John W. Davis, CA Bar # 200113
john@johnwdavis.com
LAW OFFICE OF JOHN W. DAVIS
501 W. Broadway, Suite 800
San Diego, CA 92101
Telephone: 619.400.4870
Facsimile: 619.342.7170

Steven F. Helfand, CA Bar # 206667
steven@stevenhelfand.com
HELFAND LAW OFFICES
582 Market Street, Suite 1400
San Francisco, CA 94104
Telephone: 415.397.0007
Facsimile: 415.397.0009

Attorneys for Objectors
Benjamin Trotter and Megan Marek

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SEAN LANE, *et al.*,

Plaintiffs,

v.

FACEBOOK, INC., a Delaware Corporation, BLOCKBUSTER, INC., a Delaware Corporation, FANDANGO, INC., a Delaware Corporation, HOTWIRE, INC., a Delaware Corporation, STA TRAVEL, INC., a Delaware Corporation, OVERSTOCK.COM, INC., a Delaware corporation, ZAPPOS.COM, INC., a Delaware Corporation, GAMEFLY, INC., a Delaware Corporation, and DOES 1-40, corporations,

Defendants.

Case No. 08-CV-3845 RS

CLASS ACTION

OBJECTION TO PROPOSED SETTLEMENT AND NOTICE OF INTENT TO APPEAR

Location: Courtroom 4, 5th Floor
280 South First Street
San Jose, CA 95113
Date: February 26, 2010
Time: 9:30 a.m.
Judge: Honorable Richard G. Seeborg

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PLEASE TAKE NOTICE that class members Benjamin Trotter and Megan Marek (hereinafter "Objectors"), by and through their undersigned counsel, intend to appear and be heard at the fairness hearing to discuss the following objections:

I. STANDARD OF REVIEW

Class action settlements, unlike typical settlements, require court approval for the protection of those class members whose rights may not have been given due regard by the negotiating parties. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). As guardian of absent class members, the Court cannot approve the settlement without independently evaluating the evidence and finding that the settlement is "fair, reasonable and adequate to all concerned." *Id.*; Fed. R. Civ. P. 23(e). Moreover, the parties reached a settlement prior to class certification. *Settlement Agreement* ¶ 3.1. Accordingly, the proposed settlement agreement demands heightened scrutiny. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. Cal. 1998); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997) (holding that the rights of absent class members "demand undiluted, even heightened, attention in the settlement context").

The burden of proving the fairness of a settlement rests squarely on its proponents. *See* Herbert B. Newberg & Alba Conte, 2 Newberg on Class Actions § 11.42 (3d ed. 1992); Moore's Federal Practice Sec. 23.80 [4] (2d ed. 1987); *See also Williams v. Ryan,* 78 F.R.D. 364, 369 (1978). While a high degree of precision cannot be expected in valuing a litigation, the Court should nevertheless "insist that the parties present evidence that would enable possible outcomes to be estimated," so that the Court can at least come up with a "ballpark valuation." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.,* 463 F.3d 646, 653 (2006) citing *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 285 (2002); *See also*, *Kullar v. Foot Locker Retail, Inc.,* 168 Cal. App. 4th 116, 128 (2008). The settling parties have failed to meet this burden let alone even engage it.

II. OBJECTION TO THE SUBSTANTIVE SETTLEMENT

The class action device designed to foster justice, also carries with it substantial dangers of injustice to class members who may be deprived of their rights by the actions of the class plaintiff(s). *See, e.g*. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation*, 58 U.CHI.L.REV. 1, 7-8 n. 4 (1991); *see also* John C. Coffee, Jr., *Rethinking the Class Action*, 62 IND.L.J. 625, 628-29 (1987). Just such a danger is presented by the circumstances of the instant case.

A. THE PARTIES HAVE FAILED TO PRESENT EVIDENCE SUFFICIENT TO JUSTIFY A 100% *CY PRES* DISTRIBUTION

The proposed settlement is woefully inadequate in that it **provides no monetary restitution whatsoever** to class members whose privacy was compromised by the settling defendants. Rather, the entire settlement fund is to be distributed (after deduction of attorneys' fees, "incentive awards," and settlement administration fees) to a so-called "Privacy Foundation" established and administered by Facebook. As a threshold matter, the settling parties have failed to demonstrate that this is an appropriate use of settlement funds. Moreover, as discussed *infra*, the fact that the Foundation is to be administered by Facebook and its minions in the absence of clear and concise guidelines for external independent oversight and monitoring is a major problem which cannot be glossed over.

While it is indicated, for example, that bylaws shall be presented to the Court at the fairness hearing as part of the settlement approval process, class members have, as of today, not been shown these bylaws, have no idea what they contain, and have no understanding as to whether any of those bylaws could circumvent any of the parameters of the proposed settlement (e.g., how funds are to be used, oversight, governance issues, etc.). The Court should specifically permit additional comments from class members as to the probity of any bylaws which are belatedly presented by the settling parties as part of

this proposed settlement.

In the class action context, courts have employed *cy pres* principles to distribute class damages or settlement funds for the indirect benefit of the class where actual distribution to class members is not feasible. Herbert B. Newberg & Alba Conte, 2 Newberg on Class Actions, § 10.17 at 10-40-41 (3d ed. 1992). Generally, the funds are paid to a third party such as a charitable organization or agency for use for designated purposes. *Id.* at 10-41-42. *Cy pres* principles have also been utilized where the class recovery cannot feasibly be distributed to the individual class members. Newberg, *supra*, § 10.17, at 10-40-41. Typically, courts employ *cy pres* where class members cannot be located or where individual recoveries would be so small as to make distribution economically impossible. *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 606 (D.N.J. 1994). The settling parties have failed to present evidence as to the value of individual recoveries or why class members cannot be reasonably located in this case. Accordingly, it is unfair and unreasonable to distribute the entire settlement fund (minus costs and attorneys' fees) to an organization established by Facebook and controlled by Facebook without providing class members an opportunity for monetary compensation.

In effect, Facebook is paying itself the benefit but class members are releasing their individual privacy claims. Many of the safety and online privacy concerns the Foundation is purportedly to address are issues for which Facebook already has or should have an existing obligation to deal with as part of its service structure. For example, Facebook should not be permitted to effectively have the Foundation pay for Facebook security measures which should have existed in the first place. It has not been shown by the settling parties that Facebook is not simply re-allocating the manner in which it funds various operations through the usage of a new assemblage in the context of this deal.

While some state courts have approved 100% *cy pres* distributions[1], this is not an approach preferred by federal courts which have considered such issues[2]. In the limited instances where an *ex ante cy pres* distribution might be appropriate, the settling parties must present evidence as to why it would be impossible or impracticable to first distribute funds to the class. Here, the parties have presented no such evidence as to why class members should release valuable claims for no monetary compensation. Moreover, the parties' inexplicable failure to present any analysis of damages or bother to offer any other meaningful evidence in support of the proposed *cy pres* distribution results in class members' inability to make an informed decision concerning whether to participate in the settlement, opt-out, or object. *Synfuel Techs, supra*, 463 F.3d 646 at 653. The difficulties inherent in proving individual damages may not be avoided by the use of a form of fluid recovery. *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. Ariz. 1990).

To protect the interests of absent class members the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished. Herbert B. Newberg & Alba Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11:41, p. 90. "A settlement, quite obviously, cannot be approved based solely on the fact that it has punitive or deterrent impact on the defendants. The court's primary consideration must be the interests of the absent class members and the fairness, adequacy and reasonableness of the settlement." *In re Matzo Food Prods. Litig., supra.,* 156 F.R.D. 600 at 607.

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[1] *In re Vitamin Cases,* 107 Cal.App.4th 820, 831-833 (2003).

[2] *In re Matzo Food Prods. Litig.,* 156 F.R.D. 600, 606 (D.N.J. 1994); (2d Cir. 1973) *Windham v. American Brands, Inc.*, 565 F.2d 59, 72 n.41 (4th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973) (*Eisen III), vacated on other grounds*, 417 U.S. 156 (1974).

B. THE SETTLING PARTIES HAVE FAILED TO ESTABLISH THAT THE "PRIVACY FOUNDATION" IS THE BEST USE FOR THE COMMON FUND

The use of the cy pres doctrine "runs the risk of being a vehicle to punish defendants in the name of social policy, without conferring any particular benefit upon any particular wronged person." *Six Mexican Workers v. Ariz. Citrus Growers, supra.*, 904 F.2d 1301 at 1312 (Fernandez, J., concurring). That is exactly what is happening in this case. The parties have failed to establish who, exactly, will be benefitted by the amorphous "Privacy Foundation" other than the administrators and lawyers for the settling parties who will serve in an "advisory" role. Settlement Agreement ¶ 4.22. For example, there are few, if any, genuine parameters set for how money will be spent and on what. It appears that the settling parties' attorneys may even be permitted to double-dip attorneys' fees, seeking them first for obtaining the *cy pres* relief and then subsequently using it as a "slush fund" for future undefined activities. The court should affirmatively bar any of the settling parties' lawyers from squandering the limited *cy pres* benefit on yet more legal fees.

A *cy pres* distribution should be "as near as possible" to a direct distribution of benefit. *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002). Here, even if we assume that the proposed *cy pres* distribution is appropriate at all, the settling parties have failed to demonstrate a nexus between the harm to the class and the benefit offered by the proposed Foundation. *See, e.g., In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1254 (7th Cir. Ill. 1984).

C. THE RELEASE IS OVERLY BROAD

The Ninth Circuit has cautioned that the relief offered to class members must be commensurate with released claims, particularly in light of broad release provisions. *Molski v. Gleich,* 318 F.3d 937, 942 (2003). Accordingly, given the broad release

provided by the proposed Settlement Agreement, this Court should, prior to approving this settlement, carefully scrutinize released claims and the compensation (or lack thereof) being offered to class members for releasing these claims.

III. OBJECTION TO ATTORNEYS' FEE REQUESTS AND INCENTIVE AWARDS

A. THE DISTRICT COURT HAS A FIDUCIARY DUTY TO THE CLASS IN PREVENTING COUNSEL FROM OBTAINING A WINDFALL.

The fee that class counsel is seeking is remarkable in light of the paltry relief the class is contemplated to receive. Consideration of fee petitions submitted by counsel representing a plaintiff class requires the utmost judicial scrutiny and discretion. It is at this stage that counsel for the class is transformed from the champion of the class to a competing claimant against the fund intended to recompense the wrong suffered by the class. REPORT OF THE THIRD CIRCUIT TASK FORCE, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 251 (Oct. 8, 1985) (hereinafter "*Task Force Report*").

In essence, the district court assumes the fiduciary role for the class that its counsel filled during the litigation, but vacated upon submission of the fee petition. *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989); *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977) ("*Grinnell II*"); *Task Force Report* at 255. Because objections by class members are rare and defendants, having made their contribution to the settlement, are uninterested in the distribution, the district court must act with moderation and a jealous regard for the rights of the class members in determining a reasonable attorney fee. *Rothfarb v. Hambrecht*, 649 F. Supp. 183, 237 (N.D. Cal. 1986), citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974) ("*Grinnell I*"); Deborah A. Klar, *Attorney's Fees in Securities Class Actions: Recent Developments Under the Common Fund Doctrine*, SECURITIES LITIGATION

(1991); *Task Force Report* at 251; *In re Equity Funding Corp. Sec. Litig*., 438 F. Supp. 1303, 1325 (C.D. Cal. 1977) (not only must the courts avoid awarding windfall fees, but they must avoid every appearance of having done so).

B. THE COURT IS WITHIN ITS DISCRETION TO APPLY EITHER THE LODESTAR OR PERCENTAGE OF RECOVERY METHOD.

The two prevailing methods of awarding fees are the percentage of recovery method and the lodestar analysis.[3]

The Ninth Circuit has explicitly and repeatedly refused to mandate the use of the percentage of recovery method in common fund cases.[4] *See In re Wash. Pub. Power Supp. Sys. Sec. Litig.,* 19 F.3d 1291, 1295-96 (9th Cir. 1994) (reaffirming the Ninth Circuit's "settled rule that either the lodestar or the percentage method 'may have its place in determining what would be reasonable compensation for creating a common fund'.") ("*WPPSS*"); *see also Hanlon,* 150 F.3d at 1029 ("In 'common fund' cases... the district court has discretion to use either a percentage or lodestar method."); *State of Florida v. Dunne,* 915 F.2d 542, 545 (9th Cir. 1990) ("Despite the recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases, however, we require only that fee awards in common fund cases be reasonable under the circumstances.").

Indeed, the Ninth Circuit has also refused to apply even a presumption in favor of

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[3] As its name suggests, the percentage of recovery method requires the court to determine what percentage of the fund available for distribution constitutes a fair fee for class counsel. *State of Florida v. Dunne,* 915 F.2d 542, 545 n.3 (9th Cir. 1990). The lodestar analysis requires the court to multiply the number of hours reasonably expended by counsel by a reasonable hourly rate, making adjustments upward or downward when warranted by the circumstances. *Id.* at 545 n.3.

[4] *See Six (6) Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir. 1989).

one method or the other. Under "the law of the [Ninth Circuit], in common fund cases, no presumption in favor of either the percentage or the lodestar method encumbers the district court's discretion to choose one or the other." *WPPSS* at 1296; *see Powers v. Eichen,* 229 F.3d 1249, 1256 (9th Cir. 2000) (authorizing use of either method "as long as the fee award is reasonable and the district court adequately explains its determination by written order or in open court."); *see also Van Vranken v. Atlantic Richfield Co.,* 901 F. Supp. 294, 296 (N.D. Cal. 1995) ("The Ninth Circuit has not expressed any explicit preference for either method so long as the ultimate fee award is reasonable under the circumstances.").

It is therefore fortunate that the precedent in this Circuit leaves to the sound discretion of the trial court the choice of two prevailing methods by which it may determine a reasonable award in a given case, recognizing that each "may, depending on the circumstances, have its place in determining what would be reasonable compensation . . . ." *Dunne*, 915 F.2d at 545 (quoting *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272, and finding that the district court did not err in applying the lodestar analysis).

C. NO PERSUASIVE REASON EXISTS FOR ABANDONING THE LODESTAR ANALYSIS IN FAVOR OF THE PERCENTAGE METHOD.

1. NO SINGLE METHOD OF FEE CALCULATION IS APPROPRIATE IN ALL CASES

"Reasonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *In re Coordinated Pretrial Proc. in Petroleum Antitrust Litig.,* 109 F.3d 602, 607 (1997) ("*Coordinated Pretrial*").

2. IT IS NOT AN ABUSE OF DISCRETION FOR THIS COURT TO APPLY THE LODESTAR METHOD SIMPLY BECAUSE CLASS COUNSEL PREFER THAT THE COURT FOLLOW THE PERCENTAGE OF RECOVERY APPROACH.

The only fee award that could be considered reasonable under the circumstances is one that compensates class counsel for work that benefitted the class without negating such benefit in the process or creating a windfall for counsel. *Grinnell II*, 560 F.2d at 1098 ("Courts and commentators have repeatedly warned that too little judicial regard for the interests of the benefited class can easily result in lesser recoveries for intended beneficiaries because of massive fees for enterprising attorneys."); *In re Superior Beverage/Glass Container*, 133 F.R.D. 119, 126 (N.D. Ill. 1990) (in no case should a fee award consume an untoward portion of the class recovery; what is left for the class after fees have been awarded is always of paramount consideration) ("*Superior Beverage*"); *see also Grunin v. Intl. House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975) (the primary concern is to ensure that such awards reasonably compensate the attorneys for their services, and are not excessive, arbitrary or detrimental to the class).

D. THE RESULTS OBTAINED IN THIS LAWSUIT DO NOT WARRANT A SUBSTANTIAL FEE AWARD.

The Ninth Circuit has repeatedly recognized that "[i]n a class action, whether attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper." *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003), quoting *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999).

Even though fee awards must provide sufficient incentive for competent counsel to undertake class action litigation, "there also must be recognition that an element of public service is involved and that the opportunity to represent the class plaintiffs is judicially

determined." *Rothfarb*, 649 F. Supp. 1303 at 199, citing *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. at 1377.

Objectors request that the Court carefully consider the amount of attorneys' fees and expenses requested by class counsel. The Court should consider declining to award any fee in light of the *de minimis* relief obtained by counsel.

E. THE CLASS ACTION FAIRNESS ACT REQUIRES ATTORNEYS' FEES TO BE BASED ON THE "ACTUAL VALUE" OF THE NON-CASH AWARD

As articulated above, the failure of the parties to provide evidence of the "actual value" of the "Privacy Foundation" is fatal to the proposed settlement. However, even if we assume that the substantive settlement is fair, the Class Action Fairness Act ("CAFA") prevents the Court from determining an appropriate fee for counsel in the absence of such evidence.

The non-cash "benefit" offered by the proposed settlement is analogous to a "coupon" settlement. Indeed, a 100% *cy* pres distribution is even worse than a coupon settlement since class members receive no real value. Accordingly, the portion of any attorney's fee award to class counsel that is attributable to the award of non-cash compensation should be based on the actual value to class members. 28 U.S.C. § 1712. Here, the parties have provided no analysis of what the "Privacy Foundation" is actually worth to class members. As such, the Court is not in a position to adequately evaluate the attorneys' fees request in light of CAFA.

F. THE INCENTIVE AWARDS SOUGHT BY REPRESENTATIVE PLAINTIFFS ARE EXCESSIVE AND CREATE A CONFLICT BETWEEN LEAD PLAINTIFFS AND ABSENT CLASS MEMBERS.

Under the Agreement, the class representatives will each receive between $1,000.00 and $15,000.00 (approximately $41,500.00 in the aggregate) while class members receive nothing. This is unfair and suggests that class counsel and the class representatives may

have compromised the interests of absent class members in exchange for red carpet treatment on fees.

Excessive payments to named class members can be an indication that the agreement was reached through fraud or collusion. *See Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003). Indeed, "[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard." *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989); *see also Women's Comm. for Equal Employment Opportunity v. Nat'l Broad. Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977) ("[W]hen representative plaintiffs make what amounts to a separate peace with defendants, grave problems of collusion are raised.").

The lead plaintiffs in this case appear to have taken potentially conflicting positions with absent class members as evidenced by the disparity in the requested "incentive awards." Accordingly, this Court should carefully scrutinize whether the lead plaintiffs, and their counsel, are inadequate with respect to representing this class. The named plaintiffs are seeking to obtain a windfall that is grossly disproportionate to relief available to absent class members whom the named plaintiffs purport to represent. This type of approach is contrary to the protective requirements of Fed. R. Civ. P. 23, and well-established public policy.

There is no "presumption of fairness" as to the amount of an enhancement. *See, e.g., Clark v. American Residential Services, LLC*, 175 Cal. App. 4th 785, 806 (2009). In reviewing the requested "incentive awards," the Court should consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert,* 42 F.3d 1004, 1016 (7th Cir. 1998). Other

factors to be considered include "the risk to the class representative in commencing suit, both financial and otherwise," "the notoriety and personal difficulties encountered by the class representative," the duration of the litigation, and "the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Van Vranken v. Atlantic Richfield Co.,* 901 F.Supp. 294, 299 (N.D. Cal. 1995).

In order for the lead plaintiffs or class counsel to be adequate, they must not have interests which conflict with the unnamed class members. A class representative's claims must not be inconsistent with those of the class. *Global Materials v. Superior Court,* 113 Cal. App. 4th 836, 851 (2003)*; see also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978), citing *Nat'l Assoc. of Reg'l Med. Programs, Inc. v. Mathews*, 551 F.2d 340 (D.C. Cir. 1976); Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3:23 (4th ed. 2002). By seeking such inflated incentive awards and attorneys' fees, lead plaintiffs and class counsel have put their own selfish interests ahead of the absent class members they purport to represent. Accordingly, the Court should apply heightened scrutiny to the entire negotiated settlement.

The Court should require class counsel to produce their retainer agreements with the named plaintiffs as a condition for final approval in light of the disparity between the proposed incentive awards and the class benefit as a whole. This is warranted given the disconnect between the relief the named representatives are eligible to receive in contrast with that accorded to ordinary class members. This disparity is both unseemly and striking and should cause the Court to be suspicious of the motives of the settling plaintiffs (e.g., were they promised anything pursuant to a retainer agreement which caused an irreconcilable conflict of interest between the named representatives, class counsel, and the rest of the class). *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 968 (9th Cir. Cal. 2009). Only through production of the retainer agreements can actual light be shed on this issue.

At a minimum, if the Court ultimately decides to approve the substantive settlement, fundamental fairness requires that the Court reduce the incentive award so that the savings may be properly allocated.

IV. ADDITIONAL OBJECTIONS

Objectors adopt all *bona fide* objections filed by other objectors in this case.

V. CONCLUSION

For the foregoing reasons, Objectors respectfully request that the Court withdraw its conditional approval of the proposed settlement and enter orders requiring further proceedings so as to effect substantial justice in this cause between the parties and the absent class members. Objectors hereby reserve the right to amend and refine their objections as more information is made available.

Respectfully submitted this 22nd day of January, 2010.

LAW OFFICE OF JOHN W. DAVIS

by: /s/ John W. Davis
John W. Davis
Counsel for Objectors