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17 ATTORNEYS FOR PLAINTIFF

18 IN THE UNITED STATES DISTRICT COURT
 19 FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 MICHAEL TURNER, an individual, on behalf)	Case No. 09-cv-05234-CW
21 of himself and all others similarly situated,)	
22)	
23 Plaintiff,)	PRELIMINARY APPROVAL
24)	ORDER
25 v.)	
26)	
27)	
28 STORM8, LLC, a California Limited Liability)	
Company,)	
29)	
30 Defendant.)	
31)	
32)	
33)	
34)	

PRELIMINARY APPROVAL ORDER

35 ~~PROPOSED~~ PRELIMINARY APPROVAL ORDER

1 WHEREAS, a class action is pending before the Court entitled *Turner, et al. v.*
2 *Storm8, LLC*, Case No. 09-cv-05234-CW; and

3 WHEREAS, Plaintiff Michael Turner and Defendant Storm8, LLC (“Storm8”) have
4 agreed on a Settlement Agreement dated June 21, 2010, which, together with the Exhibits
5 attached thereto, sets forth the terms and conditions for a proposed settlement and dismissal
6 of the Action with prejudice as to Defendant upon the terms and conditions set forth therein
7 (the “Agreement”), and the Court having read and considered the Settlement Agreement and
8 Exhibits attached thereto;

9 This matter coming before the Court upon the agreement of the Parties, good cause
10 being shown, and the Court being fully advised in the premises,

11 IT IS HEREBY ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

12 1. Terms and phrases in this Order shall have the same meaning as ascribed to
13 them in the Settlement Agreement.

14 2. The Parties have moved the Court for an order approving the settlement of the
15 Action in accordance with the Settlement Agreement, which, together with the documents
16 incorporated therein, sets forth the terms and conditions for a proposed settlement and
17 dismissal of the Action with prejudice, and the Court having read and considered the
18 Settlement Agreement and having heard the Parties and being fully advised in the premises,
19 hereby preliminarily approves the Settlement Agreement in its entirety subject to the Fairness
20 Hearing referred to in paragraph 18 of this Order for purposes of deciding whether to grant
21 final approval to the said Settlement Agreement.

22 **Settlement Class Certification**

23 3. For purposes of settlement only: (a) Michael Aschenbrener and Christopher
24 Dore of Edelson McGuire LLC are appointed Class Counsel for the Settlement Class; and (b)
25 Michael Turner is appointed Class Representative.

1 4. For purposes of settlement only, the Court certifies the following class (“the
2 Settlement Class”): all persons in the United States who downloaded and accessed any
3 version of any Storm8 game that was released or updated prior to August 30, 2009 on an
4 Apple iPhone.

5 5. The Court finds, subject to the Fairness Hearing referred to in Paragraph 18
6 below, that the Settlement Agreement is fundamentally fair, adequate, and reasonable, and,
7 solely within the context of and for the purposes of settlement only, that the Settlement Class
8 satisfies each of the requirements of Rule 23 of the Federal Rules of Civil Procedure,
9 specifically, that: the Class is so numerous that joinder of all members is impracticable; there
10 are questions of law and fact common to the Class; the claims of the Class Representative are
11 typical of the claims of the Class; the Class Representative will fairly and adequately protect
12 the interests of the Class; common questions of law or fact predominate over questions
13 affecting individual members; and a class action is a superior method for fairly and
14 efficiently adjudicating the action.

15 6. The Court finds that the Parties entered into the Settlement Agreement in good
16 faith, following arm’s length negotiation, including a mediation session with the Hon.
17 Eugene Lynch (Ret.).

18 7. Should the Settlement Agreement not receive the Court’s final approval,
19 should final approval be reversed on appeal, or should the Settlement Agreement otherwise
20 fail to become effective, the Court’s grant of class certification shall be vacated, and the
21 Class Representative and the Settlement Class would once again bear the burden of
22 establishing the propriety of class certification. In such case, neither the certification of the
23 Settlement Class for settlement purposes, nor any other act relating to the negotiation or
24 execution of the Settlement Agreement shall be considered as a factor in connection with any
25 class certification issue(s).

1 **Notice and Administration**

2 8. The Court approves, as to form and content, the Internet Publication Notice,
3 in the form of Exhibit B to the Settlement Agreement, the In-Game form of the Notice,
4 substantially in the form of Exhibit C thereto, and the provision for notice set out in
5 paragraph 4.2 of the Settlement Agreement constitute valid, due and sufficient notice to all
6 persons entitled thereto, that such notice is the best notice practicable under the
7 circumstances and that it constitutes due and sufficient notice to all persons entitled thereto
8 and complies fully with the requirements of the Federal Rules of Civil Procedure and of Due
9 Process. The Parties, by agreement, may revise the Notices, and other exhibits to the
10 Settlement Agreement in ways that are not material, or in ways that are appropriate to update
11 those documents for purposes of accuracy.

12 9. Pursuant to Paragraph 4.2 of the Settlement Agreement, Defendant is
13 directed to provide Notice one (1) week after Preliminary Approval through an In-Game
14 notification message. Beginning one (1) week after Preliminary Approval of the Settlement,
15 Defendant is directed to provide Internet Publication Notice on a website established,
16 administered, and maintained by Defendant. This website must inform Class Members of
17 their rights and obligations under this Settlement Agreement.

18 **Exclusion**

19 10. Settlement Class Members who wish to exclude themselves from the
20 Settlement Class may do so if, within forty-five (45) days after Defendant distributes
21 the In-Game Notice, they comply with the exclusion procedures set forth in the
22 Settlement Agreement and Class Notice. Any Settlement Class Member so excluded
23 shall neither be bound by the terms of the Settlement Agreement nor entitled to any of
24 its benefits.

25 11. Any Settlement Class Members who elect to exclude themselves or
26 “opt out” of the Settlement Agreement must file a written request (hereinafter
27

1 “Request to Opt Out”) with Class Counsel and Defendant’s Counsel, received or
2 postmarked no later than 45 days after the Notice Date. Defendant and Class Counsel
3 will record the date of receipt of the Request to Opt Out and forward electronically all
4 Requests to Opt Out to both Defendant’s Counsel and Class Counsel on a weekly
5 basis following receipt. Defendant’s Counsel and Class Counsel shall retain copies of
6 all written Requests to Opt Out until such time as it has completed its duties and
7 responsibilities under this Agreement. The Request to Opt Out must be signed by the
8 Settlement Class Member, must include the Settlement Class Member’s name,
9 address, and telephone number, and must clearly state that the person wishes to be
10 excluded from the Action and the Settlement Agreement. No Request to Opt Out will
11 be valid unless the request is sent timely and in substantial compliance with the
12 requirements of this paragraph.

13 12. Settlement Class Members who opt out of the Settlement Agreement
14 will relinquish their rights to benefits under the Settlement Agreement and will not
15 release their claims. However, Settlement Class Members who fail to submit a valid
16 and timely Request to Opt Out on or before the date specified herein shall be bound
17 by all terms of the Settlement Agreement and the Final Judgment and Order
18 regardless of whether they have requested exclusion from the Settlement Agreement.

19 13. Any Settlement Class Member who submits a timely Request to Opt
20 Out may not file an Objection to the Settlement Agreement and shall be deemed to
21 have waived any rights or benefits under the Settlement Agreement.

22 14. Settlement Class Members shall be permitted to withdraw or rescind their opt-
23 out requests by submitting a statement to Defendant’s Counsel and Class Counsel that
24 includes their name, address, and telephone number, and that clearly states their intention to
25 withdraw their previous Request to Opt Out of the Settlement Agreement and to now be
26 included. Any such rescission of a prior opt-out request must be received by Defendant’s
27

1 Counsel and Class Counsel no later than the deadline specified in paragraph 10 above. No
2 request to rescind a prior opt-out request will be valid unless that request is sent timely and in
3 substantial compliance with the provisions of this paragraph.

4 **Objections**

5 15. Any Settlement Class Member who intends to object to the fairness,
6 reasonableness, or adequacy of the Settlement Agreement (hereinafter “Objections”)
7 or to a judgment being entered dismissing the Action with prejudice in accordance
8 with the terms of the Settlement Agreement, or to the attorneys' fees and expense
9 reimbursement sought by Class Counsel in the amounts specified in the Notice, or to
10 the award to the Class Representative as set forth in the Class Notice, must sign and
11 file a written Objection no later than 45 days after the Notice Date. Any Settlement
12 Class Member who submits a timely Request to Opt Out may not file Objections to
13 the Settlement and shall be deemed to have waived any rights or benefits under this
14 Settlement Agreement.

15 16. Any Objections must be filed with the Court and sent to Michael
16 Aschenbrener, Edelson McGuire LLC, 350 N. LaSalle St., Suite 1300, Chicago,
17 Illinois 60654, one of Class Counsel, and also to Defendant’s Counsel, Steven
18 Kaufhold, Akin Gump Strauss Hauer & Feld LLP, 580 California Street, Suite 1500,
19 San Francisco, CA 94104.

20 17. Settlement Class Members making Objections must set forth their full
21 name, current address, and telephone number. Objecting Settlement Class Members
22 must provide evidence of their membership in the Settlement Class, state in writing
23 all Objections and the reasons therefor, provide copies of any documents relied upon
24 for such Objections, and include a statement as to whether the Objector intends to
25 appear at the Fairness Hearing and whether he or she is represented by separate legal
26 counsel. Settlement Class Members who fail to file and serve timely written
27

1 objections in substantial compliance with the requirements of this paragraph shall be
2 deemed to have waived any Objections and shall be foreclosed from making any
3 Objections (whether by appeal or otherwise) to the Settlement Agreement or to any of
4 the subjects listed in paragraph 22 below.

5 **Fairness Hearing**

6 18. The Fairness Hearing shall be held before this Court on November 18,
7 2010 at 2:00 P.M. at the United States Courthouse, **1301 Clay Street, Oakland,**
8 **California 94612**, to determine (a) whether the proposed settlement of the Action on
9 the terms and conditions provided for in the Settlement Agreement is fair, reasonable
10 and adequate and should be given final approval by the Court; (b) whether a judgment
11 and order of dismissal with prejudice should be entered; (c) whether to approve the
12 payment of attorneys' fees and expenses to Class Counsel; and (d) whether to
13 approve the payment of incentive awards to the Class Representative. The Court may
14 adjourn the Fairness Hearing without further notice to members of the Settlement
15 Class.

16 **Further Matters**

17 19. All further proceedings in the Action are ordered stayed until the Final
18 Judgment and Order of Dismissal with Prejudice or termination of the Settlement
19 Agreement, whichever occurs earlier, except for those matters necessary to obtain
20 and/or effectuate final approval of the Settlement Agreement.

21 20. Settlement Class Members shall be bound by all determinations and
22 judgments in the Action concerning the Action and/or Settlement Agreement,
23 whether favorable or unfavorable.

24 21. If the Settlement Agreement is not approved by the Court in complete
25 accordance with its terms, each party will have the option of having the Action revert to its
26 status as if the Settlement Agreement had not been negotiated, made, or filed with the Court.

1 In such event, the Parties will retain all rights as if the Settlement Agreement was never
2 agreed upon.

3 22. In the event that the Settlement Agreement is terminated pursuant to the
4 provisions of the Settlement Agreement, or for any reason whatsoever the approval of it does
5 not become Final, then (i) the Settlement Agreement shall be null and void, including any
6 provision related to the award of attorneys' fees, and shall have no further force and effect
7 with respect to any party in this Action, and shall not be used in this Action or in any other
8 proceeding for any purpose; (ii) all negotiations, proceedings, documents prepared, and
9 statements made in connection therewith shall be without prejudice to any person or party
10 hereto, shall not be deemed or construed to be an admission by any party of any act, matter,
11 or proposition, and shall not be used in any manner or for any purpose in any subsequent
12 proceeding in this Action or in any other action in any court or other proceeding, provided,
13 however, that the termination of the Settlement Agreement shall not shield from subsequent
14 discovery any factual information provided in connection with the negotiation of this
15 Settlement Agreement that would ordinarily be discoverable but for the attempted settlement;
16 (iii) other than as expressly preserved by the Settlement Agreement in the event of its
17 termination, the Settlement Agreement shall have no further force and effect with respect to
18 any party and shall not be used in the Action or any other proceeding for any purpose; and
19 (iv) any party may elect to move the Court pursuant to the provisions of this paragraph, and
20 none of the non-moving Parties (or their counsel) shall oppose any such motion.

21
22 It is so ordered, this 30th day of July, 2010.

23 Enter:

24 

25 Honorable Claudia Wilken
26 United States District Court Judge