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14
15 **UNITED STATES DISTRICT COURT**

16 **NORTHERN DISTRICT OF CALIFORNIA**

17 JOHN S. WHITE,
on behalf of himself and those
18 similarly situated,

19 Plaintiff,

20 v.

21 E-LOAN, INC., and
DOES 1 through 10, inclusive,

22 Defendants.
23 _____

)
) CASE NO. C O5-02080SI
)
)

) **NOTICE OF MOTION AND MOTION**
) **FOR PRELIMINARY APPROVAL OF**
) **CLASS ACTION SETTLEMENT AND**
) **INCORPORATED MEMORANDUM OF**
) **POINTS AND AUTHORITIES**
)
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24
25 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

26 PLEASE TAKE NOTICE that on December 1, 2006 at 9:00 a.m. or as soon thereafter as the
27 matter may be heard before the Honorable Susan Illston, United States District Judge for the
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1 Northern District of California, Class Plaintiffs in the above-entitled matter will and hereby do move
2 the Court pursuant to the Federal Rules of Civil Procedure for an Order: (i) certifying this action as
3 a Settlement Class and approving Plaintiffs' counsel as Class Counsel; (ii) granting preliminary
4 approval of the Stipulation of Settlement and Agreement of Settlement entered into by Plaintiffs and
5 Defendant, E-Loan, Inc. ("E-Loan"); (iii) approving the manner and form of giving Notice of the
6 Settlement to the Class Members; and (iv) establishing a time table for providing the class notice,
7 lodging objections to the terms of the Settlement, and holding a hearing regarding final approval of
8 the Settlement.

9 This motion is made on the grounds that: (i) the Settlement is in the best interests of the Class
10 Members and the terms of the Settlement are within the range of approval, (ii) the proposed manner
11 and form of giving notice of the Settlement to Class Members would fairly apprise Class Members
12 of the Terms of the Settlement; and (iii) the proposed timetable for publishing the class notice,
13 lodging objections to the terms of the Settlement, and holding a hearing regarding final approval of
14 the Settlement is appropriate. Attached hereto as Exhibit A is the Settlement Agreement fully
15 executed by the parties.

16 This motion is based on this Notice of Motion and Motion for Preliminary Approval of Class
17 Action Settlement, the following Memorandum of Points and Authorities, the complete files and
18 records in this action, and oral argument of counsel as allowed by the Court. A proposed form of
19 order is submitted herewith as Ex. B.

20
21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. INTRODUCTION**

23 This proposed settlement is the result of litigation by Plaintiff and his attorneys of claims
24 under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 et seq.. Plaintiff's counsel brought
25 this action seeking the recovery of statutory damages of \$100 - \$1,000 for themselves and class
26 members. Plaintiff's attorneys have now negotiated a settlement including several million dollars

1 of benefits to the Class. Plaintiff now asks the Court to grant preliminary approval of this settlement
2 so that notice may be given to the Class.

3 On August 18, 2006, the Court entered an Order certifying a class of:

4 All individuals throughout the United States whose consumer reports were obtained
5 or used by E-Loan in connection with a credit transaction not initiated by them, and
6 who received from E-Loan the S501-A mailing.

7 Plaintiff has entered into a Stipulation and Agreement of Settlement (“Settlement”) with E-
8 Loan. If approved by the Court, it will resolve Plaintiff’s claim that Defendant violated FCRA by
9 obtaining credit report information on Plaintiff’s and Class Members without a permissible purpose.

10 For purposes of settlement only, the parties have agreed to an expanded the originally
11 certified class to include and provide relief to an additional 100,000 persons who shall be referred
12 to hereinafter as the Settlement Class or Class Members including:

13 All individuals throughout the United States whose consumer reports were obtained
14 or used by E-Loan, Inc., (“E-Loan”) in connection with a credit transaction not
15 initiated by them, and who received a mailer from E-Loan designated as the S501-A
16 or as the S501-B mailing.

17 Under the Settlement, Defendant has agreed to provide each Class Member who submits a claim
18 with a Class Brochure (Ex. D to the Settlement Agreement) containing important and valuable credit
19 information for consumers and an opportunity to obtain: a) a credit report; b) a FICO score, and c)
20 a check for \$20 from E-Loan. These combined available benefits have a value of \$35 per class
21 member and a potential total value of \$7 million dollars.

22 Class Members who do not wish to receive these benefits and be bound by the Settlement
23 will be afforded the right to opt-out. Additionally, cost of notice, administrative costs and Class
24 counsel’s attorneys’ fees will be paid by E-Loan except that the expenses or fees of Class Counsel
25 shall not be borne by E-Loan other than as provided in paragraphs **2.25** through **2.27** of the
26 Settlement Agreement. The Settlement was achieved through negotiations hard fought between
27 Plaintiff and E-Loan with the assistance of the Court appointed mediator Dana Curtis. The
28 Settlement represents an outstanding result for the Class.

1 Through this motion, Plaintiff seeks an Order certifying the Settlement Class and granting
 2 preliminary approval of the Settlement Class and the Settlement. Class certification for purposes
 3 of settlement is appropriate under Federal Rules of Civil Procedure 23(a) and (b)(3); and the
 4 Settlement is sufficiently within the range of what might be approved as fair, reasonable, and
 5 adequate to justify sending of notice of the Settlement to Class Members and scheduling a final
 6 hearing. *See Armstrong v. Bd. of School Dir's.*, 616 F.2d 305, 314 (7th Cir. 1980). "Once the judge
 7 is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness,
 8 reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) hearing is given to the
 9 class members." Manual for Complex Litigation, Fourth, § 21.633 (2004).

10 The following is the proposed schedule for Class Notice and Hearing, as detailed in the
 11 proposed Order submitted herewith:

<u>Date</u>	<u>Event</u>
December 1, 2006	Hearing on Preliminary Approval of Settlement.
Within 10 days after Preliminary Approval Hearing or by December 15, 2006, whichever comes last.	Defendant shall create a list of Class Members.
Within 20 days of completion of Class Member List	Notice, Claim Form, and Class Brochure sent to the Class.
21 days before Court Approval Hearing	Last day to file opt-outs or objections to Settlement.
10 days before Approval hearing	Last day to file Plaintiffs' Motion for Final Approval of the Settlement including responding to any objections.
10 days before Approval Hearing	Last day to file Motion for Attorneys' Fees and Costs for Class Counsel
Within 45 days after Approval Hearing	Last day to return Claim Forms.

1 Accordingly, Plaintiffs seek an Order: (i) certifying a settlement class; (ii) granting
2 preliminary approval of the Settlement; (iii) appointing John S. White as Class Representative and
3 Plaintiffs' Counsel as Class Counsel; (iv) approving the manner and form of giving notice of the
4 Settlement to the Class; and (v) establishing the above timetable for final approval of the Settlement.

5 **II. NATURE OF THE CASE AND CLAIMS**

6 **A. Allegations in the Complaint**

7 Plaintiff seeks preliminary approval of a class action settlement of his claims under the
8 FCRA based on E-Loan's alleged obtaining of credit report information without a permissible
9 purpose. Plaintiff alleges that E-Loan willfully violated the Fair Credit Reporting Act (the "FCRA")
10 and that Plaintiff and Class Members are entitled to \$100.00 to \$1,000.00 in statutory damages.

11 E-Loan has at all times denied that it obtained credit report information without a permissible
12 purpose. E-Loan also denies its conduct was in willful violation of the FCRA or that Plaintiff and
13 Class Members are entitled to statutory damages.

14 Plaintiffs filed this action on May 20, 2005. The Court entered an Order certifying a class
15 on August 18, 2006.

16 **Negotiation Of The Proposed Class Settlement**

17 On October 4, 2006, Plaintiffs and E-Loan attended a mediation and discussed the possible
18 resolution of this case. Subsequently, on October 13, 2006, the parties agreed to resolve the case
19 based on the terms of the Settlement Agreement. The negotiation process was unquestionably arms-
20 length - as each detail of the settlement was disputed, including class size and each element of Class
21 Member relief. Ultimately, the process produced the proposed compromise and settlement of the
22 Action. Attorney's fees and costs were only negotiated upon completion of the Class Settlement.
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1 **III. CLASS CERTIFICATION OF A SETTLEMENT CLASS UNDER RULE 23 IS**
2 **APPROPRIATE**

3 Plaintiff requests (and Defendant does not oppose) that the Court confirm its certification
4 of the Class and join and certify the expanded class of persons, for purposes of the proposed
5 settlement, a class consisting of:

6 All individuals throughout the United States whose consumer reports were obtained
7 or used by E-Loan, Inc., (“E-Loan”) in connection with a credit transaction not
8 initiated by them, and who received a mailer from E-Loan designated as the S501-A
9 or as the S501-B mailing.

10 Because this is a settlement class, there is no concern with manageability of the case. *See*
11 *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997) (“Confronted with a request for
12 settlement-only class certification, a district court need not inquire whether the case, if tried, would
13 present intractable management problems, see Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that
14 there be no trial.”). This case meets the four prerequisites of Rule 23(a) necessary to class
15 certification: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P.
16 23(a). In addition, the case satisfies the requirements of Rule 23(b)(3): predominance of common
17 issues and superiority of the class action device.

18 **A. The Proposed Class Meets the Requirements of Rule 23(a)**

19 The proposed class is so numerous that the joinder of all class members is impracticable.
20 Fed. R. Civ. P. 23(a)(1). Courts have found the numerosity requirement to be satisfied “when the
21 class comprises 40 or more members, and will find that it has not been satisfied when the class
22 comprises 21 or fewer.” *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). The Class,
23 which includes approximately 200,000 consumers nationwide, easily satisfies Rule 23(a)(1)’s
24 numerosity requirement.

25 There are questions of law or fact common to the proposed class. Fed. R. Civ. P. 23(a)(2).
26 Commonality exists when there is either a common legal issue stemming from divergent factual
27 predicates or a common nucleus of facts resulting in divergent legal theories. *Hanlon v. Chrysler*
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1 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Here, Class Members share common legal and factual
2 issues, including the following:

3 (a) Whether E-Loan obtained the Class Members' consumer report information without
4 a permissible purpose. If yes:

5 (b) Whether Defendant's corporate decision to obtain the consumer report information
6 without a permissible purpose was a willful violation of the FCRA?

7 No final decision as to either question has been reached in this case, but the ultimate answer to each
8 question will be essentially the same as to each and every class member.

9 The facts and law applicable to these questions are amenable to class treatment. Because the
10 violations alleged herein do not involve an isolated incident involving Plaintiff alone, but rather
11 implicate E-Loan's uniform practice and procedure of obtaining credit report information and
12 sending substantially identical direct mailers to those persons identified through this process, the
13 question of E-Loan's liability will be determined for the Class as a whole.

14 The Northern District of Illinois upheld certification of a class in *Johms v. DeLeonardis*, 145
15 F.R.D. 480 (N.D. Ill. 1992). In so doing, the District Court held that commonality "does not require
16 that all questions of fact or law be identical, but merely that the class claims arise out of the same
17 legal or remedial theory. *Id.* at 482. Likewise, the Ninth Circuit has stated that " Rule 23(a)(2) has
18 been construed permissively. All questions of fact and law need not be common to satisfy the rule.
19 The existence of shared legal issues with divergent factual predicates is sufficient, as is a common
20 core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at
21 1019. Plaintiff has established that a common legal theory exists; thus so does Rule 23
22 "commonality."

23 The proposed class representative's claims are typical of those of the class. Fed.R.Civ.P.
24 23(a)(3). Typicality gauges the similarity between the class representatives' legal theories and those
25 of the proposed class members. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).
26 Representative claims are typical if they are reasonably co-extensive with those of the absent class
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1 members; they need not be substantially identical. *See In re Paxil Litigation*, 212 F.R.D. 539, 550
2 (C.D. Cal 2003). Here, the named Plaintiff's claims and Class Members' claims arise from E-Loan's
3 standardized practices, and from identical legal theories. Because Plaintiff alleges that E-Loan had
4 no permissible purpose for obtaining his or Class Members' credit report information, the named
5 Plaintiff's interest and the interest of the Class are aligned and the typicality requirement of Rule 23
6 is met.

7 The proposed Class Representative "fairly and adequately protect[s] the interests of the
8 class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement has two prongs: "(1) that the
9 representative party's attorneys be qualified, experienced, and generally able to conduct the
10 litigation; and (2) that the suit not be collusive and plaintiff's interests not be antagonistic to the
11 class." *In re United Energy Corp Solar Power Modules Tax Shelter Investors Securities Litigation*,
12 122 F.R.D.251, 257 (C.D. Cal 1988).

13 John White satisfies both elements. First, Mr. White has retained counsel who are qualified
14 and experienced to litigate this action and have actively participated in the negotiations. Second,
15 no class representative has any interest antagonistic to the interests of the proposed class. Indeed,
16 that Mr. White has prosecuted the case thus far is a testament to his dedication to the class. Notably,
17 this Court has already recognized Mr. White's and his Counsel's adequacy in its August 18, 2006
18 Order. The excellent result for the class in spite of the significant hurdles to success at trial, and the
19 hard-fought, arms-length, negotiations are all testaments to the noncollusive nature of the settlement.

20 **B. The Proposed Class Meets the Requirements of Rule 23(b)(3)**

21 In a factually and legally analogous case, the Seventh Circuit has recognized that Rule
22 23(b)(3) was designed for situations . . . in which the potential recovery is too slight to support
23 individual suits, but injury is substantial in the aggregate. *Murray v. GMAC Mortgage Corp.*, 434
24 F.3d 948, 953 (7th Cir. 2006). In addition, this Court has already recognized that a portion of the
25 Settlement Class meets the requirements of Rule 23(b)(3) when in certified the initial Class. *White*
26 *v. E-Loan, Inc.*, No. C 05-02080 (N.D. Cal. Aug. 18, 2006). In determining these issues, the Court
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1 rejected the Defendant's argument that whether an offer of credit is a "firm offer" is an
2 individualized inquiry, finding that the Plaintiff could establish that the four corners of the
3 Defendant's solicitation were too vague to constitute a firm offer of credit. *Id.* at 9. Here, common
4 issues of law or fact "predominate over any questions affecting only individual members." Fed. R.
5 Civ. P. 23(b)(3). In this case, as in *Murray*, the alleged unlawful practices involve E-Loan obtaining
6 Class Members' credit report information without a permissible purpose under the FCRA, applicable
7 to the representative plaintiffs and Class Members. *See Blackie v. Barrack*, 524 F.2d 891, 905-06
8 (9th Cir. 1975). Either E-Loan did or did not violate the FCRA when it obtained their credit report
9 information without their authorization. If E-Loan violated the FCRA, it did so either negligently
10 or willfully as to each member of the Class. There are no individual issues to be resolved to
11 determine whether E-Loan violated the FCRA.

12 Additionally, in the case of willful violations, the FCRA provides for statutory damages
13 which would uniformly apply to all members of the Class. 15 U.S.C. § 1681n. In this context,
14 "willful" is not synonymous with "evil" or "malice," but simply means a conscious choice of
15 procedures. *Mathews*, 23 F. Supp. 2d at 1164. The determination of whether E-Loan's actions are
16 willful can be determined for the class as a whole. That determination will be based upon whether
17 E-Loan acted "either knowing that policy [or action] to be in contravention of the rights possessed
18 by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action]
19 contravened those rights." *Reynolds v. Hartford Financial Services Group*, 435.3d 1081, 1098 (9th
20 Cir. 2006) (internal citations omitted) *cert. granted*, *GEICO Gen. Ins. Co. v. Edo*, No. 06-100, 2006
21 WL 2055539, at *1 (U.S. Sept. 26, 2006).; *see also Mathews*, 23 F. Supp. 2d at 1165 (explaining that
22 a finding of willful noncompliance with the FCRA is more likely if the defendant's violations result
23 from a failure to maintain reasonable procedures as opposed to an isolated instance of human error
24 involving a single plaintiff).

1 In a case addressing insurance companies' obligation under the adverse action provision of
2 the FCRA, the Ninth Circuit recently addressed how one would go about proving that a defendant
3 acted willfully. *Reynolds*, at 1099. The *Reynolds* court stated:

4 Whether or not there is a willful disregard in a particular case may depend in part on
5 the obviousness or unreasonableness of the erroneous interpretation [of the FCRA].
6 In some cases, it may also depend in part on the specific evidence as to how the
7 company's decision was reached, including the testimony of the company's
8 executives and counsel.

7 *Id.*

8 The willfulness analysis will turn entirely upon evidence of E-Loan's actions and the reasons for its
9 actions, not upon an analysis of individual consumer Class members.

10 The damages resulting from such willful violations can be awarded on a class-wide basis.

11 The Ninth Circuit found that an award of statutory damages based entirely upon the
12 company's conduct was appropriate. *Martinez v. Shinn*, 992 F. 2d 997, 1000 (9th Cir. 1993).
13 Moreover, the Seventh Circuit found that seeking an award of statutory damages under the FCRA
14 avoided "the sort of person-specific arguments that render class treatment infeasible. . ." *Murray*,
15 434 F.3d at 953. Finally, there are no issues presented in this case on which Plaintiffs and the
16 members of the Class are in conflict.

17 Under these circumstances, the requirements of Rule 23(b)(3) are met. The courts have
18 routinely found predominance when common questions of law or fact "predominate" with respect
19 to the alleged conduct of defendant. *In re Emulex Corp. Securities Litigation*, 210 F.R.D. 720, (C.D.
20 Cal 2002).

21 Rule 23(b)(3) lists four factors a court must analyze in determining whether a class action
22 is superior to individual litigation: whether individuals have a strong interest in controlling
23 potentially separate actions; a class action's effect on competing litigation involving members of the
24 class; whether resolution of the case in a single forum is desirable; and the potential difficulties that
25 management of a class action presents. A class action is the superior method of resolving large scale
26 claims if it will "achieve economies of time, effort, and expense, and promote . . . uniformity of
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1 decision as to persons similarly situated, without sacrificing procedural fairness or bringing about
2 other undesirable results.” *Amchem*, 117 S. Ct. 2246. One reason that a class action is the superior
3 method of proceeding in a case of this type is that it allows the plaintiffs to pool claims which would
4 be uneconomical to litigate individually.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809
5 (1985).

6 Here, aggregate claims of the class total more than \$20 million to \$200 million, but on
7 average each class member’s claim is no more than one hundred to one thousand dollars, making it
8 uneconomic for individuals to pursue these claims on their own, and therefore unlikely that they will
9 do so. *Amchem* 117 S. Ct. at 2245. Concentrating the class claims in this single forum also
10 enhances the superiority of the class action device and resolves the issue of potentially competing
11 actions. Finally, the difficulties of managing a class action are vitiated by the fact of this settlement.
12 When “confronted with a request for settlement-only class certification, a district court need not
13 inquire whether the case, if tried, would present intractable management problems . . . for the
14 proposal is that there be not trial.” *Amchem*, 117 S. Ct. at 2248.

15 The class action device proposed here “is superior to other available methods for the fair and
16 efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). There is no other mechanism by
17 which all of Plaintiffs’ outstanding claims will be as fairly, adequately, and efficiently resolved as
18 through a class action.

19 **IV. THE SETTLEMENT MERITS THE COURT’S PRELIMINARY APPROVAL**

20 The Settlement hereby presented to the Court for preliminary approval represents a fair and
21 reasonable resolution of this dispute, and is worthy of notice to, and consideration by, the Class
22 Members. It will provide relief to those Class Members who elect to receive the benefits offered.

23 24 **A. The Standard for Preliminary Approval of Settlement Agreements**

25 Federal Rule of Civil Procedure 23(e)(i)(C) provides: “The court may approve a settlement,
26 voluntary dismissal or compromise that would bind class members only after a hearing and on
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1 finding that the settlement, voluntary dismissal or compromise is fair, reasonable and adequate. The
2 Manual For Complex Litigation, Fourth § 21.632 (2004), sets forth the procedures for preliminary
3 approval of settlements: “The judge must make a preliminary determination on the fairness,
4 reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the
5 certification, proposed settlement, and date of the final fairness hearing.”

6 At the preliminary approval stage, the question for the Court is whether the Settlement before
7 this Court falls within the “range of possible approval,” and is sufficiently fair, reasonable and
8 adequate to warrant dissemination of notice apprising Class Members of the proposed Settlement
9 and to establish procedures for a final settlement hearing under Rule 23(e). *Molski v. Gleich*, 318
10 F.3d 937, 944 (9th Cir. 2003). The benefits secured by plaintiff’s counsel as a result of the
11 negotiations leading to the settlement far exceed this test.

12 The Settlement herein provides relief to Class Members having a value of \$35 to 200,000
13 Class Members for a total value of \$7 million - likely greater than could be achieved in successful
14 litigation. This is because Plaintiff would have to show that Defendant’s conduct in violation of the
15 FCRA was willful, and even if successful would face a constitutional due process challenge to an
16 award of statutory damages of \$20 million to \$200 million total judgment, where at least one court
17 has described the actual damages to Class Members as “small – a modest concern about privacy, a
18 slight chance that information would leak out and lead to identity theft.” *Murray v. GMAC*, 434 F.3d
19 948, 953 (7th Cir. 2006).

20 Given these challenges, the Settlement achieved and the Settlement Benefits available to each
21 Class Member here are extraordinary. Specifically, given the credit related nature of the claims and
22 the potential identified threat of the disclosure (i.e. added potential for identify theft), Class Members
23 will be given the opportunity to obtain a Credit report giving them information from which to
24 evaluate their relative risk of identity theft, and will also provide them with other valuable
25 information concerning their then present credit position. They will also receive their credit score
26 used by lenders to evaluate the credit position of borrowers and not available with the once annual

1 free FACTA credit report, and be provided with a Credit Brochure that explains - in detail- their
2 rights as consumers under the FCRA. Each Class Member will also have a right to receive a \$20
3 check from E-loan. These benefits, when weighed against the risks of litigation and other relevant
4 factors, including the right of Class Members to opt-out, demonstrate the essential fairness of the
5 Settlement.

6 Clearly, the Settlement is “within the range of possible approval” and thus meets the standard
7 for preliminary approval. More importantly, it is, and will be shown to be, “fair, reasonable and
8 adequate” and thus should receive final approval from the Court.

9
10 **B. Voluntary Settlement Of This Class Action Serves The Interests Of The**
11 **Parties, The Court And The Public**

12 A court decision to approve a class action settlement should consider “the strong judicial
13 policy that favors settlements, particularly where complex class action litigation is concerned.” *See*
14 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (quoting *Officers for Justice*
15 *v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982) (upholding district court’s approval of
16 class action settlement)). Approval of class action settlements is “committed to the sound discretion
17 of the trial judge.” *Class Plaintiffs*, 955 F.2d at 1276. The trial court in exercising its discretion
18 must determine whether a class action settlement is “fundamentally fair, adequate and reasonable.”
19 *Id.*

20 **C. The Settlement Resulted From Arms-Length Negotiations and Is Not the**
21 **Product of Collusion.**

22 There is a presumption that a proposed settlement is fair and reasonable when it was the
23 result of arm’s-length negotiations. *See* 2 Newberg On Class Actions, § 11.40 at 451 (2 ed. 1985);
24 the court must look at the negotiating process leading to settlement in order to ensure that “the
25 compromise be the result of arms’-length negotiations and that plaintiff’s counsel have possessed
26 the . . . ability . . . , necessary to effectively represent the class’s interests.”; (*citing Weinberger v.*
27 *Kendrick*, 698 F.2d 61, 74 (2d Cir. 1983)).

1 Here, the Settlement was the result of arm's-length negotiations by experienced class action
2 lawyers with the assistance of the Court appointed mediator Dana Curtis. The Settlement was
3 negotiated by Plaintiffs' Counsel with E-Loan representatives and E-Loan's outside counsel through
4 the mediation process.

5 **V. THE PROPOSED NOTICE TO CLASS MEMBERS IS ADEQUATE**

6 Rule 23(e) requires notice of a settlement if the settlement will bind the class. Notice to the
7 Class should establish the time and place of a public hearing on the proposed settlement and specify
8 the procedure and timetable for opting out, filing, objections, and appearing at the settlement hearing.
9 Manual for Complex Litigation, Fourth, § 21.312 (2004).

10 The Notice Plan fully complies with Rule 23(e) and with the requirements of due process.
11 The Notice is written in plain English and includes: (1) a description of the settlement class, (2) a
12 description of the proposed settlement, (3) the names of counsel for the class, (4) the fairness hearing
13 date, (5) a statement of the deadlines for filing objections to the settlement, for submitting a claim,
14 and for filing requests for exclusion, (6) the consequences of such exclusion, (7) the consequences
15 of remaining in the settlement class, (8) a statement of the Defendant's responsibility for settlement
16 class counsel's fees and expenses, and (9) how to obtain further information. The notice will
17 reference an 800 number and that Class Member can call to obtain more information about the
18 Settlement Agreement and the claims process. A copy of the Class Notice is attached as Exhibit B
19 to the Settlement Agreement, and a copy of the Claim Form mailed with each Notice is attached as
20 Exhibit C to the Settlement Agreement.

21 Notices will be mailed to the last known mailing address of all class members, all of which
22 information is in the possession of defendant. Addresses will be updated by defendant through use
23 of the National Change of Address database from the U.S. Post Office. By these methods, direct and
24 individual mailed notices will be made to all class members.

1 The form and content of the Notice, together with the manner of dissemination set forth
2 above, is reasonably calculated to reach all class members. It is the “best notice practicable” under
3 the circumstances and more than satisfies the requirements of due process and Rule 23.

4 **VI. CONCLUSION**

5 For the foregoing reasons, Plaintiffs respectfully requests that their motion be granted and
6 that this Court issue an order (i) certifying the Settlement Class and appointing John S. White as
7 Class Representative and Plaintiffs’ Counsel as Class Counsel; (ii) preliminarily approving the
8 Settlement Agreement; (iii) approving the manner and proposed forms of notice of the proposed
9 Settlements; (iv) approving the proposed timetable; and establishing a date for a Final Hearing in the
10 case.

11 DATED: November 17, 2006

12 By: /s/ Jill H. Bowman
13 Jill H. Bowman
(Appearance Pro Hac Vice)

14 **GAIL KILLEFER, ESQ.**

15 **JAMES, HOYER, NEWCOMER &
16 SMILJANICH, P.A.**
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Attorneys for Plaintiff

PROOF OF SERVICE

I, LaFaye Martin, declare as follows:

I, am a resident of the State of Florida, over the age of eighteen years, and not a party to the within action. My business address is James, Hoyer, Newcomer & Smiljanich, P.A., 4830 W. Kennedy Blvd., Suite 550, Tampa, Florida 33609.

On November 17, 2006, at Tampa, Florida, I served the following document(s) listed below as follows:

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES

- BY ELECTRONIC MAIL: I transmitted by electronic mail a true and correct copy of the above referenced documents to the persons shown below.
- BY OVERNIGHT MAIL: I sent a true and correct copy of the document(s) for delivery to the persons shown on the attached list.
- BY U.S. MAIL: I placed a true and correct copy of the document(s) in a sealed envelope with first class postage fully prepaid in the United States Mail at Tampa, Hillsborough County, Florida, addressed as shown on the attached list.

BY ELECTRONIC FILING: I transmitted by electronic filing a true and correct copy of the above referenced documents to the persons shown on the listed below.

Lee H. Rubin
Rena Chng
Mayer, Brown, Rowe & Maw LLP
Two Palo Alto Square, Suite 300
Palo Alto, CA 94306

Victoria R. Collado
Melissa J. Pastrana
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606

Mediator: Dana P. Curtis - danacp@aol.com

I am readily familiar with James, Hoyer’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

Executed on November 17, 2006 at Tampa, Florida.

/s/ LaFaye Martin
LaFaye Martin