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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN JOSE DIVISION

16 IN RE IPHONE APPLICATION
 17 LITIGATION

) CASE NOS. CV-10-5878-LHK (PSG);
) CV-10-5881-LHK; CV-11-0407-LHK;
) CV-10-0700-LHK

) **PLAINTIFF ANTHONY CHIU'S**
) **MEMORANDUM OF LAW IN**
) **FURTHER SUPPORT OF HIS**
) **RECOMMENDATION THAT**
) **MILBERG LLP BE APPOINTED**
) **INTERIM CLASS COUNSEL, AND**
) **IN OPPOSITION TO THE MOTION**
) **FILED BY THE KAMBERLAW**
) **GROUP**

) Date: TBA
) Time: TBA
) Judge: Hon. Lucy H. Koh

) Status Conference: April 6, 2011

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RELEVANT FACTS

Plaintiff Anthony Chiu respectfully submits this Memorandum of Law and accompanying Declaration of Jeff S. Westerman (“Westerman April 4 Decl.”) in further support of his Recommendation that Milberg LLP (“Milberg”) be appointed Interim Class Counsel in the consolidated *In re iPhone Application Litigation*, and in opposition to the Motion submitted by the group, led by KamberLaw LLC (“KamberLaw,” or collectively the “KamberLaw Group”).

Although self-ordering by counsel is encouraged by courts in consumer class cases, any arrangement must be scrutinized under Rule 23(g) of the Federal Rules of Civil Procedure (“Rule 23(g)”). Fed. R. Civ. P. 23(g)(2)(B); *see also Parkinson v. Hyundai Motor Am.*, No. SACV 06-345 AHS, 2006 U.S. Dist. LEXIS 59055, at *6 (C.D. Cal. Aug. 7, 2006). If self-ordering is not possible, the Court should still conduct an analysis to select “[t]he lawyer best able to represent the class’s interests” from the applicants competing for appointment. Manual For Complex Litigation (the “Manual”) § 21.272 (4th ed. 2004). An objective review of the firm résumés of Milberg and KamberLaw, the facts that support each proposal, and the conduct of the KamberLaw Group to date, show that Milberg’s experience and resources give it the edge in the Rule 23(g) analysis.

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STATEMENT OF ISSUES TO BE DECIDED

Before the Court are two competing recommendations for appointment of Interim Class Counsel in the consolidated *iPhone* action submitted by Milberg and KamberLaw Group. As the content, quality and completeness of the submissions filed with the Court by Milberg shows, it has demonstrated the type of leadership that warrants appointment as Interim Class Counsel within the meaning of Rule 23(g). As presented in Mr. Chiu’s March 25 Recommendation, and further detailed here, Milberg has both far-reaching experience and expertise in class actions and privacy litigation.

The KamberLaw Group makes the lesser showing under the Rule 23(g) requirements, by indicating a weaker bargaining position to defendants, and by taking a puzzling detour outside the parameters of this Court’s March 15, 2011 Order (“March 15 Order”), the Court’s procedures, and the local rules. The KamberLaw Group claims that its proposed stipulation for selecting Interim Class Counsel, which all counsel approved, and the Court entered on as the March 15 Order

1 demonstrates “the importance of efficiency to KamberLaw.” (ECF No. 46 at 11.) But oddly, the
2 KamberLaw Group did not follow its own suggested procedure. Instead of filing the
3 recommendation for Interim Class Counsel as ordered, it filed an improperly noticed motion for
4 appointment of Interim Class Counsel for which there is no properly noticed, or court reserved,
5 hearing date.

6 This conduct is symptomatic of KamberLaw’s approach to this litigation, which involves
7 Mr. Kamber making agreements in an attempt to appear cooperative only to bend his interpretation
8 in practice. In addition, (a) Mr. Kamber agreed that all discussions regarding the self-ordering of
9 proposed Interim Class Counsel were to be “off the record,” but he then discussed one of those
10 discussions in his moving papers in a manner that was incomplete and inaccurate (ECF No. 46 at 1-
11 2; 4-6; ECF No. 47 at ¶¶ 25-30); and (b) Mr. Kamber requested and obtained an agreement that both
12 firms would file their respective opening papers at the same time, to avoid disadvantaging either
13 group, and but he then filed the KamberLaw Group’s papers more than two hours later than the
14 agreed-upon time, and appears to have used the delay to its advantage, *i.e.* by confirming Milberg
15 adhered to the agreement that the discussions were off-the-record, and then submitting his own self-
16 serving, incorrect and incomplete account. Mr. Kamber’s conduct in only selectively dishonoring
17 his agreement is especially puzzling in light of the extensive discussions about a co-lead
18 arrangement and his repeated comments that he did not have a problem with Milberg being co-lead
19 counsel with his firm. (Westerman April 4 Decl.)

20 **RECOMMENDATION / ARGUMENT**

21 **I. MILBERG HAS DEMONSTRATED AN EDGE ON THE RULE 23(g) FACTORS**

22 Milberg presented in its initial recommendation concrete facts why it is well suited to lead
23 this litigation.

24 **A. Milberg Has More Class Action Experience And** 25 **Privacy/High Tech Case Experience Than KamberLaw**

26 Milberg has a demonstrable 40-year history in consumer class and other complex litigation
27 and experience in privacy and other high-tech cases. (ECF No. 45 at 8-10.) In contrast, Mr.
28 Kamber’s submission characterizes KamberLaw firm as a “boutique” firm, and presents its smaller

1 size and resources as an advantage over Milberg’s broader class action experience. (ECF No. 46
2 *passim*.) But the ability to apply tried-and-true methods and approaches to an emergent area of law,
3 and bring substantial resources to bear, is a valuable asset, not a liability. As demonstrated by its
4 firm résumé, Milberg pioneered many areas of class action law over four decades, and has been
5 responsible for numerous precedent-setting decisions and billions in recoveries. (ECF No. 45-5.)
6 Milberg has both broad class action experience and experience in privacy and high technology
7 actions.

8 **B. Milberg Has Superior Resources That Will Benefit The Class In This Litigation**

9 Milberg is a pioneer in the e-discovery field and has in-house e-discovery capabilities that
10 would be invaluable to this Digital Age litigation against a high-tech defendant and benefit the
11 Class. (ECF No. 45 at 4-5, 7, 11; ECF No. 45-4.) In contrast, none of the other firms that seek to
12 lead this case have these, or comparable, resources.

13
14 While the KamberLaw Group says it possesses in-house expertise and resources relevant to
15 this litigation, it provides no specific example. (ECF No. 46 at 7.) Milberg has successfully
16 spearheaded numerous complex class actions against some of the most powerful corporations in the
17 world, sometimes in litigations that spanned many years and required the expenditure of tens of
18 millions of dollars, in hard costs and attorney time, both domestically and internationally. While
19 attrition litigation obviously is never a goal for plaintiffs, a plaintiff’s bargaining position is
20 improved immensely when defendants know that they cannot outspend or outlast their adversaries.
21 It is often this understanding that compels defendants to agree to resolutions that are as beneficial to
22 class members as they are efficiently achieved. A review of the record demonstrates that none of
23 the KamberLaw Group firms, singly or in the aggregate, can match Milberg’s history of
24 successfully litigating big cases against big companies like Apple.
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26 To the contrary, KamberLaw signaled to Apple that early and moneyless settlements are
27 important to its litigation strategy. (ECF No. 46 at 9:11-15; ECF No. 47 at 6:16-19 (¶ 23).) While
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1 settlement should be explored, and privacy rights often involve remedial relief in addition to money,
2 it is hard to understand how the class is served by this public statement of settlement strategy at this
3 preliminary stage. It is also hard to understand how, as this was intended, it makes a movant more
4 qualified under 23(g) than a firm with a demonstrated track record of both monetary and non-
5 monetary recoveries, for class members. (ECF No. 45-5.)
6

7 **C. Milberg Has Achieved Monetary *And* Remedial Recoveries In Many Cases**

8 Any signal that this case can be settled for non-monetary relief is premature and a
9 questionable negotiating technique, at best. Kamber states that unlike other class actions (implicitly
10 of the types Milberg has been spearheading for decades), the point of privacy actions is to end the
11 bad conduct, not to recover money for violations of law. (ECF No. 47 at 6.) While ending the
12 conduct is obviously important, the ability to credibly obtain money not only increases the
13 negotiating leverage for when the conduct stops, it is also leverage for the nature, strength and
14 breadth of the preventative relief. More importantly, the message conveyed to defendants is that if
15 certain counsel is appointed to spearhead this litigation, the case will at most settle for non-
16 monetary relief. This alone diminishes KamberLaw Group's motion pursuant to Rule 23(g).

17 Consumer cases sometimes achieve justice through purely remedial relief. However, it is
18 difficult to understand why a proposed class counsel would take monetary relief for the Class off
19 the table at the outset of the case. The Class would be best represented by aggressive litigators who
20 can maximize the benefits to the Class, and who have the willingness and ability to pursue all types
21 of relief.

22 **D. The Reese Richman Firm Supports Milberg's Appointment**

23 Contrary to the KamberLaw Group's assertions that Milberg is the only law firm that
24 opposes the group's leadership proposal, Milberg also has the support of consumer class action law
25 firm, Reese Richman LLP. (*See* ECF No. 45, at 11-12, and Westerman April 4 Decl. Ex. 1: Reese
26 Richman LLP Declaration.)

27 **II. THE KAMBERLAW GROUP'S "MOTION" SHOULD BE DENIED**

28 Having chosen to file a "motion" rather than following its own proposed stipulation that the

1 Court ordered, the KamberLaw Group’s motion should be denied because it did not follow the
2 March 15 Order, and was not in compliance with this Court’s rules. It improperly noticed the
3 motion for a hearing on April 5, far less than 35 days from the service date, without first having
4 obtained a date from the Court, and on a day that the court does not generally hear motions. The
5 KamberLaw Group then filed an “errata” but the errata only purported to change the hearing date
6 from April 5, 2011 to April 6, 2011, which resolves none of the confusion created by the
7 KamberLaw Group’s self created motion practice. (ECF No. 48.) Though Milberg does not argue
8 that these violations by themselves undermine counsel’s fitness under Rule 23(g), when viewed
9 with other factors, it weakens the KamberLaw Group’s request.

10 Should the Court be inclined to excuse these errors and treat the KamberLaw Group’s
11 “motion” as the recommendation called for in the March 15 Order, the recommendation should be
12 declined.

13 **A. The KamberLaw Group Mischaracterized Communications Which It**
14 **Requested, And Agreed, To Be Off The Record**

15 The Manual provides that “[t]he added demands and burdens of complex litigation place a
16 premium on attorney professionalism, and the judge should encourage counsel to act responsibly.”
17 Manual § 10.21.

18 At the outset of discussions relating to self-organizing among the parties, and throughout
19 numerous discussions, Kamber requested that plaintiffs’ counsel keep the content of the
20 conversations “off the record,” and repeatedly made assurances that he would do the same.
21 Westerman April 4 Decl. Prior to the day of the filing he asked for “Rules of Engagement” for the
22 filing. On the day of the filing, at Kamber’s request, it was agreed with Milberg that both
23 recommendations would be filed concurrently at 9:00 p.m. (PST), so as to not give a later filing
24 party an advantage to make adjustments upon reviewing the other’s submission. Milberg honored
25 both agreements and commenced its filing of Mr. Chiu’s March 25 Recommendation at 9:00 p.m.
26 (PST). However, the KamberLaw Group did not file its motion until nearly three hours after the
27 agreed upon time.

28 The later filing is significant because Kamber was able to confirm that Milberg honored its

1 agreement to keep conversations off the record, which Kamber then appears to have taken
2 advantage of to present his one-sided, inaccurate and incomplete characterization. Milberg
3 objectively honored both the agreement for the filing time and for keeping discussions private.
4 Westerman April 4 Decl.

5 **III. CONCLUSION**

6 Milberg, has the resources to prosecute this action and took the time to develop the case by
7 consulting with experts and performing its own investigation before filing.

8 Plaintiff respectfully requests that the Court enter the Proposed Order appointing Milberg as
9 Interim Class Counsel.

10 DATED: April 4, 2011

Respectfully Submitted,

11
12 */s/ Jeff S. Westerman*

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DECLARATION OF SERVICE BY CM/ECF AND/OR MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, employed in the County of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is One California Plaza, 300 South Grand Avenue, Suite 3900, Los Angeles, California 90071-3149.

2. Declarant hereby certifies that on April 4, 2011, declarant served PLAINTIFF ANTHONY CHIU'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS RECOMMENDATION THAT MILBERG LLP BE APPOINTED INTERIM CLASS COUNSEL, AND IN OPPOSITION TO THE MOTION FILED BY THE KAMBERLAW GROUP, by electronically filing the foregoing document listed above by using the Case Management/ Electronic Case filing system.

3. Declarant further certifies:

All participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system

Participants in the case who are registered CM/ECF users will be served by the court's CM/ECF system. Participants in the case that are not registered CM/ECF users will be served by First-Class Mail, postage pre-paid or have dispatched to a third-party commercial carrier for delivery to the non-CM/ECF participants as addressed and listed below:

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4. That there is a regular communication by mail between the place of mailing and the places so addressed.

1 I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th
2 day of April, 2011, at Los Angeles, California.

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