Bill Lann Lee (SBN 108452)
Kelly M. Dermody (SBN 171716)
Eve H. Cervantez (SBN 164709)
Elizabeth A. Alexander (pro hac vice)
Jahan C. Sagafi (SBN 224887)
Nirej S. Sekhon (SBN 213358)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Joseph C. Kohn
Martin J. D'Urso
Hilary Cohen
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Thomas A. Saenz (SBN 159430)
Shaheena Ahmad Simons (SBN 225520)
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014
Telephone: (213) 629-2512
Facsimile: (213) 629-0266

Jack W. Lee, Esq. (SBN 071626)
Lisa Duarte, Esq. (SBN 169750)
John Ota, Esq. (SBN 195532)
MINAMI, LEW & TAMAKI LLP
360 Post Street, 8th Floor
San Francisco, CA 94108
Telephone: (415) 788-9000
Facsimile: (415) 398-3887

Attorneys for Plaintiffs [Additional counsel listed on signature page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EDUARDO GONZALEZ, ANTHONY OCAMPO, ENCARNACION GUTIERREZ, JOHAN MONTOYA, JUANCARLOS GÓMEZ-MONTEJANO, JENNIFER LU, AUSTIN CHU, IVY NGUYEN, ANGELINE WU, ERIC FIGHT, CARLA GRUBB, DAVID CULPEPPER, PATRICE DOUGLASS, and ROBAIR SHERROD, BRANDY HAWK and ANDRE STEELE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO.,

Defendants.

Case Nos. 03-2817 SI, 04-4730 and 04-4731

NOTICE OF MOTION AND PLAINTIFFS' MOTION FOR ORDER GRANTING FINAL APPROVAL OF THE CONSENT DECREE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: April 14, 2005
Hearing Time: 4:00 p.m.

Courtroom of Hon. Susan Illston

[Continued on next page]

ELIZABETH WEST and JENNIFER LU, Plaintiffs, v. ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO., Defendants.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, v. ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO. Defendants.

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TREATISES

NOTICE OF MOTION AND PLAINTIFFS' MOTION FOR ORDER GRANTING FINAL APPROVAL

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on April 14, 2005, at 4:00 p.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Susan Illston, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs Eduardo Gonzalez, Anthony Ocampo, Encarnacion Gutierrez, Johan Montoya, Juancarlos Gómez-Montejano, Jennifer Lu, Austin Chu, Ivy Nguyen, Angeline Wu, Eric Fight, Carla Grubb, David Culpepper, Patrice Douglass, Robair Sherrod, Brandy Hawk, Andre Steele, and Elizabeth West will and hereby do move this Court for final approval of the settlement that was preliminarily approved by this Court on November 16, 2004.

This motion is based upon this Notice of Motion and Motion and the Memorandum of Points and Authorities in Support thereof; the Declaration of Bill Lann Lee In Support of Order of Final Approval ("Bill Lann Lee Decl."); the Declaration of Gregory M. Gochanour ("Gochanour Decl."), the Declaration of Hunter R. Hughes III ("Hughes Decl."), the other declarations of Plaintiffs' counsel submitted herewith; the other records, pleadings, and papers filed in this action; and upon such other documentary and oral evidence or argument as may be presented to the Court at the hearing of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On November 16, 2004, this Court (1) certified a settlement class; (2) appointed Plaintiffs' counsel as Class Counsel; (3) appointed Plaintiffs as adequate Class Representatives; (4) preliminarily approved the proposed class action settlement at issue; (5) directed distribution to the Class of notice of settlement and opportunity to "opt out" of or object to the settlement; and (6) set a schedule for the final settlement approval process. Stipulation of Proposed Settlement and Order of Preliminary Approval of Proposed Consent Decree, November 16, 2004 ("Preliminary Approval Order').

As directed by this Court, notice of the settlement and instructions on how to submit Claim forms for monetary relief and on how to opt out were given by publication in periodicals and internet banner advertisements, and by first class mail to roughly 320,000 potential class members. *See* Claims Administrator's Interim Report to the Court and Point Allocation Recommendation, filed Friday, April 8, 2005 ("Interim Report") at p. 2; Declaration of Wayne Pines, filed Friday, April 8, 2005 ("Pines Decl.") at ¶ 10 (describing "total circulation of all print advertising in the Notice campaign [as] 21,468,694").

The proposed Consent Decree[1] resolves all of Plaintiffs' claims against Abercrombie arising out of the facts at issue in this litigation, including injunctive relief, monetary relief, and attorneys' fees and costs. The Consent Decree satisfies all the criteria for final settlement approval under Ninth Circuit law and falls well within the range of possible approval.

To date, the Claims Administrator has received approximately 20,000 claim forms, eight objections to the settlement (two of which were untimely), and 57 opt-outs (one of which was untimely, and five of which were rescinded). Interim Report at pp. 1-2. Thus, 0.04% of the claimants objected, and 0.28% of the people submitting Claim forms or opt-out statements opted out (both figures include timely and untimely submissions as well as timely rescissions). The objections are narrow in scope. The objectors principally raised issues concerning the fact that the Decree did not encompass disability discrimination, unsupported claims that the monetary relief obtained was insufficient, and concerns about certain general release and other provisions. As explained below, these objections are meritless.

Plaintiffs therefore respectfully request that the Court grant final approval to the Consent Decree, putting into effect the parties' settlement of Plaintiffs' claims against Defendants Abercrombie & Fitch Stores, Inc., A&F California, LLC, A&F Ohio, Inc., and Abercrombie & Fitch Management Co. (hereinafter "Abercrombie"), for significant injunctive and monetary

[1] The Consent Decree is attached hereto as Exhibit 1.

relief for the benefit of the class of minority and female employees and applicants for employment certified in the Preliminary Approval Order.

II. PROCEDURAL BACKGROUND

This litigation consists of three related cases that the court ordered consolidated on November 11, 2004.

Plaintiffs filed their first *Gonzalez* complaint on June 16, 2003, alleging that Abercrombie's nationwide employment policies and practices discriminated against minorities with respect to recruitment, hiring, job assignment, managerial promotion, termination, and other terms and conditions of employment in violation of 42 U.S. § 1981 and the California Fair Employment and Housing Act ("FEHA"). The claims of named Plaintiffs paralleled the class allegations. The complaint was filed four years after the initial administrative charge of discrimination was filed with the U.S. Equal Employment Opportunity Commission ("EEOC") and two years after the EEOC determined that Abercrombie had engaged in classwide discrimination against Latino and African American applicants and employees.

This complaint was subsequently amended on August 13, 2003, January 9, 2004, June 10, 2004 and November 8, 2004 to add Title VII claims, managerial discrimination claims, and more named Plaintiffs and Defendants. Abercrombie answered each complaint, denying all liability.

The parties conducted extensive discovery relevant to class certification. In particular, Plaintiffs' counsel obtained and analyzed 17,000 pages of documents and approximately 74 discs containing computerized data and information. After the initial round of class discovery of documents, Plaintiffs' Fed. R. Civ. P. Rule 30(b)(6) manager depositions, and Abercrombie's depositions of several named Plaintiffs, the parties commenced mediation while continuing to prepare for class certification. Plaintiffs' Mediation Brief, submitted April 5, 2004, summarized the discovery Plaintiffs conducted as well as the expert analyses prepared from the discovery. (Plaintiffs' Mediation Brief was submitted under seal as an exhibit to the November 12, 2004 Declaration of Bill Lann Lee in Support of Motion for Order Granting Preliminary Approval of the Proposed Consent Decree ("Bill Lann Lee Preliminary Approval

Decl.").) In addition to formal discovery, Plaintiffs' counsel contacted more than 500 potential class members of witnesses, and prepared over 165 declarations from potential class members and witnesses. *See* Bill Lann Lee Preliminary Approval, ¶ 12; Bill Lann Lee Decl., ¶ 35. The declarations and analyses of expert witnesses that Plaintiffs' counsel retained were prepared both for the mediation and for a class certification motion should the mediation fail.

After eight two-day sessions of arm's-length mediation, under the supervision of Mediator Hunter R. Hughes III, Esq., of Atlanta, Georgia, the parties reached agreement to the proposed Consent Decree.

A related class action complaint, the *West* action, was filed at the conclusion of the mediation on November 8, 2004, alleging gender discrimination by Abercrombie in employment policies and practices nationwide. Although their complaint was filed at the conclusion of the mediation, Plaintiffs' *West* counsel engaged in significant pre-suit activity, including contacting over 70 witnesses, collecting declarations from Class Members and retaining an expert witness to prepare statistical analyses. *West* counsel also participated fully in the mediation. *See* November 12, 2004 Declaration of Jack W. Lee In Support of Preliminary Approval of the Proposed Consent Decree.

The EEOC filed its pattern or practice action, *EEOC v. Abercrombie*, alleging both race and gender discrimination by Abercrombie in employment policies and practices nationwide, on November 8, 2004. Prior to filing, the EEOC conducted an active investigation encompassing administrative charges across the country, interviewing numerous witnesses, performing independent statistical analyses, and questioning Abercrombie managers and officials. The EEOC also fully participated in every mediation session.

Under the terms of the proposed Consent Decree, Abercrombie will pay approximately $40 million directly to the Class.[2] In addition, Abercrombie has agreed to substantial injunctive reforms, including:

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[2] After subtracting an estimated $154,767 in opt-out credits, an estimated $125,000 in administrative costs beyond imputed interest, and $360,000 in awards for Class Representatives and Charging Parties, in accordance with the Consent Decree, approximately $39,360,233 (or 98.4% of the fund) remains for distribution to the Class Members. *See* Interim Report at 6.

1. Benchmarks and goals for hiring and promotion of women, Latinos, African Americans, and Asian Americans, the progress toward which Abercrombie will be required to report at regular intervals;
2. A prohibition on using participation in fraternities or sororities as a criterion for employment and a prohibition on targeting specific colleges for recruitment purposes;
3. A new Office and Vice President of Diversity, responsible for reporting to the CEO or COO on Abercrombie's progress toward fair employment practices;
4. Equal Employment Opportunity (EEO) and Diversity Training for all employees with hiring authority;
5. Advertising of jobs, revision of position descriptions and employee performance evaluations for managers;
6. A new internal complaint procedure;
7. The hiring of 25 recruiters to recruit and hire female and minority employees, and a requirement for Abercrombie to advertise employment opportunities in media that target minorities of both genders;
8. Abercrombie marketing materials will reflect diversity by including members of minority racial and ethnic groups;
9. Regular reporting and an annual Court hearing to review progress; and
10. A Monitor and a Special Master to oversee compliance.

The term of the decree is six years unless the Court relieves Abercrombie of the provisions of the Decree after four and a half years.

III. ADEQUATE NOTICE WAS GIVEN TO THE CLASS OF THE PROPOSED CONSENT DECREE AND THE OPPORTUNITY TO OPT OUT.

A. Legal Standard

In the Ninth Circuit, "[t]he due process clause requires that notice be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1440 (9th Cir. 1987) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)), *rev'd on other grounds*, 490 U.S. 93 (1989).

> This standard does not mean that the notice must recite the language of every provision of a proposed settlement agreement. 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."

Id. (*Mendoza v. United States*, 623 F.2d 1338, 1352 (9th Cir. 1980)); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1994). Likewise, according to the Manual for Complex Litigation, Fourth (2004) ("MCL 4th"), the Court must "'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." *Id.* at § 21.312, p. 293 (quoting Fed. R. Civ. P. 23(e)(1)(B)).

> Rule 23 requires that the notice provide certain minimal information:
>
> The notice should announce the terms of a proposed settlement and state that, if approved, it will bind all class members. If the class has been certified only for settlement purposes, that fact should be disclosed. Even though a settlement is proposed, the notice should outline the original claims, relief sought, and defenses so class members can make an informed decision about whether to opt out.

Id. at p. 294.

B. <u>Adequate Notice Was Given</u>

Pursuant to the Court's Preliminary Approval Order, Claims Administrator Settlement Services, Inc. ("SSI") sent by first class mail approximately 320,000 notices of class settlement, claim forms and explanation claims procedure on or before January 18, 2005 to all known potential Class Members. *See* Declaration of Mark Patton (filed on April 8, 2005), ¶ 9; *id.* at ¶ 4 (describing database of 171,309 employees and former employees received from defense counsel); Declaration of Ron Barton (filed on April 11, 2005), ¶¶ 2-4 (describing same, compiled by Abercrombie Senior Systems Engineer and sent to defense counsel). This population included thousands of Class Members as well as thousands of individuals fitting the demographic profile of the Class who were not Class Members.

In addition, the Court's Preliminary Approval Order required that Abercrombie publish by January 18, 2005 a legal notice of class settlement, the form of which the Court previously approved, in internet banner ads and the following periodicals: *People*, *Teen People*, *Cosmopolitan*, *Glamour*, *Parents*, *Vibe*, *Ebony*, *People en Español*, and *Maxim en Español*. Defendant Abercrombie timely published legal notice of class settlement. *See* Wayne Pines Decl., ¶¶ 9-10. Furthermore, both the filing and the settlement of the case generated significant nationwide media coverage.

Adequate notice was given. As a result of the notice provided, approximately 20,000 Class Members have filed claim forms, 57 opted out, and eight submitted objections.

IV. <u>THE PROPOSED CONSENT DECREE SATISFIES THE REQUIREMENTS FOR FINAL APPROVAL BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE.</u>

"The compromise of complex litigation is encouraged by the courts and favored by public policy." 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS (4th ed. 2002) ("NEWBERG 4TH"), § 11:41, p. 87 (citing *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (Title VII employment) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.")); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("[C]ooperation and voluntary compliance are the preferred means for achieving the statutory goals of Title VII."); *Churchill Village, L.L.C. v. General Elec.*, 361 F.3d 566, 576 (9th Cir. 2004) (quoting *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *Safeco Corp. v. Van Bronkhorst*, 529 F.2d 943, 950 (9th Cir. 1976).

The Ninth Circuit has held that a class action settlement should be approved if the settlement is fair, reasonable, and adequate. *See Class Plaintiffs*, 955 F.2d at 1276; MCL 4th, § 21.634, p. 322 ("At the fairness hearing, the proponents of the settlement must show that the proposed settlement is "'fair, reasonable, and adequate.'")); 4 NEWBERG 4TH, § 11:41, p. 87; *Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980) ("The sole question before the district court in reviewing a settlement agreement is whether the agreement is fundamentally fair or just.”).

Trial courts are entrusted with broad discretion in determining whether a proposed settlement is fair, reasonable, and adequate, and will only be reversed for a clear abuse of discretion. *Class Plaintiffs*, 955 F.2d at 1276; *Officers for Justice*, 688 F.2d at 626; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977); 8 NEWBERG 4TH, § 24:126, p. 493-94 (“When appealed, a court-approved settlement rarely will be overturned. The abuse of discretion standard leaves much room for judicial discretion.”); *Churchill*, 361 F.3d at 575. Furthermore, courts should give “proper deference to the private consensual decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988).

The Ninth Circuit has provided a nonexhaustive list of factors to guide courts’ discretion:

> the strength of plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice, 688 F.2d at 625 (internal citations omitted).

Newberg provides similar guidance.

> In making a determination of whether an employment discrimination class action settlement is fair and reasonable and to safeguard properly the interests of absent class members, the district court should evaluate: (1) the probable outcome of the litigation; (2) the recommendation and experience of counsel; (3) the amount and nature of discovery; (4) the future expense and duration of litigation; and (5) the number of objectors, and the substance of the objections.

8 NEWBERG 4TH, § 24:126, pp. 492-93. “Basically, the court should weigh the rewards the class

could secure from the settlement against the probable costs and results of continued litigation as well as consider the public policy aspects of Title VII." *Id.* at 493. Newberg also advises that "arm's-length bargaining" is relevant to the fairness and reasonableness of the settlement. *Id.*, § 11.41, p. 90.

Here, these factors support a finding that the Consent Decree is fair, adequate, and reasonable. First, the strength of Plaintiffs' case, the risk, expense, complexity, and likely duration of further litigation, and the risk of maintaining class action status throughout the trial, compared to the amount offered in settlement, all support approval. Second, the discovery completed and the stage of the proceedings support the settlement because the parties have adduced sufficient evidence to provide a reliable basis for assessing the relative strength of their positions. Third, Plaintiffs' counsel's and the EEOC's recommendation support final approval of the Consent Decree because counsel and the EEOC are experienced in this type of complex employment discrimination class action litigation. Fourth, the enthusiastic reaction of Class Members and the tiny number of objections support final approval. Fifth, because the settlement is the result of extensive, arm's-length negotiations spanning six months, the Consent Decree should be granted final approval.

A. <u>The Consent Decree Provides Exceptional Injunctive And Monetary Relief for the Class.</u>

The determination of a "reasonable" settlement is not susceptible of a mathematical equation yielding a particular sum. Rather, "in any case, there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). *See also Zerkle v. Cleveland-Cliffs Iron Co.,* 52 F.R.D. 151, 159 (S.D. N.Y. 1971); *Glicken v. Bratford,* 35 F.R.D. 144, 152 (S.D.N.Y. 1964). Here, the proposed Consent Decree is reasonable in part because it offers substantial concrete benefits to Class Members that they would otherwise be unlikely to achieve. In particular, the injunctive relief is robust, possibly exceeding what might be attainable through complete litigation of the claims. The injunctive relief obtained in the proposed Decrees substantially complies with the ambitious outline of relief Plaintiffs initially proposed at the beginning of mediation. *See* Plaintiffs' Mediation Brief, Exhibit A. Furthermore, the monetary relief of $40 million is approximately 59% of the $69 million Plaintiffs sought in mediation ($73 million less $4 million of 1998 pre-class period losses). *See* Plaintiffs' Mediation Brief, Table D.

Specifically, the injunctive relief, as noted above, provides for monitoring for six years;[3] hiring benchmarks and goals; a ban on recruiting from fraternities, sororities, or specific colleges for recruitment purposes; a new Office and Vice President of Diversity; EEO and diversity training for all employees with hiring authority; advertising of vacancies and revision of job descriptions and manager performance evaluations; a new internal complaint procedure; the hiring of 25 recruiters to recruit and hire female and minority employees, and targeted advertising to minorities; a requirement that marketing materials will reflect diversity; regular reporting and an annual Court hearing and appointment of a Monitor and a Special Master.

B. <u>This Litigation Involved Substantial Potential Risks.</u>

The complexity, expense, and likely duration of the litigation are also relevant. *Marshall*, 550 F.2d at 1173, 1178; *In re NASDAQ Market-Makers Anti-trust Litig*., 187 F.R.D. 465 (S.D.N.Y. 1998); *In re Washington Public Power Supply Systems Securities Litigation*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989).

The factual and legal issues in this action are complex. The trial of Plaintiffs' claims under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, under 42 U.S.C. § 1981, and under California's Fair Employment and Housing Act, Govt. Code §12940 *et seq.* — claims that involve potentially tens of thousands of Class Members and which arose in hundreds of stores nationwide over a period of more than five years — would require substantial preparation and ultimately the presentation of a large number of witnesses.

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[3] In contrast, recent comparable consent decrees in major employment discrimination cases have had shorter terms. (Copies of several such decrees and related documents are attached to the Bill Lann Lee Decl., ¶¶ 20-34, Exs. H-V (hereinafter referred to, respectively, as *Boeing* consent decree; *Coca-Cola* consent decree; *Fleetwood* consent decree; *Group Voyagers* consent decree; *Home Depot* consent decree; *Ingles* consent decree; *Mitsubishi* consent decree; *Publix* consent decree; *Rent-a-Center* consent decree; *Shoney's* consent decree; *Texaco* consent decree; *United* consent decree; *United* notice).) *See, e.g.*, *Mitsubishi* consent decree at ¶ 14 (3-year term); *Boeing* consent decree at 12 (minimum 3-year term); *Coca-Cola* consent decree at 46 (4-year term); *Fleetwood* consent decree at 2 (4-year term); *Rent-a-Center* consent decree at 7-8 (4-year term, with possible 1-year extension).

Of particular relevance to the reasonableness of the proposed Consent Decree is the fact that Defendant has available legal and factual grounds for defending this action, including whether common questions exist justifying class action treatment of Abercrombie's three divisions extending to over 700 stores; whether special qualifications and interest limit the pool of minority or women applicants; whether Class Members applied for Abercrombie's relatively low-paying, part-time sales associate jobs; the extent of alleged in-store segregation; difficulty of assessing damages in light of the ease of mitigating harm to applicants for jobs paying slightly above minimum wage; and whether emotional distress damages are available on a classwide basis. Thus, Plaintiffs and the Class could recover no compensation for emotional distress damages or for backpay and/or they could win only limited or no injunctive relief. By the same token, Abercrombie faces the potential for a substantial jury verdict. Between these two disparate extremes is a more reasonable outcome, which is this settlement.

Furthermore, final resolution of the case through complete litigation could easily take another few years. The parties would be unlikely to be ready for trial before until 2006. Even if trial were to occur then, the delay of appeals could postpone final resolution until 2008 or later. By settling now, Plaintiffs and the Class are able to secure compensation and injunctive relief immediately, and Abercrombie is able to achieve finality.

The proposed Consent Decree will yield a certain, substantial, and prompt recovery for the class both in monetary relief and reform of Abercrombie's employment policies and practices. Such a result will benefit the parties and the court system.

C. <u>The Discovery Completed and the Stage of Proceedings Support Final Approval.</u>

Plaintiffs presented substantial evidence to support the fairness, reasonableness, and adequacy of the settlement, though such evidence is not necessary for final approval. 4 NEWBERG 4TH, § 11:45, p. 127 (noting that in the context of a class action settlement, "[i]t is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation").

As noted above, the results of Plaintiffs' classwide discovery and expert analyses are summarized in the Bill Lann Lee Preliminary Approval Decl. and Plaintiffs' Mediation Brief. Class Counsel and Abercrombie reviewed the extensive evidence carefully during the litigation and settlement negotiations to assess the strengths and weaknesses of their respective cases. They were therefore well prepared to reliably gauge the reasonableness of the Consent Decree. Their judgment of the appropriateness of the monetary compensation and the sufficiency, completeness, and feasibility of the injunctive relief was well-founded.

Thus, Plaintiffs' counsel negotiated the Consent Decree with ample knowledge of the strengths and weaknesses of their case.

D. The Experience and Views of Class Counsel, the EEOC, and Mediator Support the Proposed Consent Decree.

In appraising the fairness of a proposed settlement, the view of experienced counsel favoring the settlement is "entitled to considerable weight." *In re Saxon Sec. Litig.*, 644 F. Supp. 465 (S.D.N.Y. 1985); *Boyd v. Bechtel Corp.*, 485 F. Supp. 622 (N.D. Cal. 1979); *Linney v. Cellular Alaska P'ship*, 1997 WL 450064 , at *5 (N.D. Cal. July 18, 1997); *Ellis,* 87 F.R.D. at 15, 18.

Class Counsel are highly experienced in class action litigation generally, and specifically in employment discrimination class actions. *See* Bill Lann Lee Preliminary Approval Decl., ¶ 4; Declaration of Thomas A. Saenz ("Saenz Decl."), ¶¶ 4-7; Declaration of Martin D'Urso ("D'Urso Decl."), ¶¶ 4-6; Declaration of Jack W. Lee. It is their considered opinion that the proposed Consent Decree achieves the best result possible for Class Members under the circumstances. Some of the Class Counsel have been prosecuting this case for roughly six years, and are intimately familiar with the strengths and risks involved in the case. Likewise, the EEOC has been involved in the investigation of the claims raised in this case for almost six years as well and recommends this Consent Decree.

The EEOC's enthusiastic participation in the settlement supports approval. 4 NEWBERG 4TH, § 11:49, p. 154 (noting that "the court may ask for the agency's opinion of the fairness and adequacy of the settlement"). *See* Declaration of Gregory M. Gochanour ("Gochanour Decl.") (supporting the Consent decree as "fair, reasonable, and adequate relief for the Class," and opining that "the result is a just one").

Mediator Hunter Hughes, himself an experienced employment discrimination litigator and mediator, has submitted a declaration attesting to the fairness, adequacy, and reasonableness of the proposed Consent Decree. *See* Hughes Decl.

E. <u>The Reaction of Class Members Supports the Proposed Settlement</u>

All 16 Class Representatives support final approval. Class Members were given reasonable notice of the settlement terms and had the opportunity to object and/or opt out, in compliance with Rule 23(e)(4)(A) and the Court's Preliminary Approval Order.

The overwhelmingly positive response of potential class members supports the conclusion that the proposed settlement is fair, adequate, and reasonable. Approximately 20,000 individuals in a largely transient, college-age population submitted Claim forms. Including untimely submissions and excluding rescissions, 63 individuals, or 0.31% of the total, submitted opt-out statements or objections. Thus, roughly 99.69% of the response supported the Decree by seeking relief under its terms.

It would be "extremely unusual" if no objections were submitted. *See In re Anthracite Coal Antitrust Litig*., 79 F.R.D. 707, 712-13 (M.D. Pa. 1978), *aff'd in part*, 612 F.2d 576 (3rd Cir. 1979). Hence, for example, in *Stoetzner v. United States Steel Corp*., 897 F.2d 115, 118-19 (3rd Cir. 1990), the Third Circuit held that the fact that "only" 29 members of a 281-member class (10%) had objected "strongly favor[ed] settlement." *See also Boyd v. Bechtel Corp*., 485 F. Supp. 610, 624 (N.D. Cal. 1979) (that only 16% of the class objected was persuasive of the adequacy of the settlement); *County of Suffolk v. Long Island Lighting Co*., 710 F. Supp. 1428, 1437 (E.D.N.Y. 1989) ("[O]pposition to a class settlement--even by a majority of the class — is not a bar to court approval if the settlement is fair," citing *Grant v. Bethlehem Steel Corp*., 823 F.2d 20, 23 (2d Cir. 1987)).

Objections by several class members or even by a substantial percentage of class members do not prevent the Court from granting final approval. *See Reed v. General Motors Corp*., 703 F.2d 170 (5th Cir. 1983) (affirming district court's approval of proposed class settlement, despite objections by 23 of 27 named plaintiffs and nearly 40% of the class); *Huguley* *v. General Motors Corp.*, 128 F.R.D. 81 (E.D. Mich. 1989), *aff'd*, 925 F.2d 1464 (6th Cir. 1991), *and aff'd*, 999 F.2d 142 (6th Cir. 1993) (approving settlement over objections of approximately 15% of the class); *Parker v. Anderson*, 667 F.2d 1204, 33 Fed. R. Serv. 2d 963 (5th Cir. 1982) (affirming approval of settlement over class member and plaintiff objections); 8 NEWBERG 4TH, § 24:127, p. 501 ("Before approving a consent decree, the court may make adjustments for objections raised, unless the settlement is found to be fair and reasonable in spite of the raised objections.").

F. <u>The Settlement Is a Product of Extensive, Arm's-Length Negotiations.</u>

Where a settlement is reached through arm's-length negotiations, in the absence of fraud or collusion, the Court should be hesitant to substitute its own judgment for that of counsel. "A presumption exists in favor of a settlement when there has been arm's-length bargaining and no objections by the parties, and when both counsel are able to evaluate reasonably their chances for success if the case were to proceed to trial." 8 NEWBERG 4TH, § 24:126, p. 493 (citing *Guardians Ass'n of New York City Police Dept. v. Civil Service Commission of City of New York*, 527 F. Supp. 751 (S.D.N.Y. 1981)); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610 (N.D. Cal. 1979) (Orrick, J.) ((approving settlement of employment discrimination case negotiated by experienced counsel after significant discovery, despite finding that it provided very modest relief to the class); *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982).

The Consent Decree is the result of vigorous, extended arm's-length negotiations spanning half a year of structured mediation. The negotiations between Plaintiffs' counsel, the EEOC, and counsel for Abercrombie were conducted under the supervision of experienced mediator Hunter Hughes. *See* Hughes Decl., ¶¶ 8-10; Gochanour Decl., ¶ 6. The parties submitted mediation briefs, declarations, expert statistical reports, damages estimates and legal authorities to Mr. Hughes prior to the first mediation session on April 13-14, 2004, and thereafter as well. The negotiations were often heated and protracted. The settlement discussions involved eight two-day mediation sessions and numerous additional telephone discussions and drafting sessions. Bill Lann Lee Preliminary Approval Decl., ¶ 31. Extensive, good-faith settlement discussions between the parties continued outside of mediation sessions. The parties exchanged numerous settlement drafts until the day the Consent Decree was signed on November 8, 2004. *See* Bill Lann Lee Preliminary Approval Decl., ¶ 29. Moreover, the Court was involved in regulating the mediation schedule, extending several times the Court's deadlines.

The EEOC's participation in the negotiations weighs in favor of finding a class settlement fundamentally fair, adequate, and reasonable. *Hanlon*, 150 F.3d at 1026. Here, the government entity specifically charged with enforcing Title VII for private employees like Abercrombie, is a signatory to the proposed Decree.

The intensive efforts of Plaintiffs' counsel, the EEOC, and Defendant's counsel to resolve this case have resulted in a fair and comprehensive settlement that provides significant injunctive and monetary relief for the class members.

V. <u>THE OBJECTIONS ARE WITHOUT MERIT.</u>

Only eight objections were filed by Class Members, including two that were received late. We discuss each of the objections in turn, but note initially that most of the objections are conclusory. "General objections without factual or legal substantiation carry little weight." 4 NEWBERG 4TH, § 11:58.

A. <u>Objections of Three Minority Class Members with Disabilities.</u>

Three minority Class Members with disabilities objected to the proposed Decree because the Decree does not address disability discrimination. *See* Objections of Esteban Diaz, Tony Gómez, and Maria I. Hernandez (included in Interim Report). Those objections stated that they would make claim forms for monetary relief as minority Class Members, but that they would continue to pursue their EEOC charges raising disability discrimination against Abercrombie.

The instant cases concern discrimination on the basis of race, national origin or gender. Neither the three related complaints, the underlying administrative charges of named Plaintiffs, nor the proposed Decree address claims of discrimination on the basis of disability. Nor does the Decree bar these or other individuals from pursuing disability claims against Abercrombie in subsequent proceedings. The release provision for Class Members is limited to claims of "alleged race, color, national origin or gender discrimination." Consent Decree, XVIII.A.

These objections do not warrant any action by the Court because, as these objectors themselves admit, they can continue asserting their disability claims notwithstanding the proposed Decree.

B. <u>Late Objections of Amani J. King and Efe Agindotan.</u>

Amani J. King filed a late objection (received by the Claims Administrator on March 10, 2005) to the $40 million monetary relief as not sufficient without any supporting data. Efe Agindotan filed a late objection (received by the Claims Administrator on March 22, 2005) "claiming the amount of $250,000.00 USD."

"Inadequacy of the fund may be attacked on the basis that the circumstances indicate that the plaintiff's likelihood of recovery is greater than suggested by the proponents, or that the potential recovery of damages has been undervalued and therefore underestimated." 4 NEWBERG 4TH, § 11:58; *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380 (S.D.N.Y. 1972), *aff'd in part, rev'd in part on other grounds*, 495 F.2d 448 (antitrust) (approving settlement that represented 3.2 to 3.8% of possible damages).

In this case, King offers no factual support for his claim that the settlement is insufficient. In fact, as noted above, the $40 million in monetary relief Plaintiffs ultimately obtained is approximately three-fifths of Plaintiffs' initial estimate of loss, in spite of Defendants' substantial defenses. Similarly, Agindotan offers no factual support for his personal claim of entitlement to a quarter of a million dollars, nor did he opt out to bring his own claim.

C. <u>Objection of Elizabeth Guleke.</u>

Objector Elizabeth Guleke, represented by her father James O. Guleke II, filed a motion to dismiss for lack of personal jurisdiction (because she is a Texas resident) and a request for exclusion, as well as objecting to the proposed Decree. Plaintiffs treat the motion to dismiss and request for exclusion as an opt-out notice.

Guleke objects to the "binding" effect upon her of the injunctive relief, questions whether Class Members obtain any "real" benefit from the Decree, objects to disclosing private information during the implementation of the Decree, and argues that the appointment of Mediator Hunter Hughes as Special Master is inappropriate. First, the binding effect of the

Decree's reforms to Abercrombie's employment system result from Rule 23(b)(2), not the Decree. In any event, the binding effect is largely theoretical for a former employee such as Guleke. Second, Plaintiffs submit that the Decree's benefits are not only real but also substantial. Moreover, Guleke has no standing to object because she has not submitted a claim form and has excluded herself from the monetary relief. Third, there is no evidence at all of abuse of Class Members' privacy interests by the Claims Administrator SSI, and, again, Guleke has no standing to raise issues concerning the claims procedure.

Fourth, Guleke's opposition to the parties' proposal that the Court appoint Mr. Hughes as Special Master for implementation of the Consent Decree is meritless. She argues that a mediator should not disclose mediation communications to a Special Master "appointed to resolve all disputes arising under the Decree." Guleke's position stems from a misreading of the Decree and a misconception of the legal principles governing consent decree implementation. She is wrong that the Special Master will resolve all disputes; Section X.B. makes clear that the Court itself is the ultimate arbiter of disputes under the Decree. Furthermore, the parties' joint proposal of Mr. Hughes as Special Master waives any objections in view of the advantages of his knowledge and experience. Again, neither party nor the EEOC objects to the fact that Mr. Hughes's fee will be paid by Abercrombie. Nor is there any basis for analogizing Mr. Hughes' prior service as the parties' neutral mediator to serving as a lawyer for a party. In short, there is neither a conflict of interest nor any appearance of impropriety.

D. <u>The Objection of Rachel Potter.</u>

Rachel Potter (a.k.a. "Rachel Lee Hoop")[4] and Leigh Foster, represented by some of the same counsel, submitted substantially overlapping objections on March 7, 2005, each of which is less than four pages, addressing a series of perceived shortcomings of the Consent Decree in one or two paragraphs.[5] The objections were conclusory and cited no legal authority.

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[4] *See* Bill Lann Lee Decl., ¶ 17, Ex. F (attaching Claim form of Rachel Lee Hoop (which lists "Rachel Lee Potter" as a former name)).

[5] By agreement of the parties, Foster's counsel has withdrawn her objection subject to the Court's approval in exchange for the written assurance of Plaintiffs' Counsel to provide notice and an opportunity to comment upon any proposed modification of the Decree and to have the comments brought to the attention of the Special Master and the Court, as well as Plaintiffs' Counsels'

The lone objection with merit is the discovery of a self-described "typographical" error, in which the letter "D" should be changed to "C." (The parties have agreed to make this change, subject to the Court's approval.)[6]

1. <u>The Proposed Consent Decree Is Sufficiently Clear.</u>

Potter objects that the Decree "is simply inadequate," arguing that the 60-page Consent Decree and the Notice "do not state how much money the class member is to potentially receive." Potter Objection, at 2. Potter also asserts that the Allocation Plan is "vague and unclear," Potter Objection, at 3, but specifies no particular phrase that is vague or unclear and suggests no improvements to the Consent Decree. Potter's counsel could have easily called Class Counsel, Abercrombie's counsel, the EEOC, or the Claims Administrator to better understand the Consent Decree. Her counsel did not.[7] *See* Interrogatory Responses of Rachel Potter, pp. 10-11 (answering only "None" or that "I spoke with my attorney" in response to interrogatories regarding the effort she made to understand allocation to her or to the class members generally under the Decree). Thousands of other Class Members chose the straightforward route of calling for information. *See* Interim Report at 2-3 (summarizing over 5,000 instances of people contacting Claims Administrator for information).

Notice need only provide "general" information about a settlement. *See, e.g., Mendoza v. United States*, 623 F.2d 1338, 1352 (9th Cir. 1980) ("very general description of the proposed settlement" satisfies standards); *In re Michael Milken & Assocs. Sec. Litig.,* 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (Class notice "need only describe the terms of the settlement generally.").) "It is not necessary to include all of the details of the settlement, but only to 'fairly apprise' class members of the terms of the settlement." 5 Moore's Federal Practice, § 23.83[2]

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payment of $15,000 in attorneys' fees. *See* Motion For Order Approving Withdrawal of Objection Submitted By Leigh Foster, filed on April 11, 2005.

[6] Potter also complains, without factual support, that the negotiated attorneys' fees are "excessive" and should "better correspond to the actual value" conferred, without specifying what a more appropriate fee would be. Potter Objection, at 5. This objection is addressed above.

[7] Potter also complains that Exhibit C was not posted on the Claims Administrator's website. It was available from Counsel, the Clerk's Office and the Claims Administrator, but her counsel chose not to request it. *See* Interrogatory Responses of Rachel Potter, p. 10 (Bill Lann Lee Decl., ¶ 18, Ex. G).

(Matthew Bender 3d ed. 1999) (quoting *Gottlieb v. Wiles*, 11 F.3d 1004, 1013 (10th Cir. 1993) (settlement notice was not deficient simply because it failed to specify exact formula to be used in calculating amounts to be awarded to individual class members)). "[F]requently, . . . settlements provide only the basic principles for determining [class member] awards, contemplating further proceedings to ascertain the factual matters on which the awards depend." MCL 4th, § 32.465, p. 597; 3 NEWBERG 4TH, § 8:32, at p. 265 ("It is unnecessary for the settlement distribution formula to specify precisely the amount that each individual class member may expect to recover."). "Often, . . . the details of allocation and distribution are not established until after the settlement is approved." MCL 4th, § 21.313, pp. 295-96. Here, the Notice approved by the Court explained the settlement process and monetary relief factors in significant detail.[8]

Usually, it is impossible for an individual class member to determine their individual recovery (or even the average recovery) *ex ante*, because the number of claimants is unknowable *ex ante*. *See, e.g.*, *United* notice, p. 2 (explaining allocation as dependent on future individualized fact determinations); *Mitsubishi* consent decree, ¶ 24 (explaining discretionary allocation based on EEOC's case-by-case determination of each claim's value, based on five factors); *Rent-a-Center* consent decree, p. 15 (providing individual monetary recovery contingent on number of claimants and attorneys' fees and costs to be taken out of fund); *Boeing* consent decree, p. 18, 21-23 (same).

The proposed Decree is not vague. In addition to providing the total class recovery, the proposed Decree provided the specific factors that would be used to evaluate claims. These factors are: "length of service with Abercrombie; discrimination claims based on race, national origin or gender in promotion, assignment, hire or termination; any personal injury, such as emotional distress, suffered as a result of the discrimination; and any time or effort devoted to the litigation." Consent Decree at 56. (Potter's counsel does not appear to have read the Decree with a great amount of care, erroneously claiming that Plaintiffs' fees and costs total

[8] Potter's objection also lacks sufficient support because she failed to "specify what amount would fairly, adequately, and reasonably settle [her] monetary claims," or to "state on what grounds [s]he deserves a larger share of the settlement funds." *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 20 (N.D. Cal. 1980).

$40 million. Potter Objection, at p. 4 n.1.)

2. <u>The Court Retains Jurisdiction Over the Parties And Has Sole Authority To Modify the Terms of the Consent Decree.</u>

Potter misreads the Consent Decree to permit the parties to unilaterally modify the 60-page proposal and then objects to its own misreading.

First, Potter misconstrues Section VI.B., asserting that it allows the parties to collusively abort the Consent decree's term without Court approval, after payment of all attorneys' fees, Potter Objection, at 3, reading the first sentence in isolation. However, "[u]nless and until the court issues an order granting the motion to be relieved, all provisions of the Decree shall remain in full force and effect." Section VI.B., at p. 9.

Second, Potter similarly argues that Section IX.B.2. allows the parties to modify the Consent decree without Court approval. Potter Objection, at 3-4. This ignores the remainder of the paragraph, which makes clear that Court approval is required to effectuate a modification.

More importantly, a consent decree is an *order* of the court. Only the court may amend its own order. Decrees and commentators references to the parties' ability to modify a decree impliedly assume that such modifications require court approval. *See, e.g.*, 8 NEWBERG 4TH, § 24:126, p. 494 ("Consent decrees that are approved as part of a class settlement may be modified based on the experience of the parties implementing the decree.") (citing *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269 (N.D. Cal. 1976) (Title VII employment class action) (approving certain modifications in consent decree agreed upon by the parties).

In fact, this Court approved a Consent Decree that contained almost identical language in *Butler v. Home Depot*, Case Nos. C-94-4335 SI, C-95-2182 SI (N.D. Cal.) ("Class Counsel and Home Depot may jointly agree to modify the Decree. . . ."). *See* Bill Lann Lee Decl., ¶¶ 24-25, Exs. L-M (attaching consent decree and subsequent order in which the Court modified two aspects of that Consent Decree in response to the parties' stipulated proposed order). Similar modification language has been used in other employment discrimination consent decrees. *See, e.g.*, *Boeing* consent decree at 63 (allowing the parties to "negotiate in good faith over modifications that will ensure that the objectives of this Decree may be achieved"); *Publix* consent decree at 30 (providing that class counsel, the EEOC, and the defendant "may jointly agree to modify the Decree"); *Ingles* consent decree at 14 (same, without EEOC).

3. **<u>The Release Is Narrow, Protecting Class Members' Rights To the Maximum Extent Feasible.</u>**

Potter next asserts that the release is "far too broad," Potter Objection, at 4, without specifying how the release is overbroad, by, for example, pointing to specific types of claims (whether hers or hypothetical) that might be released. In actuality, the release is narrow. Here, the release is limited to claims arising out of conduct during the liability period alleging discrimination by race, color, national origin, and/or gender in employment. Section VIII.A., at pp. 10-11. It explicitly excludes harassment claims. It does not release disability discrimination, age discrimination, minimum wage, or overtime claims, for example. (In contrast, the named Plaintiffs' release is broader.)

Class action settlements commonly release "any and all related civil claims the plaintiffs had against the settling defendant[] based on the same facts." *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981). The release "may refer to all claims, both potential and actual, that may have been raised in the pending action with respect to the matter in controversy." 4 NEWBERG 4TH, § 12:15, pp. 310-11; *id.* at 312 & 312 n.6 (noting that it is typical for the judgment to embrace "the claims that were asserted or that may arise out of the transactions or events pleaded in the complaint").

Comparable major employment discrimination settlements have often included much broader releases than those here. *See, e.g.*, *Roberts v. Texaco Inc.*, 94 Civ. 2015 at 5 (CLB) (S.D.N.Y.) (releasing age, disability, gender, and religion discrimination claims in racial discrimination class action); *Coca-Cola* consent decree at 31 n.10 (releasing "all employment claims" including workers' compensation, age, disability, gender, and religion discrimination, libel, slander, assault and invasion of privacy).

4. **<u>Plaintiffs Agree that the Single-Letter Typographical Error Should Be Corrected.</u>**

Potter points out a typographical error in Section VIII.C. Potter Objection, at 4.

The last sentence begins, "This Section VIII.D." Because the sentence is within Section VIII.C., the letter "D" should be changed to "C."[9] As described in the Motion For Order Approving Withdrawal of Objection Submitted By Leigh Foster, filed on April 11, 2005, this change has already been addressed through the discussions between Class Counsel and Objector Foster's counsel.

5. <u>The Monitoring Mechanisms Are Adequate.</u>

Potter argues that the monitoring mechanisms are inadequate for failing to award attorneys' fees to successful challenges, asserting that the fixed payment to Class Counsel for such future challenges is an insufficient incentive for Class Counsel to uphold their duty. Potter Objection, at 4-5. This criticism is meritless.

As an initial matter, the Consent Decree provides multiple overlapping enforcement mechanisms, which together ensure that Class Members' interests are more than adequately protected: (1) a Court-appointed Monitor, (2) a Court-appointed Special Master, (3) judicial oversight, including annual status reports and hearings, (4) regular compliance meetings, (5) extensive reporting and recordkeeping, and (6) oversight by Class Counsel and EEOC.

Class Counsel will satisfy their ongoing obligations to the Class by properly seeking out and presenting instances of noncompliance to the Special Master. The liquidated $600,000 allocated for future attorneys' fees is staggered in six declining annual payments from 2005 to 2010. Section XVIII.B., p. 59. The *Home Depot* Consent Decree contained a similar provision. *Id.* at 82 (staggering payments over several years after final approval date). The Court, which will hold annual hearings, will of course be able to gauge whether Class Counsel are fulfilling their duties.

Potter also criticizes omitting the EEOC from seeking fees. Potter Objection, at p. 4. However, the EEOC is precluded by statute from recovering fees under Title VII. 42 U.S.C.

[9] Although Objectors Foster and Potter could have brought it to the parties' attention by a simple phone call or other informal contact, Objectors instead chose to bring a formal objection to the Consent Decree.

§ 2000e-5(k) (permitting parties, but not the EEOC, to recover costs and attorney's fees). This fact will not prevent the EEOC from fulfilling its duties under the Consent Decree.

6. <u>The 125% Opt-Out Credit Is Reasonable.</u>

Potter further asserts that the 125% credit that Abercrombie receives for each opt-out is excessive because the "percentage returned . . . to Abercrombie should never exceed the amount paid to [the] average Class Member." Potter Objection, at 3. Potter cites no authority or logic. To the contrary, a 125% credit is reasonable because opt-outs are likely to litigate their claims individually, imposing defense costs on Abercrombie and exposing Abercrombie to greater-than-average liability risk.

"A lump sum settlement offer by defendants may contain a provision that entitles the defendants to reduce the settlement fund on exclusion of a substantial portion of class claims." 4 NEWBERG 4TH, § 12:13, p. 307; *id.* at p. 308 (citing *State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) (approving reduction of settlement from $100 million to $83 million based on opt-out credits)). Similar employment discrimination class actions have similar provisions. For example, the *Publix* consent decree provided for an opt-out credit to the defendant of $20,000-150,000 per class member who opted out, up to a total of $4,000,000 in opt-out credits. *Id.* at 106-08. Similarly, in *Ingles*, the defendant received $37,500 or $5,000 for each opt-out, up to a total of $1,000,000. *Id.* at 67.

In the instant case, the Claims Administrator has calculated that average Class Member awards should range from $1,449 to $2,757. Interim Report at 6-7. The average opt-out credits therefore range from $1,811 to $3,446. These amounts do not provide Abercrombie generous amounts to defend individual cases. The objection to the size of the opt-out credit is without merit.

VI. <u>THE PROPOSED CLASS REPRESENTATIVE AND CHARGING PARTY AWARDS ARE FAIR, REASONABLE, AND ADEQUATE.</u>

In accordance with routine class action practice, the parties propose that the named plaintiffs receive awards to provide fair compensation for their contribution to the litigation. These awards are in place of their recovery as Class members, and compensate them for their investment of time and effort, their exposure to the risks of retaliation and harassment, the invaluable service they provided during the pre- and post-filing investigation of potential discrimination, and their broader claims releases.

"Settlement agreements in employment discrimination class actions may contain provisions awarding monetary recoveries and other special benefits to named plaintiffs for their unique claims." 8 NEWBERG, § 24:129, p. 504-05; *cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). The Ninth Circuit recently addressed the issue of representative plaintiff awards in *Staton v. Boeing*, 327 F.3d 938 (9th Cir. 2003), affirming that named plaintiffs can receive reasonable incentive awards. In order to determine whether an award was reasonable, the Ninth Circuit held that a court must individually evaluate the awards, considering relevant factors, including each plaintiff's actions for the interests of the class, the degree of benefit to the class by those actions, the amount of time and energy a plaintiff has expended for the litigation, and reasonable fears of workplace retaliation. *Staton*, 327 F.3d at 977.

In accordance with *Staton*, Plaintiffs' counsel made individualized determinations of each named Plaintiff and Charging Party award based on several factors, including an assessment of their claims, pendency of administrative charges, participation in media outreach to the Class, deposition and other involvement in investigative proceedings, or preparing written discovery. These determinations are summarized in Bill Lann Lee Decl., ¶ 8, Ex. B.

In *Ingram v. Coca-Cola Co.,* 200 F.R.D. 685 (N.D. Ga. 2001), the Court approved incentive awards of $300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process and taking the risk of stepping forward on behalf of the class. *Id.* at 694. In *Boeing*, the consent decree stated that the 12 named plaintiffs would apply for awards of $100,000 each, for a total of $1.2 million, or 1.6% of the $75 million fund. *Id.* at 26. (This was partly in compensation for the broader release of claims that they made. *Id.* at 27.) In *Publix*, each of the 12 named plaintiffs who did not opt out received $67,710, taken from the total monetary fund of $63.5 million (for a total of 1.3%). *Id.* at 96-97. The *United* consent decree provided payments of $3,350,663 to the 13 named plaintiffs, or 11.1% of the total, for an average of roughly $258,000 per named plaintiff. *United* notice p. 2. The *Rent-a-Center*, consent decree provided payments of $100,000 each to 19 named plaintiffs and 3 charging parties (for a total of $2.2 million), and $55,000 each to several other named plaintiffs. *Id.* at 12-13. Likewise, this Court recently ordered named plaintiff awards of $30,000 and $28,125 (above and beyond their compensation as class members) to two named plaintiffs in an overtime pay class action. *Scherrer*, at 12.[10]

"[I]t is not uncommon for class members with prior charges of discrimination to receive special relief in settlement." *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1024 (E.D. Wis. 1984) (Title VII) (holding that individual relief for a named plaintiff, who "filed the EEOC charge upon which this lawsuit is based and has been instrumental in prosecuting this lawsuit since the date it was filed," was appropriate); *Kyriazi v. Western Elec. Co.*, 527 F. Supp. 18, 20 (D.N.J. 1981) (Title VII) (ordering back pay of $103,507 and reinstatement for single named plaintiff in addition to $7 million settlement for which 2000 potential class members submitted claim forms); *Women's Comm. For Equal Employment Opportunity v. National Broadcasting Co.*, 76 F.R.D. 173, 180 (S.D.N.Y.1977) (Title VII) (approving awards ranging

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[10] *See also In Re S. Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997) (approving $303,000 payment to each class representative plaintiff in employment case settling before class certification); *Martens v. Smith Barney*, No. 96 Civ. 3779, 1998 WL 1661385 *4 (S.D.N.Y. July 28, 1998) and 181 F.R.D. 243, 262 (S.D.N.Y. 1998) (approving payments of up to $150,000 for named plaintiffs, for a total of $1.9 million in incentive payments for employment case settling prior to class certification); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (approving incentive payments up to $85,000 for named plaintiffs in employment case settling prior to class certification); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving $50,000 participation award); *Bogosian v. Gulf Oil Corp.*, 621 F.Supp. 27 (E.D. Pa. 1985) (award of $20,000 each to two class representatives); *Bryan v. Pittsburgh Plate Glass Co.*, 59 F.R.D. 616, 617 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3d Cir.) (payments of $17,500 each to individual class members who aided in advancing Title VII case); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250 (S.D. Ohio 1991) (approving $50,000 awards to named plaintiffs, from settlement with current cash value of $32 million in consumer case); *In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (approving $35,000 to $55,000 awards to corporate named plaintiffs, from settlement of $18 million in consumer case); *Cimarron Pipeline Const., Inc. v. National Council on Compensation Ins.*, 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993) (approving $10,000 awards to corporate named plaintiffs, from settlement of $35 million in securities case).

from $1,336 to $35,174 for named plaintiffs, equaling roughly 71% of their total damages, in addition to settlement of $1.5 million plus injunctive relief).

In sum, the factors courts use in determining the amount of incentive payments include (1) a comparison between the incentive awards and the range of monetary recovery available to the class; *Ingram*, 200 F.R.D. at 694; *Roberts*, 979 F. Supp. at 204; (2) time and effort put into the litigation; *Van Vranken*, 901 F. Supp. at 299; *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); (3) whether the litigation will further the public policy underlying the statutory scheme, *Roberts*, 979 F. Supp. at 201 n.25; (4) risks of retaliation, *Roberts*, 979 F. Supp. at 202, *Cook*, 142 F.3d at 1016; and (5) compromise of unique individual claims, *Women's Comm. for Equal Employment Opportunity v. Nat'l Broad. Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977).

The average amount awarded to the Class Representatives in this litigation is less than $16,000, *inclusive of monetary relief for their claims*, which is well within the range of awards courts have permitted named plaintiffs. *See* Exhibit C to Consent Decree (listing individual Named Plaintiff and Charging Party awards). The valuable efforts of the class representatives and charging parties, their willingness to litigate and pursue their representative claims, and the strength of their claims have resulted in a settlement that will benefit all Settlement Class Members. Bill Lann Lee Preliminary Approval Decl., ¶ 32. The payment of approximately 0.9% of the $40 million total to 16 Class Representatives additional Charging Parties is appropriate. Class Representatives and Charging Parties, unlike Class Members, are required to execute broader releases and to forego payments under the normal Claims process.

VII. THE PROPOSED FEE IS LIKEWISE FAIR, REASONABLE, AND ADEQUATE.

"Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. Proc. 23(e)). To be fair, adequate, and reasonable, the fees should be "not unreasonably high." *Id.* at 964.

Adequate compensation for Class counsel is socially beneficial:

> The contingent fee and the class action are "the poor man's keys to the courthouse." Both vehicles allow the average citizen and taxpayer to have their injuries redressed and their rights protected. Both permit persons of limited resources to obtain competent legal counsel, an essential ingredient in our adversary system of justice.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375 (D. Minn. 1985).

Where, as here, counsel's efforts create a fund and/or nonmonetary benefits available to a class, "the district court has discretion to use either [the percentage or the lodestar] method." *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994). *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (noting that the traditional method for calculating a common fund fee is to award a percentage of the total fund); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (same). "Whether a court applies the lodestar or the percentage method, 'we require only that fee awards in common fund cases be reasonable under the circumstances.'" *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1294 n.2 (9th Cir. 1994) (quoting *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990)).

First, the lodestar method involves multiplying the number of hours reasonably expended by the reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The court may reduce the hours claimed where the time was not reasonably expended, but must provide an explanation for the reduction. *Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir. 2001). The hourly rates used must be "in line with those prevailing in the community for services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 886, 895. "[A]pplying the attorneys' current rates" is appropriate as a means of compensating for the delay in payment. *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994).

The next step in the lodestar method is to determine whether to grant a multiplier, based the *Kerr* factors (listed below) that are not accounted for in the lodestar determination. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1212 (9th Cir. 1986); *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1303 (9th Cir. 1994) (holding that district court abused its discretion in denying a lodestar multiplier).[11]

Second, the percentage-of-fund method involves awarding a reasonable percentage of the fund to the attorneys. The Ninth Circuit has approved of the approach of setting the benchmark percentage-based fee awards at "25 percent . . .[, which] can then be adjusted upward or downward to account for any unusual circumstances involved in this case." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). In addition, fees in comparable cases (as a percent of total recovery) are particularly relevant. *Vizcaino v. Microsoft*, 290 F.3d 1043, 1050 n.4 (9th Cir. 2002) (approving fee of 28% of $97 million recovery) (surveying 34 recent "megafund" cases valued at $50-200 million in recovery, and finding that "most [fee] awards" are between 10% and 30% of the total recovery, and "a bare majority" are "clustered in the 20-30% range").[12] "[O]ne purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, thus ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation." MCL 4th, § 14.122, p. 193 (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980) (recognizing the importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk nonpayment)).

In the instant case, Plaintiffs used a lodestar method to determine the fee after the substantial injunctive and monetary relief had been negotiated. Bill Lann Lee Decl., ¶ 16; Hughes Decl., ¶ 11; Gochanour Decl., ¶ 7. A percentage-based cross-check provides a means of confirming the reasonableness of the fee. *Hanlon*, 150 F.3d at 1029 (approving of the district

[11] Where plaintiffs attain relief under both federal and California state law, it is appropriate to enhance the lodestar fee with a multiplier based on state law, even though the multiplier is not available under the federal substantive law. *Mangold v. California Public Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (affirming multiplier of two, where plaintiffs brought both ADEA and FEHA claims); *Scherer*, at 3 (same).

[12] Authority in other Circuits is consistent. *In re Safety Components Int'l, Inc.*, 166 F. Supp.2d 72, 101-04 (D.N.J. 2001) (surveying percentage of fund awards across Third Circuit and finding awards well above 25 percent to be common)*; In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("[t]raditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions"); *Manners v. American Gen. Life Ins. Co.*, 1999 WL 33581944, at *29 (M.D. Tenn., Aug. 11, 1999) (citing cases and stating that "throughout the Sixth Circuit, attorneys' fees in class actions have ranged from 20%-50%"); *Wise v. Popoff*, 835 F. Supp. 977, 980 (E.D. Mich. 1993) (holding that courts routinely award fees ranging from 20-50 percent of the common fund).

court's apparent review of the negotiated fees under a lodestar methodology, then conducting a brief percentage review as a cross-check); *cf.* MCL 4th, § 14.121, p. 178 (noting that "seven courts of appeals permit awarding fees by either the percentage-fee or lodestar method or both (generally using the lodestar as a cross-check)").

Under either method, the court should gauge the reasonableness of the fee by considering the factors listed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975):

> (1) the time and labor required,
> (2) the novelty and difficulty of the questions involved,
> (3) the skill requisite to perform the legal service properly,
> (4) the preclusion of other employment by the attorney due to acceptance of the case,
> (5) the customary fee,
> (6) whether the fee is fixed or contingent,
> (7) time limitations imposed by the client or the circumstances,
> (8) the amount involved and the results obtained,
> (9) the experience, reputation, and ability of the attorneys,
> (10) the 'undesirability' of the case,
> (11) the nature and length of the professional relationship with the client, and
> (12) awards in similar cases.

Id. at 70 (lodestar method); *Loring v. City of Scottsdale, Ariz.*, 721 F.2d 274, 275 (9th Cir. 1983) (percentage method) (citations omitted). Factors 1, 2, 3, 4, 5, and 9 are generally accounted for in the lodestar, and are not necessary to the determination of the multiplier here. They are discussed below because of their relevance to the percentage determination.

A. <u>The Time and Labor Required Were Substantial.</u>

Class counsel expended substantial time and labor in securing the significant relief for the Class. In total, the private firms and public interest organizations invested approximately 13,187 hours of attorney, law clerk, and support staff time. *See* declarations of Class Counsel. MALDEF in particular has prosecuted the case for six years, since 1999, when the first charge of discrimination was filed with the EEOC. *See* Saenz Decl., ¶ 12. Once the case was filed, Class Counsel quickly and intensively conducted extensive class discovery in both cases, and engaged in substantial research into the factual and legal issues, as evidenced by Plaintiffs' Mediation Brief. During the six-month mediation, Class Counsel continued to prepare for class certification and trial. Notably, Class counsel prepared and collected over 170 signed Class Member and witness declarations, and conducted hundreds of other interviews. See Plaintiffs also expended significant resources in extensive expert statistical, industrial, psychological, and sociological analyses of Defendant's employment data and employment practices. *See, e.g.*, Bill Lann Lee Preliminary Approval Decl., ¶¶ 10, 16.

B. The Questions Involved Were Novel and Difficult.

The questions involved raised novel and difficult issues. Plaintiffs alleged "image discrimination," a form of subjective stereotyping. Abercrombie was in a position to defend against substantial backpay exposure with evidence of the opportunity for easy mitigation of damages due to the low-age and part-time nature of the jobs, high industry turnover, and general labor pool mobility. Furthermore, Plaintiffs' emotional distress claims were susceptible to attack at the class certification stage on commonality grounds, and at the merits stage on grounds of provability and degree of harm.

C. The Case Required Significant Skill to Perform the Legal Service Properly.

The prosecution of this case required significant legal skill, as indicated in the previous factor, and the staying power and managerial competence to pursue the litigation in coordinated fashion with a large team of private and public interest co-counsel, and against a determined adversary. The case also required significant negotiation skills and knowledge of remedial options to conduct a successful protracted negotiation in the extended mediation.

D. Class Counsel Were Precluded From Other Employment Due to Acceptance of the Case.

The attorneys who took the laboring oar in the litigation were precluded from other employment by their substantial investment of time and resources in this litigation once the action was filed.

E. The Customary Fee and Awards in Similar Cases, Whether Measured Under the Lodestar Method or the Percentage Method, Support the Fee Application.

The customary fee in complex employment discrimination class action cases – as confirmed in similar cases[13] – is measured either by the lodestar method or as a percentage of the fund generated. Under either method, the fee is reasonable.

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[13] The fifth and twelfth *Kerr* factors are addressed together here.

1. The fee is reasonable under the lodestar-multiplier method.

The fee request is reasonable in light of the amount of time and expense invested by Class Counsel during the course of investigation and litigation. Class Counsel conducted extensive discovery, including interviewing hundreds of witnesses and potential class members to secure over 170 signed declarations. Class Counsel invested significant resources of time and money in legal, statistical, industrial, psychological, and sociological analyses of the case, and in extensive negotiations. These efforts are all reflected in counsel's contemporaneously-kept time records. *See* Bill Lann Lee Decl., ¶¶ 9-16, Exs. C-E (attaching fee and cost data for Lieff, Cabraser, Heimann & Bernstein, LLP); Saenz Decl., ¶¶ 11-19, Exs. B, C, & D (attaching fee and cost data for Mexican American Legal Defense and Educational Fund); Declaration of Kimberly West-Faulcon, ¶¶ 11, 16, Exs. C & D (attaching fee and cost data for NAACP Legal Defense and Educational Fund); Declaration of Minah Park, ¶¶ 14-15, Exs. A & B (attaching fee and cost data for Asian Pacific American Legal Center); D'Urso Decl., ¶¶ 10, 15, Ex. A (attaching fee and cost data for Kohn, Swift & Graf, P.C.); Declaration of Barry Goldstein, ¶ 10, Ex. C (attaching fee data for Barry Goldstein); Declaration of Jack Lee, ¶¶ 21, 26, Exs. A & C (attaching fee and cost data for Minami, Lew & Tamaki LLP); Declaration of Sidney L. Gold, ¶ 10, Ex. A (attaching fee data for Sidney L. Gold & Associates, P.C.); Declaration of Bryan Clobes, ¶¶ 11, 16, Exs. B & E (attaching fee data for Miller Faucher); Declaration of Cleo Fields, ¶¶ 12, 17, Ex. A & B (attaching fee and cost data for Rainbow/PUSH Coalition); Declaration of James Keller, ¶¶ 11, 16, Ex. A (attaching fee and cost data for Gottesman & Associates).[14] For the Court's convenience Exhibit 2 to this document contains a summary compilation of the firms' and nonprofit organizations' hours, lodestars, and costs.

The raw lodestar for Class Counsel amounts to $4,072,304. The Consent Decree provides for fees and costs together of $7,250,000. Total costs equal roughly $540,000, leaving

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[14] Calculation of a lodestar based on current hourly rates is appropriate as a means of compensating for delay in payment. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989); *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991).

approximately $6,710,000 as fees.[15] This corresponds to a 1.65 multiplier on the raw lodestar amount.

When awarding fees based on California law, such as the FEHA claims pleaded by Plaintiffs here, the trial court has substantial discretion to adjust the lodestar. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095-96 (2000); *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 40-45 (2002). The court may augment the lodestar upon consideration of various factors, including, but not limited to, the novelty and difficulty of the questions involved and the skill displayed in presenting them, and the contingent nature of the fee award, both from the point view of eventual victory on the merits and the point of view of establishing eligibility for an award. *Serrano v. Priest*, 20 Cal. 3d at 25, 49 (1977). In California, courts regularly use a multiplier of 2.0 or greater in statutory fee cases to approximate market fees. *See, e.g., Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478-79 (9th Cir. 1995) (2.0); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78, 82-85 (1988) (2.34); *Coalition for Los Angeles County Planning in the Pub. Interest v. Bd. of Supervisors of Los Angeles County*, 76 Cal. App. 3d 241, 251 (1977) (slightly above 2.0). In fact, "[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation." *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995); *Wershba v Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) ("Multipliers can range from 2 to 4 or even higher."); *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 886 F. Supp. 445, 482 (E.D. Pa. 1995) (noting that "the range of multipliers in large and complicated class actions has ranged from 2.26 to 4.5") (citing *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988) (listing 9 cases in that range and awarding a 3.0 multiplier)).

By comparison, this Court in *Scherrer v. Group Voyagers, Inc.*, No. C 99-04834, (N.D. Cal. March 8, 2005), a class action asserting employees' overtime pay rights, awarded

[15] At the time of the Preliminary Approval hearing, Class Counsel estimated that approximately $400,000 of this amount would be allocated to costs. Since that time, Class Counsel have received bills for further costs, and the total cost figure is roughly $540,000 at this point. Regardless, because the fees and costs amount is fixed, the increased costs do not change the amount paid by Abercrombie or the amounts recovered by the Class Members.

$3,286,916 in fees after a settlement for $14-15 million. *Id.* at 2, 10 (Bill Lann Lee Decl., ¶ ___, Ex. K). There, the Court granted a multiplier of 1.4 based on an analysis of the *Kerr* factors. *Group Voyagers* is distinguishable in four ways. First, *Abercrombie* Class counsel was efficient, bringing this complex case to resolution prior to moving for class certification less than two years after filing, whereas the parties in *Group Voyagers* spent more than four years and "wasteful[ly]" went to the brink of trial twice. *Id.* at 10. Second, *Abercrombie* Class counsel secured substantial injunctive relief to prevent recurrence of alleged discriminatory policies and practices and six-year monitoring, whereas the relief in *Group Voyagers* was solely monetary. *Id.* at 1-2. Third, the effective percentage of total recovery sought here (14%) is <u>less</u> than that sought (30-31%) <u>or</u> actually awarded (18-19%) in *Group Voyagers*. Fourth, comparable complex employment discrimination consent decrees, as discussed below, have involved higher percentage awards.

2. <u>The fee is also reasonable under the percentage method.</u>

As outlined above, the Ninth Circuit benchmark percentage award is 25%. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d at 272; *Vizcaino v. Microsoft*, 290 F.3d at 1050 n.4 (finding that "a bare majority" of recent awards in "mega fund" cases are "clustered in the 20-30% range"). The Manual for Complex Litigation observes that "[a]ttorney fees awarded under the percentage method are often between 25% and 30% of the fund." MCL 4th § 14.121, p. 188 ("Awarding attorneys 25% of a common fund represents a typical benchmark."); *id.* at p. 188 n.488 (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) for the proposition that the benchmark is "25% with adjustments up to 33% for complexity, risk, and nonmonetary results").

Recent comparable employment discrimination settlements have provided higher fees than that sought by Plaintiffs' Counsel as a percent of the total fund paid by defendant, generally ranging from 18 to 25%, even where the absolute amounts were higher. *See, e.g., Boeing* at 56 (stating class counsel's intent to seek 25% of the fund as fees, up to $15 million, plus costs up to $3 million); *Publix* at 109-10 (providing 22% or $18 million in fees and costs for work performed before and after approval date on top of $63.5 million in monetary relief); *Rent-a-Center* at 58 (providing up to 22%, or fee up to $10.5 million, plus costs of up to $775,000, to be paid out of the settlement fund of $47 million); *Shoney's* at 60; 86-89 (awarding 20%, or $25.5 million in attorneys' fees and costs on top of a monetary fund of $105 million); *Coca-Cola* at 36-37 (awarding 18%, or $20 million on top of $90 million in monetary relief).

Here, the amount payable by Abercrombie for the Class's benefit is roughly $49.45 million.[16] The proposed, effective percentage fee of 14% of total monetary recovery is reasonable in light of the customary fee in comparable contingent employment discrimination and other cases.[17]

F. The Contingent Nature of the Fee Supports the Proposed Award.

The contingent nature of the case also supports the fee request. As described above, Class Counsel were not guaranteed success once they filed suit. Bill Lann Lee Preliminary Approval Decl., ¶¶ 33-34 (describing risk at trial and appellate stages, and substantial potential difficulty and delay in achieving significant injunctive relief). Furthermore, Plaintiffs faced a determined opponent with substantial defenses.

Reward for contingency risk in cases such as this one is appropriate in the Ninth Circuit. "It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose." *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (citing Richard Posner, ECONOMIC ANALYSIS OF LAW § 21.9, at 534-35 (3d ed. 1986) and other authority); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992) ("[T]he failure to make any provision for risk of loss may result in systematic undercompensation of Class Counsel in a class action case, where as we have said the only fee

[16] The monetary relief of $40,000,000, plus fees and costs of $7,250,000, plus $600,000 for future monitoring, plus $600,000 in notice costs paid by Abercrombie, plus imputed interest for one year at 2.5% of roughly $1,000,000, equals approximately $49,450,000.

[17] The denominator of the percentage calculation includes the fees and costs because "those fees are still best viewed as an aspect of the class' recovery." *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3rd Cir. 1995).

that counsel can obtain is, in the nature of the case, a contingent one."); *In re Shell Oil Refinery*, 155 F.R.D. 552, 571 (E.D. La. 1993) (observing that the contingency fee system "permits a greater recovery for successful cases, thereby rewarding investment in successes and offsetting the losses from unsuccessful cases."). Such is the law in California as well. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131-32 (2001).

G. The Time Limitations Imposed by the Client and the Circumstances Support the Fee Award.

The compressed and overlapping discovery, mediation, and class certification phases of the litigation resulted from the Court's pretrial schedule. The parties reached settlement prior to class certification, saving the parties and the Court time and resources.

H. The Amount Involved Was Substantial and the Results Obtained Were Exceptional, Including $40 million for the Class as Well as Robust Injunctive Relief.

The amount involved and results obtained strongly support the fee award. Class Counsel secured substantial injunctive relief, as described above, as well as the approximately $40 million in cash compensation for the Class, separate from fees or costs. The value of the forward-looking injunctive relief is not quantifiable, and will inure to the benefit of Class Members and other minority and female applicants and employees of Abercrombie for years to come.

Courts customarily take nonmonetary relief into account when valuing the benefit conferred upon the class. *Vizcaino*, 290 F.3d at 1049 (noting that a higher fee was warranted in part because "counsel's performance generated benefits beyond the cash settlement fund," such as the defendant's agreement to hire class members and "change its personnel classification practices"); *id.* (an upward adjustment to the lodestar is appropriate "to reflect the benefits to the public flowing from [the] litigation") (quoting *Bebchick v. Wash. Metro. Area Transit Comm'n*, 805 F.2d 396, 408 (D.C. Cir. 1986)); *Morales v. City of San Rafael*, 96 F.3d 359, 364 (9th Cir. 1996) (instructing district court, "in determining a reasonable fee award on remand," to "consider not only the monetary results but also the significant nonmonetary results [plaintiff] achieved for himself and other members of society") ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.") (quoting *Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion)); *Loring v. City of Scottsdale, Ariz.*, 721 F.2d 274, 275 (9th Cir. 1983) (reversing district court's fee determination for failure to take into account nonmonetary benefits to class).

I. Class Counsel Have a High Degree of Experience, Reputation, and Ability.

Class counsel's experience, reputation, and ability also justify the fee award. The attorneys contributing the bulk of the work to the case, Bill Lann Lee for Lieff, Cabraser, Heimann & Bernstein, Thomas A. Saenz of MALDEF, and Martin D'Urso of Kohn, Swift & Graf, have extensive experience litigating complex employment discrimination class actions, and other class actions in general. *See* their Declarations.

J. The Case Was Somewhat Undesirable.

The undesirability of the case is a minor factor supporting the award. Abercrombie is a well-established, huge corporation that had withstood the charges of discrimination on file with the EEOC until these lawsuits were filed.

K. Class Counsel's Professional Relationship with the Class Representatives Was Longstanding.

As described above, the nature and length of the professional relationships between Class Counsel and the Class Representatives support the fee award. Class Counsel worked diligently not only to pursue compensation for the Class Representatives but also to seek substantial programmatic changes in Abercrombie's approach to hiring, promotions, and diversity, in accordance with their clients' wishes.

CONCLUSION

For all the foregoing reasons, the parties respectfully request that this Court grant final approval to the Consent Decree with the following exceptions: [to be provided].

Respectfully submitted,

Bill Lann Lee (SBN 108452)
Kelly M. Dermody (SBN 171716)
Eve H. Cervantez (SBN 164709)
Elizabeth A. Alexander (pro hac vice)
Jahan C. Sagafi (SBN 224887)
Nirej S. Sekhon (SBN 213358)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Julie Su
Minah Park
ASIAN PACIFIC AMERICAN LEGAL CENTER
1145 Wilshire Blvd., 2nd Floor
Los Angeles, CA 90017

Thomas A. Saenz (SBN 159430)
Shaheena Ahmad Simons (SBN 225520)
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014
Telephone: (213) 629-2512
Facsimile: (213) 629-0266

Kimberly West-Faulcon
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
1055 Wilshire Blvd., Suite 1480
Los Angeles, CA 90017

Joseph C. Kohn
Martin J. D'Urso
Hilary Cohen
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Bryan L. Clobes
Melody Forrester
Jeffrey D. Lerner
MILLER FAUCHER AND CAFFERTY
One Logan Square, Suite 1700
Philadelphia, PA 19103

Jack W. Lee, Esq. (SBN 071626)
Lisa Duarte, Esq. (SBN 169750)
John Ota, Esq. (SBN 195532)
MINAMI, LEW & TAMAKI LLP
360 Post Street, 8th Floor
San Francisco, CA 94108
Telephone: (415) 788-9000
Facsimile: Fax (415) 398-3887

Cleo Fields
THE FIELDS LAW FIRM, L.L.C.
2147 Government Street
Baton Rouge, LA

James F. Keller
Zachary Gottesman
GOTTESMAN & ASSOCIATES
2121 URS Center
36 East 7th Street
Cincinnati, OH 45202

Sidney L. Gold
Traci M. Greenberg
SIDNEY L. GOLD & ASSOCIATES, P.C.
1835 Market Street
Philadelphia, PA 19103

Barry L. Goldstein
GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
300 Lakeside Avenue
Oakland, CA 94612

Dated: April 11, 2005

By: *\/s\/ Bill Lann Lee*
Bill Lann Lee

Attorneys for Plaintiffs

EXHIBIT 1

Bill Lann Lee (SBN 108452)
Kelly M. Dermody (SBN 171716)
Eve H. Cervantez (SBN 164709)
Elizabeth A. Alexander (pro hac vice)
Jahan C. Sagafi (SBN 224887)
Nirej S. Sekhon (SBN 213358)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Thomas A. Saenz (SBN 159430)
Shaheena Ahmad Simons (SBN 225520)
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014
Telephone: (213) 629-2512
Facsimile: (213) 629-0266

Joseph C. Kohn
Martin J. D'Urso
Hilary Cohen
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Jack W. Lee, Esq. (SBN 071626)
Lisa Duarte, Esq. (SBN 169750)
John Ota, Esq. (SBN 195532)
MINAMI, LEW & TAMAKI LLP
360 Post Street, 8th Floor
San Francisco, CA 94108
Telephone: (415) 788-9000
Facsimile: Fax (415) 398-3887

Douglas R. Young
Sandra A. Kearney
FARELLA BRAUN & MARTEL, LLP
Russ Building, 30th Floor
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4481

Thomas Brennan Ridgley
Jonathan M. Norman
Sandra J. Anderson
Mark A. Knueve
VORYS, SATER, SEYMOUR & PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Telephone: 614-464-6400
Facsimile: 614-464-6350

Anna Y. Park (SBN 164242)
Peter F. Laura (SBN 116426)
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
255 East Temple Street, 4th Floor
Los Angeles, CA 90012

John C. Hendrickson (IL SBN 1187589)
Gregory M. Gochanour (IL SBN 6210804)
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
500 West Madison Street, Suite 2800
Chicago, IL 60661

Attorneys for Plaintiffs and Defendants [Additional counsel listed on signature page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EDUARDO GONZALEZ, ANTHONY OCAMPO, ENCARNACION GUTIERREZ, JOHAN MONTOYA, JUANCARLOS GÓMEZ-MONTEJANO, JENNIFER LU, AUSTIN CHU, IVY NGUYEN, ANGELINE WU, ERIC FIGHT, CARLA GRUBB, DAVID CULPEPPER, PATRICE DOUGLASS, and ROBAIR SHERROD, BRANDY HAWK and ANDRE

Case Nos. 03-2817 SI, 04-4730 and 04-4731

CONSENT DECREE

STEELE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO.,

Defendants.

ELIZABETH WEST and JENNIFER LU,

Plaintiffs,

v.

ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO.,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

v.

ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO.

Defendants.

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I. INTRODUCTION

This Consent Decree ("Decree") has been voluntarily entered into by the parties for the purpose of finally resolving the litigation between them.

This Consent Decree includes a joint statement of the purposes of the Decree, a description of the history of the litigation, and various substantive provisions agreed upon by the parties. As a result of negotiations supervised by a mediator, the parties have reached a voluntary agreement that is contained in this Decree.

II. PURPOSES OF THE CONSENT DECREE

The parties have entered into this Consent Decree for the following purposes:

A. To resolve all disputes covered by this Consent Decree in such a way as to avoid further expensive and protracted litigation.

B. To ensure equal employment opportunity for African Americans, Asian Americans, Latinos, and women applying to, and working within, stores operated by defendants.

C. To ensure equal employment opportunity for African American women, Latino women and Asian American women applying to, and working within, stores operated by defendants.

D. To provide for the implementation of recruitment, selection and personnel systems that will ensure that African Americans, Asian Americans, Latinos and women are considered for recruitment, hire, job assignment and managerial promotion for which they are interested and qualified on a non-discriminatory basis.

E. To provide for implementation of recruitment, selection and personnel systems that will ensure that African American women, Latino women, and Asian American women are considered for recruitment, hire, job assignment and managerial promotion for which they are interested and qualified on a non-discriminatory basis.

F. To create an expedited and efficient procedure for implementing equitable relief pursuant to the terms of this Decree; and

G. To provide finality to the resolution of all claims and defenses asserted in these civil actions.

III. DEFINITIONS

A. "Abercrombie" or the "Company" means Abercrombie & Fitch Stores, Inc.; A&F California, LLC; A&F Ohio, Inc.; and Abercrombie & Fitch Management Co., as well as each of their parents, subsidiaries, affiliates, officers, directors, agents, management, successors and assigns and those in active concert or participation with them, or any of them. The terms of this Decree cover all stores operated by Abercrombie whether under the name Abercrombie & Fitch, Hollister, abercrombie, or any other concept operated by Abercrombie.

B. "Adverse impact" shall be defined in a manner consistent with Title VII law.

C. "African American" means all persons having origins in any of the black racial groups of Africa.

D. "Approval Date" means the date upon which the Court signs this Decree, having determined that it is fair, adequate and reasonable after: (i) notice to the Settlement Class; (ii) opportunity to opt out of the Settlement Class with respect to monetary relief; (iii) opportunity to submit timely objection to the Decree; (iv) appropriate discovery of the specifics of any such timely objections; and (v) a hearing on the fairness of the settlement.

E. "Asian American" means all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, but is not limited to, China, India, Japan, Korea, the Philippine Islands, and Samoa.

F. "Associates" means all in-store hourly or managerial employees.

G. "Benchmark Positions" means Brand Representative and Manager-in-Training positions.

H. "Best Efforts" means implementing and adequately funding a plan reasonably designed to comply with all the specific objectives to which the best efforts are directed.

I. "Charging Party" means Lekisha Bondurant, Torrey Dickson, Stanley Elmore, Timothy Greer, Eric Jason and Jason Noel.

J. "Class Counsel" means all counsel of record for the Class Representatives in the Private Civil Actions.

K. “Class Representatives” or “Plaintiffs” means Eduardo Gonzalez, Anthony Ocampo, Encarnacion Gutierrez, Brandy Hawk, Johan Montoya, Juancarlos Gómez-Montejano, Jennifer Lu, Austin Chu, Ivy Nguyen, Angeline Wu, Eric Fight, Carla Grubb, David Culpepper, Patrice Douglass, Robair Sherrod, Andre Steele, and Elizabeth West.

L. “Consolidated Litigation” means the Private Civil Actions and the EEOC Civil Action that the parties stipulate they will move, or have already moved, to consolidate before Judge Susan Illston for purposes of approval and oversight of this settlement.

M. “Court” means the United States District Court for the Northern District of California.

N. “EEOC Civil Action” means *EEOC v. Abercrombie & Fitch Stores, Inc.*, N.D. Cal. Case No. 04-4731.

O. “Final Approval” means the entry of this Decree on the Approval Date by the United States District Court for the Northern District of California, and either: (1) the expiration of the time for filing of a direct appeal from the Court’s approval of the Decree without the filing of a notice of appeal, or (2) if a timely direct appeal is filed, the final resolution of the appeal (including any requests for rehearing and/or petitions for a writ of certiorari), resulting in final judicial approval of the Consent Decree.

P. “Good Faith Offer” means an offer of employment -- under the same terms and conditions of employment (e.g., hours, shifts or locations offered) offered to similarly situated individuals who receive employment offers -- that is made to an individual who has submitted a written or electronic application for a job.

Q. “Latino” means all persons of Mexican, Puerto Rican, Cuban, Central American, South American or other Spanish culture or origin, regardless of race.

R. “Lead Counsel” means Lieff, Cabraser, Heimann & Bernstein, LLP; the Mexican American Legal Defense and Educational Fund (MALDEF); and Kohn, Swift & Graf representing the *Gonzalez* Minority class; and Minami, Lew & Tamaki representing the *West* gender class.

S. "Minority" means all African Americans, Asian Americans, and Latinos. "Minority Group" means each of these three groups.

T. "Minority Women" means African American females, Latina females, and Asian American females.

U. "Preliminary Approval Date" means the date upon which the Court enters an Order preliminarily approving this Decree, pending notice (an opportunity to opt out of the notice), an opportunity to opt out of the Settlement Class or submit objections to the Decree, and a fairness hearing thereon.

V. "Private Civil Actions" means *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, N.D. Cal. Case No. 03-2817-SI and *West v. Abercrombie & Fitch Stores, Inc.*, N.D. Cal. Case No. 04-4730.

W. "Release" means the Release of Claims set forth in Section VIII of the Decree.

X. "Settlement Class" means those persons described in Section VII of the Decree. "Settlement Class Members" means each and every person described in Section VII of the Decree.

Y. "Term of the Decree," "Period of the Decree" or "Duration of the Decree" is the period from the Approval Date until the expiration of the Decree under Section VI.

IV. LITIGATION BACKGROUND

A. The *Gonzalez* Litigation

On June 16, 2003, Plaintiffs filed the *Gonzalez* case in the Northern District of California, alleging violations of 42 U.S.C. § 1981 and the California Fair Employment and Housing Act, and providing notice of Plaintiffs' intent to bring claims under Title VII of the Civil Rights Act of 1964. The Complaint was brought on behalf of a putative class of minority individuals who alleged that Defendants discriminate against minorities on the basis of race, color, and/or national origin, with respect to hiring, firing, job assignment, compensation and other terms and conditions of employment, by enforcing a nationwide corporate policy of preferring white employees for sales positions, desirable job assignments, and favorable work schedules in its stores throughout the United States.

Plaintiffs filed the First Amended Complaint on August 18, 2003, which alleged substantially the same facts and legal claims. This complaint added three named plaintiffs and three defendants, Abercrombie & Fitch Stores, Inc., A&F California, LLC, and A&F Ohio, Inc. On September 11, 2003, Defendants answered the First Amended Complaint, denying Plaintiffs' allegations.

On January 9, 2004, Plaintiffs filed the Second Amended Complaint, which again alleged substantially the same facts and legal claims, this time converting the notice of intent to file Title VII claims into actual Title VII claims. This complaint added two named plaintiffs and removed one defendant, Abercrombie & Fitch Co. This complaint also included as exhibits Right-to-Sue letters from the EEOC issued to 13 of the 14 named plaintiffs who brought Title VII and FEHA claims. Defendants answered the Second Amended Complaint, denying Plaintiffs' allegations, on January 26, 2004.

Plaintiffs filed the Third Amended Complaint on June 10, 2004, which again alleged substantially the same facts and legal claims. This complaint added individual causes of action for gender discrimination, brought only on behalf of named plaintiffs Ivy Nguyen and Angeline Wu. On June 21, 2004, Defendants answered the Third Amended Complaint, denying Plaintiffs' allegations.

On November 8, 2004, Plaintiffs filed the Fourth Amended Complaint naming two additional Plaintiffs and an additional defendant, Abercrombie & Fitch Management Co., as well as adding claims of discrimination in hiring of Managers-in-Training positions and promotion to in-store managerial positions.

On October 10, 2003, Plaintiffs served their first set of requests for discovery. On February 19, 2004, Plaintiffs served their second set of requests for discovery. Defendants responded by producing roughly 17,000 pages of documents, as well as files from Abercrombie's computerized personnel databases.

Defendants served their first set of requests for discovery in November 2003 and took the depositions of seven class representatives in February 2004. Plaintiffs took six days of depositions of Abercrombie officials and managers under Fed. R. Civ. P. 30(b)(6) in March 2004.

Plaintiffs and Defendants have obtained numerous declarations from putative class members and witnesses, including managers, concerning alleged discrimination, or lack of discrimination, that they would testify to if called.

On April 13, 2004, and on several dates subsequently, the parties conducted mediation discussions in an attempt to resolve the Consolidated Litigation. These discussions have culminated in this settlement agreement.

B. <u>The EEOC Litigation</u>

Between December 21, 1999 and January 29, 2004, the EEOC received charges of discrimination alleging discrimination in hiring, assignment, layoff, constructive discharge, discharge, terms and conditions of employment, and failure to promote into manager positions due to race, national origin, and/or gender.

Specifically, on or about December 21, 1999, a charging party filed an individual charge alleging national origin discrimination and wrongful termination. The charge was later amended on or about March 21, 2001 alleging that the charging party was not hired into a sales position or a Brand Representative position due to his national origin. Class allegations were included, alleging that Abercrombie failed to recruit, hire, and assign Latinos into Brand Representative positions and that Latinos were terminated due to their national origin.

On or about September 13, 2001, the EEOC issued a Letter of Determination finding probable cause that the charging party was denied a permanent sales or Brand Representative position, denied assignments, and terminated due to his national origin. The EEOC also found probable cause that Latinos and African Americans as a class were not recruited, hired, or assigned permanent positions or given assignments due to their race and national origin. The Commission further found probable cause that Abercrombie failed to maintain records as required by federal law.

EEOC received additional charges against Abercrombie nationwide and issued additional Letters of Determination on or about September 30, 2004 and November 1, 2004 finding probable cause that Abercrombie violated Title VII by discriminating against minority individuals on the basis of national origin, color, race, and/or gender (female including minority women) in hiring, staffing, constructive discharge, failing to promote into manager positions, steering, and discharge, on an individual basis and also on a nationwide class basis. The EEOC also found probable cause that Abercrombie violated Title VII by discriminating against a class of individuals nationwide by deterring minority applicants from applying for sales, stock, overnight, manager-in-training, and manager positions because of their race, color, and/or national origin; failing or refusing to recruit minority and female applicants for sales, stock, overnight, manager-in-training, and manager positions because of their race, color, and/or national origin; failing and refusing to hire and to assign minorities and females into sales, stock, overnight, manager-in training, and manager positions because of their race, color, national origin and/or gender; failing and refusing to promote minorities and females into manager-in-training and manager positions because of their race, color, national origin, and/or gender; terminating minority and female employees because of their race, color, national origin, and/or sex; and segregating its workforce on the basis of race, color, national origin, and/or gender. The EEOC again found probable cause that Abercrombie failed to maintain records as required by federal law.

After meeting all the conditions precedent, the EEOC filed a federal lawsuit in the matter of *EEOC v. Abercrombie and Fitch Stores, Inc.*, N.D. Cal., Case No. 04-4731, on November 8, 2004 ("EEOC Litigation") encompassing all the claims set forth in the Letters of Determination as described above. The EEOC's pre-filing investigation involved analysis of hard copy documents, statistical compilations and computer-readable files, and investigative interviews of employees and company officials.

C. <u>The *West* Litigation</u>

Counsel for the gender class became involved in this case in February 2004 after being contacted by one of the named plaintiffs in *Gonzalez v. Abercrombie & Fitch*. This named plaintiff sought separate counsel to file a gender class action against Abercrombie.

Putative counsel for the gender class thereafter conducted an independent, on-going investigation to determine the merits of a possible class gender discrimination claim against Abercrombie. Counsel for the gender class contacted scores of class members and witnesses, collected declarations from many class members regarding their experiences at Abercrombie, reviewed statistical reports produced in the course of the *Gonzalez* litigation and conducted a separate analysis of the workforce by gender.

After informing defendant of its intent to file a gender complaint, counsel for the gender class was invited to participate in the initial April 2004 mediation sessions with the *Gonzales* parties and EEOC in an effort to resolve this case without further litigation.

During the mediation, which lasted over fifteen days over the course of eight months, all parties engaged in extensive discussions regarding the merits of the race and gender claims, relief for class members, and procedures to be put into place to ensure equal employment opportunity for minorities and women in the future.

The gender class action, *West v. Abercrombie & Fitch Stores, Inc.*, N.D. Cal., Case No. 04-4730 was filed on November 8, 2004.

V. <u>JURISDICTION</u>

The Court has jurisdiction over the parties and subject matter of the Private Civil Actions and EEOC Civil Action. The parties agree that they will seek, or have already sought consolidation of the Private Civil Actions and the EEOC Civil Action before Judge Susan Illston for purposes of approval of this settlement. If the claims asserted in the complaints filed in these civil actions were proven, the Court would have the authority to grant the equitable and monetary relief set forth in this Consent Decree. Venue is proper in this District. This Court shall retain jurisdiction of these civil actions during the duration of the Decree solely for the purposes of entering all orders, authorized hereunder, that may be necessary to implement the relief provided.

VI. <u>EFFECTIVE DATES AND DURATION OF THE DECREE</u>

A. Unless provided otherwise, the equitable provisions in this Decree are effective immediately upon the Approval Date.

B. The provisions of this Decree shall remain in effect for a period of six years (72 months). Abercrombie may file a motion to be relieved of the provisions of the decree at any point following the expiration of 54 months from the effective date of the decree. The parties may stipulate that Abercrombie should be relieved of the provisions of the Decree. Absent such agreement, in order to be relieved of the provisions of the Decree before the full period of 72 months, Abercrombie must demonstrate that: 1) it has satisfied its duty to use Best Efforts with respect to its obligations under the Decree; 2) it has implemented and maintained all programs mandated by the Decree; 3) it has satisfied, without use of standard deviations, each of the benchmarks established by the Decree during the preceding 24 months; and 4) it has satisfied all monetary provisions of the Decree. Abercrombie bears the burden of demonstrating its satisfaction of these conditions to the Court. Lead Counsel and EEOC may oppose any motion to be relieved on grounds that any of these conditions have not been met and on the grounds set forth in Section X.C.1.b. Unless and until the court issues an order granting the motion to be relieved, all provisions of the Decree shall remain in full force and effect.

C. Abercrombie shall provide 30 days notice to the Special Master, Lead Counsel, and EEOC of any motion to be relieved of the provisions of the decree before the full period of 72 months. Abercrombie shall then provide its briefing and other support for its motion to the Special Master, Lead Counsel, and EEOC. Lead Counsel and the EEOC shall have 30 days to provide any opposition to the motion to the Special Master and Abercrombie. Abercrombie shall have 15 days to provide any reply materials to the Special Master, Lead Counsel, and EEOC. The Special Master shall then have 30 days to prepare a written recommendation to the court as to the resolution of the motion to be relieved. The parties shall then jointly file with the court all of the briefing and the Special Master's recommendation, and set a hearing for 28 days from the filing. Each party may file and serve a response to the Special Master's recommendation, not to exceed ten pages, not later than 14 days before the scheduled hearing.

VII. SETTLEMENT CLASS

A. For purposes of the monetary relief provided in this Decree, the Settlement Class is certified under Federal Rule of Civil Procedure 23(b)(3) and consists of:

1. All Minority and/or female applicants who applied for employment as Associates in Abercrombie stores, or attempted to apply and were discouraged from applying for employment, between February 24, 1999 and the Preliminary Approval Date and who were not hired, except those who file a timely request to opt out of the monetary relief provisions.

2. All Minority and/or female Associates of Abercrombie who are or were employed in an Abercrombie store, for any length of time, between February 24, 1999, and the Preliminary Approval Date, except those who file a timely request to opt out of the monetary relief provisions.

B. For purposes of the equitable and declaratory relief provided in this Decree, the Settlement Class is certified under Federal Rule of Civil Procedure 23(b)(2) and consists of:

1. All Minority and/or female applicants who applied for employment as Associates in Abercrombie stores, or attempted to apply and were discouraged from applying for employment, between February 24, 1999 and the Preliminary Approval Date and who were not hired.

2. All Minority and/or female Associates of Abercrombie who are or were employed in an Abercrombie store, for any length of time, between February 24, 1999, and the Preliminary Approval Date.

C. Settlement Class Members who have filed a timely request to opt out of the monetary relief provisions shall not be held to release any claims for individual relief.

D. In the event that Final Approval is not obtained, nothing in this Decree shall be deemed to waive Abercrombie's objections and defenses to class certification, liability, or entitlement to monetary or equitable relief, or any other issue in the Consolidated Litigation, the Private Civil Actions, or the EEOC Civil Action, and this Decree shall then be deemed null and void and not admissible in any court regarding the propriety of class certification, liability, or entitlement to monetary or equitable relief, or any other issue in the Consolidated Litigation, the Private Civil Actions, or the EEOC Civil Action.

VIII. RELEASE OF CLAIMS IN PRIVATE ACTIONS AND EEOC ACTION

A. Release of Claims by Settlement Class.

Upon Final Approval of the Decree, Abercrombie and its employees, managers, insurers and attorneys shall be fully released and forever discharged from any and all individual and/or class-wide claims, demands, charges, complaints, rights and causes of action of any kind, known or unknown, by the Class Representatives, Plaintiffs, Charging Parties, the Settlement Class, each member of the Settlement Class (hereafter "Releasers"), and by the Releasers' estates, whether seeking monetary and/or equitable relief of any sort, which arise out of conduct within the liability period of February 24, 1999 through the Preliminary Approval Date constituting alleged race, color, national origin or gender discrimination in recruitment, the application process (including claims of individuals who attempted to apply for and were discouraged from applying for employment), hiring, job channeling or assignment, termination of employment, any terms and conditions of employment that were or could have been raised in the Consolidated Litigation and/or managerial promotion under Title VII, 42 U.S.C. Section 1981, the California FEHA or any other federal, state, or local law prohibiting race, color, national origin or gender discrimination, whether statutory, regulatory, pursuant to local ordinance, or at common law, excepting solely claims of Class members other than Plaintiffs and Charging Parties for alleged harassment (including constructive discharge allegedly caused by such harassment). This Release is final and shall survive expiration of the Decree's terms.

B. <u>Release of Claims by Plaintiffs.</u>

Upon Final Approval of the Decree, for and in consideration of the mutual promises, terms and conditions by and between Plaintiffs and Charging Parties, and Defendants set forth herein, the sufficiency of which consideration is expressly acknowledged, the Plaintiffs and Charging Parties do hereby fully, finally and forever release and discharge Abercrombie and its employees, managers, insurers and attorneys from any and all past and/or present claims, demands, actions, causes of action, suits, damages, liabilities, assessments, judgments, costs, losses, debts, obligations and expenses, of any and every nature whatsoever, whether or not known, that they have had, now have, or may have from the beginning of time to the Preliminary Approval Date, including without limitation those arising in any way out of the alleged facts, circumstances and occurrences underlying those allegations of violations of Title VII, Section 1981 and the California FEHA that were asserted or that might have been asserted by or on behalf of the Plaintiffs against Defendants either in Plaintiffs' complaints in the *Gonzalez* and *West* actions, or in any and all charges of discrimination filed against Abercrombie by some or all of the Plaintiffs and Charging Parties with the EEOC and/or DFEH. This Release does not include workers' compensation claims, if any, of the Plaintiffs or Charging Parties. This Release is final and shall survive the expiration of the Term of the Decree. Prior to receiving any monetary relief under this Decree, including any enhanced or service payment, each Plaintiff and Charging Party will be required to execute a full and final general release of all claims against Abercrombie, whether or not asserted in the Consolidated Litigation, in the form attached as Exhibit A.

C. <u>Unknown Claims.</u>

Plaintiffs and Charging Parties acknowledge that they may not now know fully the number or magnitude of the claims they may have, and that they may suffer some further loss or damage in some way connected with the subject matter of the Consolidated Litigation, but which is unknown or unanticipated at this time. Plaintiffs and Charging Parties have taken these risks and possibilities into account and accept that, nevertheless, this Consent Decree covers all claims arising out of or related to the subject matter of the Consolidated Litigation, which, although unknown at the time of the execution of this Consent Decree, may be discovered later. Plaintiffs and Charging Parties understand and assume these risks and expressly waive the provisions of California Civil Code § 1542, or any comparable federal or other state statute, which states:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Plaintiffs and Charging Parties expressly waive any right to assert hereafter that any claim was excluded from this Consent Decree through ignorance, oversight, or error. It is expressly understood and agreed that this waiver of Civil Code § 1542 and the release and waiver set forth in this Consent Decree are material terms of the agreement and were separately negotiated between the parties. This Section VIII.C. does not waive any rights of Settlement Class members other than Plaintiffs and Charging Parties.

D. <u>EEOC Release.</u>

Upon Final Approval, this Decree shall fully and finally resolve any and all claims, demands, charges, complaints, rights and causes of action of any kind, known or unknown, asserted by EEOC in its Complaint arising from incidents occurring prior to the Preliminary Approval Date. It is the intention of Abercrombie and the EEOC that this release terminates all investigations relating to claims of Settlement Class Members which were asserted by EEOC in its Complaint. This Release shall survive the termination of this Decree.

E. <u>No Tolling of Harassment Claims.</u>

Any claims of Settlement Class Members (other than the Plaintiffs) for alleged harassment based upon race, color, national origin or gender (including constructive discharge allegedly caused by such harassment), or for the alleged retaliation for opposing or complaining about such purported harassment, are not released hereunder because such claims are not and have never been asserted on a class-wide basis as a part of the Private Civil Actions or the EEOC Civil Action. Hence, there also has been no tolling of the statute of limitations for asserting any such claims against Abercrombie and its employees, managers, insurers and attorneys by operation of these civil actions or any of the Plaintiffs' individual EEOC or DFEH charges.

F. <u>No Bar to Future Claims.</u>

Nothing in the Decree shall be construed to bar any claims of members of the Settlement Class or Plaintiffs that arise after the Preliminary Approval Date.

IX. <u>MISCELLANEOUS PROVISIONS</u>

A. <u>No Admission of Liability.</u>

This Consent Decree does not constitute and shall not be deemed to be a finding or determination by the Court, nor an admission by any party, regarding the merits, validity or accuracy of any of the allegations, claims or defenses. This Decree represents the compromise of disputed claims that the parties recognize would require protracted and costly litigation to determine. Abercrombie denies that it has engaged in any policy or pattern or practice of unlawful discrimination, or that it has engaged in any other unlawful conduct as alleged in the Consolidated Litigation, and Abercrombie's entry into this Decree is not and may not be used by any person in any proceeding as an admission or evidence that Abercrombie and/or its employees, managers, and/or attorneys have on any occasion engaged in discriminatory employment practices or any other unlawful conduct, such being expressly denied. Abercrombie has voluntarily entered into this Decree because it believes the actions it has agreed to undertake demonstrate its strong commitment to diversity and equal employment opportunity. Neither the Decree nor any compliance reports, filings, data, or other compliance information arising out of or related to the Decree shall be discoverable, admissible or used as evidence of liability or non-liability for unlawful discrimination in any proceeding other than one relating to the enforcement of this Decree.

B. Modification and Severability of the Consent Decree.

1. Whenever possible, each provision and term of this Decree shall be interpreted in such a manner as to be valid and enforceable; provided, however, that in the event that after Final Approval hereof any provision or term of this Decree should be determined to be or rendered unenforceable on collateral review, all other provisions and terms of this Decree and the application thereof to all persons and circumstances subject thereto shall remain unaffected to the extent permitted by law. If any application of any provisions or term of this Decree to any specific person or circumstance should be determined to be invalid or unenforceable, the application of such provision or term to other persons or circumstances shall remain unaffected to the extent permitted by law.

2. Lead Counsel, Abercrombie and the EEOC may jointly agree in writing to modify the Decree. In the event that changed or other circumstances make a modification of the Decree necessary to ensure its purposes are fully effectuated, but good faith negotiations seeking such modifications are unsuccessful, any party to the Decree shall have the right to move the Court to modify this Decree. Such motion shall be granted only upon the movant proving to the Court by clear and convincing evidence that changed or other circumstances make such modification necessary. In determining the specific modification to order, the Court shall consider whether there is an equally effective modification that would not materially increase the burden of compliance and/or cost to Abercrombie of compliance (out-of-pocket or otherwise). Any such modification to this Decree by the Court shall be ordered in such a fashion as will limit the burden of compliance and/or the cost to Abercrombie (out-of-pocket or otherwise) to the extent possible consistent with effectuating the purposes of this Decree. The procedures for

negotiations to modify this Decree (and, if necessary, for resolution of disputes) shall be the same as those set forth in Section X.B, regarding Decree enforcement.

C. <u>Duty to Support and Defend the Decree.</u>

Class Representatives, Class Counsel, EEOC and Abercrombie each agree to abide by all of the terms of this Decree in good faith and to support it fully, and shall use Best Efforts to defend this Decree from any legal challenge, whether by appeal or collateral attack.

D. <u>Execution In Counterparts</u>

The parties agree that the Decree may be executed in counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be part of the same Decree.

X. <u>GENERAL EQUITABLE PROVISIONS</u>

A. <u>General Injunctive Provisions.</u>

1. Abercrombie is hereby enjoined from enacting, maintaining or implementing any policy or engaging in any practice or procedure that discriminates against African Americans, Asian Americans, or Latinos on the basis of race, color and/or national origin.

2. Abercrombie is hereby enjoined from enacting, maintaining or implementing any policy or engaging in any practice or procedure that discriminates against women on the basis of gender.

3. Abercrombie is hereby enjoined from enacting, maintaining or implementing any policy or engaging in any practice, conduct or procedure that retaliates or has the purpose of retaliating against any future, current or former employee or applicant of Abercrombie because he or she opposed discrimination on the basis of race, color, national origin or gender; filed a charge of discrimination on the basis of race, color, national origin or gender; testified, furnished information or participated in any manner in any investigation, proceeding, or hearing in connection with any charge or complaint of discrimination on the basis of race, color, national origin or gender; testified, furnished information or participated in any manner in connection with the monitoring or implementation of this Decree; or sought and/or received any monetary and/or non-monetary relief pursuant to this Consent Decree.

4. Abercrombie will implement or maintain non-discrimination and non-harassment policies and an internal complaint procedure designed to assure equal employment opportunity.

5. Abercrombie will make available to Minority and female associates and applicants the same employment opportunities and terms and conditions of employment, including but not limited to recruitment, hiring, job assignments, and managerial promotions, as Abercrombie affords similarly-situated white male employees.

B. Dispute Resolution and Enforcement Procedures.

1. The parties agree to the appointment of Hunter Hughes as Special Master. The Special Master may be removed at the joint written request of Lead Counsel, EEOC, and Abercrombie, or by order of the Court upon motion of any party and a showing of good cause that Mr. Hughes should no longer serve as Special Master. In the event that Mr. Hughes becomes unavailable to serve as Special Master for any reason, Lead Counsel, EEOC and Abercrombie will make a good faith effort to select on a joint basis a new Special Master. If Lead Counsel, EEOC and Abercrombie are unable to reach agreement as to a successor Special Master within forty-five (45) days following the date Mr. Hughes becomes unavailable to serve as Special Master, the Court shall appoint a successor Special Master upon motion of Lead Counsel, EEOC or Abercrombie. Lead Counsel, EEOC or Abercrombie may nominate to the Court persons for consideration as a successor Special Master. Lead Counsel, EEOC and Abercrombie shall each have the right to interview any nominated person, and to present argument and evidence to the Court regarding the selection of the successor Special Master.

2. The Special Master shall have authority to resolve all disputes arising under the Decree, subject to limitations and standards set forth in the Decree.

3. At the request of Lead Counsel, EEOC or Abercrombie, the parties shall use Best Efforts to resolve promptly any differences or any disputes regarding the interpretation or implementation of the Consent Decree.

4. Lead Counsel, EEOC or Abercrombie shall have the right to initiate steps to resolve any dispute or issue of compliance regarding any provision of the Decree subject to limitations and standards set forth in the Decree.

a. If Lead Counsel, EEOC or Abercrombie has good reason to believe that a legitimate dispute exists, the initiating party shall first promptly give written notice to the other parties, including: (a) a reference to all specific provisions of the Decree that are involved; (b) a statement of the issue; (c) a statement of the remedial action sought by the initiating party; and (d) a brief statement of the specific facts, circumstances and any other arguments supporting the position of the initiating party;

b. Within thirty (30) days after receiving such notice, the non-initiating party shall respond in writing to the statement of facts and arguments set forth in the notice and shall provide its written position, including the facts and arguments upon which it relies in support of its position;

c. Lead Counsel, EEOC and Abercrombie shall undertake good-faith negotiations, including meeting or conferring by telephone or in person and exchanging relevant documents and/or other information, to attempt to resolve the issues in dispute or alleged noncompliance;

d. The Special Master, upon motion, may permit Lead Counsel, EEOC or Abercrombie to take post-settlement discovery as provided by the Federal Rules of Civil Procedure, but only as to matters relevant to the underlying claim of breach, if the Special Master determines that the informal exchange of documents or information has not been sufficient to allow Lead Counsel, EEOC or Abercrombie to present the dispute upon a factual record adequate for a fair determination of the issue;

e. If the parties' good-faith efforts to resolve the matter have failed, and after written notice of an impasse by the moving party to the non-initiating party or parties, Lead Counsel, EEOC or Abercrombie may file a motion with the Special Master, with a supporting brief, requesting resolution of the dispute or the issues of non-compliance, provided, however, that such motion shall be limited to the dispute(s) and/or issue(s) as to which the parties have met and conferred as described in this Section X.B.4.;

f. The non-moving parties will have fifteen (15) days to respond to any such motion;

g. The Special Master shall attempt within fifteen (15) days after filing of the final brief to resolve the dispute and may schedule a hearing or other proceeding, including an evidentiary hearing, to resolve the matter; and

h. Within thirty (30) days of any hearing, the Special Master shall issue a written determination, including findings of fact if requested by any party.

5. The provisions of this Section do not prevent Lead Counsel, EEOC or Abercrombie from promptly bringing an issue directly before the Court when exigent facts or circumstances require immediate Court action to prevent a serious violation of the terms of this Decree, which otherwise would be without meaningful remedy. The moving papers shall explain the facts and circumstances that allegedly necessitate immediate action by the Court. Absent a showing of exigent facts or circumstances, the Court shall refer the matter to the Special Master to resolve in accordance with procedures set forth above. If any such matter is brought before the Court requesting immediate action, the other parties shall be provided with appropriate actual notice, and an opportunity to be heard on the motion, under the Local Rules of the Court and the Federal Rules of Civil Procedure. The Court in its discretion may set such procedures for emergency consideration as are appropriate to the particular facts or circumstances, but no such matter may be heard or considered on an ex parte basis.

6. All fees and expenses of the Special Master shall be paid by Abercrombie.

7. Lead Counsel, EEOC or Abercrombie may appeal a decision of the Special Master to the Court provided that such an appeal is made within fourteen (14) days of receipt of notice of the decision by the Special Master. Any such appeal shall be brought by motion under the Local Rules of the Court and Federal Rules of Civil Procedure. The decision rendered by the Special Master shall be affirmed unless the Court determines that the Special Master made clearly erroneous findings of fact or wrongly interpreted or applied the Consent Decree. A party may

seek on appeal any remedy provided by law, provided that such remedy is consistent with the provisions of this Decree.

8. Only Lead Counsel, EEOC or Abercrombie shall have standing to move the Court to enforce, apply, or modify this Decree. Any individual concerned about Abercrombie's compliance with this Decree may so notify Lead Counsel and/or the EEOC and request that they examine Abercrombie's compliance and seek such relief, if any, as may be appropriate.

9. In the event that any party seeks to utilize the dispute resolution procedure set forth in Section X.B, then each party shall bear its own attorneys' fees, costs and expenses for all work performed through resolution by the Special Master. In the event that any party seeks to appeal any decision of the Special Master, then the prevailing party in such matter shall be entitled to recover reasonable attorneys' fees, costs and expenses incurred in such appeal from the other party, consistent with applicable standards under Title VII. Whether and to what extent any party is a prevailing party and awarded fees and expenses shall be determined in the sole and absolute discretion of the Court. This provision shall not apply to the EEOC, as Abercrombie and the EEOC mutually agree not to seek fees under this Section from each other.

C. Marketing.

1. Abercrombie believes that the artistic aspect of its marketing materials is a critical factor driving the success of Abercrombie and its brand. As a company committed to achieving diversity in its store associates, as reflected in the other terms of this Decree, Abercrombie will reflect diversity, as reflected by the major racial/ethnic minority populations of the United States, in its marketing materials (taken as a whole). Lead Counsel and/or the EEOC may assert that Abercrombie has not met its commitment under this paragraph for the following purposes only:

a. In the event that, at the end of the twenty-four (24) month period following the Approval Date, the Applicant Rate for any Minority group is lower than such group's interim Benchmark for the fourth six-month period, Lead Counsel and/or the EEOC may assert that this was caused by a chilling of applicant flow caused in part by not meeting the commitment in paragraph 1 of this Section. Any such assertion, and Abercrombie's response thereto, may be considered by the Special Master. If the Special Master accepts the assertion of Lead Counsel and/or the EEOC, then the sole remedy shall be that the applicable interim Benchmark shall remain in effect unless and until the applicable Applicant Rate exceeds the applicable interim Benchmark.

b. In the event that Abercrombie seeks to obtain early termination of this Decree, under Section VI.B. hereof, and in the event that Lead Counsel and/or the EEOC seeks to challenge such early termination, Lead Counsel and/or the EEOC may assert that Abercrombie has not met its commitment in paragraph 1 of this Section. Any such assertion, and Abercrombie's response thereto, may be considered by the Special Master and/or the Court, along with Abercrombie's meeting or failing to meet other provisions of the Decree, in deciding whether to grant Abercrombie's request for early termination of the Decree.

2. Nothing in this Section shall limit the scope of the Monitor's discretion under Section XVI.A.2. of this Decree in evaluating compliance (including barriers to compliance) with any of the objectives of the Decree. However, nothing in this Section or otherwise in this Decree shall be deemed to provide Lead Counsel, the EEOC, the Monitor, the Special Master, or the Court with the authority or ability to contest, challenge, alter, or seek to alter Abercrombie's marketing materials or the selection of photographs or models therefor.

3. Marketing materials include specifically, but not exclusively: quarterly magazines and similar materials, shopping bags, store posters and video, website, A&F TV, and purchased advertising.

XI. ABERCROMBIE'S INTERNAL PROCEDURES FOR IMPLEMENTING EQUAL EMPLOYMENT AND DIVERSITY PRACTICES

A. Creation of Office of Diversity.

1. If Abercrombie has not already done so, then within thirty (30) days of the Approval Date, Abercrombie shall create an Office of Diversity headed by a corporate executive with the title of Vice President ("Diversity VP"). The Diversity VP shall report directly to the Chief Executive Officer (CEO) or the Chief Operating Officer (COO) of Abercrombie.

2. Abercrombie shall appoint a person to serve as Diversity VP no later than sixty (60) days after the Approval Date. In the event that the position of Diversity VP becomes vacant, Abercrombie shall appoint a successor as soon as practicable after the position becomes vacant, and in any event, if the position remains vacant for sixty (60) days, Abercrombie will retain a search firm to search for a successor, and will appoint an interim Diversity VP who will be charged with temporarily performing the functions of the position. The following procedures shall apply in selecting the Diversity VP:

a. Abercrombie shall use Best Efforts to appoint an individual who will be effective in carrying out the duties and responsibilities set forth in Section XI.A.3.

b. Abercrombie will use a minority-owned search firm, or a minority from a majority-owned search firm, to identify potential candidates for the Diversity VP position. Abercrombie will identify the search firm or individual to Lead Counsel and the EEOC. Prior to appointing an individual for the Diversity VP position, Abercrombie shall provide Lead Counsel and EEOC with a resume of the individual whom Abercrombie intends to appoint to the position. Within ten (10) days of receiving the resume, Lead Counsel and/or the EEOC may provide their views to Abercrombie as to the individual's qualifications and suitability for the Diversity VP position. The decision as to which individual to select for the position shall be solely Abercrombie's and is not subject to further review under Section X.

3. The Diversity VP shall use Best Efforts to ensure Abercrombie's implementation and compliance with the provisions of this Decree, including the following:

a. Monitoring and implementation of any required changes to human resources systems;

b. Monitoring and implementation of the Benchmarks provided for under the Decree;

c. Overseeing the development and implementation of all training and education programs to be provided under the Decree;

d. Submitting progress reports and other monitoring and reporting material provided for in the Decree;

e. Overseeing the investigation, collection, tracking, and appropriate resolution of complaints of unlawful discrimination submitted under Abercrombie's Internal Complaint Procedure (described herein, in Section XI.D.); and

f. Overseeing the development of all recruiting programs to be provided under this Decree and monitoring the implementation of such programs.

4. Abercrombie will use Best Efforts to provide such staff, funds, and other resources to the Diversity VP as are necessary to discharge Abercrombie's obligations under the Decree.

5. Upon completion of the Internal Complaint Procedure investigation, the Diversity VP shall have the authority to recommend appropriate action to be taken and/or monetary payment to be made to any individual who has submitted a complaint of unlawful discrimination or of a violation of the Decree.

B. <u>Notice and Posting.</u>

1. Within ten (10) days of the Approval Date, Abercrombie shall post in conspicuous places where employee notices are posted in each of its stores and corporate offices, the Notice attached hereto as Exhibit B. The Notice shall remain posted in each such location (and in any new stores or corporate offices) for the duration of this Consent Decree. In addition, the Notice shall be published every four (4) months with the HR 411 Bulletin for the duration of this Consent Decree. In connection with each Semi-Annual Progress Report, Abercrombie shall certify that the Notice has been posted and remained posted as required above during the preceding six (6) month period.

2. Abercrombie shall also include within its Employee Handbook or otherwise provide to each new employee, the following statement or its equivalent: "In 2004, Abercrombie voluntarily entered into a Decree, agreeing to undertake actions that demonstrate its strong commitment to diversity and equal employment opportunity. Each store has a posted notice regarding this decree, and a summary and copy of the Consent Decree are available at [domain name]."

C. **<u>EEO and Diversity Training.</u>**

1. During the Term of the Decree, Abercrombie shall provide training on equal employment opportunity and compliance with the provisions of the Decree to Managers-In-Training, Assistant Managers, Store Managers and General Managers, to include the following topics: (1) compliance with the Decree; (2) equal employment opportunity; (3) federal, state and Company prohibitions of unlawful discrimination and retaliation; (4) diversity issues; and (5) other topics that will encourage equal employment in recruiting, hiring, assigning, promoting, and retaining minorities and females. Such training may be delivered by computer program, live "discussion" format, video format, written materials, or any combination of these or other formats tailored to be effective in communicating the material, provided, however, that such training as occurs within the first twelve months following the Approval Date shall not be provided to participants solely through written materials. No less than two hours shall be devoted to training on these topics for each participant within four months following (a) the Approval Date, or (b) the date of the participant's hiring as a Manager in Training, or promotion to an Assistant Manager, Store Manager, or General Manager position, whichever occurs later. In addition, during the Term of the Decree, Abercrombie shall provide (on a group or individual basis) at least two hours of additional training described above to Assistant Managers, Store Managers, and General Managers every twelve months after the Assistant Managers, Store Managers, and General Managers last received such training (on a group or individual basis).

2. During the Term of the Decree, Abercrombie shall provide training on equal employment opportunity and compliance with the provisions of the Decree to all District Managers, Regional Managers, and salaried exempt employees in the departments of Store Administration, Store Communications, Security, Stores HR, Store Operations, and Store Control, to include the following topics: (1) compliance with the Decree; (2) equal employment opportunity; (3) federal, state, and Company prohibitions of unlawful discrimination and retaliation; (4) diversity issues; and (5) other topics that will encourage equal employment recruiting, hiring, training, promoting, and retaining minorities and females. Such training may be delivered by computer program, live "discussion" format, video format, written materials, or

any combination of these or other formats tailored to be effective in communicating the material, provided, however, that such training as occurs within the first twelve months following the Approval Date shall not be provided to participants solely through written materials. No less than two hours shall be devoted to the training on these topics for each participant within four months following (a) the Approval Date, or (b) the date of the participant's promotion to District Manager or Regional Manager position, whichever occurs later. In addition, during the Term of the Decree, Abercrombie shall provide (on a group or individual basis) at least two hours of additional training as described above to District Managers, Regional Managers, and salaried exempt employees in the departments of Store Administration, Store Communications, Security, Stores HR, Store Operations, and Store Control, every twelve months after the District Managers, Regional Managers, and corporate employees last received such training. Provided further that if Abercrombie holds a meeting of District and/or Regional Managers in order to conduct training, then at least one hour of the training described above shall be done in live "discussion" format at such meeting.

3. Within thirty (30) days following the Approval Date, Abercrombie will train its human resources associates who have substantive responsibilities related to compliance with fair employment laws, and the practices and procedures established by this Decree. New human resources associates shall receive such training within thirty (30) days of their date of entry into such positions. Such training shall include, but not be limited to: (a) federal and state equal employment opportunity laws, including but not limited to the general provisions of these laws, the bases on which discrimination is prohibited under these laws, the identity, roles and responsibilities of agencies established to enforce these laws, and the principles and objectives underlying these laws; (b) the application of equal employment opportunity to typical employment situations, including but not limited to recruiting, hiring, job assignment, managerial promotion, and other career advancement opportunities, and general recruiting, hiring and supervision without engaging in racial, ethnic or gender stereotyping; (c) the provisions and requirements of the Decree; (d) the Internal Complaint Procedure; (e) the role and responsibility of the human resources staff; and (f) following up EEO complaints and investigations (including,

but not limited to, addressing potential or alleged retaliation, working with the complainant, and appropriate discipline and other remedial measures).

4. The training described in this section may be held in conjunction with other Company business, at Abercrombie's discretion, and may be organized geographically in such fashion as Abercrombie deems appropriate.

5. Abercrombie will provide Lead Counsel and the EEOC with the proposed plan for training discussed in Sections XI.C. 2, 3 and 4 in order to provide an opportunity for comment. Lead Counsel and the EEOC will provide comments, if any, within twenty-one (21) days of receipt. Abercrombie shall respond to such comments within fifteen (15) days of receipt. If the parties cannot agree on the proposed plan for training, any disputes will be submitted to the Special Master for resolution. The proposed plan for training will be presumed to be acceptable unless Lead Counsel and/or EEOC demonstrate that the proposed plan for training is improper.

D. <u>Internal Complaint Procedure.</u>

1. If Abercrombie has not already done so, then within thirty (30) days of the Approval Date, Abercrombie shall develop an Internal Complaint Procedure to provide for the filing, investigation and, if appropriate, remedying of complaints of discrimination or retaliation by associates or applicants for employment on the basis of race, color, national origin or gender, or where a violation of this Decree has occurred or is alleged. Abercrombie will implement the Internal Complaint Procedure within sixty (60) days of the Approval Date. Abercrombie will provide Lead Counsel and EEOC with the proposed Internal Complaint Procedure in order to provide an opportunity for comment regarding the proposed procedure. Lead Counsel and the EEOC will provide comments, if any, within twenty-one (21) days of receipt of the Internal Complaint Procedure. Abercrombie shall respond to such comments within fifteen (15) days of receipt. If the parties cannot agree on the Internal Complaint Procedure, any disputes will be submitted to the Special Master for resolution. The Internal Complaint Procedure will be presumed to be acceptable unless Lead Counsel and EEOC demonstrate that the proposed Internal Complaint Procedure is improper. Any decision of the Special Master is final and not subject to appeal.

2. The Diversity VP shall be responsible for oversight of:

a. publicizing the availability of this Internal Complaint Procedure;

b. tracking and collecting all complaints filed thereunder;

c. investigating and resolving such complaints in a timely and effective manner; and

d. retaining records regarding the resolution of all such complaints.

3. The internal complaint procedure shall incorporate the following elements:

a. A policy describing how investigations will be conducted, to be included in the Associate Handbook;

b. A prompt commencement and thorough investigation by a person trained to conduct such investigations who is not connected with the complaint;

c. A statement that an investigation should include interviews of all relevant witnesses, including the complainant, and reviews of all relevant documents;

d. A written record of all investigatory steps, and any findings and conclusions, and any actions taken;

e. Provision for the reasonably prompt resolution of such complaints;

f. An opportunity for the complainant to review and respond to tentative findings, except in those circumstances in which it is necessary to take immediate action;

g. Confidentiality of the complaint and investigation to the extent possible;

h. Appropriate communication of the final conclusions of the investigation provided to the complainant;

i. An appeal procedure to the Vice President of Human Resources, or other appropriate Abercrombie representative, should the complainant be dissatisfied with the results of the investigation; and

j. A notice that employees or applicants complaining of discrimination may use the company's internal complaint procedure and/or may file charges with the EEOC or state or local Fair Employment Practice (FEP) agencies. The notice shall also state that filing an internal complaint does not relieve the complainant of meeting any applicable deadline for the filing of a charge or complaint with EEOC or state or local FEP agencies.

4. Abercrombie may encourage resolution of internal complaints at a local level prior to investigation, but not require such informal resolution. A complainant shall not be required to first report the complaint to a person who is accused of the inappropriate conduct to invoke the Internal Complaint Procedure.

5. The Internal Complaint Procedure will permit, but not require, an employee to initiate the complaint process by submitting a written complaint on a form designed for that purpose. Abercrombie shall also set up or maintain a toll-free telephone number to receive complaints and shall designate additional persons at the district level who will be authorized to accept such complaints on behalf of the Company.

6. The Internal Complaint Procedure shall be incorporated into the Associate Handbook. Abercrombie shall continue to issue the Associate Handbook to all new store associates.

7. Abercrombie will maintain a policy of nondiscrimination and equal treatment, including a policy of zero tolerance for unlawful discrimination, in all of its employment practices.

8. The Internal Complaint Procedure is not intended to supplant the right of any employee to file a charge or complaint of discrimination or retaliation under any available municipal, state, or federal law.

9. Abercrombie shall publish with the Internal Complaint Procedure the following elements that will be included in the procedure:

a. A statement that it is unacceptable to retaliate against any associate for use of the Internal Complaint Procedure, for assisting in the investigation of a complaint, or for otherwise assisting in the utilization of the procedure. Abercrombie reserves the right to take disciplinary action against an associate who intentionally provides false information in connection with the procedure.

b. A statement that if an allegation of discrimination or retaliation against a manager or other associate is substantiated, then such conduct will result in appropriate discipline, up to and including discharge.

E. Performance Evaluations.

1. If Abercrombie has not already done so prior to the Approval Date, it shall revise its performance evaluation forms for Assistant Managers, Store Managers, General Managers, District Managers, and Regional Managers in order to include as measures of performance: (1) compliance with Abercrombie's Equal Employment Opportunity Policy and Discrimination and Harassment Policy; (2) attainment and management of diversity in the workplace; and (3) efforts to meet Benchmarks and to comply with other provisions of the Decree. The results of such evaluation factors shall have a meaningful impact upon compensation and/or bonus calculation.

2. At least thirty (30) days prior to implementation of the performance evaluation forms described in Section XI.D.1, Abercrombie will provide Lead Counsel and the EEOC with the proposed revisions in order to provide an opportunity for comment regarding the revisions. Lead Counsel and the EEOC will provide comments, if any, within twenty-one (21) days of receipt of the proposed revisions. Abercrombie shall respond to such comments within fifteen (15) days of receipt. If the parties cannot agree on the proposed revisions, any disputes will be submitted to the Special Master for resolution. The proposed revisions will be presumed to be acceptable unless Lead Counsel and/or EEOC demonstrate that the proposed revisions are improper. Any decision of the Special Master is final and not subject to appeal.

XII. JOB ANALYSIS, MINIMUM ELIGIBILITY REQUIREMENTS, JOB CRITERIA, RECRUITMENT, HIRING, JOB ASSIGNMENTS AND MANAGERIAL PROMOTION AND STAFFING

A. Job Analysis and Job Criteria.

1. The parties stipulate and agree upon Abercrombie's retention of Kathleen Lundquist, a professional industrial organizational psychologist, to develop a written job analysis and job-related criteria for each in-store store position.

2. No later than four (4) months after the Approval Date, in consultation with the industrial organizational psychologist, Abercrombie shall develop selection criteria for in-store positions, including Minimum Eligibility Requirements that are job related and consistent with business necessity to the extent required by Title VII. Selection criteria shall be subject to challenge under Section X of this Decree only if a particular position's selection criteria, taken collectively, cause adverse impact in selection rate for African Americans, Asian Americans, Latinos, or women. If the selection criteria cause such adverse impact and are challenged under Section X of this Decree, the selection criteria shall be affirmed if Abercrombie shows that it has used Best Efforts to determine whether alternative job-related selection criteria or whether an alternative use of job-related selection criteria has less adverse impact and would be equally predictive of job performance.

3. Abercrombie will not use as a criterion for store positions any of the following: enrollment in a target college, participation in college fraternity or sorority activities generally, participation in particular fraternities or sororities, participation in particular athletic activities, or gender. Abercrombie will not use enrollment in college as a Minimum Eligibility Requirement for non-management store positions.

4. Abercrombie will provide Lead Counsel and the EEOC with the job analyses, including Minimum Eligibility Requirements, and job-related criteria in order to provide an opportunity for comment. The content of the job analyses and job-related criteria prepared pursuant to Section XII.A.1. will not be subject to review under Section X of this Decree.

B. <u>Recruitment and Hiring.</u>

1. No later than four months after the Approval Date, Abercrombie, in consultation with the industrial organizational psychologist, shall develop and implement a written Recruitment and Hiring Protocol to recruit and hire job applicants for all hourly in-store positions and the Manager-in-Training position. The Recruitment and Hiring Protocol shall require that Abercrombie affirmatively seek out applications from qualified African Americans, Asian Americans, and Latinos of both genders.

2. Abercrombie's recruitment and operations materials will reflect diversity in race, color, national origin and gender in the United States, including the use of African Americans, Asian Americans and Latino models of both genders.

3. The Recruitment and Hiring Protocol shall prohibit Abercrombie from discouraging the submission of an application by any qualified person, or discarding or otherwise diverting any application submitted. In addition, the Recruitment and Hiring Protocol shall instruct Managers to make available and accept applications for Manager-in-Training at all of the places and through all of the means that applications for Brand Representative are made available and received.

4. The Recruitment and Hiring Protocol shall require clear and concise written job descriptions for each in-store non-managerial position and the Manager-in-Training position.

5. Job descriptions will be made available to anyone who requests them, and non-management job descriptions will be made available in a single package so that potential applicants are made aware of the differences among positions.

6. The Recruitment and Hiring Protocol will contain instructions for dissemination of applications, the conduct of structured interviews, programs to train involved staff, hiring decisions, documentation, and the hiring process generally.

7. The Recruitment and Hiring Protocol shall instruct Managers that Minority associates shall not be disproportionately assigned involuntarily to any particular positions on the basis of race or national origin.

8. Within sixty (60) days of the adoption of the Recruitment and Hiring Protocol and continuing every twelve (12) months thereafter, Abercrombie will use Best Efforts to train all involved staff in the conduct of structured interviews and other elements of the Recruitment and Hiring Protocol.

9. Abercrombie will provide Lead Counsel and the EEOC with the Recruitment and Hiring Protocol and the job descriptions in order to provide an opportunity for comment regarding the adequacy of the Recruiting and Hiring Protocol. If the parties cannot

agree on the Recruitment and Hiring Protocol, any disputes will be submitted to the Special Master for resolution and the Recruitment and Hiring Protocol shall be affirmed by the Special Master unless Lead Counsel and/or the EEOC demonstrate that said protocol is clearly improper and not in accordance with accepted industrial organizational psychologist professional standards. Any decision of the Special Master is final and not subject to appeal.

C. Managerial Promotions.

1. Abercrombie will use Best Efforts to promote African Americans, Latinos, Asian Americans and women at the following rates: Beginning in the second six-month period, Abercrombie shall use its Best Efforts to promote women and members of each Minority Group to positions of Assistant Manager and Store Manager/General Manager in a proportion that is no less than the specific group's proportion of the available feeder pool. The appropriate available feeder pool for Assistant Managers consists of all incumbent Managers-in-Training. The appropriate available feeder pool for Store Manager/General Manager consists of all incumbent Assistant Managers. The measuring date of incumbents in the available feeder pool shall be the last day of the preceding six-month period. For this set of Benchmarks only, if Abercrombie promotes women and African Americans, Latinos, and Asian Americans to such positions in a proportion that deviates by no more than two standard deviations from the specific group's proportion of the available feeder pool, Abercrombie shall be deemed to have achieved its promotion Benchmarks.

XIII. AFFIRMATIVE RECRUITING EFFORTS

A. Diversity Recruiters.

In the first six months of the Decree, if not before, Abercrombie will hire and maintain at least ten (10) full-time diversity recruiters who will be based in major metropolitan areas and will be charged with recruiting Minority applicants, including female applicants of each Minority, who meet Minimal Eligibility Requirements, into in-store positions. No later than twelve months after the Approval Date, Abercrombie will hire and maintain an additional fifteen (15) full-time diversity recruiters. Abercrombie will use Best Efforts to ensure that its recruiters themselves reflect diversity in race/national origin and gender. Abercrombie will consider both external and internal candidates for recruiter positions. Abercrombie will provide the resumes of the diversity recruiters to Lead Counsel and the EEOC. If Abercrombie has met the Benchmarks set forth in Section XIV for the first thirty (30) months of the term of this Decree, Abercrombie shall have the right to petition the Special Master, and if necessary the Court, for modification of this provision.

B. <u>Advertisements.</u>

During the Term of the Decree, Abercrombie will advertise for in-store employment opportunities in periodicals or other media that target African Americans, Asian Americans, and/or Latinos of both genders. Abercrombie will provide a list of media publications in which advertisements were placed to Lead Counsel and the EEOC on an annual basis.

C. <u>Recruiting Events.</u>

During the Term of the Decree, Abercrombie will attend Minority job fairs and Minority recruiting events that are attended by African Americans, Asian Americans, and/or Latinos of both genders.

D. <u>Diversity Consultant.</u>

During the Term of the Decree, Abercrombie will utilize a diversity consultant whose identity will be made known to Lead Counsel and the EEOC. The diversity consultant will conduct diversity/inclusion training for all field based managers and selected home office personnel. The diversity consultant will also, in conjunction with the VP of Diversity, aid in identifying sources of qualified Minority candidates. Abercrombie will ensure that its diversity consultant, or any subcontracted consultant, has familiarity with and experience in providing diversity training as to all three of the minority groups – African American, Asian American and Latinos – and gender.

E. <u>Documentation.</u>

Abercrombie will ensure that its recruiters document their recruiting efforts and that such records are retained for review by the Vice President of Diversity and are available to the monitor. Such documentation shall include, specifically but not exclusively: 1) a description of the placement of advertisements (publication, size, time, duration, targeted audience) and 2) a description of events/fairs attended (place, date, targeted audience).

XIV. BENCHMARKS

A. General Principles

1. Abercrombie shall use Best Efforts to meet the selection benchmarks set forth in this section. These Benchmarks do not establish maximum or minimum rates for the selection of African Americans, Latinos, Asian Americans or women; rather these Benchmarks establish selection rates that Abercrombie will use Best Efforts to achieve.

2. In attempting to meet these Benchmarks, Abercrombie shall not be required to select unqualified persons or to displace any incumbent associate from his or her position. These Benchmarks are not quotas; rather, they are Benchmarks designed to afford guidance as to whether Abercrombie is making selection decisions in such a way as to afford equal employment opportunity.

3. Abercrombie's failure to achieve a Benchmark for a particular position or period will not be considered a violation of this Decree unless Abercrombie has failed to use Best Efforts to meet the Benchmark. Should Abercrombie demonstrate that the proportion of good faith offers made to applicants of a particular group as compared to all applicants was at least as high as the Benchmark percentage, such evidence will conclusively establish that the Benchmark was met.

4. Unless otherwise specified, achievement of the Benchmarks will be calculated on a semi-annual basis and based on companywide employment data.

5. Failure to achieve a Benchmark by a fraction of a person shall not be deemed to constitute a failure to achieve a Benchmark under the Decree.

6. Abercrombie shall use voluntary self-identification to identify the race and gender of applicants and employees. No party shall influence an applicant’s or employee’s self-identification. Absent clear applicant or employee error, no applicant or employee shall be permitted to change his or her identified race or ethnicity.

B. Interim Hiring Goals

1. Interim hiring Benchmarks shall be established for Benchmark Positions.

2. Abercrombie shall monitor, by applicant self-identification, applicant flow of African Americans, Asian Americans, Latinos and women.

3. "Applicant Rate" shall be the actual applicant flow rate of a group as measured on a six-month basis.

4. "Maintenance Level" shall be the proportion of Asian Americans hired compared to all groups hired in a position as of the Preliminary Approval Date of this Decree.

5. "Percentage Level" for African-Americans shall be six-and-a-half percent (6.5%) for the second six-month period, seven-and-a-half percent (7.5%) for the third six-month period, and nine percent (9%) for the fourth six-month period.

6. "Percentage Level" for Latinos shall be seven percent (7%) for the second six-month period, eight percent (8%) for the third six-month period, and nine percent (9%) for the fourth six-month period.

7. "Percentage Level" for women shall be fifty-three percent (53%) for the second six-month period, fifty-three percent (53%) for the third six-month period, and fifty-three percent (53%) for the fourth six-month period.

8. The first six-month period begins at the beginning of the month following the Approval Date.

9. Brand Representative Position.

Abercrombie will use Best Efforts to meet the following interim hiring goals:

a. First six-month period:

African American: five percent (5%);

Latinos: six percent (6%);

Asian Americans: Maintenance Level; and

Women: fifty-three percent (53%).

b. Second six-month period:

African American: the greater of Percentage Level of six-and-a-half percent (6.5%) or Applicant Rate, as adjusted;[1]

Latinos: the greater of Percentage Level of seven percent (7%) or Applicant Rate, as adjusted;[2]

Asian Americans: the greater of Maintenance Level or Applicant Rate; and

Women: the greater of Percentage Level of fifty-three percent (53%) or Applicant Rate;

c. Third six-month period:

African Americans: the greater of Percentage Level of seven-and-a-half percent (7.5%) or Applicant Rate, as adjusted;[3]

Latinos: the greater of Percentage Level of eight percent (8%) or Applicant Rate, as adjusted;[4]

Asian Americans: the greater of Maintenance Level or Applicant Rate; and

Women: the greater of Percentage Level of fifty-three percent (53%) or Applicant Rate;

d. Fourth six-month period:

African Americans: the greater of Percentage Level of nine percent (9%) or Applicant Rate in the third six-month period;

[1] "As adjusted" means Applicant Rate supplemented by a percentage determined by multiplying by three percent (3%) the proportion of African Americans hired into the Brand Representative position compared to all Minority individuals hired into that position in the first six-month period.

[2] "As adjusted" means Applicant Rate supplemented by a percentage determined by multiplying by three percent (3%) the proportion of Latinos hired into the Brand Representative position compared to all Minority individuals hired into that position in the first six-month period.

[3] "As adjusted" means Applicant Rate supplemented by a percentage determined by multiplying by one-and-a-half percent (1.5%) the proportion of African Americans hired into the Brand Representative position compared to all Minority individuals hired into that position in the second six-month period.

[4] "As adjusted" means Applicant Rate supplemented by a percentage determined by multiplying by one-and-a-half percent (1.5%) the proportion of Latinos hired into the Brand Representative position compared to all Minority individuals hired into that position in the second six-month period.

Latinos: the greater of Percentage Level of nine percent (9%) or Applicant Rate in the third six-month period;

Asian Americans: the greater of Maintenance Level or Applicant Rate in the third six-month period; and

Women: the greater of Percentage Rate of fifty-three percent (53%) or Applicant Rate.

10. Minority Female Goal.

In addition to the interim hiring goals set forth in Section XIV.B.9, Abercrombie will use Best Efforts to meet the following interim hiring goals for African American women for the Brand Representative position:

a. First six-month period:

4.25 percent of all women hired;

b. Second six-month period:

the greater of 5.5 percent of all women hired or Applicant Rate, as adjusted;[5]

c. Third six-month period:

the greater of 6.4 percent of all women hired or Applicant Rate, as adjusted;[6]

d. Fourth six-month period:

the greater of 7.6 percent of all women hired or Applicant Rate.

Notwithstanding the foregoing, Abercrombie shall be deemed to have achieved this Benchmark if Abercrombie achieves its Benchmark for African Americans and if Abercrombie hires or extends good faith offers to African American women at the greater of the following rates: (1) 45% of Abercrombie's total African American hires; or (2) the Applicant

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[5] "As adjusted" means Applicant Rate supplemented by a percentage determined by multiplying by three percent (3%) the proportion of African American women hired into the Brand Representative position compared to all minority women hired into that position in the first six-month period.

[6] "As adjusted" means Applicant Rate supplemented by a percentage determined by multiplying by one-and-a-half percent (1.5%) the proportion of African American women hired into the Brand Representative position compared to all minority women hired into that position in the second six-month period.

Rate of African American women. In addition, Abercrombie shall report the number of all Latina and Asian American women hired in the Brand Representative position. If, in two consecutive six-month periods, the number of Latina women or Asian American women hired as a proportion of all women hired into that position is lower to a statistically significant degree than the number of Latina women or Asian American women as a proportion of all women employed in that particular position at the time this Decree takes effect, the parties shall meet and confer regarding the matter.

11. Manager-in-Training Position.

Abercrombie will use Best Efforts to meet the following interim hiring goals:

a. First six-month period:

African American: three-and-a-half percent (3.5%);

Latinos: three-and-a-half percent (3.5%) ;

Asian Americans: three and four-tenths percent (3.4%); and

Women: fifty-three (53) percent .

b. Second six-month period:

African American: four-and-a-half percent (4.5%) or Applicant Rate;

Latinos: four-and-a-half percent (4.5%) or Applicant Rate;

Asian Americans: three and six-tenths percent (3.6%) or Applicant Rate; and

Women: fifty-three percent (53%) or Applicant Rate.

c. Third six-month period:

African American: five-and-a-half percent (5.5%) or Applicant Rate;

Latinos: five-and-a-half percent (5.5%) or Applicant Rate;

Asian Americans: three and eight-tenths percent (3.8%) or Applicant Rate; and

Women: fifty-three percent (53%) or Applicant Rate.

d. Fourth six-month period:

African American: seven percent (7%) or Applicant Rate;

Latinos: seven percent (7%) or Applicant Rate;

Asian Americans: four percent (4%) or Applicant Rate; and

Women: fifty-three percent (53%) or Applicant Rate.

12. Notwithstanding the foregoing provisions XIV.B.9.-11., a rebuttable presumption shall arise that Abercrombie has exercised its Best Efforts to meet the Minority interim hiring goals for a particular six-month period if (i) Abercrombie is then in compliance with its obligations under the Decree and (ii) Abercrombie has met Percentage Level interim goals for two of the three Minority groups. However, the rebuttable presumption shall not be deemed to arise if Abercrombie has missed an interim goal for the same group for a second consecutive period. Nor would a rebuttable presumption arise if the interim goal Abercrombie has missed is based upon the Applicant Rate. If the presumption is deemed to arise, and if Lead Counsel and/or the EEOC seek to challenge whether Abercrombie has used Best Efforts to meet the Minority interim hiring goals, Lead Counsel and/or the EEOC shall have the burden of proving Abercrombie's failure to use Best Efforts by a preponderance of the evidence.

C. Applicant Rate Goals

After the period when Interim Hiring Goals, described in Part B above, will be used, Abercrombie shall use Applicant Rate in the preceding six-month period as a goal for Benchmark Positions during the remaining term of the Decree. Abercrombie will identify the applicable Applicant Rate to the Monitor, Lead Counsel, and the EEOC within thirty (30) days of the beginning of each six-month period. If Abercrombie has been found to have failed to use Best Efforts to implement Benchmarks, the parties shall meet and confer under the direction of the Special Master to determine when and under what conditions Abercrombie may proceed to use of Applicant Rate goals.

XV. REPORTING, RECORDKEEPING, AND COMPLIANCE MEETINGS

A. Documents To Be Preserved For The Duration of The Decree.

Abercrombie shall retain the following employment-related records for the Duration of the Decree or as required by state or federal law, whichever is longer:

1. Internal Complaint Procedure;
2. Job Analyses for Benchmark Positions;
3. Minimum Eligibility Requirements and job-related criteria for Benchmark Positions;
4. Recruitment and Hiring Protocol;
5. Job descriptions for Benchmark Positions;
6. Training plans;
7. Semi-Annual Progress Reports; and
8. Monitor's Reports and Executive Summaries.

B. Documents to Be Maintained for Two Years.

The following documents shall be maintained for two years from the date the document is created, or as required by state or federal law, whichever is longer:

1. Performance Evaluations of Managers;
2. Training Program Materials.;
3. Internal Complaints;
4. Recruiting Documentation described in Section XIII.E; and
5. Marketing Materials.

C. Access to Documents.

1. The Monitor shall, upon reasonable notice, be entitled to review all documents, including electronic data in machine-readable form, that are required to be maintained or created by the express terms of this Decree or that are used or referred to by Abercrombie to prepare Semi-Annual Progress Reports, except, however, that the Monitor shall not be entitled to review any such documents that are protected by attorney-client privilege or attorney work product doctrine ("privileged documents").

2. Lead Counsel and the EEOC may seek access to non-privileged documents described in C.1 above by requesting, with notice to Abercrombie, copies of such documents from the Monitor. Upon request, and notice to Abercrombie, the Monitor shall provide Lead Counsel and the EEOC with access to documents described in Section XV.C.1 unless Abercrombie objects within five (5) days of receipt of notice. If Abercrombie timely objects, the objection shall be resolved by the Monitor. The Monitor shall determine any matter in dispute by requiring that Lead Counsel and the EEOC demonstrate the access requested is relevant to a claim of breach of the Decree.

3. All documents required to be maintained by the express terms of the Decree, and all documents that are provided to the Monitor, Lead Counsel, or the EEOC under the terms of the Decree, are and shall be treated as confidential business records. Neither Lead Counsel, the EEOC nor the Monitor shall divulge any such documents to any third party unless so ordered by the Court after notice to Abercrombie and an opportunity for Abercrombie to object to such disclosure and be heard. Upon expiration of this Decree, Lead Counsel, the EEOC and the Monitor shall promptly return to Abercrombie or destroy any and all documents Abercrombie furnished under this Decree. This provision shall not prevent a party from filing otherwise confidential documents with the Court, provided that, either: (a) such documents are filed under seal; or (b) Lead Counsel and/or the EEOC give ten (10) days advance notice to Abercrombie, to permit opportunity to seek a protective order sealing such documents.

D. <u>Reporting Schedule.</u>

Within sixty (60) days of completion of the initial Benchmark period, and at six (6) month intervals thereafter through the Term of the Decree, Abercrombie shall provide Semi-Annual Progress Reports to the Monitor, Lead Counsel and EEOC on Abercrombie's compliance with the Decree's requirements. All such Reports shall be subject to the same confidentiality restrictions described in Section XV.C.3. above.

E. <u>Contents of the Semi-Annual Progress Reports.</u>

Abercrombie's Semi-Annual Progress Reports shall include information regarding the following:

1. Progress in achieving each of the Benchmarks described above in Section XIV. This report will include the applicable goal proportion and the actual achieved proportion. Abercrombie will indicate any shortfalls in achieving Benchmarks for the preceding six-month period, will analyze the possible reasons for such shortfall, and will identify plans to facilitate achievement of the Benchmark not met. If applicable, Abercrombie will analyze possible reasons if any division reflects shortfalls (i.e., less then 80 percent of companywide level) even if companywide Benchmarks are satisfied. (Division is defined as Abercrombie & Fitch, Hollister, abercrombie, or any other concept adopted by Abercrombie during the period of this Decree). In addition, if applicable, Abercrombie will analyze possible reasons that any Benchmark was met through good faith offers only.

2. Number and proportion of persons companywide in the preceding six months by race/ethnicity and gender (i.e., African American men, African American women, Asian American men, Asian American women, Latino men, Latina women, white men, white women) extended a good faith offer, hired or promoted (each of which shall be separately reported) into (a) each in-store non-managerial position (e.g., Brand Representative, stocker, overnight); (b) Manager-In-Training; (c) Assistant Manager; (d) Store Manager; and (e) General Manager.

3. Number and proportion of persons in the preceding six months extended a good faith offer, hired or promoted (each of which shall be separately reported) by store, state and division by race/ethnicity and gender (i.e. African American men, African American women, Asian American men, Asian American women, Latino men, Latina women, white men, white women) for (a) each in-store non-managerial position (e.g., Brand Representative, stocker, overnight); (b) Manager-In-Training; (c) Assistant Manager; (d) Store Manager; and (e) General Manager.

4. Composition of incumbent associates by each store position and by race, ethnicity and gender within each store, state, division and company-wide at the end of the preceding six month period.

5. Number and proportion of associates in each in-store non-managerial position (e.g., Brand Representative, stocker, overnight) by race/ethnicity and gender and by store, state, division, and companywide in the preceding six months;

6. Attrition or termination of associates from each store position by race, ethnicity and gender and by reason for leaving within each store, state, and division during the preceding six month period;

7. Confirmation by District Managers that the poster required by Section XI.B is posted, with copies attached;

8. Summary of activity of Diversity V.P. in implementing affirmative recruitment efforts, diversity training and Internal Complaint Procedure, with copies of materials attached;

9. Copies of Company materials depicting persons referred to in Section XII.B.2 and an indication of which persons used are or have been Abercrombie associates;

10. Copies of posting and publication of job descriptions of in-store positions as required in Section XII.B.5;

11. Copies of recruitment documentation referred to in Section XIII.

12. The number of hourly in-store employees by race/gender that have been terminated in the preceding six-month reporting period at the direction of home office management excluding human resources.

13. Copies of all marketing materials used by the Company in the preceding six months (e.g., print, television or internet advertising; quarterly magazines, store catalogs, and similar materials; store posters; videos; A&F television; shopping bags; etc.).

F. <u>Compliance Meetings.</u>

1. Within three months of the Approval Date, representatives of Abercrombie, Lead Counsel, and the EEOC, shall confer with the Monitor in order to review the initial implementation of the Decree, Abercrombie's compliance with the requirements, and other related topics. Thereafter, representatives of Abercrombie, Lead Counsel, and the EEOC, shall confer with the Monitor every six months to review the Semi-Annual Progress Reports required

by Section XV.E above. Within one month of the initial Progress Report and after each such Report submitted thereafter representatives of Abercrombie, Lead Counsel and the EEOC shall confer with the Monitor in order to review the matters described above. Such meetings shall be in person if requested by Lead Counsel, EEOC, or Abercrombie, except that if, after three years after the Approval Date, Abercrombie has met the Benchmarks, then only one compliance meeting each year need be in person.

2. The parties will discuss, among other things, identifying any goal not achieved and an analysis of the reasons that the goal was not achieved and plans that would facilitate achievement of the goal. In addition, if applicable, the parties will discuss possible reasons that any Benchmark was met through good faith offers only.

3. The Diversity VP shall attend each Compliance Meeting. Other officers, managers, and associates of Abercrombie, whose presence will assist the attainment of the purpose of the Compliance Meetings, may attend as appropriate. Compliance Meetings shall take place in San Francisco (or another mutually agreeable location).

G. Status Conference with Court.

1. The parties shall conduct an annual status conference with the Court to discuss the status of implementation of the Decree. Abercrombie, Lead Counsel, and the EEOC may be represented at the status conference. No party shall file any document with the Court in conjunction with the status conference, unless directed to do so by the Court.

XVI. MONITORING OF IMPLEMENTATION

A. Court-Appointed Monitor.

1. The parties have stipulated to Fred Alvarez, Esq. of Palo Alto, California for the Court to appoint as a Monitor.

2. The Monitor will prepare an Annual Compliance Report ("Report") on the status of implementation and Abercrombie's compliance with the terms and objectives of the Decree, as well as an "Executive Summary" of such Report. The Monitor's Report will include (a) a summary of the requirements of the Decree; and (b) an assessment of Abercrombie's semiannual compliance reports. The Monitor will review and evaluate Abercrombie's

compliance with the specific terms of this Decree, and identify any barriers to fulfillment of its objectives. The Monitor will also review and assess the responsibilities and performance of the VP of Diversity.

3. The Executive Summary shall set forth the substance of the Monitor's findings for the applicable reporting period. The parties contemplate that the Executive Summary will reflect the Monitor's general findings in areas such as, but not limited to, training, recruitment, creation of job analyses and descriptions, and attainment of Benchmarks, all as more specifically covered by the Report, and the parties also contemplate that the Executive Summary will not include specific findings as to, inter alia, the numbers of applications, hires, promotions, or specific occurrences or events. By way of example, the Executive Summary's discussion of the Company's training could generally set out the Monitor's findings relative to whether the Company had or had not met its overall training objectives under the Decree over the subject reporting period and, if not, a general statement of matters with respect to which there had been non-compliance and any steps the Company is to take to resolve such matters. The EEOC may respond to any legitimate inquiries by the public, media, or the government, with information contained in the Summary or a copy thereof. Other than this exception to the EEOC, the Executive Summary and information contained therein would be subject to the confidentiality provisions of Section XV.C.3 of this Decree.

4. The Monitor will provide the Special Master, Abercrombie, Lead Counsel, and the EEOC with copies of the Report and Executive Summary within ninety (90) days of the anniversary date of the Decree. The Report shall be subject to the confidentiality restrictions described in Section XV.C.3.

5. The Monitor shall have reasonable and timely access to relevant books, data (including databases), documents, and other sources of information necessary or appropriate to the exercise of his/her authority, in whatever form they are maintained in the ordinary course of business. This will include, but not be limited to, access to the following insofar as they relate to compliance with equal employment opportunity law and/or the terms of this Decree: (a) applications and related documents; (b) guidelines or training on recruitment, hiring, job

assignment, and managerial promotion; (c) EEO complaints, and any internal complaints; (d) managerial performance evaluations; (e) records of employee discipline; (f) records of attrition and terminations; (g) recruitment materials; and (h) marketing materials.

6. The Monitor shall address compliance issues that may arise as follows:

a. The Monitor shall categorize compliance issues as Low Level, Intermediate Level, or High Level and treat them as follows:

i. Low Level means non-systemic matters, such as compliance issues arising at a single store. Low Level issues may be resolved by Abercrombie and the Monitor without consulting Lead Counsel or the EEOC. Low Level issues that are not resolved by Abercrombie after notice from the Monitor and a reasonable opportunity to cure become Intermediate Level issues. Low Level issues that are resolved shall only be reported by the number of such issues in each region of Abercrombie in a confidential addendum to the Monitor's report that shall be provided to the parties. In addition, the Monitor shall maintain a log of all resolved Low Level issues that includes, as to each issue, identification of the store involved and a brief description of the nature of the issue and resolution. The Monitor shall provide the Special Master with such log on an annual basis. Neither the Monitor nor the Special Master shall produce such log to Lead Counsel or the EEOC unless and until Lead Counsel and/or the EEOC undertake an enforcement procedure under the Decree in which such information would be relevant, at which point Lead Counsel and/or the EEOC may seek such log through discovery under the standards set forth in Section X.B.4.d above.

ii. Intermediate Level means either Low Level issues that the Monitor and Abercrombie are unable to resolve after notice and a reasonable opportunity to cure, or systemic issues that arise out of policy or implementation concerns that affect a significant number of individuals. Prior to reporting Intermediate Level issues, the Monitor shall provide Abercrombie with notice and a reasonable opportunity to cure any Intermediate Level issues. Intermediate Level issues, including any resolution of such issues, will be reported in Compliance Reports and may be the topic of discussion at Section XV.F Compliance Meetings.

iii. High Level means situations involving exigent facts or circumstances which require immediate action to prevent a serious violation of the terms of this Decree. In the event a High Level matter shall arise, the Monitor will immediately notify EEOC, Lead Counsel and Abercrombie of the pressing concern. The matter shall be resolved in accordance with the provisions of Section X.B.

b. Upon request, and notice to Abercrombie, the Monitor shall provide Lead Counsel and the EEOC with access to documents described in Section XV.C.1 unless Abercrombie objects within five (5) days of receipt of notice. If Abercrombie timely objects, the objection shall be resolved in accordance with the provisions of Section X.B.

c. The Monitor shall not report or disclose any action or matter discovered in the course of the Monitor's function that does not directly relate to the terms of this Decree and Abercrombie's compliance therewith.

7. Nothing herein shall be interpreted to preclude the Monitor from resolving matters informally between the parties.

8. The Monitor may audit Abercrombie data for accuracy and/or completeness, or retain an independent expert(s) for this purpose, as he/she deems necessary or appropriate.

9. The Monitor may visit Abercrombie stores, as well as corporate offices, as necessary to fulfill his/her responsibilities. The Monitor may also interview and communicate with class members, in-store managers, employees, or other witnesses as necessary to fulfill his/her responsibilities.

10. The Monitor may request additional information from Abercrombie and may communicate with the Diversity VP, in a manner that assists the Monitor in the exercise of his/her duties. After reasonable notice, the Monitor may communicate with members of Abercrombie's senior management. The Monitor may communicate with the Special Master, counsel for Abercrombie, Lead Counsel and the EEOC.

11. All fees and expenses of the Monitor shall be paid by Abercrombie.

XVII. MONETARY RELIEF, NOTICE AND CLAIMS PROCEDURE

A. Establishment of Settlement Fund.

1. Abercrombie shall establish a settlement fund ("Settlement Fund") in the amount of $40,000,000.00 for the purpose of providing individual monetary awards to Class Representatives, Charging Parties and other eligible members of the Settlement Class and funding a portion of the settlement administration expenses, in accordance with the provisions of this Section. The Settlement Fund will be supplemented by the amount described in Section XVII.A.2.

2. The Settlement Fund will be supplemented by an amount calculated as imputed interest on the $40,000,000.00 as follows:

> $40,000,000.00 multiplied by .025 (2.5% imputed interest) multiplied by a fraction (the numerator of which is the number of days between the Preliminary Approval Date, and the date Abercrombie wire transfers final payment from the Settlement Fund to the Settlement Fund Account as provided in Section XVII.A.4.e. and the denominator of which is 360 days).

3. Lead Counsel and the EEOC will select a Claims Administrator. The Claims Administrator will open and administer an interest-bearing account ("Settlement Fund Account") designated by Lead Counsel and with a unique Taxpayer Identification Number.

4. Payments will be made by Abercrombie from the Settlement Fund to the Settlement Fund Account as follows:

a. Within seven (7) days of the Preliminary Approval Date, Abercrombie will wire $350,000.00 to the Settlement Fund Account. This amount is intended to cover costs of the mailed notices and expenses associated with the claims procedure.

b. Within seven (7) days of the Approval Date, Abercrombie will wire $350,000.00 to the Settlement Fund Account. This amount is intended to cover expenses associated with continued implementation of the claims procedure.

c. If there is no Final Approval of the Consent Decree, then the Claims Administrator shall return to Abercrombie any funds remaining in the Settlement Fund Account from the amounts described in Sections XVII.A.4.a and b.

d. Within seven (7) days of Final Approval, Abercrombie will wire the aggregate amount set forth in Exhibit C to the Settlement Fund Account. This amount shall be distributed by the Claims Administrator to the Class Representatives and Charging Parties as set forth in Section XVII.B.1.

e. After Final Approval and within seven (7) days after the Claims Administrator has informed Abercrombie in writing that it is prepared to distribute the Settlement Fund to the eligible members of the Settlement Class, Abercrombie will wire an amount to the Settlement Fund Account calculated as follows:

> $40,000,000.00 as supplemented by the amount calculated in Section XVII.A.2., less amounts Abercrombie has paid to the Settlement Fund Account in accordance with Sections XVII.A.4.a., b., and d., and less the aggregate amount of opt-out credits as calculated under the provisions of Section XVII.D.4.

f. Upon payment of the amounts set forth in Section XVII.A.4. from the Settlement Fund to the Settlement Fund Account having been made, Abercrombie will have no further monetary obligation hereunder to Class Representatives, Charging Parties or members of the Settlement Class, including no obligation to pay any funds for distribution to Class Representatives, Charging Parties or members of the Settlement Class; no obligation to pay costs of mailed notices and expenses associated with the claims procedure; and no obligation to pay any other settlement administration costs, except that Abercrombie will be responsible for paying for the published notice of the Settlement Notice as specified in XVII.C.2.

5. Nothing herein shall be deemed to require Abercrombie to separate or segregate its assets into a restricted settlement fund. The Settlement Fund Account will constitute a restricted settlement fund, and it will be created, managed and disbursed by the Claims Administrator under the supervision of Lead Counsel and the EEOC. Other than paying funds from the Settlement Fund to the Settlement Fund Account, Abercrombie will have no responsibilities or liabilities with respect to the Settlement Fund Account, its administration, or distributions therefrom.

B. <u>Distribution of Settlement Fund.</u>

1. <u>Class Representatives and EEOC Charging Parties.</u>

Each Class Representative and each Charging Party shall receive a liquidated amount as set forth in Exhibit C. This liquidated amount will compensate the Class Representatives or Charging Party for the (a) full settlement of all their claims against Abercrombie; (b) payment in recognition of risks related to being Class Representative or Charging Party; and (c) payment in consideration for the time and effort expended in the Consolidated Litigation or EEOC proceedings. Payment of these sums shall be made by the Claims Administrator no later than seven (7) days after the receipt of the funds described in Section XVII.A.4.d.

2. <u>Settlement Class.</u>

The remainder of the Settlement Fund Account will be distributed to eligible members of the Settlement Class who do not opt out based on a formula set out in the allocation plan as set forth in Section L. The distribution of the Settlement Fund Account according to the allocation plan will be undertaken by the Claims Administrator. Except as set forth in Section XVII.C.2.below, the fees, costs and expenses of the Claims Administrator shall be paid from the Settlement Fund Account, including the interest on the Settlement Fund Account. All payments to the Claims Administrator shall be approved by Lead Counsel and the EEOC.

C. <u>Notice.</u>

1. <u>Mailed Notice.</u>

Within twenty (20) days following the Preliminary Approval Date, Abercrombie shall provide the Claims Administrator with a computer disk containing the full names, social security numbers, last known addresses and phone numbers, start dates, and, as applicable, end dates of employment with Abercrombie for all in-store hourly and manager employees employed by Abercrombie at any time from February 24, 1999 through the Preliminary Approval Date who are potential Settlement Class members. Within twenty (20) days following the Preliminary Approval Date, Lead Counsel shall provide the Claims Administrator with a computer readable list of all known potential Settlement Class members and their mailing addresses. Prior to the mailing of the Notices, the Claims Administrator will combine these lists of potential Settlement

Class members received from Abercrombie and Lead Counsel and update any new address information for potential class members as may be available through the National Change of Address system. The Claims Administrator shall determine through a computer database search the most recent address that may be obtained for each person on the combined list of potential Settlement Class members. Within sixty (60) days of the Preliminary Approval Date, the Claims Administrator shall mail, via first class postage, Notice of Class Settlement, the Claim Form and the Explanation of Claims Procedure, all in the form approved by the Court in the Preliminary Approval Order, to all known potential Settlement Class members at their last known address and at the most recent address that may have been obtained through the computer database search.

2. <u>Published Notice.</u>

Abercrombie shall cause to be published the notice of the class settlement in the form approved by the Court in the Preliminary Approval Order, in newspapers and other media set forth in the Preliminary Approval Order. Abercrombie shall pay for the cost of the published notice, not to exceed $600,000.00.

D. <u>Objections and Exclusions.</u>

Class members may object to or opt-out of the class settlement.

1. <u>Objections.</u>

Class members objecting to the terms of the settlement must do so in writing at least forty (40) days prior to the scheduled Fairness Hearing. The written objection must be sent to the Claims Administrator on or before the date specified in the Preliminary Approval Order. The Claims Administrator will record the date of receipt of the objection and forward it to both Abercrombie and Lead Counsel within two (2) business days following receipt. The Claims Administrator will also file the original objections with the Clerk of the Court no later than five (5) days prior to the scheduled Fairness Hearing date. The Claims Administrator shall retain copies of all written objections until such time as it has completed its duties and responsibilities under this Decree.

2. Exclusions.

Class members may exclude themselves, or opt-out, of the monetary relief provisions of the class settlement. Any request for exclusion must be in the form of a written "Opt-out" statement sent to the Claims Administrator. Information on how to opt-out of the settlement shall be made available by the Claims Administrator. A person wishing to opt-out must sign a statement which includes the following language:

> I understand that I am requesting to be excluded from the class monetary settlement and that I will receive no money from the settlement fund created under the Consent Decree entered into by Abercrombie. I understand that if I am excluded from the class monetary settlement, I may bring a separate legal action seeking damages, but may receive nothing or less than what I would have received if I had filed a claim under the class monetary settlement procedure in this case. I also understand that I may not seek exclusion from the class for injunctive relief and that I am bound by the injunctive provisions of the Consent Decree entered into by Abercrombie.

A class member submitting an Opt-out statement shall sign and date the statement and deliver it to the Claims Administrator at least forty (40) days prior to the scheduled Fairness Hearing, as specified in the Preliminary Approval Order.

The Claims Administrator shall date stamp the original of any Opt-out statement and serve copies on both Abercrombie and Lead Counsel within two (2) business days of receipt of such statement. The Claims Administrator will also file the original Opt-out statements with the Clerk of the Court no later than five (5) days prior to the scheduled Fairness Hearing date. The Claims Administrator shall retain copies of all Opt-out statements until such time as it has completed its duties and responsibilities under this Decree.

3. Rescission of Class Member Opt-Outs

The parties recognize that some class members who initially submit Opt-out forms seeking exclusion may, upon further reflection, wish to withdraw or rescind such Opt-out statements. The parties agree that class members shall be permitted to withdraw or rescind their Opt-out statements by submitting a "Rescission of Opt-out" statement to the Claims Administrator. The Rescission of Opt-out statement shall include the following language:

> I previously submitted an Opt-out statement seeking exclusion from the class monetary settlement. I have reconsidered and wish to withdraw my Opt-out statement. I understand that by rescinding my Opt-out I may be eligible to receive an award from the claims settlement fund and may not bring a separate legal action against Abercrombie seeking damages.

A class member submitting such a rescission statement shall sign and date the statement and cause it to be delivered to the Claims Administrator no later than the deadline for claims filing period specified in the Preliminary Approval Order.

The Claims Administrator shall stamp the date received on the original of any Rescission of Opt-out statement and serve copies to counsel for Abercrombie and Lead Counsel no later than (2) days after receipt thereof and shall file the date-stamped originals with the Clerk of the Court no later than five (5) business days prior to the date of the Fairness Hearing. The Claims Administrator shall retain copies of all Rescissions of Opt-Out statements until such time as the Claims Administrator is relieved of its duties and responsibilities under this Decree.

4. Opt-Out Credits.

In the event any Settlement Class member elects to opt-out in the time and manner set forth in Section XVII.D.2, and does not rescind it, Abercrombie shall be entitled to a credit for each such opt-out. The credit amount will be 125% of the average settlement award of all class members eligible to participate in the monetary settlement fund as determined by the Allocation Plan, Section XVII.L. The aggregate credit for each opt-out shall be calculated and deducted from the Settlement Fund prior to the wire transfer of funds set forth in Section XVII.A.4.e.

5. Defendant's Rescission of Agreement.

If the number of individuals who opt out of the Settlement Class in the manner provided in this Decree exceeds one percent (1 %) of the number of the class members who submit completed claim forms, then Abercrombie, at its sole option, shall have the right to void this settlement on the tenth (10th) day after the Court requires individuals to return opt out notices. If Abercrombie exercises this option, all of Abercrombie's obligations under the Consent Decree shall cease to be of any force and effect, and the Consent Decree and any orders entered in connection therewith shall be vacated, rescinded, canceled, and annulled, and the parties shall return to the status quo in the Consolidated Litigation as if the parties had not entered into the Consent Decree. In addition, in such event, the Consent Decree and all negotiations, court orders and proceedings relating thereto shall be without prejudice to the rights of any and all parties hereto, and evidence relating to the Consent Decree and all negotiations shall not be admissible or discoverable in the Consolidated Litigation or otherwise.

E. <u>Claims Administration.</u>

The Claims Administrator shall (1) prepare and mail settlement notices and claim forms to class members; (2) establish and operate a website designed to provide information to and communication with class members; (3) receive and evaluate claims eligibility; (4) seek additional information from claimants, when appropriate; (5) receive and file opt-out statements and objections; (6) respond to questions from potential class members; (7) implement the allocation plan; and (8) maintain a toll-free number for communicating with class members; and (9) any other duties necessary to carry out its responsibilities set forth in this Decree.

The Claims Administrator shall make claim forms available to potential class members who submit oral, e-mail, or written requests for claim forms. The Claims Administrator shall mail the requested claim form via first class postage within two (2) business days after receiving a request. If Abercrombie, or its counsel, receives requests for claim forms or for information regarding the class settlement, it shall refer such requestors to the toll-free number established by the Claims Administrator for the purpose of administering this settlement. The requestors shall be informed that any requests for claim forms or information should be directed to the Claims Administrator. The Claims Administrator shall retain copies of all written requests for claim forms and all records of oral or e-mail requests for claim forms until such time as it has completed its duties and responsibilities under this Decree.

F. <u>Submission of Claim Forms.</u>

Class members who seek recovery of monetary compensation must complete a claim form and cause it to be filed with the Claims Administrator by the claim filing deadline set forth in the Preliminary Approval Order. The claim form must be postmarked on or before such date in order to be considered timely. All claim forms must be signed under penalty of perjury to be considered. Failure to file a timely claim form, for any reason whatsoever, shall bar the potential class member from having his or her claim considered and from receiving monetary compensation from the Settlement Fund Account. Class members who file a claim form must notify the Claims Administrator of any change of address. A failure to notify the Claims Administrator of a change of address may result in the forfeiture of a monetary award. The Claims Administrator shall be available through the toll-free line and via e-mail through the Claims Website to respond to requests from class members for assistance in completing and filing claim forms. Lead Counsel shall also be available to consult with and provide assistance to potential class members who request assistance in completing their claim forms.

G. Deceased Claimants.

Claims may be filed by deceased claimants through representatives of their estate if appropriate documentation is provided. Any claims paid to a deceased claimant shall be made payable to the estate of the deceased claimant.

H. Determining Eligibility.

The Claims Administrator shall make the determination as to whether a claim form is complete. If it is not complete, the Claims Administrator shall request additional information from the claimant, if it appears that such additional information would complete the Claim Form. Such requests for information shall be in writing and shall specify the information necessary to complete the claim form. The requests for information will be sent via first class mail and inform the claimant that a response must be returned no later than thirty (30) days from the date the request for information was mailed. The claimant must provide the requested information, signed under penalty of perjury, to the Claims Administrator by mail with a postmark no later than thirty (30) days from the date of the mailed request for information. Such additional information shall be considered part of the original claim form and will relate back to the original filing date. The failure of a claimant to timely respond to the request for information may result in the denial of the claim.

I. Late-Filed Claims.

For claims received after the filing deadline, the Claims Administrator shall notify late-filing claimants that their claims are untimely and that they are not eligible for any monetary award. The Claims Administrator shall also inform late-filing claimants that they may seek a review of the determination that they filed untimely by requesting the Claims Administrator to reconsider its determination. The Claims Administrator may reverse its determination that a claim was not timely filed only if the claimant proves that the claim form was filed on or before the filing deadline and that the untimeliness determination is erroneous.

J. Appeals of Claims Eligibility.

Within ninety (90) days of the close of the claims filing period, all ineligible claimants shall receive written notice of their ineligibility for monetary relief. Any claimants wishing to seek review of their ineligibility determinations must do so by returning a written request for review to the Claims Administrator by mail with a postmark no later than twenty-one (21) days from the date of the notice of claim ineligibility. Failure to file a timely request for review shall bar a claimant from challenging a determination of ineligibility.

The Claims Administrator shall resolve the requests for review based on the written requests for review and any other documentation or written information submitted by the claimant, or deemed necessary by the Claims Administrator. The Claims Administrator may seek further written information from the claimant as to the basis of their request and may consider the written arguments of Lead Counsel or Abercrombie.

The Claims Administrator shall attempt to expeditiously resolve any requests for review within sixty (60) days after the filing of the request for review. The Claims Administrator's decisions shall be communicated to the claimant in writing and shall be binding and non-appealable.

K. Claimant Information Provided by Abercrombie.

The parties understand and agree that Abercrombie may possess information that may assist in the determination of eligibility of potential class members for monetary compensation. Abercrombie shall reasonably cooperate in providing such information which Lead Counsel, the

EEOC or the Claims Administrator deems reasonably necessary to assist in determining the eligibility of any class member for monetary relief. Abercrombie shall attempt to provide such information within fourteen (14) days of any written requests for the information.

L. Allocation Plan.

Other than the Class Representatives whose monetary awards are separately determined, the disbursement of the Settlement Fund Account to eligible class members shall follow the allocation plan described in this section.

Each class member who seeks to receive an award must fill out the claim form and supply information related to his or her claim. On the basis of a review of the information supplied, the Claims Administrator shall allocate a certain number of points based upon specific factors related to the claims. The specific factors include length of service with Abercrombie; discrimination claims based on race, national origin or gender in promotion, assignment, hire or termination; any personal injury, such as emotional distress, suffered as a result of the discrimination; and any time or effort devoted to the litigation. The Claims Administrator shall total the points applicable to all eligible claimants, determine each eligible claimant's proportionate share of the total points, and allocate each eligible claimant's proportionate share of the Settlement Fund Account.

For example, if the amount available for distribution from the Settlement Fund Account to eligible class members is $1,000,000.00, and the Claims Administrator has awarded 10,000 points to eligible class members and if an eligible class member were awarded 10 points, then that class member would receive an award of $1,000.00 since each point would be worth $100.00 ($1,000,000.00 ÷ 10,000).

M. Distribution of the Monetary Awards.

As soon as practicable after making the calculations required by the allocation plan set forth in Section XVII.L, the Claims Administrator shall distribute the monetary awards to eligible class members via first class mail. The Claims Administrator shall only issue the checks in the name of the eligible class members unless Section XVII.F. is applicable. Included with the check due to the eligible claimant will be a statement showing the gross amount of the payment and an itemized statement of all deductions made. Flat rate deductions from gross amounts that are determined to be wage payments will be made for federal and state income taxes, the employee's share of social security and medicare tax, and any local income or payroll tax that applies. The Claims Administrator will inform Abercrombie of the employer's share of all taxes or contributions (i.e., matching social security and medicare tax) required to be paid by Abercrombie and Abercrombie shall timely remit all such payments to the Claims Administrator for payment to appropriate taxing authorities.

Any amounts designated as interest shall not be subject to withholding and shall be reported, if required, to the IRS on Form 1099-INT. The amounts paid for emotional distress shall not be subject to withholding and shall be reported to the IRS on Form 1099-MISC.

The Claims Administrator will be responsible for preparing and filing all appropriate tax filings and reports (except for any unemployment compensation taxes that may be due, which will be the sole responsibility of Abercrombie to calculate and pay), including, but not limited to, W-2 and 1099 forms for all eligible claimants and Class Representatives for their payments from the Settlement Fund, as well as any required for the Settlement Fund. The Claims Administrator will also be responsible for reporting and remitting to the appropriate taxing authorities the employer's share of taxes or contributions required to be paid by Abercrombie in a timely manner after receipt of the amount due for those payments from Abercrombie.

N. <u>Allocation of Monetary Awards.</u>

The monetary awards shall be allocated 15% to lost wages and 85% to compensatory damages.

O. <u>*Cy Pres* Fund.</u>

It is the intention of the parties to completely distribute the funds in the Settlement Fund Account. In the event that checks are returned and the Settlement Fund is not completely distributed for any reason, the remaining sum shall become part of a cy pres fund to be distributed to a non-profit organization or organizations designated by Lead Counsel that assist Minorities or women to obtain equal employment opportunity .

P. Report from Claims Administrator.

Within thirty (30) days of the distribution of the monies from the Settlement Fund, the Claims Administrator shall furnish an accounting of all distributions from the Settlement Fund to the Court with copies to Lead Counsel, the EEOC and Abercrombie.

XVIII. ATTORNEYS' FEES, COSTS AND EXPENSES

A. Basis for Award of Fees, Costs and Expenses.

1. The parties have agreed that it is appropriate as part of the settlement underlying this Consent Decree for Abercrombie to pay to Class Counsel, on behalf of the Class Representatives and the Settlement Class, reasonable attorneys' fees, litigation expenses, and costs in this case.

2. The Company has agreed to pay Class Counsel an award of reasonable attorneys' fees, litigation expenses, and costs in the amount of $7,250,000.00 for work performed and costs and expenses incurred through and including the Approval Date. Included in this amount is approximately $540,000.00 for litigation costs and expenses incurred by Class Counsel. This amount fully satisfies any arguable obligation the Company may have to pay attorneys' fees, litigation expenses, and costs for and on behalf of the Plaintiffs, Class Representatives and the Settlement Class for any and all work performed and costs and expenses incurred through and including the Approval Date.

3. The Company also has agreed to pay Class Counsel an amount of reasonable attorneys' fees, litigation expenses, and costs for work required to be performed by Class Counsel after the Approval Date pursuant to this Decree. The Company agrees that Class Counsel shall be paid such attorneys' fees, expenses and costs in the amount of $600,000.00 for work performed and costs and expenses incurred after the Approval Date relating to defense of the Decree, monitoring, administration and implementation, including, without limitation, evaluating possible compliance with this Decree, including the retention of experts to assist in such evaluation, and defense of the Decree. Except as provided in Section X.B.9 for appeals of decisions of the Special Master, this amount satisfies any arguable obligation the Company may have to pay attorneys' fees, expenses and costs to Class Counsel for any and all work performed

and costs and expenses incurred after the Approval Date of the Decree for the monitoring, administration, implementation and defense of the Decree.

4. Nothing herein shall be interpreted to preclude Abercrombie from seeking attorneys' fees, expenses and costs incurred in litigating enforcement matters according to Title VII law applicable to a prevailing defendant under Section X.B.9. for appeals of decisions of the Special Master.

B. <u>Payment of Award.</u>

1. Within fourteen (14) days following the Approval Date, Abercrombie shall pay to Lieff, Cabraser, Heimann & Bernstein, LLP one half (½) of the $7,250,000.00 or $3,625,000.00, for litigation-related attorneys' fees, expenses and costs as set forth in Section XVIII.A.2. Abercrombie shall pay Lieff, Cabraser, Heimann & Bernstein, LLP the remaining amount within fourteen (14) days following the Final Approval Date. Lieff, Cabraser, Heimann & Bernstein, LLP shall have sole responsibility to distribute attorneys' fees, expenses and costs to other Class Counsel, and if Abercrombie makes such payments to Lieff, Cabraser, Heimann & Bernstein, LLP, no Class Counsel may assert any claim for such payments from Abercrombie. In the event that Final Approval of the Decree is not attained, Lieff, Cabraser, Heimann & Bernstein, LLP shall return to Abercrombie the initial payment of $3,625,000.00 within fifteen (15) days after the non-approval of the Decree becomes final.

2. The attorneys' fees, expenses and costs awarded and agreed to be paid by the Company pursuant to Section XVIII.A.3. shall be paid to Lieff, Cabraser, Heimann & Bernstein, LLP according to the following schedule:

Date	Amount
Thirty (30) days after the Approval Date	$150,000
March 15, 2006	$125,000
March 15, 2007	$100,000
March 15, 2008	$100,000
March 15, 2009	$ 75,000
March 15, 2010	$ 50,000

If the Decree is terminated prior to March 15, 2011 pursuant to Section VI.B., Abercrombie shall pay to Lieff, Cabraser, Heimann & Bernstein, LLP all attorneys' fees listed above that are unpaid as of the date of the Decree is terminated. Such payment shall be made no later than fourteen (14) days after the date the Decree is terminated.

IT IS SO ORDERED, ADJUDGED AND DECREED this _____ day of ____________________, 2005.

____
SUSAN ILLSTON
United States District Judge
Northern District of California

Respectfully submitted,

Thomas A. Saenz
Shaheena Ahmad Simons
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street, 11th Floor
Los Angeles, CA 90014

Bill Lann Lee
Kelly M. Dermody
Eve H. Cervantez
Elizabeth A. Alexander (pro hac vice)
Jahan C. Sagafi
Nirej S. Sekhon
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

Julie Su
Minah Park
ASIAN PACIFIC AMERICAN LEGAL CENTER
1145 Wilshire Blvd., 2nd Floor
Los Angeles, CA 90017

Joseph C. Kohn
Martin J. D'Urso
Hilary Cohen
KOHN, SWIFT & GRAF, P.C.
One South Broad Street
Philadelphia, PA 19107

Kimberly West-Faulcon
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
1055 Wilshire Blvd., Suite 1480
Los Angeles, CA 90017

Bryan L. Clobes
Melody Forrester
Jeffrey D. Lerner
MILLER FAUCHER AND CAFFERTY
One Logan Square, Suite 1700
Philadelphia, PA 19103

Sidney L. Gold
Traci M. Greenberg
SIDNEY L. GOLD & ASSOCIATES, P.C.
1835 Market Street
Philadelphia, PA 19103

Cleo Fields
THE FIELDS LAW FIRM, L.L.C.
2147 Government Street
Baton Rouge, LA

James F. Keller
Zachary Gottesman
GOTTESMAN & ASSOCIATES
2121 URS Center
36 East 7th Street
Cincinnati, OH 45202

Barry L. Goldstein
GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
300 Lakeside Avenue
Oakland, CA 94612

April 11, 2005

/s/ Bill Lann Lee
Bill Lann Lee

April 11, 2005

/s/ Thomas A. Saenz
Thomas A. Saenz
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014

April 11, 2005

/s/ Martin J. D'Urso
Martin J. D'Urso
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107

Attorneys for Plaintiff Gonzalez, et al.

Jack W. Lee, Esq. (SBN 071626)
Lisa Duarte, Esq. (SBN 169750)
John Ota, Esq. (SBN 195532)
MINAMI, LEW & TAMAKI LLP
360 Post Street, 8th Floor
San Francisco, CA 94108

April 11, 2005

/s/ Jack W. Lee
Jack W. Lee

Attorneys for Plaintiff West, et al.

ERIC S. DREIBAND
General Counsel

JAMES LEE
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1801 "L" Street, N.W.
Washington, D.C. 20507

April 11, 2005

By: *___/s/ Anna Y. Park___*
ANNA Y. PARK
Regional Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
255 East Temple Street, 4th Floor
Los Angeles, CA 90012

April 11, 2005

By: *___/s/ Gregory M. Gochanour___*

JOHN C. HENDRICKSON
Regional Attorney
GREGORY M.GOCHANOUR
Supervisory Trial Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
500 West Madison Street, Suite 2800
Chicago, IL 60661

Douglas R. Young
Sandra A. Kearney
FARELLA BRAUN & MARTEL, LLP
Russ Building, 30th Floor
235 Montgomery Street
San Francisco, CA 94104

Thomas Brennan Ridgley
Jonathan M. Norman
Sandra J. Anderson
Mark A. Knueve
VORYS, SATER, SEYMOUR & PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

April 11, 2005

<u>/s/ Thomas Brennan Ridgley</u>
Thomas Brennan Ridgley

Attorneys for Defendants

Exhibit 2
Gonzalez v. Abercrombie; West v. Abercrombie
Hours, Lodestar, and Costs

	Hours	**Lodestar**	**Costs**
LCHB	6,511	$1,992,630	$476,243
MALDEF	994	$346,494	$10,162
APALC	401	$79,700	$571
NAACP LDF	1,083	$274,755	$2,557
Barry Goldstein	331	$182,160	$0
Minami, Lew & Tamaki	873	$364,468	$15,144
Kohn, Swift & Graf	2,133	$552,737	$31,597
Miller Faucher	638	$223,487	$4,706
Sidney L. Gold & Associates	205	$51,285	$0
Gottesman & Associates	13	$2,880	$60
Rainbow/PUSH	6	$1,710	$87
All Class Counsel	**13,187**	**$4,072,304**	**$541,128**
Fees + Costs		**$7,250,000**	
Total Costs		$541,128	
Total Fees		**$6,708,872**	
Effective multiplier		**1.65x**	

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EDUARDO GONZALEZ, ANTHONY OCAMPO, ENCARNACION GUTIERREZ, JOHAN MONTOYA, JUANCARLOS GÓMEZ-MONTEJANO, JENNIFER LU, AUSTIN CHU, IVY NGUYEN, ANGELINE WU, ERIC FIGHT, CARLA GRUBB, DAVID CULPEPPER, PATRICE DOUGLASS, and ROBAIR SHERROD, BRANDY HAWK and ANDRE STEELE, on behalf of themselves and all others similarly situated, Plaintiffs, v. ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO., Defendants. ELIZABETH WEST and JENNIFER LU, Plaintiffs, v. ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO.,	Case Nos. 03-2817, 04-4730, & 04-4731 SI **STIPULATION AND [PROPOSED] ORDER RE OPT-OUTS**

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

v.

ABERCROMBIE & FITCH STORES, INC., A&F CALIFORNIA, LLC, A&F OHIO, INC., and ABERCROMBIE & FITCH MANAGEMENT CO.

Defendants.

WHEREAS, the Claims Administrator has reported that it has received opt-outs and rescissions from certain Class Members, as reported in the Notice of Claims Administrator's Filing of Objections, Opt-outs, and Opt-out Rescissions, filed on Friday, April 8, 2005; and

WHEREAS, the Claims Administrator has reported that 56 named Class Members submitted timely opt-outs, one named Class Member submitted an untimely opt-out, five named Class Members rescinded their opt-outs in a timely fashion, and four named Class Members rescinded their opt-outs in an untimely fashion

The parties, by and through their counsel of record, stipulate and agree as follows:

1. It appropriate to designate as opting out only Class Members who submitted timely opt-outs and did not rescind them;

2. Any Class Member who submitted a rescission, whether timely or untimely, shall be deemed to have rescinded his or her opt-out, and shall be able to recover monetary relief as a Class member; and

3. The final list of opt-outs is as follows:

William Abbott	Mallory Hartung	Sara B. Ooms
Allyson Augustine	May Ling Ho	Cary L. Ooms
Erin Augustine	Nicole Kath	Jill Owen
Kristen Barnes	Stephanie Elizabeth Kokoszka	Michal Poche
Chetan Bhasin	Charissa Marie Lazio (Locke)	Jesse Quarterman
Kristin Leigh Brown	William Lee	Melissa R. Ribble
Julia Burwell	Michelle Lukas	Laura Riddlebarger
Courtney Condron	Lisa T.K.O. Lum	Cheryl Riemer
Nadia Karina Del Rio	Megan Manahl	Laura C. Riise

Jolene Eichorn	Angel McCollough	Kristin R. Ross
Minette Galura-Boquiren	Kenzi A. McNally	Allison Roth
Robyn L. Gough	Gina Moshopoulos	Pamela Soggu
Elizabeth Guleke	Sarah Ann Motl	Kelly A. Stevelt
Kirsten Hahn	Jen Munoz	Laura Teed
Hilary Harrod	Heidi Nichols	Wendy Widhalm
Lindsay Harse	Sandra M. Noviks	

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Respectfully submitted,

Julie Su
Minah Park
ASIAN PACIFIC AMERICAN LEGAL CENTER
1145 Wilshire Boulevard, 2nd Floor
Los Angeles, CA 90017
Telephone: (213) 977-7500
Facsimile: (213) 977-7595

Kimberly West-Faulcon
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
1055 Wilshire Blvd., Suite 1480
Los Angeles, CA 90017
Telephone: (213) 975-0211
Facsimile: (213) 202-5773

Sidney L. Gold
Traci M. Greenberg
SIDNEY L. GOLD & ASSOCIATES, P.C.
1835 Market Street, Suite 515
Philadelphia, PA 19103
Telephone: (215) 569-1999

Cleo Fields
RAINBOW/PUSH COALITION
930 East 50th Street
Chicago, IL 60615
Telephone: (773) 373-3366

James F. Keller
Zachary Gottesman
GOTTESMAN & ASSOCIATES
2121 URS Center
36 East 7th Street
Cincinnati, OH 45202
(513) 651-2121

Thomas A. Saenz
Shaheena Ahmad Simons
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014
Telephone: (213) 629-2512
Facsimile: (213) 629-0266

Bill Lann Lee
Kelly M. Dermody
Eve H. Cervantez
Elizabeth A. Alexander
Jahan C. Sagafi
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Bryan L. Clobes
Melody Forrester
Jeffrey D. Lerner
MILLER FAUCHER AND CAFFERTY
One Logan Square, Suite 1700
Philadelphia, PA 19103
Telephone: (215) 864-2800

Joseph C. Kohn
Martin J. D'Urso
Diana Liberto
Hilary Cohen
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700

Barry L. Goldstein
GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
300 Lakeside Avenue
Oakland, CA 94612
Telephone: (510) 763-9800

Jack W. Lee, Esq. (SBN 071626)
Lisa Duarte, Esq. (SBN 169750)
John Ota, Esq. (SBN 195532)
MINAMI, LEW & TAMAKI LLP
360 Post Street, 8th Floor
San Francisco, CA 94108
Telephone: (415) 788-9000
Facsimile: (415) 398-3887

Dated: April 11, 2005

By: *\/s\/ Bill Lann Lee*
Bill Lann Lee

Attorneys for Plaintiffs

Anna Y. Park (SBN 164242)
Peter F. Laura (SBN 116426)
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
255 East Temple Street, 4th Floor
Los Angeles, CA 90012

John C. Hendrickson (IL SBN 1187589)
Gregory M. Gochanour (IL SBN 6210804)
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
500 West Madison Street, Suite 2800
Chicago, IL 60661

Dated: April 11, 2005

By: *\/s\/ Gregory M. Gochanour*
Gregory M. Gochanour

Attorneys for EEOC

Thomas B. Ridgley
Sandra J. Anderson
Mark A. Knueve
VORYS, SATER, SEYMOUR & PEASE, LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008

Douglas R. Young
Douglas E. Dexter
Sandra A. Kearney
FARELLA BRAUN & MARTEL, LLP
Russ Building, 30th floor
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Dated: April 11, 2005

By: *\/s\/ Thomas B. Ridgley*
Thomas B. Ridgley

Attorneys for Defendants

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: ___________________________

____
Hon. Susan Illston
United States District Judge