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10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12 **IN RE FREMONT GENERAL**  
13 **CORPORATION LITIGATION**

14 **CASE No. CV07-02693 JHN(FFMx)**

15 **CLASS ACTION**

16 **PLAINTIFFS' MEMORANDUM OF**  
17 **POINTS AND AUTHORITIES IN**  
18 **SUPPORT OF MOTION FOR**  
19 **PRELIMINARY APPROVAL OF**  
20 **PROPOSED SETTLEMENT,**  
21 **PRELIMINARY CERTIFICATION**  
22 **OF RULE 23(b)(1)(B) CLASS FOR**  
23 **SETTLEMENT PURPOSES ONLY,**  
24 **APPROVAL OF NOTICE PLAN,**  
25 **AND TIME FOR FAIRNESS**  
26 **HEARING**

27 **DATE : APRIL 25, 2011**

28 **TIME : 2:00 P.M.**

**CTRM : 790**

**BEFORE THE HON. JACQUELINE**  
**HONG-NGOC NGUYEN**

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1 I. INTRODUCTION

2 Named Plaintiffs Marcy Johannesson, Wendy Horvat, Robert Anderson,  
3 Linda Sullivan, and James K. Hopkins (“Plaintiffs”) respectfully move the Court  
4 for an Order (1) granting preliminary approval of the proposed settlement (the  
5 “Settlement”); (2) preliminarily certifying the Class as a non-opt-out class under  
6 Fed. R. Civ. P. 23(b)(1)(B) for settlement purposes only; (3) approving the form  
7 and manner of notice of the Settlement to the Class (the “Class Notice”); and (4)  
8 setting a date for a Fairness Hearing.<sup>1</sup>

9 The proposed Settlement, consisting of a cash payment of \$21,000,000,  
10 provides substantial benefit to members of the Class and resolves all claims  
11 asserted by Plaintiffs.<sup>2</sup> Plaintiffs submit that the Settlement represents an excellent  
12 recovery for Class Members and is fair, reasonable, and adequate under the  
13 governing standards for evaluating class action settlements in this Circuit. *See, e.g.,*  
14 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Moreover, the  
15 proposed Class Notice satisfies the requirements of due process and has been  
16 approved in similar cases. As set forth in detail below, all prerequisites for  
17 preliminary approval of the Settlement have been met and Plaintiffs respectfully  
18 request that their motion be granted.<sup>3</sup>

19 \_\_\_\_\_  
20 <sup>1</sup> Plaintiffs have been authorized by Defendants to state that Defendants do not  
21 oppose the relief sought in the motion for preliminary approval, although  
22 Defendants deny all wrongdoing and do not concede any of the factual statements  
23 or legal arguments in the motion for preliminary approval.

24 <sup>2</sup> The details of the Settlement are set forth in the Stipulation and Agreement of  
25 Settlement – ERISA Class Action (the “Settlement Agreement”), attached hereto  
26 as Exhibit 1. Capitalized terms not otherwise defined in this memorandum have  
27 the same meaning as ascribed to them in the Settlement Agreement.

28 <sup>3</sup> Attached to the Settlement Agreement as Exhibit A is the [Proposed] Findings  
and Order Preliminarily Approving Proposed Class Action Settlement,  
Preliminarily Certifying Class Under Rule 23(b)(1)(B) for Settlement Purposes

1                   **II. PROCEDURAL AND FACTUAL BACKGROUND**

2           **A. Description of Litigation**

3           Throughout this litigation, the Parties have engaged in extensive briefing and  
4 discovery. Plaintiffs filed their initial complaint on April 24, 2007, and five similar  
5 complaints were filed soon thereafter, all of which were consolidated on August  
6 29, 2007. On October 25, 2007, Plaintiffs filed their Consolidated Complaint for  
7 Breaches of Fiduciary Duty under ERISA (the “Complaint”) against Fremont  
8 General Corporation (“Fremont” or the “Company”) and the individual Defendants  
9 who Plaintiffs alleged served as fiduciaries of the Fremont General Corporation  
10 and Affiliated Companies Investment Incentive Plan, as amended through March  
11 19, 2007, and the Fremont General Corporation Employee Stock Ownership Plan,  
12 effective January 1, 2000 (the “Plans”) during the Class Period.<sup>4</sup>

13           On December 10, 2007, Defendants filed their motion to dismiss the  
14 Complaint. In an opinion issued on May 30, 2008, Judge Cooper denied  
15 Defendants’ motion in its entirety. *See In re Fremont Gen. Corp. Litig.*, No. 07-  
16 2693, 2008 WL 2609258 (C.D. Cal. May 30, 2008) (order denying Defendants’  
17 motion to dismiss). The Court ruled that the Complaint stated claims against  
18 Defendants for: (1) failing to prudently and loyally manage the Plans’ investment  
19 in Fremont stock; (2) failing to provide Plan participants with complete and  
20 accurate information regarding Fremont stock; (3) failing to adequately monitor  
21 their fiduciary appointees; and (4) failing to prevent breaches by other fiduciaries

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22  
23           Only, Approving Form and Dissemination of Class Notice, and Setting Time for  
24 Fairness Hearing (“Order for Notice and Hearing”).

25           <sup>4</sup> As identified in the Settlement Agreement, the individual Defendants are Wayne  
26 R. Bailey, Thomas W. Hayes, Patrick E. Lamb, Robert F. Lewis, Russell K.  
27 Mayerfeld, James J. McIntyre, Raymond G. Meyers, Louis J. Rampino, and  
28 Dickinson C. Ross. The individual Defendants and Fremont are referred to herein  
collectively as “Defendants.”

1 of their duties of prudent and loyal management, complete and accurate  
2 communications, and adequate monitoring. *Id.* at \*2-3.

3 Fremont filed for bankruptcy protection under Chapter 11 on June 18, 2008,  
4 and as a result, Judge Cooper stayed this Action on June 30, 2008. On November  
5 7, 2008, and November 10, 2008, Plaintiffs timely filed in the bankruptcy  
6 proceedings a class proof of claim and separate individual claims for each Plaintiff.  
7 On February 4, 2009, Plaintiffs filed an amended motion to lift the stay in the  
8 district court as to the individual Defendants only, which the Court granted on  
9 March 12, 2009. Plaintiffs filed a motion for relief from the automatic stay in the  
10 bankruptcy court on September 4, 2009, and the Parties filed a Stipulation  
11 Regarding Limited Relief from the Automatic Stay with Respect to an ERISA  
12 Class Action Lawsuit in the bankruptcy court on October 6, 2009, which stated the  
13 Parties' agreement to subordinate any relief in excess of insurance proceeds.  
14 Accordingly, on November 3, 2009, the bankruptcy court granted Plaintiffs'  
15 motion for relief from the automatic stay, allowing this Action to proceed against  
16 Fremont in the district court.

17 On October 26, 2009, Plaintiffs filed their motion for class certification. In  
18 preparation for their opposition, Defendants deposed each Named Plaintiff: Linda  
19 Sullivan on November 30, 2009; Marcy Johannesson on December 4, 2009; James  
20 Hopkins on December 4, 2009; Robert Anderson on December 7, 2009; and  
21 Wendy Horvat on December 17, 2009. Defendants filed their opposition on  
22 December 28, 2009. On January 25, 2010, Plaintiffs moved to strike the  
23 Declaration of Daniel M. Garrett, which Defendants had filed in support of their  
24 opposition to class certification. On February 19, 2010, the Court granted in part  
25 and denied in part Plaintiffs' motion to strike and on April 15, 2010, granted  
26 Plaintiffs' motion for class certification.

1 Defendants filed a petition under Fed. R. Civ. P. 23(f) in the Ninth Circuit  
2 on April 29, 2010, seeking permission to appeal the class certification order.

3 Plaintiffs filed their response and opposition to the petition on May 12, 2010.<sup>5</sup>  
4 The Ninth Circuit denied Defendants' 23(f) petition on July 26, 2010.

5 On April 21, 2009, the individual Defendants filed their Answer to the  
6 Complaint. Fremont filed its Answer on December 8, 2009. On December 29,  
7 2009, Plaintiffs moved to strike certain of Fremont's affirmative defenses. Fremont  
8 opposed the motion on January 11, 2010, and the Court granted in part and denied  
9 in part Plaintiffs' motion on February 25, 2010.

10 Defendants filed a motion for partial summary judgment as to Count III of  
11 the Complaint on July 13, 2010, which Plaintiffs opposed on August 23, 2010.  
12 On August 9, 2010, Plaintiffs moved for partial summary judgment on Defendants'  
13 thirteenth affirmative defense, which the Court granted in part and denied in part  
14 on September 2, 2010.

15 The Parties have also engaged in extensive discovery, as discussed below.  
16 While discovery was ongoing, the Parties discussed the possibility of settlement  
17 and retained an experienced JAMS mediator, the Hon. Daniel H. Weinstein (ret.).  
18 Following a full day of mediation that included extensive discussions and  
19 negotiations, the Parties reached a settlement of the Action.

20 **B. Investigation of Claims and Discovery**

21 The Complaint seeks to recover losses under ERISA §§ 409 and 502(a)(2)  
22 suffered by the Plans as a result of Defendants' alleged breaches of fiduciary duty.  
23 The Complaint alleges four causes of action: (1) failure to prudently and loyally  
24 manage the Plans' investment in Fremont stock; (2) failure to adequately monitor

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25  
26 <sup>5</sup> Plaintiffs filed a corrected response on May 18, 2010, reducing the page count to  
27 comply with page limits.

1 fiduciary appointees; (3) failure to provide Plan participants with complete and  
2 accurate information regarding Fremont stock; and (4) failure to prevent breaches  
3 by co-fiduciaries of their duties of prudent and loyal management, adequate  
4 monitoring, and complete and accurate communications.<sup>6</sup> Class Counsel have  
5 conducted a thorough investigation into Plaintiffs' claims and the allegations set  
6 forth in the Complaint.

7 Investigative efforts have included: (1) inspecting, reviewing, and analyzing  
8 over 570,000 pages of documents produced by or otherwise relating to Fremont in  
9 discovery, as well as publicly available documents, including but not limited to  
10 news articles, related complaints, press releases, analyst reports, regulatory filings,  
11 information concerning Defendants' financial condition and the FDIC  
12 investigation of Fremont, and, generally, materials concerning the performance of  
13 Fremont stock during the relevant time period; (2) researching the applicable law  
14 with respect to the claims asserted and the potential defenses thereto;  
15 (3) inspecting, reviewing, and analyzing numerous documents concerning the  
16 Plans and the administration of the Plans; and (4) interviewing Plan participants  
17 and reviewing and analyzing documents collected from participants.

18 The Parties exchanged Initial Disclosures on June 22, 2009.

19 On May 21, 2010, the Parties filed a Joint Report of Rule 26(f) Planning  
20 Conference, in response to which the Court scheduled a discovery cut-off date of  
21 February 28, 2011, and a trial date of June 7, 2011.

22 Plaintiffs served their First Requests for Production on all Defendants on  
23 November 30, 2009, and their Second Requests on May 26, 2010.

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27 <sup>6</sup> Not all claims are alleged against all Defendants.

1 Plaintiffs have also served numerous subpoenas on third parties, including  
2 Ellington Capital Management, the FDIC, Litton Loan Servicing, iStar Financial,  
3 Inc., Capital Source, Inc., Ford Diamond III Corp., and Merrill Lynch.

4 Defendants served Plaintiffs with interrogatories and Defendants' first  
5 Requests for Production on September 9, 2009. Defendants have also subpoenaed  
6 records from third party Merrill Lynch and provided some of these records to  
7 Plaintiffs.

8 Finally, Plaintiffs deposed a number of witnesses and certain individual  
9 Defendants. On February 12, 2010, Plaintiffs deposed Daniel M. Garrett, an expert  
10 that Defendants' relied on in their opposition to class certification. Plaintiffs also  
11 conducted three depositions under Rule 30(b)(6) that addressed the structure and  
12 administration of the Plans on February 16, 2010, August 18, 2010, and August 26,  
13 2010. Additionally, Plaintiffs deposed Defendants Raymond G. Meyers and  
14 Wayne R. Bailey on August 26, 2010, and September 24, 2010, respectively, and  
15 witnesses, Monique Johnson, David S. DePillo, Richard A. Sanchez, and Gina  
16 Juarez on September 3, 10, 14, and 17, respectively.

### 17 III. SUMMARY OF THE SETTLEMENT

#### 18 A. Settlement Negotiations

19 Counsel for the Parties and the applicable insurance carriers attended a  
20 formal day of mediation on September 29, 2010, with Judge Weinstein as  
21 mediator. The Parties prepared comprehensive mediation statements in advance of  
22 the mediation, and Class Counsel prepared a detailed presentation including  
23 analysis of the claims, damages, and insurance coverage issues, with reference to  
24 discovery conducted to date. After a full day of mediation, the Parties agreed to  
25 settle this Action for \$21,000,000. After considerable additional negotiations, the  
26 Parties executed the Settlement Agreement on March 22, 2011.

1 In sum, the Settlement Agreement was the result of lengthy and contentious  
2 arm's length negotiations among the Parties. This process was in all respects  
3 thorough, adversarial, and professional.

4 **B. Terms of the Settlement Agreement**

5 The terms and conditions of the Settlement are set forth in the Settlement  
6 Agreement. The following is a summary of the principal terms of the Agreement:

7 1. Settlement Amount: The Parties agreed to settle this Action for the  
8 sum of \$21,000,000 in cash.

9 2. Released Parties: Any and all Defendants, all of Fremont's direct and  
10 indirect subsidiaries and affiliated entities and successors-in-interest—including  
11 without limitation Signature Group Holdings Inc., Fremont General Credit  
12 Corporation, and Fremont Investment & Loan—and every Person who, at any time  
13 during the Class Period was a director, officer, governor, management committee  
14 member, in-house or outside counsel, employee, or agent of Fremont or any direct  
15 or indirect subsidiary or affiliate thereof, or a trustee or fiduciary (including de  
16 facto fiduciaries) for the Plans, together with, for each of the foregoing, any  
17 present or former representatives, insurers, reinsurers, consultants, administrators,  
18 employee benefit plans, investment advisors, investment underwriters, spouses,  
19 and successors.

20 3. Released Claims: The Class releases any and all claims whether  
21 known or unknown, (1) that were asserted in the Action or that could have been  
22 asserted in the Action; (2) that would have been barred by res judicata, including  
23 by the doctrines of claim bar or claim merger, had the Action been fully litigated to  
24 a final judgment; and/or (3) that relate to any loss on any investment in Fremont  
25 stock or the Fremont stock fund by the Plans or by any Plan participant with regard  
26 to his or her investment in the Plans made or in existence during the Class Period.  
27 Released Claims shall extend to all Released Parties. Provided, however, that

1 Released Claims shall not extend to any claims asserted by or on behalf of the  
2 plaintiffs in the Securities Actions. Further, Released Claims shall not extend to  
3 claims (1) related to enforcement of the Settlement Stipulation; (2) for individual  
4 or vested benefits separate and distinct from the claims asserted in the Action; (3)  
5 among Defendants and/or Defendants and the Underwriters; (4) between the  
6 Defendants and the Underwriters; or (5) against the Independent Fiduciary.

7 4. Plan of Allocation. The Settlement Agreement contemplates, subject  
8 to the Court's approval, that after payment of Court-approved fees, costs, and the  
9 Named Plaintiffs' contribution awards, the net proceeds will be allocated to Class  
10 Members pursuant to a detailed Plan of Allocation attached to the Settlement  
11 Agreement as Exhibit C. In general terms, the net proceeds will be allocated to  
12 Class Members on a *pro rata* basis such that the amount received by each Class  
13 Member will depend on his or her calculated loss, relative to the losses of other  
14 Class Members, as a result of Plan investments in Fremont stock. In this way, the  
15 Plan of Allocation will distribute the net proceeds equitably based upon each Class  
16 Member's estimated loss.

17 5. Class Notice. A proposed Order for Notice and Hearing is attached as  
18 Exhibit A to the Settlement Agreement, which is attached hereto as Exhibit 1. The  
19 Order for Notice and Hearing provides for the following notices:

20 (a) A mailed Notice (Exhibit 1 to the Order for Notice and  
21 Hearing), to be mailed to the last known address of Class Members and all counsel  
22 known by Class Counsel to represent a member of the Class, and to be published  
23 on a website established by Class Counsel; and

24 (b) A Summary Notice (Exhibit 2 to the Order for Notice and  
25 Hearing), to be electronically published on the Business Wire.

1 **C. Reasons for Settlement**

2 Plaintiffs have entered into this proposed Settlement with an understanding  
3 of the strengths and weaknesses of their claims. This understanding is based on:  
4 (1) the motion practice undertaken by the Parties; (2) the investigation, research,  
5 and discovery as outlined above; (3) the likelihood that Plaintiffs would prevail on  
6 summary judgment; (4) the likelihood that Plaintiffs would prevail at trial; (5) the  
7 range of possible recovery; and (6) the substantial complexity, expense, and  
8 duration of litigation necessary to prosecute this Action through trial, post-trial  
9 motions, and likely appeals, and the significant uncertainties in predicting the  
10 outcome of this complex litigation. Having undertaken this analysis, Class Counsel  
11 and Plaintiffs have concluded that the Settlement is fair, reasonable, and adequate,  
12 and should be presented to the Court for approval.

13 **IV. THE PROPOSED SETTLEMENT MERITS PRELIMINARY**  
14 **APPROVAL**

15 The Settlement Agreement meets the judicial standards for preliminary  
16 approval under both Ninth Circuit law and Fed. R. Civ. P. 23. The Ninth Circuit is  
17 firmly “committed to the rule that the law favors and encourages compromise  
18 settlements.” *Ahern v. Cent. Pac. Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988)  
19 (citing *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977)). Therefore, the  
20 Ninth Circuit has found that:

21 The court’s intrusion upon what is otherwise a private  
22 consensual agreement negotiated between the parties to a  
23 lawsuit must be limited to the extent necessary to reach a  
24 reasoned judgment that the agreement is not the product of  
25 fraud or overreaching by, or collusion between, the negotiating  
26 parties, and that the settlement, taken as a whole, is fair,  
27 reasonable and adequate to all concerned.

28 *Officers for Justice v. Civil Serv. Comm’n of City and County of S.F.*, 688 F.2d  
615, 625 (9th Cir. 1982).

1 Rule 23 of the Federal Rules of Civil Procedure governs settlements of class  
2 action lawsuits. Although the procedure for approval of a class action settlement is  
3 not specifically delineated in Rule 23, a two-step procedure is set forth and  
4 approved in the Federal Judicial Center's *Manual for Complex Litigation (Fourth)*  
5 § 21.632 (2010), and is universally followed by federal courts considering class  
6 action settlements. *See, e.g., Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221  
7 F.R.D. 523, 525 (C.D. Cal. 2004) *Nat'l Rural Telecomms.* . First, the court must  
8 determine "whether a proposed class action settlement deserves preliminary  
9 approval." *Id.* at 525 (citing *Manual for Complex Litigation (Third)* § 30.41  
10 (1995)). Second, following notification of the class members, the court must  
11 determine whether final approval is warranted. *Id.*

12 During the first stage, the parties submit the settlement to the court for  
13 preliminary approval and the court makes a preliminary fairness evaluation.  
14 *Manual for Complex Litigation (Fourth)* § 21.632 (2010). In granting preliminary  
15 approval, the court determines whether the proposed settlement is "fundamentally  
16 fair, adequate, and reasonable." *Hanlon*, 150 F.3d at 1026. The court does "not  
17 decide the merits of the case or resolve unsettled legal questions." *Carson v. Am.*  
18 *Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Officers for Justice*, 688 F.2d at  
19 625. Rather, the settlement as a whole must be examined for overall fairness,  
20 adequacy, and reasonableness, standing or falling in its entirety. *Hanlon*, 150 F.3d  
21 at 1026.

22 A settlement is presumptively fair if: "(1) the negotiations occurred at arm's  
23 length; (2) there was sufficient discovery; (3) the proponents of the settlement are  
24 experienced in similar litigation; and (4) only a small fraction of the class  
25 object[s]." *Rodriguez v. West Publ'g Corp.*, No. 05-3222, 2007 WL 2827379, at \*7  
26 (C.D. Cal. Sept. 10, 2007), *rev'd on other grounds*, 563 F.3d 948 (9th Cir. 2009)  
27 (citations omitted).

1 The Settlement easily satisfies the first three fairness factors.<sup>7</sup> Negotiations  
2 occurred at arms length over a full day of discussions mediated by Judge  
3 Weinstein. The Parties also engaged in significant discovery, allowing Plaintiffs to  
4 fully understand the factual and legal issues of the case. And finally, Class Counsel  
5 have extensive experience litigating claims of this same type, and, thus, are well  
6 informed of the potential strengths and weaknesses of the case. As a result, the  
7 proposed Settlement should be afforded a presumption of fairness.

8 Further, the Settlement satisfies the eight factors articulated by the Ninth  
9 Circuit to determine whether a settlement is fair, adequate, and reasonable:

- 10 (1) strength of the plaintiffs' case;
- 11 (2) risk, expense, complexity, and likely duration of further litigation;
- 12 (3) risk of maintaining class action status throughout the trial;
- 13 (4) amount offered in settlement;
- 14 (5) extent of discovery completed and stage of the proceedings;
- 15 (6) experience and views of counsel;
- 16 (7) presence of a governmental participant; and
- 17 (8) reaction of the Class Members to the proposed settlement.

18 *Hanlon*, 150 F.3d at 1026 (citations omitted).

19 Consideration of the above criteria demonstrates that the proposed  
20 Settlement is well within the possible range for approval. As such, the proposed  
21 Settlement warrants preliminary approval.

22 **A. The Strength of Plaintiffs' Case Favors Approval of the Proposed**  
23 **Settlement Agreement.**

24 When evaluating a settlement for preliminary approval, courts need only  
25 weigh plaintiff's case against the amount offered in settlement, rather than consider

---

26 <sup>7</sup> The fourth factor will become relevant after the Class has been notified of the  
27 Settlement following preliminary approval.

1 the strength of plaintiff's case on the merits. *Nat'l Rural Telecomms. Coop.*, 221  
2 F.R.D. at 527 (citing *5 Moore Federal Practice*, § 23.85(2)(e) (Matthew Bender 3d  
3 ed.)). As evidenced by the vigor with which Class Counsel have prosecuted this  
4 Action and the amount of time expended toward that end, Class Counsel believe  
5 strongly in the merits of this case and the claims of the Complaint. Plaintiffs  
6 believe that the discovery and research conducted support Plaintiffs' core  
7 allegations that Fremont stock became an imprudent investment for the Plans  
8 during the Class Period. In Plaintiffs' view, this is because, during the Class  
9 Period, Fremont engaged in highly risky and reckless conduct that imperiled the  
10 Company, including: (1) lowering and even ignoring underwriting standards,  
11 leading to increased defaults and delinquencies on Fremont's loans; (2) operating  
12 with ineffective risk management policies; (3) improperly reserving for loan and  
13 lease losses; and (4) providing false and misleading disclosures to Plan participants  
14 and the market as a whole regarding these risky practices.

15 Furthermore, Plaintiffs believe the evidence would show that each  
16 Defendant was a Plan fiduciary and failed to take any action to protect the Plans  
17 and serve participants' best interests as required by ERISA. Therefore, Plaintiffs  
18 believe that by failing to take action to protect the Plans from significant losses  
19 during the Class Period, Defendants breached their fiduciary duties.

20 Nonetheless, Plaintiffs also recognize the risks of continued litigation and an  
21 adverse outcome. Plaintiffs readily acknowledge that many of the complex factual  
22 and legal issues involved in this Action are contested, and both Parties have  
23 proffered evidence to support their competing views of the case. Moreover, the law  
24 on claims of this type remains somewhat unsettled and subject to conflicting  
25 interpretations. *Compare In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir.  
26 2008) (holding that a "myriad of circumstances" can require fiduciaries to divest  
27 company stock under ERISA's "prudent man" standard) *with Quan v. Computer*

1 *Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (requiring plaintiffs to show that  
2 either “the company’s viability as an ongoing concern” is threatened or there was  
3 “a precipitous decline in the employer’s stock . . . combined with evidence that the  
4 company is on the brink of collapse or is undergoing serious mismanagement”  
5 (quotations and citations omitted)). Thus, while Plaintiffs and Class Counsel  
6 believe this is a strong case for Plaintiffs, the outcome of continued litigation  
7 remains uncertain. Accordingly, the overall strength of the case and the substantial  
8 recovery obtained as a result of its strength supports preliminary approval of the  
9 proposed Settlement.

10 **B. The Risk, Expense, Complexity, and Likely Duration of Further**  
11 **Litigation Weighs in Favor of Approval.**

12 “Unless the settlement is clearly inadequate, its acceptance and approval are  
13 preferable to lengthy and expensive litigation with uncertain results.” *Nat’l Rural*  
14 *Telecomms. Coop.*, 221 F.R.D. at 526 (citing *Newberg on Class Actions*, § 11:50 at  
15 155). Courts favor settlement, as it preserves individual resources by avoiding  
16 protracted litigation and the likely subsequent appeals. *Id.* at 527.

17 As indicated above, litigation of this case poses risks for both Plaintiffs and  
18 Defendants. Although Class Counsel believe strongly in the merits of this case,  
19 Class Counsel are cognizant of the risk that continued litigation could end in non-  
20 recovery. Moreover, Defendants have vigorously defended against the allegations  
21 made by Plaintiffs and are expected to continue to do so should this Action  
22 proceed through trial.

23 In addition to the risks presented by continued litigation, proceeding  
24 through trial and the likely subsequent appeals would undoubtedly require a  
25 significant undertaking by both Parties. This case presents many complex legal and  
26 factual issues in a rapidly developing area of law. To address the complexities and  
27 nuances of this case adequately, significant expenditures of time and money would

1 be required. The Parties have estimated that in addition to substantial preparation  
2 time and expense, a trial would take approximately three weeks.

3 Furthermore, because of the complexity of Fremont's business and  
4 accounting practices, both Parties would be required to consult with numerous  
5 experts to better understand and support or defend the allegations of the Complaint.  
6 Given the nature of this case, a judgment at trial would likely be appealed by the  
7 losing party. As a result, continued litigation would risk delaying the Class's  
8 potential recovery for years, further reducing its value.

9 The Settlement cuts short the additional months of contested discovery and  
10 eliminates the time and expense of the substantial motions practice that would  
11 likely occur going forward in this case. Thus, the Settlement conserves judicial  
12 resources and reduces the expense associated with the significant expert discovery  
13 and briefing required to prepare Plaintiffs' case for trial. As a result, this factor  
14 weighs in favor of preliminary approval of the proposed Settlement.

15 **C. The Risk of Maintaining Class Action Status Throughout the Trial**  
16 **Weighs in Favor of Approval.**

17 Though Defendants certainly have a contrary view, Plaintiffs do not accord  
18 this factor much weight in the context of this case. The Court certified the case as a  
19 class action, as typically is the case in cases of this type that are brought on behalf  
20 of the plan under ERISA § 502(a)(2). *See, e.g., In re Schering Plough Corp. ERISA*  
21 *Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (finding that § 502(a)(2) claims are  
22 “paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1)  
23 class”); *In re Syncor ERISA Litig.*, 227 F.R.D. 338, 346-47 (C.D. Cal. 2005)  
24 (certifying 23(b)(1)(B) class). Thus, Plaintiffs are not aware of any realistic risk  
25 that would jeopardize class certification through the course of continued litigation.  
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1 **D. The Amount Offered in Settlement Weighs in Favor of Approval.**

2 A proposed settlement should be viewed as a whole rather than in individual  
3 pieces. *Officers for Justice*, 688 F.2d at 628. It “may be acceptable even though it  
4 amounts to only a fraction of the potential recovery that might be available to the  
5 class members at trial.” *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 527.

6 Moreover, a settlement should not be judged against a “speculative measure” of  
7 what could have been attained in negotiation. *Linney v. Cellular Alaska P’ship*,  
8 151 F.3d 1234, 1242 (9th Cir. 1998).

9 Here there is a broad range of potential recovery if the case were litigated to  
10 a conclusion rather than settled. At one extreme is the possibility that Defendants  
11 might prevail on one or more of their legal or factual arguments to defeat liability  
12 entirely. While Plaintiffs are confident of the strength of the claims asserted here,  
13 they recognize that this possibility cannot be discounted completely.

14 Assuming liability were established, several variables would affect the  
15 determination of the actual amount of recoverable damages. Key among these  
16 variables are the legal framework for the measure of damages and the  
17 determination of the date (the “breach date”) on which Defendants’ failure to  
18 divest the Plans’ holdings of Fremont stock and/or to discontinue acquisitions of  
19 Fremont stock constituted a breach of their fiduciary duty. Plaintiffs anticipate that  
20 these matters would be hotly contested in the absence of a settlement, and the  
21 Court’s ultimate determinations would greatly impact the recoverable damages.

22 If the case were to go forward without a settlement, Plaintiffs would argue  
23 for a measure of damages based on the Plans’ capital loss. In preparation for  
24 mediation, Plaintiffs calculated capital loss in two ways: (1) by adding “holder”  
25 damages to “purchaser” damages, and (2) by determining “purchaser” damages  
26 only. In this case, Plaintiffs defined holder damages as the loss in value of the  
27 Plans’ holdings of Fremont stock during the relevant period. Purchaser damages

1 were the losses attributed to new purchases of Fremont stock during the relevant  
2 period based on the difference between the purchase price of Fremont stock and  
3 the price of the stock either at the time of sale or at the end of the relevant period.

4 Plaintiffs calculated capital loss based on different potential breach dates.  
5 The breach date was one of the key factual issues in this case. In the Complaint,  
6 Plaintiffs alleged that Defendants knew or should have known that Fremont stock  
7 was imprudent by January 1, 2005, but there was no guarantee that this date would  
8 prevail in further litigation, and Plaintiffs' ability to sustain their burden as of this  
9 date, admittedly, would be far more difficult than a date later in the Class Period  
10 when significant additional adverse events had occurred. Defendants, for example,  
11 would likely contend that if Fremont stock ever became imprudent, it did not  
12 become so until much later in the Class Period, after the mortgage market was in  
13 turmoil and the FDIC had issued its Cease and Desist Order (on February 27, 2007,  
14 which Fremont consented to on March 7, 2007). At that point damages were  
15 significantly reduced.

16 The following chart summarizes Plaintiffs' estimated damages through  
17 December 31, 2008 (the end of the Class Period), based on three different potential  
18 breach dates:

Breach Date	Capital Loss: Holder and Purchaser Damages
Jan. 1, 2005	\$194,750,093
Feb. 27, 2007	\$72,110,420
March 7, 2007	\$42,207,115

19  
20  
21  
22  
23 However, these numbers are far from definite. While Plaintiffs believe that  
24 both holder and purchaser losses are recoverable, Defendants would likely argue  
25 that only purchaser losses are appropriate. Furthermore, Defendants would likely  
26 contend that to sell the stock in the Plans, Defendants would have had to make  
27

1 corrective disclosures, which would have caused the value of the stock to drop,  
2 creating a no-win situation for the Plans. If Defendants were to persuade the Court  
3 that holder losses were not appropriate, Plaintiffs recoverable losses would decline  
4 steeply, particularly for the later breach dates. Below is a chart listing purchaser  
5 damages only, based on the same alternative breach dates as above:

Breach Date	Capital Loss: Purchaser Damages Only
Jan. 1, 2005	\$81,759,806
Feb. 27, 2007	\$14,053,012
March 7, 2007	\$11,464,658

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10 Accordingly, depending on the date on which Fremont stock was found to be  
11 imprudent and on which measure of damages prevailed in court, Class Counsel  
12 estimate the capital loss incurred by the Plans would range from approximately  
13 \$11.5 million to \$194.8 million, with the likelihood of recovery increasing  
14 substantially as the breach date moves forward and damages decline. This range  
15 does not take into account any discount for the risk of not establishing liability.

16 Given the wide range of potential damages outcomes at trial (as well as the  
17 possibility of summary judgment or a verdict in favor of Defendants) and the  
18 uncertainty of the Plans' actual losses, the \$21,000,000 Settlement provides a  
19 substantial recovery well in excess of the range that courts traditionally have found  
20 to be fair and adequate under the law. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*,  
21 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement with all defendants that  
22 comprised one sixth of plaintiffs' potential recovery); *Officers for Justice*, 688 F.2d  
23 at 624 (“[T]he very essence of a settlement is compromise, a yielding of absolutes  
24 and an abandoning of highest hopes.” (citations and internal quotations omitted)).  
25 Furthermore, it avoids the risks of protracted litigation and provides the Class with  
26 certain, immediate relief. Accordingly, the likelihood of success on the merits  
27  
28

1 weighed against the potential recovery supports approval of the Settlement in this  
2 case.

3 **E. The Extent of Discovery Completed and the Stage of the Proceedings**  
4 **Weigh in Favor of Approval.**

5 The extent of discovery conducted helps to determine the parties' grasp of  
6 the strengths and weaknesses of the case. *Nat'l Rural Telecomms. Coop.*, 221  
7 F.R.D. at 527 (citing *Manual for Complex Litigation (Third)* § 30.42 (1995)).  
8 Preliminary approval of a settlement is more likely if the settlement was reached  
9 after careful investigation and consideration of the "legal and factual issues  
10 surrounding the case." *Id.* (quoting *5 Moore's Federal Practice*, § 23.85(2)(e)  
11 (Matthew Bender 3d ed.)).

12 Class Counsel have undertaken extensive discovery in this Action. As  
13 described previously, Plaintiffs propounded numerous Requests for Production on  
14 Defendants and served multiple third parties with subpoenas for additional  
15 documents. Class Counsel coded and reviewed over 570,000 pages of documents  
16 produced by Fremont and third parties. Moreover, Plaintiffs have obtained  
17 considerable public documents and information from government agencies, other  
18 lawsuits, congressional hearings and research, and analysis conducted by interest  
19 groups.

20 Class Counsel also deposed ten witnesses, including Defendants Raymond  
21 G. Meyers and Wayne Bailey, who were high level executives with intimate  
22 knowledge of the Company and the administration of the Plans.

23 Based on this formal and informal discovery, Class Counsel have in-depth  
24 knowledge of the factual and legal issues of this case. Although much remains to  
25 be done to prepare for trial, Plaintiffs and Class Counsel are fully aware of the  
26 strength of the claims and potential risks, and believe without hesitation that the  
27 Settlement is fair, reasonable, adequate, and in the best interest of the Plans and the

1 Class. Thus, the extent of discovery conducted weighs heavily in favor of  
2 preliminary approval of the Settlement.

3 **F. The Experience and View of Counsel Weigh in Favor of Approval.**

4 “Great weight is accorded to the recommendation of counsel, who are most  
5 closely acquainted with the facts of the underlying litigation.” *Nat’l Rural*  
6 *Telecomms. Coop.*, 221 F.R.D. at 528 (citing *In re Painewebber Ltd. P’ships Litig.*,  
7 171 F.R.D. 104, 125 (S.D.N.Y.1997)). Thus, in the absence of fraud or collusion  
8 during negotiation, deference should be afforded to the judgment of counsel. *Id.* at  
9 528 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

10 Class Counsel have extensive experience in handling ERISA class action  
11 cases and other complex litigation. Keller Rohrback L.L.P. is a national leader in  
12 this area of litigation. The firm has served as lead or co-lead counsel in numerous  
13 ERISA class actions of this type nationwide—including *In re Enron Corp. ERISA*  
14 *Litigation*, No. 01-3913 (S.D. Tex.); *In re WorldCom, Inc. ERISA Litigation*, No.  
15 02-4816 (S.D.N.Y.); *In re Syncor ERISA Litigation*, No. 03-2446 (C.D. Cal.);  
16 *Alvidres v. Countrywide Financial Corp.*, No. 07-5810 (C.D. Cal.); *In re IndyMac*  
17 *ERISA Litigation*, No. 08-4579 (C.D. Cal.); *In re HealthSouth ERISA Litigation*,  
18 No. 03-BE-1700-S (N.D. Ala.); and *In re Williams Cos. ERISA Litigation*, No. 02-  
19 153 (N.D. Okla.)—and currently serves or has served as lead or co-lead counsel in  
20 several ERISA class actions involving the subprime and credit crises, including the  
21 *Countrywide* and *IndyMac* cases cited above as well as cases against Merrill Lynch  
22 & Co., Inc.; Washington Mutual, Inc.; Beazer Homes USA Inc.; Regions Financial  
23 Corp.; Bear Stearns Companies Inc.; and Wachovia Corp.

24 Liaison Counsel, Braun Law Group, P.C., also has extensive experience in  
25 prosecuting complex litigation actions throughout the United States. Mr. Braun has  
26 represented shareholders and consumers in class action litigation for the past  
27

1 13 years. He is a well-respected and highly regarded member of the Bar of the  
2 State of California.

3 Based on Class Counsel's experience and the specific facts and  
4 circumstances of this particular case, Class Counsel have concluded that the  
5 Settlement is fair, reasonable, and adequate. This factor supports preliminary  
6 approval of the proposed Settlement.

7 **G. The Presence of a Governmental Participant**

8 In this case, the Government is not a party or a formal participant.  
9 Consequently, this factor is not applicable.

10 **H. The Reaction of Class Members to the Proposed Settlement**

11 Plaintiffs, acting in their capacity as Class Representatives, were consulted  
12 throughout the settlement process and support the proposed Settlement.  
13 Nonetheless, full discussion of this factor cannot occur until after Class Notice is  
14 issued and the Class as a whole has the opportunity to evaluate the Settlement. As  
15 such, Plaintiffs suggest that evaluation of this factor occur at the final approval  
16 stage of the Settlement.

17 **V. CERTIFYING THE CLASS UNDER RULE 23(b)(1)(B) FOR  
18 SETTLEMENT PURPOSES ONLY IS APPROPRIATE**

19 On April 15, 2010, the Court issued an order certifying the Class pursuant to  
20 Fed. R. Civ. P. 23.<sup>8</sup> The Court originally certified an opt-out class under Fed. R.  
21 Civ. P. 23(b)(3). However, in connection with this Settlement, Plaintiffs are now  
22 requesting, and Defendants do not oppose, certification of a non-opt-out class  
23 under Fed. R. Civ. P. 23(b)(1)(B) for settlement purposes only.

24 The Settlement provides for a release of all claims against all Defendants  
25 that relate to any alleged losses suffered by the Plans as a result of investment in

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26 <sup>8</sup> The Court issued an amended class certification order on April 22, 2010, making  
27 minor, non-substantive corrections.

1 Company stock from January 1, 2005, through December 31, 2008. Because the  
2 release has Plan-wide effect and the settlement proceeds are intended to inure to  
3 the Plans as a whole, class certification under Rule 23(b)(1)(B) for settlement  
4 purposes only is appropriate. *See In re Syncor ERISA Litig.*, 227 F.R.D. at 347.  
5 Non-opt-out classes of cases of this type are routine and reflect the nature of the  
6 relief that is obtained. *Schering Plough*, 589 F.3d at 604 (finding that § 502(a)(2)  
7 claims are “paradigmatic examples of claims appropriate for certification as a Rule  
8 23(b)(1) class”); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181 (W.D. Mo. 2009)  
9 (certifying 23(b)(1) class post-*LaRue*); *In re Merck & Co., Inc. Sec., Derivative &*  
10 *ERISA Litig.*, MDL No. 1658, 2009 WL 331426 (D.N.J. Feb. 10, 2009) (same);  
11 *Alvidres v. Countrywide Fin. Corp.*, No. 07-5810, 2008 WL 1766927 (C.D. Cal.  
12 Apr. 16, 2008) (same). While, as the Court noted previously, *LaRue v. DeWolff,*  
13 *Boberb & Assocs., Inc.*, 552 U.S. 248 (2008) may open the door to an individual  
14 Plan participant to seek relief for losses solely to his own Plan account, in this case  
15 the Plaintiffs sought relief for the Plans’ total losses, as they are expressly  
16 authorized to do under ERISA § 502(a)(2). As a result, the relief obtained in this  
17 Settlement will be allocated on a pro rata basis to each Class Member based on the  
18 relationship of his or her loss to the Plans’ total losses.

19         Given the relief obtained in the case and the manner in which it will be  
20 distributed, allowing individual opt-outs would create the risk that participants  
21 subject to the exact same conduct would not all be treated the same, which is  
22 inconsistent with ERISA’s duty of impartiality. *See Morse v. Stanley*, 732 F.2d  
23 1139, 1145 (2d Cir. 1984) (citations omitted). Moreover, since each Class  
24 Member’s individual Plan loss is relatively modest, it is exceedingly unlikely that  
25 any individual Plan participant would be interested in paying the substantial legal  
26 fees necessary to bring a claim solely for his own loss.

1 This is not to say that individual Plan participants will not be allowed a say  
2 in whether the Settlement is approved. As a 23(b)(1)(B) class, individual Class  
3 Members will retain the ability to object to the Settlement and voice whatever  
4 concerns they may have about it. Class Counsel have served as lead counsel in  
5 numerous ERISA cases of this type—both before and after *LaRue*—and without  
6 exception, settlements have proceeded on a 23(b)(1) basis, class members have  
7 been provided with notice and the opportunity to object, and settlements obtained  
8 on behalf of the affected plans have been allocated efficiently and expeditiously on  
9 a pro rata basis to the plan participants. *See, e.g., In re IndyMac ERISA Litig.*, No.  
10 08-04579 DDP(VBKx) (C.D. Cal.); *In re Washington Mutual, Inc. ERISA Litig.*,  
11 No. 08-01919-MJP (W.D. Wash.).

12 Accordingly, Plaintiffs respectfully submit that because the relief obtained in  
13 this case is for the benefit of the Plans and not any one Plan participant, the  
14 Settlement proceeds will be allocated to all participants on a pro rata basis, the  
15 release resolves the total liability of the fiduciaries to the Plans, and Defendants no  
16 longer oppose Rule 23(b)(1)(B) certification, there is both good reason and just  
17 cause to certify the case for settlement purposes only under Rule 23(b)(1)(B).

18 **VI. THE PROPOSED FORM OF NOTICE TO CLASS MEMBERS**  
19 **SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS**

20 Following preliminary approval of the terms of the Settlement, the Class  
21 must be notified of the proposed settlement. Rule 23 provides that “[t]he court  
22 must direct notice in a reasonable manner to all class members who would be  
23 bound by the [proposed settlement].” Fed. R. Civ. P. 23(e)(1).

24 To satisfy due process, notice to the Class must be “reasonably calculated  
25 under all the circumstances, to apprise interested parties of the pendency of the  
26 action and afford them an opportunity to present their objections.” *Mullane v. Cent.*  
27 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Marshall v.*

1 *Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) (finding that due process  
2 requires notice to “present a fair recital of the subject matter and proposed terms  
3 and give[] an opportunity to be heard to all class members”). More specifically,  
4 notice is proper if it provides:

5 (a) the material terms of the proposed settlement; (b) disclosure  
6 of any special benefit to the class representatives; (c) disclosure  
7 of the attorneys’ fees provisions; (d) the time and place of the  
8 final approval hearing and the method for objecting to the  
9 settlement; (e) an explanation regarding the procedures for  
10 allocating and distributing the settlement funds; and (f) the  
address and phone number of class counsel and the procedures  
for making inquiries.

11 *Rodriguez*, 2007 WL 2827379, at \*6 (citations omitted).

12 Here, the proposed form of Notice describes in plain English the terms and  
13 operation of the Settlement Agreement, the considerations that caused Plaintiffs  
14 and Class Counsel to conclude that the Settlement is fair and adequate, the  
15 maximum counsel fees and class representative compensation that may be sought,  
16 the procedure for objecting to the Settlement, and the date and place of the Fairness  
17 Hearing. *See* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 8.32  
18 (4th ed. 2002). With the Court’s approval, the Notice will be mailed to Class  
19 Members, no later than 60 days prior to the Fairness Hearing and will also be  
20 published on a website established by Class Counsel. In addition, a Summary  
21 Notice will be published by electronic publication on the Business Wire no later  
22 than 60 days prior to the Fairness Hearing.<sup>9</sup>

23 These proposed forms of Class Notice will fairly apprise Class Members of  
24 the Settlement and their options related thereto, as well as fully satisfy due process

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25  
26 <sup>9</sup> The proposed Notice and Summary Notice are attached as Exhibits 1 and 2 to the  
27 Order for Notice and Hearing, which is attached as Exhibit A to the Settlement  
28 Agreement.

1 requirements. *See Silber v. Mabon*, 18 F.3d 1449, 1452-54 (9th Cir. 1994)  
2 (approving notice by first class mail as the “best notice practicable”); *Mendoza v.*  
3 *Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980), *rev’d on other*  
4 *grounds*, 475 U.S. 717 (1986) (stating that notice is satisfactory if it “generally  
5 describes the terms of the settlement in sufficient detail to alert those with adverse  
6 viewpoints to investigate and to come forward and be heard”).

7 **VII. PROPOSED SCHEDULE**

8 As laid out in the Order for Notice and Hearing, the Parties have agreed to  
9 the following schedule of events, the dates of which will be determined after the  
10 Court sets a Fairness Hearing date:

<b>Event</b>	<b>Time for Compliance</b>
Deadline for mailing Notice to Class Members	60 days prior to the Fairness Hearing
Deadline for electronic publication of the Summary Notice on the Business Wire	60 days prior to the Fairness Hearing
Deadline for Plaintiffs to post the Settlement Agreement and Notice on a website established for Class Members	60 days prior to the Fairness Hearing
Deadline for Class Members to comment upon or object to the proposed Settlement	21 days prior to the Fairness Hearing
Proposed Fairness Hearing	100 days after entry of Order for Notice and Hearing

24 The events set forth above are tied to the Fairness Hearing date, which  
25 Plaintiffs respectfully request be scheduled for 100 days after entry of the proposed  
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27  
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1 Order for Notice and Hearing to allow sufficient time for Defendants to comply  
2 with the notice requirements under the Class Action Fairness Act, 28 U.S.C. § 715.

3 **VIII. CONCLUSION**

4 For the reasons discussed above, the Settlement is a fair, adequate, and  
5 reasonable resolution of the claims against Defendants in this complex and  
6 contested ERISA class action. Thus, Plaintiffs and Class Counsel respectfully ask  
7 the Court to grant their motion and to enter the proposed Order for Notice and  
8 Hearing, which: (1) grants preliminary approval of the proposed Settlement;  
9 (2) grants preliminary certification of a non-opt-out class under Fed. R. Civ. P.  
10 23(b)(1)(B) for settlement purposes only; (3) approves the form and manner of  
11 Class Notice; and (4) sets a date for a Fairness Hearing.

12 DATED this March 23, 2011.

13 Respectfully submitted,

14 s/ Sarah H. Kimberly

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