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Honorable Theresa Doyle
Trial Date: June 16, 2014

Schroeter, Goldmark & Bender

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTINE DAVID and RODNEY
CLURE, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

BANKERS LIFE AND CASUALTY
COMPANY, a foreign corporation; and
ALBERT HAWKS, an individual,

Defendants.

No. 11-2-21154-1 SEA

~~[PROPOSED]~~ FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER REGARDING PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION

Pursuant to the Court's Memorandum Decision of December 2, 2013, plaintiffs
submit the following proposed findings and conclusions regarding the CR 23 factors in this
case.¹

¹ Citations in the following findings and conclusions are to the Declarations of Rod Clure, Christine David, Anthony Gaynes, Gary Glassburn, David Hendry, Maureen Hoff, Stephanie Huggins, Shawn Layton, Christopher Mitchell, Richard Keppler, Bill Blankenship, Erina Bowie, Nicolas Crouner, Lillian Neil, Daniel Graf, Jacquelynn McCormick, Loren Boles, Stephen Cummings, and George Francisco, all of whom are former agents with Bankers Life. Mr. Cummings and Mr. Layton also filed Second Declarations, which are cited. Exhibit citations are to the exhibits appended to the first and second Declarations of Adam J. Berger. Also cited are the declarations of Bankers managers and agents Charles "Bill" Berryhill, Rich Carter, Lawrence "Loren" Dean, Kip Stallcop, Danielle Fawaz, Jules Kendrick, Sara Dinoto, Alina Labizon, Carol Stringer Adado, Jonathan Gans and D.J. Fox submitted by Bankers.

~~[PROPOSED]~~ FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER REGARDING PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION - 1

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ORIGINAL

1 FINDINGS OF FACT

2 1. Plaintiffs Christine David and Rodney Clure seek certification pursuant to
3 Civil Rule 23(a) and (b)(3) of a class of agents who sold insurance policies in the State of
4 Washington for defendant Bankers Life and Casualty Company ("Bankers") between June
5 16, 2008 and December 2, 2013, the date of the Court's Memorandum Decision Granting
6 Plaintiffs' Motion for Class Certification. These agents worked out of two branch offices
7 (Bellevue and Tacoma/University Place) and four satellite offices (Bellingham, Walla Walla,
8 Spokane, and Vancouver). Co-defendant Albert Hawks was the ~~regional and/or branch~~
9 ~~manager~~ *sales manager for the Bellevue office and regional manager*
10 ~~manager for three of these offices (Bellevue, Bellingham, and Walla Walla) for part of the~~
11 ~~proposed class period.~~ *at least June 2008 to July 2011.*

12 2. Bankers labeled plaintiffs and the putative class of agents "independent
13 contractors." Plaintiffs allege they and the other agents were employees under the
14 Washington Minimum Wage Act, RCW 49.46, *et seq.* ("MWA"), and were denied its
15 protections of minimum wage and overtime pay by virtue of their classification as
16 independent contractors.

17 3. The "class list" produced by Bankers to plaintiffs in March 2013 shows that
18 approximately 1,156 agents had worked for the company in Washington between June 16, 2008
19 and the date of that list. Berger Decl. ¶6.

20 4. Plaintiffs have proffered substantial evidence that Bankers followed common
21 policies and practices which applied to the employment classification and working conditions of
22 all agents in Washington during the proposed class period.

23 5. All agents signed the same contract with Bankers, and all agents were classified
24 as independent contractors in accordance with that contract and company policy. Berger Decl.
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1 Ex. 17 (Agent Contract). All agents were paid under the same commission schedule, which was
2 subject to unilateral change by Bankers. Berger Decl. Ex. 15 (Commission Schedule).

3 6. When an agent left Bankers Life, the policyholders served by that agent remained
4 the client of Bankers, not of the agent. In other words, agents did not have their own "book of
5 business."²

6 7. The proposed class members were "captive" agents.³ Bankers controlled the
7 products that agents could sell and prohibited agents from selling the products of competitor
8 insurers.⁴

9 8. Agents worked out of Bankers' offices or out of their home offices; there is no
10 evidence in the record that any leased commercial space. The form of business card proscribed
11 by Bankers also required agents to list the Bankers office as their business address. Berger Decl.
12 Ex. 39 (Field Compliance Alert), at BL 2758.

13 9. Bankers' offices had work and meeting schedules that agents were expected to
14 follow, and agents could be disciplined for failing to comply.⁵

15 10. Bankers required all agents to go through the same New Agent Success and
16 Winners Edge training programs.⁶

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21 ² Layton Decl. ¶15; Mitchell Decl. ¶10; Cummings Decl. ¶10; Berger Decl. Ex. 44 ("Conservation Procedure"), at
22 BL 541 (describing that Agent does not "own" policyholder household, and servicing can be reassigned by Sales
23 Manager); Berger Decl. Ex. 45 (Complaint in lawsuit filed by Bankers against former agents for, *inter alia*,
soliciting customers away from the company).

24 ³ Cummings Decl. ¶15; David Decl. ¶8; McCormick Decl. ¶3; Berger Decl. Ex. 42.

25 ⁴ Second Layton Decl. ¶¶3-8; Second Cummings Decl. ¶¶3-6.

26 ⁵ Berger Decl. Ex. 3 (Office Schedules), Ex. 16 ("Seattle Steps for Success"); Blankenship Decl. ¶¶5-6; Layton Decl.
¶3; Keppler Decl. ¶2; Neil Decl. ¶7; Boles Decl. ¶4; McCormick Decl. ¶6; Mitchell Decl., ¶¶ 2,6; Francisco Decl.
¶4; Crouner Decl. ¶6; Clure Decl. ¶¶ 8, 10; Hendry Decl. ¶7; Gaynes Decl. ¶9; Bowie Decl. ¶5. *See also* Carter
Decl. ¶7 (Bankers declarant, acknowledging written schedule agents were encouraged to follow); Dean Decl.
¶8 (same); Stallcop Decl. ¶9 (same).

1 11. Bankers controlled distribution of sales “leads,”⁷ provided standard telephone
2 scripts and required approval of any different scripts,⁸ imposed restrictions on and required
3 corporate approval of other advertising and marketing, including presentation materials and use
4 of social media,⁹ and expected completion of certain forms, including a standardized “Fact
5 Finder” during and following sales calls.¹⁰

6
7 12. Bankers also set targets for agents regarding the number of prospecting calls and
8 in-person appointments they should make,¹¹ and Bankers’ managers monitored agents’
9 compliance with these expectations.¹²

10 13. Bankers expected agents to keep in daily contact with their managers. Berger
11 Decl. Ex. 16 (“Seattle Steps for Success”).

12 14. Bankers also warned agents when they failed to return client calls within 24
13 hours,¹³ and expected agents to deliver policies in person to customers within a set period of time
14 after the policies were issued.¹⁴

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17 ⁶ Berger Decl. Ex. 4 (“Welcome New Agent” letter), Ex. 7 (Bankers Life Branch Sales Manager [“BSM”] Manual),
18 at BL 981-82; Glassburn Decl. ¶4; Mitchell Decl. ¶4; Clure Decl. ¶5; David Decl. ¶¶6, 11; Layton Decl. ¶8
(describing mandatory new agent training schedule).

19 ⁷ Cummings Decl. ¶8; David Decl. ¶10; Boles Decl. ¶6; Francisco Decl. ¶7; Glassburn Decl. ¶3; Layton Decl.
¶10,11; Gaynes Decl. ¶6.

20 ⁸ Cummings Decl. ¶4; McCormick Decl. ¶5; Berryhill Decl. ¶ 15; Carter Decl. ¶ 18; Berger Decl. Ex. 7 (BSM
Manual), at BL 983, Ex. 23(Telephone Prospecting Training), at BL 1872 (instructing Agents, “do not stray from
the script in any way”); Second Berger Decl. ¶¶4-5 (submitting and quoting training video).

21 ⁹ Bowie Decl. ¶6; Crowner Decl. ¶8; Hoff Decl.¶ 8; *see also* Berger Decl. Ex. 7 (BSM Manual), at BL 982-86,
22 Ex. 17 (Agent Contract), at BL 10, Ex. 25 (Agent Information and Procedure [“Agent”] Manual), at BL 710,
Ex. 33 (Telemarketing Guidelines), Ex. 34 (Field Compliance Alert), Ex. 35 (Field Compliance Alert), Ex. 36
(Agent Compliance Guidelines) (prohibiting websites and restricting use of social media).

23 ¹⁰ Berger Decl. Ex. 7 (BSM Manual), at BL 985-86, Ex. 20 (New Agent Success Training – Fact Finding), at
BL 1775.

24 ¹¹ Berger Decl. Ex. 12 (New Agent Success Workshop - Prospecting), Ex. 16 (“Seattle Steps for Success”); Keppler
Decl. ¶5; Layton Decl. ¶8; David Decl. ¶3; Cummins Decl. ¶¶4, 6.

25 ¹² Boles Decl. ¶5; Cummings Decl. ¶6, Neil Decl. ¶7; Layton Decl. ¶8; David Decl. ¶3.

26 ¹³ Second Berger Decl. ¶6 & Ex. 4 (written warning).

¹⁴ Cummings ¶4; Gaynes ¶7. Ex. 7 (BSM Manual), at BL 989; Ex. 25 (Agent Manual), at BL 764.

1 15. A number of Bankers' declarants acknowledge the control that ~~branch managers,~~
2 ~~specifically Mr. Hawks,~~ could and did exercise over agents' production measures, hours, and
3 schedules.¹⁵

4 16. Bankers did not require agents to have any prior experience in sales or insurance.
5 Layton Decl. ¶5; Cummings Decl. ¶11.

6 17. All agents generally incurred the same types of expenses and made the same
7 types of investments for their work, including licensing fees, laptops, cell phones, vehicles,
8 automobile insurance, gasoline, and office supplies. Glassburn Decl. ¶5; Graf Decl. ¶5.

9 18. Although many agents did not last more than a few months on the job, they were
10 recruited with the promise of a long-term career and were held out to the public as "career"
11 agents.¹⁶ And there appears to be no dispute that the work performed by the agents was an
12 integral and permanent part of Bankers' insurance business.

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15 **CONCLUSIONS OF LAW**

16 1. Washington law favors resolution of cases through class actions, when
17 appropriate. The requirements of CR 23 are liberally construed toward this end. *Nelson v.*
18 *Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 157 P.3d 847 (2007). Often noted in favor of
19 allowing certification is the "state policy favoring aggregation of small claims for purposes
20 of efficiency, deterrence, and access to justice." *Scott v. Cingular Wireless*, 160 Wash.2d
21 843, 851-52, 856-57, 161 P.3d 1000 (2007). Because a class is always subject to a later

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24 ¹⁵ Fawaz Decl. ¶¶6-7; Kendrick Decl. ¶¶8-9; Dinoto Decl. ¶8; Labizon Decl. ¶¶7-8; Adado Decl. ¶5; Gans Decl.
¶¶8,10,11; Fox Decl. ¶9.

25 ¹⁶ Berger Decl. Ex. 4 ("Welcome New Agent" letter), Ex. 42 Inter-Office Correspondence to Albert Hawks from
26 Christine David), Ex. 48 (Program Introduction Instructor Guide), Ex. 49 (Bankers Life Policy brochure), at BL
3171, Ex. 50 (Bankers Life Policy brochure), at BL 3178, Ex. 51 (Agent Development Track); Berger Decl. ¶8 &
Ex. 5 (quoting and submitting NASv training video); Mitchell Decl. ¶7; McCormick ¶4; Layton Decl. ¶6; Huggins
Decl. ¶2; Graf Decl. ¶6; David Decl. ¶7; Crowner Decl. ¶5.

1 decertification, trial courts should err in favor of certification. *Moeller v. Farmers Insurance*
2 *Co. of Wash.*, 155 Wash.App. 133, 148 (2010), *aff'd*, 173 Wash.2d 264 (2011). However, the
3 trial court must conduct a rigorous analysis of each of the CR 23 requirements to determine
4 whether a class action is appropriate in any particular case. *Miller v. Farmer Bros. Co.*, 115
5 Wash.App. 815, 820, 64 P.3d 49 (2003).

6
7 2. In undertaking this review, the Court should not decide the merits of the case.
8 However, it is important for the Court to assess class certification in light of the substantive
9 law underlying plaintiffs' claims in order to determine whether the CR 23 requirements of
10 commonality and predominance are met.

11 3. Here, the Washington Supreme Court has settled the question of the test to be
12 applied under the MWA for determining whether workers are employees or independent
13 contractors. In *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wash.2d 851, 281 P.3d
14 289 (2012), the Court adopted the "economic dependence" test, which is more liberal and
15 provides broader coverage of workers under the MWA than the "right to control" test used in
16 some other jurisdictions.

17
18 4. The central question under the "economic dependence" test is whether the
19 worker is economically dependent upon the alleged employer or is instead in business for
20 himself or herself. *Anfinson*, 174 Wash.2d at 871. Relevant factors include:

- 21
22 (1) The degree of control exercised by the alleged employer;
23 (2) The extent of the relative investments of the worker and the alleged
24 employer;
25 (3) The degree to which the worker's opportunity for profit or loss is determined
26 by the alleged employer;

1 (4) The skill and initiative required in performing the job; and

2 (5) The permanency of the relationship.

3 *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008); *Anfinson*, 174 Wash.2d
4 at 869.¹⁷

5 5. These factors are not exclusive, and the determination must be made based
6 upon the circumstances of the whole activity. *Anfinson*, 174 Wash.2d at 870-71. Regarding
7 the degree of control factor, “[c]ontrol is only significant when it shows an individual exerts
8 such control over a meaningful part of the business that she stands as a separate economic
9 entity.” *Hopkins*, 545 F.3d at 343.

10 6. With respect to class certification under CR 23, the Court must first determine
11 whether the class is so numerous that joinder is impractical. CR 23(a)(1). There is a presumption
12 that joinder is impractical when the class numbers 40 or more. *Pierce v. Novastar*, 238 F.R.D.
13 624, 630 (W.D. Wash. 2006); *see also Miller v. Farmer Bros. Co.*, 115 Wn. App. at 821-22. As
14 noted above, there are more than 1,000 agents in the proposed class. Joinder of this many
15 potential class members is impractical, and the numerosity requirement is satisfied.

16 7. The commonality requirement of CR 23(a)(2) is satisfied if the claims of the
17 putative class members arises out of a common course of conduct or a common nucleus of
18 operative facts in relation to all class members. *Pellino v. Brink’s Inc.*, 164 Wash.App. 668, 683,
19 267 P.3d 383 (2011). The predominance requirement of CR 23(b)(3) is met where the common
20 questions of law or fact predominate over questions affecting only individual class members.
21 *Pellino*, 164 Wash.App. at 683 n.5. The analysis of predominance under CR 23(b)(3) is
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26 ¹⁷ The *Anfinson* Court also cited *Real v. Driscoll Strawberr Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979), which listed a sixth factor: “whether the service rendered is an integral part of the alleged employer’s business.”

1 “somewhat more stringent than the CR 23(a)(2) commonality but it involves a similar
2 inquiry.” *Miller v. Farmer Bros. Co.*, 115 Wn. App. at 825.

3 8. Here, common questions of fact and law predominate. As noted in the Findings
4 of Fact above, all agents were classified by Bankers as independent contractors, signed the same
5 Agent Contract and were paid according to the same commission schedule, which was controlled
6 by Bankers. Bankers exerted a substantial degree of control over what products the agents could
7 sell, as well as their training, prospecting, marketing, sales, and customer service methods.
8 Bankers maintained office schedules and productivity measures that agents were expected to
9 meet. When agents left Bankers, they did not take their customers with them, and agents did not
10 establish their own commercial offices. Thus, there are significant common questions regarding
11 the degree of control exercised by Bankers and the degree to which the agents’ opportunity for
12 profit or loss was determined by Bankers, two of the factors in the *Anfinson* test.
13

14 9. In addition, there are numerous and predominant common questions of law
15 and fact with respect to the other *Anfinson* factors, including whether any specialized skills
16 were needed by agents to perform the job, the permanence of the working relationship, the
17 relative investments of the agents and Bankers, and the centrality of the work to Bankers’
18 business. Indeed, there appears to be little dispute that many of the facts applicable to these
19 elements of the *Anfinson* test are common across the proposed class members, even though
20 the parties may disagree about the conclusions to be drawn from those facts.
21

22 10. Bankers points out differences among agents in the application of its policies
23 regarding outside employment, work hours, training, use of telephone scripts and monitoring of
24 sales practices, use of standard marketing products, and the like. Bankers argues that such
25 variation in working conditions among the agents precludes a finding that common issues
26

1 predominate. However, some variation in work experience is expected in an MWA claim, and a
2 narrow interpretation of the predominance requirement “would contravene the clear policy in this
3 state that CR 23 should be read liberally in the interest of judicial economy.” *Miller v. Farmer*
4 *Bros. Co.*, 115 Wash.App. at 827.

5
6 11. The pivotal issue is whether a trier of fact – despite this variation among
7 agents’ freedom from company policies – could still find economic dependence, the test of
8 employee status under *Anfinson*. The Court concludes that a trier of fact could do so. It was
9 Bankers, not the agents, who determined whether an agent would be exempt from standard
10 company policies. Whether, considering all the circumstances, the agents were or were not in
11 business for themselves is a question that can be answered by the finder of fact on a classwide
12 basis.

13
14 12. Defendants also contend that the agents were exempt from the MWA as outside
15 salespersons. This contention does not defeat class certification. There are common questions of
16 fact, though disputed, whether agents were free to regulate their own work hours, which is a
17 critical element of the outside sales exemption. *See* WAC 296-128-540; Department of Labor
18 and Industries Administrative Policy ES.A.9.7 (June 4, 2005).

19
20 13. Representative claims are typical under CR 23(a)(3) if they are reasonably
21 coextensive with those of absent class members. Typicality is satisfied if the claim arises
22 from the same event or practice or course of conduct that gives rise to the claims of other
23 class members, and if the representatives’ claims are based on the same legal theory. *Pellino*,
24 164 Wash. App. at 684.

25
26 14. It is undisputed that plaintiffs Christine David and Rod Clure worked as
agents for Bankers and, like all other members of the putative class, were classified by

1 Bankers as independent contractors. They allege that they were economically dependent on
2 Bankers and were subject to the same company policies broadly applicable to the class
3 discussed above. See David Decl.; Clure Decl. Their claims that they were not paid
4 minimum wages or overtime under the MWA are the same as the claims asserted on behalf
5 of all class members. Bankers has not identified any defenses uniquely applicable to these
6 plaintiffs. Therefore, typicality is satisfied in this case.

7
8 15. CR 23(a)(4) also requires that the named plaintiffs will adequately represent the
9 class. Courts generally consider two elements in determining whether adequacy of representation
10 is met: (1) there must be no adversity of interest between the class representative and other class
11 members; and (2) the attorneys for the class representative must be qualified to conduct the
12 proposed litigation. *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982); see also
13 *DeFunis v. Odegaard*, 84 Wash.2d 617, 622, 529 P.2d 438 (1974). Here, Bankers has identified
14 no adversity of interest between the plaintiffs and the proposed class, and has not challenged the
15 adequacy of plaintiffs' counsel. The Court also finds that plaintiffs' counsel is adequate, having
16 represented numerous certified classes in litigation under the MWA and other Washington wage
17 and hour laws in the past. See Berger Decl. ¶¶2-5.

18
19 16. The only challenge raised by Bankers to the adequacy of the proposed class
20 representatives concerns Ms. David's current employment in China. However, Ms. David has
21 testified that she will continue to be available to consult with class counsel even while employed
22 in China, and that she will be present in the United States during the scheduled trial of this
23 matter. David Dep. Tr. 35:5-24. Her situation is distinguishable from that of the proposed class
24 representative in *Arabian v. Sony Electronics, Inc.*, 2007 WL 627977, *6 (S.D. Cal. 2007),
25 cited by Bankers, who refused to attend trial in the United States. Finally, defendants offered no
26

1 challenge to the adequacy of Mr. Clure, and the CR 23(a)(4) requirement is satisfied as long as
2 one of the proposed representatives is adequate. For these reasons, the Court concludes that CR
3 23(a)(4) is satisfied here.

4 17. The superiority prong of CR 23(b)(3) focuses on "a comparison of available
5 alternatives." *Sitton v. State Farm Mutual Auto. Ins. Co.*, 116 Wash. App. 245, 256, 63 P.3d
6 198 (2003). A class action for the claims in this case is superior to the alternatives of
7 individual lawsuits or joined plaintiffs. Alternatives would pose unnecessary costs to the
8 judicial system with multiple lawsuits concerning the same legal issue and kinds of evidence
9 concerning agents' economic dependence on Bankers. In addition to judicial efficiency, class
10 treatment of these claims promotes access to justice because litigation costs are prohibitive
11 for most individuals, and some class members may be deterred from filing suit in their own
12 names due to their ongoing work relationship with Bankers. For these reasons, the Court
13 concludes that a class action "is superior to other available methods for the fair and efficient
14 adjudication of the controversy." CR 23(b)(3).

15
16
17 18. ~~Notwithstanding the foregoing,~~ ^{the} Court concludes that the CR 23
18 requirements are not met with respect to defendant Albert Hawks. Plaintiffs seek to certify a
19 statewide class action, but Hawks did not manage three of Bankers' six offices. He had no
20 relationship to agents working out of those offices, and those agents could not have been
21 economically dependent on him. Therefore, the requirements of commonality, typicality, and
22 predominance are not met with respect to Mr. Hawks. ^{adequacy}

23
24 **ORDER**

25 In accordance with the foregoing Findings of Fact and Conclusions of Law, the Court
26 hereby ORDERS as follows:

1 1. Plaintiffs' motion for class certification is GRANTED as to defendant
2 Bankers Life and Casualty Company. The class is defined as:

3 All individuals who worked as agents for Bankers Life and Casualty
4 Company in the State of Washington at any time between June 16, 2008 and
5 December 2, 2013 and who were classified as independent contractors.

6 2. Plaintiffs' motion for class certification is DENIED as to defendant Albert
7 Hawks.

8 3. The parties shall confer and attempt to agree upon a Notice to Class Members
9 ("Notice") no later than ~~January~~ ^{Feb.} 3, 2014 [10 calendar days after the date of this Order].

10 If no agreement can be reached, each party shall submit to the Court a proposed Notice no
11 later than February 1st, 2014 [7 calendar days after date stated in previous sentence];

12 4. After a Notice is approved, defendants' counsel shall provide to Class
13 Counsel, within ten (10) business days of the date of such Order, a complete and corrected
14 list of the putative class members with their last known addresses, telephone numbers and
15 social security numbers (such numbers shall only be used to identify correct addresses if
16 necessary). The social security numbers shall be kept confidential in conformity with the
17 Protective Order entered in this matter;

18 5. Class members shall have thirty (30) days from the date of the Notice within
19 which to return their exclusion requests advising counsel of their desire to opt-out of the
20 case;
21

22 6. Any class member who does not request exclusion may enter an appearance
23 through counsel; and
24

25 7. In the event any Notice is returned undeliverable, Class Counsel shall use
26 their best efforts to obtain corrected addresses. If corrected addresses are obtained, Class

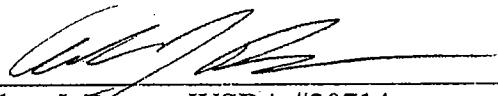
1 Counsel shall re-mail the Notice promptly to the affected individuals, with exception that the
2 deadline for returning the exclusion forms shall be at least thirty (30) days after the date of
3 mailing.

4 DATED this 22 day of January, 2014.

5
6 
7 HONORABLE THERESA DOYLE

8 Presented by:

9 SCHROETER GOLDMARK & BENDER

10
11 
12 Adam J. Berger, WSBA #20714
13 Lindsay L. Halm, WSBA #37141
14 Counsel for Plaintiffs/Class Counsel