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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

NICHOLAS MALONE, CHRIS AYERS,
JAMES BACKUS, BRIAN CONWAY,
DAVID EATON, STEVEN GRAVEL,
JAMES RAAYMAKERS, and TOD WEITZEL,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

WESTERN DIGITAL CORPORATION,
Defendant.

Case No. 5:20-cv-03584-NC

STIPULATION OF SETTLEMENT

Hon. Nathaniel Cousins

1 This Stipulation of Settlement (the “Settlement Agreement” or “Settlement”) is made by
2 Nicholas Malone, Chris Ayers, James Backus, Brian Conway, David Eaton, Steven Gravel, James
3 Raaymakers, and Tod Weitzel, (the “Plaintiffs” or “Class Representatives”), on behalf of
4 themselves and the Settlement Class (defined below), on the one hand, and Defendant Western
5 Digital Corporation (hereinafter “Defendant”), on the other hand, (collectively referred to as the
6 “Parties”) subject to and conditioned upon Court approval of the terms and conditions hereof.
7

8 RECITALS

9 A. On May 29, 2020, Plaintiff Nicholas Malone commenced an action entitled *Malone*
10 *v. Western Digital Corporation* (United States District Court, Northern District of California, Case
11 No. 5:20-cv-03584) (the “Action”), as a proposed class action, asserting claims California Code
12 § 1750 *et seq.* (the Consumers Legal Remedies Act or “CLRA”), California Business and
13 Professions Code § 17200 *et seq.* (the Unfair Competition Law or “UCL”), and California Business
14 and Professions Code § 17500 *et seq.* (the False Advertising Law or “FAL”). Mr. Malone alleged,
15 *inter alia*, that Defendant deceived customers by not disclosing the use of Shingled Magnetic
16 Recording (“SMR”) technology in certain of its Hard Drive products.

17 B. On June 16, 2020, Plaintiffs Nicholas Malone, Chris Ayers, James Backus, Brian
18 Conway, David Eaton, Steven Gravel, and Tod Weitzel, filed a First Amended Complaint asserting
19 the same claims. Dkt. No. 7.

20 C. On June 19, 2020, Plaintiff James Raaymakers commenced an action entitled
21 *Raaymakers v. Western Digital Corporation* (United States District Court, Northern District of
22 California, Case No. 5:20-cv-04091), asserting substantially similar claims as the *Malone* Action.

23 D. On July 27, 2021, the Court granted a stipulation signed by all the Parties to
24 consolidate the *Raaymakers* action with the *Malone* action. Dkt. No. 14. The consolidated
25 *Raaymakers* and *Malone* cases is referred to as the “Action” herein.

26 E. On August 10, 2020, Plaintiffs Nicholas Malone, Chris Ayers, James Backus, Brian
27 Conway, David Eaton, Steven Gravel, James Raaymakers, and Tod Weitzel filed a Second
28 Amended Complaint (“SAC”), under the caption of the *Malone* action. Dkt. No. 19.

F. Defendant answered the SAC on September 16, 2020, denying any and all liability.

1 Dkt. No. 41.

2 G. Class Counsel (defined below) conducted an examination and investigation of the
3 facts and law relating to the matters in this Action, including, but not limited to, engaging in
4 preliminary discovery, review and analysis of Defendant's documents and data, and consultation of
5 experts regarding the Hard Drive Products. Class Counsel also evaluated the merits of the Parties'
6 contentions and evaluated this Settlement, as it affects all parties, including Settlement Class
7 Members. The Class Representatives and Class Counsel, after taking into account the foregoing,
8 along with the risks and costs of further litigation, represent that they are satisfied that the terms and
9 conditions of this Settlement are fair, reasonable, and adequate, and that this Settlement is in the
10 best interest of the Settlement Class Members (defined below).

11 H. Defendant, while continuing to deny any and all allegations of wrongdoing and
12 disclaiming all liability and disputing all assertions of fact by Plaintiffs made with respect to all
13 claims that are asserted in the Action or that could have been asserted in the Action with respect to
14 the Hard Drive Products generally and SMR technology specifically, considers it desirable to
15 resolve the Action on the terms stated herein to avoid further expense, inconvenience, and burden,
16 and therefore has determined that this Settlement on the terms set forth herein is in Defendant's best
17 interests. Neither the Settlement Agreement nor any actions taken to carry out the Settlement are
18 intended to be, nor may they be deemed or construed to be, an admission or concession of liability
19 by the Defendant, or of the validity of any claim, defense, or of any point of fact or law on the part
20 of any party. Defendant denies all allegations made (or that could have been made) in the Action.
21 Neither the Settlement Agreement, nor the fact of settlement, nor settlement proceedings, nor the
22 settlement negotiations, nor any related document, shall be used or construed as an admission of any
23 fault or omission by Defendant, or be offered or received in evidence as an admission, concession,
24 presumption, or inference of any wrongdoing by Defendant in any proceeding.

25 I. The Parties have engaged in arms-length discussions concerning the prospect for
26 settlement over an extended time period, culminating in a January 13, 2021 virtual mediation with
27 Judge Elizabeth Laporte (Ret.) of JAMS San Francisco. The mediation lasted a full day but was
28 unsuccessful. However, over the following two months, the Parties directly engaged in further

1 extensive settlement discussions. As a result of those discussions, the Parties executed a Class
2 Action Settlement Term Sheet on March 9, 2021.

3 J. In consideration of the covenants and agreements set forth herein, and of the releases
4 and dismissals of claims as described below, and other good and valuable consideration, the receipt
5 and sufficiency of which hereby is acknowledged by each of the Parties, the Class Representatives,
6 on behalf of themselves and the Settlement Class Members, and Defendant, agree to the Settlement
7 described herein, subject to Court approval, under the following terms and conditions:

8 **I. DEFINITIONS**

9 1.1 “Claim Form” means the document to be submitted by Settlement Class Members
10 seeking cash payment pursuant to this Settlement Agreement. The Claim Form will be available
11 online at the Settlement Website (defined below) and the contents of the Claim Form will be
12 approved by the Court. The Parties shall request the Court approve the Claim Form substantially in
13 the form attached hereto and made a part hereof as Exhibit A.

14 1.2 “Claimant” means a Settlement Class Member who submits a claim for cash
15 payment as described in Section II of this Settlement Agreement.

16 1.3 “Class Counsel” means the law firms of Bursor & Fisher, P.A. and Hattis and
17 Lukacs.

18 1.4 “Class Notice” means the Court-approved notice plan described in Section IV below.

19 1.5 “Class Representatives” means Plaintiffs Nicholas Malone, Chris Ayers, James
20 Backus, Brian Conway, David Eaton, Steven Gravel, James Raaymakers, and Tod Weitzel.

21 1.6 “Court” means the United States District Court, Northern District of California.

22 1.7 “Defendant’s Counsel” means the law firm of Lewis Brisbois Bisgaard & Smith
23 LLP.

24 1.8 “District Court Final Approval Date” means the day on which the Court’s Settlement
25 Approval Order and Final Judgment (defined below) is entered.

26 1.9 “Fee and Expense Award” means the amount awarded to Class Counsel by the Court
27 for reasonable attorneys’ fees, costs, and expenses.

28 1.10 “Final Settlement Approval Date” means the date which is thirty (30) days after

1 entry of the Settlement Approval Order and Final Judgment without any appeal being taken, or if an
2 appeal or request for review has been taken, the date on which the Settlement Approval Order and
3 Final Judgment has been affirmed by the court of last resort to which an appeal or request for
4 review has been taken and such affirmance is no longer subject to further appeal or review, or the
5 date of denial of review after exhaustion of all appellate remedies.

6 1.11 “Hard Drives” means the following “WD Red NAS HDD” products: WD20EFAX
7 (2TB capacity), WD30EFAX (3TB capacity), WD40EFAX (4TB capacity), and/or WD60EFAX
8 (6TB capacity).

9 1.12 “Incentive Award” means any award sought by application to and approved by the
10 Court that is payable to the Class Representatives from the Settlement Fund.

11 1.13 “Long Form Notice” means the Court-approved long form of notice to be posted to
12 the Settlement Website (defined below), pursuant to the Media Plan (defined below). The Parties
13 shall request the Court approve the Long Form Notice substantially in the form attached hereto and
14 made a part hereof as Exhibit B.

15 1.14 “Mail Notice” means the Court-approved form of notice for publication to
16 Settlement Class Members, pursuant to the Media Plan. The Parties shall request the Court approve
17 the Mail Notice substantially in the form attached hereto and made a part hereof as Exhibit G.

18 1.15 “Media Plan” means the Settlement Administrator’s plan to disseminate Class Notice
19 to Settlement Class Members. The Media Plan will be designed to reach no fewer than seventy (70)
20 percent of the Settlement Class Members.

21 1.16 “Notice and Other Administrative Costs” means all costs and expenses actually
22 incurred by the Settlement Administrator (defined below) in the publication of Class Notice,
23 establishment of the Settlement Website (defined below) and the processing, handling, reviewing,
24 and paying of claims made by Claimants.

25 1.17 “Parties” means Plaintiffs Nicholas Malone, Chris Ayers, James Backus, Brian
26 Conway, David Eaton, Steven Gravel, James Raaymakers, and Tod Weitzel and Defendant Western
27 Digital Corporation.

28 1.18 “Preliminary Approval” means that the Court has entered an order preliminarily

1 approving the terms and conditions of this Settlement Agreement, including the manner of
2 providing and content of notice to Settlement Class Members. The Parties shall request the Court to
3 enter the proposed Preliminary Settlement Approval Order substantially in the form attached hereto
4 and made a part hereof as Exhibit C.

5 1.19 “Preliminary Approval Date” means the date on which the Court enters an Order
6 granting Preliminary Approval.

7 1.20 “Released Persons” means Defendant as well as defendants’ related entities attached
8 as Exhibit H hereto.

9 1.21 “Settlement Administrator” means JND Legal Administration and its successors and
10 assigns, as approved by the Court to act as the Settlement Administrator in this Action.

11 1.22 “Settlement Class Members” or “Settlement Class” means:

12 All persons in the United States (including its states, districts or territories)
13 who purchased a WD Red NAS Drive using Shingled Magnetic Recording
14 (“SMR”) technology¹ between October 2018 and the date on which the
Court preliminarily approves these settlement terms.

15 1.23 “Settlement Class Period” means the period of time from October 2018 through the
16 date of the order granting preliminary approval of the Settlement in this Action.

17 1.24 “Settlement Fund” means the total cash commitment of Defendant for purposes of
18 this settlement, as described in Section II of this Settlement Agreement, which is exactly two
19 million seven hundred thousand dollars (\$2,700,000.00), paid by Defendant for purposes of
20 effectuating the settlement of this Action, the payment and disposition of which is subject to the
21 provisions of this Settlement Agreement, including paragraphs 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 3.1, and
22 3.2, below.

23 1.25 “Settlement Approval Order and Final Judgment” means an order and judgment
24 issued and entered by the Court, substantially in the form as that attached hereto and made a part
25 hereof as Exhibit D, approving this Settlement Agreement as binding upon the Parties and the
26 Settlement Class Members and dismissing the Action with prejudice, and setting the amount for an

27 _____
28 ¹ In particular, one of the following models: WD20EFAX (2TB capacity), WD30EFAX (3TB
capacity), WD40EFAX (4TB capacity), and WD60EFAX (6TB capacity) hard drives.

1 award to Class Counsel of attorneys' fees, costs and expenses not to exceed one-third of the
2 Settlement Fund. The Settlement Approval Order and Final Judgment shall constitute a judgment
3 within the meaning and for purposes of Rule 54 of the Federal Rules of Civil Procedure. The
4 Parties shall request the Court to enter the proposed Settlement Approval Order and Final Judgment
5 substantially in the form attached hereto and made a part hereof as Exhibit D.

6 1.26 "Settlement Website" means a website operated and maintained by the Settlement
7 Administrator solely for purposes of making available to the Settlement Class Members the
8 documents, information, and online claims submission process referenced in paragraphs 2.4 through
9 2.6 below.

10 1.27 As used herein, the plural of any defined term includes the singular thereof and the
11 singular of any defined term includes the plural thereof, as the case may be.

12 **II. SETTLEMENT CONSIDERATION**

13 2.1 Benefit to Settlement Class Members from the Settlement Fund. The Settlement
14 Fund will be used to provide benefits to or on behalf of the Settlement Class. Defendant will
15 contribute \$2,700,000 in cash for payment of the following: (i) valid Claim Forms for cash benefits
16 submitted by Settlement Class Members pursuant to paragraph 2.4 below; (ii) the Notice and Other
17 Administrative Costs actually incurred by the Settlement Administrator as described in paragraph
18 4.5 below; (iii) the Fee and Expense Award, as may be ordered by the Court and as described in
19 paragraph 3.1 below, and (iv) any Incentive Award to the Class Representative, not to exceed
20 \$5,000 per Class Representative, as may be ordered by the Court and as described in paragraph 3.2
21 below.

22 2.2 Total Financial Commitment. Defendant's total financial commitment and
23 obligation under this Settlement Agreement shall not exceed \$2,700,000.

24 2.3 Schedule of Payments into Settlement Fund. Defendant shall make payments into
25 the Settlement Fund in accordance with the following schedule:

26 a. *Notice and Other Administrative Costs.* Amounts equal to the cost of
27 publishing the Class Notice and other administrative costs (as incurred), to be paid within thirty (30)
28 days of when such amounts are invoiced to Defendant and become due and owing. Defendant is

1 not required to advance costs for claims validation or other claims processing related costs until
2 such time such costs are actually incurred.

3 b. *Fee and Expense Award.* An amount equal to the Fee and Expense Award, to
4 be paid as described at paragraph 3.1, below.

5 c. *Payment of Valid Claims.* An amount equal to \$2,700,000.00, less the sum of
6 (i) the total Notice and Other Administrative Costs, (ii) the Fee and Expense Award, and (iii) the
7 Incentive Award, which amount is to be remitted to the Settlement Administrator within thirty (30)
8 days of the Final Settlement Approval Date.

9 2.4 Claims Process. Each Settlement Class Member shall be entitled to submit a Claim
10 Form for cash payment from the Settlement Fund, consistent with this paragraph. Claims are timely
11 provided they are submitted not later ninety (90) days after publication of the Class Notice.

12 a. *Cash Payment.* Each Settlement Class Member may submit a claim under
13 penalty of perjury attesting to the purchase of one or more Hard Drives during the Settlement Class
14 Period. The Claim Form may be submitted either electronically through the Settlement Website or
15 by mail, for each of the Hard Drives a Settlement Class Member purchased during the Settlement
16 Class Period. The cash payment from the Settlement Fund for valid Claim Forms will be as
17 follows:

- 18 • Purchasers of WD Red NAS Drives with 2TB capacity (WD20EFAX) or
19 3TB Capacity (WD30EFAX) will receive \$4 for each drive purchased,
20 subject to pro-rata adjustment, if applicable, as specified below;
- 21 • Purchasers of WD Red NAS Drives with 4 TB capacity (WD40EFAX) or
22 6TB capacity (WD60EFAX) will receive \$7 for each drive purchased, subject
23 to pro-rata adjustment, if applicable, as specified below.

24 b. *Cash Payment from Fund.* Claims will be paid, after the Claim Period Close
25 Date (as defined in paragraph 2.6) and after the Final Settlement Approval Date, from the
26 Settlement Fund. Claims will be paid from the amount of the Settlement Fund remaining after
27 payment of the Fee and Expense Award, Notice and Other Administrative Costs, and the Incentive
28 Award.

1 2.5 Proof of Claim. No documentation will be required to submit a claim. Class
2 Members will be required to verify, under penalty of perjury, that they purchased one (or more) of
3 the Hard Drives during the Settlement Class Period. The attestation will make clear that claimants
4 may, at the discretion of the Settlement Administrator, be called upon to provide further proof of
5 purchase where concerns over the claimants' membership in the class may exist.

6 2.6 Review of Claims. The Settlement Administrator shall be responsible for reviewing
7 all claims to determine their validity. The Settlement Administrator shall reject any claim that does
8 not comply in any material respect with the instructions on the Claim Form or the terms of
9 paragraphs 2.4 and 2.5, above, or is submitted after the close of the claim period set by the Court
10 (“Claim Period Close Date”).

11 2.7 Pro-Rata Distribution of Benefits. Receipt of total valid Settlement Class Member
12 Claims less than the available portion of the Settlement Fund (after payment of the Fee and Expense
13 Award, Notice and Other Administrative Costs, and the Incentive Award) will increase the cash
14 payout for each class member on a pro rata basis. The total amount of the payment to each Class
15 member will be based on the total number of claims submitted. If the amount used to pay eligible
16 claims is less than the full value of the settlement fund (after payment of fees, costs, notice,
17 administrative costs, and service awards), then each claimant's recovery will be increased on a pro
18 rata basis, up to a maximum pro rata upward adjustment that equals 85% of the retail purchase price
19 each of the Hard Drives purchased, which based on prevailing market prices are for purposes of this
20 settlement defined as follows: 2TB (MSRP \$84.99); 3 TB (MSRP \$106.99); 4 TB (MSRP \$119.99);
21 6TB (MSRP \$179.99). Any amounts still remaining in the Settlement Fund after an upward
22 adjustment will go to *cy pres*, Public Counsel, the “Nation’s Largest Pro Bono Law Firm” that,
23 among other practice areas, offers “Consumer Rights & Economic Justice” representation that
24 “assists with a wide variety of consumer matters, including consumer fraud, unfair business
25 practices, foreclosure and real estate fraud.”² The Parties hereby certify that neither Plaintiffs nor
26 Defendant have any relationship with Public Counsel, nor have they, to the best of their knowledge,
27

28 ² See http://www.publiccounsel.org/practice_areas/consumer_law.

1 made monetary donations to Public Counsel in the past. Defendant discloses that, based on
2 available records for the past four years, it has donated three total hard drives to Public Counsel, as
3 follows: Fiscal Year (FY) 2020, one 2 TB My Cloud drive, MSRP \$60; FY 2019, one 1 TB My
4 Passport drive, MSRP \$140; FY 2017, 1 TB My Passport Ultra, MSRP \$100.

5 2.8 Uncleared Checks. Those Settlement Class Members whose cash benefit checks are
6 not cleared within one hundred eighty (180) days after issuance shall be ineligible to receive a cash
7 settlement benefit and Defendant shall have no further obligation to make any payment pursuant to
8 this Settlement Agreement or otherwise to such Settlement Class Members. All unpaid funds from
9 uncleared checks shall remain in the Settlement Fund pending further order of the Court. Class
10 Counsel shall make an application to the Court to seek approval for a proposed disposition of the
11 unpaid funds from uncleared checks.

12 2.9 Notice to Attorneys General. Not later than ten (10) days after the Motion for
13 Preliminary Approval of the Settlement is filed in court, the Settlement Administrator shall in
14 consultation with Defendant's counsel provide notice of the proposed class action settlement to the
15 appropriate state officials (i.e., to each state attorney general) pursuant to 28 U.S.C. § 1715, and the
16 costs of such notice shall be paid from the Settlement Fund.

17 2.10 Injunctive Relief. Within 60 days of the Final Settlement Approval date, Defendant
18 shall clearly and conspicuously disclose the use of SMR technology on the product packaging and
19 website product page on westerndigital.com of all WD Red NAS drives with SMR technology. The
20 requirements of this paragraph must be complied with for no less than 4 years after the Final
21 Settlement Approval Date or 4 years from the date such disclosure is first implemented (if sooner
22 than the Final Settlement Approval Date), whichever is earlier.

23 **III. CLASS COUNSEL ATTORNEYS' FEES AND EXPENSES AND CLASS**
24 **REPRESENTATIVE INCENTIVE AWARD**

25 3.1 Attorneys' Fees, Costs and Expenses. Class Counsel shall apply to the Court for
26 payment of an award of attorneys' fees, costs, and expenses of up to one-third of the Settlement
27 Fund. Such fees, costs and expenses, if approved by the Court, shall be payable within 30 days
28 following the District Court's fee award, subject to Class Counsel executing the Undertaking

1 Regarding Attorneys' Fees and Costs (the "Undertaking") attached hereto as Exhibit E, and
2 providing all payment routing information and tax I.D. numbers for Class Counsel.

3 3.2 Notwithstanding the foregoing, if the final Settlement Approval Order and Final
4 Judgment or any part of it is vacated, overturned, reversed, or rendered void or unenforceable as a
5 result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for
6 any other reason, then Class Counsel shall, within thirty (30) days, repay to Defendant the full
7 amount of the attorneys' fees and costs paid by Defendant to Class Counsel. To effectuate this
8 provision, Bursor & Fisher, P.A., Scott A. Bursor, and Hattis & Lukacs shall, within ten (10)
9 calendar days of the Preliminary Approval Order, execute and deliver to Defendant for filing with
10 the Court the Undertaking in the form attached as Exhibit E.

11 3.3 Incentive Award. Class Counsel will petition the Court for approval of an Incentive
12 Award payable to the Class Representatives in an amount not to exceed \$2,500 each. The Claims
13 Administrator will pay such award, as approved by the Court, from the Settlement Fund by wire
14 transfer or check to Class Counsel within thirty (30) calendar days after the Final Settlement
15 Approval Date, subject to the prior delivery to Defendant of tax I.D. number(s) for the Class
16 Representative.

17 **IV. NOTICE TO CLASS AND ADMINISTRATION OF SETTLEMENT**

18 4.1 Class Notice. The Class Notice shall consist of the Long Form Notice and the Mail
19 Notice. The Class Notice shall conform to all applicable requirements of the Federal Rules of Civil
20 Procedure, the United States Constitution (including the Due Process Clauses), and any other
21 applicable law, and shall otherwise be in the manner and form approved by the Court. Class notice
22 and claims administration will be provided by JND Legal Administration with a media plan
23 designed to achieve no less than seventy (70) percent reach. Direct notice will be provided to
24 Settlement Class Members for whom Defendant has contact information.

25 4.2 General Notice Terms. The Class Notice shall:

- 26 a. inform Settlement Class Members that, if they do not exclude themselves
27 from the Class, they may be eligible to receive the relief under the proposed settlement;
- 28 b. contain a short, plain statement of the background of the Action, the class

1 certification and the proposed Settlement;

2 c. describe the proposed settlement relief outlined in this Stipulation; and

3 d. state that any relief to Settlement Class Members is contingent on the

4 Court's final approval of the proposed settlement.

5 4.3 Notice of Exclusion and Objection Rights. The Class Notice shall inform
6 Settlement Class Members of their rights to exclude themselves from the Class or object to the
7 proposed settlement, as described in paragraph 5.3 below.

8 4.4 Time and Manner of Notice. Class Notice shall be provided as set forth in the
9 Media Plan; media delivery of Class Notice shall be completed within thirty (30) days after the
10 Preliminary Approval Date.

11 4.4.1 Mail Notice. Defendant shall use reasonable efforts to identify those
12 Settlement Class Members for whom it has a valid mailing address. Through the Settlement
13 Administrator, for those Settlement Class Members for whom Defendant has a valid mailing
14 address, Defendant will send a Mail Notice via the U.S. Postal Service to such Settlement Class
15 Members. The Mail Notice will be substantially similar to the form attached as Exhibit G, and will
16 provide the web address of the Settlement Website and an email and mailing address to contact the
17 Settlement Administrator. Defendant, through the Settlement Administrator, will provide the Mail
18 Notice on or before thirty (30) calendar days after the Preliminary Approval Date. The Mail
19 Notice shall only be issued to each Settlement Class Member for whom Defendant has a valid
20 mailing address. Defendant is not required to provide the Mail Notice to any Settlement Class
21 Member to whom it is sending the Email Notice.

22 4.4.2 Email Notice. Defendant shall use reasonable efforts to potential Settlement
23 Class Members for whom it has a valid email address. Through the Settlement Administrator, for
24 those Settlement Class Members for whom Defendant has a valid email address, Defendant will
25 send an Email Notice two times to such Settlement Class Members. The Email Notice will be
26 substantially similar to the form attached as Exhibit F, and will provide the web address of the
27 Settlement Website and an email and mailing address to contact the Settlement Administrator.
28 Defendant, through the Settlement Administrator, will issue the initial Email Notices on or before

1 thirty (30) calendar days after the Preliminary Approval Date and the second round of Email
2 Notices approximately thirty (30) days thereafter.

3 4.5. Responsibilities of Settlement Administrator. The Settlement Administrator will
4 help implement the terms of the proposed Settlement Agreement. The Settlement Administrator
5 shall be responsible for administrative tasks, including, without limitation, (a) notifying the
6 appropriate state and federal officials about the settlement (the “CAFA Notice”), (b) arranging for
7 distribution of Class Notice (in the form approved by the Court) and Claim Forms (in a form
8 ordered by the Court) to Settlement Class Members, (c) answering inquiries from Settlement Class
9 Members and/or forwarding such written inquiries to Class Counsel, (d) receiving and maintaining
10 on behalf of the Court and the Parties any Settlement Class Member correspondence regarding
11 requests for exclusion to the Settlement or objections to the Settlement, (e) establishing the
12 Settlement Website that posts notices, Claim Forms and other related documents, (f) receiving and
13 processing claims and distributing payments to Settlement Class Members, and (g) otherwise
14 assisting with implementation and administration of the Settlement Agreement terms. The actual
15 costs and expenses of the Settlement Administrator, which are referred to as the Notice and Other
16 Administrative Costs, will be paid from the Settlement Fund.

17 4.6. Performance Standards of Settlement Administrator. The contract with the
18 Settlement Administrator shall obligate the Settlement Administrator to abide by the following
19 performance standards:

20 a. The Settlement Administrator shall accurately and neutrally describe, and
21 shall train and instruct its employees and agents to accurately and objectively describe, the
22 provisions of this Settlement in communications with Settlement Class Members;

23 b. The Settlement Administrator shall provide prompt, accurate and objective
24 responses to inquiries from Class Counsel or their designee, Defendant and/or Defendant’s
25 Counsel, and shall periodically report on claims, objectors, etc., or upon reasonable request of any
26 party;

27 c. The Settlement Administrator shall seek clarification, instruction or
28 authorization for performance of its duties and expenditure or disposition of cash from both Class

1 Counsel and their designee and from Defendant and/or Defendant's Counsel or its designee.

2 **V. CLASS SETTLEMENT PROCEDURES**

3 5.1 Settlement Approval. As soon as practical after the signing of this Settlement
4 Agreement, the Class Representatives will also move for Preliminary Approval, conditionally
5 certifying the Settlement Class, preliminarily approving the terms and conditions of this Settlement
6 Agreement as fair, reasonable, and adequate, and in the best interests of the Settlement Class
7 Members, approving notice to the Settlement Class Members as described in Section IV above, and
8 setting a hearing to consider final approval of the Settlement and any objections thereto.

9 5.2 Settlement Approval Order and Final Judgment. At or before the final approval
10 hearing, the Class Representatives shall move for entry of a Settlement Approval Order and Final
11 Judgment substantially in the form as that attached hereto and made a part hereof as Exhibit D,
12 granting final approval of this Settlement and holding this Settlement Agreement to be fair,
13 reasonable, and adequate, and in the best interests of the Settlement Class Members, and binding
14 (as of the Final Settlement Approval Date) on all Settlement Class Members who have not
15 excluded themselves as provided below, and ordering that the Settlement relief be provided as set
16 forth in this Settlement Agreement, ordering the releases as set forth in Section VI below to be
17 effective on the Final Settlement Approval Date, and entering judgment in the Action.

18 5.3 Exclusions and Objections. The Class Notice shall advise all Settlement Class
19 Members of their right: (a) to be excluded from the Settlement, or (b) to object to the Settlement.
20 If, within such time as is ordered by the Court and contained in the Class Notice, any Settlement
21 Class Member wishes to be excluded from the Settlement, he or she must do so by timely mailing a
22 valid opt-out notice, as described in the Class Notice. Any Settlement Class Member who timely
23 elects to opt out of the Settlement shall not be permitted to object to the Settlement. Persons falling
24 within the definition of the Settlement Class who validly and timely request exclusion from the
25 Settlement effected by this Settlement Agreement, pursuant to the procedures set forth in this
26 paragraph, shall not be Settlement Class Members, shall not be bound by this Settlement
27 Agreement and shall not be eligible to make a claim for any benefit under the terms of this
28 Settlement Agreement.

1 5.4 At least seven (7) calendar days prior to the final approval hearing, Class Counsel
2 shall prepare or cause the Settlement Administrator to prepare a list of the persons who have
3 excluded themselves in a valid and timely manner from the Settlement Class (the “Opt-Outs”), and
4 Class Counsel shall file that list with the Court. If, within such time as is ordered by the Court and
5 contained in the Class Notice, any Settlement Class Member wishes to object to the Settlement
6 and/or to be heard, he or she must, on or before the deadlines established by the Court, submit to
7 the Settlement Administrator a written notice of objection and/or request to be heard. Such
8 communication shall state the name and address of the Settlement Class Member, shall include
9 information sufficient to demonstrate membership in the Settlement Class, and state the grounds
10 for each objection asserted.

11 5.5 Stay of the Action. The Parties shall request that the Court, in connection with
12 Preliminary Approval, issue an immediate stay of the Action.

13 5.6 Effect If Settlement Not Approved. This Settlement Agreement was entered into
14 only for purposes of settlement, subject to and without waiver of the Parties’ respective rights. If
15 the Court fails to enter the order granting Preliminary Approval or fails to grant final approval, or if
16 the Final Settlement Approval Date does not occur, Class Counsel and Defendant’s Counsel shall
17 endeavor and work cooperatively in good faith, consistent with the Settlement Agreement, to cure
18 any defect identified by the Court; provided, however, that Defendant shall not be obligated to
19 accept such cure if it increases the cost or burden of the Settlement Agreement to Defendant or any
20 of the other Released Persons or reduces or otherwise affects the scope of the releases provided by
21 this Settlement Agreement. In the event that the Settlement Agreement is terminated for any
22 reason, final approval does not occur for any reason, or the Final Settlement Approval Date does
23 not occur, then no term or condition of the Settlement Agreement, or any draft thereof, or any
24 discussion, negotiation, documentation, or other part or aspect of the Parties’ settlement
25 discussions shall have any effect, nor shall any such matter be admissible in evidence for any
26 purpose in the Action, or in any other proceeding, and the Parties shall be restored to their
27 respective positions immediately preceding execution of this Settlement Agreement. If the final
28 Settlement Approval Order and Final Judgment or any part of it is vacated, overturned, reversed, or

1 rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or
2 otherwise terminated for any other reason, then within thirty (30) days, Class Counsel shall return
3 to Defendant all attorneys' fees, costs, and other payments received by Class Counsel under the
4 Settlement Agreement, as set forth in paragraph 3.1 above. The Parties agree that all drafts,
5 discussions, negotiations, documentation, or other information prepared in relation to the
6 Settlement Agreement and the Parties' settlement discussions shall be treated as strictly
7 confidential and may not be disclosed to any person other than the Parties' counsel, and only for
8 purposes of the Action.

9 5.7 Termination. The Settlement Agreement shall have no effect unless and until this
10 Settlement Agreement is fully executed by all Parties.

11 **VI. RELEASES**

12 6.1 Release by Settlement Class Members. Effective as of the Final Settlement
13 Approval Date, each and all of the Settlement Class Members (except any such person who has
14 filed a proper and timely request for exclusion and any person or entity that purchased a Hard
15 Drive for purposes of resale and not for his/her/its own consumption (i.e., "Resellers")) shall
16 release and forever discharge, and shall be forever barred from asserting, instituting, or maintaining
17 against any or all of the Released Persons, any and all claims, demands, actions, causes of action,
18 lawsuits, arbitrations, damages, or liabilities whether legal, equitable, or otherwise, relating in any
19 way to the claims asserted or claims which could have been asserted based on the factual
20 allegations made in the Action, including without limitation the alleged inefficacy of the Hard
21 Drive Products, SMR technology, and/or the purchase of any of the Hard Drive Products at any
22 time on or after October 2018 through the date of the order granting preliminary approval of the
23 settlement in this Action (collectively, the "Claims"). This release shall be interpreted to the fullest
24 extent permitted by law. Upon the effective date of the release contained in this paragraph, the
25 Class Representatives each waive or are deemed to have waived on their own behalf only the
26 provisions, rights and benefits of California Civil Code section 1542 (and equivalent, comparable,
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1 or analogous provisions of the laws of the United States of America or any state or territory
2 thereof, or of the common law or civil law). Section 1542 provides that:

3 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE**
4 **CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN**
5 **HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, AND THAT, IF**
6 **KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER**
7 **SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.**

8 6.2 Each and every term of this paragraph shall inure to the benefit of each and all of
9 the Released Persons, and each and all of their respective successors and personal representatives,
10 which persons and entities are intended to be beneficiaries of this paragraph. For avoidance of
11 doubt, this release does not affect or apply to any claims of Resellers of Hard Drive Products.

12 6.3 Effectuation of Settlement. None of the above releases include releases of claims or
13 otherwise affects rights to enforce the terms of the Settlement Agreement.

14 6.4 No Admission of Liability. This Settlement Agreement reflects, among other
15 things, the compromise and settlement of disputed claims among the parties, and neither this
16 Settlement Agreement nor the releases given herein, nor any consideration therefor, nor any actions
17 taken to carry out this Settlement Agreement, are intended to be, nor may they be deemed or
18 construed to be, an admission or concession of liability, or the validity of any claim, defense, or of
19 any point of fact or law on the part of any party. Defendant denies all allegations made or that
20 could have been made in any and all iterations of the complaint filed in this Action. Neither this
21 Settlement Agreement, nor the fact of settlement, nor the settlement proceedings, nor the settlement
22 negotiations, nor any related document, shall be used as an admission of any fault or omission by
23 any or all of the Released Persons, or be offered or received in evidence as an admission,
24 concession, presumption or inference of any wrongdoing or liability by any or all of the Released
25 Persons in any proceeding, other than such proceedings as may be necessary to consummate,
26 interpret or enforce this Settlement Agreement.

1 **VII. CERTIFICATION OF SETTLEMENT CLASS**

2 7.1 The Parties agree, for settlement purposes only, that this Action shall, subject to
3 Court approval, be certified and proceed as a nationwide class action under Federal Rule of Civil
4 Procedure 23(b)(3), with a class consisting of all Settlement Class Members, and with Plaintiffs as
5 Class Representatives and with Class Counsel as counsel for the Settlement Class Members.

6 7.2 Any certification of a conditional, preliminary or final settlement class pursuant to
7 the terms of this Settlement shall not constitute, and shall not be construed as, an admission on the
8 part of Defendant that this Action, or any other proposed or certified class action, is appropriate for
9 nationwide class treatment pursuant to Federal Rule of Civil Procedure or any similar state or
10 federal class action statute or rule. Neither the fact of this settlement nor this Settlement
11 Agreement shall be used in connection with efforts in any proceeding to seek nationwide
12 certification of any claims asserted against Defendant.

13 **VIII. MISCELLANEOUS PROVISIONS**

14 8.1 Change of Time Periods. The time periods and/or dates described in this Settlement
15 Agreement with respect to the giving of notices and hearings are subject to approval and change by
16 the Court or by the written agreement of Class Counsel and Defendant’s Counsel, without notice to
17 Settlement Class Members. The Parties reserve the right, by agreement and subject to the Court’s
18 approval, to grant any reasonable extension of time that might be needed to carry out any of the
19 provisions of this Settlement Agreement.

20 8.2 Time for Compliance. If the date for performance of any act required by or under
21 this Settlement Agreement falls on a Saturday, Sunday, or court holiday, that act may be performed
22 on the next business day with the same effect as if it had been performed on the day or within the
23 period of time specified by or under this Settlement Agreement.

24 8.3 Governing Law. This Settlement Agreement is intended to and shall be governed by
25 the laws of the State of California without giving effect to principles of conflicts of laws.

26 8.4 Entire Agreement. The terms and conditions set forth in this Settlement Agreement
27 constitute the complete and exclusive statement of the agreement between the parties relating to the
28 subject matter of this Settlement Agreement, superseding all previous negotiations and

1 understandings, and may not be contradicted by evidence of any prior or contemporaneous
2 agreement. The Parties further intend that this Settlement Agreement constitutes the complete and
3 exclusive statement of its terms as between the parties, and that no extrinsic evidence whatsoever
4 may be introduced in any agency or judicial proceeding, if any, involving this Settlement
5 Agreement.

6 8.5 Modifications and Amendments. No amendment, change, or modification of this
7 Settlement Agreement or any part thereof shall be valid unless in writing signed by the Parties or
8 their counsel.

9 8.6 Advice of Counsel. The determination of the terms and the drafting of this
10 Settlement Agreement have been by mutual agreement after negotiation, with consideration by and
11 participation of all parties and their counsel. The presumption found in California Civil Code
12 section 1654 (and equivalent, comparable, or analogous provisions of the laws of the United States
13 of America or any state or territory thereof, or of the common law or civil law) that uncertainties in
14 a contract are interpreted against the party causing an uncertainty to exist is waived by all parties.

15 8.7 Binding Agreement. This Settlement Agreement shall be binding upon and inure to
16 the benefit of the respective heirs, successors, and assigns of the Parties, the Settlement Class
17 Members and the other Released Persons.

18 8.8 Further Assurances. Each of the Parties hereto shall execute and deliver any and all
19 additional papers, documents, and other assurances and shall do any and all acts or things
20 reasonably necessary in connection with the performance of its obligations hereunder to carry out
21 the express intent of the Parties hereto.

22 8.9 No Waiver. The waiver by any party of any provision or breach of this Settlement
23 Agreement shall not be deemed a waiver of any other provision or breach of this Settlement
24 Agreement.

25 8.10 Execution in Counterparts. This Settlement Agreement shall become effective upon
26 its execution by all of the undersigned. The parties may execute this Settlement Agreement in
27 counterparts, and execution of counterparts shall have the same force and effect as if all parties had
28 signed the same instrument. The parties further agree that signatures provided by portable

1 document format (PDF) or other electronic transmission shall have the same force and effect as
2 original signatures.

3 8.11 Enforcement of this Settlement Agreement. The Court shall retain jurisdiction, and
4 shall have exclusive jurisdiction, to enforce, interpret, and implement this Settlement Agreement,
5 and the terms of any order entered pursuant to this Settlement Agreement.

6 8.12 Notices. All notices to the Parties or counsel required by this Settlement Agreement
7 shall be made in writing and communicated by email and mail to the following address:

8 If to Class Representative, Settlement Class Members, or Class Counsel:

9 Yitzchak Kopel
10 Bursor & Fisher, P.A.
11 888 Seventh Avenue, Third Floor
12 New York, NY 10019
13 Telephone: (646) 837-7150
14 E-Mail: ykopel@bursor.com

15 If to Defendant or Defendant's Counsel:

16 Eric Kizirian
17 Lewis Brisbois Bisgaard & Smith LLP
18 633 West 5th Street, Suite 4000
19 Los Angeles, California 90071
20 Telephone: (213) 250-1800
21 Facsimile: (213) 250-7900
22 Email: eric.kizirian@lewisbrisbois.com

23 8.13 List of Exhibits.

- 24 Exhibit A: Claim Form
25 Exhibit B: Long Form Notice
26 Exhibit C: Preliminary Settlement Order
27 Exhibit D: Settlement Approval Order and Final Judgment
28 Exhibit E: Undertaking Regarding Attorneys' Fees and Costs
Exhibit F: Email Notice
Exhibit G: Mail Notice
Exhibit H: List of Released Persons

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IN WITNESS HEREOF the undersigned, being duly authorized and intending to be legally bound hereby, have caused this Settlement Agreement to be executed on the dates shown below and agree that it shall take effect on the date it is executed by all of the undersigned.

APPROVED AND AGREED:

DATED: June 7, 2021

DocuSigned by:
Nicholas Malone
15F8A43AE43A48A...

Plaintiff Nicholas Malone

DATED: June 7, 2021

DocuSigned by:
Chris Ayers
144F8748AFBE4C9...

Plaintiff Chris Ayers

DATED: June 7, 2021

DocuSigned by:
James Clay Backus
8ADB16251DC44B8...

Plaintiff James Backus

DATED: June 7, 2021

DocuSigned by:
Brian Conway
7ED181F43860414...

Plaintiff Brian Conway

DATED: June 7, 2021

DocuSigned by:
David Eaton
0BB52EC56DAB449...

Plaintiff David Eaton

DATED: June 7, 2021

DocuSigned by:
Steven Gravel
74C8313CB20747D...

Plaintiff Steven Gravel

DATED: June __, 2021

Plaintiff James Raaymakers

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DATED: June 7, 2021

DocuSigned by:

56A9CB17FB2F42B...

Plaintiff Tod Weitzel

DATED: June __, 2021

Defendant Western Digital Corporation

1 IN WITNESS HEREOF the undersigned, being duly authorized and intending to be legally
2 bound hereby, have caused this Settlement Agreement to be executed on the dates shown below and
3 agree that it shall take effect on the date it is executed by all of the undersigned.
4

5 **APPROVED AND AGREED:**

6
7 DATED: June ____, 2021

8 Plaintiff Nicholas Malone

9 DATED: June ____, 2021

10 Plaintiff Chris Ayers

11 DATED: June ____, 2021

12 Plaintiff James Backus

13 DATED: June ____, 2021

14 Plaintiff Brian Conway

15 DATED: June ____, 2021

16 Plaintiff David Eaton

17 DATED: June ____, 2021

18 Plaintiff Steven Gravel

19 DATED: June 7, 2021

James Raaymakers
James Raaymakers (Jun 7, 2021 10:53 PDT)

20 Plaintiff James Raaymakers

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DATED: June ____, 2021

Plaintiff Tod Weitzel

DATED: June 4, 2021



Defendant Western Digital Corporation