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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

ROBERT BERNHARD, et al,

Plaintiffs,

v.

CITY OF ONTARIO, et al.,

Defendants.

Case No.: ED CV 04-01015 VAP (PJWx)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES, DECLARATIONS, AND EXHIBITS IN SUPPORT THEREOF

[DECLARATIONS ATTACHING BILLING RECORDS FILED SEPARATELY UNDER SEAL TO BE REVIEWED IN CAMERA BY THE COURT]

Hearing: **April 6, 2009**
Time: **9:00 a.m.**
Courtroom: 2

TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD:

PLEASE TAKE NOTICE that on April 6, 2009, at 9:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 2 in the courtroom of the Honorable Virginia Phillips of the above-entitled court, located at Twelfth Street, Riverside, California, Plaintiffs will move for preliminary approval of a class action settlement in this case. The motion will be based on Federal Rule of Civil Procedure 23, 42 U.S.C. §1988 and California Code of Civil Procedure 1021.5, the foregoing notice, points and authorities, and declarations and exhibits filed concurrently herewith, and the pleadings, records and files in this action.

DATED: March 16, 2009

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

HADSELL STORMER KEENY RICHARDSON & RENICK, LLP

By /s/
Peter Bibring
Attorney for Plaintiffs

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INTRODUCTION

By this motion, Plaintiffs Steve Trujillo, et al., seek preliminary court approval of the class action settlement set forth in the proposed Settlement Agreement submitted herewith as Exhibit 1, and a preliminary determination that the settlement is in good faith and is reasonable and fair to the parties and the members of the Plaintiff class.

1. SUMMARY OF THE CASE AND THE PARTIES' ALLEGATIONS

Plaintiffs brought this action in 2004 to challenge the covert video surveillance conducted by members of the Ontario Police Department in the men's locker room at the police station in 1996. The original complaint was filed in August, 2004 by the law firm of Lackie & Dammeier on behalf of 20 named individuals. It was not designated a class action and included no class allegations. Subsequently, in October, 2004, the ACLU Foundation of Southern California, along with the law firms of Lackie & Dammeier and Bahan & Associates filed an amended complaint that added some plaintiffs and omitted some of the initial plaintiffs. The amended complaint was designated a class action and included class allegations. In the Complaint, Plaintiffs allege that Defendants violated the Fourth Amendment of the United States Constitution, the California Constitutional right to privacy, and the common law tort of intrusion.

The Court granted plaintiffs' motion for class certification on April 14, 2005. In its order, the Court designated the ACLU, Bahan & Associates and Lackie & Dammeier as co-lead counsel under FRCP 23(g).

Defendants moved to disqualify the law firm of Lackie & Dammeier in June, 2005, on the ground that the firm had represented Defendant Brad Schneider at an interview conducted by members of the San Bernardino County Sheriff's Department as part of an investigation of the video surveillance that is the subject of this action. The Court granted the motion to disqualify on August 17, 2005.

On April 14, 2006, the Court granted partial summary judgment to plaintiffs against Defendant Brad Schneider on the Fourth Amendment claim, and against Michael Thompson on the two state law claims. Defendants appealed the denial of qualified immunity to the Ninth Circuit on an interlocutory basis. The Ninth Circuit affirmed by order dated March 13, 2008.

The Fourth Amendment claims against the remaining defendants and all claims for damages were set for trial on Feb. 17, 2009. The Ontario City Council approved settlement on that date, resulting in a written Settlement Agreement, which was signed and put on the record on February 18, 2009. *See* Exhibit 1.

2. SUMMARY OF THE PROPOSED SETTLEMENT

A. CLASS CERTIFICATION

The settlement class consists of "All persons who were employed by the Ontario Police Department or volunteered for the Ontario Police Department, used the Department's men's locker room during the period in which the surveillance equipment was installed, and were recorded by the surveillance equipment." (Court's April 14, 2005 Order at page 13:8-13).

B. TOTAL SETTLEMENT FUND

The total settlement amount is Two Million, Seven Hundred Fifty Thousand Dollars ($2,750,000). Of that amount, plaintiffs propose that $1,540,000 be paid to class members, and $1,210,000 be paid to plaintiffs' attorneys Hadsell Stormer Keeny Richardson & Renick, ACLU, and former co-lead counsel, Bahan & Associates, as fees and costs

C. PAYMENT OF STANDARD CLAIMS

The Settlement Agreement does not provide for a specific distribution of funds to the class members. Plaintiffs request that the primary mechanism for settlement involve cash payment to members of the Plaintiff class in the amount of $10,000 per class member.

D. ADDITIONAL COMPENSATION FOR ACTIVE LITIGANTS

In recognition of the significantly increased risks and burdens undertaken by the named plaintiffs and class representatives, and those class members who were previously named as plaintiffs, the settlement provides additional compensation in the amount of $10,000 each to the previously named plaintiffs (of which there are twelve) and $30,000 each to the named class representative plaintiffs who were named on the first amended complaint and continued as named plaintiffs to the conclusion of this matter (of whom there are six). This compensation shall be in addition to the $10,000 they are entitled to receive as class members. As plaintiffs set forth below, the additional compensation is well within the range of incentive awards approved by federal courts in this Circuit and elsewhere and is fair and reasonable when evaluated under the applicable criteria.

E. ATTORNEY'S FEES AND COSTS

The settlement agreement provides for the payment of attorneys' fees using the lodestar method. The fees and costs will be paid from the total settlement fund. Plaintiffs' counsel have concurrently submitted their unredacted billing records to be filed under seal and reviewed by the Court *in camera*. Payment of these sums shall extinguish Plaintiffs' claims for all costs and for all fees incurred for all work performed by counsel in this case from its inception through its conclusion. Defendants previously agreed that they would not oppose plaintiffs' counsel request for fees based on the lodestar method so long as the amount sought was 50% or less of the total settlement amount.

The fee award contemplated by the Settlement Agreement in this case is presumptively reasonable under Ninth Circuit precedent. The Court has broad discretion in assessing the reasonableness of attorneys' fees in class actions. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *In re FPI/Agretech Securities Litigation*, 105 F.3d 469, 472 (9th Cir. 1997).

Here, Plaintiffs' counsel achieved a more than just settlement for the class, enabling each class member to recover a minimum of $10,000 as recovery for his emotional distress damages as a result of having been the victim of surreptitious video surveillance by the City of Ontario.

This settlement was achieved after years of discovery, litigation, appellate proceedings, protracted negotiation, and trial preparations up to the very brink of trial. Plaintiffs' counsels' work is not quite complete, since they will have to spend time overseeing the correct addresses for the Notice to the Class, filing a motion in support of final Court approval of the agreement, which would include responses to objections, if any, and time at the Fairness Hearing itself. The work performed to date has been substantial and has resulted in a settlement with great potential benefit to the class.

F. ADMINISTRATION OF CLAIMS

The parties have agreed that the City of Ontario will send out the Notices to Class Members and, following approval of the settlement, the checks to the class members. Any checks that are not cashed will be submitted to a Cy Pres fund, to be distributed to: Electronic Frontier Foundation, a nonprofit organization specializing among other things in issues of privacy in the electronic age.

G. NOTICE TO THE CLASS

After preliminary approval, notice should be mailed to class members promptly, but in no event later than April 13, 2009. Attached hereto as Exhibit 2 is a true and correct copy of the proposed notice. The notice will inform class members of the terms of the Settlement; their right to object to the settlement; and their right to be heard at the final hearing on the fairness of the settlement.

The Notice advises each class member that they have three options. Those options are: (1) file a claim form and receive payment in the amount of either $10,000, $20,000, or $40,000, depending on their status as unnamed class

members, former named plaintiffs, or named class representatives; (2) do nothing, i.e., do not file a claim form, and their share of the settlement will revert to cy pres fund; or (3) object on or before May 11, 2006 to the proposed settlement by filing a written objection or notice to appear with the court at the Motion for Final Approval which will be set for June, 2009.

The *Manual for Complex Litigation 2d* states that if a 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 of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement. *Id.* § 30.44.

Notice in this case is to be sent to the last known addresses of each current and former class member. Defendants have provided to plaintiffs the envelopes that were returned after the original Notice to the Class was sent, and plaintiffs will shortly provide defendants with updated contact information for those individuals, which shall be used to contact those individuals. The number of class members is approximately 124. As to those notices returned to the City as undeliverable, the City will conduct a reasonable investigation, including a Skip Trace, and send additional notices to all recent addresses obtained through that process. The parties are confident that this notice by mailing to the last known address and to more recent addresses obtained through reasonable investigation is the best means available to reach class members.

ARGUMENT

A. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

1. Preliminary Approval of The Settlement is Proper

Federal Rule of Civil Procedure 23(e) provides that "[a] class action shall

not be dismissed or compromised without the approval of the court . . .” Approval under 23(e) involves a two-step process in which the court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted. *See* Manual for Complex Litigation (Third) § 30.41 (1995), at 236-37. While the Court will have the opportunity to revisit the issue of fairness at the final fairness hearing after considering any objections that may be filed by class members and reviewing the results of the claims administration process, the question now before the Court is whether the accompanying Settlement Agreement 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. If so, then the Court should grant preliminary approval and order notice be given to the class. *See* Manual for Complex Litigation (Second), § 30.44.[1]

A court should generally presume fairness at the preliminary stage of approval so long as the settlement is recommended by experienced class counsel after arm’s-length bargaining. *In re Jiffy Lube Securities Litigation*, Fed. Sec.L.Rep. (CCH) ¶ 94,859 (D.Md. 1990); *Wellman v. Dickinson,* 497 F.Supp. 824 (S.D.N.Y. 1980), *aff’d*, 682 F.2d 355 (2d Cir. 1982); *Armstrong v. Board of*

[1] A settlement should receive final approval if it is fundamentally fair, adequate and reasonable." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir.), *cert. denied*, 506 U.S. 953 (1992). This determination, to be made after the hearing on the parties’ joint motion for final approval, requires a balancing of several factors which may include, among others, some or all of the following: the strength of Plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Torrisi v. Tuscon Electric Power Co*, 8 F.3d 1370, 1376 (9th Cir. 1993); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). Plaintiffs will brief these factors, as well as respond to objections, if any, at the final approval stage.

School Directors, 471 F.Supp. 800 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305, 325 (7th Cir. 1980); *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977).

This Agreement is the product of arms-length, non-collusive negotiations after almost five years of hard-fought litigation. *See* Declaration of Peter Eliasberg at ¶ 20. The formal and informal discovery plaintiffs counsel had conducted gave them the ability to make a thorough assessment of the strengths and weaknesses of their case. *Id.* at ¶ 21. The settlement agreement was negotiated with the help of representatives of the Plaintiff class. *Id.* at ¶ 22. Plaintiffs' counsel worked extensively to keep Plaintiffs abreast of significant developments through a series of meetings with both the named Plaintiffs and a significant number of unnamed class members. *Id.* at ¶ 22. The City of Ontario's City Manager recommended the settlement and the City Council approved it.

Nothing in the substance of the settlement indicates obvious deficiencies. The amount of $10,000 is a fair award for each class member. Each class member sought only emotional distress damages, which are notoriously hard to predict, and can range greatly depending on each jury's particular valuation. No class member had documentary evidence of any special damages.

The settlement amount is reasonable when evaluated in light of both jury awards for other similar cases and the risks inherent in submitting to the jury a case where the only damages are emotional distress damages. In comparable invasion of privacy cases, the results have been wide-ranging. A number of cases have resulted in $0, or quite small per plaintiff damages awards. *See, e.g.*, *Croft v. Barger*, (Superior Court of Fulton County, GA 2002) (plaintiff challenged employer's use of a video surveillance camera at work, which she was unaware of and which allegedly caught her in some private moments – $0 award, Defendant found not liable). Others resulted in a nominal damages award fee. *See, e.g., Mitchell v. Lewis* (13th Judicial Dist. Ct., Delaware County, OK 1999) (employer,

suspecting the validity of employee's workers compensation claim, hired private investigators to conduct undercover surveillance of plaintiff including videotaping him at his home – $1 nominal damages compensatory award); *UAW v. Midland Steel Products* (Court of Common Pleas, Cuyahoga County OH 1991) (defendant employer placed video surveillance camera on rooftop to monitor union meetings – jury awarded $160,000 total for 330 union members, for an average award of just under $500 per person).

In other cases, awards for similar conduct have been more significant. *See. e.g. Martinez v. United* (19th Judicial Dist. Ct. Division H, East Baton Rouge, LA 2000) (Defendant intercepted and taped private phone conversations without consent – jury awarded 3 plaintiffs $12,000 each for a total of $36,000); *Marlahan v. Glass* (Superior Court of Siskiyou County, CA 1989) (plaintiffs were teenaged guests at B&B. Defendant admitted that he secretly used a concealed camera in a bathroom to videotape visitors – jury awarded $40,000 total to the two plaintiffs); *Topor v. State of New York* (Court of Claims, New York 1997) (plaintiff noticed a hole in the shower wall at a state park, from which someone was watching her – jury awarded $25,000 for emotional distress); *Turney v. Kenny* (Superior Court of Napa County, CA 1999) (defendant placed a concealed video camera in the women's locker room and taped women while changing and showering – jury awarded $25,224 for emotional, economic, and punitive damages); *Doe v. B.O.S. Guard Services* (St. Louis, MO 1990) (security guards videotaped dancers while changing clothes in the dressing room – jury awarded $36,000 each combined emotional and punitive damages for a total of $432,000); *Rainville v. Alersis Risk Management* (Kent County, RI 1997) (defendants implemented unlawful investigation techniques in conjunction with plaintiff's workers' compensation claim – jury awarded $65,000); ; *Couche v. Coons* (Superior Court, Santa Clara County, CA 2002) (ex-husband charged with making illegal video and audio

recordings of ex-wife – jury awarded $215,000 in combined punitive and compensatory damages); *Tarby v. Kaufman* (Waterbury Judicial Dist. CT 1997) (employer set up video camera to record and view plaintiff, an employee, while she was using the restroom – jury awarded $360,000).

The settlement amount per plaintiff is well within the range of these awards. It is, therefore, presumptively reasonable. *See In re Union Carbide Corp. Consumer Products Business Securities Litigation*, 718 F.Supp. 1099, 1104 (S.D.N.Y.,1989)("The fact that the settlement amount may equal but a fraction of potential recovery does not render the settlement inadequate."). Moreover, Barry Litt, a well-known and respected civil rights lawyer has opined that this settlement represents an excellent result for the plaintiff class, given the difficultly of obtaining large jury awards in cases where the sole basis for damages is emotional distress. Declaration of Barrett S. Litt. ¶ 18.

2. Additional Compensation for Named Plaintiffs

The proposed additional compensation, known as incentive awards, for the current named plaintiffs, as well as those named plaintiffs on the initial complaint, is consistent with a fair, just and adequate settlement. "'Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'" *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D.Pa. 2000) (quoting *In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 272 (S.D.Ohio 1997)); *accord Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 368 (D.Miss. 2003) "Courts commonly permit payments to class representatives above those received in settlement by class members generally."); *see also* Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs*: *An Empirical Study*, 53 UCLA L.Rev. 1303, 1307 (2006)(finding courts granted incentive awards in 28% of cases sampled).

The size of the incentive awards – $30,000 to the current named plaintiffs

and $10,000 to the named plaintiffs on the initial complaint – is also consistent with the range of incentive awards approved by other federal judges in class action cases. For example, in employment discrimination and employment class actions, which are the most representative samples due to the threat to the named plaintiffs of economic loss from retaliation, law professors Eisenberg and Miller found that the average incentive awards in those samples were about $12,000 and $70,000 respectively. *See* Eisernberg & Miller, *Incentive Awards*, 55 UCLA L.Rev. at 1353. Plaintiffs have found numerous cases where courts have approved incentive awards far larger than those proposed here. *See, e.g., Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp.2d 322 (E.D. Pa.. 2007)(incentive award of $75,000 to one named plaintiff); *Bynum v. District of Columbia*, 412 F. Supp. 2d 73 (D. D.C. 2006)(incentive awards of $200,000 divided among six named plaintiffs); *RMED Intern., Inc. v. Sloan's Supermarkets, Inc.*, 2003 WL 21136726 (S.D. N.Y. 2003)(incentive award of $25,000 to one named plaintiff); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685 (N.D.Ga.2001)(incentive award of $300,000 to each of four named plaintiffs); *Van Vraken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D.Cal.1995)(incentive award of $50,000 to one named plaintiff); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D.Ohio,1991)(incentive award of $50,000 to six named plaintiffs).

In determining whether incentive awards are proper and proportionate, courts examine: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *See Van Vraken*, 901 F. Supp. at 299. Most of the relevant factors weigh in favor of the proposed incentive awards.

Both sets of named plaintiffs faced a reasonable risk of retaliation. Such a risk is inherent in cases when plaintiffs sue their employer. The risk was particularly acute here, because a jury has recently concluded that the Ontario Police Department had impermissibly retaliated against Steve Trujillo, one of the named plaintiffs here, for his being a plaintiff in another Fourth Amendment suit against the department. *See Trujillo v. City of Ontario* -- ED CV 04-00569 SGL; Declaration of Steven Trujillo ¶ 31.

In addition, a number of officers in the management position in the Ontario Police Department made comments to the named plaintiffs that indicated that their role in this case would harm their careers in the department. For example, on the day that there was a press conference to announce the filing of the first amended complaint, Craig Pefferle's supervisor, Sergeant Dean Brown told him, Scott Anderson, and Nicko Carcich, who was a named plaintiff on the initial complaint and spoke at the press conference, that "they had just shot their careers in the foot" and that if the department's past practices were any indication, "they would never be promoted." Declaration of Craig Pefferle ¶ 11. After the amended complaint was filed, Captain Mendez told Jim Renstrom, one of the named plaintiffs in the initial complaint, that as long as Mendez is in the department named plaintiff Craig Ansman would "never go anywhere in the Ontario Police Department" and "he will make sure of that." Declaration of Craig Ansman ¶ 13. Since the filing of the case, Mendez has twice written the word "No"on the staff evaluation sheet concerning potential assignments – once to a gang unit and once to motorcycle duty, both of which Ansman was seeking but did not obtain. Ansman did not receive the gang unit assignment even though Captain Evans told he had gotten the top score in the oral interview. *Id.* at ¶ 14

The current named plaintiffs not only faced financial risks from bringing this suit, but they have also actually incurred financial costs. After plaintiffs

discovered during the course of discovery that Joe Sifuentes had not installed the surveillance equipment but had instead removed some of the cables used with the surveillance equipment, they sought to negotiate with him a stipulated dismissal that would result in his no longer being a defendant. Mr. Sifuentes refused to stipulate to dismissal and indicated that he would seek attorneys fees if Plaintiffs moved for his dismissal under FRCP 41(a)(1)(A)(ii). Plaintiffs and their counsel concluded that the safest course was to negotiate a settlement that provided for a stipulated dismissal and payment of some attorneys fees. In the end, the named plaintiffs each paid $225 out of their own pockets. *See* Eliasberg Decl. ¶ 23. The named plaintiffs have also each incurred substantial travel expenses going to Los Angeles or Pasadena to meet with their attorneys and attend depositions. *Id.*

The named plaintiffs have also endured a substantial amount of ridicule for their role in this case. For example, members of the department, including high ranking officers in the department have referred to the named plaintiffs by a variety of insulting names including: "the dirty dozen," "the hated eight," "Al Quaeda," and "the Taliban." Decl's of Anderson ¶¶ 12-14; Ansman ¶ 12; Bernhard ¶¶ 15-17; Pefferle ¶ 10; Rivera ¶ 11; Trujillo ¶¶ 14-19; .

The named plaintiffs, and many of the initial named plaintiffs, spent significant amounts of time on this matter, time that unnamed class members did not spend. This expenditure of time weighs heavily in favor of the proposed incentive awards. Each of the named plaintiffs performed the following tasks that took substantial amounts of time:

- Had their depositions taken and worked with their attorneys to prepare for their depositions;
- Attended three mediation sessions, one with then-Magistrate Judge Larson, one at JAMS with former federal district court Judge Lourdes Baird, and one in Ontario with Retired State Court Justice Richard Neal;
- Submitted at least one declaration in support of plaintiffs' motion for class certification, plaintiffs' motion for summary adjudication, or in opposition

to defendants' motion for summary judgment;

- attended at least two sessions with their attorneys in preparation for testifying at trial;
- participated in countless phone calls either as a group or individually with their lawyers to discuss strategy, potential settlements and other ongoing litigation matters;
- provided a wide variety of informal discovery to their attorneys on the policies and practices of the department.
- spent time responding to inquiries for unnamed class members concerning the status of the case.

Decl's of Anderson ¶¶ 4-10; Ansman ¶¶ 4-10; Bernhard ¶¶ 3-13; Pefferle ¶¶ 3-9; Rivera ¶¶ 4-10; Trujillo ¶¶ 3-13.

Beyond these tasks, which all the named plaintiffs performed, the named plaintiffs performed a variety of other time consuming tasks such as working with their lawyers on preparation for depositions; attending depositions and conferring with their lawyers during breaks about potential follow up questions; and reviewing documents produced during discovery. *See*, *e.g.*, Anderson Decl. ¶ 6 (Anderson attended depositions of Brad Schneider, Tony Del Rio, Steve Duke, Lloyd Scharf, and Eric Hopley); Ansman Decl. ¶ 6 (Ansman attended depositions of Chief Doyle, Lloyd Scharf, Joe Sifuentes, Steve Duke, Eric Hopley and Tony Del Rio); Trujillo Decl. ¶ 8 (Trujillo attended depositions of Brad Schneider, Chief Doyle, Michael Thompson, Lloyd Scharf, and Pat McMahon);

Many of the named plaintiffs on the initial complaint also spent a substantial amount of time on the case, which justifies their incentive award under the factors set forth in the *Van Vraken* case. For example, all the original named plaintiffs, save one, submitted declarations in support of the motion for class certification. Eliasberg Decl. ¶ 24. Steve Hurst and Rick Carroll also submitted declarations in support of either plaintiffs' motion for partial summary judgment or for use during depositions. *Id.* A number of the original named plaintiffs, including Mike Bors, Rick Carrol, Ron Dupuis, Steve Guderian, Keith Henderson,

Steve Hurst and Fred Ruiz, spent a substantial amount of time being interviewed by plaintiffs' lawyers, and reviewing draft responses, to respond to defendants' damages discovery. *Id.* Steve Hurst, Ron Dupuis, Keith Henderson, and Rick Carroll each met with plaintiffs' lawyers on two or more occasions to prepare to testify at trial. *Id.*

B. THE ATTORNEYS FEES AND COSTS REQUEST OF $1,210,000 IS FAIR AND REASONABLE

The settlement agreement in this case provides that the attorneys fees' award is part of the total settlement amount, and will be determined with reference to the lodestar method of calculation. In order to determine what constitutes a reasonable award, the Supreme Court has held that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 423, 433 (1983.) This calculation, known as the lodestar, is "presumed to be the reasonable fee." *Blum v. Stenson*, 465 U.S. 886, 897 (1984).[2] This presumption applies in the context of class action settlements. *See Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002).

The award of attorneys' fees is within the court's discretion, taking into consideration the following factors, set forth in *Kerr v. Screen Actors Guild*, 526

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[2] Courts frequently award a substantial multiplier to the lodestar amount to compensate the difficulty and complexity of litigation, the undesirability of a case, the success rate, and, in common fund cases, the risks of nonrecovery. *See Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases."); *Guam Soc. of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir. 1996). These multipliers can be substantial. *See, e.g.*, 4 Newberg on Class Actions, § 14:6 at 578 (4th ed. 2002) ("Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied."); *Fishcel*, 307 F.3d at 1008 (approving 1.5 multiplier for success rate); *Guam Soc.*, 100 F.3d at 697 (upholding multiplier of 2.0 due to undesirability of case).

F.2d 67, 70 (9th Cir. 1975): 1) the time and labor required; 2) the novelty and difficulty of questions involved; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the 'undesirability' of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases.

Many of these factors are subsumed within the initial lodestar determination, however. Thus, it is only in the rare case should consideration of these factors result in adjustment to the lodestar. *See Cunningham v. County of Los Angeles*, 879 F.2d 481, 487 (9th Cir. 1988). To the extent these factors would militate in favor of adjustment, the adjustment would be an upward one from the base lodestar. For example, the contingent nature of the case and experience, skill, and reputation of the attorneys for the plaintiff class would weigh in favor of upward adjustment if plaintiffs sought such an adjustment – which they do not.

As is set forth in detail below, plaintiffs' counsel's lodestar totals $1,294,454.40, reflecting $567,246.50 in fees by the ACLU of Southern California, $587,163.65 by Hadsell Stormer Keeny Richardson & Renick LLP, and $140,044.25 by Bahan & Associates, after the exercise of billing judgment. The unreimbursed costs incurred by all three offices total $59,598.91. However, plaintiffs' counsel have agreed to limit the total award of fees and costs sought to $1.21 million, in order to provide the relief described above to the class members. Should this Court reject any portion of the award to the class members, plaintiffs ask that that amount go to the attorneys so long as it does not bring the amount received by the attorneys above their lodestar amount plus costs. Conversely, should this Court reject any portion of plaintiffs' attorneys fees requested,

plaintiffs request that the remainder be allocated to the class members.

1. The Amount of Hours Worked Is Reasonable

To support this motion and the specific request for fees, plaintiffs' counsel have submitted the Declarations of Dan Stormer, Peter Eliasberg, and Della Bahan, which describe the work done by both the Hadsell firm and the ACLU, as well as the work done by Bahan & Associates.

At the Court's request, plaintiffs' counsel have also submitted their actual billing records under seal, to be reviewed by this Court *in camera*, attached to the Supplemental Declarations of Anne Richardson, Peter Eliasberg, and Della Bahan.

The time set forth in this motion is for time spent through March 13, 2009, and does not include the time that will be spent through the filing of this motion, in preparation of any reply, and at oral argument, or for time spent on the notice and for final approval. Counsel estimate that such additional tasks will cost approximately another $75,000 in fees.

The declarations constitute sworn evidence that the attorneys actually expended the time for which compensation is sought. "Sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case. . . . " *Perkins v. Mobile Housing Board*, 847 F.2d 735, 738 (11th Cir. 1988). For a court to deny compensation, "it must appear that the time claimed is *obviously and convincingly excessive under the circumstances*." *Id.* (emphasis added). "The applicant need not detail how each minute was expended; rather counsel should identify "the general subject matter of his time expenditures." *Hensley,* 461 U.S. at 437, n. 12.

As another court has put it, "a fee petition should include 'some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates." *Rode v.*

Dellarciprete, 892 F.2d 1177, 1190 (3rd Cir. 1990). "However, 'it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.'" *Id.,* at 1190. In *Rode*, the court rejected the argument that billing entries such as "settlement" and "miscellaneous research, telephone conversations, and conferences concerning facts, evidence, and witnesses" were insufficiently specific. 892 F.2d at 1191, and n. 13. *See generally Davis v. City and County of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992) (rejecting argument that billing records were insufficiently specific, emphasizing that Supreme Court's decision in *Hensley* requires only that counsel "identify the general subject matter of his time expenditures"), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir.1993).

Moreover, plaintiffs have exercised billing judgment in this request for fees. Attorneys at HSKRR went through and deleted certain entries - approximately 40 hours - performed by attorneys, law students, and paralegals on this case which could arguably be considered redundant or unnecessary. In addition, HSKRR has not included time spent by an attorney or paralegal who worked fewer than 10 hours on the case. The firm also has not included the minimal time spent on the case before the case came down from the court of appeals. Finally, HSKRR deducted an overall 5% of its attorneys and paralegal hours, in order to avoid any duplication or redundancies.

The ACLU has, among other things, deleted any time spent by lawyers, paralegals or law students who billed less than 10 hours on the case, and is not seeking compensation for more than 30 hours spent by [redacted], a 1995 law school graduate who worked on a variety of tasks in the six weeks prior to the scheduled trial date. Overall, the ACLU's exercise in billing judgment has resulted in an approximately 6.5 % reduction in the fees sought. Eliasberg Decl.

Bahan and Associates has not included time spent by staff who worked less

than 10 hours on the case. In addition, the firm has deducted an overall 5% from the hours of its attorneys and paralegals who billed more than ten hours on the matter, to avoid any duplication or redundancies. Bahan Decl. ¶¶ 12, 13.

In evaluating whether plaintiffs' fees are reasonable, the Court must consider the nature of the defense mounted by Defendants. *See Copeland v. Marshall*, 641 F. 2d 880, 904 (D.C. Cir. 1980)("[a party] cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.") (en banc); *see also Stanford Daily v. Zurcher*, 64 F.R.D. 680, 683 n.2 (1974) (finding no ground for exclusion of any of attorneys' time in calculating reasonable attorneys' fees where "[t]he large number of hours expended by plaintiffs' attorneys was necessitated not only by their claims but also from a need to counter the defendants' numerous affirmative defenses to the complaint and various motions")). As the Court is well aware, this case lasted for almost five years, during which defendants, *inter alia*, deposed all the named plaintiffs, opposed plaintiffs' motion for class certification, opposed plaintiffs' motion for partial summary judgment, filed their own motion for summary judgment, and propounded written discovery on all unnamed class members.

Finally, much of the billing in this case (and indeed, most of the billing by the Hadsell firm) took place *after* the third and final attempt at mediation, on November 7, 2008, had failed and the parties had to prepare in earnest for trial.

2. The Hourly Rates Are Reasonable

In *Blum v. Stenson*, 465 U.S. 886, 895 & n.1 (1984), the Supreme Court explained that "reasonable fees under § 1988 are to be calculated according to the prevailing market rates in the relevant community." Ordinarily, the reasonable rate is determined based on the legal market in the community where the district court sits. *See Davis v. Mason County*, 927 F.2d 1473, 1488 (1991). In this case, the district judge sat in the United States District Court for the Central District of

California in Riverside. Even if there is some difference in the rates between the Riverside and Los Angeles, where the principal courthouse for the Central District is located, Plaintiffs are nonetheless entitled to Los Angeles rates. A prevailing plaintiff is entitled to rates "outside the forum" "'if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree or experience, expertise, or specialization required to handle the case properly'" *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)).

Here, the evidence demonstrates that local counsel capable of handling this major class action litigation through trial and appeal were unavailable. Carol Sobel, and Barry Litt, two of the foremost civil rights litigators in the state have submitted declaration attesting to the scarcity of attorneys in Riverside who are capable of handling significant civil rights class actions such as this. Sobel Decl., at ¶¶15-16; Litt Decl.¶20. Nora Quinn, an extremely experienced and active attorney practicing in the Inland Empire, has also submitted a declaration attesting to the lack of attorneys in Riverside or San Bernardino Counties who could litigate such a matter. Quinn Decl., ¶ 9. By contrast, the law firms of Hadsell Stormer Keeny Richardson & Renick LLP (formerly Hadsell & Stormer, Inc.), and the ACLU Foundation of Southern California have specialized expertise in class action civil rights litigation. Eliasberg Decl. *passim*; Stormer Decl., *passim*.

Moreover, the Ninth Circuit Court of Appeal has already evaluated an interim fee request made by the ACLU for time spent on the appeal. The ACLU's fee motion explained that the ACLU was seeking compensation at Los Angeles market rates because of the unavailability of local counsel capable of handling a class action civil rights matter of this size. The Ninth Circuit granted the fee

motion in its entirety.[3] *See* Exhibit 2 attached to the Eliasberg Decl. Accordingly, Plaintiffs are entitled to attorneys' fees at Los Angeles market rates.

In determining the prevailing market rate, the Court should pay "close attention" to "the fees charged by 'lawyers of reasonably comparable skill, experience, and reputation.'" *Davis*, 976 F.2d at 1545-46 (quoting *Blum*, 465 U.S. at 895). In this case, the attached declarations of Peter Eliasberg, Dan Stormer, Anne Richardson, Della Bahan, Barrett S. Litt, Douglas Mirell, and Carol Sobel demonstrate that the hourly rates requested by Plaintiffs for each attorney and paralegal are in line with the market rates in the Los Angeles legal community for similar services performed by attorneys of comparable skill, experience, and reputation. *See* Litt Decl. ¶¶14-26; Sobel Decl. ¶¶5-17. *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)("Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for plaintiffs' attorney, are satisfactory evidence of the prevailing market rate.").[4]

Attorney/paralegal	*Grad. Year*	*Billing Rate*	*Hours Billed*	*Total Sought After Deductions*
Dan Stormer	1974	$800	301.10	228,836*
Della Bahan	1979	$695	68	44,897.00*
Allan Ides	1979	$695	10.5	7,297.50
Anne Richardson	1989	$575	345.6 less 2.1 = 343.5	187,636.88*
Peter Eliasberg	1994	$525	639.9	335,947.50

[3] Plaintiffs have exercised care to ensure that none of the time for which the Ninth Circuit awarded compensation to the ACLU in its interim fee order is included in the table above or the billing records attached to Mr. Eliasberg's supplement declaration filed under seal.

[4] Because this litigation has taken almost five years, Plaintiffs are entitled to a fee award at current, rather than historic rates. *See*, *e.g.*, *Gates v. Deukmejian*, 987 F.2d 1392, 1406-07 (9th Cir. 1992).

Ahilan Arulanantham	1999	$425	86	36,550.00
Puja Batra	1999	$425	99.6	44,897.00*
Lisa Holder	2000	$400	167.68	63,718.40*
Peter Bibring (at ACLU)	2002	$375	174.1	65,287.50
Peter Bibring (at Bahan)	2002	$375	154.2	54933.75*
Lori Rifkin	2004	$335	101	33,835.00
Nagwa Ibrahim	2007	$275	64.10	16,746.12*
Radhika Sainath	2008	$250	81.60	19,380.00*
Law Students (ACLU)		$200	320.3	64,060.00
Law Students (HSKRR)		$200	35.80	6,802*
Experienced paralegals (ACLU)		$175	138.68	24,269.00
Experienced Paralegals (HSKRR)		$175	213.90	35,560.88*
Mid-level paralegal (HSKRR)		$150	58.55	8,343.38*
Entry-level paralegal (HSKRR)		$100	212.00	20,140.00*
(*) reflects total after 5% reduction.				

Plaintiffs are requesting compensation for Peter Eliasberg, who has been one of the lead counsel throughout this litigation, at the rate of $525 an hour. Mr. Eliasberg is the Managing Attorney of the ACLU of Southern California and a leading civil rights attorney in the region. Plaintiffs are requesting compensation for Allan Ides, Ahilan Arulanantham, Peter Bibring, and Lori Rifkin of the ACLU in the amount of $695, $400, $375 and $335, respectively. *See* Declaration of Peter Eliasberg, ¶¶ 3-6 & 25. These rates are all eminently reasonable in light of

their experience, skill, and expertise. Mirell Decl. ¶¶ 6, 8-10, 13-14; Litt Decl. ¶26; Sobel Decl. ¶¶7-11.

In 2008, in preparation for trial, plaintiffs brought in the law firm of Hadsell Stormer Keeny Richardson & Renick. Plaintiffs are requesting compensation for Dan Stormer, one of the leading civil rights lawyers in California at the rate of $800 per hour. (Stormer Decl., ¶13.) They are also seeking compensation for Anne Richardson, a partner in his law firm, at the rate of $575 per hour; and for associates of the firm at the rate of $400 - $250 per hour. (Stormer Decl., ¶13; Richardson Decl. ¶5.)

Plaintiffs are also seeking the time spent by the law firm of Bahan & Associates at the rates of $695 for Della Bahan, $425 for Puja Batra, and $375 for Peter Bibring. Bahan Decl. ¶10.

Rates billed by other lawyers in the Los Angeles market who have similar experience and do civil litigation demonstrate that $800 per hour is eminently reasonable for Mr. Stormer. Mr. Stormer is regularly included in the 100 most influential attorneys in the State of California. He has been the recipient of dozens of awards and regularly teaches master classes at law schools and legal seminars throughout the country on trials and litigation. Stormer Decl. at ¶¶3-11. He is recognized as among the finest civil rights attorneys in both California and the country. Litt Declaration ¶14, Mirell Decl. ¶5. He has already been awarded his $800 an hour rate by Judge Consuelo Marshall in a class action lawsuit that went to verdict in 2007. *See* Stormer Decl. ¶ 77.

According to Douglas Mirell, a partner in the litigation department at Loeb & Loeb in Los Angeles, partners with a comparable level of skill experience as Mr. Stormer would be billed in the range of $750-$800 an hour. Mirell Decl. ¶5.

The National Law Journal's 2007 survey of billing rates at the 250 largest firms in the country provides the following information: at Loeb & Loeb, partner

rates range from $425-$875 and associate rates range from $240-$500; at Manatt Phelps & Phillips, LLP, partner rates were in the range of $520-$785 and associate billing rates were in the range of $265-$480; at Sheppard Mullin, Richter & Hampton LLP, partner rates were in the range of $425-$795 and associate billing rates were in the range of $260-$550; at Greenberg Traurig, partner billing rates were in the range of $300-$1000 and associate billing rates were in the range of $175-$505. Litt Decl. ¶24. See also Sobel Decl. Exhs. 4 &5 (NLJ survey 2008 rates).

Plaintiffs' request for Ms. Richardson to be compensated at the rate of $575 is also eminently reasonable. Ms. Richardson is a 1989 graduate from Stanford Law School with numerous awards, experience teaching Civil Rights Litigation at two law schools, and an excellent reputation as a civil rights lawyer. (See Richardson Decl., ¶¶6-8; Mirell Decl. ¶7, Sobel Decl. ¶12, 17 and Litt Decl., ¶14.) Other law firms bill partners with comparable experience at between $600-$625 an hour. Mirell Decl. ¶7.

Plaintiffs also seek compensation for the amount of time billed by various associates (at varying rates as set forth in the attached declarations) and law clerks and paralegals who served on the case at rates of $100 through $200, depending on experience. Richardson Decl. ¶5; Eliasberg Decl. ¶¶ 7-10.Their rates are well within the range of rates billed for associates and paralegals with their level of experience. Mirell Decl. ¶¶10-15; Sobel Decl. ¶¶14-17; Litt Decl. ¶¶25-26.

C. ATTORNEYS FEES CLAIMED BY LACKIE & DAMMEIER

The previously disqualified attorneys Lackie & Dammeier have filed a lien in this matter for $907,500. Plaintiffs have also informed a partner at Lackie & Dammeier, at the Court's request, that if that firm wants to seek fees, it must file a motion by March 16, 2009 Assuming Lackie & Dammeier files a motion for fees, plaintiffs request that the Court rule on the validity of the lien along with their

motion. Plaintiffs also request that this Court rule on the amount to which Lackie & Dammeier would be eligible, if the Court's disqualification order is reversed, and also if it is sustained, so that the amount in dispute will be fixed as to them.

D. PLAINTIFFS' LITIGATION EXPENSES ARE RECOVERABLE

Fed. R. Civ. P. 54(d)(1) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . .." The types of costs that may be awarded under Rule 54(d) are limited to those listed in 28 U.S.C. § 1920. *Crawford Fitting Co. v. J. T. Gibbons*, Inc., 482 U.S. 437, 441-42 (1987), *superseded by statute on other grounds as stated in Fernando v. Hotel Nikko Saipan*, 1992 U.S. Dist. LEXIS 10228, at *3 (D. N. 1992). Local Rule 54-4 lists the items taxable as costs.

In addition to attorneys' fees and costs recoverable under Rule 54-4, Plaintiffs are entitled to recover their out-of-pocket expenses normally billed to fee-paying clients. *See Harris v. Marhoefer,* 24 F. 3d 16, 19 (9th Cir. 1994) (under federal fee-shifting statutes, out-of-pocket expenses normally billed to a client are recoverable as part of fees award); *Calderon v. Witvoet*, 112 F.3d 275 (7th Cir. 1997) (travel and meal expenses recoverable); *Missouri v. Jenkins*, 491 U.S. 274, 285-89, 105 L. Ed. 2d 229, 109 S. Ct. 2463 (1989); *Herold v. Hajoca Corp*., 864 F.2d 317, 323 (4th Cir. 1988). Electronic research fees are ordinarily recoverable. *See InvesSys, Inc. v. McGraw-Hill Cos., Ltd.*, 369 F.3d 16, 22-23 (1st Cir. 2004); see also *In re Mulberry Phosphates, Inc.*, 151 B.R. 948 (Bankr. M.D. Fla. 1992) (holding that litigation expenses such as clerical expenses, postage, express mail services, and computer time do not constitute overhead when the firm uses a "user fee billing system," as is the case here, in which the firms bill clients only for specific expenses related to services performed on behalf of the client). (Stormer Decl., ¶). Plaintiffs have incurred costs and related non-taxable litigation

expenses consisting of $46,730.20 in charges for which they seek reimbursement.[5] (Richardson Decl., ¶23; Eliasberg Decl., ¶.) Those costs are as follows:

Type of Cost	HSKRR	ACLU of So. Cal.	Bahan & Associates	Total/All Firms
Filing Fees (LR 54-4.1)	$110.00			$110.00
Reporter's Transcripts (LR 54-4.5)	$15.30	$66.00		$81.3
Other Transcripts		$2,462.13		$2,462.13
Depositions (LR 54-4.6)	$1070.00	$8,621.24	$6,614.48	$16,305.72
Witness Fees (LR 54-4.7)	$282.36	$68.00		$350.36
Costs of Enhancing VideoTape and Making Clips to Show Class Members (LR 54-4.13)	$6,512.83	$350.73		$6,863.56
Deposition Videography			$577.75	$577.75
Expert Fees	$5,034.54	$1,686.00		$6,720.54
Mediation Fees		$4,275.00	$1,750.00	$6,025.00
Photocopying/Fax Service	$7,056.50	$613.20	$197.89	$7,867.59
Legislative History Documents		$693.30		$693.30
Computer-aided Research	$535.90			$535.90
Delivery/messenger charges	$239.00	$5,694.42	$436.00	$6,369.42
Postage	$61.86			$61.86
Travel/meals	$606.30	$2,083.94	$262.40	$2,952.64

[5] The related litigation expenses reasonably include: (1) travel expenses, including lodging, car rental and meals. *Keith v. Volpe*, 643 F. Supp. 37, 43 (C.D. Cal. 1985); *Thornberry v. Delta Airlines, Inc.*, 676 F.2d 1240, 1244 (9th Cir. 1982); (2) photocopying expenses and messenger service, *Thornberry*, 676 F.2d at 1244; (3) postage, *Volpe*, 643 F. Supp. at 43; *Connor v. Winter*, 519 F. Supp. 1337, 1345 (S.D. Miss. 1981); (4) express mail, *Connor*, 519 F. Supp. at 1345; (5) telephone charges, *Volpe*, 643 F. Supp. at 43; *Thornberry*, 676 F.2d at 1244; and (6) computer-aided research, *Wehr v. Burroughs Corp.*, 619 F.2d 276, 284 (3rd Cir. 1980).

Conference calls	$10.26			$10.26
Parking/Mileage	$1,212.36	$73.00	$160.86	$1,446.22
Express Mail	$122.33		$43.03	$165.36
Total	$22,869.54	$26,686.96	$10,042.41	$59,598.91

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court preliminarily approve the proposed settlement of $2,750,000; the proposed distribution of the settlement, including the incentive awards, to the class members; attorneys' fees and costs in the amount of $1,210,000 and approve the proposed notice to the class.

DATED: March 16, 2009

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

HADSELL STORMER KEENY RICHARDSON & RENICK, LLP

By /s/
Peter Bibring
Attorney for Plaintiffs