

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

SONY BMG CD
TECHNOLOGIES LITIGATION

Case No. 1:05-cv-09575-NRB

**MOTION AND MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' APPLICATION FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

GIRARD GIBBS

& De BARTOLOMEO LLP

Daniel C. Girard (Pro Hac Vice)
Jonathan K. Levine (JL-8390)
Elizabeth C. Pritzker (Pro Hac Vice)
Aaron M. Sheanin (Pro Hac Vice)
601 California Street, Suite 1400
San Francisco, California 94108
Telephone: (415) 981-4800

KAMBER & ASSOCIATES LLC

Scott A. Kamber (SK-5794)
19 Fulton Street, Suite 400
New York, NY 10038
Telephone: (212) 571-2000

Plaintiffs' Co-Lead Counsel

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND OF THE LITIGATION..... 3

 A. The Nature Of SONY BMG’s Content Protection Software..... 3

 B. XCP CDs And Software Expose Computers To Security Vulnerabilities 4

 C. MediaMax CD Software Installs Without Consent And Exposes
 Computers To Security Vulnerabilities 6

 D. The Class Action Litigation 6

III. THE PROPOSED SETTLEMENT..... 8

 A. The Settlement Class..... 8

 B. The Settlement Consideration..... 9

 1. XCP CD Exchange Program..... 10

 2. MediaMax Compensation..... 11

 3. XCP And MediaMax Software Updates And Uninstallers..... 11

 4. SONY BMG Will Not Collect Personal Data..... 13

 5. Defendants Will Waive Rights Under XCP And MediaMax EULAs 13

 6. The Settlement Contains “Most Favored Nations” Protection 14

 7. Injunctive Relief Required By The Settlement Will Effectuate Changes
 In Defendants’ Use Of Content Protection Software..... 14

 C. Release Of Claims..... 15

 D. Defendants’ Limited Right To Withdraw From Settlement 17

IV. PRELIMINARY SETTLEMENT APPROVAL 18

 A. The Role Of The Court 18

 B. The Proposed Settlement Class May Be Certified Under *Amchem* 19

| | | |
|------|---|----|
| 1. | Plaintiffs Have Met All Of The Prerequisites Under Rule 23(a)..... | 20 |
| 2. | The Court Should Certify The Settlement Class Under Rule 23(b)(3)..... | 21 |
| 3. | The Court Should Appoint Plaintiffs’ Co-Lead Counsel As Class Counsel | 22 |
| C. | Criteria To Be Considered In Deciding Preliminary Approval | 23 |
| 1. | There Are No Grounds To Doubt The Fairness Of The Settlement, Which Is The Product Of Extensive, Arm’s-Length Negotiations | 26 |
| 2. | The Settlement Contains No Obvious Deficiencies..... | 27 |
| 3. | The Settlement Falls Within The Range Of Possible Approval | 29 |
| V. | THE PROPOSED PLAN OF CLASS NOTICE..... | 31 |
| VII. | CONCLUSION..... | 35 |

TO THE HONORABLE DISTRICT COURT:

Under Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Edwin Bonner, Ori Edelstein, Joseph Halpin, Robert Hull, Andrew Klewan, John Maletta, James Michaelson, Jeffrey Potter, Tom Ricciuti, Yvonne Ricciuti, Dora Rivas, Mary Schumacher and James Springer (“Plaintiffs”) apply to this Court for preliminary approval of a proposed settlement in this consumer class action, as set forth below.

I. INTRODUCTION

Plaintiffs submit this application for preliminary approval of a proposed settlement in this consumer class action brought on behalf of people who purchased, received, possessed or used a compact disc (“CD”) containing SONY BMG Music Entertainment’s content protection software known as Extended Copy Protection (“XCP”) or MediaMax. Plaintiffs assert claims against Defendants SONY BMG Music Entertainment (“SONY BMG”), First 4 Internet, Ltd. (“F4I”), SunnComm International Inc. (“SunnComm”). The settlement will resolve all claims before this Court and all claims in related actions nationwide.

Under the terms of the settlement, Defendants agree to:

- stop manufacturing SONY BMG CDs with XCP software (“XCP CDs”) and SONY BMG CDs with MediaMax software (“MediaMax CDs”);
- immediately recall all XCP CDs;
- provide software to update and uninstall XCP and MediaMax content protection software from consumers’ computers;
- ensure that ongoing fixes to all SONY BMG content protection software are readily available to consumers;
- implement consumer-oriented changes in operating practices with respect to all CDs with content protection software that SONY BMG manufactures in the next two years;

- waive specified provisions currently contained in XCP and MediaMax software End-User Licensing Agreements (“EULAs”);
- refrain from collecting personal information about users of XCP CDs or MediaMax CDs without their affirmative consent; and
- provide additional settlement benefits to Settlement Class Members including cash payments, “clean” replacement CDs without content protection software, and free music downloads.

The proposed compromise is set forth in a Settlement Agreement, dated December 28, 2005 (“Settlement Agreement”), which accompanies this submission.

Plaintiffs ask this Court to enter the Hearing Order, submitted herewith: (1) granting preliminary approval of the proposed settlement; (2) certifying the proposed plaintiff class pursuant to Rules 23(b)(2) and (b)(3) for purposes of the settlement; (3) directing that the class be given notice of the pendency of this action and the settlement in the form and manner proposed by the parties; and (4) scheduling a hearing at which the Court will consider the parties’ motion for final approval of the settlement and entry of their proposed final judgment, and Plaintiffs’ counsel’s application for an award of attorneys’ fees and reimbursement of costs.

As identified in the proposed Order, Plaintiffs recommend that the Court order that the following actions occur on the dates specified in the proposed Order: (1) notice be provided to Settlement Class Members by electronic mail (“e-mail”), Internet postings, Internet “banner” advertising, popular and commonly-employed Internet search engines, by print publication in several identified newspapers of general circulation, and by issuance of a joint press release by SONY BMG and Plaintiffs’ Class Counsel; (2) requests for exclusion from the settlement be postmarked on or before the date specified in the proposed Order; (3) objections to the settlement or the award of attorneys’ fees and reimbursement of expenses in favor of Plaintiffs’ counsel be

served on counsel and the Court on or before February 1, 2006; (4) a Fairness Hearing be held at the Court's convenience, and on a date specified in the proposed Order; and (5) and properly executed Proofs of Claim be submitted to the claims administrator, via e-mail or U.S. mail postmarked on or before the specified date agreed upon by the Parties and identified in the proposed Order and notice.

II. BACKGROUND OF THE LITIGATION

A. The Nature Of SONY BMG's Content Protection Software

In August 2003, SONY BMG, the second largest owner and distributor of record labels, began including MediaMax, a content protection software program from SunnComm, on some of its CDs. In January 2005, SONY BMG introduced XCP, a second copy protection software program designed by F4I.

XCP and MediaMax limit the number of copies of a CD a user can make. XCP and MediaMax also make audio files and digital content on the CDs compatible only with Sony or Microsoft products and software. The CDs can only be played and copied on a computer using XCP or MediaMax. The software does not allow audio file compression in the dominant non-proprietary MP3 format or other file formats like Apple Computer, Inc.'s "*iTunes*."

SONY BMG impedes removal of XCP and MediaMax from a user's computer by (1) preventing the software from being listed in the commonly accessed "Add/Remove Programs" utility in the Microsoft Windows operating system, and (2) failing to provide an uninstall program for the software. The only way to uninstall XCP or MediaMax is for the user to visit one of Defendants' websites, fill out a form that requires a user to disclose his or her e-mail address, then wait for an e-mail, download additional software, and install a program that removes the files. Any attempt to uninstall the software manually will damage the user's computer.

XCP and MediaMax also raise potential privacy concerns, because the software can and does exchange information between the users' computer and SONY BMG's computer servers. The information sent to SONY BMG includes the user's Internet Protocol ("IP") Address. The software does not inform the user that his or her computer is providing information to SONY BMG's servers.

XCP and MediaMax are subject to highly restrictive and misleading EULAs. When a user inserts a XCP CD or a MediaMax CD into a computer, a EULA appears on the computer screen and requires that the user to accept its terms to access the audio files or digital content on the CD. If a user accepts the EULA for one CD, the EULA is not displayed when subsequent discs containing the same software are loaded onto the computer. According to Plaintiffs, the EULAs are contrary to federal and state law in that they fail to or inadequately disclose certain material facts about XCP and MediaMax software, including the following: (1) the programs cannot be readily removed by the computer user; (2) the programs collect information about the computer user and his or her computer; (3) the programs exchange information between the user's computer and SONY BMG's computer servers; (4) the programs are only compatible with Sony's and Microsoft's digital music file formats (5) the programs are not compatible with *iTunes* or MP3 audio file formats; and (6) the programs manage all XCP CDs or MediaMax CDs subsequently inserted in the computer. SONY BMG also inadequately discloses material facts about the nature and function of XCP and MediaMax software on the jewel cases of SONY BMG CDs containing such software.

B. XCP CDs And Software Expose Computers To Security Vulnerabilities

In October 2005, Mark Russinovich, a computer security research specialist, discovered that he had a hidden software program running on his system. Upon further investigation, Mr. Russinovich traced the installation of the hidden software program to an XCP CD he had

purchased and used on his computer. Mr. Russinovich discovered that XCP employs a variety of software techniques typically used by “spyware” and other virus software programs to conceal its existence from the user. Most notably, XCP installs a “rootkit” on the user’s computer. The XCP rootkit hides its existence by integrating itself deep in the architecture of a computer’s operating system, thereby forcing the computer’s operating system to conceal any file, directory or process that begins with the computer code, “\$sys\$.” XCP Software has no mechanism to ensure that other software programs cannot employ the “\$sys\$” cloaking mechanism, however. In other words, any application can make itself virtually invisible to the user by renaming its files so that they begin with “\$sys\$.”

Consequently, the XCP rootkit makes the user’s computer more susceptible to unwanted intrusion from third parties, as it effectively disables any firewall, anti-spyware and anti-malware protection programs previous installed on the computer. Indeed, in November 2005, Symantec Corporation, a leading maker of anti-virus software, public announced the discovery of the first virus to use SONY BMG’s XCP CD software cloaking mechanism.

In response to the criticism sparked by Mr. Russinovich’s findings, SONY BMG released a software utility to remove XCP software from a user’s computer, and a program intended to allow XCP software to be visible on the user’s computer. Almost immediately, Mr. Russinovich found that these SONY BMG software programs, themselves, created additional security vulnerabilities. As part of settlement, SONY BMG has agreed to and has stopped distributing these programs in the United States.

On November 18, 2005, after class action litigation was commenced in this Court, SONY BMG issued a statement acknowledging that its XCP software created security vulnerabilities for computer users. Thereafter, SONY BMG announced that it would institute a program to remove all SONY BMG XCP CDs from retailers’ shelves and inventory, and begin an XCP CD “recall”

effort, to allow consumers to exchange their SONY BMG XCP CDs for “clean” CDs containing the same music, but which were free of XCP software.

C. MediaMax CD Software Installs Without Consent And Exposes Computers To Security Vulnerabilities

SONY BMG’s MediaMax CDs and software also contain characteristics not fully disclosed to consumers at the time of purchase.

Among other things, MediaMax software contained on SONY BMG CDs installs on the user’s computer, even if the user does not consent to installation.

Additionally, when a MediaMax CD is inserted into a computer, a EULA is displayed, which the user may accept or decline. Before the EULA even appears, however, MediaMax automatically installs approximately one dozen files on the computer’s hard disk. These files remain installed and active on the user’s computer, even if the user declines the MediaMax EULA. This installation-without-consent feature is present in MediaMax 3.0 and MediaMax 5.0, the two versions of the software contained in SONY BMG CDs.

Furthermore, the most recent version of the SONY BMG contention protection software, MediaMax 5.0, renders a user’s computer more vulnerable to security breaches by third parties, by causing a file folder to be installed on a user’s computer, which allows third parties to gain enhanced permissions over the user’s computer running the Windows operating system. While SONY BMG recently issued a software “patch” and uninstall program in an effort to remedy the discovered security vulnerabilities, the day after SONY BMG issued the program, a computer specialist found that the MediaMax 5.0 patch and uninstall program, itself, posed an additional security vulnerability for computer users.

D. The Class Action Litigation

Beginning November 14, 2005, Plaintiffs filed several class action cases against Defendants in this Court and other state and federal courts around the country. On December 1,

2005, the Court entered Stipulation And Case Management Order Number 1 (“CMO No. 1”), consolidating the actions pending in this Court and appointing Plaintiffs’ Co-Lead Counsel and Plaintiffs’ Executive Committee.¹

In addition, several state and federal government authorities are presently engaged in inquiries and investigations into Defendants’ conduct involving XCP and MediaMax.²

On December 28, 2005, Plaintiffs filed a Consolidated Amended Class Action Complaint (the “Complaint”) on behalf of all natural persons or entities in the United States who purchased, received, came into possession of, or otherwise used one or more MediaMax CDs and/or XCP CDs. The Complaint alleges that Defendants engaged in unlawful, unfair and deceptive conduct

¹ The following actions are presently subject to this Court’s consolidation order: *Maletta v. Sony BMG Music Entm’t*, No. 05 CV 10637 (UA) (S.D.N.Y. Dec. 19, 2005); *Ricciuti v. Sony BMG Music Entm’t*, No. 05 CV 10190 (BSJ) (S.D.N.Y. Dec. 5, 2005); *Klewan v. Arista Holdings Inc. d/b/a Sony BMG Music Entm’t*, No. 05 CV 9609, consolidated as No. 05 CV 9575 (NRB) (S.D.N.Y. Nov. 14, 2005); *Michaelson v. Sony BMG Music, Inc.*, No. 05 CV 9575 (NRB) (S.D.N.Y. Nov. 14, 2005); *Potter v. Sony BMG Music Entm’t*, No. 05 CV 9607 (NRB) (S.D.N.Y. Nov. 14, 2005); and *Rivas v. Sony BMG Music Entm’t*, No. 05 CV 9598 (NRB) (S.D.N.Y. Nov. 14, 2005).

Additionally, other complaints raising substantially identical claims have been filed in jurisdictions other than the Southern District of New York (collectively, the “Non-S.D.N.Y. Actions”): *Black v. Sony BMG Music Entm’t*, No. CIV-05-1315 WDS/RLP (D. N.M. Dec. 19, 2005); *Klemm v. Sony BMG Music Entm’t*, No. C 05 5111 BZ (N.D. Cal. Dec. 9, 2005); *Melcon v. Sony BMG Music Entm’t*, No. C 05 5084 MHP (N.D. Cal. Dec. 8, 2005); *Ponting v. SONYBMG Music Entm’t, LLC*, No. CV-05-08472-JFW(AJWx) (C.D. Cal. Dec. 2, 2005); *Jacoby v. Sony BMG Music Entm’t*, No. 05/116679 (N.Y. Sup. Ct. Nov. 30, 2005); *Bahnmaier v. Sony BMG Music Entm’t*, No. CJ 2005 06968 (Okla. Dist. Ct. Nov. 28, 2005); *Xanthakos v. Sony BMG Music Entm’t, LLC*, No. 05-0009203 (D.C. Super. Ct. Nov. 28, 2005); *Maletta v. Sony BMG Music Entm’t Corp.*, No. BC343615 (Cal. Super. Ct. Nov. 28, 2005); *Burke v. Sony BMG Music Entm’t*, No. 857213 (Cal. Super. Ct. Nov. 22, 2005); *Hull v. Sony BMG Music Entm’t*, No. BC343385 (Cal. Super. Ct. Nov. 21, 2005); *Cooke v. Sony BMG Music Entm’t*, No. 05-0009093 (D.C. Super. Ct. Nov. 18, 2005); *DeMarco v. Sony BMG Music*, No. 2:05-cv-05485-WHW-SDW (D.N.J. Nov. 17, 2005); *Stynchula v. Sony Corp. of Am.*, No. BC343100 (Cal. Super. Ct. Nov. 15, 2005); *Gruber v. Sony Corp. of Am.*, No. BC342805 (Cal. Super. Ct. Nov. 9, 2005); *Guevara v. Sony BMG Music Entm’t*, No. BC342359 (Cal. Super. Ct. Nov. 1, 2005).

² At present, the Attorney General of the State of Texas is the only government authority to have brought suit against Defendants. See *Texas v. SONY BMG Music Entertainment*, Dist. Ct., Travis Co, Tex.

in designing, manufacturing and selling CDs with XCP and MediaMax software and without adequately disclosing the limitations the software imposes on the use of the CDs and the audio files contained on such CDs, and the security vulnerabilities the XCP and MediaMax software creates for computer users. Plaintiffs bring claims against Defendants for violating the Computer Fraud And Abuse Act, 18 U.S.C. § 1030, *et seq.*; Section 349 *et seq.* of the New York General Business Law; and Section 350 *et seq.* of the New York General Business Law. Plaintiffs also assert common law claims for breach of the implied covenant of good faith and fair dealing, trespass to chattels, and fraud.

In December 2005, following entry of the Court's CMO No. 1, Defendants approached Plaintiffs' Co-Lead Counsel to discuss the possibility of resolution of the litigation by settlement. The parties engaged in virtual round-the-clock settlement negotiations for approximately one month. The primary and overriding concern of the parties over the course of these lengthy, arms'-length negotiations was an effort to provide prompt relief to consumers affected by XCP and MediaMax software, in order to limit the risk that these consumers' computers would be vulnerable to malicious software programs such as viruses, "Trojan horses" and "spyware." In contemplation of these concerns, the merits of the parties' respective positions, and the risks, costs and delays associated with litigation, the parties reached the proposed settlement presently before this Court.

III. THE PROPOSED SETTLEMENT

A. The Settlement Class

The proposed settlement has been reached on behalf of the "Settlement Class," defined in the Settlement Agreement as follows:

the named Plaintiffs in the Action and all natural persons or entities in the United States who purchased, received, came into possession of or otherwise used one or more MediaMax CDs and/or XCP CDs from August 1, 2003 through the Effective Date. Excluded from the Settlement Class are Released Parties; SONY

BMG-authorized resellers or distributors of the XCP CDs and MediaMax CDs; current or former employees of Released Parties; and any persons or entities that have previously executed releases discharging any or all of the Defendants from liability concerning or encompassing any or all claims that are the subject of the Complaint and the complaints in the Non-S.D.N.Y. Actions.

(Settlement Agreement, ¶ I.I.M.³)

B. The Settlement Consideration

As consideration for the settlement, Defendants have agreed to provide a broad package of benefits to Settlement Class Members. The settlement benefits include:

- Compensation for buyers of XCP CDs and MediaMax CDs;
- Software utilities to update and uninstall XCP and MediaMax software from consumers' computers;
- An agreement by SONY BMG to immediately recall of XCP CDs, and not manufacture MediaMax CDs for a period of at least two years;
- A series of injunctive measures governing any SONY BMG CDs manufactured with content protection software over the next two years;
- Defendants' agreement not to collect personal information on Settlement Class Members through XCP, MediaMax and future content protection software, without their express and affirmative consent;
- Defendants' agreement to waive certain rights currently contained in the EULAs for XCP and MediaMax CDs and software; and
- A "most favored nations" provision that would enhance the benefits available to all Settlement Class Members if Defendants provide additional benefits to a subset of Settlement Class Members through an agreement with any government authority.

³ The parties' Settlement Agreement, together with all attachments thereto, is submitted herewith as Ex. C to the Affidavit of Elizabeth C. Pritzker In Support Of Plaintiffs' Application For Preliminary Approval of Class Action Settlement. All cited provisions of the Settlement Agreement shall hereinafter be referenced as "¶ __. __."

1. XCP CD Exchange Program

SONY BMG will implement a program to allow Settlement Class Members to exchange each XCP CD for an identical “clean” CD title that does not contain content protection software (“XCP Exchange Program”). SONY BMG has already offered such exchanges and will extend and incorporate that offer into this settlement. (¶ III.B.) Through the XCP Exchange Program, Settlement Class Members will be able to ship their XCP CDs to SONY BMG, free of charge, and receive an identical “clean” CD, via mail or other direct shipping mail, from SONY BMG. (¶ III.B.5.) SONY BMG also will encourage authorized resellers to accept returns of the XCP CDs for exchange. (¶ III.B.3.)

To ensure that XCP CDs are promptly removed from the market, the settlement requires that SONY BMG provide a range of Incentives to Settlement Class Members who participate in the XCP Exchange Program. (¶ III.C.) Settlement Class Members who exchange their SONY BMG XCP CDs will be entitled to receive a “clean,” non-contented protected CD identical in music content to each XCP CD exchanged, and may download non-content protected MP3 versions of the music contained on each XCP CD purchased. (¶¶ III.B.1.) In addition, these Settlement Class Members may claim one of two additional incentive packages. Under Incentive #1, Settlement Class Members will be entitled to claim a cash payment of \$7.50, payable by check or debit card, and a promotion code allowing the holder to download one additional album from a list of more than 200 titles. (¶ III.C.1.) Under Incentive #2, Settlement Class Members are entitled to claim a promotion code allowing the holder to download three additional albums from that list. (¶ III.C.2.) All promotion codes provided by the settlement are fully transferable and are valid for six months. (¶ III.C.3.) Settlement Class Members may download albums from any one of three major download services. SONY BMG will use commercially reasonable

efforts to offer Apple Computer, Inc.'s popular *iTunes* as one of the download services available to Settlement Class Members. (¶ III.C.3.)

Class Counsel will have the right to monitor the XCP CD Exchange Program and will be apprised of the number of claims submitted. (¶ III.I.) To participate in the XCP CD Exchange Program, a Settlement Class Member must: (1) return his or her XCP CDs to SONY BMG or provide SONY BMG with a receipt showing the return or exchange of such CDs at a retailer after November 14, 2005; and (2) fill out a claim form; and (3) affirm that he or she has run the XCP Uninstaller or XCP Update (described below). (¶ III.C.)

2. MediaMax Compensation

SONY BMG will provide additional compensation to Settlement Class Members who bought or obtained MediaMax CDs during the Class Period.

Specifically, Settlement Class Members will be entitled to download non-content protected MP3 versions of the music on each of his or her MediaMax 5.0 CDs and/or MediaMax 3.0 CDs. (¶¶ III.E., F.) Additionally, Settlement Class Members who bought or obtained MediaMax 5.0 CDs during the Class Period will receive a promotion code allowing the holder to download one additional album from a list of more than 200 titles. (¶ III.F.) The promotion code will be fully transferable and will be valid for six months, and the download will be available from any one of three major download services. (¶¶ III.E., F.)

3. XCP And MediaMax Software Updates And Uninstallers

Under the terms of the settlement, Defendants further agree to provide software updates and uninstallers for SONY BMG XCP and MediaMax software.

The XCP Update will be in the form of a software utility program that removes XCP's cloaking mechanism, so that the software will be visible to users through an ordinary directory search. The XCP Update is designed to eliminate the security vulnerability created by XCP's

use of hidden or cloaked filenames. (¶ III.J.) Additionally, Settlement Class Members will be able to remove XCP software from their computers completely through either the XCP Update or a separate software utility, the XCP Uninstaller. (¶¶ III.J., K.)

The MediaMax Update available under the settlement will be in the form of a software utility program that will eliminate the all currently-known security vulnerabilities associated with MediaMax software. (¶ III.L.) Additionally, Settlement Class Members will be able to remove MediaMax software from their computers, completely, through either the MediaMax Update or a separate software utility, the MediaMax Uninstaller. (¶¶ III.L.M.)

Under the Settlement Agreement, Settlement Class Members will be able to download each of these software utilities through SONY BMG's Internet website until December 31, 2007. (¶ III.N.) The MediaMax Update and MediaMax Uninstaller will also be available on SunnComm's Internet website. (¶¶ III.N., O.) Settlement Class Members will not need to provide Defendants with any personal information to obtain any of the software utilities. (¶¶ III.J., K., L., M.) Class Counsel will have an opportunity to review and comment on all instructions provided to Settlement Class Members on how to use the software utilities. (¶¶ III.J., K., L., M.) In addition, Defendants will verify that they have obtained the opinion on an independent expert that the software utilities provided under the settlement are effective and would not create any known securities vulnerabilities. (¶¶ III.J., K., L., M.) The expert verification will be subject to confirmatory discovery by Class Counsel. (¶¶ III.J., K., L., M.) Settlement Class Members are entitled to keep the software utilities provided under the settlement, even if the settlement is terminated after preliminary approval. (¶ III.P.) The parties will also discuss and attempt to agree upon other methods for publicizing and disseminating the software utilities offered by the settlement to consumers. (¶ III.Q.)

4. SONY BMG Will Not Collect Personal Data

Defendants assert that they have not used the MediaMax or XCP software, or any other content protection software placed upon SONY BMG CDs, to collect, aggregate or retain certain personal information about the users of MediaMax CDs, XCP CDs, or any such other content-protected CDs manufactured and sold by SONY BMG, without the user's express consent. (¶ III.S.) Defendants assert that they only collect information necessary to provide the CDs with enhanced functionality, including the album title, artist, user's IP address, and certain non-personally identifiable information. (¶ III.S.) As part of the settlement, SONY BMG agrees to undertake commercially reasonable steps to destroy the information that it collects within ten days of collection, except as otherwise required by law or court order. (¶ III.S.)

SONY BMG also agrees to hire an independent third party to verify these practices and provide his or her conclusions to Class Counsel and the Court before the Fairness Hearing. (¶ III.T.) SONY BMG will hire an independent third party to repeat this review during each of calendar years 2006 and 2007. (¶ III.T.) SONY BMG will post the results of each of these reviews on its website. (¶ III.T.)

5. Defendants Will Waive Rights Under XCP And MediaMax EULAs

Defendants have agreed to waive their rights under certain provisions of the current XCP and MediaMax EULAs to the extent that they: (1) limit the use of the audio files to Approved Media Players and Approved Portable Devices; (2) can be construed as preventing the removal of the software; (3) require the user to update the software to continue to use the audio files; (4) require possession of the CD to hold a license for the digital content on the CDs; (5) require the user to indemnify Defendants from harm arising from the use of the XCP CDs or MediaMax CDs; (6) prevent copying of music files and other digital content on the CDs; (7) prevent the consumer from reselling the CDs; and (8) terminate the software license if a consumer files for

bankruptcy protection or is declared insolvent. (¶ III.U.) Defendants also agree to waive the limitation of liability provisions and New York forum selection clauses of the XCP and MediaMax EULAs in cases where a Settlement Class Member alleges any claims not released by this settlement on his or her behalf only. (¶ III.U.) The latter provisions are not waived, if a Settlement Class Member brings such claims as part of a class action, mass action or private attorney general proceeding. (¶ III.U.)

6. The Settlement Contains “Most Favored Nations” Protection

SONY BMG has entered into discussions with state and federal government authorities about the claims asserted in the Action. As part of this settlement, SONY BMG agrees that, if it enters into any other agreements with government authorities that provide additional benefits to a subset of Settlement Class Members, it will offer the same benefits to all Settlement Class Members. In this way, the Settlement operates as a floor, not a ceiling, on the benefits available to Settlement Class Members. (¶¶ III.V., IV.A., B.)

7. Injunctive Relief Required By The Settlement Will Effectuate Changes In Defendants’ Use Of Content Protection Software

SONY BMG has agreed to implement the following changes in operating practices and procedures with respect to XCP, MediaMax, and any and all future content protection software technologies that SONY BMG may use on CDs that it manufactures or issues, from the present to 2008. (¶¶ II.D., IV.B.) These changes will be enforceable either through an agreement with state and/or federal government authorities or by an injunction from this Court. (¶¶ IV.A., B.)

SONY BMG will not manufacture or distribute XCP CDs. (¶ IV.B.1.) SONY BMG also will not manufacture MediaMax 3.0 CDs or MediaMax 5.0 CDs. (¶ IV.B.2.)

In addition, before manufacturing and issuing any CDs with content protection software at any time until 2008, SONY BMG will: (1) ensure that the content protection software that is contained on any such CDs will not be installed on a user’s computer, unless and until the user

affirmatively accepts the EULA; (2) ensure that an uninstaller for the content protection software is made readily available to consumers; (3) ensure that the functionality of any updates and/or material changes in the functionality of the copy protection software that is used on any such CDs is adequately disclosed; (4) ensure that the EULA associated with the content protection software used on any such CDs accurately describes the nature and function of the software in plain English; (5) obtain comments about the EULA associated with the content protection software contained on any such CDs from an independent third-party designated jointly by the parties; (6) obtain an opinion from at least one qualified, independent third-party that the content protection software used on any such CDs is effective and would not create any known securities vulnerabilities; (7) ensure that SONY BMG will only be able to collect limited information from the CD user necessary to provide enhanced functionality to any such CDs, namely album title, artist, the computer user's IP address, and certain non-personally identifiable information, without the user's express consent ; (8) include on the jewel case a written disclosure in plain English that the CD contains content protection software and a brief description of the software; and (9) fix security vulnerabilities discovered in the content protection software contained on any such CDs through software updates verified as secure by a computer security expert. (¶¶ IV.B. 3(a)-(h).)

C. Release Of Claims

In return for the above consideration, Settlement Class Members will release all "Released Claims" (as defined in Section II.O. of the Settlement Agreement) against each and all of the Defendants and each and all of Defendants' direct and indirect parent companies including, in the case of SONY BMG and without limitation, Sony Corporation and Bertelsmann AG, and each and all of each of Sony Corporation's, Bertelsmann AG's and Defendants' respective divisions and direct and indirect subsidiaries, affiliates, partners, joint ventures,

predecessors and successor corporations and business entities, and each and all of their past and present officers, directors, servants, licensees, joint ventures, sureties, attorneys, agents, consultants, advisors, contractors, employees, controlling or principal shareholders, general or limited partners or partnerships, divisions, insurers, designated management companies, and each and all of their successors or predecessors in interest, assigns, or legal representatives, and any persons or entities that have designed, developed, programmed, manufactured, supplied, advertised, marketed, distributed or sold MediaMax CDs and/or XCP CDs or software thereon.

(¶¶ II.O., VIII.A., B.)

Released Claims include all claims arising out of any purchase or use by them of an XCP CD or a MediaMax CD, the XCP Update, the XCP Uninstaller, the MediaMax Update, or the MediaMax Uninstaller or any installation or de-installation of XCP Software or MediaMax Software at any time, to the extent that such claims: (a) arise out of the Action or the Non-S.D.N.Y. Actions; (b) relate to any allegations that either were or could have been asserted in the Action or the Non-S.D.N.Y. Actions; or (c) which might in the future be asserted by any Plaintiff or Settlement Class Member, against any of the Released Parties that would arise out of, or relate to in any manner, directly or indirectly, any acts, facts, transactions, occurrences, conduct, representations or omissions alleged in the Action and the Non-S.D.N.Y. Actions, including, without limitation, claims respecting any disclosure, advertising or other descriptions of, or claims relating to (i) the nature, quality, value, and/or functionality of the MediaMax CDs, the XCP CDs, the MediaMax Software, MediaMax Update, MediaMax Uninstaller, XCP Software, XCP Update or XCP Uninstaller; and/or (ii) the EULAs, and/or (iii) the alleged collection by Defendants of Personal Data or IP addresses. (¶ II.O.) Defendants agree to release claims for abuse of process, malicious prosecution or any other claim arising out of, relating to, or in connection with the defense or resolution of the Action. (¶ II.O.)

The Settlement's release of claims does not include claims for consequential damage to a computer or a network that may or are alleged to result from interactions between XCP or MediaMax software and other software or hardware installed on those computers or networks. (¶¶ II.O., VIII.B.) The release excludes these claims out of concern that such claims for consequential damage to a computer or network may raise questions concerning the predominance and manageability requirements under Rule 23(b)(3) of the Federal Rules of Civil Procedure. (¶¶ II. O., VIII.B.) If the Settlement is approved, Settlement Class Members who wish to assert such claims may do so in small claims court or other venues. The settlement also does not release any copyright, trademark or other claims concerning the ownership of intellectual property rights in the MediaMax Software or the XCP Software, or any uninstallers or updates thereto, as no such claims were alleged by Plaintiffs in the underlying actions. (¶¶ II. O., VIII.B.)

D. Defendants' Limited Right To Withdraw From Settlement

Defendants have the right to withdraw from the settlement, if the number of timely and valid requests for exclusion from the Settlement Class exceeds 1,000. (¶ XI.H.)

In addition, SunnComm and F4I have the right to withdraw from the settlement at any time before January 15, 2006 or the date notice is first disseminated, whichever is earlier. (¶ XI.L.) This provision allows SunnComm and F4I, and these defendants alone, to review the terms of the settlement with their respective insurance carriers, which they were unable to do during the December holidays, while enabling the parties to move forward with the preliminary approval process. If either SunnComm or F4I withdraws from the settlement prior to the date notice is first disseminated, the withdrawn party will no longer be considered a "Released Party" under the Settlement Agreement. (¶ XI.L.)