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7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN MATEO

9 AARON VAN FLEET, PAUL  
10 OVBORG, and JAMES LONGFIELD,  
individually and on behalf of all others  
similarly situated,

11 Plaintiffs,

12 v.

13 TRION WORLDS, INC.,

14 Defendant.

NO. CIV 535304

**PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL  
OF CLASS ACTION  
SETTLEMENT**

Complaint Filed:  
September 8, 2015

CLASS ACTION

Assigned for All Purposes to:  
Honorable Marie S. Weiner,  
Department 2

DEPARTMENT: 2  
DATE: October 18, 2019  
TIME: 10:00 a.m.

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PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT

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1 **I. INTRODUCTION**

2 After more than four years of hard-fought litigation, Plaintiffs have reached  
3 an agreement with Trion’s insurer, Navigators Insurance Company, to settle this  
4 matter on a class wide basis for \$420,000. The proposed settlement reflects an  
5 excellent outcome for the proposed classes in light of the risks in continuing to  
6 litigate the case and Trion’s financial condition. Plaintiffs therefore request that  
7 the Court grant preliminary approval of the proposed settlement.

8 Plaintiffs seek an order under California Rule of Court 3.769 that:

- 9 (i) preliminarily approves the proposed settlement; (ii) provisionally certifies the  
10 Settlement Class and appoints Class Representatives and Class Counsel;  
11 (iii) approves the proposed notice and authorizes its dissemination to class  
12 members; and (iv) sets dates and procedures for the final approval and fairness  
13 hearing, including deadlines for class members to file objections to the proposed  
14 settlement or request exclusion. The complete Settlement Agreement and Release  
15 is attached to the Declaration of Michael Ram (“Ram Decl.”) as Exhibit 1.

16 Because the Settlement is the product of extensive arm’s-length  
17 negotiations, has no obvious deficiencies, and falls within the range of possible  
18 approval, as described in greater detail below, Plaintiffs request that the Court  
19 grant their motion for preliminary approval.

## II. BACKGROUND

### A. Plaintiffs' complaint.

Plaintiffs allege that Defendant Trion Worlds, Inc. (“Trion”) violated California consumer protection statutes in its operation of the ArcheAge video game. Prior to its sale in October 2018, Trion’s business was publishing video games online. (Ram Decl., ¶ 5, Ex. 3 (First Amended Complaint “Complaint”) at p. 1.) Plaintiffs signed up for and played ArcheAge (Complaint at ¶¶ 39–57), one of the numerous games published by Trion (*id.* at ¶ 8). Plaintiffs allege that Trion’s advertisement of ArcheAge and money-making features within the ArcheAge game violate California law. (*Id.* at ¶¶ 68–137.)

First, Plaintiffs allege that Trion advertised that ArcheAge players who purchased a special subscription package would receive a 10% discount on in-game purchases. (*Id.* at ¶¶ 22–31.) Plaintiffs claim that Trion failed to provide the discount in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (“UCL”), the California Consumers Legal Remedies Act, Cal. Civ. Code § 1770 (“CLRA”), and the California False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* Plaintiffs also claim that Trion’s advertisement of the discount was a negligent misrepresentation under California law. (*Id.* at ¶¶ 68–116.)



1 Second, Plaintiffs allege that Trion operated an unlawful lottery within  
2 ArcheAge through the sale of “mystery item” supply crates. (*Id.* at ¶¶ 32–38.)  
3 Players purchased supply crates, which contain a “random selection” of items,  
4 through Trion’s in-game Marketplace. (*Id.* at ¶¶ 32–33.) Plaintiffs allege that  
5 Trion enticed players to buy the crates by offering the players a “chance” to get a  
6 valuable virtual item in randomly selected supply crates (the “Rare Prize” or  
7 jackpot). (*Id.* at ¶ 33.) Plaintiffs allege that Trion’s supply crates are the digital  
8 equivalent of a scratch-off lottery ticket, and Trion’s sale of the crates violates the  
9 California lottery statute, California Penal Code § 319, and the UCL. (*Id.* at ¶¶  
10 34–38, 117–137.)

11 Trion denies the material allegations of Plaintiffs’ claims. (Ram Decl., ¶ 6.)

12 **B. The parties engaged in substantial discovery and litigation.**

13 Plaintiffs filed their initial complaint on September 4, 2015. (Ram Decl.,  
14 ¶ 3.) Trion removed the case to the United States District Court for the Northern  
15 District of California the following month. (*Id.*) In the federal court, Plaintiffs  
16 filed a motion to remand the action to this Court and Trion filed a motion to  
17 compel arbitration. (*Id.*) After full briefing and a hearing on both motions, the  
18 federal district court granted Plaintiffs’ motion to remand and declined to rule on  
19 Trion’s motion to compel arbitration. (*Id.* ¶ 3, Ex. 2.)

1 The case returned to this Court and was designated complex by order filed  
2 on February 17, 2016. (*Id.* ¶ 4.) Trion filed a motion to compel arbitration in this  
3 Court on February 29, 2016. (*Id.*) After full briefing and a hearing, the Court  
4 denied the motion to compel arbitration by order dated June 8, 2016. (*Id.*)

5 Trion filed an immediate interlocutory appeal of the Court’s order denying  
6 its motion to compel arbitration. (*Id.*) The Court of Appeal affirmed this Court’s  
7 denial of Trion’s motion in a decision entered on April 2, 2018. (*Id.*) Plaintiffs  
8 filed a First Amended Complaint on June 22, 2018. (*Id.* ¶ 5, Ex. 3.) Trion filed a  
9 demurrer to Plaintiffs’ claims relating to the operation of an alleged illegal lottery  
10 on July 9, 2018. (*Id.* ¶ 6.) After full briefing and a hearing, the Court denied  
11 Trion’s demurrer on September 5, 2018. (*Id.*)

12 While the demurrer was pending, Trion responded to Plaintiffs’ written  
13 discovery requests relating to the failure to provide discount claims and produced  
14 more than 700 pages of documents. (*Id.* ¶ 7.) The parties addressed discovery  
15 disputes in case management statements. The Court directed Trion to produce  
16 additional responses after a hearing. (Ram Decl., ¶ 8; Case Management Order  
17 #8.) Trion produced a total of 23,261 pages of documents and data responsive to  
18 Plaintiffs’ discovery requests, which Plaintiffs’ Counsel have reviewed and  
19 analyzed. (Ram Decl., ¶ 7.)

1 **C. Trion’s insolvency and the settlement negotiations.**

2 On October 25, 2018, Trion filed a case management statement notifying  
3 Plaintiffs and the Court that on October 22, 2018, Trion assigned and transferred  
4 to its assignee Trion Worlds (ABC) LLC all of its property and assets for the  
5 benefit of Trion’s creditors. (Ram Decl., ¶ 10, Ex. 4.) Trion’s board of directors,  
6 officers, general counsel, and employees resigned effective October 22, 2018 and  
7 the company ceased operations. (*Id.*)

8 Plaintiffs issued subpoenas for documents to both Trion Worlds (ABC)  
9 LLC and Gamigo US, Inc. (“Gamigo”), the German company to which Trion’s  
10 assets, including the ArcheAge game, were sold. (*Id.* ¶ 11.) Trion Worlds (ABC)  
11 LLC marketed and sold Trion’s assets. (Declaration of Trion Worlds (ABC) LLC  
12 in support of Plaintiffs’ Motion for Preliminary Approval of Class Action  
13 Settlement (“Trion ABC Decl.”) at ¶ 3.) The proceeds from the sale of Trion’s  
14 assets were insufficient to pay the cost of the assignment, wind down costs, and  
15 the claims of Trion’s secure creditors. (*Id.* ¶ 4.) There are no funds available to  
16 pay Trion’s unsecured creditors or stockholders. (*Id.* ¶ 5.)

17 Based on documents and information Plaintiffs received from Trion  
18 Worlds (ABC) LLC and its counsel, Plaintiffs’ Counsel concluded that a  
19 professional liability insurance policy issued by Navigators Insurance Company  
20 issued to Trion’s officers and directors was likely the only asset from which  
21

1 Plaintiffs and the proposed classes would be able to recover any judgment  
2 obtained in this action. (Ram Decl., ¶ 12.) In addition, that policy was being  
3 reduced by ongoing defense costs in this action. (*Id.*)

4 Plaintiffs sent Navigators a formal settlement demand on May 13, 2019.  
5 (Ram Decl., ¶ 13.) Plaintiffs’ Counsel and counsel for Navigators then engaged in  
6 direct arm’s-length negotiations over a period several months. (*Id.*) On July 29,  
7 2019, the parties agreed to settle the case for \$420,000, which is a majority of  
8 what remains on the insurance policy. (*Id.*) The parties fully executed the  
9 Settlement Agreement and Release on September 26, 2019. (*Id.* ¶¶ 2, 13, Ex. 1.)

### 10 III. PROPOSED SETTLEMENT TERMS

11 The details of the settlement are contained in the Settlement Agreement  
12 and Release. (*See* Ram Decl., Ex. 1 (“Settlement Agreement”).) The Settlement  
13 Agreement’s terms are summarized below.

#### 14 A. The Proposed Classes.

15 The parties propose provisional certification of two settlement classes. The  
16 proposed definitions of the Settlement Classes are substantively the same as the  
17 class definitions in Plaintiffs’ First Amended Complaint.

18 **Discount Class:** All persons in the United States who  
19 purchased an ArcheAge Patron status subscription before  
20 launch, either individually or as part of a Founder’s Pack,  
and purchased items in the ArcheAge Marketplace before  
October 22, 2018, while maintaining Patron status.

1           **Lottery Class:** All persons in the United States who have  
2 purchased at least one supply crate in the ArcheAge  
Marketplace before October 22, 2018.

3           Excluded from the Classes are Trion, its legal  
4 representatives, officers, directors, assigns, and  
5 successors, and any entity in which Trion has a controlling  
interest. Also excluded is the judge to whom this case is  
assigned and any member of the judge’s immediate family  
or court staff.

6 (*See* Settlement Agreement § I.17; Complaint at ¶ 58.)

7           **B. Monetary Relief.**

8           Trion’s insurer will pay \$420,000 in Settlement Proceeds. The Settlement  
9 Proceeds will be used to pay claims administration costs, class representative  
10 service awards, attorneys’ fees and litigation expenses, and settlement awards to  
11 the Settlement Class Members who submit claims. No money will revert to Trion  
12 or its insurer.

13           1.     Payments to Settlement Class Members.

14           Data produced to date by Trion and by third-party Gamigo reflect that there  
15 are approximately 78,500 members of the Settlement Classes. (Ram Decl., ¶ 14.)  
16 Plaintiffs’ Counsel issued a second subpoena to Gamigo on September 9, 2019, to  
17 obtain additional data needed to ensure that all members of the proposed  
18 settlement classes receive notice. (*Id.* ¶ 15.) Counsel for Gamigo have agreed to  
19 provide the information directly to the Claims Administrator upon entry of the  
20 proposed preliminary approval order. (*Id.*)

1 Under the terms of the Settlement Agreement, Class Members must submit  
2 claim forms to participate in the settlement. (Settlement Agreement § IV.3.)  
3 Members of the Settlement Classes will be able to submit claims online.  
4 (*Id.* § VII.2(b).) The Settlement Proceeds will be distributed based on the number  
5 of purchases made by Claimants. (*Id.*) Claimants will have the option to elect  
6 payment by electronic check or payment by physical check. Checks will be valid  
7 for 90 days from issuance. Any funds remaining 90 days after the distribution will  
8 be donated to Public Justice. (*Id.* § IV.3.) Public Justice is a national non-profit  
9 law firm that advocates for consumer rights in the courts and legislatures across  
10 the county. *See* [www.publicjustice.net](http://www.publicjustice.net). Beth Terrell, a founding member of the  
11 Terrell Marshall Law Group, is currently the President of the board of Public  
12 Justice. (Declaration of Toby J. Marshall in support of preliminary approval of  
13 settlement (“Marshall Decl.”), ¶ 2.) Ms. Terrell played no role in the selection of  
14 Public Justice as a proposed *cy pres* recipient. (*Id.*)

15 2. Notice Plan and Claims Administration costs.

16 After a competitive bid process, Plaintiffs’ Counsel have retained  
17 Postlewaite & Netterville (“P&N”) to serve as the Claims Administrator. (Ram  
18 Decl., ¶ 17.) Within 30 days after the Court’s entry of an order granting  
19 preliminary approval of the settlement, the Claims Administrator will send email  
20 notices in substantially the form of Exhibit A to the Settlement Agreement to the  
21

1 most recent email address available for each person in the Settlement Classes.  
2 (Settlement Agreement § VII.2.a.) The Claims Administrator must comply with  
3 industry standards in order to increase the likelihood of successful delivery of all  
4 email notices. (*Id.*) The Claims Administrator will also establish a Settlement  
5 Website containing the more detailed information set forth in Exhibit B to the  
6 Settlement Agreement. The Settlement Website will include forms to submit  
7 claims or opt-out of the settlement as well as Plaintiffs' complaint, the complete  
8 Settlement Agreement, and the Court's order granting preliminary approval of the  
9 settlement. (Settlement Agreement § VII.2.b.) Plaintiffs' Counsel's motion for  
10 attorneys' fees, expenses, and service awards to the Plaintiffs will be posted to the  
11 site within one business day after it is filed. (*Id.*)

12 P&N estimates administration costs will be \$65,351, based on the data  
13 currently available from Trion and Gamigo. (Ram Decl., ¶ 17.) This estimate may  
14 be further refined based on additional data from Gamigo. Costs will also vary  
15 based on the rate at which players submit claims. (*Id.*)

16 3. Proposed service awards to class representatives.

17 Plaintiffs will request modest service awards of \$2,000 each for their role  
18 in bringing the case and remaining involved in the litigation over four years.  
19 (Settlement Agreement § V.1.) If the Court awards anything less than the  
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1 requested amounts the difference shall be allocated to payments to claimants. (*Id.*  
2 § V.4.)

3 4. Attorneys' fees and litigation expenses.

4 Plaintiffs' Counsel will request that the Court approve an attorneys' fees  
5 award of \$105,000, which is 25% of the Settlement Proceeds. (Settlement  
6 Agreement § V.3.) Plaintiffs' Counsel's current lodestar is at least \$533,000.  
7 (Ram Decl., ¶ 18; Marshall Decl., ¶ 3; Declaration of Venkat Balasubramani in  
8 support of preliminary approval ("Balasubramani Decl."), ¶ 9.) Plaintiffs'  
9 Counsel's requested award reflects less than a quarter of the reasonable fees  
10 actually incurred. Plaintiffs' Counsel will also request an award of approximately  
11 \$18,500 in out-of-pocket litigation expenses incurred in prosecuting this action.  
12 (Settlement Agreement § V.3; Ram Decl., ¶ 18; Marshall Decl., ¶ 3;  
13 Balasubramani Decl., ¶ 9.) Securing Court approval of the settlement, making  
14 sure the settlement is fairly administered and implemented, and obtaining  
15 dismissal will require an additional time commitment. Plaintiffs' Counsel will file  
16 a motion requesting approval of an attorneys' fee and cost award to compensate  
17 and reimburse them for the work already performed in this case and the work  
18 remaining to be performed in connection with the settlement. (Settlement  
19 Agreement § V.3.) Plaintiffs' Counsel will file their motion at least thirty days  
20 before the deadline for Class Members to object and the motion will be posted to



1 the Settlement Website within one business day of filing. (*Id.*) The Settlement  
2 Agreement is not contingent on the amount of attorneys’ fees or costs awarded.  
3 (*Id.* § V.4.)

4 **C. Release.**

5 The release is appropriately tailored to the claims made in the case. In  
6 exchange for the benefits provided by the settlement, Settlement Class Members  
7 will release any legal claims that arise from the facts set forth in Plaintiffs’ First  
8 Amended Complaint, particularly, claims arising out of (1) Trion’s promise to  
9 provide a discount benefit to individuals who purchased Patron status before U.S.  
10 launch of the ArcheAge game; or (2) any lottery or game of chance related to  
11 Defendant’s sale of supply crates in the ArcheAge marketplace. (Settlement  
12 Agreement § XI.2.)

13 **IV. STATEMENT OF ISSUES**

14 1. Should the Court grant preliminary approval of the proposed  
15 settlement and provisionally certify the proposed Settlement Classes?

16 **V. AUTHORITY AND ARGUMENT**

17 Under California Rule of Court 3.769(a): “A settlement or compromise of  
18 an entire class action, or of a cause of action in a class action, or as to a party,  
19 requires the approval of the court after hearing.” Review of a proposed class  
20 action settlement generally involves two hearings. Fed. Judicial Ctr., *Annotated*

1 *Manual for Complex Litig.* § 21.632 (May 2019 ed.) (*MCL-Ann.*). First, the  
2 settlement is approved preliminarily following the submission by the parties of  
3 relevant information concerning the terms of the settlement and the history of the  
4 litigation. Second, after notice of the proposed settlement is given to the class, the  
5 Court conducts a final approval hearing, also known as a fairness hearing. *Id.*; *see*  
6 *also Munoz v. BCI Coca-Cola Bottling Co. of L.A.* (2010) 186 Cal.App.4th 399,  
7 404–406 (*Munoz*) (describing preliminary and final approval hearings and  
8 affirming order granting final approval of class settlement).

9 “Before final approval, the court must conduct an inquiry into the fairness  
10 of the proposed settlement.” Cal. Rules of Court, rule 3.769(g). Ultimately, a  
11 court should approve a proposed settlement only if it is fair, reasonable and  
12 adequate. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85  
13 Cal.App.4th 1135, 1147 (*7-Eleven*) (citing *Dunk v. Ford Motor Co.* (1996) 48  
14 Cal.App.4th 1794, 1802 (*Dunk*)). At the preliminary approval stage, the Court  
15 makes an initial evaluation of the fairness of the proposed settlement on the basis  
16 of written submissions and informal presentations from the settling parties. If the  
17 settlement is within the range of possible approval, the Court should direct the  
18 class representatives to “notify class members of a pending settlement on the  
19 merits and provide them with the opportunity to object at the final settlement

1 hearing.” *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 266  
2 (citing California Rules of Court, rule 3.769).

3 The trial court has broad discretion to approve a class action settlement.  
4 The court’s discretion “is to be exercised through the application of several well-  
5 recognized factors.” *Munoz*, 186 Cal.App.4th at p. 407. “The list, which is not  
6 exhaustive and should be tailored to each case,” includes:

7 the strength of plaintiffs’ case, the risk, expense,  
8 complexity and likely duration of further litigation, the  
9 risk of maintaining class action status through trial, the  
10 amount offered in settlement, the extent of discovery  
11 completed and the stage of the proceedings, the experience  
12 and views of counsel, the presence of a governmental  
13 participant, and the reaction of the class members to the  
14 proposed settlement.

11 *Id.* (quoting *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128  
12 (*Kullar*)) (internal quotation marks omitted). “The most important factor is the  
13 strength of the case for plaintiffs on the merits, balanced against the amount  
14 offered in settlement.” *Id.* at pp. 407–408.

15 **A. The Court should grant preliminary approval of the settlement.**

16 1. The settlement is presumptively fair under *Dunk*.

17 Under *Dunk*, “a presumption of fairness exists where: (1) the settlement is  
18 reached through arm’s-length bargaining; (2) investigation and discovery are  
19 sufficient to allow counsel and the court to act intelligently; (3) counsel is  
20 experienced in similar litigation; and (4) the percentage of objectors is small.” 7-  
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1 *Eleven, supra*, 85 Cal.App.4th at p. 1146.

2 Here the settlement was reached through arm’s-length negotiations  
3 between Plaintiffs’ Counsel and counsel for Trion’s insurer. (Ram Decl., ¶ 13.)  
4 Plaintiffs had already conducted significant investigation into the strength of their  
5 claims through contested litigation of three substantive motions and one  
6 discovery motion and had received responses to written discovery and thousands  
7 of pages of documents and data. (Ram Decl., ¶¶ 3–4, 5–8.) Plaintiffs’ Counsel are  
8 experienced class actions litigators and also have specialized knowledge of issues  
9 related to the digital economy. (Ram Decl., ¶¶ 19–24; Marshall Decl., ¶¶ 4–8;  
10 Balasubramani Decl., ¶ 11.) The Court will have before it any objections to the  
11 settlement prior to the hearing on final approval of the settlement.

12 2. The strength of Plaintiffs’ case.

13 Although Plaintiffs are confident that they would have been able to obtain  
14 class certification and prevail on the merits of their claims, they faced significant  
15 risks if the case continued to be litigated. First, as set forth in Trion’s demurrer to  
16 Plaintiffs’ First Amended Complaint, there are numerous published appellate  
17 decisions holding video games that award virtual property to players by chance  
18 are not unlawful lotteries or gambling because the virtual items awarded are not a  
19 thing of value. *See Mason v. Mach. Zone, Inc.* (D. Md. 2015) 140 F. Supp. 3d  
20 457, *aff’d* (4th Cir. 2017) 851 F.3d 315; *Soto v. Sky Union, LLC* (N.D. Ill. 2016)

1 159 F. Supp. 3d 871, 881; *Phillips v. Double Down Interactive LLC* (N.D. Ill.  
2 2016) 173 F.Supp.3d 731. Although Trion’s demurrer was denied, the Court  
3 declined to address the merits of most of Trion’s arguments because they  
4 relied on contractual terms not found in Plaintiffs’ complaint or incorporated  
5 therein by reference. Prior to Trion’s assignment for the benefit of creditors  
6 transaction, Trion’s counsel advised Plaintiffs’ Counsel that it intended to file a  
7 motion for summary judgment raising similar legal challenges to the lottery  
8 claims. (Ram Decl., ¶ 9.) While Plaintiffs believe they have the better argument  
9 regarding whether virtual property in the ArcheAge game is a thing of value  
10 under California’s lottery statutes, there is no published authority expressly  
11 holding that virtual property of this type is a “thing of value” for purposes of  
12 California’s gambling statutes.

13 In addition, Plaintiffs had not moved for class certification and establishing  
14 and maintaining class certification is always difficult. Obtaining class  
15 certification in this case would have been complicated by the fact that Trion has  
16 ceased operations. As a result, counsel for Trion was essentially unable to  
17 produce additional discovery responses or witnesses with knowledge of Trion’s  
18 operation of the ArcheAge game.

1           3.     The amount offered in settlement.

2           The data and documents produced by Trion and Gamigo reflect that the  
3 monetary value of credits players spent on supply crates exceed \$1,000,000 and  
4 that players were deprived of approximately \$62,000 worth of credits as a result  
5 of the failure to provide the promised 10% discount. (Ram Decl., ¶ 14.) The  
6 Settlement therefore reflects about 39% of the estimated damages to the class,  
7 assuming that Plaintiffs would have recovered the full amount players paid for  
8 each supply crate.

9           California courts have recognized that in determining whether a proposed  
10 settlement represents a reasonable compromise, a trial court may consider “the  
11 risks and expenses of attempting to establish *and collect*” on the claims of the  
12 proposed class through litigation. *Kullar, supra*, 168 Cal.App.4th at 129  
13 (emphasis added). The settlement amount is reasonable in light of the risk that  
14 even if the classes were certified and the classes obtained a judgment against  
15 Trion, they may not have been able to collect anything from Trion. Trion assigned  
16 its assets for the benefit of creditors under California law. (Trion ABC Decl., ¶ 2.)  
17 The Trion (ABC) entity established for the benefit of Trion’s creditors does not  
18 have sufficient assets to pay the claims of secured creditors. (*Id.* ¶ 4.) The  
19 Navigators insurance policy, which is likely to be the only asset from which  
20 Plaintiffs and the proposed Settlement Classes would be able to recover,

1 continues to be reduced by ongoing defense costs. (*Id.* ¶ 12.)

2 4. The experience and views of counsel.

3 Plaintiffs’ Counsel, counsel for Trion, and counsel for the insurer all agree  
4 that the Settlement is fair, adequate, and reasonable. Plaintiffs’ Counsel believe  
5 that absent a settlement with Trion’s insurer, the proposed classes would be  
6 unable to collect any judgment obtained. In addition, obtaining class certification  
7 and a judgment would have required months, if not years, of additional litigation.  
8 The settlement reflects a significant percentage of remaining insurance policy  
9 proceeds, which is reasonable in light of the risks discussed above.

10 **B. The Court should provisionally certify the proposed Settlement**  
11 **Classes.**

12 “The court may make an order approving or denying certification of a  
13 provisional settlement class after the preliminary settlement hearing.” Cal. Rules  
14 of Court, rule 3.769(d). Plaintiffs request that the Court provisionally certify the  
15 Settlement Classes under California Code of Civil Procedure section 382 and the  
16 CLRA.

17 Section 382 authorizes a class action when “the question is one of a  
18 common or general interest, of many persons, or when the parties are numerous,  
19 and it is impracticable to bring them all before the court.” Cal. Code Civ. P. 382.

20 “The party advocating class treatment must demonstrate the existence of an

1 ascertainable and sufficiently numerous class, a well-defined community of  
2 interest, and substantial benefits from certification that render proceeding as  
3 a class superior to the alternatives.” *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th  
4 955, 968 (*Noel*) (quoting *Brinker Restaurant Corp. v. Superior Court* (2012) 53  
5 Cal.4th 1004, 1021). “The community of interest requirement involves three  
6 factors: (1) predominant common questions of law or fact;  
7 (2) class representatives with claims or defenses typical of the class; and  
8 (3) class representatives who can adequately represent the class.” *Id.* (quoting  
9 *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436) (internal quotation marks  
10 omitted). As a general rule, “if the defendant’s liability can be determined by  
11 facts common to all members of the class, a class will be certified even if the  
12 members must individually prove their damages.” *Id.* (internal quotation marks  
13 omitted). A class is ascertainable “when it is defined in terms of objective  
14 characteristics and common transactional facts that make the ultimate  
15 identification of class members possible when that identification becomes  
16 necessary.” *Id.* at p. 980.

17 The requirements for certification under the CLRA are similar. *See* Cal.  
18 Civ. Code § 1781(b); *Noel, supra*, 7 Cal.5th at p. 969.

- 19 1. The Settlement Classes are ascertainable and so numerous that  
20 joinder is impracticable.

21 The proposed Settlement Classes are clearly defined based on objective



1 criteria. *See Cohen v. DIRECTV, Inc.*, (2009) 178 Cal. App. 4th 966, 976 (holding  
2 that the class defined as “all HD Package subscribers” was sufficiently precise,  
3 with objective characteristics, and could be determined by records of the  
4 company). Similarly the Settlement Classes here are described as (1) those U.S.  
5 players who purchased “patron” passes prior to launch and who bought items in  
6 the marketplace and (2) U.S. players who purchased supply crates in the  
7 ArcheAge marketplace. The Settlement Classes are objectively defined and can  
8 easily be determined with reference to the records of Trion.

9 Courts have concluded that classes of as few as ninety potential class  
10 members were sufficiently numerous to warrant certification. *Little v. Sanchez*,  
11 (1985) 166 Cal. App. 3d 501, 506. Here, there are thousands of ArcheAge players  
12 who fall within each of the proposed classes. Joinder of thousands of players  
13 would be impracticable, and the Settlement Classes are sufficiently numerous.

14 2. Common questions of law or fact predominate.

15 There are numerous common questions of law or fact that predominate  
16 over any individual questions. These include: (1) Whether Trion’s advertisement  
17 of the 10% discount in connection with its promotion of Patron status  
18 subscriptions before launch was false; (2) Whether Trion made false or  
19 misleading statements about the existence of price reductions in violation of the  
20 UCL and the CLRA, Cal. Civ. Code § 1770(a)(13), when it advertised the 10%

1 discount in connection with the sale of Patron status subscriptions before launch,  
2 whether individually or as part of the Founder’s Packs; (3) Whether Trion’s  
3 advertisement of the 10% discount as a benefit associated with Patron status and  
4 the Founder’s Packs, coupled with Trion’s failure to provide the discount, was  
5 deceptive and unfair in violation of the UCL, Cal. Bus. & Prof. Code §§ 17200 *et*  
6 *seq.*; (4) Whether Trion ever provided to players who purchased Patron status  
7 subscriptions before launch, either individually or as part of the Founder’s Packs,  
8 the 10% discount advertised; (5) Whether the money consumers paid to purchase  
9 supply crates constitutes “valuable consideration” under California’s illegal  
10 lottery statute, Cal. Penal Code § 319; (6) Whether the virtual items Trion  
11 distributed in supply crates are “property” for purposes of California’s illegal  
12 lottery statute, Cal. Penal Code § 319; and (7) Whether Trion distributed that  
13 property by “chance” for purposes of California’s illegal lottery statute, Cal.  
14 Penal Code § 319.

15       There are no purely individual questions other than the calculation of the  
16 amount of each player’s damages. Those calculations can be done based on  
17 common evidence—(i.e. money spent)—found in Trion’s business records  
18 reflecting transactions in the ArcheAge Marketplace. Plaintiffs obtained that data  
19 from Trion and through subpoenas to Gamigo.

1           3.     The class representatives' claims and defenses are typical of the  
2                     Settlement Classes' claims and defenses.

3           Plaintiffs' claims are typical of those of the members of the proposed  
4 Settlement Classes. Trion made the same representations to Plaintiffs and the  
5 Discount Class members regarding the 10% discount that would come with the  
6 purchase of a Patron status subscription before launch. Plaintiffs and players in  
7 the Discount Class subsequently made purchases in the ArcheAge Marketplace  
8 but did not receive the promised discount. Plaintiffs and members of the Lottery  
9 Class purchased supply crates, which are effectively the tickets in Trion's illegal  
10 lottery. In addition, Plaintiffs and members of the Settlement Classes face the  
11 same risk that they may not be able to recover on any judgment as a result of  
12 Trion's financial condition. The Plaintiffs are not subject to any individual  
13 defenses.

14           4.     The class representatives have adequately represented the Settlement  
15                     Classes.

16           Plaintiffs have no interests that conflict with members of the proposed  
17 Settlement Classes, and Plaintiffs are not subject to unique defenses. Plaintiffs  
18 came forward and put their names on a lawsuit challenging Trion's business  
19 practices. Each Plaintiff cooperated with counsel by supplying information  
20 included in the complaint and kept abreast of the progress of the case. Plaintiffs  
21 retained counsel with specialized knowledge of class action litigation and digital

1 technology. Plaintiffs' Counsel have aggressively pursued this litigation for more  
2 than four years, devoting at least 1,400 hours and advancing thousands of dollars  
3 in costs, with no guarantee that they would ever recover anything. (Ram Decl.,  
4 ¶ 18; Marshall Decl., ¶ 3; Balasubramani Decl., ¶ 9.)

5 5. A class action is superior to any other proceeding.

6 Plaintiffs' and Settlement Class Members' claims arise from relatively  
7 small-value transactions. The average cash value of each purchase in the  
8 ArcheAge Marketplace ranges between approximately \$2 and \$8. (Ram Decl.,  
9 ¶ 16.) A class action is superior to other available methods for the fair and  
10 efficient adjudication of the controversy. Absent a class action, most members of  
11 the Settlement Classes would likely find the cost of litigating their claims  
12 prohibitively high and would therefore have no effective remedy at law. Because  
13 of the small size of the claims of members of the Settlement Classes, few  
14 members could afford to seek legal redress for Trion's misconduct. Particularly in  
15 light of Trion's lack of assets to satisfy any judgment, negotiated resolution of  
16 this action on a class basis is far superior to any alternative.

17 **C. The proposed notice satisfies the requirements of Rule 3.769(d) and  
18 due process.**

19 The court must direct notice of a proposed settlement of a class action and  
20 fairness hearing on the proposed settlement to the affected class members. Cal. R.  
21 Court, rules 3.769(f), 3.770(c). The best practicable notice is that which is

1 “reasonably calculated, under all the circumstances, to apprise interested parties  
2 of the pendency of the action and afford them an opportunity to present their  
3 objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, (1950) 339 U.S. 306,  
4 314.

5 The parties propose to send notice to Settlement Class Members by email,  
6 with first class mail used as a back-up method for email addresses that are  
7 permanently undeliverable. (Settlement Agreement § VII.2.a, Ex. A.) California  
8 courts have approved notice of a class settlement via email, particularly in cases  
9 where the class members and the defendant conducted business over the internet.  
10 *See Chavez v. Netflix, Inc.*, (2008) 162 Cal.App.4th 43, 58; *see also* Fed. R. Civ.  
11 P. 23(c)(2)(B) (requiring provision of notice practicable under the circumstances,  
12 including by electronic means). Class Members will have sixty days from the date  
13 notice is distributed to submit a claim, objection, or request for exclusion.  
14 (Settlement Agreement §§ II.9–10, IV.)

15 Gamigo will provide the Claims Administrator with names and contact  
16 information for the Settlement Class Members upon entry of the proposed  
17 preliminary approval order, which the Claims Administrator will update and  
18 verify before distributing notice. *Id.*, §§ 5, 5.4–5.5. The Claims Administrator  
19 will also establish a website to provide class members with additional information  
20 about the Settlement. (*Id.* § VII.2.b., Ex. B.)

1           The proposed notice provides all of the information Class Members need to  
2 evaluate and respond to the settlement. *See Newberg* § 8:17 (“Notice of a  
3 proposed settlement must “inform[] the class members of the nature of the  
4 pending action, the general terms of the settlement, that complete and detailed  
5 information is available from the court files, and that any class member may  
6 appear and be heard at the hearing.”). The proposed notice includes: (1) the nature  
7 of this litigation; (2) the general terms of the proposed settlement; (3) a statement  
8 of each class member’s rights under the settlement, (4) an explanation of how  
9 class members can object to or exclude themselves from the settlement; (5) the  
10 identity of Plaintiffs’ Counsel and that Plaintiffs’ Counsel will seek fees from the  
11 settlement fund; (6) the Settlement Website address; and (7) a toll-free number  
12 that members of the Settlement Classes can call with questions regarding the  
13 settlement. The notice also provides the date and time of the final approval  
14 hearing, at which the Court will decide whether to approve the requested  
15 attorneys’ fees and litigation expenses, class representative service payments, and  
16 administration costs. (Settlement Agreement, Exs. A–B.)

17       **D.    Schedule for final approval.**

18           The last step in the settlement approval process is a final fairness hearing at  
19 which the Court may hear all evidence and argument necessary to make its final  
20 evaluation. Plaintiffs propose the following schedule, assuming entry of the  
21

1 preliminary approval order on October 18, 2019:

EVENT	TIMING
Deadline for Claims Administrator to establish Settlement Website and send email notice.	<b>November 18, 2019</b>
Deadline for Plaintiffs' Counsel to file motion for award of attorneys' fees, expenses, and service awards.	<b>December 18, 2019</b>
Last day for Settlement Class Members to submit claims, requests for exclusion, or objections.	<b>January 17, 2020</b>
Due date for Claims Administrator to provide to Plaintiffs' Counsel declaration that approved notice plan was carried out.	<b>January 31, 2020</b>
Deadline for Plaintiffs to file motion for final approval, including responses to any objections.	<b>February 14, 2020</b>
Deadline for objector wishing to appear at Final Fairness Hearing to file notice of appearance.	<b>February 18, 2020</b>
Fairness Hearing.	<b>February 28, 2020</b> , or as soon thereafter as the Court's schedule permits

16 **VI. CONCLUSION**

17 For the foregoing reasons, Plaintiffs and their Counsel respectfully request  
18 that the Court (1) grant this motion for preliminary approval; (2) provisionally  
19 certify the Settlement Class; (3) appoint Aaron Van Fleet, Paul Ovberg, and  
20 James Longfield as Class Representatives; (4) appoint the law firms of Robins  
21

1 Kaplan, Terrell Marshall Law Group, and Focal PLLC as Class Counsel; (5)  
2 approve the content and authorize the dissemination of the proposed settlement  
3 notice; (6) schedule a fairness hearing; and (7) adopt the proposed schedule of  
4 events and deadlines.

5 RESPECTFULLY SUBMITTED AND DATED this 27th day of  
6 September, 2019.

7 TERRELL MARSHALL LAW GROUP PLLC

8 By: /s/ Elizabeth A. Adams, CSB #290029

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*Attorneys for the Plaintiffs*

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and am employed in King County,  
3 Washington. I am over the age of eighteen (18) years and not a party to this  
4 action; my business address is 936 North 34th Street, Suite 300, Seattle,  
5 Washington, 98103-8869.

6 On September 27, 2019, I served the preceding document by placing a true  
7 copy thereof enclosed in a sealed envelope and served in the manner and/or  
8 manners described below to each of the parties herein and addressed as on the  
9 attached list.

10  **BY MAIL:** I caused such envelope(s) to be deposited in the mail at my  
11 business address, addressed to the addressee(s) designated. I am  
12 readily familiar with Terrell Marshall Law Group PLLC’s practice for  
collection and processing of correspondence and pleadings for mailing.  
It is deposited with the United States Postal Service on that same day in  
the ordinary course of business.

13  **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand  
14 to the addressee(s) designated.

15  **BY OVERNIGHT COURIER SERVICE:** I caused such envelope(s) to be  
delivered via overnight courier service to the addressee(s) designated.

16  **BY FACSIMILE:** I caused said document to be transmitted to the telephone  
17 number(s) of the addressee(s) designated.

18  **BY ELECTRONIC MAIL:** I caused said document to be transmitted to the  
19 email addresses of the addressee(s) designated.

1 I declare under penalty of perjury under the laws of the State of  
2 Washington that the foregoing is true and correct.

3 Executed at Seattle, Washington, on the 27th day of September, 2019.

4 By: /s/ Elizabeth A. Adams, CSB #290029  
5 Elizabeth A. Adams, CSB #290029  
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**PROOF OF SERVICE LIST**

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