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21 **UNITED STATES DISTRICT COURT**
22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

23 **IN RE FREMONT GENERAL**
24 **CORPORATION LITIGATION**

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

26 **CLASS ACTION**

27 **NOTICE OF MOTION AND MOTION**
28 **FOR AWARD OF ATTORNEYS' FEES,**
EXPENSES, AND CASE
CONTRIBUTION AWARDS

DATE : MONDAY, AUGUST 8, 2011
TIME : 10:30 A.M.
CTRM : 790

BEFORE THE HON. JACQUELINE HONG-
NGOC NGUYEN

1 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on Monday, August 8, 2011, at 10:30 a.m., or
3 as soon thereafter as the matter may be heard, in Courtroom 790 of the United
4 States District Court, located at 255 East Temple Street, Los Angeles, CA 90012,
5 before the Honorable Jacqueline Hong-Ngoc Nguyen, United States District Court
6 Judge, Central District of California, Plaintiffs Marcy Johannesson, Wendy Horvat,
7 Robert Anderson, Linda Sullivan, and James K. Hopkins (“Plaintiffs” or “Named
8 Plaintiffs”) will, and hereby do, move the Court for approval of Class Counsel’s
9 attorneys’ fees and expenses, and of case contribution awards to Named Plaintiffs.

10 Plaintiffs hereby move the Court for entry of an Order awarding Class
11 Counsel attorneys’ fees in the amount of \$6,300,000, and for reimbursement of
12 expenses in the amount of \$400,678.02, both of which were incurred in connection
13 with the prosecution and successful resolution of this action. In addition, Class
14 Counsel request that the Court grant a case contribution award to each Named
15 Plaintiff in the amount of \$10,000 in recognition of their valuable service to the
16 Class.

17 This Motion is supported by the attached Memorandum of Points and
18 Authorities; the Declaration of Derek W. Loeser in Support of Plaintiffs’ Motion
19 for Award of Attorneys’ Fees, Expenses, and Case Contribution Awards; the
20 Declarations of Michael D. Braun, Eric E. Castelblanco, Edward W. Ciolko, Lori
21 G. Feldman, Ronald S. Kravitz, Seymour J. Mansfield, David S. Markun, Brian
22 McTigue, Karen H. Riebel, and Jon A. Tostrud; this Court’s file on this matter;
23 oral argument; and any additional evidence that may be presented at the hearing.
24
25
26
27
28

1 Respectfully submitted June 30, 2011.

2 KELLER ROHRBACK L.L.P.

3 /s/ Derek W. Loeser

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

26 **CLASS ACTION**

27 **PLAINTIFFS' MEMORANDUM OF**
28 **POINTS AND AUTHORITIES IN**
SUPPORT OF MOTION FOR AWARD
OF ATTORNEYS' FEES, EXPENSES,
AND CASE CONTRIBUTION AWARDS

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Third Circuit Task Force Report, *Selection of Class Counsel*, 208
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1 Plaintiffs Marcy Johannesson, Wendy Horvat, Robert Anderson, Linda
2 Sullivan, and James K. Hopkins (“Plaintiffs” or “Named Plaintiffs”) respectfully
3 move the Court for an Order awarding Class Counsel attorneys’ fees and
4 reimbursement of expenses, as well as granting Plaintiffs’ case contribution awards
5 in recognition of their valuable service to the Class.

6 I. INTRODUCTION

7 Following hard-fought litigation that encompassed extensive investigation,
8 motion practice, class and merits discovery, contentious mediation, and settlement
9 negotiations, the Parties have now settled this ERISA class action. The Settlement¹
10 provides for a cash payment of \$21,000,000, to be allocated among Class
11 Members’ accounts in the Fremont General Corporation and Affiliated Companies
12 Investment Incentive Plan, as amended through March 19, 2007, and the Fremont
13 General Corporation Employee Stock Ownership Plan, effective January 1, 2000
14 (the “Plans”) based on the loss to each Class Member’s account as a result of
15 investment in Fremont stock. This Settlement was achieved through the dedicated
16 efforts of Class Counsel, working diligently to represent the Plans and Plan
17 participants.

18 On April 26, 2011, the Court issued its Findings and Order Preliminarily
19 Approving Proposed Class Action Settlement, Preliminarily Certifying Class under
20 Rule 23(b)(1)(B) for Settlement Purposes Only, Approving Form and
21 Dissemination of Class Notice, and Setting Time for Hearing on Final Approval
22 (“Preliminary Approval Order”) (Dkt. No. 257). Pursuant to the schedule in the
23 Preliminary Approval Order, Class Counsel are now filing this memorandum,
24 along with the Declaration of Derek W. Loeser (“Loeser Declaration” or “Loeser
25 Dec.”), and the Declarations of Michael D. Braun (“Braun Dec.”), Eric E.

26 ¹ Capitalized terms not otherwise defined herein have the same meaning given
27 them in the Stipulation and Agreement of Settlement – ERISA Class Action (Dkt.
28 No. 255-1).

1 Castelblanco (“Castelblanco Dec.”), Edward W. Ciolko (“Ciolko Dec.”), Lori G.
2 Feldman (“Feldman Dec.”), Ronald S. Kravitz (“Kravitz Dec.”), Seymour J.
3 Mansfield (“Mansfield Dec.”), David S. Markun (“Markun Dec.”), Brian McTigue
4 (“McTigue Dec.”), Karen H. Riebel (“Riebel Dec.”), and Jon A. Tostrud (“Tostrud
5 Dec.”) in support of Plaintiffs’ Motion for Award of Attorneys’ Fees, Expenses,
6 and Case Contribution Awards.

7 This memorandum addresses Class Counsel’s request for an award of
8 attorneys’ fees in the amount of \$6,300,000, which represents 30% of the gross
9 settlement amount, and reimbursement of out-of-pocket litigation expenses of
10 \$400,678.02. In addition, Class Counsel seek approval of a \$10,000 case
11 contribution award for each of the Named Plaintiffs in recognition of their valuable
12 service to the Class.

13 As demonstrated below, the record in this case and the case law in the Ninth
14 Circuit fully support the requested fees, expenses, and case contribution awards,
15 given the risks undertaken by Class Counsel and the outstanding results obtained in
16 this litigation. Accordingly, Class Counsel respectfully request that the Court grant
17 Plaintiffs’ motion for fees, expenses, and case contribution awards.

18 **II. PROCEDURAL AND FACTUAL BACKGROUND**

19 Throughout this litigation, the Parties have engaged in extensive briefing and
20 discovery. Plaintiffs filed their initial complaint on April 24, 2007, and five similar
21 complaints were filed soon thereafter, all of which were consolidated on August
22 17, 2007. On October 25, 2007, Plaintiffs filed their Consolidated Complaint for
23 Breaches of Fiduciary Duty under ERISA (the “Complaint”) against Fremont
24 General Corporation (“Fremont” or the “Company”) and the individual named
25 Defendants, who Plaintiffs alleged served as fiduciaries of the Plans during the
26 Class Period.

1 **A. The Parties' Motion Practice**

2 ERISA breach of fiduciary duty litigation is a rapidly developing area of law
3 with widespread disagreement among the courts as to a variety of important legal
4 issues. Given this landscape, motions practice played a pivotal role in the
5 successful prosecution of this case. Indeed, the Parties engaged in extensive motion
6 practice throughout this litigation.

7 On December 10, 2007, Defendants filed their motion to dismiss the
8 Complaint, which Plaintiffs opposed on January 24, 2008. In an opinion issued on
9 May 30, 2008, Judge Cooper denied Defendants' motion in its entirety. *See In re*
10 *Fremont Gen. Corp. Litig.*, 564 F. Supp. 2d 1156 (C.D. Cal. 2008).

11 Fremont filed for bankruptcy protection under Chapter 11 on June 18, 2008,
12 and as a result, Judge Cooper stayed this Action on June 30, 2008. Plaintiffs timely
13 filed in the bankruptcy proceedings a class proof of claim and separate individual
14 claims for each Named Plaintiff. On February 4, 2009, Plaintiffs filed an amended
15 motion to lift the stay in the district court as to the individual Defendants only,
16 which the Court granted on March 12, 2009. Plaintiffs filed a motion for relief
17 from the automatic stay in the bankruptcy court on September 4, 2009, and on
18 October 6, 2009, the Parties filed a stipulation in the bankruptcy court that stated
19 the Parties' agreement to subordinate any relief in excess of insurance proceeds.
20 Accordingly, on November 3, 2009, the bankruptcy court granted Plaintiffs'
21 motion for relief from the automatic stay, allowing this Action to proceed against
22 Fremont in the district court.

23 On October 26, 2009, Plaintiffs filed their motion for class certification.
24 Defendants filed their opposition on December 28, 2009. On January 25, 2010,
25 Plaintiffs moved to strike the Declaration of Daniel M. Garrett, which Defendants
26 had filed in support of their opposition to class certification. On February 19, 2010,
27
28

1 the Court granted in part and denied in part Plaintiffs' motion to strike and on April
2 15, 2010, granted Plaintiffs' motion for class certification.

3 Defendants filed a petition under Fed. R. Civ. P. 23(f) in the Ninth Circuit
4 on April 29, 2010, seeking permission to appeal the class certification order.
5 Plaintiffs filed their response and opposition to the petition on May 12, 2010.
6 The Ninth Circuit denied Defendants' 23(f) petition on July 26, 2010.

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

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

17 **B. Discovery**

18 The Parties have also engaged in extensive discovery.

19 **1. Investigation of Claims**

20 Class Counsel have conducted a thorough investigation into Plaintiffs'
21 claims and the allegations set forth in the Complaint since the inception of this
22 case. Prior to filing the Complaint, Class Counsel requested and reviewed Plan
23 documents, including trust agreements, summary plan descriptions, Form 5500s,
24 summary annual reports, and a Plan prospectus. In addition, Plaintiffs have, among
25 other things:

- 26 • exchanged and reviewed initial disclosures under Fed. R. Civ. P.
27 26(a)(1);

- 1 • researched and reviewed publicly available information, including
2 news articles, congressional testimony and reports, governmental and
3 non-governmental agency reports and filings, and SEC filings;
- 4 • served two sets of requests for production of documents on
5 Defendants and seven document subpoenas on non-party witnesses;
- 6 • engaged in detailed negotiations regarding production of relevant
7 information and documents to ensure full and fair production of
8 merits-based information to which Plaintiffs were entitled under the
9 Federal Rules;
- 10 • established an electronic document depository for the litigation to
11 efficiently review, categorize, code, and manage documents produced
12 by Defendants and others; and
- 13 • reviewed and analyzed over 570,000 pages of documents that the
14 document discovery process yielded.

15 Defendants also served requests for production and interrogatories on each
16 Named Plaintiff.

17 **2. Depositions**

18 Numerous depositions were taken in this action. In preparation for their
19 opposition to Plaintiffs' motion for class certification, Defendants deposed each
20 Named Plaintiff: Linda Sullivan on November 30, 2009; Marcy Johannesson on
21 December 4, 2009; James Hopkins on December 4, 2009; Robert Anderson on
22 December 7, 2009; and Wendy Horvat on December 17, 2009.

23 In addition, Plaintiffs deposed a number of witnesses and certain individual
24 Defendants. On February 12, 2010, Plaintiffs deposed Daniel M. Garrett, an expert
25 that Defendants' relied on in their opposition to class certification. Plaintiffs also
26 conducted three depositions under Fed. R. Civ. P. 30(b)(6) that addressed the
27 structure and administration of the Plans on February 16, 2010, August 18, 2010,
28 and August 26, 2010. Additionally, Plaintiffs deposed Defendants Raymond G.
Meyers and Wayne R. Bailey on August 26, 2010, and September 24, 2010,

1 respectively, and witnesses, Monique Johnson, David S. DePillo, Richard A.
2 Sanchez, and Gina Juarez on September 3, 10, 14, and 17, respectively.

3 **C. Retaining and Consulting with Experts**

4 Class Counsel retained and relied on experts during class certification
5 briefing and had retained and/or consulted testifying experts on other key issues,
6 including fiduciary responsibility, bank accounting and regulatory reporting, the
7 financial condition of the Company, ERISA § 404(c), and the measurement of the
8 Plans' losses. Loeser Dec. ¶¶ 18, 33.

9 **D. Preparations for Trial**

10 The Court set a trial date for June 7, 2011, in its Order Re Court Trial (Dkt.
11 No. 223). Accordingly, trial preparation was well underway when the Parties
12 reached agreement on the Settlement. For example, Class Counsel had prepared
13 detailed strategies for proving each claim, developed the order of proof at trial, and
14 identified key documents and witnesses for trial.

15 **E. Settlement Negotiations and Mediation**

16 While Class Counsel were simultaneously engaged in discovery, working
17 with experts, and preparing for trial, the Parties discussed the possibility of
18 settlement and retained an experienced mediator, the Hon. Daniel H. Weinstein
19 (ret.). *Id.* at ¶ 33. As detailed in the memorandum in support of Plaintiffs' Motion
20 for Preliminary Approval of Proposed Settlement (Dkt. No. 254) ("Preliminary
21 Approval Memo"), the Settlement was achieved as a result of hard-fought, arm's-
22 length negotiations occurring from September 2010 through the execution of the
23 Settlement Agreement on March 22, 2011. Class Counsel successfully negotiated a
24 cash payment of \$21 million for the Class. This process was in all respects
25 thorough, adversarial, and professional, resulting in the recovery of a substantial
26 amount of the Plans' total losses in the event of a favorable ruling on all claims.

1 **III. PLAINTIFFS' COUNSEL'S INVESTMENT OF TIME AND MONEY**
2 **IN THE CASE**

3 Class Counsel expended a substantial amount of time and money on a
4 contingent basis to prosecute this case through settlement. As of June 28, 2011,
5 Plaintiffs' Counsel have already devoted more than 10,550 professional hours to
6 this case—representing a lodestar of \$4,341,599.30—and have incurred
7 \$400,678.02 in out-of-pocket expenses. Loeser Dec. ¶¶ 13, 35-36; *see also* Loeser
8 Dec. Exs. A and B; Braun Dec. Exs. A and B; Castelblanco Dec. Exs. A and B;
9 Ciolko Dec. Exs. A and B; Feldman Dec. Exs. A and B; Kravitz Dec. Exs. A and
10 B; Mansfield Dec. Exs. A and B; Markun Dec. Exs. A and B; McTigue Dec. Exs.
11 A and B; Riebel Dec. Exs. A and B; Tostrud Dec. Exs. A and B.

12 Work on this case has not ended. Class Counsel will continue to incur
13 additional attorney hours in connection with final approval of the Settlement,
14 including drafting the memorandum in support of final approval and preparing for
15 and appearing at the Fairness Hearing. Beyond that, based on our experience with
16 numerous other settlements of comparable cases, Class Counsel anticipates that we
17 will spend a substantial amount of additional time over the next several months or
18 more following final approval responding to inquiries from Class Members,
19 working with the Settlement Administrator, and generally overseeing
20 implementation of the Settlement. Loeser Dec. ¶¶ 14-15.

21 Class Counsel will not apply later for additional fees for the hours worked
22 after final Court approval of the Settlement. We therefore also performed the
23 lodestar cross check analysis based on total fees including the estimate of \$100,000
24 for future work that will be required to implement the Settlement and Plan of
25 Allocation, yielding a lodestar of \$4,441,599.30.
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1 **IV. LEGAL STANDARD GOVERNING AWARD OF ATTORNEYS' FEES**
2 **IN ERISA FIDUCIARY BREACH CLASS ACTIONS**

3 Pursuant to the “common fund” doctrine, Class Counsel request an award of
4 attorneys’ fees based on a 30% share of the \$21 million settlement: \$6.3 million.
5 This method of calculating the fee award—based on a percentage-of-the-fund—is
6 both straightforward and fair under the circumstances of the case. Moreover, cross-
7 checking this fee request against the lodestar fee calculation validates its
8 reasonableness, as explained below.

9 **A. The Common Fund Doctrine Applies**

10 When a settlement confers a “substantial benefit” upon a class of
11 beneficiaries, attorneys are entitled to recover attorneys’ fees from the fund
12 recovered. *Fischel v. Equitable Life Assurance Soc’y of the U.S.*, 307 F.3d 997,
13 1006 (9th Cir. 2002). The doctrine is ““based on the equitable notion that those
14 who have benefited from litigation should share in its costs.”” *In re Coordinated*
15 *Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th
16 Cir. 1997) (quoting *Fla. v. Dunne*, 915 F.2d 542, 546 (9th Cir. 1990)).

17 As the Ninth Circuit has elaborated, the common fund doctrine applies
18 where “(1) the class of beneficiaries is sufficiently identifiable, (2) the benefits can
19 be accurately traced, and (3) the fee can be shifted with some exactitude to those
20 benefitting.” *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir.
21 1989) (citation omitted). These criteria are met where “each member of a certified
22 class has an undisputed and mathematically ascertainable claim to part of a lump-
23 sum [settlement] recovered on his behalf.” *Id.* (citation omitted). The ultimate goal
24 in determining fees is to reasonably compensate counsel for their efforts in creating
25 the common fund. *Id.* at 271-72.

26 The common fund doctrine is appropriate even when the statute under which
27 plaintiffs sued has a fee-shifting provision, such as ERISA § 502(g)(1), 29 U.S.C.
28 § 1132(g)(1). *Staton v. Boeing, Co.*, 327 F.3d 938, 967 (9th Cir. 2003); *see also*

1 *Bowen v. SouthTrust Bank of Ala.*, 760 F. Supp. 889, 894 (M.D. Ala. 1991)
2 (explaining that awarding attorneys’ fees from the common fund was consistent
3 with ERISA because the settlement fund was paid for by the defendants, the fund
4 explicitly provided that an unspecified sum would be used for attorneys’ fees, and
5 the award was consistent with “Congress’s intention that, in ERISA cases, ‘the
6 offending party bear the costs of the award rather than . . . plan participants”).

7 All three of the criteria enumerated in *Graulty* are met here as a result of the
8 \$21 million settlement, which undeniably constitutes a “common fund.” *See*
9 *Williams v. MGM-Pathe Comm’ns. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (per
10 curiam) (holding that a class action settlement fund was a common fund). First, all
11 Class Members can be identified through the Plans’ records that track all
12 participants and beneficiaries of the Plans. Second, the Settlement Agreement
13 specifically sets forth that each Class Member will obtain a proportional share of
14 the Settlement pursuant to the Plan of Allocation. Settlement Agreement ¶ 4.6.1;
15 *see Graulty*, 886 F.3d at 271. Third, as contemplated by the Settlement
16 Agreement, the attorneys’ fees will be paid from the common fund as part of the
17 distribution of the Class award. *See* Settlement Agreement ¶¶ 3.4-3.5; *Bowen*, 760
18 F. Supp. at 894 (concluding that the settlement agreement’s provision for
19 attorneys’ fees from the common fund were relevant to the court’s consideration).
20 Therefore, the fee can be shifted with exactitude. *See Graulty*, 886 F.3d at 271.
21 Class Counsel thus respectfully request that the Court approve payment of
22 attorneys’ fees and costs, including case contribution awards, from the common
23 fund created by virtue of the Settlement negotiated by Class Counsel.

24 **B. Class Counsel’s Fee Award Should Be Based on the Percentage-of-the-**
25 **Fund Method**

26 In this Circuit, the district court has discretion to award fees in common fund
27 cases based on either the lodestar/multiplier method or the percentage-of-the-fund
28 method. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th

1 Cir. 1994) (“WPPSS”). In the percentage-of-the-fund method, the attorneys are
2 awarded a reasonable percentage of the common fund. *Grauly*, 886 F.3d at 272.
3 In contrast, under the lodestar method, the district court multiplies the attorneys’
4 reasonable number of hours by the attorneys’ reasonable rate. *Pa. v. Del. Valley*
5 *Citizens’ Council for Clean Air*, 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L. Ed. 2d
6 439 (1986). The district court may, and in appropriate circumstances must,
7 increase the lodestar calculation by using an additional “multiplier” to arrive at a
8 reasonable fee. *Blum v. Stevenson*, 465 U.S. 886, 888, 104 S. Ct. 1541, 79 L. Ed.
9 2d 891 (1984); *Fischel*, 307 F.3d at 1008.

10 The Ninth Circuit has frequently expressed its approval of the use of the
11 percentage method in common fund cases. *See Vizcaino v. Microsoft Corp.*, 290
12 F.3d 1043 (9th Cir. 2002); *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir.
13 1993); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir.
14 1990). Indeed, many courts in this district use the percentage-of-the-fund method.
15 *See, e.g., Carter v. Anderson Merchandisers, L.P.*, No. 08-25, 2010 WL 1946757,
16 at *2 (C.D. Cal. May 11, 2010) (relying on the percentage-of-the-fund method and
17 listing cases).

18 The rationale for employing the percentage-of-the-fund method is three-fold.
19 First, the percentage method is consistent with the practice in the private
20 marketplace where contingent fee attorneys are customarily compensated with a
21 percentage of the recovery.

22 Second, the percentage method directly aligns the interests of the class and
23 its counsel to prosecute and resolve all claims quickly and efficiently. *See, e.g.,*
24 *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986). It provides class counsel with
25 a strong incentive to effectuate the maximum possible recovery in the shortest
26 amount of time, which is a tangible benefit to class members and the judicial
27 system. Under the lodestar approach, there is an “inherent incentive to prolong the
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1 litigation until sufficient hours have been expended.” *Manual for Complex*
2 *Litigation* (Fourth) § 14.121 (2004 (“*Manual*”)); *see also Vizcaino*, 290 F.3d at
3 1050 n.5 (“The lodestar method is merely a cross-check on the reasonableness of a
4 percentage figure, and it is widely recognized that the lodestar method creates
5 incentives for counsel to expend more hours than may be necessary on litigating a
6 case so as to recover a reasonable fee”). Consequently, one of the nation’s
7 leading scholars in the field of class actions and attorneys’ fees, Professor Charles
8 Silver of the University of Texas School of Law, has concluded that the percentage
9 method of awarding fees is the only method of fee awards that is consistent with
10 class members’ due process rights. *See* Charles Silver, *Due Process and the*
11 *Lodestar Method: You Can’t Get There from Here*, 74 Tul. L. Rev. 1809 (2000).

12 Third, use of the percentage method decreases the burden imposed on the
13 court by eliminating a comprehensive and time-consuming “lodestar” analysis
14 while assuring that the beneficiaries do not experience undue delay in receiving
15 their share of the settlement. *See In re Activision Sec. Litig.*, 723 F. Supp. 1373,
16 1375 (N.D. Cal. 1989); *Manual, supra* (noting that courts increasingly recognize
17 that “the lodestar method is difficult to apply, time-consuming to administer,
18 inconsistent in result, and capable of manipulation” to reach a predetermined
19 result).

20 Furthermore, the Supreme Court has consistently endorsed awarding
21 attorneys’ fees using the percentage-of-the-fund method. *See, e.g., Blum*, 465 U.S.
22 at 900 n.16; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79, 100 S. Ct. 745, 62
23 L. Ed. 2d 676 (1980); *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 165-67, 59 S.
24 Ct. 777, 83 L. Ed. 1184 (1939). Accordingly, the Ninth Circuit has upheld common
25 fund fee awards based on the percentage-of-the-fund method that have been
26 “cross-checked” by the lodestar for reasonableness. *See, e.g., Vizcaino*, 290 F.3d at
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1 1050. Thus, Class Counsel request that the Court rely on the percentage-of-the-
2 fund method here.

3 **C. A Fee Award Based on 30% of the Common Fund Is Fair and**
4 **Reasonable**

5 The Ninth Circuit has adopted a 25% “benchmark” for attorneys’ fee awards
6 in cases with a common fund recovery. *See e.g., Graulty*, 886 F.2d at 272 (citing
7 with approval the adoption of a 25% benchmark in *Mashburn v. Nat’l Healthcare,*
8 *Inc.*, 684 F. Supp. 679, 692 (M.D. Ala. 1988)); *Vizcaino*, 290 F.3d at 1047. This
9 benchmark can “be adjusted upward or downward to account for any unusual
10 circumstances.” *Graulty*, 886 F.2d at 272-73; *see also Vizcaino*, 290 F.3d at 1048
11 (affirming 28% fee and finding that the benchmark is “a starting point for analysis,
12 [but] may be inappropriate in some cases”).

13 Accordingly, courts in the Ninth Circuit, including this District, routinely
14 grant fees in excess of 25% of the total recovery under appropriate circumstances.
15 *See, e.g., Vizcaino*, 290 F.3d at 1050 (affirming 28% fee); *In re Syncor ERISA*
16 *Litig.*, No. 03-2446 (Mar. 30, 2009) (Order Re Motion for Award of Attorney’s
17 Fees) (awarding 33.3%); *In re Omnivision Techs., Inc.*, No. 04-2297, 2007 WL
18 4293467, at *11 (N.D. Cal. Dec. 6, 2007) (awarding 28%); *In re Heritage Bond*
19 *Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *23 (C.D. Cal. June 10, 2005)
20 (awarding 33.3%).

21 In *Vizcaino*, the Ninth Circuit held that “[s]election of the benchmark or any
22 other rate must be supported by findings that take into account all of the
23 circumstances of the case.” 290 F.3d at 1049. The court found the 28% fee was
24 reasonable because of: (1) the exceptional results achieved for the class; (2) the
25 extreme riskiness of the litigation; (3) the benefits generated beyond the cash
26 settlement fund; and (4) the financial burdens of representing the class on a
27 contingency basis. 290 F.3d at 1048-50. The *Manual* recommends consideration of
28 three additional factors: (1) any objections by class members, (2) the skill and

1 efficiency of the attorneys involved, and (3) attorneys' fee awards in other cases.
2 *Manual, supra*. Application of all seven of these factors strongly supports the
3 requested fee of 30% of the common fund here.

4 **1. Class Counsel Obtained Exceptional Results**

5 As discussed in the Preliminary Approval Memo, the \$21 million recovery
6 represents a substantial amount of the Plans' total potential recovery in this case.
7 To put the amount of the Settlement into context, it is necessary to consider the
8 possible outcomes at trial, based on different possible breach dates and measures of
9 damages. For example, assuming liability were established, principal damages—
10 including both holder and purchaser losses—could range from approximately
11 \$194,750,093 down to \$42,207,115, with the Settlement representing 10.8% to
12 49.8% (respectively) of total possible losses. Loeser Dec. at ¶¶ 23-25. If Plaintiffs
13 were limited to purchaser damages only, the principal damages would decrease to a
14 range of approximately \$81,759,806 to \$11,464,658, representing 25.7% to
15 183.2% of total possible losses. *Id.*

16 Furthermore, courts are not of one mind as to what Plaintiffs must show to
17 prove that company stock became an imprudent investment for a retirement plan.
18 Compare *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008) (holding
19 that a "myriad of circumstances" can require fiduciaries to divest company stock
20 under ERISA's "prudent man" standard) with *Quan v. Computer Scis. Corp.*, 623
21 F.3d 870, 882 (9th Cir. 2010) (requiring plaintiffs to show either that "the
22 company's viability as an ongoing concern" is threatened or there was "a
23 precipitous decline in the employer's stock . . . combined with evidence that the
24 company is on the brink of collapse or is undergoing serious mismanagement"
25 (internal quotations omitted)). Whatever the standard, Plaintiffs' likelihood of
26 success increases as the condition of Fremont deteriorated. Accordingly, the start
27 of Class Period \$194,750,093 damage figure is far less likely an outcome than the
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1 damages resulting from later breach dates, such as February 27, 2007, or March 7,
2 2007, which would result in damages estimates of approximately \$72 million and
3 \$42 million, respectively. Loeser Dec. at ¶ 22. In light of the range of potential
4 losses—and the more likely provable losses, in particular—the results achieved in
5 this case are outstanding. *Id.* at ¶ 26; *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d
6 454, 459 (9th Cir. 2000) (approving settlement that comprised one sixth of the
7 plaintiffs’ potential recovery); Richard M. Phillips & Gilbert C. Miller, *The Private*
8 *Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and*
9 *Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 Bus. Law. 1009,
10 1029 & n.131 (1996) (finding that typical recoveries are within range of 7-11% of
11 claimed losses).

12 **2. The Litigation Was Extremely Risky**

13 ERISA company stock cases such as this one contain a number of risks, in
14 part because ERISA is a specialized and complex area of the law, which is still
15 being developed. *In re Enron Corp. Sec., Derivative and “ERISA” Litig.*, 228
16 F.R.D. 541, 565 (S.D. Tex. 2005) (finding that the “complexity, expense and likely
17 duration of the litigation . . . are self evident and exceptional”); *In re Global*
18 *Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (explaining
19 that “numerous legal issues concerning fiduciary liability in connection with
20 company stock in 401(k) plans remain unresolved” and that “[t]hese uncertainties
21 would substantially increase the ERISA cases’ complexity, duration, and expense –
22 and thus militate in favor of settlement approval”).

23 While Plaintiffs believe the claims in this case are solidly grounded in
24 ERISA law, several similar ERISA company stock cases involving the financial
25 meltdown of 2008 were dismissed at the pleading stage after the Consolidated
26 Complaint was filed. *See, e.g., In re Bank of Am. Corp. Sec., Derivative, & ERISA*
27 *Litig.*, 756 F. Supp. 2d 330 (S.D.N.Y. 2010); *In re Wachovia Corp. ERISA Litig.*,

1 No. 09-262, 2010 WL 3081359 (W.D.N.C. Aug. 6, 2010); *In re Citigroup ERISA*
2 *Litig.*, No. 07-9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009); *In re*
3 *Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 822 (S.D. Ohio 2009).
4 Those cases demonstrate the significant risks plaintiffs face in cases of this type.
5 Moreover, to date, only four ERISA company stock cases have gone to trial, and in
6 each instance, defendants prevailed. *See Brieger v. Tellabs, Inc.*, 659 F. Supp. 2d
7 967 (N.D. Ill. 2009); *Nelson v. Hodowal (IPALCO)*, 512 F.3d 347 (7th Cir. 2008);
8 *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756 (E.D. Va. 2006); *Landgraff v.*
9 *Columbia/HCA Healthcare Corp.*, No. 98-90, 2000 WL 33726564 (M.D. Tenn.
10 May 24, 2000).

11 **3. The Settlement Provides Benefits Beyond the Settlement Fund**

12 The Settlement provides the Class with the benefit of substantial financial
13 recovery without further delay inherent in continued litigation. This is particularly
14 important here given the composition of the Class: former Fremont employees,
15 many of whom have undoubtedly suffered significant financial hardships
16 (including the loss of much of their retirement savings and their jobs) in the
17 economic turmoil of 2008 and throughout the recession. The immediate restoration
18 to their retirement savings of their allocable share of the recovery will provide a
19 meaningful benefit beyond the dollar amount recovered: liquidity for Class
20 Members in immediate need of the funds and reduced financial anxiety for many
21 others.² As Judge Harmon aptly put it when approving one of the settlements in
22 the Enron ERISA litigation: “The settlement at this point would save great expense
23 and would give the Plaintiffs hard cash, a bird in the hand.” *Enron*, 228 F.R.D. at
24 566.

25
26 ² In *Vizcaino*, the Ninth Circuit noted the potential significance of a prompt
27 settlement for “class members in need of immediate relief.” 290 F.3d at 1050 n.5.
28 In the current economic climate, many of the Class Members likely find
themselves in exactly that situation.

1 **4. Class Counsel Carried the Financial Burdens of this Litigation**

2 Class Counsel accepted this matter on a contingent basis with the attendant
3 risk that Counsel would receive no fee or expense reimbursement. As is evident
4 from the attorney time and expenses invested in the case to date, Class Counsel
5 were committed to litigating the case through trial and beyond. Furthermore,
6 litigating this case required Class Counsel to forgo significant other work. All of
7 “[t]hese burdens are relevant circumstances.” *Vizcaino*, 290 F.3d at 1050.

8 **5. No Objections to the Settlement Have Been Filed to Date**

9 Notice of the Settlement has been mailed to the over 5,000 Class Members
10 and published per the Preliminary Approval Order. As of the date of this filing, *no*
11 Class Member has objected to the Settlement. The absence of objections thus far
12 demonstrates that Class Members overwhelmingly support the Settlement. If any
13 objections are submitted between this filing and the objection deadline (July 18,
14 2011), Plaintiffs’ will respond to those in a reply brief.

15 **6. Class Counsel Are Highly Skilled and Acted Efficiently**

16 Class Counsel are or have been lead or co-lead counsel in important ERISA
17 breach of fiduciary duty cases throughout the nation, including cases against banks
18 and mortgage lenders involved in the recent mortgage crisis. For example, Keller
19 Rohrback serves or has served as lead or co-lead counsel in ERISA fiduciary
20 breach class actions filed against Countrywide Financial Corp., IndyMac Bank,
21 Washington Mutual, Merrill Lynch, and Bear Stearns, and served as co-lead
22 counsel in the *Enron*, *WorldCom*, and *Global Crossing* ERISA fiduciary class
23 actions. Over the course of litigating a substantial number of these types of cases,
24 Keller Rohrback has developed both an expertise and a facility with maneuvering
25 through the labyrinth of ERISA law effectively and efficiently, as demonstrated by
26 the results in this case and the many other cases of the same type successfully
27 litigated by Class Counsel. *See* Loeser Dec. ¶ 27, Ex. C, Keller Rohrback ERISA
28 Litigation Group Resume.

1 **7. Attorneys' Fee Awards in Other Cases Support a 30% Fee Here**

2 Courts in this Circuit have routinely awarded fees of more than 25% in
3 common fund cases. *See, e.g., Vizcaino*, 290 F.3d at 1050 (affirming 28% fee); *In*
4 *re Syncor ERISA Litig.*, No. 03-2446 (Mar. 30, 2009) (Order Re Motion for Award
5 of Attorney's Fees) (awarding 33.3%); *Omnivision Techs.*, 2007 WL 4293467, at
6 *11 (awarding 28%); *Heritage Bond*, 2005 WL 1594403, at *23 (awarding
7 33.3%); *Blyler v. Agee*, No. 97-0332 (D. Id. Aug. 25, 2004) (Order and Judgment)
8 (awarding 30%); *In re Informix Corp. Sec. Litig.*, No. 97-1289 (N.D. Cal. Nov. 23,
9 1999) (awarding 30%). Similarly, courts elsewhere have awarded 30% or more of
10 the common fund in ERISA company stock litigation. *See, e.g., In re Schering-*
11 *Plough Corp. ERISA Litig.*, No. 03-1204 (D.N.J. Dec. 19, 2011) (Order and Final
12 Judgment) (awarding 30%); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146-47
13 (S.D.N.Y. 2010) (awarding 33.3%); *In re Xerox ERISA Litig.*, No. 02-1138 (D.
14 Conn. Apr. 14, 2009) (Order granting Motion for Attorneys' Fees) (awarding
15 30%); *In re EDS ERISA Litig.*, No. 03-00126 (E.D. Tex. Aug. 6, 2008) (Minute
16 Order) (awarding 33%); *In re General Motors ERISA Litig.*, No. 05-71085 (E.D.
17 Mich. Aug. 28, 2007) (awarding 30%); *In re Household Int'l, Inc. ERISA Litig.*,
18 No. 02-7921 (N.D. Ill. Nov. 22, 2004) (Minute Order) (awarding 30%).

19 Review of all seven of the above factors confirms that Class Counsel's
20 request for 30% of the common fund as an award for attorneys' fees is reasonable
21 and merited. The exceptional results obtained by Class Counsel, despite vigorous
22 defense by several leading defense firms, the high risk and complexity of the case,
23 and the skill and efficiency with which the case was brought to successful
24 resolution by Class Counsel confirm the reasonableness of the award.

25 **D. The Lodestar Cross-Check Confirms the Reasonableness of an Award**
26 **of 30% of the Common Fund**

27 Courts in the Ninth Circuit often examine the lodestar calculation as a cross-
28 check on the percentage fee award to ensure that counsel will not receive a

1 “windfall.” *Vizcaino*, 290 F.3d at 1050 (“[W]hile the primary basis of the fee
2 award remains the percentage method, the lodestar may provide a useful
3 perspective on the reasonableness of a given percentage award.”). The cross-check
4 is not designed to be a “full-blown lodestar inquiry,” but rather an estimation of the
5 value of counsel’s investment in the case. Third Circuit Task Force Report,
6 *Selection of Class Counsel*, 208 F.R.D. 340, 422-23 (2002) (noting that “[t]he
7 lodestar remains difficult and burdensome to apply, and it positively encourages
8 counsel to run up the bill, expending hours that are of no benefit to the class”).

9 The cross-check analysis is a two-step process. First, the lodestar is
10 determined by multiplying the number of hours reasonably expended by the
11 reasonable rates requested by the attorneys. *See Caudle v. Bristow Optical Co.*, 224
12 F.3d 1014, 1028 (9th Cir. 2000). Second, the court calculates the multiplier
13 required to match the lodestar to the percentage-of-the-fund request and determines
14 whether the multiplier falls within the accepted range for such a case. Here, the
15 lodestar cross-check confirms that the 30% request is reasonable.

16 **1. Plaintiffs’ Counsel’s Total Lodestar Is Based on Reasonable**
17 **Hours Expended and Reasonable Rates**

18 Plaintiffs’ Counsel and staff have spent a total of 10,552.73 hours working
19 on this case. *See* Loeser Dec. Ex. A; Braun Dec. Ex. A; Castelblanco Dec. Ex. A;
20 Ciolko Dec. Ex. A; Feldman Dec. Ex. A; Kravitz Dec. Ex. A; Mansfield Dec. Ex.
21 A; Markun Dec. Ex. A; McTique Dec. Ex. A; Riebel Dec. Ex. A; Tostrud Dec. Ex.
22 A. As reflected in the Loeser Declaration and above, the hours claimed were
23 incurred by, among other things, investigating the claims against Defendants,
24 reviewing and analyzing Plan documents and information, preparing the Complaint
25 and amendments thereto, conducting necessary legal research, retaining and
26 working with experts, briefing and arguing Defendants’ motions to dismiss,
27 briefing and arguing the motion for class certification, briefing Defendants’ effort
28 to appeal the class certification ruling, briefing and responding to summary

1 judgment motions, conducting extensive discovery, preparing for and taking or
2 defending numerous depositions, engaging in extensive mediation and settlement
3 negotiations, and preparing the necessary agreements and pleadings related to the
4 Settlement. Loeser Dec. ¶¶ 3-4. Given these activities, the complexity of the legal
5 issues involved, and the intensity of Defendants’ defense, the hours incurred are
6 reasonable. Further, as stated previously, Class Counsel anticipates expending
7 substantial additional hours on this litigation to bring it to a conclusion, for which
8 we will not seek additional compensation. *Id.* ¶¶ 14-15. Thus, these additional
9 hours are appropriately taken into account when performing the lodestar cross-
10 check.

11 Plaintiffs’ Counsel’s rates, between \$220 and \$750 per hour, are based on
12 each attorney’s position, experience level, and location. *See* Loeser Dec. ¶¶ 8-11;
13 Braun Dec. ¶ 3; Castelblanco Dec. ¶ 3; Ciolko Dec. ¶ 3; Feldman Dec. ¶ 3; Kravitz
14 Dec. ¶ 3; Mansfield Dec. ¶ 3; Markun Dec. ¶ 3; McTigue Dec. ¶ 3; Riebel Dec.
15 ¶ 3; Tostrud ¶ 3. These rates are reasonable because they are based on the
16 prevailing rates in the communities in which Plaintiffs’ Counsel practice or on
17 hourly rates obtained by counsel in other complex or class action litigation.
18 *Bouman v. Block*, 940 F.2d 1211, 1235 (9th Cir. 1991) (finding that declarations
19 submitted by counsel of the “prevailing market rate in the relevant community . . .
20 [are] sufficient to establish the appropriate [billing] rate for lodestar purposes”);
21 *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2003)
22 (ruling that in ERISA cases, “it is appropriate to consider the declarations of
23 attorneys in other jurisdictions because ERISA cases involve a national standard
24 and attorneys practicing ERISA law in the Ninth Circuit tend to practice in
25 different districts”). Taking into account the several factors discussed above,
26 including the results achieved, the non-monetary benefits of the Settlement, the
27
28

1 complexity and risk of the litigation, and the skill and experience of counsel,
2 Plaintiffs' Counsel's rates are reasonable and appropriate in this case.

3 Accordingly, Plaintiffs' Counsel's reasonable hours and reasonable rates
4 produce a current lodestar of \$4,341,599.30, and estimating and taking into
5 account work that will be necessary following final approval, a total lodestar of
6 \$4,441,599.30.

7 **2. The Cross-Check Lodestar Multiplier Here Falls Well Within the**
8 **Accepted Range under Ninth Circuit Authority**

9 The 1.45 and 1.42 multipliers produced by cross-checking the 30% against
10 the current \$4,341,599.30 lodestar and the \$4,441,599.30 estimated total lodestar
11 are significantly below the range typically approved in the Ninth Circuit. *See, e.g.,*
12 *Vizcaino*, 290 F. 3d at 1051 (affirming 3.65 multiplier); *Craft v. County of San*
13 *Bernardino*, 624 F. Supp. 2d 1113, 1125-27 (C.D. Cal. 2008) (5.2 multiplier and
14 collecting similar cases); *In re IndyMac ERISA Litig.*, No. 08-4579 (C.D. Cal. Jan.
15 19, 2011) (Final Order and Judgment) (1.95 multiplier); *Alvidres v. Countrywide*
16 *Fin. Corp.*, No. 07-5810 (C.D. Cal. Nov. 16, 2009) (Final Order and Judgment)
17 (2.4 multiplier); *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980) (3.5 multiplier).
18 Similarly, other ERISA company stock cases outside the Ninth Circuit confirm that
19 a multiplier of 1.45 or 1.42 is reasonable. *See, e.g., In re Merrill Lynch ERISA*
20 *Litig.*, No. 07-9633 (S.D.N.Y. Aug. 4, 2009) (Order and Final Judgment) (2.9
21 multiplier); *In re HealthSouth ERISA Litig.*, No. 03-1700 (N.D. Ala. June 28,
22 2006) (Order and Final Judgment) (2.2 multiplier); *In re Bristol Myers Squibb Co,*
23 *ERISA Litig.*, No. 02-10129 (S.D.N.Y. Oct. 12, 2005) (Order) (3.9 multiplier); *In*
24 *re Royal Dutch/Shell Transport ERISA Litig.*, No. 04-1398 (D.N.J. Aug. 30, 2005)
25 (Order Approving Settlement) (3.3 multiplier); *In re Honeywell Int'l ERISA Litig.*,
26 No. 03-1214 (D.N.J. July 20, 2005) (Order) (3.7 multiplier); *In re Dynegy ERISA*
27 *Litig.*, No. 02-3076 (S.D. Tex. Dec. 10, 2004) (Final Order) (4.4 multiplier); *In re*
28

1 *Household Int'l, Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (Minute
2 Order) (4.8 multiplier).

3 Even when courts in the Ninth Circuit have relied on the lodestar method
4 alone to award attorneys' fees, these courts "have routinely enhanced the lodestar
5 to reflect the risk of nonpayment in common-fund cases" by using a multiplier.
6 *WPPSS*, 19 F.3d at 1299-1300. The rationale for enhancing the lodestar figure
7 derives in part from the established practice in the private legal market of
8 rewarding attorneys who take contingency cases with the risk of non-payment by
9 paying them "a premium over their normal hourly rates" when they win. *Id.* at
10 1299. Moreover, the multiplier incentivizes counsel to resolve litigation as quickly
11 as possible, rather than cause delay merely to generate additional attorneys' fees.
12 Thus, the Ninth Circuit has found that even though a district court generally has
13 discretion to apply a multiplier to compensate for the risk of nonpayment, "[i]t is
14 an abuse of discretion to fail to apply a risk multiplier . . . when: (1) attorneys take
15 a case with the expectation that they will receive a risk enhancement if they
16 prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that
17 the case was risky." *Fischel*, 307 F.3d at 1010. This is precisely the case here.

18 Application of these principles supports awarding the fee sought here. First,
19 the lodestar in this case does not reflect the risk of nonpayment. *See*, *Loeser Dec.*
20 ¶ 13. Second, in pursuing this litigation, Class Counsel reasonably believed that
21 they would receive additional compensation for the risk of nonpayment in light of
22 Ninth Circuit law requiring a multiplier where there is such a risk. *See Fischel*, 307
23 F.3d at 1008; *WPPSS*, 19 F.3d at 1299-1301. Thus, basing the award of attorneys'
24 fees in this case on hourly rates alone would contradict controlling Ninth Circuit
25 authority. *See Fischel*, 307 F.3d at 1008 ("[T]he district court failed fully to
26 analyze the risk factor and thus abused its discretion in determining whether to
27 award a risk multiplier."). Finally, as noted above, Class Counsel undertook this
28

1 case at great risk and produced an excellent and timely settlement. Thus, a
2 multiplier enhancing the lodestar figure to compensate for the risk of non-payment
3 and for the benefit of resolving litigation in a timely and efficient manner is
4 appropriate.

5 While this litigation presented substantial risk and complexity, Class
6 Counsel demonstrated considerable ability to produce consistently favorable
7 results for the Class. Litigating these issues involved numerous parties, documents,
8 and experts located throughout the county; motion practice has consumed vast
9 resources of time and personnel; and settlement has required months of
10 negotiation. Thus, a multiplier of 1.45 or 1.42 is reasonable because it accounts for
11 the risk and complexity of the litigation while also recognizing that the Settlement
12 resolves this litigation before trial and any other steps in the proceedings that
13 would have generated a substantially larger lodestar than presented at this point.

14 **V. PLAINTIFFS' COUNSEL SHOULD BE REIMBURSED FOR THEIR**
15 **EXPENSES AND PLAINTIFF SHOULD BE COMPENSATED**

16 Class Counsel also requests reimbursement for the reasonable and necessary
17 expenses advanced by all Plaintiffs' Counsel to prosecute this litigation since its
18 inception. These expenses, totaling \$400,678.02, are detailed in the Loeser
19 Declaration and the declarations and supporting exhibits submitted by other
20 Plaintiffs' Counsel and filed herewith. Such expenses are routinely awarded
21 following settlement of common fund cases. *See Linney v. Cellular Alaska P'ship*,
22 No. 96-3008, 1997 WL 450064, at *7 (N.D. Cal. July 18, 1997) ("It appears to the
23 Court that the costs requested are reasonable in light of the complexity of the
24 litigation and the number of counsel involved, and [the costs of litigation] are
25 therefore approved by the Court.").

26 Costs have been and continue to be incurred to provide Class Notice and
27 follow up, which the Settlement Agreement states shall be deducted from the Gross
28

1 Settlement Fund. Settlement Agreement ¶ 4.2. These costs are not included in
2 Class Counsel’s request for award of litigation expenses.

3 Class Counsel advanced reasonable and necessary expenses for mediation
4 services, experts, travel, photocopying, legal research, telephone, facsimile,
5 postage, and other costs that pertain to this litigation and which are incurred
6 routinely in any litigation of this size and complexity. *See, e.g., McPhail v. First*
7 *Command Fin. Planning, Inc.*, No. 05-179, 2009 WL 839841, at *8 (S.D. Cal.
8 Mar. 30, 2009) (awarding \$815,850.17 in costs to counsel); *Kolar v. Rite Aid*
9 *Corp.*, No. 01-1229, 2003 WL 1257272, at *6 (E.D. Pa. Mar. 11, 2003) (finding
10 \$159,059.77 in costs and expense were “reasonable for a complex matter that has
11 been pending” for two years).

12 The Settlement Agreement expressly provides for payment of Class
13 Counsel’s litigation expenses, and, as noted above, Notice expenses from the
14 Settlement Fund. Settlement Agreement ¶¶ 4.2, 5.1. For all these reasons, the Court
15 should reimburse Plaintiffs’ Counsel for their reasonably incurred expenses.

16 **VI. CASE CONTRIBUTION AWARDS ARE WARRANTED FOR NAMED**
17 **PLAINTIFFS**

18 Finally, Class Counsel request that the Court award \$10,000 each to Named
19 Plaintiffs Marcy Johannesson, Wendy Horvat, Robert Anderson, Linda Sullivan,
20 and James K. Hopkins, as certified Class Representatives, for the time they have
21 expended in representing the Class Members. The criteria courts consider when
22 determining whether to reward a class representative and the amount of the award
23 include “the actions the plaintiff has taken to protect the interests of the class, the
24 degree to which the class has benefitted from those actions, . . . [and] the amount
25 of time and effort the plaintiff expended in pursuing the litigation.” *Staton v.*
26 *Boeing Co.*, 327 F.3d at 977.

27 Here, Named Plaintiffs Marcy Johannesson, Wendy Horvat, Robert
28 Anderson, Linda Sullivan, and James K. Hopkins have diligently fulfilled their

1 obligations as Class Representative. They represented the Class, despite the
2 potential negative effects their involvement in a case of this type might have on
3 their career. Throughout the four years of litigation, Named Plaintiffs reviewed
4 each version of the Complaint and all motions and briefs filed on their behalf, and
5 provided extensive information and materials regarding the Plans. They also
6 responded to requests for production and interrogatories propounded on them.
7 They kept informed of the litigation and communicated with Plaintiffs' Counsel as
8 necessary to assist with the effective prosecution of the case. In addition, Named
9 Plaintiffs were each deposed during class certification briefing, and they reviewed
10 and discussed the terms of the Settlement. For these reasons, an award of \$10,000
11 for each Named Plaintiff is warranted.

12 This award is fair and in line with what other courts have awarded in similar
13 cases. *See, e.g., Alvidres v. Countrywide Fin. Corp.*, No. 07-5810 (C.D. Cal. Nov.
14 16, 2009) (Final Order and Judgment) (awarding \$10,000 service award); *Pelletz v.*
15 *Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1330 (W.D. Wash. 2009) (awarding
16 \$30,000 to four plaintiffs); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-1466, 2006
17 WL 3312024, at *3-4 (D. Or. Nov. 13, 2006) (approving \$10,000 award to each
18 class representative). Thus, Class Counsel respectfully request that the Court award
19 \$10,000 to Marcy Johannesson, Wendy Horvat, Robert Anderson, Linda Sullivan,
20 and James K. Hopkins for their valuable services provided to this litigation as
21 certified Class Representatives.

22 VII. CONCLUSION

23 The case pursued and settled by Class Counsel has produced a meaningful
24 and substantial settlement award for Class Members whose 401(k) accounts
25 suffered huge losses as a result of the decline of Fremont stock during the Class
26 Period. Based on the foregoing, Plaintiffs respectfully request that the Court: (1)
27 award Class Counsel payment of attorneys' fees in the amount of 30% of the
28

1 Settlement Amount; (2) order reimbursement of litigation expenses incurred by
2 Plaintiffs' Counsel in the amount of \$400,678.02; and (3) award \$10,000 each to
3 Named Plaintiffs Marcy Johannesson, Wendy Horvat, Robert Anderson, Linda
4 Sullivan, and James K. Hopkins for the time and resources they dedicated towards
5 representing the Class.

6 Respectfully submitted June 30, 2011.

7
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