

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

EUGENE ROSENFELD, On Behalf of Himself and All Others Similarly Situated,	:	CIVIL ACTION NO. 08-03381-SVW (CTx)
	:	
Plaintiff,	:	<u>CLASS ACTION</u>
	:	
vs.	:	
	:	
GATEWAY, INC.,	:	
	:	
Defendant.	:	

SETTLEMENT AGREEMENT

Plaintiff, Eugene Rosenfeld ("Plaintiff" or "Rosenfeld"), by and through his counsel, and Defendant, Gateway, Inc. ("Defendant" or "Gateway"), by and through its counsel, hereby enter into this Settlement Agreement providing, subject to the approval of the Court, for the settlement of the claims herein described against Defendant.

WHEREAS, Rosenfeld filed the above-captioned class action against Gateway on May 22, 2008, alleging that Defendant had improperly advertised certain notebook computers as having the capacity to be upgraded to 4 gigabytes ("GB") of random access memory ("RAM");

WHEREAS, Gateway vigorously denied and continues to deny Rosenfeld's allegations and denies that it engaged in any improper or unlawful conduct of any kind;

WHEREAS, Rosenfeld and Gateway (the "Parties") exchanged expert reports with respect to the central issue in this case (*i.e.*, the ability of the notebook computers to be upgraded to 4 GB of RAM) on October 10, 2008, pursuant to the Order of the Honorable Stephen V. Wilson dated August 27, 2008;

WHEREAS, Plaintiff and Defendant agreed to participate and participated in a mediation

session with the Honorable Dickran M. Tevrizian (ret.) in Los Angeles, California on October 15, 2008;

WHEREAS, after a day of vigorous discussions and negotiations with the assistance of Judge Tevrizian, the Parties reached an agreement to resolve this case and the dispute between them;

WHEREAS, for purposes of settlement, the Parties agree to the certification of a settlement class defined as follows:

All persons or entities who purchased, not for resale, one of the Notebook Computers (defined below) in the United States ("Class" or "Settlement Class");

WHEREAS, the Parties agree that the following persons and entities should be excluded from the Class: Defendant, as well as Defendant's employees, officers and directors; any persons or entities which distribute or sell the Notebook Computers; and the Judge(s) to whom this matter is assigned;

WHEREAS, Plaintiff and Defendant have conducted a thorough examination and investigation of the facts and law relating to the matters in this Litigation, subject to certain agreed upon confirmatory discovery that they have agreed to complete before a preliminary approval hearing currently scheduled for December 8, 2008;

WHEREAS, Defendant has denied and continues to deny that it is legally responsible or liable to Plaintiff or any member of the Class for any of the matters asserted in this Litigation but has concluded that settlement is desirable in order to avoid the time, expense, and inherent uncertainties of defending protracted litigation and to resolve, finally and completely, all pending

and potential claims of the Plaintiff and all members of the Class relating to claims which were or could have been asserted by Plaintiff and the Class in this Litigation, relating to the practices at issue;

WHEREAS, Plaintiff recognizes the costs and risks of prosecution of this Litigation, and believes that it is in his interest, and the interest of all Class Members, to resolve this Litigation, and any and all claims against Defendant, in this Settlement Agreement;

WHEREAS, significant arm's-length settlement negotiations have taken place between the Parties and, as a result, this Settlement Agreement has been reached, subject to the Court approval process set forth herein;

WHEREAS, the undersigned Parties believe that this Settlement Agreement offers significant benefits to Class Members and is fair, reasonable, adequate and in the best interest of Class Members; and

WHEREAS, this Settlement Agreement is made and entered into by and among Plaintiff and Defendant, individually and on behalf of the Class;

NOW, THEREFORE, it is hereby stipulated and agreed, by and between the undersigned Parties, as follows:

I. DEFINITIONS

As used in this Settlement Agreement, the following terms shall have the meaning set forth below. Where appropriate, terms used in the singular shall be deemed to include the plural and vice versa.

A. **Action**. "Action" shall mean this above-captioned class action pending before the United States District Court for the Central District of California.

B. **Claim Form.** "Claim Form" shall mean a form in substantially the same form as that attached hereto as Exhibit "A."

C. **Claims Period.** "Claims Period" shall mean the time period through which Claim Forms may be submitted by Class Members and shall conclude one hundred and twenty (120) days after the entry of the Preliminary Approval Order (defined below) with respect to this Settlement.

D. **Class Counsel.** "Class Counsel" shall mean Shepherd, Finkelman, Miller & Shah, LLP, Seeger Weiss LLP and the Law Offices of Thomas D Mauriello.

E. **Class Counsel Fees and Expenses.** "Class Counsel Fees and Expenses" shall mean the reasonable attorneys' fees and expenses in the amount of Three Hundred Thousand Dollars (\$300,000) that Defendant has agreed to pay to Class Counsel as part of the resolution of this Litigation, subject to approval of the Court. The Class Counsel Fees and Expenses will be paid separate and apart from any relief provided to the Class.

F. **Class Members.** "Class Members" shall mean all persons or entities who purchased, not for resale, one of the Notebooks in the United States with the exception of Defendant, Defendant's employees, officers and directors; any persons or entities which distribute or sell the Notebook Computers and the Judge(s) to whom this matter is assigned.

G. **Class Notice.** "Class Notice" shall mean the Court-approved form of notice to Class Members informing them of the (i) preliminary approval of the Settlement; (ii) scheduling of the Final Approval Hearing; and (iii) opportunity to submit a claim, in substantially the same form as that attached hereto as Exhibit "B."

H. **Court.** "Court" shall mean the United States District Court for the Central District of California, the Honorable Stephen V. Wilson presiding, or his duly appointed successor.

I. **Defendant.** "Defendant" shall mean Gateway, Inc. and its predecessors, successors, assigns, directors, officers, agents, attorneys, representatives and employees.

J. **Defendant's Counsel.** "Defendant's Counsel" shall mean Quinn Emanuel Urquhart Oliver and Hedges, LLP.

K. **Effective Date.** "Effective Date" shall mean the date following the entry of the Final Approval Order on which the time for any appeal expires or the date upon which any appeal is finally terminated, whichever date is later.

L. **Final Approval Hearing.** "Final Approval Hearing" shall mean the hearing at which the Court will consider and finally decide whether to enter the Final Approval Order.

M. **Final Approval Order.** "Final Approval Order" shall mean the Court order that approves this Settlement Agreement, approves payment of attorneys' fees and expenses, and makes such other final rulings as are contemplated by this Settlement Agreement.

N. **Gateway.** "Gateway" shall mean Gateway, Inc. and its predecessors, successors, assigns, directors, officers, agents, attorneys, representatives and employees.

O. **Incentive Award.** "Incentive Award" shall mean the Two Thousand Five Hundred Dollar (\$2,500) payment that the Defendant has agreed to pay to Plaintiff to compensate him for his time and efforts on behalf of the Class, subject to approval of the Court.

P. **Lead Class Counsel.** "Lead Class Counsel" shall mean Shepherd, Finkelman, Miller & Shah, LLP.

Q. **Litigation.** "Litigation" shall mean this above-captioned class action proceeding pending before the United States District Court for the Central District of California.

R. **Notebooks or Notebook Computers.** "Notebooks" or "Notebook Computers" shall mean the models in the Gateway CX210X computer series [*i.e.*, CX210X, CX210S, M285E, M285-E SB, M285G, M7225C models (collectively "CX210X Notebooks" or "CX210X Notebook Computers"), as well as the models in the Gateway M7309H, M153XL and/or DX42X computer series.

S. **Objection Date.** "Objection Date" shall mean the date agreed upon by the Parties or otherwise ordered by the Court for Class Members to object to the Settlement Agreement's terms or provisions and submit any required statements, proof, or other materials and/or argument.

T. **Opt-Out Deadline.** "Opt-Out Deadline" shall mean the date agreed upon by the Parties or otherwise ordered by the Court, by which any Class Members who do not wish to be included in the Settlement Class and participate in the Settlement Agreement must complete the acts necessary to properly effect such election.

U. **Opt-Out List.** "Opt-Out List" shall mean a written list prepared by Class Counsel of all Class Members who submit timely Requests for Exclusion.

V. **Parties.** "Parties" shall mean the Plaintiff and Defendant.

W. **Plaintiff.** "Plaintiff" shall mean Eugene Rosenfeld.

X. **Preliminary Approval Order.** "Preliminary Approval Order" shall mean the order of the Court preliminarily approving this Settlement Agreement, in substantially the same form as that attached hereto as Exhibit "C."

Y. **Request for Exclusion.** "Request for Exclusion" shall mean any request by any Class Member for exclusion from the Settlement.

Z. **Settlement.** "Settlement" shall mean the agreement by the Parties to resolve this Litigation, the terms of which have been memorialized and provided for in this Settlement Agreement.

AA. **Settlement Agreement.** "Settlement Agreement" shall mean this Settlement Agreement and all the exhibits attached hereto.

BB. **Settlement Class Members.** "Settlement Class Members" shall have the same meaning as Class Members.

II. **REQUIRED EVENTS**

A. Promptly after execution of this Settlement Agreement by all Parties:

1. Class Counsel and Defendant's Counsel shall take all reasonable and necessary steps, subject to the Court's availability, to obtain entry of the Preliminary Approval Order on or about December 8, 2008 and move for the Final Approval Order on or before February 27, 2009 (and based upon the date established by the Court for the Final Approval Hearing).

2. The Parties to the Settlement Agreement shall jointly move for entry of a Preliminary Approval Order in the same form as that attached hereto as Exhibit "C."

3. The Parties will use their best efforts, consistent with the terms of this Settlement Agreement, to promptly obtain a Final Approval Order.

4. In the event that the Court fails to issue the Preliminary Approval Order, or fails to issue the Final Approval Order, this Settlement Agreement is voidable by either of the

Parties. However, the Parties agree to use their best efforts, consistent with this Settlement Agreement, to cure any defect(s) identified by the Court.

5. The Parties acknowledge that prompt approval, consummation, and implementation of the Settlement set forth in this Settlement Agreement is essential. The Parties shall cooperate with each other in good faith to carry out the purposes of and effectuate this Settlement Agreement, shall promptly perform their respective obligations hereunder, and shall promptly take any and all actions and execute and deliver any and all additional documents and all other materials and/or information reasonably necessary or appropriate to carry out the terms of this Settlement Agreement and the transactions contemplated hereby.

6. Upon Entry of the Final Approval Order, this Action shall be dismissed, on its merits and with prejudice, subject to the continuing jurisdiction of this Court as provided in Section IX herein.

III. SETTLEMENT TERMS

A. Class Members that purchased one of the CX210X Notebooks for a specific purpose requiring 4 GB of RAM available, upon completion of a Claim Form, who (1) provide a written attestation, under penalty of perjury, setting forth (a) the intended purpose of purchasing the Notebook Computer, (b) that the Notebook Computer was purchased with 4 GB of RAM or thereafter it was expanded to 4 GB of RAM, and (c) that the Class Member was unable to use the Notebook Computer for the purpose set forth in subsection (a) above because the Class Member did not have use of 4 GB of RAM; (2) contacted Gateway on or before October 15, 2008 to complain that they were unable to access or utilize 4 GB of RAM; (3) did not receive a refund or other compensation from Gateway in response to the complaint described in paragraph (2) above;

(4) produce a receipt or other documentary proof of the amount paid for the CX210X Notebook Computer and any RAM purchased to upgrade the Notebook Computer; and (5) produce evidence of purchasing software or a similar program that required the use of 4 GB of RAM either independently or in connection with the use of other software or programs (*e.g.*, a Xerox copy of packaging identifying the software or other programs and the RAM specifications required for such usage) to demonstrate that the Notebook Computer could not be utilized for its intended purpose (as described in subsection (a) above), shall receive a refund of the purchase price of the Notebook Computer in an amount not to exceed \$2,500.00 (in exchange for return of the Notebook Computer) and a refund of any RAM purchased to expand the Notebook Computer to 4 GB of RAM in an amount not to exceed \$200.00.

B. Class Members that purchased one of the CX210X Notebooks with 4GB of RAM or thereafter purchased additional RAM to expand their computer to 4 GB of RAM on or before October 15, 2008, who are not eligible for relief under Paragraph A above or choose not to elect such relief, shall be entitled to receive a refund of up to fifty percent (50%) of the cost of the RAM purchased to expand a Notebook Computer to 4 GB of RAM in an amount not to exceed \$100.00 upon provision of a receipt or other proof of purchase of additional RAM to expand the Class Member's Notebook Computer to 4 GB of RAM.

C. Class Members that purchased one of the Notebook Computers, who are not eligible for relief under Paragraphs A or B above or choose not to elect such relief, upon completion of a Claim Form, shall be entitled to receive one of the following items from Gateway free of charge: (1) 1 GB flash drive; (2) 1 ethernet cord retractor; (3) 1 notebook cleaning kit; (4) 1 travel mouse; or (5) 1 notebook travel sleeve.

D. No Class Member shall be eligible for more than one category of relief per Notebook Computer serial number.

E. Gateway shall provide each Class Member submitting a valid Claim Form with the relief to which the Class Member is entitled within sixty (60) days of the Effective Date.

IV. CLAIMS ADMINISTRATION AND APPEALS

A. Gateway, with oversight by and reporting to Lead Class Counsel, will administer and be responsible for the claims process. Gateway will determine the validity of claims and examine the proof submitted on claims using its records and other available information. Thirty (30) days after the expiration of the Claims Period, Gateway shall submit a report to Lead Class Counsel regarding the basis for rejection of any claim(s).

B. In the event that Defendant's Counsel and Class Counsel cannot resolve any disagreements over the validity of any disputed claims after meeting and conferring regarding the same, and the Class Member wishes to pursue an appeal of the denial of the claim, Class Counsel will submit a written claim for reimbursement ("Appeal Claim"), which will not exceed two (2) pages in length, to the Honorable Dickran M. Tevrizian (ret.), and serve a copy by mail on Defendant's Counsel, not later than twenty (20) days after the meet and confer process is terminated. Gateway will have twenty-three (23) days from the date of mailing to file a written response to the Appeal Claim, which will not exceed two (2) pages in length, to the Honorable Dickran M. Tevrizian (ret.), and to serve the same on Lead Class Counsel. Judge Tevrizian will decide the appeal on the papers and his determination will be final and binding. Judge Tevrizian's fees and costs will be split 50/50 between Lead Class Counsel and Gateway unless Judge Tevrizian determines, in his sole discretion, that a different apportionment should occur in

the interests of justice.

V. NOTIFICATION TO CLASS MEMBERS

A. Gateway shall be responsible, subject to the Court approving the same, for the following notice program:

1. Gateway shall provide direct notice to all Class Members for which Gateway has addresses by sending the Class Notice to all such Class Members by electronic mail ("e-mail") or United States mail (in the event that no e-mail address is available for the Class Member) and shall also provide publication notice to all Class Members by publishing the Class Notice in non-color copy on one-sixth of a page of a weekday (Monday - Thursday) edition of *USA Today*. Gateway shall provide Class Notice to the Class Members within thirty (30) days of the entry of the Preliminary Approval Order.

B. The Class Notice will also be posted in a prominent location on Lead Class Counsel's website (www.sfmnlaw.com). The Parties shall also work cooperatively so that all other pertinent information to submit a claim, request exclusion from the Settlement, object to the Settlement or provide notice of an intention to appear in Court, is provided to all Class Members at www.sfmnlaw.com.

C. The Claims Period shall run for a period of thirty (30) days after the entry of the Final Approval Order, and the Class Notice will set forth a claims deadline of thirty (30) days after the date set by the Court for the Final Approval Hearing, which date will be extended in the event that the Final Approval Order is not entered on that date until thirty (30) days after the entry of the Final Approval Hearing.

D. All costs of the notice program will be paid by Gateway. There shall be no charge

to Gateway for the posting of the Class Notice on Lead Class Counsel's website or for posting any other information on such website.

E. Proof of Notice. No later than ten (10) days prior to the Final Approval Hearing, Gateway shall provide an affidavit to the Court, with a copy to Class Counsel, attesting that notice was disseminated in a manner consistent with the terms of this Settlement Agreement, or those otherwise required by the Court.

VI. REQUESTS FOR EXCLUSION BY CLASS MEMBERS

A. The provisions of this paragraph shall apply to any Request for Exclusion. Any Class Member may make a Request for Exclusion by mailing or delivering such request in writing to Lead Class Counsel and Defendant's Counsel at the addresses set forth in the Class Notice and/or the website referenced in the Class Notice. Any Request for Exclusion must be postmarked or delivered not later than the date specified in the Court's Preliminary Approval Order. Any Request for Exclusion shall state the name, address and telephone number of the person/entity requesting exclusion and contain a clear statement communicating that such person/entity elects to be excluded from the Settlement Class and elects to be excluded from any judgment entered pursuant to this Settlement.

B. Any Class Member who submits a timely Request for Exclusion may not file an objection to the Settlement and shall be deemed to have waived any rights or benefits under this Settlement Agreement.

C. Class Counsel shall report the names of all individuals who have submitted a Request for Exclusion to the Court not less than ten (10) days prior to the Final Approval Hearing.

VII. OBJECTIONS BY SETTLEMENT CLASS MEMBERS

A. The Parties will request that the Court enter an order requiring any Class Member who wishes to be heard orally at the Final Approval Hearing, or who wishes for any objection to be considered, to file a written notice of objection by the Objection Date. Such objections shall state the name, address and telephone number of the person/entity and provide proof of membership in the Settlement Class, as well as a detailed statement of each objection asserted, including the grounds for objection and reasons for appearing and being heard, together with any documents such person/entity wishes to be considered by the Court.

B. The agreed-upon procedures and requirements for filing objections in connection with the Final Approval Hearing are intended to ensure the efficient administration of justice and the orderly presentation of any Class Member's objections to the Settlement Agreement, in accordance with such Class Member's due process rights. The Preliminary Approval Order and Class Notice will require all Class Members who have any objections to file such notice of objection or request to be heard with the Court, and serve by mail or hand delivery such notice of objection or request to be heard upon Class Counsel and Defendant's Counsel at the addresses set forth in the Class Notice and/or the website referenced in the Class Notice, by no later than the Objection Date. The Preliminary Approval Order will further provide that objectors who fail to properly or timely file their objections with the Court, along with the required information and documentation set forth above, or to serve them as provided above, shall not be heard during the Final Approval Hearing, nor shall their objections be considered by the Court.

VIII. RELEASE, DISMISSAL OF ACTION AND JURISDICTION OF COURT

A. By this Settlement Agreement and the following Release, Defendant is released from any and all claims or causes of action that were, or could have been, asserted by the named Plaintiff or any member of the Class against the Defendant, based upon the alleged inability to upgrade the Notebook Computers at issue to 4 GB of RAM, as alleged in the Action. Without assuming that the Release given by this Settlement Agreement is a general release, Plaintiff and Class Members expressly waive and relinquish to the fullest extent permitted by law, the rights provided by Section 1542 of the California Civil Code, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor.

Plaintiff and the Settlement Class Members recognize that, even if they may later discover facts in addition to or different from those which they now know or believe to be true, they nevertheless agree that, upon entry of the Final Approval Order and Judgment, Plaintiff and the Settlement Class Members fully, finally, and forever settle and release any and all of the Released Claims. The Parties acknowledge that the foregoing waiver and release was bargained for and is a material element of the Settlement Agreement.

B. This Settlement Agreement and Release does not affect the rights of Class Members who timely and properly request exclusion from the Settlement Agreement.

C. The administration and consummation of the Settlement as embodied in this Settlement Agreement shall be under the authority of the Court. The Court shall retain jurisdiction to protect, preserve, and implement the Settlement Agreement, including, but not

