IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 14-CV-22950-UU

AMANDA WEST, PRISCILLA PEREZ, PHILLIP LITCHFIELD, MICHAEL CASNER, STANLEY CONSTANTINE, SEAN WHATLEY, CHRISTOPHER DAVIS, CATHERINE BOOHER, RAVINDER RANGI, and MELISSA C. MACIAS individually and on behalf of all others similarly situated,

Plaintiffs,

v.

EXAMSOFT WORLDWIDE INC.,

Defendant.

PLAINTIFFS' MOTION AND MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT

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Named Plaintiffs Amanda West, Priscilla Perez, Phillip Litchfield, Michael Casner, Stanley Constantine, Sean Whatley, Christopher Davis, Catherine Booher, Ravinder Rangi, and Melissa C. Macias (the "Named Plaintiffs") hereby move for preliminary approval of the Class Action Settlement Agreement (the "Settlement Agreement"[1]) reached between them and Defendant ExamSoft Worldwide, Inc. ("ExamSoft" or "Defendant"), which was fully executed on May 4, 2015. The Settlement Agreement and its Exhibits are attached hereto as Exhibit 1. If approved by the Court, the Settlement Agreement will resolve the Named Plaintiffs' claims against ExamSoft in the Actions, all of which relate to the alleged failure of its Software during the July 2014 Bar Exam.

As detailed below, the Court should grant preliminary approval of the Settlement Agreement because, among other things, it provides substantial benefits to Settlement Class Members, includes a comprehensive Notice Plan, and satisfies the requirements of Fed. R. Civ. P. 23(e). Specifically, under the Settlement Agreement Defendant will provide up to Two Million One Hundred Thousand Dollars ($2,100,000.00) that will be used exclusively to pay Approved Claims of up to $90 cash per Settlement Class Member. In addition to this monetary recovery, ExamSoft has made or is in the process of completing enhancements to its technology and communications practices. Additionally, ExamSoft has agreed to make a letter available to Settlement Class Members who request such a letter, explaining that they are members of the Settlement Class. Further, using separate funds from the monetary relief for Approved Claims noted above, ExamSoft will pay (i) the Settlement Administrator to provide direct notice to the Settlement Class (to ensure that Settlement Class Members are provided with the best practical

[1] Except as otherwise specified, defined terms shall have the meanings set forth in Section 1 of the Settlement Agreement.

notice of the Settlement), and to distribute the settlement payments, and (ii) any Service Awards and/or Fee and Expense Award ordered by the Court.

Additionally, the Settlement Agreement is the result of arms-length negotiations between the Parties. And, its material terms were reached with the assistance of a neutral third-party, Mediator Rodney A. Max of Upchurch Watson White & Max, thus further supporting a finding that it is fair and reasonable.

As set forth below, the Named Plaintiffs respectfully submit that the Settlement Agreement satisfies all of the relevant criteria for preliminary approval and should therefore be approved. ExamSoft does not oppose this requested relief.

I. INTRODUCTION

A. Procedural Background.

Five (5) materially identical class action lawsuits were filed—featuring ten (10) different Named Plaintiffs—arising out of a series of technical problems experienced by bar exam test takers during the written portion of the July 2014 Bar Exam in forty-three (43) states. Tens of thousands of bar exam takers paid between $100-150 for a license to use ExamSoft's Software, SofTest, to type the essay portion of the exam on their own laptop computers. The Software was supposed to work by essentially locking exam takers' computers—thus preventing exam takers from accessing the Internet, notes, and other material on their computers—while allowing test takers to type their exams instead of handwriting them. Then, at the end of the testing day, exam takers were required to upload their answers to ExamSoft's system so they could be kept safely and distributed to the test graders. Each of the state bar examiners required strict deadlines by which the exams were to be uploaded, under penalty of not receiving credit for the written portion of the exam.

The Named Plaintiffs allege that when the exam takers attempted to upload their answers to ExamSoft's system after the first day of the July 2014 Bar Exam—as required by the bar examiners and ExamSoft's own directions—ExamSoft's systems failed, and prevented examinees from turning in their answers. This meant that test takers did not get the value of the Software that they paid for. Additionally, instead of preparing for the second day of the bar exam, exam takers frantically attempted to upload their answers for hours, not knowing what happened to their exams, if they would be able to upload them before the deadlines established by the bar examiners and recommended by ExamSoft, or if their answers had disappeared entirely.

Although most examinees were eventually able to upload their exams shortly before the bar examiners' deadlines passed—in large part because many states' bar examiners had to make last-minute extensions to the deadlines for uploading—the impact on exam takers was significant, as it added to the extraordinary stress that already permeates the bar exam process. Further, many SofTest users whose answers were uploaded on time were not able to confirm such success due to the general failure of ExamSoft's system that evening, again resulting in extreme stress and potentially reduced test scores the second day of the bar exam.

As a result of the malfunctioning of ExamSoft's Software, the ten (10) Named Plaintiffs filed five (5) materially identical class actions between August 4 and 15, 2014, which are presently pending in four different district courts.[2] *See* Settlement Agreement Recitals at §§ (A)-(F). While most of the Actions were filed separately by different law firms, counsel for the Named Plaintiffs agreed at the inception of the cases to work together cooperatively. *Id.* at §

[2] In addition to this Court, the other districts in which a related Action is pending include the Northern District of Illinois, Eastern District of Washington, and Eastern District of California. One of the actions – *Casner v. ExamSoft* – was initially filed in Illinois state court, but was later removed to federal court.

(G). The Named Plaintiffs in each of the Actions subsequently agreed to extend Defendant's time to answer or otherwise respond to the complaints in order to allow the Parties to engage in an informal discussion regarding their respective views of the claims and defenses at issue, and the potential for global resolution of the Actions. *Id.* Additionally, on May 4, 2015, Plaintiffs West and Perez amended their complaint to name plaintiffs in the other actions as named-parties in this Action. *Id.*

B. Initial Meeting, Exchanges of Information, and Mediation.

After counsel for the Named Plaintiffs agreed to work together, the Parties began to explore their respective views of the cases and whether a formal mediation could collectively resolve the Actions. As a first step, the Parties (through their counsel and representatives of ExamSoft) met in-person in Chicago, Illinois on October 1, 2014. At the meeting, ExamSoft shared detailed information about, *inter alia*, its users' experiences with the Software during the July 2014 Bar Exam and the potential scope of the putative class. *Id.* The Parties also engaged in a preliminary discussion about what they believed to be the potential strengths and weaknesses of their respective cases. Shortly thereafter, the Parties exchanged the names of several potential mediators and eventually agreed to the selection of Rodney A. Max of Upchurch Watson White & Max. *Id.* at § (I); Declaration of Rodney A. Max ("Max Decl."), a copy of which is attached hereto as Exhibit 2, ¶ 9. Mr. Max asked the Parties to perform extensive mediation briefing in advance of the mediation, which the Parties completed. In addition, Mr. Max held pre-mediation telephonic meetings with both sides. *Id.* ¶ 10.

On January 15, 2015, the Parties participated in an all-day mediation before Mr. Max at the Chicago offices of Kirkland & Ellis LLP. Settlement Agreement Recital § (I); Max Decl. ¶ 11. Although the Parties did not reach a final agreement that day, they had made substantial

progress toward resolution and agreed to continue their discussions following the mediation. After several rounds of additional arm's-length negotiations with the assistance of Mr. Max and additional exchanges of information in the weeks that followed, the Parties agreed upon the parameters of a class action settlement that would resolve the claims against Defendant. Settlement Agreement Recital § (I); Max Decl. ¶ 10-12.

In order to preserve the resources of the Parties and the judiciary, the Parties also agreed that the Named Plaintiffs would seek approval of their class action settlement through this Action,[3] that the plaintiffs in this action would amend their complaint to name the plaintiffs in the related actions, and that the remaining actions would, subject to their respective courts' approval, be stayed. *See* Settlement Agreement at Recital § (J). Thus, following the mediation, Defendant ExamSoft filed status reports in each court apprising them of the status of the Parties' settlement discussions and the intent of the Parties to seek approval of the proposed settlement in this Court. *See id.* at § (K). At this time, all of the other Actions have been stayed pending the outcome of the Parties' request for approval of the Settlement in this Court.[4] *Id.*

C. Summary of the Settlement Terms.

The terms of the Settlement are detailed in the Settlement Agreement. The following is a summary of the Settlement Agreement's material terms.

1. The Settlement Class. The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. It is defined to include all individuals and

[3] ExamSoft's corporate headquarters are located in Boca Raton, Florida.

[4] A sixth, similar action—filed on August 7, 2014, in the United States District Court for the Northern District of California and currently captioned as *Maya Dillard Smith, et al. v. ExamSoft Worldwide, Inc.*, 3:14-cv-03590 (N.D. Cal.)—has also been stayed. Plaintiff Smith included individual causes of action in her complaint and, for that reason, is not participating as a Named Plaintiff in this Settlement. But she has agreed to stay her action pending determination of approval of this Settlement.

entities in the United States and its territories who registered and/or paid to use the Software for the July 2014 Bar Exam. Settlement Agreement at § 1.35. Excluded from the Settlement Class are (a) bar exam takers who exclusively tested in New Jersey, Massachusetts, or the U.S. Virgin Islands (which did not use the Software to test on July 29, 2014); (b) bar exam takers who never uploaded any actual (as opposed to mock) July 2014 Bar Exam files; and (c) bar exam takers who uploaded all of their July 28 and/or July 29 2014 Bar Exam files by 5:52 PM EDT on July 29, 2014 and for whom there is no record of a failed attempt to upload prior to that time on July 29, 2014. *Id.* Also excluded from the Settlement Class are (d) any Judge or Magistrate presiding over this action and members of their immediate families; (e) the Defendant, the Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest, and any of their current or former officers, directors, employees, representatives, managers, members, and any other Person acting for or on behalf of Defendant; (f) Persons who properly execute and file a timely request for exclusion (*i.e.,* "opt-out") from the Settlement Class; and (g) the legal representatives, successors or assigns of any such excluded Persons. *Id.*

2. Monetary, Prospective, and Other Relief for the Benefit of the Class. Pursuant to the Settlement Agreement, ExamSoft shall pay, or cause to be paid, the sum of ninety dollars ($90.00) for each Approved Claim, up to a total of Two Million One Hundred Thousand Dollars ($2,100,000.00). Settlement Agreement § 2.1(a). Settlement Class Members shall have until the Claims Deadline—which is forty-five (45) days after the Court grants Final Approval—to submit an Approved Claim. *Id.* at §§ 1.4, 1.7. In the event that the total amount of Approved Claims would exceed the Two Million One Hundred Thousand Dollars ($2,100,000.00), then those Settlement Class Members with an Approved Claim shall receive a *pro rata* share of that amount

based upon the number of Approved Claims submitted. *Id.* Within sixty (60) days after the Effective Date, or such other date as the Court may set, the Settlement Administrator, in coordination with Defendant, shall cause all Approved Claims to be paid by check and mailed to the claimants via First Class U.S. mail. *Id.* at § 2.1(a)(ii). In order to be eligible to receive these payments, Claim Forms must be submitted electronically (if done via the Settlement Website) or postmarked (if mailed) by the Claims Deadline. *Id.* § 1.4.

In addition to these monetary payments, Defendant has agreed to make enhancements to its technology and communications practices. These enhancement include improvements to the technology supporting Defendant's systems and to its ability to communicate with test-takers and bar examiners. *Id.* § 2.2(a)(i)-(vi).

Additionally, upon request, ExamSoft will provide Class Members with "Validation Letters," which will explain that the class member experienced technical difficulties using ExamSoft during the July 2014 Bar Examination. *Id.* § 2.2(c).

3. Class Release. In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt out will be deemed to have released ExamSoft from all claims, whether known or unknown, that have been or could have been asserted by Named Plaintiffs and/or members of the Settlement Class against any or all of the Released Parties arising out of or relating to the alleged claims in the Actions and the July 2014 Bar Exam, including damages arising from individual test takers' performance on the July 2014 Bar Exam. *Id.* § 11.14.

4. The Notice Plan. The Notice Plan (*see* Section 4 of the Settlement Agreement) is designed to provide the best notice practicable, and it is tailored to take advantage of the information ExamSoft has available about Settlement Class Members from when they registered

to use its Software for the July 2014 Bar Exam. The Settlement Administrator is Gilardi & Co. LLC. Settlement Agreement § 1.34. ExamSoft will pay all fees, costs, and expenses of the Settlement Administrator incurred in connection with the Notice Plan in addition to monetary relief to be made available used exclusively for payment of Approved Claims. *Id.* § 1.33.

The Notice Plan is comprised of both direct e-mail notice and Internet notice. *Id.* § 4.2(a)-(c). Defendant shall—based on a review of its business records and data in its possession, custody, or control—provide the Settlement Administrator the name, email address, and ExamSoft Login ID for any reasonably identifiable Persons who are potential members of the Settlement Class, including any potential Settlement Class Member that provided such information to Defendant to register to use the Software in connection with the July 2014 Bar Exam. *Id.* § 4.2(a). The Settlement Administrator will also set up and administer a Settlement Website devoted to this case, located at URL www.examsoftsettlement.com. *Id.* § 4.2(c). ExamSoft will also provide the notification required by the Class Action Fairness Act, 28 U.S.C. § 1715, to the Attorneys General of each U.S. State in which Settlement Class members reside, the Attorney General of the United States, and other required government officials. *Id.* § 4.2(e).

5. Class Representative Service Awards. Class Counsel will seek and ExamSoft will not oppose Service Awards of $1,000.00 for each of the Class Representatives (or in another lesser amount if set by the Court). Settlement Agreement § 9.1. If the Court approves them, these Service Awards will be paid separate and apart from the monetary relief being made available for Approved Claims. *Id.* The Service Awards will be in addition to the relief the Class Representatives will otherwise be entitled to under the terms of the Settlement. *Id.* The Service Awards will compensate the Class Representatives for their time and efforts in prosecuting the Actions against ExamSoft, and for representing their fellow classmates and exam

takers. *Id.*

6. Attorneys' Fees and Costs. Subject to Court approval, ExamSoft has also agreed to pay up to $600,000.00 to Class Counsel for their attorneys' fees plus reimbursement of litigation costs and expenses in addition to the monetary relief being made available for Approved Claims. Settlement Agreement § 9.2. The Parties negotiated these attorneys' fees and costs only after reaching agreement on all other material terms of this Settlement, and the amount thereof was ultimately proposed in a Mediator's proposal to which all Parties subsequently agreed. Max Decl., Ex. 2 ¶ 13. In the event the Court grants preliminary approval of the settlement, proposed Class Counsel will file a detailed memorandum with supporting materials to justify these requests and propose that they do so no later than fourteen (14) days before the Objection Deadline. Settlement Agreement § 9.3

7. Summary of Proposed Schedule. A summary of the pertinent deadlines described above and contemplated by the Settlement is set forth below:

	Event	***Timing***
1	ExamSoft to provide the notice required by CAFA, 28 U.S.C. § 1715(b)) (SA § 4.2 (e)).	Within 10 days after the Settlement Agreement is filed with the Court.
2	ExamSoft to provide the Settlement Administrator with the Potential Class Member List (SA § 4.2(a)).	Within 14 days after the entry of the Preliminary Approval Order.
3	Settlement Administrator to send e-mails to everyone on the Potential Class Member List (SA § 4.2(a)).	Within 14 days after the Settlement Administrator receives the Potential Class Member List from ExamSoft.
4	Long-Form Notice on Settlement Website to go live (SA § 4.2(c)).	Prior to any dissemination of the Summary Notice Preliminary Approval Order.
5	Deadline for filing Objections or Requests for Exclusion (i.e. "opt-outs") (SA at §1.24).	45 days after the Notice Date (i.e. the first date that the Summary Notice is issued).

6	The Filing of Plaintiffs' Request for Attorneys' Fees, Expenses, and Incentive Award for Plaintiff. (SA at § 9.3).	At least 14 days before the Objection Deadline.
7	The Filing of a Motion, Brief and Supporting Materials Seeking Final Approval of the Settlement (SA at § 5.6).	At least 14 days before the Objection Deadline.
8	Claims Deadline (SA § 1.6).	45 days after entry of Final Judgment.
9	Checks to be mailed to all Settlement Class Members who submitted Approved Claims (SA §§ 2.1(a)(ii).	Within 60 days of the Effective Date, as defined in the Settlement Agreement.

II. ARGUMENT

A. Certification of the Settlement Class Is Appropriate.

Prior to granting preliminary approval of a proposed settlement, the Court should first determine that the proposed settlement class is appropriate for certification. *See* MANUAL FOR COMPLEX LITIG., § 21.632 (4th ed. 2004)); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class, proposed class representative, and proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P 23(a)(1)–(4); *see also Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001). Additionally, where (as in this case) certification is sought under Rule 23(b)(3), the plaintiffs must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615–16. District courts are given broad discretion to determine whether certification of a class action lawsuit is appropriate. *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 323 (S.D. Fla. 1996).

This Court has stated that "[a] class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'"

Burrows v. Purchasing Power, LLC, No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *3 (S.D. Fla. Oct. 4, 2013) (Hon. Ungaro, U.) (quoting *Lipuma v. American Express Co*., 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005)). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc.*, 521 U.S. at 620. This case meets all of the Rule 23(a) and 23(b)(3) prerequisites, and for the reasons set forth below, certification is appropriate.

1. The Proposed Settlement Class Meets the Requirements of Rule 23(a).

a. The Numerosity Requirement is Satisfied.

The first prerequisite to class certification is numerosity, which requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1); *see also Fabricant*, 202 F.R.D. at 313 (requiring that joinder be impracticable, not impossible). To satisfy this requirement, there is no "definite standard as to the size of a given class, and plaintiff's estimate need only be reasonable." *Id*. However, a plaintiff must "proffer some evidence of the number of members in the purported class, or at least a reasonable estimate of that number." *Leszczynski v. Allianz Ins*., 176 F.R.D. 659, 669 (S.D. Fla. 1997). Generally, the numerosity requirement is satisfied when the class includes 40 or more members. *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

Here, the numerosity requirement of Rule 23(a) is satisfied because the Settlement Class consists of slightly more than 31,000 individuals who utilized the ExamSoft Software during the July 2014 Bar Exam from across the country. (*See* Declaration of Jay Edelson ¶ 12, attached hereto as Exhibit 4.)

b. The Commonality Requirement is Satisfied.

Second, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011) (citation omitted). Commonality is satisfied when there is "at least one issue affecting all or a significant number of proposed class members." *Fabricant*, 202 F.R.D. at 313; *see also Agan v. Kathzamn & Korr, P.A.*, 222 F.R.D. 692, 697 (S.D. Fla. 2004). The threshold for demonstrating the commonality requirement is not high and is "generally satisfied when a plaintiff alleges that defendants have engaged in a standardized course of conduct that affects all class members." *In re Checking Overdraft Litig.*, 275 F.R.D. 666, 673 (S.D. Fla. 2011); *see also Dukes*, 131 S. Ct. at 2545, 2556 (Commonality may be demonstrated when the claims of all class members "depend upon a common contention" and "even a single common question will do.").

Here, the commonality requirement is readily satisfied. In this case, all members of the proposed Settlement Class share a common claim arising out of the same alleged activity—a technical problem resulting from a malfunction of Defendant's Software during the July 2014 Bar Exam. That malfunction raises multiple common factual and legal questions, including, without limitation, whether (i) Defendant engaged in unfair, deceptive, untrue or misleading advertising, (ii) Defendant violated Florida's Deceptive and Unfair Trade Practices Act, Florida Statute § 501.201, *et seq.*, (iii) Defendant has been unjustly enriched, (iv) the Settlement Class Members have been injured by Defendant's conduct, (v) the Named Plaintiffs and the Settlement Class are entitled to monetary relief, and (vi) the Named Plaintiffs and the Settlement Class are

entitled to declaratory and injunctive relief.

The determination of these factual and legal issues—and ExamSoft's defenses regarding the same—would be resolved in one stroke. *See Dukes*, 131 S. Ct. at 2551. Thus, the commonality requirement is satisfied. *Fuller v. Becker & Poliakoff, P.A.*, 197 F.R.D. 697, 700 (M.D. Fla. 2000) ("Not all factual or legal questions raised in the litigation need be common so long as at least one issue is common to all class members.").

c. The Typicality Requirement is Satisfied.

The next requisite to certification, typicality, "measures whether a significant nexus exists between the claims of the named representative and those of the class at large." *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003); Fed. R. Civ. P. 23(a)(3). A class representative's claims are typical of the claims of the class if they "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1337 (11th Cir. 1984); *see also Cooper v. Southern Co*., 390 F.3d 695, 714 (11th Cir. 2004) ("Neither the typicality nor the commonality requirement mandates that all putative class members share identical claims, and . . . factual differences among the claims of the putative members do not defeat certification."). Simply put, when the same course of conduct is directed at both the named plaintiff and the members of the proposed class, the typicality requirement is met. *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983).

Here, and for the same reasons that the Named Plaintiffs' claims meet the commonality requirement, their claims satisfy the typicality requirement as well. Specifically, the Named Plaintiffs and the Settlement Class Members were each subjected to the same malfunction of ExamSoft's Software, suffered the same injuries, and as a result, have the same interests and will all benefit from the relief provided by the Settlement. *See Kornberg*, 741 F.2d at 1337

(typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *see also Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they "possess the same interest and suffer the same injury as the class members"). As such, the typicality requirement is satisfied here as well.

d. The Adequacy of Representation Requirement is Satisfied.

Finally, Rule 23(a) requires the representative parties to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This factor mandates both that: (1) the proposed class representatives possess no interests antagonistic to the class; and that (2) the proposed class counsel has the competence to undertake this litigation. *Fabricant*, 202 F.R.D. at 314 (citing *Kirkpatrick v. J.C. Bradford & Co*., 827 F.2d 718, 726-28 (11th Cir. 1987)). The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotation marks omitted).

Here (and as noted above), the Named Plaintiffs have the same interests as the other members of the Settlement Class as they each suffered the same injuries resulting from the alleged failure of ExamSoft's Software to function as promised. Thus, the Named Plaintiffs and the absent Settlement Class Members have the same interests in the relief afforded by the Settlement and no antagonistic or diverging interests. Moreover, the Named Plaintiffs have each remained actively involved in the prosecution of this case by assisting with the drafting of the complaints in their respective Actions, providing additional information to Class Counsel during the Parties' settlement negotiations, and staying in close communication with their attorneys over the course of this case. In sum, the Named Plaintiffs' participation throughout the litigation

demonstrates that they have protected and will continue to protect the interests of the absent Settlement Class Members.

Likewise—and as detailed in their attached declarations—proposed Class Counsel and the lawyers at their respective firms have extensive experience and expertise prosecuting complex class actions, including consumer actions similar to this suit. *See* Declarations of John Allen Yanchunis Sr. of Morgan & Morgan, Jay Edelson of Edelson PC, Gretchen Freeman Cappio of Keller Rohrback L.L.P., Benjamin F. Johns of Chimicles & Tikellis LLP, and Tina Wolfson of Ahdoot & Wolfson PC (collectively, "Class Counsel's Declarations"), along with their Firm Resumes, attached hereto as Exhibits 3-7, respectively. Each regularly engage in major complex litigation involving similar issues, have the resources necessary to conduct litigation of this nature, and have frequently been appointed lead class counsel by courts throughout the country. *See id.* Moreover, Class Counsel have devoted substantial time and resources to the vigorous litigation of the Actions since their inception and will continue to do so throughout the pendency of the Actions. *Id.*

Ultimately, because the Named Plaintiffs and proposed Class Counsel have and will continue to adequately represent and advocate on behalf of the Settlement Class, Rule 23(a)(4)'s adequacy requirement is satisfied.

2. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3).

In addition to meeting the prerequisites of Rule 23(a), the proposed Settlement Class must also meet one of the three requirements of Rule 23(b). *In re Checking*, 286 F.R.D. at 650. Here, Named Plaintiffs seek certification under Rule 23(b)(3), which requires that (i) questions of law and fact common to members of the class predominate over any questions affecting only individuals, and that (ii) the class action mechanism is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). The "inquiry into

whether common questions predominate over individual questions is generally focused on whether there are common liability issues which may be resolved efficiently on a class-wide basis." *Agan*, 222 F.R.D. at 700. The proposed Settlement Class readily meets these requirements.

a. Common Questions of Law and Fact Predominate.

Rule 23(b)(3)'s predominance requirement focuses primarily on whether a defendant's liability is common enough to be resolved on a class basis, *see Dukes,* 131 S. Ct. at 2551-57, and whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Common issues of fact and law predominate in a case "if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *In re Checking*, 286 F.R.D. at 655; *see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.,* 601 F.3d 1159, 1179 (11th Cir. 2010) (noting that "[t]he relevant inquiry [is] whether questions of liability to the class . . . predominate over . . . individual issues relating to damages. . . ."). Predominance does not require that all questions of law or fact be common, but rather, that a significant aspect of the case "can be resolved for all members of the class in a single adjudication." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).

Here, the Named Plaintiffs readily satisfy Rule 23(b)(3)'s predominance requirement because liability questions common to all Settlement Class Members substantially outweigh any possible individual issues. For example, each Settlement Class Member's relationship with ExamSoft arises from user agreements that are substantially similar, *see Sacred Heart Health Sys.*, 601 F.3d at 1171 ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment."), and each Settlement Class Member was allegedly injured based on the same events and course of conduct. Further, to the extent

Defendant was to ultimately raise its intended defenses—e.g., the validity of the liability waivers, and arbitration and choice-of-law provisions included within each Settlement Class Members licensing agreements—those would present common "issues apt to drive the resolution of the litigation" as well. *See Dukes*, 131 S. Ct. at 2551. These commonalities resulting from Defendant's alleged uniform misconduct and actions toward the class, as a whole, clearly predominate over any issues affecting only individual members of the Settlement Class.

Accordingly, the predominance requirement is met.

b. A Class Action is the Superior Method for Adjudicating this Controversy.

Finally, a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the proposed Settlement Class. As courts have historically noted, "[t]he class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free from legal accountability." *In re Checking*, 286 F.R.D. at 659. At its most basic, "[t]he inquiry into whether the class action is the superior method for a particular case focuses on 'increased efficiency.'" *Agan*, 222 F.R.D. at 700 (quoting *Sikes v. Teleline, Inc*., 281 F.3d 1350, 1359 (11th Cir. 2002)).

Here, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). Indeed, absent class treatment in the instant Action, each Settlement Class Member will be required to present the same or essentially the same legal and factual arguments, in separate and duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the judiciary and the litigants. Moreover, there is no indication that members of the Settlement Class have an interest in individual litigation or an

incentive to pursue their claims individually, given the small amount of damages likely to be recovered, relative to the resources required to prosecute such an action. *See In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 700 (S.D. Fla. 2004) (class actions are "particularly appropriate where . . . it is necessary to permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Additionally, the proposed Settlement will give the Parties the benefit of finality, and because this action has now been settled, pending approval of the Court, the Court need not be concerned with issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case . . . would present intractable management problems. . . .").

Thus, the superiority requirement—as with each of Rule 23's other requirements—is satisfied, and the Court should certify the Settlement Class.

B. Named Plaintiffs' Counsel Should be Appointed Class Counsel.

Under Rule 23, "a court that certifies a class must appoint class counsel . . .[who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the court must consider the proposed class counsel's (1) work in identifying or investigating potential claims, (2) experience in handling class actions or other complex litigation and the types of claims asserted in the case, (3) knowledge of the applicable law, and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

As discussed above, and as fully explained in Class Counsel's Declarations, proposed Class Counsel have extensive experience prosecuting similar class actions and other complex litigation. (*See* Class Counsel Declarations and attached Firm Resumes, Exs. 3-7.) Further, proposed Class Counsel have diligently investigated and prosecuted the claims in this matter,

have dedicated substantial resources to the investigation of those claims, and have successfully negotiated the settlement of this matter to the benefit of the proposed Settlement Class. *Id*. Accordingly, the Court should appoint John Allen Yanchunis Sr. of Morgan & Morgan, Jay Edelson of Edelson PC, Gretchen Freeman Cappio of Keller Rohrback L.L.P, Benjamin F. Johns of Chimicles & Tikellis LLP, and Tina Wolfson of Ahdoot & Wolfson as Class Counsel.

C. This Settlement is Fundamentally Fair, Reasonable, and Adequate, and thus Warrants Preliminary Approval.

After determining that a proposed settlement class is appropriate for certification, courts consider whether the proposed settlement itself warrants preliminary approval. Under Rule 23(e), "the Court will approve a class action settlement if it is 'fair, reasonable, and adequate.'" *Burrows v. Purchasing Power, LLC*, No. No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *13 (S.D. Fla. Oct. 4, 2013) (Hon. Ungaro, U.) (quoting Fed. R. Civ. P. 23(e)(2)). The procedure for review of a proposed class action settlement is a well-established two-step process. ALBA & CONTE, 4 NEWBERG ON CLASS ACTIONS, §11.25, at 38–39 (4th ed. 2002). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." *Id.* (quoting MANUAL FOR COMPLEX LITIG., §30.41 (3rd ed. 1995)); *Fresco v. Auto Data Direct, Inc.*, No. 03-cv-61063, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007). "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.,* No. 09-cv-60646, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010). Moreover, settlement negotiations that involve arm's-length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See* MANUAL FOR COMPLEX LITIG. at §30.42. ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between

experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

Further, it must be noted that there is a strong judicial and public policy favoring the voluntary conciliation and settlement of complex class action litigation. *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"); *Warren v. City of Tampa*, 693 F. Supp. 1051, 154 (M.D. Fla. 1998), *aff'd,* 893 F. 2d 347 (11th Cir. 1998); *Access Now, Inc. v. Claires Stores, Inc*., No. 00-cv-14017, 2002 WL 1162422, at *4 (S.D. Fla. May 7, 2002). This is because class action settlements ensure class members a benefit as opposed to the "mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transport.*, 148 F.R.D. 297, 306 (N.D. Ga. 1993); *see also*, *e.g.*, *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) (finding that the policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain). Thus, while district courts have discretion in deciding whether to approve a proposed settlement, deference should be given to the consensual decision of the parties. *Warren*, 693 F. Supp. at 1054 ("affording great weight to the recommendations of counsel for both parties, given their considerable experience in this type of litigation").

Here, there should be no question that the proposed Settlement is "within the range of possible approval." To start, the process used to reach the Settlement was exceedingly fair. That is, the Settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of these Actions. As discussed above, the Parties engaged in formal in-person mediation before an experienced and respected mediator, Rodney Max. Max Decl., Ex. 2; *see also Burrows*, 2013

U.S. Dist. LEXIS 189397, at *2 (granting final approval to another class action settlement in which Mr. Max was the mediator). Moreover, while the settlement of the related Actions did occur at a relatively early stage in the litigation, Class Counsel nevertheless obtained sufficient information needed to confidently evaluate the strengths and weaknesses of the Named Plaintiffs' claims and prospects for success at class certification, summary judgment, trial, and on appeal. Finally, all of the negotiations were arm's-length. Max Decl., ¶¶ 11-12; *see Perez v. Asurion Corp*., 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator"); *Lipuma*, 406 F. Supp. 2d at 318-19 (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel").

The relief afforded to the Settlement Class further demonstrates the fairness, reasonableness, and adequacy of the Settlement. That is, by submitting a short and simple Claim Form, Settlement Class Members are entitled to a cash payment of up to $90, subject to the total $2,100,000.00 available to pay Approved Claims. This relief is outstanding given the complexity of the litigation, and the significant risks and barriers that loomed in the absence of Settlement. *See, e.g.*, Settlement Agreement § 2.2 (b). In addition to the monetary relief, ExamSoft has made or is in the process of completing significant enhancements to its technology and communications practices. Given these various forms of relief offered under the Settlement, coupled with the robust notice plan (i.e., direct notice provided by email to all Settlement Class Members and the creation of a Settlement Website), Class Counsel believe that the results achieved are well within the range of possible approval.

Nevertheless, and despite the strength of their Settlement, the Named Plaintiffs are

pragmatic in their awareness of the various defenses available to ExamSoft as well as the risks inherent to continued litigation. For example, ExamSoft made clear at the outset that it would vigorously defend the Actions and that there are potentially applicable terms of use—including arbitration and choice-of-law clauses—that it would seek to enforce against the Settlement Class.[5] While the Named Plaintiffs had contractual formation and other arguments available in response, they do recognize the recent trend of unfavorable Supreme Court jurisprudence on the enforceability of arbitration clauses in consumer class action lawsuits, *see, e.g., AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and the challenges the Class could face in defeating the broad liability waiver contained in Defendant's End User License Agreements.[6] And, of course, ExamSoft was likely to challenge the Named Plaintiffs' ability to certify a nationwide or multi-state class for purposes of contested class certification proceedings. Finally, even if the Named Plaintiffs succeeded on the merits and class certification issues, and ultimately prevailed at trial, any recovery could be delayed for years by an appeal. *See Lipuma*, 406 F. Supp. 2d at 1322 (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement).

In contrast, this Settlement provides substantial, prompt and certain relief to Settlement Class Members. Under the circumstances, Class Counsel appropriately determined that the Settlement outweighs the gamble of continued litigation. *See e.g.*, *id.* 1323 ("it has been held proper to take the bird in hand instead of a prospective flock in the bush.").

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[5] ExamSoft contends that there are two relevant versions of the End User License Agreement in this case: one for test takers' whose computers use a Windows operating system, and one for those who use Apple computers. According to ExamSoft, all of the Windows version of these agreements contained an arbitration clause.

[6] Many of the arguments ExamSoft would have pursued in this case are set forth in the affirmative defenses contained in the Answer it filed in this case on October 20, 2014. (See Dkt. 21.)

For all of these reasons, the Named Plaintiffs and proposed Class Counsel firmly believe that the monetary and prospective relief provided by the Settlement weighs heavily in favor of a finding that it is fair, reasonable, and adequate, and well within the range of approval.

Accordingly, the Court should grant preliminary approval.

D. The Court Should Approve the Proposed Notice Plan.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPL. LITIG. § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "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." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co*., 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted); *see also* MANUAL FOR COMPL. LITIG., § 21.312 (listing relevant information).

The Notice Plan here satisfies all of these criteria and is designed to provide the best notice practicable. Foremost, the Notice Plan is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, class certification (for settlement purposes), the terms of the Settlement, Class Counsel's Fee Application and the Class Representatives' Service Awards, their rights to opt-out of or object to the Settlement, as well as the other information required by Fed. R. Civ. P. 23(c)(2)(B). Additionally, the Notice Plan is

comprised of both direct e-mail notice and Internet notice that is tailored to take advantage of the contact information ExamSoft obtained when test takers initially registered to use its Software for the July 2014 Bar Exam. *See* Settlement Agreement§ 4.2(a)-(c).

Specifically, subject to the Court's approval, within fourteen (14) days after Preliminary Approval of this Agreement, Defendant shall—based on review of its business records and data in its possession, custody, or control—provide the Settlement Administrator the name, email address, and ExamSoft Login ID for any reasonably identifiable Persons who are potential members of the Settlement Class. *Id.* § 4.2(a). Within fourteen (14) days thereafter, the Settlement Administrator will send the Summary Notice to potential Settlement Class Members by email. *Id.* The Settlement Administrator will then re-send by U.S. Mail any Summary Notice that was emailed and resulted in a "bounce-back" or was otherwise returned as undeliverable, after performing reverse look ups as the Settlement Class Administrator deems appropriate. *Id.* The Settlement Administrator will also set up and administer a Settlement Website devoted to this case, located at the URL www.examsoftsettlement.com, which will contain a Long Form Notice, *id.* §§ 4.2(b), (c)[7] and will remain live through, at a minimum, the Claims Deadline. *Id.* § 4.2(c).

Finally, ExamSoft will provide the notification required by the Class Action Fairness Act, 28 U.S.C. § 1715, to the Attorneys General of each U.S. State in which Settlement Class Members reside, the Attorney General of the United States, and other required government officials. *Id.* § 4.2(e)

As a result, the Notice and Notice Plan satisfy all applicable requirements of the law,

[7] A copy of the Long Form and Summary Notices are attached to the Settlement Agreement as Exhibits 1-B and 1-C, respectively.

including but not limited to Rule 23 of the Federal Rules of Civil Procedure and Due Process. The Court should therefore approve the Notice Plan and the form and content of the Notices attached hereto as Exhibits 1-B and 1-C.

E. The Court Should Schedule a Final Approval Hearing.

The last step in the preliminary approval process is to schedule a Final Approval Hearing, at which the Court will hear evidence and argument necessary to make its final evaluation of the Settlement. The Court will determine at or after the Final Approval Hearing whether the Settlement should be approved; whether to enter the Final Approval Order under Rule 23(e); and whether to approve Class Counsel's Fee Application, and request for Service Awards for the Class Representatives. The Named Plaintiffs and Class Counsel request that the Court schedule the Final Approval Hearing at a date convenient for the Court, and in compliance with the provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715. The Named Plaintiffs and Class Counsel will file their motion for Final Approval and Fee Application and request for Service Awards at least fourteen (14) days before the Objection Deadline.

III. CONCLUSION

Based on the foregoing, the Named Plaintiffs respectfully request that the Court enter an order: (1) certifying, for settlement purposes, the proposed Settlement Class, pursuant to Rules 23(a), (b)(3) and (e) of the Federal Rules of Civil Procedure; (2) granting Preliminary Approval to the Settlement; (3) approving the Notice Plan set forth in the Settlement Agreement and the form and content of the Claim Form and Notices attached as Exhibits 1-A, 1-B, 1-C thereto; (4) approving and ordering the opt-out and objection procedures set forth in the Settlement Agreement; (5) appointing as Class Representatives the Named Plaintiffs identified in Section 1.9 of the Settlement Agreement; (6) appointing as Class Counsel the law firms and attorneys

listed in Section 1.8 of the Settlement Agreement; (7) staying the Actions against ExamSoft pending Final Approval of the Settlement; and (8) scheduling a Final Approval at a date convenient for the Court, and in compliance with the provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715. A [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class is attached as Exhibit 8.

Respectfully submitted,

MORGAN & MORGAN COMPLEX LITIGATION GROUP

Dated: May 5, 2015

By: /s/ John A. Yanchunis

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**Motion for leave to appear pro hac vice to be filed*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record. All copies of documents required to be served by Fed. R. Civ. P. 5(a) have been so served on this the 5th of May, 2015.

/s/ John A. Yanchunis