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12 [Additional counsel appear on signature page]

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 RICHARD GREGORY, On Behalf of Himself)
17 and All Others Similarly Situated,)
18 Plaintiff,)

19 vs.

20 CHIRON CORPORATION, HOWARD H.)
PIEN, JOHN A. LAMBERT and DAVID V.)
21 SMITH,)
22 Defendants.)

Case No. C-04-4293-VRW
CLASS ACTION
LEAD PLAINTIFF'S RESPONSE TO
ORDER OF APRIL 14, 2008 RE MODIFIED
TERMS OF SETTLEMENT AND CLASS
NOTICE

1 Lead Plaintiff appreciates the Court’s approach to the proposed settlement in its April 14,
2 2008 order. Pursuant to the Order, Lead Plaintiff hereby provides information about the
3 modified terms of the proposed settlement and the request for approval of attorneys’ fees and
4 costs.

5 In addition, Lead Plaintiff proposes some issues for consideration in connection with the
6 publication of the Class notice, and jointly along with defendants, respectfully requests the
7 opportunity to discuss these issues at a status conference with the Court. In setting up the
8 conference, Lead Counsel requests that the conference not be set for April 25 or the following
9 week due to planned surgery for a close family member.

10 **I. MODIFIED SETTLEMENT TERMS**

11 The proposed settlement terms are modified as follows.

12 **A. Termination Opt-Out Number**

13 The termination opt-out number, which provides that defendants may terminate the
14 settlement if opt-outs by settlement Class members reach certain thresholds, will be disclosed.
15 *See* Court’s November 30, 2007 order denying preliminary approval of the proposed settlement
16 (the “11/30/07 Order”), at 21-23. An addendum to the Stipulation and Agreement of Settlement
17 will be executed shortly.

18 **B. Attorneys’ Fee Request**

19 Although the award of any attorneys’ fees or expenses is not a term or condition of the
20 settlement agreement, Lead Plaintiff and Lead Counsel will reduce the request for attorneys’ fees
21 to be described in the Class notice from 25% to 17%.

22 Lead Plaintiff and Lead Counsel do not object to the Court moving \$227,209.25 for
23 professional support staff, which is characterized as expenses in the Order (*see* 11/30/07 Order,
24 at 12), from the lodestar calculation to the expense category, and will make that adjustment.

25 **II. CLASS NOTICE**

26 Lead Plaintiff would like the opportunity to discuss with the Court some additional
27 logistical issues for consideration with respect to the Class notice.
28

1 **A. Issuance, Comprehensiveness and Cost of Notice**

2 The Class notice for a settlement is typically issued only once – prior to final approval of
3 the settlement – to allow Class Members to consider the terms of the settlement and the fee
4 request and to decide whether to exclude themselves (opt-out) or to object to the proposed
5 settlement. Lead Plaintiff believes there should only be one unified, comprehensive notice for
6 purposes of final approval, as any additional notices could create confusion among Class
7 Members. It would also increase costs which Defendants advise they will not shoulder. Lead
8 Plaintiff does not believe the cost of an extra notice should be born by the Class. The estimated
9 cost of two notices, mailing and publication, is in the range of \$47,000 to \$106,000 each,
10 depending on the number of pages and the weight of the mailing. Neither side negotiated the
11 settlement with the cost of two notices in mind.

12 We believe the Court’s goals and the appropriate notice for a final approval hearing can
13 be accomplished through a single, unified notice which includes both the Court’s points and the
14 traditional notice. This single unified notice can be the only notice required for the final
15 approval hearing. This notice can reflect the Court’s position that it has not tentatively approved
16 the settlement or its terms.

17 **B. Response to Class Notice and Standing to Object**

18 Under applicable law, only Class members who do not opt-out have the standing to
19 object. *See Glass v. UBS Financial Services, Inc.*, No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS
20 8476, *26 (N.D. Cal. Jan. 26, 2007) (class member who opts out is no longer a class member and
21 has no standing to object); *Mayfield v. Barr*, 300 U.S. App. D.C. 31, 985 F.2d 1090 (D.C. Cir.
22 1993) (“[t]hose who are not class members, because they are outside the definition of the class or
23 have opted out” lack standing to object to class settlement). As such, there should be a system to
24 ensure that those who respond to the Class notice and/or object to the settlement by email or
25 otherwise are valid Class members who purchased Chiron stock during the Class Period and
26 have not otherwise opted-out. This can be accomplished through combining the Court’s
27 described procedure with designated objection and opt-out deadlines, as found in typical
28 settlement notices as a prelude to a final approval hearing.

1 **C. Information on the Website**

2 Since Pacer requires a fee for access to the Court’s file, Lead Plaintiff believes that, in
3 addition to (i) the “Notice of Pendency of Class Action and Proposed Settlement Thereof,
4 Motion for Attorneys’ Fees and Settlement Fairness Hearing” and (ii) the Court’s November 30,
5 2007 order denying preliminary approval of the proposed settlement, the complete record of the
6 proceedings should also be made available free of charge to Class members on the website
7 regarding the proposed settlement, including the amended consolidated complaint and all
8 available transcripts of hearings and conferences regarding the motion to dismiss and the
9 settlement.

10 **D. Other Issues**

11 Lead Plaintiff would like the record to Class members to reflect the following facts, and
12 respectfully requests the opportunity to discuss them with the Court.

13 **1. The Number of Cases Involving the Lead Plaintiff**

14 Because the Court’s Order addresses some points that were not briefed or raised at the
15 preliminary approval hearing, Lead Plaintiff believes the record is not complete.

16 Lead Plaintiff, International Union of Operating Engineers Local No. 825 Pension Fund
17 (“Local 825 Pension Fund”), believes the record should reflect that it was not involved in seven
18 other federal securities/stockholder class actions as mentioned in the Court’s November 30, 2007
19 Order. Local 825 Pension Fund had no role whatsoever in four of those cases. While it
20 requested appointment as lead plaintiff, it was not appointed lead plaintiff in the other three.
21 Therefore, its resources as Lead Plaintiff here were not diverted by those other cases.

22 The International Union of Operating Engineers is an affiliation of some 146 local unions
23 (or “Locals”). The International Union of Operating Engineers and the Locals are separate legal
24 entities. Each Local has a specific jurisdiction where it is chartered to represent members. Each
25 of these Locals are separate legal entities and operate separately and independently from each
26 other. Local 825 Pension Plan is a defined benefits plan with approximately \$521 million in
27 assets.
28

1 In *Garber v. Pharmacia Corp.*, No. 03-1519 (D.N.J.), *City of Roseville v. Micron*
 2 *Technology*, No. 06-0085 (D. Idaho), and *Nugent v. AFC Enterprises, Inc.*, No. 03-0817 (N.D.
 3 Ga.), the lead plaintiff appointed in those cases was the International Union of Operating
 4 Engineers **Local 132 Pension Fund**, not Local 825 Pension Fund. See 11/30/07 Order, at 25.
 5 Local 825 Pension Fund also had no involvement in *Citizens for Consumers v. Abbott*
 6 *Laboratories*, No. 01-12257 (D. Mass), an antitrust action in which International Union of
 7 Operating Engineers, **Local No. 68 Welfare Fund**, represented by Kline & Spector, served as a
 8 plaintiff. See 11/30/07 Order, at 25. Although in *Shankar v. Boston Scientific Corp.*, No. 05-
 9 11934 (D. Mass), *In re Doral Financial Corp. Sec. Litig.*, No. 05-1706 (S.D.N.Y.) / *Faverman v.*
 10 *Doral Financial Corp.*, No. 05-4026 (S.D.N.Y.) (consolidated with 05-1706), and *Weiss v.*
 11 *Friedman, Billings Ramsey Group, Inc.*, No. 05-4617 (S.D.N.Y.), Local 825 moved for lead
 12 plaintiff, it was not appointed. See 11/30/07 Order, at 25.

13 In fact, in *Weiss v. Friedman, Billings, Ramsey Group, Inc.*, No. 05-4617 (S.D.N.Y.),
 14 Locals 302 and 612 made a competing motion for lead **against** Local 825 Pension Fund, which
 15 sought appointment as lead plaintiff as part of another group. The court ultimately appointed
 16 Locals 302 and 612, represented by the Coughlin, Stoia, Geller, Rudman & Robbins LLP
 17 (“Coughlin Stoia”), over Local 825 Pension Fund, represented by Milberg LLP (“Milberg”).
 18 Similarly, in *Shankar v. Boston Scientific Corp.*, No. 05-11934 (D. Mass.), Locals 302 and 612,
 19 represented by the Coughlin Stoia firm, also **competed against** Local 825 Pension Fund,
 20 represented by Milberg, for lead plaintiff appointments. There, neither was appointed.

21 2. The Laffey Matrix

22 Lead Plaintiff also believes the record should reflect certain additional information
 23 concerning the Laffey Matrix. See 11/30/07 Order, at 13-17.

24 Although the “Laffey Matrix” or the “United States Attorney’s Office Matrix” has been
 25 used by some courts to assess the reasonableness of fees, the Laffey Matrix reflects attorney
 26 billing rates in the District of Columbia and “is intended to be use in cases in which a ‘fee-
 27 shifting’ statute permits the prevailing party to recover ‘reasonable’ attorney’s fees.” See
 28

1 http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html. This is not such
2 a fee shifting case nor is the case litigated by attorneys in D.C. Additionally, the hourly rates
3 approved by the District Court in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C.
4 1983), were for work done principally in 1981-1982 – approximately 25 years ago – and the
5 rates for subsequent yearly periods are determined by adding the change in the cost of living for
6 the Washington, D.C. area to the applicable rate for the prior year, and then rounding to the
7 nearest multiple of \$5. See [http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey](http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html)
8 [Matrix_7.html](http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html). The Laffey Matrix thus does not reflect the prevailing market rates in Los
9 Angeles or New York, where most of the attorneys litigating this case are based.

10 Additionally, in *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 15 (D.D.C. 2000), the
11 court concluded that an “Updated Matrix” developed by Dr. Michael Kavanaugh, an economist,
12 better reflected the prevailing rates for legal services in the D.C. community. In contrast to the
13 Laffey Matrix which uses the D.C. Metropolitan Consumer Price Index to bring 1981-1982 rates
14 forward to the present, Dr. Kavanaugh’s Updated Matrix uses the Consumer Price Index (“CPI”)
15 for U.S. City Average, Legal Service Fees (“Legal Services Index”), a national index readily
16 available and maintained by the U.S. Department of Labor, Bureau of Labor Statistics, to bring
17 1988-1989 rates forward to the present. Courts have found the rates used in the Updated Matrix
18 reasonable and more accurate. See *Ricks v. Barnes*, No. 05-1756 HHK/DAR, 2007 U.S. Dist.
19 LEXIS 22410, at *16 (D.D.C. Mar. 28, 2007) (finding Updated Matrix rates reasonable); *Smith*
20 *v. District of Columbia*, 466 F. Supp. 2d 151, 156 (D.D.C. 2006) (concluding that use of the
21 Updated Matrix is reasonable and noting that the Updated Matrix is more accurate than the
22 Laffey Matrix because the Updated Matrix is “based on increases/decreases in legal services
23 rather than increase[s]/decreases in the entire CPI which includes price changes for many
24 different goods and services”); *Kempf v. Barrett Bus. Servs.*, No. C-06-3161 SC, 2007 U.S. Dist.
25 LEXIS 89447 (N.D. Cal. Nov. 20, 2007) (finding attorneys’ requested fees reasonable when
26 compared to rates in the Updated Matrix). Further, in *Perez v. Cozen & O’Conner Group Long*
27 *Term Disability Coverage*, No. 05cv0440 DMS (AJB), 2007 U.S. Dist. LEXIS 53996 (S.D. Cal.
28

1 Mar. 27, 2007), the court found the Laffey Matrix was not applicable to any market outside of
 2 the Washington D.C. area and that the use of the Laffey Matrix “would be contrary to Ninth
 3 Circuit law, which ‘instructs district courts to use ‘the rate prevailing in the community for
 4 similar work performed by attorneys of comparable skill, experience, and reputation.’” *Id.* at
 5 **6-7.

6 Below is a comparison of the rates under the Laffey Matrix and the Updated Matrix:

7 **Laffey Matrix – 6/1/07-5/31/08 Rates**

	Laffey Matrix Rates	Laffey Rates + 4.6% Adjustment for Los Angeles	Laffey Rates + 5% Adjustment for New York
Paras/law clerks	\$125	\$130.75	\$131.25
1-3 yr attys	\$215	\$224.89	\$225.75
4-7 yr attys	\$255	\$266.73	\$267.75
8-10 yr attys	\$315	\$329.49	\$330.75
11-19 yr attys	\$390	\$407.94	\$409.50
20+ yr attys	\$440	\$460.24	\$462.00

10 http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html.¹

11 **Updated Matrix – 6/1/07-5/31/08 Rates**

	Updated Matrix	Updated Rates + 4.6% Adjustment for Los Angeles	Updated Rates + 5% Adjustment for New York
Paras/law clerks	\$146	\$152.72	\$153.30
1-3 yr attys	\$268	\$280.33	\$281.40
4-7 yr attys	\$329	\$344.13	\$345.45
8-10 yr attys	\$475	\$496.85	\$498.75
11-19 yr attys	\$536	\$560.66	\$562.80
20+ yr attys	\$645	\$674.67	\$677.25

12 <http://www.laffeymatrix.com/see.html>

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 27 ¹ The percentage adjustments for Los Angeles and New York in the Laffey Matrix and Updated
 28 Matrix tables are based on the adjustments used by the Court in its 11/30/07 Order, at 14.

1 If Class counsel applies the Updated Matrix rates to the attorney time previously
2 submitted which was discussed in the Court's 11/30/07 Order, Class counsel's lodestar would
3 actually *increase* by approximately \$93,000.

4 **3. Skadden's Representation of Former Milberg Partners**

5 We are informed that Skadden, Arps, Slate Meagher & Flom LLP, defense counsel in this
6 action, has information to provide the Court on this point. See 11/30/07 Order, at 33.

7 DATED: April 18, 2008

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/s/ Jeff S. Westerman

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DECLARATION OF SERVICE BY MAIL

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I, the undersigned, declare:


1. That declarant is and was, at all times herein mentioned, employed in the County of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is One California Plaza, 300 South Grand Avenue, Suite 3900, Los Angeles, California 90071-3149.

2. That on April 18, 2008, declarant served the LEAD PLAINTIFF'S RESPONSE TO ORDER OF APRIL 14, 2008 RE MODIFIED TERMS OF SETTLEMENT AND CLASS NOTICE by depositing a true copy thereof in a United States mailbox at Los Angeles, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

4. That on the above date, declarant served via e-mail to: scac@law.stanford.edu.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of April, 2008, at Los Angeles, California.


ANN MARIE GENOVESE

SERVICE LIST*Richard Gregory v. Chiron Corporation, et al.*

USDC ~ San Francisco - Case No.C-04-4293-VRW

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