

1 THE HONORABLE JOHN C. COUGHENOUR

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 JUSTIN GAWRONSKI and A.
10 BRUGUIER, individually and on behalf of
all others similarly situated,

11 Plaintiffs,

12 v.

13 AMAZON.COM, INC., a Delaware
14 corporation, and AMAZON DIGITAL
SERVICES, INC., a Delaware corporation,

15 Defendants.

No. 09-CV-01084-JCC

STIPULATION OF SETTLEMENT AND
[PROPOSED] ORDER OF DISMISSAL

NOTE ON MOTION CALENDAR:
September 25, 2009

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17 This Stipulation of Settlement (“Stipulation”) is made and entered into between Plaintiffs
18 Justin Gawronski and A. Bruguier (“Plaintiffs”) and Defendants Amazon.com, Inc. and Amazon
19 Digital Services, Inc. (collectively, “Amazon”) (each, a “Party” and, together, the “Parties”), on
20 the terms and conditions set forth below:

21 WHEREAS, Amazon has sold three models of an electronic reading device — the
22 “Kindle,” sold beginning in November 2007, the “Kindle 2,” sold beginning in February 2009,
23 and the “Kindle DX,” sold beginning in June 2009 (together, the “Devices” and each such
24 device, a “Device”) — which allow users to download to, and store on, the Devices digital
25 copies of electronic books and periodicals sold by Amazon from its retail selection within the
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1 “Kindle Books,” “Kindle Magazines,” and “Kindle Newspapers” sections of its Kindle Store
2 (“Works”);

3 WHEREAS, in June 2009, Amazon received notice and take down demands (“Notice”)
4 alleging that certain Works that Amazon had made available for sale to users of the Devices —
5 namely, certain editions of the novels *1984* and *Animal Farm* by the author George Orwell and a
6 compilation containing those novels (together, the “Subject Works”) — were infringing;
7

8 WHEREAS, upon receiving this Notice, Amazon, among other things (a) refunded all
9 monies paid to it by users of the Devices for the Subject Works and (b) in fewer than 2,000
10 instances, removed copies of the Subject Works from the Devices to which they had been
11 downloaded by users;

12 WHEREAS, notwithstanding Amazon’s refund of the monies paid by users of the
13 Devices for the Subject Works, Plaintiffs contend that the removal thereof constituted a violation
14 of the Terms of Service (“TOS”) subject to which users of the Devices purchased and
15 downloaded copies of the Subject Works;
16

17 WHEREAS, Plaintiffs allege that their annotations of the Subject Works are less useful to
18 them without the copies of the Subject Works;

19 WHEREAS, on July 31, 2009, Plaintiffs commenced this action against Amazon (the
20 “Action”), seeking a declaratory judgment, and alleging violations of 18 U.S.C. § 1030 (the
21 “Computer Fraud and Abuse Act”) and R.C.W. § 19.86.010, *et seq.* (the “Washington Consumer
22 Protection Act”) and claims for trespass to chattels, conversion and breach of contract;
23

24 WHEREAS, on September 3, 2009, Amazon contacted all users whose copies of the
25 Subject Works had been deleted, offering each of them a choice between (1) delivery of a new
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1 copy of the Subject Work(s) previously purchased, at no charge, and (2) receipt of thirty dollars
2 (\$30.00) in the form of a check or an Amazon gift card; and

3 WHEREAS, Plaintiffs, through their counsel, have conducted an investigation of the
4 facts and analyzed the relevant legal issues and, although Plaintiffs and their counsel believe that
5 the claims asserted in the Action have substantial merit, they also have examined the benefits to
6 be obtained under the settlement set forth in this Stipulation, and have considered the risks, costs
7 and delays associated with the continued prosecution of the Action and the likely appeals of any
8 rulings in favor of either Plaintiffs or Amazon;

9
10 WHEREAS, based on current circumstances, Plaintiffs believe they would not likely be
11 able to certify classes under Rule 23(b)(3) because of Amazon's offer to fully reimburse affected
12 consumers for all Subject Works previously removed by Amazon from Devices and to restore
13 notes and annotations;

14
15 WHEREAS Amazon's undertakings below, the benefits of which will apply not just to
16 Plaintiffs, but also will extend to other users of the Devices, provide substantially all the relief
17 Plaintiffs could have obtained had they pursued class certification pursuant to Federal Rule of
18 Civil Procedure 23(b)(2);

19
20 WHEREAS each of the Parties and counsel believes, after fully investigating the facts
21 and analyzing the legal issues, in consideration of all the circumstances and after arms' length
22 settlement negotiations between counsel, that its interests are best served by entering into the
23 settlement set forth in this Stipulation;

24 NOW, THEREFORE, it is agreed by the undersigned on behalf of Plaintiffs and Amazon
25 that all Claims (as defined below) of Plaintiffs against Amazon be settled, compromised and
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1 released, and that the Action be dismissed with prejudice, without costs to any Party (except as
2 provided below), on the following terms and conditions:

3 1. For copies of Works purchased pursuant to TOS granting “the non-exclusive right to
4 keep a permanent copy” of each purchased Work and to “view, use and display [such Works] an
5 unlimited number of times, solely on the [Devices] . . . and solely for [the purchasers’] personal,
6 non-commercial use,” Amazon will not remotely delete or modify such Works from Devices
7 purchased and being used in the United States unless (a) the user consents to such deletion or
8 modification; (b) the user requests a refund for the Work or otherwise fails to pay for the Work
9 (e.g., if a credit or debit card issuer declines to remit payment); (c) a judicial or regulatory order
10 requires such deletion or modification; or (d) deletion or modification is reasonably necessary to
11 protect the consumer or the operation of a Device or network through which the Device
12 communicates (*e.g.*, to remove harmful code embedded within a copy of a Work downloaded to
13 a Device). This paragraph does not apply to (a) applications (whether developed or offered by
14 Amazon or by third parties), software or other code; (b) transient content such as blogs; or (c)
15 content that the publisher intends to be updated and replaced with newer content as newer
16 content becomes available. With respect to newspaper and magazine subscriptions, nothing in
17 this paragraph prohibits the current operational practice pursuant to which older issues are
18 automatically deleted from the Device to make room for newer issues, absent affirmative action
19 by the Device user to save older issues.
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23 2. Nothing in the preceding paragraph is intended to preclude any consumer from bringing
24 any claim based on any future act or omission by Amazon.
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1 3. As Amazon offered on September 3, 2009 to users of Devices who purchased a copy of a
2 Subject Work, and from whose Devices Amazon removed the Subject Work, such users may
3 elect to receive the previously purchased Subject Work, at no charge, or, alternatively, to receive
4 a check or an Amazon gift card in the amount of thirty dollars (\$30.00). Those who elect to
5 receive the previously purchased Subject Work will have any and all annotations or notes made
6 prior to removal of the Subject Work restored automatically.
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8 4. Amazon will pay Plaintiffs' counsel a fee of \$150,000, subject to the understanding that
9 KamberEdelson LLC will donate its portion of that fee to a charitable organization that promotes
10 literacy, children's issues, secondary or post-secondary education, health, or job placement.
11

12 5. Other than as set forth herein, Amazon shall not be liable for any fees or expenses of
13 Plaintiffs or Plaintiffs' counsel in connection with the Action.
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15 6. Plaintiffs agree that, to the fullest extent permitted by law, neither this Stipulation nor the
16 fact of it, nor any act performed, nor any statements made publicly or otherwise in responding to
17 concerns raised by Plaintiffs or other users, nor any document negotiated or executed pursuant to
18 or in furtherance of it, is or may be deemed to be or may be used as an admission or concession
19 of, or evidence of any liability or violation of any law by Amazon in any court, administrative
20 agency or other tribunal.
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22 7. As of the date on which the Action is finally dismissed with prejudice and without further
23 action, Plaintiffs, by entry of the Order of Dismissal with Prejudice, fully, completely and
24 generally forever, to the fullest extent permitted by law, release Amazon and all of its
25 subsidiaries, affiliates and joint ventures, and each and all of its and their agents, employees,
26 representatives, predecessors, successors, assigns, shareholders, officers, directors, distributors,

1 customers, attorneys, insurers, heirs, executors and administrators, from any and all claims,
2 rights, demands, obligations, agreements, contracts, representations, promises, liens, accounts,
3 debts, liabilities, expenses, damages, costs, interest, attorney's fees, judgments, orders, and
4 causes of action of every kind and nature, whether known or unknown, suspected or
5 unsuspected, existing or claimed to exist, legal or equitable, including, but not limited to, all
6 claims for damages and any other form of relief (each a "Claim") arising out of the facts,
7 circumstances and claims alleged in the Action (collectively, the "Released Claims").

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9 8. Plaintiffs acknowledge that they have read, considered and understand the provisions
10 and significance of Section 1542 of the California Civil Code, and any and all provisions, rights
11 and benefits of any United States federal, state or territorial law, rule or regulation or principle of
12 common law that is similar, equivalent or identical to Section 1542, which presently provides as
13 follows:
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15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
16 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
17 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
18 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
19 OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
20 HER SETTLEMENT WITH THE DEBTOR

19 Plaintiffs expressly waive any and all rights they have or may have under Section 1542 of the
20 California Civil Code as now worded or hereafter amended, or such similar, equivalent or
21 identical provisions, rights or benefits. In connection with this waiver, Plaintiffs acknowledge
22 being aware that they may hereafter discover Claims presently unknown or unsuspected facts in
23 addition to or different from those which they now know or believe to be true with respect to the
24 Released Claims and that they expressly waive and fully, finally and forever release any known
25 or unknown, suspected or unsuspected, contingent or non-contingent Released Claim.
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1 9. The Parties agree that the United States District Court for the Western District of
2 Washington shall have exclusive jurisdiction over them for all purposes relating to the
3 implementation and effectuation of this Stipulation and all provisions thereof. Any and all
4 disputes, requests or petitions regarding or arising out of the enforcement, construction,
5 administration or interpretation of the Stipulation must be made, if at all, to that Court by means
6 of commencing an action seeking enforcement of the terms of this Stipulation. The Court shall
7 retain jurisdiction to resolve disputes arising under this Stipulation until January 1, 2011.

8
9 10. This Stipulation contains the entire agreement among the Parties and supersedes any prior
10 agreements or understandings between them. It shall be construed as if drafted by all the Parties.

11 11. Having obtained the express permission and consent of their respective clients, the
12 undersigned counsel hereby consent to the terms and conditions set forth above by signing
13 below. The undersigned signatories represent that they are fully authorized to execute and enter
14 into the terms and conditions of this Stipulation on behalf of the respective persons or entities for
15 whom they have signed it.

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17 12. The terms and conditions of this Stipulation shall be construed and enforced in
18 accordance with, and governed by, the laws of the State of Washington, without regard to any
19 applicable choice of law or conflicts rules.
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1 DATED: September 25, 2009.

2 KAMBER EDELSON, LLC

3 /s Michael J. Aschenbrener

4 Michael J. Aschenbrener

5 (Admitted *Pro Hac Vice*)

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Attorneys for Defendants Amazon.com, Inc. and
Amazon Digital Services, Inc.

1 **ORDER**

2 Having reviewed the parties' stipulation of settlement,
3 The Court hereby GRANTS dismissal of this action with prejudice.

4 **IT IS SO ORDERED.**

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6 Dated this _____ day of September, 2009.

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The Honorable John C. Coughenour
United States District Judge

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12 Presented by:

13
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