STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-CVS-534

BEAU ZANCA; ERIC KROHM; A.J., by and through his Guardian CHRIS JONES; Z.K., by and through his Guardian SEAN KINNEY; M.M., by and through his Guardian DAVID MINCES; L.M., by and through his Guardian CHAD MOYER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

EPIC GAMES, INC., a Maryland corporation,

Defendant.

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR FINAL APPROVAL TO CLASS ACTION SETTLEMENT AND MOTION FOR ATTORNEYS' FEES TO SETTLEMENT CLASS COUNSEL AND OBJECTION OF K.W. WILLIAMS, JILLIAN WILLIAMS AND J.M. TO THE CLASS ACTION SETTLEMENT AND MOTION FOR ATTORNEYS' FEES

THIS MATTER comes before the Court on Plaintiffs' Motion for Final Approval of Settlement ("Approval Motion") and Motion for Award of Attorneys' Fees and Expenses and Incentive Awards ("Fee Motion," and, collectively with the Approval Motion, the "Motions") and Objection of K.W. Williams, Jillian Williams and J.M. and to the Class Action Settlement and Motion For Attorney Fees ("the Objection"), pursuant to Rule 23 of the North Carolina Rules of Civil Procedure.

At the hearing on the Motions and the Objection on May 6, 2021, counsel for

Objectors requested that the Court review that settlement agreement described in ¶¶ 36-37, *infra*, between Epic Games, Inc. ("Epic Games") and C.W. and his mother both in her capacity as guardian and her individual capacity. ("C.W Settlement Agreement"). Upon review of the C.W. Settlement agreement the Court directed that it be filed under seal and a copy be made available to counsel for Objectors. On June 22, 2021 the Court received an unsolicited Supplemental Memorandum of Objectors K.W., Jillian Williams and J.M. Regarding Recently Disclosed Individual Settlement Agreement in Support of their Objections. The Court thereafter held another hearing on July 21, 2021 and the matters before the Court are now ripe for adjudication.

After the Court preliminarily approved the settlement on February 25, 2021 (the "Settlement" or "Class Action Settlement"-*) and after appropriate notice to the more than 27 million Settlement Class Members was provided as required by the Court's Order Granting Preliminary Approval of Settlement ("Preliminary Approval Order"), one objection representing two objectors and 1,421 requests for exclusion were received.

As set forth above, the Court held a Final Approval Hearing on the Motions and Objection on May 6, 2021 and July 21,2021 and is satisfied as to the fairness, reasonableness, and adequacy of the Settlement, and the fairness and reasonableness of the fees, expenses, and incentive awards as determined by the Court. Therefore, having considered the Motions, the supporting Memoranda and materials filed with the Motions, the single objection received from "K.W.," his mother Jillian Williams, and "J.M." (the "Objection"), discussions with counsel during the Final Approval

Hearings, and other appropriate matters of record, the Court concludes that good cause exists to grant the Motions as set forth herein. Therefore, the Court OVERRULES the Objection, GRANTS the Approval Motion, CERTIFIES the class as defined below for settlement purposes only, APPROVES the Settlement, and GRANTS the Fee Motion as set forth herein.

FINDINGS OF FACT

BACKGROUND

1. Plaintiffs filed a putative class action on January 12, 2021, on behalf of themselves and those similarly situated against Epic Games, Inc. Prior to appointment of class counsel, Plaintiffs Beau Zanca, Eric Krohm and Chad Moyer, on behalf of his son, L.M. retained and were represented by: Daniel K. Bryson and Patrick Wallace of Whitfield Bryson, LLP[1]; Myles McGuire, Evan Myers, Timothy Kingsbury and Colin P. Buscarini of McGuire Law, P.C.; and Michael McMorrow of McMorrow Law, LLC[2]. Plaintiffs A.J., by and through his guardian Chris Jones; Z.K. by and through his guardian Sean Kinney, and M.M., by and through his guardian David Minces, retained and were represented in this action by: Daniel K. Bryson and Patrick Wallace of Whitfield Bryson, LLP; and Deepali Brahmbhatt and Timothy Devlin of the Devlin Law Firm, LLC.[3] Epic Games retained and is represented by:

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[1] Messrs. Bryson and Wallace are now with Milberg Coleman Bryson Phillips Grossman, PLLC

[2] Messrs. McGuire, Myers, Kingsbury, Buscarini and McMorrow filed Motions for Admission *pro hac vice* and the appropriate filing fee with the Court indicating their representation of these clients. The Court appointed these attorneys along with others as class counsel as part of the Court's preliminary approval of the Class Settlement but for some reason failed to sign the orders granting their admission *pro hac vice*. Those orders were subsequently executed by the undersigned.

[3]The identity of which counsel each plaintiff retained and was represented by is a matter of public record and can be found in the Statements of Client filed with each Motion for Admission p*ro hac vice* which are contained in the court file.

Jeffrey S. Jacobson of Faegre Dinkler Biddle & Realth, LLP; and Robert Van Arnam of Williams Mullins.

2. Epic Games, headquartered in Cary, North Carolina, produces video games, including the very popular games *Fortnite* and *Rocket League*. Plaintiffs are among the many people who played one or both of those games. Players of *Fortnite* and *Rocket League* may, but need not, make in-game transactions to enhance their enjoyment of the games. They may, for example, acquire "skins" or "emotes" for their in-game characters. Players acquire these items using in-game virtual currency, called "V-Bucks" in the case of *Fortnite* and "Credits" in the case of *Rocket League*. (hereinafter collectively referred to as "virtual currency") Players can acquire virtual currency at no cost simply by playing the game, but if players want to use more virtual currency than they have accumulated through their play, they may purchase virtual currency using real money. Epic Games sells virtual currency directly to players and the player must have a credit card or Pay-Pal account to pay for their purchase. Affidavit of Jeffrey Jacobson Aff. ¶ 15. (hereinafter "Jacobson Aff. ___). Players also may purchase virtual currency on or through third-party marketplaces like the Apple Store, if the player plays *Fortnite* or *Rocket League* on a device manufactured by Apple, Inc., or the PlayStation Store, if the player plays the games on a Sony PlayStation.[4]

3. Plaintiffs contend, and Epic Games disputes, that certain aspects of

[4] There is a dispute between Epic Games and the Objectors and Plaintiffs as to whether the third-party market place purchases constitute purchases from Games Epic or from the third party. The resolution of that issue is not necessary for a determination of the issues raised before the Court on the Motions.

their in-game transactions violated the consumer protection laws of North Carolina and/or their home states. In the past, for example, Epic Games allowed players to exchange virtual currency for "Random Item Loot Boxes," which are in-game items the contents of which would not become known to the player until after the player had made the exchange. Within *Fortnite*, these Random Item Loot Boxes were called "Loot Llamas"; within *Rocket League*, they were called "Crates." Plaintiffs challenge these virtual grab-bags of items on several grounds, including that Epic Games did not adequately disclose to players the likelihood of receiving the rarest and most desirable items. Epic Games discontinued the practice of selling Random Item Loot Boxes in 2019, but millions of *Fortnite* and *Rocket League* players exchanged virtual currency for Random Item Loot Boxes before Epic Games ceased the practice. Plaintiffs contend, and Epic Games disputes, that applicable law requires Epic Games to partially or fully refund the real money they used to purchase the virtual currency they exchanged for Random Item Loot Boxes. This is far from the only respect in which Plaintiffs challenge in-game transactions. Plaintiffs contend, and Epic Games disputes, that Epic Games actionably misled consumers about, among other things, the pace at which Epic Games would offer new in-game items, thereby making earlier-acquired items less desirable, and its refundability policies. Plaintiffs also contend, and Epic Games disputes, that Epic Games committed unfair trade practices by not providing players with sufficient tools to keep track of their in-game purchases. Finally, and most broadly, Plaintiffs contend that if a legal minor used his or her own money to purchase virtual currency, those purchases amount to

"contracts" which minors, at any time before or within a reasonable time after reaching the age of majority, can "disaffirm" pursuant to applicable state law and thereby receive refunds for their purchases, even if they have used and benefited from those purchases.

4. Epic Games' *Fortnite* video game, launched in October 2017, is one of the most successful games of all time, with hundreds of millions of players worldwide. *See* Jacobson Aff. ¶ 13. *Fortnite* has been free to play in most modes and on most platforms, and players do not need to spend any money to play it. *Id.* Players who wish to enhance their experience with (for example) different "skins" for their game characters, dances, or "emotes" for their characters, can acquire those enhancements with virtual currency. Players can earn virtual currency through game play and, if they wish to do so, purchase virtual currency with real money as previously described in ¶ 2, *supra*.

5. Sixty-nine percent (69%) of *Fortnite* and *Rocket League* players who have made in-game purchases spent less that Ten Dollars ($10.00) on in-game purchases, approximately eighty-three percent (83%) have spent less than Twenty Dollars ($20.00) and ninety-five percent (95%) have spent less than Fifty Dollars ($50.00). Supplemental Aff. of Myles McGuire at ¶ 6. (hereinafter "McGuire Supp. Aff. ___"); Defendant's Objection and Responses to Plaintiffs' First Set of Confirmatory Interrogatories (hereinafter "Confirmatory Interrogatories)", Interrogatory No. 2.

FORTNITE-RELATED PUTATIVE CLASS ACTIONS

6. Prior to the institution of this action there have been four *Fortnite*-related putative class action lawsuits filed against Epic Games: (1) *Krohm v. Epic Games, Inc.*, No. 2019 CH 02032 (Ill. Cir. Ct., Cook Cty.)("*Krohm*"); (2) *R.A. and Steve Altes v. Epic Games, Inc.*, No. 2:19-cv-1488-GW-E (C.D. Cal.) ("*R.A.*"); (3) *Rebecca White v. Epic Games, Inc.*, No. 4:19-cv-3629-YGR (N.D. Cal.) ("*White*") and *Heidbreder v. Epic Games, Inc.* No. 5:19-cv-348-BO (E.D.N.C.)[5]

Krohm

7. *Krohm* was the first of the *Fortnite*-related putative class actions and was filed in February 2019. In *Krohm,* the plaintiff alleged a data security vulnerability in *Fortnite* that he alleged subjected him to an increased risk of compromise of the personal and financial information he provided while making *Fortnite* in-game purchases. *See* Jacobson Aff. ¶ 9. *Krohm* demanded that Epic Games provide identity theft insurance to all *Fortnite* players. *See id.*

8. In April, 2019, Epic Games removed *Krohm* to the United States District Court for the Northern District of Illinois where it was subsequently transferred to the United States District Court for the Eastern District of North Carolina pursuant to a venue clause contained in the Epic Games terms of service. *McGuire Aff. ¶ 11.*

[5] On September 10, 2021, the Court gave the parties notice of its intent to take judicial notice of the filings with the courts in these actions as well as the filings in *K.W. v. Epic Games, Inc.*, 3:21-CV-00976-CRB (N.D. Cal.). Having received no objection the Court takes judicial notice of the same.

R.A.

9. Shortly after *Krohm* was filed, *R.A* was filed in the U.S District Court for the Central District of California, the second of the *Fortnite*-related putative class action suits against Epic Games. The plaintiffs in *R.A.* contended that Epic Games did not sufficiently disclose the odds of receiving particular items in randomized loot boxes and that they did not receive the items they wanted. *See id.* ¶ 17.

10. Upon motion of Epic Games, *R.A.* was transferred to the United States District Court for the Eastern District of North Carolina. *R.A.* focused on one specific kind of in-game purchase within *Fortnite*, available only in its "*Fortnite: Save the World*" mode, called "Loot Llamas." *See* Jacobson Aff. ¶ 17. Loot Llamas were "blind" items that players would acquire with V-Bucks without knowing their contents. *See* ¶ 3, *supra.*

11. In *R.A.*, the *Fortnite* End User License Agreement ("EULA"), contained a mandatory arbitration provision. When Epic Games, pursuant to the EULA, moved to compel arbitration plaintiff elected to exercise his right under California Family Code § 6710 to "disaffirm" his acceptance which necessarily included disaffirming the arbitration provision. *Id.* ¶¶ 12, 18. Epic Games honored that disaffirmation but contended that disaffirmation of a contractual relationship must be total, meaning that the plaintiffs could not disaffirm the EULA without also disaffirming the in-game purchases they made pursuant to the EULA. *See id.* ¶ 18. *See. e.g., T.K. v. Adobe Sys., Inc.*, No. 17-CV-4595-LHK, 2018 U.S. Dist. LEXIS 65557 at*10; 2018 WL

1812200, at *4 (N.D. Cal. Apr. 17, 2018) ("if a minor seeks to disaffirm a contract under section 6710, equitable principles dictate that he or she 'must disaffirm the entire contract, not just the irksome portions'"), *quoting I.B. v. Facebook, Inc.*, No. C 12-1894 CW, 2013 U.S. Dist. LEXIS 179137 at *13, 2013 WL 6734239, at *4 (N.D. Cal. Dec. 20, 2013), and *Holland v. Universal Underwriters Ins. Co.*, 270 Cal. App. 2d 417, 421 (1969). Based on that principle, Epic Games refunded the plaintiffs' in-game purchases.

12. In *R.A.*, the court agreed that the minor's disaffirmation had to be of the entire contract. *See R.A. v. Epic games, Inc., 2020 U.S. Dist. LEXIS 28593 at* * 4, 2020 WL 865420, at *2. (E.D.N.C. Feb. 20, 2020). The court agreed the refund from Epic Games mooted the entire basis for the claims and required dismissal. *Id.* The *R.A.* plaintiffs did not appeal. *See* Jacobson Aff. ¶ 19.

DISMISSAL OF *KROHM*

13. In *Krohm*, the plaintiff was not subject to mandatory arbitration as he commenced the class action before Epic Games amended its EULA to require arbitration of disputes. *See* Jacobson Aff. ¶ 12. After the case was transferred to the United States District Court for the Eastern District of North Carolina, the plaintiff argued that the federal courts did not have jurisdiction over his claim pursuant to Article III of the United States Constitution because he was not alleging an actual injury, therefore, the case should be remanded back to the Illinois state court. *Id.* ¶ 10. The court agreed with the plaintiff's Article III contention but instead of remanding the case, the Court dismissed the case for lack of jurisdiction. *See Krohm*

v. Epic Games, Inc., 408 F. Supp. 3d 717, 720-721 (E.D.N.C. 2019). The plaintiff appealed the District Court's failure to remand the case back to the Illinois State Courts and Epic Games cross-appealed, arguing that the trial court should have dismissed the case for failure to state a claim upon which relief could be granted rather than for lack of jurisdiction. Jacobson Aff. ¶ 11. Both appeals had been fully briefed, but not argued, when the parties began discussing settlement. *Id.*

WHITE

14. In June 2019, *White*, the third *Fortnite*-related putative class action suit, was filed against Epic Games. In *White*, the minor plaintiff, C.W., sought a declaration that California Family Code § 6710 gave him and every minor in California who purchased V-Bucks or other in-game items—the right to a refund for those purchases, by way of disaffirmation of the EULA even if he already had used what he purchased to obtain in-game benefits and enhance his enjoyment of the game. *Id at ¶ 21. White* was filed before disaffirmation was asserted in *R.A.*. Counsel in *White* drafted the complaint to only contain C.W.'s claims and not those of his mother Rebecca White, thus allowing the minor to disaffirm the EULA and avoid arbitration. Affidavit of Deepali Brahmbhatt ¶ 15. (hereinafter "Brahmbhatt Aff. ___").

15. C.W. was originally represented by OneLLP with Deepali Brahmbhatt as lead counsel, a contract partner with OneLLP, along with her partners John Lord and Peter Afrasiabi.

16. Epic Games moved to have *White* transferred to the Eastern District of North Carolina and to compel arbitration. The *White* court held plaintiffs were not bound by the arbitration or venue clauses as they had disaffirmed the EULA. In denying Epic Games motions, the *White* court relied upon assurances from C.W. that he had stopped playing Fortnite around October 2019 and had therefore revoked the terms of the Fortnite EULA. Brahmbhatt Aff. ¶ 15. *See White*, 435 F. Supp. 3d 1024, 1035-38 (N.D. Cal. Jan. 23, 2020).

17. One of the issues in *White,* as in all disaffirmation cases, is whether the minor used his own funds to make the in-game purchases. At the pleading stage, the court assumed as true the *White* plaintiffs' allegations that the minor plaintiff spent his "own money" on in-game transactions. *Id.* at 1038. While the court dismissed many of the claims in *White* regarding Epic Games' sales practices, the court did not dismiss the claim regarding his purported rights under California Family Code § 6710. *White*, 435 F. Supp. 3d 1024, 1035-38 (N.D. Cal. Jan. 23, 2020).

18. Between the filing of their original complaint in *White* and the filing of an amended complaint on February 13, 2020, Epic Games developed evidence they believed showed that C.W. never purchased anything from Epic Games with a "gift card" or any other method of purchase that could be considered the minor's "own money." *See* Jacobson Aff. ¶ 26.[6] Soon thereafter, the plaintiff in *White* filed an

[6] In between the filing of the original complaint in *White* and the amended complaint, the fourth *Fortnite* putative class action was filed against Epic Games in *Heidbreder v. Epic Games, Inc.* No. 5:19-cv-348-BO (E.D.N.C). In *Heidbreder*, the plaintiff asserted that certain in game purchases to his account were not authorized. Upon motion of Epic Games the claims were compelled to arbitration under the EULA. *Heidbreder v. Epic Games, Inc.,* 438 F.Supp.3d 591, 595 (E.D.N.C. 2020).

amended complaint, alleging that C.W. made his "own money" purchases from third parties, using Apple- and Sony-branded gift cards redeemable only on those companies' propriety marketplaces. *Id.* Epic Games once again moved to dismiss, but the court held it was premature to conclude that the plaintiffs could not disaffirm to Epic Games transactions they made with third parties. *See C.W. v. Epic Games, Inc.*, 2020 U.S. Dist. LEXIS 190543, 2020 WL 5257572 (N.D. Cal. Sept. 3, 2020); Jacobson Aff. ¶ 28.

19. When Epic Games asked the district court to certify its order for an interlocutory appeal, the court denied that motion. *See C.W. v. Epic Games, Inc.*, 2020 U.S. Dist. LEXIS 190543, 2020 WL 6064422 (N.D. Cal. Oct. 14, 2020).

20. In or around September and October 2020, Veridis Management, LLC,[7] ("Veridis") a litigation funder, was in negotiations with OneLLP to purchase or invest in *White*. This would have resulted in Veridis having full settlement authority over the action. Supplemental Affidavit of Deepali Brahmbhatt ¶ 7. (hereinafter "Brahmbhatt Sup. Aff ¶ ___").

21. Ms. Brahmbhatt's partners at OneLLP pressured Ms. Brahmbhatt to accept the offer as they were concerned about the need for Veridis' cash and that

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[7] According to the CEO of Veridis, Maximillian Amster:

> "Veridis Management, LLC is an asset management company that runs a single private equity fund, Veridis, L.P. Veridis, L.P. invests the capital of its investors into complex litigation claims and other assets and situations whose primary value includes legal and regulatory risks. It is a "litigation finance company" or "litigation funder." Like other litigation funders, Veridis raises its capital primarily from outside investors. Veridis is an investment company, not a law firm.

Affidavit of Maximillian Amster ¶ 5. (hereinafter "Amster Aff. ___")

OneLLP was facing a huge cost exposure. *Id.* at Ex. 2 In email communications, Ms. Brahmbhatt's partners suggested selling *White* "for $100,00 for fees incurred in past, and then 50/50 going forward with them incurring the expenses." *Id.* at Ex. 1. Despite the pressure from her partners, Ms. Brahmbhatt objected and terminated her contract with OneLLP. *Id.* at ¶ 7.

22. Plaintiff in *White* was given the choice of remaining with OneLLP or moving with Ms. Brahmbhatt to her new firm, Devlin Law Firm, LLC. Ms. Brahmbhatt's former partners at OneLLP informed C.W.'s guardian that they would team with Veridis to pursue the plaintiffs' claims if C.W. chose to remain with OneLLP. *Id.* at Exhibit 5. C.W. rejected this offer and informed all relevant counsel he would proceed in *White* with Ms. Brahmbhatt and the Devlin Law Firm, LLC as counsel. *Id.* at ¶ 8.

23. When Ms. White notified OneLLP of her decision, OneLLP informed her that OneLLP retained a lien interest and that they would enforce that interest or assign/sell it to another party. Brahmbhatt Supp. Aff. Ex. 6.

24. At the time C.W. chose to proceed with the Devlin Law Firm, OneLLP, through Ms. Brahmbhatt as lead counsel, had performed services in connection with *White* on behalf of the plaintiff in that case, including but not limited to: (1) pre-suit investigation; (2) drafting of the initial complaint (3) responding to motion to compel arbitration; (4) responding to motion to compel compliance with F.R.Civ. P. 10. (5) Opposing two motions to dismiss; (6) drafting and filing a motion to amend complaint,

and (7) conducting discovery. *See* Docket Sheet for *Rebecca White v. Epic Games, Inc.*, No. 4:19-cv-3629-YGR (N.D. Cal.)

25. After Ms. Brahmbhatt moved to the Devlin Law Firm, Veridis contacted her to discuss *White*. Brahmbhatt Supp. Aff. Ex. 3.

26. Upon the on-set of the COVID-19 epidemic, C.W. resumed playing *Fortnite* and re-accepted the *Fortnite* EULA in contravention to the representations to the Court that he would not do so. Brahmbhatt Aff. ¶ 16; Jacobson Aff. ¶ 30. In addition, C.W. was unable to provide any proof that he transacted with anyone, Epic Games or a third party, using his own money. Jacobson Aff. ¶ 30. Plaintiffs admitted that Rebecca White made purchases in multiple accounts, not just the single one they had asserted was the minor plaintiff's only account, and they conceded that they could not say which purchases were made by the minor plaintiff and which were not. *Id.*

27. On December 11, 2020, in a Notice filed with the court in *White,* Ms. Brahmbhatt informed the court that C.W. was not the best available candidate to represent any potential class on the disaffirmation claim. Ms. Brahmbhatt also filed a motion in *White* on behalf of two new potential minor plaintiffs, A.J. and Z.K. seeking to intervene in the case. A.J. and Z.K. are also named plaintiffs in this action. If the motion to intervene were granted, A.J. and Z.K. would be subject to their own motions to dismiss and to compel arbitration. *Id. C.W. v. Epic Games, Inc.*, 4:19-cv-03629-YG, Document 93, Notice of Motion and Motion to Add Minor Plaintiff Under F.R.Civ.P. 20 or 24 (Dec. 11, 2020).

INITIATION OF SETTLEMENT DISCUSSIONS WITH EPIC GAMES

28. In late 2020, Myles McGuire, lead counsel in *Krohm*, contacted counsel for Epic Games and advised him that he was prepared to moot the pending appeal by asserting much broader claims in *Krohm* and that he had potential clients, including *Krohm* that were not subject to the arbitration provisions, as well as minors seeking to disaffirm their in-game purchases. Id. at ¶ 35. *See also*, Salario Aff. Ex. A. at ¶ 4.

29. The *Krohm* plaintiffs' decision to expand their case and the problems C.W. faced in *White* occurred at roughly the same time in November 2020.

30. When the *Krohm* plaintiffs threatened their amended complaint, they suggested that Epic Games might wish to consider settlement discussions, and Epic Games agreed. See Jacobson Aff. ¶ 35. While Epic Games was willing to enter into settlement negotiations with the parties in *Krohm*, Epic Games would only enter into a settlement if it included counsel in *White*. Id. at ¶ 37.

31. Counsel for Krohm and counsel for Epic Games selected the Honorable Wayne Andersen (Retired) Former District Court Judge for the Northern District of Illinois, to serve as mediator.[8] Counsel for Epic Games advised the mediator in their

[8] Judge Andersen is a highly respected complex class action mediator. *See, e.g., In re Navistar MaxxForce Engines Mktg., Sales Practices & Prod. Liab. Litig.*, No. 14-cv-10318, 2020 WL 2477955, at *3 (N.D. Ill. Jan. 21, 2020) (granting final approval of class settlement reached "with the aid of respected class action mediator Judge Wayne Andersen"); *Fitzhenry-Russell v. Coca-Cola Co.*, No. 17-cv-00603, 2019 WL 11557486, at *5 (N.D. Cal. Oct. 3, 2019) (finally-approving class settlement produced "with the assistance of a well-respected and experienced mediator, former U.S. District Judge Wayne Andersen, of JAMS"); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 487 (N.D. Ill. 2015) (granting final approval of class settlement mediated by Judge Andersen over objection while noting Judge Andersen's reputation as "a highly respected retired judge of this court"); *In re Sw. Airlines Voucher Litig.*, No. 11-cv-8176, 2013 WL 4510197, at *8 (N.D. Ill. Aug. 26 2013) (considering Judge

first conversation, that while settlement discussions could begin, there would be no settlement unless counsel in *White* were parties to the settlement discussions. Counsel for Epic Games left it to Judge Andersen and Mr. McGuire to reach out to Ms. Brahmbhatt to invite her to join the settlement process. *Id.*

32. The initial mediation session lasted two days and took place in November 2020. These mediation settlement discussions began without plaintiff's counsel in *White* in attendance. In the negotiations that took place in November 2020 some tentative agreements were reached. In December 2020, with plaintiffs' counsel in *White* joining in the negotiations, additional material changes to the terms were agreed to, including increasing the total settlement amount, the addition of a *cy pres* fund for uncashed checks, and providing for the scope of counsel intervention on over-subscription. Brahmbhatt Aff. ¶19; Jacobson Aff. ¶¶ 37-38; See also, Affidavit of the Mediator, Hon. Wayne R. Andersen (ret.) ¶¶ 6-7. (hereinafter "Hendersen Aff. ___").

33. On December 28, 2020, Epic Games filed their opposition to the Motion to Intervene filed on behalf of A.J and Z.K. in *White*. *C.W. v. Epic Games, Inc.*, 4:19-cv-03629-YG, Document 94, Epic Games, Inc.'s Opposition to Motion to Add Minor Plaintiff Under F.R.Civ.P. 20 or 24 (Dec. 28, 2020).

34. Additional changes to the proposed class settlement were made and all material terms were agreed to prior to January 6, 2021. A final settlement document was executed on January 7 & 8 , 2021, ready to be presented to this Court. Second

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Andersen's involvement as mediator to be one indication the class settlement was "totally devoid of collusion").

Supplemental Affidavit of Deepali Brahmbhatt ¶ 6 ("hereinafter Brahmbhatt 2nd Supp. Aff. ____") . *See also*, Stipulation of Class Action Settlement.

35. On January 6, 2021, OneLLP served a Notice of Attorney's Lien for work performed in *White*. Brahmbhatt 2nd Supp. Aff. ¶ 9, Ex. 9.

36. On January 6, 2021, and after all material terms of the class settlement had been agreed to, C.W.'s mother, both as guardian ad litem and on behalf of herself negotiated a settlement with Epic Games, through their counsel Ms. Brahmbhatt, resolving any individual claims they may have against Epic Games. *Id.* at ¶ 10. *See also,* Confidential Settlement Agreement by and between Epic Games, inc. and Rebecca White, for herself and Minor C.W.

37. On July 7, 2021 the C.W. Settlement Agreement was executed between Epic Games, C.W. and Rebecca White both in her individual capacity and as guardian of C.W.

38. Upon signing the Class Settlement Agreement, the *Krohm* appeal and *White* were dismissed.

39. C.W.'s dismissal of *White*, states in part "this dismissal does not affect the rights of any person other than C.W. . .." At the time the time of the dismissal of *White,* a class had not been certified, the court had not appointed class counsel or interim counsel nor had the court ruled upon A.J's nor Z.K.'s motion to intervene. *C.W. v. Epic Games, Inc.*, 4:19-cv-03629-YG, Document 99, Order Approving Stipulation of Voluntary Dismissal of the Action (Jan. 12, 2021).

40. The Complaint in this matter was filed on January 12, 2021 along with a Motion for Preliminary Approval. As the Court in *White* had not ruled on the pending Motions to Intervene, A.J. and Z. K. joined, M.M. and L.M. in this action as minor Plaintiffs.

41. Neither C.W. nor his mother are named plaintiffs in this action.

42. On January 25, 2021, the Plaintiffs filed a motion seeking preliminary approval of class settlement.

K.W. v. Epic Games

43. On February 8, 2021, K.W., one of the two objectors in this matter, filed a fifth *Fortnite*-related putative class action in the Northern District of California entitled *K.W. and Jillian Williams v. Epic Games*, Inc. 3:21-cv-976 - CRB (N.D. Cal.). K.W. is represented by Messrs. Lord and Afrasiabi, along with Maximillian Amster and Samuel Salario, Jr. of Bay Advocacy, PLLC. Counsel for Epic Game contacted John Lord at OneLLP about the case, but Mr. Lord refused to speak with him, advising that Samuel Salario of Bay Advocacy, PLLC would be playing the lead role in the suit and that communications should be made only with him. (Jacobson Aff. ¶47-48).

44. Counsel for Plaintiff in *K.W.* sought to have the case related to *White,* which had been dismissed, and have it assigned to the same judge, but that request was denied. *K.W. v. Epic Games,* 3:21-CV-00976-CRB Document 17, Plaintiff's L.R. 3-12 Administrative Motion to Consider Whether Cases Should Be Related (February 25, 2021) and Document 25 Order Denying Motion to Relate (Mar. 12, 2021).

45. In *K.W.*, the minor plaintiff seeks to disaffirm his contract with Epic Games and any purchases through his *Fortnite*-related account. To that end, counsel for Epic Games asked that counsel for K.W. identify K.W. and his *Fortnite* account in order to make his disaffirmation effective. After doing so, Epic Games determined that K.W. had made purchases in the amount of Nineteen and 88/100 Dollars ($19.88) in purchases from Epic Games.[9] Epic Games also discovered that a player or players made *Fortnite*-related purchases from third parties as well. Epic Games then tendered a check in the amount of these purchases to K.W.'s counsel who have acknowledged receipt of the same but have indicated their intent to destroy the check. Ex. A to Salario Aff. at ¶¶ 15-20.

46. On April 19, 2021, and despite K.W.'s vigorous objection to the same, *K.W.* was stayed. *K.W. v. Epic Games, Inc.,* 3:21-cv-00976-CRB (N.D. Cal.) Document 21, Plaintiffs' Opposition to Defendant's Motion to Stay Action, March 12, 2021 and Document 36, Order Staying Case, April 19, 2021.

CONTINUED RISKS OF LITIGATION

47. Had the non-disaffirming Plaintiffs in this action elected to litigate their claims rather than settling them, they would have faced significant obstacles. In particular, Epic Games has defenses on the merits, including but not limited to the following: (1) whether random item purchases are harmless and common in physical commerce (*i.e.*, packs of baseball cards) and online commerce; and (2) whether the

[9] This is consistent with the in-game purchasing behavior of players of *Fortnite* revealed in the confirmatory discovery referenced in ¶ 5, *supra*. Objectors have not offered any competent admissible evidence to the contrary although they have had ample opportunity to do so.

plaintiffs can avoid the End User License Agreements ("EULAs") for *Fortnite* and *Rocket League*, which all players must accept in order to be able to play the games, and which requires players to submit disputes to binding, individual arbitration, rather than litigating those disputes as putative class actions.

48. Minors face different hurdles if they seek to disaffirm the EULA, including but not limited to: (1) whether applicable case law allows minors to disaffirm small dollar transactional purchases, including purchases where the minor has consumed the purchased item and therefore cannot return the same; (2) whether purchases through third-parties such as Apple or Sony constitute contracts between the purchaser and Epic Games or a contract between the purchaser and the third party for purposes of disaffirmation; (3) whether minors had used their own money make purchases; and (4) whether minors must disaffirm the entire contract as opposed to only portions of the same.

49. Absent a settlement, all plaintiffs risked the denial of class certification of a nationwide class. *See Chambers*, 214 F.Supp.3d 877, 888-89 (C.D. Cal. 2016). In addition, minors risked the denial of class certification due to the predominance of the individual issues that would have existed but for a settlement agreement.

50. At the same time, Epic Games faced risks from continued litigation. *Fortnite* and *Rocket League* are highly popular games with tens of millions of players in the United States alone. Even a small-dollar award, multiplied by such a large number of players, could have yielded a high cost to Epic Games.

51. On February 25, 2021, this Court entered the Preliminary Approval Order, finding that the Settlement was within the range of reasonableness such that putative Settlement Class Members should receive notice of the proposed Settlement and have an opportunity, if they wished, to object to or opt out of the Settlement. The Parties subsequently provided notice in the manner required by the Preliminary Approval Order.

OBJECTORS/INTERVENORS MOTIONS AND OBJECTIONS

52. On April 6, 2021, Plaintiff's in *K.W.*, as well as J.M. by and through his guardian ad litem Maria Garcia, filed a Motion to Intervene in this matter for the purpose of filing a complaint to have the action dismissed as nonjusticiable.

53. On April 12, 2021, the proposed Intervenors filed the Objection of K.W., Jillian Williams, and J.M to Class Action Settlement and to Motion for Attorneys' Fees. ("the Objection"). The proposed intervenors and Objectors are represented by D.J. O'Brien and Eric Fletcher of Brooks, Pierce McLendon, Humphrey & Leonard, L.L.P. and Samuel Salario, Jr. of Bay Advocacy, PLLC.

54. Prior to filing the Objection, the only information counsel for Objector sought from any counsel in this matter was copy of the C.W. Settlement Agreement. Trans. pp. 50-51 (July 21, 2021). Even though Epic Games did not oppose its release, C.W. apparently did. As the C.W. Settlement Agreement was subject to a confidentiality agreement, the Court conducted an *in-camera* review of the same and ordered it be provided to Objectors, prompting their unsolicited Supplemental Memorandum in Support of their Objection.

55. On May 4, 2021, Objectors filed their Evidentiary Objections of K.W., Jillian Williams, and J.M. to Affidavits Submitted in Support of Final Approval of Class Action Settlement and Motion for Attorneys' Fees. ("Evidentiary Objections").

56. Ms. Brahmbhatt invited the Court to review, *in camera,* certain documents related to C.W. that were subject to the attorney client privilege. After the Court reviewed the same, it informed counsel that it would not consider the documents in its analysis unless the same were provided to Objectors. When C.W. apparently was not willing to waive that privilege, the Court informed the parties it would not consider the documents. This Court has not considered any of those materials in reaching the decisions reported herein.

57. On May 18, 2021, Objectors filed a Motion to Compel ("Motion to Compel") seeking to compel the production of those privileged documents.[10]

58. Other than the C.W. Settlement Agreement and the documents referenced in ¶ 56, *supra*, counsel did not request any documents from the parties, including but not limited to the confirmatory discovery, or any discovery exchanged in *White. Id.*

REQUEST FOR DISCOVERY AND EVIDENTIARY HEARING

59. As part of their Objection, Objectors stated:

> [m]embers of the putative class require additional information to sufficiently assess whether the proposed settlement compensation is adequate and whether their interests were adequately represented in a settlement process. No discovery was conducted in this matter. Far from it—the parties jointly seek to use this court purely as a vessel for settlement and extinguishing claims in this and other cases. Objectors

[10] The Motion to Intervene, Evidentiary Objections and Motion to Compel will be addressed in a separate but related order.

should be allowed to conduct discovery into the adequacy of the proposed settlement. A reasonable period of discovery regarding the proposed settlement will aid the Court's ultimate determination and not unreasonably proceedings—despite the Settlement Proponents' desire for quick, unexamined approval. *See, e.g., In re Community Bank of Northern Virginia*, 418 F.3d 277, 316 (3d Cir. 2005) ("[D]iscovery may be appropriate if lead counsel has not conducted adequate discovery or if the discovery conducted by lead counsel is not made available to objectors."); *Klein v. O'Neal, Inc.*, 2010 WL 234806, at *2 (N.D. Tex. Jan. 21, 2010) (allowing discovery as to attorneys' fee award); *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 828 (E.D.N.C. 1994) (limited discovery allowed before fairness hearing).

Following limited discovery, the Objectors should be allowed to examine witnesses and otherwise put on evidence at or before the fairness hearing. *See Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 177 n.8 (3d Cir. 2012) (["[O]bjectors are correct that they have a limited right to discovery that can, in certain circumstances, include the opportunity to cross-examine witnesses before the court")). Ultimately, the goal of limited discovery is to allow the Court to make a full and informed decision as to the reasonableness of the proposed settlement. *See* 4 Newberg on Class Actions § 13:32 (5th ed. Dec. 2020 Update) ("The touchstone for discovery is that it will ultimately assist the court in determining the fairness of the settlement."). On the current record, the Court cannot.

60. In general, discovery from objectors takes two forms. First obtaining information from class counsel or counsel for defendant. Second obtaining discovery through the tools available through the rules of civil procedure. See 4 NEWBERG ON CLASS ACTIONS § 13:32 (5th ed.).

61. The MANUAL ON COMPLEX LITIGATION counsels that the [p]arties to the settlement agreement should generally provide access to discovery produced during the litigation phases of the class action (if any) as a means of facilitating appraisal of the strengths of the class positions on the merits. MCL, 4th § 21.643.

62. Objectors do not have an "absolute right" to discovery. 4 NEWBERG ON CLASS ACTIONS § 3.32 (5th ed.) *citing International Union, United Auto., Aerospace*

and Agr. Implement Workers of America v. General Motors Corp. 497 F.3d 615, 635 (6th Cir. 2007) and *In re Community Bank of Northern Virginia*, 418 F.3d 277, 316 (3r. Cir. 2005). "Discovery should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty and might be undertaken primarily to justify an award of attorney fees to the objector's counsel." MCL, 4th § 21.643.

63. The right to discovery is further diminished when there are relative few objections. *See, Hershey v. ExxonMobil Corp.*, 2012 W.L. 4758040 *2 (D. Kan. 2012); *In re Wachovia Corp. Pick -A-Payment Mortg. Marketing and Sales Practices Litg.*, 2011 U.S. Dist. LEXIS 45136 at *6, 2011 W.L. 1496342 at *2 (N.D. Cal. 2011), *Hemphill v. San Diego Ass'n of Realtors, Inc.* 225 F.R.D. 616, 620 (S.D. Cal. 2005), *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 24 (D.D.C. 2001).

64. If a party to the settlement agreement refuses to provide access to the relevant that may provide a basis for allowing traditional discovery. *In re Community Bank of Northern Virginia*, 418 F.3d 277, 316 (3r. Cir. 2005).

65. A review of the Objector's request indicates they would like to have discovery on whether the proposed settlement compensation is adequate and whether their interests were adequately represented in a settlement process. Objectors request discovery on these two broad and general topics and have failed to identify, specifically or narrowly, the precise discovery they are seeking.

66. As to discovery related to the settlement process:

> objectors are not entitled to discovery concerning the settlement negotiations between the parties in the absence of evidence indicating

> that there was collusion between plaintiffs and defendants in the negotiating process; numerous courts have so held. Courts rarely find the collusion necessary to trigger discovery.

4 NEWBERG ON CLASS ACTIONS § 13:32 (5th ed.).

67. In this case, despite their conclusory allegations of collusion and non-justiciability of claims the Court after an exhaustive legal analysis, finds those allegations to be without merit. See ¶¶ 84-109, 168-175, *infra.*

68. As to the sufficiency of the settlement, that is primarily a function of two factors: the size of the class and purchasing pattern of the class members. Counsel for Plaintiffs conducted confirmatory discovery with regard to these two factors. Yet knowing of that discovery, counsel for Objectors failed to request the same. In addition, after being advised of the purchasing pattern of the class, counsel for Objectors could have cross checked his own clients purchasing history with that disclosed in the confirmatory discovery. However, if counsel did cross check his clients' purchasing history with that of the purchasing pattern of the class, the results of such have not been disclosed to the Court. In addition, K.W.'s purchasing history appears consistent with the purchasing pattern of the class. *See,* ¶¶ 5 & 45, *supra.*

69. The Court will not allow the two Objector's failure to request information from the parties to act as a gateway to discovery. Failure to request information because one thought it would be a fool's errand is not a legitimate excuse for failure to request information.

70. The touchstone for discovery is that it will ultimately assist the court in determining the fairness of the settlement. As Objector's have only provided the

Court with two broad categories of discovery they seek and have not narrowly or specifically identified the precise discovery they propose to take, they have failed to demonstrate to the Court that discovery needs to be conducted to determine the fairness of the settlement. *See In re Checking Account Overdraft* Litigation, 830 F.Supp.2d 1330, 1337 n. 6 (S.D. Fla. 2011). The Court will not allow a fishing expedition to slow down the settlement that has overwhelming support from the class.

71. As to an evidentiary hearing, Objectors have not identified any witnesses they would call or the proposed subject matter of their testimony. Objectors counsel submitted his two affidavits as well as the affidavit of Mr. Amster. If Objectors themselves had information to support their position they could have submitted an affidavit to the court. No such affidavits were provided. The Court has received extensive briefing as well as affidavits and finds that the evidentiary record is more than adequate for the Court to consider the fairness, reasonableness and adequacy of the settlement

CLASS CERTIFICATION

72. In evaluating whether to grant Final Approval to the Settlement, the Court must follow a two-step process. First, the Court must examine whether the proposed Settlement Class satisfies North Carolina Rule of Civil Procedure 23. Second, the Court must determine whether the Settlement is "fair, reasonable, and adequate."

73. The Court turns first to whether the Settlement Class should be

certified. Rule 23 sets forth the following basic requirements to establish class certification. First, plaintiffs must establish the existence of a class. A class exists when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. The party seeking to certify a class also bears the burden of demonstrating that: (1) the named plaintiffs will fairly and adequately represent the interests of all members of the class; (2) no conflict exists between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impracticable to bring them all before the Court; and (6) adequate notice can be given to all members of the class. *See, e.g., Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 336 (2014) (citations omitted). "When all the prerequisites are met, it is left to the trial court's discretion whether a class action is superior to other available methods for the adjudication of the controversy." *Id.*

74. This Court finds that the Settlement Class meets all of these prerequisites. The claims of the named Plaintiffs BEAU ZANCA; ERIC KROHM; A.J., by and through his Guardian CHRIS JONES; Z.K., by and through his Guardian SEAN KINNEY; M.M., by and through his Guardian DAVID MINCES; and L.M., by and through his Guardian CHAD MOYER, are typical of the claims of the respective Settlement Class members. They all share the same interests in obtaining the benefits of the proposed Settlement and their claims all are based on the same alleged

injuries arising from their in-game transactions using purchased virtual currency. The Court concludes that the named Plaintiffs have no conflict of interest with the Settlement Class and that they have a genuine personal interest in the outcome of the case shared by all Settlement Class Members. The named Plaintiffs thus fairly and adequately represent the interests of the Settlement Class both within and outside of North Carolina. Numerosity and the impracticability of bringing all Settlement Class Members into the same action is not in question as the Settlement Class has tens of millions of members.

75. The Objectors undisputedly are members of the Settlement Class and the parties have not challenged their standing to object. K.W. and his mother Jillian Williams are plaintiffs in *K.W. v. Epic Games, Inc.*, No. 3:21-cv-976-CRB (N.D. Cal.), a putative class action filed on February 8, 2021, that pleads claims that would be released by this Settlement. With respect to the criteria for class certification, the Objectors contend that (a) this Court lacks jurisdiction to hear the case and should dismiss it as non-justiciable; (b) there are intra-class conflicts arising from different relief being provided for different claims; (c) common questions do not predominate; and (d) one of the attorneys for the Settlement Class purportedly is not adequate because she also represented a different plaintiff who reached a separate, individual settlement with Epic Games. Having considered all of the Objector's arguments, and having reviewed the separate individual settlement agreement, the Court finds that the Objection lacks merit.

BACKGROUND OF OBJECTORS' COUNSEL

76. In addressing the merits of an Objection, the Court may consider the background and intent of the Objectors or their counsel especially if there is an indication of a motive that puts their interests of above that of the class members. *See, In re Office of Jonathan E. Fortman, LLC*, 2013 U.S. Dist. LEXIS 13903 *3-4 (E.D. Mo. Feb. 1, 2013).

77. It is undisputed that Veridis Management, LLC ("Veridis") sought to purchase an interest or invest in *White*. Mr. Amster, in addition to being the CEO of Veridis, is the founder of Bay Advocacy, PLLC. Mr. Salario is Managing Director of Investment for Veridis as well as an attorney with Bay Advocacy, LLC. Amster Aff. ¶¶ 2-4, Salario Aff. ¶ 1. Both Messrs. Amster and Salario have submitted affidavits to the Court indicating that the Veridis entities have no financial stake or other interest in *K.W.* or the Objection. Amster Aff. ¶ 5, Supplemental Affidavit of Samuel ¶ 7, (hereinafter "Salario Supp. Aff. ___"). In essence, Bay Advocacy, PLLC and Veridis are separate and independent of each other,

78. Given the history of the claims at issue, the information available to the Court, and Veridis' attempt to acquire an interest in *White*, it is not as easy for the Court to separate Veridis from Bay Advocacy, PLLC.

79. While Mr. Amster has stated that the capital used for investment "primarily comes from outside investors (Amster Aff. ¶ 5), in communications between Veridis and OneLLP regarding an opportunity to purchase or invest in *White*, Mr. Amster stated "[o]ur law firm actually had a settled matter pay off today, so we have a healthy cash balance for something like this." Brahmbhatt Supp. Aff.

Ex. 2. Mr. Amster's statement links Bay Advocacy, PLLC to Veridis in its attempt to gain entry into a class action against Epic Games.

80. In filings with this Court, email strings submitted by Mr. Salario contain the Veridis logo, when they purport to be communications on behalf of or received by Bay Advocacy, PLLC. Moreover, they bear a header that states "Veridis Mail – Re K.W. v. Epic Games Civ. No. 3:21-cv-00976 – CRB (N.D. Cal.). Salario Aff. Exs. N & O.

81. According to documents filed with this Court Mr. Amster's Veridis phone number is (813) 251-6264, (Brahmbhatt Sup. Aff. Ex. 2); Mr. Salario's Bay Advocacy Phone Number is (813) 251-6263 (Certificate of Service to the Objection) or (813) 251 6362 (Salario Aff. Ex. J). The Veridis phone number, according to its website is (813) 251-6262 the same number Mr. Salario uses at times for Bay Advocacy.[11] Finally, the physical address for Bay Advocacy, LLC is the same as Veridis.

82. A search of the website for the Florida State Bar reveals that Messrs. Amster and Salario are the only two attorneys with Bay Advocacy, PLLC.[12]

83. It is clear to the Court that the initial interest of Veridis, including its CEO and Managing Director of Investment and what Mr. Amster termed as "[o]ur law firm", in a class action against Epic Games was purely an economic investment for profit. Given the clear intention of joining this class, not to obtain a better

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[11] See CONTACT, http://www.veridismgmt.com/contact (last visited October 6, 2021).
[12] See LAWYER DIRECTORY, https://www.floridabar.org/directories/find-mbr/?lName=&sdx=N&fName=&eligible=N&deceased=N&firm=Bay+Advocacy&locValue=&locType=C&pracAreas=&lawSchool=&services=&langs=&certValue=&pageNumber=1&pageSize=10 (last visited October 26, 2021).

settlement, but only to have it dismissed so that K.W. and his counsel could proceed with their now stayed putative class action, the Court finds that an economic investment for profits remains the primary motivation for counsel for Objectors.

JUSTICIABILITY OF THIS ACTION

84. Prior to evaluating the Final Approval of Settlement, the Court must address the threshold issue raised in the Objection that "this is a nonjusticiable collusive suit . . . made to order in which both sides came to Court without a genuine controversy asking for the same thing – a judgment that extinguishes the claims of millions of nonparty class members, including minors." Objection p. 3. Objectors contend that the "'Plaintiff v. Defendant' caption in this case is a ruse because Plaintiffs and Epic Games do not seek a judicial resolution of disputed issues." Motion to Intervene, Proposed Filing – Intervenors' Complaint and Motion to Dismiss and for Jurisdictional Discovery ¶ 12.

85. In support of their contention that this is a "suit made to order" in which this Court is asked to "rubber-stamp a pre-packaged class action settlement resolving legal claims that have never been litigated here" (Objection p. 1), and therefore should be dismissed as nonjusticiable, Objectors cite four cases: *Comm. To Elect Dan Forest v. Employees political Action Committee*, 2021, NCSC 6 ¶ 59, 853 S.E.2d 698, 723 (2021); *Parker v. Raleigh Savings Bank*, 152 N.C. 253, 67 E.S. 492 (1910); *Burton v. Durham Realty & Ins. Co.*, et al, 188 N.C. 473, 473, 125 S.E. 3, 4 (1924) and *North Carolina Consumer Powers, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974).

86. In *Comm. To Elect Dan Forest,* the North Carolina Supreme Court was faced with the issue of whether Article IV, §§ 1 and 2 of the North Carolina Constitution imposed a requirement for "standing," as well as a requirement for "injury-in-fact," in order to bring suit under a cause of action which the General Assembly has expressly created. Id. at ¶ 58, 853 S.E.2d at 722. The North Carolina Supreme Court, in addressing this issue, stated, "[t]he only case we have identified in the nineteenth century imposing a standing-type justiciability doctrine as a constitutional requirement was the prohibition against collusive suits. *See Blake v. Askew, 76 N.C. 325, 326* ("If they were ever valid in this State, feigned issues are abolished by the Constitution, Art. 4, § 1."). Other than stating the obvious, that collusive suits do not grant standing, the case provides no guidance to this Court.

87. *Parker v. Raleigh Savings Bank*, 152 N.C. 253, 67 S.E. 492 (1910); *Burton v. Durham Realty & Ins. Co.,* et al, 188 N.C. 473, 473, 125 S.E. 3, 4 (1924) and *North Carolina Consumer Powers, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974) all involve cases in which the parties sought a declaration of their legal rights when there was no apparent dispute between the parties as to those rights.

88. The case of *North Carolina Consumer Powers, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974) is instructive. Chief Justice Branch, writing for the Court, noted that "the core of this appeal lies in the determination of whether **plaintiffs have by their complaint alleged an actual genuine existing controversy**." (emphasis added). In. *North Carolina Consumer Powers, Inc.,* the

parties to a contract sought a declaratory judgment as to the validity of the contract. However, the complaint revealed that there was no dispute between the parties as to the contract's validity. The North Carolina Supreme Court noted in finding the case to be nonjusticiable that "[i]t is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, **it is necessary that the Courts be convinced that the litigation appears to be unavoidable**." *Id.* at 450, 206 S.E.2d at 187, (citations omitted) (emphasis added).

89. In *Burton v. Durham Realty & Ins. Co.,* et al, 188 N.C. 473, 473, 125 S.E. 3, 4 (1924), Lot 1 of two adjoining parcels was owned by Plaintiff and Lot 2 was owned by Defendant. Both the plaintiff and defendant agreed to this and sought a declaration by the Court to that effect. The Court refused stating:

> It is apparent that there is no "question in difference" (C. S., 626) between the parties. Both sides are asking for the same thing, and everybody is interested in the same kind of judgment. The proceeding, in realty, is one to obtain the advice or opinion of the Court, and no more. We are only asked to say whether the titles are good or bad, upon the facts agreed, and there is no one present claiming adversely to any of the parties or questioning their titles. While, upon the facts presented, the titles would seem to be valid, we must dismiss the proceeding for want of a real controversy.

Id.

90. Finally, in *Parker v. Raleigh Savings Bank*, 152 N.C. 253, 67 E.S. 492 (1910), the North Carolina Supreme Court was asked to construe a particular statute and answer the question as to whether, in light of the statute, the Corporation Commission must deduct the value of certain tax-exempt bonds from any portion of a corporation's surplus assets in valuing its stock. At the time the suit was filed the

Corporation Commission had not ruled upon the issue. The North Carolina Supreme Court held that the Corporation Commission was the body whose duty it was to pass upon that question and, until it did, the parties could not contest the matter in Court. The Supreme Court stated, "this is evidently a "suit made to order," arising not out of a **real controversy** between the parties litigant but instituted solely for the purpose of obtaining the opinion of the Court upon a "feigned issue." Id. at 255, 67 S.E. at 493. (emphasis added). There being no ruling from the Corporations Commission, there was no dispute upon which the North Carolina Supreme Court could rule.

91. Objector's reliance on these cases is misplaced. First, none of the cited cases stand for the proposition that an agreement to settle a putative class action prior to the suit being filed makes a case nonjusticiable, nor has counsel cited to any such case. However, cases to the contrary do exist. *See e.g. Scott v. B.K. Beasts, LLC*, 17 CV 699, 2018 U.S. Dist. LEXIS 75928, 2018 WL 2088280 at *1 (E.D.N.Y. May 3, 2018)(granting final approval to a class action settlement that was entered into prior to the filing of the action).

92. As described above, Objector's cited cases stand for the proposition that when litigation does not appear to be unavoidable the courts may not give advisory opinions under the guise of a declaratory judgment. In this case, it not only appears that litigation is unavoidable, but that litigation was actually commenced concerning the very issues in this case in *White*, prior to the filing of this action, and in *K.W.* after the filing of this action. In the event this Court does not approve the Class

Settlement, this case will proceed to its resolution, whether by dispositive motion or jury trial. In fact, that scenario is contemplated by the Class Settlement Agreement. *See* Stipulation of Class Action Settlement § 9.2. Furthermore, as required by *North Carolina Consumer Powers, Inc.* , 285 N.C. at, 450, 206 S.E.2d at 189, the Complaint, on its face, alleges an actual controversy, a conclusion that Objectors cannot dispute.

93. Counsel for Objectors admitted that the cited cases do not support their position as such but argued for an extension of the law given the facts at issue. (May 6, 2021 Tr. p. 95). The facts in this case do not support such an extension.

94. "'A justiciable controversy' is a real and present one, not merely an apprehension or threat of suit or difference of opinion. Presumably, 'a justiciable controversy' involves 'justiciable issues,' as opposed to imagined or fanciful.' *Sprouse v. North River Inc. Co.,* 81 N.C. App. 311, 326, 344 S.E.2d 555, 564 (1986).

95. *R.A., White* and *K.W.* as described in ¶¶9-12, 14-46, *supra*, reveal an actual controversy exists between Epic Games and its present or former players. Taken together, these three cases allege substantially similar claims to those asserted in this action.

96. There is no dispute that an actual justiciable controversy exists between *K.W.* and Epic Games as alleged in *K.W.* and certified to pursuant to Rule 11 of the Federal Rules of Civil Procedure by K.W.'s counsel. Yet despite the justiciability of the claims in *K.W.,* Objectors, one of whom is the plaintiff in *K.W.*, contend that similar claims for relief, based upon substantially similar factual allegations and

claims that have been asserted this action, are somehow nonjusticiable.[13]

97. There is no dispute that prior to this action being filed, the issue of disaffirmation was raised in *C.W.* and had survived the scrutiny of the court in denying two Motions to Dismiss on the claim of disaffirmation.[14]

98. It is undisputed a motion to intervene was pending in *White* prior to its dismissal and that those proposed intervenors are two of the four minor plaintiffs in this action, essentially making this action a continuation in part of *White,* albeit in North Carolina.

99. K.W. also contends that his case is a continuation of the *White* case stating (1) "In every respect that matters to the efficient management of judicial resources, this case and [*White*] are identical. *K.W. v. Epic Games,* 3:21-cv-00976-CRB, (N.D. Cal.) Motion to Consider Whether Cases Should Be related, Document 13, p. 1 (May 25, 2021)*;* (2) "[T]he two actions concern substantially the same parties, property, transactions or events." *Id.* at 2; (3) In those respects that matter, the two cases are essentially the same." *Id.*

100. Given that counsel for Objectors and Plaintiffs in *K.W.* have billed *K.W.* as the successor to *C.W.*, it is puzzling to the Court how this case is nonjusticiable, yet *White* and *K.W.* are not. The issues in this case are real and present. To argue that this case is nonjusticiable even though it is as much a continuation of *White* as

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[13] A comparison of the complaints in *K.W.* and this action reveal that while the verbiage may differ with respect to substantive factual allegations the substance of the allegations are substantially similar as are the claims in C.W. and this action. This comes as no surprise as OneLLP was involved in *C.W.* when it was filed and is co-counsel in C.W.

[14] The Court notes that there can be a great divide between alleging and proving a fact or claim.

K.W. reveals the fallacy of Objectors' position.

101. There is also no dispute that plaintiff's counsel in *Krohm* advised counsel for Epic Games that he was prepared to moot the appeal by asserting much broader claims in *Krohm* and that he had potential clients, including Mr. Krohm, that were not subject to the arbitration provisions of the EULA, as well as minors seeking to disaffirm their in-game purchases. Id. at ¶ 35.[15] Objectors do not and cannot argue that it would have somehow been improper for counsel to assert broader claims in *Krohm* and add minor plaintiffs to assert disaffirmation claims. Nor do or can Objectors argue that if that were done it would somehow be improper for the expanded *Krohm* plaintiffs to settle those claims, including disaffirmation claims with Epic Games.

102. When the layers of Objectors' argument are peeled away, Objectors sole argument and objection seems to be it is improper for issues that give rise to the controversy to be presented to the courts of the State of North Carolina without their participation. This conclusion is buttressed by the very first sentence of the Introduction to the Objection which states: "Plaintiffs . . . ask this Court to rubber-stamp a pre-packaged class action settlement resolving legal claims that have **never been litigated here**"[16] (emphasis added) Objection p. 1. It is therefore not surprising that in making their arguments counsel for Objectors do not base their allegations of nonjusticiable fact on the pleadings themselves but how they came

[15] Counsel in *Krohm* did in fact bring a minor client, L.M. to this action.

[16] It is important to note that Objectors do not contend that the claims have never been litigated although at times they seem to ignore that fact when it is to their detriment and at other times the emphasize the prior litigation of the claims that are before the Court.

about.

103. The fact that Epic Games sought a global settlement on all claims including disaffirmation claims, after facing multiple lawsuits across the country and required the participation of counsel in *White* and *Krohm* does not make this case nonjusticiable, and Objectors have pointed to no such law to support their argument.

104. The fact that Epic Games, as part of the settlement agreement, required that the settlement be approved by a North Carolina Court should come as no surprise to Objectors as Epic Games is headquartered in North Carolina and has sought to have every putative class action transferred to North Carolina pursuant to the EULA. Objectors' counsel's conclusory statements about the case being brought in North Carolina in an attempt to have a North Carolina Court "rubber stamp" the same is unfounded and borders on disrespect to the State Courts of North Carolina and the judges who preside over the same.[17]

105. This action contains nationwide claims that have been asserted elsewhere, including *White and K.W.* and absent a settlement, the jurisdiction over those putative nationwide claims in those Courts was not assured. *See Chambers v. Whirlpool Corp.*, 214 F. Supp.3d 877, 888-889 (2016)(nationwide class actions under California law and other jurisdictions is rare and create a risk of certification of such

[17] At the July 21, 2021 hearing of this matter, Counsel for Objectors, when confronted with this statement, did not remember making the same despite it appearing in the Objection twice at pages 1 and 18. Trans. pp. 37 (July 7, 2021). The essence of Mr. Salario's explanation in attempting to minimize his "rubber-stamp" contention is that this Court is not properly equipped to handle this matter. *Id.* at 37-39. The irony of his explanation is that when responding to plaintiffs' accusations that he was asserting this court was ill-equipped to evaluate class settlements, Mr. Salario stated that there was no evidence to support the accusation because it was not true. Salario Supp. Aff. ¶ 10.

class actions).

106. To hold that the mechanism by which this settlement made its way to this Court, after almost two years of contested litigation in multiple jurisdictions, somehow makes this case nonjusticiable would undermine the strong public policy of this State that favors settlement of cases. *Ehrenhaus v. Baker*, 216 N.C. App. 59, 72, 717 S.E.2d 9, 19 (2011) ("Our judicial system has a strong preference for settlement over litigation. . . . This preference for settlement applies to class actions.").

107. What appears to be the real basis of the Objection is that if the Court approves this settlement, counsel in *K.W.* will have failed, for a second time, to wrest the potential fruits of a class action against Epic Games away from Ms. Brahmbhatt.

108. The parties reached this settlement after almost two years of hotly contested litigation in multiple courts around the country and clearly have presented the Court with justiciable issues. The argument that a good faith extension of the law as set forth in *Parker v. Raleigh Savings Bank*, 152 N.C. 253, 67 E.S. 492 (1910); *Burton v. Durham Realty & Ins. Co.*, et al, 188 N.C. 473, 473, 125 S.E. 3, 4 (1924) and *North Carolina Consumer Powers, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974) justifies the Objectors' desired result is simply incorrect. Only a stretch, as opposed to a good faith extension of the law could possibly "justify" such a result, however, the stretch would have to be so far and wide that the probability of the high speed and ferocity at which it would snap back at this Court once it reached the appellate courts is almost certain.

109. Accordingly, this case presents justiciable issues and Objectors' Motion

to Dismiss is DENIED.

NO INTRA-CLASS CONFLICTS EXIST THAT PREVENT CERTIFICATION

110. The Court disagrees that intra-class conflicts exist. The parties designed different relief for different types of claims. See *Fisher v. Flue-Cured Tobacco Cooperative Stabilization Corp.*, 369 N.C. 202, 212, 794 S.E.2d 699 708 (2016)("We did not state in *Crow* that there can be no conflicts of interest between class members."). *Fisher* involved an action in which the named plaintiffs sued an agricultural cooperative of which they were members or former members.[18] The claims for monetary damages were divided into three groups: (a) those plaintiffs whose membership had been involuntarily terminated and had not been paid back for the stock they had purchased; (b) plaintiffs who were seeking payment for certificates of interest representing tobacco they had delivered to the cooperative and that subsequently sold for a net gain; (c) and plaintiffs who were seeking payment for their tobacco was that subsequently sold at a net gain and then placed in a reserve. Despite the varying claims of the class, the Court found no conflict that would prevent certification. *Id* at. 213-14, 794 S.E.2d at 707-08.

111. The cases Objectors rely upon are distinguishable. *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 625 (1997) involved the "mass tort" claims of individuals with "diverse medical conditions" (such as asbestos exposure cases). In *Amchem*, the Supreme Court acknowledged that the analysis required by that situation is

[18] The undersigned is intimately familiar with *Fisher* having been assigned in 2017 to preside over that case by the Chief Justice of the North Carolina Supreme pursuant to Rule 2.1 of the General Rules of Practice.

inapplicable to consumer fraud cases such this. 521 U.S. 591 at 625. *Amchem* involved two very differently situated groups of alleged asbestos victims: those who were "currently injured" and those who were merely exposed to asbestos and whose injuries could *potentially* manifest in the future. Because this is not a mass tort settlement, the "future injury" problem unique to *Amchem* is absent here. Settlement Class Members here, regardless of their status as minors or the in-game items they acquired, have all suffered the same alleged injuries as a result of their purchases of in-game benefits associated with *Fortnite* or *Rocket League*. Minors were entitled to submit claims for damages like every other Settlement Class Member, but were also entitled, alternatively, to disaffirm their contracts and close their accounts.

112. Allowing minors to choose between disaffirmation, or as a non-disaffirming class member does not create a conflict, but rather a fair and reasonable way of permitting minor Settlement Class Members to exercise their rights *without* penalizing them.[19] Neither is there any conflict between Settlement Class Members who obtained a random item lootbox and those who did not. Because Epic Games itself distributed the lootboxes, it has records of every Epic Games account used to obtain one. For Settlement Class Members seeking refunds of money paid to third

[19] To be clear, the Settlement provides minors with the choice to either seek disaffirmance (which entitles them to a partial refund but requires them to close their current Epic Games accounts) or to submit purchase refund requests like the other Settlement Class Members. The existence of these two options benefits minor Settlement Class Members because they can choose how they want to proceed and can choose the refund option afforded to non-minor Settlement Class Members if they don't want to have to close their Epic Games accounts or if they believe they can recover more through the refund option. At the same time, providing minor Class Members with such a choice in no way prejudices the other non-minor Class Members, since they would obviously never be entitled to seek minor disaffirmance.

parties besides Epic Games, a claims process was required, and courts have long recognized that a claims-made process protects against fraud and ensures that the recipients of settlement funds are those who were actually affected by the alleged conduct at issue. *See, e.g., In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 2006 U.S. Dist. 83479 at *4, 2006 WL 3332829, at *2 (E.D. La. 2016) ("without a claims process, the chances of fraud increased").

113. Objectors, reliance on *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011), is misplaced because there, the settlement protected the category A and B claims at the expense of category C claims. In the event the claims exceeded an agreed upon cap, the settlement agreement provided that the category C claims would be reduced *pro rata* until the total compensation no longer exceeded the cap. *Id.* at 246. The Second Circuit determined that the category A & B claimants' interests were fundamentally antagonistic to the interests of the category C claimants. Unlike the category C claims in *Literary Works*, and because the claim cap has not been breached no Settlement Class Members' recovery will be reduced as a result of any other Settlement Class Members' claim. Even if the cap had been breached, all class members would participate in the *pro rata* reduction until the compensation no longer exceeded the cap. Accordingly, no Class Members' interests are antagonistic to any other Class Member's interests.

114. Objector's other cited authority is similarly distinguishable. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) addressed asbestos mass tort claims. *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.*, 737 F. App'x 457, 464 (11th Cir.

2018), and *Hesse v. Sprint Corp.*, 598 F.3d 581 (2010), addressed settlements where the class representatives did not share claims with certain subpopulations of the class. Here, the Class Representatives include adults and minors who have purchased a variety of in-game items, including lootboxes, and thus adequately cover the scope of the Settlement Class. In *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 187 (3d Cir. 2012), the claims of one "residual" group of class members could only be paid after the claims of another group were satisfied—an obvious conflict and competition for Settlement Funds. Here, there is no Settlement group or sub-class whose recovery is contingent upon the amount paid to another such group or subclass.

115. Claimants have a choice as to which benefits they want to request. Although the maximum amount of relief was capped in the Settlement, that cap will not be breached based upon the claims submitted, claimants will receive all the funds they have requested and to which the Class Settlement Agreement entitles them. Even if the cap were breached, the recovery of all claimants would be reduced on a pro rata basis, unlike pro rata reduction in *Literary Works*.

COMMON ISSUES PREDOMINATE

116. The Court disagrees that individual issues predominate with respect to the Class Settlement.[20] First "[t]here is no requirement under Rule 23 . . . that the claims asserted in a class action be factually identical as to all class members." *Pitts v. Am. Secs. Ins. Co.*, 144 N.C. App. 1, 13, 550 S.E.2d 179, 189 (2001). Second, the

[20] The Court notes that *K.W.* also seeks the certification of a similar class on the issue of disaffirmation. The same individual issues that they argue predominate in this action and thus prevent certification would likewise prevent certification in *K.W.* absent a settlement agreement.

parties have, to the great benefit of the minor class members, designed a settlement that removes individual questions. Had the parties proceeded to litigate this case, Epic Games would have been able, to contest class certification due to the individual issues that predominate the disaffirmation claims as described in ¶ 48, *supra*. As part of the settlement, by contrast, at to the great benefit to minor claimants, Epic Games has agreed to accept claimants' assertions that they satisfy these conditions.

117. Objectors argue that the minor plaintiffs are being treated differently than the remainder of the class by only being able to recover one third of their purchases up to $50. The Objectors further argue that these claims are stronger than the remaining class members. The Court disagrees with Objectors. While minors are being treated differently, these differences can be attributable to the obstacles to recovery and certification the minor class members would have faced if the matter were tried. *Id.* Such alleged disparate treatment because the strength or weakness in claims does not create a class conflict that would defeat certification. *Literary Works*, 654 F.3d at 253. (An inferior recovery is not determinative of inadequate class representation because the claims faced substantial litigation risks going forward.)

ADEQUACY OF CLASS COUNSEL

118. Finally, the Court disagrees that Settlement Class Counsel Deepali Brahmbhatt is inadequate to serve as Class Counsel because of a purported conflict. While the purported conflict of interest was the only issue raised in the Objection, counsel for Objectors, during the May 6, 2021 hearing also questioned Ms. Brahmbhatt's competency in this suit as well.

Ms. Brahmbhatt is Qualified and Competent to Act as Class Counsel.

119. The Court will first address whether Ms. Brahmbhatt is competent to handle the legal claims set forth in this action. At the July 21, 2021 hearing of this matter Mr. Salario argued as follows:

> Ms. Brahmbhatt is a **patent lawyer** by training who had at the time that the settlement negotiations were underway worked with OneLLP who is our co-counsel in California on I think two class actions. She was negotiating this settlement with very experienced class action lawyers both on the plaintiff side and on the defense side. And I don't mean any disrespect to Ms. Brahmbhatt at all. Were I to walk into her office and say, hey, I want to negotiate a patent case with you, I would be at a very distinct disadvantage, and I think you have to conclude that the same is true in this circumstance.

Trans. p. 61 (July 21, 2021).(emphasis added)[21]

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[21] While counsel for Objectors asserts that no disrespect was intended, this is not the only time he has sought to publicly place into question the fitness or character of counsel in this case. Mr. Salario's affidavit contains twenty-four (24) paragraphs: (a) paragraph 1 is an introductory paragraph; (b) paragraphs 2-14 identify documents attached as exhibits; (c) paragraphs 15-17 discuss what Mr. Salario knew of the C.W. Settlement Agreement; (d) and paragraphs 19-24 discuss how Mr. Salario believes he was treated in an unprofessional manner by counsel when he sought from the parties an extension of the deadline to object to the Class Action Settlement and they would not consent. These six paragraphs (¶¶ 19-24) represent two-thirds of the substantive narrative portion of Mr. Salario's affidavit. Between the preliminary approval of the settlement agreement and the deadline for objections to be filed, Mr. Salario's father had fallen gravely ill and ultimately passed away. Mr. Salario indicates in his affidavit that none of the lawyers for plaintiffs nor Epic Games would provide that consent nor would the clerk grant an extension of time to file an objection to the Court ordered deadline. Mr. Salario concluded in paragraph 24 of his affidavit by stating:

> "I have spent roughly seventeen years as a practicing lawyers and another five and one-half years as an appellate judge in Florida. Nothing in that more than two decades of experience would have led to me believe that any lawyer would not simply say "of course" to a request to a four day extension of time sought to accommodate the impending death of an opposing lawyer's parent."

Salario Aff. ¶ 24. While the Court empathizes with the unfortunate and heartbreaking situation in which Mr. Salario found himself, the Court is puzzled as to its relevance and why he devoted such a significant portion of his affidavit to the same and then made it a part of the public record. This is especially true given the response of Class Counsel, when asked if plaintiffs would consent to an extension. Mr. Wallace stated in part:

> We feel for Mr. Salario and extend our deepest sympathies to him and his family. We certainly appreciate how difficult this must be during the pandemic. Unfortunately,

120. Counsel for Objector's argument essentially boils down to Ms. Brahmbhatt, as a patent attorney, does not have the experience to handle this case. Essentially, she was outgunned.

121. *White* is the only case that the Court is aware of where the disaffirmation claims asserted in this action and in *K.W.*, survived not only a Motion to Compel Arbitration, but also two Motions to Dismiss. In fact, the Objection filed by Mr. Salario touts the success of the *White*. Objection pp. 6-8. The undisputed evidence in this case is that Ms. Brahmbhatt was lead counsel for OneLLP in *White*, and it was through her work that the claims in *White* had advanced as far as they had at the time of its dismissal.[22]

> and with apologies for any inconvenience that this answer may cause Sam, what you are requesting is not something that is within the parties power to grant. The objector deadline is court-ordered, and we cannot change it without court permission and, potentially, notice to the entire class.
>
> That being said, if you want to go to the court and seek an extension for your own objection based on these circumstances, we will not take a position on it so long as your clients do not use the extension to gain an advantage over other class members. Ultimately though, this is relief only the court can grant. To that end, we ask that you send to us what you would propose to file in advance thereof so that we would have an opportunity to review and approve.

Salario Aff. Ex. O. Not only was Class Counsel's response professional, it was consistent with Class Counsel's duty to the class members. Moreover, class counsel was correct. Neither the parties nor the clerk could have extended the deadline. While Rule 6(b) of the North Carolina Rules of Civil Procedure permits the court to extend deadlines under the rules or deadlines set by court order, it only permits the parties to extend, by agreement, certain deadlines set forth in the rules. Absent specific authority given by a court to the parties in a case, this Court is unaware of any authority that the parties would have to extend a deadline imposed by the court. When counsel for Objectors filed a Motion to Extend the deadline to Object with the Court as suggested by class counsel, the Court granted the same. Given that the criticism of the parties professionalism was made after it should have been clear that the parties were powerless to extend the deadline set forth in this Court's order, the Court can only conclude the criticism was made to call into question the professionalism or character of counsel for the parties.

[22] Even in *K.W.* , Ms. Brahmbhatt's former partners at OneLLP are taking a backseat to Bay Advocacy, PLLC, the most recent newcomer to Epic Games litigation. Jacobson Aff. ¶¶ 47-48.

122. It is also undisputed that Veridis, of which Mr, Salario is Managing Director of Investment, was willing to invest and risk its client's money in *White,* knowing that Ms. Brahmbhatt was lead counsel. It is doubtful that Mr. Amster and Mr. Salario would have risked such an investment of their client's money[23] in a case whose lead counsel was the "patent attorney" who Mr. Salario now asserts was disadvantaged because of her lack of experience.

123. After Ms. Brahmbhatt moved to the Devlin Law Firm, Veridis contacted her in an attempt to continue discussions regarding *White.*

124. If Ms. Brahmbhatt, "the patent attorney", was so disadvantaged in her representation of C.W., that certainly calls into question the judgment of her partners at OneLLP who let a "patent attorney" take the lead in a case having nothing to do with patents. Yet despite this, when Bay Advocacy, PLLC and Mr. Salario sought counsel to partner with in filing *K.W.* they retained the same firm and partners at OneLLP who allowed the purportedly disadvantaged "patent attorney" to take the lead in *White.*

125. When Mr. Salario moved to have *K.W.* related back to *White* he was seeking to build upon the groundwork prepared by OneLLP through its "patent attorney", Ms. Brahmbhatt. Certainly if Mr. Salario thought that Ms. Brahmbhatt, the "patent attorney", was not qualified, he would not have sought to build his case upon the foundation that was constructed by her.

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[23] Whether it be an unrelated investor's money or as Mr. Amster put it, "[o]ur law firm[s]" money, the likelihood that Veridis would invest in an action run by Ms. Brahmbhatt if Mr. Salario truly felt she was not qualified is unlikely.

126. Given that Ms. Brahmbhatt was able to advance a case against Epic Games to a position that no other attorney in the country had been able to, the Court is at a loss to understand how Ms. Brahmbhatt was disadvantaged. Moreover, Mr. Salario's unsupported assertion is directly contradicted by the Hon. Wayne Andersen (Ret). *See* Andersen Aff. ¶¶ 9-10.

127. The Court finds having survived the field of battle for almost two years with Epic Games and advancing *White* to a position where no other case against Epic Games had advanced, that Ms. Brahmbhatt is a qualified and competent counsel for the class members.

NO CONFLICT OF INTEREST EXISTS THAT WOULD DISQUALIFY MS. BRAHMBHATT OR THE DEVLIN LAW FIRM.

128. As described in ¶¶ 31-38, *supra*, it was only **after** Ms. Brahmbhatt, along with others, participated in the negotiation the Class Settlement Agreement and after the substantive terms were agreed to, that Ms. Brahmbhatt then negotiated an individual settlement for C.W. and his mother in her individual capacity. At the time the C.W. Settlement Agreement was negotiated no class had been certified in *White* and this action had not been filed. At the request of the Objectors, this Court reviewed the C.W. individual settlement agreement *in camera*.

129. Potential conflicts or actual conflicts of interest are governed by Rule 1.7 of the Revised Rules of Professional Conduct of the North Carolina State Bar ("N.C.R.P.C.") provides, in part:

> **(a)** Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> **(1)** the representation of one client will be directly adverse to another client; or
>
> **(2)** the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

130. Comment 25 to N.C.R.P.C 1.7 states in part " When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action lawsuit, unnamed class members are ordinarily not considered to be clients of the lawyer for paragraph (a)(1) of this Rule. This rule is in accord with California rules. *See. Walker v. Apple, Inc.* 4 Cal. App. 5t 1098, 1109, 209 Cal. Rptr. 3d 319, 326-27 (Cal. Ct. App. 2016). Accordingly, the representation of C.W. and his mother is not directly adverse to the class.

131. Assuming the representation was concurrent, the question thus becomes whether the representation of C.W. and his mother was materially adverse to Ms. Brahmbhatt's responsibilities to the putative class. Ms. Brahmbhatt, as class counsel is permitted to represent a party in a separate proceeding based on the same set of facts and legal theories so long as the clients' interest are not inherently opposite. Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 3.75 (5th ed.). See also, *Bell v. Disner*, 2018 U.S. Dist. LEXIS 1614 at 8-9 (W.D.N.C. Jan. 4, 2018). In a case where counsel represents parties in separate proceedings based on the same set of facts and legal theories, the court would expect that counsel act as a zealous advocate for each set of clients. C.W. and the class in this case do not have inherently opposite interests and there is no allegation that C.W. advanced facts or legal theories antagonistic to this action. Had this been an instance where the Defendant had

limited funds to fund a settlement and C.W. had negotiated a settlement that depleted those funds Objectors might have an argument. Such is not the case here.

132. The cases cited by Objectors are not on point and Objectors' reliance on the same is misplaced.

133. In *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), some, but not all class counsel entered into retainer agreements with some but not all named plaintiffs that contained incentive agreements. The incentive agreements required those class counsel to seek incentive awards for their clients based upon the amount recovered, as opposed to the time spent in litigation or the financial and reputational risk undertaken by their respective client. *Id.* at 957. The court found that by agreeing to compensation on a sliding scale based upon a potential recovery in advance of any settlement "the incentive agreements disjoined the contingency financial interest of the contracting representative from the class." *Id.* at 959. In essence, the agreements created a disincentive for the named plaintiffs to go to trial once any settlement offer reached an amount where the incentive award would be capped. *Id.* at 960. This put class counsel in a position of representing class representatives with conflicting interest with that of the class While the court found that both the class representatives and class counsel who had entered into the agreements had a conflict, the court held that the class could be certified as the conflicts were cured by the presence of counsel and class representatives in the action that had no such conflicts. *Id.* at 961.

134. In *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1983), the class consisted

of two groups known as the Majority Group and the Minority Group. Class counsel represented both groups. The Minority Group consisted of the beneficiaries of a multi-million-dollar judgment against the defendant which required periodic payments to be made on their behalf. When class counsel realized that the defendant would have insufficient funds to make a settlement offer if it continued to make the periodic payments for the benefit of the Minority Group he took action to stop the payments to the detriment of the Minority Group and the benefit of the Majority Group. *Id.* The Court found these actions to constitute a direct conflict. *Id.* at 1144-46.

135. *Warnell v. Ford Motor Co.,* 205 F.Supp.2d 956 (N.D. Ill. 2002) involved a case where the court approved a class action settlement and awarded fees to class counsel. Unbeknownst to the court, class counsel, intended to and did seek to enforce the contingency fee arrangements he had entered into with the named plaintiffs prior to the class being certified. Based upon prior representations made to the court, it found the conduct of class counsel to be deceptive. *Id.* at 957-59. The court found that any conflict between the class and class counsel had been avoided, because under the settlement structure, the awards were not to be reduced by the attorney fee. *Id.* at 959.

136. In *Creative Montessori Learning Centers v. Ashford Gear, LLC*, 662 F.2d 913 (7th Cir. 2011) and *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 499 (9th Cir. 2013), the same attorney's conduct was at issue. In those cases, the plaintiffs were represented by the same counsel that had breached a promise of

confidentiality by using data to target identities of potential class action defendants and also sent misleading solicitation letters to potential plaintiffs. While finding that the attorney engaged in misconduct, the court found that the attorneys conduct did not create a serious doubt that class counsel would not represent the class loyally. *Ashford Gear, LLC.,* 662 F.3d at 918 and *Reliable Money Order, Inc,*. at 704 F.3d at 496.

137. In *Kaplan v. Pomerantz,* 132 F.R.D. 504 (N.D. Ill. 1990), after the court certified a class action, and during discovery, the court discovered that the sole class representative lied under oath. *Id.* at 508-10. The court decertified the class after finding that a plaintiff with "credibility problems is 'antagonistic to the class'" and "interferes with plaintiff's satisfaction of the typicality requirement". Id. at 510.

138. The final case cited by Objectors is *The Florida Bar v. Adorno*, 60 So.3d 1106 (2011). In that case, Adorno represented certain named plaintiffs for the purpose of bringing a class action to recover fire-rescue fees. Six years elapsed between the filing of the complaint and the settlement at issue. During that time plaintiffs had been successful at the summary judgment stage on the issue of liability and the only issue to be tried was damages. While the trial court had yet to certify a class, he made clear that certification was a "no-brainer." Mediation proved unsuccessful as Plaintiff's had demanded $35 million and the Defendant had calculated its liability between $23 million and $24 million. On the eve of trial, Adorno met with the city manager and mayor and negotiated a settlement of $7 million. Adorno led the Court and City council to believe the settlement was for the

entire class when in fact it was only for the named plaintiffs. The settlement excluded the putative class' interest and after the settlement, counsel effectively stopped work on the suit essentially leaving the claims for the class abandoned. Adorno had his clients sign a confidentiality agreement even though as a matter of law the city could not agree to one. Plaintiffs' counsel received a fee of $2 million from the settlement. Moreover, the settlement amount of $7 million substantially reduced the funds available to the class in the event of a recovery at trial or through settlement. The court found that counsel charged an excessive fee and had a conflict of interest and suspended counsel's license for a period of three years.

139. This is not a case where Ms. Brahmbhatt has: (1) disjoined the contingency financial interest of a class representative from those of the class as in *Rodriguez*; (2) acted to the detriment of one group to the benefit of another as in *Piambino;* (3) attempted to enforce a contingency fee agreement against a named plaintiff while also seeking a fee as class counsel as in *Warnell*; (4) engaged in deceptive conduct as in *Ashford Gear, LLC*, *Reliable Money Order* or *Kaplan*. Finally, unlike counsel in *Adorno*, Ms. Brahmbhatt did not negotiate an agreement for the named plaintiffs while leading the court and Epic Games to believe it was a settlement on behalf of a putative class and subsequently abandoning the members of that putative class which was all but certain to be certified.

140. While other courts have found conflicts other than those cited by the Objectors, none of those situations are present here. This is not a case where the recovery of C.W. will cut into the recovery of the class. *See, In re Cardinal Health,*

Inc. ERISA Litigation, 225 F.R.D. 552 (S.D. Ohio 2005). Nor is this a situation where the substantive law will permit recovery by only one of the parties. *See, In re Microsoft Corp. Antitrust Litigation*, 218 F.R.D. 449 (D. Md. 2003). Finally, this is not a situation where class counsel represents a client who has objected to the class settlement and is appealingly the court's approval of the settlement while at the same time representing clients who filed claims forms. *Moreno v. Autozone, Inc.*, 2007 U.S. Dist. LEXIS 98250, 2007 WL 4287517 (N.D. Cal. 2007).

141. The Court finds Objectors' arguments to be unpersuasive. As previously stated, the substantive terms of the Class Settlement Agreement were negotiated prior to the negotiation of the C.W. Agreement. ¶¶31-38, *supra.* Mrs. Brahmbhatt's participation in the negotiation of the Class Action Settlement Agreement resulted in an increased recovery for the class and resulted in additional beneficial non-monetary terms. This Court, in paragraphs 147 to 182, *infra*, has found the Class Settlement to be fair, reasonable and adequate.

142. As it is clear that, as class counsel, Ms. Brahmbhatt is permitted to represent a party in a separate proceeding based on the same set of facts and legal theories so long as the clients' interest are not inherently opposite, (4 NEWBERG ON CLASS ACTIONS § 3.75 (5th ed.)), Objectors argument must then have to do with the amount of the settlement. However, Objector's have not identified to the Court how the amount of the C.W. settlement creates a conflict of interest. As the Court finds that the Class Settlement Agreement is fair, reasonable and adequate in this case, the only possible conflict that could arise from the amount of the C.W. settlement

would be if that settlement interfered with the approved settlement in this case. That is certainly not the case and Objectors do not assert otherwise.

143. Even if the amount of the C.W. settlement were relevant, the Court does not find it to be excessive. The C.W. Settlement Agreement was not only on behalf of C.W., it also included Ms. White's individual claims.[24] The releases given by C.W. and Ms. White are broader than the release in the Class Action Settlement. Certainly Ms. Brahmbhatt was required to act as a zealous advocate in negotiating a settlement with Epic Games. The C.W. settlement was preceded by nearly two years of litigation by C.W and followed a Notice of Attorneys Lien in that case for work performed, primarily by Ms. Brahmbhatt prior to leaving OneLLP. Given the nature of the work performed in *White* in federal court, that amount could easily be six figures. All of these factors would justify the monetary terms of the C.W. Settlement. If Objectors believe that their individual circumstances justify an award substantially greater than what they would receive pursuant to the Class Settlement, they could have exercised their right to opt out of the class.

144. The Court finds no basis to conclude that Ms. Brahmbhatt has or had a conflict with the Settlement Class or acted in any manner contrary to the interests of the Settlement Class. In fact, the record shows just the opposite: the class benefitted from Ms. Brahmbhatt's participation in the negotiation of the settlement. *See*, ¶ 32, *supra*.

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[24] At the July 21, 2021 hearing, Counsel for Objector's seemed unaware of this fact. Trans. pp. 12-13 (July 21,2021). Counsel for Objector was also unaware if Mrs. White had claims against Epic Games, but a reading of the affidavits on file reveal that she did. Brahmbhatt Aff. ¶15; Jacobson Aff. ¶30.

145. Even if this Court were to find that Ms. Brahmbhatt has a conflict, no issue of a conflict has been raised as to remaining counsel. In the Objection, counsel for Objector apparently, and erroneously believes, that Ms. Brahmbhatt and the Devlin Law Firm represented all named minor plaintiffs at the time the Settlement Agreement was negotiated and before being named Class Counsel. Not only were are all minors represented by Dan Bryson and Patrick Wallace, L.M. was represented by counsel from McGuire Law, P.C. and McMorrow Law, LLC. *See,* ¶ 1, *supra.* Such representation cures any conflict. *Rodriguez,* 563 F.3d at 961.

146. Because Plaintiffs have satisfied all class action prerequisites, and the Objector's arguments to the contrary fail, this Court has the discretion to determine whether a class action is superior to all other methods for adjudication of this controversy. *Beroth Oil Co.*, 367 N.C. at 336. After a thorough and careful review of the Approval Motion, as well as the Affidavits and evidence provided in support of the Approval Motion, and after having considered the Objection, the Court concludes, in its discretion, that class certification is proper in this matter. Accordingly, the Court certifies the following Settlement Class:

> All persons in the United States who, at any time between July 1, 2015, and the date of Preliminary Approval, had a *Fortnite* or *Rocket League* account that they used to play either game on any device and in any mode, and (a) exchanged in-game virtual currency for any in-game benefit, or (b) made a purchase of virtual currency or other in-game benefit for use within *Fortnite* or *Rocket League*.

Excluded from the Settlement Class are: (1) this Court and members of the Court's immediate family; (2) Epic Games, its subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest, and their present or former officers, directors, and employees; (3) those persons who properly executed and filed a timely request for exclusion from the Settlement Class (the names of whom are appended to this Order as Exhibit 1); (4) the legal representatives, successors or assigns of any such excluded Persons; and (5) Class Counsel and/or any member of Class Counsel's firm and their family.

FINAL APPROVAL OF SETTLEMENT

147. At the outset, the Court notes that its role in reviewing and ruling on a motion to approve a class settlement, the Court acts in the role of a fiduciary to the unnamed class members and is tasked with protecting their interests. *See* 4 NEWBERG ON CLASS ACTIONS § 13:40 (5th ed.)(citations omitted).

148. The Court next looks at the Settlement to determine whether it is "fair, reasonable, and adequate." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 73 (2011). The burden of showing that the settlement satisfies this standard rests on Plaintiffs. *Id.* The determination of whether Plaintiffs have satisfied this burden rests in the trial court's sound discretion. *Id.*

149. Prior to negotiating a settlement and filing a complaint in this action, the claims in *White,* which are also asserted in this action, had been litigated for

approximately two years. The issues had been briefed by all parties in *White* and were available for the public to view on PACER. Each party in this action, had the ability to analyze the strength and weaknesses of their case and their opponents case. Confirmatory discovery was conducted as to the size of the class as well as the in-game purchasing practices of *Fortnite* and *Rocket League* users.[25] The case was also mediated by a well-respected retired U.S. District Court judge who has stated:

> 5. . . . I can provide the following information about the mediation. The mediation lasted two days, and I stayed in touch with the parties in the days and weeks that followed to resolve remaining deal points. Counsel for both sides were well prepared and thoroughly knowledgeable concerning the claims at issue in the litigation and negotiated tenaciously for their respective client's interest. I also had occasion to speak directly and repeatedly with in-house counsel at Epic Games who had decision making authority. While counsel and the parties conducted themselves professionally at all times, the mediation was adversarial and the parties had substantial disagreements concerning the factual and legal issues relevant to the case. Based upon my observations and experience, the settlement negotiations were conducted at arm's length and, at various points during the mediation, it appeared the negotiations would conclude without a settlement being reached.
>
> 6. I was aware during the November mediation that Epic Games had been and continued to be involved in multiple putative class action lawsuits alleging violations of various consumer protection laws. I understood that a primary goal of Epic games was to resolve all such litigation pending against it nationwide without incurring further burden, expense and litigation risk. To that end, I conducted further mediation sessions in December 2020 between counsel for the parties in Krohm and plaintiff's counsel in one such litigation matter from the Norther District of California, attorneys of the Devlin Law Firm, LLC, which resulted in the settlement presented for court approval.
>
> 7. The release given by C.W. and Ms. White is broader that the

[25] For reasons unknown to this Court, counsel for Objector did not ask for copies of any discovery or other documents exchanged by the parties. The sole documents Objector sought was the C.W. Settlement Agreement as well as certain attorney-client privilege documents between Rebecca White and Ms. Brahmbhatt the Court reviewed *in camera*. Trans. pp. 50-51 (July 21, 2021).

release in the Class Action Settlement. The subsequent mediation in December 2020 resulted in additional material changes to the class action settlement.

8. In conducting the mediation I was also aware of the amounts of settlements that had been reached in similar class action lawsuits, including settlements that have received court approval, both in the Northern District of Illinois, and in other courts.

9. At no time during the mediation (or after) did I come to the conclusion that plaintiffs' counsel were insufficiently prepared for mediation, or that they were mediating from a position of weakness, or that the lacked the resolve or resources to continue to prosecute the *Krohm* lawsuit, litigation in the Northern District of California or any additional litigation against Epic Games, if a settlement could not be reached.

10. . . . I can confidently express my view that the mediation process was robust and adversarial, and that the settlement reached was the product of skilled and ethical attorneys advocating for their respective clients, in case of plaintiffs' counsel, both the plaintiffs and class members.

150. As an initial matter, Objectors cite *Literary Works* and *Sharp Farms v. Speaks*, 917 F.3d 276 (4t Cir. 2019) in an attempt to diminish the role of the well-recognized and respected mediator in this action. (Objection p. 28, 36). *Literary Works* essentially held that the presence of a mediator does not cure a structural problem such as a conflict between class representatives. 654 F.3d. at 252. Such is not the case at issue. *Sharp Farms* is also distinguishable from this case. *Sharp Farms* involved an objection filed in *Speaks v. U.S. Tobacco Coop., Inc.* 5:12-cv-00729-D (E.D.N.C.) a parallel federal class action to *Fisher*. In seeking to have the Fourth Circuit Court of Appeals affirm the District Court's approval of the class action settlement, the parties pointed to the presence of a mediator in support their contention that there was no collusion. The Fourth Circuit found that because the

mediator did not have the benefit of an order from the state court in *Fisher* detailing what it found to be collusive conduct both before and after the mediation, the presence of the mediator did not mitigate the alleged collusion. *Id.* at 291-92.[26]

151. Neither *Literary Works* nor *Speaks* diminish the importance of Judge Andersen's statements to the same or the legal import of the same.

152. In *Ehrenhaus*, the N.C. Court of Appeals noted that courts consider a variety of factors in determining whether a settlement is fair, reasonable and adequate. These factors include: (1) the strength of plaintiff's claims; (2) the defendant's ability to pay; (3) the cost and complexity of litigation; (4) the amount of opposition to the settlement; (5) the reaction of the class members to the settlement, (6) counsel's opinion of the settlement; and (7) the stage of the pleadings and how much discovery has been completed. *Ehrenhaus*, 216 N.C. App. at 74. While the Court of Appeals identified a number of factors, it also identified the primary importance of two key factors. First, the likelihood that the class will prevail should litigation go forward and "the potential spoils of victory, balanced against benefits to the class offered in the settlement." *Ehrenhaus*, 216 N.C. App. at 74. The second factor "is the class's reaction to the settlement." *Id. See also, In re Progress Energy S'holder Litig.*, 2011 NCBC 44, 1, 2011 NCBC Lexis 45 at *1 (Nov. 29, 2011)("The reaction of the class is perhaps the most significant factor to be weighed in considering its adequacy").

[26] As in *Fisher*, the undersigned is intimately familiar with *Sharp Farms* as the undersigned authored the state court opinion referred to in *Speaks*.

153. In evaluating whether a settlement is fair, reasonable, and adequate "[t]he Court is not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from the settlement as they might have recovered from victory at trial. *Torres v. Bank of America (In re Checking Account),* 830 F.2d 1330, 1345 (S.D. Fl. 2011) (citations omitted).

154. As to the strength of Plaintiffs' claims, the parties in this action vigorously dispute both the merits and whether Plaintiffs would be able to obtain certification of a class for litigation purposes. It is true that in *White,* C.W. survived a Motion to Compel Arbitration and two Motions to Dismiss, but those motions only addressed the allegations of the complaint, and, as seen in *White,* even after discovery of information forced C.W. to amend his complaint, he ultimately had to admit to the Court that he was not the best candidate to act as a class representative in *White.* ¶¶ 26-27, *supra.* Success is not certain. Plaintiffs would face significant challenges in litigation. ¶¶ 47-49, *supra.* Plaintiffs also face obstacles to the certification of a nationwide class and the ability to maintain it throughout trial. In addition, absent a settlement mooting the individual issue related to minors and disaffirmation, certification of a class may not be possible. These obstacles "weigh[s] in favor of approving the settlement." *Chambers v. Whirlpool Corp.,* 214 F.Supp.3d 877, 888-89 (C.D. Cal. 2016).

155. As to the second factor, there is no dispute about Defendant's ability to pay.

156. As to the third factor, if this case proceeded to trial the obstacles faced by the plaintiffs would not only increase the cost and complexity of the litigation but could also prevent class certification.

157. The fourth and fifth factors weigh heavily in favor of approval. "Because class members are presumed to know what is in their best interests, the reaction of the class to the settlement is an important factor for the Court to consider." *Austin v. Penn. Dept. of Corrections*, 876 F. Supp. 1437, 1458 (E.D. Pa. 1995). The reaction of the class overwhelmingly favors approval. Following notice to the class, including two rounds of direct notice sent to and received by more than 27 million class members,[27] the Court received 1,421 requests for exclusion (nearly all of which came in a bulk opt-out submitted by a single law firm). A single objection on behalf of two individuals was filed by counsel, who has been attempting either through his firm or litigation funding company to insert himself in a class action against Epic Games. The two Objectors represent .0000074% of a class of more than 27 million members. The op-outs and Objectors, when combined represent, .0053% of the class. Accordingly, the Court finds the class to be overwhelming in favor of the settlement.

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[27] The Objection contends that the substance of the Notice to class members was insufficient because it did not disclose to Settlement Class Members the pendency of the *K.W. v. Epic Games* case in the Northern District of California. The purpose of a class action settlement notice is to inform putative Settlement Class Members of their rights and to allow them to assess for themselves whether to opt out of or object to the settlement. The. Objection cites no authority to support the argument that a class action settlement notice must reference other pending litigation on the same subject matter and the Court is not aware of any. Further, even if such a requirement might exist in some hypothetical case such as where a prior proposed settlement offer of greater value had been rejected as inadequate in a parallel class action, here the *K.W.* case was not even filed until several weeks *after* the parties to this case already had moved this Court for preliminary approval of the settlement. The *K.W.* case remains at the pleading stage and has not yet survived a motion to dismiss that Epic Games has filed against it. Any mention of the *K.W.* case in the settlement notice to class members would have risked confusion.

"The 'near unanimous approval of [a] proposed settlement[] by the class members is entitled to nearly dispositive weight in [the] Court's evaluation of the proposed settlement[]'" *Torres v. Bank of America* (In re Checking Account), 830 F.2d 1330, 1343 (S.D. Fl. 2011). *See also*, I*n re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (considering 3 objections out of 57,630 class members to be a "lack of objection"); *see also, e.g.*, *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement where 45 of approximately 90,000 class members objected); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118–19 (3d Cir.1990) (holding that objections by *10%* of a class "strongly favors settlement") (emphasis added); *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, No. 11-MD-2247 ADM/JJK, 2012 U.S. Dist. LEXIS at *27-29, 2012 WL 2512750, at *8 (D. Minn. June 29, 2012), *aff'd*, 716 F.3d 1057 (8th Cir. 2013) ("Twenty-Six Objectors, out of a class totaling more than 30,000, represents only token opposition to this Settlement"); *Stoner v. CBA Info. Servs.*, 352 F. Supp.2d 549, 552 (E.D. Pa. 2005) (characterizing class reaction as "more than favorable" where only 5 of 11,980 class members objected and 18 opted-out); *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 474 (W.D. Va. 2011) (approving settlement where "there are relatively few objections (59 out of 3,025,689 class members) and only a small percentage of class members (0.04%) opting out"); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-cv-60649, 2015 U.S. Dist. LEXIS 121998 at *15-16, 2015 WL 5449813, at *5 (S.D. Fla. Sept. 14, 2015) (finding 161 opt outs and four objectors out of 400,000 notice packages to be trivial, and indicative of "near universal approval" in approving settlement); *Hall*

v. Bank of Am., N.A., No. 12-cv-22700, 2014 U.S. Dist. LEXIS 177155 at *21, 2014 WL 7184039, at *5 (S.D. Fla. Dec. 17, 2014) (finding objections of less than .0016% supported approval); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 49477 at *39-402010 WL 1687832, at *15 (N.D. Cal. 2010) (holding a .4% opt-out rate "is a further indication of the fairness of the Settlement").

158. Class Counsel's opinion of the settlement is very positive as reflected in their affidavits and briefing. Many of these class counsel have been involved in litigation with Epic Games for almost two years. Mr. Salario, on the hand, counsel in *K.W.*, had only been involved in a putative class action against Epic Games for 63 days prior to the filling of the Objection. In addition, his experience and knowledge rests in large part on battles fought in the trenches by Class Counsel in this action, as such, his opinions carry little weight with the Court as compared to Class Counsel's opinions.

159. As to the stage of the pleadings and how much discovery has been conducted, counsel for Objectors would have this Court make an analysis in a vacuum. The Court declines Objectors' request. While it is true that the settlement was reached prior to the filing of the complaint, this disregards the history of the claims asserted, the counsel involved, the confirmatory discovery and the information publicly available.

160. Weighed against the risks of continued litigation, the benefits provided by the Settlement are impressive and substantial. Following preliminary approval, and without the need for Settlement Class Members to take any action, Epic Games

deposited one thousand (1,000) V-Bucks into the accounts of every *Fortnite* player in the United States who had purchased one or more Loot Llamas, and one thousand (1,000) Credits into the account of every *Rocket League* player in the United States who had purchased a Crate. The total number of Settlement Class Members who received this benefit automatically is approximately 9.4 million. Although this virtual currency has no resale value, as set forth in the EULAs, Epic Games sells one thousand (1,000) V-Bucks for Seven and 99/100 Dollars ($7.99) and one thousand (1,000) Credits for Nine and 99/100 Dollars. ($9.99). Accordingly, although this virtual currency is not redeemable for cash once purchased or awarded, it does represent a significant in-game and fair market value and avoided cost for Settlement Class Members, had each of these players purchased the virtual currency that Epic Games distributed to them.

161. Objectors contend that the value of the virtual currency distributed upon preliminary approval is illusory and the virtual currency is valueless. Objection at pp. 42-43. Objectors' argument ignores the facts of this case. The class, at least in part, consists of individual who purchased virtual currency. These individuals were willing to pay the price set by Epic Games for the virtual currency thus setting its fair market value. *See, Carlson v. Carlson*, 127 N.C. App. 87, 91, 487 S.E.2d 784, 786 (1997)("Fair Market value is defined as the price which a willing buyer would pay to purchase the asset on the open market from a willing seller, with neither party being under any compulsion to complete the transaction." (citations omitted).

162. Objectors contention is also undercut by facts cited in their Objection. As Objectors point out, in 2018 and 2019 Epic Games had total revenue of Four Billion Three Hundred Million Dollars ($4.3 billion) from *Fortnite*, eighty-three percent (83%) of which is derived from the sale of virtual currency. Objection p. 6. (citations omitted). This means that in 2018 and 2019 Epic Games had revenues of Three Billion Five Hundred Sixty-Nine Million Dollars ($3.569 billion) from the sale of V-Bucks. Using the price of Seventy-Nine and 99/100 Dollars ($79.99), which represents the most expense pack of V-Bucks sold, revenue from the sale of V-Bucks was generated from, at a minimum, forty-four million six hundred eighteen thousand seventy-seven (44,618,077) separate and distinct purchase transactions. This indicates a willingness of millions of individuals to pay the price set by Epic Games in millions of transactions. If the fact that players/buyers were willing to pay the price set by Epic Games on over 44 million occasions does not establish fair market value, the Court is at a loss of what would.

163. Further evidence that the virtual currency has value is that out of the one hundred eighteen thousand nine hundred eighty-six (118,986) claimants seeking a refund without disaffirmation, forty-seven thousand five hundred thirty-one (47,531) claimants or forty percent (40%) of the claimants had requested virtual currency instead of cash. These numbers, contrary to Objectors' assertions, demonstrate that the virtual currency has value to those who play *Fortnite* and *Rocket League* and were willing to pay for the same.

164. Objectors have also argued that the virtual currency actually costs

nothing for Epic Games. This argument ignores the benefit to class members which is the focus of the Court's analysis. Objectors argument also ignores the lost opportunity to sell a certain number of packs by providing those packs for free. Moreover, the fact that players can play the game for free, it is reasonable to assume that Epic Games incurs development and maintenance costs which would in part be deferred by purchases.

165. In addition to the virtual currency, Epic Games has made available significant monies, up to $26.5 million (minus attorneys' fees, incentive awards, and the costs of notice and administration), that Settlement Class Members can claim based on alleged legal entitlement to refunds for their in-game purchases, including requests by minors to disaffirm in-game purchases. These benefits were the product of arms-length, hard-fought negotiations that occurred only after substantial litigation and investigation and with the assistance of a highly experienced retired federal judge as a mediator. Given that ninety-five percent (95%) of the players who have made in game purchases have spent less that Fifty Dollars ($50.00), the monetary settlement offers a majority of the class members to claim full relief.

166. Importantly, Epic Games changed its purchasing procedures in April 2020. Following those changes, minors have not been able to enter payment information (*i.e.*, credit card, debit card, or gift card numbers) into Epic Games' systems. All such entries must be made by legal adults who agree that they (the adults) will be bound by the game's EULA. Accordingly, and because Epic Games

long ago ceased selling Random Item Loot Boxes, the issues raised in the Action cannot recur.

167. The Objection challenges the Settlement as inadequate on several grounds. The Objection contends the Settlement: (a) is collusive; (b) is unfair to minor claimants and does not provide sufficient value for the claims of minors; (c) imposes undue procedural hurdles on minor claimants; and (d) is weighted too heavily toward virtual currency rather than cash benefits.[28] The Court has considered the arguments in the written Objection and those presented by counsel during oral argument. After due and proper consideration, the Court finds that the arguments lack merit and overrules the Objection.

THE SETTLEMENT IS NOT COLLUSIVE

168. Objectors argue the settlement is collusive in that it: (a) is the product of a reverse auction, (b) provides illusory non-monetary benefits; (c) engages forum shopping; (d) engages in claim deterrence; and (e) ties attorneys' fees to non-monetary relief and unclaimed funds. The Objectors' argument in unfounded.

169. Objectors' claim that the settlement is the product of a "reverse auction" is not only meritless but lacks any foundation in fact. A reverse auction occurs when the defendant "pick[s] the most vulnerable or compliant plaintiff with which to settle and bind all claims." *Pietersen v. Wells Fargo Bank, N.A.*, 2019 U.S. Dis. Lexis 63961*8 (N.D. Cal. 2018) (citations omitted). The Court questioned the parties

[28] The written Objection also claimed that the release of claims specified in the Settlement Agreement is overbroad, but during oral argument, the attorney arguing for the Objection withdrew that argument.

extensively and found no evidence of a "reverse auction." In fact the opposite is true. Despite the Objectors conclusory and unfounded assertions, the Court concludes that the Settlement is the product of adversarial, arms'-length negotiations between experienced counsel and overseen by a well-respected independent mediator, is not collusive. Epic Games did not initiate the settlement discussions that bring the parties before this Court. At the time Epic Games entered into settlement discussions with counsel, it faced two active cases—*White*, prosecuted by Ms. Brahmbhatt, and *Krohm v. Epic Games, Inc.*, a putative class action that had been dismissed by the United States District Court for the Eastern District of North Carolina and was on appeal to the United States Court of Appeals for the Fourth Circuit. When approached by counsel in *Krohm*, counsel for Epic Games made clear that Epic Games would only entertain a settlement if counsel for *White* were involved. Thus Epic Games, required the presence of counsel who had succeeded where no other counsel had succeeded. Epic Games negotiated the Settlement with both sets of counsel. That is not a reverse auction.

170. The Court has previously addressed Objectors assertion that the virtual has no value and is illusory. ¶¶ 161-165, *supra*. Moreover, the mandatory non-cash benefit in the Settlement is the award of one thousand (1,000) units of virtual currency for the 9.4 million Settlement Class Members who exchanged virtual currency in *Fortnite* or *Rocket League* for a random-item loot box. Such loot boxes could have been acquired for less than (1,000) units of virtual currency, and players could earn that virtual currency through game play without purchasing it. Under

these circumstances, the Court finds that a virtual currency benefit for this element of Plaintiffs' claims is entirely appropriate. The benefit for minors seeking disaffirmation is cash only; no virtual currency option was offered. For claimants seeking a refund based upon any other legal claim arising from their purchases, the Settlement allows claimants to choose whether they wish to receive their benefit in cash or virtual currency, and it is no more difficult for claimants to choose one versus the other. Accordingly, the Objectors argument that the settlement is unfairly weighted toward non-cash consideration is incorrect.

171. The Court has previously addressed the propriety and necessity of bringing this action in North Carolina (see ¶ 104, *supra*) and finds this does not constitute forum shopping.

172. The Court finds the settlement to be both procedurally and substantively fair to minors who assert a statutory right to disaffirm contracts with Epic Games. The Court interprets Objectors' arguments to be that minors should receive a one hundred percent (100%) refund from any settlement upon disaffirmation. This position ignores the hurdles facing minors as set forth in paragraphs ¶ 48, *supra*. It also ignores the reality of the settlement process. A complete surrender or capitulation is not a settlement but that is exactly what the Objectors seems to think is in order. *See, Chambers v. Whirlpool Corp.*, 214 F. Supp.3d 877, 889 (C.D. Cal. 2016)("[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." (citations omitted). In fact such arguments are meritless. *Id.* at 891. (citations omitted).

173. The parties argued to the Court, and the Objectors do not dispute, that these claims has never been successfully litigated to conclusion on a class basis. Epic Games has substantial defenses to it both on the merits and to allowing the claim to proceed for litigation purposes on a class basis. Under the circumstances, Epic Games' agreement to provide a one-third refund for minors' purchases, up to a maximum of fifty dollars ($50), constitutes a fair and reasonable settlement. Epic Games did not require minors to provide unnecessary indicia of proof for these claims; to the contrary, the Settlement only requires the parents of minors making these claims to check boxes attesting to the minors' eligibility for the benefit. Proof of purchase is required only if and to the extent that minors are seeking refunds for purchases they made from third parties. If minors made purchases directly from Epic Games, no proof is required from claimants. The Court notes that nothing requires a minor to disaffirm the EULA, which would require them to close out their current account. Minors also have the option to submit a purchase refund request like other class members which would allow them to recover more than if they had disaffirmed the EULA.

174. As set forth in the Court's analysis of the request for attorneys' fees in ¶¶183-205, *supra*, the Court finds its award to be fair and reasonable whether the Court bases its award of fees on claimed or unclaimed funds or non-monetary benefits.

175. Checks payable to Settlement Class Members expire ninety (90) days after issuance. The Parties have agreed that the funds from any uncashed checks

will be distributed to a *cy pres* recipient selected by the Parties and approved by the Court. The Parties agreed that recipient should be a nonprofit organization that promotes online literacy for, or the general welfare of, teenagers, which charity may not be affiliated with Epic Games or its board members. Once the Parties know the amount of money to be distributed, they will return to this Court to seek a further order to distribute those monies to an appropriate *cy pres* recipient.

176. On October 27, 2021, this Court entered an order requiring the production of those portions of the confirmatory discovery referenced paragraphs 5 and 6 of the Supplemental Affidavit of Myles McGuire. The Court further permitted the Objectors, in the event they believed that the confirmatory discovery did not reflect the confirmatory discovery as reported by Mr. McGuire, to inform the Court of their beliefs, by written memorandum, within 5 days of the receipt of Plaintiffs' responses. The Court specifically stated, in the October 27, 2021 Order, that no other documents or argument shall be provided to the Court. ("October 27 Order").

177. Despite the specific limitations placed on any requested response from Objectors in the October 27 Order, on November 3, 2021 the Court received an eight-page documents titled Objector's Memorandum Responding to Order for Production of Confirmatory Discovery that far exceeded in scope the requested information including objections, legal argument, citations to materials not previously cited to the Court, and a renewed request for discovery and an evidentiary hearing. (November 3 Memorandum).

178. Among the "facts" Objectors now assert is that a 2020 survey that purportedly found that American *Fortnite* players spend an average $102.42 in game.

179. The survey is reported in a blog and provides no information from which the Court can determine whether the survey is reliable or based upon sound methodology or whether the results are accurately reported. As pointed out by Epic Games it is double hearsay. Brief of Defendant Epic Games, Inc. In Response to Objectors. Memorandum Regarding Production of Confirmatory Discovery, p. 3.

180. Even if the reported results were true and accurate, the Court's opinion on the Class Action Settlement remains unchanged. As previously stated: [T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *See, Chambers v. Whirlpool Corp.*, 214 F. Supp.3d 877, 889 (C.D. Cal. 2016)(citations omitted). Moreover, in evaluating whether a settlement is fair, reasonable, and adequate "[t]he Court is not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from the settlement as they might have recovered from victory at trial. *Torres v. Bank of America (In re Checking Account),* 830 F.2d 1330, 1345 (S.D. Fl. 2011) (citations omitted). Objectors' hopes to the contrary, a settlement does not entitle class members to a full recovery.

181. There is no contention or evidence that any participants to the survey have filed an objection to the proposed Class Action Settlement. The results of the

survey do not alter the continued risks of litigation to plaintiffs, nor do they diminish the overwhelming and near unanimous approval of the settlement by the class.

182. Ultimately, after thorough consideration of the nature and strength of Plaintiffs' claims, the potential defenses they faced on the merits and to adversarial class certification, and the benefits provided by the Settlement, the Court concludes, in its discretion, that the Settlement is fair, reasonable, adequate, and should be approved.

ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

183. Plaintiffs also move the Court to approve their request for an award of Eleven Million Three Hundred Thousand Dollars ($11,300,000) in attorneys' fees and reimbursement of expenses. Additionally, Plaintiffs request, and Epic Games does not oppose, that the named plaintiffs receive incentive awards totaling no more than Seventy-Five Thousand Dollars ($75,000) in the aggregate. The Settlement Agreement provides that the amount of a fee award "shall be determined by the Court based on a petition from Class Counsel, which shall be [and was] filed with the Court at least fourteen (14) days prior to the Objection/Exclusion deadline. Class Counsel agreed in the Settlement Agreement, with no consideration from Defendant, to limit their fee request to no more than Eleven Million Three Hundred Thousand Dollars ($11,300,000), inclusive of costs and expenses, and Epic Games agreed to pay the

amount awarded by the Court.[29]

184. The Class Settlement Agreement also provides that the Court's consideration of the Fee Award should be "conducted separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement Agreement, and any award made by the Court with respect to Class Counsel's attorneys' fees or expenses, or any proceedings incident thereto, including any appeal thereof, shall not operate to terminate or cancel" the Settlement. The Court concurs with that agreement among the Parties and has considered the Fee Motion separately from the Approval Motion. It is incumbent upon the Court to review the fees sought for reasonableness. *See, e.g., Ehrenhaus*, 216 N.C. App. at 74. The determination of the amount of attorneys' fees to be awarded is in the sound discretion of the Court. *See G.E. Betz, Inc. v. Conrad*, 231 N.C. App. 214, 242 (2013). Accordingly, the issue before the Court is whether Plaintiffs' counsel's request for Eleven Million Three Hundred Thousand Dollars ($11,300,000) is reasonable.

185. Class counsel in resolved class actions routinely receive fee awards totaling 25% or more of the benefits provided to Settlement Class Members. Class Counsel and Objectors dispute what constitutes the total benefit to the class. In its briefs and argument, Class Counsel asks this Court to place a total value on the settlement and reasonableness thereof based upon the virtual currency having a value in excess of One Hundred Million Dollars $100 million.

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[29] The written Objection incorrectly contends that the parties' Settlement Agreement included a "clear sailing" agreement with respect to fees. During oral argument, counsel for the Objectors properly withdrew that argument as unfounded.

186. Class Counsel argues they negotiated compensation to Settlement Class Members which, had those Settlement Class Members purchased those V-Bucks and Credits from Epic Games or a third party, would have cost over One Hundred Million Dollars ($100 million). Even more, under the Settlement and the Preliminary Approval Order, Epic Games has already provided the virtual currency to Settlement Class Members. Class Counsel's compensation negotiations took place only after the substantive terms of the Settlement were agreed upon. The fees and expenses requested by Class Counsel are 14% of what it would have cost Settlement Class Members to purchase these V-Bucks and Credits from Epic Games or a third party, and 10.5% of that amount plus the Twenty-Six Million Five Hundred Thousand Dollars ($26.5 million) that Epic Games has made available for all the other benefits provided by the Settlement.

187. Objectors have objected to the amount Class Counsel are seeking on the basis that the value of the virtual currency is illusory and essentially worthless. The Court has found this argument to be without merit. See ¶¶ 161-164, *supra.*

188. Objectors liken the virtual currency to a coupon for the purpose of determining its value. Objectors raise the Class Action Fairness Act ("CAFA"). 28 U.S.C. § 1711 (2005) *et seq.* in its opposition to the fee request and implicit in their argument is that the fee request would not withstand scrutiny under the CAFA.

189. CAFA was enacted to address abuses in class action settlements whereby "defendants and class counsel agree to provide coupons of dubious value to class members but pay class counsel with cash. *Levitt v. Southwest Airlines Co. (In*

re Southwest Airlines Voucher Litig.), 799 F.3d 701, 705-06 (7th Cir. 2015). In *Levitt*, the Seventh Circuit Court of Appeals stated in part:

> The potential for abuse is greatest when coupons have value only if a class member is willing to do business again with the Defendant who has injured her in some way, when the coupons have modest value compared to the new purchase for which they must be used, and when the coupons expire soon, are not transferrable, and/or cannot be aggregated.

Id. at 706.

190. It is debatable whether the virtual currency would constitute a coupon thus bringing it within the purview of CAFA. See Plaintiffs" Memorandum in Support of Approval 33-35.

191. Even if this case were filed in federal court it is debatable whether CAFA would apply to the setting of the fee. *See Chambers*, 214 F.Supp.3d at 894 citing *Mangold v. Calif. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (2016) (In diversity actions, state law, as opposed to CAFA, is to be applied in determining the entitlement to a fee and the reasonableness of a fee).

192. Objectors, while admitting that CAFA is not applicable to this case, seem to lament that if it did apply and the virtual currency were treated as a coupon, the fee request would be analyzed differently under CAFA. *See* 28 U.S.C. § 1171 (2005).

193. Notwithstanding the fact that CAFA is inapplicable to this action, the Court recognizes that the Objectors' argument has some merit.

194. Under CAFA's framework, in a proposed fee for a class action settlement

which provides for the recovery of coupons to class members, attorneys' fees are calculated based upon the value to the class members of the coupons that have been redeemed. 28 U.S.C. § 1712(a) (2005).

195. Class counsel, in their valuation of the settlement, have given full value to the virtual currency distributed upon preliminary approval of the Class Settlement. To those who have stopped playing *Fortnite* or *Rocket League* the value of the currency is minimal. Accordingly, as an alternative method of calculating the value of the settlement, the court will conduct an analysis by only considering the virtual currency that was distributed and actually consumed/redeemed by the class members.

196. As of July 13, 2021, U.S. players had consumed the equivalent of nine hundred fifty thousand (950,000) packs of the *Rocket League* virtual currency that was distributed as part of the settlement upon the preliminary approval by the Court. This virtual currency sells for Nine and 99/100 Dollars ($9.99) per pack making the value consumed by the class as of that date Nine Million Four Hundred Ninety Thousand Five Hundred Dollars ($9,490,500).

197. As of July 7, 2021, U.S. players had consumed/redeemed the equivalent of three million one hundred thousand (3.1 million) packs of the *Fortnite* virtual currency that was distributed as part of the settlement upon the preliminary approval by the Court settlement upon the preliminary approval by the Court. This virtual currency sells for Seven and 99/100 Dollars ($7.99) per pack making the value consumed by the class as of that date Twenty-Four Million Seven Hundred Sixty-

Nine Thousand Dollars ($24,769,000.00).

198. When combined with the Twenty-Six Million Five Hundred Thousand Dollars ($26,500,000) cash available to class members, the exchanged virtual currency brings the total value of the settlement to class members to Sixty Million Seven Hundred Fifty-Nine Thousand Five Hundred Dollars ($60,759,500).[30] A fee of Eleven Million Three Hundred Thousand Dollars ($11,300,000) represents 18.60% of the total value of the settlement under this analysis making the fee with well within the accepted range of the courts of North Carolina or the presumptive max of 25% argued by Objectors. Objection p. 17. Moreover, it is in line with the range set forth in the leading treatise on Class Actions. See 5 NEWBERG ON CLASS ACTIONS § 15:81 (5th ed.).

199. Objectors complain that it is unreasonable to have the fee award based on unclaimed funds. An analysis of the fee request using claimed funds leads the Court to the same conclusion. The Court notes that there are at least 118,986 non-disaffirmation claims. If each claimant were to receive Ten Dollars ($10.00) the value of the settlement would be Forty-Six Million Seven Hundred Forty-Nine Thousand Three Hundred Sixty Dollars ($46,749,360) (Fee + Claims Paid at $10 + value of Virtual Currency Consumed or Redeemed) making the requested fee 24% of the total recovery.[31] If each claimant were to receive Fifty Dollars ($50.00),) the value of the

[30] This Court has not placed any value on the virtual currency that was not consumed or redeemed as of July 2021 although it is probable that at least some has been consumed or redeemed given the continued increase in redemption from May 2021 to July 2021.

[31] By way of comparison: (a) an award of 25% of the total recovery under this analysis would yield a fee of Eleven Million Six Hundred Eight-Seven Thousand Three Hundred Forty and 00/100 Dollars ($11,687,340); and (b) an award of 33% of the total recovery would yield a fee of Fifteen Million Four Hundred Twenty-Seven Two Hundred Eighty-Eight and 00/100 Dollars ($15,427,288.00).

settlement would be Fifty-One Million Five Hundred Eight Thousand Eight Hundred Dollars ($51,508,800) (Fee + Claims Paid at $50 + value of Virtual Currency Consumed or Redeemed) making the requested fee 22%.[32] Both of these scenarios yield results where the requested fee is in line with fees awarded by Courts in this state and under the presumptive maximum argued by Objectors.[33]

200. Even assuming, for the sake of argument, that not every Settlement Class Member who received the automatic deposit of Virtual currency would have purchased that virtual currency from Epic Games or necessarily will make use of it, the fee requested by Class Counsel is amply fair and reasonable given the benefits being made available to the Settlement Class, especially in light of the risks and uncertainty of continued litigation. The Court also finds that the requested fees and expenses are made pursuant to a fee-shifting agreement set forth in the Parties' Settlement Agreement and Epic Games has agreed to pay the fees and expenses as awarded by the Court.

201. Class Counsel have adequately and competently represented the Settlement Class, have worked comprehensively on the Settlement and assisted Settlement Class Members in receiving the Settlement's benefits. Through extensive litigation and discovery that has taken place over an almost two-year period in cases in multiple jurisdictions, Class Counsel were able to properly evaluate the value of

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[32] By way of comparison: (a) an award of 25% of the total recovery would yield a fee of Twelve Million Eight Hundred Eighty-Seven Thousand Two Hundred and 00/100 Dollars ($12,887,200.00); and (b) an award of 33% of the total recovery would yield a fee of Sixteen Million Nine Hundred Ninety Seven Nine Hundred Four and 00/100 Dollars ($16,997,904).

[33] Neither of these scenarios take into account any monies paid to minors seeking disaffirmation.

the Settlement and have acted at all times in the best interests of Plaintiffs and the Settlement Class. Class Counsel provided sufficient information through the submission of their Affidavits to establish their experience, skill, and ability to successfully conduct complex litigation, and they navigated a contentious mediation. Class Counsel have also submitted sufficient information to establish the reasonableness of the requested fee award under Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar, including the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyers performing the services; and that the fee is contingent.

202. The Court also notes the risks of protracted litigation Class Counsel assumed were the Motions not approved.

203. Class Counsel have also submitted sufficient information establishing their actual out-of-pocket expenses, which has received no objection.

204. After carefully reviewing the foregoing, the Court finds, in its discretion that $11,300,000 is a fair and reasonable fee and expense award.[34] The fee and

[34] This fee is for work performed in this case. While this case in part, builds upon *White*, the fee is not an award of fees for work previously performed in *White* or *Krohm*.

expense request is made pursuant to a fee-shifting provision in the Settlement Agreement, *see* Stipulation of Class Action Settlement at § 6.2, which our courts are instructed to enforce. *See Ehrenhaus v. Baker*, 243 N.C. App. 17, 28, 776 S.E.2d 669, 706-7 (2015) ("our caselaw expressly recognizes the enforceability of settlement agreements providing for the payment of one party's attorneys' fees by the other party to the lawsuit...the courts should uphold such settlement agreements in accordance with our duty to encourage the voluntary resolution of legal disputes by the parties to those disputes."). The Court agrees that the percentage-of-the-recovery method of awarding attorneys' fees is consistent with North Carolina law and encourages timely and efficient resolution of litigation while incentivizing counsel to maximize the recovery for class members; alternatives to the percentage-of-the-recovery method may encourage the potential expenditure of unnecessary labor, expenses, and resources, as well as increasing the uncertainty of any recovery. The Court finds that the fees being requested, as a percentage of the benefits being made available, is fair and reasonable and otherwise consistent with North Carolina law. In addition, Class Counsel submitted affidavits that demonstrate that they have the requisite skill and proficiency in class actions and other complex cases, and that their representation of Plaintiffs was entirely contingent.

205. The Court has considered the arguments discussed in the Objection and raised during oral argument regarding the fee and expense request. After due and proper consideration, the Court overrules the objections to the fee and expense request for the following reasons: First, as discussed earlier, the Court is satisfied as

to the valuation of virtual currency provided under the Settlement Agreement as set forth herein. Second, the cash made available under the Settlement Agreement is not illusory but instead was made available for Settlement Class Members to claim. Third, the requested attorneys' fees and expenses are below the benchmark percentage – 25% – proposed by the Objection, and otherwise constitutes a reasonable percentage of the Settlement Relief obtained. Fourth, the requested attorneys' fees and expenses are consistent with North Carolina law.

THE REQUESTED SERVICE AWARD IS REASONABLE

206. Class Counsel have requested, and Defendant has agreed to pay, subject to Court approval, an aggregate service award of $75,000.00 out of the fund for the Class Representatives.

207. Class Action litigation cannot proceed without the willingness of an individual to step up and litigate on behalf of others. As a result, putative class representatives must devote time and energy to carry out tasks that are far above and beyond what absent class members are asked to do. Courts often award service awards to class representatives for such service. The awards are "awarded to class representatives in recognition of their time, expense, and risk undertaken to secure a benefit for the Class they represent" and such awards are "within the discretion of the Court." *Carl v. State*, 2009 NCBC LEXIS 36, at *36-37 (N.C. Super. Ct. Dec. 10, 2009). While the amount of the award is ultimately within the discretion of the Court, the size of the award itself is typically commensurate with the level of activity performed and the size of the case. *See Smith v. Krispy Kreme Doughnut Corp.*, No.

1:05CV00187, 2007 U.S. Dist. LEXIS 2389 at *12, 2007 WL 119157, at *4 (M.D. N.C. Jan. 10, 2007) (awarding a service award of $15,000).

208. Factors courts consider when awarding incentive awards include: the risk to the plaintiffs in commencing suit, both financially and otherwise; the notoriety and/or personal difficulties encountered by the representative plaintiff; the extent of the plaintiff's personal involvement in the lawsuit in terms of discovery responsibilities and/or testimony at depositions and trial; the duration of the litigation; and the plaintiff's personal benefit, or lack thereof, purely in his capacity as a class member. *Perry v. Fleetboston*, 229 F.R.D. at 118. The degree to which the Class has benefited from the Class Representative's actions is also considered. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

209. Plaintiffs assisted Plaintiffs' Counsel understanding the nature of their factual claims, made themselves available to counsel when drafting the complaint and answered questions, and communicated with counsel during mediation and settlement discussions. (Bryson Aff. at ¶¶ 46-50). Plaintiffs were prepared to litigate this action through trial to properly represent the class and fight for significant relief. Absent their efforts, the class would have received no compensation. The requested service awards are reasonable, commensurate with named plaintiffs; efforts in the litigation. Objectors have not objected to the amount of the award.

210. The Court finds, in its discretion, that $75,000, in the aggregate, in incentive awards to the six named Plaintiffs is reasonable for their time and dedication to the Settlement Class.

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

1. All defined terms herein shall have the meanings as set forth in the Settlement Agreement.

2. By order of this Court dated February 25, 2021 by the Honorable Judge Keith O. Gregory, a preliminary approval of the Settlement was granted. That Preliminary Approval Order set forth a plan consistent with Rule 23 of the North Carolina Rules of Civil Procedure to provide notice and due process to Settlement Class Members (the "Notice Plan"). Notice has been provided to all members of the Settlement Class pursuant to and in the manner directed by the Preliminary Approval Order. The Notice Plan was properly administered by a highly experienced third-party Settlement Administrator. Proof of the provision of that Notice has been filed with the Court and full opportunity to be heard has been offered to all Parties to the Action, the Settlement Class, and all persons in interest. The form and manner of the Notice is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of North Carolina Rule of Civil Procedure 23, due process, and applicable law. It is further determined that all members of the Settlement Class, save for those who opted out and whose names are appended to this Order, are bound by the Order and Final Judgment herein.

3. The Court hereby certifies the following Settlement Class: All persons in the United States who, at any time between July 1, 2015, and the date of

Preliminary Approval, had a *Fortnite* or *Rocket League* account that they used to play either game on any device and in any mode, and (a) exchanged in-game virtual currency for any in-game benefit, or (b) made a purchase of virtual currency or other in-game benefit for use within *Fortnite* or *Rocket League*. Excluded from the Settlement Class are: (1) this Court and members of the Court's immediate family; (2) Epic Games, its subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest, and their present or former officers, directors, and employees; (3) those persons who properly executed and filed a timely request for exclusion from the Settlement Class (the names of whom are appended to this Order); (4) the legal representatives, successors or assigns of any such excluded Persons; and (5) Class Counsel and/or any member of Class Counsel's firm and their family.

4. The Court finds the Settlement reflected in the Settlement Agreement to be fair, reasonable, adequate, and in the best interests of the Settlement Class. The Court thus approves the Settlement reflected in the Settlement Agreement pursuant to North Carolina Rule of Civil Procedure 23. The Parties are hereby authorized and directed to comply with and to consummate the Settlement Agreement in accordance with its terms, and the Clerk of Court is directed to enter and docket this Order and Final Judgement in the Action. This Order and Final Judgment shall not constitute any evidence or admission by any Party.

5. Plaintiffs and other members of the Settlement Class, on behalf of themselves and their present or past heirs, executors, estates, administrators,

predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, agents, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, lenders, and any other representatives of any of these Persons and entities (defined in the Settlement Agreement as the "Releasing Parties"), by virtue of this Order, are deemed to have fully, finally, and forever released, remised, relinquished, acquitted, and forever discharged Epic Games and all of its present and former, direct and indirect, subsidiaries, parents, affiliates, incorporated or unincorporated entities, divisions, groups, officers, directors, shareholders, partners, partnerships, joint ventures, employees, agents, servants, assignees, successors, insurers, indemnitees, attorneys, transferees, and/or representatives (defined in the Settlement Agreement as the "Released Parties), from any and all claims or causes of action of every kind and description (including any causes of action in law, claims in equity, complaints, suits or petitions) and any allegations of wrongdoing (including any assertions of liability, debts, legal duties, torts, unfair or deceptive practices, statutory violations, contracts, agreements, obligations, promises, promissory estoppel, detrimental reliance, or unjust enrichment) and any demands for legal, equitable or administrative relief (including any claims for injunction, rescission, reformation, restitution, disgorgement, constructive trust, compensatory damages, consequential damages, penalties, exemplary damages, punitive damages, attorneys' fees, costs, interest, or expenses) that the Releasing Parties had or have (including assigned

claims and "Unknown Claims" as defined herein) that have been or could have been asserted in the Action or in any other action or proceeding before any court, arbitrator, tribunal or administrative body (including any state, local or federal regulatory body), regardless of whether the claims or causes of action are based on federal, state, or local law, statute, ordinance, regulation, contract, common law, or any other source, and regardless of whether they are known or unknown, foreseen or unforeseen, suspected or unsuspected, or fixed or contingent, that (1) were or could have been asserted in Plaintiffs' Complaint, or (2) are based upon, arise out of, or reasonably relate to, the claims asserted in Plaintiffs' Complaint. These claims are defined in the Settlement Agreement as the "Released Claims." This definition of Released Claims specifically extends to any allegation that, during the Class Period, any of the Released Parties committed a breach of contract; violated any state's consumer fraud or deceptive trade practice laws or any similar federal law; violated federal or any state's gaming laws; or committed any other tort or common-law violation in connection with the purchase or sale of virtual currency or any other in-game item, benefit, or enhancement related to the play of *Fortnite* or *Rocket League*.

6. This release applies to Unknown Claims, as that term is defined in the Settlement Agreement. Specifically, this means claims that could have been raised in the Action and that Plaintiffs, any member of the Settlement Class or any Releasing Party, do not know or suspect to exist, which, if known by him, her or it, might affect his, her or its agreement to release the Released Parties or the Released Claims or might affect his, her or its decision to agree, to object or not to object to the

Settlement. By this Order, Plaintiffs, the Settlement Class, and the Releasing Parties shall be deemed to have, and shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, which provides as follows:

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

7. Each of the Releasing Parties shall be deemed to have, and shall have, waived any and all provisions, rights and benefits conferred by any law of any state, the District of Columbia or territory of the United States, by federal law, or principle of common law, or the law of any jurisdiction outside of the United States, which is similar, comparable or equivalent to Section 1542 of the California Civil Code. Plaintiffs, the Settlement Class, and the Releasing Parties may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of the Release, but they nonetheless forever settle and release the Released Claims, notwithstanding any Unknown Claims they may have.

8. All Releasing Parties are permanently barred and enjoined from hereafter instituting, participating in, prosecuting, or maintaining, either directly or indirectly, on their own behalf or on behalf of any other person or entity, any action or proceeding of any kind, in any forum, asserting any of the Released Claims against any of the Released Parties. All Settlement Class Members are deemed to have agreed that the Release described herein, and the injunction against pursuing

Released Claims, will be and may be raised as a complete defense to and will preclude any action or proceeding based on the claims released by and through the Settlement Agreement.

9. In the Court's discretion, Class Counsel are hereby awarded attorneys' fees and reimbursement of expenses in the amount of $11,300,000, to be paid by Epic Games within ten calendar days following the Effective Date of the Settlement, as that term is defined in the Settlement Agreement, provided that Class Counsel have provided necessary information for electronic transfer and appropriate tax documentation. Epic Games also shall disburse $75,000 to Class Counsel for distribution as incentive awards to the named Plaintiffs.

10. Any funds from checks to Settlement Class Members that those Settlement Class Members do not cash before the expiration date printed on the checks will be provided to the *cy pres* recipient selected by the Parties and approved by the Court by future order.

11. This Action is dismissed with prejudice as against the named Plaintiffs and all members of the Settlement Class. The Parties shall bear their own costs except as provided by the Settlement Agreement and as ordered herein. Without affecting the finality of this Order and Final Judgment, the undersigned hereby retains jurisdiction for the purpose of protecting and implementing the Settlement and the terms of this Order and Final Judgment, including the resolution of any disputes arising out of the Settlement, and for the entry of such further orders as may be necessary or appropriate in administering and implementing the terms and

provision of the Settlement and this Order and Final Judgment. The undersigned also retains jurisdiction to enter any order resulting from violations of the North Carolina Rules of Civil Procedure or Revised Rules of Professional Conduct.

DATED: 11/16/2021

SO ORDERED:

Honorable A. Graham Shirley
North Carolina Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons listed be low by electronic transmission via e-mail and by depositing in the U.S. Mail, postage prepaid, a copy of the same, addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 18th day of November, 2021.

Kellie Z. Myers
Trial Court Administrator – 10th Judicial District
kellie.z.myers@nccourts.org