THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GARY BUUS, et al., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WAMU PENSION PLAN, et al.,

Defendants.

No. 07-CV-00903 MJP

AMENDED DECLARATION OF LYNN L. SARKO IN SUPPORT OF MOTION FOR PLAN OF ALLOCATION AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARD

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I, Lynn L. Sarko, declare pursuant to the penalties of perjury under 28 U.S.C. § 1746 as follows:

I. INTRODUCTION

1. I am the Managing Partner of Keller Rohrback L.L.P., Head of the firm's Complex Litigation Group, Counsel for Named Plaintiffs Gary Buus, Bryan Buck, Sidney John Flor, Margaret Weber, Kellie Plumb, Thomas Schoenleber and Audrey Schulman (hereinafter, "Plaintiffs" or "Named Plaintiffs"), and appointed Lead Counsel for the certified Class. I have been personally involved in the litigation of this matter and am responsible for the prosecution of this action.

2. I submit this declaration in support of Plaintiffs' (a) Plan of Allocation; and (b) Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Award.

3. The purpose of this declaration is to summarize the factual and procedural history of this litigation, including, but not limited to, the initial filing and investigation of this action, the amended complaints, discovery, motion practice, Settlement negotiations, and litigation expenses. As Lead Counsel for Plaintiffs, I have been intimately involved in all aspects of this litigation from the outset to the present.

4. Under the Buus Class Action Settlement Agreement ("Settlement Agreement") (Dkt. No. 264), the WaMu Pension Plan agrees to pay a Settlement Amount of $20 million by increasing the liabilities of the Plan to the Class Members.[1] The Settlement represents an excellent result that will provide significant benefits to the Class, while removing the risk and delay associated with further litigation.

5. As discussed in detail below, the Settlement is the result of hard-fought litigation in the face of a highly complex and risky case, extensive briefing and discovery, and

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[1] All capitalized terms not otherwise defined in this Declaration have the same meaning given them in the Buss Class Action Settlement Agreement, a true and correct copy of which is attached hereto as Ex. A.

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1 contentious settlement negotiations. I am pleased to present the Settlement to the Court for its
2 consideration and believe strongly that it should be approved.

3 **II. TERMS OF SETTLEMENT**

4 6. The principal terms of the Settlement are:

5 **1. Class**

6 The Class consists of the Certified Class that was certified by the Court on April 16,
7 2008, and the Settlement Subclass preliminarily certified by the Court in its Preliminary
8 Approval Order, collectively referred to by the Settlement Agreement as the "Settlement Class"

9 "Certified Class" shall mean collectively, the four subclasses certified by the District Court pursuant to the July 24, 2008 Certification Order, as follows: (i) all participants, whether active, inactive or retired, their beneficiaries and estates, who were participants in and entitled to accrue benefits under the WaMu Pension Plan immediately prior to January 1, 1987, and whose accrued benefits or pension benefits are based in whole or in part on the WaMu Pension Plan's cash balance formula, from January 1, 1987 to the present, (ii) all participants, whether active, inactive or retired, their beneficiaries and estates, who were participants in and entitled to accrue benefits under the Great Western Retirement Plan immediately prior to January 1, 1997, and whose accrued benefits or pension benefits are based in whole or in part on the cash balance formulas of the Great Western Retirement Plan and/or the WaMu Pension Plan, from January 1, 1997 to the present, (iii) all participants, whether active, inactive or retired, their beneficiaries and estates, who were participants in and entitled to accrue benefits under the Dime Bancorp, Inc. Retirement Plan immediately prior to April 1, 2002, and whose accrued benefits or pension benefits are based in whole or in part on the WaMu Pension Plan's cash balance formula, from April 1, 2002 to the present, (iv) all participants, whether active, inactive or retired, their beneficiaries and estates, who were participants in and entitled to accrue benefits under the Pacific First Bank Retirement Plan immediately prior to April 1, 1994, and whose accrued benefits or pension benefits are based in whole or in part on the WaMu Pension Plan's cash balance formula, from April 1, 1994 to the present.
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21 Settlement Agreement ¶ 1.1(d).

22 "Settlement Subclass or Settlement Subclasses" shall mean (i) all participants, whether active, inactive or retired, their beneficiaries and estates, who were participants in and entitled to accrue benefits under the H.F. Ahmanson & Company Retirement Plan immediately prior to July 1, 1999, and whose accrued benefits or pension benefits are based in part on the WaMu Pension Plan's cash balance formula, from July 1, 1999 to the present; and (ii) all participants, whether active, inactive, or retired, their beneficiaries and estates, who were participants in and entitled to accrue benefits under the Great Western Retirement Plan immediately prior to January 1, 1998, and whose accrued benefits or pension benefits are based in whole or in part on the WaMu Pension Plan's cash balance
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> formula, from January 1, 1998 to the present, but only with respect to such participants not described in subsection (ii) of Section 1.2(d) of the Settlement Agreement.

Settlement Agreement 1.2(ll).

2. Settlement Considerations

Under the terms of the Settlement Agreement, an increase in liabilities of the WaMu Pension Plan equal to $20 million (the "Settlement Amount") less certain amounts set forth in the Settlement Agreement and described therein, including expenses associated with Class Notice, Court-approved attorneys' fees and expenses, case contribution awards and other costs related to the administration of the Settlement and implementation of the Plan of Allocation, will be allocated to members of the Settlement Class. *Id.* ¶ 4.1.

3. Released Claims

Named Plaintiffs release their and the Settlement Class's ERISA claims arising out of the Amended Complaint against Named Defendants and Settling Defendants during the Class Period, and Named Defendants and Settling Defendants release Named Plaintiffs, the Settlement Class and Lead Counsel from any and all claims arising out of the Plaintiffs' Amended Complaint. The release is set forth in ¶¶ 5.1 through 5.7 of the Settlement Agreement.

4. Plan of Allocation

The Net Settlement Amount will be allocated to Plan accounts of Class Members pursuant to a Plan of Allocation which is filed herewith. In general terms, the Net Settlement Amount will be allocated to Class Members on a per capita basis such that each Class Member will receive the same amount, called an Additional Benefit, from the Settlement Amount to be credited to their Plan account. The sum of Additional Benefits shall equal the Net Settlement Amount.

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III. THE FORMS AND METHODS OF NOTICE SATISFY RULE 23 AND DUE PROCESS

7. In accordance with the Preliminary Approval Order, the Class has been provided with ample and sufficient notice of the Settlement, including an appropriate opportunity to voice objections. The notice plan fully informed Class Members of the lawsuit and the proposed Settlement, and enabled them to make informed decisions about their rights.

8. The parties' notice plan, as approved by the Court and implemented by Lead Counsel, consisted of: (1) mailing the Notice on September 24, 2010, to 18,642 Class Members at their last known addresses provided by Defendants; (2) publication of the Summary Notice via Business Newswire on September 24, 2010, and in *The Seattle Times* on September 28, 2010 and September 29, 2010; and (3) creation of a dedicated website administered by Lead Counsel to provide information to Class Members, as well as establishing a toll-free telephone number that participants may call and an e-mail address that participants may e-mail to obtain information regarding the Settlement. *See* Declaration of David Skinner Regarding Notice Dissemination.

9. In summary, the Notice provided detailed information about the Settlement, including: (1) a comprehensive summary of its terms; (2) notice of Lead Counsel's intent to request attorneys' fees of $4,200,000 (21% of the settlement amount) plus reimbursement of expenses, and a case contribution award for Plaintiff; and (3) detailed information about the Released Claims. In addition, the Notice provided information about the Fairness Hearing date, Class Members' rights to object (and deadlines and procedures for objecting), and the procedure to receive additional information. It also provided Class Members with contact information for Lead Counsel, information on the toll-free phone number and e-mail address for inquiries, and a website address for further information. The Summary Notice summarized the above information for purposes of publication.

10. In addition, the Notice informed Class Members that Lead Counsel would seek reimbursement of expenses from the Settlement Amount. The notice forms and methods used

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1 here are substantially similar to those successfully used and approved by courts in many other
2 ERISA class settlements and satisfy the requirements of due process and Rule 23.

3 **IV. THE PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED**

4 11. The proposed Plan of Allocation, attached as Ex. E, reflects our informed
5 consideration of the relevant legal and factual matters pertaining to Class Members' claims. It
6 provides recovery to Class Members, net of administrative expenses and net of attorneys' fees
7 and expenses that the Court may choose to award.

8 12. As stated in the Notice, the Net Settlement Amount will be allocated to Class
9 Members on a per capita basis such that each Class Member will receive the same amount.

10 13. Payments will be made by crediting the accounts of active Plan participants with
11 the appropriate amount and by creating or re-creating an account for Class Members who are no
12 longer active participants, and then crediting their accounts in the same manner.

13 14. I believe that the proposed Plan of Allocation is fair, reasonable, and not unduly
14 complicated or expensive and accordingly urge the Court to adopt and approve it.

15 **V. PROCEDURAL AND LITIGATION HISTORY**

16 **A. Investigation and Preparation of Comprehensive Claims**

17 15. On June 12, 2007, the Named Plaintiffs filed a Class Action Complaint against
18 the WaMu Pension Plan and the WaMu Pension Plan Administration Committee ("PAC")
19 (collectively "Defendants") alleging that that the Plan's formula for calculating pension benefits
20 violates the Employee Retirement Income Security Action of 1974, as amended, 29 U.S.C. §
21 1001, *et seq.* ("ERISA").

22 16. Specifically, Named Plaintiffs alleged that the cash balance formula was
23 discriminatory based on age because it impermissibly caused the rate of benefit accrual to
24 decrease due to the age or attainment of any age by participants. Named Plaintiffs also alleged
25 Defendants violated ERISA by failing to provide adequate notice to participants of the
26 reduction to the future rate of benefit accrual caused by a merger or conversion of traditional

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1 final average pay pension plans to a cash balance formula, and by the conversion of one cash
2 balance plan to another cash balance plan in violation of ERISA § 204(h). These conversions
3 occurred over the course of twenty years as Washington Mutual acquired other banks and
4 converted acquired pension plans to the Washington Mutual Cash Balance Pension Plan.
5 ("Plan" or "Plans").

6 17. The Complaint seeks to recover losses based on Defendants' alleged ERISA
7 violations. The Complaint alleged four causes of action: (1) that the cash balance formulas
8 were age discriminatory in violation of ERISA Section 204(b)(1)(H)(1), 29 U.S.C. §
9 1054(b)(1)(H)(i)); (2) the Defendants failed to provide notice of the reduction in the rate of
10 future benefit accrual in violation of ERISA Section 204(h), 29 U.S.C. §1054(h); (3) the
11 Defendants failed to provide adequate Summary Plan Descriptions in violation of ERISA
12 Sections 102, 104(b)(1) and 29 C.F.R. § 2520.102-2), and (4) the Defendants failed to provide
13 summaries of material modifications ("SMMs") in violation of ERISA Sections 102(a),
14 104(b)(1), 29 U.S.C. §§ 1022(a), 1024(b)(1) and 29 C.F.R. 2520.104b-3)).

15 18. Named Plaintiffs sought relief for themselves and on behalf of a Class consisting
16 of all participants and beneficiaries of the Plan whose accrued benefits or pension benefits were
17 based in whole or in part on the Plan's and Predecessor Plans' cash balance formulas, from
18 January 1, 1987 to the present for Counts II, III, and IV, and from January 1, 1987 through June
19 29, 2005 for Count I, including but not limited to the case balance formulas of the WaMu
20 Predecessor Plans – the Great Western Retirement Plan, the Dime Plan, the Ahmanson Plan ,
21 and the Pacific First Bank Plan.

22 19. Named Plaintiffs filed an Amended Class Action Complaint on June 29, 2007.
23 [Dkt. No. 3.] Defendants filed an Answer to Amended Complaint and Affirmative Defenses on
24 January 10, 2008 [Dkt. No. 45]. On March 5, 2008, Named Plaintiffs filed a Motion to Amend
25 the Complaint to add Thomas Schoenleber as an additional named Plaintiff, or in the
26 alternative, for leave to amend the complaint and intervene to add an additional named plaintiff

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(hereinafter, "Motion to Amend")[Dkt. Nos. 48-50.] Defendants opposed the Motion to Amend on March 11, 2008 [Dkt. Nos. 53-56.] Named Plaintiffs filed their Reply Brief regarding the Motion to Amend with a supporting declaration on March 14, 2008 [Dkt. Nos. 57-58.], and on April 15, 2008, the Court granted Named Plaintiffs Motion to Amend. [Dkt. No. 77.] Named Plaintiffs filed their Second Amended Complaint on April 16, 2008. [Dkt. No. 79.] On April 30, 2008, Defendants filed their answer and affirmative defenses to the Second Amended Complaint. [Dkt. No. 97].

B. Motion to Dismiss and Motion to Stay

20. Defendants vigorously contested Named Plaintiffs' allegations on all fronts. On September 27, 2007, Defendants filed a Motion to Dismiss Amended Complaint (hereinafter, "Motion to Dismiss"). [Dkt. No. 22.] In their Motion to Dismiss, Defendants disputed Named Plaintiffs' theory that cash balance plans reduce the benefit accrual due to age, claimed that Named Plaintiffs were time-barred from making its notice and age discrimination claims, and disagreed that Defendants summary plan descriptions (SPD) were deficient for not including summaries of material modifications ("SMM"'s).

21. Named Plaintiffs filed their Response to Defendants' Motion to Dismiss with supporting declarations on November 6, 2007. [Dkt. Nos. 27-30]. Named Plaintiffs refuted Defendants' assertions in the Motion to Dismiss, including Defendants having conflated defined benefit and defined contribution–based pension plans for the purpose of age discrimination testing, Defendants having alleged that a pension plan must specify a particular age for discrimination to commence before it can violate ERISA's age discrimination provision and Defendants having argued that their notices had been sufficient.

22. The motion to dismiss briefing raised many complex and unsettled issues under ERISA law -- including:

- How to measure a cash balance plan's rate of benefit accrual
- Whether ERISA's anti-discrimination provisions apply before age 65

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- Whether ERISA 204(h) requires sponsors to give specific advance notice that benefits are being substantially reduced
- The meaning of "likely prejudiced" caused by misleading information
- Who has standing to sue as a participant
- When the statute of limitations begins running
- The appropriate remedies for ERISA age discrimination and disclosure violations

23. On November 15, 2007- shortly after Named Plaintiffs had filed their Opposition to Motion to Dismiss, Defendants' filed a Motion to Stay Proceedings [Dkt. No. 31], alleging that Named Plaintiffs' claims were identical to the claims in the matter of *Hurlic v. So. Cal. Gas. Co.,* which was then pending before the Ninth Circuit. Named Plaintiffs filed their Opposition to Defendants' Motion to Stay with supporting declarations on November 26, 2007, noting that Defendants must have been aware of the *Hurlic* matter months earlier since the same defense firm in the instant matter was also associated with the defense in *Hurlic.* [Dkt. Nos. 33-35]. Named Plaintiffs also argued that the issues in the *Hurlic* matter were not comparable to several aspects of the instant action, and such a stay would, among other things, harm Named Plaintiffs by unnecessarily delaying resolution of this matter. Defendants filed their Reply Memo on November 29, 2007. [Dkt. No. 36].

24. In an Order issued on November 30, 2007, Judge Pechman denied Defendants' Motion to Stay and set Oral Argument regarding the Motion to Dismiss for December 7, 2007 [Dkt. No. 38]. On December 7, the parties argued their respective positions before the Court, and on December 18, 2007, Judge Pechman issued an order granting in part and dismissing in part Defendants' Motion to Dismiss. [Dkt. No. 41]. Specifically, the Court declined to dismiss Named Plaintiffs' notice claims alleged under ERISA § 204(h (Count 2), and dismissed Named Plaintiffs' age discrimination claims under ERISA § 204(b)(1)(H)(i), and Summary Material Modification ("SMM") and Summary Plan Description ("SPD") claims under ERISA §§ 102 & 104(b)(1) (Counts 1, 3 & 4).

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1 **C. Discovery Motions**

2 25. In early January, 2008, the parties began negotiating discovery, and a class
3 certification deposition and briefing schedule.

4 26. Defendants brought a Motion to Bifurcate Discovery and Trial and for Entry of a
5 Protective Order on April 3, 2008. [Dkt. Nos. 69-71]. Named Plaintiffs filed their Opposition
6 to Defendants' Motion to Bifurcate Discovery and Trial, with a supporting declaration on April
7 14, 2008. [Dkt. Nos. 74-75]. Defendants filed their Reply Memo regarding their Motion to
8 Bifurcate Discovery and Trial with a supporting declaration on April 18, 2008. [Dkt. Nos. 82-
9 83].

10 27. Along with its Opposition to Defendants' Motion to Bifurcate Discovery and
11 trial, Named Plaintiffs filed a Cross Motion for Extension of Time of Expert Disclosure on
12 April 15, 2010. [Dkt. No. 76]. Defendants filed their Response to the Cross Motion for
13 Extension of Time of Expert Disclosure with supporting declarations on April 28, 2008 [Dkt.
14 Nos. 93- 95], and Named Plaintiffs filed their Reply Brief regarding the Cross Motion for
15 Extension of Time of Expert Disclosure on May 2, 2008. [Dkt. No. 98].

16 28. On May 13, 2008, the Court granted Defendants' Motion to Bifurcate and denied
17 Named Plaintiffs Cross Motion for Extension of Time of Expert Disclosure. [Dkt. No. 104].
18 The Court ordered that Bifurcation would occur after Class Certification matters had been
19 decided.

20 29. Defendants filed a Motion to Strike or Exclude the Supplemental Report of
21 Claude Poulin, with supporting declarations, on August 7, 2008. [Dkt. Nos. 136-136]. Named
22 Plaintiffs filed their Response to the Motion to Strike with supporting declarations on August
23 18, 2008. [Dkt. Nos. 156-159, 163-164]. Defendants filed their Motion to Strike Rebuttal
24 Expert Reports, or in the Alternative for an Order of Non-Preclusion, with supporting
25 declarations, on August 14, 2008. [Dkt. Nos. 148-152]. The parties negotiated a resolution of
26 their differences and filed a stipulation and proposed order on August 26, 2008 [Dkt. No. 172].

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D. Class Certification

30. On January 28, 2008, the parties executed a stipulation setting a noting date and briefing schedule for a class certification motion. [Dkt. No. 46]. The Court filed an Order approving the stipulation on January 29, 2008. [Dkt. No. 47]. Named Plaintiffs filed their Motion for Class Certification with seven supporting declarations on March 20, 2008. [Dkt. Nos. 61-68].

31. Defendants then filed their Opposition to Named Plaintiffs' Motion for Class Certification in conjunction with a Motion to Seal on May 5, 2008. [Dkt. No. 100]. Named Plaintiffs filed their Reply Memo supporting the Motion for Class Certification with supporting declarations on May 19, 2008. [Dkt. No. 106-108].

32. Oral Argument was held on July 10, 2008. On July 24, 2008, the Court issued an Order granting in part and denying in part Named Plaintiffs' Motion for Class Certification and certified four subclasses (the "Certified Class") pursuant to Rule 23(a) and 23(b)(1) & (2) of the Federal Rules of Civil Procedure. [Dkt. No. 127].

33. On August 7, 2008, Named Plaintiffs filed a Motion to Amend Class Certification in order to certify Subclasses pertaining to the 1998 Great Western and the 1999 Ahmanson Plan amendments and conversions. The motion also sought to add Bryan Buck as a Named Plaintiff and class representative for the 1999 H.F. Ahmanson plan subclass. [Dkt. Nos. 138-141]. That motion was pending at the time a settlement was reached.

34. Defendants filed their Opposition to Named Plaintiffs' Motion to Amend Class Certification Order on August 18, 2008 [Dkt. Nos. 161-162] and Named Plaintiffs filed their Reply regarding their Motion to Amended Class Certification with supporting declarations on August 22, 2008. [Dkt. Nos. 168-170].

E. Merits Discovery

35. Plaintiffs' age discrimination claim was dismissed on the pleadings. Discovery in this case pertained solely to Plaintiffs' ERISA disclosure claims. A chief purpose of the

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discovery was to support the Class' claims with proof that Defendants knew that the cash balance amendments were going to substantially reduce plan participants future benefit accrual, and yet chose not to disclose the fact of these reductions to the plan participants. The discovery phase of the litigation was hotly contested.

36. Lead Counsel and staff expended thousands of hours obtaining and reviewing over 360,000 pages of documents from Defendants and five third party benefits consulting companies that assisted WaMu with plan design and communications. The documents showed WaMu's internal deliberations, plan design for the six separate pension plans, and the implementation, administration and communication of the six cash balance amendments including:

- Actuarial information about class member benefits
- Proposals from benefits consulting regarding plan design and amendments
- Plan communication documents, and drafts of the same
- Plan Amendments, and drafts of the same
- Government filings
- Internal communications showing the deliberation of the timing and content of the disclosures of the plan amendments to participants

37. The parties in the litigation served a total of five sets of interrogatories, six sets of requests for production, and five sets of requests for admission. The parties' discovery disputes were resolved through lengthy negotiations, three motions to compel, and two discovery/scheduling motions filed by Defendants. Plaintiffs were either completely or partially successful on every discovery motion on which this Court ruled.

38. Defendants propounded their First Set of Interrogatories and Requests for Production of Documents on Plaintiffs Gary Buus (hereinafter, "Buus"), Sidney John Flor (hereinafter, "Flor"), Kellie Jane Plumb (hereinafter, "Plumb"), Audrey Schulman (hereinafter, "Schulman") and Margaret Weber (hereinafter, "Weber") on December 28, 2007.

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1 39. Named Plaintiffs Buus, Flor, Plumb, Schulman and Weber responded to
2 Defendants' First Set of Interrogatories and Requests for Production of Documents on January
3 29, 2008 and produced responsive documents on February 1, 2008.
4 40. Named Plaintiffs Buus, Flor, Plumb, Schulman and Weber served their
5 Amended Responses and Objections to Defendants' First Requests for Production of
6 Documents on February 4, 2008 and supplemented their document production on February 11,
7 2008, February 12, 2008 and February 21, 2008. Named Plaintiffs further amended their
8 Responses to Defendants' First Set of Interrogatories to Plaintiff Plumb on March 12, 2008.
9 41. Defendants deposed plaintiff Sidney John Flor on February 13, 2008, plaintiff
10 Gary Buus on February 14, 2008, plaintiff Margaret Weber on February 29, 2008, plaintiff
11 Kellie Plumb on March 18, 2008, plaintiff Audrey Schulman on March 19, 2008, and plaintiff
12 Thomas Schoenleber on April 28, 2008.
13 42. Named Plaintiffs propounded their First Set of Interrogatories and Requests for
14 Production of Documents to Defendants on February 22, 2008. Defendants served their
15 Response to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents
16 on March 24, 2008. The Responses consisted only of objections and no documents.
17 43. Named Plaintiffs served their Second Set of Interrogatories on Defendants on
18 March 14, 2008.
19 44. Named Plaintiffs had several extended and protracted discussions with
20 Defendants regarding Named Plaintiffs' outstanding Document Production requests, requiring
21 extensive correspondence and numerous Rule 37 conferences. The parties held a Rule 37
22 Conference regarding the production on April 1, 2008. Defendants' counsel declined to
23 commit to any deadline for producing documents but stated they would produce documents on
24 a rolling basis. Defendants produced documents on April 2, 2008; the production was limited
25 to less than two bankers' boxes worth of documents.
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45. Named Plaintiffs filed a Motion to Compel discovery responses on April 10, 2008 regarding Defendants Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents. [Dkt. Nos. 72-73]. Defendants filed their Response to Named Plaintiffs' Motion to Compel with supporting declarations on April 21, 2008. [Dkt. Nos. 85-88]. Named Plaintiffs filed their Reply regarding Defendants Response with a supporting declaration on April 25, 2008. [Dkt. Nos. 90-91]. The Court granted in part and denied in part Named Plaintiffs' Motion to Compel on May 13, 2008. [Dkt. No. 103].

46. Defendants responded to Named Plaintiffs' Second Set of Interrogatories on April 14, 2008.

47. Named Plaintiffs propounded their First Set of Requests for Admissions and their Second Set of Requests for Production of Documents to Defendants on May 30, 2008. Named Plaintiffs propounded their Second Set of Requests for Admissions, their Third Set of Interrogatories and their Third Set of Requests for Production of Documents to Defendants on June 5, 2008.

48. Defendants served Supplemental Responses to Named Plaintiffs' First and Second Sets of Interrogatories on June 5, 2008.

49. Defendants propounded their First Set of Requests for Admission, their Second set of Interrogatories and their Second Request for the Production of Documents to Plaintiffs on June 6, 2008.

50. Named Plaintiffs propounded their Third Set of Requests for Admission and their Fourth Set of Requests for Production of Documents to Defendants on June 9, 2008. Named Plaintiffs also propounded their First Set of Interrogatories to Defendant Washington Mutual Pension Plan Administration Committee on June 9, 2008 and their Fourth Set of Requests for Admission to Defendants on June 12, 2008.

51. Named Plaintiffs served document subpoenas on third parties' Towers Perrin Forster & Crosby, Merrill Lynch Commercial Commerce Corp., Merrill Lynch Business

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1 Financial Services, and Watson Wyatt & Company on March 6, 2008 and served amended
2 subpoenas on these entities on March 14, 2008. Plaintiffs served a records subpoena on the
3 Plan's record keeper, Excellerate HRO on April 8, 2008. These records productions resulted in
4 thousands of pages of material requiring extensive attorney and paralegal organization,
5 categorization and review.

6 52. Lead Counsel deposed 8 company officials and third party administrators who
7 designed the Plan, drafted Plan communications and amendments, and managed the Plan for the
8 defendants. These depositions were vigorously defended. Plaintiffs took the 30(b)(6)
9 deposition of Washington Mutual's representative Lynn Ryder Gross on June 23, 2008 and
10 June 24, 2008, the depositions of former WaMu employees Karla Morrison on June 26, 2008,
11 Phyllis Austin on June 30, 2008, Sue Elde both as a 30(b)(6) witness and individually on July
12 22 and 23, 2008, Daryl David on August 1, 2008, William Small on August 7, 2008, Victoria
13 Wu as a 30(b)(6) witness and individually on August 7, 2008, and Marc McCall on August 11,
14 2008.

15 53. Defendant WaMu Pension Plan served their Response to Plaintiffs' Second Set
16 of Requests for Production on June 30, 2008.

17 54. On July 3, 2008, Named Plaintiffs filed a Motion to Compel Discovery
18 (hereinafter "Motion to Compel re Wear Away") requesting documents related to benefit
19 restricts based on wear away. [Dkt. Nos. 114-116]. Defendants filed their Opposition to
20 Plaintiffs' Motion to Compel re: Wear Away on July 14, 2008. [Dkt. Nos. 120-122]. Named
21 Plaintiffs filed their Reply re Motion to Compel re: Wear Away on July 18, 2008. [Dkt. Nos.
22 124-126]. The Court granted Named Plaintiffs' Motion to Compel re Wear Away on August
23 19, 2008. [Dkt. No. 165].

24 55. Named Plaintiffs Buus, Flor, Plumb, Schoenleber, Schulman and Weber filed
25 their Responses to Defendants' Second Requests for Production of Documents, First Set of
26 Requests for Admissions, and Second Set of Interrogatories on July 7, 2008.

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1 56. Defendants filed their Responses to Named Plaintiffs' Third Set of Request for
2 Production and Second Set of Requests for Admission on July 9, 2008, their Responses to
3 Named Plaintiffs' Fourth Requests for Admission on July 11, 2008 and their Responses to
4 Named Plaintiffs' Fourth Request for Production on July 16, 2008. Defendant Washington
5 Mutual Pension Plan Administration Committee filed their answers to Named Plaintiffs' First
6 Set of Interrogatories on July 9, 2008.
7 57. Named Plaintiffs amended their Initial Disclosures and filed their Supplemental
8 Responses and Objections to Defendants' Second Set of Interrogatories on August 11, 2008.
9 58. Defendants filed Supplemental Disclosures on September 10, 2008.
10 59. On September 15, 2008, the parties filed a CR37 Joint Submission re Named
11 Plaintiffs' Motion to Compel Production of a Password to Defendants' Pension Database [Dkt.
12 Nos. 183-191]. [hereinafter, "Motion to Compel Password"]. Named Plaintiffs sought
13 information reflecting the reduction that all class members received as a result of the conversion
14 of their traditional pension plan to a cash balance plan.
15 60. Defendants filed a CR 7(g) Surreply and Motion to Strike Plaintiffs' Reply in
16 Support of Motion to Compel Password on September 18, 2008.
17 61. On September 22, 2008, the Court granted Named Plaintiffs' Motion to Compel
18 Password and ordered Defendants to provide the password to the dbConnect database to
19 Plaintiffs. [Dkt. No. 217].
20 **F. Summary Judgment Motions**
21 62. After the completion of the described fact and expert discovery, the parties
22 briefed and filed extensive cross-motions for summary judgment on September 16, 2008.
23 63. In their Summary Judgment Motion, Named Plaintiffs alleged that in converting
24 traditional pension plans to the WaMu cash balance pension plan, Defendants caused a
25 significant reduction in participants' rates of future benefit accrual that was reasonably
26 foreseeable. [Dkt Nos. 192-194, 205-208].

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64. In their Summary Judgment motion, Defendants contended that ERISA §204(h) law did not require notices of a plan amendment to include the communication that benefits were going to be reduced, and further argued that the amendments at issue did not trigger the ERISA § 204(h) disclosure requirements because, in part, the amendments first "froze" plan benefits, and a second amendment instituted the accrual of benefits under the cash balance formula. By using two plan amendments, Defendants argued, the second amendment converting the plan with benefits already frozen did not create a reduction. [Dkt Nos. 196-204]. Plaintiffs vigorously opposed Defendants' argument that it complied with ERISA's disclosure requirements.

G. Retaining and Consulting with Experts

65. Prior to filing the Complaint, Lead Counsel retained two actuarial experts to assist Lead Counsel in the making the calculation of benefits necessary to support the allegations in the Complaint; and later to assist in analyzing the discovery produced in this case. Lead Counsel also retained a linguistics expert to assist Lead Counsel in analyzing communications to plan participants that were the subject of the ERISA disclosure claims. Lead Counsel consulted extensively with these experts on, *inter alia*, matters related to (1) plan design of the six separate plans at issue in the litigation; (2) the actuarial valuations of the Named Plaintiffs' benefits, and Class Members' benefits, (3) the actuarial calculations of the reductions in future benefit accrual caused by the numerous amendments to the five separate pension plans; (4) the linguistic composition and readable comprehension of the notices distributed to plan participant notifying them of the changes to their future rate of benefit accrual.

66. Named Plaintiffs took the depositions of Defendants experts George D. Gopen on August 8, 2008 and Bradford R. Klinck on August 11, 2008.

67. Defendants took the depositions of Named Plaintiffs' experts Gail Stygall on August 9, 2008, and Claude Poulin on August 14, 2008.

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1 **H. Preparing for Trial**

2 68. In what was a highly risky case from the outset, Named Plaintiffs presented
3 complex and innovative legal theories and diligently prepared this case for trial.

4 69. In the fall of 2008, Named Plaintiffs began preparing for the December 8, 2008
5 trial, by beginning the process of selecting trial exhibits, identify key witness deposition
6 testimony, and working with trial consultants regarding the presentation of the case to the
7 Court. Named Plaintiffs also began preparing for mediation, which the parties had scheduled
8 for November 12, 2008 before the Honorable Edward Infante (Ret.). Nine days after the parties
9 filed their Motions for Summary Judgment, on September 25, 2008, the Office of Thrift
10 Supervision seized Washington Mutual Bank and placed it into the receivership of the Federal
11 Deposit Insurance Corporation, which sold Washington Mutual Bank's assets to JPMorgan
12 Chase & Co. One day later, Washington Mutual Inc. ("WMI") and Washington Mutual
13 Investment Corp. ("the Debtors") filed voluntary petitions for relief under Chapter 11 of Title
14 11 of the United States Code with the United States Bankruptcy Court for the District of
15 Delaware ("the Bankruptcy Court").

16 70. As a result of the uncertainty due to the on-going Chapter 11 Case, and the FDIC
17 seizure of Washington Mutual Bank, this Court stayed the *Buus* Action on October 2, 2008 for
18 thirty days, directing the parties to file a joint status report at the end of such period. After
19 Washington Mutual, Inc. filed its Voluntary Petition in Bankruptcy, the Court stayed the matter
20 pending resolution of the bankruptcy matter.

21 71. Over a period of the next twenty one months, the Court extended the Stay and
22 ordered the parties to file several Joint Status Reports. The parties complied with the Courts'
23 order, filing Joint Status Reports on November 5, 2008 [Dkt. No. 229], January 12, 2009 [Dkt.
24 No. 231], March 30, 2009 [Dkt. No. 237], April 30, 2009 [Dkt No. 243], July 9, 2009 [Dkt. No.
25 248], March 29, 2010 [Dkt. No. 257], April 30, 2010 [Dkt. No. 259], June 1, 2010 [Dkt No.
26 260] and June 18, 2010. [Dkt. No. 262].

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1 72. Named Plaintiffs vigorously attempted to have the stay in this matter lifted so
2 that the case could proceed. Along with the January 12, 2009 Status Report, Lead Counsel filed
3 a declaration urging the Court to allow the matter to proceed as it asserted that as Washington
4 Mutual, Inc. was not a defendant in the matter, that entity's Voluntary Bankruptcy Petition
5 should not prohibit this matter from proceeding. [Dkt. No. 233]. Defense counsel disputed
6 Lead Counsel's allegations. [Dkt. Nos. 232 and 234]. On May 11, 2009, Named Plaintiffs filed
7 a Response to Defendants' Updated Status Report again requesting the court lift the stay on the
8 matter so the litigation might continue. [Dkt. No. 245]. On July 13, 2009, the parties made a
9 presentation to the Court regarding the Stay imposed on the matter. The Court ordered that the
10 case would be stayed pending a ruling of the District of Delaware Bankruptcy Court. [Dkt. No.
11 251].

12 73. During the stay, the parties filed subsequent Joint Status Reports. On July 13,
13 2009, the Court held a status conference and requested the parties seek guidance from the
14 Bankruptcy Court as to whether the automatic stay under the U.S. Bankruptcy Code applied to
15 the *Buus* Action. On September 1, 2009, Named Plaintiffs filed a motion in the Bankruptcy
16 Court in which they argued that the automatic stay did not apply to the *Buus* Action and that
17 even if it did, relief from stay should be granted. That motion was opposed by the Debtors on
18 November 25, 2009. Named Plaintiffs prepared a reply brief, and were going to file it on
19 February 10, 2010, when the parties reached as settlement in principle that same day.

20 74. Prior to the Bankruptcy Bar Date of March 31, 2009, Named Plaintiffs filed
21 proofs of claim with respect to the claims asserted in the Buus Action (the "Class Claims") in
22 the Chapter 11 Case. Claim Nos. 1950, 1951, 1952, 1957, 1959, 1972, 1973, 2504 & 2513
23 were filed by Named Plaintiffs, both individually and in their in their capacity as Named
24 Plaintiffs on behalf of the class in the Buus action.
25
26

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I. Settlement Negotiations and Mediation

75. After Named Plaintiffs filed their relief from stay motion in Bankruptcy Court, they initiated settlement communications with counsel for the debtor, WMI. Named Plaintiffs made a settlement demand in late October 2009. Thereafter the parties engaged in extensive settlement discussions over the next four months first with bankruptcy counsel and then subsequently with counsel for the Named Defendants.

76. The Settlement was achieved as a result of hard-fought, arm's length negotiations and was vigorous and hard-fought. This process was in all respects, thorough, adversarial, and professional. The parties reached an agreement in principle on February 10, 2010. In the following months, the parties engaged in extensive negotiations over the remaining terms of the written agreement and its associated notices and orders. Multiple drafts of the Settlement Agreement were exchanged, extensively reviewed and negotiated by counsel for the Named Plaintiffs, the Named Defendants, and the Settling Defendants, which includes non-defendant debtor WMI and JP Morgan Chase. The parties executed the Settlement Agreement on June 17, 2010. On June 29, 2010, the parties executed and filed an Amended Settlement Agreement and submitted it to the Court on June 30, 2010 as part of a Joint Motion for Preliminary Approval of Proposed Settlement, Approval of Notice Plan, and time for Final Approval Hearing. [Dkt. No. 264].

77. A settlement agreement in principle was reached on February 10, 2010.

VI. TIME AND EFFORT DEDICATED TO THIS CASE

78. Lead Counsel has devoted significant time and effort to this case since its filing in June 2007. Lead Counsel's efforts were intensive, carefully coordinated, and efficient.

79. To date, Lead Counsel devoted more than 10,395.62 attorney and professional hours to the prosecution of this case. The hours claimed were incurred by, among other things, investigating the claims against Defendants, reviewing and analyzing Plan documents and information, preparing the Complaint and amendments thereto, conducting necessary legal

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1 research, retaining and working with experts, completing discovery, deposing fact and expert
2 witnesses, preparing materials for class certification, briefing and arguing Defendants' motions
3 to dismiss, briefing and arguing the motion for class certification, briefing Named Plaintiffs'
4 Motion for Summary Judgment, engaging in extensive settlement negotiations, and preparing
5 the necessary agreements and pleadings related to the Settlement.

6 80. I have had gathered and have had attorneys review the time and expense reports
7 from Keller Rohrback L.L.P. and Keller Rohrback P.L.C. (our affiliated law firm in Phoenix,
8 Arizona) ("Keller Rohrback"). These time and expense reports are summarized below.

9 81. Lead Counsel worked diligently and efficiently on this case. In addition, we
10 carefully assigned work within our firm to minimize the fees in the case; thus, senior attorneys
11 did not do the work that could be accomplished by more junior attorneys, and attorneys did not
12 do work that could be completed by paralegals. Throughout the litigation, we made sure that
13 we litigated the action in the most efficient method possible. Nonetheless, the case required
14 dedicated focus of a number of Keller Rohrback attorneys who were called upon to counter the
15 efforts of prominent defense firms, each of which vigorously represented its clients. Indeed,
16 Defendants were represented by Sidley Austin LLP and David Wright Tremaine – both well-
17 known and respected firms.

18 82. Since the inception of this case, in accordance with their normal business
19 practices, Lead Counsel have and do maintain detailed and contemporaneous records of the
20 time spent by their lawyers, law clerks, paralegals, and certain other personnel on this action.
21 Our timekeepers have been and are required to keep daily time-records, both noting amounts of
22 time spent on projects and providing descriptions of that work. These records then are
23 computerized, checked, and maintained in databases. These systems allow us to be confident
24 that the hours reported for this case are accurate.

25 83. The schedule attached as Ex. B is a detailed summary indicating the time spent
26 by Keller Rohrback attorneys and other professional support staff in this litigation and the

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lodestar calculation based on the firm's current billing rates from the inception of the case though October 1, 2010. For personnel who are no longer employed by the firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by Keller Rohrback L.L.P.

84. The hourly rates charged by Lead Counsel in this case, between $300 and $740 per hour, 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. Counsel's 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, for many years and throughout the time this litigation has been pending.

85. If these hours had been billed on a "straight" hourly basis (i.e., no contingency and no risk of non-payment), the lodestar (hours times current billing rates) for this professional time would be approximately $3,861,549.85.

86. The lodestar figures are based on Keller Rohrback's current billing rates and contemporaneous time records. Expense items are billed separately and such charges are not duplicated in the firm's billing rates.

87. Significant additional attorney hours will be necessary after October 1, 2010, the date as of which the above numbers were compiled, to complete the remaining work on this case. In addition to incurring hours in connection with the final approval hearing, based on its experience with numerous other settlements of comparable cases, Lead Counsel anticipates that it will spend a substantial amount of additional time over the next several months responding to inquiries from Class members, interacting with the plan sponsor, record keeper, claims administrator, and pension plan personnel with respect to technical matters concerning the settlement, and generally shepherding implementation of a settlement affecting the Pension

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Plan and its 18,642 participants.[2] Beyond that, Lead Counsel does not intend to apply for reimbursement of additional fees, substantial as they may be, incurred after Final Approval. However for purposes of evaluating the reasonableness of the 21% fee request, and performing the lodestar cross-check, it is appropriate to consider the additional fees that Lead Counsel will incur. Lead Counsel conservatively estimates that, at a minimum, additional fees will be $100,000. Thus, whereas the current lodestar is $3,861,549.85 the actual lodestar will be at least $3,961,549.85.

88. The Settlement Agreement expressly provides for payment of Lead Counsel's litigation expenses, and, as noted above, Notice expenses from the Settlement Amount. Settlement Agreement ¶¶ 1.2(t), 9.1, attached hereto as to Ex. A.

89. Lead Counsel requests reimbursement for the reasonable and necessary expenses advanced to prosecute this litigation since its inception in January 2007. These expenses, totaling $390,124.89, are detailed in Ex. C hereto. Such expenses are awarded routinely following settlement of common fund cases. *See Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *7 (N.D. Cal. July 18, 1997). Costs have been and continue to be incurred to provide Class Notice and follow up, which the Settlement Agreement states shall be deducted from the Net Settlement Amount. Settlement Agreement ¶ 1.2(t). See Ex. A hereto. These costs are not included in Lead Counsel's request for award of litigation expenses.

90. Lead Counsel also advanced expenses of $189,945.49 for experts who were retained to prepare expert reports. The expenses incurred in connection with the experts were both reasonable and necessary to the litigation. The remainder of the expenses advanced by

[2] 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.

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Lead Counsel was for travel, photocopying, legal research, telephone, facsimile, postage, and other necessary costs which are incurred routinely in any litigation of this size and complexity.

VII. THE REQUESTED FEE IS REASONABLE AND APPROPRIATE UNDER THE NINTH CIRCUIT STANDARDS

91. Under either the "lodestar/multiplier" or "percentage" method of calculating attorneys' fees, the court should consider the reasonableness of the fee application under the following factors:

A. the time and labor expended by counsel;

B. the magnitude and complexities of the litigation;

C. the risk of the litigation;

D. the quality of representation;

E. the requested fee in relation to the settlement; and

F. public policy considerations.

92. The following is a brief review of the record in support of each of the six factors.

A. Time and Labor Expended by Counsel

93. Lead Counsel has dedicated enormous efforts to this case since it was filed. *See, e.g.*, § V above. Having served in leadership positions in similar cases, we were aware at the outset of the case that considerable time and resources would likely be necessary to prosecute the case, and that proved to be true. In all, Lead Counsel devoted more than 10,395.22 hours to the successful prosecution of the action, and advanced expenses in the amount of $390,124.89.

94. Lead Counsel's efforts were conducted efficiently and with cost-savings in mind. Work was assigned to lawyers in areas in which they had experience. Where feasible, work was assigned to associates and paralegals with lower billing rates, to provide quality work at the lowest cost.[3] We took significant precautions to avoid duplication of effort, prevent

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[3] Lead Counsel maintained daily time records throughout this litigation, and a summary of such time appears in Section V of this Declaration. This summary is also supported by Ex. B attached hereto.

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unauthorized work, and ensure that areas of potential discovery deemed tangential were not pursued. Moreover, we exercised billing judgment by reviewing the bills prior to submission, and deleting erroneous or duplicative entries.

95. By taking this case and litigating it to its advance stages, we gave up opportunities to litigate other matters.

B. Magnitude and Complexities of the Litigation

96. As noted above, this case was extremely complex and subject to both changing facts and a fast-developing and hotly disputed area of the law.

97. Plaintiff's claims raise a host of contested legal and factual issues, each of which would require extensive lay and esoteric expert discovery and testimony to resolve.

98. Despite the complexity and uncertainty in the law and the vigorous defense Defendants mounted at every juncture, Lead Counsel navigated this case to a successful conclusion.

C. Risk of the Litigation

99. As noted in Plaintiffs' Motion in support of Attorneys Fees, the tangible risks faced by plaintiffs' counsel in ERISA cash balance class actions, including this one, are substantial.

100. As an initial matter, ERISA § 204(h) disclosure litigation is relatively undeveloped. The case law is exceptionally thin in comparison with securities and antitrust jurisprudence, with only a few appellate decisions on most issues. There have been only two settlements nationwide on ERISA § 204(h) disclosure claims that fall within a substantial settlement range, and these were negotiated prior to five circuit courts dismissing the age discrimination claims, which were also included in the settlement. The lack of supporting precedent in this field, and the resulting potential for significant changes as the law evolves, greatly increases the risk associated with litigating a complex case such as this one.

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101. Turning to the specific risks presented by this litigation, there were many. As described in Plaintiffs' Motion and Memorandum in support of Attorney Fees, there were risks in establishing liability and damages, and to a lesser extent, in maintaining class certification.

102. Lead Counsel accepted this matter on a contingent basis, with the attendant risk that they would receive no fee or expense reimbursement. They therefore should be rewarded for overcoming the risks involved and bringing the case to a successful resolution.

D. Quality of Representation

103. This demanding case presented difficult factual, procedural, and legal issues. It involved large amounts of money, scores of potential witnesses and thousands of pages of documents. Successfully marshalling the evidence and applying the law required a high degree of expertise in complex ERISA and class action matters. Lead Counsel—national leaders in pursuing this type of litigation—provided the high quality of services this case required, employing the expertise they have garnered from spearheading company stock and other ERISA and class action cases over the years.

104. Lead Counsel provided the necessary expertise garnered from their experience serving in leadership roles in what is now over 25 ERISA class action cases, on a variety of ERISA matters, including other cash balance ERISA class actions.

105. Keller Rohrback has played a leading role in the development of ERISA class action jurisprudence by obtaining favorable landmark decisions and recovering over $900 million dollars on behalf of employees in ERISA cases. Keller Rohrback serves or has served in a leadership capacity in numerous prominent ERISA cases filed throughout the country, including several within this Circuit. The numerous ERISA breach of fiduciary duty class actions for which Keller Rohrback serves or has served as lead or co-lead counsel are provided in the resume of Keller Rohrback's Complex Litigation Group, attached hereto as Ex. D.

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106. Keller Rohrback's work as lead counsel in ERISA cases has been widely praised. For example, in the WorldCom ERISA Litigation, in which Keller Rohrback served as lead counsel, Judge Cote found that:

> Lead Counsel has performed an important public service in this action and has done so efficiently and with integrity. It has cooperated completely and in novel ways with Lead Counsel for the Securities Litigation and in doing so all of them have worked to reduce legal expenses and maximize recovery for class members. Lead Counsel . . . has also worked creatively and diligently to obtain a settlement from WorldCom in the context of complex and difficult legal questions. . . . Lead Counsel should be appropriately rewarded as an incentive for the further protection of employees and their pension plans not only in this litigation but in all ERISA actions.

In re WorldCom, Inc. ERISA Litig., No. 02-4816, 2004 WL 2338151, at *10 (S.D.N.Y. Oct. 18, 2004).

107. I am Keller Rohrback's Managing Partner and I lead its Complex Litigation and ERISA team. I received both my M.B.A. and law degree from the University of Wisconsin, where I served as Editor-in-Chief of the *Wisconsin Law Review* and was selected by faculty as the outstanding graduate of my law school class. I am a former Assistant United States Attorney and Ninth Circuit judicial law clerk (Hon. Jerome Farris). I have been actively engaged in the prosecution of complex litigation for two decades. I have served as lead or co-lead counsel in several leading ERISA cases, including the largest and most complex—*Enron*, *WorldCom*, and *Global Crossing*, to name a few—and numerous other cases. In these ERISA actions, I have worked closely with the U.S. Department of Labor on various issues, established relationships with many of the key experts in the field, and worked extensively with counsel in parallel securities and derivative cases, developing systems for effectively coordinating the discovery across these cases.

108. In addition to my work as lead or co-lead counsel in these prominent ERISA cases, I have prosecuted a variety of class actions involving high profile matters including the Exxon Valdez oil spill, the Microsoft civil antitrust case, the Vitamins price-fixing cases, the

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1 MDL Fen/Phen Diet drug litigation, as well as notable public service lawsuits such as *Erickson*
2 *v. Bartell Drug Co.*, establishing a woman's right to prescription contraceptive health coverage.
3 Aided in part by my M.B.A. in accounting, I have also litigated numerous complex cases
4 involving financial and accounting fraud, including actions against several of the nation's
5 largest accounting and investment firms.

6 109. I am a recipient of Trial Lawyer of the Year by the Trial Lawyers for Public
7 Justice Foundation and for the last seven years have been named a "Super Lawyer" among civil
8 litigators by *Washington Law and Politics* magazine in its annual review of the State's legal
9 profession. I am a frequent commentator on ERISA litigation and regularly speak at national
10 ERISA conferences. Most recently, I spoke at the DOL Speaks: 2008 Los Angeles Benefits
11 Conference, the 2008 Western Benefits Conference, as well as the Employee Benefits
12 Conference, the American Bar Association's Employee Benefits Committee Meeting, and the
13 Glasser Annual ERISA Litigation Conference. I am considered one of the leading experts on
14 ERISA class action cases.

15 110. The Keller Rohrback complex litigation ERISA team is also highly
16 accomplished, and includes numerous lawyers whose practices focus primarily on ERISA class
17 action cases, including partner Derek W. Loeser and associate Karin B. Swope.

18 111. Mr. Loeser has served in a leadership capacity in many of the firm's ERISA
19 class actions cases, including *In re Polaroid ERISA Litig.*, No. 03-8335 (S.D.N.Y.); *In re AIG*
20 *ERISA Litig.*, No. 04- 8141 (S.D.N.Y.), *In re CMS Energy ERISA Litig.*, No. 02-72834 (E.D.
21 Mich.), *Alvidres v. Countrywide Financial Corp.*, No. 07-5810 (C.D. Cal.), *In re HealthSouth*
22 *ERISA Litig*, No. 03-1700 (N.D. Ala.); and *In re State Street ERISA Litig.*, No. 07-8488
23 (S.D.N.Y.). Mr. Loeser has extensively researched, briefed, and argued the multitude of legal
24 issues arising in ERISA class action cases, including on motions to dismiss, class certification,
25 and summary judgment, and has conducted extensive document, deposition, and expert
26 discovery in these cases. Additionally, he has played a lead role in successful settlement

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1 negotiations in numerous of the firm's ERISA cases. Mr. Loeser is a member of the American
2 Bar Association's Section of Labor & Employment Law and the Employee Benefits Committee
3 as a plaintiff attorney, is a frequent speaker at national ERISA conferences, and an author of
4 articles addressing ERISA and class action topics.

5 112. Before joining Keller Rohrback in 2002, Mr. Loeser clerked for the Hon.
6 Michael R. Hogan, United States District Court, District of Oregon, and was a trial attorney in
7 the Employment Litigation Section of the Civil Rights Division of the U.S. Department of
8 Justice in Washington, D.C. He graduated with honors from the University of Washington
9 School of Law. Mr. Loeser was named as a "Super Lawyer" among civil litigators in 2007,
10 2008, 2009, and 2010, and recognized in 2005 and 2006 as a "Rising Star" by *Washington Law*
11 *and Politics* magazine in its annual review of the State's legal profession.

12 113. Ms. Swope has served in a leadership capacity in the firm's ERISA class actions
13 cases, including *In re Regions ERISA Litig.*, No.08-2192 (W.D. Tn.) and *In re State Street*
14 *ERISA Litig.*, No. 07-8488 (S.D.N.Y.). Ms. Swope has extensively researched and briefed
15 numerous legal issues arising in ERISA class action cases, including on motions to dismiss,
16 class certification, and summary judgment, and has conducted extensive document, deposition,
17 and expert discovery in these cases. Ms. Swope serves on the ERISA amicus advisory
18 committee for the National Employment Lawyers Association. She is an Associate Editor of
19 the ABA Bar Journal Tort Trial & Insurance Practice Law Journal, and a member of the
20 American Bar Association's Section of Labor & Employment Law and the Employee Benefits
21 Committee as a plaintiff attorney. She serves as an Adjunct Professor of Law at Seattle
22 University School of Law.

23 114. Prior to joining Keller Rohrback L.L.P., in 2007, Ms. Swope clerked for the
24 Hon. John C. Coughenour, United States District Court, District of the Western District of
25 Washington, and the Hon. Robert Cowen, United States Court of Appeals for the Third Circuit.
26 She graduated with honors from Columbia Law School.

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1 **E. Requested Fee in Relation to the Settlement**

2 The requested 21% fee is fair and reasonable in relation to the recovery and compares
3 favorably to fee awards in other risky common fund cases in the Ninth Circuit and elsewhere.
4 The requested fee is well within the customary range of awards in cases like this one under both
5 a "lodestar" and "percentage of the fund" analysis.

6 115. **Percentage of the Fund Analysis.** The requested fee award represents 21% of
7 the recovery, is well-warranted, and well within the range of awards made by district courts in
8 ERISA cases in the Ninth Circuit as well as other circuits around the country. *See e.g.,* Final
9 Order and Judgment, *In re McKesson HBOC ERISA Litig.*, No. 00-20030 (N.D. Cal. Sept. 1,
10 2006) (awarding 25%); Order and Judgment, Blyler v. Agee, No. 97-0332 (D. Idaho Aug. 25,
11 2004) (awarding 30%); *In re Providian ERISA Litig.*, No. 01-5027, 2003 WL 22005019 (N.D.
12 Cal. June 30, 2003) (awarding 25%); Order and Final Judgment, *In re Merrill Lynch ERISA*
13 *Litig.*, No. 07-9633 (S.D.N.Y. Aug. 21, 2009) (awarding 25%); Order, *In re Xerox ERISA Litig.*,
14 No. 02-1138 (D. Conn. Aug. 19, 2009) (awarding 30%); Order, *In re EDS ERISA Litig.*, No.
15 03-126, (E.D. Tex. Aug. 6, 2008) (awarding 33%); *Spivey v. Southern Co.*, No. 04-1912 (N.D.
16 Ga. Aug. 14, 2007) (awarding 28%); Order and Final Judgment, *In re The Goodyear Tire &*
17 *Rubber Co. ERISA Litig.*, No. 03-2182 (E.D. Mich. Oct. 22, 2008) (awarding 25%).

18 116. **Lodestar/Multiplier Analysis.** As noted above, the total lodestar required by
19 this case as of October 1, 2010 is approximately $3,861,549.85. This figure was calculated
20 using the customary rates of the attorneys who have worked on this case, and was based on
21 contemporaneous, daily time records, regularly prepared and maintained by Lead Counsel and
22 additional Plaintiff's Counsel in the ordinary course of business. Taking into account a
23 conservative estimate of additional work that will be performed by Lead Counsel following
24 Final Approval, the total lodestar is $3,961,549.85.

25

26

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1 117. The hourly rates charged by Lead Counsel are prevailing rates in each of their
2 communities, have been approved in many judicial settlement hearings, and are consistent with
3 rates approved in this Circuit and others in many recent class action cases.
4 118. The hourly rates charged by Lead Counsel in this case are the rates that have been
5 or could be charged as usual and customary hourly rates for their work performed for non-
6 contingency fee clients and in other class action cases. Counsel's hourly rates have been paid by
7 hourly clients and/or, separately, approved for payment by federal and state courts in other class
8 and derivative litigations during the time this litigation has been pending.
9 119. Whether based on the current lodestar or the actual estimated lodestar taking into
10 account future work following Final Approval, the lodestar cross-check confirms the
11 reasonableness of the requested 21% fee ($4,200,000.00). Based on the current lodestar, the
12 21% fee sought by Lead Counsel represents a multiplier of 1.094. Taking into account the
13 estimated additional $100,000 of fees, the 21% fee request represents a multiplier of 1.066.
14 Either way, the multiplier is well below the typical range for cases of this type.
15 120. The reasonableness of the requested fee, under both the lodestar/multiplier and
16 percentage of recovery analyses, is further bolstered by another metric: the lodestar as a
17 percentage of the common fund. In effect, this metric combines the other two. If the lodestar is
18 a small percentage of the common fund, a higher multiplier may be warranted. Conversely, if
19 the lawyers' lodestar is a higher percentage of the recovery, a lower multiplier may be
20 appropriate.
21 121. In this case the lodestar is approximately 19.8% of the recovery. This reflects
22 the amount of work that was necessary to achieve the result and indicates that a percentage
23 award of well over that amount is appropriate, otherwise the lawyers are not fairly compensated
24 for their risk.
25 122. Whatever the rubric—lodestar multiplier, fees as percentage of recovery, or
26 lodestar as percentage of recovery—the fee requested here is very reasonable.

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1 **F. Public Policy**

2 123. Public policy considerations also favor encouraging skilled attorneys to bring
3 ERISA suits such as this one. ERISA was passed by Congress as a means of promoting an
4 important and essential public policy protecting and preserving the retirement savings of
5 American workers. Private enforcement of ERISA is specifically encouraged in the statute
6 itself. *See, e.g.*, ERISA § 502(a), 29 U.S.C. § 1132(a) (specifically empowering participants and
7 beneficiaries to bring civil actions to redress violations and/or enforce provisions of ERISA).

8 124. Without the efforts of Lead Counsel, Plan participants likely would not have
9 obtained relief anywhere close to this magnitude. Lead Counsel clearly have promoted the
10 public interest by vindicating the rights of the aggrieved Plan participants, and it is in the public
11 interest for Lead Counsel to be paid reasonable attorneys' fees. There was risk in pursuing
12 Named Plaintiffs claims, but we believed that the risk was justified economically because the
13 firm could earn substantially more in percentage contingent fee than it may recover in more
14 routine ERISA cases.

15 **VIII. LEAD COUNSEL SHOULD BE REIMBURSED FOR THEIR REASONABLE EXPENSES**

16 125. Lead Counsel advanced significant unreimbursed expenses of the litigation. The
17 expenses incurred in this action are commercially reasonable and are reflected on Keller
18 Rohrback's books and records. These books and records are prepared from expense vouchers,
19 check records, and other source materials, and they represent an accurate record of the expenses
20 incurred. The expenses include necessary travel, expert witnesses and copying, as well as
21 telephone, fax, computer aided research, and document database storage and maintenance.
22 Summaries of Keller Rohrback's expenses are attached hereto as Ex. C.

23 126. Expenses were also be incurred for class member identification, mailing and
24 publishing the Notice as detailed in the accompanying Skinner Declaration. The Court has
25 already approved payment of these expenses from the Settlement Amount, however, so they are
26 not included in our request for reimbursement.

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