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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY REDWEN, Individually And On Behalf Of All Others Similarly Situated,

Plaintiffs,

v.

SINO CLEAN ENERGY, INC., BAOWEN REN, WEN FU, HON WAN CHAN, PENG ZHOU, WENJIE ZHANG, ALBERT CHING-HWA PU, and ZIDONG CAO,

Defendants.

Case No.: 11-CV-03936 PA (SSx)

LEAD PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF (A) LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION AND (B) CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

Hearing Date: July 1, 2013
Time: 1:30 p.m.
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Lead Plaintiff Perritt Micro Cap Opportunities Fund (the "Lead Plaintiff"), on behalf of itself and the Class, and the undersigned Court-appointed Lead Counsel, respectfully submit this supplemental memorandum of law in support of (i) Lead Plaintiff's motion for final approval of the proposed Settlement and the proposed Plan of Allocation of the net settlement proceeds; and (ii) Class Counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses.[1] This memorandum also addresses the single objection to the Settlement filed by objector Larry Vincent.

I. PRELIMINARY STATEMENT

Lead Plaintiff and its Counsel are pleased to advise the Court that, after the mailing of more than 19,144 settlement notices, there has been only one objection submitted regarding the proposed Settlement. Further, only a minimal number of requests for exclusion have been received.

As set forth in the Declaration of Carole K. Sylvester, dated May 31, 2013 (ECF No. 86) (the "May Sylvester Dec."), the Court-authorized Claims Administrator in this matter – Gilardi & Co. LLC ("Gilardi") – provided notice of the proposed Settlement in accordance with the directions set forth in the Court's Preliminary Approval Order. *See* May Sylvester Dec. at ¶¶3-7. As of May 31, 2013, a total of 19,144 Claim Packages – consisting of the Notice of Pendency of Class Action and Proposed Settlement, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Notice") and the Proof of Claim form (the "Claim Form") – had been mailed to potential members of the Class and nominees. *Id*. at 10. In addition, the Summary Notice was published in *Investor's Business Daily* on April 9, 2013, in accordance with the Preliminary Approval Order. *See* May Sylvester Dec. at ¶13.

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[1] Unless otherwise noted, capitalized terms shall have the meanings set forth in the Stipulation and Agreement of Settlement (ECF No. 76-1) which was previously filed January 27, 2013.

The Notice sets out the essential terms of the Settlement and informed Class Members of their rights to opt out of the Class or to object. *See* Notice attached as Exhibit A to the May Sylvester Dec. (ECF No. 86-1), at ¶¶34-67, 73-83.[2] As set forth in the Notice, and directed by the Court in the Preliminary Approval Order, (1) any submission of a proof of claim; (2) any objections to the Settlement, Plan of Allocation, Lead Counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses; and (2) any requests for exclusion from the Class, were all required to be submitted so as to be received no later than June 7, 2013. *Id.* This deadline has now passed. As set forth above, only one objection to the proposed Settlement and the application for an award of fees or expenses has been submitted. *See* Supplemental Declaration of Thomas C. Bright, dated June 21, 2013, at ¶2 filed herewith (the "Bright Supp. Dec.").

Additionally, in total, Gilardi has received only five (5) requests for exclusion from individuals or on behalf of estates, none of which clearly establishes that the person requesting exclusion is a member of the Class.[3] *See*

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[2] The Notice and Proof of Claim were slightly modified by Notice of Errata which was submitted before entry of this Court's Order preliminarily approving the settlement (ECF No. 78).

[3] Exclusion 1 is from a claimant who purchased 12,000 shares and who states that he sold them for a profit. Thus, he was not damaged and is therefore not a Class Member. All four of the remaining exclusions appear to be for purchases of stock that fall well after any date that is traceable to the December 21, 2010 Secondary Offering ("Offering"): (1) Exclusion 2 claimant provided information indicating that he purchased shares on April 2, 2012; (2) Exclusion 3's purchases were on December 5, 2011, and January 5, 2012; (3) Exclusion 4 purchased his shares on April 17, 2012; (4) Exclusion 5 acquired her shares on July 21, 2012. *See* Bright Supp. Dec. ¶4.

Notwithstanding the fact that the requests for exclusion did not contain all the called-for information or clearly establish that the person requesting exclusion is a Class Member, based on their review of the requests, Lead Plaintiff submits that all persons who requested exclusion be formally excluded from the Class in order to

Supplemental Declaration of Carole K. Sylvester re: Mailing of the Notice of Pendency of Class Action and Proposed Settlement, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses and Reports on Request for Exclusion, dated June 21, 2013 (the "June Sylvester Dec.," filed herewith), at ¶3.

II. THE REACTION OF THE CLASS SUPPORTS APPROVAL OF THE SETTLEMENT, THE PLAN OF ALLOCATION, THE REQUESTED AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

Lead Plaintiff and Class Counsel respectfully submit that their opening papers in support of the proposed Settlement, the proposed Plan of Allocation, the application for attorneys' fees and reimbursement of litigation expenses,[4] demonstrate why approval of each motion is warranted.[5] Now that the time for objecting or requesting exclusion from the Class has passed, the reaction of the Class clearly supports final approval of the Settlement and fee and expense application. The fact that there is only ***one*** objection and that only five requests for exclusion were received (none of which clearly establish membership in the Class), after many thousands of notices were mailed following publication, is a strong indication that the Settlement is fair and in the best interests of the Class, that the proposed Plan of Allocation of the net proceeds of the Settlement is equitable, and that Lead Counsel's fee and expense request are reasonable.

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allay any concerns that they may have. The Notice explicitly provides for acceptance by the Court of requests for exclusion that did not technically comply with the requirements set forth in the Notice. *See* Notice at ¶ 73.

[4] ECF Nos. 81-84.

[5] In Lead Plaintiff's Memorandum of Law in Support of Motion for Final Approval of Settlement, Plan of Allocation, and Class Certification, Lead Plaintiff accurately described Sino Clean's insurance situation on page 15. However, on page 1 thereof, Lead Plaintiff inadvertently stated that the Settlement consists of all insurance.

A. Settlements with Only One Objection Are Routinely Approved

The Ninth Circuit has held that the number of class members who object to a proposed settlement is a factor the Court may consider in its settlement approval analysis. *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir.1976). "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004); *see also In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) ("By any standard, the lack of objection of the Class Members favors approval of the Settlement" when the court received only 3 objections out of 57,360 potential class members who received notice); *see also Boyd v. Bechtle Corp.*, 485 F.Supp. 610, 624 (N.D. Cal. 1979) (finding that objections from only 16 percent of the class was persuasive that the settlement was adequate); *Churchill Village v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming approval of settlement with 500 opt-outs from class of 90,000 class members, roughly .5%,); *Chun–Hoon v. McKee Foods Corp.*, 716 F.Supp.2d 848, 852 (N.D. Cal. 2010) (finding that 16 opt-outs in a class of roughly 329 members, amounting to 4.86%, strongly supported settlement); *Glass v. UBS Fin. Servives*, No. C-06-4068, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007) (approving settlement with opt-out rate of 2%); *Churchill Village LLC v. Gen. Elec.*, 361 F.3d at 577 (affirming settlement with 45 objections out of 90,000 notices sent); *Rodriguez v. West Publ. Corp.*, Case No. CV05–3222 R, 2007 WL 2827379, at *10 (C.D. Cal. Sept. 10, 2007) (54 objections out of 376,000 notices); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 641 (S.D. Cal. 2011) *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012) ("Of the potentially thousands of individuals that received the class notice, only three objected indicating the fairness of the settlement").

Courts are particularly inclined to approve a class action settlement where, as here, only one objection is received. *See In re Mego Financial Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement with one objection out of a potential class of 5400); *City of Roseville Employees' Ret. Sys. v. Micron Tech., Inc.*, 06-CV-85-WFD, 2011 WL 1882515 at *5 (D. Idaho Apr. 28, 2011) *aff'd sub nom. City of Roseville Employees' Ret. Sys. v. Orloff Fam. Tr. UAD 12/31/01*, 484 F. App'x 138 (9th Cir. 2012) ("More importantly, the fact that only one class member objected to the fairness of the proposed settlement weighs heavily in favor of approval."); *Ko v. Natural Pet Products, Inc.*, C 09-02619 SBA, 2012 WL 3945541 at *5 (N.D. Cal. Sept. 10, 2012) (approving settlement when there were three objections submitted and only 25 opt-outs); *see also, Ayers v. SGS Control Services, Inc.*, No.03-Civ-9078, 2009 WL 4185813, at *4 (S.D.N.Y. Sept. 9, 2008); (finding that the reaction of the class to the settlement favors approval when there is only one objector); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 855-856 (E.D. La. 2007) (approving settlement with one objection); *Serventi v. Buck Technical High School*, 225 F.R.D. 159, 167 (E.D. Pa. 2004) (approving settlement with one objection); *In re Rent-Way Sec. Litig.*, 305 F.Supp.2d 491, 502 (W.D. Pa. 2003) (finding "the paucity of objectors suggests overwhelming class-wide support for the proposed Settlement," and no opposition from any sophisticated institutional investors); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 144 (E.D. Pa. 2000) (approving settlement with one objector and no opt-outs); *Garner v. State Farm Mut. Auto. Ins. Co.*, CV 08 1365 CW EMC, 2010 WL 1687832, at * 14 (N.D. Cal. Apr. 22, 2010) (approving settlement with one objection and 0.055 opt-outs).

B. <u>The Objections of the Lone Objector Are Without Merit</u>

The lone objector, Mr. Larry Vincent, raises no issue that should preclude approval of the settlement or fee application. Vincent appears to object on a number of grounds, none more persuasive than the other. However, significantly,

he does not object to the reasonableness and adequacy of the settlement amount. Thus, he argues that: (1) the *de minimis* threshold for a payable claim is "grossly unfair"; (2) that the imposition of the *de minimis* threshold created a conflict between the class representative and the class; (3) the fee should be reduced because the settlement fund is small and the common benefit is difficult to determine; (4) the fee petition is not timely. Each of these objections is without merit.

1. The Objector Lacks Standing

As an initial matter, there is no evidence that Vincent is a class member – much less one injured by the misconduct of Sino Clean which is alleged in the operative complaint.[6] Disregarding the requirements for making an objection set forth in the Notice (¶80), Vincent provides no information about his purchases of Sino Clean securities, whether he purchased pursuant to or traceable to the Secondary Offering, or whether he sold for a profit.[7] For this reason alone, his objection should be overruled. *Feder v. Electronic Data Sys. Corp.*, 248 Fed.

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[6] Vincent did not timely file a Proof of Claim. June Sylvester Dec. at ¶4 This failure to provide the documentation required to support a proof of claim "falls short of establishing [Vincent's] class membership by a preponderance of the evidence." *In re Initial Pub. Offering Sec. Litig.*, 21 MC 92 SAS, 2011 WL 3792825 at *2 (S.D.N.Y. Aug. 25, 2011) ("Allowing someone to object to settlement in a class action based on this sort of weak, unsubstantiated evidence would inject a great deal of unjustified uncertainty into the settlement process."); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 340 (S.D.N.Y. 2005) (objector who did not file a proof of claim found to not have standing to bring his objections).

[7] If the Defendant did not cause any injury to Vincent, Vincent lacks standing to object to the Settlement, regardless of his membership in the Class. *See In re Omnivision Technologies*, 559 F. Supp. 2d at 1044 (citing *Wolford v. Gaekle* (*In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*), 33 F.3d 29, 30 (9th Cir. 1994) ("Simply being a member of a class is not enough to establish standing. One must be an aggrieved class member.")).

Appx. 579, 581 (5th Cir. 2007) ("[W]here the proof of claims period has closed and the settlement has been finally approved by the district court, the burden of proving class membership cannot be satisfied by the appellant's unsupported assertions of class membership. [Appellant] did not submit a proof of claim form. Nor did he provide the documentary evidence required by the claim form to support his contention that he bought or sold EDS stocks during the class period. His objection did not include the required information as to the number or type of EDS securities that [appellant] alleges to have dealt in during the period.").

Purchasers of securities issued pursuant to a registration statement may sue under Section 11 of the Securities Act of 1933 if they purchased at the time of the public offering, or if they are aftermarket purchasers who can trace their shares to an allegedly misleading registration statement. 15 U.S.C. § 77k(a). Vincent failed to provide a statement that he purchased Sino Clean common stock pursuant to or traceable to the Offering. Even if he did, this would not be sufficient by itself to establish standing and subject matter jurisdiction. *See In re STEC Inc., Sec. Litig.*, No. SACV 09-1304, 2011 WL 2669217, at *14 (C.D. Cal. June 17, 2011) ("Plaintiffs do not adequately allege standing simply by stating they purchased shares "traceable to" the Registration Statement and Prospectus); *see also In re Century Aluminum Co. Sec. Litig.*, --- F.3d ---, 2013 WL 1633094, at *3 (9th Cir. Apr. 17, 2013) ("Standing alone, the conclusory allegations that plaintiffs 'purchased Century Aluminum common stock directly traceable to the Company's Secondary Offering' does not allow us to draw a reasonable inference about anything because it is devoid of factual content.").[8]

[8] Indeed, Section 11 claims are often dismissed where the plaintiff failed to provide any suggestion they could show tracing and purchased after the public offering. *See, e.g., Grand Lodge of Pa. v. Peters*, 550 F. Supp. 2d 1363, 1369, 1376 (M.D.Fla. 2008) ((dismissing Section 11 claims where plaintiffs admitted to purchasing their shares in the aftermarket approximately four months after the

Based on his sparse and unsworn submission, there is no way to know or confirm if Vincent (1) purchased shares in the Offering, or in the aftermarket; (2) purchased shares through brokers and brokers' third-parties, as opposed to through the underwriters; or (3) if he could trace his shares in a market that already contained 16.79 million shares when 4.5 million shares were made available to the public in the Secondary Offering. Simply put, Vincent has not established his standing to object.

2. The Plan of Allocation's *De Minimis* Provision Is Fair and Reasonable

Vincent's primary objection is not clear. He states that "only those class members owning a substantial number of shares are compensated." This is patently incorrect, and ignores that Class members with larger share positions necessarily have larger claims because they incurred greater damage. Moreover, Vincent appears to be contending that the settlement's minimum claim amount (also commonly referred to as a *de minimis* threshold) established to be $20, provides inadequate relief, as it will eliminate the rights of many class members without providing adequate compensation. Vincent baldly claims that "only class members owning a substantial number of shares are compensated" and "[m]ost class member receive nothing."[9]

The *de minimis* threshold for payment set by the Plan of Allocation is a common device to preserve the Settlement Fund from being overburdened with excessive and unnecessary expenses which are borne by the Class as a whole. *See* Declaration of Bruce H. Cozzi, filed herewith. As other courts have observed, "*de*

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secondary public offering and failed to provide any suggestion as to how they would show tracing).

[9] Vincent also claims "Class counsel and defendants know how many class members will receive a payment and how many will not, objector does not." This is simply incorrect at this point in time.

minimis thresholds for payable claims are beneficial to the class as a whole since they save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs and courts have frequently approved such thresholds often at $10." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 328 (3d Cir. 2011) (citing *In re Gilat Satellite Networks, Ltd.*, No. CV–02–1510, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y.2004) (noting that the minimum recovery requirement is a common procedure that addresses "the undeniable fact that claims-processing costs money, which comes out of the settlement fund"); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 463 (E.D.Pa. 2008) (approving settlement plan with $50 minimum payment); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 02 MDL 1484, 2007 WL 4526593, at *12 (S.D.N.Y. Dec. 20, 2007) (approving a minimum payout of $50 in a class action settlement "in order to foster the efficient administration of the settlement"). Thus, the $20 minimum threshold established in this case is appropriate.

Vincent cites *Mairfasihi v. Fleet Mortgage*, 356 F.3d 781 (7th Cir. 2004) in support of his argument that because he believes, without any supporting evidence, that a substantial minority of Class members will receive no benefit, this aspect of the settlement should not be approved. This case is easily distinguishable on a number of grounds, not the least of which is that the case addresses two distinct plaintiff classes, not a plan of allocation with a *de minimis* threshold. *Id*. at 782 ("There are thus two plaintiff classes."). In fact, *Mairfasihi* endorses the concept that there may be a claim which is too small to be compensated. *Id*. at 782-783 ("Of course, if their claims were worthless (more precisely, worth too little to justify a distribution – a qualification that we elaborate on below), they lost nothing."); *id.* at 785 ("Only if they had no claim-more precisely no claim large enough to justify a distribution to them-did they lose nothing by the settlement, and

the judge made no finding that they had no such claim.). Such was not the case in *Mairfasihi*, because of the availability of an alternative remedy of damages with which "there would be no reason for thinking distribution to the class members infeasible." *Id.* at 784. Lastly, there is no proof that a substantial minority of the Class in the case at bar will receive nothing. This objection should accordingly be overruled.

3. The Objection to the Fee Amount Is Unsupported By the Facts or Legal Theories

Vincent objects to the requested Ninth Circuit benchmark fee of twenty-five percent because, in his words, "the settlement fund *vis-à-vis* the pool of potential class members is (1) small and (2) where actual common benefit is difficult to determine and, for some of the class members, non-existent, the "normal" percentage fee should be reduced."[10] Vincent does not support his objection with specific facts or legal theories. Nor does he suggest what the appropriate fee should be. Furthermore, the fee requested is based on the total recovery for the Class, *i.e.*, the "benefit" conferred, and is not based on a parsing of what individual Class members receive. If Vincent is suggesting a lodestar calculation be employed to determine the fee, Lead Counsel's fee would actually be greater than the percentage sought, as the requested fee represents a negative multiplier. This Court should not "stray from the Ninth Circuit's twenty-five percent benchmark based on a lone objection unsupported by specific facts." *In re Skilled Healthcare Group, Inc. Sec. Litig.*, No. CV 09-5416, 2011 WL 280991, at *6 (C.D. Cal. Jan. 26, 2011).

[10] This is the only mention in the entire objection of the size of the Settlement. Yet it is well established that the fairness of a proposed settlement must not "be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

4. The Fee Petition Is Compliant with *Mercury Interactive* and this Court's Order

Vincent objects that the fee petition was not timely filed. Vincent relies entirely on *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010), and its holding that a district court is required by Rule 23(h) to set the deadline for objections to counsel's fee request on a date *after* the motion and the documents supporting it have been filed. In *Mercury*, the motion for an award of attorneys' fees was filed two weeks *after* the deadline for objections had passed. *Id.* at 991. That is not the case here.

Vincent acknowledges that Lead Plaintiff's Motion for Award of Attorneys' Fees and Expenses was filed with this Court on May 31, 2013. What he fails to acknowledge however is that the motion was filed *before* the June 3, 2013 deadline set by the Court to file a motion for attorneys' fees; and more importantly, *before* the June 7, 2013 deadline to object imposed by the Court's Preliminary Approval Order (ECF No. 80). This Court's deadlines are not in conflict with *Mercury*. Indeed, *Mercury* does not set a specific number of days that an attorneys' fees motion must be filed before the objection deadline:

> We do not adopt a bright-line rule of a time period that would meet Rule 23(h)'s requirement that the class have an adequate opportunity to oppose class counsel's fee motion. Obviously, that period will vary from case to case, and the district court is better positioned to make that decision after consideration of all of the circumstances in the case. But a schedule that requires objections to be filed before the fee motion itself is filed denies the class the full and fair opportunity to examine and oppose the motion that Rule 23(h) contemplates.

Id. at 995. As noted, nothing of the sort occurred here.[11]

[11] The Notice apprised Class members of the fee to be requested, *i.e.*, the Ninth Circuit 25% benchmark. Tellingly, Vincent raised no objection to the schedule for objecting to attorneys' fees despite being given notice of the briefing schedule on March 13, 2013. In any event, Vincent certainly was not prejudiced because he

III. CONCLUSION

For the reasons set forth herein and in (i) Lead Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Settlement and Plan of Allocation; and (ii) Class Counsel's Memorandum of Law in Support of Application for An Award of Attorneys' Fees, Reimbursement of Litigation Expenses, Lead Plaintiff and Class Counsel respectfully request that the Court finally approve the proposed Settlement as fair, reasonable and adequate, approve the proposed Plan of Allocation, and approve Class Counsel's request for attorneys' fees and reimbursement of expenses.

Dated: June 21, 2013

Respectfully submitted,

GOLD BENNETT CERA & SIDENER LLP

By: s/Solomon B. Cera
Solomon B. Cera

Attorneys for Lead Plaintiff

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was able to meet the objection deadline with an 8 page objection, including to the request for attorneys' fees.

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this action.

I hereby certify that on June 21, 2013, I also served a true and correct copy of the foregoing by placing a true and correct copy enclosed in a sealed envelope for collection and deposited in the U.S. Mail, postage prepaid, on this date following ordinary business practices addressed as follows:

Larry Vincent
c/o Gary W. Sibley
The Sibley Firm
2602 McKinney Avenue, Suite 210
Dallas, TX 75204
(214) 522-5222
(214) 855-7878 (Fax)

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 21, 2013.

s/Solomon B. Cera
Solomon B. Cera