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14 Attorneys for Plaintiffs

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION
17 WESTERN DIVISION

18 JOHN S. WHITE,
19 on behalf of himself and those
similarly situated,

20 Plaintiff,

21 vs.

22 E-LOAN, INC., and
23 DOES 1 through 10, inclusive,

24 Defendants

) NO. CV-O5-02080 SI
)
) CLASS ACTION
) **PLAINTIFF'S SUPPLEMENTAL**
) **MEMORANDUM IN SUPPORT**
) **OF HIS MOTION FOR AWARD**
) **OF ATTORNEYS' FEES AND**
) **COSTS**
) Hearing: March 2, 2007

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1 **PLAINTIFF’S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS**
2 **MOTION FOR AWARD OF ATTORNEYS’ FEES AND COSTS**

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4 **I. Introduction**

5 After two years of extensive investigation, complex litigation and arms-length
6 negotiations, Plaintiff and his counsel have achieved a significant settlement of the
7 novel legal claims presented in this action. Following agreement on the terms of the
8 settlement, the parties turned to the issue of attorneys’ fees. Ultimately, Defendant
9 agreed to pay to Class Counsel \$750,000 in fees and expenses, subject to the approval
10 of the Court. On December 5, 2006, this Court preliminary approved the Settlement,
11 including an award of attorneys’ fees and costs. Plaintiff now moves for final
12 approval.
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16 Plaintiff’s success in this case is a direct result of his attorneys’ skill,
17 experience, and hard work. Plaintiff’s counsel is highly qualified and experienced in
18 the area of the Fair Credit Reporting Act (FCRA) and consumer class action litigation,
19 and has extensive experience in the prosecution of class cases. The firm resumes of
20 Plaintiff’s counsel are attached hereto as Exhibit A. Although Defendant vigorously
21 contested Plaintiff’s legal and factual positions at every stage, Plaintiff diligently and
22 effectively responded, resulting in victory in achieving class certification. As set
23 forth more fully in Plaintiff’s Motion for Final Approval of Settlement and for Final
24 Judgment, the Settlement achieved provides excellent benefits to the Class Members
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1 while avoiding the continued expense, extensive time delays, and risk inherent in
2 complex class action litigation, including the uncertainty of proving that Defendant's
3 actions, if found to be in violation of the FCRA, were willful.
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5 "Ideally, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461
6 U.S. 424, 427 (1983). The requested award is fair and reasonable and thus should be
7 approved. While an agreement between the parties regarding fees and expenses is not
8 binding on the Court, such an agreement is entitled to great weight where, as in this
9 case, the fee negotiations were conducted at arm's length and only after the merits of
10 the litigation were settled. This is particularly true here since the benefits received by
11 Class Members will not be affected by the Court's decision, since Defendant has
12 agreed to pay attorneys' fees and costs over and above the settlement relief to be
13 provided to the Class. Indeed, the only party that would benefit by a reduction in the
14 requested fee is the Defendant, which would be ironic given that Defendant has agreed
15 to pay it.
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20 Plaintiff has agreed to request payment of reasonable attorneys' fees and costs
21 to Class Counsel in the amount of \$750,000, and Defendant has agreed not to oppose
22 such request. That sum, which was achieved as a result of arms-length negotiation,
23 will fairly and reasonably compensate Plaintiff's counsel for their successful
24 resolution of this case. In addition, no class member's recovery will be reduced by
25 the requested attorneys' fees and costs.
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II. The Settlement Agreement

As set forth fully in Plaintiff's Motion for Final Approval of Settlement and for Final Judgment, given the credit related nature of the claims and the potential identified threat of disclosure (i.e. added potential for identity theft), the Settlement will give each Class Member the opportunity to obtain a credit report giving them information from which to evaluate their relative risk of identity theft, and will also provide them with other valuable information concerning their then present credit position. They will also receive their credit score used by lenders to evaluate the credit position of borrowers and not available with the once annual free FACTA credit report. Class Members have already been provided, with their mailed Notices, with a Credit Brochure that explains - in detail - their rights as consumers under the FCRA. Each Class Member will also have a right to receive a \$20 check from the Defendant. To participate in the Settlement, Class Members need only submit a timely Claim Form.

This Settlement is extremely beneficial to the Class. All Class Members will receive Settlement benefits that are closely tailored to the facts and legal circumstances governing their claims without having to prove their claims individually, without having to participate in depositions and other discovery, without experiencing delays in obtaining recovery, and without facing the risk of not recovering at all.

1 Plaintiff requests reasonable compensation for his counsel's legal fees and
2 expenses in the amount of \$750,000. This amount represents less than Plaintiff's
3 counsel's current total lodestar and costs, and does not provide additional
4 compensation for future work to be performed in administration of the Settlement.
5 Although multipliers are often awarded in complex class actions, Plaintiff's counsel
6 agreed to the requested fee in order to resolve the litigation and to ensure that the
7 Class would receive the substantial benefits already agreed upon. Plaintiff's counsel
8 believes that the requested fee is more than reasonable given the contingency risk of
9 this litigation, the complexity and novelty of the issues presented in this case,
10 counsel's qualifications, experience, and performance, and the excellent results
11 achieved.

16 III. History of the Litigation

17 The history of the litigation is set forth fully in the Supplemental Declaration of
18 Terry Smiljanich in Support of Plaintiff John S. White's Motion for Award of
19 Attorneys' Fees and Costs (Docket Entry 127) and in the Declaration of Douglas
20 Bowdoin in Support of Plaintiff John S. White's Motion for Award of Attorneys' Fees
21 and Costs (Docket Entry 128). Over two years ago, in January 2005, Class Counsel
22 began its investigation into the factual and legal circumstances of this case. The
23 investigation included interviews with class representative John S. White; extensive
24 research into the FCRA, its history, its legislative history, caselaw interpreting the
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1 relevant provisions of the FCRA, and the impact of recent amendments to the FCRA
2 on the claims asserted in the case; and extensive research on the Defendant and its
3 practices relating to pre-screening, target marketing, and making offers of credit to
4 consumers. After an extensive investigation, Class Counsel concluded that viable
5 causes of action existed against the Defendant and prepared a Complaint. The
6 Complaint was filed in May 2005.
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9 During the pendency of this litigation, Class Counsel traveled to San Francisco and
10 participated in several case management conferences. Throughout the litigation,
11 Class Counsel engaged in extensive discussions with Defendant regarding the scope
12 of discovery, scheduling, and Defendant's continuing requests to bifurcate discovery
13 in order to delay all discovery on the issue of willfulness.
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16 In late 2005, Class Counsel prepared written discovery which it subsequently
17 served on the Defendant. Class Counsel reviewed and analyzed the discovery
18 responses and documents produced by the Defendant. Class Counsel assisted Mr.
19 White in responding to Defendant's discovery requests and traveled with Mr. White
20 to California to assist in preparation for and to attend his deposition in January 2006.
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22 In January 2006, Class Counsel traveled to San Francisco to take depositions of three
23 corporate witnesses designated to testify on behalf of the Defendant.
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26 In October 2005, shortly after the case management conference, Defendant filed
27 a motion for partial judgment on the pleadings. Class Counsel extensively researched
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1 and briefed the issues presented in Defendant's motion. Class Counsel traveled to
2 San Francisco to attend a hearing on Defendant's motion for partial judgment on the
3 pleadings. In January 2006, the Court granted Defendant's motion for partial
4 judgment on the pleadings due to its decision that recent amendments to the Fair
5 Credit Reporting Act eliminated a private right of action for Plaintiff's claims under
6 § 1681m(d) of the FCRA.¹ However, the majority of Plaintiff's claims were left
7 intact.²

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10 In January 2006, after completing substantial discovery, Class Counsel prepared
11 and filed a Motion for Class Certification on behalf of Mr. White. In February 2006,
12 Defendant filed its opposition to Plaintiff's Motion for Class Certification, in which
13 it vigorously opposed certification of the class and attacked the qualifications of Mr.
14 White as class representative. Class Counsel filed a reply to Defendant's opposition
15 in February 2006. In March 2006, Class Counsel traveled to San Francisco to attend
16 a hearing on Plaintiff's Motion for Class Certification. Subsequent to the hearing,
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22 ¹ The issue of whether FACTA eliminated a private right of action for
23 violations of 15 U.S.C. § 1681m(d) is currently on appeal before the Ninth
24 Circuit in the case of *Putkowski v. Irwin Home Equity Corp.*, No. 06-15809
25 (9th Cir.)

26 ² In determining a reasonable fee, the lodestar includes time spent on all
27 related matters, even those that did not succeed, as long as an excellent
28 overall result is achieved. *Hensley*, 461 U.S. at 435 (1983). "The fee award
should not be reduced simply because the plaintiff failed to prevail on every
contention raised in the lawsuit." Clearly, the claims which were dismissed
were related factually and legally to the surviving claims, as all arose out of
Defendant's common course of conduct in pre-screening consumers for
mailed solicitations for credit. See, e.g., *Webb v. Sloan*, 330 F.3d 1158,
1168-69 (9th Cir. 2003).

1 Plaintiff's Counsel continued to research the appropriateness of certification of
2 Plaintiff's claims, including the Defendant's financial ability to withstand a class
3 judgment, and filed several Notices of Supplemental Authority in Support of
4 Plaintiff's Motion for Class Certification. In August 2006, this Court granted
5 Plaintiff's Motion for Class Certification. Class Counsel began preparing Notice to
6 be sent to the Class and making arrangements for the mailing of such Notice.
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9 During the pendency of the litigation, Class Counsel participated in court-ordered
10 pre-mediation telephone conferences with opposing counsel and a mediator. In
11 October 2006, Class Counsel traveled to California to attend a mediation conference.
12 The mediation resulted in a settlement regarding the benefits to be provided to the
13 class. After the class relief had been agreed upon, Class Counsel engaged in lengthy
14 negotiations over several weeks regarding the payment to Class Counsel of attorneys'
15 fees and expenses. Ultimately, the parties reached a compromise by which Defendant
16 agreed not to oppose by Class Counsel's request for attorneys' fees and costs in the
17 total amount of \$750,000 for all plaintiff's counsel.
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21 Class Counsel then drafted a settlement agreement and related settlement
22 documents, including the Notice of Proposed Class Action Settlement, the Class
23 Brochure, and other documentation. Class Counsel engaged in extensive
24 communications with Defendant's counsel regarding the settlement documents,
25 including the wording of the Settlement Agreement and the wording and form of the
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1 Class Notice and Claim Form. On November 17, 2006, Plaintiff's Counsel filed a
2 Motion for Preliminary Approval of Settlement on behalf of Mr. White. Class Counsel
3 traveled to San Francisco to attend a hearing on Plaintiff's Motion for Preliminary
4 Approval of Settlement on December 1, 2006. On December 5, 2006, this Court
5 granted preliminary approval of the proposed Settlement.
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8 In accordance with this Court's Order Preliminary Approving the Settlement,
9 Class Notice was mailed out on January 16, 2007. Class Counsel created a website,
10 www.whitecasesettlement.com, referred to in the Class Notice, which provides
11 information to Class Members regarding the Settlement, including answers to
12 Frequently Asked Questions, and provides a telephone number which Class Members
13 may call to speak to Class Counsel. The Class Notice itself also contains a telephone
14 number to reach Class Counsel. Class Counsel has provided assistance to over 100
15 Class Members who have contacted them via telephone seeking legal advice and
16 additional information concerning the litigation and proposed Settlement.
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20 The response to the proposed Settlement has been favorable. The deadline for
21 opt-outs passed on February 15, 2007. As of February 20, 2007, the Claims
22 Administrator had received only 35 opt-out requests. The deadline to object passed
23 on February 20, 2007. Only two objections to the proposed Settlement were
24 submitted. In contrast, as of February 20, 2007, the Claims Administrator had
25 received 7,500 claim forms submitted by Class Members indicating their desire to
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1 participate in the Settlement and receive Settlement benefits. There are still over five
2 weeks remaining before the claim submission period closes on April 2, 2007, and the
3 number of Claim Forms submitted will undoubtedly increase.
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5 **IV. Plaintiff's Request for an Award of Attorneys' Fees and Costs**
6 **is Reasonable**

7 Courts have long recognized the common fund doctrine, under which attorneys
8 who create a recovery benefitting a group of people are awarded their fees and costs
9 out of the recovery. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980);
10 *Trustees v. Greenough*, 106 U.S. 267 (1882). When the Settlement in this case created
11 a recovery for the Class and negotiated amount for Plaintiffs' counsel's fees, this case
12 became a common fund case. *Staton v. Boeing Co.*, 327 F.3d 938, 966-69 (9th Cir.
13 2003); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 563-64 (7th Cir. 1994)
14 (action that began as statutory fee shifting case under ERISA and was subsequently
15 settled would not be governed by the fee shifting provision of ERISA but would
16 instead be a common fund case for determination of the fee award to plaintiffs'
17 counsel). In common fund cases, such as this one, "the district court has discretion
18 to apply either the lodestar method or the percentage-of-the-fund method in
19 calculating the fee award." *Pincay Investments Co. v. Covad Communications Group*,
20 90 Fed. Appx. 519, 511 (9th Cir. 2004) (citing *Fischel v. Equitable Life Assurance*
21 *Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002)). "Under the lodestar method, the court
22 multiplies a reasonable number of hours by a reasonable hourly rate." *Fischel*, 307
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1 F.3d at 1006. Under the lodestar method, the court may adjust the lodestar by adding
2 a multiplier or enhancer. *E.g., Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir.
3 2003); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).
4 “[T]here is a strong presumption that the lodestar figure represents a reasonable fee.”
5 *D’Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990)
6 (internal citations omitted). Plaintiff has requested an award of attorneys’ fees to be
7 derived by applying the “lodestar” method. As discussed above, Plaintiff is not
8 requesting a multiplier.³

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12 A detailed chronology of this litigation is set forth in this memorandum and in the
13 declarations of Terry Smiljanich and Douglas Bowdoin already submitted to this
14 Court. The facts which have been set forth demonstrate that Class Counsel undertook
15 an extensive investigation, engaged in complex and hard fought litigation in which
16 they overcame significant hurdles and achieved class certification, and participated
17 in arms-length settlement negotiations that resulted in an excellent result for the Class.
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21 ³In determining whether to award a multiplier, courts will consider such factors
22 as the novelty and difficulty of the issues in the case, the level of skill required, the
23 amount involved and results obtained, and the experience reputation and ability of
24 counsel. *Hensley*, 461 U.S. at 430 n.3 (citing *Johnson v. Georgia Hwy. Express, Inc.*,
25 488 F.2d 714 (5th Cir. 1974)). Although Plaintiff is not requesting a multiplier,
26 Plaintiff submits that the reasonableness of his Counsel’s fee is exemplified by the
27 presence of factors which would support a multiplier. This case required Class
28 Counsel to litigate difficult and novel issues regarding whether Defendant’s
solicitations contained a “firm offer of credit” under FCRA. Plaintiff’s counsel is
highly qualified and experienced in the area of the FCRA and consumer class action
litigation. Opposing counsel vigorously contested both the merits of the case and
class certification. Class Counsel drew upon their extensive experience prosecuting
class cases and was able to achieve class certification and negotiate an excellent result
that is specifically tailored to address the privacy violation at issue and added potential
for identity theft.

1 For his counsel's successful efforts, Plaintiff seeks an award of attorneys' fees and
2 costs in the total amount of \$750,000.

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4 At all times during this litigation, Class Counsel kept contemporaneous and
5 accurate records of all time expended in the investigation, litigation and settlement of
6 this matter. The total lodestar of all plaintiff's counsel is set forth in the Supplemental
7 Declaration of Terry Smiljanich in Support of Plaintiff John S. White's Motion for
8 Award of Attorneys' Fees and Costs. The total lodestar of all plaintiff's counsel, as
9 of January 30, 2007, is \$745,923. Costs expended by all plaintiff's counsel total
10 \$29,625.27. Thus, the amount of fees and costs requested is less than that actually
11 expended. Class Counsel has spent additional time on this case as of January 30,
12 2007, and estimates that they will spend an additional 175 hours, and incur additional
13 costs, before the Settlement becomes final and administration is completed. If any
14 appeals are filed, this estimate will likely increase dramatically.

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16 Plaintiff submits the expert declaration of Michael Rubin in further support of his
17 Motion for Award of Attorneys' Fees and Costs (attached as Exhibit B). In viewing
18 whether the requested fee is reasonable, Class Counsel urges the Court to give great
19 weight to the opinion of Michael Rubin, who is highly respected and has vast
20 experience in complex litigation. Mr. Rubin's declaration evidences the
21 reasonableness of the number of hours expended as well as Class Counsel's hourly
22 rates. Class Counsel's hourly rates range from \$350 for associates to \$550 for the
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1 most senior partner. As Mr. Rubin demonstrates, Class Counsel's hourly rates are at
2 or below the comparable market rate for attorneys in the San Francisco Bay area,
3 which range from \$650 to \$900 per hour. Rubin Dec. ¶ 9. Class Counsel's hourly
4 rates are clearly reasonable. Mr. Rubin also reviewed the hours expended by counsel
5 in this litigation and found that they were reasonable, stating: "Comparing the work
6 performed by plaintiffs' counsel with what I know is required to successfully handle
7 complex class action litigation . . . it is my opinion that the time plaintiffs' counsel
8 spent litigating this case was fair and reasonable and well within the range of what
9 similarly-skilled and experienced counsel would have been expected to bill." Rubin
10 Dec. ¶ 11.

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15 Alternatively, and by comparison, Plaintiff's fee request is also more than
16 reasonable under the "percentage-of-the-fund" method. In the Ninth Circuit, 25% of
17 the fund is the benchmark award for attorneys' fees. *Hanlon v. Chrysler Corp.*, 150
18 F.3d 1011, 1029 (9th Cir. 1989). Each of the 200,000 Class Members are entitled to
19 receive a \$20 check and a credit report and FICO score from Equifax with a retail
20 price of \$15.95. (See Equifax website, available at:
21 https://www.econsumer.equifax.com/consumer/sitepage.html?forward=cpo_detail).
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23 The fund created in the instant case has a minimum value of \$7,190,000.⁴ This does
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26 ⁴The Supreme Court has held that the common fund, for the purposes of
27 determining an award of attorneys' fees to plaintiffs, is the fund as a whole, including
28 the unclaimed portion of any benefits made available to class members. *Boeing Co.
v. Van Gemert*, 444 U.S. 472 (1980) (plaintiffs' counsel's fees were properly awarded
from the total fund available, including the unclaimed portion of the recovery, because
each class member could obtain his or her share of the recovery).

1 not include the educational value of the Class Brochure or the value of earlier
2 detection of identity theft. It also does not include the agreed upon attorneys' fees,
3 which is included in the common fund for the purposes of determining the percentage
4 of the fund to be paid as attorneys' fees. See Manual for Complex Litigation, Fourth
5 § 21.7. The fee requested is approximately 10% of the minimum value of the
6 common fund. It is well within the Ninth Circuit benchmark for a reasonable fee.
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9 **V. Conclusion**

10 For the foregoing reasons, Plaintiff respectfully request that this Court grant
11 Plaintiff's Motion for an Award of Attorneys' Fees and Costs in the amount of
12 \$750,000.
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15 Respectfully submitted,

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18 **JAMES, HOYER, NEWCOMER &
SMILJANICH, P.A.**

19 By: s/Terry A. Smiljanich
20 **Terry A Smiljanich**
21 (Appearance Pro Hac Vice)

22 **GAIL KILLEFER, ESQ.**

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24 **DOUGLAS BOWDOIN, P.A.**
25 Douglas Bowdoin
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Attorneys for Plaintiffs

PROOF OF SERVICE

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I, Dobrila Stephens, declare as follows:

I, am a resident of the State of Florida, over the age of eighteen years, and not a party to the within action. My business address is James, Hoyer, Newcomer & Smiljanich, P.A., 4830 W. Kennedy Blvd., Suite 550, Tampa, Florida 33609.

On February 23, 2007 at Tampa, Florida, I served the following document(s) listed below as follows:

PLAINTIFF’S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS MOTION FOR AWARD OF ATTORNEYS’ FEES AND COSTS

- BY ELECTRONIC MAIL: I transmitted by electronic mail a true and correct copy of the above referenced documents to the persons shown below.
- BY OVERNIGHT MAIL: I sent a true and correct copy of the document(s) for delivery to the persons shown on the attached list.
- BY U.S. MAIL: I placed a true and correct copy of the document(s) in a sealed envelope with first class postage fully prepaid in the United States Mail at Tampa, Hillsborough County, Florida, addressed as shown on the attached list.

XX BY ELECTRONIC FILING with the Court CM/ECF system: I transmitted by electronic filing a true and correct copy of the above referenced documents to the persons shown on the listed below.

Lee H. Rubin	Victoria R. Collado
Rena Chng	Melissa J. Pastrana
Mayer, Brown, Rowe & Maw LLP	Mayer, Brown, Rowe & Maw
Two Palo Alto Square, Suite 300	71 South Wacker Drive
Palo Alto, CA 94306	Chicago, IL 60606

Executed on February 23, 2007 at Tampa, Florida.

s/Dobrila Stephens
Dobrila Stephens