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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHAD C. SMITH, Individually and on behalf of
all others similarly situated,

Plaintiff,

v.

NETAPP, INC., et al.

Defendants.

Case No. 4:19-cv-04801-JST

~~PROPOSED~~ ORDER PRELIMINARILY
APPROVING SETTLEMENT AND
PROVIDING FOR NOTICE *AS
MODIFIED*

Re: ECF No. 65

Hon. Jon S. Tigar

1 WHEREAS, Lead Plaintiff Winston Derouin (“Plaintiff”) and Defendants NetApp, Inc.
2 (“NetApp” or “Company”), George Kurian, Ronald J. Pasek, and Matthew K. Fawcett have
3 entered into the Stipulation of Settlement, dated September 21, 2021 (“Stipulation”), which is
4 subject to review under Rule 23 of the Federal Rules of Civil Procedure, and which, together with
5 the exhibits annexed thereto, sets forth the terms and conditions for the proposed settlement and
6 dismissal with prejudice of the securities class action pending before the Court titled, *Chad C.*
7 *Smith v. NetApp, Inc., et al.*, Case No. 4:19-cv-04801-JST (N.D. Cal.) (the “Action”); and the
8 Court having read and considered the Stipulation and the exhibits thereto and submissions made
9 relating thereto, and finding that substantial and sufficient grounds exist for entering this Order;
10 and the Parties having consented to the entry of this Order;

11 NOW, THEREFORE, IT IS HEREBY ORDERED that:

- 12 1. Capitalized terms used herein have the meanings defined in the Stipulation.
- 13 2. Pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure and for
14 the purposes of the Settlement only, the Action is hereby preliminarily certified as a class action
15 on behalf of all persons and entities who purchased or otherwise acquired the publicly traded
16 securities of NetApp between May 23, 2019 and August 1, 2019, both dates inclusive (“Settlement
17 Class Period”). Excluded from the Settlement Class are Defendants, the officers and directors of
18 NetApp, members of the Individual Defendants’ immediate families and their legal
19 representatives, heirs, successors, or assigns and any entity in which the Individual Defendants
20 have or had a controlling interest. Also excluded from the Settlement Class are all putative
21 members of the Settlement Class who exclude themselves by filing a valid and timely request for
22 exclusion, and persons with no compensable damages.
- 23 3. This Court finds, preliminarily and for purposes of the Settlement of the Action
24 only, that the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of
25 Civil Procedure have been satisfied in that: (a) the number of Settlement Class Members is so
26 numerous that joinder of all members of the Settlement Class is impracticable; (b) there are
27 questions of law and fact common to the Settlement Class; (c) Lead Plaintiff’s claims are typical
28 of the claims of the Settlement Class they seek to represent; (d) Lead Plaintiff fairly and adequately

1 represents the interests of the Settlement Class; (e) questions of law and fact common to the
2 Settlement Class predominate over any questions affecting only individual members of the
3 Settlement Class; and (f) a class action is superior to other available methods for the fair and
4 efficient adjudication of the Action.

5 4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, preliminarily and for
6 the purposes of the Settlement of the Action only, Lead Plaintiff is certified as the class
7 representative on behalf of the Settlement Class (“Class Representative”) and Lead Counsel,
8 selected by Lead Plaintiff and previously appointed by the Court, is hereby appointed as class
9 counsel for the Settlement Class (“Class Counsel”).

10 5. The Court finds that (a) the Settlement memorialized in the Stipulation resulted
11 from good faith, arm’s length negotiations, and (b) the Settlement memorialized in the Stipulation
12 is sufficiently fair, reasonable, and adequate to the Settlement Class Members to warrant providing
13 notice of the Settlement to Settlement Class Members and holding a Final Approval Hearing.

14 6. The Court hereby preliminarily approves the Settlement, subject to further
15 consideration at a hearing (the “Final Approval Hearing”) pursuant to Federal Rule of Civil
16 Procedure 23(e), which is hereby scheduled to be held before the Court on September 1, 2022, at
17 2:00 p.m., via Zoom at the link available at <https://cand.uscourts.gov/judges/tigar-jon-s-jst/>, for the
18 following purposes:

19 (a) to determine finally whether the applicable prerequisites for class action
20 treatment of the Action under Federal Rules of Civil Procedure 23(a) and (b) are satisfied;

21 (b) to determine finally whether the Settlement is fair, reasonable, and
22 adequate, and should be approved by the Court;

23 (c) to determine finally whether the Judgment, substantially in the form of
24 Exhibit B to the Stipulation, should be entered, dismissing the Action on the merits and
25 with prejudice, and to determine whether the release by the Releasing Parties of the
26 Released Claims against the Released Parties, as set forth in the Stipulation, should be
27 ordered, along with a permanent injunction barring efforts to prosecute or attempt to
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1 prosecute any Released Claims extinguished by the release against any of the Released
2 Parties, as also set forth in the Stipulation;

3 (d) to determine finally whether the proposed Plan of Allocation for the
4 distribution of the Net Settlement Fund is fair and reasonable and should be approved by
5 the Court;

6 (e) to consider the applications of Class Counsel for awards of attorney's fees
7 with interest and expenses to Class Counsel and Compensatory Award to Class
8 Representative;

9 (f) to consider Settlement Class Members' objections to the Settlement, if any,
10 whether submitted previously in writing or presented orally at the Settlement Hearing by
11 Settlement Class Members (or by counsel on their behalf), provided that they give proper
12 notice that they intend to appear at the Settlement Hearing; and

13 (g) to rule upon such other matters as the Court may deem appropriate.

14 7. The Court reserves the right to adjourn the Final Approval Hearing to a later date
15 and to approve the Settlement without modification, or with such modifications as may be agreed
16 to by the Parties, with or without further notice other than entry of an order on the Court's docket.
17 The Court may decide to hold the Final Approval Hearing telephonically or by other virtual means
18 without further notice. The Court further reserves the right to enter its Judgment approving the
19 Settlement and dismissing the Action, on the merits and with prejudice, regardless of whether it
20 has approved the Plan of Allocation or awarded attorney's fees and expenses.

21 8. The Court approves the form, substance and requirements of (a) the Notice of
22 Pendency and Proposed Settlement of Class Action ("Long Notice"), (b) the Summary Notice of
23 Pendency and Proposed Settlement of Class Action ("Summary Notice"), (c) the Postcard Notice,
24 and (d) the Proof of Claim and Release Form ("Proof of Claim"), all of which are exhibits to the
25 Stipulation, except as set forth below:

26 (a) The information required for Settlement Class Members to request
27 exclusion or to object should be modified consistent with this order, at paragraphs 21 and
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1 25 below. *See, e.g., Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 WL
2 4207245, at *11-12 (N.D. Cal. Sept. 4, 2018).

3 (b) The notices should indicate that the final approval hearing will be conducted
4 via Zoom, with the link available at <https://cand.uscourts.gov/judges/tigar-jon-s-jst/>.

5 (c) The Long Notice should be corrected so that it does not contain two
6 questions numbered 9. ECF No. 66-4 at 10.

7 (d) In the Short Notice, and in Question 14 of the Long Notice, Settlement Class
8 Members should be directed to mail objections to the “Clerk of Court” and not to the “Class
9 Action Clerk.” *Id.* at 12; ECF No. 66-6 at 4.

10 (e) In Question 19 of the Long Notice, the Court’s hours should be modified
11 from 9:00 a.m. to 4:00 p.m. to 9:00 a.m. to 1:00 p.m. ECF No. 66-4 at 14.

12 9. Class Counsel has the authority to enter into the Settlement on behalf of the
13 Settlement Class and has the authority to act on behalf of the Settlement Class with respect to all
14 acts or consents required by or that may be given pursuant to the Stipulation or such other acts that
15 are reasonably necessary to consummate the Settlement.

16 10. For settlement purposes only, Strategic Claims Services is appointed and approved
17 as the Claims Administrator to supervise and administer the notice procedure as well as the
18 processing of claims.

19 11. The Escrow Agent may, at any time after entry of this Order and without further
20 approval from Defendants or the Court, disburse at the direction of Class Counsel up to \$250,000
21 (two hundred fifty thousand dollars) from the Settlement Fund prior to the Effective Date to pay
22 Notice and Administration Costs.

23 12. No later than seven (7) Business Days after the date of entry of this Order, NetApp
24 shall obtain from its transfer agent, at NetApp’s expense, a list containing the names and addresses
25 of certificate or record holders who may have purchased shares of NetApp securities during the
26 Settlement Class Period. NetApp shall provide and/or cause its transfer agent to provide to the
27 Claims Administrator a list of the record owners of NetApp securities during the Class Period in a
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1 usable electronic format, such as an Excel spreadsheet. This information will be kept confidential
2 and not used for any purpose other than to provide the notice.

3 13. Within twenty (20) Business Days of the entry of this Order, Class Counsel, through
4 the Claims Administrator, shall either (a) email links to the location of the Long Notice and Proof
5 of Claim to Settlement Class Members for whom the Claims Administrator is able to obtain email
6 addresses, substantially in the form annexed to the Stipulation as Exhibit A-2 and Exhibit A-3 or
7 (b) cause the Postcard Notice, substantially in the form annexed to the Stipulation as Exhibit A-1,
8 if no electronic mail address can be obtained, mailed, by first class mail, postage prepaid, to
9 Settlement Class Members who can be identified with reasonable effort by Class Counsel, through
10 the Claims Administrator.

11 14. Class Counsel, through the Claims Administrator, shall make all reasonable efforts
12 to give notice to nominees or custodians who held NetApp securities during the Settlement Class
13 Period as record owners but not as beneficial owners. Such nominees or custodians shall, within
14 ten (10) calendar days of receipt of the notice, either: (i) request copies of the Postcard Notice
15 sufficient to send the Postcard Notice to all beneficial owners for whom they are nominee or
16 custodian, and within ten (10) calendar days after receipt thereof send copies to such beneficial
17 owners; (ii) request links to the location of the Long Notice and Proof of Claim and email the links
18 to each beneficial owner for whom they are nominee or custodian within ten (10) calendar days
19 after receipt thereof; or (iii) provide the Claims Administrator with lists of the names, last known
20 addresses and email addresses (to the extent known) of such beneficial owners, in which event the
21 Claims Administrator shall promptly deliver the Postcard Notice to such beneficial owners. If the
22 Claims Administrator receives an email address, it will send a link to the location of the Long
23 Notice and Proof of Claim electronically. Nominees or custodians who elect to email links to the
24 Long Notice and Proof of Claim or send the Postcard Notice to their beneficial owners shall send
25 a written certification to the Claims Administrator confirming that the mailing or emailing has
26 been made as directed. Copies of the Postcard Notice shall be made available to any nominee or
27 custodian requesting same for the purpose of distribution to beneficial owners. The Claims
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1 Administrator shall, if requested, reimburse nominees or custodians out of the Settlement Fund
2 solely for their reasonable out-of-pocket expenses incurred in providing notice to beneficial
3 owners, which expenses would not have been incurred except for the providing names and
4 addresses, of up to \$0.05 per name, address, and email address provided to the Claims
5 Administrator; up to \$0.05 per unit for each Postcard Notice actually mailed, plus postage at the
6 pre-sort rate used by the Claims Administrator; or up to \$0.05 per email notice sent, and subject to
7 further order of this Court with respect to any dispute concerning such reimbursement.

8 15. Class Counsel shall, at least seven (7) calendar days before the Final Approval
9 Hearing, serve upon counsel for Defendants and file with the Court proof of the mailing of the
10 Postcard Notice as required by this Order.

11 16. Within sixteen (16) calendar days of the entry of this Order Class Counsel, through
12 the Claims Administrator, shall cause the Stipulation and its exhibits, this Order, and a copy of the
13 Long Notice and Proof of Claim to be posted on the Claims Administrator's website
14 contemporaneously with the mailing of the Postcard Notice and/or emailing links to the Long
15 Notice and Proof of Claim.

16 17. Class Counsel, through the Claims Administrator, shall cause the Summary Notice
17 to be published electronically once on the *GlobeNewswire* and in print once in the *Investor's*
18 *Business Daily* within ten (10) calendar days after the Postcard Notice mailing or emailing links
19 to the location of the Long Notice and Proof of Claim. Class Counsel shall, at least seven (7)
20 calendar days before the Settlement Hearing, serve upon counsel for Defendants and file with the
21 Court proof of publication of the Summary Notice.

22 18. The forms and methods set forth herein of notifying the Settlement Class Members
23 of the Settlement and its terms and conditions meet the requirements of due process, Rule 23 of
24 the Federal Rules of Civil Procedure, and Section 21D(a)(7) of the Securities Exchange Act of
25 1934, 15 U.S.C. § 78u-4(a)(7), as amended by the Private Securities Litigation Reform Act of
26 1995; constitute the best notice practicable under the circumstances; and constitute due and
27 sufficient notice to all persons and entities entitled thereto. No Settlement Class Member will be
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1 relieved from the terms and conditions of the Settlement, including the releases provided for
2 therein, based upon the contention or proof that such Settlement Class Member failed to receive
3 actual or adequate notice.

4 19. In order to be entitled to participate in recovery from the Net Settlement Fund after
5 the Effective Date, each Settlement Class Member shall take the following action and be subject
6 to the following conditions:

7 (a) A properly completed and executed Proof of Claim must be submitted to
8 the Claims Administrator: (a) electronically through the Claims Administrator's website,
9 www.strategicclaims.net, by 11:59 p.m. EST on August 2, 2022; or (b) at the Post Office
10 Box indicated in the Notice, postmarked no later than August 2, 2022 (thirty (30) calendar
11 days prior to the Final Approval Hearing). Such deadline may be further extended by Order
12 of the Court. Each Proof of Claim shall be deemed to have been submitted when: (a) the
13 claim receives a confirmation notice from Strategic Claims Services for electronic
14 submissions; or (b) legibly postmarked (if properly addressed and mailed by first class
15 mail), provided such Proof of Claim is actually received before the filing of a motion for
16 an Order of the Court approving distribution of the Net Settlement Fund. Any Proof of
17 Claim submitted in any other manner shall be deemed to have been submitted when it was
18 actually received by the Claims Administrator at the address designated in the Notice.

19 (b) The Proof of Claim submitted by each Settlement Class Member must
20 satisfy the following conditions: (i) it must be properly completed, signed and submitted
21 in a timely manner in accordance with the provisions of the preceding subparagraph; (ii) it
22 must be accompanied by adequate supporting documentation for the transactions reported
23 therein, in the form of broker confirmation slips, broker account statements, an authorized
24 statement from the broker containing the transactional information found in a broker
25 confirmation slip, or such other documentation as is deemed adequate by the Claims
26 Administrator or Class Counsel; (iii) if the person executing the Proof of Claim is acting
27 in a representative capacity, a certification of their current authority to act on behalf of the
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1 Settlement Class Member must be provided with the Proof of Claim; and (iv) the Proof of
2 Claim must be complete and contain no material deletions or modifications of any of the
3 printed matter contained therein and must be signed under penalty of perjury.

4 (c) Once the Claims Administrator has considered a timely submitted Proof of
5 Claim, it shall determine whether such claim is valid, deficient, or rejected. For each claim
6 determined to be either deficient or rejected, the Claims Administrator shall send a
7 deficiency letter or rejection letter as appropriate, describing the basis on which the claim
8 was so determined. Persons who timely submit a Proof of Claim that is deficient or
9 otherwise rejected shall be afforded a reasonable time (at least ten (10) calendar days) to
10 cure such deficiency, if it shall appear that such deficiency may be cured. If any Claimant
11 whose claim has been rejected in whole or in part wishes to contest such rejection, the
12 Claimant must, within ten (10) calendar days after the date of mailing of the notice, serve
13 upon the Claims Administrator a notice and statement of reasons indicating the Claimant's
14 ground for contesting the rejection along with any supporting documentation, and
15 requesting a review thereof by the Court. If an issue concerning a claim cannot be otherwise
16 resolved, Class Counsel shall thereafter present the request for review to the Court.

17 (d) As part of the Proof of Claim, each Settlement Class Member shall submit
18 to the jurisdiction of the Court with respect to the claim submitted, and shall, upon the
19 Effective Date, release all claims as provided in the Stipulation. No discovery shall be
20 allowed on the merits of the Action or the Settlement in connection with processing of the
21 Proof of Claim, nor shall any discovery from or of Defendants be allowed on any topic.

22 20. All Settlement Class Members who do not submit valid and timely Proofs of Claim
23 will be forever barred from receiving any payments from the Net Settlement Fund but will in all
24 other respects be subject to and bound by the provisions of the Stipulation and the Judgment, if
25 entered.

26 21. Settlement Class Members shall be bound by all determinations and judgments in
27 the Action whether favorable or unfavorable, unless such Persons request exclusion from the
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1 Settlement Class in a timely and proper manner, as hereinafter provided. A Settlement Class
2 Member wishing to make such request for exclusion from the Settlement shall mail it, in written
3 form, by first class mail, postage prepaid, or otherwise deliver it, so that it is received no later than
4 August 11, 2022 (twenty-one (21) calendar days prior to the Final Approval Hearing) (the
5 “Exclusion Deadline”), to the address listed in the Long Notice. In order to be valid, such request
6 for exclusion must include (1) the Settlement Class Member’s full name; (2) a statement that the
7 Settlement Class Member requests to be excluded from the settlement class in *Smith v. NetApp,*
8 *Inc.*, Case No. 4:19-cv-04801-JST; and (3) the Settlement Class Member’s signature. Information
9 regarding Settlement Class Members’ transactions involving NetApp shares, or Settlement Class
10 Members’ telephone numbers and addresses, is not required. The request for exclusion shall not
11 be effective unless it provides the required information, is legible, and is made within the time
12 stated above, or the exclusion is otherwise accepted by the Court.

13 22. The Claims Administrator shall provide all requests for exclusion and supporting
14 documentation submitted therewith (including untimely requests and revocations of requests) to
15 counsel for the Parties as soon as possible and no later than the Exclusion Deadline or upon the
16 receipt thereof (if later than the Exclusion Deadline). The Settlement Class will not include any
17 Person who delivers a valid and timely request for exclusion that has not been thereafter revoked.

18 23. Any Person that submits a request for exclusion may thereafter submit to the Claims
19 Administrator a written revocation of that request for exclusion, provided that it is received no
20 later than two (2) Business Days before the Final Approval Hearing, in which event that Person
21 will be included in the Settlement Class.

22 24. All Persons who submit a valid, timely and unrevoked request for exclusion will be
23 forever barred from receiving any payments from the Net Settlement Fund.

24 25. The Court will consider comments and/or objections to the Settlement, the Plan of
25 Allocation, or the Fee and Expense Application, provided, however, that no Settlement Class
26 Member or other Person shall be heard or entitled to contest the approval of the terms and
27 conditions of the proposed Settlement, the Plan of Allocation, or the Fee and Expense Application,
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1 or any other order relating thereto, unless that Person has (at least twenty-one (21) calendar days
2 prior to the Final Approval Hearing date) filed said objection(s) with the Court by mailing them to
3 Clerk of Court, U.S. District Court, Northern District of California, 1301 Clay Street, Suite 400 S,
4 Oakland, CA 94612, or by filing them in person at any location of the United States District Court
5 for the Northern District of California. To be valid, any such objection must contain the Settlement
6 Class Member's full name, the basis for their belief that they are a member of the settlement class,
7 the basis of their objection, and their signature. Settlement Class Members should also be advised
8 that they may file an objection or appear at the Final Approval Hearing either on their own or
9 through an attorney, and that if they appear through an attorney, they are responsible for paying
10 that attorney. Settlement Class Members do not need to appear at the Final Approval Hearing or
11 take any other action to indicate their approval.

12 26. Any Settlement Class Member who does not object in the manner prescribed above
13 shall be deemed to have waived all such objections and shall forever be foreclosed from making
14 any objection to the fairness, adequacy, or reasonableness of the Settlement, the Judgment to be
15 entered approving the Settlement, the Plan of Allocation, and/or the Fee and Expense Application,
16 unless otherwise ordered by the Court; shall be bound by all the terms and provisions of the
17 Stipulation and by all proceedings, orders and judgments in the Action; and shall also be foreclosed
18 from appealing from any judgment or order entered in this Action.

19 27. All papers in support of the Settlement, the Plan of Allocation, and/or the Fee and
20 Expense Application shall be filed and served no later than thirty-five (35) calendar days before
21 the Final Approval Hearing.

22 28. The motion for final approval shall address the final approval guidelines in the
23 Northern District of California's Procedural Guidance for Class Action Settlements, available at
24 <https://cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/>, in the order
25 the guidelines are presented on the website. As reflected in the Guidance, the Court will require a
26 post-distribution accounting within 21 days after the distribution of settlement funds. The Court
27 will typically withhold between 10% and 25% of the attorney's fees granted at final approval until
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1 after the post-distribution accounting has been filed. The final approval motion should specify
2 what percentage class counsel believes it is appropriate to withhold and why.

3 29. Any submissions filed in response to any objections or in further support of the
4 Settlement, the Plan of Allocation, and/or the Fee and Expense Application shall be filed no later
5 than seven (7) calendar days prior to the Final Approval Hearing.

6 30. Defendants, their counsel, and other Released Parties shall have no responsibility
7 for, or liability with respect to, the Plan of Allocation or any application for attorney's fees and
8 interest, or expenses or payments to the Class Representative submitted by Class Counsel, and
9 such matters will be considered separately from the fairness, reasonableness, and adequacy of the
10 Settlement.

11 31. Pending final determination of whether the Settlement should be approved, all
12 Releasing Parties shall be enjoined from commencing, prosecuting, or attempting to prosecute any
13 Released Claims against any Released Party in any court or tribunal or proceeding. Unless and
14 until the Stipulation is cancelled and terminated pursuant to the Stipulation, all proceedings in the
15 Action, other than such proceedings as may be necessary to carry out the terms and conditions of
16 the Stipulation, are hereby stayed and suspended until further order of the Court.

17 32. All funds held by the Escrow Agent shall be deemed and considered to be in the
18 custody of the Court, and shall remain subject to the jurisdiction of the Court, until such time as
19 such funds shall be distributed or returned pursuant to the Stipulation and Plan of Allocation and/or
20 further order(s) of the Court.

21 33. Neither the Stipulation, nor any of its terms or provisions, nor any of the
22 negotiations or proceedings connected with it, shall be construed as an admission or concession
23 by Defendants, their counsel, or any of the other Released Parties of the truth of any of the
24 allegations in the Action, or of any liability, fault, or wrongdoing of any kind and shall not be
25 construed as, or deemed to be evidence of, or an admission or concession that Class Representative
26 or any Settlement Class Members directly have suffered any damages, harm, or loss. Further,
27 neither the Stipulation, nor any of its terms or provisions, nor any of the negotiations or
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1 proceedings connected with it, nor this Order shall be construed as an admission or concession by
2 Class Representative of the validity of any factual or legal defense or of the infirmity of any of the
3 claims or facts alleged in the Action.

4 34. In the event the Settlement is not consummated in accordance with the terms of the
5 Stipulation, then the Stipulation and this Order (including any amendment(s) thereof, and except
6 as expressly provided in the Stipulation or by order of the Court) shall be null and void, of no
7 further force or effect, and without prejudice to any Party, and may not be introduced as evidence
8 or used in any action or proceeding by any Person against the Parties or the Released Parties, and
9 each Party shall be restored to his, her, or its respective litigation positions as they existed prior to
10 September 21, 2021, pursuant to the terms of the Stipulation.

11 35. The Court retains exclusive jurisdiction over the Action to consider all further
12 matters arising out of, or relating to, the Stipulation, including by way of illustration and not
13 limitation, any dispute concerning any Proof of Claim submitted and any future requests by one
14 or more of the Parties that the Judgment, the releases and/or the permanent injunction set forth in
15 the Stipulation be enforced.

16 **IT IS SO ORDERED.**

17 Dated: May 3, 2022

18 
19 HON. JON S. TIGAR
20 UNITED STATES DISTRICT JUDGE