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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS MALONE, CHRIS AYERS,
JAMES BACKUS, BRIAN CONWAY,
DAVID EATON, STEVEN GRAVEL,
JAMES RAAYMAKERS, and TOD
WEITZEL, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

WESTERN DIGITAL CORPORATION,

Defendant.

Case No. 5:20-cv-03584-NC

**ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT
AGREEMENT AND DIRECTING
DISSEMINATION OF CLASS
NOTICE**

ORDER

1
2 Before the Court is the Motion for Preliminary Approval of Class Settlement
3 Agreement and for Direction of Class Notice pursuant to Fed. R. Civ. P. 23(e)
4 (“Motion”), filed by Plaintiffs Nicholas Malone, Chris Ayers, James Backus, Brian
5 Conway, David Eaton, Steven Gravel, James Raaymakers, and Tod Weitzel
6 (“Plaintiffs”). Plaintiffs and Defendant Western Digital Corporation (“WDC” or
7 “Western Digital”) have entered into a Class Settlement Agreement, dated June 7, 2021
8 (“Settlement Agreement”). Having thoroughly reviewed the Settlement Agreement,
9 including the proposed forms of class notice and other exhibits thereto, the Motion, and
10 the papers and arguments in connection therewith, and good cause appearing, the Court
11 hereby ORDERS as follows:

12 1. Capitalized terms not otherwise defined herein have the meanings set
13 forth in the Settlement Agreement.

14 2. This Court has subject matter jurisdiction over this matter pursuant to 28
15 U.S.C. § 1332(d) and has personal jurisdiction over the Parties and the Settlement Class
16 Members. Venue is proper in this District.

17 3. All parties have consented to the jurisdiction of a magistrate judge.
18 ECF 8, 9.

19 4. The Motion is GRANTED.

20 5. The Court hereby preliminarily approves the Settlement Agreement and
21 the terms embodied therein pursuant to Fed. R. Civ. P. 23(e)(1). The Court finds that it
22 will likely be able to approve the Settlement Agreement under Fed. R. Civ. P. 23(e)(2)
23 and to certify the Settlement Class for purposes of judgment on the proposed
24 Settlement. The Court preliminarily finds that the Settlement Agreement is fair,
25 reasonable, and adequate as to the Settlement Class Members under the relevant
26 considerations. The Court finds that Plaintiffs and proposed Class Counsel have
27 adequately represented and will continue to adequately represent the Settlement Class.
28 The Court further finds that the Settlement Agreement is the product of arms’ length

1 negotiations by the Parties through the use of an experienced mediator, Judge Elizabeth
2 Laporte (Ret.) of JAMS San Francisco, and an additional two months of extensive
3 settlement discussions. The Court preliminarily finds that the relief provided—a non-
4 reversionary common settlement fund of \$2.7 million—is adequate taking into account,
5 *inter alia*, the costs, risks, and delay of trial and appeal, the alleged harm to Settlement
6 Class Members, and the proposed method of distributing payments to the Settlement
7 Class (i.e., direct payments by mailed checks). The Court preliminarily finds that the
8 Settlement Agreement treats the Settlement Class Members equitably relative to each
9 other and that the proposed allocation of settlement funds to Settlement Class Members
10 is reasonable and equitable. Under the terms of the Settlement Agreement, all
11 Settlement Class Members who purchased one or more of the relevant WD Red NAS
12 hard drives are eligible to submit a claim for a payment (via a simple claim form listing
13 the relevant WD Red NAS hard drives that they purchased and attesting to their belief
14 of said purchases during the relevant time period). The settlement payment amounts
15 will be \$4.00 for each WD Red NAS Drive with 2TB capacity (WD20EFAX) or 3TB
16 capacity (WD30EFAX), subject to pro-rata adjustment, if applicable, and \$7.00 for each
17 WD Red NAS Drive with 4 TB capacity (WD40EFAX) or 6TB capacity
18 (WD60EFAX), subject to pro-rata adjustment, if applicable, up to a maximum of 85%
19 of the MSRP value of the drive purchased. The Court preliminarily finds that the
20 payment allocation provided in the Settlement Agreement is reasonable and equitable.

21 6. The Court hereby provisionally certifies, for settlement purposes only, a
22 “Settlement Class,” pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), consisting of:

23 All persons in the United States (including its states, districts or
24 territories) who purchased a WD Red NAS Drive using Shingled
25 Magnetic Recording (“SMR”) technology between October 2018 and the
26 date of this Order.

27 7. The Court finds that for settlement purposes only, the Settlement Class, as
28 defined above, meets the requirements for class certification under Fed. R. Civ. P. 23(a)
and 23(b)(3)—namely, that (1) the Settlement Class Members are sufficiently numerous

1 such that joinder is impracticable; (2) there are common questions of law and fact; (3)
2 Plaintiffs' claims are typical of those of the Settlement Class Members; (4) Plaintiffs
3 and Class Counsel have adequately represented, and will continue to adequately
4 represent, the interests of the Settlement Class Members; and (5) for purposes of
5 settlement, the Settlement Class meets the predominance and superiority requirements
6 of Fed. R. Civ. P. 23(b)(3).

7 8. Certification of the Settlement Class shall be solely for settlement
8 purposes and without prejudice to the Parties. In the event the Settlement Agreement is
9 not finally approved by this Court or otherwise does not take effect, the Parties preserve
10 all rights and defenses regarding class certification.

11 9. The Court hereby appoints Plaintiffs Nicholas Malone, Chris Ayers,
12 James Backus, Brian Conway, David Eaton, Steven Gravel, James Raaymakers, and
13 Tod Weitzel as Class Representatives to represent the Settlement Class.

14 10. The Court hereby appoints the law firms of Bursor & Fisher, P.A. and
15 Hattis & Lukacs as Class Counsel for the Settlement Class.

16 11. The Court hereby appoints JND Legal Administration as Settlement
17 Administrator and directs JND Legal Administration to carry out all duties and
18 responsibilities of the Settlement Administrator as specified in the Settlement
19 Agreement and herein.

20 Notice Program

21 12. Pursuant to Fed. R. Civ. P. 23(e)(1) and 23(c)(2)(B), the Court approves
22 the proposed notice program set forth at Section IV of the Settlement Agreement,
23 including the form and content of the proposed forms of class notice attached as
24 Exhibits B, E, G, and H to the Settlement Agreement. The Court finds that the proposed
25 notice program meets the requirements of Due Process under the U.S. Constitution and
26 Rule 23; and that such notice program—which includes individual direct notice to
27 known Settlement Class Members via email, mail, and a second reminder email, a
28 media and Internet notice program, and the establishment of a Settlement Website and

1 Toll-Free Number—is the best notice practicable under the circumstances and shall
2 constitute due and sufficient notice to all persons entitled thereto. The Court further
3 finds that the proposed form and content of the forms of the notice are adequate and will
4 give the Settlement Class Members sufficient information to enable them to make
5 informed decisions as to the Settlement Class, the right to object or opt-out, and the
6 proposed Settlement and its terms. The Court finds that the notice clearly and concisely
7 states in plain, easily understood language, *inter alia*: (i) the nature of the Action; (ii)
8 the definition of the Settlement Class; (iii) the class claims and issues; (iv) that a
9 Settlement Class Member may enter an appearance through an attorney if the member
10 so desires; (v) that the Court will exclude from the Settlement Class any member who
11 timely and validly requests exclusion; (vi) the time and manner for requesting
12 exclusion; and (vii) the binding effect of a class judgment on Settlement Class Members
13 under Rule 23(c)(3).

14 13. The Court directs the Settlement Administrator and the Parties to
15 implement the notice program as set forth in the Settlement Agreement.

16 14. Settlement Class Member Contact Information: By no later than **August**
17 **4, 2021**, Western Digital shall provide the available contact information of every
18 Settlement Class Member that it has in its possession to the Settlement Administrator.

19 15. Email Notice: By no later than thirty (30) days following the entry of this
20 Preliminary Approval Order (hereinafter, the “Notice Date”), the Settlement
21 Administrator shall issue the first Email Notice (substantially in the form attached as
22 Exhibit G to the Settlement Agreement) to each Settlement Class Member whose email
23 address is known to the Settlement Administrator. The Email Notice shall be sent with
24 the sender title “Western Digital Class Action Settlement Claims Administrator” and the
25 subject line “Notice of Western Digital Settlement and Eligibility to Receive
26 Compensation.”

27 16. Mail Notice: For any Settlement Class Member for whom Western
28 Digital has a valid mailing address, the Settlement Administrator shall send a Mail

1 Notice via the U.S. Postal Service to those Settlement Class Members. The Mail Notice
2 will be substantially similar to the form attached as Exhibit H to the Settlement
3 Agreement and will provide the web address of the Settlement Website and an email
4 and mailing address to contact the Settlement Administrator. Western Digital, through
5 the Settlement Administrator, will provide the Mail Notice on or before thirty (30)
6 calendar days after the Preliminary Approval Date. The Mail Notice shall be issued one
7 time to each Settlement Class Member for whom Western Digital has a valid mailing
8 address.

9 17. Reminder Email Notice: No later than **September 21, 2021**, the
10 Settlement Administrator shall issue a second round of Email Notices, substantially in
11 the form attached as Exhibit G to the Settlement Agreement, to each Settlement Class
12 Member that was sent the initial Email Notice.

13 18. Settlement Website: The Settlement Administrator shall establish and
14 maintain an Internet website, at the URL www.WDRedNASHarddriveSettlement.com,
15 where Settlement Class Members can obtain further information about the terms of the
16 Settlement Agreement, their rights, important dates, and deadlines, and related
17 information. Settlement Class Members shall also be able to submit Claim Forms
18 electronically via the Settlement Website. The Settlement Website shall include, in
19 PDF format, the Second Amended Complaint in this Action, the Settlement Agreement,
20 the long-form notice substantially in the form attached as Exhibit B to the Settlement
21 Agreement, this Preliminary Approval Order, Settlement Class Counsel's fee and cost
22 application (after it is filed), and other case documents as agreed upon by the Parties
23 and/or required by the Court, and shall be operational and live by no later than one day
24 before the first Mail Notice or Email Notice is disseminated. The Settlement Website
25 shall be optimized for display on mobile phones. The Settlement Website shall remain
26 operational until at least three months after the date the Settlement becomes Effective.

27 19. Toll-Free Number: The Settlement Administrator shall establish and
28 maintain a toll-free telephone number ("Toll-Free Number") where Settlement Class

1 Members can obtain further information about the Settlement Agreement and their
2 rights, and request that a hard copy Claim Form or long-form notice be mailed to them.
3 The Toll-Free Number shall be operational and live by no later than one day before the
4 first Mail Notice or Email Notice is disseminated and shall remain operational until at
5 least three months after the date the Settlement becomes Effective.

6 20. Publication, Media, and Internet Notice: Notice shall also be provided via
7 a media and Internet notice program, including banner ads on Internet sites targeted to
8 the Class. The media and Internet notice program shall commence as soon as
9 practicable following the entry of this Order and, in all events, shall commence not later
10 than the Notice Date.

11 21. Western Digital shall pay the Notice and Other Administrative Costs
12 within thirty (30) days of when such amounts are invoiced to Western Digital and
13 become due and owing. Payments made by Western Digital pursuant to this paragraph
14 will reduce the \$2.7 million total that Western Digital must pay for the Settlement Fund
15 by an amount commensurate with the amount of such payment.

16 22. At least seven (7) calendar days prior to the final approval hearing, Class
17 Counsel shall prepare or cause the Settlement Administrator to prepare a list of the
18 persons who have excluded themselves in a valid and timely manner from the
19 Settlement Class (the “Opt-Outs”), and Class Counsel shall file that list with the Court.

20 Claims Procedure

21 23. The Court approves the form and content of the proposed Claim Form, in
22 the form attached as Exhibit A to the Settlement Agreement, approves the Claims
23 Process set forth in the Settlement Agreement for Settlement Class Members to submit
24 Claims, and directs the Parties and the Settlement Administrator to implement the
25 Claims Process.

26 Opt-Out and Objection Procedures

27 24. Settlement Class Members may exclude themselves from the Settlement
28 Class by mailing to the Settlement Administrator a request for exclusion that is

1 postmarked or emailed no later than **December 3, 2021**, (the “Exclusion/Objection
2 Deadline”). To be effective, the request for exclusion must include: (a) the Settlement
3 Class Member’s full name, telephone number, mailing address, and email address; (b) a
4 clear statement that the Settlement Class Member wishes to be excluded from the
5 Settlement Class; (c) the name of this Action: “Malone v. Western Digital Corporation”;
6 and (d) the Settlement Class Member’s signature or a signature of an individual
7 authorized to act on his or her behalf. Settlement Class Members cannot request
8 exclusion as a class or group. Any Settlement Class Member who submits a timely and
9 valid request for exclusion is foreclosed from objecting to the Settlement or to Class
10 Counsel’s motion for attorneys’ fees, costs, and service awards. If a Settlement Class
11 Member submits both a timely and valid request for exclusion and an objection, the
12 Settlement Class Member shall be treated as if they had only submitted a request for
13 exclusion. Any Settlement Class Member who does not submit a timely and valid
14 request for exclusion in accordance with this paragraph shall be bound by the Final
15 Order and Judgment if and when it is entered. The Settlement Administrator shall
16 provide copies of all timely and valid requests for exclusion to Class Counsel and
17 Western Digital’s Counsel.

18 25. Any Settlement Class Member who does not submit a timely and valid
19 request for exclusion shall have the right to object to the proposed Settlement and/or to
20 Class Counsel’s motion for attorneys’ fees, costs, or service awards. To be considered
21 valid, an objection must be in writing, must be filed with or mailed to the Court, and
22 filed with or mailed to the Court, at the address listed in the long-form notice,
23 postmarked/mailed no later than **December 3, 2021**, (the “Exclusion/Objection
24 Deadline”), and must include the following: (a) the name of this Action: “Malone v.
25 Western Digital Corporation”; (b) the full name, mailing address, telephone number,
26 and email address of the objector; (c) the objector’s signature or the signature of an
27 individual authorized to act on his or her behalf; (d) a description of the specific reasons
28 for the objection; (e) the name, address, bar number, and telephone number of counsel

1 for the objector, if the objector is represented by an attorney; (f) a list of any objections
2 to class actions submitted by the objector or its attorney(s) within the previous 5 years;
3 and (g) state whether the objector intends to appear at the final approval hearing either
4 in person or through counsel. Only objections that are submitted in accordance with
5 this paragraph shall be heard by the Court. Any Settlement Class Member who does not
6 timely submit an objection in accordance with this paragraph shall waive the right to
7 object or to be heard at the final approval hearing and shall be forever barred from
8 making any objection to the proposed Settlement or to Class Counsel's motion for
9 attorneys' fees, costs, and service awards. Any Settlement Class Member who objects
10 to the Settlement shall nevertheless be entitled to all benefits of the Settlement if it is
11 approved and becomes final. The Settlement Administrator shall promptly after receipt
12 provide copies of any objections, including any related correspondence, to Class
13 Counsel and Western Digital's Counsel.

14 Preliminary Approval Hearing

15 26. The Court held a preliminary approval hearing by Zoom webinar on July
16 21, 2021, at 1:00 p.m. The purpose of the preliminary approval hearing was for the
17 Court to: (i) address the parties' supplemental briefing filed on July 20, 2021, and (ii)
18 schedule the final approval hearing. The Court finds that the parties' supplemental
19 briefing is satisfactory. Additionally, the parties agreed to schedule the final approval
20 hearing for December 22, 2021, at 2:00 p.m.

21 Final Approval Hearing

22 27. The Court will hold a final approval hearing by Zoom webinar on
23 **December 22, 2021, at 2:00 p.m.** The purposes of the final approval hearing will be to:
24 (i) determine whether the proposed Settlement Agreement should be finally approved
25 by the Court as fair, reasonable, adequate, and in the best interests of the Settlement
26 Class; (ii) determine whether judgment should be entered pursuant to the Settlement
27 Agreement, dismissing the Action with prejudice and releasing the Released Persons of
28 all claims stated in Section 6.1 of the Settlement Agreement; (iii) determine whether the

1 Settlement Class should be finally certified; (iv) rule on Class Counsel’s motion for
2 attorneys’ fees, costs and service awards; (v) consider any properly filed objections; and
3 (vi) consider any other matters necessary in connection with the final approval of the
4 Settlement Agreement.

5 28. By no later than **September 6, 2021**, Plaintiffs and Class Counsel must
6 file their: (a) motion for final approval of the Settlement Agreement; and (b) any motion
7 for attorneys’ fees, costs, and service awards. Promptly after they are filed, these
8 document(s) shall be posted on the Settlement Website.

9 29. By no later than **December 8, 2021**, the Parties must file any responses to
10 any Settlement Class Member objections and any replies in support of final settlement
11 approval and/or in support of Class Counsel’s motion for attorneys’ fees, costs, and
12 service awards.

13 30. The Court may, in its discretion, modify the date and/or time of the final
14 approval hearing, and may order that this hearing be held remotely or telephonically. In
15 the event the Court changes the date, time, and/or the format of the final approval
16 hearing, the Parties will ensure that the updated information is posted on the Settlement
17 Website.

18 31. Only Settlement Class Members who have submitted timely and valid
19 objections, in accordance with the requirements of this Preliminary Approval Order,
20 may be heard at the final approval hearing.

21 32. If the Settlement Agreement, including any amendment made in
22 accordance therewith, is not approved by the Court or shall not become effective for any
23 reason whatsoever, the Settlement Agreement and any actions taken or to be taken in
24 connection therewith (including this Preliminary Approval Order and any judgment
25 entered herein), shall be terminated and shall become null and void and of no further
26 force and effect except for (i) any obligations to pay for any expense incurred in
27 connection with Notice and Other Administration Costs as set forth in the Settlement
28 Agreement, and (ii) any other obligations or provisions that are expressly designated in

1 the Settlement Agreement to survive the termination of the Settlement Agreement.

2 33. Other than such proceedings as may be necessary to carry out the terms
3 and conditions of the Settlement Agreement, all proceedings in the Action are hereby
4 stayed and suspended until further order of this Court.

5 34. Pending final determination of whether the Settlement Agreement should
6 be finally approved, Plaintiffs and all Settlement Class Members are barred and
7 enjoined from filing, commencing, prosecuting, or enforcing any action against the
8 Released Persons insofar as such action asserts claims stated in section 6.1 of the
9 Settlement Agreement, directly or indirectly, in any judicial, administrative, arbitral, or
10 other forum. This bar and injunction is necessary to protect and effectuate the
11 Settlement Agreement and this Preliminary Approval Order, and this Court's authority
12 to effectuate the Settlement, and is ordered in aid of this Court's jurisdiction.

13 35. This Preliminary Approval Order, the Settlement Agreement, and all
14 negotiations, statements, agreements, and proceedings relating to the Settlement, and
15 any matters arising in connection with settlement negotiations, proceedings, or
16 agreements shall not constitute, be described as, construed as, offered or received
17 against Western Digital or the other Released Persons as evidence or an admission of:
18 (a) the truth of any fact alleged by Plaintiffs in the Action; (b) any liability, negligence,
19 fault, or wrongdoing of Western Digital or the Released Persons; or (c) that this Action
20 or any other action may be properly certified as a class action for litigation, non-
21 settlement purposes.

22 36. The Court retains jurisdiction over this Action to consider all further
23 matters arising out of or connected with the Settlement, including enforcement of the
24 Release provided for in the Settlement Agreement.

25 37. This case is stayed except for settlement approval purposes.

26 38. The Parties are directed to take all necessary and appropriate steps to
27 establish the means necessary to implement the Settlement Agreement according to its
28 terms should it be finally approved.

1 39. The Court may, for good cause, extend any of the deadlines set forth in
2 this Preliminary Approval Order without further notice to Settlement Class Members.

3 40. The following chart summarizes the dates and deadlines set by this
4 Preliminary Approval Order:

5 6 7	Last day for Western Digital to provide the Settlement Class Member contact information to the Settlement Administrator	August 4, 2021
8 9	Notice Date (Email and Direct Mail)	August 20, 2021
10 11	Reminder Email Notice	September 21, 2021
12 13	Last day for Plaintiffs and Class Counsel to file motion for final approval of the Settlement, and motion for attorneys' fees, costs and service awards	September 6, 2021
14 15	Exclusion/Objection Deadline	December 3, 2021
16 17 18	Last day for the Parties to file any responses to objections, and any replies in support of motion for final settlement approval and/or Class Counsel's application for attorneys' fees, costs and service awards	December 8, 2021
19	Claim Deadline	November 18, 2021
20 21	Final Approval Hearing	December 22, 2021, at 2:00 p.m.

22 **IT IS SO ORDERED.**

23
24 Dated: July 21, 2021

25 
26 Hon. Nathanael M. Cousins
27 UNITED STATES MAGISTRATE JUDGE
28