

1 Bill Lann Lee (SBN 108452)
2 Kelly M. Dermody (SBN 171716)
3 Eve H. Cervantez (SBN 164709)
4 Elizabeth A. Alexander (pro hac vice)
5 Jahan C. Sagafi (SBN 224887)
6 Nirej S. Sekhon (SBN 213358)
7 LIEFF, CABRASER, HEIMANN &
8 BERNSTEIN, LLP
9 275 Battery Street, 30th Floor
10 San Francisco, CA 94111-3339
11 Telephone: (415) 956-1000
12 Facsimile: (415) 956-1008

13 Thomas A. Saenz (SBN 159430)
14 Shaheena Ahmad Simons (SBN 225520)
15 MEXICAN AMERICAN LEGAL DEFENSE
16 AND EDUCATIONAL FUND
17 634 South Spring Street
18 Los Angeles, CA 90014
19 Telephone: (213) 629-2512
20 Facsimile: (213) 629-0266

21 Joseph C. Kohn
22 Martin J. D'Urso
23 Hilary Cohen
24 KOHN, SWIFT & GRAF, P.C.
25 One South Broad Street, Suite 2100
26 Philadelphia, PA 19107
27 Telephone: (215) 238-1700
28 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 AND 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)
Sue Noh (SBN 192134)
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
255 East Temple Street, 4th Floor
Los Angeles, CA 90012
Telephone: (213) 894-1080
Facsimile: (213) 894-1301

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
STEELE, on behalf of themselves and all others

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

**JOINT NOTICE OF MOTION AND
MOTION FOR ORDER GRANTING
PRELIMINARY APPROVAL OF THE
PROPOSED CONSENT DECREE**

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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.

**JOINT MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

Hearing Date: Nov. 15, 2004
Hearing Time: 4:30 p.m.

Courtroom of Hon. Susan Illston

1 **JOINT NOTICE OF MOTION AND MOTION FOR ORDER GRANTING**
2 **PRELIMINARY APPROVAL**

3 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

4 **NOTICE IS HEREBY GIVEN** that on November 15, 2004, at 4:30 p.m., or as
5 soon thereafter as the matter may be heard in the Courtroom of the Honorable Susan Illston,
6 located at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs Eduardo Gonzalez,
7 Anthony Ocampo, Encarnacion Gutierrez, Johan Montoya, Juancarlos Gómez-Montejano,
8 Jennifer Lu, Austin Chu, Ivy Nguyen, Angeline Wu, Eric Fight, Carla Grubb, David Culpepper,
9 Patrice Douglass, Robair Sherrod, Brandy Hawk, Andre Steele, and Elizabeth West and
10 Defendants Abercrombie & Fitch Stores, Inc., A&F California, LLC, A&F Ohio, Inc., and
11 Abercrombie & Fitch Management Co. (hereafter “Abercrombie”), will and hereby do jointly
12 move this Court for entry of the proposed Order filed concurrently herewith:

- 13 1. Certifying a settlement class;
- 14 2. Appointing Plaintiffs’ counsel as Class Counsel;
- 15 3. Appointing the named plaintiffs as adequate Class Representatives;
- 16 4. Preliminarily approving the class action settlement;
- 17 5. Directing distribution to the class of notice of settlement and opportunity to
18 “opt out” of or object to the settlement; and
- 19 6. Setting a schedule for the final settlement approval process.

20 The EEOC joins the other parties to the Consent Decree in urging the Court to
21 grant this motion in order to advance settlement of an important public controversy.¹

22 This joint motion is based upon this Notice of Motion and Joint Memorandum of
23 Points and Authorities in Support thereof; the Declarations of Bill Lann Lee and Jack W. Lee; the
24 Stipulation Of Proposed Settlement And [Proposed] Order Of Preliminary Approval Of Proposed
25 Consent Decree; the accompanying Consent Decree (attached as Exhibit 1 to the Stipulation and
26 [Proposed] Order); the other records, pleadings, and papers filed in this action; and upon such
27

28 ¹ Under *General Telephone v. EEOC*, 446 U.S. 318 (1980), Rule 23 requirements do not apply to
actions brought by the EEOC.

1 other documentary and oral evidence or argument as may be presented to the Court at the hearing
2 of this motion.

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1 **JOINT MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The parties jointly seek certification of a settlement class and preliminary approval
4 of their proposed class action settlement between the Plaintiffs and Defendants Abercrombie &
5 Fitch Stores, Inc., A&F California, LLC, A&F Ohio, Inc., and Abercrombie & Fitch
6 Management Co. (hereinafter collectively identified as “Abercrombie,” “A&F,” or “Defendant”).
7 Subject to Court approval, the parties have settled Plaintiffs’ claims against the Defendant for
8 significant injunctive relief and for monetary relief in the amount of \$40 million for the benefit of
9 the class. The proposed Consent Decree, resolves all of the named Plaintiffs’ and Class
10 Members’ claims against Abercrombie arising out of the facts at issue in this litigation, including
11 attorneys’ fees and costs.

12 The proposed Consent Decree satisfies all the criteria for preliminary settlement
13 approval under federal law and falls well within the range of possible approval. Accordingly, the
14 parties request that the Court certify the proposed Settlement Class, grant preliminary approval of
15 the proposed Consent Decree and allocation plan, direct distribution to the Class of notice of the
16 Consent Decree and the opportunity to “opt-out” of the Settlement, and approve the sequence and
17 schedule for the final approval hearing.

18 **FACTUAL BACKGROUND**

19 **A. The Gonzalez Race Discrimination Class Litigation**

20 On June 16, 2003, Plaintiffs filed the *Gonzalez* case in the Northern District of
21 California, alleging violations of 42 U.S.C. § 1981 and the California Fair Employment and
22 Housing Act, and providing notice of Plaintiffs’ intent to bring claims under Title VII of the Civil
23 Rights Act of 1964. The Complaint was brought on behalf of a putative nationwide class of
24 minority individuals who alleged that Defendant discriminates against minorities on the basis of
25 race, color, and/or national origin, with respect to hiring, firing, job assignment, compensation,
26 promotion and other terms and conditions of employment.

27 Plaintiffs filed the First Amended Complaint on August 18, 2003, which alleged
28 substantially the same facts and legal claims. This complaint added three named plaintiffs and

1 three defendants, Abercrombie & Fitch Stores, Inc., A&F California, LLC, and A&F Ohio, Inc.
2 On September 11, 2003, Defendant answered the First Amended Complaint, denying Plaintiffs'
3 allegations.

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

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

16 On November 8, 2004, Plaintiffs filed the Fourth Amended Complaint naming two
17 additional Plaintiffs and an additional defendant, Abercrombie & Fitch Management Co., as well
18 as adding claims of discrimination in hiring to Managers-in-Training positions and promotion to
19 in-store managerial positions. Defendants answered the Fourth Amendment Complaint on
20 November 11, 2004, denying Plaintiffs' allegations.

21 **B. The EEOC Litigation**

22 Between December 21, 1999 through January 29, 2004, the EEOC received
23 charges of discrimination from persons alleging discrimination in hiring, assignment, layoff,
24 constructive discharge, discharge, terms and conditions of employment, and failure to promote
25 into manager positions due to race, national origin, and/or gender (female).

26 Specifically, on or about December 21, 1999, a charging party filed an individual
27 charge alleging national origin discrimination and wrongful termination. The charge was later
28 amended on or about March 21, 2001 alleging that the charging party was not hired into a sales

1 position or a Brand Representative (sales) position due to his national origin. Class allegations
2 were included, alleging that Abercrombie failed to recruit, hire, and assign Latinos into Brand
3 Representative positions and that Latinos were terminated due to their national origin.

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

11 EEOC received additional charges against Abercrombie in other EEOC offices in
12 several different states and issued additional Letters of Determination on or about September 30,
13 2004 and November 1, 2004 finding probable cause that Abercrombie violated Title VII by
14 discriminating against minority individuals on the basis of national origin, color, race, and/or sex
15 (female, including minority women) in hiring, staffing, constructive discharge, failing to promote,
16 steering, and discharge, on an individual basis and also on a nationwide class basis. The EEOC
17 also found probable cause that Abercrombie violated Title VII by discriminating against a class of
18 individuals nationwide by deterring minority and female applicants from applying for its jobs, for
19 failing to recruit minorities and females for its jobs, for failing and refusing to hire and assign
20 minorities and females for its jobs, and for failing and refusing to promote minorities and females
21 because of their gender, race, color, national origin and/or sex, and for segregating its workforce
22 on the basis of race, color, national origin, and/or sex. The EEOC again found probable cause
23 that Abercrombie failed to maintain records as required by federal law.

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

1 interviews of company officials. Defendant answered the Complaint on November 11, 2004,
2 denying the EEOC's allegations.

3 **C. The West Litigation**

4 Plaintiffs' counsel for the gender class (*West v. Abercrombie*) began its
5 investigation of a potential gender case in June 2003 when it became aware of potential gender
6 discrimination complaints by employees and applicants against Abercrombie. The *West* counsel
7 thereafter began an extensive investigation to determine the validity of the gender discrimination
8 claim. Counsel for the *West* class spent over six months contacting over 70 witnesses and
9 collecting declarations from numerous class members regarding their experiences at
10 Abercrombie. Plaintiffs' counsel also received and reviewed interview notes and transcripts from
11 numerous depositions that counsel for the race class had taken in connection with their race
12 discrimination case.

13 Counsel for the gender class reviewed statistical reports produced in the *Gonzalez*
14 litigation and hired a statistical expert who analyzed statistical data on the gender composition of
15 Defendant's workforce and made independent findings regarding potential damages.

16 After their investigation, Plaintiffs' counsel filed charges with the EEOC alleging
17 class and individual claims of gender discrimination in June 2004. The gender class action,
18 *West v. Abercrombie & Fitch Stores, Inc.*, N.D. Cal., Case No. 04-4730, was timely filed on
19 November 8, 2004. Defendant answered the Complaint on November 11, 2004, denying
20 Plaintiffs' allegations.

21 **D. Plaintiffs' Litigation Efforts**

22 Since filing the first complaint in June 2003, Plaintiffs' counsel have actively
23 litigated the case. Plaintiffs' counsel have contacted more than 500 potential class members and
24 witnesses and prepared over 165 declarations from putative class members and witnesses.
25 Plaintiffs have engaged in extensive discovery since October 2003, propounding two sets of
26 discovery requests, responding to Defendant's discovery requests for 14 named plaintiffs,
27 defending depositions of 7 named plaintiffs, and taking six days of depositions of Defendant's
28 managers and officials. In addition, Plaintiffs' counsel and experts spent weeks reviewing

1 approximately 17,000 pages of documents and over twenty discs of computerized personnel data.
2 The data produced by Defendant also required months of intense review and statistical analysis
3 by Plaintiffs' counsel and their experts.

4 Beginning on April 13, 2004, and on several dates subsequently, the parties
5 conducted intensive mediation discussions in an attempt to resolve this litigation and EEOC
6 proceedings. These discussions, lasting over eight months, have culminated in this proposed
7 Consent Decree agreement.

8 **E. EEOC's Investigative Efforts**

9 The EEOC conducted an active investigation encompassing numerous changes
10 across the nation. The EEOC interviewed witnesses, conducted extensive statistical analysis, and
11 conducted interviews of Abercrombie's managers and officials.

12 **SUMMARY OF SETTLEMENT TERMS**

13 This Consent Decree is intended to resolve the Plaintiffs' claims arising out of the
14 complaints against Defendant for policies and practices that allegedly discriminated against
15 female and African-American, Latino and Asian American (hereinafter "Minority") applicants
16 and employees in hiring, firing, job assignments, compensation, promotion and other terms and
17 conditions of employment in violation of Title VII of the Civil Rights Act of 1964, as amended,
18 74 U.S.C. § 2000 *et seq.* ("Title VII"), the California Fair Employment and Housing Act, Cal.
19 Gov. Code §§ 12940 *et seq.* (the "FEHA"), and, in the case of minority applicants and employees,
20 42 U.S.C. § 1981. This Decree also resolves the EEOC's claims that arise in the EEOC litigation
21 brought under Title VII.

22 **A. Proposed Class Definition**

23 For purposes of monetary relief pursuant to Fed.R.Civ. P. 23(b)(3), the class
24 represented by Plaintiffs is defined as follows:

25 (i) All Minority and/or female applicants who applied for employment as in-
26 store hourly or managerial employees (hereafter "Associates") in Abercrombie stores, or
27 attempted to apply and were discouraged from applying for employment, between February 24,
28

1 1999 and the Preliminary Approval Date and who were not hired, except those who file a timely
2 request to opt out of the monetary relief provisions.

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

7 For purposes of the equitable and declaratory relief pursuant to Fed.R.Civ.
8 P. 23(b)(2), the class is defined:

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

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

16 The Consent Decree provides significant and valuable injunctive and monetary
17 relief to the entire class. During the six-year term of the Consent Decree, Defendant has agreed to
18 implement the following affirmative relief:

19 (a) A&F will not retaliate in any way against the employees (or former
20 employees) who sued it.

21 (b) A&F has created an Office of Diversity and hired a Diversity Vice-
22 President who will be responsible for monitoring A&F's progress toward fair employment
23 practices.

24 (c) A&F will provide training to its managers about this litigation and
25 the Consent Decree that resolved it as well as about legal prohibitions against employment
26 discrimination.

27 (d) A&F's internal complaint procedure will provide for the prompt,
28 full and confidential investigation of any complaints of employment discrimination.

1 (e) A&F will include as measures of its managers' performance an
2 assessment of their compliance with Abercrombie's EEO policies and their attainment and
3 management of diversity in the workplace and will consider these evaluations in how
4 Abercrombie compensates its managers.

5 (f) A&F has hired an industrial organizational psychologist who will
6 develop written requirements for each store position. Abercrombie has stopped using, and will
7 continue to not use, certain hiring criteria, such as enrollment in certain colleges or participation
8 in certain college activities.

9 (g) A&F will use its best efforts to promote Women and Minorities to
10 managerial positions in proportion to the numbers of such individuals who are available to be
11 promoted, as described in the Consent Decree.

12 (h) A&F will hire ten full-time diversity recruiters who will be based in
13 large cities and will be charged with recruiting Women and Minorities into in-stores position. In
14 a year, fifteen additional diversity recruiters will be hired. Abercrombie will also advertise its in-
15 store employment opportunities in periodicals or other media that target Minorities of both
16 genders.

17 (i) A&F shall use its best efforts to reach the hiring goals (called
18 "benchmarks") that are set forth in the Consent Decree. In doing so, Abercrombie shall not be
19 required to hire anyone who is unqualified or to fire anyone who is working well. These
20 benchmarks increase as time goes on, and will eventually be replaced by goals that are based on
21 the proportions of applications which Abercrombie receives from Women and Minorities.

22 (j) A&F will reflect diversity in its marketing materials.

23 (k) Throughout the term of the Consent Decree (4½ - 6 years), A&F
24 will provide semi-annual progress reports to a Monitor chosen by the parties, as well as to Lead
25 Counsel for the Plaintiffs and the EEOC. These reports shall describe, among other things,
26 whether Abercrombie is satisfying its employment goals and, if there is a shortfall, will analyze
27 possible reasons for the shortfall.
28

1 (l) A&F will pay all of the fees and expenses of the Special Master (an
2 experienced lawyer who previously served as the parties' Mediator) who is authorized to resolve
3 any disputes under the Consent Decree.

4 In addition to the broad-ranging injunctive relief, the Settlement also provides that
5 Abercrombie will create a Settlement Fund of \$40 million for the benefit of the class. A small
6 portion of this Settlement Fund, totalling \$360,000, will be used to compensate 23 Named
7 Plaintiffs and EEOC Charging Parties with monetary relief for their claims, to compensate the
8 Named Plaintiffs and Charging Parties for their service to the class, and in consideration of their
9 broader release of all claims against Abercrombie. The Settlement Fund will provide liquidated
10 amounts ranging from \$8,000 to \$39,000 with an average settlement amount of \$15,500 to each
11 of the Named Plaintiffs and EEOC Charging Parties for both monetary relief for all their claims
12 and for services rendered to the class. The balance of the Settlement Fund, approximately
13 \$39,640,000, will be distributed to class members who file timely claims, subject to the
14 possibility that a small amount thereof may be used for claims administration expenses, as
15 provided in the Decree. Under the proposed Consent Decree, the distributions to Settlement
16 Class Members will be calculated on a point system, based on several relevant factors, including
17 length of service with Abercrombie; discrimination claims based on different protected bases,
18 discrimination based on different actions including promotion, assignment, hire or termination;
19 any personal injury, such as emotional distress resulting from discrimination; and any time or
20 effort devoted to the litigation. Defendant will separately pay class publication notice costs of up
21 to \$600,000 and advance administration costs of approximately \$700,000.

22 As part of the settlement, Settlement Class Members shall release only those
23 claims against Defendant constituting alleged race, color, national origin or gender discrimination
24 that were or could have been raised in the Complaints.

25 The proposed Consent Decree also provides for the payment of reasonable
26 attorneys' fees and costs separate from the Settlement Fund. Defendant has agreed to compensate
27 Plaintiffs' counsel for reasonable attorneys' fees and costs of \$7,250,000 for work performed,
28 which includes an estimated \$400,000 in costs and expenses incurred by class counsel, through

1 and including the Approval Date. Class counsel also shall receive \$600,000 for work performed
2 after the Approval Date relating to monitoring, administration and implementation of the Consent
3 Decree over the next six years. The court-appointed independent monitor will receive no more
4 than \$950,000 for overseeing compliance with the Consent Decree over a period of six years.

5 The Consent Decree advances the interests of the class and is the product of
6 substantial, informed and non-collusive negotiations in which both parties were represented by
7 experienced counsel who approved and recommended the proposal. It is fair and reasonable and
8 falls within the range of proper approval by the Court.

9 **CLASS ACTION SETTLEMENT PROCEDURE**

10 Judicial proceedings under Federal Rule of Civil Procedure 23 have led to a
11 defined procedure and specific criteria for settlement approval in class action settlements. The
12 Rule 23(e) settlement approval procedure describes three distinct steps:

- 13 1. Certification of a settlement class and preliminary approval of the proposed
14 settlement after submission to the Court of a written motion for preliminary approval;
- 15 2. Dissemination of mailed and/or published notice of settlement to all
16 affected Class members; and
- 17 3. A formal fairness hearing, or final settlement approval hearing, at which
18 Class members may be heard regarding the settlement, and at which evidence and argument
19 concerning the fairness, adequacy and reasonableness of the settlement is presented.

20 This procedure safeguards class members' procedural due process rights and
21 enables the Court to fulfill its role as the guardian of class interests. *See 4 Newberg on Class*
22 *Actions* § 11.22, et seq.

23 With this motion, the parties request that the Court take the first step in the
24 settlement approval process, and grant certification of a settlement class and preliminary approval
25 of the proposed Settlement. The purpose of the Court's preliminary evaluation of the proposed
26 Consent Decree is to determine whether it is within "the range of reasonableness," and thus
27 whether notice to the Class of the terms and conditions of the Consent Decree, and the scheduling
28 of a formal fairness hearing, are worthwhile. *4 Newberg* § 11.25.

1 The parties further request that the Court certify the proposed Settlement Class at
2 this time, and appoint Plaintiff’s counsel as Class Counsel and the named plaintiffs as adequate
3 Class Representatives. Settlement Class certification is appropriate at the preliminary approval
4 stage where, as here, the proposed Settlement Class — as it is defined in the parties’ Settlement
5 Agreement — has not previously been certified by the Court, and where, as here, the Plaintiffs
6 assert the requirements for certification are met and Defendant, for settlement purposes only,
7 consents to Settlement Class certification. 4 *Newberg* § 11.27. The practical purpose of the
8 Settlement class certification is to avoid the costs of litigating class status while facilitating a
9 global settlement, to ensure distribution to all Settlement Class members of the notice of the terms
10 of the proposed Consent Decree, and to set the date and time of the final approval hearing. *In re*
11 *General Motors Corp. Pick-up Truck Fuel*, 55 F.3d 768, 784 (3rd Cir. 1995). The additional
12 rulings sought on this motion — approving the form, content and distribution of Class Notice,
13 and scheduling a formal fairness hearing — facilitate the settlement approval process, and are
14 also typically made at the preliminary approval stage. 4 *Newberg* § 11:24 et seq.

15 **PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE**

16 Settlement is particularly appropriate in complex class litigation. See, 4 *Newberg*
17 § 11.41 (and cases cited therein); *Churchill Village, L.L.C. v. General Elec.*, 361 F.3d 566, 576
18 (9th Cir. 2004) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). It
19 is well established that the law favors and prefers the compromise and settlement of class action
20 suits. *Officers for Justice v. Civil Service Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert.*
21 *denied*, *Byrd v. Civil Service Comm’n*, 459 U.S. 1217 (1983), *Safeco Corp. v. Van Bronkhorst*,
22 529 F.2d 943, 950 (9th Cir. 1976) (emphasizing that the policy in favor of settlement is
23 “particularly true in class actions”). The Fifth Circuit has stated that in a Title VII case, “the
24 policy favoring settlement is even stronger in view of the emphasis placed upon voluntary
25 reconciliation.” *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

26 The approval of a proposed settlement of a class action is a matter of discretion for
27 the trial court. *Churchill*, 361 F.3d at 575; *Stull v. Baker*, 410 F.Supp. 1326, 1332 (S.D.N.Y.
28 1976). In exercising that discretion, however, the Court should recognize that as a matter of

1 sound policy, settlements of disputed claims are encouraged and a settlement approval hearing
2 should “not be turned into a trial or rehearsal for trial on merits.” *Officers for Justice*, 688 F.2d at
3 625, 650; *see Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D. Cal. 1979). Furthermore, courts
4 must give “proper deference to the private consensual decision of the parties,” since “the court’s
5 intrusion upon what is otherwise a private consensual agreement negotiated between the parties to
6 a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement
7 is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and
8 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Hanlon v.*
9 *Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988).

10 To grant preliminary approval of this class action settlement, the Court need only
11 find that the settlement falls within the range of possible approval or “the range of
12 reasonableness.” *See, e.g., In re DJ Orthopedics, Inc. Sec. Litig.*, 2004 S.L. 1445101 *3 (S.D.
13 Cal. June 21, 2004); *In re Traffic Exec. Ass’n*, 627 F.2d 631, 633-634 (2d Cir. 1980); *see also, 4*
14 *Newberg* §11.25. The *Manual for Complex Litigation*, Fourth (Fed. Judicial Center 2004)
15 (“*Manual*”) characterizes the preliminary approval stage as an “initial evaluation” of the fairness
16 of the proposed settlement made by the court on the basis of written submissions and informal
17 presentation from the settling parties. *Manual*, §21.632. The *Manual* summarizes the
18 preliminary approval criteria as follows:

19 Fairness calls for a comparative analysis of the treatment of the
20 class members vis-à-vis each other and vis-a-via similar individuals
21 with similar claims who are not in the class. Reasonableness
22 depends on an analysis of the class allegations and claims and the
23 responsiveness of the settlement to those claims. Adequacy of the
24 settlement involves a comparison of the relief granted to what class
25 members might have obtained without using the class action
26 process.

27 *Manual*, § 21:62; *see also 4 Newberg*, § 11.25. Here, as shown below, the proposed Settlement
28 falls well within the range of reasonableness.

29 **I. CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE**

30 To grant preliminary approval of this class action settlement, this Court should
31 make a determination that the proposed class satisfies Rule 23(a)’s requirements of numerosity,
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1 commonality, typicality and adequacy of representation, and at least one of the subsections of
2 Rule 23(b). *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997); *Dukes v. Wal-Mart Stores,*
3 *Inc.*, 222 F.R.D. 137, 143 (N.D. Cal. 2004).

4 As set forth in the Declaration of Bill Lann Lee, ¶¶ 13-28, Plaintiffs assert that an
5 extensive factual record exists for certification of a Settlement Class. The factual record consists
6 of discovery documents, deposition and expert summaries of computer files. The Declaration
7 cites Plaintiffs' mediation briefing that identified relevant parts of the record. The mediation
8 briefing has been filed under seal.

9 For purposes of settlement only, Abercrombie acknowledges that the evidence
10 presented by Plaintiffs provides an arguable basis for finding the Rule 23 requirements have been
11 met, and for settlement purposes only, consents to the Settlement Class certification.

12 Abercrombie joins in the definition of the Settlement Class set forth in the proposed Consent
13 Decree, Section VII, and the simultaneously submitted Stipulation and [Proposed] Order.

14 **II. THE TERMS OF THE PROPOSED CONSENT DECREE ARE FAIR.**

15 A preliminary review of the terms of the proposed Settlement gives rise to no
16 doubts as to its fairness. Indeed, this Court should begin its analysis with a presumption that the
17 proposed Consent Decree is fair:

18 The initial presumption of fairness of a class action settlement may
19 be established by showing: (1) That the settlement has been arrived
20 at by arm's-length bargaining; (2) That sufficient discovery has
21 been taken or investigation completed to enable counsel and the
22 court to act intelligently; (3) That the proponents of the settlement
are counsel experienced in similar litigation; and (4) That the
number of objectors or interests they represent is not large when
compared to the class as a whole.

23 *4 Newberg*, § 11.41.

24 Here, the parties negotiated the proposed Consent Decree in good faith and at
25 arms' length, over a period of eight months of intensive settlement discussions. Extensive
26 investigation and discovery has allowed Plaintiffs' counsel — who are experienced employment
27 class action attorneys² — to assess the strengths and weaknesses of the claims against the

28 ² See Bill Lee Decl., ¶4; Jack Lee Decl., ¶¶ 3-6.

1 Defendant and the benefits of the proposed Settlement under the circumstances of this case. The
2 interests of the class members are well-aligned and thoroughly addressed by the comprehensive
3 injunctive and significant monetary relief provided to the class members. The settlement is fair
4 and streamlines a process that would otherwise be inordinately costly and lengthy for both the
5 court and the class members if individual claims were litigated. Accordingly, preliminary
6 approval of the Consent Decree is appropriate.

7 **A. Plaintiffs' Counsel Have a Sufficient Factual Basis for the Consent Decree.**

8 Plaintiffs' counsel conducted substantial discovery, a thorough investigation, and
9 engaged in intensive settlement discussions in this case. Plaintiffs' counsel served two sets of
10 discovery requests, and Abercrombie has produced approximately 17,000 pages of documents
11 and more than 20 discs of additional computerized personnel data, requiring months of review
12 and statistical analysis by Plaintiffs' counsel and their numerous experts. Plaintiffs' counsel spent
13 six days taking the depositions of several key Abercrombie officials and defended the depositions
14 of seven named plaintiffs. Plaintiffs' counsel also has responded to Defendant's discovery
15 requests for 14 named plaintiffs, and met and conferred with Defendant over discovery disputes.

16 Plaintiffs' independent investigation process has also been extensive. More than
17 500 potential class members and witnesses have been contacted by Plaintiffs' counsel, resulting
18 in more than 165 signed declarations attesting to the discrimination by Plaintiffs. Plaintiffs'
19 counsel also had the benefit of the EEOC's determination of classwide probable cause and the
20 results of their systemic investigation.

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

23 A total of eight two-day mediation sessions with mediator Hunter Hughes and the
24 EEOC were held over an extended period to resolve this litigation. Extensive, good-faith
25 settlement discussions between the parties continued outside of mediation sessions. The parties
26 exchanged numerous settlement drafts until the day the Consent Decree was signed on November
27 8, 2004. See Bill Lann Lee Decl., ¶ 29. The intensive efforts of Plaintiffs' counsel, the EEOC,
28

1 and Defendant’s counsel to resolve this case have resulted in a fair and comprehensive settlement
2 that provides significant injunctive and monetary relief for the class members.

3 **B. The Settlement Amount Is Reasonable In View Of The Risks Of Proceeding**
4 **Through Trial And Appeal.**

5 The determination of a “reasonable” settlement is not susceptible of a
6 mathematical equation yielding a particular sum. Rather, as one court has explained, “in any
7 case, there is a range of reasonableness with respect to a settlement.” *Newman*, 464 F.2d at 693.
8 *See also Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D. N.Y. 1971); *Glicker v.*
9 *Bratford*, 35 F.R.D. 144, 152 (S.D. N.Y. 1964).

10 Of particular relevance to the reasonableness of the proposed Consent Decree is
11 the fact that Defendant has available legal and factual grounds for defending this action.
12 Abercrombie denies that its treatment of its minority and female employees or applicants is
13 unlawful or discriminatory. Notwithstanding these arguments, the overall settlement commits
14 Defendant to pay \$40 million to compensate the class — a substantial amount ensuring that the
15 recoveries by potentially thousands of individual class members will be meaningful. In light of
16 all the risks of establishing both liability and damages, and the costs and delays involved in
17 further litigation, the parties believe this settlement to be well within the range of reasonableness.

18 **C. Trial And Appeal Of This Action Would Be Complex, Expensive And Time**
19 **Consuming, And Would Delay Recovery.**

20 Another factor considered by Courts in approving a settlement is the complexity,
21 expense, and likely duration of the litigation. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173,
22 1178 (9th Cir. 1977); *In re NASDAQ Market-Makers Anti-trust Litig.*, 187 F.R.D. 465 (S.D.N.Y.
23 1998); *In re Washington Public Power Supply Systems Securities Litigation*, 720 F.Supp. 1379,
24 1387 (D.Ariz. 1989); *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975), *cert.*
25 *denied*, 423 U.S. 864 (1975); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The avoidance
26 of wasteful litigation and expense are two factors which “lay behind the Congressional infusion
27 of a power to compromise.” *Florida Trailer and Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th
28

1 Cir. 1960); *West Virginia v. Chas. Pfizer & Cos.*, 314 F.Supp. 710 (S.D. N.Y. 1970), *aff'd*, 440
2 F.2d 1079 (2nd Cir. 1971), *cert. denied*, 404 U.S. 871, 30 L. Ed. 2d 115, 92 S.Ct. 81 (1971).

3 As noted above, the factual and legal issues in this action are complex. The trial of
4 Plaintiffs' claims under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, under 42 U.S.C.
5 § 1981, and under California's Fair Employment and Housing Act, Govt. Code §12940 *et seq.* —
6 claims that involve potentially tens of thousands of class members and which arose in hundreds of
7 stores nationwide over a period of more than five years — would require substantial preparation
8 and ultimately involve the presentation, at minimum, of dozens of witnesses. In contrast to the
9 delay that would result from trial and likely appeal if liability is found, the proposed Consent
10 Decree will yield a certain, substantial, and prompt recovery for the class both in monetary relief
11 and injunctive relief. Such a result will benefit the parties and the court system.

12 **D. The Consent Decree Is The Product of Arm's-Length, Informed Negotiations**
13 **Between Competent and Experienced Counsel.**

14 In appraising the fairness of a proposed settlement, the view of experienced
15 counsel favoring the settlement is "entitled to considerable weight." *In re Saxon Sec. Litig.*, 644
16 F.Supp. 465 (S.D. N.Y. 1985); *see Boyd v. Bechtel*, 45 F.Supp. at 622; *Linney v. Cellular Alaska*
17 *P'ship*, 1997 W.L. 450064 *5 (N.D. Cal. July 18, 1997); *Ellis v. Naval Air Rework Facility*, 87
18 F.R.D. 15, 18 (N.D. Cal. 1980). If the settlement was achieved through experienced counsel's
19 arm's-length negotiations, in the absence of fraud, collusion or the like, the Court should be
20 hesitant to substitute its own judgment for that of counsel. *Weinberger v. Kendrick*, 698 F.2d 61,
21 74 (1982). Summarizing the holdings in a series of cases, the Court in *Oppenlander v. Standard*
22 *Oil Co.*, 64 F.R.D. 597 (D.Colo. 1974), held: "[c]ourts have consistently refused to substitute
23 their business judgment for that of counsel, absent evidence of fraud or overreaching . . ." *Id.* at
24 624. *Accord Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 169 (S.D.N.Y. 1971).

25 The settlement of this matter occurred only after extensive, arms'-length
26 settlement negotiations between Plaintiffs' counsel, the EEOC, and counsel for Abercrombie
27 under the supervision of experienced mediator Hunter Hughes, Esq. of Atlanta, Georgia. The
28 parties submitted mediation briefs, expert statistical reports, damages estimates and legal

1 authorities to Mr. Hughes prior to the first mediation session on April 13-14, 2004 in San
2 Francisco, California. The negotiations were often heated and protracted. The settlement
3 discussions lasted over eight months, involving eight two-day mediation sessions and additional
4 telephone discussions. Moreover, the Court was involved in regulating the mediation schedule.

5 Moreover, the presence of a governmental participant weighs in favor of finding a
6 class settlement fundamentally fair, adequate, and reasonable. *Hanlon*, 150 F.3d at 1026. Here,
7 EEOC, which is charged with enforcing Title VII for private employees, such as Abercrombie, is
8 a signatory to the proposed Decree. EEOC was also a full participant in the mediation,
9 participating in every session.

10 **E. The Payments to the Named Plaintiffs For Their Service to the Class Are**
11 **Reasonable and Such Payments are Routinely Awarded.**

12 A portion of the liquidated amounts to the named Plaintiffs and charging parties
13 are intended to recognize their time and efforts on behalf of the Class. The Ninth Circuit recently
14 addressed the issue of representative plaintiff awards in *Staton v. Boeing*, 327 F.3d 938 (9th Cir.
15 2003), affirming that named plaintiffs can receive reasonable incentive awards. In order to
16 determine whether an award was reasonable, the Ninth Circuit held that a court must individually
17 evaluate the awards, considering relevant factors, including each plaintiff's actions for the
18 interests of the class, the degree of benefit to the class by those actions, the amount of time and
19 energy a plaintiff has expended for the litigation, and reasonable fears of workplace retaliation.
20 *Staton*, 327 F.3d at 977.

21 In accordance with *Staton*, Plaintiffs' counsel made individualized determinations
22 of each class plaintiff award based on several factors, including an assessment of their claims,
23 pendency of the administrative charges, participation in media outreach to the class, deposition
24 and other involvement in investigative proceedings or preparing written discovery.

25 In *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001), the Court
26 approved incentive awards of \$300,000 to each named plaintiff in recognition of the services they
27 provided to the class by responding to discovery, participating in the mediation process and
28 taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see*

1 also, *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving
2 \$50,000 participation award); *Bogosian v. Gulf Oil Corp.*, 621 F.Supp. 27 (E.D. Pa. 1985) (award
3 of \$20,000 each to two class representatives); *Bryan v. Pittsburgh Plate Glass Co.*, 59 F.R.D.
4 616, 617 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3rd Cir.) (payments of \$17,500.00 to class
5 members who aided in advancing Title VII case).

6 The average amount awarded to the representative plaintiffs in this litigation is less
7 than \$16,000, *including monetary relief for their claims*, see proposed Consent Decree, Exhibit C,
8 which is well within the range of awards courts have permitted named plaintiffs.

9 The valuable efforts of the class representatives and charging parties, their
10 willingness to litigate and pursue their representative claims, and the strength of their claims have
11 resulted in a settlement that will benefit all Settlement Class Members. The payment of less than
12 one percent of the \$40 million total to seventeen named plaintiffs and six charging parties is
13 appropriate.

14 **F. The Proposed Settlement Fund Amount is Within the Range of**
15 **Reasonableness.**

16 Given that the proposed Consent Decree creates a \$40 million Settlement Fund for
17 thousands of unnamed class members, the proposed Decree provides a significant recovery to the
18 class and easily falls within the range of reasonableness.

19 **III. THE PROPOSED CLASS NOTICE AND NOTICE PLAN ARE APPROPRIATE.**

20 **A. The Class Notice Satisfies Due Process.**

21 Rule 23(c)(2)(B), effective January 1, 2004, provides that “the court must direct to
22 class members the best notice practicable under the circumstances, including individual notice to
23 all members who can be identified through reasonable effort.” The notice must concisely and
24 clearly state in plain, easily understood language:

- 25 • the nature of the action,
- 26 • the definition of the class certified,
- 27 • the class claims, issues, or defenses,

- 1 • that a class member may enter an appearance through
2 counsel if the member so desires,
- 3 • that the court will exclude from the class any member who
4 requests exclusion, stating when and how members may
5 elect to be excluded, and
- 6 • the binding effect of a class judgment on class members
7 under Rule 23(c)(3).

8 The content of the mailed Class Notice³ fully complies with due process and
9 Rule 23. It provides the definition of the class, describes the nature of the action, including the
10 class claims, explains the procedure for making comments and objections. It provides specifics
11 regarding the date, time, and place of the Final Approval Hearing, and informs Settlement Class
12 members that they may enter an appearance through counsel. The Class Notice also informs
13 Class members how to exercise their rights and make informed decisions regarding the proposed
14 Settlement, and tells them that if they do not opt out, the judgment will be binding upon them.
15 The Notice further informs the Class about the payment of Plaintiffs’ attorneys’ fees and costs by
16 Defendant.

17 Moreover, the Class Notice describes the terms of the Settlement, informs Class
18 members how individual recoveries will be determined. The Class Notice will be mailed with a
19 Claim Form and Explanation of Claims Procedure for Settlement Class Members wishing to
20 participate in the Settlement.⁴ Courts have approved Class Notice even when they have provided
21 only general information about a settlement. *See, e.g., Mendoza v. United States*, 623 F.2d 1338,
22 1352 (9th Cir. 1980) (“very general description of the proposed settlement” satisfies standards);
23 *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (Class notice
24 “need only describe the terms of the settlement generally.”.)

25 **B. The Notice Plan is Appropriate.**

26 The Notice will be mailed individually to the last known address of class members
27 as identified through Defendant’s records. Published notice in publications and internet ads with
28

3 ³ The proposed mailed Notice is attached as Exhibit 4 to the [Proposed] Order.

4 ⁴ The proposed Claim Form and Explanation are attached as Exhibits 5 and 6 to the [Proposed] Order.

1 widespread circulation among the target group of young adult Minority individuals and women is
2 also proposed. Such a notice plan satisfies due process and Rule 23(c)(2)(B). See Exhibits 2 and
3 3 to the [Proposed] Order (the publication notice and publication notice plan, respectively).

4 Class members will have at least 40 days from the date of mailing to submit opt-
5 out requests or to comment or object to the settlement. Class members will additionally have 20
6 days after the deadline for submitting opt-out requests to rescind their opt-out requests. This is
7 sufficient time to give Settlement Class members the opportunity to comment on and take part in
8 the Settlement. *Cf. Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993) (approving
9 Notice sent 31 days before the deadline for objections and 45 days before the hearing).

10 **IV. THE COURT SHOULD SET A FINAL SETTLEMENT APPROVAL SCHEDULE**

11 The last step in the settlement approval process is the formal hearing, at which the
12 Court may hear all evidence and argument necessary to evaluate the proposed Settlement. At that
13 hearing, proponents of the Settlement may explain and describe its terms and conditions and offer
14 argument in support of Settlement approval; members of the Settlement Class, or their counsel,
15 may be heard in support of or in opposition to the Consent Decree. The parties propose the
16 following schedule for final approval of the Consent Decree.

17

Day 0	Date Preliminary Approval is Granted
20 Days after Preliminary Approval is Granted	Defendant provides computerized list of employees to Claims Administrator
20 Days After Preliminary Approval is Granted	Lead Counsel for Plaintiffs provides computerized list of potential class members to Claims Administrator
60 Days after Preliminary Approval is Granted	Mailing of Class Notice and Publication of Notice commences

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110 Days after Preliminary Approval is Granted	Last Day for Settlement Class Members to “opt-out” of this Settlement and to file objections
130 Days after Preliminary Approval is Granted	Last Day for Settlement Class Members to File their Claims and to Rescind “opt-outs”
140 Days after Preliminary Approval is Granted	Last day for Defendant to Rescind the Settlement Agreement
150 Days after Preliminary Approval is Granted	Final Settlement Approval Hearing/Fairness Hearing

CONCLUSION

For all the foregoing reasons, the parties respectfully request that this Court certify a Settlement Class; appoint Plaintiffs’ counsel as Class Counsel and the named plaintiffs as Class Representatives; grant preliminary approval of the proposed Consent Decree; approve the proposed form of Class Notice, including the Claims Form and Explanation of Claims Procedure; direct distribution to the Class of Notice of Settlement; and approve the sequence and scheduling of the final approval hearing for the Consent Decree.

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

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

1 Kimberly West-Faulcon
2 NAACP LEGAL DEFENSE AND
3 EDUCATIONAL FUND, INC.
4 1055 Wilshire Blvd., Suite 1480
5 Los Angeles, CA 90017

4 Sidney L. Gold
5 Traci M. Greenberg
6 SIDNEY L. GOLD & ASSOCIATES, P.C.
7 1835 Market Street
8 Philadelphia, PA 19103

7 James F. Keller
8 Zachary Gottesman
9 GOTTESMAN & ASSOCIATES
10 2121 URS Center
11 36 East 7th Street
12 Cincinnati, OH 45202

12 November __, 2004

_____/s/_____
Bill Lann Lee
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

16 November __, 2004

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

20 November __, 2004

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

Attorneys for Plaintiff Gonzalez, et al.

1
2
3
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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

November __, 2004

_____/s/_____
Jack W. Lee
MINAMI, LEW & TAMAKI LLP
360 Post Street, 8th Floor
San Francisco, CA 94108

Attorneys for Plaintiff West, et al.

November __, 2004

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

By: ____/s/_____
ANNA Y. PARK
Regional Attorney

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

By: ____/s/_____

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

1 November __, 2004

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

2
3
4
5 Thomas Brennan Ridgley
Jonathan M. Norman
Sandra J. Anderson
6 Mark Knueve
VORYS, SATER, SEYMOUR & PEASE LLP
7 52 East Gay Street
P.O. Box 1008
8 Columbus, OH 43216-1008

9
10 _____/s/_____
Douglas R. Young
FARELLA BRAUN & MARTEL, LLP
11 Russ Building, 30th Floor
12 235 Montgomery Street
San Francisco, CA 94104

13 *Attorneys for Defendant Abercrombie & Fitch, et al.*

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