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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOHN RIGO,

Plaintiff,

vs.

KASON INDUSTRIES, INC., *et al.*,

Defendants.

NO. 11-CV-64-MMA(DHB)

**ORDER ON FINAL
APPROVAL
OF CLASS ACTION
SETTLEMENT,
ATTORNEYS' FEES, COSTS,
AND INCENTIVE AWARD;

JUDGMENT AND
DISMISSAL**

On July 8, 2013, this matter came before the Court on Plaintiff's Motion for Final Approval of Proposed Settlement and Award of Attorneys' Fees and Reimbursement of Expenses. [Doc. No. 91.] For the reasons explained below, the Court **GRANTS** Plaintiff's motion in its entirety.

I. BACKGROUND

A. Factual Background

The individually named plaintiff in this action is John Rigo, a resident of San Marcos, California, doing business as Altered Air, a sole proprietorship.

Defendant Kason Industries, Inc. ("Kason"), a New York corporation with its corporate headquarters and principal place of business located in Georgia, is engaged in the manufacture and sale of Food Service Equipment Component

1 Hardware (“Hardware Components”). Its products are used in commercial food
2 service equipment, including walk-in and stand-alone refrigerators and freezers.

3 Defendant Peter A. Katz was the president of Kason, and managed Kason’s
4 business operations until May 29, 2009.

5 Defendant Component Hardware Group, Inc. (“CHG”), a Delaware
6 corporation with its principal place of business in New Jersey, is a global distributor
7 of Hardware Components.

8 Defendant Thomas Carr (“Carr”) was the president and CEO of CHG until
9 February 9, 2009.

10 Plaintiff’s claims arise from Defendants’ participation in a conspiracy to fix
11 prices and allocate customers and markets for Hardware Components.

12 The components themselves are items like hinges, brackets, latches, fasteners,
13 metal racks, drawer pans, casters, mounting plates, and so on—essentially, parts used
14 to make refrigerators, and other food storage appliances used in cafeterias and
15 kitchens.

16 There are two types of purchasers of the components: (1) direct purchasers
17 such as manufacturers of the food storage equipment and replacement parts
18 distributors and service companies; and (2) indirect purchasers such as wholesalers,
19 retailers and consumer/operators, who purchase from manufacturers, distributors,
20 and service companies. The direct purchasers are not part of this suit – they pursued
21 and settled their own separate class action litigation in another judicial district. This
22 suit is brought only on behalf of *indirect* purchasers.

23 Throughout the class period, Defendants controlled a significant share of the
24 national market for the components, including the California market. The market is
25 highly concentrated and conducive to the type of collusive activity in which
26 Defendants allegedly conspired to engage.

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1 Plaintiff alleges that the market for the components is “inextricably
2 intertwined” with the market for food storage equipment because the former exists to
3 serve the latter. Thus, the cost of the components directly affects the price of
4 equipment. As such, Defendants’ customer allocation and price fixing conspiracy
5 resulted in inflated prices on components, which inflated the price of equipment,
6 which was borne by the indirect purchaser.

7 Plaintiff alleges that because the components are physically discrete hardware
8 elements, when the components are purchased and incorporated into equipment, the
9 components remain unchanged and are thus traceable through the chain of
10 distribution to the indirect purchaser. As such, Plaintiff alleges that he and other
11 indirect purchasers have participated in the market for the components through their
12 purchases of the components themselves insofar as they were part and parcel of the
13 food service equipment.

14 According to Plaintiff, because of Defendants’ control over the Hardware
15 Components market and their collusion to allocate customers and fix prices, he and
16 other indirect purchasers paid supra-competitive prices. Plaintiff seeks injunctive
17 relief under the Sherman Antitrust Act, 15 U.S.C. § 1, alleging that the anti-
18 competitive effects of the illegal conduct of Defendants continue to be felt in the
19 components market. Plaintiff also seeks actual and treble damages and costs of suit,
20 including attorneys fees, under the California Cartwright Act, Cal. Bus. & Prof.
21 Code § 16720. In addition to these two antitrust claims, Plaintiff seeks relief under
22 California’s unfair competition laws, Cal. Bus. & Prof. Code § 17200. Finally,
23 Plaintiff originally alleged a common law cause of action against Defendants for
24 monies had and received, based on a quasi-contractual theory. Plaintiff alleges that
25 by virtue of the purchase and sale of the components, Defendants entered into a
26 series of implied-at-law contracts that resulted in money being had and received by
27 Defendants at the expense of Plaintiff.

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1 **B. Procedural History**

2 On January 1, 2011, Plaintiff filed a putative class action Complaint, alleging
3 claims for violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.*;
4 California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16720 *et seq.*; California
5 Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; common
6 counts/unjust enrichment; and assumpsit.

7 On March 7, 2011, Defendants collectively moved to dismiss the Complaint.
8 On April 18, 2011, Plaintiff filed a First Amended Complaint, alleging the same
9 claims as in the Complaint, but adding an additional claim for "quasi-contract." On
10 April 20, 2011, the Court denied Defendants' motion to dismiss as moot.

11 On May 23, 2011, Defendants moved to dismiss the First Amended
12 Complaint. On July 19, 2011, the Court issued an order on Defendants' motion to
13 dismiss, dismissing Plaintiff's claims for common counts, assumpsit, unjust
14 enrichment, and quasi-contract against all Defendants. The Court further dismissed
15 Plaintiff's claim for injunctive relief against the individual defendants.

16 On September 4, 2012, after the parties consummated a settlement, Plaintiff
17 moved for an order certifying a settlement class and preliminarily approving the
18 class settlement. On September 21, 2012, the Court tentatively denied Plaintiff's
19 motion. However, after a hearing on the motion was held, the Court vacated its
20 tentative ruling and allowed the parties to submit supplemental briefing regarding
21 various issues the Court raised in its tentative ruling and at the hearing.

22 On October 24, 2012, the Court granted Plaintiff's motion for settlement class
23 certification and preliminary approval. The parties then commenced providing
24 notice to the class and proceeded with the claims administration process.

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1 **C. The Settlement**

2 **1. The Settlement Class**

3 The settlement class is comprised of: All persons or entities (except those
4 provided under the Settlement Agreement), including, but not limited to, individuals,
5 companies, corporations, partnerships, joint ventures, agents, principals, and
6 employees, who purchased Food Service Equipment Component Hardware or Food
7 Service Equipment that incorporated Food Service Equipment Component Hardware
8 anywhere in the United States from a person or entity other than the Defendants
9 from February 1, 2004, through February 11, 2008. Excluded from the Indirect
10 Purchaser Class are the Defendants, the trial judge and his spouse, parents, siblings
11 or children, and any person deemed by the Court to have properly requested to be
12 excluded from the Settlement.

13 **2. The Settlement Terms**

14 Upon the Settlement Effective Date, the Claims Administrator will provide
15 each eligible Claim by Claimants with a cash refund out of the net settlement fund,
16 which will consist of \$720,000 less fees and costs.

17 Class members who purchased individual food service Hardware Components
18 will receive a full refund of the purchase price. Class members who purchased
19 appliances that contain Hardware Components will receive a fixed 1.4% of the
20 amount they paid for the appliance.

21 The parties have agreed that Defendants will not oppose Plaintiff's motion for
22 attorneys' fees and costs, which seeks \$216,000 in attorneys' fees plus \$5,052.10 in
23 costs. The parties have agreed that any attorneys' fees and costs shall be paid from
24 the settlement.

25 The sole class representative, John Rigo, will receive an enhancement award
26 of \$2,500.

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1 If the dollar value of claims submitted by class members exceeds the amount
2 of net settlement funds, the claims will be prorated by (1) dividing the remaining
3 settlement funds by the total value of the valid claims submitted, (2) applying the
4 percentage from the above calculation to reduce the total value of an individual
5 claimant's refund, and (3) rounding up the reduced claim value to the nearest dollar.

6 II. DISCUSSION

7 A. Motion for Final Approval of Class Settlement

8 1. Class Certification

9 A plaintiff seeking a Rule 23(b)(3) class certification must first satisfy the
10 prerequisites of Rule 23(a). Once subsection (a) is satisfied, the purported class
11 must then fulfill the requirements of Rule 23(b)(3). Here, the Court previously
12 preliminarily certified the following class:

13 [A]ll persons or entities (except those provided under the Settlement
14 Agreement), including, but not limited to, individuals, companies,
15 corporations, partnerships, joint ventures, agents, principals, and
16 employees, who purchased Food Service Equipment Component Hardware
17 or Food Service Equipment that incorporated Food Service Equipment
18 Component Hardware anywhere in the United States from a person or entity
19 other than the Defendants from February 1, 2004, through February 11,
20 2008. Excluded from the Indirect Purchaser Class are the Defendants, the
21 trial judge and his spouse, parents, siblings or children, and any person
22 deemed by the Court to have properly requested to be excluded from the
23 Settlement.

19 At that time, the Court concluded that the proposed classes satisfied the
20 numerosity, commonality, typicality, and adequacy of representation requirements
21 of Rule 23(a). The Court also found that the proposed class satisfied the
22 predominance and superiority requirements of Rule 23(b)(3). The Court again
23 certifies the class for the purpose of settlement.

24 2. The Settlement

25 a. Legal Standard

26 Courts require a higher standard of fairness when settlement takes place prior
27 to formal class certification to ensure class counsel and defendant have not colluded
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1 in settling the case. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).
2 Ultimately, “[t]he court’s intrusion upon what is otherwise a private consensual
3 agreement negotiated between the parties to a lawsuit must be limited to the extent
4 necessary to reach a reasoned judgment that the agreement is not the product of
5 fraud or overreaching by, or collusion between, the negotiating parties, and that the
6 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”
7 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). “The
8 question [the Court] address[es] is not whether the final product could be prettier,
9 smarter or snazzier, but whether it is fair, adequate and free from collusion.”
10 *Hanlon*, 150 F.3d at 1027.

11 Courts consider several factors when determining whether a proposed
12 settlement is “fair, adequate and reasonable” under Rule 23(e). Such factors may
13 include: “[1] the strength of the plaintiffs’ case; [2] the risk, expense, complexity,
14 and likely duration of further litigation; [3] the risk of maintaining class action status
15 throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery
16 completed and the stage of the proceedings; [6] the experience and views of counsel;
17 [7] the presence of a governmental participant; and [8] the reaction of the class
18 members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026; *see also Lane v.*
19 *Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at
20 1026).

21 Judicial policy favors settlement in class actions and other complex litigation
22 where substantial resources can be conserved by avoiding the time, cost, and rigors
23 of formal litigation. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp.
24 1379, 1387 (D. Ariz. 1989).

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1 **b. Analysis**

2 **i. The strength of the case, and the risk, expense,**
3 **complexity and likely duration of further litigation**

4 To determine whether the proposed settlement is fair, reasonable, and
5 adequate, the Court must balance against the continuing risks of litigation (including
6 the strengths and weaknesses of the Plaintiff's case), the benefits afforded to
7 members of the class, and the immediacy and certainty of a substantial recovery. *In*
8 *re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). In other words,

9 [t]he Court shall consider the vagaries of litigation and compare the
10 significance of immediate recovery by way of the compromise to
11 the mere possibility of relief in the future, after protracted and
12 expensive litigation. In this respect, "It has been held proper to take
13 the bird in hand instead of a prospective flock in the bush."

14 *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal.
15 2004) (citations omitted).

16 Beginning with the strength of the case, Plaintiff avers that while he believed
17 his case was strong, "the case was certainly not without risk in terms of the range of
18 possible recovery." Specifically, "[i]n attempting to establish liability and damages,
19 Plaintiff faced the risk that there would be disputes whether the allocations at issue
20 resulted in increased product prices and whether such increased amounts were
21 'passed on' to consumers, and the average out-of-pocket expenses Class members
22 incurred." Although the range of recovery was from "zero" to "several million
23 dollars," Defendants made it clear to Plaintiff that a high damages award would go
24 uncollected because such an award would place substantial financial strain on them.
25 Thus, the greatest risk of continued litigation was the possibility that the class would
26 not be able to collect an eventual damages award.

27 As for the complexity of the case, Plaintiff explains that "the Class . . . faced
28 many risks in proving liability and damages. Thus, this settlement is likely close to
the total amount that could have achieved in terms of actual payment, even at trial.

1 Absent a settlement, the Class members faced risk of non-recovery and, even in the
2 best case, long delays in receiving any recovery against companies that are having
3 financial difficulties.” Plaintiff also faced strong opposition from Defendants in
4 regards to establishing that Defendants’ conduct increased component prices.

5 These factors favor approval.

6 **ii. The stage of the proceedings**

7 In the context of class action settlements, as long as the parties have sufficient
8 information to make an informed decision about settlement, ““formal discovery is
9 not a necessary ticket to the bargaining table.”” *Linney v. Cellular Alaska P’ship*,
10 151 F.3d 1234, 1239 (9th Cir. 1998) (quoting *In re Chicken Antitrust Litig.*, 669
11 F.2d 228, 241 (5th Cir.1982)). Here, Plaintiff avers that “[i]n response to both
12 informal and formal discovery, Defendants had supplied a significant amount of
13 evidentiary information amounting to over 1.1 gigabytes of data.” It appears class
14 counsel were informed and prepared for settlement discussions.

15 **iii. The settlement amount**

16 To assess whether the amount offered is fair, the Court may compare the
17 settlement amount to the parties’ estimates of the maximum amount of damages
18 recoverable in a successful litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at
19 459. While settlement amounts that are close to the plaintiff’s estimate of damages
20 provide strong support for approval of the settlement, settlement offers that
21 constitute only a fraction of the potential recovery do not preclude a court from
22 finding that the settlement offer is fair. *Id.* (finding settlement amount constituting
23 16% of the potential recovery was fair and adequate). Thus, district courts have
24 found that settlements for substantially less than the plaintiff’s claimed damages
25 were fair and reasonable, especially when taking into account the uncertainties
26 involved with litigation. *See, e.g., Glass v. UBS Fin. Serv., Inc.*, 2007 U.S. Dist.
27 LEXIS 8476, 2007 WL 2216862, at *4 (N.D. Cal. Jan. 26, 2007) (finding settlement
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1 of wage and hour class action for 25 to 35% of the claimed damages to be
2 reasonable).

3 Here, the indirect purchaser class members will receive a large percentage of
4 the price they paid for individual Hardware Components or 1.4% of the price they
5 paid for large appliances that contain Hardware Components. The parties estimate
6 that 1.4% is a fair value, given that large appliances contain many discreet pieces
7 and parts—some or many of which may not be covered by this lawsuit. Although
8 class members have submitted claims for the total dollar amount they paid for
9 Defendants’ products, their actual damages are a fraction of this amount. Even after
10 proration of claims, class members will receive 40% of the total amount paid for the
11 hardware components. This 40% appears above and beyond their actual damages,
12 which are a fraction of the price of the components. Moreover, the settlement
13 amount in this indirect purchaser case is 40% of the related direct purchaser
14 settlement, which settled for \$1,800,000. This percentage is in line with other
15 indirect purchaser cases. *See, e.g., In re First DataBank Antitrust Litig.*, 205 F.R.D.
16 408, 412-13 (D.D.C. 2002) (12% of direct purchaser settlement). The settlement
17 amount is fair and reasonable.

18 **iv. Whether the class has been fairly and adequately**
19 **represented during settlement negotiations**

20 Plaintiff avers that the class was “represented throughout the course of this
21 litigation by counsel with years of experience in litigating consumer class actions
22 and who have negotiated numerous class settlements that have been approved by
23 courts throughout the United States, including numerous anti-trust settlements.” The
24 class was adequately represented by competent counsel. This factor supports
25 approval of the settlement.
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1 **3. Conclusion**

2 The Court **GRANTS** the motion, finding that the settlement is “fair, adequate
3 and reasonable” under Rule 23(e).

4 **B. Motion for Award of Attorneys’ Fees, Costs, and Class Representative
5 Award**

6 Plaintiff seeks an award of attorneys’ fees and costs in the amount of
7 \$221,052.10 which represents \$216,000 in attorneys’ fees and \$5,052.10 in costs.

8 **1. Relevant Law**

9 Rule 23(h) of the Federal Rules of Civil Procedure provides that, “[i]n a
10 certified class action, the court may award reasonable attorneys fees and nontaxable
11 costs that are authorized by law or by the parties’ agreement.” Under Ninth Circuit
12 precedent, a court has discretion to calculate and award attorneys fees using either
13 the lodestar method or the percentage-of-the-fund method. *Vizcaino v. Microsoft*
14 *Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002).

15 The Ninth Circuit has held that 25% of the gross settlement amount is the
16 benchmark for attorneys fees awarded under the percentage method. *Vizcaino*, 290
17 F.3d at 1047. Case law surveys suggest that 50% is the upper limit, with 30-50%
18 commonly being awarded in cases in which the common fund is relatively small.
19 *See Rubenstein, Conte and Newberg, Newberg on Class Actions* at § 14:6.
20 California cases in which the common fund is small tend to award attorneys fees
21 above the 25% benchmark. *See Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d
22 1113, 1127 (C.D. Cal. 2008) (holding attorneys fees for large fund cases are
23 typically under 25% and cases below \$10 million are often more than the 25%
24 benchmark).

25 **2. Analysis**

26 Regardless of whether the Court uses the percentage approach or the lodestar
27 method, the ultimate inquiry is whether the end result is reasonable. *Powers v.*
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1 *Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000). The Ninth Circuit has identified a
2 number of factors that may be relevant in determining if the award is reasonable: (1)
3 the results achieved; (2) the risks of litigation; (3) the skill required and the quality
4 of work; (4) the contingent nature of the fee; (5) the burdens carried by class
5 counsel; and (6) the awards made in similar cases. *See Vizcaino*, 290 F.3d at
6 1048-50.

7 Here, the results achieved in this case were favorable. The risks of litigation
8 were real and substantial. The complexity and duration of the case, coupled with the
9 arms-length settlement negotiations, weighs in favor of awarding the 30% amount
10 that counsel request here. This is especially true given that counsel aver they
11 incurred fees in a much greater amount. Moreover, class counsel took this case on a
12 contingent fee basis and had to forego other financial opportunities to litigate it for
13 more than two years. Also, the request for attorneys fees in the amount of 30% of
14 the common fund falls below the 31.71% average awarded in cases with common
15 funds. *See In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001)
16 (noting that in a study of 287 settlements ranging from less than \$1 million to \$450
17 million, “[t]he average attorney’s fees percentage is shown as 31.71%, and the
18 median turns out to be one-third”). Moreover, no class member has objected to the
19 request for attorneys’ fees.

20 Finally, class counsel seek reimbursement of out-of-pocket expenses in this
21 litigation, in the amount of \$5,052.10. Class counsel are entitled to reimbursement
22 of the out-of-pocket costs they reasonably incurred investigating and prosecuting
23 this case. *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D.
24 Cal. 1996) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970));
25 *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). The Court finds that the
26 out-of-pocket costs were reasonably incurred in connection with the prosecution of
27 this litigation, were advanced by class counsel for the benefit of the class, and should
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1 be reimbursed in the amount requested.

2 **3. Conclusion**

3 The Court **APPROVES** the award of attorneys' fees in the amount of
4 \$216,000, as well as class counsel's request for litigation costs and expenses, in the
5 amount of \$5,052.10. The settlement agreement also calls for administration funds
6 to be paid from the settlement fund. The Court further approves payment of
7 \$79,954.84, in administration costs to the class administrator.

8 **C. Class Representative Incentive Payment**

9 The only class representative in this case is Plaintiff John Rigo. No class
10 member has objected to Plaintiff's intent to seek an incentive award of \$2,500. The
11 arguably nominal \$2,500 incentive award for more than two years of service is well
12 within the acceptable range of approval and does not appear to be the result of
13 collusion. *See, e.g., Villegas v. J.P. Morgan Chase & Co.*, 2012 U.S. Dist. LEXIS
14 114597, *18 (N.D. Cal. Aug. 8, 2012) ("[T]he Settlement provides for an incentive
15 award to the Plaintiff in the amount of \$10,000. In this District, a \$5,000 incentive
16 award is presumptively reasonable."); *Williams v. Costco Wholesale Corp.*, 2010
17 U.S. Dist. LEXIS 67731, *19-*20 (S.D. Cal. July 7, 2010) (approving \$5,000 award
18 in an antitrust case settling for \$440,000). The Court **APPROVES** the \$2,500
19 incentive award as reasonable.

20 **III. CONCLUSION**

21 The Tentative Ruling issued on July 8, 2013, shall be **WITHDRAWN**. The
22 Court **GRANTS** Plaintiff's motion in its entirety, finding the proposed settlement of
23 this class action appropriate for final approval pursuant to Federal Rule of Civil
24 Procedure 23(e). In doing so, the Court finds that the proposed settlement appears to
25 be the product of informed and non-collusive negotiations, and has no obvious
26 deficiencies. The Court finds that the settlement was entered into in good faith; that
27 the settlement is fair, reasonable and adequate; and that Plaintiff has satisfied the
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1 standards for final approval of a class action settlement under federal law.
2 Furthermore, as set forth above, the Court finds the negotiated attorneys' fees and
3 costs amount reasonable and fair. Finally, the class representative incentive payment
4 is reasonable.

5 **JUDGMENT AND ORDER OF DISMISSAL**

6 This Court **APPROVES** the settlement and **ORDERS** the parties to effectuate
7 the settlement agreement according to its terms.

8 The Court **DISMISSES** this case on the merits and with prejudice pursuant to
9 the terms of the parties' settlement agreement.

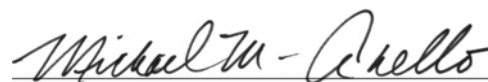
10 Upon the effective date, the Plaintiff, and each and every class member who
11 have not opted out of the settlement, and anyone claiming through or on behalf of
12 any of them, shall be deemed to have, and by operation of this Judgment shall have,
13 fully, finally, and forever waived, released, relinquished, discharged, and dismissed
14 each and every one of the released claims against each and every one of the
15 Defendant Releasees.

16 If this Judgment and the settlement do not become final and effective in
17 accord with the terms of the settlement agreement, then this Judgment and all orders
18 entered in connection therewith shall be deemed null and void and shall be vacated.

19 The Court shall not retain continuing jurisdiction over implementation of the
20 settlement or future disputes over construing, enforcing, or administering the
21 settlement.

22 **IT IS SO ORDERED.**

23 DATED: July 16, 2013

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25 Hon. Michael M. Anello
26 United States District Judge
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