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15 **UNITED STATES DISTRICT COURT**

16 **NORTHERN DISTRICT OF CALIFORNIA**

17
18 MICHAEL TURNER, an individual, on behalf) Case No. 09-cv-05234-CW
19 of himself and all others similarly situated,)
20)
Plaintiff,)
21)
v.) **SETTLEMENT AGREEMENT**
22)
STORM8, LLC, a California Limited Liability)
23 Company,)
24)
Defendant.)
25)
26)

SETTLEMENT AGREEMENT

1 This Settlement Agreement (“Agreement” or “Settlement Agreement”) is entered into
2 as of May _____, 2010, by and among (i) Michael Turner (the “Named Plaintiff”), (ii) the
3 Settlement Class (as defined herein) (the Settlement Class and the Named Plaintiff are
4 collectively herein referred to as “Plaintiff” unless otherwise noted), and (iii) Defendant
5 Storm8, LLC. The Plaintiff and the Defendant are collectively referred to herein as the
6 “Parties.” This Settlement Agreement is intended by the Parties to fully, finally and forever
7 release, resolve, discharge and settle the Released Claims (as the term is defined below),
8 upon and subject to the terms and conditions of this Settlement Agreement, and subject to the
9 final approval of the Court.
10

RECITALS

11
12 A. Plaintiff Michael Turner alleged that between March 2009 and August 2009,
13 Defendant Storm8 harvested his wireless phone number and the wireless phone numbers of
14 approximately 3.5 million other persons and that the collection of numbers occurred without
15 notice or consent by any individual. Defendant stored these phone numbers for several
16 months.

17 B. On November 4, 2009, Plaintiff brought a putative class action against the
18 Defendant, claiming that the unauthorized access and removal of his wireless telephone
19 number was a breach of contract and in violation of the Computer Fraud and Abuse Act (18
20 U.S.C. § 1030), the California Computer Crime Law (Cal. Penal Code § 502), and
21 California’s Unfair Competition Law (Cal. Bus. and Prof. Code § 17200). This Action was
22 filed in the United States District Court for the Northern District of California and assigned
23 to the Honorable Claudia Wilken. Hereafter, “the Court” shall refer to Judge Wilken or any
24 judge who shall succeed her as the Judge in this Action.

25 C. In March of 2010, the Parties agreed to take part in a mediation conducted by
26 the Honorable Eugene Lynch (ret.) of JAMS. The Parties submitted detailed confidential
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1 mediation briefs to Judge Lynch, setting forth their respective views as to the strengths of
2 their cases and the perceived weaknesses in their opponent's case. On March 18, 2010,
3 counsel for the Parties, as well as representatives of Defendant Storm8, met at the JAMS
4 office in San Francisco with Judge Lynch. The Parties reached agreement in principle as to
5 the terms of the settlement further described herein.

6 D. Pursuant to the terms of the agreement between the Parties, Plaintiff seeks to
7 file an Amended Complaint against the Defendant substantially in the form attached hereto
8 as Exhibit A. Defendant stipulates to Plaintiff filing the proposed Amended Complaint for
9 the sole purpose of effectuating a one-class settlement as set forth herein.

10 E. At all times, the Defendant has denied and continues to deny any wrongdoing
11 whatsoever and has denied and continues to deny that it committed, or attempted to commit,
12 any wrongful act or violation of law or duty alleged in the Action and contend that they have
13 acted properly in all regards in connection with the design and dissemination of its gaming
14 software. Defendant maintains that it respects the privacy of its users.

15 F. Defendant also denies: (1) each and all of the claims and contentions alleged
16 by Plaintiff in the Action; (2) all charges of wrongdoing or liability against it arising out of
17 any conduct, statements, acts or omissions alleged in the Action; and (3) that Plaintiff or the
18 Settlement Class are entitled to any form of damages based on the conduct alleged in the
19 Action. In addition, Defendant maintains that it has meritorious defenses to the claims
20 alleged in the Action and it was prepared to vigorously defend the action. Finally, Plaintiff
21 and Class Counsel acknowledge that they have located no evidence of Defendant's use of the
22 phone numbers collected by Defendant. Nonetheless, taking into account the uncertainty and
23 costs inherent in any litigation, Defendant has concluded that further defense of the Action
24 could be protracted, burdensome, and expensive, and that it is desirable and beneficial to
25 them that the Action be fully and finally settled and terminated in the manner and upon the
26 terms and conditions set forth in this Agreement. This Agreement is a compromise, and the
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1 Agreement, any related documents, and any negotiations resulting in it shall not be construed
2 as or deemed to be evidence of or an admission or concession of liability or wrongdoing on
3 the part of Defendant, with respect to any claim of any fault or liability or wrongdoing or
4 damage whatsoever.

5 G. Plaintiff believes that the claims asserted in the Action have merit.
6 Nonetheless, Plaintiff and Class Counsel recognize and acknowledge the expense and length
7 of continued prosecution of the Action against Defendant through trial and any subsequent
8 appeals. Plaintiff and Class Counsel also have taken into account the uncertain outcome and
9 risks of any litigation, especially in complex actions, as well as the difficulties and delays
10 inherent in such litigation. Therefore, Plaintiff believes that it is desirable that the Released
11 Claims be fully and finally compromised, settled and resolved with prejudice, and barred
12 pursuant to the terms set forth herein. Based on their evaluation, Class Counsel have
13 concluded that the terms and conditions of this Agreement are fair, reasonable and adequate
14 to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the
15 claims raised in the Action pursuant to the terms and provisions of this Agreement.

16 H. The Parties agree that the Action was resolved in good faith, following arm's
17 length bargaining presided over by a neutral and highly-experienced mediator, and that the
18 settlement reflected herein confers substantial benefits upon the Parties.

19 NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among
20 Plaintiff, the Settlement Class, and each of them, and Defendant, by and through their
21 respective undersigned counsel that, subject to final approval of the Court after a hearing or
22 hearings as provided for in this Settlement Agreement, in consideration of the benefits
23 flowing to the Parties from the Settlement set forth herein, that the Action and the Released
24 Claims shall be finally and fully compromised, settled and released, and the Action shall be
25 dismissed with prejudice, upon and subject to the terms and conditions of this Agreement.

1 **AGREEMENT**

2 1. **DEFINITIONS.**

3 As used in this Settlement Agreement, the following terms have the meanings
4 specified below:

5 1.1 **“Action”** refers to the above captioned case, *Turner v. Storm8, LLC* (09-cv-
6 05234-CW) (N.D. Cal.) currently pending before the Judge Wilken in the Northern District
7 of California.

8 1.2 **“Settlement Administration Expenses”** means the expenses incurred by the
9 Defendant in effectuating the terms of this Settlement, including but not limited to, carrying
10 out the agreed methods of Notice and distributing the in-game relief to the Settlement Class.

11 1.3 **“Class Counsel”** means Michael Aschenbrener and Christopher Dore of
12 Edelson McGuire, LLC.

13 1.4 **“Class Representative”** means the Named Plaintiff in this Action, Michael
14 Turner.

15 1.5 **“Court”** means the Honorable Claudia Wilken or any judge who shall
16 succeed her as the Judge in this Action.

17 1.6 **“Defendant”** means Storm8, Inc., a Delaware Corporation and Storm8, LLC
18 a California Limited Liability Company (collectively “Storm8”).

19 1.7 **“Defendant’s Counsel”** means Steven Kaufhold and Chad Allen Stegeman of
20 Akin Gump Strauss Hauer & Feld LLP.

21 1.8 **“Effective Date of Settlement”** or **“Effective Date”** means the first date by
22 which all of the events and conditions specified in Section 9.1 have been met and have
23 occurred.

24 1.9 **“Final Approval Hearing”** means the hearing before the Court where the
25 Parties will request the Final Judgment and Order of Dismissal with Prejudice to be entered
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1 by the Court approving the Settlement, approving the Fee Award, and the incentive awards to
2 the Class Representative.

3 1.10 **“Fee Award”** means the amount of attorneys’ fees and reimbursement of
4 expenses awarded by the Court to Class Counsel.

5 1.11 **“Final”** means one business day following the later of the following events:
6 (i) the date upon which the time expires for filing or noticing any appeal of the Court’s Final
7 Judgment and Order of Dismissal With Prejudice approving the Settlement; (ii) if there is an
8 appeal or appeals, other than an appeal or appeals solely with respect to attorneys’ fees and
9 reimbursement of expenses, the date of completion, in a manner that finally affirms and
10 leaves in place the Final Judgment and Order of Dismissal With Prejudice without any
11 material modification, of all proceedings arising out of the appeal or appeals (including, but
12 not limited to, the expiration of all deadlines for motions for reconsideration or petitions for
13 review and/or certiorari, all proceedings ordered on remand, and all proceedings arising out
14 of any subsequent appeal or appeals following decisions on remand); or (iii) the date of final
15 dismissal of any appeal or the final dismissal of any proceeding on certiorari.

16 1.12 **“Final Judgment and Order of Dismissal With Prejudice”** means the Final
17 Judgment and Order to be entered by the Court approving the Settlement after the Final
18 Approval Hearing.

19 1.13 **“Mandatory Pop-Up Message”** refers to a full screen box containing text
20 that appears in a Storm8 game when the software is first launched and prevents a consumer
21 from accessing any other part of the game without first clicking an “OK,” “ACCEPT,” or
22 similar button.

23 1.14 **“Mediator”** means Honorable Eugene F. Lynch of JAMS.

24 1.15 **“Nationwide”** means the 50 states in the United States of America and its
25 territories.

1 1.16 **“News Feed”** refers to the section of a Storm8 game appearing on the startup
2 home screen that informs consumers of recent events occurring within the game (in real time)
3 such as messages from other users, attacks, software updates, and messages from Storm8
4 itself. Storm8 has the ability to place a message in the “News Feed” that will remain in there
5 for a fixed period of time.

6 1.17 **“Notice”** means the Notice of Pendency and Proposed Settlement of Class
7 Action and Final Approval Hearing, which is to be sent to Settlement Class Members
8 substantially in the manner set forth in this Agreement and substantially in the forms attached
9 hereto as Exhibits B & C.

10 1.18 **“Preliminary Approval Order”** means the proposed order preliminarily
11 approving the Settlement and directing notice thereof to the Settlement Class.

12 1.19 **“Parties”** or **“Settling Parties”** means Plaintiff Michael Turner, the
13 Settlement Class and the Defendant Storm8.

14 1.20 **“Person”** shall have the broadest meaning possible and shall mean, without
15 limitation, any individual, corporation, partnership, limited partnership, limited liability
16 company, association, joint stock company, estate, legal representative, trust, unincorporated
17 association, government or any political subdivision or agency thereof, and any business or
18 legal entity and their spouses, heirs, predecessors, successors, representatives, or assigns.

19 1.21 **“Plaintiff”** means Michael Turner and the Settlement Class Members.

20 1.22 **“Points”** means “Favor Points,” “Honor Points,” “Loyalty Points,” “Master
21 Points” and all other names assigned to the points Storm8 sells for use within its various
22 games.

23 1.23 **“Released Claims”** means any and all actual, potential, filed, known or
24 unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims,
25 demands, liabilities, rights, causes of action, contracts or agreements, extra-contractual
26 claims, damages, punitive, exemplary or multiplied damages, expenses, costs, attorneys’ fees
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1 and or obligations (including “Unknown Claims” as defined below), whether in law or in
2 equity, accrued or unaccrued, direct, individual or representative, of every nature and
3 description whatsoever, whether based on federal, state, local, statutory or common law or
4 any other law, rule or regulation, including the law of any jurisdiction outside the United
5 States, against the Released Party, arising out of any facts, transactions, events, matters,
6 occurrences, acts, disclosures, statements, misrepresentations, omissions or failures to act
7 relating to the removal and storage of phone numbers belonging to the Settlement Class that
8 were or could have been alleged or asserted in the Action relating to such removal and
9 storage, belonging to Plaintiff and each of them and any of their present or past heirs,
10 executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries,
11 associates, affiliates, employers, employees, agents, consultants, independent contractors,
12 insurers, directors, managing directors, officers, partners, principals, members, attorneys,
13 accountants, financial and other advisors, investment bankers, underwriters, lenders, and any
14 other representatives of any of these Persons and entities (including, without limitation, any
15 claims, whether direct, derivative, representative or in any other capacity, arising under
16 federal, state, local, statutory or common law or any other law, rule or regulation, including
17 the law of any jurisdiction outside of the United States) that relate in any way to any actual or
18 alleged violation of law, misstatement or omission, breach of duty, negligence or fraud or
19 any other actual or alleged wrongdoing or misconduct.

20 1.24 **“Released Party”** means Storm8, and any and all of its present or past heirs,
21 executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries,
22 associates, affiliates, employers, employees, agents, consultants, independent contractors,
23 Insurers, directors, managing directors, officers, partners, principals, members, attorneys,
24 accountants, financial and other advisors, investment bankers, underwriters, shareholders,
25 lenders, auditors, investment advisors, legal representatives, successors in interest, assigns
26 and Persons, firms, trusts, corporations, officers, directors, other individuals or entities in
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1 which Storm8 has a controlling interest or which is related to or affiliated with it, or any
2 other representatives of any of these Persons and entities.

3 1.25 **“Settlement”** or **“Settlement Agreement”** means the settlement
4 contemplated by this Settlement Agreement.

5 1.26 **“Settlement Benefit”** means the benefits a Settlement Class Member may
6 receive pursuant to this Settlement Agreement.

7 1.27 **“Settlement Class”** means “all persons in the United States who downloaded
8 and accessed any version of any Storm8 game that was released or updated prior to August
9 30, 2009 on an Apple iPhone.” Excluded from the Class are Defendant, its legal
10 representatives, assigns, and successors, and any entity in which Defendant has a controlling
11 interest. Also excluded is the judge to whom this case is assigned and the judge’s immediate
12 family.

13 1.28 **“Settlement Class Member”** or **“Class Member”** means a Person who falls
14 within the definition of the Settlement Class as set forth above and who has not submitted a
15 valid request for exclusion.

16 1.29 **“Preliminary Approval”** means the Court’s certification of the Settlement
17 Class for settlement purposes, preliminary approval of the Settlement, and approval of the
18 form of the Settlement Class Notice.

19 1.30 **“Unknown Claims”** means claims that could have been raised in this
20 litigation and that the Plaintiff or any or all other Persons and entities whose claims are being
21 released, or any of them, do not know or suspect to exist, which, if known by him, her or it,
22 might affect his, her or its agreement to release the Released Party or the Released Claims or
23 might affect his, her or its decision to agree, object or not to object to the Settlement. Upon
24 the Effective Date, Plaintiff and all other Persons and entities whose claims are being
25 released shall be deemed to have, and shall have, expressly waived and relinquished, to the
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1 fullest extent permitted by law, the provisions, rights and benefits of § 1542 of the California
2 Civil Code, which provides as follows:

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

7 Upon the Effective Date, Plaintiff and all other Persons and entities whose claims are being
8 released, also shall be deemed to have, and shall have, waived any and all provisions, rights
9 and benefits conferred by any law of any state or territory of the United States, or principle of
10 common law, or the law of any jurisdiction outside of the United States, which is similar,
11 comparable or equivalent to § 1542 of the California Civil Code. Plaintiff acknowledges that
12 he may discover facts in addition to or different from those that they now know or believe to
13 be true with respect to the subject matter of this release, but that it is his intention to finally
14 and forever to settle and release the Released Claims, notwithstanding any Unknown Claims
15 they may have, as that term is defined in this Paragraph.

16 **2. SETTLEMENT RELIEF**

17 2.1 **Prospective Relief.** In fulfillment of this Settlement Agreement, Storm8
18 agrees that:

19 (a) Within thirty (30) days of the Effective Date, Storm8 will place its
20 privacy policy on its website at www.storm8.com/privacy. Storm8's current privacy policy
21 can be found at <http://forum.storm8.com/showthread.php?t=28>. Additionally, the privacy
22 policy will provide clear notice of all data Storm8 collects through its mobile software,
23 including all personally identifiable information and all non-personally identifiable
24 information. Further, the privacy policy must be available from, at a minimum, the main
25 page of Storm8, www.storm8.com. Notwithstanding the foregoing, this subsection is subject
26 to applicable law.

1 (b) In all future versions of any mobile software created and distributed by
2 Storm8 for the iPhone, Storm8 will only remove and store consumers' phone numbers from
3 their wireless telephones in a manner consistent with Storm8's Privacy Policy then in effect.

4 (c) Within thirty (30) days of the Effective Date, Storm8 will place a
5 notice of the above stated privacy policy on the pre-install page in the mobile iTunes Store
6 and the desktop iTunes Store including, but not limited to, the URL of the privacy policy
7 (subject to approval by Apple, Inc.). This notice will state, at a minimum, as follows:
8 "Storm8 respects your privacy. To view Storm8's privacy policy, please visit
9 www.storm8.com/privacy."

10 2.2 **In-Kind Relief.** Defendant agrees to distribute to each Class Member in-kind
11 relief of forty-five (45) Points per each device owned by a Settlement Class Member. In the
12 instance where a Class Member has downloaded more than one Storm8 game, the Class
13 Member will be provided an opportunity to choose which game to apply the points by
14 denying to apply the Points to an opened game until acceptance occurs in another game, after
15 which the ability to accept points in all other games will cease. Class Members are entitled
16 to only one distribution of Points per device, regardless of the number of games downloaded
17 and/or installed. Distribution of points to all Settlement Class Members will occur upon their
18 accessing Storm8 games within ninety (90) days of the Effective Date. Points will be
19 available for one year after the Effective Date.

20 3. **RELEASES**

21 3.1 The obligations incurred pursuant to this Settlement Agreement shall be a full
22 and final disposition of the Action and any and all Released Claims, as to the Released Party.

23 3.2 Upon the Effective Date, Plaintiff, and the Settlement Class Members, shall be
24 deemed to have, and by operation of the Final Judgment and Order of Dismissal with
25 Prejudice shall have, fully, finally, and forever released, relinquished and discharged the
26 Released Party from all Released Claims.

1 **4. NOTICE TO THE CLASS**

2 4.1 One (1) week after the entry of the Preliminary Approval Order, the
3 Defendant shall cause the Settlement Class Notice describing the Final Approval Hearing and
4 the terms of the Settlement embodied in this Settlement Agreement to be disseminated to
5 Settlement Class Members as provided herein. Such notice shall comport with due process
6 and be effectuated pursuant to the agreed methods of Notice

7 4.2 The agreed methods of Notice shall include:

8 (a) In-Game Notice. One (1) week after Preliminary Approval of the
9 Settlement, Notice shall be provided to Class Members through an in-game notification
10 message. The message will initially appear as a Mandatory Pop-Up Message within the
11 games so that all class members opening the games will see the message, and thereafter
12 remain as a posted message in the games' News Feeds so that class members have continued
13 access to the in-game notification for thirty (30) days after the Effective Date .(Examples
14 attached as Exhibit D.) The text of the In-Game Notice shall be substantially in the form of
15 Exhibit B.

16 (b) Internet Publication Notice. One (1) week after Preliminary Approval
17 of the Settlement, Notice shall be provided on a website, to be established and administered
18 by the Defendant (wholly separate from www.storm8.com), which shall inform Class
19 Members of their rights and obligations under this Settlement Agreement. The Internet
20 Publication Notice shall be substantially in the form of Exhibit C hereto.

21 (c) The Internet Publication Notice shall be discontinued no earlier than
22 ninety (90) days after the Effective Date.

23 (d) Class Action Fairness Act ("CAFA") Notice. Pursuant to 28 U.S.C.
24 § 1715, not later than fifteen (15) days after the proposed settlement is filed, Defendant shall
25 serve upon the Attorneys General of each of the fifty United States, and the Attorney General
26 of the United States, notice of the proposed settlement, which shall include (1) a copy of the
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1 Complaint and all materials filed with the Complaint or notice of how to electronically access
2 such materials; (2) notice of all scheduled judicial hearings in the Action; (3) all forms of
3 Notice to the Settlement Class; and (4) a copy of this Agreement. The Defendant shall serve
4 upon the above-referenced government official the names of Settlement Class Members who
5 reside in each respective state and the share of the claims of such members to the entire
6 settlement, or if not feasible, a reasonable estimate of the number of class members residing
7 in each state and the estimated proportionate share of the claims of such members to the
8 entire settlement.

9 4.3 The Notice shall advise the Settlement Class of their rights, including the right
10 to opt out of, comment upon, and/or object to the Settlement Agreement or its terms. The
11 Notice shall specify that any objection to this Settlement Agreement, and any papers
12 submitted in support of said objection, shall be received by the Court at the Final Approval
13 Hearing, only if, on or before a date forty-five (45) days after Notice is sent or such other
14 date as shall be approved by the Court and stated in the Notice, the Person making an
15 objection shall file notice of his or her intention to do so and at the same time (a) file copies
16 of such papers he or she proposes to submit at the Final Approval Hearing with the Clerk of
17 the Court and (b) send copies of such papers via mail, hand or overnight delivery service to
18 both Class Counsel and Defendant's Counsel.

19 4.4 The cost of the agreed methods of Notice, including the In-Game Notice, the
20 Internet Publication Notice, and the CAFA Notice and all other parts making up the agreed
21 methods of Notice, are Settlement Administration Expenses to be paid by the Defendant.

22 4.5 Any member of the Settlement Class who intends to object to this Settlement
23 Agreement must file and serve on Class Counsel, Defendant's Counsel, and the Court a
24 formal signed written objection, and include his/her name and address, include all arguments,
25 citations, and evidence supporting the objection (including copies of any documents relied
26 on), state that he or she is a member of the Settlement Class, state whether the objector
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1 intends to appear at the Final Approval Hearing, and state whether any such appearance shall
2 be with or without counsel. Any member of the Settlement Class who fails to timely file a
3 written objection and notice of his or her intent to appear at the Final Approval Hearing in
4 accordance with the terms of paragraph or as detailed in the Notice, and at the same time
5 provide copies to designated counsel for the Parties, shall not be permitted to object to this
6 Settlement Agreement at the Final Approval Hearing, and shall be foreclosed from seeking
7 any review of this Settlement Agreement by appeal or other means.

8 4.6 A member of the Settlement Class may opt out of the Settlement Class within
9 forty-five (45) days after Defendant distributes the In-Game Notice, or by a date approved by
10 the Court and specified in the Notice. In order to exercise the right to opt out, a member of
11 the Settlement Class must timely send a request for exclusion to Class Counsel and
12 Defendant’s Counsel. Except for those members of the Settlement Class who have properly
13 opted out, all Class Members will be bound by this Settlement Agreement and the Judgment
14 to be entered following final approval of this Settlement Agreement and entry of the Final
15 Judgment and Order of Dismissal with Prejudice. Any member of the Settlement Class who
16 elects to opt out shall not: (i) be bound by any orders or the Final Judgment and Order of
17 Dismissal with Prejudice; (ii) be entitled to relief under this Settlement Agreement; (iii) gain
18 any rights by virtue of this Settlement Agreement; or (iv) be entitled to object to any aspect
19 of this Settlement Agreement. The request for exclusion must be personally signed by the
20 Person requesting exclusion. So called “mass” or “class” opt-outs shall not be allowed. To
21 be valid, an opt-out must be postmarked or received by the date specified in the Notice.

22 **5. SETTLEMENT ADMINISTRATION**

23 5.1 The Defendant shall, under the supervision of Class Counsel and the Court,
24 administer the relief provided by this Settlement Agreement by carrying out the agreed
25 methods of Notice and distributing the Settlement Benefit. The Defendant shall maintain
26 reasonably detailed records of its activities under this Settlement Agreement. The Defendant
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1 shall maintain all such records as are required by applicable law in accordance with its
2 normal business practices and such records will be made available to Class Counsel and
3 Defendant’s Counsel upon request. The Defendant shall also provide reports and other
4 information to the Court as the Court may require. The Defendant shall provide Class
5 Counsel with information concerning notice, administration and implementation of the
6 Settlement. Should the Court request, the Defendant shall submit a timely report to the Court
7 summarizing the work performed by the Defendant in its capacity as Settlement
8 Administrator.

9 5.2 Class Counsel and Defendant’s Counsel shall receive all exclusion forms and
10 other requests from Class Members to exclude themselves from the Settlement.

11 5.3 The deadline for opting out of or objecting to the Settlement Agreement shall
12 be forty-five (45) days after Defendant distributes the In-Game Notice, and any opt-out or
13 objection must be postmarked or received by that deadline to be timely.

14 5.4 The Final Approval Hearing shall be ninety (90) days after CAFA Notice is
15 given or such date as ordered by the Court.

16 5.8 Any Class Member who does not, in accordance with the terms and conditions
17 of this Settlement, seek exclusion from the Class will be entitled to receive the Settlement
18 Benefit and any other benefits pursuant to this Settlement, and will otherwise be bound
19 together with all Class Members by all of the terms of this Settlement, including the terms of
20 the Final Judgment and Order of Dismissal with Prejudice to be entered in the Action and the
21 Releases provided for in the Settlement, and will be barred from bringing any action against
22 the Released Party concerning the Released Claims.

23 **6. TERMINATION OF SETTLEMENT**

24 6.1 The named Plaintiff in this Action, on behalf of the Settlement Class, or
25 Defendant, shall have the right to terminate this Settlement by providing written notice of
26 their election to do so (“Termination Notice”) to all other Parties hereto within ten (10) days,
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1 of any of the following events: (i) the Court’s refusal to grant Preliminary Approval of this
2 Agreement in any material respect;; (ii) the Court’s refusal to enter the Final Judgment and
3 Order of Dismissal with Prejudice in this Action in any material respect; (iii) the date upon
4 which the Final Judgment and Order of Dismissal with Prejudice is modified or reversed in
5 any material respect by the Court of Appeals or the Supreme Court; or (v) the date upon
6 which an Alternative Judgment, as defined in paragraph 9.1 of this Agreement is modified or
7 reversed in any material respect by the Court of Appeals or the Supreme Court.

8 **7. PRELIMINARY APPROVAL ORDER AND FINAL APPROVAL ORDER**

9 7.1 Promptly after the execution of this Settlement Agreement, Class Counsel and
10 Defendant’s Counsel shall jointly submit this Agreement together with its Exhibits to the
11 Court and shall move the Court for Preliminary Approval of the Settlement set forth in this
12 Agreement, certification of a class for settlement purposes only, appointment of Class
13 Counsel and Class Representative, and entry of a Preliminary Approval Order, which order,
14 at the Court’s leave, shall set a Final Approval Hearing date and approve the Notice for
15 dissemination in accordance with the agreed methods of Notice, substantially in the form of
16 the Exhibits hereto.

17 7.2 At the time of the submission of this Settlement Agreement to the Court as
18 described above, Class Counsel and Defendant’s Counsel shall request that, after Notice is
19 given, the Court hold a Final Approval Hearing and approve the Settlement of the Action as
20 set forth herein.

21 7.3 After Notice is given, the Parties shall request and, at the Court’s leave, obtain
22 from the Court a Final Judgment and Order of Dismissal with Prejudice. The Final Judgment
23 and Order of Dismissal with Prejudice will (among other things):

24 (a) find that the Court has personal jurisdiction over all Settlement Class
25 Members and that the Court has subject matter jurisdiction to approve the Settlement
26 Agreement, including all Exhibits thereto;

1 (b) approve the Settlement Agreement and the proposed settlement as fair,
2 reasonable and adequate as to, and in the best interests of the Settlement Class Members;
3 direct the Parties and their counsel to implement and consummate the Settlement Agreement
4 according to its terms and provisions; and declare the Settlement Agreement to be binding
5 on, and have *res judicata* and preclusive effect in all pending and future lawsuits or other
6 proceedings maintained by or on behalf of Plaintiff and all other Settlement Class Members,
7 as well as their heirs, executors and administrators, successors and assigns;

8 (c) find that the agreed methods of Notice implemented pursuant to the
9 Settlement Agreement (a) constitute the best practicable notice under the circumstances,
10 (b) constitute notice that is reasonably calculated, under the circumstances, to apprise
11 Settlement Class Members of the pendency of the Action, their right to object to or exclude
12 themselves from the proposed Settlement and to appear at the Final Approval Hearing,
13 (c) are reasonable and constitute due, adequate and sufficient notice to all persons entitled to
14 receive notice, and (d) meet all applicable requirements of the Federal Rules of Civil
15 Procedure, the Due Process Clause of the United States Constitution and the rules of the
16 Court;

17 (d) find that Plaintiff and Class Counsel adequately represented the
18 Settlement Class for purposes of entering into and implementing the Agreement;

19 (e) dismiss the Action (including all individual claims and Settlement
20 Class claims presented thereby) on the merits and with prejudice, without fees or costs to any
21 party except as provided in the Settlement Agreement;

22 (f) incorporate the Release set forth above, make the Release effective as
23 of the date of the Final Judgment and Order of Dismissal with Prejudice, and forever
24 discharge the Released Party from any claims or liabilities arising from or related to the facts,
25 circumstances, or subject matter of this Action;

1 (g) bar and enjoin all Settlement Class Members who have not been
2 excluded from the Settlement Class from filing, commencing, prosecuting, intervening in, or
3 participating (as class members or otherwise) in, any lawsuit in any jurisdiction based on or
4 arising out of the removal and storage of Class Member's phone numbers by Defendant;

5 (h) authorize the Parties, without further approval from the Court, to agree
6 to and adopt such amendments, modifications and expansions of the Settlement Agreement
7 and its implementing documents (including all Exhibits to this Agreement) as (a) shall be
8 consistent in all material respects with the Final Judgment and Order of Dismissal with
9 Prejudice, or (b) do not limit the rights of Settlement Class Members;

10 (i) without affecting the finality of the Final Judgment and Order of
11 Dismissal with Prejudice for purposes of appeal, retain jurisdiction as to all matters relating
12 to administration, consummation, enforcement and interpretation of the Settlement
13 Agreement and the Final Judgment and Order of Dismissal with Prejudice, and for any other
14 necessary purpose; and

15 (j) incorporate any other provisions, as the Court deems necessary and
16 just.

17
18 **8. CLASS COUNSEL'S ATTORNEYS' FEES AND REIMBURSEMENT OF
EXPENSES; INCENTIVE AWARD.**

19 8.1 Subject to the Court's approval, the Parties have agreed that Defendant shall
20 pay to Class Counsel the sum of \$125,000 for attorneys' fees and expenses in this Action.
21 Defendant shall pay the Fee Award in four installments as follows: (1) Class Counsel shall,
22 within seven (7) days after the Effective Date, be paid \$31,250; (2) Class counsel shall be
23 paid a second installment of \$31,250 within ninety (90) days after the first payment; (3) Class
24 Counsel shall be paid a third installment of \$31,250 within one hundred and eighty (180)
25 days after the first payment; (4) Class Counsel shall be paid a fourth installment of \$31,250
26 within two hundred and seventy (270) days after the first payment.

1 8.2 Defendant agrees that such fee is reasonable and was reached following arms'
2 length negotiations with the help of a Mediator, and only after class relief was agreed upon.
3 Defendant further agrees that it will not oppose such an award, directly or indirectly. Any
4 payment of the Fee Award shall be paid via electronic transfer to an account designated by
5 Class Counsel in a letter to Defendant's Counsel providing the necessary information for
6 electronic transfer. Class Counsel agrees that in no event shall Defendant pay or be
7 obligated to pay in excess of \$125,000 for Class Counsel attorneys' fees and expenses.

8 8.3 In addition to any award to which they may be entitled under the Settlement
9 Agreement, and in recognition of his efforts on behalf of the Settlement Class, Michael
10 Turner, the Class Representative, shall, subject to the approval of the Court, be awarded an
11 incentive award of \$2,500. Defendant agrees that it shall not oppose such award, directly or
12 indirectly. These sums shall be paid to in recognition of the Plaintiff's time and effort serving
13 as the Class Representative in this litigation. Defendant shall pay such amounts via check to
14 the Class Representative and such check shall be sent care of Class Counsel within seven (7)
15 days after the Effective Date.

16
17 **9. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL,
 CANCELLATION OR TERMINATION.**

18 9.1 The Effective Date of this Settlement Agreement shall not occur unless and
19 until each of the following events occurs and shall be the date upon which the last (in time)
20 of the following events occurs:

- 21 (a) The Court has entered the Preliminary Approval Order;
- 22 (b) The Court has approved the Settlement, following Notice to the
23 Settlement Class and a Final Approval Hearing, as provided in the Federal Rules of Civil
24 Procedure, and has entered the Final Judgment and Order of Dismissal with Prejudice, or a
25 judgment substantially consistent with this Agreement; and
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27
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1 (c) The Final Judgment and Order of Dismissal with Prejudice has
2 become Final, as defined above, or, in the event that the Court enters an order and final
3 judgment in a form other than that provided above (“Alternative Judgment”) and that has the
4 consent of the Parties, such Alternative Judgment becomes Final.

5 9.2 If some or all of the conditions specified in Section 9.1 are not met, or in the
6 event that this Settlement Agreement is not approved by the Court, or the Settlement set forth
7 in this Agreement is terminated or fails to become effective in accordance with its terms, then
8 this Settlement Agreement shall be canceled and terminated subject to Section 9.3 unless
9 Class Counsel and Defendant’s Counsel mutually agree in writing to proceed with this
10 Agreement. If any Party is in material breach of the terms hereof, any other Party, provided
11 that it is in substantial compliance with the terms of this Agreement, may terminate this
12 Agreement on notice to all of the Parties.

13 9.3 If this Agreement is terminated or fails to become effective for the reasons set
14 forth in Sections 9.1 and 9.2 above, the Parties shall be restored to their respective positions
15 in the Action as of the date of the signing of this Agreement. In such event, any Final
16 Judgment and Order of Dismissal with Prejudice or other order entered by the Court in
17 accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*.

18 **10. CONFIRMATORY DISCOVERY**

19 10.1 Storm8 agrees to engage in limited confirmatory discovery, consisting of
20 responding to written interrogatories, for the purpose of confirming that Storm8 retained
21 exclusive possession of the collected numbers before permanently destroying the numbers.

22 10.2 Storm8 will provide a statement under penalty of perjury to the effect that the
23 collected phone numbers remained in the possession of Storm8 at all times and that Storm8
24 has destroyed the list of collected numbers. A final version of this statement will be
25 incorporated into this Agreement and filed with the Court along with the Parties Motion for
26 Preliminary Approval. A draft of this statement is attached as Exhibit E.

1 10.3 Storm8 will provide a statement under penalty of perjury stating exactly what
2 data it is currently collecting from its customers through its games. A final version of this
3 statement will be incorporated into this Agreement and filed with the Court along with the
4 Parties Motion for Preliminary Approval. A draft of this statement is attached as Exhibit F.

5 **11. MISCELLANEOUS PROVISIONS**

6 11.1 The Parties (a) acknowledge that it is their intent to consummate this
7 Settlement Agreement; and (b) agree, subject to their fiduciary and other legal obligations, to
8 cooperate to the extent reasonably necessary to effectuate and implement all terms and
9 conditions of this Agreement and to exercise their reasonable best efforts to accomplish the
10 foregoing terms and conditions of this Agreement. Class Counsel and Defendant’s Counsel
11 agree to cooperate with one another in seeking Court approval of the Preliminary Approval
12 Order, the Settlement Agreement, and the Final Judgment and Order of Dismissal With
13 Prejudice, and promptly to agree upon and execute all such other documentation as may be
14 reasonably required to obtain final approval of the Settlement

15 11.2 The Parties intend this Settlement Agreement to be a final and complete
16 resolution of all disputes between them with respect to the Released Claims by Plaintiff and
17 the Settlement Class, and each or any of them, on the one hand, against the Released Party,
18 on the other hand. Accordingly, the Parties agree not to assert in any forum that the Action
19 was brought by Plaintiff or defended by Defendant, in bad faith or without a reasonable
20 basis.

21 11.3 Whether or not the Effective Date occurs or this Settlement Agreement is
22 terminated, neither this Agreement nor the Settlement contained herein, nor any act
23 performed or document executed pursuant to or in furtherance of this Agreement or the
24 Settlement:

25 (a) is, may be deemed, or shall be used, offered or received against the
26 Released Party, as an admission, concession or evidence of, the validity of any Released
27

1 Claims, the truth of any fact alleged by the Plaintiff, the deficiency of any defense that has
2 been or could have been asserted in the Action, or of any alleged wrongdoing, liability,
3 negligence, or fault of the Released Party;

4 (b) is, may be deemed, or shall be used, offered or received against
5 Defendant, as an admission, concession or evidence of any fault, misrepresentation or
6 omission with respect to any statement or written document approved or made by the
7 Released Party;

8 (c) is, may be deemed, or shall be used, offered or received against
9 Plaintiff or the Settlement Class, or each or any of them, as an admission, concession or
10 evidence of, the infirmity or strength of any claims raised in the Action, the truth or falsity of
11 any fact alleged by Defendant, or the availability or lack of availability of meritorious
12 defenses to the claims raised in the Action;

13 (d) is, may be deemed, or shall be used, offered or received against the
14 Released Party, as an admission or concession with respect to any liability, negligence, fault
15 or wrongdoing as against any Parties to the Settlement Agreement, in any civil, criminal or
16 administrative proceeding in any court, administrative agency or other tribunal. However,
17 the Settlement, this Agreement, and any acts performed and/or documents executed in
18 furtherance of or pursuant to this Agreement and/or Settlement may be used in any
19 proceedings as may be necessary to effectuate the provisions of this Agreement. However, if
20 this Settlement Agreement is approved by the Court, any Party may file this Settlement
21 Agreement and/or the Final Judgment and Order of Dismissal with Prejudice in any action
22 that may be brought against such Party or Parties in order to support a defense or
23 counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith
24 settlement, judgment bar or reduction, or any other theory of claim preclusion or issue
25 preclusion or similar defense or counterclaim;

1 (e) is, may be deemed, or shall be construed against Plaintiff and the
2 Settlement Class, or each or any of them, or against the Released Party, as an admission or
3 concession that the consideration to be given hereunder represents an amount equal to, less
4 than or greater than that amount that could have or would have been recovered after trial; and

5 (f) is, may be deemed, or shall be construed as or received in evidence as
6 an admission or concession against Plaintiff and the Settlement Class, or each and any of
7 them, or against the Released Party, that any of Plaintiff's claims are with or without merit or
8 that damages recoverable in the Action would have exceeded or would have been less than
9 any particular amount.

10 11.4 The headings used herein are used for the purpose of convenience only and
11 are not meant to have legal effect.

12 11.5 The waiver by one Party of any breach of this Agreement by any other Party
13 shall not be deemed as a waiver of any other prior or subsequent breaches of this Agreement.

14 11.6 All of the Exhibits to this Settlement Agreement are material and integral
15 parts thereof and are fully incorporated herein by this reference.

16 11.7 This Agreement and its Exhibits set forth the entire agreement and
17 understanding of the Parties with respect to the matters set forth herein, and supersede all
18 prior negotiations, agreements, arrangements and undertakings with respect to the matters set
19 forth herein. No representations, warranties or inducements have been made to any Party
20 concerning this Settlement Agreement or its Exhibits other than the representations,
21 warranties and covenants contained and memorialized in such documents. This Agreement
22 may be amended or modified only by a written instrument signed by or on behalf of all
23 Parties or their respective successors-in-interest.

24 11.8 Except as otherwise provided herein, each Party shall bear its own costs.
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1 11.9 Plaintiff represents and warrants that he has not assigned any claim or right or
2 interest therein as against the Released Party to any other Person or party and that he is fully
3 entitled to release the same.

4 11.10 Each counsel or other Person executing this Settlement Agreement, any of its
5 Exhibits, or any related settlement documents on behalf of any Party hereto hereby warrants
6 and represents that such Person has the full authority to do so and has the authority to take
7 appropriate action required or permitted to be taken pursuant to the Agreement to effectuate
8 its terms.

9 11.11 This Agreement may be executed in one or more counterparts. All executed
10 counterparts and each of them shall be deemed to be one and the same instrument provided
11 that counsel for the Parties to this Agreement all exchange original signed counterparts. A
12 complete set of original executed counterparts shall be filed with the Court.

13 11.12 This Settlement Agreement shall be binding upon, and inure to the benefit of,
14 the successors and assigns of the Parties hereto and the Released Party.

15 11.13 The Court shall retain jurisdiction with respect to implementation and
16 enforcement of the terms of this Agreement, and all Parties hereto submit to the jurisdiction
17 of the Court for purposes of implementing and enforcing the Settlement embodied in this
18 Agreement.

19 11.14 This Settlement Agreement is deemed to have been prepared by counsel for
20 all Parties, as a result of arms' length negotiations among the Parties. Whereas all Parties
21 have contributed substantially and materially to the preparation of this Agreement, it shall not
22 be construed more strictly against one party than another.

23 11.15 Any disputes arising out of this Settlement Agreement shall be resolved under
24 the laws of the State of California.

1 11.16 Where this Settlement Agreement requires notice to the Parties, such notice
2 shall be sent to the undersigned counsel: Michael Aschenbrener, Edelson McGuire, LLC, 350
3 North LaSalle Street, Suite 1300, Chicago, Illinois 60654; Steven Kaufhold, Akin Gump
4 Strauss Hauer & Feld LLP, 580 California Street, Suite 1500, San Francisco, California
5 94104.

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7
8 Dated: May ___, 2010

Respectfully submitted,
EDELSON MCGUIRE, LLC

9
10 By: _____
MICHAEL ASCHENBRENER
11 One of the Attorneys for Plaintiff

12 Dated: May ___, 2010

AKIN GUMP STRAUSS
HAUER & FELD, LLP

13
14
15 By: _____
STEVEN KAUFHOLD
16 One of the Attorneys for Defendant

17
18 MICHAEL J. ASCHENBRENER
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