EXHIBIT D

Joseph Darrell Palmer (SBN 125147)
darrell.palmer@palmerlegalteam.com
Law Offices of Darrell Palmer
603 North Highway 101, Ste A
Solana Beach, California 92075
Telephone: (858) 792-5600
Facsimile: (858) 792-5655

Attorney for Objector Kerry Ann Sweeney

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE MAGSAFE APPLE POWER ADAPTER LITIGATION	Case No. 5:09-cv-01911-JW **OBJECTION OF KERRY ANN SWEENEY TO PROPOSED SETTLEMENT AND NOTICE OF INTENT TO APPEAR** Date: February 27, 2012 Time: 9:00 a.m. Place: San Francisco Courthouse Courtroom 9, 19th Floor 450 Golden Gate Avenue San Francisco, CA 94102 Judge: Hon. James Ware

COMES NOW, KERRY ANN SWEENEY ("Objector") Class Member to this action, by and through her undersigned counsel, and hereby files these Objections to the Proposed Class Action Settlement, gives notice of her counsel's intent to appear at the February 27, 2012, final approval hearing, and requests award of an incentive fee for her role, if any, in improving the settlement for the benefit of the class members.

Objector, KERRY ANN SWEENEY, represents to the court that she is a Class Member, qualified to make a claim as set forth in the NOTICE OF CLASS ACTION SETTLMENT; her address which will be made available upon the Court's and/or Counsel's request is in Madison, Wisconsin, but all mail should be sent to her attorney's address above. The serial number on her Apple computer is w8045rx9agu. She has not made any prior objections.

Objector Sweeney objects on the following grounds:

1. The attorneys' fee application fails to comply with the recent Ninth Circuit decisions of *Mercury* and *Bluetooth*, because class counsel only provided billing summaries. This is insufficient information, and cannot support the application of a lodestar multiplier.

2. There are hurdles in the claims and redemption process which are confusing and/or unnecessary. These hurdles can easily be resolved, and necessarily should be before final approval.

I. THE COURT MUST CRITICALLY ANALYZE THE FEE AWARD AS FIDUCIARY OF THE CLASS

The court has a "duty under Rule 23 of the Federal Rules of Civil Procedure to protect absent class members and to police class action proceedings." *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 849 (5th Cir. 1998). The duty requires a review of substantive claims included in the agreement and an investigation into the manner in which fees of class counsel are to be paid and the dollar amount for such services. *Id.* The 2003 Committee Notes to Rule 23(h) state that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on case law development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility." Committee Notes to Rule 23(h), 2003.

Rule 23(e) of the Federal Rules of Civil Procedure provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." A settlement may only be approved after the court finds it is fundamentally fair, adequate and reasonable.

Id. This rule has been read as a requirement for the court to " 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.' " *In Re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3rd 2001), citing *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3rd Cir. 1995)(emphasis added).

Once a settlement is reached, both Class and Defendant's counsel's interests change. No longer vigorously advocating for their clients' interests, Class Counsel's interests are inherently conflicted with the Class as they become another claimant to the very fund that they have created for their clients. It matters little to Defense Counsel what percentage or lodestar Class Counsel takes, because the result for its client is the same under either scenario. Thus, the Court necessarily becomes the fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing fee applications. *Skelton v. General Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). To appropriately scrutinize the fee request, the district court must carefully review all of the evidence presented to it. *In Re Cendant* 264 F.3d at 231. (emphasis added) Accordingly, class counsel must support the fee request with competent and admissible evidence. The standard of admissible evidence to support a proposed settlement may be slightly less stringent than at trial, but self-serving declarations and unauthenticated documentation is insufficient. See *Alberto v. GRMI, Inc.*, 252 F.R.D. 652, 663 (2008).

/ / /

/ / /

II. THE NINTH CIRCUIT HAS EXPRESSLY REJECTED THE SUBMISSION OF MERE HOURLY SUMMARIES IN A PETITIONER'S FEE REQUEST

Class Counsel has failed to submit their time records for examination by the class, an action required under Ninth Circuit and Supreme Court precedent. The Ninth Circuit has held that:

> Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members. It also ensures that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee.

In re Mercury Interactive Corp. Securities Litig., 618 F.3d 988, 994 (9th Cir. 2010). This language is clear that the district court must critically analyze the fee request to ensure accuracy and the non-duplication of hours or tasks. *Id.* A more recent Ninth Circuit opinion expanded and reiterated *Mercury's* reasoning by specifically rejecting the use of summaries to support fee applications. *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011.). This court deemed it insufficient to provide only summaries and remanded to the district court with detailed instructions to review in greater detail. Likweise, in *Intel Corp. v. Terabyte Intern., Inc.*, 6 F.3d 614 (9th Cir. 1993), the court held that time records, not summaries, must be produced and reviewed by the court, to support class counsel's fee application:

> While the district court did have evidence of Intel's hours expended and its customary fees, the court made no findings that the hours expended were reasonable and that the hourly rates were customary. The order merely awarded the fees without elaboration. **"Such a procedure is inadequate."** *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984). That is particularly true where, as here, the requesting party submits **mere summaries** of hours worked. As Terabyte pointed out to the district court, those summaries alone made it very difficult to ascertain whether the time devoted to particular tasks was reasonable and whether there was improper overlapping of hours. Terabyte was not required to take Intel's word that every hour was needed and all overlap had been eliminated. While summaries can be used in proper circumstances, the underlying material must be made available. Fed. R. Evid. 1006. Under our adversary system, Terabyte was entitled to see just what was charged and why.

> What may seem obvious to Intel and to the district court is not obvious to us. That, among other reasons, explains our long-standing insistence upon a proper explanation of any fee award.

6 F.3d at 623 (emphasis added).

The *Intel* court set aside the fee award and remanded it for further consideration. Further support for this notion may also be found in Supreme Court jurisprudence. That Court has held that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

Due to these considerations, the fee application fails to comport with Ninth Circuit requirements regarding adequate support for a fee request. This Objector suggests that the time records be released consistent with this case law for examination by the class, and that a new fairness or subsequent fee hearing be scheduled in accordance therewith.

III. A RISK MULTIPLIER MAY NOT BE APPLIED HERE, WHERE THE VALUATION OF THE SETTLEMENT IS IN QUESTION AND CLASS COUNSEL'S HOURLY RATE ALREADY INCLUDES THE RISK INCURRED

Class counsel attempts to glean a greater award than the one to which it is entitled by requesting a risk multiplier in its fee petition. In support, the petition cites to the Ninth Circuit case of *Fischel v. Equitable Life Assur.*, 307 F.3d 997, 1008 (9th Cir. 2002), for its proposition that it would be an "abuse of discretion to fail to apply a risk multiplier when their hourly rate does not reflect that risk." Motion for Fees at 15. This cite fails to take into account recent Supreme Court case law, which states that hourly rates **customarily** take in that risk, and that multipliers are only appropriate in "rare or extraordinary" circumstances. *Perdue v. Kenny A.*,130 S.Ct. 1662, 1673 (2010). Class Counsel has not demonstrated the current result as "rare or extraordinary," which means the appropriateness of utilizing a multiplier in this instance is not supported.

Furthermore, a valuation of the settlement fund is conspicuously absent from the settlement website and related pleadings. Class Counsel mentions that at least 1.3 million of the 11 million person settlement class has purchased the replacement adapters already. While some of these class members may be eligible for "up to" $237 in cash, it remains to be shown how much Apple has estimated it may owe. Numerous scholarly articles have been published regarding the commonplace occurrence of very low claims rates in settlements such as this. Ordinarily, claims rates hover between 1 and 10 percent. This means that the settlement here could be a very small fund indeed. This objector suggests that before a fee petition is approved, a quantifiable estimate of what Apple expects to pay out be provided to the Court, and to the Class.

IV. THERE ARE CONFUSING COMPONENTS TO THE SETTLEMENT AND REDEMPTION PROCESS CALLING FOR FURTHER CLARIFICATION

The settlement contains several unclear elements which the Court must clarify and define prior to final approval.

One of the settlement ambiguities is the promise of replacement of the adapter. In several documents, including the fee petition, Class Counsel mention that adapters exhibiting signs of strain will be replaced. However, nowhere is it explained who determines what a "sign of strain" is, nor what level of damage qualifies an adaptor to be replaced. Class Counsel then states that adapters that do not "yet" show signs of strain will also be replaced. This standard is hopelessly unclear and must be clarified.

Another vague settlement term is the length of the warranty period: is it for three years, or is it through December 31, 2012? The language states "whichever is later," which would put the warranty period out through 2014. In the settlement agreement, there is a cap of December, 2012, but in the pleadings, this outside limit of "whichever is later" suggests that 2014 is the real outside limit.

Lastly, the claim form contains unnecessary and unreasonable hurdles for completing a claim. While it is reasonable to submit a serial number from a computer that someone still possesses, this same

user who may have had to replace his adapter may not have saved his financial records documenting his date of purchase. This single hurdle, if it can undo a valid claim, is therefore unreasonable.

V. CONCLUSION

The settlement provides no real information about the total value of the settlement, leaving the Court, and the class, at sea as to whether this is a reasonable settlement and fee application. While Class Counsel has submitted summaries of their hours, this approach has been rejected several times. The court in *Bluetooth* found several problems with the lodestar billing requiring further verification. The same should apply here. Finally, the ambiguities in what adapters can be replaced, how long they can be replaced, and whether the claim form is too onerous require further examination by the Court.

WHEREFORE, This Objector respectfully requests that this Court:

A. Upon proper hearing, sustain these Objections;

B. Upon proper hearing, enter such Orders as are necessary and just to adjudicate these Objections and to alleviate the inherent unfairness, inadequacies and unreasonableness of the proposed settlement;

C. Award an incentive fee to this Objector for his service in improving the fairness of the settlement, as well as consider awarding an attorneys' fee to her attorney.

Dated: January 6, 2012

By: /s/ Joseph Darrell Palmer
Joseph Darrell Palmer
Attorney for Objector, Kerry Ann Sweeney

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2012, I electronically filed the foregoing OBJECTION OF KERRY ANN SWEENEY TO PROPOSED SETTLEMENT AND NOTICE OF INTENT TO APPEAR with the Clerk of the Court of the United States District Court for the Northern District of California by using the USDC CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the USDC CM/ECF system, to wit:

___/s/ Joseph Darrell Palmer____
Joseph Darrell Palmer
Attorney for Objector