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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

LORA AND CLAY WOLPH, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

ACER AMERICA CORPORATION, a
California corporation,

Defendant.

CASE NO. CV-09-01314 JSW

CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
CLASS NOTICE PLAN**

(Assigned to the Honorable Jeffrey S. White)

[Complaint Filed: March 25, 2009]

Date: June 29, 2012
Time: 9:00 a.m.
Crtrm.: 11

PEARSON, SIMON, WARSHAW & PENNY, LLP
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1 PLEASE TAKE NOTICE THAT, on June 29, 2012 at 9:00 a.m., in the Courtroom of the
2 Honorable Jeffrey S. White, United States District Court, Northern District of California, San
3 Francisco Division, Plaintiffs Lora Wolph and Clay Wolph will and hereby do move pursuant to
4 Federal Rule of Civil Procedure 23(c) for an order approving the form of notice in this case and
5 ordering dissemination of notice to the class.

6 The motion is based on this Notice of Motion and Motion for Approval of Class Notice
7 Plan, the accompanying Memorandum of Points and Authorities, Declarations and Exhibits, and
8 the pleadings and papers on file in this action, oral argument and such other matters as the Court
9 may consider in hearing this motion.

10

11 DATED: April 23, 2012

/s/ Daniel L. Warshaw

Daniel L. Warshaw

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Attorneys for Plaintiffs and the Class

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION AND STATEMENT OF ISSUES**

3 On March 25, 2011 this Court certified this case as a class action on behalf of the
4 following class of persons:

5 All persons and entities who reside in the United States who have
6 purchased, and have not returned for refund, a new Acer notebook
7 computer from Acer or an Acer Authorized Reseller, not for resale,
8 that came pre-installed with a Microsoft® Windows Vista Home
Premium, Business, or Ultimate operating system, and contained
1GB of Random Access Memory or less as shared memory for both
the system and graphics (“Class”).

9 See Order On Motion for Class Certification (Dkt. 129).

10 Since entry of the Court’s Class Certification Order, Plaintiffs have undertaken substantial
11 efforts to obtain contact information for the Class Members and to develop a comprehensive
12 notice program that will likely reach at least 75% of the Class Members. A key aspect of the
13 notice program includes direct notice to all Class Members whose email or postal address can be
14 identified through Acer’s records. This direct notice program will be supplemented through
15 indirect notice utilizing both traditional print media and a robust online campaign. In summary,
16 Plaintiffs propose the following notice plan:

- 17 • ***Direct Email Notice to Class Members:*** Individualized notice via email will be
18 sent to all Class Members whose email address can be reasonably identified
through Acer’s records;
- 19 • ***Supplemental Direct Postcard Notice to Class Members:*** Class Members who can
20 be identified through Acer’s records, but either do not have a functioning email
address or did not provide an email address to Acer will receive a postcard notice
21 via first class mail;
- 22 • ***Magazine Publication:*** The proposed publication notice will be published once in
the national edition of *Newsweek* magazine, *People* magazine, *Popular Science*
23 magazine, and *Parade* magazine, and four times in *The San Francisco Chronicle*;
- 24 • ***Internet Publication:*** Class Members will be provided notice on hundreds of
websites utilizing banner ads published on the 24/7 Network, AOL Advertising
25 Network, and Yahoo! Network;
- 26 • ***Case Website and Toll Free Number:*** The notice administrator will set up a case
website and a toll free telephone number where Class Members can obtain a copy
27 of the long form notice and detailed information about the case;
- 28 • ***Press Release:*** The Plaintiffs will issue a press release setting forth the terms of
the Notice that can be picked up by various news outlets.

1 As detailed in this brief and the Declaration of Shannon Wheatman (“Wheatman Decl.”)
 2 filed herewith, the notice program in this case satisfies the form, content and distribution
 3 requirements of Federal Rule of Civil Procedure (“Rule”) 23 and due process and should be
 4 approved by the Court.

5 **II. DISCUSSION**

6 **A. The Form and Content of Class Notice Satisfies Rule 23**

7 The form of notice is “adequate if it may be understood by the average class member.”
 8 Newberg on Class Actions § 11.53. Rule 23(c)(2)(B), which sets forth the requirements governing
 9 the form and content of class notice, provides in relevant part as follows:

10 The notice must clearly and concisely state in plain, easily
 11 understood language: (i) the nature of the action; (ii) the definition
 12 of the class certified; (iii) the class claims, issues, or defenses; (iv)
 13 that a class member may enter an appearance through an attorney if
 14 the member so desires; (v) that the court will exclude from the class
 any member who requests exclusion; (vi) the time and manner for
 requesting exclusion; and (vii) the binding effect of a class judgment
 on members under Rule 23(c)(3).

15 Here, the proposed Postcard Notice, Print Publication Notice and Email Notice
 16 (collectively “Summary Notices”), drafted by Plaintiffs, and experienced notice administrators at
 17 Rust Consulting and Kinsella media, each independently satisfy the requirements of Rule 23(c)(6).
 18 See Summary Notices, attached as Exhibits 4-6 to Wheatman Decl. Each of the Summary Notices
 19 provides a clear and concise explanation of the case, the class definition, a summary of the
 20 lawsuit, the rights of Class Members to retain their own counsel, the rights and procedures for
 21 Class Members to exclude themselves, and the binding effect of any class settlement or judgment
 22 for Class Members who do not timely exclude themselves. See *Browning v. Yahoo! Inc.*, 2006
 23 WL 3826714 at * 8–9 (N.D. Cal. 2006) (approving a summary notice that sets forth the elements
 24 of Rule 23(c)(2)(B) “in a clear and concise form.”).

25 The Summary Notices refer Class Members to a toll free number and the case website
 26 where Class Members can obtain a copy of the Long Form Notice (Wheatman Decl., Exh. 7), and
 27 more detailed information regarding the case. Similarly, the Banner Advertisements (Wheatman
 28 Decl., Exh. 3), link directly to the case website, allowing Class Members to obtain detailed

1 information regarding the case at the click of a button. This type of notice program where
 2 summary notices are utilized to direct Class Members to a case website containing detailed
 3 information has been approved by courts in similar cases. *See Browning*, 2006 WL 3826714 at
 4 *8–9 (“the Email Notice will direct each Class Member to the official Settlement Website, where
 5 they may access complete notice information, as well as other materials concerning this lawsuit.”);
 6 *In re HP Laser Printer Litig.*, 2011 WL 3861703 * 3 (C.D. Cal. Aug. 31, 2011) (approving a
 7 notice plan consisting of: (1) direct email notice, “(2) publishing the ‘summary notice’ in USA
 8 Weekend, Parade, People, and CIO Magazine as well as placing banner advertisements on
 9 Yahoo.com and other websites; and (3) providing a link on both notice forms to a settlement
 10 website.”); *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 57 (2008) (citing to Federal authority in
 11 holding that, “[u]sing a summary notice that directed the Class Member wanting more information
 12 to a Web site containing a more detailed notice, and provided hyperlinks to that Web site, was a
 13 perfectly acceptable manner of giving notice in this case.”); *see also* Wheatman Decl., ¶¶ 22-34.

14 **B. The Class Notice Plan Satisfies Rule 23 and Due Process**

15 Notice to the class must be “the best notice practicable under the circumstances, including
 16 individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P.
 17 23(c)(2)(B); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Eisen v. Carlisle &*
 18 *Jacqueline*, 417 U.S. 156, 175 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 229 U.S.
 19 306, 314 (1950). Notice by publication is an acceptable method of providing notice where the
 20 identity of specific class members is not reasonably available. *See In re Tableware Antitrust Litig.*,
 21 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (citing Manual for Complex Litigation (4th ed.
 22 2004) § 21.311); *see also* Cal. Civ. Code § 1781 (authorizing notice by publication pursuant to the
 23 Consumers Legal Remedies Act “if personal notification is unreasonably expensive or it appears
 24 that all members of the class cannot be notified personally”).

25 According to guidelines set forth by the Federal Judicial Center, the recommended reach
 26 for a Class notice is between 70-95% of Class Members. *See* Federal Judicial Center (“FJC”),
 27 “Judges’ Class Action Notice and Claims Checklist and Plain Language Guide” (2010) available
 28 at <http://www.fjc.gov>. Here, the proposed notice plan has both a direct and indirect component,

1 ensuring that it will reach at least 75% of Class Members who purchased the approximately
 2 975,000 Acer notebooks that fall within the scope of the Class definition (“Notebooks”). *See also*
 3 Wheatman Decl. ¶ 50.

4 **1. Direct Notice Will Be Provided by Email and Postal Mail to All Class**
 5 **Members Who Can be Reasonably Identified**

6 In accordance with Rule 23(c) the notice proposal is designed to provide notice to all Class
 7 Members who can be reasonably identified through Acer’s records and databases. Since Acer did
 8 not directly sell the Notebooks to the vast majority of Class Members, it does not possess contact
 9 information for the entire Class. However, Acer does possess Class Member contact information
 10 for purchasers who either registered their Notebooks for warranty purposes or otherwise contacted
 11 Acer for service inquiries. A review and analysis of these records has resulted in the identification
 12 of Class Member names and contact information (either email or postal mail) for 373,740 Class
 13 Members who purchased the approximately 975,000 Notebooks that fall within the Class
 14 definition. *See* Wheatman Decl. ¶¶ 16-17.

15 The Email Notice will be sent to each Class Member whose email address can be identified
 16 through Acer’s records. Wheatman Decl. ¶ 17. If the Email Notice “bounces back” (i.e. is not
 17 delivered because the address is no longer valid), then the Class Member will be sent the Postcard
 18 Notice via First Class mail, if he or she has a valid address in Acer’s records. *See id.* ¶ 18.
 19 Postcard Notice will also be sent to every Class Member whose name or address appears in Acer’s
 20 records without an email address. *See id.*

21 As Courts in the Northern District of California have recognized, a direct Email Notice
 22 campaign supplemented by postal mail for bounced back emails is “particularly suitable” in cases
 23 relating to technology products. *See Lundell v. Dell, Inc.* 2006 WL 3507938 * 1 (N. D. Cal. Dec.
 24 5, 2006) (notice “disseminated via electronic messaging and first class mail [] to Class members
 25 whom Dell determined did not receive notice via electronic message [], and posting of the Notice
 26 on the www.lundellsettlement.com website ... provided the best practicable notice to the members
 27 of the Class and satisfied the requirements of due process.”); *Browning*, 2006 WL 3826714 at * 8,
 28 (The notice program that “employs email techniques that the Court finds to be particularly suitable

1 in this case, where Settlement Class Members' allegations arise from their visits to Defendants'
 2 Internet websites, demonstrating that the Settlement Class Members are familiar and comfortable
 3 with email and the Internet.”); *In re HP Laser Printer Litig.*, 2011 WL 3861703 * 3. Thus,
 4 relevant authority supports the adoption of the direct notice program supplemented by indirect
 5 publication notice in this case.

6 **2. Notice by Print Publication and Internet Publication**

7 The Notice Program supplements the direct email and postal mail notice, set forth above,
 8 with publication notice to ensure that the notice satisfies due process. The publication notice in
 9 this case consists of a combination of print and internet publication similar to those approved by
 10 Courts presiding over similar class actions: *Norfleet ex rel. Norfleet v. John Hancock Life Ins. Co.*,
 11 658 F.Supp.2d 350, 352 (D. Conn. 2009) (approving a notice program utilizing internet banner
 12 advertisements); *In re HP Laser Printer Litig.*, 2011 WL 3861703 * 3 (C.D. Cal. Aug. 31, 2011)
 13 (approving a notice utilizing a combination of newspaper, magazine and internet banner
 14 advertisement publications).

15 The print publication under the Notice Plan calls for the insertion of the Publication Notice
 16 in the following popular magazines and newspaper supplements: (1) *Newsweek* (1,500,000
 17 circulation); (2) *People* (3,450,000 circulation); (3) *Popular Science* (1,300,000 circulation); and
 18 (4) *Parade* (33,000,000 circulation).¹ See Wheatman Decl. ¶ 32. The Publication Notice will also
 19 be published for four consecutive weeks in the *San Francisco Examiner*. See *id.* ¶ 33. The
 20 internet publication under the Notice Plan utilizes internet banner advertisements that will be
 21 published through the 24/7 Network, AOL Advertising Network, and the Yahoo! Network. See
 22 *id.* ¶ 34. These internet media networks will publish the banner advertisements on an array of
 23 websites, thereby ensuring that they are seen by a significant portion of the Class. See *id.* It is
 24 anticipated that these banner advertisements will result in over 112,000,000 total impressions

25 _____
 26 ¹ Parade magazine is distributed by more than 600 Sunday newspapers, including the Atlanta
 27 Journal & Constitution, The Baltimore Sun, Boston Globe, Chicago Tribune, Dallas Morning
 28 News, Houston Chronicle, The Los Angeles Times, The Miami Herald, the New York Post, The
 (footnote continued)

1 during the notice period.² *See id.*

2 In combination with the aforementioned direct notice, it is anticipated that the notice
3 program in this case will reach at least 75% of Class Members, which satisfies due process, Rule
4 23 and the guidelines set forth by the Federal Judicial Center. Wheatman Decl. ¶¶ 50-52.

5 **C. The Proposed Schedule for Dissemination of Notice**

6 Plaintiffs propose that the “Triggering Date” for notice shall be the date that the Court
7 enters an order approving Plaintiffs’ plan for dissemination of notice. The proposed schedule for
8 dissemination of notice in this case is set forth as follows:

Event	Time
Deadline for notice administrator to email notice to Class Members; start the Internet publication program; start the print publication program; mail notice to Class Members with valid addresses but no emails; Plaintiffs to issue.	Within 30 days after the Trigger Date
Deadline for notice administrator to mail out notice to Class Members with “bounced back” emails or undeliverable mailing addresses.	Within 60 days after the Trigger Date
Deadline for Class Members to opt-out.	Within 90 days after the Trigger Date
Deadline for list of opt outs to be filed with the Court.	Within 120 days after the Trigger Date

18 The proposed schedule provides Class Members with up to 60 days to opt-out or exclude
19 themselves from the start of the notice campaign. This proposed schedule is similar to other
20 schedules adopted and approved in the Northern District of California. *See e.g. Thieriot v. Celtic*
21 *Ins. Co.*, 2011 WL 109636 *5 (N.D. Cal. Jan. 13, 2011) (ordering 60 day opt-out period); *Lemus v.*
22 *H&R Block Enters., LLC*, 2010 WL 5069695 *6 (N.D. Cal. Dec. 7, 2010) (approving notice with
23 opt-out period of 45 days); *Wahl v. Am. Sec. Ins.*, 2010 WL 1881126 *10 (N.D. Cal. May 10,
24 2010) (ordering an opt-out period of 45 days).

26 Philadelphia Inquirer, San Francisco Chronicle, Seattle Times & Post Intelligencer and The
27 Washington Post.

28 ² Impressions are the total number of times the ad will be shown to Internet visitors.

1 In light of the foregoing, the Class Notice Program satisfies the requirements of Rule 23
2 and due process.

3 **III. Conclusion**

4 For the aforementioned reasons, Plaintiffs request that the Court enter an order approving
5 their notice plan and providing notice to the Class in accordance with the schedule set forth herein.

6
7 DATED: April 23, 2012

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