UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael Tate, Joseph Shuster, Lyle Evanson and John Ayers, individually and on behalf of all other individuals similarly situated,

Plaintiffs,

vs.

Restaurant Technologies, Inc., Parthenon Capital LLC, Jeffrey R. Kiesel, John C. Rutherford, Jonathan O. Grad, Zachary F. Sadek, Philip A. Clough and Robert E. Weil,

Defendants.

Civil File No. 09-cv-02076 MJD/JJG

PLAINTIFFS' MEMORANDUM IN SUPPORT OF ENTRY OF FINAL APPROVAL ORDERS

INTRODUCTION

Plaintiffs Michael Tate, Joseph Shuster, Lyle Evanson and John Ayers (collectively "Plaintiffs"), now move the Court for entry of a Final Judgment and Order of Dismissal with Prejudice. Plaintiffs are also seeking entry of an Order Approving the Reimbursement of Expenses, Award to Class Representatives, Award of Attorneys' Fee and Distribution consistent with the Motion for Reimbursement of Expenses, Award to Plaintiffs and Award of Attorneys' Fees submitted on November 1, 2010 and consistent with the Notice of Proposed Settlement of Class Action and Hearing Regarding Settlement which was mailed out to all Class members.

As set forth below, the proposed settlement has received uniformly positive responses from the Class members. There has been only one objection received. No

member of the Class has requested exclusion. The settlement is fair and reasonable. Plaintiffs now request that it be finally approved by the Court and that the Court enter an Order granting fees, expenses and approving a process for distribution in accordance with the proposed plan of allocation.

BACKGROUND

The procedural and factual background leading to this settlement has been placed before the Court on numerous occasions and will not be repeated here. (Dkt. ## 46, 126 and 165.) The below summary is an update of activities occurring since the time an agreement to settle the matter was reached.

On September 27, 2010, the parties entered into a Stipulation of Settlement ("Stipulation") of this matter. The Stipulation was a result of a protracted mediation process which began in June 2010 and was conducted by Richard Solum, a former Hennepin County Judge. The Stipulation was promptly brought before the Court on September 29, 2010.[1]

On September 29, 2010, the Court issued an Order Preliminarily Approving Settlement and Approving Form and Manner of Notice ("Order"). (Dkt. # 150.) In accordance with the Order, on October 14, 2010, a Notice of Proposed Settlement of Class Action and Hearing Regarding Settlement ("Notice") and Claim and Release Form ("Claim Form") was mailed out to all Class members as well as individuals/entities specifically excluded from the Class. *See* Affidavit of Kelley Bethke ("Bethke Aff."),

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[1] Defendants have sought to have the approval process expedited in order to engage in a sale of the company . . . a sale which they have argued is in the best interest of existing RTI shareholders as well as the Class.

dated November 18, 2010. The mailing went to a total of 431 individuals and entities based upon a list of preferred shareholders, common shareholders and option holders which had been provided by Restaurant Technologies, Inc. ("RTI"). *Id.* at ¶ 3. Of the 431 record mailings, 45 of the mailings were sent to individuals/entities who were specifically excluded from the Class. *Id.* Those 45 mailings included only the Notice. *Id.* A date of November 12, 2010 was set as a cutoff date for mailing of Claim Forms, requests for exclusions and objections. *Id.* at ¶ 3 and Exs. A and B. As of November 18, 2010, the following have been received:

- One objection from Gemini Investors[2]
- No requests for exclusions
- 279 Claim Forms

Id. Specifically, Claim Forms representing the following number of shares have been received.

	Total Number of Shares/Options in the Class As Shown on the Company's Books	Shares Represented By Proof of Claims Submitted
Common Shares	1,243,527	1,184,853
Preferred Shares	329,343	334,455[3]
Options	280,400	245,801

Taken as a whole, there are 1,572,870 shares of common and preferred stock who have submitted Claim Forms. Of that combined amount, approximately 95% of the

[2] Gemini Investors' objection is responded to in a separate filing. Gemini Investors did file a Claim Form and did not seek exclusion from the Class.

[3] Based upon documentation received from Claimants, some preferred shares had been improperly recorded as common shares on the company's books. *See* Bethke Aff., ¶ 6.

outstanding stock within the Class submitted Claim Forms. For the most part, the individuals not responding to the Notice and failing to file Claim Forms were RTI option holders owning small option amounts.

On November 1, 2010, a Motion and Memorandum in Support of Plaintiffs' Motion for Reimbursement of Expenses, Award to Plaintiffs and Award of Attorneys' Fees ("Fee and Expense Memorandum") was filed with the Court.[4] (Dkt. # 153.) The Motion and Fee and Expense Memorandum seek reimbursement of expenses, an award to the Plaintiffs and an attorneys' fees award.

ARGUMENT

I. THIS SETTLEMENT MERITS FINAL APPROVAL.

Plaintiffs have filed with the Court a proposed Final Judgment and Order of Dismissal with Prejudice which Plaintiffs respectfully request be executed in conjunction with the execution of an Order Approving Reimbursement of Expenses, Award to Class Representatives, Award of Attorneys' Fees and Distribution.[5]

A. Settlements are Preferred.

It has long been the case that the federal courts look with favor on the voluntary resolution of litigation through settlement. *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398, 1405 (D. Minn. 1987). It is also the case that, in a class action context, "there is an overriding public interest in settling class action litigation." *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 535 (3d Cir. 2004). *See also Thompson v.*

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[4] The Fee and Expense Memorandum was promptly posted on the website described in the Notice . . . **http://www.aoblaw.com/news/newsline.html**.

[5] These proposed Orders have been placed on the website.

Edward D. Jones & Co., 992 F.2d 187, 191 (8th Cir. 1993) (holding settlement class member was enjoined from pursuing subsequent individual claims and citing Second Circuit's position that "paramount policy of encouraging settlements takes precedence").

B. The Standards for Final Certification of the Settlement Class Have Been Met.

The Class consists of the following:

> All individuals and entities who held Restaurant Technologies, Inc. "RTI" common stock or Series A preferred stock as of June 12, 2009 and all individuals or entities holding options to purchase RTI common stock as of May 13, 2009.[6]

Boiled down to its essence, this Class consists of 156 individuals/entities holding common and/or preferred shares and/or options and 230 individuals and entities holding merely options. *See* Bethke Aff., ¶ 2.

The Court has had before it a discussion of the various Rule 23 standards for certifying this Class on several occasions. (Dkt. ## 126, 169 and 273.) Although questioning whether the Class could obtain certain forms of relief, Defendants never opposed class certification by suggesting that the standards under Rule 23 had not been met. (Dkt. # 142.) The Court preliminarily certified the Class for purposes of issuance of the settlement notice. (Dkt. # 150.) In light of the overwhelming support for the settlement now shown by members of the Class and based upon all of the materials

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[6] The Class specifically excludes the individual Defendants and members of their immediate family, current officers and directors of RTI, RTI's legal and financial representatives, Parthenon Capital LLC and ABS Capital Partners and their affiliates and RTI employees who received certain options after the company was recapitalized

previously submitted to the Court showing commonality, typicality, numerosity, adequacy, predominance and superiority, final certification is wholly appropriate.[7]

C. The Settlement is Fair, Reasonable and Adequate.

The Eighth Circuit has set forth four factors to determine if a class action settlement should be approved, namely (1) the merits of the case; (2) the financial condition of the company; (3) the complexity and expense of future litigation; and (4) the amount of opposition to the settlement. *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d 922, 932 (8th Cir. 2005).

1. The Merits of the Case.

Although Defendants mounted a vigorous defense, from Plaintiffs' perspective, the case enjoyed strength in terms of liability (that the recapitalization was not a liquidation event permitting the consideration of preferences and accreted values for Series B-1 and B-2 stock, self-dealing and other breaches of fiduciary duty). The liability case for the RTI common shareholders could be viewed as slightly stronger than that for the RTI preferred shareholders as the RTI common shareholders were required to sign a release in connection with the recapitalization. The preferred shareholders did not have to sign such a release. However, the damages claim was tied in part to a valuation of the company which faced numerous challenges. Defendants argued that the downturn in the financial markets in late 2008 and the resultant lowering of commodity prices had

[7] The Class received one objection from Gemini Investors questioning whether certification was proper under *AmChem Products Inc. v. Windsor*, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) and, specifically, whether subclassing was required. That objection is being addressed through a separate, contemporaneous filing which is incorporated herein.

seriously affected the overall value of RTI, making RTI's common shares worthless and certain RTI preferred shares only worth a fraction of their initial investment amounts. Defendants also argued that, absent a recapitalization, RTI may have faced bankruptcy. Plaintiffs opposed that position arguing that RTI was worth substantially more than the $140 million valuation employed at the time of the recapitalization. Plaintiffs noted that RTI had received an arm's-length offer from a potential purchaser for $300 million in the fall of 2008 and prior to that had entertained the possibility of an initial public offering generating an even higher valuation. Plaintiffs also argued that, irrespective of the valuation of RTI, the recapitalization transaction was not an event which permitted the upstreaming of equity to Series B-1 and B-2 preferred stock holders and that, therefore, the allocation of equity in the recapitalized entity was improper. Defendants argued that the decision on how to reallocate equity as part of the recapitalization was protected by the business judgment rule. This argument was only part of a plethora of arguments which Defendants were making before the Court. (Dkt. # 104.) While Plaintiffs were fully prepared to address Defendants' arguments, all of these arguments would have been weighed by the Court and/or a jury creating uncertainty in the outcome for the Plaintiffs.

2. RTI's Financial Condition.

Irrespective of RTI's pre-recapitalization financial position, the consensus view is that during the course of the litigation in late 2009 through 2010, RTI was well on the way to stabilizing itself financially. Nevertheless, a significant monetary judgment against RTI, or even against those Defendants who were seeking indemnity from RTI, threatened to cripple the company. To the extent that the Court awarded equitable relief

in terms of reinstating the equity interest of the Class members, the reinstatement of those interests may have suffered from substantial dilution, may have seriously disrupted the company's existing lending relationships and may still have been subject to payment only upon a sale. In other words, ongoing litigation itself may have been self-defeating to the enhancement of value of any equity which would have been reinstated by the Court.

The settlement lifts a cloud hanging over RTI relating to its ownership and permits the company to engage in a sales process. If the financial condition of RTI improves and a sale occurs, Plaintiffs may share in the upside, although the settlement provides no equity interest in RTI. If the financial condition of RTI does not improve, the Class members are in no worse condition than if they had remained equity holders in a company that was performing poorly.

3. The Litigation Threatened to be Protracted and Expensive.

While a great deal was done to get the case trial ready, there remained considerable work to be completed at the time of the settlement. Approximately ten fact depositions had not been taken. Further, Plaintiffs had incurred approximately $90,000 in expert consulting fees and yet, a final expert report had not been issued, much less expert depositions taken. The costs associated with expert work alone going forward, was going to be significant. The trial of the case promised to involve dozens of witnesses and was likely to take a minimum of 14 days. Further, if the matter was hugely successful for Plaintiffs at trial, it was questionable whether a jury would ever award more than the amount of the actual investment by Plaintiff class which totaled

approximately $18 million. A judgment in that range would have necessarily been appealed given the financial condition of RTI.

4. Class Members Support this Settlement.

The response to the settlement has been overwhelmingly positive. *See* Bethke Aff. No one has excluded themselves from the settlement and only one objection has been received. *Id.* Approximately 95% of the outstanding shares comprising the Class have submitted Claim Forms. *Id.*

II. THE NOTICE, MAILING AND POSTING FULLY INFORMED CLASS MEMBERS OF THEIR RIGHTS.

The Notice and Claim Form meets the requirements of Rule 23. *See* Bethke Aff., Exs. A and B. The Notice was not only mailed out by first class mail, but a follow-up reminder card was submitted to all of those who had not responded by November 2, 2010. *Id.* at ¶ 4 and Ex. E. From the initial mailing to over 400 individuals/entities, only six were returned as non-deliverable and, in four of those cases, updated mailing addresses were obtained and an additional mailing was sent out.

The Notice specifically advised Class members to obtain additional information about the settlement on a website. *Id.*, Ex. A. The website contained not only past filings with the Court, but all relevant settlement materials including the Notes, the Fee and Expense Memorandum, the Notice, the Proof of Claim and the Stipulation of Settlement. The efforts to provide full and complete information fully protected the due process rights of each and every Class member.

CONCLUSION

For all the above reasons, Plaintiffs respectfully request that a Final Judgment and Order in the form proposed by Plaintiffs be entered as well as an Order granting reimbursement of expenses, an award to the Class Representatives and an attorneys' fees award.

Dated: November 19, 2010

ANTHONY OSTLUND BAER & LOUWAGIE, P.A.

By: *s/ Robert C. Moilanen*
Robert C. Moilanen (#74263)
Cory D. Olson (#386941)
Nathan P. Brennan (#0389954)
3600 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: 612-349-6969
Facsimile: 612-349-6996

and

LOCKRIDGE GRINDAL NAUEN P.L.L.P
Richard A. Lockridge (#64117)
Gregg M. Fishbein (#202009)
Suite 2200
100 Washington Avenue South
Minneapolis, MN 55401-2197
Telephone: 612-339-6900
Facsimile: 612-339-0981

ATTORNEYS FOR PLAINTIFFS