

The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

CHERYL KATER and SUZIE KELLY,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

CHURCHILL DOWNS INCORPORATED, a
Kentucky corporation, and BIG FISH GAMES,
INC., a Washington corporation.

Defendants.

No. 15-cv-00612-RSL

**PLAINTIFFS' MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AGREEMENT**

Noting Date: January 15, 2021

MANASA THIMMEGOWDA, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

BIG FISH GAMES, INC., a Washington
corporation; ARISTOCRAT TECHNOLOGIES
INC., a Nevada corporation; ARISTOCRAT
LEISURE LIMITED, an Australian corporation;
and CHURCHILL DOWNS INCORPORATED,
a Kentucky corporation,

Defendants.

No. 19-cv-00199-RSL

**PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AGREEMENT**

Noting Date: January 15, 2021

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INTRODUCTION

1
2 In 2015, Cheryl Kater initiated the first ever case alleging that social casino apps are
3 illegal gambling under Washington law. Since that time, and joined by Suzie Kelly and Manasa
4 Thimmegowda, Plaintiffs have vigorously litigated these cases before this Court, the Ninth
5 Circuit (twice), the Washington State Gambling Commission, and even the Washington
6 Legislature. After a 12-hour marathon mediation with the Honorable Layn R. Phillips (ret.),
7 Plaintiffs and Defendants Churchill Downs, Big Fish Games, Aristocrat Technologies, and
8 Aristocrat Leisure reached a class settlement, the cornerstone of which is the establishment of a
9 non-reversionary \$155 million common fund. At that level of recovery every class member who
10 has ever lost money playing Defendants' social casino games can get a substantial portion of
11 their losses back, and those with higher levels of losses are entitled to recover increasingly higher
12 percentages of their losses. Utilizing data from the Platform Providers—the entities through
13 which Class Members purchased chips to gamble at Defendants' social casinos—the Court-
14 approved Notice Plan has been successfully implemented.

15 The reaction of the class to date has been exceptional: more than 50,000 Class Members
16 have already submitted claims and the claims deadline is still several weeks out. By contrast, one
17 class member has so far requested exclusion and there are currently no objections. Given the life-
18 changing relief afforded, this volume of claims is not surprising and is consistent with the
19 projections at preliminary approval. Participating Class Members stand to recover substantial
20 portions of their losses with those that have lost the most standing to recover more than half of
21 their gambling losses. *See* Declaration of Steven Weisbrot, Dkt. 219 ¶¶ 50-53. By way of
22 example, Class Representatives Thimmegowda, Kater, and Kelly, who have previously estimated
23 their losses at approximately \$4,000, \$40,000, and \$400,000, are according to those estimates
24 projected to recover \$500-\$1,000 (Thimmegowda), \$10,000-\$20,000 (Kater), and \$200,000-
25 \$300,000 (Kelly). *Id.* Equally as important, the Settlement requires Defendants to provide
26 addiction-related resources within their social casino games and create and honor a self-
27 exclusion policy likes those at Washington brick-and-mortar casinos.

1 Given the novelty of Plaintiffs’ claim, Professor William B. Rubenstein (author of
2 influential treatise NEWBERG ON CLASS ACTIONS) describes the recovery as an “astounding
3 accomplishment” and calls the relief provided “historic.” And although there are no truly
4 comparable settlements, it dwarfs its nearest factual equivalent, *In re Apple In-App Purchase*
5 *Litigation.*, No. 5:11-CV-01758 EJD, 2013 WL 1856713, at *1 (N.D. Cal. May 2, 2013)
6 (providing \$5 to users of apps that “compel children playing them to purchase large quantities”
7 of in-game currency, “amounting to as much as \$100 *per purchase* or more”) (emphasis added)
8 and far surpasses the typical consumer privacy class settlement, which often provides *cy pres*
9 relief with no individual payments, *see In re Google Referrer Header Privacy Litig.*, 869 F.3d
10 737, 740 (9th Cir. 2017), *vacated on other grounds by Frank v. Gaos*, 139 S. Ct. 1041 (2019).

11 For the reasons that follow, this settlement is fair, reasonable, and adequate and the Court
12 should not hesitate to grant final approval.

13 **BACKGROUND**

14 For the Court’s convenience, the “Background” section from Class Counsel’s
15 contemporaneously-filed motion for attorneys’ fees, expenses, and incentive awards is replicated
16 below.

17 In 2014, Class Counsel began investigating the burgeoning social casino industry. *See*
18 Declaration of Todd Logan (“Logan Decl.”) ¶ 3. The results of that investigation were startling:
19 multinational gambling corporations like Churchill Downs, International Game Technology, and
20 Scientific Games had found a way to smuggle slot machines onto consumers’ smart phones
21 without complying with any federal or state gambling laws. *Id.* ¶ 4. By 2015, social casino
22 games like “Big Fish Casino” were capturing more than \$3 billion in annual revenues.¹ Those
23 revenues, just like those of Vegas casinos, were disproportionately derived from gambling
24 addicts who just couldn’t stop themselves from buying chips and spinning the slots. Moreover,

25
26 1 *See* Dean Takahashi, *13 predictions for the future of the \$3.4B social casino games market*, GAMESBEAT
27 (Oct. 19, 2015, 6:00 AM), available at <https://bit.ly/37TPao9>.

1 those revenues—at least in Class Counsel’s judgment—were entirely ill-gotten gains under a
2 variety of state gambling laws. *See* Logan Decl. ¶ 4.

3 Based on that investigation, in 2015 Class Counsel initiated a nationwide, multi-forum
4 campaign against the social casino industry. As Professor William B. Rubenstein, the sole author
5 of NEWBERG ON CLASS ACTIONS, summarizes that campaign (and its results):

6 Prior to entering academia, I was a lawyer at the national office of the
7 American Civil Liberties Union (ACLU) for nearly a decade, during which
8 time I pursued civil rights campaigns on behalf of minority groups. Based
9 on that experience, it strikes me that what Class Counsel have pursued here
10 is closer in form to a civil rights litigation campaign than it is to a series of
11 discrete class action settlements. Class Counsel saw an injustice – a thinly
12 disguised form of gambling preying on those most vulnerable to addictive
13 gambling – and they sought to fix it. Their goal was not to win a case but to
14 reform an entire industry, much like a civil rights campaign might aim to
15 reform a particular type of discriminatory practice across an entire
16 employment sector. To accomplish this end, Class Counsel went far beyond
17 what lawyers pursuing a simple class action case would normally do. Class
18 Counsel pursued multiple cases. Class Counsel pursued multiple
19 defendants. Class Counsel filed actions in multiple forums. Class Counsel
20 tested various state laws. Class Counsel built websites to help app users
21 avoid forced arbitration clauses, lobbied legislators and regulators, and took
22 their efforts to the media. When Class Counsel lost, they did not give up,
23 but changed tactics or forums and kept going. And they did all of this with
24 their own funds, risking millions of dollars of their own money to end this
25 practice. What they have achieved so far, with these initial settlements, is
26 an astounding accomplishment that begins to chip away at the pernicious
27 underlying social casinos.

18 Declaration of Professor William B. Rubenstein (“Rubenstein Decl.”) ¶ 2.

19 Because the extraordinary settlement here is but a part of Class Counsel’s efforts carrying
20 the banner nationwide for victims of the social casino industry, a summary of Class Counsel’s
21 efforts both before this Court and otherwise is provided below.

22 **I. Class Counsel’s 2015 Social Casino Lawsuits, Including *Kater*.**

23 Having concluded that social casinos constitute gambling, between April and October of
24 2015, Class Counsel filed five (5) proposed class action lawsuits, in four (4) different courts,
25 alleging class claims under five (5) different sets of state gambling laws. *See* (1) *Mason v. Mach.*
26 *Zone, Inc.*, No. 15-cv-01107 (D. Md. Apr. 17, 2015) (alleging claims under California and
27 Illinois gambling laws); (2) *Kater v. Churchill Downs Inc.*, No. 15-cv-612 (W.D. Wash. Apr. 17,

1 2015) (alleging claims under Washington gambling law); **(3)** *Dupee v. Playtika Santa Monica, et*
 2 *al.*, No. 15-cv-01021 (N.D. Ohio May 21, 2015) (alleging claims under Ohio and Nevada
 3 gambling laws); **(4)** *Phillips v. Double Down Interactive LLC*, No. 15-cv-04301 (N.D. Ill.)
 4 (removed May 14, 2015) (alleging claims under Illinois gambling laws); **(5)** *Ristic v. Mach.*
 5 *Zone, Inc.*, No. 15-cv-08996 (N.D. Ill. Oct. 9, 2015) (alleging claims under Illinois gambling
 6 laws).

7 Each federal district court initially presented with Class Counsel’s theory of these
 8 cases—*i.e.*, that social casinos are illegal gambling and consequently must return to consumers
 9 their ill-gotten gains—squarely rejected it. *See Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 316
 10 (4th Cir. 2017); *Kater v. Churchill Downs Inc.*, No. C15-612 MJP, 2015 WL 9839755, at *3
 11 (W.D. Wash. Nov. 19, 2015), *rev’d*, 886 F.3d 784 (9th Cir. 2018); *Dupee v. Playtika Santa*
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 14 15-CV-8996, 2016 WL 4987943, at *4 (N.D. Ill. Sept. 19, 2016). In representative fashion,
 15 Judge Pechman’s dismissal order in *Kater* concluded that “Big Fish Casino does not award
 16 something of value satisfying the requisite prize element, and therefore the game is not ‘illegal
 17 gambling’ under Washington law.” *Kater*, 2015 WL 9839755, at *3.

18 **II. Class Counsel Appeals The *Kater* Dismissal And The Ninth Circuit Reverses.**

19 Following Judge Pechman’s dismissal order in *Kater*, Class Counsel appealed. Merits
 20 briefing before the Ninth Circuit concluded in September 2016, and oral argument was held in
 21 February 2018. Along the way, Defendant Churchill Downs moved to substitute Big Fish
 22 Games, Inc. as the real party in interest, on grounds that as a result of an impending sale it would
 23 “soon lack any interest in either Big Fish Games, Inc., or Big Fish Casino.” *Kater v. Churchill*
 24 *Downs*, No. 16-35010, Dkt. 48 at 6 (9th Cir. 2018). Class Counsel opposed that motion. *See id.*,
 25 Dkt. 50 at 3 (“Ms. Kater alleges that Churchill Downs—not Big Fish Games—retained the
 26 benefit of what she lost gambling at the Big Fish Casino.”)

27 In March 2018, the Ninth Circuit reversed:

1 In this appeal, we consider whether the virtual game platform “Big Fish
2 Casino” constitutes illegal gambling under Washington law. Defendant–
3 Appellee Churchill Downs, the game’s owner and operator, has made
4 millions of dollars off of Big Fish Casino. However, despite collecting
5 millions in revenue, Churchill Downs, like Captain Renault in *Casablanca*,
purports to be shocked—shocked!—to find that Big Fish Casino could
constitute illegal gambling. We are not. We therefore reverse the district
court and hold that because Big Fish Casino’s virtual chips are a “thing of
value,” Big Fish Casino constitutes illegal gambling under Washington law.

6 *Kater*, 886 F.3d 784, 785 (9th Cir. 2018). In that opinion, the Ninth Circuit dispensed with a
7 variety of the arguments that had persuaded district courts nationwide to initially dismiss the
8 social casino cases. For example, the Court rejected the argument that social casino chips “do not
9 extend gameplay, but only enhance it.” *Id.* at 787. The Circuit also rejected Big Fish’s argument
10 that the Washington State Gambling Commission (“WSGC”) had determined that social casino
11 games aren’t gambling, concluding that “these documents do not indicate that the Commission
12 adopted a formal position on social gaming platforms.” *Id.* at 788. And the Ninth Circuit
13 explicitly rejected “the reasoning of other federal courts that have held that certain ‘free to play’
14 games are not illegal gambling.” *Id.*

15 The Ninth Circuit also denied Churchill Down’s motion to be substituted out of the case.
16 *See Kater*, No. 16-35010, Dkt. 55 at 10-11 n.4 (denying Churchill Downs’ Rule 43(b) motion).
17 Class Counsel’s insistence that Churchill Downs remain in the case benefited the Class
18 enormously, as Churchill Downs ultimately contributed \$124 million of the \$155 million
19 settlement now before the Court.

20 **III. Class Counsel’s Post-Appeal Litigation Conduct Before This Court.**

21 Upon remand, *Kater* was reassigned to Judge Leighton. Dkt. 59.² Churchill Downs
22 promptly moved to compel *Kater*’s case to arbitration, arguing that *Kater* had previously agreed
23 to Big Fish Games’ Terms of Use (and its mandatory arbitration provision). Dkt. 60. *Kater*
24 opposed, arguing *inter alia* that Churchill Downs had waived any right to compel arbitration by
25 seeking a dismissal on the merits in 2015. *See generally* Dkt. 68. In November 2018 Judge
26

27 ² Unless otherwise indicated, all “Dkt.” citations are to *Kater*, No. 15-cv-612 (W.D. Wash. Apr. 17, 2015).

1 Leighton agreed, denying Churchill Downs' motion because "Churchill Downs waived its right
2 to arbitration when it took its first bite of the apple and chewed thoroughly for over three years."
3 Dkt. 75 at 11. Churchill Downs then answered Kater's complaint in November 2018. Dkt. 76.

4 In February 2019, the Parties began disputing the propriety of adding additional parties
5 into the case. The results of these disputes were two-fold: first, Class Counsel filed an amended
6 complaint in *Kater* adding Suzie Kelly as a Class Representative and adding Big Fish Games as a
7 defendant, *see* Dkt. 85; and second, Class Counsel filed the *Thimmegowda* action as a
8 companion case that expanded the temporal scope of the classes that Class Counsel sought to
9 represent. *See Thimmegowda v. Big Fish Games*, No. 19-cv-199 (W.D. Wash.).

10 The next year of litigation was consumed with motion practice and discovery disputes. In
11 May 2019, in the *Thimmegowda* action, Big Fish moved to compel arbitration, *see*
12 *Thimmegowda* Dkt. 33, and Aristocrat and Churchill Downs moved to dismiss for lack of
13 personal jurisdiction. *See Thimmegowda* Dkt. 35. The very same day, Big Fish and Churchill
14 Downs moved to compel arbitration in the *Kater* matter. *See* Dkt. 100. With these motions
15 pending, the Parties engaged in protracted negotiations over the manner and scope of discovery,
16 which ultimately resulted in a sixteen-part discovery and scheduling agreement. *See* Dkt. 118.
17 On September 12, 2019, Defendants' arbitration and jurisdiction motions were terminated with
18 leave to refile when Judge Leighton stayed both cases pending the Ninth Circuit's disposition of
19 an arbitration interlocutory appeal of an arbitration issue in a related case, *Wilson v. Huuuge*,
20 *Inc.*, No. 18-cv-05276 (W.D. Wash.). *See* Dkt. 121.

21 By the fall, the cases veered further into waters uncharted in the class action space. In
22 October 2019, Big Fish launched a pop-up in its games that—if clicked—purported to bind its
23 players to the "Dispute Resolution Provision," requiring them to arbitrate any claims against
24 Defendants and to cut the relevant statutes of limitations. Dkt. 218 ¶ 3. In response, Plaintiffs
25 moved for a temporary restraining order to enjoin Big Fish from displaying the pop-up. *See* Dkt.
26 122. After briefing and argument, Judge Leighton granted Plaintiffs' motion in part, labeling Big
27 Fish's pop-up "coercive and misleading." Dkt. 137 at 7. But in the same stroke, Judge Leighton

1 ordered the Parties to propose language regarding any future similar pop-up windows, *see id.*,
2 and after the Parties submitted competing proposals, the Court approved Defendants’ proposal.
3 Dkt. 145. With this Court-approved language in hand, Defendants aggressively presented their
4 players with revised pop-ups in December 2019 (and then again in February 2020 and April
5 2020)—aimed at preventing putative class members, *en masse*, from participating in this
6 litigation. Dkt. 218 ¶ 4.

7 Plaintiffs responded to this development in “enterprising” fashion, *see* Mar. 4, 2020 Hr’g
8 Tr. at 5:9. Specifically, because the Court-approved language allowed putative class members to
9 opt out of the arbitration provision, Plaintiffs’ counsel established a website to help those class
10 members opt out of Big Fish’s Dispute Resolution Provision by sending Big Fish’s legal
11 department a postcard with the click of a button. *See* Dkt. 159. Within days of the website’s
12 launch, scores of putative class members had opted out of Big Fish’s Dispute Resolution
13 Provision. *See* Dkt. 218 ¶ 6. Defendants moved the Court for a Rule 23(d) protective order to
14 immediately shut down Class Counsel’s website, *see* Dkt. 164, but that motion was denied. *See*
15 Dkt. 185. Both Parties appealed to the Ninth Circuit and both appeals were dismissed for lack of
16 appellate jurisdiction. *See* Dkts. 188, 189.

17 In the midst of this dispute, Plaintiffs moved to certify a class under Fed. R. Civ. P.
18 23(b)(2) and to preliminarily enjoin the sale of virtual chips in Big Fish’s games. *See* Dkt. 176.
19 On March 4, 2020, prior to Defendants’ response date, Judge Leighton denied Plaintiffs’ motion
20 without prejudice, spelling out a clear roadmap for the next steps in the litigation: Defendants’
21 renewed arbitration and personal jurisdiction motions would come first, and in the meantime, the
22 Parties would cooperate on a stipulated briefing schedule, ESI Protocol, Protective Order, and
23 limited discovery. *See* Dkt. 185.

24 The Parties fought tooth and nail on each point. They could not reach agreement on a
25 briefing schedule and proposed competing schedules to the Court. *See* Dkt. 186; Dkt. 187. They
26 could not reach agreement on an ESI Protocol and Protective Order, so Plaintiffs moved for entry
27 of the District’s model orders. *See* Dkt. 192. And they could not agree on the scope of discovery

1 ahead of the renewed motions, so Plaintiffs moved to compel outstanding jurisdictional
2 discovery requests. *See* Dkt. 191. Ultimately, the Court entered Defendants’ briefing schedule
3 and granted both of Plaintiffs’ contested motions, ordering Defendants to produce a bevy of
4 internal documents and communications. *See id.*; Dkt. 213. On April 10, 2020, Defendants filed
5 their renewed arbitration and jurisdiction motions, which the Parties fully briefed. *See* Dkt. 205.
6 It was at this point that the Parties agreed to attempt to resolve these cases through mediation.

7 Settlement talks began in earnest in April 2020. The Parties agreed to schedule a
8 mediation session on May 22, 2020 with Judge Layn Phillips (ret.). *See* Dkt. 218 ¶ 12. From that
9 point forward, over the next several weeks, the Parties were in near-daily communication with
10 the Phillips ADR team and each other, as the Parties sought to crystallize the disputed issues,
11 produce focal information and data, and narrow down potential frameworks for resolution. *Id.*
12 ¶ 13. During this period, Defendants provided Plaintiffs with several sets of detailed
13 transactional data, the Parties exchanged more than fifty (50) pages of briefing on the core facts,
14 legal issues, litigation risks, and potential settlement structures, and the Parties supplemented that
15 briefing with extensive written and telephonic correspondence, mediated by the Phillips ADR
16 team, clarifying each other’s positions in advance of the mediation. *See id.*

17 On May 22, 2020, the Parties participated in a full-day (indeed, more than twelve-hour-
18 long) video-mediation. *See id.* ¶ 14. Following several rounds of arms-length negotiations
19 facilitated by Judge Phillips, the Parties agreed to a settlement in principle, which was
20 memorialized in the form of a binding term sheet. *See id.*; Dkt. 214. But the negotiations didn’t
21 end there: over the next two months, the Parties worked out the details of a fulsome final
22 settlement agreement, exchanged several rounds of a working settlement document and
23 supporting exhibits, met and conferred telephonically to flesh out the remaining disputed
24 provisions, and together met and conferred with Apple Inc., Google LLC, and Facebook, Inc.
25 (collectively, the “Platform Providers”) to help design a robust Notice Plan. *See* Dkt. 218 ¶ 16.
26 On July 23, 2020, the Parties executed the Settlement Agreement before the Court. *See id.* ¶ 29.

1 **IV. Class Counsel’s Litigation-Adjacent Efforts On Behalf Of The Class.**

2 As a necessary extension of the traditional litigation work necessitated by these cases,
3 Class Counsel has for years undertaken all manner of litigation-adjacent work for the benefit of
4 the Class. These efforts are organized into three categories and summarized below.

5 *First*, Class Counsel went to great lengths to protect this litigation from collateral
6 administrative attacks. Just two weeks after the Ninth Circuit’s mandate issued in *Kater*, Big Fish
7 dispatched its Covington & Burling lawyers—*i.e.*, the same lawyers defending *Kater*—to the
8 WSGC session in Tacoma to present a “Petition for a Declaratory Order” asking the Commission
9 to declare that Big Fish’s games “do[] not constitute gambling within the meaning of the
10 Washington Gambling Act, RCW 9.46.0237.” Dkt. 79-5 at 1. At each of the three public
11 hearings that followed—in July 2018 (in Tacoma), August 2018 (in Pasco), and October 2018 (in
12 Olympia)—Class Counsel appeared before the Commission, and Class Counsel presented live
13 argument at both the Tacoma and Pasco hearings. *See* Logan Decl. ¶ 10. Class Counsel
14 supplemented these appearances with a formal letter to the Commission (ahead of the Tacoma
15 hearing) and, on the Commission’s request, with an eighteen-page comment for the
16 Commission’s consideration (between the Tacoma and Pasco hearings). *Id.* The WSGC
17 ultimately declined to enter a Declaratory Order. *See* Dkt. 74-1. And even after the initial
18 declaratory order proceedings, Class Counsel continued to represent the interests of the Class in
19 additional flare-ups before the WSGC, including in similar declaratory order proceedings
20 initiated by The Stars Group. *See* Logan Decl. ¶ 11.

21 *Second*, Class Counsel has been the frontline opposition to Defendants’ attempt to change
22 Washington’s gambling laws. Starting in early 2019, the International Social Gaming
23 Association (“ISGA”) provided legislators draft legislation that would amend Washington’s
24 gambling statutes with the effect (and specific intent) of gutting these lawsuits. *See id.* ¶ 12. Over
25 time, these efforts gained steam, with Senators Mark Mullet and John Braun, as well as
26 Representatives Zack Hudgins, Brandon Vick, Bill Jenkin and Brian Blake, collectively
27 sponsoring four (4) bills threatening to kill these cases by “clarifying” that players who lose

1 money playing social casinos cannot recover under the RMLGA. H.B. 2720, 66th Leg., Reg.
2 Sess. (Wash. 2020); S.B. 6568, 66th Leg., Reg. Sess. (Wash. 2020); H.B. 2041, 66th Leg., Reg
3 Sess. (Wash. 2019); S.B. 5886, 66th Leg., Reg. Sess. (Wash. 2019). Local and national media
4 covered these efforts and left no doubt as to what the ISGA hoped to accomplish. *See, e.g.,*
5 Phillip Conneller, *Washington State Social Gaming Legislation Could Rescue Big Fish Casino*
6 *From Legal Trouble*, CASINO.ORG (Jan. 29, 2020), available at <https://bit.ly/39dKtWM>.

7 In response, Class Counsel engaged the lobbying firm Peggen & Mara Political
8 Consulting LLP—experts in Washington tribal and gambling laws—to help Class Counsel (i)
9 stay on top of all administrative and legislative developments in the Washington gaming
10 industry; (ii) understand the intricacies of Washington’s specific legislative process, including
11 the nuances of—and procedures for—bill drafting; (iii) understand who the relevant lawmakers
12 and stakeholders in Washington’s gaming industry were, what those lawmakers and stakeholders
13 cared about, and how Class Counsel could educate those lawmakers and stakeholders about
14 social casinos; and (iv) work with legislative groups, task forces, and other interested parties in
15 in Washington’s gaming industry, including the Washington Indian Gaming Association
16 (“WIGA”). *See* Logan Decl. ¶ 13.

17 Class Counsel then used this information and expertise to amplify the Class’s interests
18 and concerns. Class Counsel drafted memos and prepared handouts for a variety of stakeholders,
19 including State Senators and Representatives, the WIGA, the Washington Trial Attorneys’
20 Association, the Public Interest Research Group, and other organizations dedicated to remedying
21 problem gambling. *Id.* ¶ 14.

22 Class Counsel also personally met with lawmakers in the Washington Senate and House,
23 met with officials in the Executive branch, and provided in-person testimony to the Washington
24 Legislature. *Id.* ¶ 15. For example, in January 2019—after Class Counsel got wind that
25 Defendants and the ISGA were planning to gut Washington’s gambling statutes (in what would
26 become the failed H.B. 2041 and S.B. 5886)—Class Counsel met in-person with Representative
27 Shelley Kloba, then-Representative (and now Senator) Derek Stanford, Lieutenant Governor

1 Cyrus Habib, and several other government officials. *Id.* ¶ 16. On January 28, 2020, Class
 2 Counsel met with Senator Stanford at the State Capitol—following Class Counsel’s written and
 3 in-person testimony before the House Civil Rights & Judiciary Committee in (successful)
 4 opposition to H.B. 2720. *Id.* ¶ 17.

5 Class Counsel’s efforts went beyond in-person testimony and meetings with legislative
 6 and executive officials. On March 21, 2019, Class Counsel sent formal correspondence to
 7 Senator Mark Mullet ahead of a planned work session before the Senate and Financial
 8 Institutions, Economic and Trade Committee about the *Kater* matter—in which Defendants
 9 Aristocrat and Big Fish Games had been invited, but Class Counsel had not. *Id.* ¶ 18. In August
 10 2019, Class Counsel traveled to Anacortes—on Swinomish Tribe land—to speak at a monthly
 11 WIGA meeting, in opposition to the ISGA-backed bills. *Id.* ¶ 19. And in early 2020, Class
 12 Counsel coordinated the submission of more than 200 letters to Washington State
 13 Representatives from Big Fish Casino players across the country and spoke with local press
 14 about the ISGA’s renewed efforts to gut these lawsuits. *See id.* ¶ 20; *see also* Melissa Santos,
 15 ‘Free’ casino apps prey on addiction, users say, and WA lawmakers are considering a
 16 crackdown, CROSSCUT (Feb. 7, 2020), available at <https://bit.ly/3hfFxDI>. These efforts held the
 17 line. Each bill introduced over the past two years has stalled.

18 *Third*, beyond Class Counsel’s work on legislative and administrative fronts, Class
 19 Counsel also helped its clients sound the alarm on social casinos to the public at large by helping
 20 clients share their stories with local and national media, including in the following pieces:

- 21 • *Harpooned by Facebook*, REVEAL-CENTER FOR INVESTIGATIVE REPORTING (Aug.
 22 3, 2019), available at <https://bit.ly/39NIIdri> (featuring radio interview with Class
 Representative Suzie Kelly)
- 23 • *How social casinos leverage Facebook user data to target vulnerable gamblers*,
 24 PBS NEWSHOUR (Aug. 13, 2019), available at <https://to.pbs.org/3lPRd1m>
 (featuring television interview with Class Representative Suzie Kelly)
- 25 • Melissa Santos, ‘Free’ casino apps prey on addiction, users say, and WA
 26 lawmakers are considering a crackdown, CROSSCUT (Feb. 7, 2020), available at
 27 <https://bit.ly/3hfFxDI> (featuring Class Representative Suzie Kelly, Class Member
 Jill Interrante, and Class Counsel Alexander Tievsky)

- *Addicted to losing: How casino-like apps have drained people of millions*, NBC NEWS (Sept. 14, 2020), available at <https://nbcnews.to/39Lo1X1> (featuring interviews with Class Members).

V. The Settlement Now Before The Court.

Following all of these efforts, and with the assistance of the Judge Phillips, Class Counsel reached a Settlement with Defendants that provides a non-reversionary cash recovery of \$155 million from which every class member who has ever lost money playing Defendants' social casino games is entitled to recover a substantial portion of their losses back. *See* Dkt. 218-1 § 1.32 (the "Agreement"). Class members with higher levels of losses are entitled to recover increasingly higher percentages of their losses, and the upper echelons of "VIP" players stand to recover more than half of their losses. *See id.* §§ 1.36, 2.1(c). The Settlement also requires Defendants to implement meaningful prospective relief, including by providing addiction-related resources within their social casino games and by creating and honoring a self-exclusion policy akin to what one might expect to soon see at the Emerald Queen or the Muckleshoot casinos. *See id.* § 2.2.

THE TERMS OF THE SETTLEMENT AGREEMENT

For the Court's convenience, the key terms of the Agreement are briefly summarized as follows:

A. Settlement Class Definition: The Settlement Class is defined as follows: "all persons in the United States who played Big Fish Casino, Jackpot Magic Slots, or Epic Diamond Slots on or before Preliminary Approval of the Settlement."³ *See* Agreement § 1.33.

B. Monetary Benefits: Defendants agreed to establish a \$155,000,000.00 Settlement Fund from which each Settlement Class Member who files a valid claim will be entitled to recover a cash payment, after deducting administrative expenses, any fee award to Class

³ Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this action and members of their families, (2) the Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former officers, directors, and employees, (3) persons who properly execute and file a timely request for exclusion from the class, and (4) the legal representatives, successors or assigns of any such excluded persons. *See* Agreement § 1.33.

1 Counsel, and any incentive payments to the Class Representatives. *See id.* §§ 1.32, 1.35. No
2 portion of the Settlement Fund will revert to Defendants. *Id.* § 2.1(j). Any Settlement Class
3 Member checks not cashed within 90 days of issuance will be either be placed in a second
4 distribution fund or donated to a Court-approved *cy pres* recipient. *Id.* § 2.1(i). As described in
5 detail in the Plan of Allocation, the amount of each Settlement Class Member’s payment will
6 vary based on the Settlement Class Member’s total losses (those with higher loss amounts are
7 eligible to recover a greater percentage of their losses), whether the Settlement Class Member is
8 potentially subject to Big Fish’s Dispute Resolution Provision, and overall Settlement Class
9 Member participation levels. *See id.* §§ 1.36, 2.1(c); Exhibit E. Based on its experience, Angeion
10 Group (the “Settlement Administrator”) anticipates that participating Settlement Class Members
11 in the highest category of Lifetime Spending Amounts will recover the majority of their losses,
12 and that participating class members in the smallest category of Lifetime Spending Amounts will
13 recover more than 10% of their losses. *See* Dkt. 219, ¶ 53. Settlement Class Members will be
14 able to quickly and easily estimate the amount of their potential payment on the Settlement
15 Website. *See* Agreement § 4.2(c). Based on preliminary claims data, Class Counsel expect
16 recoveries to fall within the range originally projected by the Claims Administrator.

17 **C. Prospective Relief:** Defendants have agreed to establish a voluntary self-
18 exclusion policy that will allow players to exclude themselves from further gameplay. *See*
19 Agreement § 2.2. Defendants must also make a link to that policy prominently available within
20 the games, and their customer service representatives will provide the link to players who contact
21 them and reference or exhibit video game behavior disorders. *See id.* Defendants have also
22 agreed to other prospective relief measures, including changes to game mechanics such that
23 when players run out of virtual chips, they won’t need to purchase additional chips or wait to
24 receive free additional chips to keep playing Defendants’ games. *See id.*

25 **D. Release:** In exchange for the monetary relief described above, Defendants and
26 other entities, including the Platform Providers Facebook, Apple, Google, and Amazon will be
27 released from all claims raised in these cases relating to the operation of their casino style games

1 and the sale of virtual chips in those games, including claims that the games were illegal
2 gambling or the chips were “things of value.” The full release is contained at *id.* § 1.27.

3 **E. Attorneys’ Fees and Expenses Requests & Incentive Award Requests:**

4 Contemporaneously with the filing of this motion, Class Counsel are filing a motion for
5 attorneys’ fees, expenses, and incentive awards.

6 **ARGUMENT**

7 **I. The Court Need Not Revisit Class Certification.**

8 A threshold inquiry at final approval is whether the Class satisfies the requirements of
9 Federal Rule of Civil Procedure 23(a) and (b). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
10 1019-1022 (9th Cir. 1998). Because no relevant facts have changed since the Court certified the
11 Settlement Class, Dkt. 221, the Court need not revisit class certification here. *See, e.g., Aikens v.*
12 *Panatte, LLC*, No. 2:17-cv-01519, Dkt. 54 (W.D. Wash. Feb 5, 2019) (Lasnik, J.).

13 **II. Notice Was Successful And Satisfied Due Process.**

14 Prior to granting final approval to this Settlement, the Court must consider whether the
15 Class members received “the best notice that is practicable under the circumstances, including
16 individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ.
17 P. 23(c)(2)(B); *accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). “The rule does
18 not insist on actual notice to all class members in all cases.” *Mullins v Direct Digital LLC*, 795
19 F.3d 654, 665 (7th Cir. 2015); *see also Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir.
20 2012) (noting that “even in Rule 23(b)(3) class actions, due process does not require that class
21 members actually receive notice” and collecting cases). Although what constitutes the “best
22 notice practicable” is case-specific, the Federal Judicial Center has noted that a notice campaign
23 that reaches 70% of a class is often reasonable. Federal Judicial Center, *Judges’ Class Action*
24 *Notice & Claims Process Checklist & Plain Language Guide* 3 (2010), available at
25 <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf>.

26 The Court already provisionally approved the Notice Plan proposed by the Class
27 Representatives and Class Counsel. Dkt. 221 at 5-6. That plan utilized both direct and

1 publication notice to the Settlement Class. *Id.* To provide direct notice to all who were eligible to
2 submit a claim for payment from the Settlement, Class Counsel worked with Counsel for
3 Defendants and also subpoenaed a variety of third parties to obtain contact information for
4 everyone with a Lifetime Spending Amount of greater than zero (*i.e.*, those who are entitled to
5 make a claim against the Settlement Fund). *See generally* Declaration of Steven Weisbrot
6 (“Weisbrot Decl.”) As the Court is well aware, this was not an easy process. Class Counsel
7 engaged in extensive negotiations with the Platform Providers. Apple, Google, and Facebook
8 ultimately provided Class Counsel with sufficient data to effectuate the Notice Plan. Class
9 Counsel was forced to move to compel the necessary data from Amazon. Dkt. 224. Ultimately,
10 after two orders from this Court (*see* Dkts. 250, 256)—and even then further negotiations—
11 Amazon provided the necessary information. *See* Weisbrot Decl. ¶¶ 22-26.

12 Once that data was collected, it was transmitted to Angeion Group, the Settlement
13 Administrator, to compile a complete Class List. The Defendants and Platform Providers
14 ultimately provided Angeion with contact information for approximately 2.8 million accounts.
15 Once duplicate emails were removed, Angeion created a notice list of 2,228,215 emails. *See id.*
16 ¶ 13. Angeion sent out two rounds of email notice. In the first round (which did not include
17 Settlement Class Members whose information was provided by Amazon, given the timing of
18 Amazon’s data production), 1,074,024 emails were successfully delivered. *See id.* ¶ 14. A large
19 portion of the emails sent in this round were prevented by Google from being successfully
20 delivered (a so-called “soft bounce”). *See id.* ¶ 15. Angeion adjusted its strategy for email
21 delivery on the second round of email notice, and those changes worked: during the follow-up
22 reminder notice campaign, Angeion sent emails to 2,150,037 email addresses (those associated
23 with an account that had not yet submitted a claim), and 2,059,603 (or 95.8%) were successfully
24 delivered. *See id.* ¶ 27.

25 Additionally, using the information provided by Defendants and the Platforms, Angeion
26 performed a “reverse look-up” to find mailing information for every account with at least \$100
27 in Lifetime Spending Amount. *See id.* ¶ 12. That analysis yielded 122,521 postal addresses. *Id.*

1 That data was combined with address information provided by the Platforms. *See id.* ¶ 13.
2 Angeion sent postcard notice to each of these individuals via First Class U.S. Mail. All told,
3 Angeion sent postcard notice to 230,234 addresses. *See id.* ¶ 17.

4 As of December 9, 2020, 2,213 Postcard Notices were returned by the USPS with a
5 forwarding address. *Id.* ¶ 20. Angeion updated its database with the new addresses and Postcard
6 Notices were forwarded to the new addresses. *Id.* Also as of December 9, 2020, 21,079 Postcard
7 Notices were returned as undeliverable by the USPS without a forwarding address. *Id.* ¶ 21.
8 Angeion conducted address verification searches (“skip traces”) in an attempt to locate updated
9 addresses. *Id.* Angeion identified 15,392 updated addresses via skip tracing and updated its
10 database with the new addresses to be remailed. *Id.*

11 Direct notice was to be supplemented by online publication notice in the form of digital
12 advertisements targeted to be seen by individuals most likely to be part of the Settlement Class.
13 As an Angeion employee averred at preliminary approval, digital advertisements were placed
14 using leading technology intended to target members of the Settlement Class. *See* Dkt. 219 ¶ 32.
15 This program was designed to reach an overinclusive population, and was projected to have
16 around an 80% reach of the entire class. *See* Weisbrot Decl. ¶¶ 34, 36. That aspect of the Notice
17 Plan has been successfully implemented. The publication notice was published in a full-page ad
18 in PC Gamer magazine, which has an estimated circulation of 50,800. *See id.* ¶ 42. Given the
19 extent to which social casino players are active on Facebook, Angeion also purchased sponsored
20 ads on Facebook. *See id.* ¶ 38. The Facebook ads have generated 43,071,747 impressions. *See id.*
21 In addition, traditional internet banner ads were purchased. *See id.* ¶ 40. To date, those ads have
22 generated 36,428,084 impressions. *Id.* The banner ads began running on November 9, 2020 and
23 will run for 60 consecutive days. *Id.*

24 Finally, all forms of notice accurately described the Settlement and directed the recipient
25 to the Settlement Website, where Class Members can review the Plan of Allocation, use a slider
26 tool to estimate in real time how much of their losses they are projected to recover through the
27 Settlement, and file a claim. *See* Agreement § 4.2(c); Dkt. 217 at 9.

1 These early numbers confirm what the Court already provisionally found: the Notice Plan
2 here constituted the “best practicable notice” under the circumstances, and was reasonably
3 calculated to apprise interested Settlement Class Members of their rights under the Settlement.
4 Apart from one hiccup with soft-bounces on the first-round email notice (which was promptly
5 rectified), there have been no issues noticing the Settlement Class, and initial figures confirm the
6 estimates provided to the Court at preliminary approval. The Court should therefore find that the
7 Notice Plan ultimately complied with Due Process.

8 **III. The Court Should Finally Approve The Settlement.**

9 To approve the settlement of a class action as fair, reasonable, and adequate, Rule 23(e)
10 requires Court to consider “whether (A) the class representatives and class counsel have
11 adequately represented the class; (B) the proposal was negotiated at arm’s length; (C) the relief
12 provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and
13 appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including
14 the method of processing class-member claims; (iii) the terms of any proposed award of
15 attorney’s fees, including timing of payment; and (iv) any agreement required to be identified
16 under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.”
17 These factors largely encompass those identified by the Ninth Circuit for evaluating a class
18 settlement. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)
19 (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

20 The Committee Notes to the recent revision of Rule 23 make clear that the newly
21 enumerated factors were not intended to replace approval factors already used in courts around
22 the country, but “rather to focus the court and the lawyers on the core concerns of procedure and
23 substance that should guide the decision whether to approve the proposal.” Thus, courts examine
24 the new Rule 23 factors alongside the traditional *Churchill* factors relevant to the particular case,
25
26
27

1 mindful that there is considerable overlap between the two. *See, e.g., Walters v. Target Corp.*,
2 No. 3:16-cv-1678-L-MDD, 2020 WL 6277436, at *5 (S.D. Cal. Oct. 26, 2020).⁴

3 **A. Class Counsel and the Class Representatives have adequately represented**
4 **the Class and support the Settlement.**

5 Class Counsel’s representation of the Class’ interests here was not just adequate; it was
6 extraordinary. Class Counsel filed this case, in 2015, asserting its own novel interpretation of
7 Washington gambling law as applied to the brand-new social casino industry. After the district
8 court dismissed the case with prejudice (echoing a chorus of other federal district courts who at
9 first could not see how social casinos could constitute gambling), Class Counsel nevertheless
10 appealed and obtained a landmark decision from the Ninth Circuit. Upon remand, Class Counsel
11 had to defend Washington’s gambling laws from repeated attacks both in the WSGC and in the
12 Washington State Legislature. Class Counsel also employed novel and “enterprising” tactics to
13 fend off Defendants’ repeated attempts to force Plaintiffs and the Class to arbitration, leading to
14 a dizzying array of motions seeking injunctions and protective orders. *See* Mar. 4, 2020 Hr’g Tr.
15 at 5:9. All the while, Class Counsel dispensed with motion after motion from Defendants’ fleet
16 of large law firms. Time and time again, Class Counsel held the line and marched the case closer
17 to class certification and trial, ultimately leading to the Settlement now before the Court. All of
18 these efforts demonstrate that Class Counsel provided more than adequate service to the Class in
19 this case.

20 Class Representatives Kater, Kelly, and Thimmegowda likewise adequately represented
21 the Class. Each remained in regular communication with Class Counsel, timely responded to
22 requests for information, closely reviewed papers, answered written discovery, provided
23 documents to aid in Class Counsel’s prosecution of the case, closely reviewed the terms of the
24 Settlement, discussed the Settlement with Class Counsel, and signed the Settlement because they
25 believe it is fair and in the best interests of the Class. *See* Declaration of Cheryl Kater (“Kater

26 _____
27 ⁴ There is no governmental participant here, so that factor is neutral. Further, to date, there are no agreements
that must be identified under Rule 23(e)(3), nor do counsel anticipate reaching any such agreements.

1 Decl.”) ¶ 5; Declaration of Suzie Kelly (“Kelly Decl.”) ¶ 5; Declaration of Manasa
2 Thimmegowda (“Thimmegowda Decl.”) ¶ 5. Those services were far more than adequate.

3 The Court may also consider Class Counsel’s support of the Settlement, which can be
4 considered and also favors approval. *In re Bluetooth*, 654 F.3d at 946. It is well-established that
5 “[t]he recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.”
6 *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (quotations omitted).
7 Class Counsel here are the only lawyers with experience prosecuting these types of claims, and it
8 is their considered judgment that this Settlement represents an outstanding result for the
9 Settlement Class.

10 **B. The Settlement was negotiated at arm’s length.**

11 To say the Settlement here was negotiated at arm’s length and was the product of non-
12 collusive negotiations—as the Court has already preliminarily found—would be quite the
13 understatement. *See* Dkt. 221 at 4. The Settlement was reached only after an intense, 12-hour
14 mediation, followed by months of further negotiations about the mechanics, supports a finding
15 that there was not a hint of collusion here. *See Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965
16 (9th Cir. 2009) (“We put a good deal of stock in the product of an arms-length, non-collusive,
17 negotiated resolution.”); *Helde v. Knight Transp., Inc.*, No. 2:12-cv-00904 RSL, Dkt. 191 at 2
18 (W.D. Wash. May 24, 2017) (granting preliminary approval where “Settlement Agreement
19 resulted from extensive arm’s-length negotiations, with participation of an experienced
20 mediator”); *Gragg v. Orange CAB Co., Inc.*, No. 12-cv-0576 RSL, 2017 WL 785170, at *1
21 (W.D. Wash. Mar. 1, 2017) (same). The Parties reached this Settlement only after years of
22 intense litigation marked by round after round of contested issues, with Class Counsel and
23 defense counsel agreeing on almost nothing of substance over life of the case.

24 Moreover, this Settlement contains none of the red flags the Ninth Circuit has identified
25 as indicative of possible collusion: (1) “when counsel receive a disproportionate distribution of
26 the settlement, or when the class receives no monetary distribution but class counsel are amply
27 rewarded,” (2) “when the parties negotiate a ‘clear sailing’ arrangement,” and (3) “when the

1 parties arrange for fees not awarded to revert to defendants rather than be added to the class
2 fund.” *In re Bluetooth* 654 F.3d at 947 (quotations omitted). Class Counsel’s fee will be
3 determined separately, but as explained in Class Counsel’s fee petition, they seek a percentage
4 recovery that is consistent with Washington law and Ninth Circuit precedent, reflects their work
5 here, and is proportionate. Moreover, the Settlement does not contain a “clear sailing”
6 agreement; Defendants are free to object to Class Counsel’s fee petition if they so desire.
7 Agreement § 8.1. And there is no reverter here. All Settlement funds will go to Class Members,
8 less Class Counsel’s fees and any administrative costs. *Id.* § 1.35. This consideration clearly
9 supports final approval.

10 **C. The amount offered in Settlement is adequate, taking into account the**
11 **strength of Plaintiffs’ case, and the risks inherent in further litigation.**

12 Even before the revised Rule 23 highlighted that the Court should consider the amount
13 offered in settlement, courts recognized that the size of any settlement, compared to the
14 likelihood of full recovery, “is generally considered the most important” factor in evaluating a
15 settlement. *See Bayat v. Bank of the West*, No. C-13-2376 EMC, 2015 WL 1744342, at *4 (N.D.
16 Cal. Apr. 15, 2015). Here, an evaluation of the risks present in this litigation, combined with an
17 assessment of the scope of relief, shows that the Settlement easily qualifies as fair, reasonable,
18 and adequate.

19 **i. The Settlement Class would have faced significant delay before it**
20 **could have recovered anything on the merits.**

21 Class Counsel has always been confident about prevailing on the merits of these cases.
22 The key legal questions, particularly under the RMLGA, are straightforward, and have, in Class
23 Counsel’s view, been conclusively answered by the Ninth Circuit’s decision in the appeal in the
24 *Kater* matter. Nevertheless, the case presented some legal risks. For instance, several of the
25 defendants in this and related cases have raised the contention that the regular provision of free
26 chips within their gambling games meant that the chips themselves were not “things of value.”
27 *See, e.g., Benson v. DoubleDown Interactive, LLC*, No. 18-cv-525, Dkt. 103 (W.D. Wash. June

1 17, 2020) (seeking to certify issue to the Washington Supreme Court). Plaintiffs, of course,
2 disagree, and this Court dismissed that contention at every turn, relying on the Ninth Circuit’s
3 decision in *Kater*. But it is also true that the opinion in *Kater* specifically notes that the court did
4 not consider Defendants’ specific arguments about the regular provision of free chips. *See* 886
5 F.3d at 787.

6 But as Plaintiffs explained at preliminary approval, the principal risk here was legislative,
7 *i.e.*, the chance that Defendants’ efforts at changing the law, either through the Washington
8 Legislature or the WSGC, would succeed before this matter reached judgment, and leave
9 Settlement Class Members with nothing. Plaintiffs’ counsel have thus far fended off the ISGA’s
10 phalanx of well-heeled lobbyists, but Defendants and their ISGA comrades are formidable
11 opponents. If these cases do not settle now, each legislative cycle the class will be at risk of
12 having their claims eviscerated in the name of “remov[ing] . . . economic uncertainty” by
13 “clarifying” that proposed class members cannot recover under the RMLGA. H.B. 2720, 66th
14 Leg., Reg. Sess. (Wash. 2020).

15 This legislative risk is particularly acute here because it is practically inevitable that this
16 case would take years to reach judgment. Pending at the time the Parties settled was, of course, a
17 renewed motion to compel arbitration, the denial of which would lie an immediate appeal as of
18 right. *See* 9 U.S.C. § 16. Such an appeal would itself take at least a year. The Parties have thus
19 far fought tooth and nail over every aspect of discovery, and there is every reason to believe that
20 would have continued had the case not settled. Such discovery fights would inevitably prolong
21 the discovery period here, after which the Parties would heavily contest class certification and,
22 perhaps, summary judgment, and then trial. The history of the case so far also suggests that any
23 trial verdict was bound to be appealed, further lengthening the proceedings.

24 Courts have regularly recognized that the prospect of significant delay while a case works
25 its way to judgment is reason to favor immediate settlement. After all, one dollar today is worth
26 significantly more than one dollar three years from now. *Rodriguez*, 563 F.3d at 966 (“Inevitable
27 appeals would likely prolong the litigation, and any recovery by class members, for years. This

1 factor, too, favors the settlement.”); *Ikuseghan v. Multicare Health Sys.*, No. 3:14-cv-05539
 2 BHS, 2016 WL 3976569, at *4 (W.D. Wash. July 25, 2016) (“[T]he outcome of trial and any
 3 appeals are inherently uncertain and involve significant delay. The Settlement avoids these
 4 challenges.”). But delay is especially problematic here. The longer the case survives, the more
 5 opportunities Defendants and their allies would have to effect retroactive change to the law.

6 **ii. Given the risks involved with further litigation, the amount offered in**
 7 **Settlement is outstanding.**

8 The cornerstone of this Settlement is a \$155 million non-reversionary common fund,
 9 which will be used to help Settlement Class Members recoup their losses. That is an
 10 “astounding” recovery. Rubenstein Decl. ¶ 2. It is a significant enough sum that Class Members
 11 with the largest Lifetime Spending Amounts stand to recover more than 50% of their losses, and
 12 that no participating class member is likely to recover less than 10% of their losses. Dkt. 219
 13 ¶ 53. By way of example, Class Representatives Thimmegowda, Kater, and Kelly, who have
 14 previously estimated their losses at approximately \$4,000, \$40,000, and \$400,000, are according
 15 to those estimates projected to recover \$500-\$1,000 (Thimmegowda), \$10,000-\$20,000 (Kater),
 16 and \$200,000-\$300,000 (Kelly). *Id.* ¶ 52.

17 It is difficult to compare this recovery to the recovery provided for under other
 18 comparable settlements, given that this case has no true peers to be reasonably measured against.
 19 On the facts, the closest comparator is almost certainly *In re Apple In-App Purchase Litigation*,
 20 in which the class alleged that certain apps offered within Apple’s App Store were “highly
 21 addictive, designed deliberately so, and tend to compel children playing them to purchase large
 22 quantities” of in-game currency, “amounting to as much as \$100 *per purchase* or more.” 2013
 23 WL 1856713, at *1 (emphasis added). But there, the settlement established no common fund at
 24 all, the default recovery for participating class members was five dollars (yes, \$5), and with
 25 adequate proof some claiming class members could claim refunds for a single 45-day period of
 26 purchases. *Id.* at *5. Similarly, in *Kim v. Tinder, Inc.*, the class alleged unfair pricing with regard
 27 to in-app purchases in a popular dating app. No. CV 18-3093-JFW(ASX), 2019 WL 2576367, at

1 *2 (C.D. Cal. June 19, 2019). The settlement established no common fund at all, and
2 participating class members received 50 free “Super Likes” (*i.e.*, coupons) in addition to an
3 option to select a \$25 cash payment (as an alternative to other coupon offers). *Id.* Simply put,
4 there is just no comparison between the settlements that have ever previously been reached in
5 factually-similar cases and the Settlement currently before the Court.

6 Perhaps the better measuring stick for this Settlement are class action settlements in the
7 consumer privacy space, given that those settlements often resolve large (statutory) damages
8 claims and are premised on novel interpretations of law as applied to allegations of internet-
9 based misconduct. Consumer privacy settlements, too, are notorious for failing to provide
10 consumers with real-world relief for the damages they have suffered. For example, *In re Google*
11 *Referrer Header Privacy Litigation*, 869 F.3d at 740 approved the settlement where all of the
12 money was to go to *cy pres*, with no cash relief for the class at all. *Gaos*, 139 S. Ct. at 1045. And
13 even in consumer privacy settlements that do provide monetary relief and have been adjudged to
14 be fair and reasonable by district courts, the relief is often primarily in-kind. *See, e.g., In re*
15 *Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 324 (N.D. Cal. 2018) (explaining that less than
16 10% of the “fund” was available for cash payments, with the rest being reserved to purchase
17 credit monitoring services); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-
18 02752-LHK, 2020 WL 4212811, at *22 (N.D. Cal. July 22, 2020) (cash relief made available
19 only to class members with existing credit monitoring, out-of-pocket losses, and who paid
20 Yahoo! for premium services).

21 And beyond the cash recovery, the Settlement provides for substantial non-monetary
22 benefits. The Settlement requires Big Fish to implement meaningful prospective relief, including
23 by providing addiction-related resources within its social casino games and by creating and
24 honoring a meaningful self-exclusion policy. *See* Agreement § 2.2. Given the fervor with which
25 Defendants have long insisted that their games are not gambling, these in-game changes are a
26 monumental achievement for the Settlement Class. They represent the first steps toward much-
27 needed self-regulation within the social casino industry and given Big Fish’s prominence in the

1 social casino industry, other industry players have and will continue to follow suit.

2 These measures also highlight that resolving this case now is itself a benefit. Recall that
3 Plaintiffs allege that many members of the Settlement Class are problem gamblers, whose
4 addictions cause real-world problems like devastating credit card bills. Had the case not settled,
5 Settlement Class Members would have continued to suffer these and other similar harms,
6 perhaps with devastating and irreversible consequences in some cases. Bringing this litigation to
7 a beneficial conclusion now will forestall these harms from occurring, a potentially incalculable
8 benefit to some Settlement Class Members.

9 In sum, the amount offered in the Settlement, when compared with the risks and expense
10 of further litigation, strongly supports final approval.

11 **D. The Settlement treats Settlement Class Members equitably.**

12 The revised Rule 23 further asks courts to assess whether the proposed settlement “treats
13 class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D). The Rule’s revised
14 text makes clear that *equal* treatment is not required, but fair treatment is instead the goal. The
15 Settlement here achieves that goal.

16 As the Court explained at preliminary approval, and as hashed out in detail in the Plan of
17 Allocation, a Settlement Class Member’s total recovery will depend on the extent of their losses
18 (*i.e.*, those with greater losses will recover a higher proportion of their losses), whether the
19 Settlement Class Member opted out of Big Fish’s Dispute Resolution Provision after seeing the
20 pop-up displayed in late 2019 and early 2020, and on the number of claims. Dkt. 221 at 3-4. The
21 Plan of Allocation therefore distributes Settlement funds according to those who have suffered
22 the greatest harm, and those with the stronger legal claims.

23 Allocating settlement funds in this way achieves an equitable result. Settlement Class
24 Members with tens or hundreds of thousands of dollars in losses have frequently suffered serious
25 collateral harms, such as alienation from family or friends, or the accrual of huge debts, that were
26 not suffered by those who may have purchased \$10 or \$20 worth of chips. And even though all
27 Settlement Class Members have equally strong RMLGA claims, Settlement Class Members with

1 huge losses who accessed Defendants' VIP tiers and interacted with a VIP host may have a
2 stronger CPA claim to release here. Likewise, those who did not opt out of Defendants'
3 purportedly mandatory dispute resolution provision still have a strong RMLGA claim, and while
4 Class Counsel do not believe the provision is or was binding, if those Class Members had been
5 compelled to arbitration they could have seen their losses cut by, for instance, a provision in the
6 Terms of Use which purports to bind users to a shorter limitations period than is codified in
7 Washington law. As explained above, in Class Counsel's view, the Class stands largely on equal
8 footing. But a clear-eyed assessment of the risks that lay ahead demonstrates that certain claims
9 are stronger than others, something appropriately reflected in the Plan of Allocation. *See In re*
10 *Equity Funding Corp. of Am. Securities Litig.*, 603 F.2d 1353, 1365 (9th Cir. 1979) (concluding
11 that the district court's approval of certain offsets "in [a] Plan of Allocation was a component of
12 its duty to insure the equitable distribution of the settlement proceeds"); 2 McLaughlin on Class
13 Actions § 6.23 (17th ed. 2020) ("Allocation formulas, including certain discounts for certain
14 types of claims within a class, may properly take into consideration the comparative strengths
15 and values of different categories of the settled and released claims.").

16 Likewise, the provision of service awards for the Named Plaintiffs is consistent with the
17 equitable treatment of class members. Cheryl Kater and Manasa Thimmegowda each seek an
18 award of \$10,000, as explained below. This modest award reflects their service to the Class.
19 Each put their name to a lawsuit that advanced a novel theory and that ultimately allowed injured
20 individuals to recoup thousands of dollars in losses. While that is typical of class plaintiffs, the
21 risk of reputational injury here is higher, given the subject matter of the lawsuit. Kater and
22 Thimmegowda also provided significant formal and informal discovery that allowed Class
23 Counsel to determine the best size and structure of any settlement. They also reviewed pleadings
24 and participated in the settlement process. Each estimates that they spent dozens of hours in
25 service to the Settlement Class. As explained in the separate motion for incentive awards, an
26 award of this size is in line with other awards given to class representatives, and fairly reflects
27 their service to the Settlement Class. Given that their efforts were key to ensuring that the

1 Settlement Class recovered anything, the modest proposed incentive award for Kater and
2 Thimmegowda is fully consistent with equity.

3 Suzie Kelly seeks an award of \$50,000. Despite its size, this award, too, is equitable, in
4 light of Kelly's extraordinary contributions to the Settlement Class. As explained elsewhere in
5 this brief, and in other papers related to this Settlement, the field of battle in this litigation
6 extended far beyond the courtroom. Significant effort was expended on both sides to lobby
7 regulators and legislators. Suzie Kelly was instrumental in these efforts. Of the dozens of
8 individuals Class Counsel spoke to who had incurred six-figure losses to the casino gambling
9 apps at issue in this cluster of cases, most were unwilling to attach their name to their story, and
10 only Kelly was willing to serve as Class Representative. But these stories were among the most
11 powerful and were key to Class Counsel's efforts to preserve the protections that Washington
12 law provides. More, Kelly agreed to an on-camera interview with PBS Newshour in which she
13 shared her story with the world, including details about her addiction, and the harms it had led
14 her to cause to those around her. That step has proven to be a great personal sacrifice for Kelly,
15 as her decision to share her story continues to be a source of personal hardship. It is Class
16 Counsel's considered judgment, however, that Kelly's decision to share her story was
17 instrumental in helping Class Counsel negotiate the instant Settlement. Thus, Kelly's
18 extraordinary personal service to the Class deserves recognition. Given Kelly's extraordinary
19 service to the Settlement Class, a \$50,000 award to her also is fully consistent with equity.

20 In sum, the Settlement treats all Class Members equitably relative to each other,
21 supporting final approval.

22 **E. Class Counsel had completed sufficient discovery to reach an informed**
23 **judgment about the benefits of settling, and the quality of the Settlement.**

24 Next, the Parties "had enough information to make an informed decision about the
25 strength of their cases and the wisdom of settlement." *Rinky Dink Inc. v. World Bus. Lenders,*
26 *LLC*, No. C14-0268-JCC, 2016 WL 4052588, at *5 (W.D. Wash. Feb. 3, 2016). The Parties only
27 agreed to mediate after more than five years of contentious litigation, and consequently mediated

1 with a crystal-clear understanding of the strengths and weaknesses of the Parties' claims and
2 defenses. *See* Dkt. 218 ¶ 26. And while the Parties did not conduct a substantial volume of
3 formal discovery prior to mediation, proposed Class Counsel independently undertook massive
4 informal discovery efforts throughout these cases. *See id.* Those efforts involved frequent
5 communications with members of the proposed class, the collection of large numbers of
6 documents possessed by proposed class members (*e.g.*, emails, text messages, and in-game chat
7 exchanges with Defendants' "VIP Hosts"), informal communications and/or attempts with
8 Defendants' former employees, and more. *See id.*

9 Moreover, in the weeks before the mediation, Defendants provided Plaintiffs with several
10 sets of detailed transactional data for virtual chip purchases; the Parties exchanged reams of
11 briefing on the core facts, legal issues, litigation risks, and potential settlement structures; and the
12 Parties supplemented that briefing with extensive written and telephonic correspondence,
13 mediated and shuttled by the Phillips ADR team, clarifying each other's positions in advance of
14 the mediation. *See id.* ¶ 13. The May 22, 2020 mediation session lasted more than twelve hours.
15 *See id.* ¶ 14. It was only at the end of that long day, and with the skilled assistance of Judge
16 Phillips and his Phillips ADR team, that the Parties were able to hash out a settlement. *See id.* By
17 then, the Parties were fully informed on all pertinent issues and capable of assessing the benefits
18 of the settlement now before the Court. *See id.* ¶ 15; *Ikuseghan*, 2016 WL 3976569, at *3
19 (approving settlement reached "between experienced attorneys who are familiar . . . with the
20 legal and factual issues of this case in particular"). This factor, too, thus supports final approval.

21 **F. The reaction of the Settlement Class has been favorable.**

22 Finally, current claim data indicates that the Class has responded favorably to the
23 Settlement, warranting final approval. Thus far, the Settlement Administrator has received more
24 than 50,000 claims. Weisbrot Decl. ¶ 44. Astoundingly, for a settlement of this size, and given
25 the breadth of publication notice about the Settlement, only one person has opted out and nobody
26 has filed an objection. *Id.* ¶ 45. Such low opposition to the Settlement speaks volumes regarding
27 the fairness and adequacy of the Settlement. "When few class members object, a court may

1 appropriately infer that a class action settlement is fair, adequate, and reasonable.” *Schneider v.*
 2 *Wilcox Farms, Inc.*, No. 07-CV-01160-JLR, 2009 WL 10726662, at *3 (W.D. Wash. Jan. 12,
 3 2009). Courts in this district have found that class reaction supported final approval even with
 4 significantly higher exclusion and objection rates. *See Pelletz v. Weyerhouser Corp.*, 255 F.R.D.
 5 537, 543-44 (W.D. Wash. 2009) (lauding “positive response” of Settlement Class of 110,000 to
 6 140,000 members where 19 excluded themselves from the settlement, and 3 objected); *Clemans*
 7 *v. New Werner Co.*, No. 3:12-cv-5186, 2013 WL 12108739, at *5 (W.D. Wash. Nov. 22, 2013)
 8 (in settlement involving class of 300, one objection and four exclusions were filed, court found
 9 that “the overwhelming non-opposition to and participation in the Settlement [are] strong
 10 indications of Class Members’ support for the Settlement as fair, adequate, and reasonable.”); *see*
 11 *also Rodriguez*, 563 F.3d at 967 (concluding that the district court “had discretion to find a
 12 favorable reaction” when 54 of 376,301 class members objected to settlement); *Churchill Vill.*,
 13 361 F.3d at 577 (affirming approval of class action settlement where 45 of 90,000 class members
 14 objected). Given the high participation rates here, and near total absence of any opposition to the
 15 Settlement, the Court should find that the reaction of the Settlement Class also favors final
 16 approval.⁵

17 CONCLUSION

18 The Court should finally certify the Settlement Class and grant final approval to the
 19 instant Settlement.

20 Respectfully submitted,

21
 22 Dated: December 14, 2020

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⁵ Consistent with the Court’s order at Dkt. 223, Class Counsel intend to file a supplemental brief with final claims numbers and projected recoveries after the claims deadline and prior to the final fairness hearing.

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Plaintiffs' Attorneys and Class Counsel
**Admitted pro hac vice*

The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

CHERYL KATER and SUZIE KELLY,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

CHURCHILL DOWNS INCORPORATED, a
Kentucky corporation, and BIG FISH GAMES,
INC., a Washington corporation.

Defendants.

No. 15-cv-00612-RSL

**[PROPOSED] ORDER GRANTING
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Noting Date: January 15, 2021

MANASA THIMMEGOWDA, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

BIG FISH GAMES, INC., a Washington
corporation; ARISTOCRAT TECHNOLOGIES
INC., a Nevada corporation; ARISTOCRAT
LEISURE LIMITED, an Australian corporation;
and CHURCHILL DOWNS INCORPORATED,
a Kentucky corporation,

Defendants.

No. 19-cv-00199-RSL

**[PROPOSED] ORDER GRANTING
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Noting Date: January 15, 2021

1 THIS MATTER came before the Court on Plaintiffs' Motion for Final Approval of Class
2 Action Settlement. The Court has considered all papers and materials submitted by the Parties in
3 support of the proposed Settlement Agreement, including Plaintiffs' motions for preliminary and
4 final approval of the Settlement Agreement and the declarations of Class Representatives, Class
5 Counsel, and the Settlement Administrator. The Court held a Final Approval Hearing on
6 February 7, 2021, at which the Court heard argument from counsel and allowed others to appear
7 to voice their support for, or objection to, the Settlement. Based on all these materials and the
8 statements at the Final Approval Hearing, the Court issues the following Order and Final
9 Judgment:

10 **1. Settlement Terms.** All terms and definitions used herein have the same meanings
11 as set forth in the Settlement Agreement.

12 **2. Jurisdiction.** The Court has jurisdiction over the Parties, the subject matter of the
13 dispute, and all Settlement Class Members.

14 **3. Class Certification.** The Court confirms its certification for settlement purposes
15 of the following Settlement Class under Rule 23(b)(3) of the Federal Rules of Civil Procedure:

16 All persons in the United States who played Big Fish Casino, Jackpot Magic Slots or
17 Epic Diamond Slots on or before Preliminary Approval of the Settlement.¹

18 *See Agreement, Kater Dkt. # 218-1, § 1.33.* The Court also finds that this action meets all
19 prerequisites of Rule 23 of the Federal Rules of Civil Procedure, including numerosity,
20 commonality, typicality, predominance, and superiority; that the Class Representatives are
21 adequate representatives of the Settlement Class; and that Class Counsel are adequate to
22 represent the Settlement Class.

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25 ¹ Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this action and
26 members of their families, (2) the Defendants, Defendants' subsidiaries, parent companies, successors,
27 predecessors, and any entity in which the Defendants or their parents have a controlling interest and their
current or former officers, directors, and employees, (3) persons who properly execute and file a timely
request for exclusion from the class, and (4) the legal representatives, successors or assigns of any such
excluded persons. *See Agreement § 1.28.*

1 **4. Class Notice.** The Settlement Administrator completed delivery of Class Notice
2 according to the terms of the Agreement, as preliminarily approved by the Court. The Class
3 Notice given by the Settlement Administrator to the Class was the best practicable notice under
4 the circumstances and was reasonably calculated, under the circumstances, to apprise Settlement
5 Class Members of the pendency of the Action, their right to object to the Settlement or exclude
6 themselves from the Settlement Class, and to appear at the Final Approval Hearing. The Class
7 Notice and the means of disseminating the same, as prescribed by the Agreement, was
8 appropriate and reasonable and constituted due, adequate and sufficient notice to all persons
9 entitled to notice. The Class Notice and the means of disseminating the same satisfied all
10 applicable requirements of the Federal Rules of Civil Procedure, constitutional due process, and
11 any other applicable law.

12 **5. Settlement Approval.** The Court hereby grants final approval to the Settlement
13 and finds that the Settlement is, in all respects, fair, reasonable, and adequate, and in the best
14 interests of the Settlement Class. The Court finds that the Settlement is within the authority of
15 the Parties and the result of extensive, arm's-length negotiations. The Parties are directed to
16 proceed with the Settlement procedures specified under the terms of the Settlement Agreement,
17 including payment and prospective relief.

18 **6. Objections or Exclusions from Settlement Class.** Class Members were given a
19 fair and reasonable opportunity to object to the Settlement. One member of the Class has timely
20 and validly requested to be excluded from the Class and the Settlement. No objections have been
21 brought to the Court's attention. Aside from with respect to the one Class Member who timely
22 and validly requested to be excluded, who is hereby excluded, this Order is binding on all Class
23 Members and has res judicata and preclusive effect in all pending and future lawsuits or other
24 proceedings maintained by or on behalf of Class Members with respect to the Released Claims.

25 **7. No Admission.** Neither this Final Judgment nor the fact or substance of the
26 Settlement Agreement shall be considered a concession or admission by or against Defendants or
27 any other related party, nor shall they be used against Defendants or any other released party as

1 an admission, waiver, or indication with respect to any claim, defense, or assertion or denial of
2 wrongdoing or legal liability.

3 **8. Dismissal with Prejudice.** Pursuant to the terms of the Settlement, the action
4 (including all individual claims and class claims) is hereby dismissed with prejudice on the
5 merits, without costs or attorneys' fees to any Party except as provided under the terms of the
6 Settlement Agreement, this Final Judgment, and the Court's Order Granting Class Counsel's
7 Motion for Award of Attorneys' Fees and Expenses and Issuance of Incentive Awards.

8 **9. Releases.** This Order incorporates the Releases set forth in the Settlement
9 Agreement and makes them effective as of the Effective Date. All Settlement Class Members
10 who have not properly sought exclusion from the Settlement Class are hereby permanently
11 barred and enjoined from filing, commencing, prosecuting, intervening in, or participating (as
12 class members or otherwise) in any lawsuit or other action in any jurisdiction based on the
13 Released Claims, as set forth in the Settlement Agreement.

14 **10. Attorneys' Fees and Expenses.** Pursuant to the Court's Order Granting Class
15 Counsel's Motion for Award of Attorneys' Fees and Expenses and Issuance of Incentive
16 Awards, the Court awards \$38,750,000 in attorneys' fees and \$1,785,942.27 in costs and
17 expenses to Class Counsel.

18 **11. Incentive Awards.** Pursuant to the Court's Order Granting Class Counsel's
19 Motion for Award of Attorneys' Fees and Expenses and Issuance of Incentive Awards, the Court
20 awards \$10,000 each to Cheryl Kater and Manasa Thimmegowda for their services as Class
21 Representatives and awards \$50,000 to Suzie Kelly for her services as a Class Representative.

22 **12. Continuing Jurisdiction.** Without affecting the finality of the Final Judgment for
23 purposes of appeal, the Court retains continuing and exclusive jurisdiction over the Parties and
24 all matters relating to the Settlement Agreement, including the administration, interpretation,
25 construction, effectuation, enforcement, and consummation of the Settlement and this Order.
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IT IS SO ORDERED.

DATED this _____ day of _____, 2021.

ROBERT S. LASNIK
UNITED STATES DISTRICT JUDGE