UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DEVI KHODAY and DANISE TOWNSEND, on behalf of themselves and all others similarly situated, Plaintiffs, v. SYMANTEC CORP., and DIGITAL RIVER, INC., Defendants.	Civil Action No. 11-CV-00180 (JRT-TNL) CLASS ACTION **CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR FINAL APPROVAL OF SETTLEMENT**

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I. INTRODUCTION

Devi Khoday and Danise Townsend (hereinafter, "Plaintiffs"), individually and on behalf of all similarly situated consumers (the "Class" or "Class Members"), respectfully submit this memorandum in support of their motion for final approval of the proposed Settlement pursuant to the terms and conditions of the Class Action Settlement Agreement dated August 17, 2015 (the "Settlement" or "Settlement Agreement") (the Settlement Agreement is attached as Exhibit 1 to the Declaration of Andrew N. Friedman, "Friedman Final Approval Decl.," filed concurrently herewith). The proposed settlement of this class action provides for the payment of $60 million into a common fund for the benefit of the Class. The Settlement is exceptional and easily surpasses the approval requirements of Rule 23. Indeed, the Settlement will likely pay class members who submit valid claims well in excess of their out-of-pocket loss incurred in the purchase of the services at issue in this Action. For the reasons set forth below, the Settlement should be approved.

The Settlement is the product of hard-fought, arms-length negotiations over the course of years, including multiple mediation sessions culminating in one before the Honorable Layn R. Phillips (ret.) which resulted in the agreement in principle that paved the way for the Settlement Agreement.

When judged in light of all the facts, including the size of the recovery and the ability to prove liability and damages, there can be no reasonable doubt that the Settlement satisfies the elements of Rule 23 for final approval. The Settlement represents

an excellent resolution of the litigation that provides substantial benefits to the Class. Respectfully, the Settlement meets all the criteria for final approval.

II. PROCEDURAL AND FACTUAL BACKGROUND

As set forth here and in Friedman Final Approval Declaration, the Settlement is the product of months of investigation, years of hard-fought litigation, and arms-length settlement negotiations.

A. The Underlying Litigation[1]

On January 24, 2011, Plaintiffs filed a putative class action complaint against Symantec Corp. ("Symantec") and Digital River, Inc. ("Digital River") (collectively, "Defendants"). On April 14, 2011, Plaintiffs filed their Amended Complaint (the "Amended Complaint"), alleging that Defendants sold download insurance services to consumers called either Extended Download Service ("EDS") or Norton Download Insurance ("NDI") (collectively, "Download Insurance"), which was marketed as the only way to extend the time for customers to download their Norton software beyond 60 days from the date of purchase. The Amended Complaint alleges that Defendants failed to disclose at point of sale that customers could, in fact, redownload their Norton software without purchasing Download Insurance through various free alternatives. Despite the existence of these alternatives, Defendants automatically added Download Insurance, and its accompanying $4.99 to $16.99 fee, to consumers' online shopping carts, requiring consumers to affirmatively remove the Download Insurance from their carts before checkout if they wanted to avoid purchasing it.

[1] Additional details of the litigation are provided in the Friedman Final Approval Decl.

On May 16, 2011, Defendants separately filed motions to dismiss [Dkt. Nos. 50 & 55], which were largely denied [Dkt. No. 78].[2] Defendants subsequently produced approximately 575,000 documents during the discovery phase spanning 1.8 million pages, which Plaintiffs' counsel reviewed and analyzed. Plaintiffs conducted 15 fact depositions of current or former Symantec and Digital River employees. Plaintiffs were deposed and depositions were also taken of Plaintiffs' three expert witnesses and Defendants' four expert witnesses. (Friedman Final Approval Decl. ¶¶ 18; 20; 30; 41.)

After the close of discovery, Plaintiffs moved for the certification of a national class and this Court granted in full Plaintiffs' motion to certify a nationwide class [Dkt. No. 274]. Defendants timely filed separate petitions for permission to appeal the class certification order pursuant to Fed. R. Civ. P. 23(f), which were denied [8th Cir. Dkt. Nos. 14-8007 and 14-8009]. The certified class is comprised of:

> All persons in the United States who purchased Extended Download Service ("EDS") for Norton products or Norton Download Insurance ("NDI") between January 24, 2005 and March 10, 2011.

[Dkt. No. 274 at 79].

By a June 26, 2014, Order, Notice of Pendency of the Class Action was disseminated via email to over 14 million Class Members. Email addresses of the Class Members were derived from Defendants' records. Notice of Pendency dissemination was also made through a multi-media publication notice program that included Social Media, search advertising, and media outreach publication.

[2] Only the declaratory judgment cause of action was dismissed as to each defendant. *Id*.

On April 15, 2014, Plaintiffs filed a motion to exclude certain testimony of two of Defendants' expert witnesses [Dkt. No. 276]. The same day, Defendants filed several motions to exclude the testimony of Plaintiffs' experts [Dkt. Nos. 279 & 285]. On May 15, 2014, Symantec filed a motion for summary judgment [Dkt. No. 314]. On March 19, 2015, the Court denied Symantec's motion for summary judgment, denied all motions to exclude Plaintiffs' experts, and granted in part and denied in part Plaintiffs' motion to exclude certain testimony of Defendants' experts [Dkt. No. 372, *modified at* Dkt. Nos. 376 and 384].

In April 2015, Symantec moved to implement a trial plan under Fed. R. Civ. P. 23(d) or, in the alternative, to decertify the class [Dkt. No. 377]. That motion was pending at the time the Settlement was reached.

B. Settlement Discussions

The parties have mediated this case on three separate occasions. The first mediation took place on February 20, 2013, shortly after the commencement of discovery, before mediator Randall Wulff in Oakland, California. This mediation session occurred prior to the development of the factual record and before class certification had even been briefed. At that early stage, the parties had an extremely large gap between their respective negotiating positions and as a result, settlement talks ended. (Friedman Final Approval Decl. ¶ 50.)

In September 2014, after the Court's order granting certification of a nationwide class and with a trial date set for December 8, 2014, the parties again attempted to mediate, this time before the Honorable Layn R. Phillips (ret.) in Orange County,

California. Despite participating in a full day of mediation, the case was not resolved. (*Id.* ¶ 51.)

On April 22, 2015, with a new trial-ready date of May 26, 2015, looming, the parties again met to mediate the case before Judge Phillips in New York, New York. Although there was a considerable gap between the parties' negotiating positions at the outset, the gap narrowed, ultimately resulting in the execution of the Settlement Agreement now before the Court. (*Id.* ¶ 52.) The Settlement confers a substantial benefit on the Class and also avoids the considerable risks, delays, and expense inherent in complex class action litigation. (*Id.* ¶¶ 58; 61-62.) The Settlement will completely and finally dispose of all of Plaintiffs' claims against Defendants.

C. The Settlement Agreement

The terms of the settlement are set forth fully in the Settlement Agreement. (Friedman Final Approval Decl. ¶ 2, Ex. 1.) The following is a summary of the principal terms of the settlement:

Class Definition: As held by the Court, "All persons in the United States who purchased Extended Download Service ("EDS") for Norton products or Norton Download Insurance ("NDI") between January 24, 2005 and March 10, 2011."

Benefits: Defendants will collectively pay $60 (sixty) million to establish a common fund for the benefit of the Class paid in the following manner:

- Symantec will pay $30 million of the Settlement Fund into an escrow fund within ten (10) calendar days of preliminary approval of the Settlement.[3]
- Digital River will pay $10 million of the Settlement Fund into an escrow fund within ten (10) calendar days of preliminary approval of the Settlement (the "First Payment Date").[4]
- Digital River will pay the remaining $20 million of the Settlement Fund into the Escrow Fund within ten (10) calendar days of entry of the Final Approval Order and Judgment.).
- **Plan of Allocation:** This is a claims-based settlement. There will be no reversion of the Settlement Fund to Defendants. All Class Members who submit an Approved Claim will receive a *pro rata* share of the Net Settlement Fund (the Settlement Fund minus the attorneys' fees and costs awarded, Notice and Administration costs, and service awards to the extent they exceed $7,500 to each of the two named plaintiffs) according to the following guidelines:
- Those Class members who submit an Approved Claim will each be eligible to receive $50 for each purchase of Download Insurance during the Class Period subject to *pro rata* reduction if the total claims exceed the Net Settlement Fund.

[3] This payment was made in October 2015.

[4] This payment was made in October 2015.

- In the event that after distribution of settlement benefits to the Class described above there would be sufficient funds (after payment of administrative costs associated with a second distribution) to pay at least $2 to each Approved Claimant, then such funds will be distributed in a second distribution to the Approved Claimants on a *pro rata* basis.
- In the event that after distribution of the settlement funds there is anything remaining in the Net Settlement Fund then the remaining funds shall be distributed *cy pres* to the Electronic Frontier Foundation (a nonprofit organization defending civil liberties in the digital world).

Claims: Class members must electronically complete and sign a simplified Claim Form[5] and submit it to the Settlement Administrator via an electronic Claim Form submission process to be established by the Settlement Administrator. The Claim Form must be submitted not later than thirty (30) days after entry of the Final Approval Order. For those Class Members who have requested hard copy Claim Forms, they may submit such Claim Forms via U.S. mail.

Case Contribution Awards for Class Representatives: Defendants agree to pay up to $7,500 to each Class Representative of any Service Award approved by the Court. To the extent that the Court awards more than $7,500 in Service Awards to each Class Representative, the difference will be paid from the Settlement Fund.

[5] Any capitalized terms have the definitions given in the Settlement Agreement if not otherwise defined in this Motion.

Attorneys' Fees and Costs: Class Counsel will apply to the Court by motion for an award to Class Counsel for attorneys' fees of up to 33 and 1/3% of the Settlement Fund, for reimbursement of reasonable expenses, any amount of Service Awards in excess of $7,500 per Class Representative and costs of Notice and Administration to be paid from the Settlement Fund.

Releases: If approved, the Settlement will release Defendants from any and all claims that were, or could have been, raised arising out of the subject matter of the litigation. Defendants will also release plaintiffs from any claims related to the prosecution of the litigation.

D. Preliminary Approval

The parties filed preliminary approval papers with the Court on August 18, 2015 [Dkt. Nos. 392-395]. The Court preliminary approved the Settlement on October 8, 2015 [Dkt. No. 400]. As described in Section IV, below, Notice of the Settlement was disseminated to the Class pursuant to the October 8 Order.

III. FINAL APPROVAL SHOULD BE GRANTED

The issue of whether a proposed settlement should be approved is within the sound discretion of the district court, which should be exercised in the context of public policy strongly favoring the pretrial settlement of controversies, particularly in the context of class action lawsuits. *See MSK Eyes, Ltd. v. Wells Fargo Bank, N.A.*, 546 F.3d 533, 541 (8th Cir. 2008) (noting "strong public policy of encouraging settlement"); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("[S]trong public policy favors agreements, and courts should approach them with a presumption in their favor.")

(internal citation omitted); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation[.]"); *Grunin v. Int'l House of Pancakes*, 513 F.3d 114, 123 (8th Cir. 1975) (approval of a settlement "is committed to the sound discretion of the trial judge").

Review of a proposed settlement generally proceeds in two stages: first, a hearing on preliminary approval, followed by a second hearing, on final approval. *See Manual for Complex Litigation* § 21.632 (4th ed. 2004). This Court preliminarily approved the Settlement and now, respectfully, should grant final approval.

A. The Standard for Final Approval Has Been Satisfied in This Case

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, before a class action may be settled, voluntarily dismissed or compromised, the court must determine whether the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(A); *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) (quoting *Grunin*, 513 F.2d at 123); *see also DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995). In determining whether a settlement is fair, reasonable, and adequate, courts in the 8th Circuit examine a range of factors. These factors typically include assessing: "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 631 F. Supp. 2d 1151, 1158 (D. Minn. 2009). The court

must also assess whether a proposed settlement is "within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Martin v. Cargill*, 295 F.R.D. 380, 383 (D. Minn. 2013). The Settlement here is fair, reasonable, and adequate and falls within the range of possible approval.

1. *The Settlement Was Negotiated at Arm's Length and Therefore Satisfies the Procedural Component for Final Approval.*

"Before approving a class action settlement, a district court must reach a reasoned judgment that the proposed agreement is not the product of fraud and overreaching by, or collusion among, the negotiating parties[.]" *Ficalora v. Lockheed Cal. Co.*, 751 F.3d 995, 997 (9th Cir. 1985); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) ("[P]rior to approving settlement . . . the court must determine there has been no fraud or collusion in arriving at the settlement agreement[.]").

If a settlement is negotiated at arm's length, there is a presumption that the settlement is procedurally sound. *See, e.g., In re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 631 F. Supp. 2d at 1158 ("Where sufficient discovery has been provided and the parties have bargained at arm's length, there is a presumption in favor of the settlement.") (quoting *City P'ship Co. v. Atlantic Acquisition Litd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)).

Courts additionally consider whether the settlement was reached with the assistance of a mediator. *See, e.g., Desert Orchid Partners, LLC v. Transaction Sys. Architects, Inc.*, Nos. 8:02CV553, 8:02CV561, 2007 WL 703515, at *2 (D. Neb. Mar. 2, 2007) (finding the assistance of "qualified mediators" supports approval of a settlement);

In re Schering-Plough Corp. Sec. Litig., No. 01-CV-0829, 2009 WL 5218066, at *3 (D.N.J. Dec. 31, 2009) (use of highly-regarded mediator part of "a pattern that demonstrates arms-length negotiating").

In the instant case, there is no dispute that the proposed Settlement is the product of extensive, arm's length negotiations. The Settlement in this case was reached after several mediation sessions over the course of several years conducted by well-respected mediators. These mediations culminated in resolution before the Honorable Layn R. Phillips (ret.) after over four years of active litigation and negotiations between highly experienced counsel. (Friedman Final Approval Decl. ¶¶ 4; 50-52; 59.) There was no fraud or collusion and there are no indicators suggesting there was. At the time of settlement: the parties had completed fact and expert discovery; the Class had been certified; motions for summary judgment had been heard and denied; *Daubert* motions had been heard and ruled upon; Plaintiffs' Counsel had already conducted a mock jury trial; and Plaintiffs' were preparing for an imminent trial. Indeed, the parties were only weeks away from the trial ready date imposed by the Court. (*Id*. ¶¶ 13; 18; 20; 30; 33; 41-43; 46; 49.)

Over the course of litigation and mediation, Plaintiffs' Counsel gained extensive knowledge regarding the merits, strengths, and weaknesses of the claims asserted. (*Id*. ¶ 60.) Based on their familiarity with the factual and legal issues, Plaintiffs' Counsel was able to make well-informed, good faith, assessments of the costs and risks of proceeding to trial before reaching an agreement. These assessments were also made based on Plaintiffs' Counsel's extensive experience litigating claims of this type. Thus, the

Settlement here is "the product of hard-fought adversarial negotiations" between the parties. *Wietzke v. CoStar Realty Info. Inc.*, No. 09-2743, 2011 WL 817438, at *5 (S.D. Cal. Mar. 2, 2011).

2. *There Was Sufficient Discovery for Plaintiffs to Make an Informed Decision Concerning the Reasonableness of the Settlement.*

There was considerable discovery in this action, such that Plaintiffs have had sufficient access to information to properly weigh the advantages and risks of continued litigation and have made an informed decision concerning settlement. In fact, as noted above, *all* fact and expert discovery had been completed at the time of the settlement. The parties diligently engaged in an exchange of a large volume of discovery. Defendants produced approximately 1.8 million pages of documents which Plaintiffs' counsel reviewed and analyzed. Plaintiffs then conducted 15 fact depositions of current or former Symantec and Digital River employees. Plaintiffs also conducted third-party discovery. Plaintiffs were deposed and depositions were also taken of Plaintiffs' three expert witnesses and Defendants' four expert witnesses. (*Id*. ¶¶ 13; 18; 20; 30; 41.)

The scope of discovery conducted by Plaintiffs more than satisfies the threshold necessary to grant approval of the Settlement. *See West v. PSS World Med., Inc.*, No. 4:13-CV-574 CDP, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014) (granting final approval where "the parties have engaged in extensive discovery"); *Carpenters and Joiners Welfare Fund, Univ. Care Inc. v. SmithKline ZBeecham, Corp.*, No. CV 04-3500 MJD/SRN, 2008 WL 4435734, at *3 (D. Minn. Sept. 30, 2008) (granting final approval

where "[t]he parties engaged in extensive discovery in the matter and were thus well informed as to the strengths and weaknesses of their positions").

3. *The Settlement is Not Only Fair, Reasonable, and Adequate, but an Exceptional Result for the Class.*

The Settlement provides benefits to the Class that is significant when compared to what could be obtained through trial. Courts in this Circuit and nationwide routinely approve settlements where "the Gross Settlement Fund will provide Class Members a substantial amount of their purchase price[.]" *See, e.g.*, *Cromeans v. Morgan, Keegan & Company, Inc.*, No. 2:12–cv–04269–NKL, 2015 WL 5785576 , at *1 (W.D. Mo. Sept. 16, 2015); *Roeser v. Best Buy Co., Inc.*, No. 13–1968 JRT/HB, 2015 WL 4094052, at *7 (D. Minn. July 7, 2015) (Tunheim, J.) (granting final approval where the cash settlement "roughly equal[ed] the full purchase price of the . . . service purchased"). The $60 million recovery represents a substantial portion of the out-of-pocket damages to the approximately 14 million members of the Class. Indeed, based on historical rates for claims in class actions, the Settlement will likely provide compensation to Class Members who submit valid claim forms well in excess of their out-of-pocket losses. (Friedman Final Approval Decl. ¶¶ 54; 58.) The Settlement provides, dependent on a potential *pro rata* reduction based on the claims rate, for $50 cash for each customer for each individual purchase for a product that only cost the customer between $4.99 to $16.99. If there is money to distribute after an initial distribution is made, Class Members will receive an additional amount. Therefore, a customer who purchased EDS twice during the Class Period would likely receive at least $100 cash despite having at

most $33.98 in out-of-pocket damages.[6] (*Id.* ¶ 54.) Such an amount is clearly fair, reasonable, and adequate, and "within the range of possible approval[.]" *Cargill*, 295 F.R.D. at 383.

4. *Experienced Class Counsel Have Concluded That the Proposed Settlement Reflects a Reasonable Assessment of the Strength of the Class's Claims.*

Courts give substantial weight to the experience of the attorneys who prosecuted the case and negotiated the settlement. *Christina A. v. Bloomberg*, No. Civ. 00-4036, 2000 WL 33980011, at *4 (D.S.D. Dec. 13, 2000) ("The Court attributes significant weight to Plaintiffs' attorney's assertion that the Settlement Agreement is fair, reasonable and provides significant benefits to the Plaintiff class. Indeed, Plaintiffs' lead attorney . . . based this assertion on his 22 years of experience in this field and his participation in similar cases in 15 other states."). Class Counsel's approval of a settlement weighs in favor of the settlement's fairness. *EEOC v. Fairifabult Foods, Inc.*, Civ. Nos. 07-3976 (RHK/AJB), 07-3986 (RHK/AJB), 07-3977 (RHK/AJB), 07-3985 (RHK/AJB), 2008 WL 879999, at *4 (D. Minn. Mar. 28, 2008); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005). Here, Plaintiffs' Counsel, who have extensive class action litigation experience, conducted an extensive factual and legal analysis in connection with the claims and allegations asserted in the Action and believe that the benefit conferred by the Settlement is an excellent result for the Class. (Friedman Final Approval Decl. ¶¶ 4; 60.)

[6] Plaintiffs note that Defendants are both multi-million dollar companies and therefore any analysis relating to ability to pay is not relevant here. See I*n re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 631 F. Supp. 2d at 1156.

Final approval of the settlement should be granted because it reflects a reasonable assessment of the strengths and weaknesses of the claims and the risks of establishing liability and damages. While Plaintiffs' Counsel believe in the merits of this case, they recognize that the outcome of further litigation is uncertain. To succeed on their various claims at trial, Plaintiffs would have needed to prove, among other things: (1) that Defendants' misrepresentations and omissions regarding Download Insurance were material—*i.e.*, that customers would not have purchased EDS or NDI had they known about the free alternatives or would not have paid as much for the service had the free alternative been disclosed; (2) that class members suffered damages as a result of their purchase of the Download Insurance; and (3) the extent of the damages on a class-wide basis.

Plaintiffs' Counsel understand that there are significant legal obstacles and defenses which render recovery in this case uncertain and could affect the amount of any potential recovery. In addition, litigating this case to final judgment after appeals would delay any recovery for Class Members for several more years.

Defendants have vigorously defended against Plaintiffs' allegations and would be expected to continue to do so should this action proceed through trial. Defendants deny that they misrepresented EDS or NDI or participated in any other wrongdoing. Defendants would likely argue, among other things, that: (1) EDS and NDI were of real value to customers because the free alternatives were not the same as either EDS or NDI and did not render EDS or NDI "unnecessary" or "worthless"; (2) that Defendants had no duty to disclose the free alternatives at the point of sale; (3) that the free alternatives

would not have worked for all customers and it would have been misleading for Defendants to tell consumers that EDS and NDI were unnecessary; (4) that the failure to disclose the free alternatives did not cause customers to suffer any legally cognizable harm; and (5) that Plaintiffs cannot establish their claims on a class-wide basis. While Plaintiffs do not agree with Defendants' analysis, they recognize that succeeding at trial was far from certain.

Plaintiffs also recognize that although the Class was certified and Defendants' Rule 23(f) motions were denied, Defendants would certainly appeal the certification order to the Eighth Circuit if this case progressed. Thus, even if Plaintiffs secured a favorable judgment at trial, the implementation of that judgment would be placed in jeopardy – or at a minimum, greatly delayed – as a result of that appeal. The Settlement avoids that uncertainty, while securing a significant benefit to the members of the Class.

5. *The Reaction of the Class Has Been Positive.*

While the date for class members to serve objections to the Settlement or exclude themselves from the Settlement has not yet occurred,[7] the reaction of class members to the settlement to date is positive. Out of approximately 14 million Class Members, only two objections have been received to date.[8] (*See* Declaration of Jennifer M. Keough "Keough Decl." ¶ 17, filed as Exhibit 6 to the Friedman Final Approval Decl.) Only 72 requests for exclusion were received. (*Id*. ¶ 16.) This response strongly supports approval. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 378

[7] The deadline for serving objections and opting out of the Class is December 21, 2015.
[8] Plaintiffs will address any objections in their Reply brief.

(D.D.C. 2002) (finding that "the settlement group's reaction to this settlement has been overwhelmingly positive and supports approval" and that "[t]he existence of a relatively few objections certainly counsels in favor of approval"); *In re Rambus Inc. Derivative Litig.*, 2009 WL 166689, at *3 (N.D. Cal. 2009) ("The reaction of the class to the proffered settlement . . . is perhaps the most significant factor to be weighed in considering its adequacy . . . ."") (quotation marks and brackets omitted); *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

IV. THE NOTICE PLAN SATISFIES DUE PROCESS

The Notice Plan conducted by the parties provided individual notice to all known Class Members and all Class Members who could be identified through reasonable efforts and constitutes the best notice practicable under the circumstances of this Action, meeting or exceeding all applicable requirements of Fed. R. Civ. P. 23, the United States Constitution (including the Due Process Clause), and any other applicable law.

In accordance with the Court's Order preliminarily approving the Settlement, the Settlement Administrator, Garden City Group, disseminated notice to approximately 14 million potential Class Members. (Keough Decl. ¶¶ 8-9.) Per the terms of the Settlement, the Settlement Administrator sent direct notice via electronic mail to the last known email addresses of each identifiable Class Member appearing in Defendants' records at the time that the notice of pendency of the existence of the class action. (*Id.* ¶ 8.) This process began in 2014 when the Settlement Administrator emailed the Notice

of Pendency to the approximately 14 million potential Class Members for whom Defendants provided information. For the approximately 10 million potential Class Members whose Notice of Pendency email was not returned undeliverable, the Settlement Administrator sent email notice to the last known email addresses as they appeared in Defendants' records. (*Id.*) The email notice directed each Class Member to the official Settlement website (www.DownloadInsuranceSettlement.com), where Class Members could access complete notice information and a claim form, as well as other materials concerning the lawsuit, including how to submit an objection or opt-out of the Settlement. Further, the Settlement Administrator established a toll-free telephone number that Class Members are able to utilize if they have questions about the Settlement and/or need assistance completing their Claim Forms.[9] (*Id.* ¶ 15.) After at least two additional attempts to send email notice, the Settlement Administrator mailed approximately 4 million Postcard Notices to class members to the last known physical address of all Class Members for whom an email Notice had been returned undeliverable. (*Id.* ¶ 9.) The Settlement Administrator also posted notice of the settlement via a classified advertisement in USA TODAY and ran a four-week Social Media and Google advertising campaign. (*Id.* ¶¶ 10-13.)

This Notice program unquestionably meets the due process requirements of Fed. R. Civ. P. 23, which calls for "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable

[9] The Settlement Website and the toll-free number will remain active at least until the February 18, 2016 deadline for filing claims.

effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (emphasis omitted); *see also In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 174 (E.D. Pa. 2000) ("In order to satisfy due process, notice to class members must be 'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In this regard, potential Class Members have been: (1) provided with direct notice of the Settlement Agreement; (2) fully informed of their rights and obligations under the Amended Settlement Agreement; and (3) provided with the resources to ask questions and, to the extent necessary, receive assistance in submitting Claim Forms.

Pursuant to the Settlement Agreement, Defendants mailed notice of the settlement to state Attorneys General and the U.S. Attorney General, in accordance with the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711-15. Only one of the Attorneys' General responded to the Notice, requesting more information, which was provided. To date, none have sought to intervene in this litigation.

V. CONCLUSION

The settlement here represents a tremendous result for the Class. For the reasons stated above, Plaintiffs respectfully request that the Court grant final approval to the proposed Settlement.

DATED this 7th day of December, 2015

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DEVI KHODAY and DANISE TOWNSEND, on behalf of themselves and all others similarly situated, Plaintiffs, v. SYMANTEC CORP., and DIGITAL RIVER, INC., Defendants.	Civil Action No. 11-CV-00180 (JRT-TNL) CLASS ACTION **LR 7.1(d) WORD COUNT COMPLIANCE**

This brief complies with the word limitation of LR 7.1(d) because this brief contains 5,022 words, including all text, headings, footnotes, and quotations, other than the parts of the brief exempted by LR 7.1(d). This brief was prepared using Microsoft Word 2010.

This brief complies with the type size requirements of LR 7.1(f) because this brief was prepared using at least font size 13, is double-spaced (except for headings, footnotes and quotations that exceed two lines) and is submitted on 8½" by 11" paper with at least one inch margins on all four sides.

Date: December 7, 2015

Respectfully submitted,

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