WHATLEY KALLAS LLP
Alan M. Mansfield (SBN 125998)
amansfield@whatleykallas.com
1 Sansome Street, 35th Fl., PMB # 131
San Francisco, CA 94104
Tel: (415) 860-2503
Fax: (888) 331-9633

BURSOR & FISHER, P.A.
L. Timothy Fisher (SBN 191626)
ltfisher@bursor.com
Neal J. Deckant (admitted *pro hac vice*)
ndeckant@bursor.com
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Tel: (925) 300-4455
Fax: (925) 407-2700

Class Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE NVIDIA GTX 970 GRAPHICS CHIP LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

CASE NO.: 15-cv-00760-PJH

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ENTRY OF ORDER FINALLY APPROVING CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: December 7, 2016
Time: 9:00 a.m.
Courtroom 3 – 3rd Floor

Judge: Honorable Phyllis J. Hamilton

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 7, 2016 at 9:00 a.m., before the Honorable Phyllis J. Hamilton, Chief District Judge for the U.S. District Court for the Northern District of California, 1301 Clay St., Oakland, CA 94612, the Class Representatives, by and through their undersigned counsel of record, will and hereby do move, pursuant to Fed. R. Civ. P. 23(e), for the Court to enter an Order finally approving the proposed class action settlement agreed to herein, in the form submitted herewith.

In support of this Motion, the parties submit, as more fully described in the accompanying Memorandum of Points and Authorities in support of this final approval motion and the supporting declarations and exhibits, that this settlement represents a fair, reasonable, and adequate compromise of the claims asserted in the Second Amended Consolidated Class Action Complaint in that it provides significant benefits to the Settlement Class in exchange for releases of claims to Defendants relating directly to the claims asserted in the operative Complaint, as set forth in detail in the Settlement Agreement previously filed with the Court (Dkt. No. 130-2, Ex. 1).

This motion is based on the Court's August 26, 2016 Order Granting Motion for Preliminary Approval of Class Action Settlement and Directing Dissemination of Class Notice (Dkt. No. 137) and the papers submitted in support of that Motion (which are incorporated herein by reference), this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Alan M. Mansfield of Whatley Kallas, LLP and Phil Cooper of Kurtzman Carson Consultants LLC ("KCC"), the Court-appointed settlement administrator, filed in support of this Motion, the moving papers and Declarations filed in support of the accompanying application for payment of attorneys' fees, reimbursement of expenses and representative plaintiff awards, the Proposed Order Granting Final Approval, and all other papers filed and proceedings had in this action and any other written and oral arguments that may be presented to the Court.

/ / /

/ / /

/ / /

/ / /

CIVIL RULE 7-4(a)(3) STATEMENT OF ISSUE TO BE DECIDED

Whether the Court should enter an order finally approving the proposed class action settlement, pursuant to Fed. R. Civ. P. 23(e).

Dated: October 25, 2016

Respectfully submitted,

WHATLEY KALLAS LLP

By: */s/ Alan M. Mansfield*

Alan M. Mansfield (SBN 125998)
amansfield@whatleykallas.com
1 Sansome Street, 35th Fl., PMB # 131
San Francisco, CA 94104
Tel: (415) 860-2503
Fax: (888) 331-9633

BURSOR & FISHER, P.A.

By: 

L. Timothy Fisher (SBN 191626)
ltfisher@bursor.com
Neal J. Deckant (admitted *pro hac vice*)
ndeckant@bursor.com
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Tel: (925) 300-4455
Fax: (925) 407-2700

Class Counsel

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES

PAGE(S)

CASES (Cont'd)

RULES

TABLE OF AUTHORITIES

PAGE(S)

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Andrew Ostrowski, Mark Roushion, Kiloe Young, Jason Doerrer, Pedro Santiago, Kyle Ellis, Andy Torrales, Dylan Jordan, Joseph Vorraso, David Dropski, Austin Verlinden, Stephen Denz, Joel Bernabel, Jan Paolo Jimenez, Timothy Farley, Alexander Montgomery, Ryan Brenek, Jorrell Dye, Chester Bailey, Gukjin Chung, Garret Giordano, Francis Palagano, Patrick E. Parker and Donald Le (collectively, the "Class Representatives" or "Plaintiffs"), by and through Class Counsel Bursor & Fisher, P.A. and Whatley Kallas, LLP (collectively, "Class Counsel"), respectfully submit this memorandum in support of Plaintiffs' Motion for Entry of Order Finally Approving Class Action Settlement.

II. SUMMARY OF ALLEGATIONS AND SETTLEMENT TERMS

Plaintiffs filed their Second Amended Consolidated Class Action Complaint ("SACC") in this lawsuit on November 24, 2015 against Defendants NVIDIA Corporation ("NVIDIA"), Gigabyte Global Business Corporation d/b/a Giga-Byte Technology Co. Ltd., G.B.T. Inc. (together with Gigabyte Global Business Corporation, "Gigabyte"), ASUS Computer International ("ASUS"), and EVGA Corporation ("EVGA") (collectively, "Defendants"). As Plaintiffs allege in the operative Complaint, and explained in the papers filed in support of their motion for preliminary approval of this settlement, the GTX 970 series of graphic processing units were designed by NVIDIA and offered for sale by companies such as NVIDIA, Gigabyte, ASUS, and EVGA through various retail outlets (collectively the "GTX 970 devices"). According to Plaintiffs, Defendants misrepresented three aspects of the GTX 970 devices' design and performance in their marketing, advertising, and product labeling: (i) that the GTX 970 purportedly operates with a full 4 GB of video RAM, when in fact it has 3.5 GB of video RAM and a decoupled 0.5 GB spillover segment that operates as slow as one-seventh the speed of the 3.5 GB pool; (ii) that the GTX 970 purportedly has 64 render output processors, when in fact it only has 56; and (iii) that the GTX 970 purportedly has an L2 cache capacity of 2 MB, when in fact it is only 1.75 MB. *See* SACC ¶ 4. Based on such allegations, the SACC asserts federal and state law causes of action for breach of warranty and violation of state consumer protection laws, seeking

primarily both equitable relief and damages. Declaration of Alan M. Mansfield in Support of Plaintiffs' Motion for Entry of Order Finally Approving Class Action Settlement ("Mansfield Decl."), ¶¶ 6-7.

A copy of the executed Settlement Agreement is attached as Exhibit 1 to the July 25, 2016 Declaration of L. Timothy Fisher filed in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Provisional Certification of Nationwide Settlement Class, and Approval of Procedure for and Form of Notice (Dkt. No. 130-2). The settlement documented in the Settlement Agreement provides Settlement Class Members the ability to submit a claim for $30.00 for each GTX 970 device they purchased or acquired, with no limit on the number of claims they could individually submit based on the number of GTX 970 units they purchased at retail (subject to audit and verification). Nor is there a limit on the overall number timely and valid claims that could be approved and paid to by potential Settlement Class Members.

Class Counsel also negotiated a settlement that was designed to make submitting such claims as easy as reasonably practicable, subject to verification. Based on the extensive efforts of Class Counsel and Defendants, the Court-appointed Settlement Administrator KCC, sent individual notice by either U.S. mail or e-mail to 485,227 potential Settlement Class Members. *See* Declaration of Phil Cooper of KCC ("Cooper Decl.") at ¶¶21-22. These individuals were only required to provide a pre-assigned verification code through the settlement website to submit a claim. Mansfield Decl., ¶ 8. Settlement Class Members who did not receive direct notice would only be required to submit a unique ID number for their GTX 970 device. The settlement website fully explains how to access such numbers in various ways. *See* https://www.gtx970settlement.com/Faqs.aspx#q10.

In filing this lawsuit, the Plaintiffs' underlying goals were to: (1) confirm and quantify the loss caused by Defendants' misrepresentations, as discussed above, and (2) provide members of the proposed Settlement Class the ability to receive reimbursement of a portion of their alleged losses. As set forth in paragraph 4 of the July 25, 2016 Fisher Decl., while the claim of actual (or any) damages would be hotly contested by Defendants for the reasons set forth in their Motion to Dismiss the SACC (Dkt. No. 114-1), Plaintiffs believe provable class-wide damages would be in

the range of $43.75 to $50.00 for each GTX 970 device. Thus a $30.00 cash payment to each Settlement Class Member for each GTX 970 device they purchased represents a significant percentage recovery on these claims.

While the subject of a separate motion, the fee and expense provisions of the settlement were not negotiated until after the principal terms and conditions of the settlement benefitting the Settlement Class Members had been agreed to by the parties, with the active assistance and involvement of The Hon. Edward A. Infante (Ret.), so as to ensure there was no appearance of any potential conflict between the negotiations over the principal terms of the settlement benefitting the Settlement Class and any fee negotiations. Mansfield Decl. at ¶¶ 9-10. By doing so, the parties avoided any potential claim that some conflict of interest arises when both negotiations occur at the same time. *See* Manual for Complex Litigation 4th § 21.7 ("Separate negotiation of the class settlement before an agreement on fees is generally preferable."); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 334-35 (3rd Cir. 1998) (affirming final approval of class settlement and fee award where parties negotiated settlement agreement prior to negotiating attorneys' fees).

III. THE SETTLEMENT NOTICE PROGRAM HAS BEEN COMPLETED AND THE INITIAL CLASS MEMBER RESPONSE HAS BEEN POSITIVE

On August 24, 2016, the Court held a hearing on the motion for preliminary settlement approval. The Court thereafter granted preliminary approval of the settlement and provisionally certified the Settlement Class under Federal Rule of Civil Procedure 23(b)(3). *See* 8/26/16 Order (Dkt. No. 137). The Court at that time also approved the parties' proposed notice plan to the Settlement Class, and approved KCC as the claims administrator to supervise and administer the notice plan and the claims administration process.

As detailed in the Cooper Declaration at ¶¶3, and 20-25, in addition to the public official CAFA notice, the short form class notice was mailed or e-mailed directly to 485,227 Settlement Class Members identified by both Defendants and through records subpoenaed by Class Counsel from the primary retailers of the GTX 970 devices, including Amazon, Best Buy, Fry's, PC Nation, Rakuten, and NewEgg. A summary notice was also published in *Wired* Magazine, and KCC ran an

Internet banner and campaign with approximately 130 million impressions. In addition, KCC also set up the settlement website and a toll-free telephone number to answer Settlement Class Member inquiries. That notice program has now been completed. *Id.*

The parties can estimate the exact number of Settlement Class Members. While the parties know over 700,000 GTX 970 devices were sold, based on the claims to date a significant number of Settlement Class Members purchased more than one GTX 970 device, with the average claim so far being almost 2 units per member. *See* Cooper Decl., ¶ 27. Assuming there are approximately 600,000 unique Settlement Class Members (which is conservative), the fact class notice was individually disseminated to almost 500,000 individuals means that over 80% of the Settlement Class Members would have received direct mailed notice of this settlement. This does not include the 361,711 click throughs to the settlement website resulting from the banner ad campaign, or notice from the *Wired* publication. *Id.* at ¶23. Courts have approved notice programs reaching a comparable percentage of class members. *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 945-46 (9th Cir. 2005) (affirming approval of notice plan based on rental records using both regular and email); *Wilson v. Airborne, Inc.*, 2008 WL 3854963, at * 4 (C.D. Cal., Aug. 13, 2008) (approving program reaching 80% of class members); *Federal Judicial Center Judges' Class Action Notice and Claims Process Checklist*, at www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf ("A high reach, e.g. between 70-95% can often reasonably be reached by a notice campaign"). The notice plan approved and implemented here by KCC was outstanding and appropriate. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (notice need not actually reach every single class member; instead, the notice need only be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections).

So far there have been a significant number of inquiries to both KCC and Class Counsel (over 353 phone calls and 270,217 visits to the settlement website), but only two requests for exclusion have been received to date. Cooper Decl., ¶¶ 24-28. There has been only one objection filed with the Court (discussed *infra*). *Id.* And the communications Class Counsel have received

/ / /

from Settlement Class Members directly have been overwhelmingly positive. Mansfield Decl., ¶ 23.

The notice program and simplified claims process so far has worked as intended. With still five weeks prior to the November 30, 2016 claims deadline, the response of Settlement Class Members has been significant. As of October 23, 2016, Settlement Class Members have already submitted 54,787 claims for 83,762 GTX 970 devices. Cooper Decl. at ¶ 27.[1] While the notice program has been recently completed, the lack of significant opposition to the settlement from persons with a vested interest in this matter, combined with the extensive reach of the notice program, is an important factor for the Court to consider in deciding whether to approve this settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

IV. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS ARE SATISFIED HERE

Under Federal Rule of Civil Procedure 23(e), the Court must approve all settlement agreements that will bind absent class members. *See Briggs v. United States*, 2010 WL 1759457, at *3 (N.D. Cal., Apr. 30, 2010). Final approval involves an assessment of whether the class action settlement, as a whole, is fundamentally fair, adequate, and reasonable. *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004)

In granting final approval of a class action settlement and making such a determination, the Court's inquiry is to determine that the settlement: (a) was not the product of fraud or collusion, and (b) is fair, adequate, and reasonable. The Court must evaluate the settlement terms as a whole, rather than in terms of specific components or terms to accept or reject, in determining whether the settlement is fair, reasonable, and adequate, such that the settlement stands or falls in its entirety. *Officers for Justice v. Civil Service Comm.*, 688 F.2d 615, 625, 628 (9th Cir. 1982); *see also, Hanlon, supra*, 150 F.3d at 1026. The parties' settlement of disputed claims are highly favored by

[1] As such claims are still coming in, they are subject to later audit and verification once the claims period is over; however, a significant number of claims have already been verified. Cooper Decl. at ¶27. Plaintiffs will update the Court on the responses they receive from Settlement Class Members and the claims received in the reply brief that will be filed closer to the final approval hearing.

the federal courts, and there is a particularly strong judicial policy favoring settlement of class litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) ("there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits").

The Ninth Circuit in *Officers for Justice* endorsed the trial court's examination of the following factors in determining whether a class action settlement is fair, reasonable, and adequate: (1) the experience and views of counsel; (2) the strengths and weaknesses of the plaintiff's case and the range of recovery when compared against the value of the settlement; (3) the risk of obtaining liability and maintaining class action status through trial and appeals; (4) the complexity, expense, and duration of litigation; (5) the reaction of class members to the proposed settlement, including the substance and amount of any opposition to the settlement; and (6) the extent of discovery completed and stage of proceedings at which the settlement was achieved. *Officers for Justice*, *supra*, 688 F.2d at 625; *Torrisi v. Tuscon Electric Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). The relative importance assigned to each factor "varies depending on the nature of the case." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

In determining the adequacy and reasonableness of a proposed settlement, a settlement is presumed fair where, as here, the settlement is reached through arm's length bargaining, where the factual investigation is sufficient to allow counsel and the Court to act intelligently, where counsel is experienced in similar litigation, and where the percentage of objectors is small. *Officers for Justice*, *supra*, 688 F.2d at 625; *In re Consol. Pinnacle West Secs. Litig.*, 51 F.3d 194, 197 n.6 (9th Cir. 1995). Such a presumption is properly invoked here. The economic value of the settlement, considered as a function of the bargaining and litigation context, shows that this settlement is a fair, reasonable, and adequate compromise of the claims in the SACC and should be finally approved.

V. EVALUATION OF THE SETTLEMENT TERMS UNDER THE *OFFICERS FOR JUSTICE* FACTORS DEMONSTRATES IT IS FAIR, REASONABLE AND ADEQUATE

A. This Settlement was the Product of Serious, Informed Litigation and Non-Collusive Negotiations

Part of the analysis of the reasonableness of a class action settlement involves an inquiry

into whether the settlement in question was achieved through arm's-length negotiations by experienced counsel. *See, e.g., In re McDonnell Douglas Equipment Leasing Sec. Litig.*, 838 F.Supp. 729, 737 (S.D.N.Y. 1993) (observing that courts "have consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or overreaching") (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)). As set forth in ¶ 21 of the Mansfield Decl., Class Counsel are experienced in class action litigation (see their firm resumes previously submitted to the Court). They believe these terms are reasonable, particularly considering, *inter alia*, the risks and delays of continued litigation and the ever-changing technology involved. The benefits made available to the members of the Settlement Class as a whole are fair, reasonable, and adequate compensation for such claims based on the particular facts and circumstances of this case. *See Hanlon, supra*, 150 F.3d at 1027 ("[T]he question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.")

Between June 2015 and March 2016, Plaintiffs and Defendants, through their respective counsel, participated in a number of settlement discussions in which the factual bases of the litigation and the outlines and details of a settlement were discussed. As part of this process, counsel for the parties engaged in extensive negotiations and the informal exchange of relevant information. These discussions included in-person meetings in July and October 2015 and March, 2016, and numerous telephonic discussions occurring on a weekly basis. This effort culminated with an in-person mediation with Judge Infante in San Francisco in April 2016, which resulted in another series of telephone calls, negotiations, and ultimately a suggested mediator recommendation. The parties agreed on the parameters of a settlement in late April 2016. Through this process, counsel for both sides were made familiar with the claims and contentions of the Plaintiffs and the responses and defenses of Defendants. The negotiations between the parties were thus well-informed and conducted in a manner that ensured such negotiations were arms'-length and non-collusive. Mansfield Decl. at ¶¶ 11-14, 19-20.

The parties continued to engage in protracted negotiations between April and July 2016 over the precise language of the Settlement Agreement and accompanying exhibits. This process

in itself raised numerous issues that required additional consultation and effort, even after the settlement terms were originally agreed to in principle. Mansfield Decl., ¶ 13. While the additional issues raised by both Plaintiffs and Defendants during the course of that negotiation process were ultimately resolved, these facts show that the entire settlement negotiation process was conducted at arm's-length and in a non-collusive manner. These hard-fought negotiations culminated in the execution and filing of a Settlement Agreement and the accompanying exhibits with the Court on July 25, 2016. Even after the settlement was preliminarily approved the parties continued to work on the precise workings of the settlement website, how the methods of verification would be described, and even the color of the banner ads. *Id.* Where, as here, experienced counsel view this settlement favorably, and the evidence shows that the settlement was negotiated at arm's-length and in an adversarial manner, this factor weighs significantly in favor of granting final approval to the settlement. The Ninth Circuit favors deference to the "private consensual decision of the settling parties," particularly where the parties are represented by experienced counsel and negotiation has been facilitated by a neutral party, such as a private mediator and a magistrate judge. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

B. <u>The Views of Experienced Counsel Support Approving this Settlement</u>

In evaluating a settlement, another factor the Court considers is the judgment of experienced counsel for the parties. When the counsel recommending approval of the settlement are experienced, significant weight may be given to their opinion. *Kirkorian v. Borelli*, 695 F.Supp. 446, 451 (N.D. Cal. 1988); *see also In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 1992 WL 226321, * 2 (C.D. Cal. June 10, 1992) (finding counsel's belief that the proposed settlement represented the most beneficial result for class a significant factor in approving settlement).

Counsel for Plaintiffs and Defendants, guided by the material assistance and recommendation of Judge Infante, support the approval of the settlement. Where, as here, the settlement was negotiated by experienced counsel and facilitated by an accomplished mediator, "great weight" should be accorded to the recommendation of counsel, who are most closely

acquainted with the facts of the underlying litigation. *DIRECTV, supra*, 221 F.R.D. at 528; *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F.Supp. 1379, 1392 (D. Ariz. 1989) (*aff'd sub nom. Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992)) ("Counsels' opinions warrant great weight both because of their considerable familiarity with this litigation and because of their extensive experience in similar actions.").

As indicated in the Mansfield Decl., ¶ 21, and Exhibits previously submitted to the Court, the Settlement Class has been represented throughout the course of this litigation by counsel with years of experience in litigating consumer class actions and who have negotiated numerous class settlements that have been approved by courts throughout the United States, including with NVIDIA. Based on numerous factors, such as necessity of a settlement to provide partial compensation to Settlement Class Members relatively early on and the uncertainty of the outcome at trial against Defendants, as compared to the direct and significant benefits of the settlement made available, it was the informed conclusion of experienced counsel that the proposed settlement is fair, reasonable, and adequate, and warrants final Court approval.

C. The Settlement Terms are Fair, Reasonable, and Adequate Considering the Relevant Risk Factors

1. The Strength of Plaintiffs' Claims and the Range of Possible Recovery

Both sides faced risks in proceeding to litigate this case, and the settlement is fair to the Settlement Class Members in light of these risks. *See* NEWBERG ON CLASS ACTIONS § 11:50 (4th ed. 2002) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."); *DIRECTV, supra*, 221 F.R.D. at 526. While Class Counsel believed they had a strong case, the case was certainly not without risk in terms of the range of possible recovery, assuming liability could be established. The range of recovery went from zero if the Court or the jurors accepted Defendants' arguments, to an amount that could be based on the pricing of the GTX 970 devices as compared the value and performance provided by other devices, the market pricing of the products during the entirety of the class period, and the GTX 970's reduction in performance by 12.5%. Class Counsel estimate such damages to be in the range of $43.75 to $50.00. 10/25/16 Fisher Decl. ¶ 74. The

amount the parties ultimately agreed to is a reasonable compromise of such claims.

The standard of measuring a settlement "is not how much money a company spends on purported benefits, but the value of those benefits to the class." *In re TD Ameritrade Accountholder Litig*., 266 F.R.D. 418, 423 (N.D. Cal. 2009) (*citing O'Keefe v. Mercedes-Benz United States, LLC*, 214 F.R.D. 266, 304 (M.D. Pa. 2003). This is the relevant question for purposes of evaluating the reasonableness of this settlement as a whole, since neither the parties nor the Court can compel consumers to submit claims, even where they make it as easy as possible to do so. Thus, in evaluating a settlement (and the reasonableness of the fees requested), the Court looks at the potential recovery made available to both the individuals and the entire class, rather than the amount claimed. *Cf., Williams v. MGM-Pathe Communications*, 129 F.3d 1026, 1027 (9th Cir. 1997). In addition, the proposed class notice fully advises Settlement Class Members of their alternatives so that they can make an informed decision on whether to accept the settlement or to opt-out and pursue their own claims. Although only two opt-out requests have been submitted to date, Settlement Class Members have the right to exclude themselves by November 8, 2016 and pursue individual claims if they believe they are entitled to a greater recovery.[2]

2. Complexity of the Litigation

While Class Counsel believed they would be successful in this litigation, the Settlement Class nevertheless faced many risks in proving liability and damages. While they believe they could ultimately establish the GTX970 devices were not accurately represented in terms of their real-world performance, as described above, this issue is far from certain and would be vigorously contested by Defendants. *See* Mansfield Decl., ¶¶ 15-18. In attempting to establish liability, Class Counsel faced the risks that there would be significant disputes whether the GTX 970 devices' characteristics were compliant with applicable industry standards, which would likely entail competing viewpoints expressed by the parties' technology experts. In addition, although the

[2] In terms of the presence of governmental participants, no action has been pursued by any federal or state agency. However, in response to the CAFA notice Class Counsel received a communication from representatives of several state Attorneys General offices to answer questions they have about the settlement. Mansfield Decl. at ¶ 23. As they made clear, their inquiry or involvement (or lack thereof) is not to be viewed as either an endorsement or indictment of this settlement.

Court has certified a Settlement Class as part of the preliminary approval order, it has not certified a litigation class. Numerous decisions both for and against class certification and several matters pending before the Ninth Circuit illustrate the risks to Plaintiffs and the Settlement Class of proceeding to litigate certification issues on behalf of a nationwide class. *See e.g., Brazil v. Dole Food LLC*, 2014 WL 5794873 (N.D. Cal., Nov. 6, 2014, *aff'd in part*, 9th Cir. No. 14-17480 filed Sept. 30, 2016) (not for publication)); *see also, In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919 (C.D. Cal. 2015) (*pet. granted, Briseno v. ConAgra Foods, Inc.*, 9th Cir. Case No. 0:15-cv-55727) (granting in part and denying in part class certification). Thus, while Plaintiffs continue to believe the claims should be certified, the risk of non-certification is plain and underscores the benefits to the Settlement Class. Given the "risk that the class would not be certified … actual recovery through settlement confers substantial benefits on the class that outweighs the potential recovery that could have been obtained through full adjudication." *Gardner v. GC Servs., LP*, 2012 WL 1119534, at * 4 (S.D. Cal., Apr. 2, 2012).[3] And even assuming the Court granted class certification, absent a settlement, Settlement Class Members faced risks of non-recovery and, even in the best case, long delays in obtaining meaningful monetary recovery beyond what is being offered in this settlement. This settlement is superior to another possible result – little or no recovery for Settlement Class Members, or a recovery not realized for several years.

D. The Response of the Class Members Has Been Overwhelmingly Positive

As set forth in the Cooper Decl. at ¶¶ 24-27, over 270,000 potential claimants have either called the KCC toll-free telephone line with questions or visited the settlement website. Settlement Class Members have submitted claims for close to 84,000 GTX 970 devices, valued at over $2.5 million with another month to submit claims. In addition, as set forth in the accompanying fee application, Class Counsel have communicated with numerous Settlement Class Members in response to the class notice, and the settlement has received widespread attention on-line. The majority of Settlement Class Members who have contacted us have expressed approval of this

[3] Under the principles set forth in *Hanlon, supra*, the Court should reaffirm its initial determination on preliminary approval based on the evidence presented that certification of the Settlement Class for settlement purposes is proper. If any objections are raised as to this issue (none have been raised so far), we will address the issue on reply.

settlement. Mansfield Decl., ¶ 23. In comparison, as of the date of this Motion, only two potential Settlement Class Members – or less than 0.0004 percent of the potential Settlement Class Members who received direct mailed notice from KCC – have opted out of the Settlement, and only one objection has been filed. Cooper Decl., ¶¶ 28-29. While objections are due by November 8, 2016, the lack of significant opposition to the settlement militates in favor of finally approving the settlement. *Marshall v. Holiday Magic, Inc*., 550 F.2d 1173, 1178 (9th Cir. 1977) (objection by only 1% of class supports approval); *Churchill Village, LLC v. GE*, 361 F.3d 566, 577 (9th Cir. 2003) (500 opt outs and 45 objections out of 90,000 class members indicates support for settlement). A small number of objections "strongly supports the fairness of the settlement" and should not stand in the way of final approval. *Shames v. Hertz Corp*., 2012 WL 5392159, at * 8 (S.D. Cal., Nov. 5, 2012) ("The small number of objections and class members who opted out of the settlement, when compared to the large number of class members, favors approval.").

To date, only one objection has been filed with the Court (Dkt. 138), by Devin Kearns. As this objection has just been received, it is still in the process of being verified.[4] While Dr. Kearns states he is "grateful to the plaintiffs' attorneys for undertaking this litigation effort," he suggests that the settlement is inadequate because every Settlement Cass Member should, according to Dr. Kearns, receive either a new graphics card free of charge, or a refund of the entire cost of the GTX 970 device. Respectfully, Dr. Kearns' objection does not withstand scrutiny.

First, as he later notes, there is no "replacement card" available (the GTX 980 is a significant upgrade not only in terms of design but also other features, so that is not a viable replacement request). As far as a refund, Dr. Kearns does not indicate when he purchased this device, and if he made a formal refund request to either EVGA or the retailer where he purchased his GTX 970 device and whether he did so early on after purchase or after receiving notice of this settlement.

/ / /

[4] KCC's records show notice was sent to Devin Kearns, but his address is in Long Beach, California, not Vernon, Connecticut as stated on his filed letter. Plaintiffs reserve the right to challenge the validity of this objection based on further investigation.

Second, under the law, a party is not entitled to keep the device *and* obtain either a full refund or a new device. Parties must elect *either* rescission and return the device or make a claim for damages. And while rescission of all of the transactions was theoretically a possible remedy for some Settlement Class Members, as this Court has previously held, typically that is not an available remedy absent evidence of fraudulent representations of fact. *See, e.g., Oracle Corp. v. Warranty Corp. of America*, 2005 WL 658976, *1-2 (N.D. Cal. Mar. 22, 2005) (Hamilton, J.) (granting summary judgment against rescission claim).

Third, even if such a remedy was warranted under the law and the facts (and Plaintiffs did not determine there was fraudulent intent), such a remedy would not be provided by Defendants as part of a settlement, since a full refund is *the most* Plaintiffs could likely obtain in this litigation. Such relief would not be available absent Plaintiffs prevailing on the pending pleadings motions, obtaining a nationwide class certification order, engaging in significant discovery, prevailing against summary judgment, and winning a full trial and possibly an appeal, with all the attendant risks and delays. Even if this were realistic, such relief would only be available least four to five years down the road. Plaintiffs do not assert the GTX 970 devices do not perform at all; rather, Plaintiffs allege that device does not perform as represented. SACC ¶ 4. Thus, if Dr. Kearns believes he is entitled to full rescission, he could proceed with that request by requesting exclusion from this settlement and attempting to individually obtain such relief. However, the Ninth Circuit has not held that for a settlement to be reasonable it must represent a 100% recovery of all possible losses, which is what Dr. Kearns requests; if anything, they have held the opposite. Rather, a settlement is to be considered fair and reasonable in light of the risks of the litigation compared to the benefits conferred. *See Hanlon, supra*, 150 F.3d at 1027; *Rodriguez,, supra*, 563 F.3d at 965 ("In reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlements by considering the likelihood of a plaintiff's or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value.").

E. The Case was Sufficiently Advanced That Plaintiffs' Counsel Could Make an Informed Judgment Regarding the Merits of the Settlement

The final *Officers for Justice* factor in the context of approving a class action settlement is

the stage of the proceedings at which the settlement was reached. If the parties have sufficient information sharing and cooperation in providing access to necessary data, the settlement may be deemed fair, reasonable, and adequate. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). It is well-established that parties can acquire sufficient information in the absence of formal discovery and based on informal means of acquiring information. *Id.* ("In the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement." (*quoting Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998))).

Here, the parties have briefed the issues raised by Defendants as to the sufficiency of the SACC to have an understanding of the strengths and weaknesses of the legal theories. In addition to the significant publicly available information about the design of the GTX 970 devices on both sides of the debate, in connection with these settlement discussions NVIDIA disclosed significant information regarding the design, testing, and operation of the GTX 970 devices. NVIDIA also supplied Class Counsel with significant evidentiary information and provided counsel the opportunity to conduct interviews with key NVIDIA employees. Realistic damage assessments from both sides were based on information available about comparable and competitive products available on the market, average market prices for both original and used GTX 970 devices, and retail sales data. Class Counsel had all of this information prior to and during the course of negotiating the settlement. Mansfield Decl., ¶¶ 11-18. With the benefit of this information, Class Counsel are confident in their assessment of the merits of the case and the events that gave rise to it. Class Counsel therefore possessed sufficient background and information necessary to evaluate the fairness, adequacy, and reasonableness of the proposed settlement. *See Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 460.

Based on the substantial factual information known to both parties during the course of the litigation and the settlement negotiations, all counsel were in a position at the time the settlement was reached to understand the strengths and weaknesses of the action such that they could make an intelligent and informed decision regarding the reasonableness of the settlement terms. This final factor weighs in favor of approving this settlement. *Officers for Justice, supra*, 688 F.2d at 625.

VI. CONCLUSION

Based on a weighing of all relevant factors, the settlement terms reflected in the Settlement Agreement as a whole are reasonable. Plaintiffs respectfully request the Court finally approve this class action settlement.

Dated: October 25, 2016

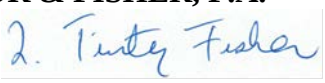
Respectfully submitted,

WHATLEY KALLAS LLP

By: */s/ Alan M. Mansfield*

Alan M. Mansfield (SBN 125998)
amansfield@whatleykallas.com
1 Sansome Street, 35th Fl., PMB # 131
San Francisco, CA 94104
Tel: (415) 860-2503
Fax: (888) 331-9633

BURSOR & FISHER, P.A.

By: 

L. Timothy Fisher (SBN 191626)
ltfisher@bursor.com
Neal J. Deckant (admitted *pro hac vice*)
ndeckant@bursor.com
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Tel: (925) 300-4455
Fax: (925) 407-2700

Class Counsel