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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Case No: 4:15-cv-00163-DCB

*In re AudioEye, Inc. Sec. Litig.*

**LEAD PLAINTIFFS' MOTION TO  
AUTHORIZE DISTRIBUTION OF  
NET SETTLEMENT FUND AND TO  
APPROVE THE PROPOSED  
MODIFIED PLAN OF  
ALLOCATION; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

MOTION TO AUTHORIZE DISTRIBUTION OF NET SETTLEMENT FUND AND  
TO APPROVE THE PROPOSED MODIFIED PLAN OF ALLOCATION

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1           Lead Plaintiffs Globis Capital Partners, L.P. and Globis Overseas Fund Ltd.  
2 (“Lead Plaintiffs”), by and through their undersigned counsel, respectfully move this  
3 Court for the entry of the Proposed Order (“Distribution Order”), filed concurrently  
4 herewith, authorizing, *inter alia*: (i) the approval of the Proposed Modified Plan of  
5 Allocation (as defined below); (ii) distribution of the Net Settlement Fund<sup>1</sup> under the  
6 Proposed Modified Plan of Allocation, as established by the Settlement of this action to  
7 Authorized Claimants; (iii) the Claims Administrator to deem timely, all otherwise  
8 eligible claims that were submitted after the April 24, 2017 claims filing deadline, but  
9 received no later than February 1, 2018; (iv) distribution of the Net Settlement Fund to  
10 Class Members whose Proofs of Claim have been accepted, as described more fully in  
11 the Affidavit of Robert Cormio in Support of Lead Plaintiffs’ Motion to Authorize  
12 Distribution of the Net Settlement Fund and to Approve the Proposed Modified Plan of  
13 Allocation (“Cormio Aff.”);<sup>2</sup> (v) the Claims Administrator to reallocate to Authorized  
14 Claimants (including late claimants approved by the Court), if economically feasible,  
15 any residual funds remaining in the Net Settlement Fund (whether by reason of tax  
16 refunds, uncashed checks, or otherwise) one (1) year after the initial distribution, and  
17 thereafter to permit Lead Counsel to donate any remaining balance to the Arizona  
18 Foundation for Legal Services and Education or any not-for-profit successor of it; (vi)  
19 the destruction of claim forms and records in paper form one year after final distribution  
20 of the Net Settlement Fund, and claim forms and records in electronic forms three years  
21  
22  
23  
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25

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26 <sup>1</sup> Unless otherwise defined, capitalized terms herein have the same meaning as the  
27 Stipulation of Settlement dated December 13, 2016 (the “Stipulation”), Dkt. No. 89-1.

28 <sup>2</sup> A true and correct copy of the Cormio Affidavit is attached as Exhibit 1 to the  
Declaration of Ira M. Press (“Press Decl.”), filed concurrently herewith.

1 after final distribution of the Net Settlement Fund; and (vii) finally and forever barring  
2 further claims against the Settlement Fund.

3  
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 On May 8, 2017, this Court granted final approval to the settlement of a securities  
7 class action brought by Lead Plaintiffs, individually and on behalf of all others similarly  
8 situated. Order and Final Judgment (“Final Approval Order”), Dkt. No. 100. The Final  
9 Approval Order, entered by the Court in this case, provides that the Court retains  
10 exclusive and specific jurisdiction over for all matters relating to the Settlement,  
11 including *inter alia*, “administering and distributing the settlement proceeds to the  
12 Settlement Class Members.” See Final Approval Order ¶ 14.

13  
14 Now, pursuant to Federal Rule of Civil Procedure 23(e), Lead Plaintiffs, on  
15 behalf of the Class, respectfully submit this memorandum of law in support of their  
16 motion for an order to authorize distribution of the Net Settlement Fund *inter alia*.  
17 Pursuant to the Stipulation, Defendants have no interest in the relief sought by this  
18 motion.<sup>3</sup>

19 **II. BACKGROUND**

20  
21 The Stipulation provided for an all-cash payment of \$1.525 million to compensate  
22 members of the Class and to pay attorneys’ fees and expenses as awarded by the Court.

23  
24 <sup>3</sup> See Stipulation ¶ F.3 (“The Released Parties shall have no responsibility for and no  
25 obligations or liabilities of any kind whatsoever in connection with the determination,  
26 administration, calculation, or payment of claims to Settlement Class Members.”); ¶  
27 D.15 (“This is not a claims-made settlement. If all conditions of the Stipulation are  
28 satisfied and the Settlement becomes Final, no portion of the Gross Settlement Fund will  
be returned to the Defendants or their insurance carriers for any reason, including  
without limitation, the number of Proofs of Claim filed, the collective amount of  
recognized losses of Authorized Claimants, the percentage of recovery of losses, or the  
amounts to be paid to Authorized Claimants from the Net Settlement Fund.”).

1 Stipulation ¶¶ A.30, C.1. On May 8, 2017, this Court granted final approval of the  
 2 \$1.525 million cash Settlement between and among Lead Plaintiffs, on behalf of the  
 3 Class, and Defendants under the terms set forth in the Stipulation, and dismissed this  
 4 action with prejudice. *See* Final Approval Order ¶ 7. The Court also awarded Lead  
 5 Counsel attorneys’ fees of 33 1/3% of the Settlement Fund plus reimbursement of Lead  
 6 Counsel’s litigation expenses in the amount of \$26,250.47. *Id.* ¶ 17. As of February 5,  
 7 2018, the balance of the Settlement Fund, including accrued interest, is \$934,805.26.  
 8 The Net Settlement fund continues to accrue interest daily. *See* Press Decl. ¶ 4.  
 9

10 The Stipulation provides for the distribution of the Net Settlement Fund, in  
 11 accordance with the Court-approved Plan of Allocation (or any changed Plan of  
 12 Allocation ordered by the Court, *see* Stipulation ¶ F.6), among Authorized Claimants  
 13 who purchased or otherwise acquired AudioEye, Inc. (“AudioEye”) common stock from  
 14 May 14, 2014 through April 1, 2015 (the “Class Period”), and were damaged thereby.  
 15 The Court authorized Lead Counsel to retain a Claims Administrator in its Order  
 16 Preliminarily Approving Settlement and Providing for Notice dated January 23, 2017  
 17 (“Preliminary Approval Order”), Dkt. No. 93, ¶ 10. On behalf of Lead Plaintiffs and the  
 18 Class, Lead Counsel retained JND Legal Administration (“JND”) as the Claims  
 19 Administrator. JND has extensive experience in handling the administration of complex  
 20 settlements of securities class actions.  
 21  
 22

### 23 **III. CLAIMS ADMINISTRATION**

#### 24 **A. Notice to the Settlement Class**

25 Pursuant to this Court’s Preliminary Approval Order, JND distributed over 800  
 26 Postcard Notices. *Horn Aff.*<sup>4</sup> ¶ 11. JND set up a case-specific toll-free telephone  
 27

28 <sup>4</sup> “Horn Aff.” refers to the Affidavit of Amanda Horn Regarding (A) Mailing of the Postcard Notice; (B) Publication of the Summary Notice; (C) Establishment of the

1 number and also posted downloadable copies of, *inter alia*, the Long Form Notice  
2 (“Notice”) and Proof of Claim and Release forms at  
3 www.audioeyesecuritieslitigation.com. *Id.* ¶¶ 13, 14. The Notice provided a  
4 background of the Action, described the circumstances leading up to the Settlement,  
5 supplied the details of the Settlement and the process leading up to the Settlement, gave  
6 notice of the Settlement Hearing, and provided instructions for Class Members regarding  
7 submissions of claims, exclusion from the Settlement, objection to the terms of  
8 Settlement and/or the application for attorneys’ fees and reimbursement of expenses, and  
9 attendance at the Settlement Hearing. *See* Notice.  
10

11 In response to the Notice efforts, through February 1, 2018, JND received and  
12 processed a total of 140 claims from potential Class members in connection with this  
13 action. Cormio Aff. ¶ 5.  
14

15 **B. Claims Processing**

16 Pursuant to the Stipulation, the Court’s Preliminary Approval Order, and the  
17 Notice, all Class Members wishing to be eligible to participate in the Settlement Fund  
18 were required to submit Proof of Claim forms, postmarked on or before April 24, 2017.  
19

20 As explained in detail in the accompanying Cormio Affidavit, once the claims  
21 filing deadline passed and JND had completed its initial processing of the claims, JND  
22 had only received a total of approximately 80 Proof of Claim forms in connection with  
23 this action. *Id.* at ¶ 28. JND made extensive additional efforts to encourage more  
24 claimants to file claims and participate in the Settlement, including: (1) re-contacting  
25

26 Telephone Hotline; (D) Establishment of the Settlement Website; (E) Report on  
27 Requests for Exclusion Received to Date; and (F) Report on Objection(s) Received to  
28 Date, dated March 30, 2017, Dkt. No. 96-1. A copy of the Postcard Notice is attached as  
Exhibit A and a copy of the Notice is attached Exhibit B to the Horn Aff.

1 institutions on the initial Transfer Agent List who did not respond; (2) obtaining emails  
2 and sending an email blast to names on the Transfer Agent List who did not file a claim;  
3 (3) contacting large holders who did not file a claim; and (4) publishing an additional  
4 summary notice over *PR Newswire* and DTC Lens. *Id.* at ¶¶ 25-28. Following this  
5 additional outreach campaign and efforts, the number of Proof of Claim forms *increased*  
6 approximately 75% to a total of 140 Proof of Claim forms. *Id.* at ¶ 5, 28.

8 JND made substantial efforts to contact claimants that had submitted ineligible or  
9 deficient claims (such as lacking the required information or documentation to  
10 substantiate the claimant's transactions during the Settlement Class Period) and instruct  
11 them on how to cure any such deficiencies. *Id.* at ¶¶ 17-24. JND mailed approximately  
12 94 deficiency and/or ineligibility notices and letters to claimants who had submitted  
13 deficient and/or ineligible claims, describing the defect(s) with his, her or its claim and  
14 stating what, if anything, was necessary to cure the claim. *Id.* at ¶ 16; Cormio Aff. Ex.  
15 A (sample deficiency/ineligibility letters). The letters also informed the claimant that  
16 failure to cure the deficiencies may lead to rejection of his, her or its claim. *Id.*  
17 Following the mailing of the deficiency letters, JND also instituted a calling campaign to  
18 claimants who still had not cured his, her or its deficient claims in order to provide these  
19 claimants with a final opportunity to cure the deficiencies in their claims. Specifically,  
20 JND made several attempts to contact all Claimants, or the institutions that filed on their  
21 behalf, that could potentially have valid claims. Cormio Aff. ¶¶ 21-24.

24 Claimants were also informed that they could seek judicial review of their claims  
25 if they did not agree with JND's administrative determinations. *Id.* at ¶ 19; Cormio Aff.  
26 Ex. A. A total of two (2) claimants initially disputed JND's administrative rejection of  
27 their Proofs of Claim and requested Court review. However, after JND provided an  
28 explanation to the claimants, both claimants rescinded their requests for judicial review.



1 As such, as of the date of the Cormio Affidavit, no claimant has disagreed with JND's  
2 administrative determination of deficiencies or ineligibility. Cormio Aff. ¶ 16.

3  
4 **C. Claims Calculation**

5 **1. Under the Original Plan of Allocation**

6 Using the Court-approved Plan of Allocation (the "Original Plan of Allocation"),  
7 of the 140 claims received, JND determined that 74 claims were ineligible to participate  
8 in the Settlement because the claims: (1) did not result in a Recognized Loss; (2) did not  
9 indicate any eligible purchases of AudioEye securities during the Class Period or did not  
10 fit definition of the class; (3) had uncured deficiencies, including insufficient  
11 information and/or documentation to support the claim; or (4) were duplicate claims. *Id.*  
12 at ¶ 38; Cormio Aff. Ex. B-3. These claimants each received a deficiency and/or  
13 ineligibility letter, as applicable. Cormio Aff. ¶¶ 16-20.

14  
15 Under the Original Plan of Allocation, the aggregate recognized loss for eligible  
16 claims filed is \$144,659.32 (the total Recognized Loss for timely claims is \$116,370.54  
17 and the total Recognized Loss for Late Claims (*see* Section IV.B.2 below) is  
18 \$28,288.78). *Id.* at ¶ 40. This amount is far below the amount available for distribution  
19 from the Net Settlement Fund, which has a balance of \$934,805.26 as of February 5,  
20 2018. *See* Press Decl. ¶ 4. In order to maximize potential payouts to Authorized  
21 Claimants, Lead Counsel instructed the Claims Administrator to test an alternative  
22 method of calculation (hereinafter, the "Proposed Modified Plan" or "Proposed  
23 Modified Plan of Allocation").

24  
25 **2. Under the Proposed Modified Plan of Allocation**

26 The Proposed Modified Plan applies the First-In-First-Out ("FIFO") methodology  
27 and simply calculates the claimant's out of pocket loss for shares sold or held after the  
28

1 disclosure date of April 1, 2015.<sup>5</sup> Cormio Aff. ¶ 35. Using the Proposed Modified Plan,  
2 the aggregate recognized loss for eligible claims filed is \$579,375.28 (the total  
3 Recognized Loss for timely claims is \$476,243.78 and the total Recognized Loss for  
4 Late Claims (*see* Section IV.B.2 below) is \$103,131.50). *Id.* at ¶¶ 36, 43. This amount  
5 is still below the amount available for distribution from the Net Settlement Fund (*see*  
6 Press Decl. ¶ 4) but significantly increases the aggregate Recognized Loss by over  
7 \$400,000. *Id.* at ¶ 36.

9 Under the Original Plan of Allocation, Authorized Claimants will only receive  
10 \$144,659.32 (with the remainder going to a *cy pres* recipient). If the Court approves the  
11 Proposed Modified Plan, on the other hand, Authorized Claimants (*i.e.*, the intended  
12 recipients of the settlement fund) will receive \$579,375.28 in aggregate distributions, or  
13 roughly 4 times the distribution that they will receive under the Original Plan of  
14 Allocation. If the Proposed Modified Plan is approved by the Court, it will then  
15 equitably increase final payments to all Authorized Claimants. Cormio Aff. ¶¶ 36, 43,  
16 44.

18 Applying the Proposed Modified Plan for the 140 claims received, JND  
19 determined that 70 claims were ineligible to participate in the Settlement because the  
20 claims: (1) did not result in a Recognized Loss; (2) did not indicate any eligible  
21 purchases of AudioEye securities during the Class Period or did not fit definition of the  
22 class; (3) had uncured deficiencies, including insufficient information and/or  
23 documentation to support the claim; or (4) were duplicative claims. *Id.* at ¶ 41. These  
24

25  
26  
27 <sup>5</sup> The Original Plan of Allocation matched transactions on a Last-In-First-Out (“LIFO”)  
28 basis. *See* Notice 6; Cormio Aff. ¶ 33. The Original Plan of Allocation also restricted  
Recognized Losses to the single day stock price reaction to AudioEye’s April 1, 2015  
disclosure (*i.e.*, \$0.10 per share). *Id.*

1 claimants each received a deficiency and/or ineligibility letter, as applicable. *Id.* at ¶¶  
2 16-20. As of the date of the Cormio Affidavit, no claimant has disagreed with JND’s  
3 administrative determination of deficiencies or ineligibility. *Id.* at ¶ 16.  
4

5 JND has prepared separate detailed ledgers for the Original Plan of Allocation  
6 (Exhibit B) and the Proposed Modified Plan (Exhibit C) of: (i) all valid and timely  
7 claims by Authorized Claimants (Cormio Aff. Exs. B-1 and C-1, respectively); (ii)  
8 claims that were submitted after the filing deadline but by February 1, 2018 that are  
9 otherwise valid (“Late Claims”) (Cormio Aff. Exs. B-2 and C-2, respectively); and (iii)  
10 claims that were rejected or deemed ineligible (Cormio Aff. Exs. B-3 and C-3,  
11 respectively). If the Court approves the Proposed Modified Plan, JND will pay  
12 Authorized Claimants identified in Exhibits C-1 and C-2.  
13

#### 14 **IV. ARGUMENT**

##### 15 **A. The Court Should Approve the Proposed Modified Plan of** 16 **Allocation**

17 As the total amount of the Net Settlement Fund available for distribution  
18 (\$934,805.26, *see* Press Decl. ¶ 4) exceeds the aggregate classwide Recognized Loss  
19 under either method of calculation (the Original Plan of Allocation or the Proposed  
20 Modified Plan) – a rarity among securities class action settlements – application of the  
21 plan that yields the higher classwide Recognized Loss figure will increase the class  
22 members’ settlement recoveries.  
23

24 Specifically, Lead Counsel requests that the Court approve the following  
25 Proposed Modified Plan of Allocation (*see* n.8, *infra*):

26 For all AudioEye shares acquired during the Class Period and sold prior to  
27 April 1, 2015, the Recognized Loss shall be \$0.  
28

1 For all AudioEye shares acquired during the Class Period that were sold  
2 between April 1, 2015 and June 30, 2015, the Recognized Loss shall be the  
3 difference between (a) the purchase or acquisition price and (b) the sale  
4 price.

4 For all AudioEye shares that remained unsold as of June 30, 2015, the  
5 Recognized Loss shall be the difference between: (a) the purchase or  
6 acquisition price, and (b) \$0.19 per share.

7 All Class Period sales shall be matched to purchases on a First-In-First-Out  
8 (“FIFO”) basis.

9 “To warrant approval, the plan of allocation must also meet the standards by  
10 which the . . . settlement was scrutinized – namely, it must be fair and adequate.” *In re*  
11 *MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 668 (E.D. Va. 2001) (citing *Class*  
12 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992); *In re Oracle Sec.*  
13 *Litig.*, No. 90 Civ. 0931, 1994 WL 502054, at \*1 (N.D. Cal. June 18, 1994)). As noted in  
14 *MicroStrategy*, “the plan . . . fairly treats class members by awarding a pro rata share to  
15 every Authorized Claimant, but also sensibly makes interclass distinctions based  
16 upon, inter alia, the relative strengths and weaknesses of class members’ individual  
17 claims and the timing of purchases of the securities at issue.” 148 F. Supp. 2d at 669.

19 Here, Lead Counsel believes that both the Original Plan of Allocation and the  
20 Proposed Modified Plan fairly compensate Class Members. Both Plans look to the stock  
21 price reaction to AudioEye’s April 1, 2015 disclosure (that it anticipated restating  
22 reported earnings to erase all of the previously-reported revenues from the non-monetary  
23 licensing agreements) as the basis to determine entitlement to recovery. However, given  
24 the number of claims received and the remaining amount to be distributed from the Net  
25 Settlement Fund, Lead Counsel believes that the Proposed Modified Plan is a significant  
26 improvement of the Original Plan of Allocation as it awards each Authorized Claimant  
27 (and therefore the class as a whole) a *greater* pro rata share of the settlement.  
28

1 As disclosed in the Notice, “[t]he District Court may approve this [Original] Plan  
2 of Allocation as proposed or it may modify the Plan of Allocation without further notice  
3 to the Settlement Class. Any orders regarding a modification of the Plan of Allocation  
4 will be posted on the settlement website . . .” Notice at 7. “Any modification or change  
5 in the Plan of Allocation that may hereafter be approved shall in no way disturb, affect  
6 or delay the finality of this Order and Final Judgment . . .” Final Approval Order ¶ 10.  
7 Additionally, pursuant to the Stipulation, “[a]ny change in the allocation of the Net  
8 Settlement Fund ordered by the Court shall not affect the validity or finality of this  
9 Settlement.” Stipulation ¶ F.6.

10 For these reasons, Lead Counsel believes the Proposed Modified Plan of  
11 Allocation fairly and adequately compensates Class Members and should be approved.  
12

13  
14 **B. The Court Should Authorize Distribution of the Net  
15 Settlement Fund to Authorized Claimants**

16 **1. Timely and Valid Claims**

17 If the Court approves the Proposed Modified Plan, JND will proceed with the  
18 distribution plan and pay Authorized Claimants identified in Exhibit C-1 of the Cormio  
19 Affidavit. There were 47 Authorized Claimants who submitted timely and valid claims  
20 postmarked on or before the Court-approved claims filing deadline of April 24, 2017.  
21 Cormio Aff. Ex. C-1. The aggregate Recognized Loss of these 47 Authorized Claimants  
22 is \$476,243.78. Cormio Aff. ¶ 43. Lead Plaintiffs respectfully request that the Court  
23 approve the 47 Authorized Claimants listed in Exhibit C-1 to the Cormio Affidavit.  
24

25 **2. Untimely But Otherwise Eligible Claims**

26 If the Court approves the Proposed Modified Plan, JND will proceed with the  
27 distribution plan and pay Authorized Claimants identified in Exhibit C-2 to the Cormio  
28 Affidavit. JND received 62 Late Claims after the April 24, 2017 submission deadline

1 through February 1, 2018. *Id.* at ¶ 37. JND processed all Late Claims and under the  
2 Proposed Modified Plan, has determined that the total number of Authorized Claimants  
3 submitting valid Late Claims is 23 with an aggregate Recognized Loss of \$103,131.50.  
4 *Id.* These Late Claims were received by JND while the processing of timely claims was  
5 ongoing, and due to the amount of time needed to process the claims received and test an  
6 alternative plan of allocation, the processing of these late claims did not delay the  
7 completion of the claims administration process or the distribution of the Net Settlement  
8 Fund. *Id.* Inclusion of these Late Claims will not dilute the amount to be distributed to  
9 timely Authorized Claimants as the total amount of the Net Settlement Fund available  
10 for distribution (\$934,805.26, *see* Press Decl. ¶ 4) exceeds the combined Recognized  
11 Loss of all Authorized Claimants. *Cormio Aff.* ¶¶ 43-44.

14 It is well settled that “[a] district court has discretion to allow late claims to a  
15 settlement fund.” *Lemus v. H & R Block Enters., LLC*, No. 09 Civ. 03179 SI, 2013 WL  
16 3831866, at \*2 (N.D. Cal. July 23, 2013) (citing *In re Valdez*, 289 F. App’x 204, 206  
17 (9th Cir. 2008)). Until the Net Settlement Fund is actually distributed, this Court retains  
18 broad and inherent equitable powers to include claims that were submitted late. *See*  
19 *Zients v. LaMorte*, 459 F.2d 628, 630-31 (2d Cir. 1972) (“[W]here, as here, all the  
20 equities are on the side of the claimants, the fund has not been distributed and the  
21 administration of the fund would be insignificantly hampered by allowing these few late  
22 claims, appellants should be permitted to participate in the fund.”). Lead Plaintiffs  
23 believe that, when the equities are balanced, it would be unfair to prevent an otherwise  
24 eligible claim from participating in the Net Settlement Fund solely because it was  
25 submitted after the cut-off date, when it was submitted while claims were still being  
26  
27  
28

1 processed.<sup>6</sup> Moreover, payment of the late claims will not cost Defendants any  
2 additional money nor will payment of these late claims materially prejudice or delay  
3 payment to the timely claimants.  
4

5 However, in order to facilitate the efficient and proportional distribution of the  
6 Net Settlement Fund, there must be a final cut-off after which no other claims may be  
7 accepted. *See Lemus*, 2013 WL 3831866, at \*2 (without claim period deadlines, “the  
8 claim period would never cease and the money could never be distributed”).  
9 Accordingly, it is respectfully requested that the Distribution Order provide that no  
10 claim received after February 1, 2018, may be accepted for any reason whatsoever.  
11 Cormio Aff. ¶ 46(d).  
12

13 Lead Plaintiffs respectfully request that the Court approve JND’s administrative  
14 recommendations to accept the 23 Late Claims listed in Exhibit C-2 to the Cormio  
15 Affidavit.

16 **C. The Court Should Accept the Claims Administrator’s**  
17 **Administrative Recommendations to Reject the Ineligible Claims**

18 JND rejected a total of 70 claims using the Proposed Modified Plan. JND mailed  
19 each of these claimants a deficiency and/or ineligibility letter. Cormio Aff. ¶¶ 16-20.  
20

---

21 <sup>6</sup> Courts have the equitable power to include late-filed claims as part of a settlement  
22 distribution even where the parties agreed to a claims deadline pursuant to the terms of a  
23 settlement agreement. *See, e.g., Zients*, 459 F.2d at 630 (“[u]ntil the fund created by the  
24 settlement is actually distributed, the court retains its traditional equity powers.”); *In re*  
25 *Gilat Satellite Networks, Ltd.*, No. 02 Civ. 1510, 2009 WL 803382, at \*6 (E.D.N.Y. Mar.  
26 25, 2009) (allowing payment of late claims); *In re Agent Orange Prod. Liab. Litig.*, 689  
27 F. Supp. 1250, 1262-63 (E.D.N.Y. 1988) (a “district court overseeing settlement  
28 distribution has inherent power to accept late claims” where there is no prejudice to the  
defendants and no delay of pay-out to timely claimants) (internal citation omitted); *In re*  
*Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 321 (3d Cir. 2001) (court  
allowed a late claim where all class members were asserting claims on a “finite pool of  
assets”).

1 The reasons for rejections included: (1) did not result in a Recognized Loss; (2) did not  
2 indicate any eligible purchases of AudioEye securities during the Class Period or did not  
3 fit definition of the class; (3) had uncured deficiencies, including insufficient  
4 information and/or documentation to support the claim; or (4) were duplicate claims. *Id.*  
5 at ¶ 41.

7 Accordingly, Lead Plaintiffs respectfully request that the Court reject these  
8 ineligible claims listed in Exhibit C-3 to the Cormio Affidavit.

9  
10 **D. The Court Should Authorize Distribution of the Net Settlement Fund**

11 The Net Settlement Fund is ready to be distributed at this time.<sup>7</sup> Lead Plaintiffs  
12 respectfully request that the Court direct JND to distribute the Net Settlement Fund to  
13 the claimants whose claims JND has administratively determined to be valid (those  
14 listed in Exhibit C-1 and C-2 to the Cormio Affidavit), and who would receive a  
15 distribution amount of at least \$10.00 pursuant to the Court-approved Plan of Allocation  
16 in the Notice.<sup>8</sup> *See* Notice at 7. If these administrative determinations are approved,  
17 each of these claimants will receive, under the Proposed Modified Plan, a *pro rata* share  
18 of the Net Settlement Fund based on his, her, or its Recognized Loss compared to the  
19 total Recognized Loss of all Authorized Claimants (the “Distribution”). *Id.*  
20

21 It may be expected that not all of the payments to be distributed to Authorized  
22 Claimants (including late filing claimants) will be cashed promptly. In order to  
23

24  
25 <sup>7</sup> Pursuant to the Stipulation, the Net Settlement Fund will be distributed to Authorized  
26 Claimants after, *inter alia*, the outstanding fees and expenses of claims administration  
27 have been paid. *See* Stipulation ¶ D.13.

28 <sup>8</sup> Although Lead Plaintiffs have proposed a Modified Plan of Allocation for calculation  
purposes, the other aspects of the Court-approved Original Plan of Allocation remain the  
same, including the allocation, distribution and redistribution terms.



1 encourage Authorized Claimants to promptly cash their Distribution checks, and to  
2 avoid or reduce future expenses relating to unpaid Distributions, Lead Plaintiffs propose  
3 that all the Distribution checks bear a notation “CASH PROMPTLY. VOID AND  
4 SUBJECT TO REDISTRIBUTION IF NOT CASHED 90 DAYS AFTER ISSUE  
5 DATE.” Cormio Aff. ¶ 46(b). Lead Plaintiffs also propose that Authorized Claimants  
6 who do not cash their Distribution checks within the time allotted shall irrevocably  
7 forfeit all recovery from the Settlement, and the funds allocated to all such stale-dated  
8 checks shall be available in any redistribution to other Authorized Claimants.  
9

10 Consistent with the terms of the Stipulation and the Court-approved Plan of  
11 Allocation in the Notice (*see* n.8 *supra*), Lead Plaintiffs respectfully request that, if any  
12 funds remain in the Net Settlement Fund by reason of uncashed distributions or  
13 otherwise, then after the Claims Administrator has made reasonable efforts to have  
14 Settlement Class Members who are entitled to participate in the distribution of the Net  
15 Settlement Fund cash their distributions, if economically feasible, any balance remaining  
16 in the Net Settlement Fund one (1) year after the initial Distribution shall be  
17 redistributed to Settlement Class Members who have cashed their initial Distributions  
18 and who would receive at least \$10.00 from such redistribution, after payment of any  
19 unpaid costs or fees incurred in administering the Net Settlement Fund for such  
20 redistribution. *See* Stipulation ¶ D.14; Notice at 7. Thereafter, if redistribution is not  
21 economically feasible, Lead Counsel shall donate, pursuant to the doctrine of *cy pres*,  
22 any remaining funds in the Net Settlement Fund to the Arizona Foundation for Legal  
23 Services and Education or any not-for-profit successor of it. Stipulation ¶ D.14.  
24  
25

26 **E. The Release of Claims**

27 In order to allow the full and final distribution of the Net Settlement Fund, it is  
28 respectfully requested that the Court bar any further claims against the Net Settlement

1 Fund beyond the amount allocated to Authorized Claimants, and to provide that all  
2 persons involved in the review, verification, calculation, tabulation, or any other aspect  
3 of the processing of the Proofs of Claim submitted herein, or otherwise involved in the  
4 administration or taxation of the Settlement Fund or Net Settlement Fund, be released  
5 and discharged from any and all claims arising out of such involvement, provided,  
6 however, that the Court’s Distribution Order shall not release any claim by Lead  
7 Plaintiffs against the Claims Administrator with respect to distributions, if any, if later  
8 discovered to have been made not substantially in accordance with the Stipulation, the  
9 Plan of Allocation or any order of the Court.<sup>9</sup>  
10

11 **F. Retention of Proof of Claim Forms and Other Documents**

12 Lead Plaintiffs respectfully request that the Court authorize JND to destroy claim  
13 forms and records in paper form one (1) year after final distribution of the Net  
14 Settlement Fund, and claim forms and records in electronic form three years after final  
15 distribution of the Net Settlement Fund.  
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25 <sup>9</sup> “Lead Plaintiffs, Defendants, and their respective counsel, and all other Released Parties shall  
26 have no responsibility or liability whatsoever for the investment or distribution of the settlement  
27 funds, the Net Settlement Fund, the Plan of Allocation, or the determination, administration,  
28 calculation, or payment of any Claim Form or nonperformance of the Claims Administrator, the  
payment or withholding of taxes owed by the Settlement Fund, or any losses incurred in  
connection therewith.” Notice at 7; *see, e.g.*, Stipulation ¶¶ F.4, F.5.

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**V. CONCLUSION**

For the foregoing reasons, Lead Plaintiffs respectfully request that this Court issue the accompanying Proposed Distribution Order granting the relief sought herein including: (1) approving the Proposed Modified Plan of Allocation; and (2) authorizing Distribution of the Net Settlement Fund.

Dated: February 7, 2018

Respectfully Submitted,

**KIRBY McINERNEY LLP**

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to any non-CM/ECF participants indicated on the Manual Notice list.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Ira M. Press

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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

*In re AudioEye, Inc. Sec. Litig.*

Case No: 4:15-cv-00163-DCB

**[PROPOSED] ORDER  
AUTHORIZING DISTRIBUTION OF  
NET SETTLEMENT FUND AND  
APPROVING THE PROPOSED  
MODIFIED PLAN OF ALLOCATION**

Having considered the Motion for an Order to Authorize Distribution of the Net Settlement Fund and to Approve the Proposed Modified Plan of Allocation, and the accompanying documents thereto, and all matters submitted to it and good cause appearing therefore; and

It appearing that the parties have administered the terms of the Stipulation; and,

It appearing as set forth in the Notice of Pendency and Proposed Settlement of Class Action (the “Notice”), the deadline for Class Members to submit Proof of Claim and Release forms to the claims administrator for the Settlement, JND Class Action Administration (“JND” or “Claims Administrator”), in order to participate in the distribution of the Settlement Fund was April 24, 2017; and

It appearing that in satisfaction of due process requirements, all Class Members who filed claims that were in any way ineligible or deficient were: (1) informed that

1 their claims were ineligible or deficient; and (2) given opportunities to correct any  
2 deficiency prior to their claims being finally rejected, or to contest the determination as  
3 to the deficiency; and  
4

5 It appearing that the process of reviewing all Proofs of Claim has been  
6 completed; and

7 It appearing that Lead Plaintiffs' Counsel now seeks authorization to distribute  
8 the proceeds of the Settlement Fund to Authorized Claimants, after the payment of any  
9 taxes and unpaid costs or expenses, and to approve the Proposed Modified Plan of  
10 Allocation; and  
11

12 It appearing that this Court has retained exclusive and specific jurisdiction of this  
13 Action with respect to all matters relating to the Settlement, including the  
14 administration, interpretation, effectuation or enforcement of the Stipulation or  
15 Settlement and the Order and Final Judgment, and including *inter alia* administering  
16 and distributing the settlement proceeds to the Settlement Class Members;

17 **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND**  
18 **DECREED THAT:**

19 (1) The Proposed Modified Plan of Allocation is approved as fair and  
20 reasonable and Lead Plaintiffs' Counsel and the Claims Administrator are directed to  
21 administer the Stipulation and Proposed Modified Plan of Allocation in accordance with  
22 its terms and provisions. Any modification or change in the Proposed Modified Plan of  
23 Allocation that may hereafter be approved shall in no way disturb, affect or delay the  
24 finality of the Order and Final Judgment dated May 8, 2017 (Dkt. No. 100) or the  
25 Releases provided thereunder, shall not disturb, affect or delay the Effective Date of the  
26 Settlement, and shall be considered separate from the Order and Final Judgment.  
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1           (2)    The administrative determinations of JND to accept the valid and timely  
2 claims by Authorized Claimants, as set forth in Exhibit C-1 to the Cormio Affidavit, and  
3 the late but otherwise valid claims by Authorized Claimants, as set forth in Exhibit C-2  
4 of the Cormio Affidavit, are adopted and said claims are hereby accepted.  
5

6           (3)    Any claim submitted after February 1, 2018 is and will be rejected, and  
7 that no further claims against the Settlement Fund be permitted.

8           (4)    The administrative determinations of JND to reject the claims on the list  
9 of rejected or ineligible Claimants, as set forth in Exhibit C-3 of the Cormio Affidavit,  
10 are adopted and said claims are hereby rejected.  
11

12           (5)    Payment shall be made from the Settlement Fund to the Internal Revenue  
13 Service for the proper amount of taxes due and owing on the interest earned on the  
14 Settlement Fund while in escrow, if any.

15           (6)    The balance of the Settlement Fund, after deducting payments previously  
16 allowed or set forth herein, shall be distributed to the Authorized Claimants listed on  
17 Exhibit C-1 and C-2 of the Cormio Affidavit under the Court-approved Modified Plan  
18 of Allocation in proportion to each Authorized Claimant's Recognized Loss as  
19 compared to the total Recognized Loss of all accepted claimants as shown on such  
20 printout.  
21

22           (7)    The checks for distribution to the Authorized Claimants shall bear the  
23 notation "CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF  
24 NOT CASHED 90 DAYS AFTER ISSUE DATE." Lead Plaintiffs' Counsel and JND  
25 are authorized to take appropriate action to locate and/or contact any Authorized  
26 Claimant who has not cashed his, her or its check within said time. The costs of such  
27  
28

1 services to locate and reissue payments to such Authorized Claimants shall be payable  
2 from the unclaimed/uncashed monies remaining in the Net Settlement Fund.  
3

4 (8) One (1) year after the initial distribution, (a) any funds remaining in the  
5 Net Settlement Fund, by reason of uncashed checks, or otherwise, after the Claims  
6 Administrator has made reasonable efforts to have Authorized Claimants who are  
7 entitled to participate in the distribution of the Net Settlement Fund cash their  
8 distribution checks, shall be redistributed, if economically feasible, to Settlement Class  
9 Members who have cashed their initial distributions and who would receive at least  
10 \$10.00 from such redistribution, after payment of any unpaid costs or fees incurred in  
11 administering the Net Settlement Fund for such redistribution; and (b) if there is any  
12 balance remaining in the Net Settlement Fund after distribution or redistribution to  
13 Authorized Claimants, then such remaining funds, after payment of any further notice  
14 and administration expenses and taxes, shall be donated to the Arizona Foundation for  
15 Legal Services and Education or any not-for-profit successor of it.  
16

17 (9) The Court finds that the administration of the Settlement and the proposed  
18 distribution of the Net Settlement Fund comply with the terms of the Stipulation and the  
19 Modified Plan of Allocation and that all persons who are involved in the review,  
20 verification, calculation, tabulation, or any other aspect of the processing of the Proofs  
21 of Claim filed in this Action, or who are otherwise involved in the administration or  
22 taxation of the Settlement Fund, or the Net Settlement Fund are released and discharged  
23 from any and all claims arising out of such involvement, and, pursuant to the release  
24 terms of the Settlement, all Class Members, whether or not they are to receive payment  
25 from the Net Settlement Fund, are barred from making any further claims against the  
26 Net Settlement Fund, beyond the amount allocated to Authorized Claimants, and to  
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1 provide that all persons involved in the review, verification, calculation, tabulation, or  
2 any other aspect of the processing of the Proofs of Claim submitted herein, or otherwise  
3 involved in the administration or taxation of the Settlement Fund or Net Settlement  
4 Fund, be released and discharged from any and all claims arising out of such  
5 involvement.  
6

7 (10) This Order shall not release any claim by Lead Plaintiffs against the  
8 Claims Administrator with respect to distributions, if any, if later discovered to have  
9 been made not substantially in accordance with the Stipulation, the Modified Plan of  
10 Allocation or any order of the Court.  
11

12 (11) JND is hereby authorized to destroy claim forms and records in paper  
13 form one year after final distribution of the Net Settlement Fund, and claim forms and  
14 records in electronic form three years after final distribution of the Net Settlement Fund.  
15

16 (12) This Court retains jurisdiction over any further application or matter  
17 which may arise in connection with this Action.

18 **IT IS FURTHER ORDERED** that the Motion for an Order to Authorize  
19 Distribution of the Net Settlement Fund and to Approve the Proposed Modified Plan of  
20 Allocation (Doc. \_\_\_\_ ) is \_\_\_\_\_.  
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