Acer and
20 Acer’s competitors was identical, Plaintiff contends that Acer’s competitors *did* provide access to
21 disks with the native Windows recovery features and/or disclose that their preinstalled version of
22 Windows might differ from retail versions.

23 In its defense, Acer denies that there is any factual or legal basis to Plaintiff’s allegations.
24 Acer contends that the versions of Windows sold with Acer’s computers were determined by Mi-
25 crosoft and had all of the features and functions permitted by Microsoft, including all recovery
26

27 ¹ Acer redesigned its recovery disks solution beginning with Windows 7 to allow restoration of
28 the hard drive to original factory settings and to allow data and programs to be saved before resto-
ration. (Safier Decl., Ex. 1.)

1 features. Acer also contends that the Windows versions sold with Acer's computers were the
2 same as the versions sold by Acer's competitors. Acer contends that Microsoft determined the
3 version of Windows that Acer would sell and that Acer's description of Windows in Acer's mar-
4 keting was consistent with Microsoft's guidelines, which Acer was required to follow and which
5 were applied across the computer industry. Acer also claims that most, if not of all, of Plaintiff's
6 allegations about missing or inadequate recovery disks were dismissed by the Court as lacking
7 merit. Acer denies that Plaintiff and any other member of the Settlement Class have suffered
8 damage because every Acer computer came with a version of Windows required by Microsoft
9 and with all necessary recovery features. Acer further has denied and continues to deny that this
10 case can be certified as a class action, except for purposes of settlement. Acer also denies that the
11 evidence is sufficient to support a finding of liability.

12 The Settlement was reached after extensive litigation including a motion to dismiss, two
13 motions for class certification, protracted discovery battles and voluminous production, and
14 months of arms-length negotiations that culminated in a mediation conducted by David A. Rot-
15 man of Gregorio, Haldeman, Piazza & Rotman in San Francisco, California (the "Mediation").
16 At the time of Settlement, a renewed motion for class certification was pending.

17 The proposed Settlement provides for an estimated \$280 million in benefits on a claims-
18 made basis. A copy of the Settlement Agreement is attached as Exhibit 1 to the Declaration of
19 Seth Safier in Support of Motion for Preliminary Approval of Class Action Settlement ("Safier
20 Decl."). Under the proposed Settlement, claimants can file a claim for each computer purchased
21 from Acer, and can choose whether to receive benefits under "Group A," "Group B" or "Group
22 C."

23 "Group A" claimants will receive an optical disk (CD-rom or DVD-rom) from which they
24 can run the Windows recovery utilities that were alleged to be missing from the Acer eRecovery
25 disks. Each optical disk will be designed to work with the particular version of Microsoft Win-
26 dows that was installed on the claimant's computer. Group A claimants shall also have the right
27 to return their computer(s) to the Acer service center for free service if they replaced the original
28

1 installed hard drive and were unable to reload the operating system to the new drive.² Acer shall
2 either reload original factory settings or replace the customer's hard drive with a compatible pre-
3 loaded hard drive before returning the computer to the claimant at Acer's expense. (Safier Decl.,
4 Ex. 1.)

5 "Group B" claimants will be permitted to select a free 8GB USB Drive, mini optical
6 mouse or 720HD webcam, as further described in Exhibit I to the Settlement Agreement. These
7 items have an estimated retail value of \$11-16. Group B claimants must have contacted Acer, an
8 Acer retailer, or a third-party repair technician, on or before June 3, 2011, about a problem relat-
9 ing to inadequate recovery or missing Windows recovery utilities.³ (Id.)

10 "Group C" claimants will receive reimbursement of their out of pocket expenses (up to a
11 maximum of \$50) they paid for service related to a recovery issue. (Id.)

12 The proposed Settlement falls within the standard for preliminary approval. *See Ross v.*
13 *Trex Co., Inc.*, 2009 U.S. Dist. LEXIS 69633 (N.D. Cal. July 30, 2009), at *9 (standard for pre-
14 liminary approval is whether proposed settlement is "within range of reasonableness"). Indeed,
15 class settlements that are reached after sufficient discovery and arms-length negotiations are pre-
16 sumed fair. *See Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal.
17 2004). Numerous other factors also strongly favor the proposed Settlement, including the risks of
18 further litigation and the informed opinion of experienced counsel on all sides who have negoti-
19 ated (and approved) it based upon their views of the strengths and weaknesses of the claims and
20 defenses. *See id.* (finding that experienced counsel's views regarding settlement are entitled to
21 great weight).

22
23
24 ² Claimants must declare under perjury that it was not possible to recover to the new drive using
25 recovery disks that had been obtained from Acer or had been burned from the Acer computer, and
26 there must be a record of the claimant attempting to contact Acer and proof of the new hard drive
purchase. (Safier Decl., Ex. 1.)

27 ³ In the event that the contact was to a retailer or third-party technician, the claimant must provide
28 proof of purchase from the retailer or technician showing the product or service purchased to re-
solve the recovery issue. (Safier Decl., Ex. 1.)

1 Accordingly, the parties have requested that the Court preliminarily approve the proposed
2 Settlement, order that the proposed Notice be disseminated, appoint Gutride Safier LLP as Class
3 Counsel and Kevin Embry as Class Representative, and schedule a final approval hearing.

4 **II. BACKGROUND FACTS AND DETAILS OF SETTLEMENT**

5 **A. LITIGATION HISTORY**

6 Plaintiff filed this putative class action on March 25, 2009, alleging claims for false adver-
7 tising under California Business and Professions Code sections 17500, *et seq.*; unfair business
8 practices under California Business and Professions Code sections 17200, *et seq.*; breach of con-
9 tract; and violation of the California Consumers Legal Remedies Act, California Civil Code sec-
10 tions 1750, *et seq.* (“CLRA”).

11 On April 24, 2009, Defendant removed the case to this Court pursuant to the Class Action
12 Fairness Act of 2005, 28 U.S.C. 1332(d), *et seq.*

13 On May 1, 2009, Defendant moved to dismiss. (Dkt.# 8.) On July 15, 2009, Defendant’s
14 motion to dismiss was granted in part and denied in part. (Dkt.# 19) On August 19, 2010, the
15 Court denied Plaintiff leave to file a first amended complaint. (Dkt.# 87.)

16 Around the time of the implementation of Windows 7 (which was October 2009), Acer
17 redesigned its eRecovery program to allow restoration of the hard drive to original factory set-
18 tings and to allow data and programs to be saved before restoration. (Safier Decl., Ex. 1.)

19 On September 27, 2010, after hearing Plaintiff’s initial motion for class certification, the
20 Court indicated that certification was likely warranted, Dkt.# 96, 167, but denied the motion
21 without prejudice to permit merits discovery and to permit Acer to file a concurrent motion for
22 summary judgment. (Dkt.# 95.) The Court indicated that it wanted additional information about
23 whether Plaintiff’s claims were not unique to Acer computer. (Dkt.# 96, 167.)

24 After bruising and costly discovery battles, Plaintiff obtained from Acer and reviewed
25 more than 500,000 pages of documents, more than 3,000,000 records of unique customer service
26 contacts, and more than 15 terabytes of images of the preinstalled Windows operating systems
27 and applications. (Safier Decl., ¶ 4.) Plaintiff also has obtained documents from third parties,
28

1 including Microsoft and some of Acer's competitors. (Id.) In addition, the Parties took depositions of thirteen witnesses and exchanged answers to interrogatories. (Id.)

2
3 As a result of that discovery, Plaintiff has adduced evidence that thousands of customers
4 complained to Acer of the same types of problem Plaintiff alleged. Further, Acer engineers themselves had queried why its eRecovery disks did not provide access to Windows recovery features,
5 and one actually wrote that the inability to restore to a new hard drive was "unacceptable" and
6 likely grounds for a lawsuit. (Dkt.# 169, Ex. F.) Acer's marketing witness admitted that its use
7 of the statement "OEM, not full-featured, version" on software *other* than Windows would have
8 led even her to believe that Acer was providing all Windows features. (Dkt.# 169, Ex. G.) Acer
9 disputed these facts but Defendant did not file a motion for summary judgment by the Court-
10 imposed deadline or seek extension of that deadline. (Dkt.# 95.) Instead, Plaintiff renewed his
11 motion for class certification, which was still pending at the time of this Settlement. (Dkt.# 167.)

12 **B. SETTLEMENT NEGOTIATIONS**

13
14 The proposed Settlement was reached following many rounds of arms-length talks that
15 began soon after the inception of the case and eventually led to a full-day mediation on June 3,
16 2011, before a highly respected and experienced mediator. In the days following the mediation, a
17 term sheet was finalized, and thereafter the formal settlement documents were drafted. At the
18 time of settlement, all counsel had full knowledge of the strengths and weaknesses the claims and
19 defenses due to the extensive discovery and motion work that had preceded the settlement talks.
20 (Safier Decl., ¶¶ 5-7.)

21 Based on their reasoned judgment, Plaintiff's Counsel believes the proposed Settlement is
22 fair and reasonable and should be approved by this Court. (Safier Decl., ¶ 7.) Plaintiff's Counsel
23 has determined that there are significant risks of continuing the litigation. For example, the Court
24 has already partially dismissed Plaintiff's claims regarding Acer recovery disks, and it has denied
25 Plaintiff leave to re-plead those claims. There is a possibility that the Court will interpret its dismissal broadly, thus excluding most or all of Plaintiff's remaining claims. Further, Defendant has
26 raised substantial arguments in opposition to class certification, contending that the circumstances
27 regarding each purchase and use of an Acer computer must be examined. Although Plaintiff be-

1 believes that these arguments are incorrect, the Court might decline to certify the class. Even if the
2 class is certified, Plaintiff will have to show that Defendant's marketing of the Acer computers—
3 and in particular its failure to identify limitations of the eRecovery disks—was likely to deceive
4 reasonable consumers. For some claims, Plaintiff also will have to show that it would have been
5 material to Acer customers to know at the time of purchase about the limitations of the Acer re-
6 covery disks. The Court may require Plaintiff to show that Acer's conduct differed from its com-
7 petitors. There will also be difficulties establishing the amount of damages or restitution due to
8 the class or to any class member. While Plaintiff can more easily establish the retail value of the
9 entire Microsoft Windows operating system, there will be disputes about what portion of that
10 value should be attributed to the accessibility, on a separate optical disk, of the specific Windows
11 recovery features at issue in this case. Thus, there is a substantial possibility that Plaintiff would
12 be unable to certify a class, to establish liability, or to prove that any class member is entitled to
13 monetary recovery. Even if Plaintiff overcomes all these obstacles and obtains a judgment for the
14 class, Acer would likely appeal. Thus, even in the best case, it could take years to get relief for
15 class members. (Safier Decl., ¶ 7.)

16 With this Settlement, Plaintiff has achieved his desired goal in this litigation—i.e., obtain-
17 ing for class members a disk containing all of the native Windows recovery tools they need to di-
18 agnose and repair their computers. (Id., ¶ 7.) In addition, those who already spent money to
19 recover their computers because they lacked the needed tools can receive reimbursement. Those
20 who replaced their hard drives and were unable to recover can send their computers to Acer for
21 free repair. Finally, those who complained about inadequate recovery or missing Windows utili-
22 ties but do not wish to receive the above benefits (for example, because they no longer use their
23 Acer computer) can obtain a free item, such as a USB drive or mini optical mouse. (Id., Ex. 1.)

24 Plaintiff and his counsel believe that the recovery provided by the settlement is as good or
25 better than the likely recovery at trial. (Safier Decl., ¶ 7.) Although Plaintiff could theoretically
26 seek restitution of the entire amount that each class member paid for each Acer computer, it
27 would be extremely difficult to achieve such restitution, because Plaintiff has not raised issues
28 with other aspects of the computer hardware and software. Therefore, the most likely recovery at

1 trial, even if Plaintiff were to succeed, would be a few dollars per class member, representing the
2 value of the allegedly inaccessible Windows recovery utilities. (Id.)

3 Acer, while continuing to deny all allegations of wrongdoing, also believes the Settlement
4 is in its interest to avoid further expense, inconvenience, and interference with its ongoing busi-
5 ness operations.

6 C. THE PROPOSED SETTLEMENT

7 The Settlement Agreement provides for approximately \$280 million in eligible cash and
8 product benefits on a claims-made basis. (Safier Decl., ¶ 9; Ex. 1.) The Settlement Class com-
9 prises all persons who, from March 24, 2005, through May 1, 2011, purchased in the United
10 States a PC manufactured by Defendants that was advertised or marketed by Defendants to in-
11 clude a Microsoft Windows operating system, except for purposes of resale. (Id., Ex. 1.)⁴ Ap-
12 proximately 14 million Acer computers were sold to end-users during the class period. (Id., ¶ 8;
13 Dkt.# 83-2.)

14 1. Free Replacement Disks, Computer Equipment and Monetary 15 Relief

16 Class members can select one of three sets of settlement benefits. First, class members
17 can obtain a CD-rom, designed for their particular Windows operating system, that contains all
18 the Windows recovery features that Plaintiff alleges are inaccessible from the Acer eRecovery
19 disks. Plaintiff's counsel estimate that the CD-rom is worth at least \$20 were it to be offered for
20 sale on the market (Dkt.# 83-2); Acer currently sells its "eRecovery" disks for the same price al-
21 though Plaintiff alleges that those disks do not provide direct access to Windows recovery fea-
22 tures. (Id. ¶ 9; Dkt.# 83-2.)

23 If class members replaced their hard drives and were unable to recover their operating sys-
24 tem to the new drive, they also can send their computers to Acer, which will reinstall the operat-

25 _____
26 ⁴ Excluded from the Settlement Class are the Honorable Judge James Ware, David A. Rotman,
27 any member of their immediate families, any government entity, Acer, any entity that directly or
28 indirectly controls, or is controlled by, or is in common control with Acer, any of Acer's officers,
directors, employees, legal representatives, heirs, successors, or assigns, and any persons who
timely opt-out of the Settlement Class.

1 ing system on the new drive for free. Acer typically charges a minimum of \$99 for this service if
2 the computers are out of warranty.

3 Second, class members can choose a free item such as an 8GB USB drive, 720HD
4 webcam, or mini optical mouse, if they previously were affected by the types of problems at issue
5 in this case. The free items are further described in Exhibit I to the Settlement Agreement. As
6 shown in Exhibit I, the parties have estimated that the retail value of these items is between \$11
7 and \$16.

8 Third, class members can obtain reimbursement of money they spent to repair their com-
9 puters due to a recovery issue, up to \$50.

10 Acer's duty under the settlement is to pay claims as they are made. There is no minimum
11 or maximum amount of money that Acer will distribute to class members. If a Group A claim
12 (estimated value \$20) is submitted for each of the 14 million computers purchased, then Acer
13 would distribute an estimated \$280 million in free Windows recovery disks. (Dkt.# 75; 83-2.) If
14 some of those persons also seek the free repair service for their replacement hard drives, addi-
15 tional benefits would be provided. The total value of benefits could increase if class members
16 instead make a claim for reimbursement under Group C, where the maximum cash to be distrib-
17 uted to each class member is \$50. The total value of the benefits could decrease if claimants in-
18 stead choose Group B, where the value of the free item is between \$11 and \$16. It is not known
19 how many people are eligible to make a Group B or C claim, but Acer has also produced more
20 than 3 million records of unique customer service inquiries that relate broadly to the subjects of
21 recovery, restoration, and alleged missing Windows utilities. (Gutride Decl. ISO Renewed Class
22 Cert, Dkt.# 169, Ex. Q; Henin Decl. ISO Renewed Class Cert, Dkt.# 168.)

23 **2. Administrative Expenses, Attorneys' Fees and Costs, Incentive** 24 **Awards**

25 As part of the proposed Settlement, Defendant will pay all costs of notice and administra-
26 tion of the Settlement. In addition, Class Counsel will request, and Defendant will not object to,
27 attorneys' fees and expenses in the amount of \$1.2 million, constituting less than 1% of the poten-
28 tial monetary value of the Settlement. Attorneys' fees and costs will be paid in addition to, and

1 will in no way reduce, any settlement benefits available to class members. Plaintiff also will re-
2 quest approval for an incentive award of \$15,000 for Plaintiff. The request for fees, costs and
3 incentive awards will be the subject of a separate motion to be filed at least 42 days before the
4 final approval hearing.

5 3. Notice

6 Defendant has agreed to disseminate notice to the Settlement Class Members as follows:

7 (1) direct email notification using all electronic mail addresses in Acer's possession or control
8 that correspond to potential Settlement Class Members, (2) a Settlement Website containing the
9 notices and a contacts information page for the Claim Administrator and the Parties, and an elec-
10 tronic and downloadable version of the Claim Form, (3) Publication in *USA Today* (or other na-
11 tional print publication of equivalent circulation) of the Summary Published Notice, in a size
12 equivalent to a one eighth-page ad, for two consecutive weeks announcing the settlement, (4) a
13 hyperlink on the "Alerts and Recalls" page of the Acer website that connects to the Settlement
14 Website and (5) \$20,000 in online advertising via Google AdWords using key terms and phrases
15 "Acer recovery settlement" and "Acer eRecovery settlement." (Id., Ex. 1.)

16 III. ARGUMENT

17 A. PRELIMINARY APPROVAL IS WARRANTED

18 Rule 23(e) requires court approval of a class settlement. There is, however, a "strong ju-
19 dicial policy that favors settlements, particularly where complex class action litigation is con-
20 cerned." *Class Plaintiff v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "In most
21 situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable
22 to lengthy and expensive litigation with uncertain results." *DIRECTV*, 221 F.R.D. at 526, *citing* 4
23 A CONTE & H. NEWBERG, *NEWBERG ON CLASS ACTIONS* ("Newberg") § 11.50 at 155 (4th ed.
24 2002). At the preliminary approval stage, the Court's role is to determine, on a preliminary basis,
25 whether the settlement is within the range of what might be considered "fair, reasonable, and ade-
26 quate" to allow notice to the proposed settlement class to be given and a hearing for final ap-
27 proval to be set. *Ross*, 2009 U.S. Dist. LEXIS 69633 at *9. In addition, where a class has not yet
28

1 been certified, a district court must determine whether the settlement class meets the requirements
2 of Rule 23. *See In re Wireless Facilities, Inc. Sec. Litig.*, 253 F.R.D. 630, 633 (S.D. Cal. 2008).

3 **1. The Settlement is Presumed Fair**

4 Class settlements are presumed fair when they are reached “following sufficient discovery
5 and genuine arms-length negotiation.” *DIRECTV*, supra, 221 F.R.D. at 528; 4 Newberg at
6 § 11.24. Before reaching the Settlement, the parties engaged in extensive, highly adversarial fac-
7 tual investigation, which included numerous depositions, document production and interroga-
8 tories. As a result of Defendant’s early motion to dismiss, discovery motions and two motions for
9 class certification, extensive briefing of most significant legal issues had occurred before the Set-
10 tlement was reached. This Court’s and the Magistrate’s rulings on these motions also informed
11 the parties of the viability of the claims in issue and the various risks to both sides if the cases did
12 not settle. Further, the proposed Settlement was not reached until after a renewed class certifica-
13 tion motion was on file. (Safier Decl., ¶ 5; Dkt.# 167.)

14 The parties negotiated the proposed Settlement in good faith, including in a full day, in-
15 person session with a highly regarded mediator, after months of back-and-forth negotiations.
16 (Safier Decl., ¶¶ 5, 6.) This further demonstrates the arms-length nature of the negotiations. *See*
17 *Satchell v. Federal Express Corp.*, 2007 WL 1114010, *4 (N.D. Cal.) (“The assistance of an ex-
18 periented mediator in the settlement process confirms that the settlement is non-collusive”); *Bert*
19 *v. AK Steel Corp.*, 2008 WL 4693747 at *2 (S.D. Ohio 2008) (“the participation of an independ-
20 ent mediator in settlement negotiations virtually insures that the negotiations were conducted at
21 arm’s length and without collusion between the parties”); *Carter v. Anderson Merchandisers,*
22 *L.P.*, 2010 WL 1946784, *7 (C.D. Cal. 2010) (same).

23 Furthermore, counsel for each side, who are experienced class action and attorneys, have
24 fully evaluated the strengths, weaknesses, and equities of the parties’ respective positions. The
25 fact that they consider the proposed Settlement to be a fair resolution of their respective differ-
26 ences is entitled to considerable weight. *See DIRECTV*, 221 F.R.D. at 528 (“great weight” nor-
27 mally given to opinion of counsel regarding class settlement).
28

1 **2. Other Factors Also Demonstrate the Fairness of the Settlement**

2 In addition to being presumptively valid, the settlement meets the “fairness” criteria con-
3 sidered by courts in evaluating class action settlements under Rule 23(e), even in the context of
4 final approval. Some of these final settlement approval criteria are discussed below. *See Chur-*
5 *chill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

6 a) **The Strength of Plaintiff’ Case and the Risks of Further**
7 **Litigation**

8 These factors survey the potential risks and rewards of proceeding with litigation, to
9 weigh the likelihood of success against the benefits of an immediate settlement. At the time the
10 Settlement was reached, Plaintiff’s renewed class certification motion was pending. The litigation
11 between the parties had been highly contentious, and the parties strongly disagreed on Plaintiff’s
12 ability to prove liability at trial, as well as damages. While Plaintiff is confident in his positions
13 and believe his claims are strong, Class Counsel are also experienced and realistic enough to
14 know that the guaranteed recovery and certainty achieved through settlement, as opposed to the
15 uncertainty inherent in the trial and appellate process, weighs heavily in favor of settlement.

16 This uncertainty is highlighted by the fact that Acer has maintained throughout the litiga-
17 tion that its OEM version of Windows had the same features and functions as the retail versions
18 and the versions sold by its competitors, such as HP. Further, Acer argues that it was prohibited
19 by Microsoft from providing any disclaimer that preinstalled versions of Windows differed from
20 retail versions, and it argues that most, if not of all of, Plaintiff’s claims about missing or inade-
21 quate recovery disks were dismissed by the Court. While Plaintiff disputes (and has adduced evi-
22 dence to undermine) Acer’s arguments, it was far from clear how the arguments would be
23 resolved. Acer also has asserted a host of other issues that could compromise Plaintiff’ claims,
24 including numerous affirmative defenses.

25 b) **The Amount Offered in Settlement**

26 This factor “assess[es] the consideration obtained by the class members in a class action
27 settlement.” *DIRECTV*, 221 F.R.D. at 527. “[I]t is the complete package taken as a whole, rather
28 than the individual component parts, that must be examined for overall fairness.” *Officers for*

1 *Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982). “In this regard, it is well-settled
2 law that a proposed settlement may be acceptable even though it amounts to only a fraction of the
3 potential recovery that might be available to the class members at trial.” *DIRECTV*, 221 F.R.D. at
4 527, citing *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998).

5 Under the proposed Settlement, Settlement Class members are eligible to make claims for
6 cash and product benefits; given the size of the class, this amounts to approximately \$280 million
7 (or more) in eligible benefits. (Safier Decl., ¶ 9; Dkt.# 75; Dkt.# 83-2.) Most importantly, class
8 members can obtain the complete set of Windows recovery tools, on an optical disk, which is ex-
9 actly what Plaintiff alleged was missing from the initial purchase and what caused him to sue. In
10 other words, every class member is made whole. Class members who spent money out of pocket
11 because of the missing recovery tools can get cash reimbursement. And those class members
12 who no longer use their computers (and thus do not need the recovery disk) can obtain a free item
13 (such as a USB drive or mini optical mouse) to use with another computer. The available bene-
14 fits are in addition to any attorneys’ fees and costs awarded to Class Counsel, as well as any ad-
15 ministrative and notice costs. Moreover, the provision of the full set of recovery tools is exactly
16 why Plaintiff initiated this litigation.

17 **c) The Extent of Discovery**

18 This factor evaluates whether “the parties have sufficient information to make an in-
19 formed decision about settlement.” *In re M.L. Stern Overtime Litigation*, 2009 WL 995864 at *4
20 (S.D. Cal. 2009), citing *Linney*, 151 F.3d at 1239. As shown above, the parties had exchanged
21 sufficient information to make an informed decision about settlement. This litigation has been
22 ongoing for nearly two-and-one-half years, during which time the parties have engaged in exten-
23 sive discovery. Defendants produced more than 500,000 pages of documents, 3 million unique
24 customer service records, and 15 terabytes of images of installed operating systems and applica-
25 tions. In addition, numerous depositions have been taken of the parties, of Plaintiff’s experts, and
26 of third party Microsoft. (Safier Decl., ¶ 4.)

1 **d) The Experience and Views of Counsel**

2 “[S]ignificant weight should be attributed to counsel’s belief that settlement is in the best
3 interest of those affected by the settlement.” *In re NVIDIA Corp. Derivative Litig.*, 2008 WL
4 5382544 at *4 (N.D. Cal. 2008); *see also DIRECTV*, 221 F.R.D. at 528. The proposed Settlement
5 was negotiated by counsel for both sides who have extensive experience in class action matters
6 and who were intimately familiar with the facts and issues underlying this litigation at the time
7 settlement was negotiated and reached. Further, the arms-length character of the negotiations, as
8 exemplified by the involvement of a highly-regarded mediator, as well as the considered opinion
9 of counsel for all parties in favor of the proposed Settlement, confirms the propriety of the Set-
10 tlement. (Safier Decl., ¶¶ 5,6.)

11 **B. THE SETTLEMENT CLASS SHOULD BE PRELIMINARILY**
12 **CONDITIONALLY CERTIFIED**

13 When a class settlement occurs before class certification has taken place, a court may
14 conditionally certify an action for settlement purposes. *See In re Wireless*, 253 F.R.D. at 633
15 (“Parties may settle a class action before class certification and stipulate that a defined class be
16 conditionally certified for settlement purposes”). When certification is sought under Rule 23(a)
17 and (b)(3), the Court’s threshold task is to preliminarily determine whether the proposed settle-
18 ment class satisfies the numerosity, commonality, typicality and adequacy requirements of Rule
19 23(a), and the predominance and superiority requirements of Rule 23(b)(3). *Id.* The parties have
20 sought preliminary certification of the Settlement Class now, with that certification to be con-
21 firmed at the time of Final Approval.

22 Plaintiff’s renewed motion for class certification (filed April 25, 2011) was still pending at
23 the time of settlement. This Court had indicated at the first hearing on class certification that
24 class certification likely was warranted here, but opened merits discovery and invited Acer to file
25 a motion for summary judgment to be heard concurrently with class certification. Acer ultimately
26 declined to file for summary judgment, and the facts discovered since the first motion, after
27 lengthy discovery motion practice, further supported this Court’s initial inclination to grant class
28

1 certification. (Safier Decl. ¶ 5; Dkt.# 167.) Defendant has now agreed to certification of the Set-
2 tlement Class for settlement purposes.

3 The Settlement Class is: All individual consumers who, from March 24, 2005, through
4 May 1, 2011, purchased in the United States a PC manufactured by Defendant that was advertised
5 or marketed by Defendant to include a Microsoft Windows operating system, except for purposes
6 of resale.

7 All of the class certification elements are met here. Numerosity is met because Acer's re-
8 cords confirm that there are likely millions of members of the Settlement Class (Safier Decl., ¶ 8)
9 and "joinder of all members is impracticable." Rule 23(a)(1). *See Stewart v. Abraham*, 275 F.3d
10 220, 227 (3d Cir. 2001) (more than 40 claimants sufficient to establish numerosity); 1 Newberg at
11 § 3.5.

12 Commonality under Rule 23(a)(2), which requires that there be common questions of law
13 or fact, is also present. This requirement is construed permissively, and there does not have to be
14 "complete congruence" of common issues; even one common issue is sufficient. *Rodriguez v.*
15 *Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010); 1 Newberg at § 3.10 (the commonality standard is
16 "easily met" for most settlement classes). Here, all claims arise from same uniform business
17 practices, in that each class member suffered the same injuries due to Acer's alleged failure to
18 disclose differences between its version of Windows and the retail version of Windows. Each
19 member either was exposed to the same or substantially similar advertising and thus the same
20 non-disclosures and omissions of fact are at issue with respect to all purchasers of Acer's com-
21 puters with its pre-installed OEM Windows. Whether the alleged misrepresentations and omis-
22 sions were likely to mislead reasonable customers is a common question of fact. Acer has
23 asserted common defenses to the claims of Plaintiff and plaintiff class members, further support-
24 ing a finding of commonality. (Dkt.# 35.)

25 Typicality under Rule 23(a)(3) requires that the representative claims be "reasonably co-
26 extensive with those of absent class members; they need not be substantially identical." *Hanlon*
27 *v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). This requirement is "satisfied when each
28 class member's claim arises from the same course of events, and each class member makes simi-

1 lar legal arguments to prove the defendant's liability.” *Rodriguez*, 591 F.3d at 1124, *citing Arm-*
2 *strong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). Plaintiff's claim that the differences between
3 Acer's pre-installed Windows and the retail Windows were not disclosed to him are identical to
4 the claim of the Settlement class members. Typicality is also aided by the fact that the “objective
5 reasonable consumer standard” applies to determine liability here under all of the consumer stat-
6 utes in issue. *See Miletak v. Allstate Ins. Co.*, 2010 WL 809579, *11 (N.D. Cal. 2010) (rejecting
7 defendants' attack on typicality based on fact that objective reasonable consumer standard ap-
8 plied).

9 Adequacy under Rule 23(a)(4) concerns whether the class representatives will “fairly and
10 adequately protect the interests of the class.” This inquiry involves two questions: “(1) do the
11 named Plaintiff and their counsel have any conflicts of interest with other class members and (2)
12 will the named Plaintiff and their counsel prosecute the action vigorously on behalf of the class?”
13 *Hanlon*, 150 F.3d at 1020. Both requirements are met here. There is no antagonism between
14 Plaintiff and the class members, all of whom assert the same underlying claims based upon the
15 same injuries, arising in the same manner from the same uniform business practices. Plaintiff's
16 interests are thus in line with the interests of the class he represents because he seeks the same
17 relief as the class, based upon the same claims and uniform business practices. Plaintiff's ade-
18 quacy is also shown by his agreement to serve as representative Plaintiff, his retention of experi-
19 enced, competent counsel, his appearance for deposition, his filing of declarations in support of
20 class certification, and his participation in responding to written discovery. (Safier Decl., ¶ 10.)

21 Counsel for Plaintiff is competent and qualified to represent the Class. Plaintiff's counsel
22 has extensive experience with complex class actions, having served as class counsel in numerous
23 federal and state court consumer fraud actions that have resulted in millions of dollars being re-
24 turned to consumers. (Safier Decl., Ex. 2.) Numerous courts have repeatedly found Class Coun-
25 sel to be adequate class counsel. (*Id.*) *See also* 1 Newberg § 3.24 at 418 (the competence and
26 experience of class counsel should be presumed in the absence of proof to the contrary).

27 The predominance requirement under Rule 23(b)(3) is also satisfied. “Predominance” is
28 determined from the Plaintiff's legal theory of the case; that is, the relevant question is whether

1 proving Plaintiff’s theory will involve mainly common legal and factual issues or individual is-
2 sues. *See United Steel v. Conocophillips Co.*, 593 F.3d 802, 808-09 (9th Cir. 2010) (main ques-
3 tion is whether Plaintiff’s legal theory was one in which common issues of law or fact would
4 predominate over individual issues; whether plaintiff will in fact prevail is immaterial). The pre-
5 dominance inquiry focuses on “the relationship between the common and individual issues”—as
6 long as common issues “present a significant aspect of the case” and can be resolved in a single
7 case, predominance is met. *In re Juniper Networks, Inc.*, 264 F.R.D. 584, 590 (N.D. Cal. 2009),
8 *citing Hanlon*, 150 F.3d at 1022); *see also* 2 Newberg at § 4.25.

9 Here, the claims in issue are based upon uniform business practices and standardized
10 documentation, such as website and other marketing materials. There are no predominating indi-
11 vidual issues because, under Plaintiff’s legal theories, the objective reasonable consumer standard
12 applies to determining liability, as well as to the materiality of the alleged non-disclosures or al-
13 leged misrepresentations. *See Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1089,
14 1092-93 (9th Cir. 2010) (predominance requirement met where state’s consumer protection stat-
15 ute is based upon the objective reasonable consumer standard); *Williams v. Gerber Products Co.*,
16 552 F.3d 934, 938-39 (9th Cir. 2008) (reasonable consumer standard applies to California’s con-
17 sumer protection statutes); *see also In re Apple & AT&TM Antitrust Litig.*, 596 F.Supp.2d 1288,
18 1310-11 (N.D. Cal. 2008) (materiality for purposes of duty to disclose analysis determined by
19 reasonable consumer standard); *In re Tobacco II Cases*, 46 Cal.4th 298, 326-27 (2009) (no show-
20 ing of injury or reliance by absent class members required).

21 Finally, Rule 23(b)(3)’s superiority analysis essentially looks to alternative methods of ad-
22 judication and whether maintenance of a class action would be fair and efficient. *See Valentino v*
23 *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir 1996); 2 Newberg at § 4.27. Superiority is sat-
24 isfied in the present case because: (1) prosecuting or defending separate actions at this stage
25 would be impractical and inefficient; and (2) to the parties’ knowledge, there is no other litigation
26 concerning this controversy. (Safier Decl., ¶ 12.) *See Fed. R. Civ. Proc.*, Rule 23(b)(3). Here,
27 there are a multitude of consumers who were injured in small amounts. This “small individual
28

1 damages” factor is significant and weighs heavily in favor of class certification, especially given
2 the common scheme at issue. *See Miletak*, 2010 WL 809579 at *13.⁵

3 C. THE PROPOSED NOTICE IS ADEQUATE

4 The proposed Notice Plan and Claim Form (“Notice”) comports with the procedural and
5 substantive requirements of Rule 23. Under Rule 23, due process requires that class members re-
6 ceive notice of the settlement and an opportunity to be heard and participate in the litigation. *See*
7 *Fed. R. Civ. Proc.*, Rule 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen*
8 *v. Carlisle and Jacquelin*, 417 U.S. 156, 175-76 (1974) (“individual notice must be provided to
9 those class members who are identifiable through reasonable effort”). The mechanics of the no-
10 tice process are left to the discretion of the Court, subject only to the broad “reasonableness”
11 standards imposed by due process. *See* 7A Wright & Miller, FEDERAL PRACTICE & PROCEDURE §
12 1786 (3d ed. 2008); *see also Rosenberg v. I.B.M.*, 2007 WL 128232 at *5 (N.D. Cal. 2007) (no-
13 tice should inform class members of essential terms of settlement including claims procedure and
14 their rights to accept, object or opt-out of settlement).

15 The proposed notice plan contemplates disseminating notice to the Settlement Class
16 Members through (1) direct email notification using all electronic mail addresses in Acer’s pos-
17 session or control that correspond to potential Settlement Class Members, (2) a Settlement Web-
18 site containing the notices and a contacts information page for the Claim Administrator and the
19 Parties, and an electronic and downloadable version of the Claim Form, (3) Publication in *USA*
20 *Today* (or other national print publication of equivalent circulation) of the Summary Published
21 Notice, in a size equivalent to a one eighth-page ad, for two consecutive weeks announcing the
22

23 ⁵ Because this action is being settled, the Court need not consider the manageability issues. *See*
24 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Furthermore, Because Acer’s
25 headquarters are in California and its marketing decisions were made here, California law is ap-
26 plicable to all class members. (Dkt.# 72, 167); *see also Norwest Mortgage, Inc. v. Superior*
27 *Court* (1999) 72 Cal. App. 4th 214 (upholding certification of a nationwide class in a consumer
28 protection action against defendant with both its headquarters and principal place of business lo-
cated outside the state of California for alleged wrongful conduct occurring in California);
Clothesrigger v. GTE Corp. (1987) 191 Cal. App. 3d 605 (nationwide class could be certified in
suit against foreign corporation for allegedly fraudulent representations that had been prepared in
and disseminated from California).

1 settlement, (4) a hyperlink on the Acer Website that connects to the Settlement Website, and (5)
2 \$20,000 in online advertising via Google AdWords using key terms and phrases “Acer recovery
3 settlement” and “Acer eRecovery settlement.”

4 This multi-communication method is the best notice practicable and is reasonably de-
5 signed to reach the Settlement Class Members. (Safier Decl., Ex. 1.) The notice plan is consistent
6 with class certification notice plans approved by numerous state and federal courts and is, under
7 the circumstances of this case, the best notice practicable. *See, e.g., Simpao v. Gov’t of Guam*,
8 369 Fed. Appx. 837, 838 (9th Cir. 2010) (notice plan was “best notice practicable” where direct
9 notice was mailed to class members and supplemented by published notice in multiple media out-
10 lets); *Vasquez v. Coast Valley Roofing, Inc.*, 670 F.Supp.2d 1114, 1126-27 (E.D. Cal. 2009) (di-
11 rect mailed notice supplemented by published notice in newspapers of general circulation in areas
12 and languages designed to reach potential class members provided “best possible notice” to class
13 members of settlement); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 56-59 (2008) (emailed
14 summary notice directing class members to settlement website satisfied due process require-
15 ments).

16 The proposed Notice informs Class Members about the proposed Settlement, their right to
17 opt out or object, the claims process, and the fact that they will be bound by the judgment if they
18 do not opt out. In understandable language, the proposed Notice describes the purpose of the No-
19 tice, a summary of the proceedings, a summary of the settlement terms and benefits, including
20 identification of the parties bound by the proposed Settlement, issues related to attorneys’ fees,
21 costs and awards, and a discussion of the relevant releases of the parties. (Safier Decl., Ex. 1.)

22 Additionally, the Notice advises Settlement Class Members of what they need to do to
23 participate in the proposed Settlement, whether through objecting or attending the final approval
24 hearing. The proposed Notice also properly advises Settlement Class Members where they can
25 receive additional information, including contact by telephone, mail and email. Accordingly, the
26 Notice fully meets due process requirements, and the notice plan should be approved. (Id.)

27 Settlement Class Members who seek benefits under the Settlement simply need to down-
28 load, print and complete a Claim Form, then send it in via first class mail, signed in ink by the

1 Settlement Class Member during the Claim Period. On the Claim Form, the Settlement Class
2 Member must certify the following under the penalty of perjury:

- 3 a. his or her name and address;
- 4 b. the serial number of the Acer computer;
- 5 c. that the Acer computer reflected in the Claim Form was purchased by the Settlement
6 Class Member.
- 7 d. Proof of purchase, in the case of returns of hard drives for service, requests for reim-
8 bursement for services provided by third parties, or requests for free computer equip-
9 ment where the claimant sought third party assistance.

10 (Id.)

11 **IV. DATES FOR THE FINAL APPROVAL PROCESS**

12 Plaintiff request that in connection with preliminary approval, this Court set a date for a
13 final approval hearing to consider the fairness of the Settlement and to hear any comments from
14 the Settlement Class Members, as well as dates for mailing and publishing Notice and deadlines
15 for objections and opting out of the Settlement Class. Plaintiff proposes the following schedule:

16	<u>Item</u>	<u>Due Date</u>
17	Initiate Notice	14 days after Preliminary Approval
18	Motion for Final Approval; Plaintiff's Motion 19 for Attorneys' Fees, Costs and Incentive Award	42 days before Final Approval hear- 20 ing
21	Objections, Requests to Appear, Requests to In- 22 tervene; opt-outs	28 days before Final Approval hear- 23 ing
24	Replies in support of Final Approval and motion 25 for attorneys' fees, costs and incentive awards; 26 response to objections and requests to intervene	14 days before Final Approval Hear- 27 ing
28	Final Approval Hearing	November 21, 2011 (approximately 70 days after Preliminary Approval)
	Claims	30 days after Final Approval

25 **V. CONCLUSION**

26 For the foregoing reasons, Plaintiff requests that this motion for preliminary approval be
27 granted.

28 DATE: August 25, 2011

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GUTRIDE SAFIER LLP

/s/ Adam Gutride
Adam Gutride
Seth A. Safier
Attorneys for Plaintiff