

1 V James DeSimone, SBN 119668
2 Michael D. Seplow, SBN 150183
3 SCHONBRUN DESIMONE SELOW
4 HARRIS & HOFFMAN, LLP
5 723 Ocean Front Walk
6 Venice, CA 90291
7 Telephone: (310) 396-0731
8 Facsimile: (310) 399-7040
9 vjdesimone@gmail.com
10 mseplow@gmail.com

11 LAW OFFICES OF THOMAS W. FALVEY
12 THOMAS W. FALVEY, SBN 65744
13 J.D. HENDERSON, SBN 235767
14 301 North Lake Avenue, Suite 800
15 Pasadena, California 91101
16 Telephone: (626) 795-0205
17 thomaswfalvey@gmail.com
18 jdlaw@charter.net

19 Attorneys for Plaintiffs

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

29 DUANE WATERS, DEBRA
30 TURNER and RUDY FAJARDO,
31 on behalf of themselves, all others
32 similarly situated and the general
33 public,

34 Plaintiffs,

35 vs.

36 AT&T SERVICES, INC. (formerly
37 SBC Services, Inc.) and DOES 1
38 through 10;

39 Defendants.

40 Case No: CV 09-3983 BZ

41 **DECLARATION OF V. JAMES
42 DESIMONE IN FURTHER
43 SUPPORT OF MOTION FOR
44 PRELIMINARY APPROVAL OF
45 CLASS ACTION SETTLEMENT
46 AND PROVISIONAL
47 CERTIFICATION OF THE
48 CLASS**

49 **Under Submission
50 Courtroom G**

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DECLARATION OF V. JAMES DESIMONE

59 I, V. James DeSimone, declare as follows:

60 1. I am an attorney-at-law and a partner with the firm Schonbrun
61 DeSimone Seplow Harris & Hoffman LLP (“SDSHH”). I am duly admitted to

1 practice before this Honorable Court and am one of the attorneys of record for
2 Plaintiffs in this action. I have personal knowledge of the facts set forth herein,
3 (except where indicated upon information and belief) and if called as a witness,
4 could and would testify competently thereto. This declaration is being made in
5 support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action
6 Settlement and Provisional Certification of the Class. I am providing this
7 declaration in response to the Court's Order of August 5, 2010, and the comments
8 made by the Court during the August 4, 2010 hearing on the motion for
9 preliminary approval.

10
11 2. This Declaration is submitted to supplement the information provided
12 in the Declaration of Michael D. Seplow which was submitted concurrently with
13 the Motion for Preliminary Approval of Class Action Settlement and Provisional
14 Certification of the Class. As stated in that declaration, Plaintiffs' Counsel
15 retained the services of an expert forensic accountant, Philip Gorman, Ph.D, and
16 worked closely with him to analyze the data provided by Defendant AT&T
17 Services, as well as the information contained in approximately 160 survey
18 responses from putative class members. The materials produced by Defendant
19 included information and documents regarding job titles, claimed overtime hours,
20 work weeks and termination dates and payroll data for each class member. The
21 data provided to Dr. Gorman also included survey responses from approximately
22 130 Sr. Analysts and approximately 30 surveys from Sr. Database Administrators.
23 The total number of surveys - 160 - represents approximately 25% of the 671
24 putative class members.^{1/} Based upon information received from Defendant,
25

26 1. At the time of the mediation, Plaintiffs' counsel had received
27 approximately 160 surveys out of 667 putative class members. Since the
28 mediation, the number of putative class members has increased to 671 and the
total number of surveys received by Plaintiffs' counsel has risen to approximately

1 approximately 60 percent of those 671 putative class members, are still employed
2 by Defendant and 40 percent are former employees.^{2f} Further, according to
3 information obtained from Defendant and from putative class members, AT&T re-
4 classified the Sr. Database Administrator position as “non-exempt” in May 2009.
5 The information obtained from Defendant and the surveys revealed that, apart
6 from the re-classification of Sr. Database Administrators in May 2009,
7 Defendant’s practice during the class period with respect to the classification of
8 Senior Analysts (including Sr. IT Analysts and Sr. OC Test Analysts) as being
9 exempt from overtime requirements is consistent with the practice in effect during
10 the named Plaintiffs’ employment.

11
12 3. Dr. Gorman produced a detailed analysis of his findings
13 which was relied upon extensively by Plaintiffs’ counsel in preparation for the
14 mediation utilizing primarily the payroll data supplied by Defendant and the
15 overtime estimates provided by putative class members who responded to the
16 surveys. Using data provided by Defendant, Dr. Gorman estimated the total
17 number of workweeks to be 83,202 through April 30, 2010, and the classwide
18 average hourly pay rate to be \$36.43.

19
20 4. According to Dr. Gorman’s detailed analysis, based on the estimates
21 of overtime worked, the total potential unpaid overtime without penalties and
22 interest, was approximately \$42,333,151 for Senior IT Analysts. The total for
23 Senior Database Administrators was approximately \$5,308,501 for a total of
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25
26 185. The information in these additional surveys is consistent with the
information in the surveys received prior to the mediation.

27 2. Plaintiffs’ counsel has received at least 67 surveys from current
28 employees.

1 approximately \$47,641,652 for the entire class. Thus, the \$17,000,000 Class
2 Action settlement provided, at the time the agreement was reached on May 19,
3 2010, for a recovery of approximately 36% of the total potential unpaid overtime,
4 excluding penalties and interest.^{3/} This figure is based on the assumption that the
5 estimates of overtime hours contained in the survey responses which were
6 reviewed by Dr. Gorman were both accurate and reflective of the class as a whole.
7 Defendant AT&T Services, Inc. disputes these estimates, as stated in the
8 Declaration of Thomas E. Geidt submitted herewith and contends that the potential
9 recovery of damages, in this action is much less.

10
11 5. An analysis of the Maximum Payment to class members, which in this
12 case is \$11,740,000, shows that the dollar amount recovered on behalf of the class,
13 at the time the agreement was reached on May 19, 2010, is approximately 25% of
14 the total estimate of potential unpaid overtime, excluding penalties and interest.
15 The settlement amount is, of course, a compromise figure, taking into account
16 risks related to certification, liability, and damages. While counsel for Plaintiffs
17 believe that Plaintiffs would prevail both on a contested Motion for Class
18 Certification and in the liability and damages phase of this case, we are also

19
20 3. These figures do not include potential penalties under California law for
21 pay stub and waiting time violations. Plaintiffs estimate that total pay stub and
22 waiting time penalties of the class to be in excess of \$5,000,000. However, in
23 order to establish these penalties, Plaintiffs would need to prove that Defendant
24 acted "wilfully." Defendant contends that its wage statements and payments were
25 made in good faith. Further, these figures do not include payments for missed
26 meal and rest breaks under California law, which is an area of great uncertainty
27 given the California Supreme Court's granting of review in *Brinkley v. Public*
28 *Storage, Inc.*, 198 P.3d 1087 (2009) and *Brinker Restaurant Corp. v. Superior*
Court, 196 P.3d 216 (2008). Plaintiffs estimate the amount of meal and rest break
penalties to be in excess of \$15,000,000 for the entire class, a figure which is
vigorously disputed by Defendant.

1 cognizant of the fact if the Motion for Class Certification were not granted or if
2 the Court or the jury determined that these putative class members were properly
3 classified as exempt, that each class member would likely receive no recovery
4 whatsoever. Moreover, Defendant strongly disputed the amount of overtime
5 worked which, if believed by the trier of fact, would decrease the damage estimate
6 reflected in paragraphs 3 and 4 of this Declaration. Counsel for Plaintiffs also
7 recognize the recent trend towards denial of class certification in general.
8

9 6. For the 671 potential class members, this case involves approximately
10 94,000 work weeks, based on an approval date of August 30, 2010. Under the
11 proposed settlement, each class member will receive approximately \$125 per work
12 week.^{4/} In this case, if the Motions for Preliminary Approval and Final Approval
13 are granted, each Class member will receive approximately \$6,250 for every year
14 worked in the eligible job positions. This means that class members who were
15 employed in these positions for four years will receive approximately \$25,000.00,
16 providing for a certain and definite monetary payment as contrasted with the
17 inherent uncertainty of litigation as well as the current uncertain economic climate.
18 There is also a strong value in the prompt resolution of this case, which will insure
19 that class members will receive compensation by early 2011. Otherwise, they may
20 have to wait for a potential recovery for several years, given the normal pace of
21 litigation and the likelihood of an appeal of a substantial Plaintiffs' verdict. In
22 light of all of these factors, Plaintiffs' counsel and their clients are of the firm
23

24 4. The estimates for total compensable work weeks and value per work
25 week contained in the original moving papers were based on an estimated
26 preliminary approval date of August 4, 2010. As a result of the slight delay in the
27 date of preliminary approval, the number of compensable work weeks in the class,
28 (and the resulting overall payments to class members) will increase somewhat
while the value per work week is now estimated to be approximately \$125 per
work week, a marginal difference given the total overall value of the settlement.

1 belief that this settlement is in the best interest of the class.
2

3 7. As Plaintiffs' counsel stated during the August 4, 2010 hearing,
4 Plaintiffs' counsel is determined to use their best efforts to maximize the number
5 of class members participating in the settlement. The proposed agreement requires
6 the Claims Administrator to send out reminder post cards and also make follow up
7 calls to class members whose surveys have not been received, terms which
8 Plaintiffs' counsel insisted on in negotiations, and to which Defendant agreed, in
9 order to make sure class members were informed of their rights pursuant to the
10 settlement. Further, pursuant to the Court's directive, the revised agreement will
11 require that Defendant provide electronic notice to all class members who are
12 current AT&T Services employees about this settlement. Moreover, information
13 concerning this case, including all pleadings, motions and court order, as well as
14 the terms of the settlement will be posted on Plaintiffs' counsel's website.
15 Additionally, Plaintiffs' counsel will continue their concerted effort to contact all
16 class members for whom we have contact information to encourage them and their
17 colleagues to participate in the benefits of this settlement. Further, pursuant to the
18 Court's request attached hereto as Exhibit A is a proposed mock up of the
19 envelope containing the class notice, claims form and exclusion form. Plaintiffs'
20 counsel has worked with the Claims Administrator to design an envelope that will
21 most likely be noticed by members of the proposed class.
22

23 8. The parties are also submitting, concurrently herewith, a revised
24 settlement agreement that specifically addresses the concerns expressed by the
25 Court during the August 4, 2010 hearing and that were also set forth in the
26 Court's order of August 5, 2010, including concerns about the tension between
27 the opt out California class and the opt in FLSA class and also a revised dispute
28

1 resolution procedure. Plaintiffs are also submitting a brief that provides authority
2 for the proposition that former employees are adequate class representatives.
3 Indeed, as set forth in the accompanying brief, numerous courts have recognized
4 that in damages cases, former employees are often superior class representatives
5 since they are less fearful of reprisals by the employers and therefore more
6 willing to push for a more favorable settlement. The compelling legal authority
7 submitted by Plaintiffs in response to the Court's stated concerns demonstrates
8 unequivocally that former employees are adequate representatives of current
9 employees for the purposes of obtaining damages for the entire class. Finally, the
10 parties are also submitting a revised proposed order, which includes a modified
11 timetable of the relevant dates and deadlines, including notice to class members,
12 deadlines for submitting claims forms and objections, and a proposed date for
13 final approval.

14
15 9. Counsel for the parties believe that the supplemental information
16 provided to the Court addresses all of the concerns expressed during the August
17 4, 2010 hearing. Plaintiffs' counsel has worked diligently to arrive at a fair and
18 just resolution of this matter and will continue to work diligently to promote the
19 best interests of the class members and to maximize the participation in the event
20 the settlement is approved. The proposed settlement in this case is eminently fair
21 and reasonable and provides a substantial benefit to the class members, who, if
22 the settlement is approved, are each likely to receive several thousands of dollars
23 in early 2011. The settlement avoids protracted and uncertain litigation in a hotly
24 contested matter, and thereby promotes the interests of the Courts, the Defendant
25 and the proposed class members. Therefore, we respectfully request that the
26 Court grant preliminary approval of this settlement.
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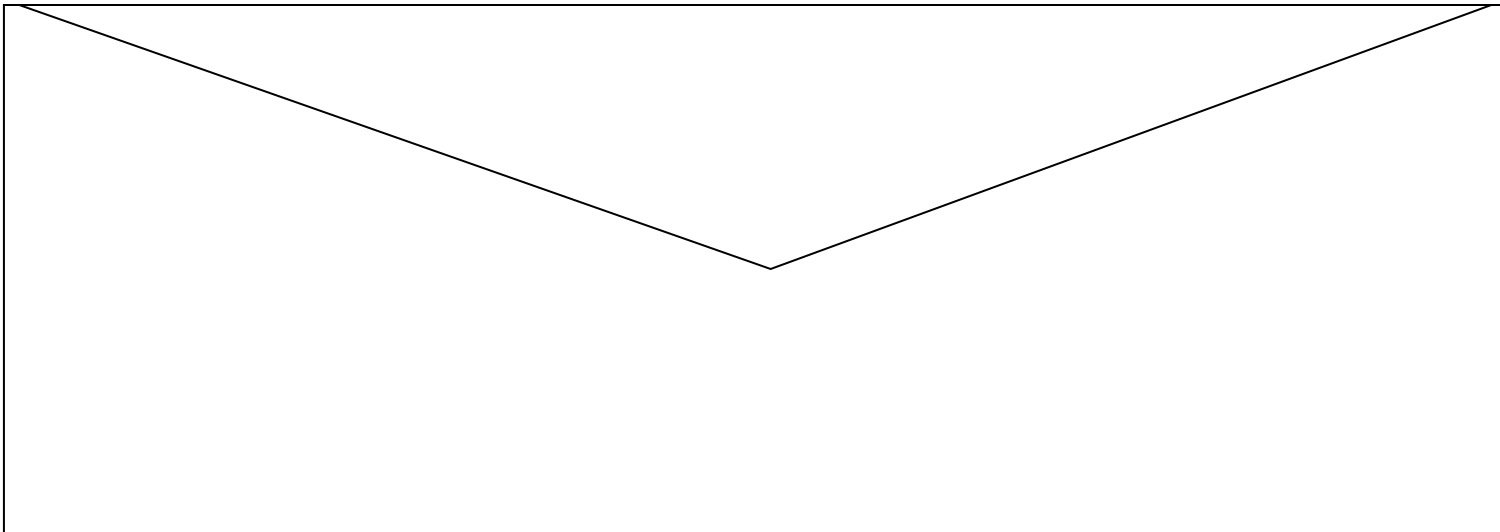
I declare under penalty of perjury that under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 23rd Day of August , 2010 in Venice, California.



V. James DeSimone

EXHIBIT A



**Back Side
#11 Envelopes**

**Front Side
#11 Envelopes**
(4 1/2 x 10 3/8)

Waters, Turner and Fajardo v. AT&T Services, Inc.
c/o CPT Group, Inc.
16630 Aston
Irvine, CA 92606

PRESORTED
First Class
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PAID
QuickSort

RETURN SERVICE REQUESTED

***Please open and promptly respond to participate
in Class Action Settlement pertaining to your
employment at AT&T Services.***

Window

**TIME-SENSITIVE INFORMATION
ENCLOSED**

Waters, Turner and Fajardo v. AT&T Services, Inc.

*c/o CPT Group, Inc.
16630 Aston
Irvine, CA 92606*

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