UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

IN RE WACHOVIA CORPORATION ERISA LITIGATION	MASTER FILE: 3:09-CV-00262-MR
THIS DOCUMENT RELATES TO: All Actions	

CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND NAMED PLAINTIFF CASE CONTRIBUTION AWARDS

Plaintiffs David W. Allen, Robert M. Cominsky, Richard F. Dziak, Rose Hansen, Alan A. Hardman, Jerry R. Kelley, Jr., Denise A. Tuttle, and Todd A. Wright ("Plaintiffs" or "Named Plaintiffs"), by and through Class Counsel, respectfully move the Court for an Order awarding Class Counsel attorneys' fees in the amount of $3,087,500, and for reimbursement of expenses in the amount of $94,769.55, plus interest, both of which were incurred in connection with the prosecution and successful resolution of this Action. In addition, we request that the Court grant Case Contribution Awards of $5,000 to each Named Plaintiff in recognition of their valuable service to the Class.

In support of this Motion, and as may be required by Federal Rule of Civil Procedure 54(d)(2)(B), Plaintiffs state that Class Counsel are entitled to the award of attorneys' fees and reimbursement of expenses in the amounts represented herein as a result of having created a substantial monetary fund for the benefit of the Class.

In further support of this Motion, Plaintiffs rely upon (a) the record herein; (b) the Class Action Settlement Agreement (the "Settlement Agreement"); (c) the

accompanying Memorandum; and (d) the Declaration of Derek W. Loeser in Support of Plaintiffs' Motion for Final Approval of ERISA Class Action Settlement, for Settlement Class Certification, and for Approval of Plan of Allocation, and Class Counsel's Motion for Award of Attorneys' Fees and Expenses and Named Plaintiff Case Contribution Awards.

Plaintiffs' [Proposed] Final Order and Judgment is submitted with Plaintiffs' Motion for Final Approval of ERISA Class Action Settlement, for Settlement Class Certification, and for Approval of Plan of Allocation.

In conjunction with filing this Motion, Class Counsel are adding to the documents posted on the settlement websites approved by the Court in this Action, www.erisafraud.com and www.kellersettlements.com, this Motion, supporting Memorandum, and the Loeser Declaration.

Class Counsel note that in addition to this Motion, Plaintiffs' Motion for Final Approval of ERISA Class Action Settlement, for Settlement Class Certification, and for Approval of Plan of Allocation also is pending. As part of a final resolution of this Action, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

WHEREFORE, for the foregoing reasons and those stated in the supporting Memorandum, Named Plaintiffs respectfully request that the Court enter their [Proposed] Final Order and Judgment.

Respectfully submitted this 12th day of July, 2011.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

IN RE WACHOVIA CORPORATION ERISA LITIGATION	MASTER FILE: 3:09-CV-00262-MR
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MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND NAMED PLAINTIFF CASE CONTRIBUTION AWARDS

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I. INTRODUCTION

Following hard-fought litigation that encompassed extensive investigation, motion practice, and contentious settlement negotiations, the Parties have now settled this ERISA fiduciary breach class action for a cash payment of $12.35 million and additional consideration. This Settlement was achieved through the dedicated efforts of Class Counsel[1] working diligently to represent the Plans and participants and beneficiaries of the Plans.

While the concurrently-filed Memorandum in Support of Plaintiffs' Motion for Final Approval of ERISA Class Action Settlement, for Settlement Class Certification, and for approval of Plan of Allocation ("Final Approval Memo") documents why the Settlement is an excellent result for the Class—in particular in light of the fact that the case was dismissed by the Court and was settled after the opening brief to the Fourth Circuit Court of Appeals was filed—this memorandum addresses Class Counsel's request for: (i) an award of attorneys' fees in the amount of $3,087,500, which represents 25% of the Settlement amount; (ii) reimbursement of out-of-pocket litigation expenses of $94,769.55; and (iii) approval of Case Contribution Awards of $5,000 each to Plaintiffs David W. Allen, Robert M. Cominsky, Richard F. Dziak, Rose Hansen, Alan A. Hardman,

[1] "Class Counsel" refers to Keller Rohrback L.L.P. and Keller Rohrback P.L.C. (our affiliated law firm in Phoenix, Arizona) (together, "Keller Rohrback"). Capitalized Terms not otherwise defined herein have the meanings set forth in the Class Action Settlement Agreement ("Settlement Agreement"), which appears as Exhibit A the Declaration of Derek W. Loeser in Support of Plaintiffs' Motion for Final Approval of ERISA Class Action Settlement, for Settlement Class Certification, and for approval of Plan of Allocation, and Class Counsel's Motion for Award of Attorneys' Fees and Expenses and Named Plaintiff Case Contribution Awards ("Loeser Declaration" or "Loeser Decl.").

Jerry R. Kelley, Jr., Denise A. Tuttle, and Todd A. Wright ("Named Plaintiffs") in recognition of their valuable service to the Class.

As demonstrated below, the record in this case and the case law in the Fourth Circuit fully support the requested fees, expenses, and Case Contribution Awards.

II. BACKGROUND

Because the Final Approval Memo and the Loeser Declaration filed herewith contain detailed discussions of this litigation's progress, risks, and ultimate success, Plaintiffs ask the Court to consider these documents in connection with this request for attorneys' fees, expenses, and Case Contribution Awards, and Plaintiffs incorporate by reference those documents herein.

III. ERISA PLAINTIFFS' COUNSELS' INVESTMENT OF TIME AND MONEY IN THE CASE

As of July 1, 2011, Class Counsel and Local Counsel, Wyatt & Blake, L.L.P., have devoted more than 2,620 attorney and professional hours to this case, representing a lodestar of $1,026,639.25 at their hourly rates, and have incurred $82,850.41 in out-of-pocket expenses. Loeser Decl. ¶ 33, Exs. F-H.

Additionally, other Plaintiffs' counsel for the other Plaintiffs involved in this case[2] (together with Class Counsel and Local Counsel, "ERISA Plaintiffs' Counsel") have devoted more than 1,150 attorney and professional hours to this case, representing a lodestar of $579,543.00 at their hourly rates, and have incurred

[2] Dyer & Berens LLP; Stember Feinstein Doyle & Payne LLC; Squitieri & Fearon, LLP; Holzer Holzer & Fistel LLC; Wolf Haldenstein Adler Freeman & Herz LLP; Izard Nobel, P.C.; Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP; and Lieverman of Spector, Roseman Kodroff & Willis, P.C.

$11,919.14 in out-of-pocket expenses. *Id.* ¶ 34, Exs. I-P. Therefore, the total combined lodestar of all ERISA Plaintiffs' Counsel is $1,606,182.25. *Id.* ¶ 34.

Class Counsel will continue to incur additional attorney hours in connection with final approval of the Settlement, responding to inquiries from Settlement Class members, interacting with Wells Fargo & Co. (responsible for implementing the Plan of Allocation), and generally overseeing implementation of the Settlement. Loeser Decl. ¶¶ 35-36. Since Class Counsel will not apply later for additional fees, we will analyze our fee request using a lodestar cross-check based on total fees including a very conservative estimate of $100,000 for future work required to implement the Settlement and Plan of Allocation, yielding a total lodestar of $1,706,182.25. *Id.* [3]

IV. AWARD OF ATTORNEYS' FEES

Class Counsel request an award of attorneys' fees of 25% ($3,087,500) of the $12.35 million Settlement. This method of calculating the fee award, based on a percentage-of-the-fund, is both straightforward and fair under the circumstances of the case. Moreover, cross-checking this fee request against the lodestar fee calculation validates its reasonableness, as explained below.

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[3] For example, in the *Enron* ERISA case, *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. 01-3913 (S.D. Tex.), in which Keller Rohrback was co-lead counsel, we are still responding to occasional inquiries from class members, advising the district court of our views on various implementation matters, and monitoring the docket, even though the court gave final approval to the settlement in 2007. In *In re The Goodyear Tire & Rubber Co. ERISA Litigation*, No. 03-2182 (N.D. Ohio), in which implementation of the plan of allocation was particularly complex in light of the length of the class period and changes to the retirement plans, Keller Rohrback incurred over $700,000 in additional fees.

A. Work Performed by Class Counsel

Class Counsel have worked diligently, over the course of almost three years, to investigate, file, prosecute, and obtain a favorable recovery for the Settlement Class. In summary, these efforts included:

- filing an initial complaint in the Southern District of New York on June 11, 2008;
- moving for consolidation of the related ERISA actions and for appointment of interim lead counsel on August 26, 2008;
- responding to Defendants' motion to transfer on February 27, 2009, and participating in oral argument regarding same on June 18, 2009;
- filing a Consolidated Complaint ("Complaint" or "Compl.") on September 18, 2009 (Pls.' Consolidated Compl. for Violations of the Employee Retirement Income Security Act, Sept. 18, 2009, Dkt. No. 104), after this consolidated Action was transferred to this District;
- reviewing and analyzing documents that were publicly available concerning the Company's financial condition and the performance of Company stock during the relevant time period, including but not limited to: news articles, related complaints and pleadings, press releases, analyst reports, and regulatory filings;
- inspecting, reviewing, and analyzing numerous documents concerning the Plans and the administration of the Plans;

- interviewing participants of the Plans and reviewing and analyzing documents collected from Plan participants;
- researching the applicable law with respect to the claims asserted and the potential defenses thereto;
- responding to Defendants' motion to dismiss;
- filing a timely Notice of Appeal (Pls.' Notice of Appeal, Sept. 2, 2010, Dkt. No. 146);
- filing an opening brief in the United States Court of Appeals for the Fourth Circuit on November 17, 2010;
- filing a joint motion on December 7, 2010, to remand the case to the Western District of North Carolina for settlement purposes;
- engaging in mediation with Robert A. Meyer, Esq., a nationally recognized and highly experienced mediator, on December 8, 2010, which resulted in the Term Sheet; and
- executing the final Settlement Agreement on February 10, 2011, which was amended on February 28, 2011, following the Preliminary Approval Hearing.

B. Attorneys' Fees Should Be Set as a Percentage of the Common Fund Recovery

It is well-established, in this Circuit and elsewhere, that attorneys whose efforts result in a "common fund" may, and should be, compensated by awarding

them a percentage of the recovery. *DeLoach v. Philip Morris Cos.*, No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C. Dec. 19, 2003); *In re MicroStrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 786-87 (E.D. Va. 2001). *See also* MANUAL FOR COMPLEX LITIGATION § 14.121, at 187 (4th ed. 2004) ("the vast majority of courts of appeals . . . permit or direct district courts to use the percentage-fee method in common-fund cases"). Supreme Court cases on this point date back to at least 1881:

> Since the decision in [*Internal Improvement Fund*] *Trustees v. Greenough*, 105 U.S. 527 [] (1882) [sic] and *Central [R.R.] & Banking Co. v. Pettus*, 113 U.S. 116 [] (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 [] (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 [] (1939); *cf. Hall v. Cole*, 412 U.S. 1 [] (1973). . . . The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).[4]

In this Circuit, the percentage-of-recovery approach is not only permitted, it is the preferred approach to determining attorneys' fees. *See Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 438 (D. Md. 1998) (noting endorsement

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[4] The common fund doctrine is based on the notion that all those who have benefited from litigation should share its costs. *See generally Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 461-62 (S.D.W. Va. 2010) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). In this case, Plaintiffs, acting on behalf of the Plans and the proposed Class, undertook litigation that, upon the Court's approval of the Settlement, will result in a significant benefit for all Class members. A common fund fee award is therefore appropriate in this case.

of percentage-of-recovery method by several courts in the Fourth Circuit). Percentage-of-recovery fees are firmly based in the real-world marketplace for legal services: contingent fees are commonly – indeed almost universally – established as a percentage of the amount recovered. Percentage-of-recovery fees also have the salutory effect of conserving judicial resources. Percentage fees are simple to calculate, are not subject to manipulation, and do not require the Court to "second-guess" each and every decision made by counsel in the course of a complex case. *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 503 (E.D. Va. 1995) ("[T]he percentage method is more efficient and less burdensome that the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases[.]").

The percentage-of-recovery method is particularly appropriate where, as here, the settlement confers a significant benefit on members of a class. *Boeing Co.*, 444 U.S. at 479. *See also Teague v. Bakker*, 213 F. Supp. 2d 571, 584 (W.D.N.C. 2002) ("'[A]n award of attorneys' fees from a common fund depends on whether the attorneys' specific services benefited the fund – whether they tended to create, increase, protect or preserve the fund[.]'") (citations omitted). Clearly, the percentage method is the gold standard in cases where a common fund exists. Accordingly, Class Counsel seek a percentage of the cash portion of the total Class recovery.

C. An Attorneys' Fee Equal to 25% of the Cash Recovery is Reasonable

To determine the reasonableness of the fee award sought by Class Counsel in this Action, this Court may elect to apply all or some of the factors that the Fifth Circuit announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714,

717-19 (5th Cir. 1974), which were adopted by the Fourth Circuit in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978). The Fourth Circuit's approved list of factors that should be considered in "common fund" fee award determinations are:

> (1) time and labor expended;
>
> (2) novelty and difficulty of the questions raised;
>
> (3) skill required to properly perform the legal services;
>
> (4) attorney's opportunity costs in pressing the litigation;
>
> (5) customary fee for like work;
>
> (6) attorney's expectation at the outset of litigation;
>
> (7) time limitations imposed by the client or circumstances;
>
> (8) amount in controversy and results obtained;
>
> (9) experience, reputation, and ability of the attorney;
>
> (10) undesirability of the case within the legal community in which the suit arose;
>
> (11) nature and length of the professional relationship between the attorney and client; and
>
> (12) fee awards in similar cases.

MicroStrategy, 172 F. Supp. 2d at 786 (citing *Barber*, 577 F.2d at 226).

We address each of these factors in turn:

1. Time and labor expended

Thus far, as discussed in more detail below in Section IV(D)(1), ERISA Plaintiffs' Counsel have devoted at least 3,778 attorney and professional hours to the vindication of the Class's interests. Loeser Decl. ¶¶ 33-36, 38, Exs. F and H.

We estimate that up to an additional $100,000 in fees will required if this Court grants final approval to the Settlement, in order to see this case through to a full and final conclusion. *Id.* ¶ 38. ERISA Plaintiffs' Counsel have devoted considerable time and labor on this case for the benefit of the Class, and it is fair and reasonable for Class Counsel and other Plaintiffs' counsel to be compensated for that effort.

2. Novelty and difficulty of the questions raised

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

While Plaintiffs believe the claims in this case are solidly grounded in ERISA law, several similar ERISA company stock cases involving the financial meltdown of 2008 were dismissed at the pleading stage after the Complaint was filed. *See*, *e.g.*, *In re Citigroup ERISA Litig.*, No. 07-9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009); *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842 (S.D. Ohio 2009); and *In re Bank of Am. Corp. Sec., Derivative, &*

ERISA Litig., 756 F. Supp. 2d 330 (S.D.N.Y. 2010). Those cases demonstrate the significant risks plaintiffs face in cases of this type.

3. Skill required to properly perform the legal services

Closely related to the preceding factor, large-scale ERISA class action litigation requires a high degree of skill and experience. ERISA litigation of the type presented here is a rapidly evolving and demanding area of the law. New precedents are issued almost weekly, and the demands on counsel and the Court are complex and require the devotion of significant resources. It is not unreasonable to assume that Defendants would continue their vigorous defense of this case through the appeal and up through trial.

4. Attorney's opportunity costs in pressing the litigation

While there were many times when the demands of this litigation precluded other paying work, it would be difficult if not impossible to quantify such forgone opportunities.

5. Customary fee for like work

When plaintiffs' counsel accept a case on contingency, it is customary to charge as fees one-third (33.3%) of any amount recovered for the client. This analogy lacks power, however, because in high-stakes class action litigation, both the risks and potential benefits of litigation are accentuated. It is not clear that a normal contingent fee represents a fee for "like work." Here, a more useful comparison might be "fee award in similar cases," which is addressed below as *Barber* factor number 12.

6. Attorney's expectation at outset of litigation

At the outset of this litigation, Class Counsel expected that Defendants would present a vigorous defense. In this case, Wachovia was acquired by Wells Fargo, which is not insolvent. Class Counsel fully expected to litigate this case to final judgment on appeal. Counsel were prepared to see this case though, even if it took several years, the expenditure of large outlays, and the consumption of a large part of our practice. Counsel expected to be rewarded for their efforts (if successful) in the form of a percentage of the common fund obtained for the benefit of the Class. Loeser Decl. ¶ 44.

7. Time limitations imposed by the client or circumstances

At various times, the time demands of this case required Class Counsel to delay other important work on paying cases. The time demands of this case did not create a major hardship, but "[p]riority work that delays the lawyer's other legal work is entitled to some premium." *Johnson*, 488 F.2d at 718.

8. Amount in controversy and results obtained

Class Counsel prepared some preliminary damage models and calculations at the outset of the case. However, Class Counsel were cognizant that there was no guarantee of success in their appeal, nor was there a guarantee of success back at the district court should the appeal be successful, and were aware of the risk of depletion of available insurance coverage. Accordingly, the Parties engaged in mediation with Robert A. Meyer, Esq.

The Settlement results in a $12.35 million cash common fund for the Class. The Settlement, considered as a percentage of the conservatively-estimated

potential recovery, represents a significant recovery for the Plans and the Class particularly in light of the fact that the case was dismissed with prejudice. This result reflects the skill and zealous advocacy that Class Counsel provided for the benefit of the entire Class.

9. Experience, reputation, and ability of the attorney

Class Counsel is or has been lead or co-lead counsel in important ERISA breach of fiduciary duty cases throughout the nation. For example, Keller Rohrback is currently lead or co-lead counsel in ERISA fiduciary breach class actions filed against American International Group, Fremont General Corp., and Bear Stearns and served as co-lead counsel in ERISA fiduciary class actions against Enron, WorldCom, Global Crossing, Merrill Lynch, Countrywide, IndyMac, and Washington Mutual. Additional information regarding Keller Rohrback can be found in its firm resume. *See* Loeser Decl., Ex.E.

10. Undesirability of the case within the legal community in which the suit arose

Numerous initial complaints were filed in this Action in the Southern District of New York, indicating significant interest among attorneys who practice in this area in the case. Once the Action was dismissed, however, and the prospects for successful resolution became less apparent, the Action certainly became less desirable and the circumstances more difficult for the Plaintiffs. Nonetheless, Class Counsel dedicated significant time and effort on the appeal and subsequent negotiations.

11. Nature and length of the professional relationship between the attorney and client

Class Counsel did not have professional relationships with any of the Named Plaintiffs prior to this litigation. Named Plaintiffs contacted Class Counsel and other Plaintiffs' counsel for their specific expertise in this type of litigation.

12. Fee Awards in similar cases

In similar cases, courts commonly award percentage fees of 25% or more. *See Smith v. Krispy Kreme Doughnut Corp.*, No. 05-187, 2007 WL 119157, at *3 (M.D.N.C. Jan. 10, 2007) (awarding 26%); *In re Merrill Lynch & Co., Inc., Sec., Derivative & ERISA Litig.*, No. 07-10268 (S.D.N.Y. Aug. 21, 2009) (awarding 25%); *In re Xerox ERISA Litig.*, No. 02-1138 (D. Conn. Apr. 14, 2009) (awarding 30%); *In re ADC Telecomms., Inc. ERISA Litig.*, No. 03-2989 (D. Minn. Oct. 16, 2006) (awarding fee 30%); *In re Westar Energy, Inc., ERISA Litig.*, No. 03-4032 (D. Kan. July 27, 2006) (awarding 30%); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499, at *3 (E.D. Mich. June 27, 2006) (awarding 28.5%); and *In re Household Int'l, Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (awarding 30%). Class Counsel's request for 25% of the cash recovered for the Class is well within the norm for cases of this type, which involves a complex and rapidly developing area of the law, in which, as this Action itself demonstrates, success is far from certain.

D. The Fairness and Reasonableness of a 25% Percentage Fee is Confirmed by a "Cross-Check" Against Lodestar

As noted above, Fourth Circuit precedent calls for attorneys' fees in common fund cases to be set as a percentage of the gross recovery. Applying the

12 *Barber* factors, it is clear that a fee constituting 25% of the cash recovery is completely reasonable under the facts and circumstances of this case. The Court could properly end its analysis at this point, and simply award attorneys' fees as a percentage of the gross cash recovery (at 25%, or whatever percentage the Court deems proper). We invite the Court to do so.

We recognize, however, that the Court may choose to "cross-check" the results of a percentage-fee award against the attorneys' "lodestar." *See Helmick Helmick v. Columbia Gas Transmission*, No. 07-743, 2010 WL 2671506, at *5 (S.D.W. Va. July 1, 2010) (citing *Manual for Complex Litigation* § 14.121, at 191 (4th ed. 2004)); *In re Royal Ahold N.V. Sec. & ERISA Litig.,* 461 F. Supp 2d 383, 385 (D. Md. 2006); *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 436 (2d Cir. 2007); *In re AT & T Corp.,* 455 F.3d 160, 164 (3d Cir. 2006); *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1050 (9th Cir. 2002); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 778 (S.D. Tex. 2008); *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 764 (S.D. Ohio 2007); *Smith*, 2007 WL 119157, at *3.

The cross-check analysis is a two-step process. First, the lodestar is determined by multiplying the number of hours reasonably expended by the reasonable rates requested by the attorneys. Second, the court determines the multiplier required to match the lodestar to the percentage-of-the-fund request made by counsel, and determines whether the multiplier falls within the accepted range for such a case. Here, the lodestar cross-check confirms that the 25% request is reasonable.

1. ERISA Plaintiffs' Counsels' lodestar is reasonable.

The hourly rates charged by ERISA Plaintiffs' Counsel in this Action are the rates that have been or could be charged as usual and customary hourly rates for their work performed for non-contingency fee clients and in other class action cases. Loeser Decl. ¶ 32, Exs. F, H-P. Class Counsel's and other Plaintiffs' counsels' hourly rates have been paid by hourly clients and/or, separately, approved for payment by federal and state courts in other class and derivative litigations during the time this litigation has been pending. *Id.* ¶ 32. Class Counsel has gathered and reviewed the other Plaintiffs' Counsels' fees and expenses, reviewed their daily back-up information, and have confirmed that the work was completed and done for the stated purposed. *Id.* ¶¶ 29-32.

Using lodestar as a cross-check, the facts show:

- Class Counsel and Local Counsel have devoted at least 2,624 attorney and professional hours to the prosecution of this case. *Id.* ¶ 33, Exs. F-H.
- Other ERISA Plaintiffs' Counsel have devoted at least 1,153 attorney and professional hours to the prosecution of this case. *Id.* ¶ 34, Exs. I-P.
- On a straight-time basis (*i.e.*, assuming that ERISA Plaintiffs' Counsel were charging standard hourly rates and had reasonable assurance of timely payment), the total time ERISA Plaintiffs' Counsel expended on this case has a market value of $1,606,182.25. *Id.* ¶ 34.

- Class Counsel estimate that up to an additional $100,000 in fees may be required to complete diligent representation of the Class. *Id.* ¶¶ 35-36.
- The hourly rates charged by ERISA Plaintiffs' Counsel, between $250 and $740 per hour, are the usual and customary hourly rates charged for services in other actions and are based on each person's position, experience level, and location. *Id.* ¶ 32, Exs. F, H-P.
- As explained in the Final Approval Memo and in the Loeser Declaration, as well as the exhibits thereto, the stated hours were incurred by, among other things, investigating the claims against Defendants, reviewing and analyzing Plan documents and information, preparing the Complaint, conducting necessary legal research, briefing Defendants' motions to dismiss, engaging in settlement negotiations, communicating with class members and Named Plaintiffs, and preparing the necessary agreements and pleadings related to the Settlement.

Thus, ERISA Plaintiffs' Counsels' reasonable hours and reasonable rates produce a current lodestar of $1,606,182.25, and estimating and taking into account work that will be necessary following Final approval, a total lodestar of $1,706,182.25. *Id.* ¶ 36.

2. A lodestar cross-check also supports the requested fee award.

The 25% fee award requested here ($3,087,500), constitutes a multiplier of approximately 1.9 over the current lodestar ($1,606,182.25) and a multiplier of approximately 1.8 over the estimated total lodestar ($1,706,182.25). This is an exceptionally modest risk multiplier and is well within the range that has been accepted in the Fourth Circuit. *See, e.g., Goldenberg*, 33 F. Supp. 2d at 439 n.6 (lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee); *Jones v. Dominion Resources Serv. Inc*., 601 F. Supp. 2d 756, 766-67 (S.D.W. Va. 2009) (citing *Goldenberg* for same, and awarding lodestar multiplier between 3.4 and 4.3 awarded).

Similarly, other ERISA company stock cases outside the Fourth Circuit confirm that the requested multiplier is reasonable. *See, e.g., Household Int'l* (Minute Order) (4.8 multiplier); *In re Dynegy, Inc. ERISA Litig*., No. 02-3076 (S.D. Tex. Dec. 10, 2004) (Final Order) (4.4 multiplier); *In re Bristol Myers Squibb Co. ERISA Litig*., No. 02-10129 (S.D.N.Y. Oct. 12, 2005) (Order) (3.9 multiplier); *In re Honeywell ERISA Litig*., No. 03-1214 (D.N.J. July 20, 2005) (Order) (3.7 multiplier); and *In re Royal Dutch/Shell Transport ERISA Litig*., No. 04-1398 (D.N.J. Aug. 30, 2005) (Order Approving Settlement) (3.3 multiplier). Theses cases are, again, consistent with nationwide practice. *See generally In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig*., 268 F. Supp. 2d 907, 938 n.45 (N.D. Ohio 2003) (relying on a 2003 study of fee awards in 1,120 cases to conclude that "the courts' effective multipliers averaged … 3.89 across all 1,120 cases").

As a general matter, the approach Class Counsel intends to take is to separate pre- and post-appointment time – that is time spent working on the case before and after Class Counsel was appointed interim lead counsel. The reason for this distinction is that pre-appointment time unlike post-appointment time was not done at Class Counsel's direction. For pre-appointment time, no multiplier will be applied – meaning that counsel will achieve their lodestar only for this time. Pre-appointment work includes reviewing Plan documents and public filings, and drafting initial complaints and leadership briefs. For Class Counsel, post-appointment works includes drafting the consolidated complaint, opposing Defendants' motion to dismiss, drafting opening appellate brief, participating in mediation and negotiating the Settlement with Defendants, and preparing Settlement documents. For the other Plaintiffs' counsel, such work includes reviewing pleadings and orders in order to keep their clients updated on the status of the Action.

E. Objections

Class Counsel's request for a 25% fee has been reviewed by more than 150,000 Class members via the mailed and internet Notice, and is being reviewed by a sophisticated independent fiduciary. Class Counsel received and responded to inquiries from 630 Class members or potential Class members. The Settlement websites have had 1,300 hits. So far, only three objections have been lodged, and only one objection relates to the award of attorney fees. *See* Loeser Decl. ¶¶ 54-60. Plaintiffs' fees however, are reasonable given the size of this Action, which involved complex factual and legal issues against the backdrop of a fast-

developing and hotly disputed area of law over the course of more than three years, and accordingly, this objection should not be given any weight. *Id.* ¶ 56

Pursuant to the Preliminary Approval Order and Notice, objections must be postmarked no later than July 25, 2011, and filed with the Court and served upon the counsel listed in the Notice by no later than August 18, 2011. Class Counsel will respond to additional objections concerning the fee request, if any, that are filed and served before these deadlines on or before August 22, 2011.

V. REIMBURSEMENT OF EXPENSES

Reimbursement of reasonable costs and expenses to counsel who create a common fund is both necessary and routine. *Strang*, 890 F. Supp at 503; 1 Alba Conte, ATTORNEY FEE AWARDS § 2:08, at 50-51 (3d ed. 2004) ("The prevailing view is that expenses are awarded in addition to the fee percentage."). As one commentator has written:

> [A]n attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved. The equitable principle that all reasonable expenses incurred in the creation of a fund for the benefit of a class are reimbursable proportionately by those who accept benefits from the fund authorizes reimbursement of full reasonable litigation expenses as costs of the suit.

Conte, *supra*, § 2:19, at 73-74 (citing *Internal Improvement Fund Trustees*, 105 U.S. 527). The expenses that may be reimbursed from the common fund are not limited to those taxed in a judgment against an opponent, but instead, encompass "all reasonable expenses." *Id.*

Class Counsel and Local Counsel have advanced or incurred more than $82,850 in expenses to date.[5] Because these expenses were advanced with no guarantee of recovery, Class Counsel had a strong incentive to keep them to a reasonable level. Class Counsel and Local Counsel have provided the Court with a detailed summary of the expenses advanced. Loeser Decl. ¶ 33, Exs. G-H. Other ERISA Plaintiffs' Counsel have advanced or incurred more than $11,919 in expenses to date. *Id.* ¶ 34, Exs. I-P.

The expenses advanced by ERISA Plaintiffs' Counsel were reasonable and necessary and include photocopying/duplication of electronic media, travel, Lexis/Westlaw charges, paying the mediator, and lesser amounts for postage, telephone, service of process, and other routine costs of litigation. *See id.* ¶¶ 33-34, Exs. G-P.

In light of the nature of this litigation, the expenses incurred by ERISA Plaintiffs' Counsel were both reasonable and reasonably related to the interests of the Plaintiffs and the Class. Hence, Class Counsel respectfully requests that they be fully reimbursed.

Class Counsel's request for expense reimbursement has been reviewed by more than 150,000 Class members via the mailed and internet Notice and is being reviewed by a sophisticated independent fiduciary. Only one of the three

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[5] This figure excludes the expense of issuing class notice, which the Court approved to be paid from the Qualified Settlement Fund. Order Preliminarily Approving Settlement, Preliminarily Certifying the Settlement Class and Appointing Class Counsel and Liaison Counsel, Approving Form and Dissemination of Class Notice, and Setting a Date and Time for the Fairness Hearing (Mar. 2, 2011) (Dkt. No. 156).

objections received to date addresses the request for expense reimbursement. *Id.* ¶ 56. However, Plaintiffs' costs are reasonable given the size of this Action, which involved complex factual and legal issues against the backdrop of a fast-developing and hotly disputed area of law over the course of more than three years, and accordingly, this objection should be given no weight. *Id.*

As with the request for attorney fees, Class Counsel will respond to additional objections concerning expense reimbursement, if any, that are filed and served before these deadlines on or before August 22, 2011.

VI. NAMED PLAINTIFF CASE CONTRIBUTION AWARDS

At the conclusion of a successful class action case, it is common for courts, exercising their discretion, to award special compensation to the class representatives in recognition of the time and effort they have invested for the benefit of the class, which often includes providing information to counsel, reviewing and approving pleadings, assisting with discovery, preparing for and/or attending a deposition, and participating in settlement discussions. Such awards to class representatives generally are paid out of the common fund recovery, and that is what Plaintiffs suggest here.

Such awards are the norm in class actions to "encourage socially beneficial litigation by compensating named plaintiffs for…their personal time spent advancing the litigation on behalf of the class and for any personal risk they undertook." *Helmick*, 2010 WL 2671506, at *3 (citing *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 767 (S.D.W. Va. 2009)).

This award is fair and in line with what other courts have awarded in similar cases. *See, e.g., Smith*, 2007 WL 119157, at *4 (awarding $15,000 case

contribution awards); *In re Wash. Mut., Inc. ERISA Litig.*, No 08-1919 (W.D. Wash. Jan. 7, 2011) (Amended Final Order and Judgment) (awarding $5,000 service awards); *Alvidres v. Countrywide Fin. Corp.*, No. 07-5810 (C.D. Cal. Nov. 16, 2009) (Final Order and Judgment) (awarding $10,000 service awards); *In re Merrill Lynch & Co., Inc. Sec., Derivative & ERISA Litig.*, No 07-9633 (S.D.N.Y. Aug. 21, 2009) (Order and Final Judgment) (awarding $5,000 case contribution awards).

Here, Named Plaintiffs have diligently fulfilled their obligations as Class Representatives. They alone represented the Class, despite the potential negative effects their involvement in a case of this type might have on their careers. Throughout the almost three years of litigation, Named Plaintiffs kept informed of the litigation and communicated with ERISA Plaintiffs' Counsel as necessary to assist with the effective prosecution of the case. Loeser Decl. ¶ 64. For these reasons, Case Contribution Awards of $5,000 for each Named Plaintiff is warranted.

Class Counsel's request that the Named Plaintiffs receive Case Contribution Awards of $5,000 each has been reviewed via the mailed and internet Notice by more than 150,000 Class members and is being reviewed by a sophisticated independent fiduciary. No objections have been lodged concerning the Case Contribution Awards. Class Counsel shall respond to any objections concerning the Case Contribution Awards on or before August 22, 2011.

VII. CONCLUSION

For all the reasons given above and in the supporting documentation submitted herewith, Plaintiffs respectfully request that the Court:

(1) Award ERISA Plaintiffs' Counsel attorneys' fees in the amount of $3,087,500 (which represents 25% of the cash recovery obtained by the Class), to be paid from the common fund established for the Class;

(2) Award ERISA Plaintiffs' Counsel $94,769.55 as reimbursement of expenses actually and reasonably incurred for the benefit of the Class, to be paid from the common fund established for the Class;

(3) Award each Named Plaintiff – David W. Allen, Robert M. Cominsky, Richard F. Dziak, Rose Hansen, Alan A. Hardman, Jerry R. Kelley, Jr., Denise A. Tuttle, and Todd A. Wright – $5,000 as a Case Contribution Award, to be paid from the common fund established for the Class.

Dated: July 12, 2011.

Respectfully submitted,

KELLER ROHRBACK L.L.P

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