IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HOLLY YENCHA, individually and on behalf of all others similarly situated, *Plaintiff*, *v.* ZeoBIT LLC, a California limited liability company, *Defendant*.	Case No. 2:14-cv-00578-JFC Honorable Joy Flowers Conti

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiff Holly Yencha ("Plaintiff" or "Yencha") respectfully requests that this Court grant final approval to the class action settlement ("Settlement") reached between herself and Defendant ZeoBIT LLC ("Defendant" or "ZeoBIT") (together, the "Parties"). Final approval of the Settlement is appropriate for a number of reasons, not the least of which is the extraordinarily positive reaction from the Settlement Class.[1] Indeed, for the 513,330 Settlement Class Members, more than 78,000 claims have been submitted (for a claims rate exceeding 15%), and not a single substantive objection has been raised. Not only is that rate of class member participation essentially unprecedented in consumer cases such as this,[2] it is especially indicative of the favorable view of the Settlement here. That's because the Settlement Class is made up exclusively of Mac computer users—a community well known to be active when it comes to consumer issues and which has been particularly vocal (on blogs, in articles and the like) with respect to their views of the instant Settlement.[3]

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[1] Unless otherwise noted, defined terms used herein shall have the same meaning ascribed to them in the Parties' Stipulation of Class Action Settlement. (Dkt. 38-1.)

[2] As Class Counsel explained to the Court at the preliminary approval hearing, the typical rate of claims in consumer class action settlements such as this is between 1% and 3% of the class. (*See* dkt. 38-5 at 7:4-5; 8:1-11.) At the time Plaintiff filed her Motion for Attorneys' Fees and Incentive Award, the rate of claims was relatively consistent with that historical metric and therefore, Plaintiff anticipated that Settlement Class Members submitting valid claims would receive nearly $30. (*See* dkt. 46-1.) Though a pleasant surprise, the second round of direct Email Notice—which was sent one business day before the fee petition was filed—produced a substantially higher rate of claims than originally anticipated. As a result, the Parties now expect that Settlement Class Members submitting valid claims will receive closer to $15 to $16. However, that individual payment amount is still significant and deserving of final approval given that Plaintiff never sought to recover a full refund of the Software's purchase price, but rather, only a portion thereof in an amount consistent with the Software's allegedly diminished value. Indeed, had the claims rate been significantly less than it is and claiming Settlement Class Members stood to recover near full refunds, that could arguably be considered an improper windfall to the Class given Plaintiff's diminution in value theory.

[3] By contrast, only eleven Settlement Class Members have requested to be excluded from the Settlement and just two have commented upon it. Though styled as "objections," the two

While even more favorable than expected, the Settlement Class's reaction makes sense given the significant relief secured under the Settlement. Specifically, based on the current claims rate, Settlement Class Members stand to recover nearly 40% of the typical purchase price of the Software at issue (i.e., $15 - $16) and the $2 million non-reversionary Settlement Fund is all but assured to be exhausted. That recovery is particularly significant—and deserving of final approval—in light of Plaintiff's theory of the case: that the Software is not completely worthless since it performed *some* of the advertised functions, but rather is of diminished value since it did not perform *all* of the advertised functions. Thus, Plaintiff never sought (nor could she expect) to recover all of the money paid for the Software, but instead, a portion of the purchase price, representing the amount she overpaid for the Software.[4] And quite notably, the recovery is also consistent with, and in many cases greater than, those available under the other settlements with Defendant's industry competitors.

And finally, there is no ongoing threat to Settlement Class Members (or the public more generally) of being exposed to the sorts of allegedly deceptive design and marketing practices upon which Plaintiff's claims are based. That is, ZeoBIT—as it expressly represented in the Settlement Agreement—has discontinued its marketing and sale of the Software altogether.[5]

For all of these reasons, and as explained further below, this Court should not hesitate to find the Settlement to be fair, reasonable, and adequate, and thus warranting final approval.

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comments do not actually raise any criticism of the terms of the Settlement itself. *See supra*, Section IV.A.2.

[4] A complete background of Plaintiff's allegations, the litigation history, and settlement negotiations is set forth in both Plaintiff's motion for preliminary settlement approval (dkt. 38) and fee petition (dkt. 46-1). For the sake of efficiency, that background is not repeated here.

[5] As previously explained to the Court, since the filing of this lawsuit ZeoBIT has discontinued its marketing and sale of the Software, selling its rights to the product to another entity that has itself discontinued selling the product in the form at issue in this case.

II. TERMS OF THE SETTLEMENT.

The terms of the Settlement, which this Court preliminarily approved on July 16, 2015, are fully set forth in the settlement agreement (dkt. 38-1) (the "Settlement Agreement" or "Agreement") and briefly summarized below.

A. Class Definition. On July 16, 2015, the Court certified a Settlement Class of "All persons in the United States and its territories who purchased MacKeeper on or before July 8, 2015." (Dkt. 43 at 3; *see also* Agreement § 1.29.)

B. Monetary Relief. Defendant has agreed to create a non-reversionary $2 million Settlement Fund. (*Id.* § 1.31.) Each Settlement Class Member who submits a valid claim prior to the November 30, 2015 Claims Deadline will receive a *pro rata* share of the Settlement Fund, following payment of notice costs, attorneys' fees, and an incentive award. (*Id.* § 2.1(a).) The ultimate *pro rata* amount that each Settlement Class Member will receive will not be known until after the Claims Deadline has passed, but at this time it appears that the amount will be around $15 or $16.[6] While the Agreement provides that any unclaimed amounts in the Settlement Fund will be distributed to various *cy pres* recipients (*Id*. § 2.1(b)), payments to Settlement Class Members will exhaust the Settlement Fund, and that provision will therefore not come into effect.

C. Incentive Award and Attorneys' Fees. In its preliminary approval order, this Court appointed Yencha as Class Representative and her counsel as Class Counsel. (Dkt. 43 at

[6] After payment of notice costs, attorneys' fees, and an incentive award (assuming the Court approves of the amounts requested for the latter two), there will be approximately $1,250,000 in the Settlement Fund to pay Approved Claims. As of September 26, 2015, 78,652 claims have been filed. (Declaration of Scott Exley ("Exley Decl.") ¶ 17, attached hereto as Exhibit 1.) If all of these claims are valid and no more claims are submitted, each Settlement Class Member will receive $15.90. Even if another 5,000 Approved Claims are submitted before the Claims Deadline, each Settlement Class Member will receive $14.95.

2.) The Settlement Agreement provides that any incentive award and attorneys' fees awarded to Yencha by the Court will by paid from the Settlement Fund. (Agreement §§ 8.1, 8.3.) Plaintiff has separately petitioned the Court for an incentive award of $1,000 and attorneys' fees and expenses of $660,000. (Dkt. 46-1.)

D. Payment of Notice and Administrative Expenses. The costs of Notice and settlement administration are being paid from the Settlement Fund. (Agreement § 1.31.) The total costs of notice and administration of the Settlement to date is $88,448.69. (Exley Decl. ¶ 18.)

E. Release. In exchange for the monetary relief described above, Defendant will be released, acquitted and forever discharged from any and all claims relating to the design, marketing, and performance of the Software. (Agreement § 3.)

III. THE PARTIES' COMPREHENSIVE NOTICE PLAN WAS SUCCESSFULLY EXECUTED AND SATISFIED DUE PROCESS.

Following preliminary approval and certification of a class for settlement purposes, Rule 23 requires a district court to direct to class members "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Larson v. AT&T Mobility LLC*, 687 F.3d 109, 126 (3d Cir. 2012). Such notice must "clearly and concisely state in plain, easily understood language," the nature of the action, the class definition, and class members' right to exclude themselves from the class, among other things. *Id.* Further, before granting final approval to a proposed class settlement, the Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). The Federal Judicial Center has suggested that a notice plan that reaches at least 70% of the class is reasonable. *See* Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* at 3 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/

NotCheck.pdf/$file/NotCheck.pdf.[7]

Here, this Court approved the notice plan set forth more fully in the Settlement Agreement, which called for (i) direct Email Notice to the last known email address of each Settlement Class Member with an accompanying Claim Form, (ii) creation of the settlement website that, among other things, allows Settlement Class Members to file claims online, provides answers to frequently asked questions and telephone numbers to call in the event of a question, as well as other relevant court documents, and (iii) publication notice through an online media campaign including Internet and mobile banner advertisements (the "Notice Plan"). (Dkt. 43 ¶¶ 10-11; Agreement § 4.1.) The Court also approved the Parties' notice documents, which used simple, plain language to encourage readership and comprehension and provided Settlement Class Members with a detailed explanation of their rights under the Settlement, including how to obtain the monetary benefits offered by the Settlement, how to "opt-out" of or object to the Settlement, and how to be heard by the Court. (Agreement § 4.1, Exs. B, C.)

In approving the Notice Plan, this Court held that it was "reasonably calculated to, under all circumstances, apprise the members of the Settlement Class" of the Settlement and their rights to object or exclude themselves, and that the Notice Plan was "consistent with the requirements of Rule 23 and due process and constitut[ed] the best notice practicable under the circumstances." (Dkt. 43 ¶ 9.) The Court appointed Rust Consulting ("Rust") as the Settlement Administrator. (*Id.* ¶ 8.)

Rust and the Parties have diligently followed and successfully implemented the Court-approved Notice Plan. In particular, Defendant provided Rust with the email address of all

[7] The Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, also requires sending the U.S. Attorney General, the Attorneys General of each of the fifty states and the District of Columbia copies of the Settlement Agreement and other documents related to this case. The required CAFA notice was sent on March 16, 2015 and April 15, 2015. (Exley Decl. ¶¶ 6, 7.)

513,330 Settlement Class Members, only three of which were invalid. (Exley Decl. ¶¶ 8.) On August 7, 2015, Rust sent the first round of email notices and achieved a deliverability rate of 90.67%. (*Id.* ¶ 9.) On September 4, 2015, Rust sent the second round of email notices, this time achieving a deliverability rate of 90.55%. (*Id.* ¶ 13.) Consequently, the direct Email Notice was successfully sent to more than 90% of the Settlement Class, which alone renders the Notice reasonable. *See* Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* at 3.

In addition to sending direct notice by mail, and pursuant to the Court's suggestion, Rust engaged a third-party media advertiser to place banner advertisements on Facebook and the Internet. The campaign ultimately yielded an estimated 20,826,862 impressions. (*Id.* ¶ 12.) In addition, news of the Settlement spread online with articles about it appearing on PC World, MacRumors, and MacIssues websites.[8]

On August 7, 2015, Rust established the settlement website at www.YenchaSoftwareSettlement.com, which contains all relevant Court documents—including the Settlement Agreement and Plaintiff's fee petition—and allows Settlement Class Members to file claims online. (*Id.* ¶ 10.) Rust also established a toll-free number (1-877-315-1149) that provides general information about the Settlement, answers to frequently asked questions, and an option to request a hard copy of the notice documents and Claim Form. (*Id.* ¶ 11.)

Given that the Parties and Rust fully implemented the Court-approved Notice Plan and more than 90% of the Settlement Class received direct notice of the Settlement, it is clear that Rule 23's notice requirements and due process have been satisfied.

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[8] *See* http://www.pcworld.com/article/2968332/legal/mackeeper-customers-can-file-a-claim-to-get-their-money-back.html; http://www.macrumors.com/2015/08/10/mackeeper-refund-settlement/; http://www.macissues.com/2015/08/11/feeling-burnt-by-mackeeper-claim-a-refund/.

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT.

Turning to the substance of the Settlement, the Court must hold a hearing and find the Settlement "fair, reasonable, and adequate" before granting final approval. Fed. R. Civ. P. 23(e)(2). The Third Circuit has identified nine factors (the "*Girsh* factors") to consider when determining whether a proposed class action settlement is fair, reasonable and adequate: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation. *Girsh v. Jepson,* 521 F.2d 153, 156-57 (3d Cir. 1975); *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 534-35 (3d Cir. 2004*); In re Ins. Brokerage Antitrust Litig*., 579 F.3d 241, 258 (3d Cir. 2009).

When evaluating these factors, there is an "overriding public interest in settling class action litigation." *In re Warfarin*, 391 F.3d at 535; *see also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010). Settlement is particularly favored in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *see also* Newberg & Conte, 2 NEWBERG ON CLASS ACTIONS, §11.50 (4th ed. 2002) ("Unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.").

Further, a proposed settlement is "entitled to a presumption of fairness" when "(1) the

settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Warfarin*, 391 F.3d at 535 (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 (3d Cir. 2001)). Here, such a presumption is warranted. The Settlement, as this Court recognized, was "the result of serious, informed, non-collusive arm's-length negotiations involving experienced counsel familiar with the legal and factual issues of this case," (dkt. 43 ¶ 7); Class Counsel obtained sufficient information to effectively evaluate the strength of the claims and negotiate the Settlement, *see infra*, Section IV.A.3; Class Counsel is experienced in similar litigation, (dkt. 46-1 at 10-11); and only two out of more than 513,000 Settlement Class Members expressed any criticism at all (though they didn't actually take issue with the terms of the Settlement itself). *See infra*, Section IV.A.2.

A. Each of the *Girsh* Factors Weigh in Favor of Final Approval.

Bearing in mind the overriding public interest in settling class litigation and the presumption of fairness here, consideration of the *Girsh* factors also support final approval of the Settlement.

1. The complexity, expense and likely duration of the litigation justify final approval of the Agreement.

The first *Girsh* factor considers "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors,* 55 F.3d at 812 (citing *Bryan v. Pittsburgh Plate Glass Co.,* 494 F.2d 799, 801 (3d Cir. 1974)). In short, this means the Court should "determine the extent of the benefit that would be gained from settling the claim amicably." *Erie Cnty. Retirees Ass'n v. Cnty. of Erie*, 192 F. Supp. 2d 369, 373 (W.D. Pa. 2002) (citing *In re Gen. Motors,* 55 F.3d at 812).

Here, the Settlement avoids lengthy, expensive, and necessarily complex continued

litigation that would only serve to delay ultimate relief to the Settlement Class. Indeed, as the Court's stated views on class certification at the preliminary approval hearing recognized, the potential battle over class certification would be difficult, specifically in regards to Plaintiff's fraud claim (which she would reassert if there were no settlement). (*See* dkt. 38 at 5-6.) Additionally, given the technical nature of the claims, Plaintiff would attempt to establish—and Defendant would contest—the alleged non-functionality of a complex software application, a process that would likely involve an expensive and contentious battle of the experts. (Declaration of Rafey S. Balabanian ("Balabanian Decl.") ¶ 7, attached hereto as Exhibit 2.) And because many of the relevant witnesses are likely located in Europe where the Software was developed, there would without question be disputes over subpoena power and witness availability, thus creating additional complexity and expense. (*Id*.) Finally, no matter which way the Court ultimately ruled, the losing party would be likely to appeal, further raising the cost—in terms of both time and money—and delaying any recovery to the Settlement Class. (*Id.* ¶ 9.)

For these reasons, the first *Girsh* factor "weighs heavily" in favor of final approval. *Erie Cnty. Retirees Ass'n*, 192 F. Supp. 2d at 374 ("In sum, continued litigation in this case would undoubtedly be time-consuming and further delay the Plaintiffs' recovery. Accordingly, we find that the first *Girsh* factor weighs heavily in favor of approving the Settlement.") (internal citations omitted).

2. The reaction of the Settlement Class has been overwhelmingly favorable.

The second *Girsh* factor—the reaction of class members—overwhelmingly supports final approval of the Settlement. Indeed, for the 513,330 Settlement Class Members, more than 78,000 claims have been submitted thus far. (Exley Decl. ¶ 17). This vast number of claims results in an extraordinary and, in Class Counsel's experience, almost unprecedented claims rate exceeding

15%. (*See* Balabanian Decl. ¶ 3.) On the other end of the spectrum, merely eleven Settlement Class Members (or 0.0021% of the Settlement Class) opted out of the Settlement. (*See* Exley Decl. ¶ 16.) Even greater proof is that only two Settlement Class Members (or 0.0004% of the Settlement Class) have expressed any dissatisfaction with it. And though styled as "objections," neither actually takes issue with any of the Settlement's terms. Rather, one demands that his MacKeeper software be removed from his computer and his prior anti-virus software restored. (Stegen Letter at 1.)[9] The other requests that Defendant replace two of his computers that were supposedly harmed by the Software. (Hartman Letter (dkt. 48) at 2.) These, however, are not valid bases for objections.

First, there is nothing that prevents Settlement Class Member Stegen from removing the Software from his computer and installing other software. He need only navigate to the "Applications" folder of his Mac and delete the Software. Second, there is no evidence, nor did Plaintiff ever allege, that the Software actually damages computers. Rather, Plaintiff's theory was that the Software was not worth the price that Settlement Class Members paid because it didn't provide all of the functionality promised by Defendant. Thus, Settlement Class Member Hartman's request for new computers is simply not warranted. Moreover, if either of these individuals was actually dissatisfied with the relief afforded by the Settlement, they could have simply requested exclusions to pursue their particularized complaints. Ultimately, to the extent either of these comments are even considered "objections" by the Court, they should be overruled. *See, e.g., In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 218 (E.D. Pa. 2014) (finding objections generally complaining that the settlement did not offer sufficient

[9] Though addressed to the Clerk of the Court, it does not appear that Settlement Class Member Stegen actually filed his objection with the Court as required by the Settlement Agreement. (Agreement ¶ 4.3.) Nevertheless, and for the sake of completeness, a true and accurate copy of his letter is attached to the Balabanian Declaration as Exhibit 2-A.

compensation "do not take into account the risks and costs that would ensue with further litigation of their claims" and overruling them as such).

In the end, the numbers speak for themselves and show an exceptionally positive reaction by the Settlement Class. Consequently, the second *Girsh* factor weighs heavily in favor of final approval. *See In re Rent-Way Securities Litig.*, 305 F. Supp. 2d 491, 501-02 (W.D. Pa. 2003) (finding that large number of claims and "paucity of objectors" demonstrated "considerable satisfaction" and "overwhelming class-wide support" of the proposed settlement).

3. Class Counsel had sufficient information at this stage in the litigation to evaluate the merits and reasonableness of the Agreement.

The third *Girsh* factor to be considered is the stage of the proceedings and the amount of discovery completed. *See Girsh,* 521 F.2d at 156-57. The purpose of this factor is to aid the court in evaluating "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Frederick v. Range Resources-Appalachia, LLC*, No. 08-cv-288, 2011 WL 1045665, at *7 (W.D. Pa. Mar. 17, 2011). And as long as "there are means for class counsel to apprise themselves of the merits of the litigation, such as 'conduct[ing] significant independent discovery or investigations to develop the merits of their case (as opposed to supporting the value of the settlement)' or retaining their own experts or interviewing witnesses," *In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 270 (E.D. Pa. 2012), settlements negotiated early in the litigation are proper.

Here, far before this lawsuit was even filed, Class Counsel conducted an extensive investigation into the marketing and functionality of the Software, including, but not limited to, consulting with their own in-house computer forensic technicians to complete multiple rounds of forensic testing and comparing their results with how the Software was advertised to perform. (Balabanian Decl. ¶ 10.) They also spoke with consumers to understand their experiences in

purchasing and using the Software. (*Id.*) And after the action was filed, the Parties have continuously explored the strengths and weaknesses of their respective claims and defenses through informal discussion, informational exchanges, and early neutral evaluation. (*Id.* ¶ 11.) That investigation, coupled with the experience and industry knowledge gained through their lawsuits against Defendant's industry competitors, provided Class Counsel an acute understanding of Plaintiff's and the Settlement Class Members' claims. *See In re Prudential Ins. Co. of Am. Sales Pracs. Litig.*, 962 F. Supp. 450, 541-42 (D.N.J. 1997) ("*Prudential Ins. Co.*") *aff'd sub nom. In re Prudential Ins. Co. Am. Sales Pracs. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) ("*In re Prudential*") ("Informal discovery is perfectly adequate to substantiate claims"). Ultimately, and with Judge Infante's assistance, the Parties exchanged and had at their disposal sufficient information from which to evaluate their claims and defenses and negotiate the Settlement now before the Court. (*See* Balabanian Decl. ¶ 12.)

Accordingly, the third *Girsh* factor weighs in favor of final approval as well.

4. Establishing liability and damages would be risky.

The fourth and fifth *Girsh* factors examine Plaintiff's ability to establish liability and damages and are commonly discussed together. These factors require the district court to inquire as to "what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *In re Gen. Motors,* 55 F.3d at 814. The fourth factor specifically requires courts to "attempt to balance the likelihood of success at trial against the benefits of immediate settlement," *Frederick*, 2011 WL 1045665, at *6, while the fifth factor assesses the "expected value of litigating the action rather than settling it" at the current time. *Id.* A greater level of difficulty establishing either liability or damages at trial favors settlement. *Id.* "The Court need not delve into the intricacies of the merits of each side's

arguments, but rather may 'give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" *Perry v. FleetBoston Fin. Corp.,* 229 F.R.D. 105, 115 (E.D. Pa. 2005) (internal quotation omitted).

Here, while Class Counsel is confident in the strength of Plaintiff's claims, there is a definite risk in proceeding with litigation. (Balabanian Decl. ¶ 5.) Indeed, to establish that ZeoBIT's products do not perform all of the advertised functions, Plaintiff will need to obtain and review the source code to uncover the underlying technology and algorithms it utilized as well as depose witnesses who made decisions regarding the Software's design and marketing—many of whom are likely located in Europe, where the Software was developed. (*See id.* ¶ 7.) And if there is no settlement, Plaintiff would likely reassert her claims for fraud and be required to establish that Defendant's conduct was willful—i.e., that ZeoBIT intentionally designed its Software to artificially exaggerate the number of problems present on a user's computer—which could only conclusively be established by reviewing the development notes for the underlying Software and deposing many additional witnesses who may not even work for ZeoBIT anymore and are likely outside of the Court's subpoena power. (*See id.*) And though Plaintiff is confident that Class Counsel's investigation into the Software supports the existence of the alleged unfair and deceptive acts, ZeoBIT has at all times denied these allegations and raised at least fifteen affirmative defenses that Plaintiff would need to overcome. (*Id.* ¶ 9; *see also* dkt. 44.)

As with liability, there is also a risk in terms of Plaintiff's ability to establish damages should litigation continue. Indeed, throughout the litigation Yencha has never contended that the MacKeeper software was completely worthless and that consumers should receive all of the money that they paid for the Software. Rather, Plaintiff's theory was based on the Software's

diminished value, as only certain of the advertised benefits could be performed as promised. (Balabanian Decl. ¶ 8.) Thus, rather than seek recovery of the full purchase price, Yencha sought to recover only the amount that she and other consumers overpaid for the Software. (*See* dkt. 1 ¶¶ 73, 81, 87.) Determining and establishing the difference in value between the Software as promised and the Software as delivered would undoubtedly be a complicated and uncertain enterprise.

In light of these risks to Plaintiff's ability to sufficiently establish liability and damages should litigation continue, the fourth and fifth *Girsh* factors weigh in favor of final settlement approval.

5. Maintaining class action status through trial would not be certain.

The next *Girsh* factor examines the risk of maintaining class action status through trial. "[T]he prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action." *In re Warfarin,* 391 F.3d at 537 (quoting *In re Gen. Motors,* 55 F.3d at 817). Further, "[t]he value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits." *In re Gen. Motors,* 55 F.3d at 817. Accordingly, this *Girsh* "factor measures the likelihood of obtaining and keeping a class certified if the action were to proceed to trial." *Id.* (citing *In re Prudential,* 148 F.3d at 321).

Here, while Plaintiff and Class Counsel have always been confident in their ability to certify the Class—at least in terms of the breach of contract and unjust enrichment claims—absent this Settlement, Plaintiff would face the risks attendant with certifying and maintaining an adversarial class. At the preliminary approval hearing, the Court expressed great skepticism

about Plaintiff's ability to certify a class with respect to several of her fraud-based claims. (*See* dkt. 38-5 at 5:13-6:1.) While Plaintiff ultimately withdrew these claims (dkt. 34) and the Court certified the Settlement Class for settlement purposes on the remaining claims (dkt. 43 at 2), there is no guarantee that the Settlement Class would remain certified were litigation to continue, and the Court is in no way bound by its current certification order. *See* Fed. R. Civ. P. 23(c)(1)(C); (Agreement § 9.2). In addition, Defendant has steadfastly disputed that class treatment is appropriate here (dkt. 44 at 10), and would likely vigorously contest class certification if litigation were to continue.

Consequently, the risk here to maintaining class status through trial weighs in favor of granting final approval to the Settlement. *See Prudential Ins. Co.*, 962 F. Supp. at 540 ("[A]lthough the Court finds that this case is manageable as a class action and that the class action device is the most appropriate means to adjudicate this controversy, as the case evolves, maintaining the class action may become unworkable and the Court may decertify the class. Accordingly, the risks of decertification weigh in favor of approving the Proposed Settlement.").

6. Defendant's ability to withstand a greater judgment is not an issue.

The next *Girsh* factor looks to "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *In re Cendant,* 264 F.3d at 240. Here, "[t]here is no evidence regarding [ZeoBIT's] ability (or inability) to withstand a greater judgment," *Serrano v. Sterling Testing Sys., Inc.,* 711 F. Supp. 2d 402, 416 (E.D. Pa. 2010), and the relief achieved by the Settlement was not negotiated due to ZeoBIT's financial circumstances. Consequently, this factor neither weighs in favor of nor against final approval. *See In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 489 (E.D. Pa. 2010) ("[B]ecause ability to pay was not an issue in the settlement negotiations, this factor is

neutral."); *Serrano,* 711 F. Supp. 2d at 416.

7. The Settlement amount is within the range of reasonableness in light of the recovery and attendant risks of litigation.

The final two *Girsh* factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *In re Warfarin,* 391 F.3d at 538 (citing *In re Prudential,* 148 F.3d at 322). "The reasonableness of a proposed settlement depends in part upon a comparison of the present value of the damages the plaintiffs would recover if successful, discounted by the risks of not prevailing." *In re Cmty. Bank of N. Va. and Guar. Bank Second Mortg. Litig.*, No. 02-cv-1201, 2007 WL 2008494, at *7 (W.D. Pa. July 5, 2007) (citing *In re Gen. Motors,* 55 F.3d at 806). "[T]his evaluation must be undertaken with the recognition that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution." *In re PNC Fin. Servs. Group, Inc.*, 440 F. Supp. 2d 421, 435 (W.D. Pa. 2006). In making this determination, courts may give credence to the opinions of experienced attorneys in assessing the comparison. *Orloff v. Syndicated Office Sys., Inc.,* 2004 WL 870691, at *7 (E.D. Pa. Apr. 22, 2004).

As explained above, Plaintiff seeks recovery not of the entire $39.95 purchase price of the MacKeeper software, but only the amount that she and other consumers overpaid in light of the Software's partial non-functionality. Assuming, generously, that Plaintiff could establish that consumers paid twice as much as they should have, a complete victory at trial would result in less than $20 per class member. And assuming—again, generously—that Plaintiff had a 75% chance of achieving such a result at trial, the expected value of continued litigation is less than $15 per class member. Discounting this expected value to account for the delay in recovery resulting from a lengthy trial would result in a present value of continued litigation at far less

than $15 per class member. Consequently, the proposed Settlement's immediate anticipated recovery of $15-$16 *exceeds* "the present value of the damages the plaintiffs would recover if successful, discounted by the risks of not prevailing." *In re Cmty. Bank*, 2007 WL 2008494, at *7.

Further still, it is also worth noting that the individual relief available to Settlement Class Members here meets—and in many cases exceeds—individual recoveries provided by settlements involving Defendant's industry competitors. *See, e.g.*, *Webb v. Cleverbridge, Inc.*, No. 11-cv-04141 (N.D. Ill.) (providing for a $12.50 cash payment); *Gross v. Symantec Corp.*, No. 12-cv-00154 (N.D. Cal.) (providing for a $9 cash payment); *Drymon, et al. v. Cyberdefender Corp.*, No. 11 CH 16779 (Cir. Ct. Cook Cnty.) (providing for a $10 cash payment); *Ledet v. Ascentive LLC*, No. 2:11-cv-294 (E.D. Pa.) (providing for a $10 or $18 cash payment); *Rottner v. AVG Techs. CZ, s.r.o.*, No. 12-cv-10920 (D. Mass.) (providing for a $15 cash payment).

In its own right—not to mention in light of the result the Settlement Class could realistically achieve through continued litigation—the proposed Settlement amount is eminently reasonable. Thus, the final two *Girsh* factors likewise weigh in favor of final approval.

B. The Applicable *Prudential* Considerations Also Support Final Approval.

In addition to the nine *Girsh* factors, courts may also consider a list of "permissive and non-exhaustive" factors originally established in *In re Prudential* that "illustrat[e] the additional inquiries that in many instances will be useful for a thoroughgoing analysis of a settlement's terms." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (internal quotation omitted). Such factors include, *inter alia*, (i) the right of settlement class members to opt-out, (ii) the reasonableness of the requested fee award, (iii) a fair and reasonable claims process, and (iv)

the degree of direct benefit to the class. *In re Pet Food Prods.*, 629 F.3d at 350; *In re Baby Prods.*, 708 F.3d at 174.[10]

Here, each of these additional *Prudential* factors also support final approval. First, Settlement Class Members were given the right to opt out of the Settlement, allowing them to preserve their individual claims against ZeoBIT, and the notice documents (including the direct Email Notice and the settlement website) are easy to understand and clearly indicate that option. Second, and for the reasons discussed at length in Plaintiff's fee petition, the requested attorneys' fee is reasonable and in line with fees typically awarded in the Third Circuit. (*See* dkt. 46-1.) Third, the Court found the claims procedure to be fair and reasonable when it preliminarily approved the Settlement (dkt. 43), and that certainly holds true given the extremely high rate of claims that have been submitted thus far. *See In re Ins. Brokerage*, 579 F.3d at 259 n.17 (affirming final approval of a settlement and finding this factor weighed in support when "the District Court found the claims processing procedure fair and reasonable."). Moreover, Class Counsel has at all times been engaged in helping Settlement Class Members navigate the claim filing process by responding to inquiries and assisting with the filing of claims. (Dkt. 46-1, Ex. 1 ¶ 29); *see also In re Imprelis Herbicide Mktg., Sales Pracs. & Prods. Liab. Litig.*, 296 F.R.D. 351, 366 (E.D. Pa. 2013) (granting final approval and finding Class Counsel's assistance to class members with the claims process favorable under this *Prudential* factor). Fourth and finally, in light of the previously discussed riskiness of the litigation and

[10] The Court need not analyze *Prudential* factors not relevant to the Settlement, *see Wallace v. Powell*, 301 F.R.D. 144, 163-64 (M.D. Pa. 2014), which in this case are "[t]he maturity of the underlying substantive issues…, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants." *In re Pet Food Prods.*, 629 F.3d at 350.

chance of recovering nothing, the real and immediate monetary recovery to Settlement Class Members here guarantees a direct benefit to the Settlement Class. *See In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 101-02 (E.D. Pa. 2013) ("Under the settlement, each class member can benefit from the fund immediately and avoid the uncertainties and delay inherent in continuing to litigate this complex class action.").

Thus, in addition to the *Girsh* factors, the relevant *Prudential* considerations thus also support final approval of the Settlement.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order: (a) granting final approval of the Settlement Agreement; (b) dismissing all Released Claims with prejudice; and (c) granting such other and further relief as the Court deems reasonable and just.

Respectfully submitted,

HOLLY YENCHA, individually, and on behalf of a class of similarly situated individuals,

Dated: October 2, 2015

By: /s/ Rafey S. Balabanian
One of Plaintiff's Attorneys

Rafey S. Balabanian (IL 6285687)*
rbalabanian@edelson.com
Benjamin H. Richman (IL 6300668)*
brichman@edelson.com
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Pittsburgh, Pennsylvania 15222
Tel: 412.391.9860
Fax: 412.391.7453

**Admitted Pro Hac Vice*

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HOLLY YENCHA, individually and on behalf of all others similarly situated, *Plaintiff,* v. ZeoBIT LLC, a California limited liability company, *Defendant.*	Case No. 14-cv-00578

DECLARATION OF SCOTT EXLEY

I, Scott Exley, hereby declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a Program Manager at Rust Consulting, Inc. ("Rust" or the "Settlement Administrator"), the offices of which are at 625 Marquette Avenue, Suite 880, Minneapolis, Minnesota 55402. Rust was appointed as Settlement Administrator in the above-captioned litigation, by an Order dated July 16, 2015 approving the Settlement Agreement dated March 16, 2015 (the "Agreement"), to supervise and administer the settlement notice and claims processes. I have been responsible for monitoring and overseeing the notice and administration processes.

Rust Consulting

2. Rust Consulting specializes in class action administration.

3. Rust Consulting's class action administration services include data management, data processing, notice implementation, claim administration and distribution, website hosting, call center services, and reporting to counsel and courts regarding claims processes.

4. Rust Consulting has provided services in more than 5,000 matters, including: *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL No. 0982 (W.D. Pa.) (price-fixing settlement); *In re Waste Mgmt., Inc. Securities Litig.*, No. 99-2183 (S.D. Tex) (securities settlement); *McNeil v. American Gen. Life & Accident Co.*, No. 99-1157 (M.D. Tenn.) (life insurance settlement); *Naef v. Masonite Corp.*, No. 94-4033 (Ala. Cir. Ct., Mobile Co.) (defective product settlement); *In re FTD.COM, Inc. Shareholders Litig.*, No. 19458-NC (Del. Ch.) (securities settlement); *In re Metropolitan Life Ins. Co.*, No. 96-0179, MDL No. 1091 (W.D. Pa.) (life insurance market conduct settlement); *Benacquisto v. American Express Fin. Corp.*, No. 00-1980 (D. Minn.) (life insurance market conduct settlements); *Coordination Proceedings Special Title (Rule 1550(b)) Microsoft I-V Cases*, Case No. J.C.C.P. No. 4106 (Cal. Super. Ct., San Francisco Co.) (consumer software settlement); and numerous other cases.

5. I have experience overseeing the implementation of notice programs and the administration of claims processes.

Notice and Administration

6. On March 16, 2015, pursuant to the directions of the Parties, Rust served notice of the Parties' proposed settlement onto the appropriate federal official and the appropriate state and territorial officials as directed by Counsel and as required by the Class Action Fairness Act, 28 U.S.C. § 1715.

7. On April 15, 2015, Rust served a supplemental notice under the Class Action Fairness Act to the same federal, state, and territorial officials.

8. On July 17, 2015, Defendant electronically provided Rust with 513,330 email addresses for the members of the Settlement Class. Rust determined that three of the email addresses were not valid and/or undeliverable.

9. On August 7, 2015, Rust arranged to have the Notice sent via email to the 513,327 potential Settlement Class Members for whom Defendant provided email addresses. Two attempts were made on each email address. After two attempts, Rust was able to confirm delivery of 465,457 emails, representing 90.67% of the email addresses. Of the emails sent, 47,870 emails failed to deliver. [A sample Notice is attached hereto as Exhibit A.]

10. On August 7, 2015, Rust caused the website www.yenchasoftwaresettlement.com to be opened to the public. The website contains frequently asked questions and various case documents, including the Settlement Agreement, Motion for Preliminary Approval, and the Preliminary Approval Order, all of which were available on the website as of August 7, 2015. Per Court order, Rust posted the Motion for Attorneys' Fees, Expenses, and Incentive Award on September 8, 2015. The website also contains an online claim form, allowing Settlement Class Members to file their claims via the website.

11. On August 7, 2015, Rust caused a toll-free number (1-877-315-1149) to be opened to the public for settlement assistance in this matter. The phone line contains frequently asked questions and provides general information about the Settlement. The line also leaves an option for individuals to request a hard copy of the Notice and Claim Form.

12. Starting on August 7, 2015, Rust engaged Kinsella Media to place banner ads on Facebook and on the Internet through Xaxis. This campaign yielded an estimated 20,826,862 impressions.

13. On September 4, 2015, Rust arranged to send reminder emails to the same 513,327 potential Settlement Class Members that were sent notice on August 7, 2015. Two attempts were again made on each email address. After two attempts, Rust confirmed delivery

of 464,817 emails, representing 90.55% of the email addresses. Of the emails sent, 48,510 emails failed to deliver. [A sample Reminder Notice is attached hereto as Exhibit B.]

14. Through September 26, 2015, the settlement website had been visited by 137,316 unique visitors. In addition, Settlement Class Members have made 1,086 calls to the toll-free number.

15. Through September 26, 2015, Rust has sent 332 notices to Settlement Class Members based on telephone requests. Rust will continue to send out these requests through the Claim Form deadline.

16. Through September 26, 2015, Rust has received a total of 11 requests for exclusion. [A listing of the names of those requesting exclusion is included as Exhibit C.]

17. Through September 26, 2015, Rust has received a total of 78,652 Claim Forms. Rust, however, has not finished validating the Claim Forms received, and Settlement Class Members otherwise have until November 30, 2015 to submit claims. As a result, the total number of Approved Claims is not known at this time. Rust will continue to validate claims received prior to and after the November 30, 2015 claims deadline. This will include determining the number of duplicate and fraudulent claims, if any.

18. The cost to administer the Settlement to date is $88,448.69.

19. The figures presented in this declaration are the results of the administration services completed to date.

* * *

I declare under penalty of perjury under the laws of the Commonwealth of Pennsylvania and the United States of America that the foregoing is true and correct.

Executed on October 2, 2015.

Scott Exley

EXHIBIT A

From: MacKeeper Settlement Administrator [mailto:Administrator@qgemail.com]
Sent: Friday, August 07, 2015 3:44 PM
To: Bill, Lissa
Subject: Important Legal Notice

RE: LEGAL NOTICE OF CLASS ACTION SETTLEMENT

IF YOU PURCHASED MACKEEPER SOFTWARE ON OR BEFORE JULY 8, 2015, A CLASS ACTION SETTLEMENT MAY AFFECT YOUR RIGHTS.

A Federal Court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

A settlement has been reached in a class action lawsuit against ZeoBIT LLC, the makers of MacKeeper software. The lawsuit alleges that ZeoBIT deceptively advertised and sold MacKeeper as capable of enhancing a Macintosh computer's speed, performance, and security by detecting and eliminating harmful errors and threats, but that it does not and cannot perform all of the functions advertised. ZeoBIT denies any wrongdoing, and the settlement does not establish that any law has been broken. The lawsuit is called *Yencha v. ZeoBIT LLC*, No. 14-cv-00578 and is in the U.S. District Court for the Western District of Pennsylvania. You need not live in Pennsylvania to participate.

- **Why Am I Being Contacted?** Our records show you may be a "Settlement Class Member" entitled to payment under the Settlement. Settlement Class Members are those people who live in the United States or its territories and purchased MacKeeper on or before July 8, 2015.
- **What Can I Get From the Settlement?** Settlement Class Members can submit a valid claim by November 30, 2015 to receive a payment of up to $39.95 from a $2,000,000 Settlement Fund, after payment of the costs of administering the settlement, the attorneys' fee award, and any incentive award to the plaintiff. The amount of the payment to Settlement Class Members depends upon the number of valid claims filed. There are approximately 513,000 individuals in the Settlement Class. Based upon class member participation in other similar settlements, the Parties anticipate that each Settlement Class Member that submits an approved claim in this case will receive a payment of $39.95. If, however, the amount required to pay each class member exceeds the amount of the Settlement Fund (after paying fees and expenses), then each Settlement Class Member who filed a valid claim will receive a proportionally reduced share of the Settlement Fund. If there is still money left in the Settlement Fund after all payments are made, the money will be donated to non-profit organizations. File your claim online here at www.YenchaSoftwareSettlement.com[smtr.qgemail.com] by November 30, 2015. To request a paper copy, call toll-free 1-877-315-1149.
- **How Do I Get My Payment?** Just click here[smtr.qgemail.com] and complete the short and simple Claim Form. More information is available at www.YenchaSoftwareSettlement.com[smtr.qgemail.com]. You can also call 1-877-315-1149 to request a paper copy of the Claim Form. ***All Claim Forms must be postmarked or received by November 30, 2015.***
- **What Are My Options?** You can do nothing, submit a Claim Form, comment on or object to any of the Settlement terms, or exclude yourself from the Settlement. If you do nothing or submit a Claim Form, you won't be able to sue ZeoBIT in a future lawsuit about the claims addressed in the Settlement. If you exclude yourself, you won't get a payment—but you'll keep your right to sue ZeoBIT on the issues the settlement concerns, unless otherwise ordered by the Court. You must contact the settlement administrator by mail or e-mail to exclude yourself. You can also object to the settlement if you disagree with any of its terms. ***All Requests for Exclusion and Objections must be postmarked or received, and all Objections must be filed with the Court, by September 21, 2015.*** For a more detailed description of the claims that you will be releasing if you do not request to exclude yourself from the Settlement, see **paragraph 1.24 on pages 7–8** of the Settlement Agreement.
- **Do I Have a Lawyer?** Yes. The Court has appointed lawyers from Edelson PC to represent you as "Class Counsel." You will not be charged for these lawyers. You can hire your own lawyer, but you'll need to pay your own legal fees. The Court has also appointed Holly Yencha —a class member like you—to represent the Class.
- **When Will the Court Consider the Proposed Settlement?** The Court will hold a hearing to determine the fairness of the settlement at 1:30 P.M. on October 16, 2015 at the United States Courthouse, Pittsburgh Division, 700 Grant Street, Pittsburgh, Pennsylvania 15219 in Courtroom 5A before Judge Joy Flowers Conti. At that hearing, the Court will hear objections, determine if the Settlement is fair, and consider Class Counsel's request for fees and expenses of up to one-third (1/3) of the Settlement Fund and an award for the Class

Representative of up to $1,000. The Court may award less than these amounts. The hearing may be postponed to a different date or time without notice, so check www.YenchaSoftwareSettlement.com[smtr.qgemail.com] for updates. You are not required to come to this hearing.

- **Want More Information?** This notice is a summary. For a detailed notice or to see the Settlement Agreement and other court documents, go to www.YenchaSoftwareSettlement.com[smtr.qgemail.com], call the settlement administrator at 1-877-315-1149 or call Class Counsel at 1-866-354-3015. The Agreement and all other pleadings and papers filed in the case are available for inspection and copying during regular business hours at the office of the Clerk of the U.S. District Court of the Western District of Pennsylvania, Pittsburgh Division, located at the United States Courthouse, 700 Grant Street, Pittsburgh, Pennsylvania 15219. Do not contact the Court or MacKeeper with questions.

By Order of the Court Dated: July 16, 2015

EXHIBIT B

From: MacKeeper Settlement Administrator [mailto:Administrator@qgemail.com]
Sent: Friday, September 04, 2015 2:42 PM
To: Bill, Lissa
Subject: Important Legal Notice - FINAL NOTICE

RE: LEGAL NOTICE OF CLASS ACTION SETTLEMENT

IF YOU PURCHASED MACKEEPER SOFTWARE ON OR BEFORE JULY 8, 2015, A CLASS ACTION SETTLEMENT MAY AFFECT YOUR RIGHTS.

A Federal Court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

A settlement has been reached in a class action lawsuit against ZeoBIT LLC, the makers of MacKeeper software. The lawsuit alleges that ZeoBIT deceptively advertised and sold MacKeeper as capable of enhancing a Macintosh computer's speed, performance, and security by detecting and eliminating harmful errors and threats, but that it does not and cannot perform all of the functions advertised. ZeoBIT denies any wrongdoing, and the settlement does not establish that any law has been broken. The lawsuit is called *Yencha v. ZeoBIT LLC*, No. 14-cv-00578 and is in the U.S. District Court for the Western District of Pennsylvania. You need not live in Pennsylvania to participate.

- **Why Am I Being Contacted?** Our records show you may be a "Settlement Class Member" entitled to payment under the Settlement. Settlement Class Members are those people who live in the United States or its territories and purchased MacKeeper on or before July 8, 2015.
- **What Can I Get From the Settlement?** Settlement Class Members can submit a valid claim by November 30, 2015 to receive a payment of up to $39.95 from a $2,000,000 Settlement Fund, after payment of the costs of administering the settlement, the attorneys' fee award, and any incentive award to the plaintiff. The amount of the payment to Settlement Class Members depends upon the number of valid claims filed. There are approximately 513,000 individuals in the Settlement Class. Based upon class member participation in other similar settlements, the Parties anticipate that each Settlement Class Member that submits an approved claim in this case will receive a payment of $39.95. If, however, the amount required to pay each class member exceeds the amount of the Settlement Fund (after paying fees and expenses), then each Settlement Class Member who filed a valid claim will receive a proportionally reduced share of the Settlement Fund. If there is still money left in the Settlement Fund after all payments are made, the money will be donated to non-profit organizations. File your claim online here at www.YenchaSoftwareSettlement.com[smtr.qgemail.com] by November 30, 2015. To request a paper copy, call toll-free 1-877-315-1149.
- **How Do I Get My Payment?** Just click here[smtr.qgemail.com] and complete the short and simple Claim Form. More information is available at www.YenchaSoftwareSettlement.com[smtr.qgemail.com]. You can also call 1-877-315-1149 to request a paper copy of the Claim Form. ***All Claim Forms must be postmarked or received by November 30, 2015.***
- **What Are My Options?** You can do nothing, submit a Claim Form, comment on or object to any of the Settlement terms, or exclude yourself from the Settlement. If you do nothing or submit a Claim Form, you won't be able to sue ZeoBIT in a future lawsuit about the claims addressed in the Settlement. If you exclude yourself, you won't get a payment—but you'll keep your right to sue ZeoBIT on the issues the settlement concerns, unless otherwise ordered by the Court. You must contact the settlement administrator by mail or e-mail to exclude yourself. You can also object to the settlement if you disagree with any of its terms. ***All Requests for Exclusion and Objections must be postmarked or received, and all Objections must be filed with the Court, by September 21, 2015.*** For a more detailed description of the claims that you will be releasing if you do not request to exclude yourself from the Settlement, see **paragraph 1.24 on pages 7–8** of the Settlement Agreement.
- **Do I Have a Lawyer?** Yes. The Court has appointed lawyers from Edelson PC to represent you as "Class Counsel." You will not be charged for these lawyers. You can hire your own lawyer, but you'll need to pay your own legal fees. The Court has also appointed Holly Yencha —a class member like you—to represent the Class.
- **When Will the Court Consider the Proposed Settlement?** The Court will hold a hearing to determine the fairness of the settlement at 1:30 P.M. on October 16, 2015 at the United States Courthouse, Pittsburgh Division, 700 Grant Street, Pittsburgh, Pennsylvania 15219 in Courtroom 5A before Judge Joy Flowers Conti. At that hearing, the Court will hear objections, determine if the Settlement is fair, and consider Class Counsel's request for fees and expenses of up to one-third (1/3) of the Settlement Fund and an award for the Class

Representative of up to $1,000. The Court may award less than these amounts. The hearing may be postponed to a different date or time without notice, so check www.YenchaSoftwareSettlement.com[smtr.qgemail.com] for updates. You are not required to come to this hearing.

- **Want More Information?** This notice is a summary. For a detailed notice or to see the Settlement Agreement and other court documents, go to www.YenchaSoftwareSettlement.com[smtr.qgemail.com], call the settlement administrator at 1-877-315-1149 or call Class Counsel at 1-866-354-3015. The Agreement and all other pleadings and papers filed in the case are available for inspection and copying during regular business hours at the office of the Clerk of the U.S. District Court of the Western District of Pennsylvania, Pittsburgh Division, located at the United States Courthouse, 700 Grant Street, Pittsburgh, Pennsylvania 15219. Do not contact the Court or MacKeeper with questions.

By Order of the Court Dated: July 16, 2015

EXHIBIT C - PERSONS REQUESTING EXCLUSION

Name

PIERLUIGI BONELLO
KIONA BAEZ
JEFF GOTTESFELD
STEPHEN AUERBACH
C M SMRT
LUCY GUNN
GEORGE R JONES
SUE GRIFFITHS
NUZHAT SULTAN-KHAN
WEILING LUO
EUGENE BENNETT

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HOLLY YENCHA, individually and on behalf of all others similarly situated, *Plaintiff*, *v.* ZeoBIT LLC, a California limited liability company, *Defendant*.	Case No. 2:14-cv-00578-JFC Honorable Joy Flowers Conti

DECLARATION OF RAFEY S. BALABANIAN

Pursuant to 28 U.S.C. § 1746, I hereby declare and state as follows:

1. I am an attorney admitted to practice *pro hac vice* in the United States District Court for the Western District of Pennsylvania. I am entering this declaration in support of Plaintiff's Motion and Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement. This declaration is based upon my personal knowledge unless otherwise indicated. If called upon to testify as to the matters stated herein, I could and would competently do so.

2. I am a Partner and the General Counsel of the law firm Edelson PC, which has been retained to represent the Settlement Class Representative in this matter, Holly Yencha. I, along with my colleagues Benjamin H. Richman and Courtney C. Booth, have been appointed Class Counsel in this matter.

The Settlement Warrants Final Approval

3. The Settlement warrants final approval for a number of reasons, not the least of which is the overwhelmingly positive reaction of the Settlement Class. Indeed, with more than

78,000 claims submitted, the claims rate exceeds 15%, which in my experience is almost unprecedented in consumer class actions such as this.

4. The Settlement also warrants final approval because it avoids the lengthy, expensive, and necessarily complex and risky continued litigation that would only serve to delay relief to the Settlement Class.

5. In particular, while we are confident in the strength of Plaintiff's claims, there is a definite risk in proceeding with litigation—as it relates to obtaining class certification and establishing both liability and damages.

6. First, and as it relates to class certification, the Court previously indicated (and we agree) that securing class certification in this case—particularly with respect to Plaintiff's fraud claims (which she would reassert absent a settlement)—would be an uphill battle.

7. Additionally, given the technical nature of the claims at issue, Plaintiff will have to establish—and Defendant would contest—the alleged diminished functionality of a complex software application. To do this, Plaintiff will be required to, *inter alia*, (i) obtain and review the Software's source code to analyze its underlying technology and algorithms, and (ii) take deposition testimony of one or more witnesses who made decisions regarding the Software's design and marketing—a process that would likely involve an expensive and contentious battle of the experts. And if Plaintiff reasserted her fraud claims, she would be required to establish that ZeoBIT's conduct was willful—i.e., that ZeoBIT intentionally designed its Software to artificially exaggerate the number of problems present on a user's computer—which could only conclusively be established by reviewing the development notes for the Software and deposing additional witnesses, many of whom may not even work for ZeoBIT anymore. Because many of the relevant witnesses are likely located in Europe where the Software was developed, there

would unquestionably be disputes over subpoena power and witness availability, creating additional complexity and expense.

8. As with liability, there is also a risk in terms of Plaintiff's ability to establish damages should the litigation continue. Indeed, Yencha has never contended that the Software was completely worthless and that consumers should recoup the full purchase price they paid. Rather, Plaintiff's theory of the case is based on the Software's allegedly diminished value, as only certain of the advertised benefits could be performed as promised. Thus, rather than seek recovery of the full purchase price, Yencha sought to recover only the amount that she and other consumers overpaid for the Software. (*See* dkt. 1 ¶¶ 73, 81, 87.) Determining and establishing the difference in value between the Software as promised and the Software as delivered would undoubtedly be a complicated and uncertain enterprise.

9. Additionally, though Plaintiff is confident that Class Counsel's investigation into the Software supports the existence of the alleged unfair and deceptive acts, ZeoBIT has at all times denied these allegations and raised at least fifteen affirmative defenses that Plaintiff would need to overcome. (*See* dkt. 44.) And no matter how the Court ultimately ruled, the losing party would be likely to appeal, further raising the cost—in terms of both time and money—and delaying any recovery to the Settlement Class.

10. Finally, Settlement approval is also warranted because the Parties had sufficient information to evaluate the merits and reasonableness of their proposed Agreement. Before this lawsuit was even filed, my firm conducted an extensive investigation into the marketing and functionality of the Software, including, but not limited to, consulting with our own in-house computer forensic technicians to complete multiple rounds of forensic testing and comparing their results with how the Software was advertised to perform. Attorneys at my firm also spoke

with numerous consumers to understand their experiences in purchasing and using the Software, and to also compare those against Defendant's marketing materials and our own internal testing.

11. After the case was filed, the Parties have also continuously explored the strengths and weaknesses of their respective claims and defenses through informal discussion, informational exchanges, and early neutral evaluation. That investigation, coupled with the experience and industry knowledge gained through our lawsuits against Defendant's industry competitors, provided my firm an acute understanding of Plaintiff's and the Settlement Class Members' claims, Defendant's asserted and likely defenses, and the other legal and factual issues attendant with this litigation.

12. Similarly, Judge Infante's assistance through the early neutral evaluation and settlement process also ensured that the Parties were able to exchange, and had at their disposal, sufficient information from which to evaluate their claims and defenses and negotiate the Settlement now before the Court.

Attachment

13. Attached hereto as Exhibit 2-A is a true and accurate copy of Mr. Steven G. Stegen's letter dated September 3, 2015.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of October 2015.

/s/ Rafey S. Balabanian

Exhibit 2-A

18 Eliot Court

O'Fallon, MO 63366

September 03, 2015

Clerk of the Court

United States Courthouse

W.D. of Pennsylvania

Pittsburgh Division

700 Grant Street

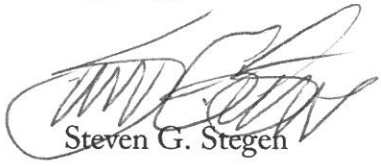
Pittsburgh, Pennsylvania 15219

Re: *Yencha v. ZeoBIT LLC*, Case No. 14-cv-00578

Cc:: (a) Benjamin H. Richman EDELSON PC 350 North LaSalle, Suite 1300 Chicago, Illinois 60654
(b) Matthew D. Brown Cooley LLP 101 California Street, 5th Floor San Francisco, California 94111

Honorable Joy Flowers Conti;

I object to this settlement ,without having all MacKeeper products removed from my computer and have my previous product, SOPHOS ANTI-VIRUS, restored to my computer at their cost, as MacKeeper reported SOPHOS to me, as a virus and blocked it from use.



Steven G. Stegen

314-304-5401

sfc399@aol.com