IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAVID G. RAY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiff, v. TIERONE CORPORATION, GILBERT G. LUNDSTROM, EUGENE B. WITKOWICZ, MICHAEL J. FALBO, AND CHARLES W. HOSKINS, Defendants.	Case No. 8:10-cv-00199 **LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION**
DOUGLAS L. STEJSKAL, Plaintiff, v. GILBERT G. LUNDSTROM, Defendant.	Member Case No. 4:10-cv-3177
DOUGLAS L. STEJSKAL, Plaintiff, v. JAMES A. LAPHEN, Defendant.	Member Case No. 8:10-cv-332

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I. INTRODUCTION

Lead Plaintiffs Vincent Valentino, Raoul and Sharon Turcot, and Eric Follestad (collectively, "The Valentino Group" or "Lead Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the class action settlement and plan of allocation of settlement proceeds, pursuant to Federal Rules of Civil Procedure 23(e), as set forth in the Stipulation of Settlement, dated May 25, 2012 (the "Stipulation"). This Action has been settled for a $3,100,000 cash payment. It is the product of non-collusive negotiations between counsel with vast experience in these types of cases, with the mediation assistance of retired United States District Judge Layn R. Phillips (W.D. Okla.). All parties to this litigation firmly believe that the settlement is fair, reasonable and adequate and recommend that it be approved.

II. OVERVIEW OF THE LITIGATION[1]

This Action[2] is brought on behalf of behalf of purchasers of TierOne Corporation ("TierOne" or the "Company") common stock between August 9, 2007 and May 14, 2010, inclusive (the "Class Period"). By Order dated October 12, 2010, the Valentino Group was appointed to serve as lead Plaintiff, and the Rosen Law Firm, P.A. was approved as Lead Counsel. *See* Kim Decl., ¶ 10.

The Settlement was brought to fruition only after hard-fought litigation and investigation by Lead Counsel. This Action was carefully investigated and vigorously litigated from start to finish. Throughout this Action, Defendants have asserted aggressive defenses and have maintained that plaintiffs could not prevail on their claims.

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[1] For the sake of brevity, a full description of the procedural history and facts of this Action have been omitted. It can be found in the Declaration of Phillip Kim, filed herewith ("Kim Decl."), ¶¶ 7-16, attached as Exhibit 1, of the Index filed herewith.

[2] Unless otherwise defined, capitalized terms herein have the same meanings attributed to them in the Stipulation and Agreement of Settlement, dated May 25, 2012.

The Settlement was not achieved until Lead Plaintiff and their counsel's: (a) review and analysis of relevant filings made by TierOne with the United States Securities and Exchange Commission (the "SEC"); (b) review and analysis of defendants' public documents, conference calls and press releases; (c) review and analysis of securities analysts' reports and advisories concerning the Company; (d) review and analysis information readily obtainable on the Internet; (e) interviews of over a dozen witnesses with personal knowledge of the relevant facts through Lead Counsel's private investigators; (f) consultation with experts in banking and banking regulations, forensic accounting, and damages; (g) substantial motion practice, including the drafting of the Initial Complaint, Consolidated Amended Complaint and Second Amended Consolidated Complaint; (h) pressing and preserving the Class' claims in the bankruptcy court; (i) preparation and participation in extensive settlement negotiations with the aid of a nationally regarded mediator, Judge Layn R. Phillips (ret.); and (j) obtaining the settlement offer following arm's-length negotiations with defense counsel and prepare the documents necessary to obtain preliminary and final approval of the Settlement. Kim Decl., ¶ 6.

To date, over 13,000 claim packets, including the detailed "Notice of Pendency and Settlement of Class Action," ('the "Notice") and "Proof of Claim and Release" form have been sent by first-class mail to potential Settlement Class Members, and a Summary Notice has been timely published in *Investor's Business Daily* and electronically on *GlobeNewswire*. *See* Declaration of Josephine Bravata Concerning Mailing of Notice of Pendency and Settlement of Class Action and Proof of Claim and Release Form ("Bravata Decl."), ¶¶ 4, 7 (attached as Exhibit 2 to Index filed herewith). The deadline to request exclusion was September 14, 2012 and to object is October 11, 2012. To date, there have been only 7 requests for exclusion and 2 objections (one was withdrawn). Bravata Decl., ¶¶ 9-10.

As detailed in the Kim Declaration, the Settlement represents a realistic assessment by knowledgeable and experienced attorneys of the risks of further proceedings. This includes the failure of TierOne, which has created severe financial distress. Kim Decl., ¶ 8. Furthermore, TierOne has filed a Chapter 7 bankruptcy petition, and TierOne and certain individual defendants are subject to ongoing civil and regulatory proceedings and investigations. Kim Decl., ¶ 44. Thus, not only is it unlikely that TierOne will be able to satisfy a greater judgment, there is the substantial risk that were the Action continue for a significant amount of time, even the current Settlement amount would become unrecoverable. The Settlement, on the other hand, confers an immediate and substantial benefit on the Settlement Class. It represents a recovery of approximately 13.5% of the Class' maximum damages of $23 million, and eliminates the risk, expense and uncertainty of continued litigation under circumstances where a more favorable outcome was at great risk. Kim Decl., ¶¶ 38-45. By any objective measure, the Settlement is fair, reasonable, and adequate.

III. ARGUMENT

A. Legal Standards for Final Approval of Class Action Settlement

Federal Rule of Civil Procedure 23(e) provides that "the district court acts as a fiduciary, serving as a guardian of the rights of absent class members." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005); *Desert Orchid Partners, L.L.C. v. Transaction Systems Architects, Inc.*, 2007 WL 703515, at *1 (D. Neb. March 2, 2007). In deciding whether to approve a proposed settlement, the Eighth Circuit indicates that a "'strong public policy favors [such] agreements, and courts should approach them with a presumption in their favor.'" *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (quoting *Little*

Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371, 1388 (8th Cir. 1990)); *Justine Realty Co. v. Am. Nat'l Can Co.*, 976 F.2d 385, 391 (8th Cir. 1992).

A proposed class settlement that has been reached after an arm's-length negotiation by capable counsel with the assistance of a skilled mediator is presumptively fair. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1178 (8th Cir.1995). Consequently, in making its assessment pursuant to Rule 23(e), the Court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. *Wireless*, 396 F.3d at 934; *Petrovic*, 200 F.3d at 1148; *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975).

As explained below, the Settlement was reached after extensive investigation and litigation by experienced counsel on both sides, and then only after protracted arms-length negotiations. Under these circumstances, the Settlement should be afforded the presumption of fairness.

B. The Settlement Is Fair, Reasonable and Adequate

Under Rule 23(e), a court must find that the proposed settlement is fair, reasonable and adequate in approving it. *Wireless*, 396 F.3d at 932; *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988); *Grunin*, 513 F.2d at 123; *DeBoer*, 64 F.3d at 1176. To determine whether a proposed settlement is fair, reasonable, and adequate, a court must examine the following factors: (1) the possible rewards of continued litigation weighed against the benefits of settlement; (2) the defendants' financial condition; (3) the complexity and expense of further

litigation; and (4) the amount of opposition of the settlement. *Wireless*, 396 F.3d at 932. As applied to the instant action, these factors all point toward approval of the proposed.

The Court is "entitled to rely on the judgment of experienced counsel when evaluating the merits of a proposed class action settlement." *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1420 (D. Minn. 1987); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 667 (D. Minn. 1974) (the recommendation of experienced counsel is entitled to great weight). And "a presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery." *See* Manual for Complex Litigation §30.42 (3d ed. 1995). Here, the judgment of experienced securities counsel is that this settlement is fair, reasonable and adequate. *See* Kim Decl., ¶¶ 52-54.

1. Strength of Plaintiffs' Case Weighed Against the Benefits of the Settlement

The most important consideration in determining whether a settlement is fair, reasonable, and adequate is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Petrovic*, 200 F.3d at 1150 (citation omitted). In reaching this determination, courts balance the continuing risks of litigation against the immediate and certain benefits afforded to class members in a recovery. *See Grunin*, 513 F.2d at 124; *Welsch v. Gardebring*, 667 F. Supp. 1284, 1290 (D. Minn. 1987). In approving class action settlements, courts have recognized stockholder suits are "notoriously unpredictable and uncertain." *In re BankAmerica Corp. Securities Litigation*, 210 F.R.D. 694, 709 (E.D. Mo. 2002) (citations omitted). Furthermore, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000)). While the plaintiffs believe they have the arguments and evidence to support

their claims and would prevail, victory in such a complex trial is not assured. *See* Kim Decl., ¶ 47.

Plaintiffs and the Class faced serious obstacles in successfully opposing Defendants' extensive motions to dismiss primarily due to issues surrounding Plaintiffs' falsity and materiality, scienter, and loss causation and damages. Moreover, assuming that this Action survived Defendants' motions to dismiss, Lead Plaintiffs would have also faced similar obstacles to recovery at the proof stage. *E.g.* Kim Decl., ¶¶ 40-43.

Preliminarily, Eighth Circuit law on adequately pleading a securities fraud claim is stringent and difficult to satisfy. *E.g.*, *Horizon Asset Mgmt. v. H&R Block, Inc.*, 580 F.3d 755, 761 (8th Cir. 2009) (complaint failed to raise "strong inference of scienter" for each defendant and each misstatement); *McAdams v. McCord*, 584 F.3d 1111, 1115 (8th Cir. 2009) (complaint failed to allege loss causation adequately); *In re 2007 Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 883 (8th Cir. 2009) (complaint failed to allege "specific facts indicating why those statements were false"); *In re Hutchinson Tech., Inc. Sec. Litig.*, 536 F.3d 952, 961 (8th Cir. 2008) (even if defendant's "projections were off, no facts alleged support the inference that those statements were false when made"); *In re Ceridian Sec. Litig.*, 542 F.3d 240, 244 (8th Cir. 2008) ("[I]t is not sufficient for the facts alleged to give rise to a weak or plausible or even reasonable inference of scienter"); *Elam v. Neidorff*, 544 F.3d 921, 927 (8th Cir. 2008) (pleading requirements "cannot be satisfied with allegations that defendants made statements 'and then showing in hindsight that the statement is false'"); *In re AMDOCS Ltd., Sec. Litig.*, 390 F.3d 542, 548 (8th Cir. 2004) (affirming dismissal under bespeaks caution doctrine); *In re Navarre Sec. Litig.*, 299 F.3d 735, 742 (8th Cir. 2002) ("investors fail to plead the existence of any facts

or further particularities that, if true, demonstrate that the defendants had access to, or knowledge of, information contradicting their public statements").

Defendants assert that Lead Plaintiffs fail to adequately allege falsity and materiality, as the alleged false statements of ALL were merely estimates and were accompanied by adequate cautionary language. Defendants also argue that Plaintiffs had failed to adequately scienter, i.e. that any specific individual TierOne officer or director knowingly or intentionally made a false or misleading statement to investors. Kim Decl., ¶ 13. While Lead Plaintiffs believed that they had adequately alleged knowing and intentional conduct to overcome defendants falsity, materiality and scienter arguments, alleging, let alone, proving an individual's state of mind is difficult and would have presented a formidable challenge at the proof stage. Kim Decl., ¶ 38.

Beyond the complications surrounding the pleading and proof of falsity and materiality, and scienter, Lead Plaintiffs, through expensive and highly complex expert testimony, would have to prove loss causation and damages; in particular, that the revelation of the fraud caused the price of TierOne's stock to fall. Defendants would have presented their own expert testimony to demonstrate that the alleged stock drops were not the proximate cause of the revelation of the fraud or attempt to demonstrate that a portion of the alleged stock drops were attributable to things unrelated to the fraud or were instead attributable to general market movement. Consequently, expert discovery and trial preparation would be expensive and complex. While certainly attainable, victory in such a complex trial is hardly assured:

> In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad non-actionable factors such as general market conditions.

In re Warner Comm. Sec. Litig., 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985); *see also In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *23 (noting that class actions have a well

deserved reputation as being the most complex) (citation omitted); *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (same).

Likewise, there will be a battle of the experts at the proof stages for falsity and scienter. For example, banking or accounting expert would opine on the obviousness of a particular rule or regulations, which would be probative as to whether a defendant acted with scienter or with mere negligence. Kim Decl., ¶ 40.

Although Lead Plaintiffs believe they have arguments and evidence to counter each one of Defendants' positions, and are confident that their presentation would have overcome Defendants' motion to dismiss and carried the burden of proof at trial, there is no way to guarantee that this would indeed be the case. A conclusion that is especially true when one considers the number and complexity of the defenses laid out above, the heightened pleading standards of the Private Securities Litigation Reform Act, and the difficulties of proof under the federal securities laws. Accordingly, this factor supports approval of the Settlement.

2. Defendants' Financial Condition

A crucial factor in determining the adequacy of a proposed settlement is "the ability to ultimately collect a favorable recovery from a defendant is an important factor in determining the adequacy of a proposed settlement." *Spencer v. Comserv Corp.*, 1986 WL 15155, at * 7 (D. Minn. Dec. 30, 1986). TierOne has failed. Individual defendants' wealth was tied to their ownership of TierOne stock and the waged they earned from the Company. TierOne's stock is worthless, given the bankruptcy. TierOne and the individual defendants face ongoing civil and regulatory proceedings and investigations, which makes any future recovery after a prolonged litigation questionable. Kim Decl., ¶ 44.

3. The Complexity and Expense of Further Litigation

Courts have held that the complexity, expense and duration of the litigation should be considered in assessing the fairness, reasonableness and adequacy of a settlement. *Pfizer Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972). Therefore, the present Settlement must be weighed against the delay and expense of pursuing a more favorable result at trial. *Grunin*, 513 F.2d at 124.

Settlements are encouraged "to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto." *Pfizer*, 456 F.2d at 543. In the absence of this Settlement, the expense and duration of this litigation would increase, "'all the while class members would receive nothing.'" *Wireless*, 396 F.3d at 933 (citation omitted). Even if an adjudication on the merits is in favor of the plaintiffs, defendants would likely appeal. *See, e.g., National Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523 at 527 (C.D. Cal., 2004) (if a class action obtains a successful judgment, an appeal is likely to follow). As a result, the risk of the plaintiffs ultimately not prevailing would remain high and the case would be prolonged. *See, e.g., In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) (delay from appeals is a factor to be considered), *aff'd*, 798 F.2d 35 (2d Cir. 1986). Accordingly, this factor weighs in favor of this Court's approval of the settlement.

4. The Amount of Opposition to the Settlement

Pursuant to the Court's Notice Order, 13,986 Notices were sent to Class Members and the Summary Notice was published in *Investors' Business Daily* and published electronically on *GlobeNewswire*. *See* Bravata Decl., ¶¶ 5-7. The deadline to object was October 11, 2012. *Id.*, ¶ 10.

To date, Lead Plaintiffs have received 2 (two) objections from purported class members—as one was withdrawn. *See* Bravata Decl., Ex. E. The objections should be overruled. Plaintiffs will address any further objections that are filed, in their reply, which is five calendar days prior to the Settlement Hearing. *See* Docket no. 111, ¶18.

- Betty L Van Boening, Ms. Boening is not a class member, thus she has no standing to object. She purchased 200 shares TierOne stock for $2,000 on October 1, 2002, nearly five years before the Class Period. Her dispute appears to be with American Stock Transfer & Trust Company for that company's purported failure to return her TierOne stock certificates.

- John Reimnitz, Mr. Reimnitz purchased of 585 shares of TierOne stock for $274.29. While termed as an "objection," he is merely seeking more time to submit his claim. Mr. Reimnitz claims that he did not receive his claim form until September 3, 2012 due to his claim form being forwarded to his new address by the post office. Lead Counsel, pursuant to ¶E4 of the Stipulation has instructed the Claims Administrator to contact Mr. Reimnitz to inform him that his late claim will be accepted given the Post Office issue. Mr. Reimnitz has since withdrawn his objection. *See* Bravata Decl., ¶ 10 & Ex. F.

- Ron Brimmer, Mr. Brimmer purchased 100 shares of TierOne stock on January 24, 2008 for $1,970. Mr. Brimmer states that he "disagree[s] with this settlement" on the grounds that a purported "buy out did not happen" and based on his belief that some unidentified persons "made money on the speculation." Lead Plaintiffs do not know what to make of this objection, as no cognizable reason related to the claims in this Action is cited.

- In short, only Brimmer and Van Boening represent only 300 shares out the over 12 million outstanding shares.

Additionally, the deadline to seek exclusion from the Class was September 11, 2012. Plaintiffs have received purported requests for exclusion from 7 (seven) shareholders. *See* Bravata Decl., ¶ 9, & Ex. D. Only two requests for exclusion appear to be submitted by actual class members, Martin Klotovich and Gary Peck, collectively representing 350 shares of TierOne Stock. *Id.*[3]

The other "exclusions" are not made by class members or are defective.

- TierOne Corporation and TierOne Corporation's bankruptcy estate submitted a "notice of non-inclusion." These entities are not Class Members nor were they intended to be Class Members.

- Mark G. Bernadiner and Dmitri M Egorov as JTTEN submitted a defective exclusion request as they did not indicate if they were class members or provide a listing of their purchases of TierOne stock as required by the Notice at ¶ 10. *Cf.* Bravata Decl., Ex. A (the Notice) & Bravata Decl., D.

- Jeff and Janie Kuester state that "[n]o purchases or shares of TierOne stock were made individually or jointly during the Class Period." By definition, the Kuesters are not Class Members and cannot exclude themselves from a Class they are not members of.

- Martin L. Grotelueschen is not a Class Member because he has sought exclusion based on 100 shares he purchased in October 1, 2002.

- Gerald M. and Linda Sue Bontrager submitted a defective exclusion request by only noting that they purchased 50 shares TierOne stock "several years ago." It is unclear whether they are even Class Members.

[3] Gary Peck has sought to exclude himself from the settlement and object. Mr. Peck cannot object if he is excluded from the class action- as he is no longer a class member. Given that he has excluded himself from the Class his objection should be overruled as moot.

In short, in an abundance of caution, Lead Plaintiffs will accept all seven requests for exclusion. A list of the excluded parties are set forth as an exhibit to the proposed order and final judgment filed as Exhibit 3 to the Index.

Given that no authorities are cited for the conclusory objections, and the Settlement has thus far been overwhelmingly approved by majority of the Class, this factor supports final approval. *See Petrovic,* 200 F.3d at 1152 (approving settlement where "fewer than 4 percent of the class members objected to the settlement"); *In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (district court did not err in approving a settlement where there was a handful of objectors and one opt-out in a 5,400 member class); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (Twenty-nine objections out of 281 class members "strongly favors settlement").

5. The Plan of Allocation Is Fair and Reasonable and Should Be Approved

"Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate." *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 262 (D.N.H. 2007) (citing *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005)). The standard for approval of a plan of allocation is not rigorous. "When formulated by competent and experienced class counsel," a plan of allocation "need have only a 'reasonable, rational basis."' I*n re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004); *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993) (stating that "[t]he court . . . affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved" in approving distribution of settlement proceeds).

The Net Settlement Fund will be distributed to Authorized Claimants – *i.e.*, members of the Class who submit timely and valid Proofs of Claim – in accordance with the Plan of

Allocation set forth in the Notice. The Plan of Allocation treats all Class Members in a similar manner: everyone who submits a valid and timely claim, and who has not excluded himself, herself or itself from the Class, receives a *pro rata* share of the Net Settlement Fund in the proportion that the Class Member's recognized loss bears to the total of all recognized losses. The "Recognized Loss," as used in the Plan, is not market loss. Rather, it is a calculation used to arrive at a weighted loss figure for the purpose of calculating an Authorized Claimant's pro rata participation in the Net Settlement Fund.

The Plan of Allocation, which was developed in consultation with Lead Plaintiff's damages consultant, reflects Lead Plaintiff's allegations that the price of TierOne's common stock was artificially inflated during the Class Period because of Defendants' materially false and misleading statements concerning the Company and its results, and that the truth regarding those facts leaked out to the market, through partial corrective disclosures correcting that artificial inflation over time during the Class Period. Thus, the amount of artificial inflation decreases through the end of the Class Period as Lead Plaintiffs allege there were numerous partial corrective disclosures during and through the end of the Class Period. The Plan of Allocation provides for a pro rata distribution to each Authorized Claimant.

In short, the Plan of Allocation has a rational basis, Lead Counsel believes it fairly compensates Class Members, and this Court should approve it. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) ("When formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational' basis.")..

IV. CONCLUSION

Whereas both the Settlement and the Plan of Allocation are fair, reasonable, and adequate, Lead Plaintiffs respectfully request that each be approved by this Court.

Dated: September 25, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all CM/ECF participants and counsel of record.

In addition, I certify that on September 25, 2012 copies of the foregoing documents were mailed via United States first class regular mail to the following non CM/ECF participants:

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By: /s/ Phillip Kim