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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

13 HEATHER STERN, on behalf of herself and all others similarly situated,
14 Plaintiff,
15 v.
16 AT&T MOBILITY CORPORATION f/k/a CINGULAR WIRELESS CORPORATION, et al.,
17 Defendants.

CASE NO. CV 05-8842 CAS (CTx)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

Hearing Date: November 15, 2010
Time: 12:00 p.m.
Courtroom: 5

Hon. Christina A. Snyder, presiding

18 PAUL LOZANO, on behalf of himself and all others similarly situated,
19
20 Plaintiff,
v.
21 AT&T WIRELESS SERVICES, INC., et al.,
22 Defendants.

CASE NO. CV 02-0090-CAS (AJWx)

23 HEATHER STERN, on behalf of herself and all others similarly situated,
24
25 Plaintiff,
v.
26 NEW CINGULAR WIRELESS SERVICES, INC. f/k/a AT&T
27 WIRELESS SERVICES, INC., et al.,
28 Defendants.

CASE NO. SACV 09-1112-CAS (AGRx)

CONSOLIDATED FOR COORDINATED SETTLEMENT APPROVAL PURPOSES ONLY

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I. INTRODUCTION

In May 2010, the Court preliminarily approved the Settlements,[1] finding that they were "entered into at arms length by experienced counsel" after extensive negotiations and that their terms were "fair, reasonable and adequate."[2] The Court's preliminary analysis of the Settlements is correct, and Defendants respectfully request that the Court grant Final Approval of the Settlements.

First, Defendants have successfully provided comprehensive notice of the Settlements, obtaining a 78 percent "reach" through its newspaper and online banner ads alone, exceeding the 77 percent target. In fact, the online banner ads obtained over five million impressions more than planned. Over 200 million people viewed the publication notices. In addition, Defendants provided notice by: (a) Bill Inserts and Bill Messages to over seven million current AT&T Mobility subscribers, (b) postcards to over five hundred thousand current AT&T Mobility subscribers, (c) emails sent to over seven million potential class members, (d) a press release that generated nearly 300 articles, (e) a website that so far has generated nearly 300,000 visits, and (f) a toll-free telephone number that to-date has received over fifteen thousand calls. No class members have objected to the method or content of the notice. In addition, Defendants provided notice of the Settlements to the federal and state attorneys general as required by the Class Action Fairness Act ("CAFA"), and no governmental agency has objected to the Settlements.

Second, the terms of the Settlements are fair, adequate and reasonable. The

---

[1] The Settlements include: (a) *Stern v. AT&T Mobility*, Case No. CV 05-8842 CAS (CTx) ("*Stern I*"); (b) *Lozano v. AT&T Wireless Services, Inc.*, Case No. CV 02-00090 CAS (AJWx) ("Lozano"); and (c) *Stern v. New Cingular Wireless Services, Inc.*, Case No. SACV 09-01112-CAS (AGRx) ("*Stern II*").

[2] Order Granting Preliminary Approval of the *Stern I* Settlement (*Stern I* Dkt. No. 293) ¶ 1; Order Granting Preliminary Approval of the *Lozano* Settlement (*Lozano* Dkt. No. 301) ¶ 1; Order Granting Preliminary Approval of the *Stern II* Settlement (*Stern II* Dkt. No. 30) ¶ 1.

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Settlements provide benefits of 33 to 50 percent of the amount of damages claimed by Plaintiffs—far more than the monetary benefits approved in other actions. By comparison, if Plaintiffs proceed to trial, they are unlikely to obtain a recovery as favorable as provided in the Settlements, and *they may obtain no relief at all*. The terms of the Settlements were negotiated through a fair and reasonable process. The Parties engaged in adversarial and arm's-length negotiations through a mediation with a well-respected mediator, the Honorable Howard B. Wiener, Justice of the California Court of Appeals, retired. The Parties agreed upon the amount of benefits to the class before negotiating or agreeing upon the amount of attorneys' fees or incentive compensation payments to the representative Plaintiffs.

Finally, out of thirty-six million potential class members, only four class members have submitted objections to the UCC Settlements.[3] No class member has objected to the *Stern I* or *Lozano* settlements. Because the Settlements are fair, adequate and reasonable, for the reasons discussed above, each of these objections is meritless and should be denied.

II. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENTS.

A. Defendants Have Provided Comprehensive Notice of the Settlements.

In its Preliminary Approval briefing, AT&T described the proposed Notice Plan. The Notice Plan was designed to reach at least 77 percent of the target audience, which consists of all adult owners of a cell phone in the United States and its territories. The Notice Plan was comprised of:

- Publication: The Short Form Class Notice would be published in (a) *Parade* (32,200,000 circulation), (b) *USA Weekend* (22,600,000 circulation), (c)

[3] As shown below, objections were submitted by five other persons, who were not class members and those objections must be disregarded.

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Newsweek (1,500,000 circulation), (d) *Sports Illustrated* (3,150,000 million circulation), (e) *People* (3,615,858 circulation), and (f) Newspapers generally circulated in the U.S. Territories (271,536 circulation). In addition, AT&T agreed to place banner ads on popular websites, including Facebook, Hotmail, Yahoo, Yahoo Mail, AOL and AOL E-Mail, which were intended to obtain an estimated 193,523,313 impressions.[4]

- Bill Inserts and Bill Messages: AT&T Mobility agreed to (a) insert the Short Form Class Notice into the paper bills sent to potential class members who remained current AT&T Mobility subscribers and (b) print a Bill Message on the bills that alerted the subscribers to the presence of the Bill Insert.
- Email: Defendants agreed to send the Short Form Class Notice by email to (a) certain current subscribers of AT&T Mobility who do not receive paper bills and who have provided their email addresses, and (b) all Former Subscribers for whom AT&T Mobility has email addresses.
- Settlement Website: The Settlement Website, www.awssettlement.com, would contain information about the Settlements, including each of the Settlement Agreements, the Long Form Class Notice, and the Claim Form as well as answers to "frequently asked questions," copies of documents, and other material. The Settlement Website was structured so that Settlement Class members may electronically submit their claims online.
- Toll-free Telephone Number: A toll-free telephone number would provide general information about the Settlements and permit class members to request a copy of the Long Form Class Notice and the Claim Form.
- Press Release: AT&T agreed to issue a press release describing the Settlements and directing readers to the Settlement Website or toll-free

[4] Declaration of Jeanne Finegan in Support of Motion for Preliminary Approval ("Finegan Prelim. Approval Dec.") (Dkt. No. 277) ¶¶ 26-28.

telephone number for more information.

- CAFA Notice: GCG mailed the notice of the Settlements to the federal and state attorneys general, as required by CAFA.

The Court approved this Notice Plan, including the text of the various forms of notice, finding that it constituted the best notice practicable under the circumstances, provided due and sufficient notice of the Settlements, satisfied the requirements of Federal Rule 23, and complied with other applicable law. *Stern I* Order ¶ 9, *Lozano* Order ¶ 9, *Stern II* Order ¶ 9. The Court established a notice period of July 1, 2010 through August 15, 2010. *Id.* ¶ 11.

The Parties have fully and successfully complied with the Court's Orders, providing all of the notice specified in the Notice Plan.[5] Indeed, in several respects that are described below, the Parties provided materially *more notice* than that called for by the Notice Program. No class members have objected to the method or content of any aspect of the Notice Program. Consequently, the Court should find that, as actually implemented, the Parties have provided adequate notice of the Settlements as required by due process and Federal Rule 23.

1. The Publication Notice Reached 78 Percent of the Target Audience, Exceeding the 77 Percent Goal.

A notice expert, Jeanne Finegan, designed the publication component of the notice plan to obtain a 77 percent reach through print and online publication. Finegan Prelim. Approval Dec. ¶¶ 13-14. The print publications were made exactly as planned. Keough Dec. ¶ 9; Finegan Dec. ¶ 11. The online banner ads achieved five million more impressions than Ms. Finegan anticipated. Finegan Dec. ¶ 14.

[5] *See* accompanying Declaration of Jennifer M. Keough ("Keough Dec."); Declaration of Jeanne C. Finegan ("Finegan Dec."); Declaration of Pamela Arnold ("Arnold Dec."); Declaration of John T. Throckmorton ("Throckmorton Dec."); Declaration of Jessica Adams ("Adams Dec."); Declaration of Christopher Huffstutler ("Huffstutler Dec.").

1 Together the print publications and online banner ads were viewed by 200 million
2 people. *Id.* ¶ 6. Consequently, the publication campaign, standing alone, reached 78
3 percent of the target audience, a full percentage point more than Ms. Finegan
4 originally anticipated. *See id.*

5 This publication notice, standing alone, satisfies the requirements of due
6 process and Federal Rule 23 because Defendants cannot, with reasonable effort,
7 specifically identify those subscribers who are actual members of the UCC
8 Settlement Class.[6] *See* Declaration of Christopher Huffstutler in Support of Motion
9 for Preliminary Approval (Dkt. No. 275) ("Huffstutler Prelim. Approval Dec.") ¶ 3.
10 Instead, Defendants' reasonably available method of identifying the members of the
11 UCC Settlement class based on "unique subscriber IDs" produces, at best, a
12 substantially over-inclusive list for at least two reasons. *First*, it is likely that many
13 individual class members were assigned multiple unique subscriber IDs and, thus,
14 these individuals are double-counted. *Id.* ¶¶ 8-13. *Second*, Defendants cannot
15 determine with reasonable efforts the number of subscribers who received credits or
16 refunds related to the UCC, who are excluded from the UCC Settlement Class. *Id.*
17 ¶¶ 18-22. *See also* Defendants' Memorandum of Points and Authorities in Support
18 of Motion for Preliminary Approval of Class Action Settlements ("Defendants'
19 Preliminary Approval Brief") (*Stern I* Dkt. No. 278) at 17:14-22:19. Specifically
20 identifying actual class members would require a manual, bill by bill review of the
21 records of 36,533,691 potential class members and a review of untold customer
22 service records—a task that is not practically possible. Huffstutler Prelim. Approval
23 Dec. ¶ 20.

24 Under these circumstances, notice by publication alone meets the
25

26 [6] Members of the *Stern I* and *Lozano* classes are included within the persons who received notice of the UCC Settlement Class. *See* Declaration of Linda Fisher in
27 Support of Motion for Preliminary Approval (Dkt. No. 273) ¶ 2; Defendants' Preliminary Approval Brief at 13:22-14:6.
28

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requirements of Federal Rule 23 and due process. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (only those class members "who can be identified through reasonable effort" must receive individual notice); *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (approving use of publication notice); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990) (approving notice by mail to "those persons for which accurate addresses existed" and by publication notice to the remaining class members).[7]

2. AT&T Mobility Provided the Short Form Class Notice Directly Via U.S. Mail to Class Members Through Bill Inserts and Postcards.

As contemplated in the Notice Plan, AT&T Mobility provided the Short Form Class Notice by direct mail to all potential settlement class members who: (a) are current AT&T Mobility subscribers, (b) have remained subscribers of AWS, Cingular, and AT&T Mobility since 2004, and (c) receive paper bills (the "Current Subscribers"). Huffstutler Dec. ¶¶ 4-7; Arnold Dec.¶¶ 7-15; Throckmorton Dec. ¶¶ 7-9, Adams Dec. ¶¶ 3-7. As planned, AT&T Mobility mailed the Short Form Class Notice as a Bill Insert accompanied by a Bill Message printed on each bill to 2,861,734 accounts of Current Subscribers. Arnold Dec. ¶ 15; Adams Dec. ¶¶ 3-7; Throckmorton Dec. ¶ 9. AT&T Mobility provided 530,902 of these Current Subscribers with the Short Form Class Notice in the form of a postcard by direct mail in lieu of Bill Inserts and Bill Messages. Throckmorton Dec. ¶ 8; Adams Dec.

[7] *See also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (approving notice by publication and requiring no mailed notice to individual class members); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 296-97 (W.D. Tex. 2007) (notice by mail not required to over-inclusive class list); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 546 (N.D. Ga. 1992) (rejecting as a futile exercise defendants' request that plaintiffs be required to comb through defendants' records to identify all potential class members); *Sollenbarger v. Mountain States Tel. & Te. Co.*, 121 F.R.D. 417, 436-37 (D.N.M. 1988) (rejecting as unreasonable the contention that plaintiffs must search Mountain Bell's microfiche records to identify former customers).

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¶ 7; Keough Dec. ¶ 8.

AT&T Mobility provided a postcard instead of the Bill Inserts to certain class members for two reasons. *First*, AT&T Mobility's computer systems cannot accommodate Bill Inserts for certain subscribers such as those who failed to fully and timely pay their prior bill. Throckmorton Dec. ¶ 7. As part of its standard quality control process, AT&T Mobility discovered 25,621 Current Subscribers whose accounts could not accommodate Bill Inserts. Throckmorton Dec. ¶ 8. After de-duplication, GCG mailed 25,314 Current Subscribers a postcard containing the Short Form Class Notice on August 6, 2010. Keough Dec. ¶ 8.

Second, AT&T Mobility encountered a technical difficulty that caused *all of its bills* (even bills to non-class members) printed from August 1 through 6 to include the Bill Insert and Bill Message. Arnold Dec. ¶ 12; Adams Dec. ¶ 5. Because AT&T Mobility currently prints and mails approximately 24 million paper bills per month, it ran out of Bill Inserts from the evening of Friday, August 6 through mid-day on Monday, August 9, 2010. Arnold Dec. ¶ 13; Adams Dec. ¶ 6. AT&T Mobility was able to identify precisely the 505,588 Current Subscribers whose bills did not include the Bill Insert. Adams Dec. ¶ 7. GCG mailed the Short Form Class Notice to those 505,588 Current Subscribers by August 14, 2010. Keough Dec. ¶ 8. This technical difficulty caused AT&T Mobility to mail approximately four million more Bill Inserts than was required by the Notice Plan. *See* Arnold Dec. ¶ 15; Finegan Prelim. Approval Dec. ¶ 13.

3. GCG Sent the Short Form Class Notice Electronically in Over Seven Million Emails.

GCG sent the Short Form Class Notice by email to 7,172,595 potential class members who are: (a) current subscribers of AT&T Mobility who do not receive paper bills and have provided their email addresses, and (b) former subscribers for whom AT&T Mobility has email addresses. Keough Dec. ¶ 7; Huffstutler Dec. ¶¶

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9-15. GCG received confirmation that over 60 percent of these emails were delivered to the potential class members' email accounts. Keough Dec. ¶ 7.

4. The Settlement Website and Toll-Free Telephone Number Provided Additional Information About the Settlements.

The Parties provided potential class members with additional information about the Settlements through a website and toll-free telephone number dedicated to the Settlements.

The website, www.awssettlement.com, contained the Long Form Class Notice, the Settlement Agreements, the Claim Form (which could be completed online or printed and mailed to GCG), Frequently Asked Questions, images of important settlement documents, and contact information for Plaintiffs' counsel. Keough Dec. ¶ 12, Exs. D-F. The website went live on June 29, 2010 and will remain live until after the close of the claim period. *Id.* ¶ 12. From June 29, 2010 through October 11, 2010, the website received 296,191 visits. *Id.*

The toll-free telephone number also provided callers with information about the Settlements, including the benefits available, the deadlines for filing claims or objections, and class members' right to opt-out of the Settlements. *Id.* ¶ 13, Ex. G. The toll-free telephone number received 15,858 calls from June 29, 2010, when it went live, through October 11, 2010. *Id.* ¶ 13. The toll-free telephone number will remain active until after the close of the claim period. *Id.*

5. The Press Release Generated Almost 300 Articles.

On July 1, 2010, GCG issued a press release regarding the Settlements on behalf of AT&T. Keough Dec. ¶ 11; Finegan Dec. ¶ 15, Ex. 4. The press release was widely disseminated over PR Newswire. *Id.* The press release caught the media's attention—nearly 300 stories were published in English and Spanish about the Settlements. Finegan Dec. ¶ 15, Ex. 4.

6. Defendants Provided the CAFA Notice.

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As required by CAFA, GCG mailed notices of these Settlements to the federal and state attorneys general on Defendants' behalf. *See* Supplemental Declaration of Steven P. Rice In Support of Motion for Preliminary Approval of Class Action Settlements, dated May 11, 2010 (*Stern I* Dkt. No. 287) ("Rice Supp. Dec."), Ex. J. None of the federal or state attorneys general has objected to the Settlements.

7. The Parties Made the Claim Form Widely Available.

Class members wishing to submit a claim have three options: (1) submit a claim online through the Settlement Website, (2) download a personalized claim form from the Settlement Website and mail it back to GCG, or (3) call the toll-free telephone number and request that a claim form be mailed to them, then mail it back to GCG. As approved by the Court in the Preliminary Approval Order, the claim form requests basic information about the claimant and includes questions designed to determine whether the claimant is a member of the class who was damaged and is entitled to benefits in the Settlements. *See* Keough Dec. Ex. E & F. To obtain benefits, the claimant must declare under penalty of perjury as follows:

- Stern I: the claimant was charged and paid for and was not refunded in full for mMode or EDID, and either (a) did not authorize AWS to bill for mMode or EDID, or (b) did not understand what mMode or EDID meant when it appeared on his or her AWS bill.
- Lozano: the claimant is a California resident who had a "One Rate-type" plan, who (a) was "charged and paid for cellular telephone calls during a billing period other than the billing period in which the calls were made," and (b) did not "understand when [he or she] signed up for a 'One Rate-type' plan with AWS that calls made during one billing period may be charged as if made in another billing period."
- UCC (Stern II): the claimant "was charged and paid for, and was not refunded for," the UCC, and (a) was not aware when he or she subscribed that the UCC

1 would be charged, and (b) the imposition of the UCC would have made a
2 difference had he or she known about it at the time he or she subscribed.
3 *See* Keough Dec. Exs. E & F.

4 * * * * *

5 The Parties have widely disseminated notice of the Settlements. Identifiable
6 current and former subscribers have received direct notice by Bill Insert, postcards,
7 and email. The publication program obtained approximately five million
8 impressions more than expected, increasing its reach to 78 percent of the target
9 audience, or some 200 million individuals. The media reported extensively on the
10 Settlements, and information about the Settlements is available on the Settlement
11 Website and by dialing a toll-free telephone number. The Parties have provided all
12 of the notice specified in the Notice Plan and the Court's Orders. Indeed, the Parties
13 provided *more notice* by publication, and by Bill Inserts and postcards than required
14 by the Notice Program. No class members have objected to the method or content
15 of the notice. Consequently, the Court should find that the Parties have provided the
16 best notice practicable under the circumstances and satisfied all of the notice
17 requirements of due process and Federal Rule 23.

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18 **B. The Settlements Are Fair, Adequate and Reasonable.**

19 Courts strongly favor the settlement of complex class actions and approve
20 such settlements so long as they are "fundamentally fair, adequate and reasonable."
21 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992). In
22 undertaking this analysis, courts examine several factors, including:

23 the strength of plaintiffs' case; the risk, expense, complexity and likely
24 duration of further litigation; the risk of maintaining class action status
25 throughout the trial; the amount offered in settlement; the extent of
26 discovery completed, and the state of the proceedings; the experience
27 and views of counsel; the presence of a governmental participant; and
28

1 the reaction of the proposed class members to the proposed settlement.
2 *Class Plaintiffs*, 955 F.2d at 1291.
3 The Court should find that the Settlements are fair, reasonable and adequate
4 to the class members because: (a) the Settlements provide benefits of 33 to 50
5 percent of the amount of damages claimed by Plaintiffs, far more than the monetary
6 benefits approved in other class actions, (b) if Plaintiffs proceeded to trial, they face
7 a real risk that *they will not achieve any recovery*, or will achieve a lower recovery,
8 and (c) the amount of compensation is fair and adequate because it was negotiated in
9 adversarial and arm's-length mediations with a well-respected mediator.

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10 **1. The Settlements Provide Benefits of 33 to 50 Percent of**
11 **Claimed Damages.**
12 The monetary benefits provided by the Settlements are in line with the
13 benefits approved in other class action settlements. Class members who submit
14 Approved Claim Forms will receive the following benefits:
15 - *Stern I* Settlement Class: $8 check for mMode and a $10 check for EDID;
16 - *Lozano* Settlement Class: $8 check *or* a 250 minute Phone Card, having
17 an approximate retail value of $15; and
18 - UCC Settlement Class: $7 check.
19 These benefits represent at least one third of the amount of the Plaintiff
20 classes' estimated damages. *Stern I* claimants will receive between 47 percent and
21 68 percent of the amount of their damages as estimated by Class Counsel. *See*
22 Declaration of Robert Curtis in Support of Motion for Preliminary Approval
23 ("Curtis Dec.") (Dkt. No. 269-2) ¶ 14. These benefits constitute more than two and
24 a half months of the mMode service charge ($2.99 per month) and the EDID service
25 charge ($3.99 per month). *See Stern I* Second Amended Complaint ¶ 15. *Lozano*
26 claimants will receive 50 percent of their damages as estimated by Class Counsel.
27 Curtis Dec. ¶ 17. UCC claimants will receive 33 percent of the damages as
28

estimated by Class Counsel, and 99 percent of the damages as estimated by Defendants. Declaration of Hunter Pyle in Support of Motion for Preliminary Approval ("Pyle Dec.") (Dkt. No. 269-9) ¶¶ 9-10.

Courts have approved compromises of claims providing far less compensation than these Settlements provide. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement providing approximately 16% of plaintiffs' potential recovery); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving a settlement amounting to 9% of plaintiff's damages estimate and noting that the small percentage was not a per se reason to reject a reasonable settlement); *Glass v. UBS Fin. Servs. Inc.*, 2007 WL 221862, at *9 (N.D. Cal. Jan. 26, 2007) (approving a settlement constituting 25-35% of the estimated loss). Thus, the monetary benefits provided for in the Settlement Agreements are fair and reasonable to the settlement class members.

2. Plaintiffs May Obtain No Recovery, or a Lower Recovery, at Trial.

Defendants have strong defenses to each of Plaintiffs' claims. In the absence of this settlement, the Plaintiff classes have a risk of achieving a less favorable recovery than is offered in these settlements. Indeed, Plaintiffs face a substantial risk that they will achieve no recovery if they proceed to trial. Given the risks associated with continued litigation of Plaintiffs' claims, the settlement amounts offered to class members are manifestly reasonable.

a. UCC Claims in *Stern II*.

The Plaintiffs in *Stern II*, as well as the Plaintiffs in *Schnall v. AT&T Wireless Services, Inc.*, Case No. 02-2-0576-4 (Washington Supreme Court) ("*Schnall*") and *Randolph v. AT&T Wireless Services, Inc.*, Case No. RG05193855 (Alameda Superior Court) ("*Randolph*"), claim that Defendants improperly imposed the UCC on consumers. Defendants vigorously dispute this claim, and, recently, the Alameda

Superior Court largely agreed with Defendants in *Randolph*, granting summary judgment on most of Plaintiffs' claims for breach of contract. Defendants have potent defenses to Plaintiffs' remaining consumer protection and breach of contract claims. Consequently, in the absence of this settlement, Plaintiffs face a real risk that they will not obtain any recovery at trial.

(1) The UCC Charge was Statutorily Permitted.

The Telecommunications Act of 1996 ("the Act") created the federal Universal Service Fund (the "USF") to encourage universal telecommunications services, including, for example, service for low-income consumers. The Act requires each telecommunications carrier, such as AWS, to contribute to the USF based on its telecommunications revenue. *See* 47 U.S.C. § 254(d). The Federal Communications Commission expressly permits telecommunications companies to pass this cost through by way of a line-item charge on subscribers' bills.[8]

Like all major telecommunications carriers, AWS included a charge on its subscribers' bills for the cost of its USF contributions. In the *Randolph* case, Plaintiffs conceded that AWS has the legal right to recover its USF contributions through the UCC. However, Plaintiffs claim that, by including the UCC in the "Taxes, Surcharges and Other Fees" portion of consumers' bills, AWS breached its contracts by: (a) imposing the UCC without clearly disclosing it; and (b) increasing the amount of the UCC without advance notice (the "Secondary Contract Claims").

(2) The *Randolph* Court Granted Defendants' Motion for Summary Judgment.

In November 2009, the *Randolph* court granted partial summary judgment for Defendants on Plaintiffs' breach of contract claims based on the contract language

[8] *See In re Incomnet*, 463 F.3d 1064, 1066 (9th Cir. 2006); *In re Federal-State Joint Bd. on Universal Serv. Twenty-First Order on Recommendation*, 15 F.C.C.R. 12,050 ¶ 3.

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1 in use from June 2002 until AWS (or its successor) ceased charging the UCC on
2 June 30, 2005. Declaration of Steven P. Rice in Support of Motion for Preliminary
3 Approval of Class Action Settlements (*Stern I* Dkt. No. 276) ("Rice Prelim.
4 Approval Dec.") Ex. B (*Randolph*, Order dated November 20, 2009). The court
5 found that "the UCC falls within the range of charges that the [subscribers from
6 June 2002 through June 30, 2005] agreed to pay. . . under the clear and
7 unambiguous contract terms." *Id.*, Ex. B at 12. Additionally, the trial court granted
8 summary adjudication for Defendants on Plaintiffs' Secondary Contract Claims for
9 the entire class period. The court found Plaintiffs' claims that AWS breached its
10 contracts with its subscribers by increasing the amount of the UCC without advance
11 notice to be fatally flawed. *Id.*, Ex. B at 12-13. Thus, the *Randolph* court
12 dramatically limited the breach of contract claims that Plaintiffs may present at trial.

13 **(3) Defendants Have Substantial Additional**
14 **Defenses Against the Limited UCC Claims.**

15 Defendants may well succeed on their defenses to Plaintiffs' remaining
16 breach of contract and consumer protection claims (violation of California's
17 Business & Professions Code § 17200, Consumer Legal Remedies Act, and the
18 False Advertising Statute). The contract documents, such as the Welcome Guide,
19 and other materials that AWS provided to each of its subscribers disclosed at all
20 times that subscribers would be required to pay taxes, surcharges, fees, assessments,
21 or recoveries whether imposed by the government directly on the subscriber or on
22 AWS. This includes the UCC. Indeed after June 2002, as the *Randolph* court
23 found, the contract documents and other materials provided to subscribers *explicitly*
24 disclosed the imposition of the UCC. These disclosures preclude both Plaintiff's
25 breach of contract and consumer protection claims.

26 Moreover, to succeed on their claims, Plaintiffs will likely be required to
27 prove "fraud in the inducement"—*i.e.*, that the Plaintiffs would never have entered
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the Subscriber Agreements with AWS if they had known about the UCC. This is a standard that even the Named Plaintiffs cannot meet, since each of them renewed their Agreement with AWS on multiple occasions. And any claim for "restitution" under the California statutes discussed above would fail because AWS will show that it was not enriched by the UCC—AWS remitted all UCC funds collected to the federal government's Universal Service Fund.

Consequently, in the absence of these Settlements, Defendants are likely to defeat all or part of Plaintiffs claims at trial, resulting in no recovery, or a lesser recovery than is provided by this settlement, for the UCC class members.

b. Out-of-Cycle Billing Claims in *Lozano*.

The *Lozano* Plaintiffs challenge the practice of "out of cycle" billing, which occurred when AWS subscribers made roaming calls on other carriers' networks, and the call records were not forwarded to AWS until after the close of a billing cycle. Charges for such calls were billed in the month that AWS received the call information. The practice of out-of-cycle billing is legal and not at issue in this lawsuit. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 724 n.4 (9th Cir. 2007) (Federal Communications Act § 332 preempts challenges to the practice of out-of-cycle billing). Instead, Plaintiffs' suit is limited to a claim that AWS acted deceptively by failing to fully and adequately disclose the potential for out-of-cycle billing.

In fact, Defendants clearly disclosed the practice of out-of-cycle billing and, consequently, have strong defenses to this claim. For example, the Welcome Guide that was provided to Mr. Lozano when he purchased service stated:

> **Roaming**
>
> Roaming refers to minutes used outside of the Home Calling Area … Roaming minutes used may be billed in a subsequent month due to reporting between carriers and will be applied against the included

1 minutes for the month in which they are billed.
2 Declaration of Kelly Noonan Ex. A (*Lozano* Dkt. No. 125) [Deposition of Paul
3 Lozano Ex. 101]. Similarly, the Welcome Guide that was provided to all class
4 members stated:

5 **Delayed Charges**

6 When traveling with your phone, service may be provided by other
7 carriers. Sometimes we do not receive these charges from other
8 carriers in time for your scheduled bill. If charges are delayed, they
9 will be included in the following month's invoice and may impact the
10 amount of your bill.

11 Declaration of David Haight ¶¶ 20-22 (*Lozano* Dkt. No. 124). Consequently, AWS
12 did not act deceptively through the practice of out-of-cycle billing.

13 Moreover, Plaintiffs will face serious obstacles to proving their damages
14 because the out-of-cycle billing practices are equally likely to operate to the class
15 members' benefit as to their detriment. Out-of-cycle billing may cause airtime
16 charges to be billed in a month after the month in which the charges were incurred.
17 This will benefit a subscriber who exceeded his or her allotted airtime minutes in the
18 month in which the charges were incurred. Any damages award would have to take
19 this benefit into account. Plaintiffs' counsel acknowledges the difficulties presented
20 in the damages calculation in *Lozano*, characterizing the issue as "hotly contested"
21 and "extremely complicated." Curtis Dec. ¶ 16.

22 Finally, Plaintiffs may not be able to prove causation. Mr. Lozano admitted
23 that he did not read or rely on AWS's disclosures. Thus, any allegedly misleading
24 disclosures could not have damaged him. If Mr. Lozano is typical of the other class
25 members, Plaintiffs will have difficulty proving causation.

26 For these reasons, Plaintiffs face a substantial risk that they will obtain no
27 recovery, or will obtain a smaller recovery than provided by this settlement.
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c. Bill Description Claims in *Stern I*.

Plaintiffs' claims in the *Stern I* litigation are confined to assertions that AWS failed to adequately describe mMode and EDID.[9] AWS is likely to prevail on its defenses to these claims. For example, Plaintiff Stern has admitted that: (1) she did not read her AWS bills for thirteen months, and (2) when she finally did read them, she understood the bill descriptions. These admissions support AWS's argument that its descriptions of mMode and EDID were clear.

Additionally, Plaintiffs are unlikely to be able to prove class-wide causation and injury. For example, regardless of whether the descriptions of mMode and EDID were clear, a person who requested or otherwise benefited from these features could not have been injured by the allegedly misleading description. Such a person received the service she requested. In addition, each class member's damages will likely be limited to two to three months of services, after which time the subscriber should have noticed and cancelled any unwanted services.

Because of these flaws in their claims, Plaintiffs in *Stern I* may obtain no recovery or a *de minimus* recovery if they proceeded to trial.

3. The Parties Negotiated the Settlement Terms Through an Adversarial Process Over Four Full Days of Mediation.

The Parties negotiated these Settlements with the assistance of a well-respected and independent mediator, Justice Howard Wiener. During the mediation proceedings, the Parties fully described to Justice Wiener the issues in the litigation and the strengths and weaknesses of each case. *See* Declaration of Hon. Howard Wiener (Ret.) in Support of Motion for Preliminary Approval of Class Action

[9] The Court denied Plaintiffs' motion for certification of a "features cramming" class, finding that common issues did not predominate in the litigation because Plaintiffs failed to offer a method of determining, on a class wide basis, whether AWS added features to each class member's account without authorization. *Stern I*, Order dated August 22, 2008 at 12-16 (*Stern I* Dkt. No. 183).

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Settlements ("Wiener Dec.") (Dkt. No. 274) ¶ 21; Rice Prelim. Approval Dec. ¶¶ 4-9. Justice Wiener described the Parties' negotiations as professional, yet "adversarial and hotly contested." Wiener Dec. ¶ 21. In each of the settlements, the amount of compensation to be provided to the class members was negotiated before any discussions regarding the amount of attorneys' fees. Rice Prelim. Approval Dec. ¶¶ 8, 9; Wiener Dec. ¶¶ 16, 20. The amount of the incentive payments to class representatives was also negotiated after class benefits had been determined. Declaration of J. Paul Gignac (*Stern I* Dkt. No. 300) ¶ 19; Rice Dec. ¶¶ 1-4.

After consideration of the Parties' written submissions and extensive discussions with the Parties, Justice Wiener concluded that all of the terms of the Settlement Agreements are fair and reasonable to the class members, given the nature of Plaintiffs' claims and AWS's defenses. Wiener Dec. ¶ 21. Justice Wiener's participation in each of the mediation sessions, as well as the Parties' adversarial and arm's-length negotiations support the approval of these Settlements. *See Milliron v. T-Mobile USA, Inc.*, No. 08-4149, 2009 WL 3345762, at *5 (D.N.J. Sept. 10, 2009) (Linares, J.) ("the participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties"); *Dusek v. Mattel, Inc.*, 141 Fed. Appx. 586, 588 (9th Cir. 2005) (rejecting argument that settlement allocation was inadequate where court-appointed mediator proposed the allocation).

III. EACH OF THE OBJECTIONS SHOULD BE DENIED.

Out of the estimated 36 million potential class members, only nine individuals submitted purported objections to the Settlements. As shown in the chart below, only four of the objectors are actually members of any Settlement Class. *See* Declaration of Caroline Mahone-Gonzalez in support of Motion for Final Approval of Class Action Settlements ("Gonzalez Dec.").

	Name	Members of the Settlement Class?		
		Stern I	**Lozano**	**UCC**
1	James E. Coffin	No – no mMode or EDID services	No – not a CA resident	YES
2	Sally Y. Coffin	**Not an AWS subscriber**		
3	Clark Richard Brown	**Not an AWS subscriber**		
4	Gene Hopkins	No – no mMode or EDID services	No – not a CA resident	YES
5	Barbara Cochran	**Not an AWS subscriber**		
6	Karin Lynch	No objection	No objection	YES
7	Robert Lynch	No objection	No objection	**Not an AWS subscriber**
8	Marc Gambello	No – no mMode or EDID services	No objection	YES
9	Kwaku O. Kushindana	Submitted objection but also excluded himself from these Settlements and, consequently, lacks standing to object.		

None of the objectors is a member of the *Stern I* or *Lozano* Settlement Classes and, consequently, there are no proper objections to the *Stern I* and *Lozano* Settlements. And only four of the objectors are members of the UCC Settlement Class. None of the objections to the UCC Settlement have merit.

A. Objectors to a Settlement Bear a "Heavy Burden" of Showing the Settlement Is Unreasonable.

A settlement that has received preliminary approval is "presumptively reasonable." *Williams v. Vukovich,* 720 F.2d 909, 921 (6th Cir. 1983). An objector to such a presumptively reasonable settlement "must overcome a heavy burden to prove that the settlement is unreasonable." *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 246 (S.D. Ohio 1991) (granting final approval of settlement). In evaluating the merits of the objections, the Court should "view the objections to the proposed settlement in light of its overarching obligation to determine that the settlement is fair, reasonable, and adequate." *Olden v. LaFarge*

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Corp., 472 F. Supp. 2d 922, 931 (E.D. Mich. 2007).

In addition, counsel for at least six of the nine objectors, appear to be professional objectors. Courts provide additional scrutiny to boilerplate objections to class action settlements filed by such professional objectors. "[P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors." *Barnes v. FleetBoston Fin. Corp.*, 2006 U.S. Dist. LEXIS 71072, 3-4 (D. Mass. Aug. 22, 2006) (requiring appeal bond). *See also In re UnitedHealth Group PSLRA Litig.*, 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009) (objectors counsel's goal "was, and is, to hijack as many dollars for themselves as they can wrest from a negotiated settlement").

None of the objectors is able to bear its "heavy burden" of showing that the Settlements are unreasonable.

B. Mr. Kushindana Excluded Himself From The Settlements.

Mr. Kushindana sent Plaintiffs and Defendants a letter objecting to the settlements and requesting exclusion.[10] However, GCG has confirmed its receipt of a request for exclusion from Mr. Kushindana. Keough Dec. ¶ 14. Consequently, Mr. Kushindana is not a class member and lacks standing to object to the Settlements. Fed. R. Civ. P. 23(e)(5).

C. Mr. Coffin's Objections, Which Only Can Go to the UCC Settlement, Should Be Rejected Because The Settlement Agreements Properly Require A Claim Form.

Sally and James Coffin jointly objected to all three of the Settlements. Mr. Coffin is a member of the UCC Settlement class because he was an AWS customer from 2001 through 2005. Gonzalez Dec. ¶ 3. Although Mr. Coffin states that he may have had a California cell phone, a diligent search of Defendants' records

[10] This objection has not yet been filed on the Court's electronic docket.

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1 revealed that his billing address with AWS was always in Washington, and not
2 California. *Id.* Consequently, he is not a member of the *Lozano* class. Similarly,
3 Mr. Coffin is not a member of the *Stern I* class because he did not have the mMode
4 or EDID services on his account. *Id.* Accordingly, Mr. Coffin has standing to
5 object only to the UCC Settlement. Fed. R. Civ. P. 23(e)(5). Ms. Coffin was not an
6 AWS subscriber and, consequently, is not a class member with standing to object to
7 the Settlements. Gonzalez Dec. ¶ 4. Fed. R. Civ. P. 23(e)(5).

8 Mr. Coffin objects to the requirement that he submit a claim form signed
9 under penalty of perjury. The use of the claim form is essential to determine those
10 claimants who were harmed and are entitled to relief. Courts routinely require
11 claimants to fill out claim forms in order to obtain their benefits. *See, e.g., DeHoyos*
12 *v. Allstate Corp.*, 240 F.R.D. 269, 313-15 (W.D. Tex. 2007) (approving claim form
13 that required claimants to state ethnicity in discrimination case). In fact, courts have
14 required claimants to submit proof of their damages in order to prove their
15 entitlement to the class benefit. *In re Lawnmower Engine Horsepower Mktg. &*
16 *Sales Practices Litig.*, __ F. Supp. 2d __ , 2010 WL 3310264, at *10 (E.D. Wis.
17 Aug. 16 2010) (approving claim form and requirement that claimants provide serial
18 numbers of their lawnmowers, even though many claimants no longer possessed
19 their lawnmowers).

20 In this case, the claimants are not required to submit documents, such as their
21 bills, to prove that they were AWS customers. Instead, claimants must only submit
22 their claim under penalty of perjury. This modest and reasonable requirement "is
23 critical to prevent fraudulent claims" where, as here, the claimant possesses relevant
24 information. *In re Albertson's, Inc.*, 2006 WL 236764, at *3 (D. Idaho Jan. 4,
25 2006). Only Mr. Coffin knows whether he was deceived by the imposition of the
26 UCC. The requirement that he sign the claim form under oath is Defendants' only
27 protection against fraudulent claims. Since the class may include as many as 36
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million members, and over 200 million people were reached by notice of the Settlements, the potential for fraudulent claims is real. Huffstutler Prelim. Approval Dec. ¶ 17; Finegan Final Approval Dec. ¶ 6.

Accordingly, Mr. Coffin's objection should be denied.

D. Mr. Gambello's Objections to the UCC Settlement Lack Merit.

Mr. Gambello, who is represented by counsel, one of whom appears to be a professional objector, purports to object to the *Stern I* and UCC Settlements.[11] However, Mr. Gambello is only a member of the UCC Settlement class. Gonzalez Dec. ¶ 10. Because Mr. Gambello's account did not include mMode or EDID services (*id.*), he is not a *Stern I* class member and lacks standing to object to that settlement. Fed. R. Civ. P. 23(e)(5). Each of Mr. Gambello's objections to the UCC Settlement should be denied.

1. The UCC Settlement Releases Only the UCC Claims.

Mr. Gambello's objection to the scope of the release of claims in the UCC Settlement Agreement should be denied. The release is expressly limited to the "facts, acts, events, transactions, [and] occurrences…with respect to the UCC and/or the UCC Claims. . ." at issue in *Schnall, Randolph,* and *Stern II*. Rice Prelim. Approval Dec. Ex. A at 9 (UCC Settlement Agreement ¶ 17). The Ninth Circuit has approved such a release. "[A] federal court may release not only those claims alleged in the complaint, but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and *might not have been presentable in the class action.*" *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1991).[12]

[11] Mr. Gambello conceded that he is not a member of the *Lozano* class. *See* Objector Gambello's Objection and Opposition to Requests for Depositions at 4:7-8.

[12] Although Mr. Gambello lacks standing to object to *Stern I* and *Lozano*, he claims that the releases in the three cases are somehow overlapping. *See* Gambello Objection at 6:14-18. This analysis is incorrect. Each of the releases for each of the

(continued…)

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Because the release is limited to those claims relating to the UCC Claims at issue in the underlying lawsuits, it releases only claims "based on the identical factual predicate" as that underlying the claims in *Stern II*, *Schnall*, and *Randolph*. Consequently, the release is not overbroad.

2. The Claims Process Is Fair, and the UCC Settlement Provides Reasonable Compensation.

Mr. Gambello objects to the claim form for the same reasons as Mr. Coffin, and his objection should be denied for the same reasons. Only those persons who were damaged are entitled to relief; the claim form requires nothing more than a minimal showing that the claimant was damaged.

Mr. Gambello next argues that, if a claim form is required, Plaintiffs' counsel should have negotiated differently for more compensation for class members, seeking a 100% refund of all damages.[13] However, "[c]omplaining that the settlement should be 'better' . . . is not a valid objection." *Browning v. Yahoo! Inc.*, 2007 WL 4105971, at *5 (N.D. Cal. 2007). The amount of the UCC Settlement is manifestly reasonable, providing between 33 percent and 99 percent of average damages.[14] Pyle Dec. ¶ 9-10. This is far more than the benefits approved in other class actions. *In re Mego Fin. Sec. Litig.*, 213 F.3d at 459 (settlement amounting to

(continued)
three lawsuits is limited to the "facts, acts, events, transactions, [and] occurrences" at issue in the individual lawsuit (*i.e.*, the *Lozano* release addresses only the out-of-cycle billing issues at issue in *Lozano*, and the *Stern I* release addresses only the mMode and EDID billing issues at issue in *Stern I*). *See* Curtis Dec. Ex. A (*Stern I* Settlement Agreement ¶ 18) & Ex. B (*Lozano* Settlement Agreement ¶ 16).

[13] It is unclear whether Mr. Gambello seeks an individualized inquiry into the specific amount of damages to each class member to prove the total amount of damages. Such an individualized inquiry would require the submission of several years' worth of bills and be wholly impractical. *See* Gonzalez Dec. ¶ 12; Huffstutler Prelim. Approval Dec. ¶¶ 18-20.

[14] Likewise, the amount of the *Stern I* and *Lozano* Settlements are reasonable, providing 47 percent and 50 percent, respectively, of Plaintiffs' damages estimate. Curtis Dec. ¶¶ 14, 17.

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16% of plaintiffs' potential recovery held reasonable).

Moreover, Mr. Gambello makes no showing that he suffered *any* damage—he does not assert that he was unaware of the UCC or that it would have made any difference to him had he known about the UCC. Neither does Mr. Gambello make any showing of the actual amount of his damages. *Cf.* Pyle Dec. (calculating *average* amount of claimed damage). Mr. Gambello fails to show that he would receive less than the full amount of his damages through this Settlement.

3. Mr. Gambello's Attorneys' Fees Objection to the UCC Settlement Provides the Class No Benefit.

Mr. Gambello's objection to attorneys' fees will not benefit the class in these claims-made settlements—class members will receive the same per-claim amount, regardless of the amount of attorneys' fees. Moreover, the maximum amount of attorneys' fees for all settlements was negotiated through a hotly-contested, adversarial process, with Justice Wiener's assistance, only after the amount of the benefits to the class was determined. Wiener Dec. ¶¶ 16, 20; Rice Prelim. Approval Dec. ¶¶ 8-9. In fact, in *Stern I* and *Lozano*, the amount of fees was set through a mediator's proposal from Justice Wiener. *Id.* And, in the UCC Settlement, agreement was reached on the amount of attorneys' fees only late in the evening on the second of two full days of intense negotiations in mediation sessions with Justice Wiener. *Id.*

E. Mr. Hopkins's Attorneys' Fees Objection Also Provides No Benefit to the Class.

Mr. Brown, Mr. Hopkins, and Ms. Cochran object only to the amount of the attorneys' fees and expenses requested. Counsel for these objectors appear to be professional objectors, who have frequently filed similar objections. Mr. Brown and Ms. Cochran were never customers of AWS and are not members of any of the Settlement classes. Gonzalez Dec. ¶¶ 5, 7. Consequently, Mr. Brown and Ms.

Cochran lack standing to object to any settlement. Fed. R. Civ. P. 23(e)(5).

Mr. Hopkins was an AWS customer beginning in 1999, but he did not have mMode or EDID on his account, and he is not a California resident. Gonzalez Dec. ¶ 6. Consequently, Mr. Hopkins is a member of the UCC Settlement Class only. Mr. Hopkins' objections to the amount of the attorneys' fees from the UCC Settlement should be denied for the same reasons as Mr. Gambello's objections.

F. Ms. Lynch's Objections to the UCC Settlement Should Be Rejected As Well.

Counsel for Mr. and Ms. Lynch (who also appear to be professional objectors) have asserted similar objections to Mr. Gambello, complaining about the scope of the releases, the amount of benefits, and the amount of attorneys' fees. Mr. and Ms. Lynch stipulated on the record at the October 15, 2010 Status Conference that their objections relate only to the UCC Settlement. Each of these objections should be rejected for the same reasons as Mr. Gambello's objections. Moreover, Mr. Lynch is not a member of any Settlement class as he has never been an AWS subscriber. Gonzalez Dec. ¶ 9.

IV. CONCLUSION

For the reasons discussed above, the Settlement Agreements are fair and reasonable to the class members, and Defendants respectfully request that the Court grant them Final Approval.

DATED: October 15, 2010

CROWELL & MORING LLP

By: /s/ *Kathleen Balderrama*
Steven P. Rice
Kathleen Balderrama

Attorneys for Defendants