UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael Tate, Joseph Shuster, Lyle Evanson and John Ayers, individually and on behalf of all other individuals similarly situated,

Plaintiffs,

vs.

Restaurant Technologies, Inc., Parthenon Capital LLC, Jeffrey R. Kiesel, John C. Rutherford, Jonathan O. Grad, Zachary F. Sadek, Philip A. Clough and Robert E. Weil,

Defendants.

Civil File No. 09-cv-02076 *MJD/JJG*

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

Plaintiffs Michael Tate, Joseph Shuster, Lyle Evanson and John Ayers (collectively "Plaintiffs"), individually and on behalf of the Settlement Class (as defined in the Stipulation of Settlement filed herewith as an Exhibit (hereinafter "Stipulation")), move this Court for Preliminary Approval of Class Action Settlement by requesting conditional certification of settlement class and appointment of Class Representatives and Class Counsel. Plaintiffs also seek approval of a form and method for distribution of a class-wide Notice of Settlement of Class Action and Hearing Regarding Settlement ("Notice") and setting of a date for a final settlement hearing. In support thereof, Plaintiffs submit this memorandum.

The litigation involves claims filed by Plaintiffs on behalf of themselves and all others similarly situated against Restaurant Technologies, Inc. ("RTI"), Parthenon Capital LLC, Jeffrey R. Kiesel, John C. Rutherford, Jonathan O. Grad, Zachary F. Sadek, Philip A. Clough and Robert E. Weil (hereinafter collectively referred to as "Defendants") for alleged violations of fiduciary duties in connection with the operation of RTI and a June, 2009 recapitalization of RTI ("2009 recapitalization"). Defendants deny all alleged wrongdoing and contend that their conduct was at all times legal and was in the best interest of RTI. Following extensive work both inside and outside the Court and after an extensive mediation process, the parties reached an agreement to settle, the terms of which are set forth on the Stipulation. Therefore, by this motion, Plaintiffs respectfully move the Court for entry of an order providing the following:

1. preliminarily approving the settlement set forth in the Stipulation;
2. conditionally certifying a settlement class;
3. appointing Michael Tate, Joseph Shuster, Lyle Evanson and John Ayers as the Class Representatives;
4. appointing Anthony Ostlund Baer & Louwagie P.A. and Lockridge Grindal Nauen P.L.L.P. as Class Counsel;
5. approving the proposed Notice; and
6. scheduling a final settlement hearing to consider final approval of the settlement and any related matters, including an application for payment of fees and costs.

I. OVERVIEW OF THE LITIGATION

On July 17, 2009, Plaintiffs filed a Complaint in state court in Minnesota. Shortly thereafter the case was removed to federal court. On March 23, 2010, Plaintiffs filed an Amended Complaint, alleging breaches of fiduciary duty, conversion, fraud, misrepresentation, tortious interference, unjust enrichment, conspiracy and violations of the Delaware entire-fairness standard. The Amended Complaint seeks a declaration that the 2009 recapitalization be voided and other monetary and equitable relief.

More specifically, the Amended Complaint alleges that Defendant Parthenon Capital LLC took control of RTI sometime before 2004 and utilized that control to the detriment of other RTI shareholders by, among other things, diverting RTI's equity to itself. Plaintiffs assert that this occurred through a number of preferred stock offerings and culminated in a 2009 recapitalization which froze out RTI common shareholders and underpaid certain RTI preferred shareholders. Plaintiffs also allege that Defendants acted in concert and elevated their own interests above those of other RTI shareholders to whom they owed fiduciary duties. Plaintiffs have also asserted that the proxy materials used in connection with the 2009 recapitalization contained false and misleading statements, omitted to state material facts necessary to make the statements made not misleading and failed to properly advise RTI shareholders of their ability to pursue certain appraisal rights.

Defendants have denied all alleged wrongdoing and contend that their conduct was at all times legal and was in the best interest of RTI. Defendants also contend that without the financial support of Defendant Parthenon Capital LLC and other private

equity firms, RTI may not have survived. Defendants also contend that, even if a jury was to determine that some act or failure to act took place in connection with the 2009 recapitalization, that Plaintiffs suffered no damage given the financial condition of RTI at that time. The Court has not ruled on the merits of any of the claims or defenses.

The case has undergone extensive motion practice including a motion to dismiss, a motion to assert punitive damages, a motion for class certification, a motion for partial summary judgment and several discovery motions.[1] Further, more than 300,000 pages of documents have been exchanged between the parties and numerous third parties and more than 30 depositions have occurred.

II. SUMMARY OF MEDIATION AND SETTLEMENT NEGOTIATIONS

The Stipulation of Settlement is the result of mediation efforts that took place after nearly a year of litigation. The parties engaged in mediation beginning in late June 2010, facilitated by the Hon. Richard Solum (Ret.). In late August, after extensive negotiations, both parties accepted a proposal developed by Judge Solum, which finally resulted in the Stipulation.

The proposed Stipulation would resolve all claims against the Defendants and the Settlement Class and would result in the release of all claims by members of the putative class. The proposed Stipulation provides for a base recovery amount of $5.5 million and provides for the *possibility* of additional amounts contingent on the occurrence of, and proceeds from, a potential sale of RTI.

[1] At this time, certain motions are pending before the Court including a motion for class certification, a motion to assert punitive damages and a motion for partial summary judgment.

In agreeing to the base recovery amount of $5.5 million with a possible upside resulting from a sale of RTI, Plaintiffs and their counsel took into account not only the size of the recovery, but also (a) the extensive factual record developed in the course of discovery, which included over 300,000 pages of document discovery materials; (b) the 30 depositions taken during the course of discovery, including depositions of many of the named parties, current and former RTI personnel, customers of RTI, attorneys, investment bankers and other witnesses with information regarding the allegations in the Amended Complaint; (c) the factual and affirmative defenses being put forward by Defendants; (d) analyses and assessments of RTI's enterprise value and damages calculations provided by valuation experts; (e) the estimated costs and expenses involved in trial and any subsequent appeal; (f) the efforts and recommendations of the mediator; (g) the impact of protracted litigation on RTI's ongoing efforts to sell the company; and (h) the overall body of knowledge possessed by both parties regarding the strength and weaknesses of the claims and defenses in this case.

DISCUSSION

I. PRELIMINARY APPROVAL OF THE SETTLEMENT AGREEMENT IS APPROPRIATE

A. Class Action Settlements Are Strongly Favored

It is well-established that "compromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 585 (1910); *accord MSK EyEs Ltd. v. Wells Fargo Bank, Nat'l Ass'n*, 546 F.3d 533, 541 (8th Cir. 2008) (noting "our strong public policy of encouraging settlement") (citation and internal

quotation marks omitted); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191 (8th Cir. 1993) (noting "the paramount policy of encouraging settlements" (citation and internal quotation marks omitted)). In general, the settlement of a lawsuit is the result of "the parties' calculus as to the likelihood of success weighed against the cost (money, time, and uncertainty of outcome) of achieving the desired result … except in unusual circumstances, the terms of a settlement are left to the discretion of the parties." *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 (E.D. Pa. 2001). The decision to approve or reject a proposed settlement is committed to the court's sound discretion. *In re UnitedHealth Group, Inc. Sec. Litig.*, 643 F. Supp. 2d 1094, 1099 (D. Minn. 2009).

The policy favoring settlements is particularly strong where class action litigation is concerned, as this Court and other federal courts have noted. *See White v. National Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993) ("The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context."); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." (quotations omitted)); *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits."); *Airline Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166–67 (7th Cir. 1980) ("Federal Courts look with great favor upon the voluntary resolution of litigation

through settlement. This rule has particular force regarding class action lawsuits." (citations omitted)), *aff'd*, 455 U.S. 385 (1982).

Class settlements are favored, in large part, because they provide for prompt, cost-effective resolution of disputes for litigants. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) ("The very purpose of compromise is to avoid the delay and expense of . . . a trial. The parties to a class action are not required to incur immense expense before settling as a means to justify that settlement." (citation and internal quotations omitted)). Class settlements also help to relieve pressure on crowded court dockets. *See Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 688 (N.D. Ga. 2001) (class action settlements "conserve scarce resources that would otherwise be devoted to protracted litigation"). It is because of the strong public policy favoring settlement agreements that "courts should approach them with a presumption in their favor." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (quoting *Little Rock Sch. Dist. v. Pulaski Co. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990)).

Preliminary approval is the first of a two-step process for approval of a proposed class action settlement. *Schoenbaum v. E.I. Dupont De Nemours & Co.*, 4:05CV01108, 2009 WL 4782082, at *2 (E.D. Mo. Dec. 8, 2009). In this first step, the Court simply determines whether the proposed settlement falls within the range of possible approval and whether it is reasonable to issue notification to class members of the settlement's terms. *Id*; *see also Liles v. Del Campo*, 350 F.3d 742, 745 (8th Cir. 2003). In the second step, after notice to the class and an opportunity is provided for absent class members to object or otherwise be heard, the Court must determine whether to grant final approval of

the settlement as fair, reasonable and adequate, under the rules of civil procedure. *See* MANUAL FOR COMPLEX LITIGATION (Third) § 30.41 (1995).

B. Applicable Standards Pertaining to Preliminary Approval of Settlements

On a motion for preliminary approval, a court's review is limited, and "the 'fair, reasonable, and adequate' standard is lowered, with emphasis only on whether the settlement is within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Schoenbaum*, 2009 WL 4782082 at *3; *White v. Nat'l Football League*, 836 F. Supp. 1458, 1466 (D. Minn. 1993); *see In re Prudential Secs. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 208–09 (S.D.N.Y. 1995) (at preliminary approval stage, the court determines only whether the settlement is "possibly fair, reasonable and adequate").

In making this preliminary determination, "courts should consider issues such as whether the settlement carries the hallmarks of collusive negotiation or uninformed decision-making, is unduly favorable to class representatives or certain class members, or excessively compensates attorneys." *Schoenbaum*, 2009 WL 4782082 at *3; s*ee In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1015-16 (S.D. Ohio 2001). The settling parties' views as to the propriety of the settlement are also entitled to some weight. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995); *In re Cendant Corp. Secs. Litig.*, 109 F. Supp. 2d 235, 255 (D.N.J. 2000) ("Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class." (citation and internal quotations omitted)); *In re RJR Nabisco, Inc.*

Sec. Litig., MDL 818, 1992 WL 210138, at *4 (S.D.N.Y. Aug. 24, 1992) (asserting that the court "should give deference, when considering the fairness of the proposed settlement, to the judgment of experienced class counsel").

When considering preliminary approval of a class settlement, the Court lacks "the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1974) ("In examining a proposed compromise for approval or disapproval … the court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial." (citation and internal quotations omitted)). In sum, "a proposed settlement is presumptively reasonable at the preliminary approval stage, and there is an accordingly heavy burden of demonstrating otherwise." *Schoenbaum*, at *3. Assuming that the lenient standard for preliminary approval is satisfied, "then the court should direct that the notice be given to the class members of a formal fairness hearing." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (quoting MANUAL FOR COMPLEX LITIGATION, Second § 30.44 (1985)).

In this case, the proposed settlement clearly satisfies all of the factors required for preliminary approval under Rule 23. First, the proposed settlement is the result of serious, arm's-length negotiations between the parties, facilitated by the substantial efforts of a former judge who is an experienced mediator. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (fact that magistrate judge presided over settlement negotiations and that the district court had prior experience with similar litigation merited further mention as evidence of non-collusive negotiations). Second, the

Stipulation has no obvious deficiencies, falls within the range of possible approval, and does not grant preferential treatment to the Class Representatives or other segments of the class. Finally, the proposed form of Notice provides the necessary information and instructions for members of the Settlement Class to conveniently and fully exercise their due process rights with respect to the settlement. *See* Exhibit C-1 to Stipulation at pp. 16-19. Accordingly, the Court has a solid basis on which to grant preliminary approval and direct that notice of a final settlement hearing be given to class members.

II. CONDITIONAL CERTIFICATION OF A SETTLEMENT CLASS, APPOINTMENT OF PLAINTIFFS AS CLASS REPRESENTATIVES AND APPOINTMENT OF CLASS COUNSEL IS APPROPRIATE

"The settlement class device has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims," particularly where the individual claims are relatively small. *In re Prudential Sec. Ltd. P'ship Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). The purpose of conditional class certification is to allow notice of the proposed settlement to be directed to members of the conditional approval class. *See In re Lupron Mktg. and Sales Practices Litig.*, 345 F. Supp. 2d 135, 138 (D. Mass. 2004) ("no practical way" for court to ascertain fairness of proposed class settlement "other than by proceeding with conditional class certification and giving notice with the opportunity for its members to opt in or out of the settlement"). The notice, in turn, is necessary so that due process and Rule 23 requirements of notice and the right to be heard in court are achieved before a settlement is considered for final approval. Because the certification is conditional, "the court preserves the defendant's ability to contest certification should the settlement fall apart."

In re Cmty. Bank of N. Va., 418 F.3d 277, 299 (3d Cir. 2005) (citation and internal quotations omitted).

The proposed Settlement Class is defined as follows:

> All individuals and entities who held RTI common stock or Series A preferred stock as of June 12, 2009 and all individuals or entities holding options to purchase RTI common stock as of May 13, 2009 (the "Class"). Excluded from the Class are the individual Defendants and members of their immediate family; Defendant RTI and its current officers and directors, legal representatives and financial representatives; Defendant Parthenon Capital LLC, ABS Capital Partners and their affiliates, subsidiaries and individuals affiliated with those entities. Also excluded, with respect to their ownership of options cancelled in the 2009 recapitalization, from the Class are individual employees of RTI who subsequently received options pursuant to a plan adopted on September 3, 2009.[2]

The proposed Settlement Class consists of approximately 260 individuals/entities specifically identified on Exhibit A to the Stipulation.[3]

A. The Proposed Settlement Class Meets All the Requirements for Class Certification Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

Pending in the Court file is Plaintiffs' Memorandum in Support of Motion for Class Certification setting forth a thorough discussion of why this action should proceed

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[2] After the initial filing of the class certification motion [Dkt # 63], Plaintiffs became aware that certain employees who held options prior to the recapitalization were granted options in the new recapitalized entity. As to their pre-recapitalization option holdings, those individuals are now being excluded from the proposed Settlement Class. The "Settlement Class" is the same as the "Class" defined in the Stipulation and the terms may be used interchangeably.

[3] Specifically, the Class is made up of 61 individuals/entities holding 329,455 shares of Class A preferred stock, 59 individuals/entities holding 1,251,015 shares of RTI common stock and 150 individuals holding 275,000 options as of May 13, 2009.

as a class action. [Dkt. # 63] That motion was filed prior to the parties commencing a mediation process. That discussion is incorporated herein and will only briefly be repeated below.

Rule 23(a) sets forth the following prerequisites for certifying a class: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). The proposed Class meets all of the requirements for class certification under Rule 23(a). Moreover, "[t]he requirements for class certification are more readily satisfied in the settlement context than when a class has been proposed for the actual conduct of the litigation." *White v. Nat'l Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993).

Numerosity. Here, the Class exceeds 250 people or entities who collectively held RTI stock and options. *See* Exhibit A to Stipulation The Class members are disbursed nationwide and joinder of all members would be impracticable. *See Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 54 (8th Cir. 1977) ("[T]he question of what constitutes impracticability depends upon the facts of each case."). Accordingly, it is clear that the number of class members and the facts of this case demonstrate that the numerosity requirement of Rule 23 is easily met.

Commonality. Second, the same legal and factual questions are present for each member of the Class. "As a general rule, the commonality requirement imposes a very light burden on plaintiff seeking to certify a class and is easily satisfied." *In re Hartford*

Sales Practices Litig., 192 F.R.D. 592, 603 (D. Minn. 1999). Rule 23(a)(2) requires simply that questions of law or fact be shared by prospective class members — it is not required that all questions be common or that issues be identical. *Lockwood Motors, Inc. v. GM Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995). Here, questions of law and fact common to the Settlement Class include:

- Whether a private equity firm that takes control of a business is subject to the same fiduciary obligations as the board of directors with respect to other shareholders;
- Whether it is a breach of fiduciary duty when a controlling shareholder diverts equity to itself at an unfair price to the detriment of other shareholders;
- Whether the 2009 recapitalization process met the Delaware entire fairness standard;
- Whether it is appropriate to require a specific class of shareholders to release their claims in order to maintain any ownership in the company;
- Whether the proxy memorandum distributed in conjunction with the 2009 recapitalization improperly failed to disclose material information;
- Whether the 2009 recapitalization of RTI was a liquidation event permitting the receipt of liquidation values for holders of Series B-1 and B-2 preferred stock.[4]

Typicality. The third requirement of Rule 23(a) calls for the party seeking certification to show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied when the named plaintiffs' claims emanate from the same event or are based on the same legal theory as the claims of the class members. *Lockwood Motors*, 162 F.R.D. at 575.

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[4] For a more detailed discussion of commonality, *see* Plaintiffs' Memorandum in Support of Motion for Class Certification. [Dkt. # 63]

In many cases the test for typicality is "fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (citation omitted). Here, the claims brought by the Plaintiffs are founded in the same fiduciary obligations owed by Defendants to all members of the Settlement Class. Class members were all affected by the same alleged conduct taking place prior to and in conjunction with the same event — namely, the 2009 recapitalization.

Adequacy. Finally, Rule 23(a) also requires that the plaintiffs must adequately protect the interests of the class. "The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Burch v. Qwest Commc'ns Intern., Inc.*, 677 F. Supp. 2d 1101, 1127–28 (D. Minn. 2009). Here, the named Plaintiffs have shared common interests in obtaining a recovery for their respective equity ownership in RTI. Each of the Plaintiffs has willingly participated in this litigation, including attendance at numerous meetings with Counsel and hearings before this Court and the Magistrate Judge, preparation and participation in depositions, participating in the mediation process, and paying significant out-of-pocket costs associated with this litigation.

Additionally, the requirement of adequacy of representation is met by the qualifications of class counsel herein. *See Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 486 (D. Minn. 2003) (finding adequacy of counsel based on previous experience and expertise). The firms involved — Anthony Ostlund Baer & Louwagie P.A. and

Lockridge Grindal Nauen P.L.L.P. — represent a great deal of expertise in securities-related class action litigation, and the voluminous record developed in this case demonstrates a vigorous, diligent and competent pursuit of this litigation. Consequently, the Plaintiffs as well as their choice for Class Counsel, meet the requirements of Rule 23(a)(4) and (g)(1)(C)(i). [5]

B. The Proposed Settlement Class Meets the Requirements of Rule 23(b).

In addition to satisfying all the criteria of Rule 23(a), a party seeking class certification must satisfy one of the requirements of Rule 23(b). As demonstrated below, Plaintiffs have satisfied both prongs of Rule 23(b)(3), which requires (1) "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and (2) "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

1. The predominance requirement is met.

As discussed above, common questions predominate because the central inquiry in this litigation involves liability and damages stemming from Defendants' alleged conduct, the impact of which affected all RTI shareholders and options holders. The predominance of common questions makes a class action superior for the adjudication of this controversy. *See Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358 (11th Cir.

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[5] For more details about the individual Plaintiffs and for more information about the experience of Anthony Ostlund Baer & Louwagie P.A. and Lockridge Grindal Nauen P.L.L.P. law firms, *see* Plaintiffs' Memorandum in Support of Motion for Class Certification. [Dkt. # 63]

2009) ("If a district court determines that issues common to all class members predominate over individual issues, then a class action will likely be more manageable than, and superior to, individual actions."); *Turner v. Bernstein*, 768 A.2d 24, 26 (Del. Ch. 2000) (approving class certification because "[t]his case requires a determination of whether corporate fiduciaries have committed breaches of fiduciary duty in connection with a corporate transaction and, if so, what the appropriate class-wide remedy should be"); *Glen v. Fairway Indep. Mortg. Corp.*, 265 F.R.D. 474, 480–81 (E.D. Mo. 2010) (common questions of fact predominated where class members received nearly identical representations and primary issue was legality of defendant's non-disclosure), *order clarified*, 4:08CV730, 2010 WL 891621 (E.D. Mo. Mar. 8, 2010).

Here, Plaintiffs represent a Class whose members' claims are predicated on the same issues — namely, whether Defendants are liable for improper conduct in overseeing the operations, capital structure and 2009 recapitalization of RTI and whether the conduct caused damage to members of the Class. The claims alleged in the Amended Complaint involve common questions that predominate over any individual ones that may exist.

2. The superiority requirement is met.

Plaintiffs' proposed class action also satisfies Rule 23(b)'s superiority requirement, which provides that the following factors should be considered in assessing the superiority of class resolution of plaintiffs' claims:

> the interests of members of the class in individually controlling the prosecution ... of separate actions; the extent and nature of any litigation concerning the controversy already commenced by ... members of the class; the desirability ... of concentrating the litigation of the claims in

> the particular forum; the difficulties likely to be encountered in the management of the class action.

Fed. R. Civ. P. 23(b)(3). Each of those factors weighs in favor of a determination that the class mechanism is the superior method for resolving this litigation.

First, "the interest of members of the class in individually controlling the prosecution ... of separate actions" is minimal here. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997). Indeed, individual suits would be cost-prohibitive. Courts have recognized that this so-called "negative value" factor is "the most compelling rationale for finding superiority in a class action." *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 379 & n.175 (E.D. Ark. 2007) (citation and internal quotations omitted); *Jancik v. Cavalry Portfolio Servs., LLC*, Civil No. 06-3104, 2007 WL 1994026, at *9 (D. Minn. July 3, 2007) ("A class action is a superior form of litigation to address 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'." (quoting *Amchem*, 521 U.S. at 617)).

Further, there can be no doubt that multiple suits would result in repetitive and time-consuming adjudications of the same factual and legal issues concerning Defendants' conduct, requiring numerous courts to weigh the same evidence over and over again to resolve the liability questions at issue here. These are the very types of inefficiencies that the class action mechanism is designed to avoid. *See Lockwood Motors*, 162 F.R.D. at 582 (superiority component satisfied where class prosecution of claims would "limit duplicative litigation, limit the burden on this and other courts, and provide a uniform result for similarly situated parties").

For all the above reasons, Plaintiffs respectfully request that the Court conditionally certify a Settlement Class, that the Plaintiffs be appointed Class Representatives and that Anthony Ostlund Baer & Louwagie P.A. and Lockridge Grindal Nauen P.L.L.P. be named Class Counsel.

III. THE PROPOSED FORM OF NOTICE AND METHOD OF DISTRIBUTION OF NOTICE TO THE CLASS MEMBERS IS ADEQUATE

Pursuant to Rule 23(e)(1)(B), "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement]" Fed. R. Civ. P. 23(e)(1). The proposed Notice of Proposed Settlement of Class Action and Hearing Regarding Settlement ("Notice" – attached as Exhibit C-1 to the Stipulation) and plan for publishing are reasonable and designed to advise members of the Settlement Class of their rights. The purpose of notice is to "afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–74 (1974)).

A. Contents of the Notice

A notice must fairly describe the litigation and the proposed settlement and its legal significance. *See*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) ("[T]he information provided to the class members in the notice must be structured in a manner that enables class members rationally to decide whether they should intervene in the settlement proceedings or otherwise make their views known." (internal quotations

omitted)). Due process is satisfied where the class notice provides "a reasonable summary of the stakes of the litigation" and, as is the case here, a convenient method for class members to acquire more detailed information. *Id.*

The proposed Notice, attached as Exhibit C-1 to the Stipulation, is sufficient to inform Settlement Class members of their due process rights. The Notice includes the Class definition and other identifying information, a fair summary of the parties' respective litigation positions, the general terms of the settlement as set forth in the Stipulation, instructions for opting out of or objecting to the settlement, the process and instructions for filing a claim and the date, time, and place of the final settlement hearing. *See* Exhibit C-1 to Stipulation. As described above, recipients of the Notice will be given clear directions for conveniently accessing further information if they so desire.

Further, the Notice sets forth in detail the financial terms of the settlement.[6] Those terms include the following:

1. Defendants will pay the Class $2.55 million in cash; $1.275 million of this amount will be paid into trust upon preliminary approval of the Settlement and $1.275 million will be paid into trust upon final approval of the Settlement;

2. Defendants have represented to the Court their intention to sell RTI through an arm's-length auction process in the relatively near future. There is no guarantee a sale will be consummated nor is there a guaranteed timetable for such a sale. Nonetheless, based in part upon the representation of a possible sale:

   (i) RTI will issue a $1.55 million note payable to the Class by June 1, 2013 or upon the sale of RTI, whichever is earlier, which note is to be subordinated to certain pre-existing RTI debts and will bear a 3% interest rate;

[6] *See* Exhibit C-1 to Stipulation at pp. 12-15.

(ii) RTI will also issue a $1.40 million note payable to the Class (also subordinated to certain pre-existing debt and paying 3% interest rate), which note will be payable the earlier of the closing of an RTI sale or June 1, 2014. This note will be deemed fully satisfied in the event of a sale closing prior to June 1, 2013 for a gross sales price in excess of $150 million, in which case the Class (as designated) will be paid 7% of all amounts over $150 million in connection with a sale in full satisfaction of such note. However, in no event will the Class receive less than the $1.40 million amount reflected by the note and may receive additional sums if the sale of RTI occurs before June 1, 2013 and the gross sales price for RTI exceeds $170 million.

As summarized above, the minimum payment by the Defendants will be $5.5 million (dependant upon RTI's credit for $2.95 million of that amount over time pursuant to the notes). Because Plaintiffs may receive a percentage of the proceeds from any sale of RTI in lieu of the second note, the settlement amount may ultimately be an amount in excess of $5.5 million.[7]

The Notice also sets forth a proposed Plan of Allocation: If the proposed settlement is approved by the Court and becomes final, the money generated by the settlement will be distributed pursuant to the Plan of Allocation as approved by the Court. The Plan of Allocation being proposed by Plaintiffs as set forth in the Notice is as follows:

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[7] Because of the nature and timing of payments, the Notice advises that the settlement will require ongoing jurisdiction of the Court and provides for monitoring of the financial position of RTI and the sales process by the Plaintiffs. Under the terms of the Stipulation, the parties will ask the Court to retain jurisdiction over this matter until all the terms of the Stipulation have been fully satisfied.

1. Costs

All out-of-pocket costs will be paid out of the initial $2.55 million cash payment. Total out-of-pocket costs in this matter are expected to be in the range of $200,000 by the time of the final settlement hearing. These costs will be itemized and filed with the Court in connection with a Fee and Incentive Award Petition which is to be filed no later than three weeks prior to the final settlement hearing in order to provide the opportunity for Class members to review the request.

The Notice advises that a portion of the out-of-pocket costs were paid by approximately 40 individual members of the class who made contributions to help pay the costs as the litigation progressed. In addition to being reimbursed for helping fund the litigation, the proposed Plan of Allocation provides for a pool of $25,000 be set aside and divided among these individuals. *See* Exhibit C-1 to Stipulation at p. 12.

2. Class Representative Incentive Fee

The four named Plaintiffs each participated in the litigation through monitoring and consultation, communications with Class members, attending depositions and hearings, answering interrogatories, producing documents and raising funds to support the litigation. A cumulative amount of $35,000 will be proposed by Class Counsel in acknowledgment of the efforts undertaken by the four named Plaintiffs with respect to the litigation. This is set forth in the Notice, but will be more fully discussed in connection with the submission of a Fee and Incentive Award Petition.

3. Attorneys' Fees

Class Counsel will be seeking an attorneys' fee award in an amount not to exceed 29% of the total recovery to the Settlement Class. If a sale of RTI occurs for more than $190 million, Class Counsel intends to seek a reduced sum of 27% of the proceeds received by the Settlement Class and will recommend a further reduction to 23% of any additional amounts received by the Settlement Class from a sale over $200 million. This is set forth in the Notice but will be more fully set forth in a Fee Petition to be filed with the Court no later than three weeks prior to the final settlement hearing.

4. Option Holders

The option holders who are members of the Settlement Class hold approximately 275,000 options with exercise prices ranging from $5 per share to $27 per share. Under the minimum $5.5 million settlement, the per-share amounts being returned to the common and preferred shareholders are considerably less than the lowest exercise price ($5) of the RTI options. Under these circumstances, the Plaintiffs (one of whom holds options) do not feel that an allocation of proceeds to option holders is appropriate. However, in the event there is a sale in excess of certain levels, the Plaintiffs have determined that a pool of money should be made available to the option holders.

As set forth on the Notice, Plaintiffs are recommending as part of the Plan of Allocation that if a sale of RTI takes place above $200 million, a portion of the proceeds to go to the Settlement Class as a whole should be set aside for option holders in an amount of $10,000 for every $1 million in excess of the $200 million floor. For example, a sale of RTI for $215 million would make $150,000 available for distribution to option

holders. Conversely, a sale of less than $200 million or no sale at all would generate no return for option holders. As indicated in the Notice, Plaintiffs believe that the pool of proceeds for option holders should be divided as follows:

34% to those holding options exercisable at $5 and $10

33% to those holding options exercisable at $15 and $19

33% to those holding options exercisable at $23 or $27

These amounts would be divided on a per option held basis.

5. RTI Preferred and Common Stockholders

Plaintiffs' proposed Plan of Allocation of the settlement proceeds for the RTI preferred and common shareholders is based on an analysis which considered investment amounts, Plaintiffs' argument that the 2009 recapitalization was not a liquidation event and gave no preference rights to RTI preferred shareholders, the amounts actually received in the 2009 recapitalization, the types of equitable relief that a court could administer and the respective strengths and weaknesses of the legal position of the RTI preferred shareholders and the RTI common shareholders. The Plan of Allocation as set forth in the Notice proposes the following:

i) Minimum $5.5 Million Settlement

In the event that no sale of RTI occurs or a sale occurs for less than $170 million, the gross value of the settlement is $5.5 million. After a deduction for fees and costs as proposed above, the following approximate amounts would be distributed to RTI preferred and common shareholders:

$2.92 per preferred share

$2.14 per common share

These amounts may vary depending on the accrual of interest on the notes, the number of people who opt out of the Settlement Class, the number of people who return their claim forms, the actual (instead of estimated) out-of-pocket costs incurred, interest on the money held in trust for the Settlement Class and other factors. However, the above represents Plaintiffs' best estimate of the amount to be paid to RTI preferred and common shareholders comprising the Settlement Class assuming the minimum $5.5 million settlement.

ii) <u>Other Potential Recoveries</u>

The Notice also sets forth several hypothetical situations which could occur in the event there is a sale of RTI in excess of $170 million. For example, as set forth in the Notice:

> If RTI sells for $190 million, the Class may expect to receive monies in the following range:
>
> $3.73 per preferred share
> $2.72 per common share
>
> If RTI sells for $200 million, the Class may expect to receive monies in the following range:
>
> $4.17 per preferred share
> $3.01 per common share

Plaintiffs cannot project exact recoveries under the settlement and can only provide estimates/ranges of potential outcomes because it is uncertain whether a sale will occur and, if so, what the sale price of RTI will be. Further, these are estimates which could vary based on a number of other factors.

B. Plan of Distribution

The responsibility for distribution of settlement proceeds rests with Plaintiffs, who have proposed a Plan of Distribution utilizing a Claims Administrator that is designed to expedite the cost-effective distribution of proceeds to Settlement Class members following the final settlement hearing. Because the amount and timing of settlement proceeds may be affected by the RTI sale process, the Plan of Distribution provides for two-step program of distribution.

First, an initial distribution will be made immediately following the final settlement hearing which will reimburse all costs incurred in the litigation and will pay a portion of the attorneys' fees. This distribution will ensure that those Settlement Class members who contributed to the out-of-pocket costs of the litigation are promptly reimbursed and will provide Class Counsel a partial payment for the time and effort expended over the past 16 months of representation.[8]

Second, Plaintiffs and the Claims Administrator will be prepared to distribute to the Settlement Class the remainder of the proceeds in one of two ways, depending on the RTI sale process. If a sale of RTI has closed prior to the final settlement hearing or is expected to close before June 2011, a single Settlement Class distribution of all proceeds is being proposed with money being held in escrow. However, if no sale of RTI has occurred or is expected to close before June 2011, Plaintiffs may make a distribution of the then-available proceeds solely to the Settlement Class. Thereafter, a final Settlement

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[8] Again, more detail will be provided in the Fee Petition which will set forth an itemization of costs and more detail regarding the time spent on this matter.

Class distribution of the remainder of the proceeds would be made the sooner of (a) the closing of a sale of RTI or (b) the payment on the notes. It is through this final Settlement Class distribution that the remainder of the attorneys' fees are expected to be paid.

In sum, the Plan of Distribution seeks to expedite the distribution of proceeds to the Settlement Class while minimizing the expense associated with distributions. This is explained in the Notice. *See* Exhibit C-1 to Stipulation at p. 16.

C. The Method of Distribution of the Notice

The Class members are each identified on RTI's books and records and it is proposed that the Notice be sent by first class mail. *First Nat'l Bank (Fulda) v. Am. Lenders Facilities, Inc.*, CT 00-269, 2002 WL 1835646, at *2 (D. Minn. July 16, 2002) (finding that mailing notice to all class members by first class mail meets the requirements of Rule 23 and constitutes due and sufficient notice); *Johnson v. GMAC Mortg. Group, Inc.*, 04-CV-2004-LRR, 2006 WL 2433474, at *4 (N.D. Iowa Aug. 21, 2006) ("The court finds that Class Counsel's plan to provide individual notice through first class mail to the Class members' last known addresses provides the 'best notice practicable under the circumstances.' Fed. R. Civ. P. 23(c)(2)(B)."); *Dworsky v. Bank Shares Inc.*, CIV. 3-93-13, 1993 WL 331012, at *1 (D. Minn. May 3, 1993) (same). Further, the Notice will refer to an internet site which will provide additional information to Class members.

CONCLUSION

For all the foregoing reasons, the Court should grant Plaintiffs' Motion for Preliminary Approval of Class Action Settlement which would conditionally certify a Settlement Class, appoint Plaintiffs as Class Representatives and appoint Class Counsel. Plaintiffs respectfully request that the Court approve the form and method of distribution of Notice as proposed herein and set a date for a final settlement hearing.

Dated: September 27, 2010

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