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13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN JOSE DIVISION

18 ERIC ROSS and BRADLEY S. HURETH,
 19 Plaintiffs,
 20 v.
 21 TREX COMPANY, INC., a Delaware
 corporation,
 22 Defendant.

Case No. 5:09-CV-00670-JF

**NOTICE OF MOTION AND MOTION FOR
 FINAL APPROVAL OF THE CLASS
 ACTION SETTLEMENT AND
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF**

DATE: October 30, 2009
 TIME: 9:00 a.m.
 COURTROOM: 3, 5th Floor
 JUDGE: Hon. Jeremy Fogel

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on October 30, 2009, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Jeremy Fogel of the Northern District of California, San Jose Division, located at 280 South First Street, San Jose, CA 95113-3099, Plaintiffs Eric Ross and Bradley S. Hureth (“Plaintiffs”), on behalf of themselves and all others similarly situated, by and through their undersigned counsel, will and hereby do request that this Court enter an Order Granting Final Approval of the Settlement.

This Motion is supported by Plaintiffs’ accompanying Memorandum of Points and Authorities, the supporting papers and exhibits filed herewith, the record in this case, and any oral argument the Court allows.

Defendant Trex Company, Inc. does not object to the motion in the context of the parties’ proposed settlement.

1 **I. INTRODUCTION**

2 Plaintiffs respectfully request that this Court grant final approval of the proposed
3 Settlement Agreement, submitted previously with Plaintiffs' motion for preliminary approval.
4 (Docket No. 32, Ex. A; *see* amended Agreement at Docket No. 78, Ex. A.) The Settlement
5 resolves all claims in this matter against Defendant Trex Company, Inc.

6 Plaintiffs Eric Ross and Bradley S. Hureth brought this action on behalf of themselves and
7 all others similarly situated alleging a defect in the design and manufacture of Trex decking and
8 railing products ("Trex Products"). Specifically, Plaintiffs allege that Trex Products are
9 inherently defective in that they experience "Surface Flaking" shortly after being installed and
10 well before the expiration of their warranted life, regardless of whether the product is properly
11 installed and maintained. The Settlement resolves all claims in this matter against Defendant
12 Trex Company, Inc. regarding "Surface Flaking." Surface Flaking, as defined by the Settlement
13 Agreement, means "any visibly noticeable surface flaking, crumbling, delamination, and/or
14 peeling away of the surface of Trex Product caused by a design or manufacturing defect."
15 (Docket No. 78, Ex. A, § A, ¶ 31.)

16 Starting in May 2007, when Plaintiffs counsel first began to investigate this problem, the
17 parties engaged in an extensive investigation and expert evaluation of Plaintiffs' claims. Through
18 informal discovery the parties exchanged pertinent information that would have been available
19 under usual discovery procedures. This information included product formulation, expert reports,
20 warranty, and claims information. Deck inspections and testing of Trex Product were also
21 conducted.

22 Meaningful settlement discussions occurred from June 2008 through February 9, 2009,
23 when the parties entered into a Memorandum of Understanding ("MOU") on the material terms
24 of the Settlement, except for attorneys' fees and costs. The discussions culminated in the
25 Settlement Agreement entered on April 6, 2009.

1 As described below, the Settlement endeavors to provide relief to Class Members who
2 have experienced Surface Flaking, including relief not available under the warranty.¹
3 Specifically, the Settlement ensures that those who submit valid claims will receive replacement
4 product or a cash equivalent at retail price for any defective Trex Product (i.e., Trex Product
5 exhibiting the Surface Flaking defect). For those with more than 50% of the Trex decking boards
6 exhibiting the Surface Flaking defect, Trex will replace all of the Trex decking boards or provide
7 a cash equivalent at retail price. This enhanced replacement/reimbursement scheme is not
8 available under the warranty. The Settlement also goes beyond the warranty terms by providing
9 for a partial labor stipend as well as free shipping for all replacement product. Finally, the
10 Settlement establishes an enforcement scheme to ensure Trex complies with its terms by
11 implementing a neutral appeals process for any denied claims. Equally important, it avoids the
12 cost and risks of ongoing litigation, including the potential to lose claims, damages types, and
13 even portions of the Settlement Class.

14 The proposed Settlement is informed by extensive investigation, expert evaluation of
15 affected decks and product samples to assess the scope of the alleged defect, input from affected
16 Class Members, over a thousand pages of pertinent information obtained from Trex without the
17 need for time-consuming and costly discovery procedures, over nine months of sustained and
18 contentious negotiations, and finally by counsels' experience in other composite decking class
19 action cases. After assessing this information, and based on their extensive collective experience,
20 the undersigned counsel all reached the same conclusion – that the proposed Settlement conferred
21 immediate and substantial benefits on the class, and that the risks and disadvantages of litigating

22 ¹ As the Court has noted, Trex's twenty-five year warranty on all its product, including
23 that at issue, limits recovery as follows: "The warranty shall not cover and Trex shall not be
24 responsible for costs and expenses incurred with respect to the removal of defective Trex
25 products or the installation of replacement materials, including but not limited to labor or freight."
26 The warranty further states: "UNDER NO CIRCUMSTANCES WILL TREX BE LIABLE FOR
27 SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES... AND TREX'S LIABILITY
28 WITH RESPECT TO DEFECTIVE PRODUCTS SHALL IN NO EVENT EXCEED THE
REPLACEMENT OF SUCH PRODUCTS OR REFUND OF THE PURCHASE PRICE."
(Docket No. 60, Ex. A.)

1 further in the hopes of recovering additional labor costs outweighed the potential benefits. As the
2 Court found in its Order granting preliminary approval, the benefits provided “represent value
3 gained through the Settlement.” (Docket No. 81 at 7.)

4 With this Motion, Plaintiffs seek final approval of the Settlement Agreement. As
5 discussed in detail below, the proposed Settlement satisfies all criteria for final settlement
6 approval under Ninth Circuit law. Trex does not oppose this Motion in the context of this
7 Settlement.

8 **II. STATEMENT OF THE FACTS**

9 **A. Factual Background**

10 Plaintiffs brought this action against Trex as a consumer protection and breach of
11 warranty class action on behalf of a proposed California and Nationwide Class. Plaintiffs allege
12 that Trex Product is defective in that it begins to exhibit Surface Flaking well before the end of its
13 warranted life. Further, Plaintiffs allege that the Surface Flaking occurs regardless of whether the
14 Trex Product is properly installed and maintained, and is thus a defect inherent in the Trex
15 Product.

16 Unlike traditional wood decking, Trex Product is a plastic and wood composite and is
17 specifically marketed to be more durable than traditional wood in outdoor conditions without
18 additional treatment. Based on the nature of the Trex Product’s deterioration, the reports of
19 Surface Flaking occurring in varying climates, and the fact that Surface Flaking can occur even
20 when the Trex Product is properly installed and maintained, Plaintiffs allege that the failure of the
21 Trex Product is due to an inherent defect. Plaintiffs have retained a wood science expert who
22 confirmed the Surface Flaking defect. Moreover, Trex acknowledged the existence of a Surface
23 Flaking defect in certain Trex Product manufactured in its Fernley, Nevada plant in its 2007
24 annual report.

25 As a result of Trex’s conduct, Plaintiffs allege that thousands of homeowners in California
26 and nationwide, including the class representatives, own defective Trex Product. The class has
27 suffered ascertainable losses including not only the cost of the Trex Product, but also
28 unanticipated labor expenses to replace the Trex Product.

1 Both Plaintiffs and Trex are ably represented by counsel who are extremely experienced
2 in consumer class action litigation. Their investigation was thorough and the settlement
3 negotiations were hard-fought and conducted at arms'-length over a period of nine months, from
4 June 2008 through February 9, 2009. Plaintiffs' counsel zealously sought the appropriate
5 compensation for Plaintiffs and the class in an effort to avoid the protracted timetable and
6 uncertainties of litigation.

7 **B. Procedural History**

8 The Complaint was filed in the Superior Court of California, County of Santa Cruz on
9 September 30, 2008 alleging claims related to mold spotting and Surface Flaking. (Declaration of
10 Jonathan D. Selbin in Support of Plaintiffs' Motion for Final Settlement Approval ("Selbin
11 Decl."), at ¶ 8.) The Complaint was amended on January 6, 2009. Plaintiffs amended the
12 Complaint to temporarily remove the mold claims since this Settlement only resolves the Surface
13 Flaking claims. (*Id.*) The case was removed to this Court on February 13, 2009. (*Id.*) The
14 parties signed an MOU on February 9, 2009, outlining the terms of the Settlement other than
15 attorneys' fees and costs. (*Id.* at ¶ 20.) The proposed Settlement Agreement resolves all claims
16 related to Surface Flaking that were asserted in the above-captioned case on behalf of the
17 proposed California Class and the proposed Nationwide Class, who collectively include all
18 owners of Trex Product in the United States manufactured at the Fernley, Nevada plant between
19 January 1, 2002 and December 31, 2007.

20 **C. Plaintiffs Thoroughly Investigated The Case**

21 Counsel for Plaintiffs began investigating complaints related to Trex decking in July 2007
22 after they were contacted by a homeowner whose Trex Product was allegedly defective. (Selbin
23 Decl., at ¶ 9.) After further investigation, in May 2008, Plaintiffs' counsel contacted Trex by
24 letter regarding the mold and Surface Flaking issues. (*Id.* at ¶ 10.) On June 9, 2008, Plaintiffs'
25 counsel met with Trex representatives in person in Washington, D.C. to exchange pertinent
26 information regarding the alleged mold defect and the alleged Surface Flaking defect. (*Id.*) At
27 that time, they agreed to continue exchanging information and working cooperatively toward a
28 resolution of both claims. (*Id.*) Counsel for Plaintiffs proposed, and Trex agreed to, a tolling

1 agreement which obviated the need for filing a Complaint, and preserved class members' rights
2 during the pendency of the settlement discussions. (*Id.*)

3 A related case, *Okano v. Trex Company, Inc.*, Case No. 3:09-cv-0187-WHA, alleging the
4 Surface Flaking and mold defects was transferred on April 14, 2009, from the United States
5 District Court, Western District of Washington, to the Northern District of California, San
6 Francisco Division and was subsequently reassigned to this Court by a Related Case Order.
7 (Docket No. 30.)

8 Before the settlement discussions began, and during the entire course of the discussions,
9 Plaintiffs' counsel expended significant time, effort and resources developing their case regarding
10 both mold spotting and Surface Flaking. (Selbin Decl., at ¶ 11.) Plaintiffs' expert conducted
11 multiple deck inspections with Trex's research and development employees in attendance. In
12 addition to substantial testing regarding the nature and cause of mold spotting, experts retained by
13 Plaintiffs' counsel conducted bulk sampling of Trex Product that exhibited Surface Flaking to
14 determine the nature and cause of the alleged Surface Flaking defect. (*Id.* at ¶ 11.) Plaintiffs also
15 discussed these issues with a leading wood-plastic composite materials expert. (Declaration of
16 Richard S. Lewis, Docket No. 35 at ¶ 8.) At another in-person meeting of counsel for the parties
17 on August 22, 2008, Plaintiffs' wood science expert met with Trex's research and development
18 staff, at which time they exchanged significant technical information. (Selbin Decl. at ¶ 12.)

19 In addition to retaining and utilizing two experts during the informal discovery process,
20 Plaintiffs obtained a great deal of proprietary information from Trex. Over one thousand pages of
21 documents were obtained from Trex, including product formula information, laboratory testing
22 results, studies conducted by Trex regarding both the alleged mold spotting and alleged Surface
23 Flaking, Trex's research and development information, marketing materials, internal documents
24 regarding complaints and warranty claims related to both mold spotting and Surface Flaking, and
25 insurance information. (Selbin Decl., at ¶ 13.) This information was instrumental in informing
26 Plaintiffs' counsel of the strengths and weaknesses of the Surface Flaking claims. (*Id.*)

27 Also, as part of their investigation, Plaintiffs' counsel has been in contact with
28 approximately 450 owners of Trex Product, a large percentage of whom have complained of

1 Surface Flaking, and who provided information regarding their experience with Trex Product.
2 (Selbin Decl., ¶ 14.)

3 All the information obtained from Trex, Plaintiffs' experts, and Class Members was used
4 in the calculation of damages and in the formulation of the MOU and Settlement Agreement.

5 **D. Settlement Negotiations**

6 The settlement negotiations in this case were intense, substantive, and adversarial. (Selbin
7 Decl., ¶ 18.) They involved attorneys on both sides who are experienced in the prosecution,
8 defense, trial, and settlement of class action litigation, including allegedly defective products and
9 consumer fraud cases. (*Id.* at ¶¶ 2-7.) As a result of the work discussed above and based on their
10 experience, the attorneys were well-versed in the factual and legal issues implicated in this action.
11 (*Id.*)

12 From June 2008 through February 2009, counsel for the parties engaged in a sustained and
13 contentious, arm's-length negotiation process. (Selbin Decl., ¶¶ 8-20.) In addition to the in-
14 person meetings in June and August 2008, counsel and Trex representatives met in person for
15 additional arm's-length negotiations on or about September 27 and November 7, 2008 in
16 Washington, D.C., on or about November 20, 2008, in Newark, New Jersey, and again in
17 Washington, D.C. on December 17, 2008. (*Id.* at ¶ 16.) Significant discussions continued by
18 telephone and email during the entire course of the settlement negotiations. (*Id.* at ¶ 17.) The
19 negotiations between Trex and Class Counsel were arm's-length and hard-fought at all times. (*Id.*
20 at ¶ 18.) There were material disputes regarding, among other things, the scope of the alleged
21 defect, the extent of the damages, and the coverage provided by Trex's warranty. (*Id.*) On each
22 of these points, the parties had significant disagreement. (*Id.*) As a result, on several instances,
23 the parties came to an impasse and it appeared that a settlement could not be reached without
24 resorting to litigation. (*Id.*) On one occasion, in fact, at least one attorney representing Plaintiffs
25 walked out of a settlement meeting over such a dispute. (*Id.*)

26 Because of these periodic breakdowns, Plaintiffs filed their Complaint in Santa Cruz
27 Superior Court, California on September 30, 2008. (Selbin Decl., ¶ 18.) Despite the filing of the
28 Complaint, the parties continued to work toward a settlement. (*Id.* at ¶ 19.) At the November 20,

1 2008, meeting, it became apparent that the only claim that Trex would agree to resolve through
2 settlement was the Surface Flaking claim. (*Id.*)

3 The extensive negotiations between Plaintiffs' counsel and Trex finally culminated in an
4 agreement in principle on all material terms of a nationwide Surface Flaking Settlement (with the
5 exception of attorneys' fees and costs) on or about January 28, 2009. An MOU setting forth those
6 terms was finalized on February 5, 2009. (Selbin Decl. ¶ 20.) Agreement on all material
7 Settlement terms was reached before the parties negotiated recovery of Class Counsels' attorneys'
8 fees and costs. (*Id.*) On April 6, 2009, the parties finalized the Settlement Agreement. (*Id.*)

9 **E. Preliminary Approval**

10 On May 26, 2009, Plaintiffs submitted a Motion for Preliminary Approval of the
11 Settlement. (Docket No. 31.) Plaintiffs asked the Court to grant preliminary approval of the
12 proposed Settlement; to provisionally certify the proposed nationwide Settlement Class; to
13 appoint Eric Ross and Bradley Hureth as class representatives; to approve the Notice Program
14 and forms of Settlement notice and order provision of such notice; to appoint the firms of Lief, f,
15 Cabraser, Heimann & Bernstein, LLP, Tousley Brain Stephens, PLLC, Audet & Partners, LLP,
16 Cuneo, Gilbert & LaDuca, LLP and Lockridge, Grindal Nauen P.L.L.P as Class Counsel; and to
17 schedule a final fairness hearing. (*See* Docket No. 31.)

18 *Okano* Plaintiffs objected to preliminary approval of the Settlement on June 17, 2009
19 (Docket No. 49.) The chief objection was that the proposed recovery is insufficient because it
20 does not provide for recovery of full labor costs.

21 *Okano* Plaintiffs also argued that the release would encompass claims related to a failure
22 of structural integrity of the Trex Product, thus precluding Class Members from participating in a
23 prior settlement with Trex in the case of *Kanefsky v. Trex Company, Inc.*, No. L-7347-00 (N.J.
24 Sup. Ct., Essex County). That settlement required successful claimants to show that there is a
25 compromise of structural integrity, degradation of more than one-quarter inch, or "aluminum
26 flakes greater than 1/8 inch." (*See* Declaration of Robert F. Lopez, Docket No. 51, Ex. D at 2; *see*
27 *also* <trex.com/legal/classactin.asp>.) During the course of their extensive investigation,
28 Plaintiffs concluded that the alleged Surface Flaking defect was not one that compromised the

1 structure of the Trex boards. (Selbin Decl., ¶ 15.) Nevertheless, on July 15, 2009, in response to
2 *Okano*'s concern and at the suggestion of the Court, the Plaintiffs filed an amended Settlement
3 Agreement excluding from the release any claims in which "a single piece of Trex Product is
4 broken completely through from top to bottom into two or more separate pieces." (Notice of
5 Filing of Revised Settlement Agreement, Class Notice and Proposed Order, Ex. A at p. 8.) To
6 ensure that there is no legitimate concern regarding structural integrity resulting from the alleged
7 Surface Flaking defect, Plaintiffs have since asked their wood science expert, Albert L. DeBonis,
8 PhD, to test a sample of Plaintiff Ross's deck to confirm that the alleged defect does not
9 compromise the structural integrity of the boards. Dr. DeBonis did confirm this to be true, and a
10 report setting forth the scope of his analysis and its conclusions is attached to the Selbin
11 Declaration filed herewith as Exhibit B. *Okano* Plaintiffs also raised concerns regarding the fees,
12 costs and service payments to the named plaintiffs. Those concerns were addressed by the Court
13 in its Order, and will be addressed again by the Plaintiffs in their Memorandum in Support of
14 Final Approval of Attorneys' Fees, Costs, and Service Payments.

15 A hearing was held on the Plaintiffs' Motion for Preliminary Settlement Approval on
16 July 10, 2009. The Court carefully considered each issue raised by *Okano* Plaintiffs and on
17 July 30, 2009, granted preliminary settlement approval. In considering *Okano*'s concern
18 regarding the value of the Settlement, the Court noted that "a settlement by definition requires
19 compromise, and Plaintiffs cannot expect to make a full recovery in the absence of litigation."
20 (Docket No. 81 at 7.) The Court further held that the "labor costs, shipping, and additional
21 recovery for more than fifty percent failure exceed the basic entitlement of the warranty and
22 represent value gained through the Settlement." (*Id.*) The Court found, in addressing *Okano*'s
23 concerns, that there was no guarantee that the warranty exclusion for labor costs would be
24 overturned through litigation and cited authority for the contrary. Specifically, the Court stated
25 that, "While it is possible that the disclaimer would be found unenforceable for unconscionability,
26 such a result cannot be presumed. Limitations of consequential economic damages for consumers
27 are not prima facie unconscionable, U.C.C. § 2-719(3), and such disclaimers in consumer
28 warranties have been upheld where there is no great disparity of bargaining power. *E.g.*

1 *Zaremba v. Marvin Lumber and Cedar Co.*, 458 F. Supp. 2d 545 (N.D. Ohio 2006).”

2 Accordingly, the Court rejected *Okano* Plaintiffs’ objections and set a hearing for final Settlement
3 approval on October 30, 2009. (*Id.* at 10.)

4 **III. THE PROPOSED SETTLEMENT**

5 As the Court determined at the preliminary approval stage, the proposed Settlement offers
6 substantial recovery for Class Members, including certain recovery and benefits not provided for
7 in Trex’s warranty. It does so through a neutral claims process that imposes little burden on, and
8 no cost to, Class Members. The Settlement treats all Class Members fairly and equally as both
9 the amount of replacement product and the labor payment each Class Member receives are
10 proportionate to the harm he or she has suffered. Importantly, the Settlement avoids the
11 substantial risk, delay, and expense of continued litigation.

12 Class Counsel are all extremely experienced in class action litigation (including class
13 action litigation regarding allegedly defective composite decking) as well as settlement and
14 claims resolution processes, and are convinced that the proposed Settlement is fair and highly
15 beneficial to the class. (Declarations of Selbin ¶ 36; Stephens ¶ 13; Gary ¶ 12; Shelquist ¶ 10;
16 Lewis ¶ 15; Miller ¶ 13; McShane ¶ 10.)

17 **A. The Settlement Class**

18 The “Settlement Class” includes all Persons in the United States or its Territories who
19 own or owned decks or other structures composed of Trex Product manufactured at Trex’s
20 Fernley, Nevada plant between January 1, 2002 and December 31, 2007. (Docket No. 78, Ex. A,
21 § A, ¶ 30.) Included within the Settlement Class are the legal representatives, heirs, successors in
22 interest, transferees, and assignees of all such foregoing holders and/or owners, immediate and
23 remote. (*Id.*) Excluded from the Settlement Class are: “Defendant and its subsidiaries and
24 affiliates; all Persons who, in accordance with the terms of the Agreement, properly execute and
25 timely file during the Opt-Out Period a request for exclusion from the Settlement Class; all
26 governmental entities; and the judge(s) to whom this case is assigned and any immediate family
27 members thereof.” (*Id.*)

1 **B. The Settlement Benefits**

2 As set forth in detail in the Memorandum in Support of Plaintiffs' Motion for Preliminary
3 Settlement Approval, upon proof of a valid claim for Surface Flaking, Class Members will be
4 provided with either replacement product or a cash equivalent at retail price for any board of Trex
5 Product experiencing Surface Flaking, either in whole or in part. (Docket No. 78, Ex. A, § D,
6 ¶ 1(a).) The decision whether to provide replacement or cash will be at Trex's discretion and any
7 replacement product provided will carry the same limited warranty as the originally installed Trex
8 Product. (*Id.*)

9 Further, if a Class Member has experienced Surface Flaking in more than 50% of the Trex
10 decking boards, Trex will replace all of the Trex decking boards or provide a cash equivalent at
11 retail price. (Docket No. 78, Ex. A, § D, ¶ 1(a).) This benefit is not provided for in Trex's
12 warranty. Shipping of any replacement material will be paid for by Trex. (*Id.*) This benefit is
13 expressly excluded by Trex's warranty.

14 In addition to the cash payment or replacement, Class Members will be entitled to a
15 payment for partial labor costs associated with replacement. (Docket No. 78, Ex. A, § D, ¶ 1(b).)
16 This benefit will be provided whether Class members actually replace the product or not. Class
17 Members who have not previously received any form of compensation from Trex will receive a
18 labor payment determined by a formula of \$0.18 per linear foot of Trex Product board to be
19 replaced. (*Id.*) This calculation endeavors to achieve a payment of \$225.00 to a Class Member
20 with an average sized deck based on a typical order for the Trex Product. (*Id.*) Class Members
21 who have already received some form of compensation (*e.g.*, through an earlier claim on their
22 warranty outside the Class Settlement claims process) will receive a labor payment calculated by
23 the same formula of \$0.18 per linear foot of Trex Product board to a maximum of \$225.00. (*Id.* at
24 § D, ¶ 1(c).) Labor costs are specifically excluded from the Trex warranty.

25 Finally, Class Members will have access to a neutral appeal process for any claim denied
26 under the Settlement and will have the benefit of experienced Class Counsel monitoring the
27 progress of the Settlement through the reporting requirements it provides. (Docket No. 78, Ex. A
28 at § D, ¶ 1(c).)

1 **C. Attorneys' Fees and Costs**

2 Attorneys' fees and costs for Class Counsel, a total amount of \$1.25 million subject to
3 approval by the Court, will be paid separately by Trex in addition to any relief granted to
4 Plaintiffs and Settlement Class members. (Docket No. 78, Ex. A, § K, ¶ 1.) The payment for fees
5 and costs will in no way reduce any Class Member's recovery. Class Counsel and counsel for
6 Trex negotiated fees and costs separately from the negotiations for settlement and only after all
7 other material terms were reached. (Selbin Decl., ¶ 21.) The enforceability of the Settlement
8 Agreement is not contingent on the amount of attorneys' fees or costs awarded. (*Id.*)

9 **D. Class Representative Stipend**

10 Trex will provide each named Plaintiff or class representative (*i.e.*, Eric Ross and
11 Bradley S. Hureth) with a cash payment of \$7,500. (Docket No. 78, Ex. A, § Q, ¶ 3(i).) This
12 amount shall be in addition to the relief to which they are entitled under this Agreement. (*Id.*)

13 **E. Settlement Administration And Notice**

14 The costs of notice (including but not limited to the costs of printing, reproducing, and
15 publishing notice to the potential Settlement Class members) and claims administration have been
16 paid for by Trex. (Docket No. 78, Ex. A, § F, ¶ 1.) As set forth in greater detail below, Notice
17 has been effectuated in accordance with the Notice Plan, with both Direct Mail Notice and
18 Publication Notice. Subject to Court approval, Trex will continue to administer the claims
19 resolution process, subject to review by Class Counsel, including calculating and issuing
20 settlement payments and responding to Class Member inquiries regarding the claims
21 administration process. The Notice Plan provided the best practicable notice to Class Members.

22 **F. Requests For Exclusion From And Objections To The Settlement**

23 The Notice informed Class Members of their rights to opt-out of the proposed Settlement
24 and to object to the terms of the Settlement - including the request for attorneys' fees and costs,
25 and Class representative service awards. The deadline for objections is October 9, 2009. As of
26 this filing, only two objections had been submitted. (*Id.*)

27 The deadline for exclusions is October 29, 2009. (Selbin Decl., ¶ 26.j.) As of this filing,
28 only thirty-six (36) Class Members had excluded themselves from the Settlement. (*Id.*) Any

1 Class Member who timely opts out will not be bound by the Settlement and will be free to
2 separately pursue claims, if any, against Trex.

3 **IV. THE CLASS ACTION SETTLEMENT PROCESS**

4 As a matter of “express public policy,” federal courts strongly favor and encourage
5 settlements, particularly in class actions and other complex matters, where the inherent costs,
6 delays, and risks of continued litigation might otherwise overwhelm any potential benefit the
7 class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.
8 1992) (noting that “strong judicial policy . . . favors settlements, particularly where complex class
9 action litigation is concerned”); *see also* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class*
10 *Actions* § 11.41 (4th ed. 2002) (“*Newberg*”) (gathering cases). The proposed Settlement is the
11 best vehicle for Class Members to receive the relief to which they are entitled in a prompt,
12 efficient manner.

13 Class action settlement approval is a three-step process. *See Manual for Complex*
14 *Litigation (Fourth)* (“*Manual for Compl. Lit.*”) §§ 21.632-34 n.971 (2004). Two of the three
15 steps have already been completed here. First, in granting preliminary approval on July 30, 2009,
16 the Court conducted a preliminary evaluation of the Settlement and determined it to be within the
17 range of reasonableness. The Court also provisionally certified the class and determined that the
18 proposed Notice Program was appropriate.

19 The second step was the implementation of the Notice Program. As discussed below, the
20 Notice has been sent to Class Members, published in accordance with the Notice Plan, and
21 provided to the appropriate state and federal government officials pursuant to 28 U.S.C. § 1715.
22 The third step is the final approval hearing and final approval of the Settlement—the issue now
23 before the Court.

24 **V. THE COURT-ORDERED NOTICE PROGRAM IS CONSTITUTIONALLY**
25 **SOUND AND HAS BEEN FULLY IMPLEMENTED**

26 **A. Notice Standards**

27 To protect the rights of absent Class Members, the Court must provide the best notice
28 practicable to Class Members of a potential class settlement. *See* Fed. Rule Civ. P. 23(e)(1)(B);

1 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). As the *Manual for Complex*
 2 *Litigation* observes, “Rule 23 . . . requires that individual notice in [opt-out] actions be given to
 3 class members who can be identified through reasonable efforts. Those who cannot be readily
 4 identified must be given the ‘best notice practicable under the circumstances.’” *Id.* at § 21.311.
 5 “[D]ue process has not required actual notice to parties who cannot reasonably be identified.” *Id.*
 6 at n.882.

7 **B. The Notice Program Has Been Fully Implemented And Meets Applicable**
 8 **Standards**

9 “Rule 23(e)(1)(B) requires the court to ‘direct notice in a reasonable manner to all class
 10 members who would be bound by a proposed settlement, voluntary dismissal, or compromise’
 11 regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3).” *Manual for*
 12 *Compl. Lit., supra*, at § 21.312. Many of the same considerations govern both certification and
 13 settlement notices. In order to protect the rights of absent class members, the Court must provide
 14 the best notice practicable to class members. *See Phillips Petroleum*, 472 U.S. at 811-12.
 15 According to the *Manual, supra*, at § 21.312, the settlement notice should:

- 16 ● Define the class;
- 17 ● Describe clearly the options open to the class members and the deadlines for
 18 taking action;
- 19 ● Describe the essential terms of the proposed settlement;
- 20 ● Disclose any special benefits provided to the class representatives;
- 21 ● Provide information regarding attorneys’ fees;
- 22 ● Indicate the time and place of the hearing to consider approval of the settlement,
 23 and the method for objecting to or opting out of the settlement;
- 24 ● Explain the procedures for allocating and distributing settlement funds, and, if the
 25 settlement provides different kinds of relief for different categories of class
 members, clearly set out those variations;
- 26 ● Provide information that will enable class members to calculate or at least estimate
 27 their individual recoveries; and
- 28 ● Prominently display the address and phone number of class counsel and the

1 procedure for making inquiries.

2 The Court-approved Notice Plan satisfied all of the criteria identified above and has now
3 been fully implemented. (Declaration of Patrick J. Perrone (“Perrone Decl.”).) First, individual
4 notice was sent to over 17,000 unique names and addresses via U.S. Mail. (*Id.*, ¶ 4.) The mailing
5 list was generated by Trex from its database of inquiries received regarding the alleged defect.
6 Prior to mailing, the addresses were checked against the National Change of Address (“NCOA”)
7 database maintained by the United States Postal Service (“USPS”). (*Id.*)

8 In addition, the Court-approved publication notice ran in *USA Today* on August 18, 2009,
9 which has a reported circulation of 2,284,219, and in *TV Guide* on August 24-September 6, 2009,
10 which had a reported circulation of 2,900,000. (Perrone Decl., ¶ 6.) On July 31, 2009, Trex
11 issued a press release. (*Id.*, ¶ 6.) Trex’s settlement website
12 (<<http://www.Trex.com/legal/classactionsettlement.aspx>>) went online by August 6, 2009 with
13 links to the website posted on <http://www.trex.com>. (*Id.*, ¶ 8.) By logging onto this website,
14 Class members can view and print the Settlement Agreement, the Class Notice, and the claim
15 forms. (*Id.*) The website also provides the toll free number for settlement inquiries. (*Id.*)
16 Finally, notice of the settlement was provided to the appropriate state and federal government
17 officials pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715. (*Id.*, ¶ 10.)

18 **VI. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE**

19 The Ninth Circuit has recognized a strong policy favoring voluntary settlement of
20 complex class actions. “[V]oluntary conciliation and settlement are the preferred means of dispute
21 resolution.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). “This
22 is especially true in complex class action litigation,” which lend themselves to compromise
23 because of the difficulties of proof, uncertainty of outcome, and length and complexity of
24 litigation. *Id.*; see also *City of Seattle*, 955 F.2d at 1276 (“strong judicial policy ... favors
25 settlements, particularly where complex class action litigation is concerned”).

26 Federal Rule of Civil Procedure 23(e) requires that a class action settlement be “fair,
27 adequate and reasonable” in order to merit approval. A settlement is fair, adequate, and
28 reasonable when “the interests of the class as a whole are better served if the litigation is resolved

1 by the settlement rather than pursued.” *Manual for Compl. Lit.* at § 30.42. The decision to
 2 approve or reject a proposed settlement is committed to the court’s sound discretion. *City of*
 3 *Seattle*, 955 F.2d at 1276.

4 In affirming the settlement approved by the trial court in *City of Seattle*, the Ninth Circuit
 5 noted that it “need not reach any ultimate conclusions on the contested issues of fact and law
 6 which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and
 7 avoidance of wasteful and expensive litigation that induce consensual settlements.” *City of*
 8 *Seattle*, 955 F.2d at 1291 (internal quotation and citation omitted). The district court’s ultimate
 9 determination “will involve a balancing of several factors,” which may include:

10 the strength of plaintiffs’ case; the risk, expense, complexity, and
 11 likely duration of further litigation; the risk of maintaining class
 12 action status throughout the trial; the amount offered in settlement;
 13 the extent of discovery completed, and the stage of the proceedings;
 the experience and views of counsel . . . and the reaction of the
 class members to the proposed settlement.

14 *Id.* (quoting *Officers for Justice*, 688 F.2d at 625). *See also Churchill Vill., L.L.C. v. GE*, 361
 15 F.3d 566, 575 (9th Cir. 2004).

16 **A. The Settlement Is Presumed To Be Fair, Adequate, And Reasonable**

17 “Before approving a class action settlement, the district court must reach a reasoned
 18 judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion
 19 among, the negotiating parties. . . .” *City of Seattle*, 955 F.2d at 1290 (quoting *Ficalora v.*
 20 *Lockheed Cal. Co.*, 751 F.2d 995, 997 (9th Cir. 1985)). Where, as here, the settlement is the
 21 product of arm’s-length negotiations conducted by capable counsel with extensive experience in
 22 complex class action litigation, the court begins its analysis with a presumption that the settlement
 23 is fair and should be approved. *See Newberg*, § 11.41; *see also Ellis v. Naval Air Rework*
 24 *Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (“the fact that experienced counsel involved in the
 25 case approved the settlement after hard-fought negotiations is entitled to considerable weight”).

26 Each of these factors is present here: Class Counsel have extensive experience in class
 27 action litigation, including recent experience in litigation against manufacturers of composite
 28 decking materials, and they reached the Settlement with Trex only after extensive investigation

1 and substantial negotiation about the specific terms of the Settlement. (Selbin Decl., ¶¶ 3-7, Ex.
 2 A; Stephens Decl., ¶ 2-3; Lewis Decl., ¶ 3, Ex. A; Gary Decl., ¶ 3, Ex. A; McShane Decl., Ex. A;
 3 Miller Decl., ¶ 4, Ex. A; Shelquist Decl., ¶ 3, Ex. A.)

4 **B. All Of The Relevant Factors Support Final Approval Of The Settlement**

5 **1. The Value of the Settlement, and the Substantial Benefits it Provides to**
 6 **Class Members, Support Final Approval**

7 The Settlement provides relief for all Class members whose decks exhibit Surface
 8 Flaking. The Settlement provides replacement product or a cash equivalent at retail price for any
 9 defective Trex Product (i.e., Trex Product exhibiting the Surface Flaking defect), and requires
 10 Trex to cover all shipping costs for replacement product. If more than 50% of a Class Members'
 11 Trex decking boards exhibit the Surface Flaking defect, Trex will replace all of the Trex decking
 12 boards or provide a cash equivalent at retail price. This benefit is not available under the
 13 warranty. (Docket No. 78, Ex. A, § D, ¶ 1(a).) Class Members will also receive partial recovery
 14 of labor costs based on the amount of the Trex Product to be replaced, even though Trex's
 15 warranty excludes such costs. (*Id.* at ¶ 1(b).) The Settlement treats all Class Members fairly and
 16 equally as each Class Member's recovery is based on the amount of his or her Trex Product that
 17 has experienced Surface Flaking. Both the amount of replacement product and the labor payment
 18 each Class Member receives are proportionate to the harm he or she has suffered. To ensure
 19 fairness, the Settlement also includes an appeals process (*id.* at 15, ¶ 6), and annual reporting of
 20 the progress of the claims process to Class Counsel. (*Id.* at 15-16, ¶ 8.)

21 In considering the *Okano* Plaintiffs' objections at the preliminary approval stage, the
 22 Court noted that the value of the settlement exceeded the warranty protection in that it provides
 23 labor costs, shipping, and enhanced recovery where there is more than fifty percent failure of a
 24 structure's Trex decking boards. (Docket No. 81 at 7.) As a result, the Court found that there
 25 was value to the Settlement. (*Id.*)

26 The vindication and enforcement of the Class' legal rights is undoubtedly of value to
 27 Class members. For example, in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998),
 28 objectors claimed that a nationwide settlement which provided for replacement of defective

1 automobile latches was inadequate because the manufacturer had previously agreed with the
2 federal government to replace the latches. *Id.* at 1019. In affirming the district court's final
3 approval of the settlement, the Ninth Circuit noted that the settlement was valuable because it
4 freed the class from having to prove the defect, and provided for supervision of the replacement
5 scheme by Class Counsel and the court. *Id.* at 1027. Similar benefits are conferred here. While
6 Trex's warranty provides a laundry list of reasons why it may reject claims (*see* Selbin Decl.,
7 Ex. A at 1-2), Trex cannot consider any of those factors in evaluating claims under the
8 Settlement. Rather, proof of Surface Flaking mandates compensation by way of replacement
9 material and/or cash reimbursement. (Docket No. 78, Ex. A at 12.) Claim denials are subject to
10 review by Class Counsel and a neutral arbitrator. (*Id.* at 15.) The Court will also retain
11 jurisdiction to ensure the Agreement is effectuated according to its terms. Just as in *Hanlon*, this
12 Settlement vindicates and enforces the Class's legal rights, and in doing so confers a substantial
13 benefit to the Class.

14 **2. The Risks Inherent in Continued Litigation Support Final Approval**

15 The Settlement serves the interests of the Class. Although Class Counsel believe that all
16 claims asserted in the Complaint are meritorious, they understand the significant burdens
17 Plaintiffs would have faced to obtain a class judgment against Trex, including obtaining class
18 certification and prevailing on their legal claims. Moreover, the outcome of trial and any appeals
19 are inherently uncertain and involve significant delay. The Settlement avoids these challenges
20 and provides prompt, substantial relief for Class Members which weighs in favor of final
21 approval of the Settlement. *City of Seattle*, 955 F.2d at 1291.

22 As the Court noted in its Order granting preliminary approval, there is no guarantee that
23 Plaintiffs would be able to recover damages above and beyond what is provided in the warranty.
24 (Docket No. 81 at 7.) The Settlement recognizes this risk and provides significant benefit in light
25 of it.

1 **3. The Discovery and Investigation Completed Before Settlement Favor**
2 **Final Approval**

3 By the time the parties reached the Settlement, they had compiled sufficient information
4 and conducted extensive analyses to assess the strengths and weaknesses of their respective cases,
5 and to make a thorough appraisal of the adequacy of the Settlement. Specifically, Class Counsel
6 reviewed Trex's confidential product formulation, and, together with Plaintiffs' expert, inspected
7 and tested the Trex Product to assess the nature and scope of the alleged defect. In addition,
8 Class Counsel was in contact with over 450 inquiries by Trex purchasers. Counsel and their
9 experts met with Trex on numerous occasions, including meeting with their representative
10 regarding research and development. Trex provided Class Counsel with significant confidential
11 information regarding the Trex Product through informal discovery. Based on this exhaustive
12 investigation of the factual and legal bases for Plaintiffs' claims, Class Counsel determined that
13 the Settlement provides an excellent result for the Class. (Declarations of Selbin ¶ 36; Stephens ¶
14 13; Gary ¶ 12; Shelquist ¶ 10; Lewis ¶ 15; Miller ¶ 13; McShane ¶ 10.) *See In re Mego Fin.*
15 *Corp. Securities Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (class counsel's significant
16 investigation, research, and work with experts throughout the litigation supported approval of
17 settlement, even absent extensive formal discovery).

18 **4. The Terms and Conditions of the Proposed Settlement Favor Final**
19 **Approval**

20 As discussed above, the Settlement provides meaningful benefits, including those not
21 otherwise available under the warranty. The straightforward claims process applies equally to all
22 Class members, and assistance is available—from Class Counsel and Trex—for those who need
23 help in completing claim forms.

24 **5. The Recommendation of Experienced Class Counsel Supports Final**
25 **Approval**

26 The judgment of experienced counsel regarding the settlement is entitled to significant
27 weight, *see, e.g., Hanlon*, 150 F.3d at 1026, and the recommendation of experienced class counsel
28

1 should be given a presumption of reasonableness. *See Boyd v. Bechtel Corp.*, 485 F.Supp. 610,
2 622 (N.D. Cal. 1979).

3 Class Counsel in this case, who are experienced and skilled in consumer class action
4 litigation, support the Settlement as fair, reasonable, and adequate, and in the best interests of the
5 Class as a whole. Class Counsel conducted a comprehensive legal and factual investigation of the
6 claims, and Class Counsel firmly believe that the proposed Settlement Agreement easily satisfies
7 Rule 23(e)'s requirements and is in the best interest of all Class members. (Declarations of Selbin
8 ¶ 36; Stephens ¶ 13; Gary ¶ 12; Shelquist ¶ 10; Lewis ¶ 15; Miller ¶ 13; McShane ¶ 10.)

9 Moreover, this factor is especially relevant in this case given Class Counsel's experience
10 in a decking case. In prosecuting this case, Class Counsel were benefited by their settlement of a
11 consumer class action wherein Plaintiffs alleged a mold spotting defect in ChoiceDek brand
12 composite decking and railing products. *See Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537 (W.D.
13 Wash. 2009).

14 The ChoiceDek case proceeded in much the same manner as this one. After a lengthy
15 investigation, but before filing a complaint, Plaintiffs' counsel (which included most of the
16 undersigned firms) met with Defendants to discuss an early resolution to the matter. Over the
17 course of nine months, the parties conducted joint deck inspections, retained and consulted wood
18 science experts and mycologists, traded relevant and proprietary information, and engaged in
19 arms-length, contested negotiations to reach an acceptable agreement. The mold spotting claims
20 were ultimately resolved using a creative Settlement that provided tiered and staged relief
21 depending on the extent of the alleged defect in the claimant's deck. In fact, in the ChoiceDek
22 settlement, product replacement/reimbursement represents the highest tier of relief, available only
23 to those with the most significant mold spotting problems. Here, by contrast, product
24 replacement/reimbursement is the base relief for all claimants. Moreover, unlike the instant
25 Settlement, the ChoiceDek settlement did not include any recovery for labor costs at all. *Pelletz*,
26 255 F.R.D. 537 at 542-43. The ChoiceDek settlement also included payment of \$1.75 million in
27 attorneys' fees and costs, and class representative stipends of \$7,500 per named plaintiff.
28

1 *Pelletz v. Weyerhaeuser Co.*, No. 08-0334, 2009 U.S. Dist. LEXIS 1803, *19-20 (W.D. Wash.
2 Jan. 9, 2009).

3 In granting final approval, Judge Coughenour of the Western District of Washington noted
4 the risk inherent in consumer class actions, and found that the settlement provided “substantial
5 benefits” to the Class without the delay, expense and risk of litigation. *Pelletz*, 255 F.R.D. at 542-
6 543. *See also Pelletz*, 2009 U.S. Dist. LEXIS 1803, *13-14.

7 Under these circumstances in particular, the considered view of experienced counsel
8 weighs heavily in favor of final approval. *Hanlon*, 150 F.3d at 1026

9 **6. The Expense and Likely Duration of Litigation in the Absence of a**
10 **Settlement Supports Final Approval**

11 Another factor courts consider in assessing a proposed class action settlement is the
12 complexity, expense, and likely duration of the litigation had a settlement not been reached. *City*
13 *of Seattle*, 955 F.2d at 1291. In applying this factor, the Court must weigh the benefits of the
14 Settlement against the expense and delay of continued litigation, including the potential for
15 appeals. *See Churchill*, 361 F.3d at 576.

16 As discussed above, the Settlement guarantees a substantial recovery for the Class while
17 obviating the need for lengthy, uncertain, and expensive pretrial practice, trial, and appeals. Even
18 if the Class prevailed at trial, Trex would likely appeal any adverse rulings against it. (Selbin
19 Decl., ¶ 36.) Accordingly, Class Members would likely not obtain relief, if at all, for a period of
20 years.

21 **7. The Presence of Good Faith and the Absence of Collusion Favors Final**
22 **Approval**

23 Courts should also consider the presence of good faith and the absence of collusion on the
24 part of the settling parties. *Officers for Justice*, 688 F.2d at 625; *Newberg* at § 11.43.
25 Furthermore, courts recognize that arm’s-length negotiations conducted by competent counsel are
26 *prima facie* evidence of fair settlements. As the Supreme Court has held, “[o]ne may take a
27 settlement amount as good evidence of the maximum available if one can assume that parties of
28 equal knowledge and negotiating skill agreed upon the figure through arm’s-length

1 bargaining . . .” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999). *See also In re*
2 *Consolidated Pinnacle West Securities*, 51 F.3d 194, 197 n.6 (9th Cir. 1995).

3 As this Court found at the preliminary approval stage, “there is nothing to indicate
4 collusion” here, “especially in light of the documented record of adversarial negotiations.”
5 (Order, Docket No. 81, at 6.) Indeed, the proposed Settlement here is the result of intensive,
6 arm’s-length negotiations between experienced attorneys who are highly familiar with class
7 action litigation and the legal and factual issues of this case. (Selbin Decl., ¶¶ 3-7, Ex. A;
8 Stephens Decl., ¶ 2-3; Lewis Decl., ¶ 3, Ex. A; Gary Decl., ¶ 3, Ex. A; McShane Decl., Ex. A;
9 Miller Decl., ¶ 4, Ex. A; Shelquist Decl., ¶ 3, Ex. A.) Based on these facts, the Court should find
10 that the parties entered the Settlement in good faith.

11 **8. Class Members’ Positive Reaction Supports Final Approval**

12 Finally, the Settlement has received a positive response from the Class. The reaction of
13 class members to a proposed settlement is an important factor in determining whether a
14 settlement is fair, adequate, and reasonable. *City of Seattle*, 955 F.2d at 1291. A court may
15 appropriately infer that a class action settlement is fair, adequate, and reasonable when few class
16 members object to it. *See, e.g., Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir.
17 1977); *Churchill*, 361 F.3d at 577 (upholding district court’s approval of class settlement with
18 45 objections and 500 opt-outs from a class of 150,000). Indeed, a court can approve a class
19 action settlement as fair, adequate, and reasonable even over the objections of a significant
20 percentage of class members. *See City of Seattle*, 955 F.2d at 1291-96.

21 Both Named Plaintiffs support the Settlement. (*See* Declarations of Eric Ross and
22 Bradley S. Hureth, filed herewith.) Further, as of the date of filing, only thirty-six (36) Class
23 Members had opted out of the Settlement, and only two (2) Class Members had objected to it.
24 This is particularly significant in light of the success of the Notice Program, which included
25 individual notice to approximately 18,000 unique names and addresses, publication notice in the
26 *USA Today* on August 18, 2009, publication notice in *TV Guide* between August 24 and
27 September 6, 2009, a press release on July 31, 2009, and a Settlement website. (Perrone Decl. at
28

¶¶ 4-7.) The scarcity of objections and requests to opt out of the Settlement indicate the broad, class-wide support for the Settlement and supports its approval. *Marshall*, 550 F.2d at 1178.

Neither of the objections that were filed raise issues that warrant rejection of the Settlement. The primary objection of William J. Langan is that the \$225 limit on the labor payment for those who have prior compensated claims is not fair because other Class members may receive more in labor costs under the Settlement. (Selbin Decl., Ex. G.) Mr. Langan also takes issue with the formula of \$0.18 per linear foot as being too small. This is also the sole complaint of the other objector, Michael R. Capelle. (*Id.*, Ex. F.) In other words, the objectors complain that, by way of Settlement, they will not obtain all of the relief (and perhaps more) they could hope to recover after years of 100% successful litigation. Unfortunately, that is not a realistic goal, and it is not the standard by which final approval of a settlement is measured. Instead, both objections “offer nothing more than speculation about what damages ‘might have been’ won had they prevailed at trial.” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (*quoting Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982)). As the Ninth Circuit has repeatedly held, “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *Id.* (*quoting Officers for Justice*, 688 F.2d at 625). The Court explained, “the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.” *Id.* Although the Settlement terms reached here provide a significant benefit, “[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *Id.* (citations and quotations omitted).

When addressing this same objection made by *Okano* Plaintiffs’ at the preliminary approval stage, the Court recognized that “a settlement by definition requires compromise, and Plaintiffs cannot expect to make a full recovery in the absence of litigation.” (Docket No. 81 at 7.) The Court also found that there was no guarantee that, if the warranty limitations had been contested in litigation, they would be found unconscionable and, in fact, cited authority for the

1 contrary. (*Id.* (“While it is possible that the disclaimer would be found unenforceable for
2 unconscionability, such a result cannot be presumed. Limitations of consequential economic
3 damages for consumers are not prima facie unconscionable, U.C.C. § 2-719(3), and such
4 disclaimers in consumer warranties have been upheld where there is no great disparity of
5 bargaining power. *E.g. Zaremba v. Marvin Lumber and Cedar Co.*, 458 F. Supp. 2d 545
6 (N.D. Ohio 2006).”)) The Court further held that the “labor costs, shipping, and additional
7 recovery for more than fifty percent failure exceed the basic entitlement of the warranty and
8 represent value gained through the Settlement.” (*Id.*) It also noted that Class Counsel, “after
9 investigation and in light of their broad experience with consumer class actions, decided that a
10 compromise was appropriate.” (Order, Docket No. 81 at 7.)

11 Class Counsel, who are experienced in litigating consumer and class action cases,
12 maintain that this proposed Settlement is in the best interest of the Class and that the two
13 objections are without merit.

14 **VII. THE COURT CAN APPROPRIATELY ENTER A FINAL ORDER ON BEHALF**
15 **OF THE CLASS**

16 The Court has provisionally certified the proposed Settlement Class. All required criteria
17 for class certification remain satisfied. For the sake of brevity, Class Counsel respectfully refer
18 the Court to the class certification discussion at pages 12-16 of its Memorandum and Points of
19 Authority in Support of the Motion for Preliminary Approval of Settlement, Docket No. 32. The
20 Court should approve the class certification and enter a final order approving the Settlement on
21 behalf of the certified Class.

22 **VIII. CONCLUSION**

23 For the reasons stated above, the Settlement is fair, adequate, and reasonable. Plaintiffs
24 respectfully request this Court grant final approval of the Settlement.

1 Dated: September 28, 2009

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2
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12 [Additional Counsel Appear on Signature Page]

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ERIC ROSS and BRADLEY S. HURETH,
Plaintiffs,
v.
Trex COMPANY, INC., a Delaware
corporation,
Defendant.

Case No. 5:09-CV-00670-JF

**[PROPOSED] FINAL ORDER
APPROVING CLASS ACTION
SETTLEMENT, AND DISMISSING CLASS
ACTION WITH PREJUDICE**

DATE: October 30, 2009
TIME: 9:00 a.m.
COURTROOM: Courtroom 3, 5th Floor
JUDGE: Hon. Jeremy Fogel

24 WHEREAS, Plaintiffs and Trex have entered into a class action Settlement Agreement,
25 signed by all Parties and filed with the Court on May 26, 2009; and

26 WHEREAS, the Court entered an Order dated July 30, 2009, preliminarily certifying the
27 putative class in this Action for settlement purposes under Fed. R. Civ. P. 23(b)(3), ordering
28 notice to potential Class Members, scheduling a Fairness Hearing for October 30, 2009, at

1 9:00 a.m., and providing those persons with an opportunity either to exclude themselves from the
2 settlement class or to object to the proposed Settlement (the “Preliminary Approval Order”); and

3 WHEREAS, Trex provided notice of the proposed Settlement under 28 U.S.C. § 1715 to
4 the appropriate state and federal government officials; and

5 WHEREAS, the Court held a Fairness Hearing on October 30, 2009, at 9:00 a.m., to
6 determine whether to give final approval to the proposed Settlement; and

7 WHEREAS, the Parties have complied with the Preliminary Approval Order and the
8 Court is of the opinion that the Settlement Agreement is fair, adequate, and reasonable, and that it
9 should be approved.

10 NOW THEREFORE, based on the submissions of the Parties and Class Members, the
11 testimony adduced at the Fairness Hearing, any comments or objections filed by objectors, any
12 comments or objections filed by state and/or federal government officials, the pleadings on file,
13 and the argument of counsel, the Court hereby finds, and it is hereby ORDERED as follows:

14 1. Incorporation of Defined Terms and the Settlement Agreement. Except where
15 otherwise noted, all capitalized terms used in this Final Order Approving Class Action Settlement
16 and Dismissing Class Action with Prejudice (the “Final Order and Judgment”) shall have the
17 meanings set forth in the Amended Stipulation of Settlement and Release (“Settlement
18 Agreement”). The Settlement Agreement (and any attachments thereto) is expressly incorporated
19 by reference into this Final Order and Judgment and made a part hereof for all purposes.

20 2. Jurisdiction. The Court has personal jurisdiction over the Parties and all Class
21 Members, and has subject-matter jurisdiction over this Action, including, without limitation,
22 jurisdiction to approve the proposed Settlement, to grant final certification of the Settlement
23 Class, to settle and release all claims arising out of the transactions alleged in Plaintiffs’
24 Complaint and Amended Complaint, and to dismiss this Action on the merits and with prejudice.

25 3. Final Class Certification. The Settlement Class this Court preliminarily certified
26 in its Preliminary Approval Order is hereby finally certified for settlement purposes under Fed. R.
27 Civ. P. 23(b)(3). The Settlement Class consists of: all Persons in the United States or its
28 Territories who own or owned decks or other structures composed of Trex Product manufactured

1 at Trex's Fernley, Nevada plant between January 1, 2002 and December 31, 2007. Included
2 within the Settlement Class are the legal representatives, heirs, successors in interest, transferees,
3 and assignees of all such foregoing holders and/or owners, immediate and remote.

4 Notwithstanding the foregoing, the following Persons shall be excluded from the Class: Trex and
5 its subsidiaries and affiliates; all Persons who, in accordance with the terms of this Agreement,
6 properly execute and timely file during the Opt-Out Period a request for exclusion from the
7 Settlement Class; all governmental entities and the judge(s) to whom the case is assigned and any
8 immediate family members thereof. A list of those persons who have timely excluded themselves
9 from the Class, and who therefore are not bound by this Final Order and Judgment, is attached
10 hereto as Appendix A, which is incorporated herein and made a part hereof for all purposes.

11 4. Adequacy of Representation. The Court appoints Eric Ross and Bradley Hureth to
12 serve as Settlement Class representatives. The Court appoints Lief Cabraser Heimann &
13 Bernstein, LLP; Tousley, Brain & Stephens, PLLC; Hausfeld, LLP; Gary, Naegle & Theado,
14 LLC; Audet and Partners, LLP; Cuneo, Gilbert & LaDuca, LLP, and Lockridge Grindal Nauen,
15 PLLP to serve as Class Counsel. The appointment of Class Counsel, and the appointment of the
16 Plaintiffs as the Settlement Class representatives, is fully and finally confirmed. The Court finds
17 that Class Counsel and Plaintiffs have fully and adequately represented the Settlement Class for
18 purposes of entering into and implementing the Settlement Agreement and have satisfied the
19 requirements of Fed. R. Civ. P. 23(a)(4).

20 5. Class Notice. The Court finds that the direct mail notice and publication of the
21 Notice in accordance with the terms of the Settlement Agreement and this Court's Preliminary
22 Approval Order, and as explained in the declarations filed before the Fairness Hearing:

23 a. constituted the best practicable notice to Class Members under the
24 circumstances of this Action;

25 b. were reasonably calculated, under the circumstances, to apprise Class
26 Members of (i) the pendency of this class action, (ii) their right to exclude themselves from the
27 Settlement Class and the proposed Settlement, (iii) their right to object to any aspect of the
28 proposed Settlement (including final certification of the Settlement Class, the fairness,

1 reasonableness or adequacy of the proposed Settlement, the adequacy of the Settlement Class's
2 representation by Plaintiffs or Class Counsel, and/or the award of attorneys' and representative
3 fees), (iv) their right to appear at the Fairness Hearing (either on their own or through counsel
4 hired at their own expense), and (v) the binding effect of the orders and Final Order and Judgment
5 in this Action, whether favorable or unfavorable, on all persons who do not request exclusion
6 from the Settlement Class;

7 c. was reasonable and constituted due, adequate and sufficient notice to all
8 persons entitled to be provided with notice; and

9 d. fully satisfied the requirements of the Federal Rules of Civil Procedure,
10 including Fed. R. Civ. P. 23(c)(2) and (e), the United States Constitution (including the Due
11 Process Clause), the Rules of this Court, and any other applicable law.

12 6. Class Action Fairness Act Notice. The Court finds that Trex provided notice of
13 the proposed Settlement to the appropriate state and federal government officials pursuant to
14 28 U.S.C. § 1715. Furthermore, the Court has given the appropriate state and federal government
15 officials the requisite 90 day time period (pursuant to 28 U.S.C. § 1715) to comment or object to
16 the proposed Settlement before entering its Final Order and Judgment.

17 7. Class Findings. For purposes of the settlement of this Action (and only for such
18 purposes, and without an adjudication of the merits), the Court finds that the requirements of the
19 Federal Rules of Civil Procedure, the United States Constitution, the Rules of this Court and any
20 other applicable law have been met in that:

21 a. The Settlement Class consists of thousands of Persons who own decks or
22 other structures composed of Trex Product as defined in the Settlement Agreement. The
23 Settlement Class is so numerous that their joinder before the Court would be impracticable.

24 b. The commonality requirement of Fed. R. Civ. P. 23(a) generally is satisfied
25 when members of the proposed Settlement Class share a common factual or legal issue. Here, the
26 Court finds for settlement purposes that Plaintiffs have alleged at least one question of fact and
27 law purportedly common to the Settlement Class. Plaintiffs complain of alleged common
28 misrepresentations by Trex and an alleged common condition of the product in question.

1 c. The Court finds for settlement purposes that the claims of the named
2 Plaintiffs are typical of the claims of the Settlement Class that are being settled. The named
3 Plaintiffs are adequate representatives of the Settlement Class they represent, since their interests
4 are reasonably co-extensive with those of Settlement Class members, and the Plaintiffs have
5 retained experienced counsel to represent them. The named Plaintiffs and Class Counsel will
6 fairly and adequately protect the interests of the Settlement Class.

7 d. The Court finds for settlement purposes that a resolution of this Action in
8 the manner proposed by the Settlement Agreement is superior to other available methods for a
9 fair and efficient adjudication of the Action and that common issues predominate over individual
10 issues. Common questions include whether Trex products manufactured during the relevant time
11 period are defective by design or manufacture. Class treatment here, in the context of the
12 Settlement, will facilitate the favorable resolution of all Settlement Class members' claims. The
13 proposed resolution of this Action involves a Claims Program which will identify and resolve
14 complaints without burdening the courts or regulators and which will result in the replacement of
15 any defective Trex Product (i.e., Trex Product exhibiting the Surface Flaking defect) or a cash
16 equivalent at retail price and a partial labor stipend. Given the number of Class Members, use of
17 the class device will offer a more efficient and fair means of adjudicating the claims at issue,
18 conserve judicial resources, and will promote consistency and efficiency of adjudication by
19 avoiding multiple individual suits or piecemeal litigation. The Court also notes that, because this
20 Action is being settled rather than litigated, the Court need not consider manageability issues that
21 might be presented by the trial of a nationwide class action involving the issues in this case. *See*
22 *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997).

23 In making these findings, the Court has considered, among other factors: (i) the interests
24 of Class Members in individually controlling the prosecution or defense of separate actions;
25 (ii) the impracticability or inefficiency of prosecuting or defending separate actions; (iii) the
26 extent and nature of any litigation concerning these claims already commenced; and (iv) the
27 desirability of concentrating the litigation of the claims in a particular forum. The Court takes
28 guidance in its consideration of certification issues from *Hanlon v. Chrysler Corp.*, 150 F.3d 1011

1 (9th Cir. 1998).

2 8. Final Settlement Approval. The terms and provisions of the Settlement
3 Agreement, including any and all amendments and exhibits, have been entered into in good faith
4 and are hereby fully and finally approved as fair, reasonable and adequate as to, and in the best
5 interests of, the Plaintiffs and the Class Members, and in full compliance with all applicable
6 requirements of the Federal Rules of Civil Procedure, the United States Constitution (including
7 the Due Process Clause), and any other applicable law.

8 The Court finds that the Settlement Agreement is fair, adequate and reasonable based on
9 the following factors, among other things. First, there is no fraud or collusion underlying this
10 settlement, and it was reached after good faith, arms-length negotiations, warranting a
11 presumption in favor of approval. *Officers for Justice v. Civil Serv. Comm'n.*, 688 F.2d 688 F.2d
12 615, 625 (9th Cir. 1982). Second, the complexity, expense and likely duration of the litigation
13 favors settlement on behalf of the Settlement Class, which provides meaningful benefits on a
14 much shorter time frame than otherwise possible. Based on the stage of the proceedings and the
15 amount of investigation and informal discovery completed, the Parties had developed a sufficient
16 factual record to evaluate their chances of success at trial and the proposed Settlement. Third, the
17 support of Class Counsel, who are highly skilled in class action litigation such as this, and the
18 Plaintiffs, who have participated in this litigation and evaluated the proposed Settlement, also
19 favors final approval. *See Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979); *Class*
20 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992). Fourth, the Settlement provides
21 meaningful relief to the Settlement Class, including replacement product or a cash equivalent at
22 retail price for any defective Trex Product (i.e., Trex Product exhibiting the Surface Flaking
23 defect) as well as a partial labor payment for replacement of any defective Trex Product, and
24 certainly falls within the range of possible recoveries by the Settlement Class. Finally, the
25 positive response to the Settlement by the Settlement Class – evidenced by a very small
26 percentage of opt-outs and objections – further supports final approval. Of the thousands and
27 thousands of Class Members, only thirty-six (36) opted out and only two (2) objected. *Compare*
28 *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004). Moreover, no government agent

1 has responded to the proposed Settlement despite the notifications sent to the appropriate state
2 and federal government officials.

3 The Court has considered the objections and hereby overrules them. The objectors
4 generally argue that the Settlement could have been better by providing different or additional
5 relief. However, as the Ninth Circuit has made clear, the Court's inquiry "is not whether the final
6 product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from
7 collusion." *Hanlon*, 150 F.3d at 1027. The Court finds that the Settlement meets this standard.

8 The primary objection of William J. Langan is that the \$225 limit on the labor payment
9 for those who have prior compensated claims is not fair because other Class Members may
10 receive more in labor costs under the Settlement. (Selbin Decl., Ex. G.) Mr. Langan also takes
11 issue with the formula of \$0.18 per linear foot as being too small. This is also the sole complaint
12 of the other objector, Michael R. Capelle. (*Id.*, Ex. F.) In other words, the objectors complain
13 that, by way of Settlement, they will not obtain all of the relief (and perhaps more) they could
14 hope to recover after years of 100% successful litigation. That is not a realistic goal, and it is not
15 the standard by which final approval of a settlement is measured. Instead, both objections "offer
16 nothing more than speculation about what damages 'might have been' won had they prevailed at
17 trial." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (*quoting Officers*
18 *for Justice*, 688 F.2d at 625). As the Ninth Circuit has repeatedly held, "it is the very uncertainty
19 of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual
20 settlements. The proposed Settlement is not to be judged against a hypothetical or speculative
21 measure of what might have been achieved by the negotiators." *Id.* (*quoting Officers for Justice*,
22 688 F.2d at 625). The Court explained, "the very essence of a settlement is compromise, a
23 yielding of absolutes and an abandoning of highest hopes." *Id.* Although the Settlement terms
24 reached here provide a significant benefit, "[t]he fact that a proposed settlement may only amount
25 to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement
26 is grossly inadequate and should be disapproved." *Id.* (citations and quotations omitted).

27 This Court has previously recognized that "a settlement by definition requires
28 compromise, and Plaintiffs cannot expect to make a full recovery in the absence of litigation."

1 (Docket No. 81 at 7.) There is no guarantee that, if the warranty limitations had been contested in
2 litigation, they would be found unconscionable. In fact, there is authority for the contrary. (*Id.*
3 (“While it is possible that the disclaimer would be found unenforceable for unconscionability, such
4 a result cannot be presumed. Limitations of consequential economic damages for consumers are
5 not prima facie unconscionable, U.C.C. § 2-719(3), and such disclaimers in consumer warranties
6 have been upheld where there is no great disparity of bargaining power. *E.g. Zaremba v. Marvin*
7 *Lumber and Cedar Co.*, 458 F. Supp. 2d 545 (N.D.Ohio 2006).”)) Moreover, the labor costs,
8 shipping, and enhanced recovery for decks with more than fifty percent failure exceed the basic
9 entitlement of the warranty and represent value gained through the Settlement. Class Counsel,
10 after investigation and in light of their broad experience with consumer class actions, decided that
11 a compromise was appropriate, and the Court agrees.

12 Accordingly, the Court overrules all objections and approves the Settlement Agreement as
13 fair, adequate, and reasonable. The Parties and Class Members are hereby directed to implement
14 and consummate the Settlement Agreement according to its terms and provisions.

15 9. Binding Effect. The terms of the Settlement Agreement, and of this Final Order
16 and Judgment shall be forever binding on Plaintiffs and all other Class Members, as well as their
17 heirs, executors, administrators, representatives, agents, successors and assigns, and those terms
18 shall have res judicata and other preclusive effect in all pending and future claims, lawsuits or
19 other proceedings maintained by or on behalf of any such persons, to the extent those claims,
20 lawsuits or other proceedings involve matters that were or could have been raised in this Action
21 or are otherwise encompassed by the Release described in the next paragraph of this Final Order
22 and Judgment.

23 10. Release. The release language contained in the Settlement Agreement (including
24 but not limited to § A, ¶ 27 and § I of the Settlement Agreement) is expressly incorporated herein
25 in all respects, is effective as of the date of this Final Order and Judgment, and forever discharges
26 the Released Parties as set forth therein.

27 11. Permanent Injunction. All Class Members who have not been timely excluded
28 from the Settlement Class (by filing and serving a properly executed request for exclusion by

1 October 29, 2009) are hereby permanently barred and enjoined from (a) filing, commencing,
2 asserting, prosecuting, maintaining, pursuing, continuing, intervening in, participating in (as class
3 members or otherwise), or receiving any benefits or other relief from, any other lawsuit,
4 arbitration, or administrative, regulatory or other proceeding or order in any jurisdiction based on
5 or relating to the claims and causes of action, or the facts and circumstances relating thereto, in
6 this Action and/or the matters released in the Released Claims section of the Settlement
7 Agreement (§ A, ¶ 27), and (b) organizing or soliciting the participation of any Class Members in
8 a separate class for purposes of pursuing as a purported class action (including by seeking to
9 amend a pending complaint to include class allegations, or by seeking class certification in a
10 pending action) any lawsuit or other proceeding based on or relating to the claims and causes of
11 action, or the facts and circumstances relating thereto, in this Action and/or the matters released in
12 the Released Claims section of the Settlement Agreement (§ A, ¶ 27). The Court finds that
13 issuance of this permanent injunction is necessary and appropriate in aid of the Court's
14 jurisdiction over this Action and to protect and effectuate the Court's Final Order and Judgment.

15 12. Enforcement of Settlement. Nothing in this Final Order and Judgment shall
16 preclude any action to enforce the terms of the Settlement Agreement; nor shall anything in this
17 Final Order and Judgment preclude Plaintiffs or Class Members from participating in the Claims
18 Program described in § E of the Settlement Agreement if they are entitled to do so under the
19 terms of the Settlement Agreement.

20 13. Attorneys' and Class Representative's Fees and Expenses. The Settlement
21 Agreement provides for attorneys' fees and reimbursement of their expenses in the amount of
22 \$1,250,000.00, and stipends to the Class representatives as follows: \$7,500.00 each to Eric Ross
23 and to Bradley S. Hureth. The Court will issue a separate order addressing these fees and stipend
24 requests.

25 14. No Other Payments. The preceding paragraph of this Final Order and Judgment
26 covers, without limitation, any and all claims for attorneys' fees and expenses, representative
27 fees, costs or disbursements incurred by Class Counsel or any other counsel representing the
28 Plaintiffs or Class Members, or incurred by the Plaintiffs or the Class Members, or any of them,

1 in connection with or related in any manner to this Action, the settlement of this Action, the
2 administration of such Settlement, and/or the matters released in the Released Claims section of
3 the Settlement Agreement (§ A, ¶ 27) except to the extent otherwise specified in this Final Order
4 and Judgment and the Settlement Agreement. Trex shall not be liable to Plaintiffs and the Class
5 Members for any additional attorneys' fees, representative fees, or expenses. All costs of court
6 are taxed against the Parties incurring same.

7 15. Retention of Jurisdiction. The Court has jurisdiction to enter this Final Order and
8 Judgment. Without in any way affecting the finality of this Final Order and Judgment, this Court
9 expressly retains exclusive and continuing jurisdiction over the Parties, including the Settlement
10 Class, and all matters relating to the administration, consummation, validity, enforcement and
11 interpretation of the Settlement Agreement and of this Final Order and Judgment, including,
12 without limitation, for the purpose of:

13 a. enforcing the terms and conditions of the Settlement Agreement and
14 resolving any disputes, claims or causes of action that, in whole or in part, are related to or arise
15 out of the Settlement Agreement, and/or this Final Order and Judgment (including, without
16 limitation, whether a person or entity is or is not a Class Member; whether claims or causes of
17 action allegedly related to this Action are or are not barred or released by this Final Order and
18 Judgment, whether persons or entities are enjoined from pursuing any claims against Trex, etc.);

19 b. entering such additional orders, if any, as may be necessary or appropriate
20 to protect or effectuate this Final Order and Judgment and the Settlement Agreement (including,
21 without limitation, orders enjoining persons or entities from pursuing any claims against Trex), or
22 to ensure the fair and orderly administration of the Settlement; and

23 c. entering any other necessary or appropriate orders to protect and effectuate
24 this Court's retention of continuing jurisdiction over the Settlement Agreement, the Parties, and
25 the Class Members.

26 16. No Admissions. Neither this Final Order and Judgment nor the Settlement
27 Agreement (nor any other document referred to herein, nor any action taken to negotiate,
28 effectuate and implement the Settlement) is, may be construed as, or may be used as an admission

1 or concession by or against Trex as to the validity of any claim or any actual or potential fault,
2 wrongdoing or liability whatsoever. Additionally, neither the Settlement Agreement, nor any
3 negotiations, actions, or proceedings related to them, shall be offered or received in evidence in
4 any action or proceeding against Trex in any court, administrative agency or other tribunal for
5 any purpose whatsoever, except to enforce the provisions of this Final Order and Judgment and
6 the Settlement Agreement. This Final Order and Judgment and the Settlement Agreement may be
7 filed and used by Trex or the Released Parties to seek an injunction and to support a defense of
8 res judicata, collateral estoppel, estoppel, release, waiver, good-faith settlement, judgment bar or
9 reduction, full faith and credit, or any other theory of claim preclusion, issue preclusion or similar
10 defense or counterclaim.

11 Certification shall be automatically vacated and this Final Order and Judgment shall
12 become null and void if the Settlement Agreement is disapproved by any appellate court and/or
13 any other court of review, or if Trex invokes its right to terminate this Settlement Agreement
14 (pursuant to § P of the Settlement Agreement), in which event this Final Order and Judgment, the
15 Settlement Agreement and the fact that they were entered into shall not be offered, received or
16 construed as an admission or as evidence for any purpose, including the “certifiability” of any
17 class as further discussed in § B of the Settlement Agreement. The Settlement Agreement itself,
18 actions in conformance with the Settlement, and the other documents prepared or executed by any
19 party in negotiating or implementing the Settlement called for by the Settlement Agreement,
20 including any of the terms of any such documents, shall not be construed as an admission, waiver
21 or estoppel by Trex and shall not be offered in evidence in or shared with any party to any civil,
22 criminal, administrative, or other action or proceeding without Trex’s express written consent.

23 17. Dismissal of Action. This Action, including all individual and Settlement Class
24 claims resolved in it, is hereby dismissed on the merits and with prejudice against Plaintiffs and
25 all other Class Members, without fees or costs to any party except as otherwise provided in this
26 Final Order and Judgment and the Court’s separate order regarding attorneys’ fees and costs and
27 class representative stipends.

28 18. Final Judgment. This is a Final Judgment disposing of all claims and all parties.

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SIGNED this _____ day of _____, 2009.

The Honorable Jeremy Fogel
UNITED STATES DISTRICT JUDGE

APPENDIX A

LIST OF OPT-OUTS EXCLUDED FROM THE CLASS

Case No. 5:09-CV-00670-JF (N.D. Ca.)

Appendix A: Final List of Opt-Outs

	Name	Date	State
1	Adams, Gary	9/17/2009	CA
2	Baker, James R.	9/7/2009	CA
3	Bogart, John C.	9/3/2009	AZ
4	Bohannon, William and Martha	9/2/2009	CA
5	Bugua, Christine	9/14/2009	CA
6	Collom, Kurt S. and Darlene M.	9/4/2009	CA
7	Di Cristina, Marie and Ronald Di	9/22/2009	WA
8	Etter, Larry and Mary	9/15/2009	CO
9	Guthrie, Sharon and Ed	8/28/2009	CA
10	Hardt, Robert and Lori	9/22/2009	AZ
11	Horell, Carmelita and Archie	9/18/2009	WA
12	Iker, Gilber H. and Thelma P.	9/2/2009	UT
13	Inger, Ivan and Jeri	9/4/2009	OR
14	Kaeske, Michael and Joanne	9/16/2009	UT
15	Krauser, Sheryl and Larry B.	9/21/2009	WA
16	Lomagno, Mike	9/23/2009	CA
17	Ludemann, Mary B.	9/17/2009	WY
18	Lynchchild, Nancy	9/12/2009	OR
19	MacIvor, Evan and Mitsuko	8/25/2009	CA
20	Montana, Richard A. and Carmen H.	9/19/2009	OR
21	Neufeld, Gerald and Gail	8/31/2009	OR
22	Perker, Rick K.	9/13/2009	CA
23	Powell, Daniel and Lynne	9/1/2009	CA
24	Press, Stanley	9/12/2009	CA
25	Reynolds, Douglas	8/25/2009	CA
26	Rudd, Dorothy	9/4/2009	CA
27	Rusca, John A.	8/31/2009	CA
28	Sage, Russ	9/2/2009	CA
29	Seikel, John A. and Paula	9/19/2009	ID
30	Stone, Robert	9/13/2009	CO
31	Swanson, Art	8/31/2009	OR
32	Trenner, Susan	9/1/2009	CA
33	Wetter, Tom and Gayle	9/11/2009	CA
34	Wexler, Bruce D. and Dana M.	9/8/2009	CA

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35	Witt, Jack	8/26/2009	NV
36	Woolmington-Smith, Barbara and Craig	9/2/2009	CA