Exhibit 3

No. 08-80071

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Bernard P. Parrish, Herbert A. Adderley, and Walter Roberts III,

Plaintiffs and Respondents,

v.

National Football League Players Association and National Football League Players Incorporated d/b/a/ Players Inc,

Defendants and Petitioners.

On A Petition Seeking Interlocutory Appeal
From A Class Certification Order of the United States District Court
Northern District of California No. C-07-0943-WHA
The Honorable William H. Alsup

OPPOSITION TO PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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INTRODUCTION

Petitioners National Football League Players Association and Players Inc (collectively "NFLPA") fail to offer any issues worthy of the extraordinary remedy of interlocutory appeal. The District Court carefully and correctly evaluated the facts and law, and it provisionally certified the class Petitioners now seek permission to attack.

This is not the "rare" case deserving of interlocutory review. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). The District Court committed no error, much less one that can be assailed as "manifest error." *Id.*

The action should be allowed to proceed to trial in September, 2008 as scheduled. Indeed, discovery concludes tomorrow (May 23), belying Petitioners' contention that an interlocutory appeal is necessary to "save millions of dollars." (Pet. 3.)

The petition raises two unremarkable questions: (1) whether the law of a single state may apply to a class of nationwide plaintiffs; and (2) whether the members of this particular certified class have irreconcilable conflicts of interest. Neither point justifies this Court's attention; neither point withstands scrutiny. Indeed, although Petitioners vigorously argued that the law of Virginia or Washington D.C. should apply, they now about-face to the position that no single state's law may apply.

District Courts have broad discretion in certifying a class and managing class action litigation. The class certification order here falls well within that discretion. Unlike more complex class actions involving mass personal injury, wrongful death, products liability, or consumer protection, the class here seeks redress simply for breach of contract and related breach of fiduciary duty. As the District Court put it, "this is not a particularly large or complex action." (Opp.App.-5 at 2:2-3.) Moreover, class certification is always subject to review and modification later. If necessary, the District Court can fashion appropriate remedies to address any legitimate problems that may crop up.

The petition does not present any unsettled and fundamental issue of class action law nor any issue likely to evade "end of the case review." Petitioners can always appeal after a final judgment in September. As demonstrated below, this case does not come close to satisfying this Court's criteria for immediate review; the petition should therefore be denied.

STATEMENT OF FACTS

A. The District Court Certified A Class Of Retired NFL Players To Pursue Breach Of Contract And Breach Of Fiduciary Duty Claims Based On A Group Licensing Agreement

Herb Adderley, a retired National Football League player, sued Petitioners for breach of contract and fiduciary duty on behalf of the class of retired NFL players who signed group licensing agreements ("GLAs"). Specifically, this class

is defined as all retired NFL players who at any time signed a GLA containing language substantially similar to the following:

> [T]he moneys generated by such licensing of retired player group rights will be divided between the player and an escrow account for all eligible NFLPA members who have signed a group licensing authorization form. (Opp.App.-4B.)

The 2000 NFLPA-Players Inc Agreement [Opp.App.-4D] further provides for distribution of an equal-share royalty to players who signed GLAs. Petitioners concede that they set up a group license revenue depository ("GLRD") escrow account from which each player who "currently licensed NFLPA to use their Group Licensing Rights" [Opp.App.-4D at 4] was to be paid the "equal share" royalty contemplated by the NFLPA-Players Inc Agreement. (*See* App.-2 at 7:20-8:9; App.-3 at 5:15-19.)

Petitioners generate tens of millions of dollars annually from group licensing programs, including programs that reference retired players rights. (App.-2 at 8:18-27.) Yet Petitioners concede that they have failed to pay *retired* players who signed GLAs an equal-share royalty from the GLRD escrow account, and that they did not set up any other escrow account on behalf of *retired* players who signed GLAs. (App.-2 at 10:4-11:2) Therefore, Petitioners have breached their contract and fiduciary duties to the class either by (a) not establishing the required escrow

account for retired players; or (b) establishing the account in the guise of the GLRD, yet failing to make payments to retired players from that account.

B. The District Court Rigorously Analyzed The Facts And Law In Certifying The Class And In Selecting The Appropriate Governing Law

The thick stack of exhibits accompanying the petition (which glaringly omits Plaintiffs' reply brief [supplied at Opp.App.-3]) and this opposition amply demonstrate the lengths to which class certification was argued. Similarly, the District Court's detailed 14-page Order reflects its rigorous analysis of the many points raised by the parties.

As the Order makes clear, Plaintiffs did not prevail on every issue. In particular, Plaintiffs sought application of California law, whereas the District Court — at Petitioners' urging — ruled that Virginia or Washington D.C. law would govern. (*See* footnote 2, below; *see also* Opp.App.-5 [District Court's denial of Petitioners' motion to transfer to Virginia or Washington D.C.].) Ultimately, however, the District Court did provisionally certify one narrowly defined class under Federal Rule of Civil Procedure 23(b)(3), which Petitioners now seek permission to attack.

ARGUMENT

I. Petitioners Cannot Satisfy The Stringent Criteria Required For This Court To Exercise Its Extraordinary Discretion For Interlocutory Review

Although Petitioners emphasize this Court's "unfettered discretion" to grant interlocutory review, citing *Chamberlan*, 402 F.3d at 959, Petitioners fail to note that Rule 23(f) review was *denied* in *Chamberlan* on the basis that such review "should be a rare occurrence." *Id.* at 955. In addition to cautioning that Rule 23(f) review should be granted only "sparingly" in "rare" cases, *Chamberlan* explained that a sound basis for review should involve: (1) a death-knell situation absent immediate intervention; (2) the presence of an "unsettled and fundamental issue of law"; or (3) manifest error (particularly an error "of law, as opposed to an incorrect application of law to facts"), premised on a well-developed factual record. *Id.* at 959. Here, Petitioners argue for review solely on the last ground, manifest error.[1]

The contours of manifest error, however, require that the District Court's mistake be "easily ascertainable from the petition itself," such that it can be

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[1] Although Petitioners assert in passing that decertification might end the litigation [Pet. 2, 8], this assertion does not itself warrant immediate review since such an assertion may be made in many, if not most, class actions. Moreover, this is not a situation where immediate review is warranted because the defendants will be forced either to settle or run the risk of ruinous liability. *Cf. Chamberlan*, 402 F.3d at 960. Indeed, Petitioners' press release after the Order is very positive about Petitioners' prospects [Opp.App.-1] and — far from being forced to settle — Petitioners have made no efforts to settle [Opp.App.-2 at 2 n.5].

resolved without delving into a time-consuming consideration of the merits that could delay trial. *Id.* at 959. As detailed below, however, there is no manifest error; and given that trial is scheduled for this September, any examination of the petition's purported merits will require the type of detailed factual analysis that will delay the upcoming trial.

II. The Class Certification Order Presents No "Manifest Error"

A. The District Court Properly Resolved Any Choice Of Law Obstacle In Certifying The Class

Recognizing that state-to-state variations in law could pose an obstacle to class certification, the District Court resorted to a common solution, which Petitioners *themselves had suggested*: The law of Virginia or the District of Columbia should apply because both Defendants are Virginia corporations with principal places of business in Washington, D.C.[2] (App.-1 at 7-8.) Although Petitioners barely gloss over this fact in their petition [Pet. 14], the District Court provided the plaintiff class with the option of stipulating to "*defendants' own*

[2] As the District Court recognized, Petitioners repeatedly advocated for application of either Virginia or D.C. law. (App.-1 at 8.) *See* App.-6 at 30 [35:5-20] (Petitioners offer Virginia or D.C. law as "defendants' law" in light of their incorporation and principal places of business); *see also* App.-2 at 26 (quoting Petitioners' motion for judgment on the pleadings to the effect that "the substantive law of Virginia regarding fiduciary duty applies here" [Opp.App.-7 at 6 n.5]); Opp.App.-6 at 7:19-20 ("the majority of the operative facts in this dispute center around the licensing and marketing activities of Players Inc, in the Washington, D.C. area."); App.-3 at 31 n.75 ("the exclusive [Electronic Arts] agreement was executed in Washington, D.C.")

choice of law" [App.-1 at 7 (emphasis in original)], which Plaintiffs have done [Opp.App.-2].

This Court has long rejected the notion that problems arising from varying state law pose an "absolute bar" to certification of a multi-state plaintiff class action. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230-31 (9th Cir. 1996). Far from legal error or an abuse of discretion, the District Court's choice of Defendants' home state law accords with the most current academic thinking on this issue. *See, e.g.*, Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 Colum. L. Rev. 1839, 1844 (2006) (federal courts should avoid the state choice-of-law approach by applying the law of defendant's home state).[3]

Petitioners nonetheless object, arguing that certifying a nationwide class under a single state's law would violate due process rights of absent class members to have the law of their state applied. (Pet. 8-15, citing *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).) Obviously, Petitioners' efforts to "protect" the rights of absent class members must be taken with the proverbial grain of salt. Since

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[3] *See also*, Holly Kershell, Comment, *An Approach to Certification Issues in Multi-state Diversity Class Actions in Federal Court after the Class Action Fairness Act of 2005*, 40 U.S.F. L. Rev. 769 (2006) (urging federal courts to manage rather than dismiss class actions because after CAFA federal court is likely the only viable forum); *and see* Sue-Yun Ahn, *CAFA, Choice-Of-Law, And the Problem of Legal Maturity in Nationwide Class Actions*, 76 U. Cin. L. Rev. 105, 120-21 (Fall 2007).

class members will receive notice, and an opportunity to opt out if they wish, Petitioners' efforts to thwart this class action are most likely rooted in a desire to prevent an effective and efficient challenge to their misconduct. *See* Opp.App.-8; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (noting importance of opt-out in nationwide class action).

Petitioners recognize, as they must, that the Supreme Court has created a two-step analysis to determine which state's law may constitutionally apply to all of the individual state claims of a class. First, the court must determine whether the chosen state law "conflicts in any material way with any other law which could apply." *Shutts*, 472 U.S. at 816. Second, the court must determine whether the chosen law has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 818. Despite Petitioners' attempts to show that the District Court manifestly erred in finding Virginia or D.C. law satisfies both prongs, both prongs are easily satisfied.

There Is No Material Conflict. The class's claims are for breach of contract and breach of fiduciary duty. There are no relevant, material differences in the applicable laws of the fifty states with regard to breach of contract claims. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1263 (11th Cir. 2004) ("A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet

autumn breeze in New Jersey."); *Steinberg v. Nationwide Mut. Ins.* Co., 224 F.R.D. 67, 76-77 (E.D.N.Y. 2004) (certifying multi-state class action contract claims because contract law is essentially uniform nationwide).

Petitioners fail to identify any material substantive differences that would preclude applying a single state's law. The closest they come is to point out that some states have longer statutes of limitations than others. But Petitioners provide no authority that such differences create a *material* conflict for these purposes. Nor do Petitioners argue that such differences cannot be otherwise resolved by case management or even the opting out of class members who believe that a potentially longer limitations period might benefit them.

More specifically, Petitioners ignore *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), clarifying that a forum state may apply its own statute of limitations even to claims that are substantively governed by another state's law. And more generally, the fact that some states recognize different affirmative defenses is not

controlling.[4]

The same is true for the related breach of fiduciary duty claims: The law of the various states is roughly the same.[5] Again, the best Petitioners can do is assert — without analysis and in opposition to their prior position that the law of Virginia or D.C. should apply — that there are differences in breach of fiduciary duty issues such as agency by estoppel, direct agency theories, burdens of proof, and punitive damages. (Pet. 11.) Moreover, to the extent that any of these purported differences are material — and they are not (*e.g.*, there is no longer an "agency by estoppel" claim at issue) — there is no reason to believe they cannot be addressed

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[4] *E.g., Smilow v. S.W. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003) (in multi-state breach of contract class action, court notes: "Courts traditionally have been reluctant to deny class action status . . . simply because affirmative defenses may be available against individual members."); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 138 (2d Cir. 2001) ("as long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification"); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924 (3d Cir. 1992) (individual issues of "compliance with statute of limitations has not prevented certification of class actions"); *Cameron v. E.M. Adams & Co.*, 547 F.2d 473, 478 (9th Cir. 1976) (same).

[5] Note also that Petitioners overreach in arguing that the law of a plaintiff's home state must be applied to a breach of fiduciary duty claim. (Pet. 12-13.) Here, Plaintiffs primarily complain about a breach of the fiduciary duty of loyalty; that breach is centered "where those owing loyalty could be found and was the nexus of the alleged conflicted multiple representation." *E.g., Huber v. Taylor*, 469 F.3d 67, 81 (3d Cir. 2006) (plaintiffs located in Pennsylvania, Ohio and Indiana, but breach of loyalty occurred in Texas, where defendant owing duty was found and was the nexus of the conflicted representation).

in due course. *See Hanlon*, 150 F.3d at 1022-23 ("the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims" of a nationwide class).[6]

Significant Contacts. The second element is whether there are significant contacts between the chosen state's law to the class members. Here, of course, the chosen law is that of the Defendants' own state of incorporation or principal place of business. (It also is arguably the "place" where the breach or wrong occurred.) Thus, there is no sound argument that such law — the applicability of which has been urged by Petitioners themselves earlier in this proceeding — is an arbitrary or unfair choice to anyone.

This case is nothing like *Shutts*, where the defendant (an Oklahoma company) and ninety-nine percent of the gas leases at issue and approximately ninety-seven percent of the plaintiffs had no apparent connection to Kansas, yet the Kansas court applied its own law to the entire class. *Shutts*, 472 U.S. at 801. *Shutts* found it unconstitutional to select the law of a single state having no relationship with the vast majority of claims to a national class action when the laws of other states (*e.g.*, Texas and Oklahoma) had a more significant relationship

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[6] *See In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 315 (3d Cir. 1998) (minor differences in state law can be overcome by subclasses); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) (same).

with the other class members and with the defendant. It is not unconstitutional, however, as here, to apply the law of a single state in a national class action where that law governs Defendants' home operations; its wrongful acts are centered there; and every class member is connected to that law by virtue of having contracted with Defendants.[7]

"When considering fairness in this [choice-of-law] context, an important element is the expectation of the parties." *Shutts*, 472 U.S. at 822. In that regard, defendants generally expect to be held to the law of their home jurisdiction. If any jurisdiction has an interest in litigation against its own corporations, it would be defendants' home, given each state's powerful and valid interest in governing the conduct of its corporate citizens and preventing harm to persons in any location. Similarly, a non-resident plaintiff wishing to sue might expect to have to take the fight to a defendant's home forum and litigate under that law.

It would not defeat the expectations of either Petitioners or the class members to apply the law of Petitioners' home: The class members, after all,

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[7] *E.g., Gruber v. Price Waterhouse*, 117 F.R.D. 75 (E.D. Pa. 1987) (*Shutts* satisfied in nationwide class action applying Pennsylvania law because misstatements emanated from there and defendant had offices there); *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15 (N.D. Cal. 1986) (*Shutts* satisfied in class action where defendant was incorporated and headquartered in California; "alleged misrepresentations emanated from" there; and "defendants ha[d] no cause to be surprised by application of California law").

knowingly contracted with a Virginia corporation, and might have expected to have to sue Petitioners in their home jurisdiction. Therefore, there is a strong and direct connection between each class member and Petitioners' home jurisdiction. There is no reason to believe that non-resident Plaintiffs would recover more under any other law, and any class members who think otherwise can opt-out of this Rule 23(b)(3) class. (*See* Opp.App.-8.)

Applying the law of a defendant's home state in the context of a nationwide class action is a common and entirely appropriate approach. Contrary to Petitioners' portrayal, federal courts routinely certify both national and multi-state classes applying the law of a single state.[8] This is most often done in the context of state law claims for securities fraud or the purchase of financial products litigation,

[8] *See* footnote 8, above. *See also*, *In re Badger Mount. Irr. Dist. Sec. Litig.*, 143 F.R.D. 693, 700 (W.D. Wash. 1992); *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 84 (D. Md. 1991); *Zinberg v. Wash. Bancorp., Inc.*, 138 F.R.D. 397, 411-12 (D.N.J. 1990); *Grace Perception Tech. Corp.*, 128 F.R.D. 165, 171-72 (D. Mass 1989); *Randle v. Spectram*, 129 F.R.D. 386, 393 (D. Mass. 1988).

closely analogous to this litigation.[9] In contrast to the vexing law of mass personal injury tort and products liability matters, the relationship between the class members and their claims against the Defendants here more closely resembles securities fraud or financial litigation — *i.e.*, the interests of each class member at the time of contracting and with respect to possible violations is uniform and aligned.

B. Irreconcilable Conflicts Among Class Members Do Not Exist

Petitioners argue that irreconcilable conflicts between class members should have prevented class certification. (Pet. 15-19.) This argument fails because it rests on a misleading caricature of what this class action actually seeks. As

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[9] *E.g., Ferris, Baker Watts, Inc. v. Deutsche Bank Sec. Ltd.*, Nos. 02-3682, 02-4585, 2004 WL 2501563 (D. Minn. Nov. 5, 2004) (application of New Jersey law constitutional where defendants domiciled and incorporated there); *In re Great S. Life Ins. Co. Sales Practices Litig.*, 192 F.R.D. 212 (N.D. Tex. 2000); *Lerch v. Citizens First Bancorp, Inc.*, 144 F.R.D. 247 (D.N.J. 1992) (*Shutts* satisfied in class action where bank located in New Jersey and allegedly fraudulent statements made there, regardless of plaintiff's domicile); *In re ORFA Sec. Litig.*, 654 F. Supp. 1449 (D.N.J. 1987) (*Shutts* satisfied where defendant had principal place of business in New Jersey; all alleged misrepresentations originated there, even though "each Plaintiff may not have had direct contact with New Jersey"; "Defendants chose to use New Jersey as their principal place of business and cannot claim surprise at being held to the state's legal standards."); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675 (N.D. Cal. 1986).

These cases also refute NFLPA's assertion that the law of the place were "the wrong was felt" should apply [Pet. 12]; rather, in cases where the harm emanates from misrepresentations in or about written contracts, *Shutts* is satisfied by applying the law of the place where the defendant is located.

Petitioners portray it, class members must have divergent interests and damages because each has a different value associated with his own celebrity. In other words, a retired player with more cachet would want to recover more damages than a relatively unknown retired player.

This presentation, however, grossly misstates the claims at issue. Plaintiffs' lawsuit seeks equal-share royalties from an escrow fund that was promised in the Group Licensing Agreement, but that Petitioners claim never was created, despite evidence to the contrary. Nothing about that claim requires each class member to establish the economic value of licensing his own personal rights. The equal-share damages sought here rests on the language of the GLA itself (*i.e.*, "the moneys generated by such licensing of retired player group rights will be divided between the player and an escrow account for all *eligible* NFLPA members" [emphasis added]). The only such escrow fund is an equal-share fund. (*See* App.-2 at 7:20-8:9; App.-3 at 5:15-19.)

The District Court characterized the GLA as "a masterpiece of obfuscation" that "raises more questions than it answers." (App.-1 at 3) In no event, however, is any squabble over contract interpretation a question worthy of interlocutory review. And with regard to factual matters, discovery to date has disclosed that:

- Petitioners have not established an escrow fund specifically for retired players;

- there is, however, an escrow fund in existence, the GLRD, through which "eligible" players do share equally, whether the player is a superstar or benchwarmer;[10]
- the GLA defines group licensing as the use of six or more active or retired players; thus if the GLRD receives funds from the licensing of six active players, that qualifies as group licensing under the GLA, and the retired players are entitled to recover from it.

Petitioners argue that there is no factual basis for an equal share of licensing revenues [Pet. 17], but that is a factual issue the District Court has either already fully resolved or, if necessary, can address again at a later stage of the proceedings. Either way, the issue definitely is not worthy of interlocutory review. (More ironically, the very notion of an equal-share royalty scheme derives directly from

[10] Defendants also breached their contract or duties to retired players by defining "eligible" players under the GLRD to mean only active players, not retirees.

the NFLPA's own administration of the GLRD.)[11]

Petitioners' citation to *Coscarart v. MLB* and other cases [Pet. 16, 16 n.21] is unavailing, because none of those cases involved the facts and specific contracts at issue here. Petitioners also try to conflate an individual player's *ad hoc* agreements — from which a player may obtain royalty payments in accord with his own celebrity status — with group licensing.

The District Court specifically recognized that Plaintiffs' case is not about *ad hoc* agreements, and the certified class does not seek to collect from any such agreements. (App.-1 at 9-10.) The Plaintiffs' equal-share royalty claim does not affect any player's ability to continue to enter into individual *ad hoc* agreements at market rate; Plaintiff's claim rests solely on group licensing. (*Id.*)

Further, the opt-out remedy exists here as well. To the extent that any class member might believe he deserves more than his equal share — which is all this action seeks — he is free to opt out of the class and attempt to pursue what would

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[11] Decertification would not be proper even if this case did raise questions of differing damages calculations between class members, which it doesn't. *E.g.*, *Smilow*, 323 F.3d at 40 (individuation of damages "rarely determinative" as long as "common questions predominate regarding liability" (citing *Visa Check*, 280 F.3d at 139)); *see also Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796, 798 (10th Cir. 1970) (need for individual damages analysis "has never been held . . . a bar to class actions"). District courts have a "variety of management devices" — *e.g.*, severing liability and damages determinations — to address the issue. *Smilow*, 323 F.3d at 41; *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

be a very different sort of action than the one Mr. Adderley has brought.

In sum, this action is nothing like a personal injury class action (or class action for wrongful death or products liability) where damages issues vary dramatically between class members. Nor does this action in any way seek recovery from funds generated through individual *ad hoc* licensing agreements.

C. Nothing About The Scope Of The Class Definition Warrants Review

Petitioners also argue that the District Court erred in defining the class as one for "[a]ll retired players who signed GLAs" instead of "all retired players who signed GLAs with language similar to the provision underlying Adderley's claim," *i.e.*, referencing the escrow fund. (Pet. 19-20.) This throwaway point gains no yardage. Plainly the class must consist of retired players whose GLAs reference an escrow fund. To the extent there is any error here, it can and will be corrected during the course of litigation. Fed. R. Civ. P. 23(c)(1)(C) (allowing district court to modify class definition any time before, during or after trial). As even Petitioners seem to acknowledge [Pet. 4, n.3], nothing about this alleged error warrants intervention by this Court at this time.

CONCLUSION

The overriding purposes of class certification are to cover all similarly-situated plaintiffs and to further judicial efficiency and economy. The District Court's Order laudably accomplishes both goals, and did so in a case in which trial

has been set for September, 2008 and discovery closes tomorrow (May 23, 2008). In light of Petitioners' concession as to the appropriate law to apply, the soundness of applying that law on the facts presented, and the lack of any significant intra-class conflicts, no basis exists for this Court to intervene now by invoking the extraordinary remedy of interlocutory review. This Court should deny the petition.

Dated: May 21, 2008

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: _____
Ronald S. Katz
Attorneys for Appellees

PROOF OF SERVICE

I, Nichole Budwig, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On May 21, 2008, I served a copy of the within document(s):

OPPOSITION TO PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f) & APPENDIX TO OPPOSITION TO PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f) (1-Volume)

☒ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

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Clerk of the Court U.S. District Court for the Northern District of California The Honorable William H. Alsup U.S. Courthouse 450 Golden Gate Ave. San Francisco, CA 94102-3483	**1 courtesy copy of Opposition (via fed-ex only)**

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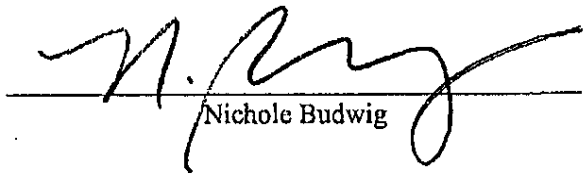
I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 21, 2008, at Los Angeles, California.



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