

Exhibit B

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HONORABLE JAMES L. ROBERT
NOTING DATE: February 17, 2023

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEPHEN J. TUTTLE, et al,

Plaintiffs,

v.

AUDIOPHILE MUSIC DIRECT INC. d/b/a
MUSIC DIRECT and MOBILE FIDELITY,
SOUND LAB, INC. d/b/a MOBILE FIDELITY
and/or MOFI,

Defendants.

No. 22-cv-01081-JLR

**REVISED UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT
AND NOTICE PROGRAM**

Plaintiffs Stephen Tuttle and Dustin Collman, on behalf of themselves and the putative class they seek to represent respectfully submit this Revised Unopposed Motion for Certification of Settlement Class and for Preliminary Approval of Class Action Settlement (“Revised Motion”).¹

Pursuant to the Court’s Order of January 20, 2023 (Dkt. #21), the Plaintiffs’ revisions primarily address the following topics:

¹ On January 27, 2023, third-parties Stiles, Flores, and Bitterman filed a Motion to Intervene and/or Stay the Settlement. Dkt. #23. That motion is noted for February 17, 2023. *Id.* Until and unless that motion is granted, the putative intervenors are not parties to this action. Nonetheless, Plaintiffs’ Counsel has noted this motion for the same day.

- 1 1. Additional information regarding the procedure and timeline for Class Members to
2 submit claim forms, and elect which form of relief they wish to receive, i.e., coupon,
3 partial refund, or return for full refund;
- 4 2. Additional information regarding the procedure and timeline for Class Members to return
5 their records for a full refund following final approval, and the mechanism for curing any
6 deficiencies with returned records;
- 7 3. Changes to the proposed notice program to increase saturation among both direct and
8 indirect purchasers of records; and
- 9 4. Correction of various scrivener’s errors, including captioned case numbers in supporting
10 materials and exhibits.

11 **I. INTRODUCTION.**

12
13 Defendants Audiophile Music Direct, Inc. (“Music Direct”) and Mobile Fidelity Sound
14 Lab, Inc. (“MoFi”) (collectively, “Defendants”) are business entities which market and sell
15 high-end vinyl record audio recordings. The records are mastered and manufactured by MoFi
16 and sold to the retail and wholesale market by both MoFi and Music Direct. This is a putative
17 class action lawsuit brought by Defendants’ customers and purchasers of certain of Defendants’
18 Original Master Recording (“OMR”) and Ultradisc One-Step (“One-Step”) series vinyl records
19 which were sourced from original analog master recordings and contained a direct stream digital
20 transfer step in the mastering chain (the “Applicable Records”).
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23 In the lawsuit, the Plaintiffs allege that Defendants represented that their collectable and
24 limited-edition OMR and One-Step series vinyl records were produced with “analog-only”
25 methods. Under these methods, a consumer record is produced using an analog master
26 recording, without any intervening digital transfer, translation, or storage. Vinyl records created

1 using analog-only methods are highly prized by audiophiles, and often carry a higher price point
2 in the primary and secondary markets. Plaintiffs allege that in reality, Defendants relied on
3 production methods which involved digital storage and translation, the absence of which was a
4 major selling point of their “analog-only” products. Plaintiffs allege that by misrepresenting the
5 source and provenance of the Applicable Records, Defendants acted unfairly and deceptively,
6 and breached their contractual obligations to original purchasers. Defendants deny all such
7 allegations.
8

9 As result of these claims, the Parties have reached a proposed Settlement which would
10 allow all original purchasers to either: return their Applicable Records to Defendants in exchange
11 for a full refund, plus any shipping and taxes, or alternatively, keep their Applicable Records and
12 receive either a refund equal to five percent (5%) of the Applicable Records’ purchase price, or a
13 coupon for ten percent (10%) of the Applicable Records’ purchase price towards other of
14 Defendant Music Direct’s or MoFi’s products. Under the proposed Settlement, Class Members
15 are able to make this selection in respect to each Applicable Record purchased from Defendants.
16 Thus, for Applicable Records whose value on the secondary market is higher than the purchase
17 price, Class Members can keep those Applicable Records and still receive other means of fair
18 and reasonable consideration.
19

20 Because the Settlement Class is comprised of both individuals directly purchasing from
21 Defendants and those who purchased from other retailers selling Applicable Records, the Parties
22 propose a substantial and intensive Notice Program. Under that program, the Settlement
23 Administrator will send Direct Mailed Full Notice by U.S. Mail and will distribute Emailed
24 Summary Notice by e-mail to all Class Members who purchased directly from Defendants. To
25 reach those who purchased Applicable Records from other retailers, the Settlement Administrator
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1 will advertise the Settlement in industry and hobbyist print and online publications, a Facebook ad
2 campaign, as well as on Defendants' own Music Direct and MoFi retail websites. This multi-front
3 approach will ensure strong notice saturation among the proposed Settlement Class.
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5 Finally, the proposed Settlement is the result of extensive and arm's-length negotiations
6 among the Parties and their counsel and is a fair compromise in light of potential risks of continued
7 litigation.

8 **II. FACTUAL BACKGROUND.**

9 **A. Defendants' Marketing of the Applicable Records.**

10 Defendant MoFi is a manufacturer of high-end audio recordings, including, without
11 limitation, the Applicable Records, which it sells at retail online to consumers and wholesale to
12 other retailers. Defendant Music Direct is a primary retail and wholesale seller of MoFi
13 recordings, including, without limitation, the Applicable Records. Between March 19, 2007, and
14 approximately July 27, 2022, the Defendants marketed and sold vinyl records labeled "Original
15 Master Recording" or "Ultra-Disc One-Step," including, without limitation, the Applicable
16 Records.
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18 In describing the Applicable Records, Defendants frequently represented that they were
19 "Mastered from the Original Master Recordings..." Plaintiffs allege that among the audiophile
20 community, this representation and many others were understood to mean that Defendant MoFi
21 was using an all-analog "mastering chain" to produce its vinyl records.² Plaintiffs allege an all-
22 analog mastering chain inherently limits the number of producible copies because each newly
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26 ² A "master chain" is the method used to produce vinyl records from an original audio
master studio recording or tape.

1 stamped record wears and degrades the source master lacquer. Plaintiffs further allege, for this
2 reason, many of Music Direct's products were sold in limited runs, which increased their
3 collectability to audiophiles and earned a higher price point because of their respective scarcity
4 on the primary and secondary markets. Defendants deny all such allegations.

6 **B. Potential Class Members.**

7 Prior to reaching this Settlement, Music Direct produced sales data to Plaintiffs' Counsel
8 for approximately one-hundred and twenty-three (123) OMR and One-Step vinyl record
9 products. *See* Dkt. #19, Declaration of Jim Davis, President of Music Direct.³ This data showed
10 that Music Direct had sold over six-hundred thousand (600,000) OMR and One-Step vinyl
11 records during the relevant period, of which approximately one-quarter were to retail customers.
12 *See* First Declaration of Duncan C. Turner, Dkt. #18, ¶2. The remaining three-quarters were sold
13 wholesale by Music Direct to other retailers, *e.g.* Target and Walmart, who then sold the product
14 to consumers. *Id.* Because the proposed Settlement Class is comprised of both direct and indirect
15 primary purchasers of Defendants' products, it is difficult to estimate the potential class size.
16 Nonetheless, Defendants estimate that the proposed Class is comprised of at least 20,000 direct
17 purchasers and 20,000 indirect purchasers.

19 **C. Procedural Posture.**

20 This action was filed on August 2, 2022. Dkt. #1. On September 28, 2022, the
21 Defendants appeared through counsel. Dkt. #5. On December 20, 22, the Plaintiffs amended their
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26 ³ Although Defendants produced data for one-hundred and twenty-four (124) records, it
later produced information showing that one (1) was not relevant to Plaintiffs' allegations.

1 complaint to describe the Defendant parties more accurately. Dkt. #18. To date, no formal
2 discovery has occurred and Defendants have not answered.

3 Plaintiffs are aware of at least four other putative class actions against Defendants arising
4 from substantially similar claims over its “all-analog” process:

- 5 – *Bitterman v. Mobile Fidelity Sound Lab, Inc.* – #1:22-cv-04714 (N.D. Illinois)⁴
- 6 – *Stiles v. Mobile Fidelity Sound Lab, Inc.* – #1:22-cv-04405 (N.D. Illinois)
- 7 – *Allen v. Audiophile Music Direct*, 22:cv-08146 (C.D. California)
- 8 – *Molinari v. Audiophile Music Direct et al.* – 22-cv-05444 (N.D. California)

9 To Plaintiffs’ knowledge, none of these cases have been consolidated or certified for class
10 treatment.

11 On January 27, 2023, the plaintiffs in *Bitterman* and *Stiles* filed their Motion to Intervene
12 and/or Stay the Settlement. Dkt. #23.

13 **D. Terms of the Proposed Settlement.**

14 The terms of the Parties’ proposed Settlement are within the Amended Settlement
15 Agreement. *See* Second Declaration of Duncan C. Turner, Ex. 1. For purposes of this motion, the
16 following discussion summarizes the Amended Settlement Agreement’s terms.

17 **1. The Settlement Class.**

18 The proposed Settlement Class is comprised of:

19 All original retail consumers in the United States who, from March 19, 2007,
20 through July 27, 2022 purchased, either directly from a Defendant or other retail
21 merchants, new and unused Mobile Fidelity Sound Lab, Inc. (“MoFi”) vinyl
22 recordings which were marketed by Defendants using the series labeling
23 descriptors “Original Master Recording” and/or “Ultradisc One-Step,” that were
24 sourced from original analog master tapes and which utilized a direct stream digital
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26 ⁴ As described in fn. 1, the *Bitterman* and *Stiles* plaintiffs seek to intervene. Dkt. #23.

1 transfer step in the mastering chain, and provided that said purchasers still own said
2 recordings (the “Applicable Records”). Excluded from the Class are persons who
3 obtained subject Applicable Records from other sources.
4 Second Turner Dec., Ex. 1, ¶ 4.28. To date, Defendants have identified approximately one-
5 hundred and twenty-three (123) Applicable Records marketed in this fashion. Dkt. #19.
6 Although investigation is ongoing and additional Applicable Records may be identified prior to
7 Notice publication, the Settlement is structured as to only effect the rights of purchasers of
8 specific albums, not all of Defendants’ customers generally. *See* Amended Settlement
9 Agreement, Exhibit A.

10 As previously described, based on available sales data for these albums, the Settlement
11 Class is estimated to comprise over forty fifty thousand (40,000) individual purchasers. Dkt. #19,
12 ¶5.

13 **2. Financial Consideration and Release.**

14 Under the terms of the Amended Settlement Agreement, the Defendant agrees to provide
15 Class Members with the two different approaches to relief. Second Turner Dec., Ex. 1, ¶5.1(a-d).
16 For individuals who want to return their Applicable Records, Class Members will receive a full
17 refund including associated taxes and shipping. *Id.*, ¶5.1(a). For individuals who want to keep
18 their Applicable Records, they may elect to either receive a coupon of 10% off another Music
19 Direct purchase or a refund of 5% of the record’s original purchase price and associated taxes
20 and shipping. *Id.*, ¶5.1(b-c). The total gross value of available relief is expected to be over \$25
21 million dollars.
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23 In consideration, the Settlement Class members shall release the Defendants and other
24 released parties from:
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26 any and all claims which arise out of or are in any way related to Defendants’
marketing, promotion and sale of the Applicable Records during the Applicable

1 Period (including, without limitation, Unknown Claims as defined herein), demands,
2 rights, liabilities, and causes of action of every nature and description whatsoever
3 including, without limitation, statutory, constitutional, contractual, or common law
4 claims, whether known or unknown, whether or not concealed or hidden, whether
5 contingent or vested, against Defendants, the Defendants' Releasees, or any of them,
6 that accrued, had accrued, or could have accrued at any time on or prior to the
7 Effective Date for any type of relief whatsoever including, without limitation,
8 compensatory damages, treble damages, unpaid costs, penalties, statutory damages,
9 liquidated damages, punitive damages, interest, attorneys' fees, litigation costs,
10 restitution, rescission, or equitable relief, based on any and all claims which are or
11 could have been raised in the Litigation either individually or on a class-wide basis
12 related to the Applicable Records.

13 For purpose of Settlement, "Unknown Claims" are defined as:

14 any Released Claims which the Class Representatives or any Class Member does
15 not know or suspect to exist in his, her, or its favor at the time of the entry of the
16 Order Granting Final Approval of Settlement and which, if known by him, her, or
17 it might have affected his, her, or its settlement with and release of Defendants
18 and the Defendants' Releasees. The Class Representatives and each Class
19 Member may hereafter discover facts in addition to or different from those which
20 they now know or believe to be true with respect to the subject matter of the
21 Released Claims, but the Class Representatives and each Class Member, upon
22 the Effective Date, shall be deemed to have, and by operation of the Order Granting
23 Final Approval of Settlement shall have, fully, finally, and forever settled and
24 released any and all Released Claims, known or unknown, suspected or
25 unsuspected, contingent or non-contingent, whether or not concealed or hidden,
26 which then exist, or heretofore have existed upon any theory of law or equity now
existing or coming into existence in the future including, but not limited to, conduct
which is negligent, reckless, intentional, with or without malice, or a breach of any
duty, law, regulation, or rule, without regard to the subsequent discovery or
existence of such different or additional facts. Each of the Class Representatives
and each Class Member expressly waive and relinquish, to the fullest extent
permitted by law, the provisions, rights and benefits of Section 1542 of the
California Civil Code, or any similar provision under federal or state law that
purports to limit the scope of a general release. Section 1542 provides: A
GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
DEBTOR OR RELEASED PARTY. The Class Representatives acknowledge, and
the Class Members shall be deemed by operation of the Order Granting Final
Approval of Settlement to have acknowledged, that the foregoing waivers were

1 separately bargained for and key elements of the Settlement of which these releases
2 are a part.

3 *See* Second Turner Dec., Ex. 1, ¶4.26 & 4.32.

4 The Defendants have retained Kroll Settlement Administration, LLC (“Administrator”)
5 to act as notice, and claims administrator, and will bear any costs associated with preparation and
6 distribution of the Notice to the Settlement Class, reception and reporting of opt-outs and
7 objectors, receipt of claim materials, validation of claim forms and proofs, and distribution of
8 the Settlement funds.

9
10 **3. Settlement Payments.**

11 The election to receive a full/partial refund or coupon will be available to all Class
12 Members who do not opt out of the Settlement and who submit valid Proofs of Purchase and
13 Ownership. Class Members will have ninety (90) days from Notice publication to submit a valid
14 claim in order to receive compensation. Second Turner Dec., Ex. 1, ¶4.25. If the Settlement
15 receives final approval, qualified Class Members who did not select the return option will
16 receive their payments from the Administrator within thirty (30) days of: (1) expiration for the
17 period to appeal or (2) any appeal affirming final approval of the Settlement becomes final. *Id.*,
18 ¶5.5.1. Qualified Class Members who elected to return all or some of their records for a full
19 refund will receive a pre-paid return shipping label with tracking number and return instructions
20 at the same time. *Id.*, ¶5.5.2. Qualified Class Members will have ninety (90) days to return their
21 Applicable Records from the date they receive their pre-paid label, and will receive their
22 payments from the Administrator within thirty (30) days after receipt of their records. *Id.*
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4. Notice Program.

In conjunction with preliminary approval, Plaintiffs respectfully request the Court approve the Notice and claims program in which the Administrator will (1) send Full Notice and Claim Forms by U.S. Mail and will e-mail Summary Notices, with a link to the Settlement Website, to Class Members who directly purchased from Defendants. *See* Second Turner Dec., Ex. 1, Amended Settlement Agreement, ¶5.3.3; Ex. C & D; *see also* Declaration of Jeanne Finegan, generally. To reach indirect purchasers, the Administrator will publish notice on industry and audiophile online forums and media sources, and on Defendants' websites. *See* Second Turner Dec., Ex. 1, Amended Settlement Agreement, ¶5.3.2. Further, the Administrator will create a website for Class Members to electronically submit their Proofs of Purchase and Ownership in order to claim compensation. *Id.*, ¶5.3.4. The Settlement is conditioned upon no more than 10% of the Settlement Class opting out. *Id.*, ¶5.4.3.

5. Plaintiffs' Service Award.

Plaintiffs will ask the Court to approve a service award of \$20,000 (\$10,000 for each Class Representative) to be paid out directly by Defendants. *Id.*, ¶5.7.2. These awards will compensate Plaintiffs for their time and effort serving as the named plaintiffs and for the risks they undertook in prosecuting the case. The enforceability of the Settlement is not contingent on the Court's approval of the service award in the amount sought by the Plaintiffs.

6. Attorney's Fees and Litigation Expenses.

Plaintiffs' Counsel will ask for an award of attorney's fees of no more than \$290,000, to be paid directly by Defendants. *Id.*, ¶5.7.1. The purpose of this award would be to compensate and reimburse Plaintiffs' Counsel for work already performed on the case, and the work necessary to oversee and shepherd the proposed Settlement to completion. The enforceability of

1 the Settlement is not contingent on the Court's approval of an award of attorney's fees and costs
2 in the amounts sought by Plaintiffs' Counsel.

3 **7. Administrative Costs.**

4 Defendants shall bear any expenses and costs arising from administration of Settlement
5 class claims. *Id.*, ¶5.8. Subject to the Court's approval, Defendants have retained Kroll
6 Settlement Administration, LLC as the Settlement Administrator.
7

8 **8. Proposed Settlement Timeline.**

9 In summary, the Parties propose the following timelines for issuing Notice, Claim Form
10 submission, and briefing issues related to final approval: and subsequently distributing
11 compensation to Qualified Class Members:
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14 Event	Days From Preliminary Approval	Days From Triggering Event
15 Preliminary Approval Order	0	
16 Notice Deadline	45	45
17 Exclusion/Objection Deadline	105	60
18 Claim's Administrator's Filing of Exclusion Requests	112	7
19 Class Member Claim Form Submission Deadline	135	90
20 Plaintiffs' Counsels' Fee Motion Deadline	135	30
21 Parties' Final Approval Motion Deadline	135	30
22 Response to Objection Deadlines	135	30
23 Final Approval Hearing	145-170	

24 If final approval is granted, the Parties propose the following timeline for distributing
25 compensation, and processing returned Applicable Records:
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Event	Days From Effective Date	Days From Triggering Event
Effective Date	0	
Distribution of Non-Return Class Member Proceeds	30	30
Distribution of Return Labels to Return Members	30	30
Deadline for Return of Elected Records	120	90
Period to Identify Deficiencies	140	20
Payment for Non-Deficient Returns	150	10
Deficiency Cure Period	195	45
Payment for Cured Deficient Returns	205	10

E. Considerations In Reaching Settlement.

The proposed Settlement is the result of substantial arm's-length negotiations between the opposing parties. While the Plaintiffs are confident that the Defendants' own marketing materials and admissions would allow them to demonstrate the presence of unfair and deceptive marketing of "all-analog" vinyl records, they also risk potential difficulties in demonstrating credible injury or harm. For example, many of the effected albums sell on the secondary market, even opened, and used, for more than their original MSLRP. Furthermore, Plaintiffs also believe that Class Members face potential difficulties in demonstrating that the DSD-master chain products they received were lower quality than the all-analog master chain promised by Defendants with its OMR and One-Step products. First Turner Dec., Dkt. #18, ¶4.

To ascertain potential damages and class size, Plaintiffs' Counsel reviewed retail and wholesale sales data produced by Defendants for approximately one-hundred and twenty-three (123) OMR and One-Step albums. *Id.*, ¶2; Dkt. #19, ¶3.

Here, the Plaintiffs alleged four distinct causes of action: (1) violation of the Washington State Consumer Protection Act (RCW 19.86), (2) breach of contract, (3) unjust enrichment, and

1 (4) violation of the Illinois Consumer Fraud Act (815 ILCS 505/2). Dkt. #14, pg. 9-13. Plaintiffs
2 originally raised the CPA on behalf of a sub-class of Washington residents, although the
3 negotiated settlement does not make any distinction between Washington and non-Washington
4 Class Members. Second Turner Dec., Ex. 1, Amended Settlement Agreement, ¶4.28. For
5 purposes of this Settlement, all Class Members are treated the same. *Id.* In considering the
6 proposed Settlement, Plaintiffs’ counsel assessed each claim and the likelihood of prevailing on
7 that claim, as well as the various methods for establishing damages of limited-run or collectible
8 merchandise. After analyzing data produced by Defendants and considering arguments raised by
9 Defendants, Plaintiffs’ Counsel believes the proposed Settlement is fair and reasonable.
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11 III. AUTHORITY AND ARGUMENT

12 A. The Settlement Approval Process.

13 As a matter of “express public policy,” federal courts strongly favor and encourage
14 settlements, particularly in class actions and other complex matters, where the inherent costs,
15 delays, and risks of continued litigation might otherwise overwhelm any potential benefit the
16 class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.
17 1992) (noting the “strong judicial policy that favors settlements, particularly where complex class
18 action litigation is concerned”); *see also* William B. Rubenstein, *Newberg on Class Actions*
19 (“Newberg”) § 13.1 (5th ed. Updated 2015) (citing cases). Here, the proposed Settlement is the
20 best vehicle for the Settlement Class Members to receive the relief to which they may be entitled
21 in a prompt and efficient manner.
22

23 The Manual for Complex Litigation describes a three-step procedure for approval of
24 class action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination
25 of notice of the settlement to all affected settlement class members; and (3) a “fairness hearing”
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1 or “final approval hearing,” at which settlement class members may be heard regarding the
2 settlement, and at which evidence and argument concerning the fairness, adequacy, and
3 reasonableness of the settlement may be presented. *Manual for Complex Litigation (Fourth)*
4 (“MCL 4th”) §§ 21.632 – 21.634, at 432–34 (2014). This procedure safeguards settlement class
5 members’ due process rights and enables the court to fulfill its role as the guardian of class
6 interests. *See* Newberg § 13.1.

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8 With this motion, the Parties request that the Court take the first step in the settlement
9 approval process by granting preliminary approval of the proposed Amended Settlement
10 Agreement. The purpose of preliminary evaluation of proposed class action settlements is to
11 determine whether the settlement “is within the range of possible approval” and thus whether
12 notice to the settlement class of the settlement’s terms and the scheduling of a formal fairness
13 hearing is worthwhile. Newberg § 13.13. *See City of Seattle*, 955 F.2d at 1276 (in context of
14 class action settlement, appellate court cannot “substitute [its] notions of fairness for those of the
15 [trial] judge and the parties to the agreement,” and will reverse only upon strong showing of
16 abuse of discretion) (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 626 (9th
17 Cir. 1982)). The Court’s grant of preliminary approval will allow the Settlement Class to receive
18 direct and publication notice of the proposed Amended Settlement Agreement’s terms, and the
19 date and time of the Final Approval Hearing, at which Settlement Class Members may be heard
20 regarding the Amended Settlement Agreement, and at which time further evidence and argument
21 concerning the settlement’s fairness, adequacy, and reasonableness may be presented. *See* MCL
22 4th § 21.634.
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1 **B. The Criteria for Settlement Approval Are Satisfied.**

2 The Ninth Circuit puts “a good deal of stock in the product of an arms-length, non-
 3 collusive, negotiated resolution.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir.
 4 2009). To assess a settlement proposal, courts must balance the strength of the Plaintiffs’ case;
 5 the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining
 6 class action status throughout the trial; the amount offered in settlement; the extent of discovery
 7 completed and the state of the proceedings; the experience and views of counsel; and the reaction
 8 of the class members to the proposed settlement. *In re Online DVD-Rental Antitrust Litig.* (“*In*
 9 *re Online DVD*”), 779 F.3d 934, 944 (9th Cir. 2015); *McKinney-Drobnis v. Oreshack*, 16 F.4th
 10 594, 607 (9th Cir. 2021) (listing factors from the 2018 amendments to FRCP 23 as “(A) the class
 11 representatives and class counsel have adequately represented the class; (B) the proposal was
 12 negotiated at arm’s length; (C) the relief provided for the class is adequate, taking into account:
 13 (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of
 14 distributing relief to the class, including the method of processing class-member claims; (iii) the
 15 terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any
 16 agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class
 17 members equitably relative to each other.”).

18 **1. The Settlement is the Product of Serious, Informed, and Non-Collusive Negotiations.**

19 The Court’s role is to ensure that “the agreement is not the product of fraud or
 20 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
 21 whole, is fair, reasonable and adequate to all concerned.” *Hanlon v. Chrysler Corp.*, 150 F.3d
 22 1011, 1027 (9th Cir. 1998) (internal quotes and citations omitted); *see also In re Online DVD*,
 23 779 F.3d at 944 (noting settlements in class actions “present unique due process concerns for
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1 absent class members,” including the risk that class counsel “may collude with the defendants”
2 (quoting *In re Bluetooth Headset Prods. Liab. Litig.* (“*In re Bluetooth*”), 654 F.3d 935, 946 (9th
3 Cir. 2010)).

4 The Settlement is the result of extensive, arm’s-length negotiations between experienced
5 attorneys for both parties who are competent practitioners in class action litigation in general and
6 with the legal and factual issues of this case. First Turner Dec., Dkt. #18, ¶15.

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8 **2. The Settlement is Fair and Reasonable In Light of the Alleged Claims and Potential**
9 **Defenses.**

10 The Amended Complaint asserts claims for violations of Washington and Illinois
11 consumer-protection statutes, as well as breach of contract and unjust enrichment. Dkt. #14, pg.
12 9-13. The Amended Complaint also seeks prejudgment interest, exemplary damages, and
13 attorney’s fees and costs. *Id.*

14 Although this case was conditionally settled before the determination of key legal issues
15 in dispute, the Defendants expressed their intention, if necessary, to contest the issue of class
16 certification, and Plaintiffs’ ability to demonstrate harm or injury resulting from the presence of
17 DSD within the OMR and One-Step master chains. The recoverability of prejudgment interest is
18 highly uncertain because extensive analysis was required to identify the full scope of Settlement
19 Class Members’ damages. Defendants would likely argue that such analysis precludes
20 recoverability of prejudgment interest. Finally, the recoverability of exemplary damages is also
21 uncertain because the Defendants would likely argue that the product Class Members received
22 was auditorily indistinguishable from that promised.
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1 **3. The Settlement Provides Substantial Relief and Treats All Settlement Class**
2 **Members Fairly.**

3 As previously described, the Settlement provides that Class Members will have the
4 opportunity to return their Applicable Records for a full refund, or alternatively, to keep their
5 records and claim a 5% refund or 10% coupon towards future purchases from Defendants.
6 Second Turner Dec., Ex. 1, ¶5.1(a-d). Further, Class Members can elect which method of relief
7 to receive for each individual album they purchased and have in their possession. *Id.* Therefore,
8 the Settlement structure not only fairly distributes compensation each Class Member paid for
9 each Applicable Record, but it also allows Class Members to make this election while
10 considering the resale value of each Applicable Record on the secondary market.

11 **4. Plaintiffs' Requested Fees Are Reasonable.**

12 Plaintiffs' Counsel will seek an award of up to \$290,000 for reasonable fees and costs
13 occurred in prosecuting this action. *Id.*, ¶5.7.1. These fees will be borne and paid directly by
14 Defendants and will not reduce the relief available to Class Members. *Id.*

15 The Ninth Circuit has approved two methods for calculating attorneys' fees depending on
16 the circumstances: the lodestar method and the percentage-of-recovery method. Under the
17 lodestar method, the prevailing attorneys are awarded an amount calculated by multiplying the
18 hours they reasonably expended on the litigation by their reasonable hourly rates. *Staton v.*
19 *Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003). "Under the percentage-of-recovery method, the
20 attorneys' fees equal some percentage of the common settlement fund..." *In re Online DVD*,
21 779 F.3d at 949. Regardless of the method, "courts have an independent obligation to ensure
22 that the award, like the settlement itself, is reasonable." *In re Bluetooth*, 654 F.3d at 941.
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1 The benchmark award is 25% of the common fund or gross recovery. *Hanlon v. Chrysler*
2 *Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). Plaintiffs' Counsel's request is approximately 2.7%
3 of the potential estimated non-exemplary relief available to direct purchase Class Members. *See*
4 *First Turner Dec.*, Dkt. #18, ¶3. When indirect purchaser Class Members are included, the fee
5 request is closer to 1.1% of total non-exemplary relief. *Id.*

7 Plaintiffs' Counsel were confident in their ability to succeed at class certification and at
8 trial. Nevertheless, success was by no means guaranteed, especially considering the complexity
9 of the issues involved. Because Plaintiffs' Counsel agreed to prosecute this case on a
10 contingency basis with no guarantee of ever being paid, they faced substantial risk if they
11 proceeded to trial.

13 Prior to final approval, Plaintiffs' Counsel will file a separate motion for an award of
14 attorney's fees and costs, addressing in greater detail the facts and law supporting their fee
15 request in light of all of the relevant facts.

16 **5. The Requested Service Award Is Reasonable.**

17 “[I]ncentive awards that are intended to compensate class representatives for work
18 undertaken on behalf of a class ‘are fairly typical in class action cases.’” *In re Online DVD*,
19 779 F.3d at 943 (quoting *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)).
20 Incentive or service awards are generally approved so long as the awards are reasonable and
21 do not undermine the adequacy of the class representatives. *See Radcliffe v. Experian Info.*
22 *Solutions*, 715 F.3d 1157, 1164 (9th Cir. 2013) (finding service award must not “corrupt the
23 settlement by undermining the adequacy of the class representatives and class counsel”). For
24 example, if a settlement explicitly conditions a service award on the class representative's
25 support for the settlement, the service award is improper. *See id.* By contrast, where a
26

1 settlement “provide[s] no guarantee that the class representatives would receive incentive
2 payments, leaving that decision to later discretion of the district court,” a service award may
3 be appropriate.” *In re Online DVD*, 779 F.3d at 943.

4 Here, the Plaintiffs individually request service awards of \$10,000.00, or an amount the
5 Court deems appropriate. This value reflects the proposed Class Members’ high degree of
6 participation in the investigation of their claims, as well as those of their fellow members. It also
7 reflects their active participation in negotiation of this Settlement, and their substantial
8 contribution to settlement terms which ultimately benefited the Class. First Turner Dec., Dkt.
9 #18, ¶6. Plaintiffs’ support of the Settlement is independent of any service award and not
10 conditioned on the Court awarding any particular amount or any award at all, in stark contrast to
11 *Radcliffe*. Thus, Plaintiffs’ adequacy as class representatives is unaffected by an appropriate
12 service award that recognizes their efforts and contributions to the case.

15 **6. The Proposed Notice Program Is Constitutionally Sound.**

16 Rule 23(e)(1) requires the Court to “direct notice in a reasonable manner to all class
17 members who would be bound by” a proposed settlement. Fed. R. Civ. P. 23(e)(1); *see also*
18 MCL 4th § 21.312. The best practicable notice is that which is “reasonably calculated, under
19 all the circumstances, to apprise interested parties of the pendency of the action and afford them
20 an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339
21 U.S. 306, 314 (1950). According to the Manual for Complex Litigation, a settlement notice
22 should do the following:

- 24 ● Define the class;
- 25 ● Describe clearly the options open to the class members and the
26 deadlines for taking action;
- Describe the essential terms of the proposed settlement;

- 1 • Disclose any special benefits provided to the class representative;
- 2 • Indicate the time and place of the hearing to consider approval of the
- 3 settlement, and the method for objecting to or opting out of the settlement;
- 4 • Explain the procedures for allocating and distributing settlement funds, and,
- 5 if the settlement provides different kinds of relief for different categories of
- 6 class members, clearly set out those variations;
- 7 • Provide information that will enable class members to calculate or at least
- 8 estimate their individual recoveries; and
- 9 • Prominently display the address and phone number of class counsel and the
- 10 procedures for making inquiries.

11 The proposed forms of notice, attached as Exhibits C & D to the Amended Settlement
 12 Agreement, satisfy all of the above criteria. The proposed Notices are clear, straightforward,
 13 and provides persons in the Settlement Class with enough information to evaluate whether to
 14 participate in the settlement. Thus, the Notices satisfy the requirements of Rule 23. *Phillips*
 15 *Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (explaining a settlement notice must
 16 provide settlement class members with an opportunity to present their objections to the
 17 settlement).

18 The Administrator will send Full Notices and Claim Forms by U.S. Mail (Ex. D) and
 19 Summary Notices (Ex. C), with a hyperlink to the Settlement Website, by e-mail to all direct
 20 purchasers of effected albums from Defendants. Second Turner Dec., Ex. 1, ¶5.3.3. For indirect
 21 purchasers who bought Defendants' products from other retailers, the Administrator will publish
 22 a media campaign to notify Settlement Class Members of their rights and applicable deadlines
 23 and invite them to submit timely claims. *Id.*, ¶5.3.2. This Notice Program satisfies due process
 24 especially because Rule 23 does not require that each potential class member receive actual
 25 notice of the class action. *Mullane*, 339 U.S. at 316 (explaining that the Supreme Court "has not
 26

1 hesitated to approve of resort to publication as a customary substitute in [a] class of cases where
 2 it is not reasonably possible or practicable to give more adequate warning”).

3 All in all, the Notice Program constitutes the best notice practicable under the
 4 circumstances, provides due and sufficient notice to the Settlement Class, and fully satisfies the
 5 requirements of due process and Rule 23. *See* Declaration of Jeanne Finegan, ¶30.
 6

7 **C. Provision Certification of the Class Is Appropriate.**

8 For settlement purposes only the Parties have agreed to certify the Settlement Class and
 9 respectfully request that the Court provisionally certify the Settlement Class defined as:

10 All original retail consumers in the United States who, from March 19, 2007,
 11 through July 27, 2022 purchased, either directly from a Defendant or other retail
 12 merchants, new and unused Mobile Fidelity Sound Lab, Inc. (“MoFi”) vinyl
 13 recordings which were marketed by Defendants using the series labeling descriptors
 14 “Original Master Recording” and/or “Ultradisc One-Step,” that were sourced from
 15 original analog master tapes and which utilized a direct stream digital transfer step
 in the mastering chain, and provided that said purchasers still own said recordings
 (the “Applicable Records”). Excluded from the Class are persons who obtained
 subject Applicable Records from other sources.

16 Second Turner Dec., Ex. 1, ¶4.28. As detailed below, the Settlement Class satisfies the applicable
 17 certification requirements.

18 **1. The Rule 23(a) Factors Are Met for Settlement Purposes.**

19 **a. Numerosity.**

20 “The prerequisite of numerosity is discharged if ‘the class is so large that joinder of all
 21 members is impracticable.’” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)
 22 (quoting Fed. R. Civ. P. 23(a)(1)). “It is a long-standing rule that ‘impractical’ does not mean
 23 ‘impossible’ rather, impracticality means only ‘the difficulty or inconvenience of joining all
 24 members of the class.’” *McClusky v. Trustees of Red Dot*, 268 F.R.D. 670, 673 (W.D. Wash.
 25 2010). The Settlement Class herein includes approximately over 20,000 direct purchasers,
 26

1 rendering joinder impracticable. *See McCluskey v. Trs. of Red Dot Corp. Emp. Stock*
2 *Ownership Plan & Trust*, 268 F.R.D. 670, 674 (W.D. Wash. 2010).

3 **b. Commonality.**

4 The commonality requirement of Rule 23(a)(2) is satisfied because the questions of law
5 common to the Settlement Class are, in fact, identical, and the questions of fact address merely
6 each individual customer's claim, and the answers to these questions can all be derived from a
7 common database and associated sales data. Because persons in the Settlement Class here all
8 allegedly suffered the same injury and are generally subject to the same defenses, commonality
9 is satisfied for settlement purposes.
10

11 **c. Typicality.**

12 "Typicality refers to the nature of the claim or defense of the class representative, and not
13 to the specific facts from which it arose or the relief sought." *Hanon v. Dataprods. Corp.*, 976
14 F.2d 497, 508 (9th Cir. 1992). "[R]epresentative claims are typical if they are reasonably co-
15 extensive with those of absent class members; they need not be substantially identical." *Hanlon*,
16 150 F.3d at 1020. Here, the representatives were direct customers of Defendants' during the
17 relevant period, and purchased both OMR and Ultradisc One-Step products. They are not
18 asserting claims different than those of the remaining Settlement Class Members. Because
19 Plaintiffs' claims arise from the same course of conduct that affected all Settlement Class
20 Members, typicality is satisfied for settlement purposes.
21

22 **d. Adequacy of Representation.**

23 Adequacy requires the representative of a class to provide fair and adequate
24 representation of the class. Fed. R. Civ. P. 23(a)(4). "To determine whether named plaintiffs
25 will adequately represent a class, courts must resolve two questions: '(1) do the named plaintiffs
26

1 and their counsel have any conflicts of interest with other class members and (2) will the named
2 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Ellis v.*
3 *Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (quoting *Hanlon*, 150 F.3d at 1020).
4 In the context of a class settlement, examination of potential conflicts of interest “is especially
5 critical.” *In re Online DVD*, 779 F.3d at 942 (internal marks and quotation omitted). That said,
6 courts will not deny class certification on the basis of “speculative” or “trivial” conflicts. *See id.*
7 (finding settlement class representatives adequate and overruling objection that proposed \$5,000
8 service award created a conflict of interest).

9
10 Plaintiffs have no interests that are antagonistic to or in conflict with persons in the
11 Settlement Class they seek to represent. They suffered the same alleged deception and unfair
12 business practices that all persons in the Settlement Class allegedly suffered. Class Counsel are
13 active practitioners in consumer and class action litigation, including cases very similar to this
14 one. *See First Turner Dec.*, Dkt. #18, ¶12. The requirements of Rule 23(a) are satisfied for
15 settlement purposes.

16 17 **2. The Rule 23(b)(3) Factors Are Satisfied for Settlement Purposes.**

18 Rule 23(b)(3)’s predominance requirement tests whether proposed classes are
19 “sufficiently cohesive to warrant adjudication by representation.” *Hanlon*, 150 F.3d at 1022
20 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The predominance inquiry
21 measures the relative weight of the common questions. *Amchem*, 521 U.S. at 624. Common
22 issues predominate here for settlement purposes because the central liability question in this case,
23 whether Defendants are liable for their alleged misrepresentation that OMR Ultradisc One-Step
24
25
26

1 products were produced using an “all-analog” master chain, applies to all Settlement Class
2 Members.

3 Because the claims are being certified for purposes of settlement, there are no issues
4 with manageability. *Amchem*, 521 U.S. at 620 (“Confronted with a request for settlement-only
5 certification, a district court need not inquire whether the case, if tried, would present
6 intractable management problems ... for the proposal is that there be no trial.”). Additionally,
7 resolution of thousands of claims in one action is far superior to individual lawsuits and
8 promotes consistency and efficiency of adjudication. *See Id.* at 617 (noting the “policy at the
9 very core of the class action mechanism is to overcome the problem that small recoveries do
10 not provide the incentive for any individual to bring a solo action prosecuting his or her
11 rights”). Certification for purposes of settlement is appropriate.

12
13
14 **E. Scheduling a Final Approval Hearing Is Appropriate.**

15 The last step in the settlement approval process is a final approval hearing at which the
16 Court may hear all evidence and argument necessary to make its settlement evaluation.
17 Proponents of the settlement may explain the terms and conditions of the Amended Settlement
18 Agreement and offer argument in support of final approval. The Court will determine after the
19 final approval hearing whether the settlement should be approved, and whether to enter a final
20 order and judgment under Rule 23(e). Plaintiffs request that the Court set a date for a hearing
21 on final approval at the Court’s convenience, approximately 145-170 days after entry of an
22 order preliminarily approving the settlement. The Parties also request that the Court schedule
23 further settlement proceedings pursuant to the schedule set forth on the next page:
24
25
26

Event	Days From Preliminary Approval
Preliminary Approval Order	0
Notice Deadline	45
Exclusion/Objection Deadline	105
Claim's Administrator's Filing of Exclusion Requests	112
Class Member Claim Form Submission Deadline	135
Plaintiffs' Counsels' Fee Motion Deadline	135
Parties' Final Approval Motion Deadline	135
Response to Objection Deadlines	135
Final Approval Hearing	145-170

If the Court preliminarily approves the settlement in late February 2023, the final approval hearing should be scheduled for approximately **August 7, 2023**.

IV. CONCLUSION.

For the foregoing reasons, the Parties respectfully request that the Court: (1) grant preliminary approval of the Settlement; (2) provisionally certify the proposed Settlement Class; (3) appoint Duncan Turner of Badgley Mullins Turner PLLC as Class Counsel; (4) appoint Stephen Tuttle and Dustin Collman as Class Representatives; (5) approve the proposed Notice Program; (6) appoint Kroll Settlement Administration, LLC to serve as Notice and Settlement Administrator; and (7) schedule the final fairness hearing and related dates.

Submitted this 2nd day of February, 2023.

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