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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DAVID WALSH, an individual, DAVID KALUA, an individual, on behalf of themselves, and on behalf of all persons similarly situated,

Plaintiffs,

vs.

APPLE, INC.,

Defendants.

CASE NO. **05:08-cv-04918 JF**
(Class Action)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Judge: Hon. Jeremy Fogel
Court: Dept. 3

Hearing Date: February 26, 2010
Hearing Time: 9:00 a.m.

Action Filed: August 4, 2008

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Plaintiffs David Walsh and David Kalua ("Plaintiffs") respectfully submit this memorandum of points and authorities in support of Plaintiffs' motion for preliminary approval of settlement of this class action.

I. INTRODUCTION

Plaintiffs and Defendant Apple, Inc. ("Apple") have reached a full and final settlement of the above-captioned action, which is embodied in the Stipulation and Settlement Agreement of Class Action Claims ("Agreement") filed concurrently with the Court.[1] By this motion, Plaintiffs seek preliminary approval from the Court of the Agreement (a copy of which is attached as Exhibit 1 to the Declaration of Norman Blumenthal, served and filed herewith), conditional certification of the Settlement Class for settlement purposes only, approval of the Preliminary Approval Order, and a date for the Final Approval Hearing.

II. DESCRIPTION OF THE PROPOSED SETTLEMENT

Counsel for the Parties, after litigation and settlement negotiations, agreed to a settlement that is fair, reasonable and favorable to the Class, which provides for Settlement Fund of no more than Nine Hundred Ninety Thousand Dollars ($990,000.00) to resolve the claims asserted in the Third Amended Complaint ("Complaint"). The Settlement Fund is all-in, except for the payment of payroll taxes, and will not revert back to Apple.

The Class consists of Defendant's current and former employees in the IS&T and/or Global Computing Network Services ("GNCS") division in the United States who were classified as exempt holding the job titles of Network Engineer (levels 1 through 3), Telecommunication Engineer (levels 1 through 3), Information Systems Engineer (levels 1 through 3), Systems Engineer (levels 1 through 3), Information Systems Analyst (levels 1 through 3), Tech/Info Systems Analyst (levels 1 through 3), or substantially similar job titles at levels 1, 2 and 3 who worked at any time from August 4, 2004 through the date of preliminary Court approval of this Settlement. All other employees in all other job titles and job levels within the class definition in the Complaint

[1] Capitalized terms in this Memorandum have the same meaning as contained in the Stipulation and Settlement Agreement.

shall be dismissed from the Action without prejudice.

The Class is divided into three subclasses: Subclass One is all Class Members who have filed with the Court a consent to join this Action as a plaintiff pursuant to 29 U.S.C 216(b) of the Fair Labor Standards Act ("FLSA"). Subclass Two is Class Members employed by Defendant in the state of California during the Class Period. Subclass Three is all Class Members who are members of both Subclass One and Subclass Two.

Each Class Member who submits a timely and valid Claim Form ("Settlement Class Members") will be eligible to receive a Settlement Award pursuant to the following formula: Based on data provided by Defendant, the Settlement Administrator shall initially calculate the number of weeks (including each partial week as a full week) of employment for employee in a Class Position in the Class Period ("Work Weeks"). Then, each Subclass One Member's Work Weeks shall be multiplied by 1.0 in recognition of a release of FLSA claims to arrive at that Class Member's "Subclass One Weekly Employment Credits."[2] Each member of Subclass Two shall have his or her Work Weeks multiplied by 2.0 in recognition of a release of California state law claims to arrive at that Class Member's "Subclass Two Weekly Employment Credits." Each Member of Subclass Three shall have his or her Work Weeks multiplied by 2.5 to arrive at that Class Member's "Subclass Three Weekly Employment Credits." The Net Settlement Sum will then be divided by the total number of Weekly Employment Credits (defined as the sum of the Subclass One, Subclass Two, and Subclass Three Weekly Employment Credits) to obtain an amount per Weekly Employment Credit. This amount per Weekly Employment will then be multiplied by the Weekly Employment Credits worked by each respective Class Member to determine the Settlement Award available to each respective Settlement Class Member.

In the event that the entire Net Settlement Sum is not claimed by the Settlement Class Members, any unclaimed Settlement Award funds shall be used first to pay any corporate payroll

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[2] The FLSA claims have less value as compared to the California state claims because FLSA uses a different method for calculating unpaid overtime which results in less overtime compensation paid to salaried employees. In addition, FLSA claims are only released to the extent an employee affirmatively elects to opt in and accept the settlement amount.

tax obligations, and then the remainder of any such funds shall be distributed pro rata to Settlement Class Members.

The Parties engaged in private mediation before the respected Mediator of employment class actions, Mark Rudy, to try and resolve the claims alleged in the Action. The Parties attended the mediation on April 27, 2009, but the Parties were not able to reach settlement at the mediation. Following the exchange of additional information and subsequent discussions and negotiations, the Parties thereafter reached this Agreement. Declaration of Norman Blumenthal, ("Decl. Blumenthal") ¶ 5. The parties prepared for the mediation by exchanging payroll data, calculating damages and submitting mediation briefs to Mr. Rudy. Subsequent discovery was conducted by both parties, including multiple sets of production requests, interrogatories and admission requests. As a result of the mediation process, the parties ultimately reached a settlement that they believe to be fair and reasonable in light of the experience of the Parties' attorneys as Counsel in other wage and hour cases, and the uncertainties and cost of the years of litigation the Parties faced if the settlement was not reached. Decl. Blumenthal, ¶ 5.

Under the terms to which the Parties have agreed, Apple will make a payment no more than Nine Hundred Ninety Thousand Dollars ($990,000.00). The settlement will be made on a claims-made basis without a reversion to Apple except for payment of taxes. Decl. Blumenthal, ¶ 3. This sum is inclusive of all claims of the Settlement Class members, as well as Class Counsel's attorneys' fees and costs, incentive awards for the Class Representatives, PAGA payments, and the cost of class notice and claims administration.

This is a excellent result for the members of the Settlement Class. Liability in this case was uncertain because some or all of the Class Members may have been exempt from certain pay requirements applicable to nonexempt employees. Indeed, some courts have found exemptions to apply in cases involving similar facts. Decl. Blumenthal, ¶ 5. Moreover, there was further uncertainty as to whether class certification could have been achieved and maintained throughout the litigation.

III. NATURE OF THE CASE

On August 4, 2008, Plaintiff David Walsh filed a complaint in the Southern District of

California on behalf of a putative class of "Network Engineers" who worked for Apple by physically installing, physically configuring, and physically replacing and maintaining network equipment. [Doc. No. 1]. The central allegation of the Action was that these employees were misclassified as exempt. (Decl. Blumenthal, ¶ 7.)

On September 9, 2008, Plaintiff Walsh filed a First Amended Complaint. [Doc. No. 5]. Apple filed a motion to strike and for a more definite statement on September 23, 2008. [Doc. No. 6]. Apple also filed a motion to change the venue of the Action. [Doc. No. 7]. Upon joint motion of the Parties, on October 24, 2008, the Action was transferred to the United States District Court for the Northern District of California. [Doc. No. 12]. (Decl. Blumenthal, ¶ 7.)

To address some of the issues raised by the motions filed by Apple, Plaintiffs filed a Second Amended Complaint on December 30, 2008, which in part added David Kalua as a Named Plaintiff and revised the class allegations to include employees in the positions "Systems Engineers," "Data Center Systems Engineers," "WAN Network / Voice Engineers," "Network Engineers," "Retail Engineers," and "Information Systems Analyst," who worked within the Global Network and Computing Services Group ("GNCS") and the Information Systems & Technology Group ("IS&T") at Apple. [Doc. No. 16]. (Decl. Blumenthal, ¶ 8.)

On January 29, 2009, Apple filed a motion to strike and for a more definite statement with respect to the Second Amended Complaint. [Doc. No. 17]. Plaintiffs prepared and filed opposition to the motions by Apple on February 23, 2009. [Doc. No. 19]. The Parties appeared before this Court and argued the motions. On March 23, 2009, this Court granted the motions in part and denied the motions in part. [Doc. No. 21]. (Decl. Blumenthal, ¶ 8.)

In accordance with the Order of this Court, Plaintiffs filed their Third Amended Complaint on May 1, 2009. [Doc. No. 31]. Apple answered the Third Amended Complaint on May 18, 2009. [Doc. No. 35]. Litigation of the Action ensued. (Decl. Blumenthal, ¶ 9.)

The Parties prepared a discovery plan and both Parties propounded substantial written discovery. The depositions of David Walsh was taken. The Parties were completing the necessary discovery for class certification, when the Parties agreed to stay formal discovery and resume their settlement discussions. (Decl. Blumenthal, ¶ 9.)

Apple provided Plaintiffs with the payroll data, employment information , policies and procedures, job descriptions, performance reviews and other data and which Plaintiff required for mediation. After initial exchanges of information, the Parties mediated on April 27, 2009 before respected mediator, Mark Rudy. The Parties were not able to reach settlement at the mediation session, however, discussions continued in the following motions. Ultimately, these subsequent discussions and negotiations were successful, and the Parties reached this Agreement. (Decl. Blumenthal, ¶ 10.)

Although a settlement has been reached and Apple is not opposing the motion for preliminary approval, Apple denies any and all liability or wrongdoing of any kind associated with the claims alleged in the Complaint. Apple maintains, among other things, that they have complied at all times with the California Labor Code, that the members of the putative class are properly classified as exempt under California law and that all members of the putative class were properly paid all wages owed to them. Specifically, in Apple's view, the Class Members are properly classified as exempt because they spend the majority of their time engaged in work directly related to the general business operations of Apple and were, therefore, covered under the administrative exemption. (Decl. Blumenthal, ¶ 11). Apple also maintains that some Class Members were exempt under the executive and professional exemptions.

Plaintiffs contend that Apple violated California wage and hour laws and the FLSA, and that the Action is appropriate for class certification on the basis that the Plaintiffs' claims meet the requisites for class certification. Without admitting that class certification is proper, Apple has stipulated that a Class of individuals employed by Apple in a Class Position in California during the respective settlement subclass class periods may be certified for settlement purposes only. The Parties agree that certification for settlement purposes is not an admission that class certification would be proper if the class certification issue were litigated. Further, this agreement is not admissible in this or any other proceeding as evidence that the Class could be certified absent a settlement. Solely for purposes of settling the lawsuits, the Parties stipulate and agree that the requisites for establishing class certification with respect to the Class, as defined above, have been met and are met. (Decl. Blumenthal ¶ 12.)

Class Counsel has conducted a thorough investigation into the facts of the class action. Class Counsel has diligently evaluated the Class Members' claims against Apple. Prior to the Parties executing the Agreement, Apple provided Class Counsel with access to Class Member data, including data reflecting the weeks worked by the Class Members and relevant salary information for the positions at issue, and contact information for the employees to conduct interviews. Based on the foregoing data and their own independent investigation and evaluation, Class Counsel believes that the settlement with Apple for the consideration and on the terms set forth in this Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Apple, and numerous potential appellate issues. (Decl. Blumenthal at ¶ 13.) Apple and Apple's counsel also agree that the Settlement is fair and in the best interest of the Class.

IV. PLAN OF ALLOCATION

In consideration for settlement of this Action and a release of the claims as described in the Agreement, Apple agrees to pay into a Settlement Fund a sum not to exceed Nine Hundred Ninety Thousand Dollars ($ 990,000.00) ("Settlement Fund"). The Settlement Fund in this Action has five components: (1) the Settlement Awards; (2) the Named Plaintiff Awards; (3) the Fee and Costs Payment; (4) the Administration Payment; and (5) the PAGA Payment. The "Net Settlement Sum" is the amount remaining in the Settlement Fund after deductions from the Settlement Fund for Administration Costs, the Fee and Costs Award, the Named Plaintiff Awards, and the PAGA Payment. (Decl. Blumenthal at ¶ 14.)

The Net Settlement Sum shall be paid entirely to Settlement Class Members, except that if there is unclaimed residue it shall first be used to satisfy Defendant's obligations to pay payroll taxes on the Settlement Awards. (Decl. Blumenthal, ¶ 15.) The Net Settlement Fund will be distributed as follows:

Each Settlement Class Member will be eligible to receive a Settlement Award pursuant to the following formula: Based on data provided by Defendant, the Settlement Administrator shall initially calculate the number of weeks (including each partial week as a full week) of employment for each Plaintiff in a Class Position in the Class Period ("Work Weeks"). Then, each Subclass One

Member's Work Weeks shall be multiplied by 1.0 in recognition of a release of FLSA claims to arrive at that Class Member's "Subclass One Weekly Employment Credits." Each member of Subclass Two shall have his or her Work Weeks multiplied by 2.0 in recognition of a release of California state law claims to arrive at that Class Member's "Subclass Two Weekly Employment Credits." Each Member of Subclass Three shall have his or her Work Weeks multiplied by 2.5 to arrive at that Class Member's "Subclass Three Weekly Employment Credits." The Net Settlement Sum will then be divided by the total number of Weekly Employment Credits (defined as the sum of the Subclass One, Subclass Two, and Subclass Three Weekly Employment Credits) to obtain an amount per Weekly Employment Credit. This amount per Weekly Employment will then be multiplied by the Weekly Employment Credits worked by each respective Class Member to determine the Settlement Award available to each respective Settlement Class Member. In the event that the entire Net Settlement Sum is not claimed by the Settlement Class Members, any unclaimed Settlement Award funds shall be used first to pay any corporate payroll tax obligations, and then the remainder of any such funds shall be distributed pro rata to Settlement Class Members. (Decl. Blumenthal, ¶ 16.)

As per paragraph 64 of the Agreement, Apple and their counsel will not oppose an attorneys' fees award to Class Counsel of 25% of the Settlement Fund or $247,500 (Two Hundred Forty-Seven Thousand and Five Hundred Dollars) as a Fee and Costs Payment to compensate Class Counsel for all of the work already performed in this case and all of the work remaining to be performed in documenting the Settlement, securing Court approval of the Settlement, making sure that the Settlement is fairly administered and implemented and obtaining dismissal of the actions. The amounts paid in fees and costs shall constitute full satisfaction of any obligation to pay for attorneys' fees, expenses or costs past, present and future incurred in the Action. (Decl. Blumenthal, ¶ 17.)

As per paragraph 67 of the Agreement, Class Counsel will request that Class Representatives Walsh and Kalua each receive an class representative service award of $10,000 (Ten Thousand Dollars) as Named Plaintiff Awards for their service as a Class Representative. These awards will be paid in addition to their individual claims for a share to which they are

otherwise entitled through the claims process. Apple will not oppose this request. (Decl. Blumenthal, ¶ 18.)

As per paragraph 71 of the Agreement, a PAGA Payment in the amount of $49,500 (Forty-Nine Thousand and Five Hundred Dollars) shall be allocated from the Settlement Fund to pay all applicable penalties under the California Labor Code's Private Attorney General Act of 2004, as amended, California Labor Code sections 2699 et. seq. The PAGA Payment shall be paid to the California Labor and Workforce Development Agency within 30 days after the Effective Date. (Decl. Blumenthal, ¶ 19.)

As per paragraphs 2 and 52 of the Agreement, the reasonable costs of the Settlement Administrator associated with the administration of this Settlement will be paid from the Settlement Fund. The Parties currently project the Administration Payment to be no more than $10,000 (Ten Thousand Dollars). The Settlement Administrator will be Gilardi & Company LLC. (Decl. Blumenthal, ¶ 20.)

V. THE SETTLEMENT MEETS ALL CRITERIA NECESSARY FOR PRELIMINARY APPROVAL

When a proposed class-wide settlement is reached, the settlement must be submitted to the court for approval. Fed. R. Civ. P. 23(e)(1)(A); 2 H. Newberg & A. Conte, Newberg on Class Actions (3d ed. 1992) at §11.41, p.11-87. Preliminary approval is the first of three steps that comprise the approval procedure for settlements of class actions. The second step is the dissemination of notice of the settlement to all class members. The third step is a final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and class members may be heard regarding the settlement. See Manual for Complex Litigation, Second §30.44 (1993).

The question presented on a motion for preliminary approval of a proposed class action settlement is whether the proposed settlement is "within the range of possible approval." Manual for Complex Litigation, Second §30.44 at 229; Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982). Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement . . . may be submitted to members of the prospective Class for their acceptance or

rejection." Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 372 (E.D. Pa. 1970). There is an initial presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel for the Class, is presented for court approval. Newberg, 3d Ed., §11.41, p.11-88. However, the ultimate question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the settlement is given to the class members and a final settlement hearing is held by the Court.

A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement

The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. Staton v. Boeing, 327 F.3d 938, 959 (9th Cir. 2003). Preliminary approval does not require the trial court to answer the ultimate question of whether a proposed settlement is "fair, reasonable and adequate." In re Jiffy Lube Sec. Litig., 927 F.2d 155, 158 (4th Cir. 1991); Manual for Complex Litigation, Third, §§ 20.212. That determination is made only after notice of the settlement has been given to the members of the class and after the class members have been given an opportunity to voice their views of the settlement or to be excluded from the settlement Class. See, e.g., 3B J. Moore, Moore's Federal Practice §§23.80 - 23.85 (2003).

In considering a potential settlement for preliminary approval purposes, the trial court does not have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute (Detroit v. Grinnell Corp., 495 F.2d 448, 456 (2d Cir. 1974)), and need not engage in a trial on the merits. Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). The court is not required to determine that certification of a settlement class is appropriate until the final settlement approval. In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 797 (3d Cir. 1995).

The question of whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "the terms of the compromise with the likely rewards of litigation." Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied 464 U.S. 818 (1983) (quoting Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968)). Therefore, many courts recognize that the opinion of experienced counsel supporting the settlement is entitled

to considerable weight. Kirkorian v. Borelli, 695 F. Supp. 446, 451 (N.D. Cal. 1988); Reed v. General Motors Corp., 703 F.2d 170, 175 (5th Cir. 1983); Weinberger, 698 F.2d at 74; Armstrong v. Board of School Directors, 616 F.2d 305, 325 (7th Cir. 1980); Fisher Bros. v. Cambridge-Lee Indus., Inc., 630 F. Supp. 482, 489 (E.D. Pa. 1985). For example, in Lyons v. Marrud, Inc., [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court noted that "[e]xperienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well-advised and necessary. The parties' decision regarding the respective merits of their position has an important bearing on this case." Id. at ¶ 92,520.

B. Factors To Be Considered In Granting Preliminarily Approval

A number of factors are to be considered in evaluating a settlement for purposes of preliminary approval. No one factor should be determinative, but rather all factors should be considered. These criteria have been summarized as follows:

If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement. Manual of Complex Litigation, Second §30.44, at 229. Here, the settlement meets all of these criteria.

1. The Settlement is the Product of Serious, Informed and Noncollusive Negotiations

This settlement is the result of extensive and hard fought negotiations. Apple denies each and every one of the claims and contentions alleged in this Action. Apple has asserted and continues to assert many defenses thereto, and has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Nonetheless, Apple has concluded that this Action be settled in the manner and upon the terms and conditions set forth in the Agreement in order to avoid the expense, inconvenience, and burden of further legal proceedings, and the uncertainties of trial and appeals. Apple has decided to put to rest the

Released Claims of the Settlement Class.

The parties scheduled a private mediation to take place before Mark Rudy, one of the preeminent mediators of wage and hour class actions. In preparation for the mediation, Apple provided Class Counsel with job descriptions, performance evaluations, time records and payroll information for the members of the Class. Plaintiffs analyzed the data with the assistant of damages expert DM&A and prepared and submitted a mediation brief to Mr. Rudy. The scheduled mediation was contentious and arm's length, and did not result in a settlement at that session. The parties, however, continued settlement discussions and were ultimately able to reach the settlement contained in the Agreement. (Decl. Blumenthal ¶ 5.) Importantly, Plaintiffs and Class Counsel believes that this settlement is fair, reasonable and adequate. By reason of the settlement, Apple has agreed to pay $990,000.00, as payment in full of all of the Class claims arising from the events described in the Complaint including Class Counsel's attorneys' fees and expenses, PAGA payments, Class Representatives' service awards, and the cost of class notice and claims administration.

Class Counsel has conducted a thorough investigation into the facts of the class action, including an extensive review of relevant documents and data, contact information to hundreds of Class Members, and have diligently pursued an investigation of the Class Members' claims against Apple. (Decl. Blumenthal, ¶ 11.) Based on the foregoing documents and data and their own independent investigation and evaluation, Class Counsel is of the opinion that the settlement with Apple for the consideration and on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Apple, and numerous potential appellate issues. Apple and Apple's counsel also agree that the Settlement is fair and in the best interest of the Class Members.

Plaintiffs and Class Counsel recognize the expense and length of continuing to litigate and trying this Action against Apple through possible appeals which could take several years. Class Counsel has also taken into account the uncertain outcome and risk of litigation, especially in complex actions such as this Action. Class Counsel is also mindful of and recognize the inherent

problems of proof under, and alleged defenses to, the claims asserted in the Action. Based upon their evaluation, Plaintiffs and Class Counsel has determined that the settlement set forth in the Agreement is in the best interest of the Class Members. (Decl. Blumenthal, ¶ 21.)

Here the negotiations have been hard-fought and aggressive with capable advocacy on both sides. Accordingly, "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence." In re Wash. Public Power Supply System Sec. Litig., 720 F. Supp. 1379, 1392 (D. Ariz. 1989).

2. The Settlement Has No "Obvious Deficiencies" and Falls Within the Range for Approval

The proposed Settlement herein has no "obvious deficiencies" and is well within the range of possible approval. All Class Members will receive an opportunity to participate in and receive payment.

The damage estimate calculations to compensate for the amount due for the nonpayment of wages were calculated by DM&A, Plaintiffs' damage expert. (Blumenthal Decl., ¶ 6.) For the Class Members whose claims are at issue here, DM&A reviewed Apple's time and payroll data and assumed that each employee was not paid for five (5) overtime hours for each week worked during the Class period and missed one meal break per work week. Plaintiffs' expert then calculated the compensation owed to the members of the class and found that Apple was subject to a Class-wide claim of $2,901,942 for the 5 unpaid hours of overtime. (Blumenthal Decl., ¶ 6.) Once estimates for meal break compensation, wage statement penalties, waiting time penalties and other statutory penalties are included, the total damage estimates were $3.6 million. (Blumenthal Decl., ¶ 6.)

Consequently, Plaintiffs reasonably believed that Apple was subject to total claims of about $3.6 million for the entire Class Period for unpaid overtime and penalties that was susceptible to solid proof. The settlement of $990,000, before deductions, represents 27% of the total possible claims, assuming these amounts could be proven at trial, and represents 34% of the total overtime estimate. Clearly the goal of this litigation has been met. (Decl. Blumenthal, ¶ 6).

In Glass v. UBS Fin. Servs., 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. January 27, 2007) the federal district court for the Northern District of California recently approved a settlement of an

action claiming unpaid overtime wages where the settlement amount constituted only approximately 25 to 35% of the estimated actual loss to the class. Here the settlement consideration falls well within the realm of this range of approved percentages based on the estimated actual loss to the class.[3] Blum. Decl., ¶ 27.

In Glass, the federal court ruled that the settlement which represented approximately 25% to 35% of the loss to the class was fair, reasonable, and adequate. Id. at 28. As a result, this settlement is most certainly entitled to preliminary approval.

Where both sides face significant uncertainty, the attendant risks favor settlement. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by Apple present serious threats to the claims of Plaintiffs and the other Class Members. For example Apple contended that many Class Members were barred from recovery by the "administrative exemption" set forth in 29 C.F.R. Section 541.402, which provides:

> Computer employees within the scope of [the computer professional exemption] may also have . . . administrative duties which qualify the employees for exemption under [the administrative exemption]. For example, systems analysts and computer programmers generally meet the duties requirement for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer's customers.

Apple also relied on 29 C.F.R. § 541.201(a)(b) which provides:

> Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

These new federal regulations specifically identify work as a project manager as an example of that which qualifies for the administrative exemption. 29 C.F.R. Section 541.203 (c) states: "An

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[3] In Glass, the federal court granted preliminary approval of the settlement although the parties failed to submit evidence verifying their estimate of the total loss to the class. At the final fairness hearing, the parties presented a lengthy discussion of the above-referenced estimate, in which they represented that their estimate of the maximum loss to the class was based on hard data obtained from interviews with class members, computer log-in records, and payroll records. Id. at *28-*29. The parties estimate of the total loss to the Settlement Class here is based on the same type of hard data that was not submitted in Glass until final settlement approval was sought.

employee who leads a team of other employees assigned to complete major projects for the employer . .. generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team."

In Bagwell v. Florida Broadband, 2005 WL 1962562, (S.D. Fla. 2005), the district court found that a network operation engineer was exempt under both the administrative and the computer professional exemptions to the FLSA. The court found that the administrative exemption applied where plaintiff's primary duty was developing, improving, and making Florida Broadband's network system function reliably. Although the plaintiff performed some physical work, the court found that the plaintiff's primary duty was not manual because the predominance of plaintiff's duties were problem-solving, office and administrative duties. Id. at 1323-24.

In Koppinger v. American Interiors, Inc., 295 F. Supp. 2d 797 (N.D. Ohio 2003), the court granted summary judgment for the employer, finding that the plaintiff who was responsible for maintaining the company's computer system qualified for the administrative exemption.

> [The plaintiff's] duties consisted of ordering replacement parts, recommending purchases of new software and hardware, installing software, and repairing equipment for the company's computer users. When users called in with computer problems, plaintiff determined the priority of and when and how to handle those problems. No one set his priorities; he worked largely, if not entirely, independently. . . . While the plaintiff did a fair amount of work loading software and fixing computers and other equipment, he also made recommendations about what software and hardware the company should purchase.

Id. at 799.[4] (See also Decl. Blumenthal, ¶ 23 - 25.)

There was also a significant risk that, if the Actions were not settled, Plaintiffs would be unable to obtain class certification and thereby not recover on behalf of any Apple employees other than themselves. In Dunbar v. Albertson's, Inc., 141 Cal. App. 4th 1422, 1431-32 (2006), the California Court of Appeal recently affirmed an order denying class certification to a class of

[4] See also Heffelfinger v. Elec. Data Sys. Corp., 2008 U.S. Dist. LEXIS 46461 (C.D. Cal. June 6, 2008) (holding that classes of information technology workers were exempt under the administrative exemption); Hickman v. United States, 10 Cl. Ct. 550, 561 (1986)(holding that electronics technician and computer equipment analyst were exempt under the administrative exemption); Shillinglaw v. System Works, Inc., 1993 WL 603289 (N.D. Ga. 1993)(holding that computer programmer/analyst was an exempt administrative employee); Raper v. State of Iowa, 688 N.W.2d 29, 43 (Iowa 2004).

employees who claimed that they were denied overtime pay because whether the executive exemption applied would have had to have been individually determined for each class member which meant that common issues did not predominate. Similarly, here Apple would have certainly argued in opposing class certification that individual issues predominated because the applicability of the administrative exemption would have to be separately determined for each Class Member based on their individual experience. While other cases have approved class certification in overtime wage claims, class certification in this action would have been hotly disputed and was by no means a foregone conclusion. (Decl. Blumenthal at ¶26).

After vigorous negotiations, including the preparation and submission of mediation briefs to mediator Mark Rudy, as well as a study of hard data provided to Plaintiff's expert, the parties recognized the potential risks and agreed on the settlement of $990,000. As the federal court recently held in Glass, where the parties faced uncertainties similar to those here:

> In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." See In re Mego Financial Corp. Securities Litigation, 213 F.3d 454, 458 (9th Cir. 2000).

Here, the risk of further litigation is substantial.

3. The Settlement Does Not Improperly Grant Preferential Treatment To The Class Representative or Segments Of The Class

The relief provided in the settlement will benefit all Class Members equally. The settlement does not improperly grant preferential treatment to the Class Representative or any individual segments of the Class.

Each Settlement Class member, including the Named Plaintiffs, will be entitled to payment based on the plan of allocation. Each Settlement Class member's lump sum payment will be determined as follows:

Based on data provided by Defendant, the Settlement Administrator shall initially calculate the number of weeks (including each partial week as a full week) of employment for each Plaintiff in a Class Position in the Class Period ("Work Weeks"). Then, each Subclass One Member's Work

Weeks shall be multiplied by 1.0 in recognition of a release of FLSA claims to arrive at that Class Member's "Subclass One Weekly Employment Credits." Each member of Subclass Two shall have his or her Work Weeks multiplied by 2.0 in recognition of a release of California state law claims to arrive at that Class Member's "Subclass Two Weekly Employment Credits." Each Member of Subclass Three shall have his or her Work Weeks multiplied by 2.5 to arrive at that Class Member's "Subclass Three Weekly Employment Credits." The Net Settlement Sum will then be divided by the total number of Weekly Employment Credits (defined as the sum of the Subclass One, Subclass Two, and Subclass Three Weekly Employment Credits) to obtain an amount per Weekly Employment Credit. This amount per Weekly Employment will then be multiplied by the Weekly Employment Credits worked by each respective Class Member to determine the Settlement Award available to each respective Settlement Class Member. In the event that the entire Net Settlement Sum is not claimed by the Settlement Class Members, any unclaimed Settlement Award funds shall be used first to pay any corporate payroll tax obligations, and then the remainder of any such funds shall be distributed pro rata to Settlement Class Members.

In addition, the Class Representatives will each apply to the Court for a Named Plaintiff Enhancement of $10,000. In Glass, the district court recently awarded each of the class representatives in an overtime wages class action a service award of $25,000. Glass, 2007 U.S. Dist. LEXIS 8476 at *51-52.

4. The Stage Of The Proceedings Is Sufficiently Advanced To Permit Preliminary Approval Of The Settlement

The stage of the proceedings at which this settlement was reached also militates in favor of preliminary approval and ultimately, final approval of the settlement. Class Counsel has conducted a thorough investigation into the facts of the class action. Class Counsel began investigating the Class Members' claims before this action was filed. Class Counsel also obtained production of extensive business and payroll records produced through both formal and informal discovery. Class Counsel engaged in an extensive review and analysis of the relevant documents and data with the assistance of experts. Class Counsel also received contact information for the Class and interviewed potential Class Members. Accordingly, the agreement to settle did not occur until

Class Counsel possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. (Decl. Blumenthal at ¶27.)

Based on the foregoing data and their own independent investigation and evaluation, Class Counsel is of the opinion that the settlement with Apple for the consideration and on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Apple, and numerous potential appellate issues. Apple and Apple's counsel also agree that the Agreement is fair and in the best interest of the Class Members. There can be no doubt that Counsel for both parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. (Decl. Blumenthal ¶¶ 27-29.)

In Glass, the Northern District of California recently granted final approval of an overtime and meal wage action although in Glass no formal discovery had been conducted prior to the settlement:

> Here, no formal discovery took place prior to settlement. As the Ninth Circuit has observed, however, "[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." See In re Mego Financial Corp. Securities Litigation, 213 F.3d at 459.

Glass, 2007 U.S. Dist. LEXIS 8476 at *14.

Here, Class Counsel was in a significantly stronger position to evaluate the fairness of this settlement than in Glass because they conducted formal discovery and informal discovery, as well as independent investigations and due diligence to confirm the accuracy of the information supplied by Apple.

VI. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES

The proposed settlements meet all of the requirements for class certification under F.R.C.P. §23(b)(2) as demonstrated below, and therefore, the Court may appropriately approve the Settlement Class as defined in the Agreement. This Court should conditionally certify a settlement

class for settlement purposes only that consists of all of Defendant's current and former employees in the IS&T and/or Global Computing Network Services ("GNCS") division in the United States who were classified as exempt holding the job titles of Network Engineer (levels 1 through 3), Telecommunication Engineer (levels 1 through 3), Information Systems Engineer (levels 1 through 3), Systems Engineer (levels 1 through 3), Information Systems Analyst (levels 1 through 3), Tech/Info Systems Analyst (levels 1 through 3), or substantially similar job titles at levels 1, 2 and 3 who worked at any time from August 4, 2004 through the date of preliminary Court approval of this Settlement. All other employees in all other job titles and job levels within the class definition in the Third Amended Complaint shall be dismissed from the Action without prejudice. (Agreement at ¶¶9, 31.)

A. Rule 23 of the Federal Rules of Civil Procedure Governs

Plaintiffs seek certification of this Action for settlement purposes under F.R.C.P §23(b)(3). This portion of rule 23 applies to class actions where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

To maintain a class action under rule 23(b)(3), the four prerequisites of F.R.C.P. Rule 23(a) must first be satisfied. These prerequisites are referred to as numerosity, commonality, typicality, and adequacy of representation, and are set forth in Rule 23(a) as follows:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

While Apple disputes that the Plaintiffs can satisfy any of these requirements, the Parties agree that, for purposes of settlement, these requirements may be satisfied in this case, and therefore, the proposed Settlement Class should be certified for purposes of settlement.

B. The Numerosity Requirement Is Satisfied

Rule 23(a) merely requires that the class be "so numerous that joinder of all members is impracticable." F.R.C.P. §23(a). "Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." EEOC v. Kovacevich "5" Farms, 2007 U.S. Dist. LEXIS 32330 at *57 (E.D.Cal. April 18, 2007); see also Slaven v. BP Am., Inc., 190 F.R.D. 649, 654 (C.D. Cal. 2000); Ansari v. New York Univ., 179 F.R.D. 112, 114 (S.D.N.Y. 1998); Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 574 (D. Minn. 1995). In Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995), the Court held that "numerosity is presumed at a level of 40 members." The Ninth Circuit observed that classes with fewer than 70 members have been certified in numerous cases. Jordan v. County of Los Angeles, 669 F.2d 1311, 1320 n.10 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810, 103 S. Ct. 35, 74 L. Ed. 2d 48 (1982) (noting that classes with fewer than 70 members have been certified in numerous cases).

Here, the Settlement Class is composed of over 100 current and former employees, which is sufficiently numerous. (Decl. Blumenthal at ¶30(a).)

C. Common Questions of Law and Fact Bind the Class

Rule 23(a) requires that there be a common question of law or fact. There is no requirement that the members of the class be identically situated, only that there exists one or more factual or legal questions common to all members. Jenson v. Continental Fin. Corp., 404 F. Supp. 806 (D. Minn. 1975). This threshold of "commonality" is not particularly high. Jenkins v. Raymark Ind., Inc., 782 F.2d 468, 472 (5th Cir. 1986). The fundamental question is whether the resolution of the common legal or factual questions would affect all or a substantial number of the class members. Jenkins, supra, 782 F.2d at 472. Indeed, if a claim "arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir. 1977), cert. denied, 434 U.S. 856 (1977).

Rule 23(a) is satisfied where "the course or conduct giving rise to the cause of action affects all class members, and at least one of the elements of that cause of action is shared by all of the class members." Lockwood Motors, 162 F.R.D. at 575. This requirement is met if common questions of liability are present, even if there may be individual variations. In re Workman's

Comp., 130 F.R.D. 99, 104 (D. Minn. 1990).

Here, common questions of law and fact, as alleged by the Plaintiffs, are present, specifically the question of whether the GNCS and IS&T Support Staff employees employed by Apple are "exempt." (Decl. Blumenthal at ¶30(b).) Apple does dispute that commonality actually exists, but will not oppose such a finding for purposes of this settlement only.

D. The Claims of the Plaintiffs Are Typical of the Class Claims

The typicality requirement of Rule 23(a) requires the Plaintiffs to demonstrate that the members of the class have the same or similar claims as the named Plaintiffs. "The typicality requirement is met when the claims of the named Plaintiff arise from the same event or are based on the same legal theories." Tate v. Weyerhaeuser Co., 723 F.2d 598, 608 (8th Cir. 1983). In Hanlon v. Chrysler Co., 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit held that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." 50 F.3d at 1020. Typicality "does not mean that the claims of the class representative[s] must be identical or substantially identical to those of the absent class members." Stanton, supra, at 957.

In the instant case, there can be little doubt that the typicality requirement is fully satisfied. The Plaintiffs, like every other member of the Class, were employed by Apple and classified as "exempt" by Apple. The Plaintiffs performed the same type of computer installation and maintenance work as the members of the Class. The Plaintiffs, like every other member of the Class, claim unpaid overtime wages for work performed in the same job classifications. Thus, the claims of both the Plaintiffs and the Members of the Class arise from the same course of conduct by the Apple, involve the same work performed in connection with the Apple computer systems, and are based on the same legal theories. (Decl. Blumenthal at ¶30(c).) The typicality requirement of Rule 23 is met as to the common issues presented in this case. While Apple disputes that Plaintiffs have claims typical of the individuals they purport to represent, it will not oppose a finding of typicality for purposes of this settlement only.

E. The Class Representatives Fairly and Adequately Protected the Class Interests

The Class Representatives provided adequate representation of the interests of the class in

that: (a) their attorneys are competent, experienced in class litigation and generally able to conduct the proposed litigation; and (b) the Class Representatives do not have interests antagonistic to those of the class. White v. Local 942, 688 F.2d 85, (9th Cir. 1982). Simply put, Rule 23 asks whether the Class Representatives will vigorously prosecute on behalf of the class and have a basic understanding of the claims. This requirement has been met here. First, Plaintiffs are well aware of their duties as representatives of the class and have actively participated in the prosecution of this case to date. They effectively communicated with counsel, providing documents to counsel and participated extensively in discovery and investigation of the Action. Plaintiff Walsh appeared for deposition and testified thoroughly about his claims. (Decl. Blumenthal at ¶30(d).) Second, the Plaintiffs have retained competent counsel who have extensive experience in employment class actions. (Decl. Blumenthal at ¶ 31.) Class Counsel has extensive experience in class action litigation in California and throughout the country. Class Counsel has been involved as class counsel in over two hundred (200) class action matters, including many wage and hour class actions. See, e.g., Resume, attached as Exhibit 3 to the Declaration of Blumenthal. Third, there is no antagonism between the interests of the named Plaintiffs and those of the Class. Both the Plaintiffs and the Members of the Class seek monetary relief under the same set of facts and legal theories. Under such circumstances, there can be no conflicts of interest, and adequacy of representation is presumed. In re Wirebound Boxes Antitrust Lit., 128 F.R.D. 268 (D. Minn. 1989).

F. The Additional Requirements of Rule 23 Are Satisfied

Since the requirements of Rule 23(a) have been satisfied, the Court now must look to Rule 23(b)(3) in order to determine whether a class should be maintained under one of the listed categories. Under Rule 23(b)(3), a class action may be maintained if, first, common questions predominate over individual issues, and second, the class action must be superior to other available other methods for the fair and efficient adjudication of the controversy.

1. The Predominance Requirement Is Met

Rule 23(b)(3) provides that a class may be maintained if "the court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members." There is no bright line to determine whether common issues predominate. A

claim will meet the predominance requirement in cases where generalized evidence of the Defendants' conduct will prove or disprove an element of the claim on a simultaneous class-wide basis. The "fundamental question" is whether the claim asserted is seeking a remedy to a "common legal grievance." Lockwood Motors, 162 F.R.D. at 580; Buchholtz v. Swift & Co., 62 F.R.D. 581, 598 (D.Minn. 1973). Further, the mere fact that there are certain issues that may need to be determined on an individual basis does not preclude the satisfaction of the predominance requirement. See Newberg & Comte, Newberg on Class Actions §4.25 (3d ed. 1992).

Here, the adjudication of the common issues surrounding Apple's alleged uniform and systematic acts could establish Apple's liability on a class-wide basis. Plaintiffs contend that Apple had engaged in a uniform course of conduct with respect to the Settlement Class; the only question is whether Apple's conduct supports a meritorious claim. Such suits challenging the legality of a standardized course of conduct are generally appropriate for resolution by means of a class action. (Decl. Blumenthal at ¶30(e).) Accordingly, Plaintiffs argue that common issues of law and fact present in this case predominate.

In the context of overtime pay litigation, courts have often found that common issues predominate where an employer treats the putative class members uniformly with respect to compensation and where, as here, (a) company-wide policies governing how employees spend their time, or (b) uniformity in work duties and experiences that diminish the need for individualized inquiry. See, e.g., Wamboldt v. Safety-Kleen Sys., 2007 U.S. Dist. LEXIS 65683, *40-41 (N.D. Cal. 2007) (plaintiffs classified as exempt all share same job description); Breeden v. Benchmark Lending Group, Inc., 229 F.R.D. 623, 630 (N.D. Cal. 2005) (parties agree putative class members "all performed the same duties at the same location."); Krzesniak v. Cendant Corp., 2007 U.S. Dist. LEXIS 47518 (N.D. Cal. 2006).

While Apple disputes that the predominance requirement may be satisfied, it will not oppose such a finding for purposes of this settlement only.

2. The Superiority Requirement Is Met

To certify a class, the Court must also determine "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." F.R.C.P. Rule 23

(b)(3). "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).

"If the plaintiffs' claims are substantiated, a question as to which the court presently has no opinion, the class action mechanism is clearly the most efficient means of resolving the many claims which may be asserted. If the case were not handled as a class, thousands of small claims would either be brought or unjustly abandoned. The first possibility would be a flood of cases, the second would involve individual claims abandoned because of cost." In re Workers Compensation., 130 F.R.D. 99, 110 (D.Minn. 1990).

Here, a class action is the superior mechanism for adjudication of the claims as pled by the Plaintiffs. While Apple disputes that the superiority requirement may be satisfied, it will not oppose such a finding for purposes of this settlement only.

VII. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE

The Parties have agreed upon procedures by which the Class will be provided with written notice of the Settlement similar to that approved and utilized in hundreds of class action settlements. The Parties have jointly drafted a Notice of Preliminary Approval of the Settlement, attached to the Agreement as Exhibit 1 and is hereby submitted to the District Court for Approval. Within 45 days after entry of the Preliminary Approval Order as provided herein, the Settlement Administrator shall send a copy of the Class Notice, Claim Form and Opt In Form in the form approved by the Court in its Preliminary Approval Order to the members of the Class via first-class regular U.S. mail using the most current mailing address information available from Apple's payroll records, which shall be updated by the Settlement Administrator to correct for any known or identifiable address changes. (Agreement at ¶56).

The Notice, drafted jointly and agreed upon by the Parties through their respective counsel, includes information regarding the nature of the Action; a summary of the substance of the Settlement, including Apple's denial of liability; the definition of the Class; the procedure and time period for objecting to the Settlement and participating in the Final Approval hearing; a statement

that the District Court has preliminarily approved the Settlement; and information regarding the claims filing procedure and the opt-out procedure. See Exhibit 1 to the Agreement. Attached to the Notice will be a Claim Form and Opt In Form, in the form attached to the Agreement as Exhibits 2.

The costs associated with the mailing will be paid out of the Settlement Fund. The Claims Administrator shall disseminate the settlement Notice and Claim Form and Opt In Form to the Class, by U.S. mail, within forty-five (45) days of the entering of the order granting preliminary approval of the Settlement. The Notice shall state that Class Members who wish to participate in the settlement shall complete and return the Claim Form pursuant to the instructions contained therein by first class mail or equivalent, postage paid. The Notice shall also provide that any Class Member may choose to opt out of the Class, and that any such person who chooses to opt out of the Class will not be entitled to any recovery obtained by way of the settlement and will not be bound by the settlement or have any right to object, appeal or comment thereon.

The Notice will provide that all objections to the Settlement by anyone, including members of the Settlement Class, must be filed in the District Court and served upon all counsel of record by no later than forty-five (45) days from the mailing of the Notice of Preliminary Approval (the "Objection/Exclusion Deadline"). The 45-day period applies notwithstanding any argument regarding non-receipt of the notice. All objections must state with particularity the basis on which they are asserted. Further, if any objector intends to appear at the Final Approval hearing, either in person or through counsel, he or she must include notice of that fact and state the purpose for the appearance in his or her objection.

This notice program was designed to meaningfully reach the largest possible number of potential Class Members. The mailing and distribution of the Notice satisfies the requirements of due process and is the best notice practicable under the circumstances and constitutes due and sufficient notice to all persons entitled thereto. (Agreement at ¶56).

This notice satisfies the content requirements for notice following the exemplar class notice in the Manual for Complex Litigation, Second §41.43. This notice also fulfills the requirement that Class notices be neutral. Newberg, at §8.39.

VIII. CONCLUSION

Counsel for the Parties have committed substantial amounts of time, energy, and resources litigating and ultimately settling this case. In the judgment of Plaintiffs and Class Counsel, the proposed settlement is a fair and reasonable compromise of the issues in dispute in light of the strengths and weaknesses of each party's case. After weighing the substantial, certain and immediate benefits of these settlements against the uncertainty of trial, and appeal, Plaintiffs believe the proposed settlement is fair, reasonable and adequate, and warrants this Court's preliminary approval.

Accordingly, Plaintiffs respectfully request that the Court preliminarily approve the proposed settlements, certify the Class for settlement purposes, schedule a date for a hearing on Final Approval, and sign the proposed Preliminary Approval Order, submitted herewith.

Dated: January 21, 2010

BLUMENTHAL, NORDREHAUG & BHOWMIK

By: */s/Norman B. Blumenthal*
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