

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE CLASSMATES.COM
CONSOLIDATED LITIGATION

MASTER CASE NO. C09-45RAJ
ORDER

(APPLIES TO ALL ACTIONS)

I. INTRODUCTION

This matter comes before the court on Plaintiffs' motion (Dkt. # 73) for preliminary approval of a settlement with Defendants, including preliminary certification of a settlement class. Defendants do not oppose the motion. The court GRANTS the motion subject to the limitations stated below, and sets a hearing on October 27, 2010, at 10:00 a.m. to determine whether the settlement should be made final.

II. BACKGROUND

Defendants, who the court will refer to collectively as "Classmates," operate a website at www.classmates.com. The website contains records of millions of people organized according to high school graduating class, college graduating class, and other similar groupings. People gain various levels of access to the records by registering for unpaid and paid Classmates memberships.

This consolidated class action is an amalgamation of two suits that Anthony Michaels and Xavier Vasquez filed challenging various Classmates practices. The court consolidated the suits, and Mr. Michaels' counsel was appointed interim class counsel.

1 At the court's direction, class counsel filed an amended complaint to govern all claims in
2 the consolidated action. They dropped Mr. Vasquez as a Plaintiff and added David
3 Catapano. The consolidated complaint asserts only Washington law causes of action,
4 including claims under the Washington Consumer Protection Act ("CPA") and the
5 Washington Commercial Electronic Mail Act ("CEMA").

6 The consolidated complaint describes Classmates' deceptive practices to induce
7 users to pay for subscriptions. In one such practice, Classmates sent e-mails to unpaid
8 members informing each of them that someone with whom they went to high school or
9 college or the like was seeking contact with them or had visited their Classmates profile.
10 Each e-mail informed the member that he could communicate with that person by
11 upgrading to a paid membership. Plaintiffs allege that they paid for a membership in
12 response to this practice, only to discover that no one (or at least no one known to them)
13 had visited their profile or sought contact with them. Numerous variations on this
14 deceptive practice are described in the consolidated complaint.

15 The parties propose a settlement in which Mr. Michaels and Mr. Catapano
16 (residents of California and Nevada, respectively) will serve as representatives of a
17 nationwide class of all registered Classmates users since October 30, 2004. In addition,
18 they will represent a subclass of approximately 3.1 million "Gold Members." A gold
19 membership is a paid classmates.com membership, and is apparently the membership
20 package to which Plaintiffs subscribed because of the deceptive Classmates practices
21 described above. Plaintiffs define the subclass to include only Classmates users who
22 likely became Gold Members in response to one of Classmates' deceptive practices.
23 Although the court follows Plaintiffs' lead in referring to these Gold Members as a
24 "subclass," the court notes that the class is defined so that it excludes all subclass
25 members. The proposed class and subclass thus share no members in common. The
26 court refers to the two mutually exclusive classes as the "main class" and the subclass.

1 When referring to all members of both classes, the court will use the generic term “class
2 members.”

3 The principal features of the settlement are a Classmates credit for main class
4 members, a credit or cash payment to subclass members, and a three-year injunction
5 targeting the challenged Classmates practices. Main class members may claim a \$2
6 credit to be used toward a paid Classmates membership. Subclass members may claim
7 the credit, or they may claim a \$3 cash payment, up to a maximum cash outlay of \$9.5
8 million. The injunction requires Classmates to include disclosures on its website about
9 the “Guestbook” feature on which many of its allegedly deceptive practices are focused,
10 and also include disclosures to enable users to better protect their personal information.

11 In exchange, Classmates will receive a broad release of all claims from class
12 members, including not only the Washington law claims asserted in the consolidated
13 complaint, but claims under federal law or any state’s law. Classmates admits no
14 wrongdoing in the settlement.

15 Class counsel will seek attorney fees. They will request no more than \$1.3 million
16 in attorney fees, although they may also seek costs, as well as a \$2500 incentive payment
17 for Mr. Catapano and Mr. Michaels.

18 Notice to class members will be accomplished electronically via the last e-mail
19 address that each class member provided to Classmates, and also via a Wall Street
20 Journal advertisement. Because of the large number of class members, Plaintiffs have
21 requested at least 90 days between preliminary approval of their settlement and the
22 deadline for completing notice. Main class and subclass members would then be required
23 to submit a claim form (with the option to do so via e-mail) if they wish to claim either
24 the credit or the cash payment.

25 The court now turns to its preliminary approval analysis.

III. ANALYSIS

1 The parties' agreement to settle this matter is not itself a sufficient basis for
2 approving the settlement. The settlement would require the court to certify a class and
3 dispose of the claims of its members. The court has an independent obligation to protect
4 class members. *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). Even for a class
5 certified solely for purposes of settlement, the court must ensure that the class and its
6 proposed representatives meet the requirements of Fed. R. Civ. P. 23. *Staton v. Boeing*
7 *Co.*, 327 F.3d 938, 952 (9th Cir. 2003). In addition, the court must ensure that the
8 settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

9 Both the main class and subclass satisfy the four prerequisites of Rule 23(a). The
10 parties estimate that there are 3.1 million subclass members. The consolidated complaint
11 estimates the number of main class members at about 50 million. Both the subclass and
12 the main class therefore satisfy the numerosity requirement of Rule 23(a)(1).

13 The class members' claims satisfy the minimal commonality standard of Rule
14 23(a)(2). Determining whether Classmates' inducements for paid memberships violated
15 the CPA or CEMA presents numerous common questions of law and fact. A single
16 common question suffices for purposes of Rule 23(a)(2). *E.g., Haley v. Medtronic, Inc.*,
17 169 F.R.D. 643, 648 (C.D. Cal. 1996).

18 Mr. Catapano and Mr. Michaels have claims that are typical of the claims of
19 subclass members. They allege that they paid for memberships as a result of Classmates'
20 deceptive practices, and the subclass is defined such that it is likely that other subclass
21 members did so as well. Their claims are not obviously typical of main class members,
22 however, because unlike them, Mr. Catapano and Mr. Michaels succumbed to deceptive
23 Classmates practices. All class members, however, were targets of the deceptive
24 practices, and Mr. Catapano and Mr. Michaels are typical main class members in at least
25 that regard. The court concludes that the main class and subclass satisfy the typicality
26 requirement of Rule 23(a)(3).

1 The court also finds that Mr. Catapano and Mr. Michaels are adequate class
2 representatives, as Rule 23(a)(4) requires. To the extent that other class members have
3 claims based on a sufficiently similar factual predicate, the record reflects that Mr.
4 Catapano and Mr. Michaels can adequately represent them. Subject to the same
5 limitation, interim class counsel are adequate to represent the main class and subclass.
6 *See* Fed. R. Civ. P. 23(g).

7 To the extent class members have sufficiently different claims against Classmates,
8 however, the class representatives' intent to force them to release all of their claims is
9 suspect. *See, e.g., Hesse v. Sprint Corp.*, No. 08-35235, 2010 U.S. App. LEXIS 5017, at
10 *9-24 (9th Cir. Mar. 10, 2010) (concluding that representational inadequacy partially
11 invalidated release of claims in a nationwide class action settlement). In *Hesse*, the court
12 found that a broad release imposed on members of a nationwide class action had no
13 preclusive effect on a later class action against the same defendant. *Id.* at *9 (“We
14 conclude . . . that the release cannot preclude the Washington Plaintiffs’ claims because
15 the [prior] Class Plaintiff did not adequately represent the Washington Plaintiffs and
16 because the Washington Plaintiffs’ claims are based on a set of facts different from those
17 underlying the claims settled in the [prior] settlement.”). The release in *Hesse* contained
18 language much like the release Plaintiffs propose here. *Id.* The court makes no finding
19 as to whether Plaintiffs are adequate representatives of class members for any claims
20 other than those sufficiently similar, as described in *Hesse*, to those asserted in the
21 consolidated complaint. The court need not demand a narrower release, however,
22 because a future court called upon to determine the preclusive effect of this settlement
23 will narrow it appropriately. To the extent the release is too broad, Classmates may
24 obtain less than it bargained for.

25 The court concludes that the main class and subclass meet the requirements of
26 Rule 23(b)(3). Typically, Rule 23(b)(3) serves to ensure that a class action is the best

1 means of resolving a dispute. When the parties settle a class action, many of the concerns
2 articulated in the rule do not apply, because a negotiated resolution moots some of the
3 practical difficulties of resolving the dispute on a classwide basis. *Amchem Prods., Inc.*
4 *v. Windsor*, 521 U.S. 591, 620 (1997) (“Confronted with a request for settlement-only
5 class certification, a district court need not inquire whether the case, if tried, would
6 present intractable management problems.”). The common legal and factual questions
7 related to Classmates allegedly deceptive tactics predominate over any individualized
8 concerns. There is nothing in the record that suggests this court is an undesirable forum
9 for resolving those claims.

10 Plaintiffs propose to use e-mail to notify class members of class certification, this
11 settlement, and their obligations to submit a claim for either a credit or cash payment. E-
12 mail notice is an excellent option here, where every class member provided an e-mail
13 address to Classmates in the process of registering as a user. Given the large number of
14 class members, e-mail notice also avoids the substantial expense of sending notice by
15 mail. The court finds that Plaintiffs’ notice procedure satisfies the requirements of Rule
16 23(c)(2)(B) (mandating “the best notice that is practicable under the circumstances”).
17 The court also appreciates that Plaintiffs have enabled class members to return claim
18 forms via e-mail. This is an important benefit, as the cost of postage would be a large
19 portion of the relief that Classmates is offering to each class member. The court notes,
20 however, that Plaintiffs have not given class members the option to opt out of the class
21 via e-mail. The court sees no obvious reason for this. It thus orders Plaintiffs to enable
22 class members to opt out via e-mail. If this requirement presents a problem, Plaintiffs
23 shall provide a statement as soon as possible explaining why.

24 The court has reviewed Plaintiffs’ proposed forms of notice to main class and
25 subclass member. Those notices are adequate, but Plaintiffs must modify them to reflect
26 this order, including the order to permit class members to opt out via e-mail.

1 Finally, Plaintiffs must allow the court to review the notice, opt-out, and claim
2 submission features in their electronic format. Accordingly, the court directs class
3 counsel to arrange for the court to receive electronic notice as soon as the technology is
4 enabled. Counsel shall also notify the court when the settlement website they have
5 promised to create becomes “live.”

6 The court now considers whether the settlement is “fair, reasonable, and adequate”
7 as required by Rule 23(e)(2). The court begins by considering the financial relief. As to
8 main class members, Classmates’ \$2 credit toward a paid membership is reasonable.
9 Indeed, main class members have suffered no apparent financial harm, and thus
10 Classmates’ agreement to offer them even modest compensation is fair. As to subclass
11 members, the record shows that they paid between \$10 and \$40 to become Gold
12 Members, with an average price around \$24. Classmates’ offer of \$3 is about an eighth
13 of what the average subclass member paid. This is a reasonable discount, given the
14 uncertainty of obtaining any recovery if this case went to trial.

15 The injunctive relief is an additional benefit to all class members. It requires
16 Classmates to make disclosures that would blunt future deceptive marketing practices.

17 The court’s final observation regarding the fairness and adequacy of the settlement
18 concerns attorney fees for class counsel. As the court just noted, the relief to class
19 members is not, standing alone, unreasonable. Collectively, however, it is not certain
20 what Classmates will pay to settle this action. There is no indication that its offer of
21 credit toward paid memberships will hurt its bottom line. To the extent that the credit
22 offer induces persons to pay for memberships that they otherwise would not, it may be a
23 financial boon to Classmates. The offer of cash to subclass members is different, but
24 perhaps not substantially so. For Classmates to pay out cash awards equaling the \$9.5
25 million cap on the settlement, every one of the approximately 3.1 million subclass
26 members would have to make a claim for the \$3 payment. As the parties are no doubt

1 aware, it is exceedingly unlikely that subclass members will do so. In the court's
2 experience, class members typically do not bother to make claims for a few dollars of
3 compensation. It is therefore highly likely that Classmates will pay only a tiny fraction of
4 \$9.5 million. Class counsel has indicated that they will seek up to \$1.3 million in
5 attorney fees. That amount is about 14% of \$9.5 million, and perhaps not coincidentally
6 just below the 15% limit on attorney fees that class counsel agreed to in the event it
7 sought fees as a percentage of a common fund awarded to class members. The court
8 cannot forecast what counsel will request for attorney fees, and cannot forecast the
9 methodology they will use to buttress that request. The court merely notes that if counsel
10 move for an award of attorney fees that is disproportionate to the payout to class
11 members, they should acknowledge as much, and explain why such a result is justified.
12 Thus, Plaintiffs should plan on obtaining information from the settlement administrator
13 regarding the number of class members making claims for cash payments, so that they
14 may submit that information in conjunction with the final approval process.

15 For all of the reasons stated above, the court preliminarily approves this class
16 action settlement. The remainder of this order reproduces Plaintiffs' proposed order,
17 except that it inserts dates where appropriate, and modifies paragraph 8 to provide class
18 members the option to opt out of the class via email. The preceding portion of this order
19 shall control in the event of any conflict between Plaintiffs' language and the court's
20 language.

21 **IV. ORDER**

22 This matter comes before the Court on Plaintiffs' Motion for Preliminary
23 Approval of Class Action Settlement. The parties have agreed, subject to final approval
24 by this Court following notice to the Settlement Class and Settlement Subclass, as
25 defined below, to settle this action upon the terms and conditions set forth in the
26 Settlement Agreement. The Court has reviewed the Class Action Settlement Agreement,

1 as well as all files, records, and proceedings to date in this matter.

2 IT IS HEREBY ORDERED:

3 1. **Preliminary Approval of Proposed Settlement.** The Settlement
4 Agreement is preliminarily approved as fair, reasonable and adequate. The Court also
5 finds that notice to members of the Settlement Class and Settlement Subclass should be
6 provided and a final fairness hearing on the Settlement Agreement should be held as set
7 forth in this Order.
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9 2. **Stay of Proceedings.** All proceedings in this action are hereby stayed and
10 suspended until further order of the Court, except such actions as may be necessary to
11 implement the Settlement Agreement and this Order.
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13 3. **Class Findings.** Solely for the purposes of the Settlement Agreement, the
14 Court preliminarily finds that the requirements of the Federal Rules of Civil Procedure,
15 the United States Constitution, the Rules of the Court and any other applicable law have
16 been met as to the Settlement Class and Settlement Subclass defined below, in that:
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18 (a) The Court preliminarily finds for purposes of settlement only that, as
19 required by FED. R. CIV. P. 23(a)(1), the Settlement Class and Settlement Subclass are
20 ascertainable from records maintained by Defendants, and the members of the Settlement
21 Class and Settlement Subclass are so numerous that their joinder before the Court would
22 be impracticable.
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1 (b) The Court preliminarily finds for purposes of settlement only that, as
2 required by FED. R. CIV. P. 23(a)(2), there are one or more questions of fact and/or law
3 common to the Settlement Class and the Settlement Subclass.

4 (c) The Court preliminarily finds for purposes of settlement only that, as
5 required by FED. R. CIV. P. 23(a)(3), the claims of the Plaintiffs are typical of the claims
6 of the Settlement Class and Settlement Subclass.

7 (d) The Court preliminarily finds, for purposes of settlement only, as required
8 by FED. R. CIV. P. 23(a)(4), that the Plaintiffs will fairly and adequately protect the
9 interests of the Settlement Class and the Settlement Subclass in that: (i) the interests of
10 the Plaintiffs and the nature of their alleged claims are consistent with those of the
11 members of the Settlement Class and Settlement Subclass, (ii) there appear to be no
12 conflicts between or among the Plaintiffs and the Settlement Class or Settlement
13 Subclass, and (iii) the Plaintiffs and the members of the Settlement Class and Settlement
14 Subclass are represented by qualified, reputable counsel who are experienced in
15 preparing and prosecuting complex consumer class actions.

16 (e) The Court finds for purposes of settlement only that, as required by FED.
17 R. CIV. P. 23(b)(2), final injunctive relief or corresponding declaratory relief is
18 appropriate respecting the Settlement Class and Settlement Subclass as a whole.

19 (f) The Court finds for purposes of settlement only that, as required by FED.
20 R. CIV. P. 23(b)(3), that questions of law or fact common to Settlement Class and
21 Settlement Subclass members predominate over any questions affecting only individual
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1 members, and that a class action is superior to other available methods for fairly and
2 efficiently adjudicating the controversy.

3 (g) The Court preliminarily finds for purposes of settlement only that, as
4 required by FED. R. CIV. P. 23(g), Counsel for Plaintiffs (“Class Counsel”) are capable
5 of fairly and adequately representing the interests of the Settlement Class and Settlement
6 Subclass, in that Class Counsel (i) have done appropriate work identifying or
7 investigating potential claims in the action; (ii) are experienced in handling class actions;
8 (iii) are knowledgeable of the applicable law; and (iv) have committed the necessary
9 resources to represent the Class.
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12 4. **Class Certification.** The Court, in conducting the settlement approval process as
13 required by FED. R. CIV. P. 23, preliminarily certifies the following Settlement Class
14 and Settlement Subclass under FED. R. CIV. P. 23(b)(2) and 23(b)(3):
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16 **“Settlement Class”**

17 All Persons, excluding Settlement Subclass members,
18 residing in the United States who were registered with or
19 subscribed to www.classmates.com at any time between
20 October 30, 2004 and the date of entry of this Order.

21 **“Settlement Subclass”**

22 All Persons residing in the United States who registered with
23 or subscribed to www.classmates.com and between January
24 1, 2007 and the date of entry of this Order, paid for a Gold
25 Membership subscription to www.classmates.com (and did
26 not previously receive a refund of such payment) as a result
27 of:

- 28 1. Upgrading to a Gold Membership through the process
on Classmates.com of seeking to see who visited their
Guestbook; or
2. Upgrading to a Gold Membership after clicking on a
link to Classmates.com in a Guestbook email, or
Connections email that included a Guestbook subject

1 line, and upgrading to a Gold Membership within the
2 same session activated by clicking on that link or
3 within the same day of clicking on that link; or

- 4 3. Upgrading to a Gold Membership within the same day
5 of receiving a Guestbook email or Connections email
6 that included a Guestbook subject line.

7 The following Persons are expressly excluded from the Settlement Class and Settlement
8 Subclass:

9 Defendants, all present or former officers and/or directors of Defendants,
10 Class Counsel, the Judge of this Court, the Judge's family and staff,
11 Defendants' counsel of record, and all Persons who make a timely and
12 valid election to be excluded from the Settlement Class and Settlement
13 Subclass in accordance with the provisions of the Individual Notice to
14 Settlement Class and Individual Notice to Settlement Subclass.

15 The Court appoints David Catapano and Anthony Michaels as representatives for
16 the Settlement Class and Settlement Subclass and Class Counsel as counsel for the
17 Settlement Class and Settlement Subclass.

18 4. **Final Approval Hearing.** A final approval hearing (the "Settlement
19 Hearing" or "Final Hearing") shall be held before this Court on October 27, 2010, at
20 10:00 a.m., to determine whether the Settlement Agreement is fair, reasonable and
21 adequate and should be approved. The Settlement Hearing may be postponed, adjourned,
22 or continued by order of the Court without further notice to the Settlement Class and
23 Settlement Subclass. After the Settlement Hearing, the Court may enter a Final Approval
24 Order and Judgment that will fully and finally adjudicate the rights of the Settlement
25 Class and Settlement Subclass members and the named parties to this lawsuit.

26 5. **Notice.** No later than ninety (90) days after the date of entry of this Order
27 (the "Notice Date"), the Settlement Administrator shall have a copy of the Individual
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1 Notice to Settlement Class and Settlement Class Claim Form and the Individual Notice to
2 Settlement Subclass and Settlement Subclass Claim Form in substantially the same form
3 as Exhibits A through Exhibit D of the Settlement Agreement sent or made available via
4 electronic mail to all members of the Settlement Class and Settlement Subclass. In
5 addition, the Settlement Administrator shall provide publication notice to potential
6 Settlement Class members and Settlement Subclass members by a *Wall Street Journal*
7 newspaper classified advertisement no smaller than one-eighth of a page, and establish a
8 website with settlement and claim administration information, within 30 days of the date
9 of entry of this Order.
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12 6. **Findings Concerning Notice.** The Court finds that electronic notice,
13 together with the proposed form of published notice, is the best practicable notice under
14 the circumstances and is as likely as any other form of notice to apprise potential
15 Settlement Class and Settlement Subclass members of the Settlement Agreement, and
16 their rights to opt out and to object. The Court further finds that such notice is
17 reasonable, that it constitutes adequate and sufficient notice to all persons entitled to
18 receive notice, and that it meets the requirements of Due Process.
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21 7. **Papers in Support of Settlement.** The parties to the Settlement
22 Agreement may file additional papers in support of the proposed settlement seven (7)
23 calendar days prior to the Final Hearing.

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25 8. **Right to Exclude.** Any Settlement Class or Settlement Subclass member
26 may choose to be excluded from the Settlement Class or Settlement Subclass, as the case

1 may be, by signing and submitting to the Settlement Administrator a Request For
2 Exclusion postmarked no later than thirty (30) days after the Notice Date, or by sending
3 an e-mail to the appropriate address, as set forth more fully in the Notice to Settlement
4 Class and Notice to Settlement Subclass.

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6 9. **Objections and Appearances**

7 (a) **Written Objections.** Any Settlement Class or Settlement Subclass
8 member may object to the fairness, reasonableness or adequacy of the Settlement
9 Agreement. Settlement Class and Settlement Subclass members may do so either on their
10 own or through counsel hired at their own expense. Any Settlement Class or Settlement
11 Subclass member who wishes to make a written objection to the Settlement Agreement
12 must serve a written statement of objection as set forth in the Notice along with any other
13 supporting materials, papers or briefs that he or she wishes the Court to consider
14 postmarked no later than thirty (30) calendar days after the Notice Date. The objection
15 must be sent to the Clerk of the Court **and** he or she must also serve such papers so as to
16 be received by Class Counsel and counsel for Defendants, as set forth below, no later
17 than thirty (30) calendar days after the Notice Date:

18 Mark A. Griffin and Amy Williams-Derry
19 Keller Rohrback L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052

20 **and to**

21 Stelman K. Keehnel and Russ Wuehler
22 DLA Piper LLP (US)
701 Fifth Avenue, Suite, 7000
23 Seattle, Washington 98104-7044

24 (b) **Appearance at Settlement Hearing.** Any Settlement Class or
25 Settlement Subclass member who has served an objection may appear at the Settlement
26 Hearing, either in person or through counsel hired at the Settlement Class or Settlement
27 Subclass member's expense, and object to the fairness, reasonableness or adequacy of the

1 Settlement Agreement. Any Settlement Class or Settlement Subclass member who
2 chooses to be heard must send a written notice of intent to appear to the Clerk of the
3 Court and on Class Counsel at the addresses listed above so as to be received no later
4 than thirty (30) calendar days after the Notice Date.

5 10. **Effect of Failure to Finally Approve the Settlement Agreement.** If (i)
6 the Court does not finally approve this Settlement Agreement, (ii) the Court does not
7 enter the Final Approval Order and Judgment dismissing the Consolidated Lawsuit with
8 prejudice and without leave to amend, (iii) Defendants terminate the Settlement
9 Agreement pursuant to Section 16.4 of the Settlement Agreement, or (iv) the Settlement
10 Agreement does not become final for any other reason, then:
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12 (a) The Settlement Agreement shall automatically become null and void and
13 have no further force or effect, and all proceedings that have taken place with regard to
14 this Settlement Agreement and the settlement shall be without prejudice to the rights and
15 contentions of the Parties hereto;
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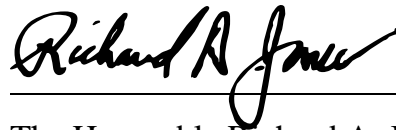
17 (b) The Settlement Agreement, all of its provisions (including, without
18 limitation, any provisions concerning class certification), and all negotiations, statements
19 and proceedings relating to the Settlement Agreement shall be without prejudice to the
20 rights of any of the Parties, each of whom shall be restored to their respective position as
21 of December 18, 2009;
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23 (c) The Settlement Agreement, any provision of the Settlement Agreement
24 (including, without limitation, the provisions concerning class certification), and the fact
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1 of the Settlement Agreement having been made, shall not be admissible or entered into
2 evidence for any purpose whatsoever; and

3 (d) Any judgment or order entered in connection with the Settlement
4 Agreement, including, without limitation, any order certifying the Settlement Class
5 and/or Settlement Subclass, will be vacated and will be without any force or effect.
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7 DATED this 19th day of April, 2010.

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10 The Honorable Richard A. Jones
11 United States District Judge
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