ELI GOTTESDIENER *(PHV)*
GOTTESDIENER LAW FIRM, PLLC
498 7th Street
Brooklyn, New York 11215
Telephone: (718) 788-1500
eli@gottesdienerlaw.com

WILLIAM H. BLESSING *(PHV)*
THE BLESSING LAW FIRM
119 East Court Street, Suite 500
Cincinnati, Ohio 45202
Telephone: (513) 621-9191
bill@blessing-attorney.com

SUSAN MARTIN (AZ#014226)
DANIEL L. BONNETT (AZ#014127)
JENNIFER KROLL (AZ#019859)
MARTIN & BONNETT, P.L.L.C.
1850 N. Central Avenue, Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
smartin@martinbonnett.com
dbonnett@martinbonnett.com
jkroll@martinbonnett.com

Attorneys for Plaintiffs and the Classes

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Levanna C. Traylor, *et al.* Plaintiffs, vs. Avnet, Inc.; Avnet Pension Plan, Defendants.	No. 08-cv-00918-PHX-FJM **PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs, on behalf of themselves and the Lump Sum and Restricted Participant Classes, respectfully move the Court for an order that would: (1) grant preliminary approval of the Class Action Settlement Agreement ("Agreement") attached hereto as Exhibit 1, under which all claims will be dismissed in exchange for a Total Settlement Amount of $34 million, consisting of $29 million in gross consideration to the approximately 3,470 member Lump Sum Class and $5 million in gross consideration to the approximately 976 member Restricted Participant Class; (2) grant preliminary approval of Class Counsel's recommended Plans of Allocation of the Lump Sum Class Settlement Fund and the Restricted Participant Class Settlement Fund to the Members of the two Classes; (3) grant approval of the proposed notice to be mailed and the proposed notice for publication to the Classes (attached as Exhibits B-D, to Ex. 1, the Settlement Agreement), in terms of both their content and their manner of dissemination; (4) make technical adjustments to the Class definitions to clarify the actual covered persons whose claims would be released if the settlement is approved; and (5) set a date for a fairness hearing and deadlines for the interim steps of mailing and publication of the notices, and the filing of Class Member objections, Plaintiffs' motion for final approval, Class Counsel's application for attorney's fees and expenses and case contribution payments for the Named Plaintiffs in recognition for the time and effort they expended on behalf of the two Classes.

A proposed Preliminary Approval Order, substantially identical to the one attached to the Parties' Agreement as Ex. A, is attached hereto. Defendants Avnet, Inc. ("Avnet") and the Avnet Pension Plan ("Plan") (collectively, "Defendants") have authorized Plaintiffs to represent that they concur in the relief sought by this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

As noted in their filing of October 5, 2009 (Doc. 182), the parties have reached an agreement after over two years of hard-fought litigation under which all claims will be dismissed in exchange for a Total Settlement Amount of $34 million, consisting of $29

million in gross consideration to the Lump Sum Class and $5 million in gross consideration to the Restricted Participant Class. *See* Ex. 1, Agreement, Preamble and Sections 1, 8.

Plaintiffs submit that the Settlement represents an excellent recovery for Class Members and should be preliminarily approved as within the range of possible final approval by this Court under the governing standards for evaluating class action settlements in this Circuit. *See, e.g., Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir. 1998).

The Agreement provides substantial benefits to both Classes and removes the risk of non-recovery or a lesser recovery and delay that the Classes face were this vigorously defended action to continue. In the litigation, the merits have yet to be decided and Defendants dispute as to both Classes, among other things: (1) liability: (2) the availability of damages or monetary relief in the event liability is established; (3) the amount of damages; (4) that any of the claims asserted are still timely; (5) that causation or injury in the case of the Restricted Participant Class can be established; and (6) that the Restricted Participant Class Members' claims can be properly pursued as a class action. The $34 million Total Settlement Amount represents **nearly 80%** of Defendants' estimate of the two Classes' damages in the event all of Defendants' defenses were overcome and **over 40%** of Plaintiffs' estimated damages based on their basic "whipsaw" liability and damages theories. *See* Declaration of Eli Gottesdiener ("Gottesdiener Decl.") ¶ 4. A $29 million recovery for the Lump Sum Class represents a gross recovery **over 52%** of what Plaintiffs contend they were underpaid, together with prejudgment interest compounded from the date of the original underpayment. *Id.* ¶ 5. A $5 million recovery for the Restricted Participant Class represents a gross recovery of **over 31%** of what Plaintiffs contend should be the additional amount, over and above their existing notional account balances they should be paid, should they establish their entitlement to a lump sum and now elect one. *Id.*

The net results for Class Members are also very substantial. Assuming the

maximum possible award of attorney's fees under the Agreement (25% of the Total Settlement Amount or $8.5 million), the maximum agreed upon expense reimbursement ($400,000), the maximum estimated costs for settlement administration for the Lump Sum Class ($100,000) and the maximum requested named plaintiff case contribution payments, ($3,000 per plaintiff), Lump Sum Class members would receive on average, an additional **$6,140** net payment from the Plan, offered on the same tax-favored basis as their original payment was offered. *Id.* ¶ 6. Restricted Participants would receive, on average, an additional net payment or credit to their existing notional account balance of **$3,760**, also available on a tax-favored basis. *Id.* These are clearly results within the range of possible final approval by this Court in a complicated case where all participants otherwise face the very real risk, on multiple bases, of recovering nothing at all, or substantially reduced amounts only after continued delay.

As detailed below, Plaintiffs respectfully request that the Court also grant preliminary approval of Class Counsel's recommended Plans of Allocation of the net settlement proceeds because they properly account for differences in the case of both Classes among Class Members in terms of their likelihood of recovery prior to a determination of Class Members' pro rata Individual Net Settlement Benefit. Plaintiffs request that the Court also find that the proposed Class notice of the proposed settlement satisfies the requirements of due process and that all other prerequisites for preliminary approval of the settlement have been met.

To provide sufficient time for notice and Class Member objections, Plaintiffs respectfully request that the Fairness Hearing be scheduled for approximately ninety days (90) days after entry of the proposed Preliminary Approval Order, or at the Court's convenience. The parties have agreed to the following schedule of events, the actual dates of which will be determined after the Court sets a Fairness Hearing date but which events are shown below with dates supplied assuming that preliminary approval is granted by November 19, 2009, and that a Fairness Hearing date of February 19, 2010 is set:

Event	**Days following Preliminary Approval or Preceding Final Approval Hearing**	**Dates Assuming Preliminary Approval By 11/19/09 and Fairness Hearing on 2/19/10**
Mailed Notice to Classes	To be commenced within 21 days of Entry of Preliminary Approval Order	December 10, 2009
Mailed Notice to Classes	To be completed within 30 days of Entry of Preliminary Approval Order	December 19, 2009
Publication Notice Published	To be published no later than 30 days of Preliminary Approval Order	December 19, 2009
Petition for Class Counsel Fees and Named Plaintiffs' Case Contribution Payments	No later than 28 days prior to Final Approval Hearing	January 22, 2010
Publish Fee Petition to website	Within 3 business days of Fee Petition filing	January 27, 2010
Class Member Objections to be postmarked	No later than 14 days prior to Final Approval Hearing	February 5, 2010
Rollover request deadline	No later than 5 business days prior to Final Approval Hearing	February 12, 2010
Motion for Final Approval	No later than 7 days prior to Final Approval Hearing	February 12, 2010
Filing of Proof of Mailing and Publication	No later than 7 days prior to Final Approval Hearing	February 12, 2010
Final Approval Hearing	NA	February 19, 2010

FACTUAL BACKGROUND

I. Case History - History of Settlement Negotiations.

On September 25, 2007, Named Plaintiff Levanna Traylor filed a complaint in the Southern District of Ohio under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), on behalf of herself and a proposed class of others who had

received a lump sum payment from the Plan between January 1, 1994 and August 17, 2006 (the "Lump Sum Class" or the "Class"). The case was transferred to the District of Arizona on April 29, 2008 upon Defendants' motion under 28 U.S.C. § 1404(a).

On July 28, 2008, after obtaining the Court's leave, Plaintiff filed an amended Complaint ("Complaint"), adding Named Plaintiffs Kevin Moses, James Coy, and Gwyn Moriarty as additional representatives of the Lump Sum Class, and adding Named Plaintiffs Linda Phillips, Thomas Small, Dwayne Cohen, and Steve Dison as representatives of a separate Restricted Participant Class (the "Restricted Participant Class").

The Complaint alleges that the Plan had failed to properly calculate lump sum distributions for members of the Lump Sum Class, and improperly denied the members of the Restricted Participant Class the opportunity to receive lump sum distributions because, as written and administered, the Plan, a defined benefit pension plan of the "cash balance" variety, unlawfully equated the participant's lump sum distribution to the balance of the participant's notional Account. Plaintiffs contend that ERISA required the lump sum to be calculated as no less than the present value of the participant's accrued benefit under the Plan projected to normal retirement age (age 65, under the Plan) using the Plan's interest crediting rate, which has always equaled at least 7%. According to the Complaint, had the required projection been performed, and the participant's resultant projected account balance converted into an annuity using the Plan's annuity conversion factors before the participant's benefit was reduced to a present value using the required statutory discount rate and mortality table, the actuarial equivalent of the participant's accrued benefit would have been more than the account balance because the statutorily-prescribed discount rate was always lower than 7%.

Defendants timely answered the Amended Complaint on March 2, 2009 and deny all liability to Plaintiffs, the Lump Sum Class, and the Restricted Participant Class; dispute that the relief requested is available under the statute; dispute the amount of damages sought; contend all or most members of both Classes are time-barred; dispute

causation and injury in the case of all or most members of the Restricted Participant Class and contend their claims must proceed, if at all, as individual actions.

Discovery consumed the better part of two years. Between November 2007 and August 2009, the parties had engaged in extensive discovery with respect to liability, damages, class certification and limitations, including taking sixteen (16) depositions and exchanging many thousands of documents, and issuing and answering dozens of interrogatories and requests for admission. *See* Gottesdiener Decl. ¶ 2. The parties also engaged in considerable motions practice, regarding discovery, class certification and the merits. The Court certified the case as a class action on May 26, 2009. The parties filed cross-motions for judgment on the pleadings or partial judgment on the pleadings in April and May 2009. On September 15 and 16, 2009, the parties filed their respective motions for summary judgment. Trial is scheduled for February 9, 2010.

By October 1, 2009, the date of the parties' formal mediation and the date Plaintiffs reached the decision to settle on the terms embodied in the Agreement, Plaintiffs had thoroughly investigated and evaluated their claims and the Plan's available defenses and the risks attendant to further litigation. *Id.* ¶ 3. The negotiations leading to the settlement were arm's-length and culminated in the October 1 mediation. The mediation was presided over by a professional mediator with expertise in large class action mediation (Jonathan B. Marks, Esq. of MarksADR, LLC). *Id.* It was attended by representatives of each of the two Classes and lasted until well into the evening before a final accord was reached. *Id.* Both sides prepared extensively for the mediation, conferring in advance among themselves and the mediator regarding possible damages under various scenarios and exchanging updated damages reports and position papers. *Id.*

Plaintiffs and Class Counsel are convinced that the proposed settlement is fair, reasonable, and adequate and in the best interests of the Lump Sum Class Members and the Restricted Participant Class Members. They urge the Court to preliminarily approve it and will later urge its final approval as an excellent result for the two Classes.

II. SETTLEMENT TERMS

A. Total Settlement Amount and the Two Classes.

In exchange for releases of all claims that were brought or could have been brought via the instant action, Defendants would create two settlement funds to be funded by a combined gross amount ("Total Settlement Amount") of $34 million. *See* Ex. 1, Agreement, Section 1. The "Lump Sum Class Settlement Fund," to be created on behalf of the Lump Sum Class, shall consist of a gross settlement amount of $29 million. *Id.,* Section 1.B.1. The "Restricted Participant Class Settlement Fund," to be created on behalf of the Restricted Participant Class, shall consist of a gross settlement amount of $5 million. *Id.,* Section 1.B.2.

The definitions of the two Classes certified by the Court on May 26, 2009 (Doc. 141), as modified on July 9, 2009 (Doc. 150), would remain unchanged except for technical adjustments to the Class definitions to clarify the actual persons covered whose claims would be released if the settlement is approved. These proposed amendments are embodied in the proposed Preliminary Approval Order and summarized below.

The parties request that the Court makes three discrete modifications to the definition of the Lump Sum Class. First, the parties ask the Court to reaffirm that the twelve (12) individuals who timely opted out of the Lump Sum Class are not Class members. *See* Docs. 159-60, 177-78, 181, 184. Second, Plaintiffs ask the Court to exclude from the Class any individuals who do not have a colorable claim to an additional benefit under any of Plaintiffs' theories of the case. Plaintiffs are currently aware of only one such person.[1] Such a person could not properly be paid any of the settlement proceeds and therefore would not receive any consideration in exchange for the releases that Class members confer on Defendants in the Settlement. Third, to the extent that there

[1] This individual was both over age 65 when he received his lump sums and due to the confluence of interest rates at the time (1995) and the fact that the present value of his pre-1994 Plan benefit was over $25,000 (a relevant factor at the time), his pre-1994 Plan benefit was greater not just than his notional account balance but also his "whipsawed" account balance. *See* Doc. 167-2 at 10 n.18 (Lowman Expert Report, 4/1/09).

are any unknown and undiscovered persons who meet the definition of a Lump Sum Class member (other than successors of known lump sum recipients), the parties urge the Court to exclude those individuals from the Class. The parties do not believe that any such unknown persons exist, but Class Counsel seeks this limitation out of an abundance of caution to assure that previously unknown lump sum recipients whose claims were not taken into account in negotiating the settlement amount do not dilute the settlement payments to known Class members. In addition, as a practical matter, any such unknown individuals will not receive individual notice of the Settlement.

With respect to the Restricted Participant Class, the parties request that the Class definition be revised to specify that the Class consists of all persons "for whom the Plan maintained a notional account at any time after December 31, 1993, who terminated employment at any time after December 31, 1993 and before August 17, 2006, and who were ineligible or were told that they were ineligible for a lump sum distribution under Plan Section 6.10B at any time, regardless of whether such participant did or did not inquire about the possibility of receiving a benefit, and the lawful beneficiaries, estates and Alternate Payees of such persons."[2] The change in wording is intended to eliminate a possible ambiguity over the scope of the Class. Plaintiffs submit the requested amendment would leave unchanged the persons covered or that should be covered under the existing definition; Defendants submit it would expand the persons covered. But both sides are in agreement that it would not *exclude* anyone the Court intended to be covered under the existing definition.

More specifically, the parties disagree on whether the existing definition includes individuals who never inquired about receiving a lump sum distribution from the Plan and for whom the Plan never made a determination of whether the present value of their pre-

[2] The current definition refers to "all persons for whom the Plan maintained a notional account at any time after December 31, 1993 and who between January 1, 1994 and August 17, 2006 were not offered a lump sum distribution upon termination of their employment because the Plan determined the present value of their pre-January 1, 1994 benefit exceeded their notional account balance."

1/1/94 benefit exceeded their notional account balance. Defendants argue that such individuals do not fall within the class definition; Plaintiffs disagree. The Settlement Agreement seeks to resolve this dispute by settling the claims of these individuals at an appropriate discount as compared to the claims of individuals whose membership in the Restricted Participant Class is not in dispute. The parties ask the Court to modify the Restricted Participant Class definition to facilitate settlement with the individuals whose status is in dispute.

In addition, for the same reasons that they asked for similar modifications to the Lump Sum Class, the parties ask the Court to exclude from the Restricted Participant Class: (1) any individuals who were not identified as potential class members in discovery other than unknown class member successors (the parties do not believe that any such individuals exist), and (2) any persons who do not have a colorable claim to an additional benefit under any of Plaintiffs' theories of the case.

B. Net Settlement Benefits.

The Net Settlement Benefit available to the Lump Sum Class will equal $29 million minus court-approved attorneys' fees and expenses (proportionate to the $29 million/$5 million division of the $34 million Total Settlement Amount), named plaintiff case contribution payments, and settlement administration costs. *See* Agreement, Section 1.B. The Net Settlement Benefit available to the Restricted Participant Class will equal $5 million minus court-approved attorneys' fees and expenses and named plaintiff case contribution payments.[3]

These deductions, which are each subject to Court approval, are discussed below.

1. Attorney's Fees and Expenses.

Counsel has agreed to limit the request for an award of attorney's fees under the Agreement to not more than 25% of the Total Settlement Amount or $8.5 million and to

[3] Defendants have agreed to bear the settlement administration costs with respect to the Restricted Participant Class, other than costs related to developing the Plan of Allocation and calculation of settlement benefits. *Id.,* Section 1.D.

limit the maximum expense reimbursement to $400,000. *See* Agreement, p.1. To ensure Class members have an adequate opportunity to review and make objections to the request, Class Counsel will file their fee petition at least twenty eight (28) days prior to the final approval hearing and promptly post it on the internet website dedicated to the proposed settlement, www.traylorpensionclassaction.com, which would be activated upon the Court's grant of preliminary approval. *See* Agreement, Ex. A, proposed Preliminary Approval Order, p.5 ¶ 7. Both the proposed mailed notice to the Class and the publication notice will also apprise proposed Class members of Counsel's potential fee request and direct Class members to the website for a copy of the fee petition, the Agreement and other information about the proposed settlement. *Id.,* Exs. B-D.

2. Named Plaintiff Case Contribution Payment.

At the same time the fee petition is filed, the named plaintiffs will petition the Court for a case contribution payment of no more than $3,000 to reimburse and compensate them for their time and efforts expended in this matter on behalf of the two Classes. *See* Agreement, p.3; *id.,* Ex. A, proposed Preliminary Approval Order, p.5 ¶ 7.

3. Settlement Administration Costs. The maximum estimated cost of settlement administration for the Lump Sum Settlement Fund is $100,000. *Id.,* Exs. B-C. This will cover, among other things: the printing and mailing of the Mailed Notice; the cost of Publication Notice; the receipt and processing of benefit election forms; creating, updating and staffing the participant website and toll-free line for participant inquiries; the processing distribution requests; coordinating with Class Counsel and the actuaries with respect to final actual Individual Settlement Benefit calculations; and making such payments to the individual Class Members, minus required Federal Tax withholdings. *See* Agreement, Section 1.D.

Assuming the maximum deductions possible, the Lump Sum Class' Net Settlement Benefit would be approximately **$21.3 million**, and the Restricted Participant Class' Net Settlement Benefit would be approximately **$3.67 million**.

C. Plans of Allocation.

Under the Agreement, the final step in determining the individual net settlement benefit to be paid to each Class Member would be a pro rata calculation, based on the net settlement proceeds available, multiplied by the ratio that the individual's alleged underpayment (or, in the case of Restricted Participants, the amount due in excess of their notional account balances if they were to now elect lump sums) bears to an aggregate of underpayments (or amounts due in excess of account balances). Counsel believes, however, that this pro rata distribution should be proceeded by a division of the two Classes into subgroups of participants based on the relative strength of their claims as against Defendants' key defenses, and a weighting of each Classes' Net Settlement Benefits accordingly. The recommended Plans of Allocation (discussed below) are designed with this in mind, *i.e.,* that Class Members with relatively stronger claims are entitled to proportionately higher settlement benefits.

1. Lump Sum Class.

For the Lump Sum Class, Class Counsel propose that the Net Settlement Benefit be allocated by reference to four subgroups, defined according to the most significant statute of limitations defenses that Avnet and the Plan asserted against Lump Sum Class Members. The four subgroups are:

Subgroup A. This subgroup consists of those Lump Sum Class Members paid on or after September 25, 2001 – *i.e.,* within six (6) years of the date the lawsuit was filed – and who did not sign a Mutual Agreement to Arbitrate Claims that contained a one-year (1-year) contractual statute of limitations for claims against one or both of the Defendants (an "Arbitration Agreement").

Subgroup B. This subgroup consists of those Lump Sum Class Members paid on or after September 25, 2001 and who *did* sign an Arbitration Agreement.

Subgroup C. This subgroup consists of those Lump Sum Class Members paid before September 25, 2001 – *i.e.,* more than six (6) years before suit was field – and who did not sign an Arbitration Agreement.

Subgroup D. This subgroup consists of those Lump Sum Class Members paid before September 25, 2001 and who *did* sign an Arbitration Agreement.

While all four Subgroup Members' claims faced obstacles to recovery and all such claims could have been eliminated had Defendants been successful under one or more of their statute of limitations defenses, the probability of Members overcoming these defenses varied from one Subgroup to the next. Thus, the Lump Sum Class's Net Settlement Benefit should be distributed based on a weighting of the percentage of total proceeds available to the Class according to Subgroups A, B, C and D's relative probability of overcoming these defenses.

As the classifications above indicate, there were arguments advanced in the case under which the relevant statute of limitations might be one year, six years, or fifteen years; the date on which a participant's claim accrued and limitations period began to run might be the date Defendants informed them of the challenged Plan provisions or practices, the date payment was made or some other date. Defendants argued that under a one-year statute of limitations and a date of claim accrual no later than the date of payment, no Class Members would have timely claims, and that under a six-year statute of limitations, only those Class Members who received lump sum payments less than six years before suit was filed would have timely claims (*i.e.,* Subgroup A Class Members). Class Members who received their lump sum payments more than six years before suit was filed thus faced an additional obstacle to recovery that was not faced by Class Members who received more recent lump sum payments.

In addition, many Class Members signed a Mutual Agreement to Arbitrate Claims when they began employment with Avnet. Defendants argued that this agreement required its signatories to give notice of any claim against Avnet or the Plan within one year of the event giving rise to the claim. According to Defendants, this agreement barred the claims asserted in this lawsuit for all employees who signed them. Class Members who signed such an agreement thus faced an additional obstacle to recovery that was not faced by other Class Members.

Taking into account the relative positions of the Subgroups and the arguments advanced against them (without crediting any of those arguments), Class Counsel has

concluded that the following assessment of the strength of the claims of members of Subgroups B, C, and D vis-à-vis the claims of members of Subgroup A (who had no risk of having their claims eliminated if the limitations period were six years or more) should be used and would result in the most a fair and reasonable allocation of the Net Settlement Benefit for the Lump Sum Class:

	Relative Strength of Claims
Subgroup A	**100%**
Subgroup B	**85%**
Subgroup C	**50%**
Subgroup D	**42.5%**

This would result in an allocation of the estimated $21.3 million Net Settlement Benefit among the four Subgroups in the following amounts, which in turn represent the following gross and net recovery percentages under Plaintiffs' basic theory of the case:

	Net Settlement Benefit	Gross Recovery Ratio	Net Recovery Ratio
Subgroup A	$15,418,333	61.4%	45.1%
Subgroup B	$2,596,763	52.2%	38.3%
Subgroup C	$3,222,668	30.7%	22.5%
Subgroup D	$65,295	26.1%	19.2%

Of course, the Court has the final say as to the Plan of Allocation, *see* Agreement, p.4; *id.,* Section 2, and the parties remain bound by the Agreement even if the Court were to order a different division of the proceeds. *Id.,* Section 3.C. For now, the Court need only conclude that the Plan of Allocation is within the range of reasonableness based on the foregoing considerations and that the proposed settlement and proposed plan of allocation should be presented to the proposed Class for Class Members' objections or comment. Even if the Court thinks it may ultimately order a different allocation of the

Net Settlement Benefit, notifying the Class and seeking Class Members reactions and input would still be appropriate now.

As noted at the outset of this discussion, the final step in the calculation is to determine the individual Class Member's pro rata share – *i.e.,* if the Plan of Allocation is approved, by multiplying the Net Settlement Benefit applicable to the Class Member's Subgroup by the ratio that the Class Member's alleged underpayment bears to the total underpayments to the applicable Subgroup, calculated according to Plaintiffs' basic whipsaw liability and damages theory by Plaintiffs' enrolled actuary. *Id.,* Section 2.C.

Assuming the maximum deductions, under the proposed Plan of Allocation, this calculation yields the following average results per Subgroup, and the **average of $6,140 per Lump Sum Class Member** reported above:

	No. of Participants	Average Additional Payment
Subgroup A	1774	**$8,691**
Subgroup B	421	**$6,168**
Subgroup C	1254	**$2,570**
Subgroup D	21	**$3,109**

2. Restricted Participant Class.

For the Restricted Participant Class, Class Counsel propose that the Net Settlement Benefit be allocated by reference to two subgroups, defined according to the relative difficulty Class Members would have had overcoming one of the key defenses asserted by Defendants: lack of causation and/or lack of injury. The two subgroups Counsel proposes the Court recognize for purposes of the recommended allocation are: the "Inquiry" Subgroup and the "Non-Inquiry" Subgroup. The Inquiry Subgroup consists of those Class Members who, according to records maintained by the Plan, inquired about receiving a benefit distribution from the Plan at any time between January 1, 1994 and August 17, 2006, and before their 65th birthday. The Non-Inquiry Subgroup consists of those Class Members for whom there is no record of any such inquiry.

While all Members' claims faced obstacles to recovery and all such claims could have been eliminated had Defendants been successful in asserting one or more of their defenses, the probability of Inquiry Subgroup Members overcoming the Plan's arguments was considerably higher than Non-Inquiry Subgroup Members who faced additional defenses regarding causation and injury. The Restricted Participant Class claims for additional benefits relate to a provision in the Plan, Section 6.10B, which the Plan relied on to restrict payment of benefits only after Plan participants inquired about receiving a lump sum benefit distribution. The Plan thus argued that if participants did not make an inquiry about receiving benefits, they did not suffer any injury caused by the Plan's application of Section 6.10B, and they are not members of the Restricted Participant Class and are not entitled to any additional payment. Without crediting this argument, Counsel can say that it is appropriate to recognize that it posed a possibly high hurdle that Inquiry Class Members would not have had to face.

Class Counsel believes that the Restricted Participant Net Settlement Benefit should be distributed based on a weighting of the percentage of total proceeds available to the Class according to the two Subgroups' relative probability of success as against this lack of causation/lack of injury defense. Taking into account the relative positions of the Subgroups and the arguments advanced against them, Class Counsel has concluded that the following assessment of the strength of the claims of members of the Non-Inquiry Subgroup vis-à-vis the claims of members of the Inquiry Subgroup should be used and would result in the most a fair and reasonable allocation of the Net Settlement Benefit for the Restricted Participant Class:

	Relative Strength of Claims
Inquiry Subgroup	**100%**
Non-Inquiry Subgroup	**50%**

This would result in an allocation of the estimated $3.67 million Net Settlement Benefit among the two Subgroups in the following amounts, which in turn represent the following gross and net recovery percentages under Plaintiffs' basic theory of the case:

	Net Settlement Benefit	Gross Recovery Ratio	Net Recovery Ratio
Inquiry Subgroup	$2,651,041	40%	29.4%
Non-Inquiry Subgroup	$1,021,900	20%	14.7%

As in the case of the Lump Sum Class, the final step in the calculation is to determine the individual Class Member's pro rata share – *i.e.,* if the Plan of Allocation is approved, by multiplying the Net Settlement Benefit applicable to the Class Member's Subgroup by the ratio that the amount the Class Member would be due in excess of his or her notional account balances if he or she were to now elect a lump sum, bears to the total excess amounts due that would now be due to the Class Members' Subgroup, calculated according to Plaintiffs' basic whipsaw liability and damages theory calculated by Plaintiffs' enrolled actuary. *Id.,* Section 2.C.

Assuming the maximum deductions, under the proposed Plan of Allocation, this calculation would yield the following average results per Subgroup, and the **average of $3,760 per Class Member** reported above:

	No. of Participants	Average Additional Payment
Inquiry Subgroup	458	**$5,788**
Non-Inquiry Subgroup	518	**$1,973**

D. Form of Payment of Individual Net Settlement Benefits.

Each individual net settlement benefit paid to a Lump Sum or Restricted Participant Class Member would be paid to Class members by the Plan to the greatest extent possible as a tax-qualified benefit. *Id.,* Section 2.F. In the event that some or all of a Class member's individual net settlement benefit cannot be paid as a tax-qualified benefit, Avnet shall make the appropriate arrangements to have the amount paid as a non-tax-qualified benefit. *Id.*

The individual net settlement benefit due members of the Lump Sum Class will be paid as an additional lump sum either via a rollover or via a direct payment at their election (or, if no timely election is made, in the form in which the individual's initial lump-sum payment from the Plan was made). *Id.,* Section 2.D.

The individual net settlement benefit due members of the Restricted Participant Class shall be provided as an additional credit to their notional Cash Balance Accounts. Restricted Participant Class members will be notified if such additional credit makes them eligible for an immediate lump sum distribution of their Cash Balance Account or an immediate annuity under the terms of the Plan. *Id.,* Section 2.E. If such additional contribution does not make the participant eligible for an immediate lump sum distribution of their Cash Balance Account, the Restricted Participant Class member will nevertheless be entitled to elect (subject to his or her spouse's consent) to receive his or her individual net settlement benefit in the form of an immediate lump sum either via a rollover or via a direct payment at their election. *Id.*

E. Costs of Settlement Administration.

Under the Agreement, Plaintiffs, the Classes and/or Class Counsel bear the cost of designing the plans of allocation and the cost of paying an enrolled actuary to perform all calculations regarding Class members' estimated and final individual net settlement benefits. *Id.,* Section 1.D. The cost of settlement administration as regards the Lump Sum Class aspect of this Settlement is to be borne by the Lump Sum Class. *Id.* Class Counsel is responsible for selecting and compensating the Settlement Administrator to be

engaged by the Plan as a custodial trustee for the Lump Sum Class aspect of this Settlement, subject to approval of Defendants (which shall not be unreasonably withheld) and the Court. *Id.* Counsel has selected Rust Consulting, Inc., which ably handled the opt-out notice to the Lump Sum Class in August 2009 and is highly experienced in this area.

As noted above, with certain exceptions, the cost of settlement administration as regards the Restricted Participant Class aspect of this Settlement will be borne by Defendants. *Id.* Defendants or one of them will act as the settlement administrator for the Restricted Participant Class aspect of this Settlement. *Id.*

F. Proposed Notices to the Classes.

The parties have agreed on the form and content of both individualized notices to be mailed ("Mailed Notice") to both Classes and a general publication notice ("Publication Notice") to the Lump Sum Class, attached as Exhibits B-D to the Settlement Agreement, in order to adequately inform all known Class members of their rights under the terms of the Settlement. Because Restricted Participant Class Members are current Plan participants or their beneficiaries or payees with whom the Plan is already in direct contact, the parties do not believe there is a need for a generalized publication notice for this Class.

The Mailed Notice explains the case history; the settlement reached; the proposed plans of allocation and reasons why Plaintiffs believe it is fair and reasonable under the circumstances; and the procedure for obtaining final approval and procedures for objecting to or commenting on the proposed settlement and/or the requested attorney's fee and named plaintiff awards once they are submitted. *Id.,* Exs. B-C.

Each Mail Notice is personal to the recipient and contains a specific estimate of the individual Class Member's Settlement Benefit that was calculated by the enrolled actuary referenced above, based on the assumption that the Plan of Allocation is approved and the Court awards the attorney's fees, expense reimbursement, and named plaintiff case contribution payments as requested and in the case of the Lump Sum Class, the maximum

estimated settlement administration costs are expended. Class members are informed in the notice that should these deductions be less than maximum, their net benefit would be proportionately higher than estimated. *Id.*

The Lump Sum Class Publication Notice will be published in *USA Today* and also discusses the case history, the proposed Settlement and the procedure for obtaining final approval and procedures for objecting to or commenting on the Settlement and/or the Class Counsel's and Named Plaintiffs' requested case contribution payments once they are submitted. *Id.,* Ex. D.

G. Releases

In return for the payment and benefits described above, Plaintiffs and the Classes will seek entry of a Final Order and Judgment in accordance with the terms of the Agreement dismissing with prejudice all claims in the Lawsuit. *See* Agreement, Section 8. After final approval, each Member of the two Classes will be deemed to have released Defendants from any and all claims concerning their participation in the Plan except for individual claims that could not have been asserted on behalf of the Classes (such as a claim that the Class Member's original lump sum was incorrectly calculated by reason of one or more factual errors), provided the participant gives Defendants written notice of such claim no later than the deadline established in the Preliminary Order for objecting to the Settlement. *Id.,* p.4 and Section 8. The Mailed Notice in particular fully apprises proposed Class members of the effect final approval of the proposed settlement will have on their rights in all these regards. *Id.,* Exs. B-C, Section IV.

DISCUSSION

I. The Settlement Meets the Standard for Preliminary Approval

Rule 23 of the Federal Rules of Civil Procedure governs settlements of class action lawsuits. Fed. R. Civ. P. 23(e)(1)(A). Although the procedure for approval of a class action settlement is not specifically delineated in Rule 23, a two-step procedure is set forth and approved in the Federal Judicial Center's *Manual for Complex Litigation* § 21.632, at 320-21 (4th ed. 2004), and is universally followed by federal courts considering class

action settlements. *See, e.g., Nat'l Rural Telecomms. Coop. v. DIRECTV*, *Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). First, the court must determine "whether a proposed class action settlement deserves preliminary approval." *Id.* at 525 (*citing Manual for Complex Litigation*, § 30.31, at 236-37 (3rd ed. 1995)). Second, following notification of the class members, the court must determine whether final approval is warranted. *Id.*

During the first stage, the parties submit the settlement to the court for preliminary approval and the court makes a preliminary fairness evaluation. *Manual for Complex Litigation* § 21.632, at 320-21. In granting preliminary approval, the court determines whether the proposed settlement is "fundamentally fair, adequate, and reasonable." *Hanlon*, 150 F.3d at 1026. While final approval of a class action settlement requires a specific finding that the settlement is "fair, reasonable and adequate," at this juncture this Court need determine only that the proposed settlement falls within the range of possible approval. *Id. Accord In re McKesson HBOC, Inc. ERISA Lit.*, 391 F.Supp.2d 844, 847 (N.D.Ca. 2005); *Arnold v. Arizona Dep't. of Pub. Safety*, CV-01-1463-PHX-LOA, 2006 WL 2168637, *4 (D. Ariz., July 31, 2006).

A more thorough examination of the proposed settlement here will be made based upon the record presented for final approval. For now, however, it should be clear that the proposed settlement is substantively and procedurally fair for present purposes and is a viable candidate for final approval. The proposed settlement would provide Class members with substantial relief without further delay. All Class Members face risks of non-recovery or significantly reduced recovery compared to what they would receive under the proposed settlement. Given the complexities of this action; the skill and tenacity of defense counsel; the merits defenses and damages theories available to Defendants that could significantly reduce the Classes' recovery even if merits defenses are overcome; and the risk of increased costs that would offset the recovery and continued delays in receiving a benefit from the litigation if the parties were to proceed through the completion of summary judgment briefing and/or trial and through a possible appeal, the proposed settlement represents a reasonable resolution of the Classes' claims. It

completely eliminates the risk that the Classes or some portion of them might not otherwise recover from Defendants, or might not recover nearly as much as it would under the proposed settlement.

The Court can give weight to the opinion of experienced and non-collusive counsel in determining whether to preliminarily approve a settlement, especially given the advanced stage of these proceedings. *Nat'l Rural Telecomms. Coop.,* 221 F.R.D. at 528. In the present matter, Class Counsel has worked on this matter for well over two years and conducted significant investigation, discovery and research. Class Counsel has undertaken extensive review of the governing law, relevant facts and tens of thousands pages of documents produced in discovery. Counsel deposed Defendants' expert and all of the key fact witnesses and throughout worked closely with their two actuarial experts to explore every avenue of the parties' possible claims and defenses and potential damages measures. Counsel had abundant information on which to make an informed decision about the proposed Settlement and considers it an excellent result in light of the defenses and alternative damages theories available to the Plan. Class Counsel's opinion is entitled to great weight, especially given their demonstrated ERISA expertise. *See In re Washington Pub. Power Supply Sys. Sec. Lit.*, 720 F.Supp. 1379, 1392 (D. Ariz. 1989) (*citing Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).

The involvement of a highly-experienced (and highly-regarded) professional mediator in helping broker the proposed settlement should give the Court added confidence that the proposed settlement was the result of arm's-length negotiations.

II. The Proposed Notice Satisfies Rule 23

Assuming the Court preliminarily determines that the Settlement is within the range of possible approval, it must then address the notice to be given to the Classes.

Rule 23(e) requires that the district court "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." Fed.R.Civ.P. 23(e)(1). Rule 23(e) notice is designed "to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement

documents, papers, and pleadings filed in the litigation." *In re Prudential Ins. Co.,* 148 F.3d 283, 327 (3d Cir.1998). Notice to class members is essential to providing each member with due process because members of the settlement classes will be bound to the resolution of this case. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313-14 (1950); *see also Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) (finding that due process requires notice to "present a fair recital of the subject matter and proposed terms and give[] an opportunity to be heard to all class members").

More specifically, notice is proper if it provides:

> (a) the material terms of the proposed settlement; (b) disclosure of any special benefit to the class representatives; (c) disclosure of the attorneys' fees provisions; (d) the time and place of the final approval hearing and the method for objecting to the settlement; (e) an explanation regarding the procedures for allocating and distributing the settlement funds; and (f) the address and phone number of class counsel and the procedures for making inquiries.

Rodriguez v. West Publ'g Corp., No. 05-3222, 2007 WL 2827379, at *6 (C.D. Cal. Sep. 10, 2007).

Here, the proposed form of Notice describes in plain English the terms and operation of the Agreement, the considerations that caused Plaintiffs and Class Counsel to conclude that the Settlement is fair and adequate, the maximum counsel fees and class representative compensation that may be sought, the procedure for objecting to the Settlement, and the date and place of the Fairness Hearing.

The content of the Mailed and Publication Notice provides all of the required information concerning Class Members' rights and obligations under the proposed settlement. The Notice sets forth the background of the litigation, the definition of the Class and the key terms of the Settlement. It contains sufficient detail to permit each member of the proposed Settlement to make an informed decision about whether to support or oppose Settlement as well as how to obtain additional information about the Settlement, whether through the website dedicated to the lawsuit or by contacting Class

Counsel directly. It details the procedures for filing objections to the Settlement, Class Counsel's fee petition and/or the request for an award of special payments to the two Named Plaintiffs and for requesting to be heard at the final approval hearing. It explains how to make the elective choice between a rollover and a direct payment via easy-to-understand enclosed forms and instructions. The Mailed Notice arguably goes beyond the requirements of the Rule by providing a specific estimate of each Class Member's Settlement Benefit.

These proposed forms of Notice will fairly apprise Class Members of the Settlement and their options related thereto, as well as fully satisfy due process requirements. *See Silber v. Mabon,* 18 F.3d 1449, 1452-54 (9th Cir. 1994) (approving notice by first class mail as the "best notice practicable"); *Mendoza v. Tucson Sch. Dist. No. 1,* 623 F.2d 1338, 1352 (9th Cir. 1980), *rev'd on other grounds*, 475 U.S. 717 (1986) (stating that notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard").

The method of transmitting the Notice also satisfies Rule 23. The Plan will send notice to Restricted Class members, who are current participants or beneficiaries or alternate payees of current participants in the Plan. *See* Agreement, Section 4.C-D. The Plan has already transmitted the last known address of all Lump Sum Class Members to Class Counsel. The Settlement Administrator will confirm or update the valid postal addresses for the Lump Sum Class members and cause the Notices to be mailed by first class mail to each identified member of the Class. *Id.,* Section 4.A. In the event that the Postal Service returns any of the Notices as undeliverable, the Settlement Administrator will take further steps to obtain correct addresses and re-mail the Notice to those recipients. *Id.* Dissemination of the mailed Notice by first class mail is the usual notification method for class action certifications and settlements. *See In re Prudential Ins.,* 148 F.3d at 326-28 (opt-out class requiring claims); *In re IKON Office Solutions, Inc.*, 209 F.R.D. 94, 101 (E.D. Pa. 2002) (non-opt out class, published notice program also

used).

Under the circumstances, the parties believe that it is sufficient to make only one publication of the Published Notice for the Lump Sum Class in a national newspaper. The parties believe that the Plan's last known address information coupled with the Settlement Administrator's address update efforts will assure the best practicable communication with Class members. Where, as here, Class Counsel is reasonably certain that the address information available from Defendants is comprehensive and will be updated as necessary by the Settlement Administrator, and where the parties have already agreed to provide individualized notice via first class mail, which is the preferred method for disseminating class notice, the extra expense of multiple publications of published notice is not warranted.

CONCLUSION

WHEREFORE, for the reasons stated herein, such reasons as Plaintiffs may later adduce and/or such reasons as may appear to the Court, Plaintiffs ask that their motion be granted and that the Court issue an order: (1) preliminarily approving the proposed Settlement, (2) preliminarily approving the proposed Plans of Allocation (3) approving the form and manner of Class Notice to the Classes, (4) making technical adjustments to the Class definitions to clarify the actual covered persons whose claims would be released if the Settlement is approved, and (5) setting dates for a Fairness Hearing and interim deadlines.

Respectfully submitted this 6th day of November 2009.

Gottesdiener Law Firm, PLLC

By: s/Eli Gottesdiener
Eli Gottesdiener *(PHV)*
498 7th Street
Brooklyn, New York 11215
Telephone: (718) 788-1500

The Blessing Law Firm

William H. Blessing *(PHV)*
119 East Court Street, Suite 500
Cincinnati, Ohio 45202
Telephone: (513) 621-9191

Martin & Bonnett, P.L.L.C.
Susan Martin
Daniel L. Bonnett
Jennifer Kroll
Martin & Bonnett, P.L.L.C.
3300 North Central Avenue, Suite 1720
Phoenix, AZ 85012-2517
Telephone: (602) 240-6900

ATTORNEYS FOR PLAINTIFFS AND THE CLASSES

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2009, I caused the foregoing document and accompanying exhibits to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants listed below:

Robert D. Wick
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Suite 1003
Washington, D.C. 20004

D. Lewis Clark, Jr.
Squire Sanders & Dempsey, LLP
2 Renaissance Sq
40 N. Central Avenue, Suite 2700
Phoenix, AZ 85004

Tara A. Aschenbrand
Squire Sanders & Dempsey, LLP
1300 Huntington Ctr
41 S. High Street
Columbus, OH 43215

Attorneys for Defendants

s/Eli Gottesdiener
Eli Gottesdiener