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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

GAIL MEDEIROS, et al.,

Plaintiffs,

vs.

HSBC CARD SERVICES, ET AL.,

Defendants.

TERRY FANNING, et al.,

Plaintiffs,

vs.

HSBC CARD SERVICES, et al.,

Defendants.

STEFAN O. LINDGREN,

Plaintiffs,

Vs.

HSBC CARD & RETAIL SERVICES, et al.

Defendants.

Case No: 2:15-cv-09093 JVS (AFMx)

Case No. 12-cv-00885-JVS- RNB

Relates to Medeiros, Fanning and Lindgren

Hon. James V. Selna

OBJECTION OF CHRISTINE CHAVEZ TO CLASS ACTION SETTLEMENT AND ATTORNEY'S FEES

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INTRODUCTION

As class counsels' fee motion remarks, this matter involves three almost identical class action lawsuits against HSBC for violations of California's Invasion of Privacy Act, Cal. Penal Code Sections 632 and 632.7 ("CIPA").[1] In each suit, plaintiffs allege HSBC violated CIPA by recording telephone conversations with California account holders concerning their HSBC credit card accounts without those account holders' consent.[2]

The first case to settle was *Medeiros et al. v. HSBC Card & Retail Services, Inc. et al.* (No. 3:14-cv-01786-JLS-MDD; No. 2:15-cv-09093-JVS-AFMx after transfer to C.D. Cal) in May, 2015.[3] Under that settlement, HSBC agreed to pay between $4.5 and $6.5 million.

In October, 2015, three firms (Altshuler Berzon LLP, Arleo Law Firm PLC, and Mehdi Law Firm, PC), representing *Terry J. Fanning and Stefan O. Lindgren* in two of the class actions, moved to intervene to oppose preliminary approval.[4] The Court granted the *Fanning/Lindgren* plaintiffs' motion to intervene and their motion to transfer *Medeiros* to this Court.[5]

These three firms vigorously opposed the initial May, 2015 settlement.[6] They complained, *inter alia*, that the settlement in which HSBC agreed not to contest a fee

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[1] 8:12-cv-00885, ECF Doc. 369-1, at 2.

[2] *Id.*

[3] *Id.* at 6.

[4] *Id.* To the extent applicable to this latest proposed settlement, Ms. Chavez incorporates by reference herein Plaintiffs-Intervenors' Opposition to Motion for Preliminary Approval of Settlement

[5] *Id.*

[6] 2:15-cv-09093-JVS-AFM, ECF Doc. 49, *passim.*

award up to 25%, appeared to be a product of collusion.[7] They further challenged the $4.5-$6.5 million award relative to the total potential damages as grossly inadequate.[8] They also opposed the failure to break down groups with disparate claims (and likely recoveries) into subclasses with differing recoveries.[9] For example, the settlement provided for the same recovery for individuals who were called on cell phones rather than landlines even though those with cell phones faced less risk in litigation.[10]

Many of the defects identified by three firms have not been cured. But, the three firms that previously identified them are silent now that they are part of a group asking for 33% of $13 million.[11] That is 8% more than the fees initially sought, which the three firms previously believed was excessive. If 25% was too much, then certainly 33% is.

Although the latest settlement offers $13 million, the class will likely receive no more than $7.6 million after attorneys' fees are deducted and assuming $1 million in administration costs. At the same time, we know that CIPA allows recovery of $5,000 per violation. *See* Cal. Penal Code §630 *et seq.* We also know that HSBC *identified* 146,000 individuals as having been recorded during the class period, and that in total it may have recorded up to 866,000 individuals, many of whom, the evidence shows, were called on multiple occasions.[12]

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[7] *Id.* at 12-14.

[8] *Id.* at 18-19.

[9] *Id.* at 17-18.

[10] *Id.* at 22.

[11] The three firms opposing the prior settlement have submitted $3 million of the collective $3.8 million lodestar. *Id.* at 17.

[12] *Id.* at 19.

Just accounting for the 146,000 identified by HSBC would produce $730 million in damages assuming only one call was made to each person. Or, considering the 866,000 individuals who may have been recorded based on HSBC's estimates, potential damages are at least $4.3 billion. Either way, $7.6 million is 1% or a fraction of 1% of recovery.

Class counsel tout that they doubled recovery from the prior settlement. But here, double a grossly inadequate recovery is still an inadequate recovery.

Just as the initial proposed settlement benefitted class counsel at the expense of the class, so too here. This Court should reject the latest settlement which continues to represent an unjustified discount on potential recovery. In no case should class counsel be awarded 1/3 of this already deficient fund.

STANDING AND PRELIMINARY STATEMENTS

Objector's full name, address, telephone number, are as follows: Christine A. Chavez; 297 Festival Dr., Oceanside, California 92057; 760-390-8451.

Between March 23, 2009 and May 1, 2012, Ms. Chavez received one or more telephone calls in California from or on behalf of HSBC Card Services Inc. See Exhibit 1, Declaration of Christine A. Chavez, attached hereto and incorporated by reference as if set forth in full. Ms. Chavez also received a class notice in the mail indicating that she may be a member of the Settlement Class. See Exhibit 1-A. Upon information and belief, one or more calls that Ms. Chavez received from or on behalf of HSBC Card Services Inc. between March 23, 2009 and May 1, 2012 were recorded or monitored by

or on behalf of HSBC. Ms. Chavez is thus a member of the Settlement Class as defined by the class notice.

Ms. Chavez filed a claim online as directed by the settlement website. *See* Exhibit 1-B. Ms. Chavez has never previously filed an objection to a class action settlement.

To the extent an issue is raised regarding Ms. Chavez's standing as a class member based on whether the calls made to her were recorded or monitored by HSBC, when that information has not been made available to the class, the settlement should fail as violative of Rule 23's ascertainability requirement. *See Belfiore v. Proctor & Gamble Co.*, 311 F.R.D. 29, 65-67 (E.D.N.Y. Oct. 5, 2015); *Red v. Kraft Foods, Inc.*, 2012 WL 8019257, at *4 (C.D. Cal. Apr. 12, 2012) ("[w]hether analyzed under the implied ascertainability requirement, or, the superiority requirement of 23(b)(3) as informed by the manageability component imparted in 23(b)(3)(D), the issue of whether class members will be able to identify themselves to the Court in any even remotely verifiable way remains a significant legal an practical hurdle for Plaintiff's certification under 23(b)(3)").

Objector Christine A. Chavez is represented by local counsel, Timothy R. Hanigan, LANG, HANIGAN & CARVALHO, LLP. Objector is also represented by Bandas Law Firm, PC, as his general counsel in objecting to the settlement. Chris Bandas of Bandas Law Firm does not presently intend on making an appearance for himself or his firm.

Ms. Chavez objects to the settlement and class counsels' request for an excessive fee in the HSBC California Call Recording Lawsuits. The statement of the objections and the grounds therefore are set forth below. Objector does not intend on appearing at

the fairness hearing either in person or through counsel but ask that their objection be submitted on the papers for ruling at that time. Objector relies upon the documents contained in the Court's file in support of these objections. Objection is made to any procedures or requirements to object in this case that require information or documents other than those that are contained herein on grounds that such requirements

This objection is filed for the purpose of improving the settlement for the benefit of the class members. Objector incorporates by reference the arguments and authorities contained in other filed objections, if any, made in opposition to the fairness, reasonableness and adequacy of the proposed settlement, the adequacy of class counsel and to the proposed award of attorneys' fees and expenses that are not inconsistent with this objection.

OBJECTIONS

I. This Court's fiduciary responsibility to the class.

Many courts have commented on the role of the district court as a guardian for the absent class members in deciding whether to approve a settlement or award attorneys' fees. Indeed, because "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). "As a fiduciary for the class, the district court must 'act with a jealous regard to the rights of those who are interested in the fund' in determining what a proper fee award is." *Id.*

II. There is inadequate representation for class members who received calls on cell phones.

The proposed settlement here still fails to differentiate between individuals who were called on cell phones versus those called on landlines. Class counsel were on notice of this defect, and indeed three of the firms contested approval of the prior settlement before this Court on this very ground.[13]

Penal Code §632.7 allows class members called on a cell phone to recover without proof that the conversations were "confidential," which in turn, reduces the risk of litigation. This reduced risk "should be reflected in the settlement by a higher payment."[14]

In failing to allocate funds to account for these two groups with varying risks and recoveries, the settlement fails on adequacy of representation under Fed. R. Civ. P. 23(a)(4). Sub-classes with separate counsel for these groups was required.

Rule 23(a)(4) and the Due Process Clause require that "the representative parties ... fairly and adequately protect the interests of the class," compelling the district court "to uncover conflicts of interest between named parties and the class they seek to represent," as well as the "competency and conflicts of class counsel." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 626 n. 20 (1997). One means of ensuring adequate representation is the formation of sub-classes and appointment of separate counsel. This "allow[s] for adequate structural protections to assure the differently situated plaintiffs negotiate for their own unique interests[.]"*Sullivan v. DB Investments, Inc.*, 667 F.3d 273,

[13] *Id.* at 19.

[14] *Id.* at 18.

327 (3d Cir. 2011) (quotation omitted); *see also Sandoval v. M1 Auto Collisions Centers*, 309 F.R.D. 549, 569–70 (N.D. Cal. 2015) ("[c]lass counsel may be inadequate under Rule 23 if they seek to represent class members with different interests"); *In re Southeastern Milk Antitrust Litig.*, 2:07-CV 208, 2011 WL 3878332, at *4 (E.D. Tenn. Aug. 31, 2011) (rejecting settlement in the face of a conflict of interest that required subclass represented by separate counsel).

The idea that all class members should treated equally, while facially appealing, is not an argument against separate counsel. To the contrary, one of the:

> fatal deficienc[ies] in the *Ortiz* settlement was that all present claimants were treated equally, notwithstanding that some had claims that were more valuable. 'It is no answer to say . . . that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes' for the very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that [the disparate claimants] would have chosen.

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 232 (2d Cir. 2016) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999)).

Because "the need for the adequacy of representation finding is particularly acute in settlement class situations[,]" "[t]hese requirements are scrutinized more closely, not less, in cases involving a settlement class." *Southeastern Milk*, 2011 WL 3878332, at *4. In fact, the Supreme Court requires "undiluted, even heightened, attention in the settlement context [ ]" to the certification requirements of Rule 23. *Amchem,* 521 U.S. at 620. Accordingly, without subclasses and separate counsel taking into account disparate recovery between class members like Ms. Chavez called on her cell phone, and those

with greater obstacles to recovery who received calls on landlines, the settlement and plan of allocation should not be approved.

To be certain, the failure to account for the strength of the claims of these sub-groups amounts to disparate treatment of class members and weighs against approval of the settlement. *See Ybarrondo v. NCO Fin. Sys., Inc.*, No. CIV. 05CV2057-L JMA, 2008 WL 183714, at *2 (S.D. Cal. Jan. 18, 2008) (disapproving a settlement in a Fair Debt Collection Practices Act case where the settlement included debt relief to class members and "provide[d] for the same award to class members who paid all or any portion of their debt upon receiving the allegedly misleading letter as the class members who paid none of their debt", because this "amounts to vastly disparate treatment among class members."); *Sanchez v. Frito-Lay, Inc.*, 2015 WL 4662636, at *10-*11 (denial of preliminary approval of settlement that presumed uniform violation rate without evidentiary support and could unfairly benefits some class members at expense of others).

III. The Latest Proposed Settlement is Still an Unfair Discount on Potential Damages.

As described, *supra*, $7.6 million for the class is a token of the $730 million-$4.3 billion in potential damages based on the $5,000 per violation recovery under CIPA. The 54,247 Direct Payment members alone would have $271 million in potential damages. The remaining "1.67 million individuals who might have been recorded" and who may submit a claim form would have potential damages in the neighborhood of $8 billion.[15]

[15] 8:12-cv-00885-JVS-RNB, ECF Doc. 369-1, at 7.

As the three firms opposing the prior settlement observed, "[a] wide discrepancy between potential recovery and the proposed settlement amount can only be justified where the risk of litigation is high." Plaintiffs-Intervenors' Opposition to Motion for Preliminary Approval of Settlement, 3:14-cv-01786-JLS-MDD, at 19 (citing *See Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 393 (C.D. Cal. May 31, 2007) (preliminary approval was denied where settlement was less than 1% of total exposure, where "[t]he economic value of the Settlement pales in comparison to Plaintiffs' potential recovery through litigation" and "Plaintiffs' prospects for prevailing in this litigation are not so bleak as to render this a 'good value for a relatively weak case'"); *Myles v. AlliedBarton Sec. Servs., LLC*, No. 12-CV-05761-JD, 2014 WL 6065602, at *4 (N.D. Cal. Nov. 12, 2014) (preliminary approval denied where maximum potential recovery was $18.9 million and the maximum settlement amount was $1.75 million, holding "[t]he parties have also not sufficiently explained why the proposed settlement amount for each class member is fair and reasonable given that it is quite small in comparison to the plaintiffs' potential recovery at trial")).

The risks identified in class counsels' fee motion are not so great as to warrant this great of a departure from the potential recovery. Indeed, as the three firms who opposed the earlier proposed settlement noted, the risks associated with the litigation here have been "overstated" and "fail to justify the wide discrepancy between statutory damages and the settlement amount."[16]

[16] 2:15-cv-09093-JVS-AFM, ECF Doc. 49, at 20.

Class counsel should not be heard to dismiss *potential* class recovery at this stage when the three firms previously relied on it in opposing preliminary approval of the proposed *Medeiros* settlement. Whether $3 or $4 million, or $7 million here, "The Amount of the Settlement is [Still] Grossly Inadequate Compared to the Potential Recovery."[17]

Further, although there is no clear-sailing provision in this instance, the parties agreed to fees in excess of the prior arrangement (33% versus 25%).[18] Two months after class counsel filed their fee motion, there has been no complaint by HSBC. There is no reason to think this settlement is any less a product of collusion than the first given the $4.3 million fee relative to the diminutive $7.6 million class recovery, or relative to the represented per capita recovery of $7.50 per class member. And while class counsel unearthed cases where courts approved similar amounts, they omit discussion of the potential damages in those instances, likely to be far, far less.[19]

Further, the class notice is also still inadequate inasmuch as it again fails to mention of the $5,000 per violation recovery under CIPA is given to the class.

IV. The Claims Form Process Is Still Unnecessary and Burdensome.

The three law firms who previously opposed a claims process have yet to explain why one is justified now. The claims form still asks claimants to affirm they received a

[17] 2:15-cv-09093-JVS-AFM, ECF Doc. 49, at i; *see also id.* at 2 ("Overall, the amount of the settlement is grossly inadequate compared to the potential recovery and the disparity is not justified by the risks of litigation.").

[18] Settlement Agreement, 8:12-cv-00885-JVS-RNB, ECF Doc. 360-1, at ¶ 3.9.

[19] 8:12-cv-00885-JVS-RNB, ECF Doc. 369-1, at 12 n.3.

call from HSBC during the class period.[20] According to the prior opposition, this fact can independently confirmed or rebutted by HSBC.

Accordingly, the claims process creates an artificial barrier to obtaining compensation, while at the same time doing nothing to prevent good faith mistaken claims filings. The opposing firms should have to explain why they are now wrong that more class members (whom HSBC can ostensibly identify) should receive direct payment without having to file claims forms at all. *See* Plaintiffs-Intervenors' Opposition to Motion for Preliminary Approval of Settlement, 3:14-cv-01786, ECF Doc. 49, at 24 (*See Rubio-Delgado v. Aerotek, Inc.*, No. 13-cv-03105-SC, 2015 WL 3623627, at *5, *7 (N.D. Cal. June 10, 2015) denying preliminary approval in part because the claims process was unnecessary and an "obvious deficienc[y]" in case where "[c]lass members are readily identifiable from [defendant's] records, and each class member's share is simply a *pro rata* portion of the settlement fund," and "a claim form will result in additional costs to the class while reducing the number of class members who will receive a settlement payment"); Fed. Judicial Ctr., *Managing Class Action Litig.: A Pocket Guide for Judges,* 30 (3d ed. 2010). ("First, consider whether a claims process is necessary at all. The defendant may already have the data it needs to automatically pay the claims of at least a portion of class members who do not opt out.")).

V. Class counsels' 33% fee request is excessive.

Class counsel previously sought 25%, or $1.6 million, from the *Medeiros* settlement providing between $4.5 and $6.5 million to the class. Now, the same attorneys who

[20] 8:12-cv-00885-JVS-RNB, ECF Doc. 360-1, at ECF p. 50.

objected to this as excessive fee request 33%, or $4.3 million, of $13 million, when only $7.6 million is likely to go to the class.

Again, the trial court bears "responsibilities as a 'fiduciary' for the protection of absent class members. . . 'whose rights may not have been given due regard by the negotiating parties.'" *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556. "*[T]horough* judicial review of fee applications is required in all class action settlements. . . ." *Id.* at 555 (emphasis added).

To the extent $1.6 million was excessive for "the disproportionately small percentage of potential damages that will be paid to class members," the same is true of class counsels' proposed $4.3 million. Certainly, nothing about the $7.6 million recovery relative to the potential billions in damages represents an exceptional recovery. In a similar setting, a district court considering fees noted that the class recovery "represents a whopping 99.5% discount from the theoretical verdict value were statutory damages to be awarded to the entire class. This cannot be credibly called an 'outstanding' result." *Bayat v. Bank of the W.*, C-13-2376 EMC, 2015 WL 1744342, at *5 (N.D. Cal. Apr. 15, 2015); *see also Rinky Dink, Inc., v. World Business Lenders, LLC*, No. C14-0268, 2016 WL 3087073, at *3 (W.D. Wa. May 31, 2016) (awarding 25% in fees where the class members would receive $150).

In seeking approval of a 33% fee, class counsel again rely on authority without discussing the proportionality of potential damages released. This omitted analysis, which again three of the firms seeking compensation here previously advocated, leaves class counsels' fee analysis empty.

Whether justified under the percentage method or lodestar method, $4.3 million is not appropriate. *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal. 5th 480. Class counsel should be held to the Ninth Circuit benchmark or less, even in the context of California law. *Lealao v. Beneficial California, Inc.*, (2000), 82 Cal. App.4th 19, 52 n.1 (noting "[s]tudies show that this [25%] benchmark is within the range followed by most courts") (citing Lynk, The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class–Action Litigation (1994) 23 J. Legal Studies 185, 208; Newberg & Conte, Attorney Fee Awards (2d ed.1993), pp. 50–53; *but see*, Grady, Reasonable Fees: A Suggested Value–Based Analysis for Judges (1998) 184 F.R.D. 131, 141–142, quoted, post, at p. 820, fn. 16.)); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311; (9th Cir.1990) (noting that 25 percent "is the 'benchmark' award that should be given in common fund cases.").

And, if the lodestar method is employed, this Court should carefully scrutinize and then reduce the hourly rates, some of which exceed $900 per hour. For example, Michael Rubin and Jeffrey Demain of Altshuler Berzon both relied on hourly fees in excess of $900 for their lodestar.[21] *Compare with In re Magsafe Apple Power Adapter Litig.*, 5:09-CV-01911-EJD, 2015 WL 428105, at *12 (N.D. Cal. Jan. 30, 2015) (citations omitted) (noting that "[i]n the Bay Area, reasonable hourly rates for partners range from $560 to $800").

After reducing the lodestar for excess, this Court should then employ a negative multiplier based on what is the latest grossly inadequate recovery relative to potential

[21] ECF Doc. 369-2, at 19.

damages. When "the plaintiff has achieved 'only limited success,' counting all hours expended on the litigation—even those reasonably spent—may produce an 'excessive amount,' and the Supreme Court has instructed district courts to instead 'award only that amount of fees that is reasonable in relation to the results obtained.'" *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358, at *6 (N.D. Cal. Aug. 29, 2014) (citing *Hensley*, 461 U.S. at 436, 440).

VI. Class counsel should not be awarded a lump sum.

Class counsel failed to specify the manner in which fees will be allocated among the seven firms. Instead, they seek a lump sum fee to be divided at the discretion of counsel.[22] This does not serve the interests of the class.

Indeed, the district court's fiduciary obligation on behalf of the Class does not end at calculating a fair fee. Instead, in "a class action settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *See In re High Sulfur Content Gasoline Prods. Litig.*, 517 F.3d 220, 227–28 (5th Cir. 2008); *In re "Agent Orange" Prods. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987). The district court "must not … delegate that duty to the parties." *High Sulfur,* 517 F.3d at 228 (internal quotation omitted).

To be certain, class members have an interest in the manner in which their common fund is distributed. *See Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016) ("in a class action, an objector need not establish standing to object to an award of

[22] ECF Doc. 1814, at 23.

attorney's fees by the district court"); *In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 337 (D.N.J. 2002) ("[i]In common fund cases, the fees paid to counsel come directly out of the recovery available to the interested parties, so that every dollar paid to counsel results in one less dollar for the plaintiffs"); *see also Dennis*, 697 F.3d at 865 ("in addition to asking 'whether the *class settlement,* taken as a whole, is fair, reasonable, and adequate to all concerned,' we must also determine 'whether the *distribution* of the approved class settlement complies with our standards governing *cy pres* awards'") (emphasis original). Class members have a direct interest in ensuring that those who are not deserving, not be provided a windfall on their behalf; and conversely, that those who provided exceptional representation be compensated accordingly.

As such, this Court must allocate the attorneys' fees among the various firms rather than simply award a lump sum and trust they will do so fairly. While "lead counsel may be in a better position . . . to evaluate the contributions of all counsel seeking recovery of fees[,]" the allocation should be supervised by the court in light of inherent conflicts among the attorneys. *High Sulfur*, 234-35 (citing *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 173 (3d Cir. 2005)) (Ambro, J., concurring)) ("They make recommendations on their own fees and thus have a financial interest in the outcome. How much deference is due the fox who recommends how to divvy up the chickens?'").

Conclusion

Objecting class member Christine A. Chavez requests that this settlement not be approved. Although better than the first proposal, it is still woefully deficient relative to potential damages and does not come close to satisfying the fairness inquiry under Rule

23. Class counsel should not be awarded anything above the 25% initially proposed in the May, 2015 settlement (which three firms which now seek 33% here asserted was excessive). Ms. Chavez further requests that this Court judicially supervise allocation of fees among the various firms making up class counsel.

DATED: August 28, 2017

Respectfully submitted,

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Certificate of Service

The undersigned certifies that today he filed the foregoing Objection and supporting exhibits on ECF which will send electronic notification to all attorneys registered for ECF-filing. The foregoing Objection and supporting exhibits were also mailed today to the following:

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DATED: August 28, 2017

/s/ *Timothy R. Hanigan*
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