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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **(WESTERN DIVISION – LOS ANGELES)**

12 **GRANT MCKEE, ERIC WEBER,**
13 **and MICHAEL ROGAWSKI,**
14 **individually and on behalf of all**
15 **other similarly situated,**

16 **Plaintiffs,**

17 **v.**

18 **AUDIBLE, INC.,**

19 **Defendant.**

20 **ERIC WEBER and BRYAN REES,**
21 **individually and on behalf of all**
22 **other similarly situated,**

23 **Plaintiffs,**

24 **v.**

25 **AMAZON.COM, INC. and**
26 **AMAZON SERVICES LLC,**

27 **Defendants.**

Case Nos.: 2:17-cv-01941 GW (Ex) &
2:17-cv-08868 GW (Ex)

**PLAINTIFFS’ RENEWED,
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: March 14, 2019
Time: 8:30 a.m.
Courtroom: 9D
Judge: Hon. George H. Wu
Trial date: None set

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 14, 2019 at 8:30 a.m., in the Courtroom of the Honorable George H. Wu, United States District Judge for the Central District of California, located at the First Street Courthouse, 350 West First Street, Courtroom 9D, Los Angeles, California 90012, Plaintiffs Grant McKee, Eric Weber, Michael Rogawski, and Bryan Rees, on behalf of themselves and all others similarly situated, will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for an Order preliminarily approving a proposed Stipulation of Class Action Settlement and Release (“Stipulation” or “Settlement”), and for other related relief. The Settlement was originally executed in November 2018 and was revised in several respects and re-executed in February 2019 following the hearing held on December 10, 2018.

By this renewed and unopposed motion, Plaintiffs seek an Order:

1. Preliminarily approving the Settlement in this action pursuant to Federal Rule of Civil Procedure 23(e);
2. Preliminarily certifying a Settlement Class pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3);
3. Appointing Soderstrom Law PC as Class Counsel;
4. Appointing Grant McKee, Eric Weber, Michael Rogawski, Seth Beals, Bryan Rees, and Taylor Fisse as Class Representatives;
5. Approving the Parties’ proposed form of notice and notice plan, and directing that notice be disseminated pursuant to this plan; and
6. Setting a Final Approval Hearing and certain other dates in connection with the final approval of the Settlement.

This Motion is based on the accompanying Memorandum of Points and Authorities, the Declaration of Jamin S. Soderstrom and all exhibits thereto, the arguments of counsel, and all papers and records on file in this matter.

1 At the request of the Parties and with the Court's permission, the terms of the
 2 revised Settlement have been filed under seal unless and until the Settlement is
 3 preliminarily approved by the Court.

4 The Parties respectfully propose that the Court set the following dates and
 5 deadlines:

6 Last Date to Send Class Notice and Make 7 Settlement Website Available	April 8, 2019 (25 days after preliminary approval hearing)
8 Deadline to File Motion for Attorneys' 9 Fees, Costs, and Service Awards	April 29, 2019 (24 days before the end of the Notice Period)
10 Last Day of the Notice Period	11 May 23, 2019 (45 days after Class Notice sent)
12 Deadline to File Motion for Final 13 Approval	June 24, 2019 (77 days after Class Notice sent)
14 Fairness Hearing	15 July 8, 2019 (91 days after Class Notice sent)

16
 17 Dated: March 7, 2019

SODERSTROM LAW PC

18 By: /s/ Jamin S. Soderstrom

19 Jamin S. Soderstrom

20 *Counsel for Plaintiffs and the Proposed Class*

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1 **I. Introduction.**

2 The Lawsuits against Defendants complain that Audible members unfairly lose
3 what they paid for when an audiobook credit expires, Audible does not adequately inform
4 members of the rollover and cancellation policies that can cause credits to expire, and
5 Audible does not adequately inform members of the auto-pay and back-up card features
6 of an Audible membership. The revised Stipulation of Class Action Settlement and
7 Release (“Settlement” or “Stipulation,” Soderstrom Decl. ¶ 2, Ex. 1¹) addresses these
8 complaints and provides valuable relief to all Class Members.

9 The Settlement gives Class Members three forms of relief:

- 10 1. **In-Kind Relief:** 7,171,139 Regular Class Members and 30,367 Gift Class
11 Members will collectively receive the right to select 11,984,814 free
12 audiobooks from a selection of over 200,000 titles.
- 13 2. **Reimbursement of Fees:** 3,211,477 Payment Card Class Members will get
14 to submit a claim for reimbursement of any overdraft or similar fees incurred
15 because Audible charged a back-up card, with no cap on reimbursements.
- 16 3. **Injunctive Relief.** Audible revised its advertisements, disclosures, and
17 terms to ensure current and future Audible members make informed
18 decisions related to credit expiration, auto-pay, and back-up card policies.

18 This combination of in-kind relief, a reimbursement right, and injunctive relief provides
19 an excellent result for Class Members. And the caps on Plaintiffs’ right to seek attorneys’
20 fees (inclusive of costs) up to \$1.5 million and service awards up to \$5,000 each are on
21 the lower end of the range of awards granted in similar cases and in no way collusive.

22 The Lawsuits were hard fought at every stage. The Settlement was too. The
23 Settlement was reached in August 2018, finalized in November 2018, and improved in
24 February 2019. It is fair, reasonable, and adequate, and it falls well within the range of
25 possible approval. The Court should grant this motion, certify a class for settlement
26 purposes, preliminarily approve the Settlement, order notice to be given to all Class
27 Members, and set motion deadlines and a date for the final Fairness Hearing.

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¹ Cited as “Stipulation § _”. Capitalized terms have the same meaning as the Stipulation.

1 **II. Background.**

2 Plaintiffs Grant McKee, Eric Weber, Michael Rogawski, Bryan Rees, Seth Beals,
3 and Taylor Fisse (“Plaintiffs”) each sued Audible, Inc., Amazon.com, Inc., and/or
4 Amazon Services LLC (“Defendants”) concerning credit expiration, auto-pay, and back-
5 up card disclosures, policies, and advertisements. Soderstrom Decl. ¶ 5.

6 **A. The McKee Action**

7 The *McKee* action was filed on March 10, 2017. *McKee* Dtk. 1. The three named
8 plaintiffs in *McKee* are McKee, Weber, and Rogawski. *McKee* Dkt. 115 (TAC). Beals,
9 Fisse, and Rees were formerly named plaintiffs in *McKee* but their claims were
10 compelled to arbitration and/or transferred to other district courts. *See McKee* Dkts. 40
11 (FAC), 53, 62, 65 (SAC), and 111; *see generally Beals* action²; *Fisse* action.³

12 *McKee* includes eight causes of action against Audible: (1) violation of the
13 California False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* (“FAL”); (2)
14 common law fraud and misrepresentation; (3) violation of the Credit Card Accountability
15 Responsibility and Disclosure Act of 2009 (“CARD Act”), which amended the Electronic
16 Funds Transfer Act (“EFTA”), 15 U.S.C. § 1693; (4) violation of the California Gift
17 Certificate Law, Cal. Civ. Code § 1749.45 *et seq.* (“GCL”), (5) violation of the EFTA;
18 (6) common law conversion; (7) violation of the California Consumers Legal Remedies
19 Act, Cal. Civ. Code § 1750 *et seq.* (“CLRA”); and (8) violation of the California Unfair
20 Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (“UCL”), including violation
21 of the California Automatic Purchase Renewals Law, Cal. Bus. & Prof. Code § 17600 *et*
22 *seq.* (“CAPRL”). *See McKee* Dkt. 115 (TAC).

23 These claims generally fit into four categories: unlawful expiration of audiobook
24 “credits” included as part of Audible’s membership offerings based on federal and
25 California gift card laws; false advertising based on the sufficiency of disclosures on the

26 _____
27 ² Beals is the plaintiff in *Beals v. Audible, Inc.*, Case No. 1:17-cv-09838-AJN (S.D.N.Y. Judge Nathan) (“*Beals* action”).

28 ³ Fisse and Rees are plaintiffs in *Fisse v. Audible, Inc.*, Case No. 5:18-CV-00211-D (E.D.N.C. Judge Dever) (“*Fisse* action”).

1 fact that these audiobooks are capable of expiring; inadequate disclosures related to auto-
2 pay policies; and inadequate disclosures and unlawful policies related to charging cards
3 on file with Amazon that were not initially designated for making payments to Audible.
4 Soderstrom Decl. ¶ 8.

5 **B. The Weber Action.**

6 The *Weber* action was filed on December 8, 2017 and has been consolidated with
7 the *McKee* action for settlement purposes. *Weber* Dkt. 1. The named plaintiffs are Weber,
8 who is also a plaintiff in *McKee*, and Rees, who is also a named plaintiff in *Fisse*. *Id.*
9 *Weber* includes ten causes of action against Amazon.com, Inc. and Amazon Services,
10 LLC (“Amazon”): (1) violation of the EFTA; (2) violation of the Electronic
11 Communications Privacy Act, 18 U.S.C. § 2510 et seq. (“ECPA”); (3) fraud in the
12 inducement; (4) conversion; (5) interference with contracts; (6) violation of the FAL; (7)
13 violation of the CLRA; (8) violation of the UCL; (9) violation of North Carolina’s Unfair
14 Competition Law; and (10) restitution/unjust enrichment. *See Weber* Dkt. 25 (FAC).

15 These claims complain about Amazon’s role in letting its subsidiary Audible
16 charge back-up cards that are stored with Amazon. Soderstrom Decl. ¶ 10. Plaintiffs
17 allege neither Audible nor Amazon properly disclosed to Audible members the back-up
18 card charging policies and that this failure can sometimes result in Audible members
19 incurring overdraft and similar fees. *Id.* The Court tentatively compelled Weber’s claims
20 to arbitration and transferred Rees’s claims based on personal jurisdiction, but those
21 tentative rulings have not been adopted. *Weber* Dkt. 65; Soderstrom Decl. ¶ 10.

22 **III. The Revised Settlement.**

23 **A. Hard-fought litigation led to a successful mediation.**

24 The Settlement is the product of hard-fought litigation that lasted 18 months before
25 mediation (with months of pre-litigation activities), spanned three venues, involved
26 numerous motions and briefs, and prompted two appeals. Soderstrom Decl. ¶ 11. Both
27 sides had procedural and substantive wins and losses and gained a keen understanding of
28 the strengths and weaknesses of their arguments. *Id.* The Parties engaged in informal and

1 formal discovery and exchanged detailed mediation statements explaining their positions
 2 on class certification, liability, and remedies. *Id.* On August 17, 2018, they attended a
 3 full-day mediation in San Francisco with mediator Robert Meyer which led to the original
 4 stipulation submitted to the Court in November 2018. *Id.* After the December 10, 2018
 5 hearing, the Parties negotiated several new terms that are now reflected in the revised
 6 Settlement. *Id.* The Settlement will resolve the *McKee* and *Weber* actions and will result
 7 in the dismissal of the *Beals* and *Fisse* actions. *Id.*

8 **B. The terms of the revised Settlement.**

9 **1. The Settlement Class.**

10 The Settlement Class consists of a nationwide class of all Class Members who do
 11 not validly and timely opt out of the Settlement. Stipulation § 2.h. Class Members are all
 12 persons who fit within one or more of the following subclasses:

13 **Regular Member Class:** “all individual consumers of Audible in the
 14 United States who, between March 10, 2013 and August 17, 2018, lost any
 15 unredeemed Paid Membership Credits.” *Id.* § 2.jj.

16 **Gift Member Class:** “all individual consumers of Audible in the United
 17 States who, between August 11, 2011 and August 17, 2018, purchased or redeemed
 18 an Audible Gift Membership that resulted in one or more unredeemed Audible gift
 membership credits being lost.” *Id.* § 2.t.

19 **Payment Card Class:** “all individual consumers of Audible in the United
 20 States who, between March 10, 2013 and August 17, 2018, incurred charges from
 21 Audible to a credit or debit card other than the card originally designated as the
 primary payment card for the customer’s Audible membership.” *Id.* § 2.bb.

22 Every Class Member will benefit from the Settlement unless they opt out (and even then
 23 they will benefit from the injunctive relief). Soderstrom Decl. ¶ 12.

24 **2. In-kind relief in the form of millions of free audiobooks.**

25 The Settlement gives millions of Regular Class Members and Gift Class Members
 26 in-kind relief in the form of millions of free audiobook selections from a Settlement
 27 Catalog with over 200,000 audiobook titles. Stipulation § 21.a-f. Depending on how a
 28 credit was lost and how many credits were lost, qualifying Class Members can select up

1 to four free audiobooks. *Id.* § 21.d. The Settlement Catalog will be open for at least a year
 2 (longer than the standard rollover period) and will include titles that have the same
 3 general listing price as Audible’s overall library, celebrity narrations, exclusive content,
 4 award winners, and best sellers. *Id.* § 21.e.; Soderstrom Decl. ¶ 13.

5 Soon after the Settlement is approved, Audible will send an email to each Regular
 6 Class Member and Gift Class Member telling them how many free audiobook selections
 7 they can make and giving them instructions on how to make their selections. Stipulation
 8 § 21.d; Soderstrom Decl. ¶ 14. This chart shows how the number of free audiobook
 9 selections will be determined for each Class Member:

How Credits Were Lost	What the Class Member Gets
Lost 1 credit from rollover	1 free audiobook selection
Lost 3 credits from rollover and 1 credit from cancellation	2 free audiobook selections (one for each Class Membership category)
Lost 1 credit from rollover, 1 credit from cancellation, and 1 credit as a Gift Member	3 free audiobook selections (one for each Class Membership category)
Lost 5 credits from cancellation	2 free audiobook selections (1 for the Class Membership category and 1 extra based on total lost credits)
Lost 3 credits from rollover and 2 credits from cancellation	3 free audiobook selections (1 for each Class Membership category and 1 extra based on total lost credits)
Lost 1 credit from rollover, 3 credits from cancellation, and 1 credit as Gift Member	4 free audiobook selections (1 for each Class Membership category and 1 extra based on total lost credits)

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21 Stipulation § 21.d. To encourage class member participation, Audible will send an email
 22 15-30 days before the end of the selection period reminding members who have not made
 23 all of their selections to do so. *Id.*; Soderstrom Decl. ¶ 14.

24 Class Members do not need a paid Audible membership and they do not need to
 25 submit a claim, make a purchase from Defendants, or provide any payment information
 26 to Defendants in order to participate in the Settlement; all they need is their *free* Amazon
 27 account (even if they cancelled their Audible membership). Soderstrom Decl. ¶ 15. For
 28 any eligible Class Members who became Audible members prior to its acquisition by

1 Amazon in 2008 and have not integrated their Amazon account or do not have an Amazon
2 account, Audible will provide an alternative means to select their free audiobooks. *Id.*

3 **3. Reimbursement of overdraft or similar fees.**

4 The Settlement gives Payment Card Class Members the right to get reimbursed if
5 Audible charged a back-up card and caused them to incur any overdraft or similar fees.
6 Stipulation §§ 2.h., 21.f. There is no cap on the total possible reimbursements.
7 Soderstrom Decl. ¶ 16. When the Settlement is approved, Audible will include in a final
8 approval email sent to Settlement Class Members instructions on how Payment Card
9 Class Members can submit a claim for reimbursement and they will have at least 60 days
10 to submit a claim. Stipulation § 22.a. Audible will train its customer service personnel to
11 handle reimbursement claims. *Id.*; Soderstrom Decl. ¶ 16.

12 **4. Injunctive relief that improves Audible’s disclosures and policies.**

13 Audible has made and will maintain the following changes to its disclosures, which
14 changes will stay in effect for at least one year from the date of final approval:

15 **Rollover Disclosures:** in marketing copy where Audible mentions the ability
16 to roll over credits, Audible will mention rollover limits. In the welcome email
17 that Audible sends to new members, Audible will disclose rollover limits.

18 **Cancellation Disclosures:** in the welcome email that Audible sends to new
19 members, Audible will state that unused credits will be lost upon cancellation.

20 **Card Charging / Manage Payment Options:** Audible will continue to
21 inform users upon sign up that Audible may charge other cards on file. In the
22 welcome email that Audible sends to new members, Audible will provide a
23 link to manage payment options and a link to the Audible COU.

24 **Conditions of Use Disclosures:** Audible has improved the locations and
25 clarity of the language requiring members to accept the Audible COUs during
26 sign ups and will ensure that such improvements will also exist on any future
27 sign-up webpages or flows for at least the one-year period from the date of
28 final approval.

26 Stipulation § 21. During the litigation, Audible also started giving its members email and
27 online “reminders” when they are nearing the rollover limit to help members avoid losing
28 credits because they forgot about the rollover limits. Soderstrom Decl. ¶ 17.

1 The injunctive relief will help improve Audible members' use of credits and other
2 membership benefits and help avoid the same complaints Plaintiffs had about not
3 knowing about the rollover and cancellation terms when they signed up and not realizing
4 they were authorizing Audible to charge a back-up card in certain circumstances. *Id.* ¶
5 18. It also gives Audible members instructions on how to manage their back-up payment
6 options right when the members first sign up and ensures all Audible members have
7 reasonable notice of and knowingly consent to Audible's terms and policies. *Id.*

8 **5. Administration of the Settlement will be efficient and effective.**

9 Defendants will cover all administrative costs, including costs related to: sending
10 the Class Notice; engaging a third party administrator to process any opt outs;
11 maintaining a Settlement website; training customer service personnel to respond to
12 Settlement-related inquiries; creating processes, communications, and websites so
13 Regular Class Members and Gift Class Members can easily select and download free
14 audiobooks; maintaining a reimbursement procedure for Payment Card Class Members;
15 and ensuring their advertisements, websites, and apps comply with the injunctive relief
16 requirements. Stipulation §§ 20-22, 27-33. Defendants will devote significant time and
17 resources to complete these tasks which in the end will have taken well over a year to
18 complete. Soderstrom Decl. ¶ 19. Defendants will use their infrastructure and
19 technological capabilities to ensure the effective administration of the Settlement. *Id.*
20 Class Members will not need to be a paid Audible member, make any purchases, or
21 provide any payment information to participate in and benefit from the Settlement. *Id.*

22 **6. The Class Notice will be by email and a Settlement website.**

23 Audible will send a Court-approved Class Notice to the email address Defendants
24 have on file for every Class Member and will create and manage a Settlement website
25 that will be available on the date the Class Notice is sent, will include important Court
26 documents, and will contain more detailed information than the Class Notice. Stipulation
27 §§ 31-34. The Class Notice will link to the Settlement website, explain the basic terms
28 of the Settlement, explain Class Members have 45-days to submit written opt outs or

1 objections, explain what happens if Class Members do nothing, provide the date and time
2 of the Fairness Hearing, and tell Class Members that Plaintiffs have a right to seek and
3 award of attorneys' fees and costs up to \$1.5 million and service awards up to \$5,000
4 each. *See* Class Notice; Soderstrom Decl. ¶ 20.

5 Within 30 days of final approval of the Settlement, Audible will send another email
6 to all Settlement Class Members telling them the Settlement was approved and providing
7 instructions for Payment Card Class Members on how to submit a claim form to
8 Audible's customer service department for reimbursement. Stipulation § 22.a. When the
9 Settlement Catalog is ready, Audible will send one more email telling eligible Settlement
10 Class Members how many free audiobooks they can select and providing a link and
11 instructions on how to make their selections. *Id.* § 22.b.; Soderstrom Decl. ¶ 21.

12 **7. The scope of Releases and persons not giving a release.**

13 All Settlement Class Members will give Defendants a general release of "any and
14 all claims, known or unknown, alleged or asserted in the Lawsuits or that could have been
15 alleged or asserted related to the advertisement, purchase, receipt, charges for, or loss of
16 an Audible membership, Audible gift membership, Audible credits or other Audible
17 membership benefits, or the use of an alternative payment method in connection with
18 Audible services through August 17, 2018." Stipulation §§ 41-43. Class Members are not
19 releasing any claims that arose after August 17, 2018 even if they involve the same
20 conduct or causes of action, and they are not releasing claims that do not relate to the
21 allegations in the Lawsuits. *Id.* Plaintiffs separately agreed to give Defendants general
22 releases of all possible claims through November 28, 2018, including any claims that do
23 not relate to the Lawsuits or relate to Audible. *Id.* § 42; Soderstrom Decl. ¶ 22.

24 Persons not granting releases include: (1) Audible customers who only purchased
25 Audible products or services on an a la carte basis; (2) Audible customers who signed up
26 for a free trial membership but cancelled before they were charged; (3) Audible members
27 who never lost a paid credit and never had a back-up card charged; (4) persons who were
28 never Audible customers; and (5) Class Members who opt out. Soderstrom Decl. ¶ 23.

1 **IV. The Court should Grant Preliminary Approval of the Settlement.**

2 The Court's approval is required to consummate the Settlement. *See* Fed. R. Civ.
3 P. 23(e) ("a class proposed to be certified for purposes of settlement . . . may be settled,
4 voluntarily dismissed, or compromised only with the court's approval"). Because the
5 Settlement is fair, reasonable, adequate, and in the best interest of Class Members, the
6 Court should certify a class for settlement purposes and grant preliminarily approval.

7 **A. Legal standards for preliminary approval of class action settlements.**

8 "There is a strong judicial policy that favors settlements, particularly where
9 complex class action litigation is concerned." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th
10 Cir. 2015) (quotation omitted). Federal Rule of Civil Procedure 23(e) requires courts to
11 approve any class action settlement, however, because "settlement class actions present
12 unique due process concerns for absent class members." *Hanlon v. Chrysler Corp.*, 150
13 F.3d 1011, 1026 (9th Cir. 1998). The Court has a "fiduciary duty to look after the interests
14 of those absent class members." *Allen*, 787 F.3d at 1223. If settlement is reached before
15 certification, "courts must peruse the proposed compromise to ratify both the propriety
16 of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d
17 938, 952 (9th Cir. 2003). The Court first evaluates whether certification of a settlement
18 class is appropriate under Federal Rule of Civil Procedure 23(a) and (b); it then
19 determines whether the settlement is fair, adequate, and reasonable. *See In re Volkswagen*
20 *"Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 672820, at *5
21 (N.D. Cal. Feb. 16, 2017) (citations omitted); Fed. R. Civ. P. 23(e)(2) (a court can only
22 approve a class settlement after finding it is fair, reasonable, and adequate).

23 **B. Certification of a Settlement Class is proper under Rule 23(a).**

24 Rule 23(a) provides that a class action is proper if four requirements are met: (1)
25 numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* Fed.
26 R. Civ. P. 23(a)(1)-(4). All four requirements are met here.

27 **Numerosity.** Rule 23(a)(1) requires the class to be "so numerous that joinder of
28 all parties is impracticable." There are 8,421,237 total Class Members, including

1 7,171,139 Regular Class Members, 30,367 Gift Class Members, and 3,211,477 Payment
2 Card Class Members. Soderstrom Decl. ¶ 26. Around 62% of Payment Card Class
3 Members are also Regular Class Members and/or Gift Class Members, and around 38%
4 of all Class Members are current Audible members. *Id.* Numerosity is met.

5 **Commonality.** Rule 23(a)(2) requires that there be “questions of law or fact
6 common to the class.” The common question “must be of such a nature that it is capable
7 of classwide resolution – which means that determination of its truth or falsity will
8 resolve an issue that is central to the validity of each one of the claims in one stroke.”
9 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). All that is needed is a single
10 common question of law or fact. *Id.* at 369. “The existence of shared legal issues with
11 divergent factual predicates is sufficient, as is a common core of salient facts coupled
12 with disparate legal remedies within the class.” *Hanlon*, 150 F.3d at 1019.

13 Plaintiffs’ and Class Members’ claims against Defendants involve the same core
14 factual and legal issues. Soderstrom Decl. ¶ 27. The common facts include the pre-sign-
15 up advertisements and representations on Defendants’ websites; the sign-up webpage and
16 disclosures; the payment card designation webpage and disclosures; the credit
17 redemption webpage and disclosures; and the underlying Conditions of Use and related
18 terms, policies, and disclosures. *Id.* The common legal issues include whether audiobook
19 credits are subject to gift card laws; whether Audible’s disclosures were sufficient to put
20 members on notice of and to secure their consent to the membership, auto-pay, and back-
21 up card charging terms, and to the Conditions of Use. *Id.* Commonality is met.

22 **Typicality.** Rule 23(a)(3) requires that Plaintiffs’ claims be “typical of the claims
23 or defenses of the class.” Typicality “assures that the interest of the named representative
24 aligns with the interests of the class.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d
25 1168, 1175 (9th Cir. 2010). This “permissive” rule requires only that the claims and
26 defenses be “reasonably coextensive with those of absent class members; they need not
27 be substantially identical.” *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (citation
28 and quotations omitted).

1 Plaintiffs’ claims implicate the same course of conduct that Defendants direct at
2 class members nationwide via their advertisements, websites, and apps. Soderstrom Decl.
3 ¶ 28. Plaintiffs and Class Members are all subject to the same or substantially similar
4 credit expiration, auto-pay, and card-charging terms, disclosures, and policies, and they
5 have all suffered from the same injuries—i.e., they lost credits and their auto-pay and
6 back-up card decisions were not fully informed. *Id.* McKee, Weber, Rogawski, Beals,
7 and Fisse each lost credits based on the same policies that apply to all Class Members
8 and they all designated payment cards using the same online processes. *Id.* Defendants’
9 defenses also rely on the same or substantially similar disclosures and terms which
10 include the same arbitration clauses, waivers, and disclaimers, and how they issue credits.
11 *Id.*; see *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (“The test of
12 typicality ‘is whether other members have the same or similar injury, whether the action
13 is based on conduct which is not unique to the named plaintiffs, and whether other class
14 members have been injured by the same course of conduct.’”) (citation omitted); *Herrera*
15 *v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 681 (N.D. Cal. 2011) (“The fact that some
16 members of a putative class may have signed arbitration agreements or released claims
17 against a defendant does not bar class certification.”). Typicality is met.

18 **Adequacy.** Rule 23(a)(4) requires that class representatives “fairly and adequately
19 protect the interests of the class.” Adequacy asks whether Plaintiffs and their counsel
20 have conflicts of interest with Class Members and whether Plaintiffs and their counsel
21 will prosecute the action vigorously. *Volkswagen*, 2017 WL 672820, at *7-8. Plaintiffs
22 and their counsel do not have any conflicts with absent class members that have caused
23 or would cause them not to prosecute the class claims vigorously. Soderstrom Decl. ¶¶
24 29, 60-63. The litigation has been hard fought for nearly two years, Plaintiffs’ claims
25 have been subjected to intense adversarial testing, Plaintiffs have each been involved in
26 the litigation, and Plaintiffs’ counsel has demonstrated competence and diligence in
27 pursuing the interests of the class against well-funded opponents with experienced
28 counsel. *Id.*; *Amchem Prods. v. Windsor*, 521 U.S. 591, 621 (1997). Adequacy is met.

1 **C. Certification of a Settlement Class is Proper under Rule 23(b)(3).**

2 Plaintiffs ask the Court to certify a settlement class under Rule 23(b)(3). The rule
3 requires that “the questions of law or fact common to class members predominate over
4 any questions affecting only individual members” and that “a class action [be] superior
5 to any other available methods for fairly and efficiently adjudicating the controversy.”
6 Fed. R. Civ. P. 23(b)(3). Both requirements are satisfied here.⁴

7 **Predominance.** Rule 23(b)(3)’s predominance criterion is “more demanding” than
8 Rule 23(a)(2)’s commonality requirement. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426,
9 1432 (2013). Predominance asks “whether proposed classes are sufficiently cohesive to
10 warrant adjudication by representation,” with courts giving “careful scrutiny to the
11 relation between common and individual questions in a case.” *Tyson Foods, Inc. v.*
12 *Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). It exists “[w]hen common
13 questions present a significant aspect of the case and they can be resolved for all members
14 of the class in a single adjudication.” *Hanlon*, 150 F.3d at 1022 (internal quotations
15 omitted); *Salazar v. Midwest Servicing Group, Inc.*, 2018 WL 3031503, at *3 (C.D. Cal.
16 June 4, 2018) (predominance is found when “defendants have engaged in standardized
17 conduct toward members of the proposed class”). The question is whether “the common,
18 aggregation-enabling, issues in the case are more prevalent or important than the non-
19 common, aggregation-defeating, individual issues. *Tyson Foods*, 136 S. Ct. at 1045.

20 There are several significant aspects of the Lawsuits that are prevalent and
21 important for all Class Members and that can and should be resolved in a single
22 adjudication. Soderstrom Decl. ¶ 30. They include whether federal gift card requirements
23 apply to Audible credits and whether Defendants’ auto-pay and back-up card disclosures
24 and terms satisfied the EFTA’s notice requirements. *Id.* Federal law applies to every
25 Class Member’s claims and the same or substantially similar facts and circumstances are
26 needed to resolve the claims (e.g., the same advertisements and disclosures, the same
27 “flows,” the same Conditions of Use). *Id.*; see *Amchem*, 521 U.S. at 625 (predominance

28 _____
⁴ Manageability is not an issue. *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

1 is “readily met” in many consumer cases). The federal statutes and common facts at issue
2 in each of the Lawsuits show that predominance exists. Soderstrom Decl. ¶ 30.

3 This is not a case where Plaintiffs are asking the Court to certify a nationwide
4 settlement class based on 50 different states’ laws, but even their state-law claims involve
5 “aggregation-enabling” factual and legal issues that predominate over individual issues.
6 *Id.*; see *In re Anthem, Inc. Data Breach Litigation*, 327 F.R.D. 229, 311-15 (N.D. Cal.
7 2018) (finding predominance and approving nationwide class settlement based on state
8 laws and noting the core question is whether “variations in state law may swamp any
9 common issues and defeat predominance”); *Cody v. SoulCycle Inc.*, 2017 WL 6550682,
10 at *2-3 (C.D. Cal. Oct. 3, 2017) (finding predominance and approving nationwide class
11 settlement based on the application of federal gift card laws to spin class passes where
12 there were also related state law claims); *Edwards v. First American Corp.*, 2016 WL
13 8943464, at *6 (C.D. Cal. 2016) (finding predominance in nationwide class of consumers
14 with claims against a title insurance company). The state law claims rely on the same
15 common proof (flows, disclosures, and terms), common injuries (lost credits and
16 unexpected fees on back-up cards), and common remedies (restoration of credits,
17 damages based on overdraft or similar fees, injunctive relief). Soderstrom Decl. ¶ 30. A
18 “common nucleus of facts and potential legal remedies” exists, so any differences in state
19 laws “are not sufficiently anomalous to deny class certification” even though “some class
20 members may possess slightly differing remedies based on state statute or common
21 laws.” *Hanlon*, 150 F.3d at 1022. Predominance exists.

22 **Superiority.** Superiority focuses on “whether maintenance of the litigation as a
23 class action is efficient and whether it is fair.” *Wolin*, 617 F.3d at 1175-76; Fed. R. Civ.
24 P. 23(b)(3) (considering class members’ interests in controlling separate actions, other
25 litigation, desirability of concentrating litigation in a forum, and management
26 difficulties). The class action device is particularly important in cases like this one where
27 there is a large disparity between high litigation costs and small individual recoveries.
28 *Wolin*, 617 F.3d at 1175; see also *In re Anthem*, 327 F.R.D. at 315-16. There are over 7.2

1 million Regular Class Members and Gift Class Members and over 3.2 million Payment
 2 Card Class Members (with several million in both groups). Soderstrom Decl. ¶ 31. The
 3 alternative to a class action is thousands or millions of individual claims that seek small
 4 individual recoveries. *Id.* The most likely alternative, however, is very few or no
 5 individual claims because court and arbitration filing fees alone dwarf the possible
 6 recovery in most cases. *Id.* A class action is the superior alternative. *Id.*

7 **D. The Settlement is fair, reasonable, and adequate.**

8 The recently revised Rule 23(e) provides:

9 If the proposal would bind class members, the court may approve it only after
 10 a hearing and only on finding that it is fair, reasonable, and adequate after
 11 considering whether (A) the class representatives and class counsel have
 12 adequately represented the class; (B) the proposal was negotiated at arm's
 13 length; (C) the relief provided for the class is adequate, taking into account:
 14 (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any
 15 proposed method of distributing relief to the class, including the method of
 16 processing class-member claims; (iii) the terms of any proposed award of
 attorney's fees, including timing of payment; and (iv) any agreement required
 to be identified under Rule 23(e)(3); and (D) the proposal treats class members
 equitably relative to each other.

17 Fed. R. Civ. P. 23(e)(2). The Court should also consider several factors in evaluating
 18 whether the Settlement is fair, reasonable, and adequate:

19 (1) The strength of the plaintiff's case; (2) the risk, expense, complexity, and
 20 likely duration of further litigation; (3) the risk of maintaining class action
 21 status throughout the trial; (4) the amount offered in settlement; (5) the extent
 22 of discovery completed and the stage of the proceedings; (6) the experience
 and views of counsel; (7) the presence of a governmental participant; and (8)
 the reaction of the class members of the proposed settlement.

23 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Where a
 24 settlement is reached before a class is certified, the settlement "must withstand an even
 25 higher level of scrutiny" to ensure "no collusion or other conflicts of interest." *Id.*
 26 "Preliminary approval of a settlement is appropriate if 'the proposed settlement appears
 27 to be the product of serious, informed, non-collusive negotiations, has no obvious
 28 deficiencies, does not improperly grant preferential treatment to class representatives or

1 segments of the class, and falls within the range of possible approval.” *Ruch v. AM Retail*
2 *Grp., Inc.*, 2016 WL 1161453, at *7 (N.D. Cal. Mar. 24, 2016) (citation omitted).

3 The Parties have provided the Court with “information sufficient to enable it to
4 determine” that the Settlement is fair, reasonable, and adequate, and that giving Class
5 Members notice of the Settlement is proper. *See* Fed. R. Civ. P. 23(e)(1)(A) and (e)(2).
6 The Settlement satisfies each requirement and should be preliminarily approved.

7 **1. Plaintiffs and their counsel have adequately represented the class.**

8 Plaintiffs are current or former customers of Defendants who used Defendants’
9 websites, relied on Defendants’ disclosures (or lack thereof), and suffered harm in the
10 form of lost credits and unexpected charges to back-up cards. Soderstrom Decl. ¶ 33.
11 Collectively, they represent a wide swath of Audible members and fit within the Regular
12 Member Class, Gift Member Class, and/or Payment Card Class. *Id.* They reviewed
13 records, shared information with their counsel, and personally participated in pursuing
14 claims on a class basis while eschewing the possibility of individual settlements. *Id.*

15 Plaintiffs’ counsel spent considerable time and resources pursuing the interests of
16 the class without singling out individuals or subclasses for favorable treatment. *Id.* ¶¶ 34,
17 60-63. Counsel achieved multiple successes in motions practice and was prepared to seek
18 certification promptly and establish liability if Settlement was not reached. *Id.* Plaintiffs
19 and their counsel have adequately represented the class. Fed. R. Civ. P. 23(e)(2)(A).

20 **2. Serious, informed, arm’s-length, non-collusive negotiations.**

21 The Settlement was reached only after each side understood the strengths and
22 weaknesses of their positions. Soderstrom Decl. ¶ 35. Plaintiffs’ counsel started
23 investigating claims against Defendants in 2016 and researched all colorable claims
24 related to Audible memberships, credit expirations, auto-pay policies, and back-up card
25 charging practices. *Id.* By the time the Settlement was reached in August 2018, Plaintiffs’
26 counsel had reviewed thousands of records, numerous webpage versions, and documents
27 and data provided by Defendants in formal discovery and for purposes of mediation. *Id.*
28 The Parties exchanged mediation briefs and used an experience mediator. *Id.*

1 Counsel on both sides are experienced in complex civil litigation and class actions
2 and have been involved from the beginning of the litigation. *Id.* ¶ 36. Their negotiations
3 were serious, informed, at arm’s length, and conducted at an appropriate stage of the
4 proceedings. *Id.* Counsel for both sides recommend that the Court approve the
5 Settlement. *Id.*; *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)
6 (“We put a good deal of stock in the product of an arms-length, non-collusive, negotiated
7 resolution, and have never prescribed a particular formula by which that outcome must
8 be tested.”) (citations omitted); *In re Zynga Inc. Secs. Litig.*, 2015 WL 6471171, at *9
9 (N.D. Cal. Oct. 27, 2015) (the use of a mediator and the fact that discovery had occurred
10 “support the conclusion that the Plaintiff was appropriately informed in negotiating a
11 settlement”); *see also* Fed. R. Civ. P. 23(e)(2)(A) & (B).

12 The facts and circumstances of the Settlement, fully explained, show no trace of
13 collusion, nor do they show that Plaintiffs “bargained away the benefit to the class in
14 exchange for their own interests.” *Bluetooth*, 654 F.3d at 938.

15 Class action settlements are not required to provide “cash” or “monetary”
16 compensation to class members. *Cody*, 2017 WL 6550682, at *7 (approving a settlement
17 class based on “economic consideration” of 229,646 reinstated spin classes with an
18 undiscounted face value of over \$7 million); *Johnson v. Ashley Furniture Industries, Inc.*,
19 2016 WL 866957, at *4 (S.D. Cal. Mar. 7, 2016) (approving settlement of vouchers that
20 could be applied to future purchases at defendant’s stores); *In re Online DVD-Rental*
21 *Antitrust Litig.*, 779 F.3d 934, 951-52 (9th Cir. 2015) (same); *Knapp v. Art.com, Inc.*, 283
22 F. Supp. 3d 823, 828 (N.D. Cal. 2017) (same); *In re Southwest Airlines Voucher Litig.*,
23 799 F.3d 701, 704 (7th Cir. 2015) (approving a claims-made coupon settlement plus
24 injunctive relief). Even if the Settlement involved “coupons” (it does not), it still is fair,
25 reasonable, and adequate and does not overcompensate counsel. Soderstrom Decl. ¶ 37.

26 The Court still must scrutinize the Settlement and seek “adequate assurance” that
27 there was no collusion, however. *Bluetooth*, 654 F.3d at 947-48. Here, Plaintiffs and their
28 counsel put Class Members’ interests first at every step. Soderstrom Decl. ¶ 38. The cap

1 on attorneys' fees and costs was not negotiated until after the other Settlement terms were
2 agreed, and Plaintiffs did not negotiate terms that give a disproportionate distribution of
3 the Settlement for attorneys' fees and costs. Soderstrom Decl. ¶ 38.

4 The Settlement requires Audible to give Class Members who are current or former
5 Audible members that lost membership credits the right to select between one and four
6 free audiobooks, which right would exist for a full year. Stipulation § 21. The Settlement
7 Catalog lets each Regular Class Member and Gift Class Member choose from over
8 200,000 titles based on his or her personal preferences. *Id.*; Soderstrom Decl. ¶ 38. The
9 "face value" of the in-kind relief (nearly 12 million free selections multiplied by the list
10 price of each audiobook selected) is substantial by itself. Soderstrom Decl. ¶ 38.

11 Plaintiffs did not try to capitalize on the "face value" of the Settlement and
12 potentially put their own and their counsel's interests first. *Id.* Instead, Plaintiffs agreed
13 not to request more than \$1.5 million in attorneys' fees (inclusive of costs) and not more
14 than \$5,000 each in service awards. Stipulation §§ 24-25; Soderstrom Decl. ¶ 39.
15 Defendants compare the value of the in-kind portion of the Settlement to closed catalog
16 sales they routinely run that let customers purchase any included title for \$5.00 each, but
17 they acknowledge the \$5.00 figure may undervalue the breadth of options provided in
18 such a large settlement catalog. Soderstrom Decl. ¶ 39. Even based on Defendants'
19 conservative \$5.00 valuation per audiobook and conservative 10% estimated redemption
20 rate, the value of the in-kind portion of the Settlement alone is around \$6.0 million.⁵ *Id.*
21 Even accepting this conservative valuation, the maximum possible fee award of \$1.5
22 million would still be less than the 25% benchmark and would require less than a 1.75

23 ⁵ Plaintiffs expect a higher participation rate than the conservative estimates used for
24 attorneys' fees because (i) around 38% of Class Members are current Audible members,
25 (ii) Audible will send multiple emails, including a reminder email, which will prompt
26 qualifying Class Members to make free selections, (iii) there is no "claims made" process
27 so every qualifying Class Member will automatically receive the right to make their
28 selections, (iv) former Audible members sometimes purchase audiobooks a la carte even
though they cancelled their subscription, (v) the Settlement Catalog will include content
that is more desirable to a wider population than a small closed catalog offering, and (vi)
the selection process will be quick, convenient, and free. Soderstrom Decl. ¶ 40.

1 lodestar multiplier without accounting for the value of the other relief secured by the
2 Settlement. *Id.* ¶¶ 39, 60-63. Plaintiffs agreed to a maximum fee award request not tied
3 to the face value of the Settlement and lower than amounts approved in other cases. *Id.*;
4 *see Cody*, 2017 WL 6550682, at *4 (\$1,790,000 approved based on the face value of
5 reinstated classes); *In re Southwest Airlines*, 799 F.3d at 704 (\$1,649,118 approved based
6 on lodestar multiplier without considering coupon redemption rates).

7 The agreement with respect to fees is not a “clear sailing” arrangement that lets
8 Defendants pay off Plaintiffs’ counsel in exchange for paltry relief for Class Members.
9 *See Bluetooth*, 654 F.3d at 939-40 (requiring the district court to better explain the
10 reasons it was assured of the fairness of a settlement providing for up to \$800,000 in
11 attorneys’ fees but no economic relief for class members); *Cavka v. SoulCycle Inc.*, 2018
12 WL 1426343, at *4 (C.D. Cal. Jan. 25, 2018) (denying approval where the settlement
13 exchanged a broad release for improved contract disclosures but no economic relief, with
14 counsel seeking \$350,000). Far from giving Plaintiffs and their counsel a potential
15 windfall at Class Members’ expense, \$1.5 million is a cap on potential attorneys’ fees
16 that does not reduce the value of the Settlement to Class Members and that gives
17 Defendants assurance that Plaintiffs will not seek multiples of that amount based on the
18 total value of the Settlement and a higher redemption rate. Soderstrom Decl. ¶ 41.

19 The injunctive relief is also valuable, important, and includes most of what
20 Plaintiffs were seeking all along. *Id.* ¶ 42. It makes sure notices and disclosures are clear,
21 conspicuous, and made at the start of the relationship with Audible, and it helps members
22 avoid letting credits expire, avoid incurring unexpected fees, and manage their back-up
23 payment methods. *Id.* The Settlement essentially ensures that Audible customers’
24 purchasing decisions will always be *informed* decisions. *Id.* Plaintiffs’ arguments in this
25 litigation started causing Defendants to make improvements only a few months after
26 *McKee* was filed, and the Settlement will provide substantial value to millions of Class
27 Members and all of Audible’s future consumers. *Id.*; *Staton*, 327 F.3d at 974 (the value
28 of injunctive relief is also considered for attorneys’ fees awards).

1 Finally, the reason no “residue” will be distributed to Class Members was a
2 function of the Settlement’s size and structure: in-kind, reimbursement, and injunctive
3 relief. Soderstrom Decl. ¶ 43; *see Cody*, 2017 WL 6550682, at *6. Paying any residue to
4 many millions of Class Members would create new administrative costs and complexities
5 without providing any meaningful value to Class Members. Soderstrom Decl. ¶ 43.

6 **3. The Settlement does not have any obvious deficiencies.**

7 The Settlement gives meaningful relief to all Class Members and does not suffer
8 from any obvious deficiencies. It represents an excellent result given the complexities of
9 this case and the risks of litigation. Soderstrom Decl. ¶ 44.

10 **Litigation risks.** The risks facing Plaintiffs if the Settlement was not reached are
11 substantial. Fed. R. Civ. P. 23(e)(2); *Staton*, 327 F.3d at 959. There is little authority
12 related to federal and state gift card laws, especially authority examining arguments like
13 Plaintiffs’ that a credit is functionally equivalent to a gift card. *See Cody*, 2017 WL
14 6550682, at *3. Plaintiffs’ gift card claims survived dismissal, but the Court observed
15 that they “barely” survived and suggested the claims were a proper subject for an early
16 summary judgment motion. *McKee* Dkt. 53; Soderstrom Decl. ¶ 45. The issues of
17 whether a “credit” that is part of a larger package of membership benefits (including a
18 30% discount, a free return policy, free streaming services and other free content,
19 members-only specials, and discounted “extra credits”) is issued in a “specified amount”
20 if it can be redeemed for over 99% of Audible’s audiobooks regardless of list price is
21 hotly disputed. Soderstrom Decl. ¶ 45. The “cash value” of a credit itself is also uncertain
22 because Audible’s terms provided that credits have no “cash value,” members use credits
23 for a wide range of products with different list prices, and individual members value and
24 use credits and other membership benefits differently based on personal preferences. *Id.*

25 Several of Plaintiffs’ other claims also only narrowly avoided dismissal and raised
26 questions of whether causation and damages could be proved if Audible members had
27 reasonable notice of credit expiration terms, auto-pay terms, and back-up card charging
28 terms even though the technical requirements of the EFTA and/or the CAPRL were not

1 met at sign up. *McKee* Dkts. 53 and 94; Soderstrom Decl. ¶ 46; *Cody*, 2017 WL 6550682,
2 at *3 (observing causation of damages from expired classes would be difficult to prove).

3 **Litigation complexities.** The litigation is complex, involves laws with little
4 published precedent and/or that are being applied in novel ways, and is based largely on
5 webpages and disclosures made on multiple platforms (e.g., standard website, mobile
6 website, apps) that have been periodically updated. Soderstrom Decl. ¶ 47; *McKee* Dkts.
7 37, 53, 87, 94; *Weber* Dkt. 53. It has also already spread to three district courts, involved
8 numerous motions with more expected, prompted two appeals with more expected, and
9 caused both sides to incur significant fees and expenses. Soderstrom Decl. ¶ 47. Avoiding
10 individual arbitration and maintaining class certification through trial and appeal would
11 also be difficult and involve substantial time, expense, and risk. *Id.*

12 Ultimately, the strengths of Plaintiffs' claims are reflected in the size and value of
13 the Settlement and in the injunctive relief that gave Plaintiffs most of what they were
14 asking for. *Id.* ¶ 48. The strengths of Defendants' defenses are also reflected in the
15 Settlement. *Id.* The question of whether the outcome of litigation would be superior to
16 the Settlement is highly uncertain, a fact that strongly favor preliminary approval. *Id.*

17 **Effectiveness of distributing relief.** Class Members signed up for a free Amazon
18 account and an Audible membership online using a computer, smartphone, tablet, or
19 similar device. *Id.* ¶ 49. They will all be receiving a Class Notice at their designated email
20 address associated with that Amazon account and, if the Settlement is approved, they will
21 be receiving another email with instructions on how to select their free audiobook(s) and
22 how to submit a reimbursement claim for overdraft and similar fees. *Id.*; Stipulation § 22.
23 Defendants have the largest selection of audiobooks in the world and they specialize in
24 creating websites that make the process of selecting and downloading things like free
25 audiobooks quick, easy, and convenient. Soderstrom Decl. ¶ 49. They are also known for
26 good customer service and have committed to training personnel to field Settlement-
27 related questions and reimbursement claims. *Id.* The Settlement will distribute relief to
28 Class Members in the most effective way possible. Fed. R. Civ. P. 23(e)(2).

1 **4. The Settlement does not grant preferential treatment.**

2 Each of the Regular Class Members and Gift Class Members who lost a paid credit
3 will get to pick at least one free audiobook. Stipulation § 21.a-e.; Soderstrom Decl. ¶ 50.
4 Some will get to pick two or more free audiobooks. Soderstrom Decl. ¶ 50. Similar to the
5 reinstated classes in *Cody*, the in-kind relief is proportional and equitable for Regular
6 Class Members and Gift Class Members. 2017 WL 6550682, at *4.

7 For Class Members who cancelled their memberships, they still have *free* Amazon
8 accounts to access past audiobook purchases and other Amazon products and services,
9 many may still purchase audiobooks a la carte, and many may have cancelled for reasons
10 unrelated to the claims in this litigation (i.e., their listening habits did not support a
11 monthly or annual membership and they chose to cancel instead of suspend their
12 membership). Soderstrom Decl. ¶ 51 (noting Rogawski suspended his paid membership
13 when he could not keep up with his credits and Fisse signed up and cancelled several
14 memberships). They are still among the group of consumers who would value a free
15 audiobook because they had a paid Audible membership relatively recently, they already
16 have a free Amazon account, they are not required to spend any money or become an
17 Audible customer again, and the selection process will be free and convenient. *Id.*

18 Around 62% of Payment Card Class Members are also Regular Class Members
19 and/or Gift Class Members and will get to select at least one free audiobook in addition
20 to getting a right to seek reimbursement. Stipulation § 21.a-f.; Soderstrom Decl. ¶ 52.
21 The Payment Card Class Members who are not also getting the right to pick a free
22 audiobook *never lost a paid credit*—this means they either used every credit they ever
23 paid for or they are current Audible members with all of their credits still in their
24 accounts.⁶ Soderstrom Decl. ¶ 52. The right to get reimbursed for any overdraft or similar

25 _____
26 ⁶ A consumer who never intended to pay for a monthly or annual membership (e.g., he
27 did not realize that he signed up or that he had to cancel the “free trial membership,” or
28 that he thought he cancelled but it was unsuccessful for some reason) would be a Class
Member only if he (1) lost a credit (i.e., the unintended payments lasted long enough for
him to reach the rollover limit) or (2) had a back-up card charged by Audible (i.e., he

1 fees is the same for all Payment Card Class Members and is not subject to a total
 2 reimbursement maximum. *Id.* The reimbursement right is limited to fees that would be
 3 incurred if a back-up card was charged unexpectedly because there would be no damages
 4 if the member knew the back-up card was being charged (i.e., they authorized the charge).
 5 *Id.* The reimbursement relief is fair and equitable and does not give preferential treatment.

6 The \$5,000 maximum service award is a reflection of Plaintiffs' service to the
 7 Class, the reputational and other risks they bore in bringing nationwide litigation, and the
 8 broader releases Plaintiffs are giving to Defendants. Stipulation § 24; Soderstrom Decl.
 9 ¶ 54. These amounts are fair and presumptively reasonable in the Ninth Circuit. *See Smith*
 10 *v. Am. Greetings Corp.*, 2016 WL 362395, at *10 (N.D. Cal. Jan. 29, 2016).

11 **5. The Settlement falls within the range of possible approval.**

12 The Settlement falls well within the range of possible approval. "To determine
 13 whether a settlement 'falls within the range of possible approval' courts focus on
 14 'substantive fairness and adequacy' and 'consider plaintiffs' expected recovery balanced
 15 against the value of the settlement offer." *Shuchardt v. Law Office of Rory W. Clark*,
 16 2016 WL 232435, at *10 (N.D. Cal. Jan. 20, 2016) (quoting *In re Tableware Antitrust*
 17 *Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007)).

18 Plaintiffs had three "damages" theories: (1) the loss of a credit, (2) fees incurred
 19 due to unexpected charges to a back-up card, and (3) the difference between the price of
 20 a membership and the price Audible members would have paid if Audible's terms and
 21 policies were better disclosed. Soderstrom Decl. ¶ 55; *see Rodriguez*, 563 F.3d at 964-65
 22 ("courts do not traditionally factor treble damages into the calculus for determining a
 23 reasonable settlement"). The in-kind relief addressed the loss of a credit by restoring a

24 _____
 25 cancelled his primary payment method instead of cancelling the membership itself and
 26 Audible charged his back-up card under its policy). In either case, he would receive a
 27 Class Notice advising him of his rights and, if he chose not to opt out, he would receive
 28 compensation for and release claims through August 17, 2018. If any of the unintended
 payments occurred after August 17, 2018, he still would not be releasing those claims.
 Based on Audible's customer service policies, disclosures, email reminders, and high
 redemption rates, such a customer would be an outlier. Soderstrom Decl. ¶ 53.

1 lost right; the reimbursement addressed unexpected fees; and the injunctive relief limits
2 future credit losses and unexpected fees *and* makes sure all current and future Audible
3 members' purchasing decisions are fully informed decisions. Soderstrom Decl. ¶ 55.

4 **Lost Credits.** If a Class Member lost a credit that could be used to select an
5 audiobook regardless of its list price, the in-kind relief largely restores the right that was
6 lost. *Id.* ¶ 56. With the right restored, there are no remaining actual or consequential
7 damages. *Id.* And because some Class Members may choose \$5.00 books, others \$15.00
8 books, and others \$25.00 books, the in-kind relief maximizes Class Members' flexibility.
9 *Id.* The total value of the free audiobooks qualifying Class Members will select will be
10 substantial even if the Settlement has a redemption rate lower than Plaintiffs expect. *Id.*

11 **Extended Class Periods.** Defendants agreed to extended class periods for Class
12 Members nationwide even though the EFTA limitations period is only one year. 15
13 U.S.C. § 1693m; Soderstrom Decl. ¶ 57. The Class Period for all Regular Class Members
14 and Payment Card Class Members nationwide reaches back four years from the date
15 *McKee* was filed and the Class Period for Gift Class Members reaches back six-years
16 from the date Beals added his claims. Stipulation §§ 2.t., 2.jj., 2.bb. Any Class Members
17 who cancelled their memberships several years ago will get some compensatory relief
18 even though they may not have been able to recover separately from the Settlement under
19 the EFTA or other laws with shorter limitations periods. Soderstrom Decl. ¶ 57. The
20 extended class periods also let more Audible members receive compensatory relief and
21 give members a greater chance of getting more than one free audiobook selection if they
22 had multiple credits expire. *Id.*

23 **EFTA Damages Caps.** The EFTA caps Plaintiffs' maximum possible classwide
24 damages at \$500,000 for each "failure to comply by the same person," gives courts
25 discretion to lower (but not raise) that amount, and does not authorize restitution or
26 injunctive relief. 15 U.S.C. § 1693m. At best, Plaintiffs could have recovered \$2.5 million
27 total in cash damages under the EFTA (\$500,000 based on gift card and \$1 million each
28 from Audible and Amazon based on preauthorized and unauthorized electronic fund

1 transfer theories of liability). *Id.*; Soderstrom Decl. ¶ 58. Plaintiffs strongly believed that
2 in-kind relief and an uncapped reimbursement right for overdraft and similar fees was
3 superior to a cash or cash-option settlement where the per-Class Member compensation
4 would be small and the administrative costs would increase significantly. *Id.*; *see Cody*,
5 2017 WL 6550682, at *4 (only 0.1% of class members chose a cash option which
6 required a “claims made” procedure; the Court based its approval on the face value of all
7 reinstated classes even though they could still expire and may never be used).

8 **Difference in Price Damages.** Plaintiffs chose to exclude from the Settlement
9 Audible members whose only complaint is that they would have paid less for their
10 membership if Audible’s disclosures were better. Soderstrom Decl. ¶ 59. The measure of
11 these damages would have been very difficult to quantify—e.g., would a member have
12 paid \$13.95 instead of \$14.95 each month if Audible’s disclosures were clearer—and
13 would have required a battle of experts at great cost to both sides. *Id.* Moreover, those
14 Audible members never lost a credit or had a back-up card charged, so it would be
15 difficult to prove they did not know Audible’s policies and they suffered harm. *Id.*

16 **V. The Court Should Approve the Class Notice, Appoint Class Counsel and Class**
17 **Representatives, and Set a Fairness Hearing.**

18 **Appointment of Counsel.** In appointing class counsel the Court should consider
19 counsel’s work, experience, knowledge of the law, and resources. Fed. R. Civ. P.
20 23(c)(1)(B) and (g)(1); *Farley v. Baird, Patrick & Co., Inc.*, 1992 WL 321632, at *5
21 (S.D.N.Y. Oct. 28, 1992) (“Class counsel’s competency is presumed absent specific
22 proof to the contrary by defendants.”). Class Counsel has experience in complex civil
23 litigation and in class action cases on both the defense and the plaintiff side and has
24 managed this complex series of related cases for over two years facing formidable and
25 well-funded opponents. Soderstrom Decl. ¶¶ 60-63. The work done to date shows that
26 appointment of Soderstrom Law PC as Class Counsel is appropriate. *Id.*

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1 **Appointment of Class Representatives.** Each of the Plaintiffs has reviewed and
2 prepared documents and supported the litigation whenever needed and has placed the
3 interests of Class Members ahead of his or her own. *Id.* ¶ 64. The Court should appoint
4 each of them as a Class Representative for purposes of the Settlement. *Id.*

5 **Approval of the Class Notice.** A class notice “is satisfactory if it generally
6 describes the terms of the settlement in sufficient detail to alert those with adverse
7 viewpoints to investigate and to come forward and be heard.” *Churchill Vill., LLC v. Gen.*
8 *Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); see Fed. R. Civ. P. 23(c)(2)(B) (requiring the
9 “best notice that is practicable under the circumstances,” including electronic and other
10 appropriate means); Fed. R. Civ. P. 23(e)(1) (requiring notice be given in a “reasonable
11 manner”). These requirements are satisfied here.

12 Email notice with a supporting Settlement website is the best practicable notice
13 because all Class Members designated an email address to create their free Audible and
14 Amazon accounts and Defendants’ have the email addresses for every Class Member.
15 Soderstrom Decl. ¶ 65. The free Audible and Amazon accounts still exist and Class
16 Members still receive emails from Defendants even if some of them have cancelled their
17 paid memberships. *Id.* The notice will remain in each Class Member’s email account and
18 it and the Settlement website will be easily accessible and reviewable at the Class
19 Member’s convenience. Stipulation §§ 26-34. Defendants will also train Audible
20 personnel to field Settlement-related questions. *Id.* § 28. The proposed Class Notice is
21 individualized and the best form of notice under the circumstances.

22 **VI. Conclusion.**

23 Preliminary approval does not turn on whether the Settlement “could be prettier,
24 smarter, or snazzier, but whether it is fair, adequate, and free from collusion.” *Hanlon*,
25 150 F.3d at 1027. Plaintiffs have secured in-kind, reimbursement, and injunctive relief
26 for millions of Class Members. Even if the Settlement is not perfect, it is excellent under
27 the circumstances. Plaintiffs respectfully ask the Court to grant this motion, certify a
28 settlement class, and preliminarily approve the Settlement.

1 Dated: March 7, 2019

SODERSTROM LAW PC

2 By: /s/ Jamin S. Soderstrom

3 Jamin S. Soderstrom

4 *Counsel for Plaintiffs and the Proposed Class*

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CERTIFICATE OF SERVICE

The undersigned certifies that on, March 25 2019, I caused the foregoing document to be served on all counsel of record by the Court's CM/ECF electronic filing system.

By: /s/ Jamin S. Soderstrom

Jamin S. Soderstrom

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Counsel for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION – LOS ANGELES)

GRANT MCKEE, ERIC WEBER,
and MICHAEL ROGAWSKI,
individually and on behalf of all
other similarly situated,

Plaintiffs,

v.

AUDIBLE, INC.,

Defendant.

Case Nos.: 2:17-cv-01941 GW (Ex) &
2:17-cv-08868 GW (Ex)

DECLARATION OF JAMIN S.
SODERSTROM IN SUPPORT OF
PLAINTIFFS’ RENEWED,
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT

Date: March 14, 2019
Time: 8:30 a.m.
Courtroom: 9D
Judge: Hon. George H. Wu
Trial date: None set

ERIC WEBER and BRYAN REES,
individually and on behalf of all
other similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC. and
AMAZON SERVICES LLC,

Defendants.

DECLARATION OF JAMIN S. SODERSTROM

I, Jamin S. Soderstrom, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and before this Court. I am the founding shareholder of Soderstrom Law PC, counsel of record for Plaintiffs Grant McKee, Eric Weber, Michael Rogawski, Bryan Rees, Seth Beals, and Taylor Fisse (collectively, “Plaintiffs”) in the consolidated *McKee* and *Weber* cases and in two related cases (the *Beals* lawsuit and the *Fisse* lawsuit). The facts set forth in this declaration are based on my own personal knowledge and, if called as a witness, I could and would competently testify to the facts set forth herein.

Introduction

2. The Lawsuits against Defendants Audible Inc., Amazon.com, Inc., and Amazon Services, LLC (collectively, “Defendants”) complain that Audible members unfairly lose what they paid for when an audiobook credit expires, Audible does not adequately inform members of the rollover and cancellation policies that can cause credits to expire, and Audible does not adequately inform members of the auto-pay and back-up card features of an Audible membership. The revised Stipulation of Class Action Settlement and Release (“Settlement” or “Stipulation”) addresses these complaints and provides valuable relief to all Class Members. A true and correct copy of the Stipulation is attached as **Exhibit 1** (with the proposed Class Notice attached as Exhibit A to the Stipulation). The Stipulation will be cited as “Stipulation § _” and all capitalized terms in this Declaration and in the accompanying motion papers have the same definition and meaning as in the Stipulation.

3. The Settlement gives Class Members three forms of relief:

In-Kind Relief: 7,171,139 Regular Class Members and 30,367 Gift Class Members will collectively receive the right to select 11,984,814 free audiobooks from a selection of over 200,000 titles.

Reimbursement of Fees: 3,211,477 Payment Card Class Members will get to submit a claim for reimbursement of any overdraft or similar fees incurred

1 because Audible charged a back-up card. There is no cap on the total
2 reimbursements Payment Card Class Members can receive.

3 **Injunctive Relief.** Audible revised its advertisements, disclosures, and
4 terms to ensure current and future Audible members make informed
5 decisions related to credit expiration, auto-pay, and back-up card policies.

6 This combination of in-kind relief, a reimbursement right, and injunctive relief provides
7 an excellent result for Class Members. And the caps on Plaintiffs' right to seek attorneys'
8 fees (inclusive of costs) up to \$1.5 million and service awards up to \$5,000 each are on
9 the lower end of the range of awards granted in similar cases and in no way collusive.

10 4. The Lawsuits were hard fought at every stage. The Settlement was too. The
11 Settlement was reached in August 2018, finalized in November 2018, and improved in
12 February 2019. It is fair, reasonable, and adequate, and it falls well within the range of
13 possible approval. The Court should grant this motion, certify a class for settlement
14 purposes, preliminarily approve the Settlement, order notice to be given to all Class
15 Members, and set motion deadlines and a date for the final Fairness Hearing.

16 **Background**

17 5. Plaintiffs each sued Audible, Inc., Amazon.com, Inc., and/or Amazon
18 Services LLC concerning credit expiration, auto-pay, and back-up card disclosures,
19 policies, and advertisements.

20 **The McKee Action**

21 6. The *McKee* action was filed on March 10, 2017. *McKee* Dtk. 1. The three
22 named plaintiffs in *McKee* are McKee, Weber, and Rogawski. *McKee* Dkt. 115 (TAC).
23 Beals, Fisse, and Rees were formerly named plaintiffs in *McKee* but their claims were
24 compelled to arbitration and/or transferred to other district courts. *See McKee* Dkts. 40
25 (FAC), 53, 62, 65 (SAC), and 111; *see generally Beals v. Audible, Inc.*, Case No. 1:17-
26 cv-09838-AJN (S.D.N.Y. Judge Nathan) ("*Beals* action"); *Fisse v. Audible, Inc.*, Case
27 No. 5:18-CV-00211-D (E.D.N.C. Judge Dever) ("*Fisse* action").

28 7. *McKee* includes eight causes of action against Audible: (1) violation of the
California False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* ("*FAL*"); (2)

1 common law fraud and misrepresentation; (3) violation of the Credit Card Accountability
2 Responsibility and Disclosure Act of 2009 (“CARD Act”), which amended the Electronic
3 Funds Transfer Act (“EFTA”), 15 U.S.C. § 1693; (4) violation of the California Gift
4 Certificate Law, Cal. Civ. Code § 1749.45 *et seq.* (“GCL”), (5) violation of the EFTA;
5 (6) common law conversion; (7) violation of the California Consumers Legal Remedies
6 Act, Cal. Civ. Code § 1750 *et seq.* (“CLRA”); and (8) violation of the California Unfair
7 Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (“UCL”), including violation
8 of the California Automatic Purchase Renewals Law, Cal. Bus. & Prof. Code § 17600 *et*
9 *seq.* (“CAPRL”). *See McKee* Dkt. 115 (TAC).

10 8. The claims in *McKee* generally fit into four categories: unlawful expiration
11 of audiobook “credits” included as part of Audible’s membership offerings based on
12 federal and California gift card laws; false advertising based on the sufficiency of
13 disclosures on the fact that these audiobooks are capable of expiring; inadequate
14 disclosures related to auto-pay policies; and inadequate disclosures and unlawful policies
15 related to charging cards on file with Amazon that were not initially designated for
16 making payments to Audible.

17 **The Weber Action.**

18 9. The *Weber* action was filed on December 8, 2017 and has been consolidated
19 with the *McKee* action for settlement purposes. *Weber* Dkt. 1. The named plaintiffs are
20 Weber, who is also a plaintiff in *McKee*, and Rees, who is also a named plaintiff in *Fisse*.
21 *Id.* *Weber* includes ten causes of action against Amazon.com, Inc. and Amazon Services,
22 LLC (“Amazon”): (1) violation of the EFTA; (2) violation of the Electronic
23 Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* (“ECPA”); (3) fraud in the
24 inducement; (4) conversion; (5) interference with contracts; (6) violation of the FAL; (7)
25 violation of the CLRA; (8) violation of the UCL; (9) violation of North Carolina’s Unfair
26 Competition Law; and (10) restitution/unjust enrichment. *See Weber* Dkt. 25 (FAC).

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1 **The terms of the revised Settlement.**

2 **The Settlement Class.**

3 12. The Settlement Class consists of a nationwide class of all Class Members
4 who do not validly and timely opt out of the Settlement. Stipulation § 2.h. Defendants’
5 records show there are 8,421,237 Class Members from all 50 states and several U.S.
6 territories. Class Members are all persons who fit within one or more of the following
7 subclasses:

8 **Regular Member Class:** “all individual consumers of Audible in the
9 United States who, between March 10, 2013 and August 17, 2018, lost any
10 unredeemed Paid Membership Credits.” *Id.* § 2.jj.

11 **Gift Member Class:** “all individual consumers of Audible in the United
12 States who, between August 11, 2011 and August 17, 2018, purchased or redeemed
13 an Audible Gift Membership that resulted in one or more unredeemed Audible gift
membership credits being lost.” *Id.* § 2.t.

14 **Payment Card Class:** “all individual consumers of Audible in the United
15 States who, between March 10, 2013 and August 17, 2018, incurred charges from
16 Audible to a credit or debit card other than the card originally designated as the
primary payment card for the customer’s Audible membership.” *Id.* § 2.bb.

17 Every Class Member will benefit from the Settlement unless they opt out (and even then
18 they will benefit from the injunctive relief).

19 ***In-kind relief in the form of millions of free audiobooks.***

20 13. The Settlement gives millions of Regular Class Members and Gift Class
21 Members in-kind relief in the form of millions of free audiobook selections from a
22 Settlement Catalog with over 200,000 audiobook titles. Stipulation § 21.a-f. Depending
23 on how a credit was lost and how many credits were lost, qualifying Class Members can
24 select up to four free audiobooks. *Id.* § 21.d. The Settlement Catalog will be open for at
25 least a year (longer than the standard rollover period, which is 6 months for Gold Monthly
26 members) and will include titles that have the same general listing price as Audible’s
27 overall library, celebrity narrations, exclusive content, award winners, and best sellers.
28 *Id.* § 21.e.

1 14. Soon after the Settlement is approved, Audible will send an email to each
 2 Regular Class Member and Gift Class Member telling them how many free audiobook
 3 selections they can make and giving them instructions on how to make their selections.
 4 Stipulation § 21.d. This chart shows how the number of free audiobook selections will
 5 be determined for each qualifying Class Member:

How Credits Were Lost	What the Class Member Gets
Lost 1 credit from rollover	1 free audiobook selection
Lost 3 credits from rollover and 1 credit from cancellation	2 free audiobook selections (one for each Class Membership category)
Lost 1 credit from rollover, 1 credit from cancellation, and 1 credit as a Gift Member	3 free audiobook selections (one for each Class Membership category)
Lost 5 credits from cancellation	2 free audiobook selections (1 for the Class Membership category and 1 extra based on total lost credits)
Lost 3 credits from rollover and 2 credits from cancellation	3 free audiobook selections (1 for each Class Membership category and 1 extra based on total lost credits)
Lost 1 credit from rollover, 3 credits from cancellation, and 1 credit as Gift Member	4 free audiobook selections (1 for each Class Membership category and 1 extra based on total lost credits)

17 Stipulation § 21.d. To encourage class member participation, Audible will send an email
 18 15-30 days before the end of the selection period reminding members who have not made
 19 all of their selections to do so. *Id.*

20 15. Class Members do not need a paid Audible membership and they do not
 21 need to make a purchase from Defendants or provide any payment information to
 22 Defendants in order to participate in the Settlement; all they need is their *free* Amazon
 23 account (even if they cancelled their Audible membership). For any eligible Class
 24 Members who became Audible members prior to its acquisition by Amazon in 2008 and
 25 have not integrated their Amazon account or do not have an Amazon account, Audible
 26 will provide an alternative means to select their free audiobooks.

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1 ***Reimbursement of overdraft or similar fees.***

2 16. The Settlement gives 3,211,477 Payment Card Class Members the right to
 3 get reimbursed if Audible charged a back-up card and caused them to incur any overdraft
 4 or similar fees. Stipulation §§ 2.h., 21.f. There is no cap on the total possible
 5 reimbursements Audible will make. When the Settlement is approved, Audible will
 6 include in a final approval email sent to Settlement Class Members instructions on how
 7 Payment Card Class Members can submit a claim for reimbursement and they will have
 8 at least 60 days to submit a claim. Stipulation § 22.a. Audible will train its customer
 9 service personnel to handle reimbursement claims. *Id.*

10 ***Injunctive relief that improves Audible's disclosures and policies.***

11 17. Audible has made and will maintain the following changes to its disclosures,
 12 which changes will stay in effect for at least one year from the date of final approval:

13 **Rollover Disclosures:** in marketing copy where Audible mentions the ability
 14 to roll over credits, Audible will mention rollover limits. In the welcome email
 15 that Audible sends to new members, Audible will disclose rollover limits.

16 **Cancellation Disclosures:** in the welcome email that Audible sends to new
 17 members, Audible will state that unused credits will be lost upon cancellation.

18 **Card Charging / Manage Payment Options:** Audible will continue to
 19 inform users upon sign up that Audible may charge other cards on file. In the
 20 welcome email that Audible sends to new members, Audible will provide a
 21 link to manage payment options and a link to the Audible COU.

22 **Conditions of Use Disclosures:** Audible has improved the locations and
 23 clarity of the language requiring members to accept the Audible COUs during
 24 sign ups and will ensure that such improvements will also exist on any future
 25 sign-up webpages or flows for at least the one-year period from the date of
 26 final approval.

27 Stipulation § 21. Plaintiffs believe this injunctive relief is excellent and valuable. It
 28 represents most of what Plaintiffs had been seeking since the beginning of the litigation—
 more clear disclosures and terms, advertisements which actually reference rollover limits,
 and an email at the point of sign-up that gives all Audible members the relevant terms
 and policies in a written form they can keep in their email account. During the litigation,

1 Audible also started giving its members email and online “reminders” when they are
2 nearing the rollover limit to help members avoid losing credits because they forgot about
3 the rollover limits, which is another important and valuable benefit caused by this
4 litigation. The only injunctive relief Plaintiffs were hoping for but were unable to secure
5 was for Audible to discontinue its credit expiration policies altogether.

6 18. The injunctive relief will help improve Audible members’ use of credits and
7 other membership benefits and help avoid the same complaints Plaintiffs had about not
8 knowing about the rollover and cancellation terms when they signed up and not realizing
9 they were authorizing Audible to charge a back-up card in certain circumstances. It also
10 gives Audible members instructions on how to manage their back-up payment options
11 right when the members first sign up and ensures all Audible members have reasonable
12 notice of and knowingly consent to Audible’s terms and policies. All current Audible
13 members (around 38% of Class Members) and all future Audible members will directly
14 benefit from these improvements.

15 ***Administration of the settlement will be efficient and effective.***

16 19. Defendants will cover all administrative costs, including costs related to:
17 sending the Class Notice; engaging a third party administrator to process any opt outs;
18 maintaining a Settlement website; training customer service personnel to respond to
19 Settlement-related inquiries; creating processes, communications, and websites so
20 Regular Class Members and Gift Class Members can easily select and download free
21 audiobooks; maintaining a reimbursement procedure for Payment Card Class Members;
22 and ensuring their advertisements, websites, and apps comply with the injunctive relief
23 requirements. Stipulation §§ 20-22, 27-33. Defendants will devote significant time and
24 resources to complete these tasks which in the end will have taken well over a year to
25 complete. Defendants will use their infrastructure and technological capabilities to ensure
26 the effective administration of the Settlement. Class Members will not need to be a paid
27 Audible member, make any purchases, or provide any payment information to participate
28 in and benefit from the Settlement.

1 ***The Class Notice will be by email and a Settlement website.***

2 20. Audible will send a Court-approved Class Notice to the email address
3 Defendants have on file for every Class Member and will create and manage a Settlement
4 website that will be available on the date the Class Notice is sent, will include important
5 Court documents, and will contain more detailed information than the Class Notice.
6 Stipulation §§ 31-34. The Class Notice will link to the Settlement website, explain the
7 basic terms of the Settlement, explain Class Members have 45-days to submit written opt
8 outs or objections, explain what happens if Class Members do nothing, provide the date
9 and time of the Fairness Hearing, and tell Class Members that Plaintiffs have a right to
10 seek and award of attorneys’ fees and costs up to \$1.5 million and service awards up to
11 \$5,000 each. *See* Class Notice.

12 21. Within 30 days of final approval of the Settlement, Audible will send
13 another email to all Settlement Class Members telling them the Settlement was approved
14 and providing instructions for Payment Card Class Members on how to submit a claim
15 form to Audible’s customer service department for reimbursement. Stipulation § 22.a.
16 When the Settlement Catalog is ready, Audible will send one more email telling eligible
17 Settlement Class Members how many free audiobooks they can select and providing a
18 link and instructions on how to make their selections. *Id.* § 22.b.

19 ***The scope of Releases and persons not giving a release.***

20 22. All Settlement Class Members will give Defendants a general release of
21 “any and all claims, known or unknown, alleged or asserted in the Lawsuits or that could
22 have been alleged or asserted related to the advertisement, purchase, receipt, charges for,
23 or loss of an Audible membership, Audible gift membership, Audible credits or other
24 Audible membership benefits, or the use of an alternative payment method in connection
25 with Audible services through August 17, 2018.” Stipulation §§ 41-43. Class Members
26 are not releasing any claims that arose after August 17, 2018 even if they involve the
27 same conduct or causes of action, and they are not releasing claims that do not relate to
28 the allegations in the Lawsuits. *Id.* Plaintiffs separately agreed to give Defendants general

1 releases of all possible claims through November 28, 2018, including any claims that do
2 not relate to the Lawsuits or relate to Audible. *Id.* § 42.

3 23. Persons not granting releases include: (1) Audible customers who only
4 purchased Audible products or services on an a la carte basis; (2) Audible customers who
5 signed up for a free trial membership but cancelled before they were charged; (3) Audible
6 members who never lost a paid credit and never had a back-up card charged; (4) persons
7 who were never Audible customers; and (5) Class Members who opt out.

8 **The Court should Grant Preliminary Approval of the Settlement.**

9 24. The Court's approval is required to consummate the Settlement. Because
10 the Settlement is fair, reasonable, adequate, and in the best interest of Class Members,
11 the Court should certify a class for settlement purposes and grant preliminarily approval.

12 **Certification of a Settlement Class is proper under Rule 23(a).**

13 25. Rule 23(a) provides that a class action is proper if four requirements are met:
14 (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See*
15 *Fed. R. Civ. P. 23(a)(1)-(4)*. All four requirements are met here.

16 26. **Numerosity.** Defendants' records show there are 8,421,237 total Class
17 Members, including 7,171,139 Regular Class Members, 30,367 Gift Class Members, and
18 3,211,477 Payment Card Class Members. Around 62% of Payment Card Class Members
19 are also Regular Class Members and/or Gift Class Members, and around 38% of all Class
20 Members are current Audible members. Numerosity is met.

21 27. **Commonality.** Plaintiffs' and Class Members' claims against Defendants
22 involve the same core factual and legal issues. The common facts include the pre-sign-
23 up advertisements and representations on Defendants' websites; the sign-up webpage and
24 disclosures; the payment card designation webpage and disclosures; the credit
25 redemption webpage and disclosures; and the underlying Conditions of Use and related
26 terms, policies, and disclosures. The common legal issues include whether audiobook
27 credits are subject to gift card laws; whether Audible's disclosures were sufficient to put
28 members on notice of and to secure their consent to the membership, auto-pay, and back-

1 up card charging terms, and to the Conditions of Use. Each of the Plaintiffs and every
2 Class Member visited one of Defendants’ websites (standard or mobile), created an
3 Amazon and Audible account, viewed the disclosures on the sign-up pages (or lack of
4 disclosures), and clicked-through the online flows to sign-up for an Audible membership
5 (or in the case of Gift Class Members, to redeem a gift membership he or she received).
6 Each of the flows Plaintiffs and Class Members was the same or substantially similar,
7 and the underlying credit expiration, auto-pay, and back-up card charging terms were
8 also the same or substantially similar. Commonality is met.

9 28. **Typicality.** Plaintiffs’ claims implicate the same course of conduct that
10 Defendants direct at Class Members nationwide via their advertisements, websites, and
11 apps. Plaintiffs and Class Members are all subject to the same or substantially similar
12 credit expiration, auto-pay, and card-charging terms, disclosures, and policies, and they
13 have all suffered from the same injuries—i.e., they lost credits and their auto-pay and
14 back-up card decisions were not fully informed. McKee, Weber, Rogawski, Beals, and
15 Fisse each lost credits based on the same policies that apply to all Class Members and all
16 Plaintiffs designated payment cards using the same online processes. Defendants’
17 defenses also rely on the same or substantially similar disclosures and terms which
18 include the same arbitration clauses, waivers, and disclaimers, and how they issue credits.
19 Typicality is met.

20 29. **Adequacy.** Plaintiffs and my firm do not have any conflicts with absent
21 class members that have caused or would cause them not to prosecute the class claims
22 vigorously. My firm did not promise Plaintiffs any relief or any minimum request for a
23 service award. The litigation has been hard fought for nearly two years, Plaintiffs’ claims
24 have been subjected to intense adversarial testing, Plaintiffs have each been involved in
25 the litigation, and Plaintiffs’ counsel has demonstrated competence and diligence in
26 pursuing the interests of the class against well-funded opponents with experienced
27 counsel. Adequacy is also met.

28 ///

1 **Certification of a Settlement Class is Proper under Rule 23(b)(3).**

2 30. Plaintiffs ask the Court to certify a settlement class under Rule 23(b)(3).
3 **Predominance.** There are several significant aspects of the Lawsuits that are prevalent
4 and important for all Class Members and that can and should be resolved in a single
5 adjudication. They include whether federal gift card requirements apply to Audible
6 credits and whether Defendants’ auto-pay and back-up card disclosures and terms
7 satisfied the EFTA’s notice requirements. Federal law applies to every Class Member’s
8 claims and the same or substantially similar facts and circumstances are needed to resolve
9 the claims (e.g., the same advertisements and disclosures, the same “flows,” the same
10 Conditions of Use). The federal statutes and common facts at issue in each of the
11 Lawsuits show that predominance exists. This is not a case where Plaintiffs are asking
12 the Court to certify a nationwide settlement class based on 50 different states’ laws, but
13 even their state-law claims involve “aggregation-enabling” factual and legal issues that
14 predominate over individual issues. The state law claims rely on the same common proof
15 (flows, disclosures, and terms), common injuries (lost credits and unexpected fees on
16 back-up cards), and common remedies (restoration of credits, damages based on
17 overdraft or similar fees, injunctive relief). Predominance exists.

18 31. **Superiority.** The class action device is particularly important in cases like
19 this one where there is a large disparity between high litigation costs and small individual
20 recoveries. There are over 7.2 million Regular Class Members and Gift Class Members
21 and over 3.2 million Payment Card Class Members (with several million in both groups).
22 The alternative to a class action is thousands or millions of individual claims that seek
23 small individual recoveries. The most likely alternative, however, is very few or no
24 individual claims because court and arbitration filing fees alone dwarf the possible
25 recovery in most cases. For example, the current AAA consumer arbitration filing fee is
26 \$200 for consumers, and a Class Member would have had to have lost 14 paid credits
27 (i.e., never used a credit for over a year) and each credit would have to be valued at the
28 entire price of a monthly membership (\$14.95) to make the amount in controversy more

1 than the filing fee itself (14 x \$14.95 = \$209.30). If the Settlement is not approved and
2 Plaintiffs are ultimately unable to maintain a certified class of all Class Members
3 nationwide through trial and appeal, most Class Members will likely never get any relief
4 because it makes no financial sense to pay a \$200 arbitration fee to recover \$5.00, \$25.00
5 or even \$150.00 in lost credit or overdraft fee damages. The class action device is
6 superior.

7 **The Settlement is fair, reasonable, and adequate.**

8 32. The Parties have provided the Court with “information sufficient to enable
9 it to determine” that the Settlement is fair, reasonable, and adequate, and that giving Class
10 Members notice of the Settlement is proper. The Settlement satisfies each requirement
11 and should be preliminarily approved.

12 **Plaintiffs and their counsel have adequately represented the class.**

13 33. Plaintiffs are current or former customers of Defendants who used
14 Defendants’ websites, relied on Defendants’ disclosures (or lack thereof), and suffered
15 harm in the form of lost credits and unexpected charges to back-up cards. McKee, Weber,
16 Rogawski, Beals, and Fisse each signed up for an Audible membership online on
17 Defendants’ websites. McKee, Weber, Rogawski, and Fisse each lost one or more regular
18 credits and Beals lost a gift membership credit. All Plaintiffs stored payment methods
19 with Amazon. Collectively, Plaintiffs represent a wide swath of Audible members and fit
20 within the Regular Member Class, Gift Member Class, and/or Payment Card Class. They
21 reviewed records, shared information with their counsel, and personally participated in
22 pursuing claims on a class basis while eschewing the possibility of individual settlements.
23 They each understood their obligations to absent Class Members and took their
24 obligations seriously.

25 34. My firm spent considerable time and resources pursuing the interests of the
26 class without singling out individual Plaintiffs, individual Class Members, or any
27 subclasses for favorable treatment. My firm achieved multiple successes in what was
28 very intense motions practice (15 motions and at least 37 separate briefs in three different

1 venues) and was prepared to seek certification promptly and establish liability if
2 Settlement was not reached. Plaintiffs and my firm have adequately represented the class.

3 **Serious, informed, arm’s-length, non-collusive negotiations.**

4 35. The Settlement was reached only after each side understood the strengths
5 and weaknesses of their positions. My firm started investigating claims against
6 Defendants in 2016 and researched all colorable claims related to Audible memberships,
7 credit expirations, auto-pay policies, and back-up card charging practices. By the time
8 the Settlement was reached in August 2018, my firm had reviewed thousands of records,
9 numerous webpage versions, and documents and data provided by Defendants in formal
10 discovery and for purposes of mediation. The Parties exchanged mediation briefs and
11 used an experience mediator.

12 36. Counsel on both sides are experienced in complex civil litigation and class
13 actions and have been involved from the beginning of the litigation. I started my firm in
14 August 2016 after serving as a federal law clerk in the Fifth Circuit for two years and
15 practicing complex civil litigation and class action work (primarily on the defense side)
16 at Sullivan & Cromwell LLP, Reynolds Frizzell LLP, and Call & Jensen APC.
17 Defendants’ counsel Fenwick & West LLP is a highly ranked firm that specializes in
18 complex litigation and class actions and Defendants are large, sophisticated companies
19 with experienced in-house legal departments and significant resources. Mr. Wakefield
20 and his team provided a vigorous and skilled defense at every stage of proceedings. The
21 Parties’ negotiations were serious, informed, at arm’s length, and conducted at an
22 appropriate stage of the proceedings. Counsel for both sides recommend that the Court
23 approve the Settlement.

24 37. The facts and circumstances of the Settlement, fully explained, show no
25 trace of collusion, nor do they show that Plaintiffs bargained away the benefit to the class
26 in exchange for their own interests. Class action settlements are not required to provide
27 “cash” or “monetary” compensation to class members. My firm examined numerous
28 class action settlements leading up to mediation and considered all potential structures of

1 a classwide settlement. The structure that made the most sense was in-kind relief that
2 would give back to Class Members essentially what they lost. The *Cody v. Soulcycle* case
3 in particular served as a reference point for what relief was reasonable in these
4 circumstances and what Class Members would prefer and expect. In *Cody*, the parties
5 negotiated a settlement where customers who had purchased spin class passes and had at
6 least on class pass expire before it was used would receive back at least one and up to
7 two class passes. The reinstated passes still had an expiration on them, but the expiration
8 was much longer than the standard expiration time period. Each reinstated pass had a
9 face value of between \$30 and \$40. A cash option of up to \$50 was also offered to Class
10 Members as part of the settlement, but only 0.1% of all class members preferred the cash
11 option—99.9% of class members preferred the reinstated passes even though they still
12 expired and even though it was very possible many class members would not end up
13 using the reinstated passes.

14 38. Plaintiffs and my firm put Class Members' interests first at every step. The
15 cap on attorneys' fees and costs was not negotiated until after the other Settlement terms
16 were agreed. Plaintiffs and my firm intentionally did not negotiate terms that would give
17 a disproportionate distribution of the Settlement for attorneys' fees and costs. The
18 Settlement requires Audible to give over 7.2 million Class Members who are current or
19 former Audible members that lost membership credits the right to select between one and
20 four free audiobooks, which right would exist for a full year. Stipulation § 21. The
21 Settlement Catalog lets each Regular Class Member and Gift Class Member choose from
22 over 200,000 titles based on his or her personal preferences. The "face value" of this in-
23 kind relief (nearly 12 million free audiobook selections multiplied by the list price of
24 each audiobook selected) is substantial by itself.

25 39. Plaintiffs did not try to capitalize on the "face value" of the Settlement and
26 potentially put their own and their counsel's interests first. They did not, in other words,
27 do what the settlement in *Cody* did: use the undiscounted "face value" of reinstated spin
28 class passes that still may never be used as a basis for determining attorneys' fees.

1 Instead, Plaintiffs agreed not to request more than \$1.5 million in attorneys' fees
2 (inclusive of costs) and not more than \$5,000 each in service awards. Stipulation §§ 24-
3 25. While Plaintiffs do not necessarily agree with Defendants' view on how to discount
4 the value of the in-kind relief, Defendants compare the value of the in-kind portion of the
5 Settlement to Audible's "closed catalog sales" they routinely run that let customers
6 purchase any included title for \$5.00 each. These "closed catalogs," as Defendants
7 acknowledge, typically include only several hundred books with low list prices. Plaintiffs
8 made sure the Settlement Catalog would have a minimum of 200,000 audiobooks and
9 those audiobooks would have the same general listing price as Audible's overall library
10 (which ranges from around \$5.00 to well over \$25.00), will have celebrity narrations,
11 exclusive content, award winners, and best sellers. In other words, Plaintiffs made sure
12 the Settlement Catalog would include highly desirable content that with many books
13 whose list prices are well above \$5.00. Even Defendants acknowledge a \$5.00 baseline
14 for the value of each free audiobook selection may undervalue the selection right (and it
15 will not account for the higher priced audiobooks that many Class Members will
16 ultimately select). Nevertheless, even if Plaintiffs' accepted Defendants' conservative
17 \$5.00 valuation per audiobook and conservative 10% estimated redemption rate, the
18 value of the in-kind portion of the Settlement alone is around \$6.0 million. And using
19 this conservative valuation, the maximum possible fee award of \$1.5 million would still
20 be less than the 25% benchmark and would require less than a 1.75 lodestar multiplier
21 (*see* paragraph 63 below), all without accounting for the value of the other relief secured
22 by the Settlement. In the end, Plaintiffs agreed to a maximum fee award request that was
23 not tied to the face value of the Settlement and that was lower than amounts approved in
24 other cases. This alone shows Plaintiffs were not trying to and did not engage in any
25 collusion and did not put their interests and my firm's interests ahead of Class Members'
26 interests.

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1 40. To be clear, Plaintiffs expect a much higher participation rate in the
2 Settlement than the conservative estimates used for attorneys' fees purposes. This is
3 because:

4 (i) around 38% of Class Members are current Audible members (which means
5 they are currently paying for audiobook credits and using their credits to
6 select audiobooks from Audible's library);

7 (ii) Audible will send multiple emails, including a reminder email near the end
8 of the selection period, which will prompt qualifying Class Members to
9 make their free selections;

10 (iii) there is no "claims made" process so every qualifying Class Member will
11 automatically receive the right to make their free audiobook selections
12 without having to take any steps other than to click on a link and select one
13 or more audiobooks for free;

14 (iv) former Audible members sometimes purchase audiobooks a la carte even
15 though they cancelled their subscription, so the fact that someone cancelled
16 a subscription does not mean they have no desire to listen to audiobooks
17 anymore;

18 (v) the Settlement Catalog will include content that is more expensive and more
19 desirable to a wider population than a small closed catalog offering; and

20 (vi) the free audiobook selection process will be quick, convenient, and free.

21 In Plaintiffs' view, each of these factors strongly suggest that the in-kind relief is exactly
22 the type of relief most Class Members want and expect to receive, and that the total value
23 of the free audiobooks Class Members ultimately select will far exceed the conservative
24 estimates used for attorneys' fees purposes.

25 41. The agreement with respect to fees also is not a "clear sailing" arrangement
26 that lets Defendants pay off Plaintiffs' counsel in exchange for paltry relief for Class
27 Members. Far from giving my firm a potential windfall at Class Members' expense, the
28 \$1.5 million is a cap on potential attorneys' fees that does not reduce the value of the

1 Settlement to Class Members. In Plaintiffs' view, the cap on a maximum potential
2 attorneys' fee award simply gives Defendants assurance that Plaintiffs will not seek
3 multiples of that amount based on the total value of the Settlement and the higher
4 redemption rate Plaintiffs' expect.

5 42. The injunctive relief is also valuable, important, and includes most of what
6 Plaintiffs were seeking all along. It makes sure Defendants' notices and disclosures are
7 clear, conspicuous, and made at the start of the relationship with Audible, and it helps
8 members avoid letting credits expire, avoid incurring unexpected fees, and manage their
9 back-up payment methods. The Settlement essentially ensures that Audible customers'
10 purchasing decisions will always be *informed* decisions. Plaintiffs' arguments in this
11 litigation started causing Defendants to make improvements only a few months after
12 *McKee* was filed, and the Settlement will provide substantial value to millions of Class
13 Members and all of Audible's future consumers. As the Court will recall, much of the
14 motions practice and discovery was focused on the clarity and conspicuousness of
15 Defendants' various disclosures and terms, and Defendants' procedural and substantive
16 defenses and arguments focused heavily on their website notices and terms. Even though
17 Plaintiffs did not win every argument raised in the motions practice, Plaintiffs were able
18 to secure through the Settlement a commitment from Defendants to revise their
19 disclosures and terms in ways that are designed to avoid those same arguments and
20 disputes in the future and improve every Audible customer's experience. In litigation
21 focused largely on the clarity, conspicuousness, and timing of online disclosures, the
22 injunctive relief represents an excellent result that will positively impact many millions
23 of current and future Audible customers.

24 43. Finally, the reason no "residue" will be distributed to Class Members was
25 simply a function of the Settlement's size and structure: in-kind, reimbursement, and
26 injunctive relief. Distributing any residue of the attorneys' fees and service awards "caps"
27 among many millions of Class Members would create significant new administrative
28 costs and complexities without providing any meaningful value to Class Members.

1 **The Settlement does not have any obvious deficiencies.**

2 44. The Settlement gives meaningful relief to all Class Members and does not
3 suffer from any obvious deficiencies. It represents an excellent result given the
4 complexities of this case and the risks of litigation. Based on my experience and based
5 on my understanding of the benefits and risks of this litigation and the value of the
6 Settlement, I strongly recommend approval of the Settlement.

7 45. **Litigation risks.** The risks facing Plaintiffs if the Settlement was not
8 reached are substantial. There is little authority related to federal and state gift card laws,
9 especially authority examining arguments like Plaintiffs' that a credit is functionally
10 equivalent to a gift card. Plaintiffs' gift card claims survived dismissal, but the Court
11 observed that they "barely" survived and suggested the claims were a proper subject for
12 an early summary judgment motion. Defendants were in the process of preparing a
13 motion for summary judgment when the mediation occurred. Additionally, the issues of
14 whether a "credit" that is part of a larger package of membership benefits (including a
15 30% discount, a free return policy, free streaming services and other free content,
16 members-only specials, and discounted "extra credits") is issued in a "specified amount"
17 if it can be redeemed for over 99% of Audible's audiobooks *regardless of their list prices*
18 is hotly disputed and far from certain. Furthermore, the "cash value" of a credit itself is
19 also far from certain because Audible's terms expressly provided that credits have no
20 "cash value," members use credits for a wide range of products with different list prices,
21 and individual members value and use credits and other membership benefits differently
22 based on personal preferences. By way of example, some members will use credits only
23 to purchase expensive audiobooks and use the 30% discount to pay for less expensive
24 audiobooks in cash, thereby maximizing the value of each credit. Other members will
25 only use credits and are not concerned with the list price of each audiobook. Other
26 members use the "Great Listen Guarantee" and return audiobooks they do not enjoy and
27 get back their credit to use again on a different book. Other members purchase "extra
28 credits" at a discount to supplement their monthly credits. And still other members use

1 the non-audiobook services Audible offers as part of a membership and credits and
2 audiobooks are less important to them. While Plaintiffs were confident that they would
3 be able to certify a class and obtain expert testimony that could accurately value each lost
4 credit for the class as a whole, their ability to do so was far from certain.

5 46. Several of Plaintiffs' other claims (e.g., false advertising, inadequate
6 disclosures under state law) also only narrowly avoided dismissal and raised questions of
7 whether causation and damages could be proved if Audible members had reasonable
8 notice of credit expiration terms, auto-pay terms, and back-up card charging terms even
9 though the technical requirements of the EFTA and/or the CAPRL were not met at sign
10 up. *McKee* Dkts. 53 and 94. A few of Plaintiffs' claims were dismissed and Defendants
11 had not filed a motion to dismiss in *Weber* before Settlement was reached (and they may
12 not have needed to file any motion to dismiss considering they tentatively prevailed on a
13 motion to compel arbitration and motion to dismiss for lack of personal jurisdiction). All
14 of Plaintiffs' claims were unquestionably colorable, but none of them were "slam dunks"
15 that provided a path to classwide liability with no hurdles.

16 47. **Litigation complexities.** The litigation is complex. It involves laws with
17 little published precedent and/or that are being applied in novel ways. And it is based
18 largely on webpages and disclosures made on multiple platforms (e.g., standard website,
19 mobile website, apps) that have been periodically updated. The complicated nature of the
20 evidence and arguments presented Plaintiffs with substantial uncertainty as to how to
21 avoid individual arbitration and prove lack of notice, damages, and causation. The
22 litigation has also already spread to three district courts, involved numerous motions with
23 more expected, prompted two appeals with more expected, and caused both sides to incur
24 significant fees and expenses. Avoiding individual arbitration and maintaining class
25 certification through trial and appeal would also be difficult and involve substantial time,
26 expense, and risk.

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1 48. Ultimately, the strengths of Plaintiffs' claims are reflected in the size and
2 value of the Settlement and in the injunctive relief that gave Plaintiffs most of what they
3 were asking for. The strengths of Defendants' defenses are also reflected in the
4 Settlement. The question of whether the outcome of litigation would be superior to the
5 Settlement is highly uncertain, a fact that strongly favor preliminary approval.

6 49. **Effectiveness of distributing relief.** Class Members signed up for a free
7 Amazon account and an Audible membership online using a computer, smartphone,
8 tablet, or similar device. They will all be receiving a Class Notice at their designated
9 email address associated with that Amazon account and, if the Settlement is approved,
10 they will be receiving another email with instructions on how to select their free
11 audiobook(s) and how to submit a reimbursement claim for overdraft and similar fees.
12 Stipulation § 22. Defendants have the largest selection of audiobooks in the world and
13 they specialize in creating websites that make the process of selecting and downloading
14 things like free audiobooks quick, easy, and convenient. They are also known for good
15 customer service and have committed to training personnel to field Settlement-related
16 questions and reimbursement claims. The Settlement will distribute relief to Class
17 Members in the most effective way possible.

18 **The Settlement does not grant preferential treatment.**

19 50. Each of the Regular Class Members and Gift Class Members who lost a paid
20 credit will get to pick at least one free audiobook. Stipulation § 21.a-e. Some will get to
21 pick two or more free audiobooks. Similar to the reinstated classes in *Cody*, the in-kind
22 relief is proportional and equitable for Regular Class Members and Gift Class Members.

23 51. For Class Members who cancelled their memberships, they still have *free*
24 Amazon accounts to access past audiobook purchases and other Amazon products and
25 services, many may still purchase audiobooks a la carte, and many may have cancelled
26 for reasons unrelated to the claims in this litigation (i.e., their listening habits did not
27 support a monthly or annual membership and they chose to cancel instead of suspend
28 their membership). By way of example, Rogawski suspended his paid membership for

1 several months when he could not keep up with his monthly credits, and Fisse signed up
2 and cancelled several memberships over the course of several years. Even customers who
3 cancelled a paid membership subscription are still among the group of consumers who
4 would value a free audiobook because they had a paid Audible membership relatively
5 recently, they already have a free Amazon account, they are not required to spend any
6 money or become an Audible customer again, and the selection process will be free and
7 convenient. Many Class Members who cancelled may still be Audible *customers*, they
8 simply are not current Audible *subscribers*.

9 52. According to Defendants' records, around 62% of Payment Card Class
10 Members are also Regular Class Members and/or Gift Class Members and those Class
11 Members will get to select at least one free audiobook *in addition to* getting a right to
12 seek reimbursement. Stipulation § 21.a-f. Payment Card Class Members who are not also
13 getting the right to pick a free audiobook *never lost a paid credit*—this means they either
14 used every credit they ever paid for or they are current Audible members with all of their
15 credits still in their accounts. The right to get reimbursed for any overdraft or similar fees
16 is the same for all Payment Card Class Members and is not subject to a total
17 reimbursement maximum. The reimbursement right is limited to fees that would be
18 incurred if a back-up card was charged unexpectedly because there would be no damages
19 if the member knew the back-up card was being charged (i.e., they authorized the charge).
20 The reimbursement relief is fair and equitable and does not give preferential treatment.

21 53. By way of example, a consumer who never intended to pay for a monthly
22 or annual membership (e.g., he did not realize that he signed up or that he had to cancel
23 the “free trial membership,” or that he thought he cancelled but it was unsuccessful for
24 some reason) would be a Class Member only if he (1) lost a credit (i.e., the unintended
25 payments lasted long enough for him to reach the rollover limit) or (2) had a back-up
26 card charged by Audible (i.e., he cancelled his primary payment method instead of
27 cancelling the membership itself and Audible charged his back-up card under its policy).
28 In either case, he would receive a Class Notice advising him of his rights and, if he chose

1 not to opt out, he would receive compensation for and release claims through August 17,
2 2018. If any of the unintended payments occurred after August 17, 2018 (e.g., if the Class
3 Notice was the first time he discovered he was part of a paid Audible subscription), he
4 still would not be releasing those claims that arose in the last six months even if he chose
5 to participate in the Settlement. Based on Audible’s customer service policies (including
6 policies that provide refunds and reinstate credits to customers who call and complain),
7 disclosures that were more conspicuous on some webpages than others (as the Court will
8 recall from motions practice), email reminders, and high credit redemption rates,
9 Plaintiffs believe such a customer would be an outlier.

10 54. The \$5,000 maximum service award is a reflection of Plaintiffs’ service to
11 the Class, the reputational and other risks they bore in bringing nationwide litigation, and
12 the broader releases Plaintiffs are giving to Defendants. Stipulation § 24. These amounts
13 are fair and presumptively reasonable in the Ninth Circuit and would not overcompensate
14 Plaintiffs if the Court were to grant the maximum awards, particularly in light of the more
15 broad general release Plaintiffs are granting that Class Members are not granting.

16 **The Settlement falls within the range of possible approval.**

17 55. The Settlement falls well within the range of possible approval. Plaintiffs
18 had three “damages” theories: (1) the loss of a credit, (2) fees incurred due to unexpected
19 charges to a back-up card, and (3) the difference between the price of a membership and
20 the price Audible members would have paid if Audible’s terms and policies were better
21 disclosed. The in-kind relief addressed the loss of a credit by restoring a lost right; the
22 reimbursement addressed unexpected fees; and the injunctive relief limits future credit
23 losses and unexpected fees *and* makes sure all current and future Audible members’
24 purchasing decisions are fully informed decisions.

25 56. **Lost Credits.** If a Class Member lost a credit that could be used to select an
26 audiobook regardless of its list price, the in-kind relief largely restores the right that was
27 lost. With the right restored, there are no remaining actual or consequential damages.
28 And because some Class Members may choose \$5.00 books, others \$15.00 books, and

1 others \$25.00 books, the in-kind relief maximizes Class Members' flexibility. The total
2 value of the free audiobooks qualifying Class Members will select will be substantial
3 even if the Settlement has a redemption rate lower than Plaintiffs expect. Moreover, if
4 the Settlement had been a cash settlement (e.g., common fund), the total value of the
5 Settlement would be much lower than the "face value" of the in-kind relief alone, Class
6 Members would be receiving small checks that likely would not be seen as useful for
7 much, the total value of the settlement would be reduced by high administrative expenses
8 and other costs, fees, and awards so the net amount received by Class Members would
9 be far smaller than the gross amount of the fund, and Class Members who typically used
10 credits for audiobooks with list prices far above \$5.00 would be very disappointed.
11 Plaintiffs pushed for restoration of the right to select free audiobooks and are very pleased
12 with the size and scope of the class and the value represented by the in-kind relief.

13 **57. Extended Class Periods.** Defendants agreed to extended class periods for
14 Class Members nationwide even though the EFTA limitations period is only one year.
15 The Class Period for all Regular Class Members and Payment Card Class Members
16 nationwide reaches back four years from the date *McKee* was filed and the Class Period
17 for Gift Class Members reaches back six-years from the date Beals added his claims.
18 Stipulation §§ 2.t., 2.jj., 2.bb. Any Class Members who cancelled their memberships
19 several years ago will get some compensatory relief even though they may not have been
20 able to recover separately from the Settlement under the EFTA or other laws with shorter
21 limitations periods. The extended class periods also let more Audible members receive
22 compensatory relief and give members a greater chance of getting more than one free
23 audiobook selection if they had multiple credits expire.

24 **58. EFTA Damages Caps.** The EFTA caps Plaintiffs' maximum possible
25 classwide damages at \$500,000 for each "failure to comply by the same person," gives
26 courts discretion to lower (but not raise) that amount, and does not authorize restitution
27 or injunctive relief. 15 U.S.C. § 1693m. At best, Plaintiffs could have recovered \$2.5
28 million total in cash damages under the EFTA (\$500,000 based on gift card and \$1

1 million each from Audible and Amazon based on preauthorized and unauthorized
2 electronic fund transfer theories of liability). Plaintiffs strongly believed that in-kind
3 relief and an uncapped reimbursement right for overdraft and similar fees was superior
4 to a cash or cash-option settlement where the per-Class Member compensation would be
5 small and the administrative costs would increase significantly. In particular, Plaintiffs
6 noted that even with a cash option of up to \$50 (which Plaintiffs never could secured in
7 this case), only 0.1% of class members in *Cody* opted for the cash even though \$25 or
8 \$50 could be used to purchase many products or services and would be unlikely to go
9 uncashed.

10 **59. Difference in Price Damages.** Plaintiffs ultimately chose to exclude from
11 the Settlement any Audible members whose only complaint is that they would have paid
12 less for their membership if Audible’s disclosures had been better. The measure of these
13 damages would have been very difficult to quantify—e.g., would a member have paid
14 \$13.95 instead of \$14.95 each month if Audible’s disclosures were clearer—and would
15 have required a battle of experts at great cost to both sides. Moreover, those Audible
16 members *never lost a credit and never had a back-up card charged*, so it would have
17 been difficult to prove they did not know Audible’s policies and they suffered harm. Any
18 Audible members who fit into this category will still benefit from the injunctive relief
19 (improved disclosures, etc.) and will not be granting any release, so they can bring such
20 claims separately from this litigation if they so choose.

21 **The Court Should Approve the Class Notice, Appoint Class Counsel and Class**
22 **Representatives, and Set a Fairness Hearing.**

23 **60. Appointment of Counsel.** My firm has experience in complex civil
24 litigation and in class action cases on both the defense and the plaintiff side and has
25 managed this complex series of related cases for over two years facing formidable and
26 well-funded opponents. The work done to date shows that appointment of Soderstrom
27 Law PC as Class Counsel is appropriate.

28 ///

1 61. My firm has successfully prosecuted other class actions is currently
2 prosecuting other actions against similarly large corporations and highly capable defense
3 counsel. My firm has shown an unwavering commitment to prosecute Plaintiffs' claims
4 on behalf of all Class Members. My firm's prosecution of this case and the related cases,
5 and particularly the successes Class Counsel obtained in hard-fought motions practice
6 and in the Settlement itself, demonstrate the diligence and competence required by Rule
7 23.

8 62. The general background of my practice, my firm, and my involvement in
9 the Lawsuits are as follows:

10 (i) I received my undergraduate degree from Pepperdine University in 2002,
11 my MBA from Grand Canyon University in 2004, and my law degree from
12 Pepperdine University in 2008. I have been licensed to practice law in
13 California since 2008.

14 (ii) My firm and I, as its founding shareholder, have experience with complex
15 civil litigation and, specifically, class action litigation in federal and state
16 courts and arbitration. Other than when I was serving as a federal law clerk,
17 I have actively practiced complex civil litigation for eleven years. In law
18 school, I served as the head research assistant for then-Dean Kenneth W.
19 Starr for two years and worked full-time for one semester for then Chief
20 Judge Alex Kozinski in the United States Court of Appeals for the Ninth
21 Circuit. I practiced at Sullivan & Cromwell LLP in Los Angeles, California
22 from 2008 to 2010; Reynolds Frizzell LLP in Houston, Texas from 2012 to
23 2015 (named one of the Top 10 litigation boutiques in the nation by
24 Benchmark the last several years); and Call & Jensen, A Professional
25 Corporation from 2015 to 2016 in Newport Beach, California. Between
26 practicing at Sullivan & Cromwell LLP and Reynolds Frizzell LLP, I served
27 as a law clerk to the Honorable Harold R. DeMoss Jr. in the United States
28 Court of Appeals for the Fifth Circuit in Houston, Texas from 2010 to 2012.

1 (iii) Prior to August 2016, I had experience defending class action cases,
2 including consumer-related class actions, among other forms of complex
3 civil litigation. Since founding my firm in August 2016, a large part of my
4 practice has involved prosecuting consumer and employment class action
5 cases. In addition to the Lawsuits, I have worked as plaintiffs' counsel on
6 the following class action cases:

- 7 a. *Hart v. Charter Communications, Inc.*, Case No. 8:17-cv-00556, a
8 consumer class action case pending in the United States District Court
9 for the Central District of California;
- 10 b. *Jimenez v. Charter Communications, Inc.*, Case No. 2:18-cv-06480,
11 a consumer class action case pending in the United States District
12 Court for the Central District of California;
- 13 c. *Ehrman v. Cox Communications, Inc.*, Case No. 2:18-cv-05580, a
14 consumer class action case pending in the United States District Court
15 for the Central District of California, recently remanded to the
16 Superior Court for the County of Orange;
- 17 d. *Bieger v. Houzz Inc.*, Case No. 18CV325624, an employment class
18 action case pending in the California Superior Court for the County
19 of Santa Clara and stayed while claimant pursues class arbitration;
- 20 e. *Palacios v. Electrode Technologies, Inc.*, an employment class action
21 pending in the Superior Court for the County of Orange;
- 22 f. *Higgins v. Holland Motor Homes*, Case No. 37-2017-00037446, an
23 employment class action case that was settled and preliminarily
24 approved as a class action for \$950,000 with the final approval
25 hearing on March 15, 2019 (appointed as sole class counsel);
- 26 g. *Marin v. General Assembly Space, Inc.*, Case No. 2:17-CV-05449-
27 SJO-KSx, an employment class action case that was settled and
28 finally approved in November 2018 for \$1,000,000; and

1 h. *SolarCity Wage and Hour Cases*, JCCP 4945, an employment class
2 action case that settled as a class action for \$1.8 million and was
3 recently approved by the California Superior Court for the County of
4 San Mateo (appointed as one of three class counsel).


5 63. From late 2016 through the present, I devoted a large percentage of my
6 firm's time and resources to this matter, which necessarily took time and resources away
7 from other pending matters. My records show I have worked a total of 1,226.5 hours
8 related to the Lawsuits, from investigation through the date of the renewed motion for
9 preliminary approval. My regular hourly rate in 2019 is \$700. The Lawsuits represented
10 a large percentage of my firm's total workload for nearly two years. I am informed and
11 believe through conversations with other attorneys, as well as reviewing declarations
12 filed by other attorneys and attorneys' fee awards in similar cases, that my rate is lower
13 than the normal hourly rate of partners at other law firms practicing in the field of
14 complex civil litigation and class actions and lower than many partners at Defendants'
15 counsel's firm. I believe my hourly rate to be reasonable, particularly in light of the
16 *SolarCity* and *Marin* settlements where the courts approved a request for attorneys' fees
17 and costs in which my lodestar for hours worked mostly during 2017 was based on a
18 \$650 hourly rate. Based on my total hours and regular rate, my firm's current lodestar is
19 approximately \$858,550, which total does not include work performed by my
20 experienced paralegal and does not include future work that will be necessary to seek
21 final approval of the Settlement and to consummate its terms. Based on this lodestar
22 estimation, an award of the maximum possible attorneys' fees of \$1.5 million would
23 represent less than a 1.75 multiplier, which is very reasonable and in the lower range of
24 common multipliers for similar cases. My firm's expenses to date are also over \$16,000.

25 64. **Appointment of Class Representatives.** Each of the Plaintiffs has
26 reviewed and prepared documents and supported the litigation whenever needed and has
27 placed the interests of Class Members ahead of his or her own. They are common and
28 typical of Class Members and have adequately represented the class and served Class

1 Members' interests. The Court should appoint each of them as a Class Representative for
2 purposes of the Settlement.

3 65. **Approval of the Class Notice.** Email notice with a supporting Settlement
4 website is the best practicable notice because all Class Members designated an email
5 address to create their free Audible and Amazon accounts and Defendants' have the email
6 addresses for every Class Member. The free Audible and Amazon accounts still exist and
7 Class Members still receive emails from Defendants even if some of them have cancelled
8 their paid memberships. The notice will remain in each Class Member's email account
9 and it and the Settlement website will be easily accessible and reviewable at the Class
10 Member's convenience. Stipulation §§ 26-34. Defendants will also train Audible
11 personnel to field Settlement-related questions. *Id.* § 28. The proposed Class Notice is
12 individualized and the best form of notice under the circumstances.

13
14 I declare under penalty of perjury under the laws of the United States of America
15 and the State of California that the foregoing is true and correct. This Declaration was
16 executed on March 7, 2019 at Irvine, California.

17
18 By:  _____
19 Jamin S. Soderstrom
20 *Counsel for Plaintiffs and the Proposed Class*

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CERTIFICATE OF SERVICE

The undersigned certifies that on, March 25, 2019, I caused the foregoing document to be served on all counsel of record by the Court's CM/ECF electronic filing system.

By: /s/ Jamin S. Soderstrom

Jamin S. Soderstrom

EXHIBIT 1

1 JEDEDIAH WAKEFIELD (CSB No. 178058)
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 2 TODD R. GREGORIAN (CSB No. 236096)
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 6 San Francisco, CA 94104
 Telephone: 415.875.2300
 7 Facsimile: 415.281.1350

8 Attorneys for Defendants
 AUDIBLE, INC., AMAZON.COM, INC. and
 9 AMAZON SERVICES LLC

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION

FENWICK & WEST LLP
 ATTORNEYS AT LAW

14 GRANT MCKEE, ERIC WEBER, and
 MICHAEL ROGAWSKI, individually
 15 and on behalf of all other similarly
 situated,

16 Plaintiffs,

17 v.

18 AUDIBLE, INC.,

19 Defendant.

21 ERIC WEBER and BRYAN REES,
 individually and on behalf of all other
 22 similarly situated,

23 Plaintiffs,

24 v.

25 AMAZON.COM, INC. and AMAZON
 SERVICES LLC,

26 Defendants.

27 [This document relates to all cases]
 28

Case Nos.: 2:17-cv-01941 GW (Ex) &
 2:17-cv-08868 GW (Ex)

**STIPULATION OF CLASS
 ACTION SETTLEMENT AND
 RELEASE**

1 1. This Stipulation of Settlement and Release is entered into by plaintiffs
2 Grant McKee, Eric Weber, Seth Beals, Michael Rogawski, Taylor Fisse and Bryan
3 Rees, individually and on behalf of all others similarly situated (collectively
4 “Plaintiffs”), and defendants Audible, Inc., Amazon.com, Inc., and Amazon Services
5 LLC (collectively “Defendants”), subject to the approval of the Court. In addition to
6 the above-captioned cases, this Agreement relates to the following actions: *Seth*
7 *Beals v. Audible, Inc.*, Case No. 1:17-cv-09838-AJN (S.D.N.Y.), and *Taylor Fisse,*
8 *et al. v. Audible, Inc.*, Case No. 5:18-CV-00211-D (E.D.N.C.).

9 DEFINITIONS

10 2. As used in this Settlement Agreement, the following terms will have the
11 following meanings:

12 a. The “Action” or “Lawsuits” refers to the lawsuits resolved by this
13 Settlement: *Grant McKee, Eric Weber, and Michael Rogawski v. Audible, Inc.*, Case
14 No. 2:17-cv-01941 (C.D. Cal., Judge Wu) (including pending appeals from that
15 matter) (the “McKee Lawsuit”); *Eric Weber and Bryan Rees v. Amazon.com, Inc.,*
16 *and Amazon Services LLC*, Case No. 2:17-cv-08868 (C.D. Cal., Judge Wu) (the
17 “Weber Lawsuit”) (which has been consolidated with the McKee Lawsuit for
18 purposes of settlement); *Seth Beals v. Audible, Inc.*, Case No. 1:17-cv-09838
19 (S.D.N.Y., Judge Nathan) (the “Beals Lawsuit”); and *Taylor Fisse and Bryan Rees*
20 *v. Audible, Inc.*, Case No. 5:18-cv-00211 (E.D.N.C., Judge Dever) (the “Fisse
21 Lawsuit”).

22 b. “Agreement” or “Settlement Agreement” or “Settlement” or
23 “Stipulation” means this Stipulation of Settlement and Release.

24 c. “Amazon” refers to defendants Amazon.com, Inc. and Amazon
25 Services LLC.

26 d. “Audible” refers to defendant Audible, Inc.

27 e. “CAFA Notice” means the notice to be sent by Defendants to
28 appropriate federal and state officials pursuant to the requirements of the Class

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1 Action Fairness Act of 2005, 28 U.S.C. § 1715(b) (“CAFA”), within ten (10) days
2 after the Motion for Preliminary Approval is filed with the Court.

3 f. “Claim” means a claim submitted to Audible pursuant to this
4 Agreement.

5 g. “Class Counsel” means Soderstrom Law PC.

6 h. “Class Member” means all Persons within the definition of the
7 Regular Member Class, the Gift Member Class, or the Payment Card Class.

8 i. “Class Notice” means the Notice of Class Action Settlement as
9 approved by the Court in its Preliminary Approval Order. Audible, in consultation
10 with Class Counsel, will prepare the Class Notice, the proposed form of which is
11 attached as Exhibit A.

12 j. “Class Notice Date” means the date that the Class Notice is first
13 disseminated, as certified by Audible.

14 k. “Class Period” for the Regular Class and the Payment Card Class
15 is March 10, 2013 through August 17, 2018. The class period for the Gift Class is
16 August 11, 2011 through August 17, 2018.

17 l. “Court” means the United States District Court for the Central
18 District of California, the Honorable George H. Wu presiding, or any other district
19 judge who presides over Case Nos. 2:17-cv-01941 and 2:17-cv-08868.

20 m. “Defendants” means Audible, Inc., Amazon.com, Inc. and
21 Amazon Services LLC.

22 n. “Defense Counsel” is Fenwick & West LLP.

23 o. “Concluding Date” means the later of: (a) the date of the Order
24 of Final Approval of this Agreement by the Court, if no objections are timely filed;
25 (b) the expiration date of the time for filing notice of any appeal from the Order of
26 Final Approval by the Court if any timely objections are filed but no appeal is filed;
27 or (c) if an appeal is filed, the latest of (i) the date of final affirmance of that Order
28 of Final Approval; (ii) the expiration of the time for a petition for writ of certiorari to

1 review the Order of Final Approval if affirmed and, if the certiorari is granted, the
2 date of final affirmance of the Order of Final Approval following review pursuant to
3 that grant; or (iii) the date of final dismissal of any appeal from the Order of Final
4 Approval or the final dismissal of any proceeding on certiorari to review the Order
5 of Final Approval that has the effect of confirming the Order of Final Approval.

6 p. “Final Approval Hearing” means the hearing to be requested by
7 the Parties and conducted by the Court, following appropriate notice to the Class and
8 an opportunity for Class Members to exclude themselves from the Class and/or
9 submit objections, at which time Plaintiffs will request the Court to finally approve
10 the fairness, reasonableness, and adequacy of the terms and conditions of this
11 Agreement and to enter an Order of Final Approval and Final Judgment. The Final
12 Approval Hearing will be no earlier than ninety (90) days after the CAFA Notice
13 date.

14 q. “Final Approval Motion” or “Motion for Final Approval” means
15 Plaintiffs’ motion seeking final approval of this Agreement.

16 r. “Final Judgment” means the judgment dismissing with prejudice
17 all claims asserted against Defendants in the Action, which will be entered following
18 the Final Approval Hearing.

19 s. “Gift Class Member” means any person in the Gift Member
20 Class.

21 t. “Gift Member Class” means all individual consumers of Audible
22 in the United States who, between August 11, 2011 and August 17, 2018, purchased
23 or redeemed an Audible Gift Membership that resulted in one or more unredeemed
24 Audible gift membership credits being lost.”

25 u. “Notice of Proposed Class Action Settlement” means the Court-
26 approved written notice to Class Members.

27 v. “Notice Plan” means the notice plan set forth and described in
28 paragraphs 31-32 to this Settlement Agreement, which program will be effected

1 following issuance of the Preliminary Approval Order by the Court.

2 w. “Objection Deadline” means the date forty-five (45) days after
3 the Class Notice Date.

4 x. “Opt-Out Deadline” means the date forty-five (45) days after the
5 Class Notice Date.

6 y. “Order of Final Approval” means the order issued by the Court in
7 response to the Final Approval Motion following the Final Approval Hearing,
8 granting final approval of this Agreement.

9 z. “Paid Membership Credit” means a credit received as part of a
10 paid Audible membership but does not include a credit received for free, as part of a
11 gift membership, or as a part of any action taken by Audible or Amazon customer
12 service units in the ordinary course of business to address one or more customer
13 complaints.

14 aa. “Parties” means the Named Plaintiffs and the Defendants.

15 bb. “Payment Card Class” means all individual consumers of Audible
16 in the United States who, between March 10, 2013 and August 17, 2018, incurred
17 charges from Audible to a credit or debit card other than the card originally
18 designated as the primary payment card for the customer’s Audible membership.

19 cc. “Payment Card Class Member” refers to any person in the
20 Payment Card Class.

21 dd. “Plaintiffs” or “Named Plaintiffs” refers to the lead class
22 representatives, Plaintiffs Grant McKee, Seth Beals, Eric Weber, Michael Rogawski,
23 Taylor Fisse and Bryan Rees.

24 ee. “Preliminary Approval Date” means the date of the Preliminary
25 Approval Order.

26 ff. “Preliminary Approval Motion” or “Motion for Preliminary
27 Approval” means the Named Plaintiffs’ motion seeking preliminary approval of this
28 Agreement, which will include a copy of this Settlement Agreement.

1 gg. “Preliminary Approval Order” means the Court’s Order
2 preliminarily approving this Agreement, setting a date for the Final Approval
3 Hearing, and providing for notice of the Settlement Agreement to be sent to the Class
4 Members.

5 hh. “Qualified Payment Card Expense” means an overdraft fee or
6 similar fee for exceeding an available balance incurred by a Payment Card Class
7 Member between March 10, 2013 and August 17, 2018 as a direct result of Audible
8 having charged a backup payment card instead of the Payment Card Class Member’s
9 primary payment card.

10 ii. “Regular Class Member” means any person in the Regular
11 Member Class.

12 jj. “Regular Member Class” means all individual consumers of
13 Audible in the United States who, between March 10, 2013 and August 17, 2018, lost
14 any unredeemed Paid Membership Credits.

15 kk. “Released Claims” refers to all claims released by Releasing
16 Parties as described in paragraphs 41–42 below.

17 ll. “Released Parties” means the Defendants and each and all of their
18 respective past, present, and future parents, subsidiaries, and affiliated entities of any
19 type, and each and all of their respective past, present, and future agents, employees,
20 partners, officers, shareholders, directors, employees, attorneys, insurers,
21 subsidiaries, divisions, successors, and assigns.

22 mm. “Releasing Parties” means Named Plaintiffs and all Class
23 Members who do not validly and timely request to be excluded from the proposed
24 Settlement, and each of their respective successors, assigns, legatees, heirs, and
25 personal representatives.

26 nn. “Settlement Award” means the free audiobook(s) from the
27 Settlement Catalog to which a Class Member will be entitled as is finally determined
28 by Audible pursuant to the terms of this Agreement.

1 oo. “Settlement Catalog” refers to the selection of hundreds of
2 thousands of free audiobooks available to qualifying Class Members. The Settlement
3 Catalog will, at all times, comprise a minimum of 200,000 titles that have the same
4 general list pricing as Audible’s overall library, and will include certain celebrity
5 narrations, exclusive content, award winners, and best sellers.

6 pp. “Settlement Website” refers to the website described in paragraph
7 29 below.

8 **RECITALS**

9 3. This Settlement Agreement relates to the four Lawsuits defined above.
10 The Named Plaintiffs were plaintiffs in the Lawsuits.

11 4. The litigation started when Plaintiff McKee filed a putative class action
12 in the Central District of California on March 10, 2017 against both Audible and
13 Amazon. McKee had signed up for a free trial Audible membership in June 2016,
14 which became a paid membership after 30 days. McKee cancelled his paid
15 membership in December 2016. McKee lost two unredeemed credits automatically
16 when he cancelled before he redeemed those credits. McKee brought claims under
17 certain federal and California statutes and under common law concerning allegedly
18 unlawful advertisements, incomplete disclosures, and expiration of credits. Audible
19 and Amazon both moved to compel arbitration. The Court granted Amazon’s motion
20 and dismissed all claims against Amazon, but denied the motion as to Audible after
21 finding that the particular mobile webpages and user flows that McKee encountered
22 did not create assent to Audible’s Conditions of Use.

23 5. Plaintiff filed an Amended Complaint adding Seth Beals as a named
24 plaintiff. Beals based his claim on the expiration of credits he had received through
25 a gift membership. Audible moved to compel arbitration as to Beals and moved to
26 dismiss McKee’s claims for failure to state a claim and for lack of standing. With
27 respect to the motion to compel arbitration, the Court held that—while the
28 membership sign-up flow that Beals had used failed to create assent—the pages on

1 the Amazon desktop website that Beals used to redeem credits put him on adequate
2 notice of Audible's Conditions of Use. The Court further found that Audible's
3 Conditions of Use incorporated terms relating to gift memberships, which at that time
4 did not include an arbitration provision. Accordingly, the Court compelled certain
5 of Beals' claims to arbitration, and transferred Beals' claims relating to a gift
6 membership to the Southern District of New York pursuant to a venue clause in the
7 gift terms, resulting in the Beals Lawsuit.

8 6. The Court dismissed a number of McKee's claims without prejudice,
9 including for lack of Article III standing. In particular, the Court found that McKee
10 lacked standing to assert claims based on losing credits due to rollover limits or the
11 charging of back-up payment methods.

12 7. Following the transfer of Beals' claims, McKee filed a Second
13 Amended Complaint which added four new plaintiffs: Eric Weber, Michael
14 Rogawski, Taylor Fisse, and Bryan Rees. Weber's claims were based in part on
15 Audible's charging of his employer's card for an Audible membership. Rogawski's
16 claims were based in part on losing credits due to rollover limits. Fisse and Rees
17 were a couple, each of whom had separate Amazon accounts but, for at least one
18 transaction, Rees had used Fisse's Amazon account to complete a purchase using his
19 personal debit card. Based on Rees's purchase made on Fisse's Amazon account,
20 one of the cards on file on Fisse's Amazon account belonged to Rees and was charged
21 twice for Fisse's Audible membership. Fisse additionally lost an unredeemed credit
22 when she cancelled her Audible membership before redeeming that credit. Fisse's
23 claims were based in part on losing a credit upon cancellation, and Rees's claims
24 were based on having his debit card stored on Fisse's Amazon account charged by
25 Audible.

26 8. Audible moved to dismiss as to Fisse and Rees—both North Carolina
27 residents—for lack of personal jurisdiction, and moved to compel arbitration as to
28 Weber and Rogawski. The Court granted the motion to dismiss for lack of personal

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1 jurisdiction, and transferred Fisse and Rees’s claims to United States District Court
2 in the Eastern District of North Carolina, resulting in the Fisse Lawsuit. The Court
3 denied Audible’s motion to compel as to Weber, and Audible has appealed from that
4 ruling. Audible also brought a motion to stay proceedings as to Weber pending that
5 appeal, which the Court tentatively granted. The Court tentatively granted the motion
6 to compel arbitration as to Rogawski, which ruling Rogawski would appeal if it were
7 adopted.

8 9. Plaintiffs Weber and Rees separately filed the Weber Lawsuit against
9 Amazon in the Central District of California based on allegations of unauthorized
10 charges of payment methods that had not been initially designated for payments to
11 Audible. Amazon brought a motion to dismiss for lack of personal jurisdiction as to
12 Rees and a motion to compel arbitration as to Weber. The Court tentatively granted
13 these motions. Rees and Weber would appeal such rulings if they were adopted.

14 10. Audible has also appealed from two orders in the McKee Lawsuit to the
15 Ninth Circuit Court of Appeals, including an order taking corrective action under
16 Federal Rule of Civil Procedure 23(d) related to revisions to Audible’s disclosures.

17 11. At all times, the Parties have negotiated vigorously with each other and
18 at arm’s length. The Parties have investigated the facts relating to the claims alleged
19 in each of the Lawsuits and have made a thorough study of the legal principles
20 applicable to the claims asserted against Defendants, as well as settlements of other
21 class action lawsuits. Based upon Class Counsel’s and Defense Counsel’s
22 investigation, legal evaluation, and taking into account the contested legal and factual
23 issues involved, including the Parties’ assessment of the uncertainties of litigation,
24 the existing and tentative Court orders and related or anticipated appeals, and the
25 relative compensatory and non-compensatory benefits conferred upon the Class
26 Members pursuant to this Agreement, Class Counsel and Defense counsel have
27 concluded that this Settlement on the terms set forth in this Agreement is fair,
28 reasonable, adequate, and in the best interests of the Class Members.

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1 12. The Parties acknowledge that notice to the Class Members of the
2 material terms of this Agreement, as well as Court approval of the Agreement, are
3 required to effectuate the Agreement, and that the terms of the Agreement will not
4 become operative unless and until the Court grants final approval and the Agreement
5 becomes effective on the Concluding Date.

6 13. The Defendants have asserted, or would assert, numerous defenses to
7 the claims alleged in the Lawsuits, and they expressly deny each of the claims and
8 allegations asserted against them and any and all liability arising out of the conduct
9 alleged in the Lawsuits. Defendants assert that all of Plaintiffs' claims are subject to
10 arbitration under Defendants' respective terms of use. Defendants assert that their
11 advertisements and related representations, their disclosures concerning payment
12 card cycling, and practices concerning rollover credits, membership credits, and gift
13 membership credits during the Class Period did not violate any law, and they deny
14 that either the Named Plaintiffs or Class Members suffered any cognizable injury as
15 a result of their conduct. By entering into this Agreement, Defendants do not admit
16 any wrongdoing, and this Agreement, therefore, does not, and may not be deemed to,
17 constitute an admission of liability by any of the Defendants. Rather, Defendants are
18 settling this matter solely to avoid the cost and burden of continued litigation.

19 14. NOW THEREFORE, IT IS HEREBY AGREED, BY AND BETWEEN
20 the undersigned Parties, that this Action will be settled, subject to the approval of the
21 Court, pursuant to the following terms and conditions:

22 **CERTIFICATION OF SETTLEMENT CLASS**

23 15. The Parties agree that this Action will be certified and proceed as a class
24 action solely for purposes of settlement under Fed. R. Civ. P. 23(e), in accordance
25 with the requirements of Fed. R. Civ. P. 23(b)(2) and Fed. R. Civ. P. 23(b)(3) as to
26 all Defendants. The Settlement Class consists of all Class Members, with the Named
27 Plaintiffs as the Settlement Class representatives and Class Counsel as counsel for
28 the Settlement Class.

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1 16. This Agreement and certification of the Settlement Class is for
2 settlement purposes only, and neither the fact of, nor any provision contained in, this
3 Agreement or its Exhibits, nor any action taken hereunder, constitutes, may be
4 construed as, or is admissible in evidence as, any admission of the validity of any
5 claim or defense, the appropriateness of class certification other than for settlement
6 purposes, or any fact alleged by Plaintiffs in this Action or in any other pending or
7 subsequently filed action or proceeding of any wrongdoing, fault, violation of law,
8 or liability of any kind on the part of any of the Defendants, or admission by any of
9 the Defendants of any claim or allegation made in this Action or in any other action
10 or proceeding. This Agreement is, however, admissible in any other action or
11 proceeding to enforce the terms of the Agreement.

12 17. Any certification of a conditional, preliminary, or final Settlement Class
13 pursuant to the terms of this Agreement does not constitute, and may not be construed
14 as, an admission on the part of any of the Defendants that this Action, or any other
15 proposed or certified class action, is appropriate for class treatment pursuant to Fed.
16 R. Civ. P. 23 or any similar state or federal class action rule or statute outside the
17 settlement context. This Agreement is without prejudice to the rights of the
18 Defendants to: (1) oppose final certification in this Action should this Settlement not
19 be approved or implemented for any reason; (2) oppose certification in any other
20 proposed or certified class action; or (3) use the certification of this Settlement Class
21 to oppose certification of any other proposed class action arising out of the issues and
22 claims that are asserted herein.

23 18. In the event this Agreement is terminated pursuant to its own terms, or
24 a Final Approval of the Settlement for any reason does not occur, the Settlement
25 Class defined herein will cease to exist and the Action will proceed as if no
26 Settlement Class or Agreement had ever existed, and Defendants will not have
27 waived any and all rights they might have to oppose class certification, and to defend
28 themselves against Plaintiffs allegations in the Lawsuits.

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SUBMISSION FOR PRELIMINARY APPROVAL

19. Following execution of this Agreement, at a time to be mutually agreed upon by the Parties, or as ordered by the Court, Class Counsel must submit this Agreement to the Court by way of a Motion for Preliminary Approval.

RELIEF TO THE CLASS

INJUNCTIVE RELIEF TO THE CLASS BY DEFENDANTS

20. Audible has made or will make changes to its disclosures as follows, which will remain in effect for a period of at least one year from the Concluding Date:

a. Rollover Disclosures. In marketing copy where Audible mentions the ability to roll over credits, Audible will mention rollover limits. In the welcome email that Audible sends to new members, Audible will disclose rollover limits.

b. Cancellation Disclosures. In the welcome email that Audible sends to new members, Audible will state that unused credits will be lost upon cancellation.

c. Audible will continue to inform users upon sign up that Audible may charge other cards on file. In the welcome email that Audible sends to new members, Audible will provide a link to manage payment options and a link to the Audible Service Conditions of Use (the “COUs”).

d. Audible has improved the locations and clarity of the language requiring members to accept the COUs during sign ups and will ensure that such improvements will also exist on any future sign-up webpages or flows for at least the one-year period from the Concluding Date.

COMPENSATORY RELIEF FROM AUDIBLE

21. As provided below, Audible will (1) offer Payment Card Class Members reimbursement of Qualified Payment Card Expenses, and (2) offer qualifying Class Members audiobooks from the Settlement Catalog. The Settlement Catalog will at

1 all times consist of at least 200,000 titles that have the same general list pricing as
2 Audible’s overall library, and will include certain celebrity narrations, exclusive
3 content, award winners, and best sellers.

4 a. Credit Lost from Rollover Limit. Every Regular Class Member
5 who lost one or more Paid Membership Credit from March 10, 2013 through August
6 17, 2018 due to rollover limits will be eligible to select one audiobook from the
7 Settlement Catalog.

8 b. Credit Lost from Cancellation. Every Regular Class Member
9 who lost one or more Paid Membership Credit from March 10, 2013 through August
10 17, 2018 due to cancellation of the member’s Audible membership will be eligible to
11 select one audiobook from the Settlement Catalog.

12 c. Lost Gift Membership Credit. Every Gift Class Member who
13 redeemed an Audible gift membership and lost one or more credits from that gift
14 membership from August 11, 2011 through August 17, 2018 will be eligible to select
15 one audiobook from the Settlement Catalog.

16 d. Aggregate Limits. Qualifying Class Members may select one
17 audiobook from the Settlement Catalog for each of the categories (a) through (c)
18 above. For example, a Regular Class Member who lost two credits from rollover
19 limits and one credit from cancellation would be eligible to select two audiobooks. If
20 the same Regular Class Member also lost one or more additional credits from a gift
21 membership and qualified as a Gift Class Member, that person would be eligible to
22 select another audiobook, for a total of three audiobooks. In addition to the above,
23 any qualifying Class Member who lost five or more qualifying credits in the
24 aggregate under any of the circumstances identified in categories (a) through (c)
25 above will be eligible to receive one additional audiobook, for a total of up to four
26 audiobooks. For example, a Regular Class Member who lost six credits from rollover
27 limits would be eligible for two audiobooks. As a further example, a Regular Class
28 Member who lost four credits from cancellation and is also a Gift Class Member who

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1 lost one credit due to expiration of a gift membership credit would be eligible for
2 three audiobooks. Audible will inform Class Members of how many audiobooks
3 they are eligible to select from the Settlement Catalog. Audible will cause a reminder
4 email to be sent between 15 and 30 days before the one-year period ends for any
5 Class Members who have remaining audiobook selections.

6 e. Settlement Catalog Offering Period and Composition. Audible
7 will make its Settlement Catalog offering available to Class Members for a period of
8 not less than one year from the date Audible first makes the Settlement Catalog
9 available to Class Members to select their audiobooks. During the one-year offering
10 period, Audible is permitted to remove titles and replace them with substitute titles,
11 provided that the Settlement Catalog will continue to have at least 200,000 titles at
12 all relevant times, the same general list pricing as Audible’s overall catalog, and
13 include celebrity narrations, exclusive content, award winners, and best sellers.

14 f. Reimbursement of Qualified Payment Card Expenses. Audible
15 will reimburse Payment Card Class Members for Qualified Payment Card Expenses.
16 To be eligible for reimbursement, a Payment Card Class Member must submit
17 documentation to Audible sufficient to confirm that the expenses submitted for
18 reimbursement are Qualified Payment Card Expenses.

19 **NOTICE AND DISTRIBUTION OF COMPENSATORY RELIEF**

20 22. The compensatory relief set forth in this Agreement will be made
21 available to eligible and qualifying Class Members after the Concluding Date of this
22 Agreement.

23 a. Within 30 days of the Concluding Date, Audible will cause a
24 Notice of Final Settlement Approval to be sent by email to each Class Member who
25 has not opted out by the Opt-Out Deadline, using current or last known Audible email
26 address information as discussed in Paragraph 32. The Notice of Final Settlement
27 Approval will contain (1) information about eligibility to receive audiobooks from
28 the Settlement Catalog once the Settlement Catalog is opened to class members, and

1 (2) instructions to Payment Card Class Members on how to submit documentation of
2 Qualified Payment Card Expenses in order to receive reimbursement under the terms
3 set forth in paragraph 21 *above*. Payment Card Class Members will be given at least
4 60 days from the date of the email to submit that documentation.

5 b. Within 90 days of the Concluding Date, Audible will cause an
6 email to be sent to all Class Members who are eligible to receive one or more
7 audiobooks from the Settlement Catalog and have not opted out by the Opt-Out
8 Deadline, which will contain one or more links to the Settlement Catalog, where the
9 eligible Class Members can select the audiobook(s) they are eligible to select, under
10 the terms set forth in paragraph 21 *above* with instructions on how to complete their
11 audiobook selections.

12 c. Audible will cause a reminder email regarding audiobook
13 selections to be sent between 15 and 30 days before the one-year period ends to all
14 Class Members who have remaining audiobook selections.

15 **PAYMENTS**

16 23. Within ten (10) business days following the Concluding Date, and
17 subject to the Court's Order of Final Approval, Audible will make payments for:
18 (a) the service awards as set forth herein and approved by the Court for the Named
19 Plaintiffs for their efforts in bringing and prosecuting this matter, and (b) attorneys'
20 fees, costs, and expenses as set forth herein and approved by the Court (and to be
21 distributed by Class Counsel in their sole discretion).

22 24. Service Award to Named Plaintiffs. Subject to the Court's approval, the
23 Named Plaintiffs will each receive a service award not to exceed \$5,000 for their
24 time and efforts in bringing and prosecuting this matter. The Parties acknowledge
25 that approval of payment of service awards will be considered separately by the Court
26 from its consideration of the overall fairness and adequacy of this Settlement
27 Agreement, and it is the Parties' intention that any order with respect to this payment
28 will not affect or delay the approval of the Settlement Agreement. Within ten (10)

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1 business days after the Concluding Date, Audible will pay the Named Plaintiffs the
2 amount approved by the Court up to \$5,000 for each Named Plaintiff. Plaintiffs are
3 solely responsible for any taxes due based on the Incentive Awards.

4 25. Attorneys' Fees, Costs, and Expenses. No later than the date ordered by
5 the Court, Class Counsel will file a Motion for Attorneys' Fees, Costs, and Expenses
6 and seek Court approval of an award totaling no more than \$1.5 million in accordance
7 with Fed. R. Civ. P. 23(h). The Parties' acknowledge that approval of Class
8 Counsel's Motion for Attorneys' Fees, Costs, and Expenses will be considered
9 separately by the Court from its consideration of the overall fairness and adequacy
10 of this Settlement Agreement, and it is the Parties' intention that any order with
11 respect to this separate motion will not affect or delay the approval of the Settlement
12 Agreement, provided, however, that in no event will Defendants be required to pay
13 attorneys' fees, costs, and expenses totaling more than \$1.5 million in the aggregate.
14 Defendants agree not to oppose an award of attorneys' fees, costs, and expenses up
15 to \$1.5 million, inclusive of costs and expenses incurred by Class Counsel and
16 Named Plaintiffs. These amounts will compensate counsel, at Class Counsel's sole
17 discretion, for work already performed in this case and all of the work remaining to
18 be performed in this case, including but not limited to documenting the Settlement,
19 securing Court approval of the Settlement, responding to and settling any objections,
20 ensuring that the Settlement is fairly administered and implemented, and obtaining
21 dismissal of the Action. Within three business days after the Concluding Date,
22 Audible will pay to Class Counsel the amounts approved by the Court for attorneys'
23 fees, costs, and expenses of up to \$1.5 million in the aggregate. The money paid
24 pursuant to paragraphs 21(f) and 23-25 is the only payment for which Defendants are
25 responsible. Class Counsel is solely responsible for any taxes due based on the
26 receipt of fees, costs, and expenses.

27 **NOTICE OF SETTLEMENT**

28 26. Notice of this Settlement will be provided to Class Members as set forth

1 in paragraphs 31 and 32. The Parties will request that the Court determine that the
2 proposed procedures for notice constitute the best practicable notice to Class
3 Members.

4 27. Audible will be responsible for effecting the Notice Plan. As soon as
5 reasonably practicable after the Court issues the Preliminary Approval Order, per the
6 terms of the Notice Plan, Audible will send the Court-approved Class Notice to all
7 Class Members. The Class Notice will provide instructions and information to Class
8 Members concerning the Settlement, their objection rights and opt-out rights, their
9 right to request reimbursement of Qualified Payment Card Expenses on the terms set
10 forth herein at paragraph 21(f) if the Settlement is approved and they do not opt out,
11 and their right to select free audiobook(s) from the Settlement Catalog on the terms
12 set forth herein at paragraph 21 if the Settlement is approved and they do not opt out.

13 28. During the Settlement Catalog Offering Period defined in paragraph
14 21.e., Audible will provide its customer service group with information necessary to
15 respond to questions from Class Members and to assist Class Member's with the
16 selection of free audiobooks from the Settlement Catalog. For at least 60 days
17 following delivery of the Notice of Final Settlement Approval described in paragraph
18 22, Audible will provide its customer service group with information necessary to
19 assist Payment Class Members with the reimbursement of Qualified Payment Card
20 Expenses.

21 29. Effective on the Class Notice Date, Audible will also make active the
22 Settlement Website, which will describe the terms of the Settlement and from which
23 Class Members can download relevant forms such as the Class Notice; the Settlement
24 Agreement; the Court's Preliminary Approval Order; and Class Counsel's Motion
25 for Final Approval and Motion for Attorneys' Fees and Expenses, when they become
26 available. The Settlement Website will remain active until such time as distributions
27 of the compensatory relief set forth in paragraph 21 *above* are completed to eligible
28 Class Members.

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1 30. No later than ten days before the deadline set by the Court for filing the
2 Motion for Final Approval, Audible will provide Class Counsel with a declaration
3 setting forth: (a) the details of execution and performance of the Notice Plan; (b) the
4 total number of Class Members who were sent the Class Notice; and (c) the total
5 number of Class Members who sent timely requests for exclusion or objections to the
6 Settlement, along with the complete copies of all requests for exclusion and
7 objections received, including the postmark dates for each request for exclusion or
8 objection. Class Counsel will file such declaration with the Court.

9 **NOTICE PLAN**

10 31. Audible will send each Class Member the Class Notice by email. The
11 date the Class Notice is sent is the Class Notice Date, which triggers the Opt-Out
12 Deadline and Objection Deadline.

13 32. The email containing the Class Notice will contain a link to the
14 Settlement Website and will be sent to the current or last known Audible email
15 address of every current or former Audible account holder who qualifies as a Class
16 Member as reflected in Defendants’ business records. Audible has maintained and
17 continues to maintain records in the ordinary course of business that reflect the
18 Audible account history of all current and past Audible members in the United States
19 during the relevant time period. This includes information about whether an Audible
20 member account lost any credits due to cancellation, rollover limits, or expiration of
21 a gift membership, and whether a member incurred charges from Audible to a credit
22 or debit card other than the card originally designated as the primary payment card
23 for the customer’s Audible membership.

24 **OPT-OUTS AND OBJECTIONS**

25 33. Requests for Exclusion. All forms of the Class Notice will provide that
26 Class Members who wish to exclude themselves from the Settlement must submit a
27 written statement requesting exclusion from the Settlement (“opt-out”), postmarked
28 no later than the Opt-Out Deadline. Such written request for exclusion must contain

1 the name, address, telephone number, and email address associated with the Audible
2 membership of the Class Member requesting exclusion, and be personally signed by
3 the Class Member who seeks to opt out. No opt-out request may be made on behalf
4 of a group of Class Members. The opt-out request must be sent by mail to KCC LLC,
5 P.O. Box 404099, Louisville, KY 40233-4099 and must be timely postmarked as set
6 forth above. The postmark date of the mailing envelope will be the exclusive means
7 used to determine whether an opt-out has been timely submitted. Any Class Member
8 who requests exclusion from (i.e., who opts out of) the Settlement will not be entitled
9 to any Settlement Award and will not be bound by the Settlement Agreement or have
10 any right to object to, appeal from, or comment thereon. KCC LLC shall keep and
11 maintain all opt-out requests and shall forward them to Defense Counsel no later than
12 five days after the Opt-Out Deadline.

13 34. Objections. The Class Notice will provide that any Class Members who
14 wish to object to the Settlement Agreement must send to the Court a written statement
15 of objection filed or postmarked no later than the Objection Deadline. The written
16 statement of objection must state the basis for the objection and include any
17 supporting papers. Such objection must contain the name, address, telephone
18 number, and email address of the Class Member making the objection and be
19 personally signed by the Class Member or that Class Member's counsel. Any
20 objection and supporting papers must be timely filed with the Court, either by mailing
21 them to the Clerk of the United States District Court for the Central District of
22 California, or by filing them in person at any location of the United States District
23 Court for the Central District of California, except that any objection made by a Class
24 Member represented by counsel must be filed through the Court's Case
25 Management/Electronic Case Filing (CM/ECF) system under the case number for
26 the McKee Case as set forth above. Class Members who fail to make objections in
27 the manner specified above will be deemed to have waived any objections and will
28 be foreclosed from making any objection (whether by appeal or otherwise) to the

1 Settlement Agreement. Anyone wishing to appear at the final approval hearing to
2 object to the Settlement must expressly indicate this in his or her written objections.
3 The filing of an objection will not affect such Class Member's right to obtain the
4 benefits of the Settlement.

5 **ORDER OF FINAL APPROVAL AND FINAL JUDGMENT**

6 35. Final Approval Motion. On or before the deadline set by the Court,
7 Plaintiffs will file a Motion for Final Approval requesting that the Court grant final
8 approval of the Settlement Agreement, with Class Counsel filing a memorandum of
9 points and authorities in support of the motion and addressing any timely submitted
10 objections to the Settlement.

11 36. Matters to be Considered at Final Approval Hearing. At the Final
12 Approval Hearing, the Court will consider and determine whether provisions of this
13 Agreement should be approved; whether the Settlement should be finally approved
14 as fair, reasonable, and adequate; whether any objections to the Settlement should be
15 granted or overruled; whether the service awards referenced in paragraph 24 should
16 be approved; whether Class Counsel's separate Motion for Attorneys' Fees, Costs
17 and Expenses referenced in paragraph 25 should be approved; and whether an Order
18 of Final Approval and Final Judgment should be entered.

19 37. This Agreement is subject to and conditioned upon the issuance by the
20 Court of an Order of Final Approval which grants final approval of this Agreement;
21 approves the Settlement Class pursuant to Fed. R. Civ. P. 23 and its relevant subparts;
22 and:

23 a. Finds that the Class Notice satisfies the requirements of due
24 process and Fed. R. Civ. P. 23(e)(1);

25 b. Finds that the Agreement is fair, reasonable, and adequate as to
26 the Class, and that each Class Member (except those who submit a timely and valid
27 request for exclusion from the Class) is bound by this Agreement;

28 c. Dismisses on the merits and with prejudice all claims asserted in

1 the Action against Defendants; and

2 d. Retains jurisdiction of all matters relating to the interpretation,
3 administration, implementation, effectuation, and enforcement of this Settlement.

4 **TERMINATION OF AGREEMENT**

5 38. The Named Plaintiffs, on behalf of the Class Members, by Class
6 Counsel, and any of the Defendants, by that Defendant’s counsel, each have the right
7 to unilaterally terminate this Agreement by providing written notice of their election
8 to do so to all other Parties hereto within ten business days of: (a) the Court’s refusal
9 to grant Preliminary Approval of this Agreement; (b) the Court’s refusal to grant final
10 approval of this Agreement; or (c) the date upon which the Final Judgment is
11 modified or reversed in any material respect by the Ninth Circuit Court of Appeals
12 or the U.S. Supreme Court. The above notwithstanding, the Parties agree that should
13 the Court modify the Agreement in any respect, or condition preliminary or final
14 approval of the Agreement on modification in any respect, then the Parties will,
15 within the above-indicated period, meet and confer in a good-faith attempt to reach
16 agreement and preserve the Agreement.

17 39. Any Defendant may terminate this agreement if, following the Opt-Out
18 Deadline, Defendant determines that the number of Settlement Class members who
19 have timely and validly submitted requests for exclusion exceeds a number agreed to
20 by the Parties in the Confidential Supplemental Agreement (the “Opt-Out
21 Threshold”). Requests for exclusion from persons or entities who would not
22 otherwise meet the Settlement Class definition do not count toward the Opt-Out
23 Threshold. The Parties agree to take steps to keep the Opt-Out Threshold
24 confidential. In the event that the Court directs that the Confidential Supplemental
25 Agreement be filed under seal prior to the deadline for submitting Requests for
26 Exclusion, no party will have any right to any relief by reason of such disclosure. In
27 the event of a termination of this Settlement pursuant to the Confidential
28 Supplemental Agreement, this Stipulation will become null and void. In order to

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1 terminate this Agreement pursuant to this paragraph, a Defendant must give Class
2 Counsel and counsel of record for each Defendant written notice of such election by
3 email no later than 5:00 p.m. Pacific Standard Time within ten days of the Opt-Out
4 Deadline, followed by mailed notice postmarked the same date. Class Counsel may
5 request copies of each opt out on which the Defendant is relying to exercise its
6 termination right within two days of receipt of such termination notice, and such
7 copies must be mailed within thirty days of such request. If a Defendant elects to
8 terminate this Agreement pursuant to this paragraph, it will file a notice with the
9 Court within five business days of such election.

10 40. If this Settlement Agreement is terminated pursuant to paragraph 38 or
11 39 it will be deemed null and void ab initio. In that event: (i) the Preliminary
12 Approval Order and all of its provisions will be vacated; (ii) the Action will revert to
13 the status that existed before the Settlement Agreement's execution date; and (iii) no
14 term or draft of this Settlement Agreement, or any part or aspect of the Parties'
15 settlement discussions, negotiations, or documentation (including any declarations
16 and briefs filed in support of the motion for preliminary or final approval) will have
17 any effect or be admissible into evidence, for any purpose, in this Action or any other
18 proceeding.

19 **RELEASES**

20 41. Release by Releasing Parties. Upon the Concluding Date, and in
21 consideration of the benefits and other consideration set forth above, the Releasing
22 Parties will be deemed to have, and by operation of the Final Judgment will have,
23 fully, finally, and forever released, relinquished, and discharged each of the Released
24 Parties from any and all claims, known or unknown, alleged or asserted in the
25 Lawsuits or that could have been alleged or asserted related to the advertisement,
26 purchase, receipt, charges for, or loss of an Audible membership, Audible gift
27 membership, Audible credits or other Audible membership benefits, or the use of an
28 alternative payment method in connection with Audible services through August 17,

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1 2018.

2 42. Release by Named Plaintiffs. Upon the Concluding Date, and in
3 consideration of the benefits and other consideration set forth above, the Named
4 Plaintiffs will be deemed to have, and by operation of the Final judgment will have,
5 fully, finally, and forever released, relinquished and discharged each of the Released
6 Parties from any and all claims whatsoever, known or unknown through November
7 28, 2018.

8 43. Waiver of Known and Unknown Claims. The releases in paragraphs 41
9 and 42 of this Agreement extend to claims the Releasing Parties do not know or
10 suspect to exist in their favor, which, if known by them, would have materially
11 affected their decisions to enter into this Agreement. The Parties and the Releasing
12 Parties understand and acknowledge that they are familiar with California Civil Code
13 § 1542, which provides as follows:

14
15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT
16 THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR
17 SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
18 EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR
19 HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
20 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY..

19 Upon the Concluding Date, the Releasing Parties will be deemed to have, and by
20 operation of this Agreement will have, expressly waived and relinquished any rights
21 they may have under California Civil Code § 1542 or any other statute or common
22 law principle with a similar effect as to all releases set forth in paragraphs 41 and 42
23 of this Agreement. In connection with such waiver and relinquishment, the Releasing
24 Parties acknowledge that they are aware that, after executing this Agreement, they or
25 their legal counsel or agents may discover Released Claims or facts in addition to, or
26 different from, those which they now know or believe to exist with respect to the
27 subject matter of this Agreement or the Parties hereto, but that it is Plaintiffs' and
28

1 Releasing Parties' intention hereby to fully, finally, and forever settle and release all
2 of the Released Claims, whether known or unknown, suspected or unsuspected,
3 which now exist, may exist, or heretofore may have existed against the Released
4 Parties.

5 **MISCELLANEOUS**

6 44. Acknowledgment. Each of the Parties acknowledges and represents that
7 such Party: (a) has fully and carefully read this Agreement prior to execution; (b) has
8 been fully apprised by counsel of the legal effect and meaning of the terms of this
9 Agreement; (c) has had the opportunity to undertake whatever investigation or
10 inquiry is necessary or appropriate in connection with this Agreement; (d) has been
11 afforded the opportunity to negotiate any and all terms of this Agreement; and (e) is
12 executing this Agreement voluntarily and free from any undue influence, coercion,
13 or duress of any kind.

14 45. Agreement To Cooperate. The Parties and their respective counsel will
15 cooperate with each other in good faith and use their best efforts to effect the
16 implementation of the Agreement.

17 46. Authority. Each person executing this Settlement Agreement on behalf
18 of any of the Parties represents that such person has the authority to execute this
19 Agreement.

20 47. Binding Upon Successors and Assigns. This Agreement is binding
21 upon, and inure to the benefit of, the successors or assigns of the Released Parties
22 and the Parties, as previously defined.

23 48. Construction. The Parties believe that the terms of this Agreement are
24 a fair, adequate, and reasonable settlement of this Action, and have arrived at this
25 Settlement Agreement after arms-length negotiations, taking into account all relevant
26 factors, present and potential. This Agreement has been drafted jointly by counsel
27 for the Parties. Hence, in any construction or interpretation of this Agreement, it may
28 not be construed against any of the Parties.

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1 49. Counterparts. This Agreement may be executed in one or more
2 counterparts. All executed copies of this Agreement and photocopies thereof
3 (including facsimile, electronically signed, and/or emailed copies of the signature
4 pages), have the same force and effect and are as legally binding and enforceable as
5 the original.

6 50. Entire Agreement. This Agreement constitutes the entire, fully
7 integrated agreement among the Parties relating to the Settlement. All prior or
8 contemporaneous agreements, understandings and statements, whether oral or
9 written, and whether by a party or its counsel, are merged herein. No oral or written
10 representations, warranties or inducements of any kind have been made to any Party
11 concerning this Agreement, other than as set forth herein.

12 51. Limitation of Agreement. This Agreement may not be relied upon for
13 any purpose by, and does not create any rights in, any person(s) or entity other than
14 Named Plaintiffs, the Settlement Class, and the Defendants.

15 52. Governing Law. This Agreement is governed by the laws of the State
16 of California.

17 53. Headings and Captions. The headings and captions in this Agreement
18 are for convenience only and in no way define, limit, or otherwise describe the scope
19 or intent of this Agreement, or any term of this Agreement.

20 54. No Oral Modifications. This Agreement may be amended or modified
21 only by a written instrument signed by counsel for all Parties or their successors-in-
22 interest. No rights hereunder may be waived except in writing. No oral amendment
23 or modification is permitted or effective.

24 55. Publicity. The Parties, Class Counsel, and counsel for any Defendant
25 may not make any public statements about the Parties' settlement except: (a) as
26 reasonably necessary to fulfill the obligation to provide Class Notice; (b) to refer to
27 the fact that the case settled; (c) to discuss the terms of the settlement in papers filed
28 or discussions with the Court in this Action; and (d) to advocate before the Court for

1 preliminary and final approval of the settlement in this Action. Other than the Court-
2 approved Class Notice, or other statements as to which the Parties agree in writing,
3 the Parties and their counsel agree not to make any public statements about the
4 Lawsuits or the Settlement. In response to media inquiries, unless otherwise agreed
5 in writing (including by email), the Parties and their counsel may not make any
6 comment about the Lawsuits or the Settlement other than stating that the case has
7 been settled on mutually agreeable terms.

8 56. No Waiver. The failure of any party to enforce at any time any provision
9 of this Agreement may not be construed to be a waiver of such provision, or any other
10 provision, nor in any way to affect the validity of this Agreement or any part hereof,
11 or the right of any party thereafter to enforce that provision or each and every
12 provision. No waiver of any breach of this Agreement constitutes or may be deemed
13 a waiver of any other breach.

14 57. Notices. Unless otherwise agreed in writing, all notices to the Parties or
15 counsel required by the Agreement must be made in writing and communicated by
16 first class mail and email to the following:

17 If to the Named Plaintiffs or Class Counsel:

18 Jamin Soderstrom
19 SODERSTROM LAW PC
20 3 Park Plaza, Suite 100
21 Irvine, CA 92614
22 Telephone: (949) 667-4700
23 Facsimile: (949) 424-8091
 jamin@soderstromlawfirm.com

24 If to Defendants or its counsel:

25 Jedediah Wakefield
26 FENWICK & WEST LLP
27 555 California Street, 12th Floor
28 San Francisco, CA 94104
 Telephone: (415) 875.2300
 Facsimile: (415) 281.1350

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jwakefield@fenwick.com

Any party may change the address to which requests, demands, claims, or other communications hereunder are to be delivered by giving the other Parties notice in the manner herein set forth.

58. Time Periods. The time periods and/or dates described in this Agreement with respect to the giving of Notice and the hearings are subject to approval and change by the Court with the approval of the Parties, or by agreement of the Parties.

59. Exclusive Remedy and Jurisdiction of the Court. This Agreement is the sole and exclusive remedy for any and all Released Claims. Upon entry of the Order of Final Approval and Final Judgment, each Class Member may not initiate, assert, or prosecute any Released Claims against any Released Party. If any Class Member who does not opt-out in accordance with the procedures set forth in this Settlement Agreement attempts to prosecute an action asserting a Released Claim, counsel for any affected Party must forward this Agreement and the Order of Final Approval and Final Judgment to such Class Member and advise the Class Member of the releases provided under this Settlement Agreement.

60. This Court retains exclusive and continuing jurisdiction over the Consolidated Action and all Parties and Class members to interpret and enforce this Settlement Agreement.

61. No provision in this Agreement precludes any action to enforce the terms of this Agreement.

62. The Parties agree to treat this agreement as confidential unless and until the Settlement is preliminarily approved by the Court, at which point it will become public. The Parties agree to cooperate to file this Agreement and the Motion for Preliminary Approval under seal, and take all efforts to maintain its confidentiality unless and until the Settlement is preliminarily approved by the Court. Prior to

1 preliminary approval, a party may only share this Agreement with third parties with
2 the consent of counsel for all other Parties, and only so long as any third parties who
3 are to receive this agreement also agree to maintain its confidentiality.

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READ AND AGREED TO:

PLAINTIFFS:

2/27/2019

Dated: _____, 2019

Dated: _____, 2019

Dated: _____, 2019

Dated: _____, 2019

Dated: _____, 2019


Dated: _____, 2019

DEFENDANTS:

Dated: _____, 2019

Dated: _____, 2019

Dated: _____, 2019

DocuSigned by:

50503073E094433...

Grant McKee, Plaintiff

Seth Beals, Plaintiff

Eric Weber, Plaintiff

Michael Rogawski, Plaintiff

Taylor Fisse, Plaintiff

Bryan Rees, Plaintiff

Audible, Inc., Defendant

By: _____

Its: _____

Amazon.com, Inc., Defendant

By: _____

Its: _____

Amazon Services LLC, Defendant

By: _____

Its: _____

1 **READ AND AGREED TO:**

2

3 **PLAINTIFFS:**

4 Dated: _____, 2019

5

2/28/2019

6 Dated: _____, 2019

7

8 Dated: _____, 2019

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10 Dated: _____, 2019

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12 Dated: _____, 2019

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14 Dated: _____, 2019

15

16 **DEFENDANTS:**

17 Dated: _____, 2019

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21 Dated: _____, 2019

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25 Dated: _____, 2019

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27

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Grant McKee, Plaintiff

DocuSigned by:
Seth Beals
D2BB4226B0224AE

Seth Beals, Plaintiff

Eric Weber, Plaintiff

Michael Rogawski, Plaintiff

Taylor Fisse, Plaintiff

Bryan Rees, Plaintiff

Audible, Inc., Defendant

By: _____

Its: _____

Amazon.com, Inc., Defendant

By: _____

Its: _____

Amazon Services LLC, Defendant

By: _____

Its: _____

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1 **READ AND AGREED TO:**

2

3 **PLAINTIFFS:**

4 Dated: _____, 2019

Grant McKee, Plaintiff

5

6 Dated: _____, 2019

Seth Beals, Plaintiff

7

2/27/2019

8 Dated: _____, 2019

DocuSigned by:
Eric Weber

Eric Weber, Plaintiff

9

10 Dated: _____, 2019

Michael Rogawski, Plaintiff

11

12 Dated: _____, 2019

Taylor Fisse, Plaintiff

13

14 Dated: _____, 2019

Bryan Rees, Plaintiff

15

16 **DEFENDANTS:**

17 Dated: _____, 2019

Audible, Inc., Defendant

18

19 By: _____

20 Its: _____

21 Dated: _____, 2019

Amazon.com, Inc., Defendant

22

23 By: _____

24 Its: _____

25 Dated: _____, 2019

Amazon Services LLC, Defendant

26

27 By: _____

28 Its: _____

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1 **READ AND AGREED TO:**

2

3 **PLAINTIFFS:**

4 Dated: _____, 2019

Grant McKee, Plaintiff

5

6 Dated: _____, 2019

Seth Beals, Plaintiff

7

8 Dated: _____, 2019

Eric Weber, Plaintiff

9

2/27/2019

10 Dated: _____, 2019

DocuSigned by:
Michael A. Rogawski

Michael Rogawski, Plaintiff

11

12 Dated: _____, 2019

Taylor Fisse, Plaintiff

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14 Dated: _____, 2019

Bryan Rees, Plaintiff

15

16 **DEFENDANTS:**

17 Dated: _____, 2019

Audible, Inc., Defendant

18

19 By: _____

20 Its: _____

21 Dated: _____, 2019

Amazon.com, Inc., Defendant

22

23 By: _____

24 Its: _____

25 Dated: _____, 2019

Amazon Services LLC, Defendant

26

27 By: _____

28 Its: _____

FENWICK & WEST LLP
ATTORNEYS AT LAW

1 **READ AND AGREED TO:**

2

3 **PLAINTIFFS:**

4 Dated: _____, 2019

Grant McKee, Plaintiff

5

6 Dated: _____, 2019

Seth Beals, Plaintiff

7

8 Dated: _____, 2019

Eric Weber, Plaintiff

9

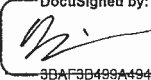
10 Dated: _____, 2019

Michael Rogawski, Plaintiff

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2/27/2019

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Taylor Fisse, Plaintiff

13

14 Dated: _____, 2019

Bryan Rees, Plaintiff

15

16 **DEFENDANTS:**

17 Dated: _____, 2019

Audible, Inc., Defendant

18

19 By: _____

20 Its: _____

21 Dated: _____, 2019

Amazon.com, Inc., Defendant

22

23 By: _____

24 Its: _____

25 Dated: _____, 2019

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26

27 By: _____

28 Its: _____

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27 By: _____

28 Its: _____

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APPROVED AS TO FORM AND CONTENT:

Dated: February 28, 2019

SODERSTROM LAW PC

By: 
Jarhin Soderstrom
Attorneys for Plaintiffs

Dated: February 28, 2019

FENWICK & WEST LLP

By: 
Jeddiah Wakefield
Attorneys for Defendants

FENWICK & WEST LLP
ATTORNEYS AT LAW

EXHIBIT A: Draft Settlement Notice

If you have used Audible services, your rights could be affected by a class action settlement. **Please read this notice carefully. Your legal rights could be affected depending on whether or not you act in response to this notice.** This is not a solicitation from a lawyer.

This notice relates to a class action settlement preliminarily approved by the Court in the following lawsuits: *Grant McKee et al. v. Audible, Inc.*, Case No. 2:17-cv-01941 (C.D. Cal.), and *Eric Weber and Bryan Rees v. Amazon.com, Inc., and Amazon Services LLC*, Case No. 2:17-cv-08868 (C.D. Cal.). These two lawsuits, as well as two similar lawsuits pending in other courts, challenge the sufficiency of information provided to Audible customers about how membership credits work, claiming that customers may not understand that unredeemed credits are lost upon cancellation of a membership plan or upon reaching rollover limits and, for gift memberships, that credits expire following the end of the gift membership term. The lawsuits also challenge the adequacy of information provided to Audible customers related to Audible's practice of charging other credit or debit cards on file with a customer's Amazon account if a customer's primary card is declined. Audible and its parent company, Amazon, dispute the claims by the Plaintiffs in each of the lawsuits and believe that their business practices, and the information provided about them, are clear and understandable to customers and comply with all applicable laws.

Why is there a settlement? No court has decided in favor of either side in any of the lawsuits. Plaintiffs and their lawyers believe that the claims they have made against Audible and Amazon have merit, but that the proposed settlement is fair and in the best interest of the class because it provides appropriate recovery for class members now, while avoiding the risk, expense, uncertainty, and delay of continuing to pursue the lawsuits. In reaching this conclusion, Plaintiffs and their lawyers considered the possibility that one or more of the Plaintiffs and many of the class members might be required to bring their claims individually in arbitration, and the possibility that the lawsuits might ultimately result in no recovery whatsoever. Audible and Amazon do not believe that the claims against them have merit. They are settling because they believe that it is in the best interests of both the Audible business and Audible's customers to enter into the proposed settlement.

Who is in the settlement class? In the preliminary approval of the settlement, the Court has decided that everyone in the United States who fits one or more of the following descriptions is a class member for purposes of the proposed settlement, defined as follows:

- "Regular Class Member" means any individual consumer of Audible in the United States who, between March 10, 2013 and August 17, 2018, lost any unredeemed Paid Membership Credits based on rollover or cancellation. A "Paid Membership Credit" means any credit received as part of a paid Audible membership but does not include a credit received for free, as part of a gift membership, or as a part of any action taken by Audible or Amazon customer service units in the ordinary course of business to address one or more customer complaints.
- "Gift Class Member" means any individual consumer of Audible in the United States who, between August 11, 2011 and August 17, 2018, purchased or redeemed an Audible Gift Membership that resulted in unredeemed Audible gift membership credits being lost.

- “Payment Card Class Member” means any individual consumer of Audible in the United States who, between March 10, 2013 and August 17, 2018, incurred charges from Audible to a credit or debit card other than the card originally designated as the primary payment card for the customer’s Audible membership.

The settlement will result in additional disclosures from Audible regarding how credits work and its payment processes. In addition, Regular Class Members and Gift Class Members (as defined above) are eligible to receive one or more audiobooks from a settlement catalog of audiobook selections, according to the following:

- Credit(s) Lost from Rollover Limit. Every Regular Class Member who lost one or more Paid Membership Credit(s) from March 10, 2013 through August 17, 2018 due to rollover limits will be eligible to select one audiobook from the settlement catalog.
- Credit(s) Lost from Cancellation. Every Regular Class Member who lost one or more Paid Membership Credit(s) from March 10, 2013 through August 17, 2018 due to cancellation of the member’s Audible membership will be eligible to select one audiobook from the settlement catalog.
- Lost Gift Membership Credit(s). Every Gift Class Member who lost one or more Audible gift membership credit(s) from August 11, 2011 through August 17, 2018 will be eligible to select one audiobook from the settlement catalog.

In addition, any class member who lost five or more credits in the aggregate under any of the circumstances identified above will be eligible to select one additional audiobook, for a total of up to four audiobooks. The settlement catalog will have at least 200,000 audiobook titles, will consist of titles that have the same general list pricing as Audible’s overall library, and will include certain celebrity narrations, exclusive content, award winners, and best sellers.

Additionally, Payment Card Class Members may be eligible to receive reimbursement for any Qualified Payment Card Expense that they submit to Audible along with proper documentation within 60 days of the notice of final approval of settlement. A “Qualified Payment Card Expense” means an overdraft fee or similar fee for exceeding an available balance incurred by a Payment Card Class Member between March 10, 2013 and August 17, 2018 as a direct result of Audible having charged a backup payment card instead of the Payment Card Class Member’s primary payment card. To be eligible for reimbursement, a Payment Card Class Member must submit documentation sufficient to confirm that the expenses submitted for reimbursement are Qualified Payment Card Expenses. If you are a Payment Card Class Member, you will receive an email from Audible after final approval informing you of how to request reimbursement for documented Qualified Payment Card Expenses.

Compensation for class representatives and class counsel: As an award for the work performed on your behalf by each of the class representatives in these two lawsuits and two related lawsuits, Defendants have agreed to pay each Class Representative \$5,000, with the final approval of that payment to be decided by the court. Jamin Soderstrom of Soderstrom Law PC has been approved by the court as class counsel for the settlement class. You will not be charged for this lawyer. If you want to be represented by your own lawyer, you may hire one at your own expense, but it is

not necessary. Class counsel will ask the court for payment of attorneys’ fees and the expenses that they have incurred in this Lawsuit, of up to \$1,500,000.00. Defendants have agreed to pay up to this amount, which will not reduce the benefits made available to the Class under the Settlement. The court, however, may award class counsel less than this amount.

Additional information and documents related to the Settlement and the several lawsuits that are being settled are available at [URL TO BE DETERMINED].

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

The purpose of the notice is to inform you of the proposed settlement agreement and, if you are a class member (as defined above), of your options. Each option has consequences, which you should consider carefully before making your decision. Your options as a class member are summarized below:

DO NOTHING



If you do nothing in response to this Notice, you will give up your right to object to the settlement or be excluded from the settlement if it is approved. However, if the settlement is approved, you will automatically become a class member. If you are a Regular Class Member or Gift Class Member, you will receive an email from Audible within 90 days of approval indicating whether you are eligible to select audiobooks from the settlement catalogue as part of the settlement, and if so, the number of audiobooks you are eligible to select and providing instructions on how to select them and Audible will also send you an email between 15 and 30 days before the settlement catalogue closes (which will be at least one year after you receive the original email) to remind you about your selection rights. If you are a Payment Card Class Member, you will receive an email from Audible within 90 days of approval informing you of how to request reimbursement for documented Qualified Payment Card Expenses.

OBJECT

You may write to the Court about why you object to (i.e., don’t like) the settlement and think it should not be approved. Filing an objection does not exclude you from the settlement. Even if you object, you will still become a class member if the settlement is approved. To object to the settlement, you must send a letter saying that you object to the Audible settlement in the McKee class action. Be sure to include your name, address, telephone number, signature, and the reasons you object to the settlement. Any objection and supporting papers must be filed with the Court no later than [DEADLINE TBD], either by (1) mailing them to the Clerk of the United States District Court for the Central District of California and sending a copy by fax, U.S. mail, or email to Class Counsel and Defense Counsel at the addresses listed below; or (2) by

Deadline:

[REDACTED]

	<p>filing them in person at any location of the United States District Court for the Central District of California, except that if you are represented by counsel you must file your objection through the Court’s Case Management/Electronic Case Filing (CM/ECF) system under the case number for the McKee Case as set forth above. If you fail to object in the manner specified above you will be deemed to have waived any objections and will be prohibited from later making any objection (whether by appeal or otherwise) to the settlement agreement.</p>	
<p>EXCLUDE YOURSELF</p>	<p>You may exclude yourself from the settlement, if it is approved, by submitting a written request for exclusion to KCC LLC, P.O. Box 404099, Louisville, KY 40233-4099. Your request for exclusion must include your name; your current address; the email address associated with the Amazon.com account you used to sign up for your Audible membership; a statement indicating that you would like to be excluded from the settlement in <i>McKee v. Audible, Inc.</i>, Case No. 2:17-cv-01941 (C.D. Cal.); and your signature. If you exclude yourself from the settlement and it is approved, you will not receive any audiobooks under the settlement and you will retain your right to file your own claims in arbitration or court against Audible or Amazon.</p>	<p>Deadline: </p>
<p>GO TO THE “FAIRNESS HEARING”</p>	<p>The Court will hold a “Fairness Hearing” to consider the settlement, the request for attorneys’ fees and costs by the lawyers who brought the lawsuits, and the Plaintiffs’ request for incentive awards for bringing the Litigation.</p> <p>You may, but are not required to, speak at the Fairness Hearing about any objection you filed to the settlement. If you intend to speak at the Fairness Hearing, you must also submit a “Notice of Intention to Appear” to the Court and the parties’ attorneys, indicating your intent to do so. To do so, you must send a letter saying that it is your “Notice of Intention to Appear in the McKee v. Audible, Inc. Class Action Settlement Fairness Hearing.” Be sure to include your name, address, telephone number, signature, and the reasons you object to the settlement. Mail the notice to the Court, and send a copy by fax, U.S. mail, or email to Class Counsel and Defense Counsel at the addresses listed below.</p>	<p>Hearing Date: </p>

COURT
 Clerk of the Court

United States Courthouse for the Central District of California
350 West First Street
Los Angeles, CA 90012

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