

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (“Settlement Agreement” or “Agreement” or “Settlement”) is entered into on March 1, 2017, between Plaintiff Vince Mullins (“Plaintiff”) and Defendant Direct Digital, LLC (“Direct Digital” or “Defendant”) (collectively, the “Parties”).

Recitals

- A. Direct Digital manufactures, markets, sells and distributes a dietary supplement containing glucosamine sulfate, sold under the name Instaflex Joint Support (“Instaflex” or the “Product”).
- B. In 2013, Plaintiff filed this putative class action involving Instaflex (the “Litigation”).
- C. Plaintiff alleges in the Litigation that certain claims made on the labeling and packaging of Instaflex are false, deceptive, and misleading. Based on those allegations, Plaintiff alleges in the Litigation that Direct Digital violated various state consumer protection acts. No allegations related to safety or physical injury have been made.
- D. Direct Digital denies the allegations raised in the Litigation, and denies any wrongdoing and any liability in connection with the claims asserted in the Litigation.
- E. Plaintiff and his counsel have conducted an extensive examination of the facts and documents relating to the Litigation, including documents produced by Direct Digital, responses to written discovery requests, third party discovery, and the

deposition of Direct Digital's 30(b)(6) witness regarding, among other things, the science regarding Instaflex.

- F. The Parties also engaged in motion practice with regard to Plaintiff's class certification motion which also included expert disclosures, written reports, and depositions.
- G. On September 30, 2014, the District Court granted Plaintiff's motion for class certification.
- H. Defendant sought and was granted a F.R.A.P. Rule 23(a) hearing. On July 28, 2015, the Seventh Circuit affirmed the District Court's class certification order. Defendant sought *certiorari* before the United States Supreme Court and on February 29, 2016, the Court denied certiorari.
- I. This Settlement Agreement was reached after protracted, arm's-length negotiations over more than a year's time, including first a full-day mediation before the Hon. Wayne Andersen and then over the ensuing year, and numerous telephonic and email communications between counsel for the Parties and Judge Andersen.
- J. Plaintiff and his counsel have concluded that this Settlement Agreement provides substantial benefits to Plaintiff and to members of the Settlement Class (as defined below), and resolves all issues that were or could have been raised in the Litigation without prolonged litigation and the risks and uncertainties inherent in litigation. Plaintiff's counsel have also considered the collectability of any judgment that might ultimately be entered against Defendant.

- K. Plaintiff and his counsel have concluded that this Settlement Agreement is fair, reasonable, adequate, and in the best interest of the Settlement Class and the consuming public.
- L. Direct Digital consents to the Settlement Agreement solely to avoid the expense, inconvenience, and inherent risk of litigation, as well as the concomitant disruption of its business operations.
- M. Nothing in this Settlement Agreement shall be construed as an admission or concession by Direct Digital of the truth of any allegations raised in the Litigation, or of any fault, wrongdoing, or liability of any kind.
- N. This Settlement Agreement, its terms, documents related to it, and the negotiations or proceedings connected with it, shall not be offered or received into evidence in the Litigation, or any other action or proceeding, to establish any liability or admission by Direct Digital.

NOW, THEREFORE, in consideration of the foregoing, and the mutual covenants, promises, and general releases set forth below, the Parties hereby agree as follows:

Proposed Class for Settlement Purposes

1. **Settlement Class Definition.** Pursuant to Fed. R. Civ. P. 23, the Parties agree to certification, for settlement purposes only, of the “Settlement Class” which consists of all persons who paid money to obtain Instaflex for personal use and not for resale or distribution, including all persons who paid only shipping and handling for an Instaflex trial or sample. Excluded from the Settlement Class are: (i) Defendant; (ii) retailers of Instaflex; (iii) the parents, subsidiaries, affiliates, officers, and directors of (i) and (ii); (iv) those persons who submit valid requests for

exclusion from the Settlement Class; and (v) any persons who purchased Instaflex and have already received a full refund.

2. **Settlement Class Counsel.** Pursuant to the Court's September 30, 2014, Class Certification Order, "Settlement Class Counsel" are:

Elaine A. Ryan
BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.
2325 E. Camelback Road, Suite 300
Phoenix, Arizona 85016

Max A. Stein
BOODELL & DOMANSKIS, LLC
One North Franklin, Suite 1200
Chicago, Illinois 60606

Stewart M. Weltman¹
Joseph Siprut
SIPRUT, PC
17 North State Street, Suite 1600
Chicago, Illinois 60602

3. **Settlement Purposes Only.** Defendant does not agree to certification of the Settlement Class for any purpose other than to effectuate the Settlement Agreement.

4. **Vacating Settlement Class Certification.** The certification of the Settlement Class shall be binding only with respect to the settlement of the Litigation. In the event that the Settlement Agreement is terminated pursuant to its terms or is not approved in all material respects by the District Court, or such approval is reversed, vacated, or modified in any material respect by this or any other court, the certification of the Settlement Class shall be deemed vacated, the Litigation shall proceed as if the Settlement Class had never been certified, and no reference to the Settlement Class, this Settlement Agreement, or any documents, communications, or negotiations

¹ At the time of the class certification order, Mr. Weltman was the owner of Stewart M. Weltman LLC and subsequently joined Boodell & Domanskis, LLC as Of Counsel on February 1, 2015. Thereafter, as of February 1, 2017, Mr. Weltman joined Siprut, P.C.

related in any way thereto shall be made for any purpose in this Litigation or any other action or proceeding.

Benefits to the Class

5. **Settlement Fund and Net Settlement Fund.** Direct Digital agrees to contribute \$4,500,000 to a Settlement Fund (the “Settlement Fund”), which will be used to pay any and all Cash Awards (as defined in paragraph 6), Attorneys’ Fee Awards (as defined in paragraph 8), Incentive Awards (as defined in paragraph 9), and Notice and Administration Costs up to \$400,000 (as defined in paragraph 10). Direct Digital shall fund the Settlement Fund as follows: (a) \$400,000 shall be deposited within 30 days of the Court’s order preliminarily approving this Settlement Agreement for purposes of covering Notice and Administration Costs; (b) \$1,100,000 by no later than April 5, 2017, or 30 days after the Effective Final Judgment Date², whichever is later; (c) \$1,500,000 by no later than one year after the \$1,100,000 installment was due to be paid; (d) \$1,500,000 by no later than two years after the first \$1,100,000 installment was due to be paid. All payments shall be made to the Settlement Administrator, as defined in paragraph 14, and shall be held by the Settlement Administrator in an interest-bearing account until such time as the funds should be distributed pursuant to the terms of this Agreement or order of the Court. Other than distributions to cover Notice and Administration Costs, no distributions shall be made until the Settlement Fund is fully funded absent order of the Court. In the event that the Settlement Fund is not fully funded, then Plaintiff may elect to terminate the Settlement Agreement or seek to enforce it. Should Plaintiff elect to terminate the Settlement Agreement, Direct Digital shall not

² The “Effective Final Judgment Date” shall be the later of: (a) the expiration of the time to appeal the Final Judgment and Order with no appeal having been filed; or (b) if any such appeal is filed, the termination of such appeal on terms that affirm the Final Judgment and Order or dismiss the appeal with no material modification of the Final Judgment and Order; or (c) the expiration of the time to obtain any further appellate review of the Final Judgment and Order.

be entitled to a refund of any monies already distributed by the Settlement Administrator, including Notice and Administration Costs. Should Plaintiff choose to enforce the Settlement Agreement, Plaintiff shall be entitled to recover from Defendant all attorneys' fees and any expenses incurred in enforcing the Settlement Agreement. "Net Settlement Fund" means the Settlement Fund, less the amounts paid in Attorneys' Fee Awards, Incentive Awards, and Notice and Administration Costs up to \$400,000 subject to paragraph 10 below.

6. **Payment of Claims.** Pursuant to paragraph 16 below, members of the Settlement Class who submit timely and valid claims shall look solely to the Net Settlement Fund for payment of such claims, and shall be entitled to receive "Cash Awards" from the Net Settlement Fund as follows:

- a. Members of the Settlement Class who submit timely and valid claims shall receive \$15.00 per bottle of Instaflex, up to a maximum of seven (7) bottles per household, except that Settlement Class members who paid only shipping and handling for an Instaflex sample or trial and did not pay money to purchase Instaflex shall receive \$5.00.
- b. If payments calculated under paragraph 6(a) exceed the monies available in the Net Settlement Fund, payments to all members of the Settlement Class who submitted a valid and timely claim will be reduced *pro rata*.
- c. Subject to paragraph 10 of this Agreement, if payments calculated under paragraph 6(a) are less than the monies available in the Net Settlement Fund, payments to all members of the Settlement Class who submitted a valid and timely claim, other than members of the Settlement Class who paid only for an Instaflex sample or trial, will be increased *pro rata* up to a

maximum of \$60 for each bottle claimed. All other monies shall then be paid to a *cy pres*, namely, The Arthritis Foundation.

- d. The details, requirements, terms, and limits of the claims process are defined in paragraphs 14-18 below.

7. Labeling Changes.

- a. Without admitting liability and solely to avoid the cost and disruption of further litigation, Defendant, as defined in the release set forth in this Agreement, agrees that, commencing after the Effective Final Judgment Date, it will not make the following statements, or statements conveying the same messages, on Direct Digital's packaging and labeling, or in promotional materials under Direct Digital's direct control, on product internet websites under Direct Digital's direct control, or in any other advertising media under Direct Digital's direct control, pertaining to the formulation of Instaflex, or any other identical or substantially similar joint health benefit product Direct Digital manufactures or offers for sale under any different product name: (i) that any such product provides joint support; (ii) that any such product was created by a research group including, without limitation, a Cambridge research group; (iii) that any such product was specially formulated; (iv) that any such product is a revolutionary formula; or (v) that any such product contains an exclusive compound.
- b. Direct Digital also agrees that it will not, commencing after the Effective Final Judgment Date, make the following statements, or statements conveying the same message, pertaining to the Product's effect on cartilage:

supporting, fixing, mending, reconditioning, rehabilitating, increasing, developing, building, maintaining, strengthening, repairing, rebuilding, renewing, regrowing, adding, regenerating, or rejuvenating.

- c. Further, Direct Digital will not state that the Product supports, maintains, or improves joint health commencing after the Effective Final Judgment Date.
- d. The above prohibitions do not prevent Direct Digital from using the phrase “joint health” or “joint function,” or from making statements such as the product relieves discomfort.
- e. Notwithstanding anything in this Settlement Agreement to the contrary, Direct Digital shall not be required to change or cause the removal of any claims on any packaging which exists as of the Effective Final Judgment Date, regardless of whether such claims appear on packaging that exists in warehouses or other storage locations for future sales at retail locations or via any internet website.
- f. Subsequent to the Effective Final Judgment Date, if Direct Digital becomes aware of new evidence substantiating any of the above prohibited representations, Direct Digital may seek relief from the Court to change the labels accordingly.
- g. With regard to any requested label change described above, Direct Digital shall give Plaintiff and his counsel forty-five (45) days’ written notice of the proposed labeling change and the evidence that Direct Digital claims supports the requested labeling change. Plaintiff and his counsel shall have the right to oppose the requested labeling change before the Court.

- h. If Plaintiff's counsel elects to oppose Direct Digital's requested labeling change and prevails, Direct Digital shall pay such counsel's reasonable lodestar and expenses. If Direct Digital prevails and, additionally, the Court finds that Plaintiff's counsel's opposition to the requested labeling change was without any reasonable basis, Plaintiff's counsel shall reimburse Direct Digital's reasonable attorneys' fees and expenses.

8. **Attorneys' Fees and Costs.** The firms of BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.; BOODELL & DOMANSKIS, LLC; LEVIN FISHBEIN SEDRAN AND BERMAN PC and SIPRUT PC will apply to the Court for an award of attorneys' fees and expenses (including their court costs), to be paid from the Settlement Fund. Collectively, these awards will be referred to in this Agreement as "Attorneys' Fee Awards."

9. **Incentive Awards for Plaintiff.** Plaintiff agrees that any incentive award shall not exceed \$5,000.00 ("Incentive Award"), subject to Court approval. Any Incentive Award shall be paid from the Settlement Fund.

10. **Notice and Administration Costs.** The Parties agree that up to \$400,000 of the reasonable costs of notice and administration ("Notice and Administration Costs") will be paid from the Settlement Fund. Notice and Administration Costs includes costs of notice required by 28 U.S.C. § 1715. If all payments out of the Net Settlement Fund have been made and funds remain in the Net Settlement Fund that would otherwise be distributed to a *cypres*, and if costs of notice and administration exceed \$400,000, then up to \$200,000 of the remaining funds in the Net Settlement Fund may be used to pay such excess costs. Direct Digital will pay for any Notice and Administration Costs in excess of the \$400,000 referenced in this paragraph only after it is

determined whether Direct Digital may use up to \$200,000 (and if so, then how much) of the remaining funds in the Net Settlement Fund as described in this paragraph.

Releases

11. Release by Plaintiff and the Settlement Class.

- a. Upon final approval, Plaintiff, the Settlement Class members, and their related individuals and entities (including, but not limited to, Plaintiff's and Settlement Class members' spouses and former spouses, and their present, former, and future respective administrators, agents, assigns, attorneys, executors, heirs, partners, predecessors-in-interest, and successors) (collectively, the "Releasing Parties"), shall forever release the Released Parties (defined below) from any and all rights, duties, obligations, claims, actions, causes of action, or liabilities, whether arising under local, state, or federal law, whether by statute, contract, common law, or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, arising from any time in the past through the date of the Preliminary Approval Order, arising out of or relating in any way to: (i) allegations, claims, or contentions that were or could have been asserted in the Litigation; and (ii) the Product, including, but not limited to, its efficacy or performance, and any and all advertising, labeling, packaging, marketing, claims, or representations of any type whatsoever made in connection with the Product (collectively, the "Released Claims"). The Released Claims do not encompass any claim for personal injuries or safety-related concerns.

- b. For purposes of this Agreement, the Released Parties are: (i) Direct Digital, LLC including, but not limited to its present, former, and future direct and indirect parent companies, affiliates, agents, members, shareholders, owners, divisions, predecessors-in-interest, subsidiaries, successors, and any entities that manufactured or sold Instaflex from which Direct Digital acquires assets or contracts; and (ii) any person or entity in the chain of distribution of Instaflex including, but not limited to, raw material suppliers, distributors, and retailers (including, but not limited to GNC, to the extent that it is in the chain of distribution of Instaflex) including, but not limited to, their present, former, and future direct and indirect parent companies, affiliates, agents, shareholders, member, owners, divisions, predecessors-in-interest, subsidiaries, and successors.

12. **Release of Unknown Claims.** The Releasing Parties acknowledge that they may have claims that are currently unknown and that the release in paragraph 11 is intended to and will fully, finally, and forever discharge all Released Claims, which do not include any claim for personal injuries or safety-related concerns, whether now asserted or unasserted, known or unknown, suspected or unsuspected, which now exist, or heretofore existed or may hereafter exist, which if known, might have affected their decision to enter into this Agreement and the release therein. Each Releasing Party shall be deemed to waive any and all provisions, rights, and benefits conferred by any law of the United States, any state or territory of the United States, or any state or territory of any other country, or principle of common law or equity, which governs or limits a person's release of unknown claims. In making this waiver, the Releasing Parties understand and acknowledge that they may hereafter discover facts in addition to or different from those that are

currently known or believed to be true with respect to the subject matter of the Released Claims, but agree that they have taken that possibility into account in reaching this Settlement Agreement and that, notwithstanding the discovery or existence of any such additional or different facts, as to which the Releasing Parties expressly assume the risk, they fully, finally, and forever settle and release any and all Released Claims, known or unknown, suspected or unsuspected, which now exist, or heretofore existed, or may hereafter exist, and without regard to the subsequent discovery or existence of such additional or different facts. The foregoing waiver includes, without limitation, an express waiver, to the fullest extent not prohibited by law, by Plaintiff, the Settlement Class members including those located in California or who are California residents or citizens, and all Releasing Parties, of any and all rights under California Civil Code Section 1542, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

In addition, all Releasing Parties also expressly waive any and all provisions, rights, and benefits conferred by any law or principle of common law or equity, that are similar, comparable, or equivalent, in whole or in part, to California Civil Code Section 1542.

13. **Additional Releases.** Except as to the rights and obligations provided for under this Agreement, Direct Digital hereby releases and forever discharges Plaintiff, the Settlement Class, and Settlement Class Counsel from any and all rights, duties, obligations, claims, actions, causes of action, or liabilities, whether arising under local, state, or federal law, whether by statute, contract, common law, or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, which

Direct Digital may now have, own, or hold or which Direct Digital at any time may have, own, or hold, against Plaintiff, the Settlement Class, or Settlement Class Counsel by reason of any matter, cause, or thing whatsoever occurred, done, omitted, or suffered from the beginning of time to the date of Preliminary Approval Order, related to the subject matter of the Litigation except for the rights and obligations created by this Agreement.

SETTLEMENT ADMINISTRATION

14. **Settlement Administrator.** The Parties agree that a third party, KCC LLC, shall serve as the settlement administrator to administer the Settlement and advise the Parties on a notice plan (the “Settlement Administrator”). The Settlement Administrator will work under the direction of Settlement Class Counsel and Direct Digital’s counsel. Subject to paragraph 10, Direct Digital shall pay the Settlement Administrator up to \$400,000 as prescribed in paragraph 5 for Notice and Administration Costs reflected in the “Notice Plan” attached as Exhibit A, with no more than \$400,000 to come from the Settlement Fund after it is fully funded pursuant to paragraph 5, unless additional monies from the Net Settlement Fund are available to pay such excess costs pursuant to paragraph 10.

15. **Class and CAFA Notice.** Not later than 10 days after Plaintiff files its motion for preliminary approval of the Settlement, the Settlement Administrator shall cause the notices required by 28 U.S.C. § 1715 to be issued pursuant to the terms of said statute. As soon as practicable after entry of the Preliminary Approval Order, the Settlement Administrator shall cause notice to issue to the Settlement Class consistent with the Notice Plan and proposed forms of notice attached as Exhibits B (email Notice), C (long form notice), D (summary notice), E (claim form), and F (website screen shots) hereto, collectively “Notice.”

16. **Claims Process.** The Notice shall provide information regarding the filing of claims. Claim forms shall be available from the Settlement Administrator and on the settlement website after the notice process is implemented. A claim must: (i) be post-marked or submitted online no later than ninety (90) days after Notice is first published; (ii) contain all of the information and documentation required by the Settlement Agreement and Notice; and (iii) be signed by the Settlement Class member submitting the claim.

17. **Determination of Validity.** The Settlement Administrator shall be responsible for reviewing all claims to determine their validity.

- a. Any claim that is not substantially in compliance with the instructions on the claim form or the terms of paragraph 16, or is post-marked or submitted online later than the close of the claim period set by the Court in the Preliminary Approval Order, shall be rejected.
- b. The Settlement Administrator shall provide a report of any rejected claims to Direct Digital's counsel and Settlement Class Counsel. If Settlement Class Counsel do not agree with the rejection of a claim, they shall bring it to the attention of counsel for Direct Digital, and the Parties shall attempt, in good faith, to resolve any disputed rejected claims. The Settlement Administrator, after considering the positions of the Parties, will make the final decision within 30 days of the Parties presenting their respective positions.

18. **Fraudulent Claims.** At any time during the claims process, if the Settlement Administrator has a reasonable suspicion of fraud, the Settlement Administrator shall immediately notify both Settlement Class Counsel and Direct Digital's counsel of that fact, and the basis for its

suspicion. Settlement Class Counsel and Direct Digital's counsel shall endeavor to reach an agreed appropriate solution to any suspected fraud and, if necessary, Direct Digital may suspend the claims process, and then the Parties shall promptly seek assistance from the Court.

19. **Payment of Claims.** No payments shall be made until the Settlement Fund is fully funded by Defendant. Upon full funding of the Settlement Fund, the Settlement Administrator shall disburse all payments as pursuant to this Agreement.

SETTLEMENT APPROVAL PROCESS

20. **Preliminary Approval Order.** The Parties agree to petition the Court presiding in *Vince Mullins v. Direct Digital, LLC*, No. 1:13-cv-01829 (N.D. Ill.) promptly after execution of this Settlement Agreement for an order preliminarily approving the Settlement Agreement (the "Preliminary Approval Order"). A copy of the form of the proposed Preliminary Approval Order agreed to by the Parties is attached as Exhibit G hereto. The Preliminary Approval Order shall provide, *inter alia*, that:

- a. The Settlement proposed in this Agreement has been negotiated at arm's length and its adequacy is such that the Settlement falls within the range of possible final approval;
- b. Subject to the Court's consideration of additional evidence at the Fairness Hearing (as defined below), and based on the documents submitted to the Court in connection with preliminary approval, the Notice and the proposed plan for giving notice fully complies with the requirements of Fed. R. Civ. P. 23 and due process, constitutes the best notice practicable under the circumstances, and is due and sufficient notice to all persons entitled to notice of this Settlement;

- c. The Settlement Class is conditionally certified, with Plaintiff serving as class representative, and the attorneys and law firms listed above serving as Settlement Class Counsel, on the condition that the settlement class certification shall be automatically vacated if the Settlement is terminated or is disapproved in whole or in part by the Court or any appellate court, or any of the Parties pursuant to the terms of this Agreement;
- d. A final hearing on the Settlement proposed in this Agreement shall be held before the Court to determine whether the proposed Settlement is fair, adequate, and reasonable, and whether it should be approved by the Court (“Fairness Hearing”);
- e. In further aid of the Court’s jurisdiction to implement and enforce the proposed Settlement, Plaintiff and all Settlement Class members shall be preliminarily enjoined and barred from commencing or prosecuting any action asserting any of the Released Claims, either directly, representatively, derivatively, or in any other capacity, whether by a complaint, counterclaim, defense, or otherwise, in any court or other tribunal (such as arbitration). Any person or entity who knowingly violates such injunction shall pay the attorneys’ fees and costs incurred by Direct Digital or any other Released Party as a result of the violation; and
- f. In accordance with 28 U.S.C. § 1715(d), the final approval hearing shall take place not less than 140 days after the Motion for Preliminary Approval is filed.

21. **Rights of Exclusion.** All Settlement Class members who properly deliver to the Settlement Administrator a timely written request to opt-out of the Settlement shall be excluded from the Settlement Class, shall have no rights as members of the Settlement Class pursuant to this Settlement Agreement, and shall receive no Cash Awards or other payments as provided herein. A request for exclusion from the Settlement Class must: (a) be in writing; (b) state the name, address, and phone number of the Settlement Class member(s) seeking exclusion; (c) contain a signed statement that: “I/We hereby request to be excluded from the proposed Settlement Class in the Instaflex Product Litigation”; (d) be mailed to the Settlement Administrator at the address provided in the Notice; and (e) be post-marked no later than forty-five (45) days after the Notice is first published. A request for exclusion that does not include all of the foregoing information, that is sent to an address other than the one designated in the Notice, or that is not post-marked within the time specified, shall be invalid and the person(s) serving such a request shall be deemed member(s) of the Settlement Class, and shall be bound as class member(s) by the Settlement. The Settlement Administrator shall promptly forward copies of all requests for exclusion to Settlement Class Counsel and counsel for Direct Digital.

22. **Right to Comment or Object.** Any member of the Settlement Class may comment in support of or in opposition to the Settlement and may do so in writing, in person, or through counsel, at his or her own expense, at the Fairness Hearing. Except as the Court may order otherwise, no Settlement Class member objecting to the Settlement shall be heard and no papers, briefs, pleadings, or other documents submitted by any such class member shall be received or considered by the Court unless such class member shall both file with the Court and mail to Settlement Class Counsel and counsel for Direct Digital a written objection with the caption *Mullins v. Direct Digital, LLC*, Case No. 1:13-cv-01829, that includes: (a) the Settlement Class

member's name, address, and telephone number; (b) a signed statement that he or she is a member of the Settlement Class; (c) the grounds for the objection; and (d) a notice of intention to appear (if any) that lists the name, address, and telephone number of the attorney, if any, who will appear. All written objections shall be filed and post-marked no later than forty-five (45) days after the first Notice is published. Any member of the Settlement Class who fails to object in the manner prescribed herein shall be deemed to have waived his or her objections and shall forever be barred from making any such objections in this action or in any other action or proceeding. While the statement described above is *prima facie* evidence that the objector is a member of the Settlement Class, Plaintiff or Direct Digital, or both, may take discovery regarding the matter.

23. **Final Judgment and Order.** If this Settlement Agreement is preliminarily approved by the Court, the Parties shall each request at the Fairness Hearing that the Court enter final judgment (the "Final Judgment and Order"). The Fairness Hearing shall be held no earlier than fourteen (14) days after the deadline for Settlement Class members to submit a claim, and no earlier than 140 days after the Motion for Preliminary Approval is filed. A copy of the form of the proposed Final Judgment and Order agreed to by the Parties is attached hereto as Exhibit H. The Final Judgment and Order shall provide, *inter alia*, that:

- a. The Notice fully complied with the requirements of Fed. R. Civ. P. 23 and due process, constituted the best notice practicable under the circumstances, and was due and sufficient notice to all persons entitled to notice of this Settlement;
- b. The Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Settlement Class;

- c. The Released Claims are dismissed with prejudice as to all Released Parties, without fees or costs except as provided in this Settlement Agreement; and
- d. Plaintiff and all Settlement Class members are permanently enjoined and barred from commencing or prosecuting any action asserting any of the Released Claims,

24. **Option to Withdraw.** Either Direct Digital or Settlement Class Counsel, on behalf of the Settlement Class, shall have the option to withdraw from the Settlement Agreement, and thereby render this Settlement null and void, if (a) any Party breaches any material provision of the Settlement Agreement or the Preliminary Approval Order, or fails to fulfill any material obligation hereunder or thereunder; (b) the Court fails to give final approval to any portion of the Settlement Agreement or any aspect of the Settlement; or (c) upon such other grounds as may be agreed by the Parties or permitted by the Court. Any election made by a Party to terminate this Agreement pursuant to this paragraph shall be made in writing (which may be my e-mail or facsimile) no later than seven (7) days prior to the Fairness Hearing.

25. **Effect of Withdrawal/Rejection.** In the event that (a) either Party withdraws from the Settlement Agreement pursuant to paragraph 24; (b) the Settlement Agreement, Preliminary Approval Order, and Final Judgment and Order are not approved in all material respects by the Court; or (c) the Settlement Agreement, Preliminary Approval Order, or Final Judgment and Order are reversed, vacated, or modified in any material respect by this or any other Court, then: (i) the Settlement Agreement shall become null and void; (ii) Direct Digital shall cease to have any obligation to pay any of the amounts set forth in this Agreement, any amount then paid by Direct Digital except for Notice and Administration Costs incurred as of the date the Settlement Administrator is notified that the Settlement Agreement has become null and void shall be

returned, (iii) the Litigation may continue; and (iv) any and all orders entered pursuant to the Settlement Agreement shall be deemed vacated, including, without limitation, any order certifying or approving certification of the Settlement Class; provided, however, that if the Parties hereto agree to appeal jointly any ruling and the Settlement Agreement and Final Judgment and Order are upheld on appeal, then the Settlement Agreement and Final Judgment and Order shall be given full force and effect according to their terms. The Parties reserve all rights regarding class certification in the event of withdrawal or rejection, including Direct Digital's right to oppose any motion for class certification on any and all factual and legal grounds in this or any other action.

MISCELLANEOUS PROVISIONS

26. **Interpretation.** This Settlement Agreement contains the entire agreement among the Parties hereto and supersedes any prior discussions, agreements, or understandings among them. All terms are contractual. For the purposes of construing or interpreting this Settlement Agreement, the Parties agree that it is to be deemed to have been drafted equally by all Parties hereto and shall not be construed strictly for or against any Party.

27. **Binding Effect.** The terms are and shall be binding upon each of the Parties hereto, their administrators, agents, assigns, attorneys, executors, heirs, partners, representatives, predecessors-in-interest, and successors, and upon all other persons claiming any interest in the subject matter hereto through any of the Parties hereto including any Settlement Class members.

28. **Headings.** The headings contained in this Settlement Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Settlement Agreement.

29. **No Rescission on Grounds of Mistake.** The Parties acknowledge that they have made their own investigations of the matters covered by this Settlement Agreement to the extent

they have deemed it necessary to do so. Therefore, the Parties agree that they will not seek to set aside any part of the Settlement Agreement on the grounds of mistake. Moreover, the Parties understand, agree, and expressly assume the risk that any fact not recited, contained, or embodied in the Settlement Agreement may turn out hereinafter to be other than, different from, or contrary to the facts not known to them or believed by them to be true, and further agree that the Settlement Agreement shall be effective in all respects notwithstanding and shall not be subject to termination, modification, or rescission by reason of any such difference in facts.

30. **Amendment.** This Settlement Agreement may be amended or modified only by a written instrument signed by the Parties or their counsel. Amendments and modifications may be made without notice to the Settlement Class unless notice is required by law or by the Court.

31. **Integration of Exhibits.** The exhibits to this Settlement Agreement are an integral and material part of the Settlement and are hereby incorporated and made a part of this Settlement Agreement.

32. **Jurisdiction.** The United States District Court for the Northern District of Illinois has jurisdiction over the Parties to this Settlement Agreement and the Settlement Class.

33. **No Admission.** Neither this Settlement Agreement, nor any of its provisions, nor any of the documents (including, but not limited to drafts of the Settlement Agreement, the Preliminary Approval Order, or the Final Judgment and Order), negotiations, or proceedings relating in any way to the Settlement, shall be construed as or deemed to be evidence of an admission or concession by any person, including Direct Digital, and shall not be offered or received in evidence, or subject to discovery, in this or any other action or proceeding except in an action brought to enforce its terms or except as may be required by law or Court order. The provisions of this paragraph shall become effective when this Settlement Agreement has been

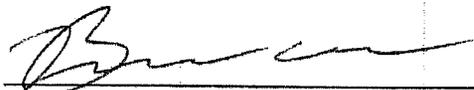
signed by the Parties and shall be binding on the Parties and their counsel regardless of whether the Settlement Agreement is approved by this Court or any other court and regardless of whether the Settlement Agreement is otherwise rendered null and void.

34. **Governing Law.** This Settlement Agreement shall be governed by and construed in accordance with the internal laws (as opposed to the conflicts of law provisions) of the State of Illinois.

35. **Counterparts.** This Settlement Agreement may be executed in counterparts, and may be executed by facsimile or PDF, and as so executed shall constitute one agreement.

36. **No Media Statements.** Subject to the Preliminary Approval Order issued by the Court, neither the Parties nor their counsel shall issue any press release, or make any statement to any media or press of any sort, regarding this Settlement, including any references on websites maintained by Plaintiff or his counsel, other than to state that the Litigation has been resolved on terms satisfactory to the Parties and contained in this Agreement. Class Counsel will be permitted to provide a link to the settlement website on their website with accompanying language to be reviewed and approved by Direct Digital, such approval not to be unreasonably withheld, before posting of the same.

DIRECT DIGITAL LLC



Brandon Adcock
Co-Founder

Date: 3/1/17

COUNSEL FOR DIRECT DIGITAL LLC



Date: March 1, 2017

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ON BEHALF OF PLAINTIFF IN THE LITIGATION



Date: March 1, 2017

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