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15 *Attorneys for Plaintiffs and the Class*

16 **UNITED STATES DISTRICT COURT**  
17 **CENTRAL DISTRICT OF CALIFORNIA**

18 THOMAS LA PARNE and  
19 EMILE BOUARI, individually  
and on behalf of themselves and  
20 all others similarly situated,  
Plaintiffs,

21 vs.

22 MONEX DEPOSIT COMPANY,  
23 a California limited partnership;  
COMCO MANAGEMENT  
24 CORPORATION, a California  
corporation; MONEX CREDIT  
25 COMPANY, a California limited  
partnership; METCO  
26 MANAGEMENT  
CORPORATION; and Does 1  
27 through 10,

28 Defendants.

Case No. SACV08-302 DOC (MLGx)

**CLASS ACTION**

**DECLARATION OF JUSTIN T.  
BERGER IN SUPPORT OF  
PLAINTIFFS' APPLICATION FOR  
REASONABLE ATTORNEYS FEES  
AND COSTS AND ENHANCEMENT  
AWARDS**

Date: February 28, 2011  
Time: 8:30 a.m.  
Ctrm: 9D  
Hon. David O. Carter

1 I, JUSTIN T. BERGER, declare:

2 1. I am an attorney admitted to practice before all courts of the State of  
3 California, the Central and Northern District Courts of California, and am an  
4 attorney at the law firm of Cotchett, Pitre, & McCarthy (“CPM”), Co-Counsel for  
5 Plaintiffs in this proceeding. I make this declaration of my own personal  
6 knowledge, and, if called as a witness, I could and would competently testify to  
7 the matters stated below.

8 2. I submit this declaration in support of (2) Plaintiffs’ Application for  
9 Attorneys’ Fees, Costs and Incentive Awards.

10 3. CPM is experienced in handling complex litigation, and is presently  
11 serving as lead class counsel in numerous class actions, as well as lead counsel in  
12 other complex litigation. CPM has a long history of successful class action  
13 results. For example, CPM, including Susan Illston (now, a United States District  
14 Court Judge for the Northern District of California), and Joseph Cotchett, served  
15 as co-lead trial counsel for the class in *In re American Continental Corp./Lincoln*  
16 *Sav. & Loan Securities Litig.* (D.Ariz. 1992) 794 F.Supp. 1424 and the related  
17 insurance litigation, *Aetna Cas. & Sur. Co. v. Dannenfeldt* (D.Ariz. 1991) 778  
18 F.Supp. 484. This was a major securities class action on behalf of shareholder and  
19 bondholder victims of Charles Keating, including a five month jury trial which  
20 resulted in one of the largest class action jury verdicts in history. More recently,  
21 the law firm has served as lead and/or trial counsel in class actions and/or complex  
22 cases including, among others, the following:

- 23 • *In re: Bextra and Celebrex Marketing Sales Practices and Product*  
24 *Liability Litigation* (N.D. Cal., Case No. M:05-CV-01699-CRB,  
25 MDL 1699) (designated as trial counsel for Plaintiffs);
- 26 • *In re Homestore Sec. Litig.* (C.D. Cal., Master File No. 01-CV-11115  
27 RSWL) (The firm is Class Counsel);
- 28 • *California State Teachers' Retirement System v. AOL Time Warner*

- 1 (Los Angeles Superior Court, Case No. CGC-03-422609);
- 2 • *California State Teachers' Retirement System v. Qwest*
- 3 *Communications International Inc.* (San Francisco Superior Court,
- 4 Case No. CV 415546);
- 5 • *In re Natural Gas Anti-trust Cases I, II, III, IV, and V (Price Indexing*
- 6 *Cases)* San Diego Superior Court, JCCP Nos. 4221, 4224, 4226, and
- 7 4228 (Lead Counsel for Non-Class cases);
- 8 • *Old Republic Litigation*, San Francisco Superior Court No. 993507
- 9 (Successfully tried class action and won appeal); and
- 10 • *In re Household Litigation*, N.D. Cal. Case No. C-02-1240 CW.
- 11 4. CPM has also handled wage/hour and other employment cases,
- 12 including:
- 13 • *In re AXA Wage and Hour Litigation* (N.D. Cal. Case No. C-06-4291
- 14 JSW) (CPM appointed as co-lead counsel);
- 15 • *Sotelo et al. v. MediaNews Group, et. al.* (Alameda Superior Court,
- 16 Case No. HG06287184);
- 17 • *Woo v. Skidmore, Owings, & Merrill LLP* (San Francisco Superior
- 18 Court, Case No. 319540);
- 19 • *Flinn v. Continental Casualty Company* (N.D. Cal., Case No. C
- 20 03-02306 SBA);
- 21 • *RN Solution, Inc. v. Catholic Healthcare West* (San Francisco
- 22 Superior Court, Case No. CGC 06-456789); and
- 23 • *Dimick and Tamura v. Ono Hawaiian Grill* (Pro Bono) ( DLSE Case
- 24 Nos. 12-54783 RB, 12-54793 RB).
- 25 5. The original complaint in this action was filed on March 18, 2008.
- 26 6. After conferring with Defendants, Plaintiffs agreed to drop a
- 27 conversion claim, and filed the First Amended Class Action and Collective Action
- 28 Complaint on May 22, 2008. This is the operative complaint which was ultimately

1 settled. Defendants filed their Answer on May 27, 2008.

2 7. Extensive discovery was undertaken during the litigation in  
3 preparation for trial. Both parties produced substantial data and documents, as  
4 well as exchanging written discovery totaling over 100 requests.

5 8. The parties also took a total of fourteen depositions, including those  
6 of the named Plaintiffs, three absent class members and five management or  
7 executive level employees of Monex.

8 9. Of these depositions, four lasted more than one day, including the  
9 depositions of both named Plaintiffs. The parties also deposed three experts in  
10 this case - two for the Plaintiffs and one for the Defendant. In sum, five  
11 depositions were taken in northern California, nine in southern California and one  
12 deposition was continued in Nevada.

13 10. The parties briefed three significant dispositive motions: for FLSA  
14 collective action certification, for Rule 23 class certification, and for summary  
15 adjudication.

16 11. The motion for FLSA certification was filed on February 6, 2009 and  
17 granted on March 9, 2009. On April 10, 2009, the Court approved Plaintiffs'  
18 Proposed Notice to a conditional FLSA class numbering 276 former and current  
19 Monex ARs. This motion consisted of five declarations and significant briefing  
20 by both parties.

21 12. The Plaintiffs filed a motion to certify a Rule 23 class on September  
22 28, 2009. The Court certified a Rule 23 class on December 22, 2009. This motion  
23 involved the filing of a memorandum, opposition, reply and surreply by the  
24 parties, in addition to thirty-seven declarations by Plaintiffs, Defendants, their  
25 attorneys and other witnesses. The application to file a surreply was also fully  
26 briefed.

27 13. The parties also briefed (including briefing to file a surreply) and  
28 argued Defendants' motion for summary adjudication, regarding whether Monex

1 Deposit Company is a “retail establishment” under Section 7(i) of the Fair Labor  
2 Standards Act (“FLSA”).

3 14. This presented an issue of first impression in this Court and the entire  
4 country, and was very closely and tenaciously contested.

5 15. The parties submitted four briefs, ten declarations, three sets of  
6 evidentiary objections, two “supplements” and a statement of disputed facts to this  
7 court in connection with the motion.

8 16. Plaintiffs also provided an extensive legislative analysis of applicable  
9 tax law, showing that the owner of Monex had argued that commodity transactions  
10 with customers were for resale.

11 17. In addition to these three motions, the parties also fully briefed a  
12 motion to file a second amended complaint and filed several declarations and  
13 notifications regarding discovery disputes.

14 18. The parties also engaged in a formal mediation session conducted by  
15 Hon. William J. Cahill (Ret.) on August 31, 2009.

16 19. Beyond this formal session, the parties participated in extensive  
17 settlement discussions which were adversarial, non-collusive and at arm’s length,  
18 at all times.

19 20. A settlement was eventually reached between the parties and noticed  
20 to this Court on August 12, 2010, just five weeks before the trial was set to begin  
21 on September 14, 2010.

22 21. The motion for preliminary approval was filed on September 23, 2010  
23 and granted by this Court on November 29, 2010. The motion for final approval  
24 of settlement is set to be briefed and argued before this court on February 28,  
25 2011.

26 22. Plaintiffs achieved some of the benefit they sought in bringing the  
27 suit, and also received a monetary recovery pursuant to the terms of the settlement.

28 23. The reaction of class members to the preliminary approval of the

1 settlement has been exceedingly positive. To date, only one exclusion out of a  
2 total class of three hundred fifty two people has been received by Plaintiffs'  
3 attorneys. Plaintiffs' attorneys have received no objections to the settlement to  
4 date.

5 24. This matter was intensively litigated for nearly three years and  
6 resulted in a settlement of \$78,786.00 for a class of 352 individuals, which  
7 represents a financial reward of between \$78 and \$4,558.24 for each class  
8 member.

9 25. CPM has, throughout the litigation, maintained updated time and cost  
10 summaries.

11 26. Attached hereto as Exhibit A is a true and correct copy of CPM's  
12 lodestar report detailing plaintiffs' counsel's time and fees through December 21,  
13 2010. As indicated, the total amount of hours, as of December 21, 2010, is  
14 2,821.30. Attached hereto as Exhibit B is a true and correct copy of CPM's  
15 litigation costs detailing the expenses of CPM through December 21, 2010. The  
16 total amount of costs incurred, as of December 21, 2010, is \$178,304.15. The total  
17 amount of attorneys' fees, as of December 21, 2010, is \$1,134,980.00.

18 27. Based on Plaintiffs' counsel's continued advocacy for our class  
19 representatives and class members, the extensive effort exhibited throughout the  
20 discovery process, mediations, preliminary approval, and the preliminary  
21 settlement administration process, and the vast collective experience in wage and  
22 hour class actions, I respectfully submit our attorney/paralegal time and costs to  
23 the court for approval.

24 28. The attorneys for Plaintiffs have expended \$208,060.19 out of pocket  
25 for items such as service, the hiring of experts, travel, copies, witness fees and  
26 other items. These are the total costs expended by all three firms representing  
27 Plaintiffs in this matter. These costs were vital and necessary in the process of  
28 moving toward the eventual settlement. These costs, including travel for

1 depositions, witness fees and other expenses were a necessary part of reaching the  
2 settlement. The formal mediation did not result in a settlement, and only after the  
3 full briefing of the Motion for Summary Adjudication, and the two class  
4 certification motions did Defendants provide a settlement offer.

5 29. Each of the firms involved in the litigation made every effort to  
6 prevent the duplication of work or inefficiencies that might have resulted from  
7 having multiple firms working on the case. Counsel carefully coordinated  
8 discovery efforts and motion practice to ensure that they were working efficiently  
9 and productively, and held many conference calls to discuss strategy and new  
10 developments in the case, share knowledge they had obtained from documents and  
11 depositions, and keep one another informed about the status of various project

12 30. The Class Representatives have expended substantial time and effort  
13 working to advance the interests of the Class. Throughout the litigation, these  
14 Class Representatives have participated in discovery. The Class Representatives  
15 were deposed and spent many hours preparing for and sitting for their deposition.  
16 Unlike unnamed Class members, who will enjoy the benefits of the  
17 Representatives' efforts without taking any personal action, the named Class  
18 Representatives participated actively in the litigation. They made themselves  
19 available as witnesses at deposition and subjected themselves to all the obligations  
20 of named parties, including participating in discovery and following the litigation.

21 31. The hourly rates of all counsel involved in this litigation on behalf of  
22 Plaintiffs are well within the range of reasonable amounts charged by attorneys in  
23 the region with similar skill and experience. In fact, many of the attorneys' rates  
24 are below what attorneys with similar experience charge in the same market.

25 32. Both class representatives took significant risks and provided  
26 substantial assistance to class counsel throughout this case. These risks included  
27 both the pecuniary and non-pecuniary. Furthermore, both class representatives  
28 responded to formal discovery requests and made themselves available for

1 deposition. Mr. La Parne, who lives in southern California, traveled to Northern  
2 California on two occasions and sat for two days worth of deposition. Mr. Bouri,  
3 who lives in Las Vegas, also traveled to Northern California for deposition.

4 33. The difference in the amount of enhancement payments to the two  
5 class representatives reflects the approximate difference in time dedicated by them  
6 in assisting counsel with the prosecution of this action.

7 34. Neither of these awards is disproportionate as to the awards that the  
8 rest of the class is receiving, as class members will receive up to \$4,558, and  
9 numerous members will receive more than \$500.

10 35. In contrast to the award of attorneys' fees and expenses, which will be  
11 paid by Monex apart from the award to the class, the settlement agreement  
12 provides that the incentive payments to Mr. LaParne and Mr. Bouari be paid from  
13 the class settlement fund.

14 36. I believe that in light of the settlement in this case, a total recovery to  
15 Plaintiffs' counsel of \$208,000.00 is reasonable.

16  
17 I declare under penalty of perjury under the laws of the State of California  
18 that the foregoing is true and correct. Executed this 10th day of January 2010 at  
19 Burlingame, California.

20  
21 /s/ Justin T. Berger

22 JUSTIN T. BERGER

# **EXHIBIT A**

**COTCHETT, PITRE & McCARTHY**

Monex

Lodestar Report

Inception Through December 21, 2010

NAME	RANK	TOTAL HOURS	HOURLY RATE	TOTAL FEES
McCarthy, Niall P.	Partner	112.00	\$ 750	\$ 84,000.00
Schlichtmann, Laura E.	Partner	1004.30	\$ 600	\$ 602,580.00
<b>SUB-TOTAL PARTNERS</b>		1116.30		\$ 686,580.00
Berger, Justin T.	Associate	292.30	\$ 350	\$ 102,305.00
Buescher, Eric J.	Associate	17.10	\$ 350	\$ 5,985.00
Teti, Drew	Associate	35.30	\$ 350	\$ 12,355.00
<b>SUB-TOTAL ASSOCIATES</b>		344.70		\$ 120,645.00
Grafilo, Mark A.	Sr. Paralegal	4.10	\$ 250	\$ 1,025.00
Kelley, Darren G.	Sr. Paralegal	1134.90	\$ 250	\$ 283,725.00
Banis, Alexandra	Paralegal/Case Assistant	6.00	\$ 225	\$ 1,350.00
Marcelino, Marybeth	Paralegal/Case Assistant	65.80	\$ 225	\$ 14,805.00
Piller, Nathan	Paralegal/Case Assistant	1.00	\$ 225	\$ 225.00
Townsend, Emanuel	Paralegal/Case Assistant	58.00	\$ 225	\$ 13,050.00
<b>SUB-TOTAL PARALEGALS</b>		1269.80		\$ 314,180.00
Champion, Laurel	Law Clerk	53.10	\$ 150	\$ 7,965.00
Teti, Drew	Law Clerk	37.40	\$ 150	\$ 5,610.00
<b>SUB-TOTAL LAW CLERK</b>		90.50		\$ 13,575.00
<b>GRAND TOTAL</b>		<b>2,821.30</b>		<b>\$ 1,134,980.00</b>

**EXHIBIT B**

**COTCHETT, PITRE & McCARTHY**

Monex

Litigation Costs

Inception through December 21, 2010

<b><u>DESCRIPTION</u></b>	<b><u>AMOUNT</u></b>
Attorney Service	\$ 3,167.51
Depositions	\$ 40,774.25
Experts/Consultants	\$ 100,851.71
Federal Express; OnTrac Overnight	\$ 1,019.32
Hearing Transcript	\$ 467.32
Lexis/Nexis	\$ 2,379.70
In-house Photocopies	\$ 9,526.30
Outside Photocopies	\$ 916.30
Postage	\$ 640.94
Sp Master/Arbitration	\$ 5,275.00
Telephone/Fax	\$ 821.33
Temporary/Special Personnel	\$ 2,058.00
Travel	\$ 10,160.83
Witness Fees	\$ 245.64
<b>TOTAL LITIGATION COSTS</b>	<b>\$ 178,304.15</b>