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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

**NAMED PLAINTIFFS'
MEMORANDUM IN SUPPORT OF
PRELIMINARY APPROVAL OF
PROPOSED SETTLEMENT,
APPROVAL OF NOTICE PLAN, AND
TIME FOR FAIRNESS HEARING**

Noted for Consideration: June 30, 2010

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PRELIMINARY
APPROVAL OF PROPOSED SETTLEMENT, APPROVAL OF
NOTICE PLAN, AND TIME FOR FAIRNESS HEARING
(07-CV-00903 MJP)

LAW OFFICES OF
KELLER ROHRBACK L.L.P.
1201 THIRD AVENUE, SUITE 3200
SEATTLE, WASHINGTON 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

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I. INTRODUCTION

Plaintiffs Gary Buus, Bryan Buck, Sidney John Flor, Kellie Plumb, Thomas Schoenleber, Audrey Schulman, and Margaret Weber (“Named Plaintiffs” or “Plaintiffs”) and Defendants respectfully jointly move the Court for an Order: (1) granting preliminary approval of the proposed settlement (“Settlement”);¹ (2) approving the form and manner of notices of the Settlement (“Class Notice” and “Publication Notice”); (3) preliminarily certifying two additional subclasses for settlement purposes, and (4) setting a date for a Fairness Hearing.

The proposed Settlement, which requires Defendants to allocate \$20 million, net certain administrative costs and attorneys fees, to the WaMu Pension Plan for distribution to class members, provides substantial benefit to members of the class and resolves all claims asserted by Named Plaintiffs in this litigation (“the Buus Action”). The Settlement represents an excellent recovery for the Class and is fair, reasonable, and adequate under the governing standards for evaluating class action settlements in this Circuit. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Moreover, the proposed Class Notice satisfies the requirements of due process. As set forth in detail below, all prerequisites for preliminary approval of the Settlement have been met, and Named Plaintiffs respectfully request that this joint motion be granted.²

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Description of Litigation

On June 12, 2007, Named Plaintiffs filed a Class Action Complaint against the WaMu Pension Plan and the WaMu Pension Plan Administration Committee (“PAC”) (collectively

¹ Capitalized terms not otherwise defined in this memorandum have the same meaning ascribed to them in the Settlement Agreement. A copy of the Settlement Agreement is attached as Exhibit 1 to the Motion filed herewith.

² The motion has been filed jointly by Named Plaintiffs and Defendants. However and in accordance with the terms of the Settlement, this memorandum in support of the motion is being filed by Named Plaintiffs only. Attached to the Motion as Exhibit 2 is the [Proposed] Order Preliminarily Approving Proposed Settlement, Approving Form and Dissemination of Class Notice, and Setting Date for Hearing on Final Approval (“Preliminary Approval Order”).

1 “Named Defendants” or “Defendants”) alleging that that the Plan’s formula for calculating
2 pension benefits violates the Employee Retirement Income Security Action of 1974, as amended,
3 29 U.S.C. § 1001, *et seq.* (“ERISA”). Specifically, Named Plaintiffs alleged that the cash
4 balance formula impermissibly caused the rate of benefit accrual to decrease due to the age or
5 attainment of any age by participants. Named Plaintiffs also alleged the Named Defendants
6 violated ERISA by failing to provide adequate notice to participants of the reduction to the future
7 rate of benefit accrual caused by a merger or conversion of traditional final average pay pension
8 plans to a cash balance formula, and by the conversion of one cash balance plan to another cash
9 balance plan. Named Plaintiffs filed an Amended Class Action Complaint on June 29, 2007.

10 On September 27, 2007, Defendants filed a motion to dismiss the Amended Class Action
11 Complaint. Named Plaintiffs’ opposed the motion on November 6, 2007, and the Court heard
12 oral argument on December 7, 2007. On December 18, 2007, the Court denied Defendants’
13 Motion to Dismiss in part and granted it in part. Specifically, the Court declined to dismiss
14 Named Plaintiffs’ notice claims alleged under ERISA § 204(h) (Count 2), and dismissed Named
15 Plaintiffs’ age discrimination claims under ERISA § 204(b)(1)(H)(i), and Summary Material
16 Modification (“SMM”) and Summary Plan Description (“SPD”) claims under ERISA §§ 102 &
17 104(b)(1) (Counts 1, 3 & 4).

18 On April 16, 2008, with leave of Court, Named Plaintiffs filed a Second Amended
19 Complaint adding Thomas Schoenleber as an additional Named Plaintiff. On April 30, 2008,
20 Defendants filed their answer and affirmative defenses to the Amended Complaint.

21 On March 20, 2008, Named Plaintiffs filed a motion for class certification under Fed. R.
22 Civ. P. 23(a) and 23(b)(1) & (2). Defendants opposed the motion on May 5, 2008, and the Court
23 heard oral argument on July 11, 2008. On July 24, 2008, the Court granted in part and denied in
24 part Named Plaintiffs’ Motion for Class Certification, and certified four subclasses (the
25 “Certified Class”) pursuant to Rule 23(a) and 23(b)(1) & (2) of the Federal Rules of Civil
26 Procedure.

1 On August 7, 2008, the Named Plaintiffs filed a motion to amend the Court's class
2 certification to include two additional subclasses relating to the merger and conversion of the
3 1998 Great Western Retirement Plan and the 1999 H.F. Ahmanson & Company Retirement Plan
4 to the WaMu Pension Plan cash balance formula. The motion also sought to add Bryan Buck as
5 a Named Plaintiff and class representative for the 1999 H.F. Ahmanson plan subclass.

6 From December 18, 2007 through the discovery cut-off of August 11, 2008, the parties
7 engaged in active discovery. Named Plaintiffs propounded and responded to 5 sets of
8 interrogatories, 7 sets of requests for production and 5 sets of requests for admission. Named
9 Plaintiffs issued 5 subpoenas on third parties, reviewed tens of thousands of pages of documents
10 and took and defended 17 fact witness depositions. Named Plaintiffs also took and defended 4
11 expert witness depositions, and exchanged expert witness reports. The discovery phase of the
12 litigation was hotly contested. It included Named Plaintiffs filing 3 separate motions to compel,
13 and opposing 2 discovery/scheduling motions filed by Defendants.

14 After the completion of fact and expert discovery, the parties filed cross-motions for
15 summary judgment on September 16, 2008, and Named Plaintiffs began preparations for trial
16 which was scheduled to begin on December 8, 2008.

17 Ten days later, on September 26, 2008, Washington Mutual Inc. ("WMI"), and WMI
18 Investment Corp. (collectively "the Debtors") filed voluntary petitions for relief under chapter 11
19 of title 11 of the United States Code with the United States Bankruptcy Court for the District of
20 Delaware ("the Bankruptcy Court"), as jointly administered, *In re Wash. Mutual, Inc.*, No. 08-
21 12229 ("Chapter 11 Case"). As a result of the Chapter 11 Case, this Court stayed the Buus
22 Action on October 2, 2008 for thirty days, directing the parties to file a joint status report at the
23 end of such period. The parties filed subsequent Joint Status Reports informing the District
24 Court of, *inter alia*, the status of the Chapter 11 cases and corresponding litigation between the
25 Debtors, the FDIC, and JPMorgan Chase ("JPMC") relating to the disposition of the WaMu
26 Pension Plan. The parties disputed whether the stay should continue or be lifted. Prior to the

1 Bankruptcy Bar Date of March 31, 2009, Named Plaintiffs filed proofs of claim with respect to
2 the claims asserted in the Buus Action (the "Class Claims") in the Chapter 11 Case.³

3 On July 13, 2009, the Court held a status conference and requested the parties seek
4 guidance from the Bankruptcy Court as to whether the automatic stay under the U.S. Bankruptcy
5 Code applied to the Buus Action. On September 1, 2009, Named Plaintiffs filed a motion in the
6 Bankruptcy Court in which they argued that the automatic stay did not apply to the Buus Action
7 and that even if it did, relief from stay should be granted. That motion was opposed by the
8 Debtors.

9 In sum, the parties conducted a thorough investigation and discovery of the claims, the
10 litigation was hard-fought over several years, and the case was in its advanced stages with cross
11 motions for summary judgment pending when a settlement was reached.

12 **B. Settlement Negotiations**

13 After Named Plaintiffs filed their motion with regard to the automatic stay with the
14 Bankruptcy Court, and in the context of discussing the status of the litigation and bankruptcy
15 motion with Debtors' counsel, Named Plaintiffs and Debtors' counsel initiated settlement
16 discussions. Named Plaintiffs made a settlement demand in late October 2009, and thereafter the
17 parties engaged in extensive settlement discussions over the next four months. The parties
18 reached an agreement in principle on February 10, 2010. Multiple drafts of the Settlement
19 Agreement were exchanged, extensively reviewed and negotiated by counsel for the Named
20 Plaintiffs, the Named Defendants, and the Settling Defendants, which includes non-defendant
21 debtor WMI. The parties executed the Settlement Agreement on June 17, 2010, bringing to a
22 close the parties' arm's length, hard-fought, and thorough negotiations. The parties signed an
23 amended Settlement Agreement on June 29, 2010 that specifically identified Audrey Schulman
24
25

26 ³ Claim Nos. 1950, 1951, 1952, 1957, 1959, 1972, 1973, 2504 & 2513 were filed by Named Plaintiffs, both
individually and in their in their capacity as Named Plaintiffs on behalf of the class in the Buus action.

1 as a Named Plaintiff, and did not otherwise change any material terms of the June 17, 2010
2 Settlement Agreement.

3 **C. Terms of Settlement Agreement**

4 The terms and conditions of the proposed Settlement are set forth in the Settlement
5 Agreement, Exhibit 1 to the Motion filed herewith. The following is a summary of the principal
6 terms of the parties' agreement.

7 1. **Settlement Amount.** The parties agreed to settle this action for \$20,000,000, net
8 of the settlement administration fees and costs, Lead Counsel's approved fees and costs, and case
9 contribution awards to the Named Plaintiffs, as specifically set forth in the Settlement
10 Agreement.

11 2. **Settlement Class.** A non-opt -out class consisting of all persons who are within
12 the scope of the Certified Class, certified by this Court's July 24, 2008 Certification Order and
13 the Settlement Subclasses, as set forth in Section III.B.

14 3. **Class Notice and Publication Notice.** A proposed Preliminary Approval Order
15 is attached to the Motion for Preliminary Approval, filed herewith as Exhibit 2. The proposed
16 Preliminary Approval Order provides for the following notices:

17 (a) A Class Notice (Exhibit 1 to the Preliminary Approval Order), to be mailed via
18 first class to the last known address of Settlement Class Members who have been
19 identified after reasonable efforts and based upon the reasonably accessible records; and
20 to be posted on the website at www.kellersettlements.com.

21 (b) A Publication Notice (Exhibit 2 to the Preliminary Approval Order), to be
22 published in the Seattle Times, and by newswire, and posted on the website at
23 www.kellersettlements.com.

24 4. **Plan of Allocation.** As provided for in Section 7.3 of the Settlement Agreement,
25 the Named Plaintiffs will seek Court approval of the Plan of Allocation. The Plan of Allocation
26 will provide for the distribution, allocation or credit to the WaMu Pension Plan of the Net
Settlement Amount. The Plan will then allocate additional benefits on a *per capita* basis to
members of the Settlement Class who have been identified after reasonable best efforts. The
parties determined to utilize a *per capita* approach because a *pro rata* type allocation would be

1 extremely time consuming and expensive to administer because of the number of plans involved,
2 the length of the Class Period, and the status of the data that would be necessary for calculating
3 *pro rata* recoveries. The Defendants are in the process of analyzing data in order to determine
4 the total number of participants in the Class, and, thus, the *per capita* amount that will be
5 provided pursuant to the Settlement.

6 5. **Releasees.** As provided for in Section 1.2(ff) of the Settlement Agreement, the
7 Releasees are the Debtors and their non-Debtor affiliates, the WaMu Pension Plan and all
8 predecessors and successors thereto, the sponsor of the WaMu Pension Plan and any successor
9 plan sponsor and any contributing employer with respect to the WaMu Pension Plan and any
10 successor contributory employer and any plan into which the WaMu Pension Plan is merged,
11 including, but not limited to the WaMu Predecessor Plans, the Plan Trustee, the PAC, the Plan
12 Record Keeper, and all predecessors, successors, parents, subsidiaries, affiliates, divisions,
13 assigns, officers, directors, committees, employees, fiduciaries, administrators, actuaries, agents,
14 insurers, representatives, attorneys, retained experts and trustees of each of them.

15 6. **Released Claims.** Released Claims is defined in Section 5.2 of the Settlement
16 Agreement, which include, in general terms, all claims raised or that could have been raised in
17 this action that pertain to the allegations of the Amended Complaint.

18 7. **Bankruptcy Court Approval.** Within 7 days of this Court's issuance of the
19 Preliminary Approval Order, the parties will move to obtain an order from the Bankruptcy Court
20 in the Chapter 11 Case for approval of the Settlement Agreement. The parties expect that the
21 hearing in Bankruptcy Court shall occur prior to, or at the same time as, the Final Approval
22 Hearing in this District Court.

23 8. **Attorneys' Fees.** By separate application to be filed prior to the Final Fairness
24 Hearing, Lead Counsel will seek an award of attorneys' fees in an amount not to exceed 21% of
25 the Settlement Amount (\$4.2 million), plus reimbursement of costs incurred in the case. The
26 Settlement Class shall be notified of these details in the Class Notice.

1 **D. Reasons for Settlement**

2 Named Plaintiffs and the Settling Defendants have entered this proposed Settlement with
3 an understanding of the strengths and weaknesses of their claims and defenses. This
4 understanding is based on: (1) the motion practice undertaken by the parties; (2) the
5 investigation, research, and discovery as outlined above; (3) the possibility that either party could
6 prevail at trial; (4) the range of possible recovery; and (5) the substantial complexity, expense,
7 and duration of litigation necessary to prosecute this action through trial on liability, and possibly
8 a second trial on damages, post-trial motions, and likely appeals, as well as the significant
9 uncertainties in predicting the outcome of this complex litigation. Having undertaken this
10 analysis, the Named Plaintiffs, the Named Defendants and the Settling Defendants have
11 concluded that the Settlement is fair, reasonable, adequate, and should be presented to the Court
12 for approval.

13 **III. DISCUSSION**

14 **A. The Settlement Agreement Meets the Judicial Standards for Preliminary Approval
Under Rule 23.**

15 Rule 23(e) of the Federal Rules of Civil Procedure governs settlements of class action
16 lawsuits. It provides that a “class may be settled, voluntarily dismissed, or compromised only
17 with the court’s approval.” *See* Fed. R. Civ. P. 23(e). Although the procedure for approval of a
18 class action settlement is not delineated in Rule 23, a two-step procedure is set forth in the
19 Federal Judicial Center’s *Manual for Complex Litigation* § 21.632 (4th ed. 2004). This
20 procedure is universally followed by district courts within the Ninth Circuit when considering
21 preliminary approval of class action settlements. *See Alberto v. GMRI, Inc.*, 252 F.R.D. 652,
22 658-59 (E.D. Cal. 2008); *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525
23 (C.D. Cal. 2004); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 556
24 (W.D.Wash. 2004).

25 Under this framework, the court must initially determine “whether a proposed class
26 action settlement deserves preliminary approval.” *DIRECTV*, 221 F.R.D. at 525 (citing *Manual*

1 *for Complex Litigation*, § 30.31, at 236-37 (3rd ed. 1995)). Members of the class are
2 subsequently given notice of the proposed settlement, and the court must then determine whether
3 final approval is warranted. *See id.*

4 When evaluating whether to grant preliminary approval of a class settlement, the court
5 need “not decide the merits of the case or resolve unsettled legal questions.” *Carson v. Am.*
6 *Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). Courts should not reach legal conclusions “for it is
7 the very uncertainty of outcome in litigation and the avoidance of wasteful and expensive
8 litigation that induce consensual settlements.” *Officers for Justice v. Civil Serv. Comm’n*, 688
9 F.2d 615, 625 (9th Cir. 1982). Instead, the court “need only determine whether the proposed
10 settlement is within the range of possible approval.” *Alberto*, 252 F.R.D. at 666 (internal
11 quotations and citation omitted). In making this inquiry, the court’s “intrusion upon what is
12 otherwise a private consensual agreement ... must be limited[.]” *Officers for Justice*, 688 F.2d at
13 625. Specifically, the court must ensure that “the agreement is not the product of fraud or
14 overreaching by, or collusion between, the negotiating parties, and that the settlement taken as a
15 whole, is fair, reasonable and adequate to all concerned.” *Id.* Therefore “preliminary approval
16 of a settlement has both a procedural and a substantive component.” *In re Tableware Antitrust*
17 *Litig.*, 484 F.Supp.2d 1078, 1080 (N.D.Cal. 2007).

18 Importantly, it is well-settled that there exists “a strong judicial policy that favors
19 settlements, particularly where complex class action litigation is concerned.” *Class Plaintiffs v.*
20 *City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *see also Officers for Justice*, 688 F.2d at
21 625 (“[I]t must not be overlooked that voluntary conciliation and settlement are the preferred
22 means of dispute resolution.”). It is equally well-established that approval of a proposed
23 settlement is a matter committed to the sound discretion of the trial judge. *See Hanlon*, 150 F.3d
24 at 1026. The Court should therefore exercise its discretion and grant preliminary approval of the
25 instant class action settlement based on the principles of Rule 23(e).

1 **1. The Proposed Settlement Is the Result of an Arm's-Length Negotiation and**
2 **Satisfies the Procedural Component for Preliminary Approval**

3 “Before approving a class action settlement, the district court must reach a reasoned
4 judgment that the proposed agreement is not the product of fraud and overreaching by, or
5 collusion among, the negotiating parties[.]” *Ficalora v. Lockheed Ca. Co.*, 751 F.2d 995, 997
6 (9th Cir. 1985). A settlement is presumptively fair if: “(1) the negotiations occurred at arm’s
7 length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in
8 similar litigation; and (4) only a small fraction of the class object[s].” *Rodriguez v. West Publ’g*
9 *Corp.*, No. 05-3222, 2007 WL 2827379, at *7 (C.D. Cal. Sept. 10, 2007), *rev’d on other*
10 *grounds*, 563 F.3d 948 (9th Cir. 2009) (citing Alba Conte & Herbert B. Newberg, *Newberg on*
11 *Class Actions* § 11.41 (4th ed. 2002)).

12 The Settlement easily satisfies these three procedural fairness factors. (The fourth factor
13 will become relevant after the Settlement Class has been notified of the Settlement following
14 preliminary approval.) First, negotiations occurred at arm’s-length for months. Second, the
15 parties also completed fact and expert discovery, allowing Named Plaintiffs to fully understand
16 the factual and legal issues of the case. Not only was discovery completed, but cross-motions for
17 summary judgment were filed based on the extensive factual record developed in this case. The
18 parties also completed expert reports and were in the process of preparing the case for trial at the
19 time the settlement was reached. Thus, there is no doubt that there was sufficient discovery and
20 legal analysis of the factual record. Third, the negotiations were informed by the knowledge of
21 counsel gained by their respective investigations of the law and the facts over a three-year
22 period. Based on their familiarity with the factual and legal issues, the parties were able to make
23 a well-informed decision on the relative strengths and weaknesses of their claims and defenses.
24 Both parties were able to make good-faith assessments of the costs and risks of proceeding to
25 trial before reaching an agreement. These assessments were also made based on both counsels’
26 extensive experience litigating claims of this same type. As a result, the proposed Settlement is
the result of serious, arm’s-length, non-collusive negotiations.

1 **2. The Proposed Settlement is Fair, Reasonable and Adequate and Satisfies the**
2 **Substantive Component for Preliminary Approval.**

3 The Settlement also satisfies the eight factors articulated by the Ninth Circuit to
4 determine whether a settlement is substantively fair, adequate, and reasonable:

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

11 *Hanlon*, 150 F.3d at 1026. Courts within the Ninth Circuit and this district have consistently
12 applied these factors when making the fairness determination. *See Linney v. Cellular Alaska*
13 *P'ship*, 151 F.3d 1234, 1241 (9th Cir. 1998); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370,
14 1375 (9th Cir. 1993); *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D 537, 542 (W.D. Wash. 2009).
15 Consideration of these criteria demonstrates that the proposed Settlement should be approved.

16 **a. The Strength of Named Plaintiffs' Case Favors Approval of the**
17 **Proposed Settlement.**

18 When evaluating a settlement for preliminary approval, courts need only weigh the
19 plaintiff's case against the amount offered in settlement, rather than considering the strength of
20 the plaintiff's case on the merits. *DIRECTV*, 221 F.R.D. at 527 (citing *5 Moore Federal*
21 *Practice*, § 23.85(2)(e) (Matthew Bender 3d ed.)). As evidenced by the vigor with which Lead
22 Counsel have prosecuted this action, and the amount of time expended toward that end, Lead
23 Counsel strongly believe in the merits of this case and the claims in the complaint. In Lead
24 Counsel's view, the discovery conducted in this case supports Named Plaintiffs' core allegation
25 that Plan participants experienced a reduction in the rate of their future benefit accrual through
26 the conversion of their traditional final average pay pension plans to cash balance plan formulas.
Named Plaintiffs also believe discovery supports their position that Defendants knew that
converting the Plans to cash balance formulas was going to significantly reduce participants
future rate of benefits, and chose not to inform participants of this reduction in violation of
ERISA §204(h).

1 Defendants dispute these claims, and have argued throughout the case that they fully
2 satisfied the requirements ERISA § 204(h), and face no liability in this case. The parties
3 obviously interpret both the facts developed in discovery and the requirements of ERISA
4 differently. Case law as well is mixed with regard to similar ERISA §204(h) claims. Thus,
5 while Named Plaintiffs believe the evidence developed in discovery supports their claims,
6 Named Plaintiffs are cognizant that Defendants dispute the claims, and that courts have come to
7 different conclusions regarding the requirements of ERISA § 204(h) in this setting. Thus, this
8 factor strongly supports approval of the Settlement.

9 **b. The Risk, Expense, Complexity, and Duration of Further Litigation**
10 **Weighs in Favor of Approval.**

11 “Unless the settlement is clearly inadequate, its acceptance and approval are preferable to
12 lengthy and expensive litigation with uncertain results.” *DIRECTV*, 221 F.R.D. at 526 (citing
13 Alba Conte & Herbet B. Newberg, *Newberg on Class Actions*, § 11.50 (4th ed. 2002)). Courts
14 clearly favor settlement, as it preserves individual resources by avoiding protracted litigation and
15 subsequent appeals. *Id.* at 527.

16 Here, the Named Plaintiffs recognize the risks of continued litigation and the possibility
17 of an adverse outcome. The factual underpinnings of this lawsuit – whether there were
18 amendments to the Plans that resulted in a significant reductions to the rate of participants’ future
19 benefit accrual, and whether the participants received sufficient notice of these reductions – are
20 both complex and in dispute. These issues have required expert actuarial analysis, and are the
21 subject of disagreement by the disclosed experts in their expert reports. The case law under
22 ERISA §204(h) is not well established in this Circuit, which also adds risk to this litigation.

23 In addition, the potential costs of trial and appeals would be substantial. The parties
24 estimated that the trial on liability would take two weeks. Given the bifurcation of this case, the
25 parties would have had to litigate a separate damages trial if successful on liability. Moreover, a
26 judgment at both the liability and damages trials would likely to have been appealed by the
losing party. Under such circumstances, the avoidance of further risks and costs conserves both

1 the parties' and judicial resources. As such, this favor weighs in favor of the preliminary
2 approval of the proposed Settlement.

3 **c. The Risk of Maintaining Class Action Status Throughout the Trial**

4 Where "[t]he court is unaware of any specific difficulty in maintaining class-action status
5 in [a] case were the matter to continue to trial ... the court will not consider this factor for
6 settlement purposes." *Alberto v. GMRI, Inc.*, 2008 WL 4891201, at *9 (E.D.Cal. Nov. 12, 2008)
7 (citation omitted). Here, Named Plaintiffs believe that the class certification order was properly
8 decided and they do not face any serious risk of decertification. Accordingly, in Named
9 Plaintiffs' view, this factor does not apply.

10 **d. The Amount Offered in Settlement Weighs in Favor of Approval.**

11 A proposed settlement should be viewed as a whole rather than in individual pieces.
12 *Officers for Justice*, 688 F.2d at 628. An offer "may be acceptable even though it amounts to
13 only a fraction of the potential recovery that might be available to the class members at trial."
14 *DIRECTV*, 221 F.R.D. at 527. Moreover, a settlement should not be judged against a
15 "speculative measure" of what could have been attained in negotiation. *Linney v. Cellular*
16 *Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). Courts should "not substitute its business
17 judgment for that of the parties." *Rankin v. Rots*, 2006 WL 1876538, at *3 (E.D.Mich. 2006).

18 In this case, there is a broad range of potential damages if the case were to be litigated to
19 its conclusion. At one end of the damages spectrum is the possibility that Plaintiffs would
20 prevail on their claims and obtain a judgment for the full amount that they request. Under
21 Plaintiffs' theory of the case, this would be the difference between the amount of pension
22 benefits paid to class members under the cash balance formulas, and the benefit that would have
23 been paid to them under the final average pay formulas of the Predecessor Plans. Based on
24 available data, Named Plaintiffs estimate a range of potential damages of between \$ 142 million
25 and \$ 208 million (if Named Plaintiffs' prevail on liability, and the Court accepts Named
26 Plaintiffs' damages methodology). At the other end of the spectrum is the possibility that

1 Defendants would prevail on their legal arguments to defeat liability entirely. This would
2 obviously result in no recovery for Named Plaintiffs.

3 However, even if the risk of no damages or a small judgment were remote (which
4 Defendants dispute), Named Plaintiffs' ability to collect a large judgment in this case is
5 questionable based on the disputed amount of the Plan's surplus, and WMI's bankruptcy
6 proceedings. According to the Plan's latest reported filing, at the time WMI filed for bankruptcy
7 in November, 2008, the Plan had a surplus of \$39,173,922.00. See, Debtor-In-Possession
8 Monthly Operating Report for Filing Period 4/1/10 to 4/30/10 at 7, In re Washington Mutual,
9 Inc., No. 08-12229-MFW, Dkt. 4428, (Bankr. D. Del May 28, 2010). However, the Pension
10 Benefit Guaranty Corporation has alleged that the WaMu Pension Plan is underfunded in the
11 amount of \$35,600,000, and, accordingly, filed proofs of claim in the bankruptcy for unfunded
12 liabilities under 29 U.S.C. §§ 1362, 1368. Claims # 1900 & 1771. Thus the amount of a Plan
13 surplus, if any, is disputed. Moreover, any judgment in excess of a surplus would implicate the
14 property of WMI's bankruptcy estate because WMI, as the Plan sponsor, is under an obligation
15 to fund the Pension Plan. Simply put, it is Named Plaintiffs' assessment that there is uncertainty
16 regarding the ability to recover on a full judgment. Thus, while Named Plaintiffs' damages
17 models suggest a potential (home run) range of \$ 208 million, there is little chance of collecting
18 on a judgment of that amount in light of the uncertainty regarding the Plan's funding, and the
19 bankruptcy proceedings.

20 Given the broad range of potential damages, and the impact of the bankruptcy
21 proceedings, the Settlement provides a substantial recovery within the range that courts have
22 traditionally found to be fair and adequate under the law. See, e.g., *In re Mego Fin. Corp. Sec.*
23 *Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving a settlement that comprised one-sixth of
24 plaintiffs' potential recovery). A \$20 million settlement is a reasonable compromise when
25 considering the total amount sought by Named Plaintiffs, the attendant risks of trial, and the slim
26

1 possibility of collecting on a massive judgment against the Defendants. Thus, this factor
2 strongly supports the Settlement as well.

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

5 The extent of discovery conducted assists in the parties' determination of the strengths
6 and weaknesses of the case. See *DIRECTV*, 221 F.R.D at 527 (citing Manual for Complex
7 Litigation § 30.42 (3d ed. 1995)). Preliminary approval of a settlement is more likely if the
8 settlement was reached after careful investigation and consideration of the "legal and factual
9 issues surrounding the case." *Id.* "A court is more likely to approve a settlement if most of the
10 discovery is completed because it suggests that the parties arrived at a compromise based on a
11 full understanding of the legal and factual issues surrounding the case." *DIRECTV*, 221 F.R.D.
12 at 527 (internal quotations and citation omitted).

13 Here, and as described previously, discovery was completed in this action, and the parties
14 briefed summary judgment motions based on an extensive factual record. Both parties
15 propounded and answered multiple discovery requests, conducted over 20 depositions, and have
16 reviewed thousands of pages of documents in this case. The parties had a complete and well-
17 informed view of the case. This factor clearly supports preliminary approval.

18 **f. The Experience and View of Counsel Weigh in Favor of Approval.**

19 "Great weight is accorded to the recommendation of counsel, who are most closely
20 acquainted with the facts of the underlying litigation." *DIRECTV*, 221 F.R.D. at 528 (citation
21 omitted). "This is because '[p]arties represented by competent counsel are better positioned than
22 courts to produce a settlement that fairly reflects each party's expected outcome in the
23 litigation.'" *Id.* (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

24 All counsel involved in the case have extensive experience in handling complex class
25 action cases, and ERISA class actions in particular. Keller Rohrback L.L.P. is a national leader
26 in ERISA class action litigation, and has served as lead counsel in dozens of ERISA cases. The
firm also has served as lead or co-lead counsel in numerous other types of class actions including

1 in the areas of consumer protection, securities fraud, and antitrust litigation. *See* Swope Decl.,
2 ¶ 3 Dkt No. # 62 (attaching firm resume). Defendants (and WMI) were represented as well by
3 experienced counsel at major national firms, including Sidley Austin; Weil, Gotshal & Manges;
4 and Davis Wright Tremaine.

5 Based on the collective experience and the specific facts of this case, counsel for both
6 parties have concluded that the Settlement is fair, reasonable, and adequate. This factor also
7 supports preliminary approval of the Settlement.

8 **g. The Presence of a Government Participant**

9 The Government is not a party or a formal participant in this case. Consequently, this
10 factor does not apply. Nevertheless, the government is involved in this Settlement. Under
11 Section 3.6 of the Settlement Agreement, the Settlement requires the Internal Revenue Service's
12 approval of a plan amendment in order to facilitate the Plan of Allocation of the Net Settlement
13 Amount. Pursuant to the Settlement, Settling Defendants will submit this amendment to the IRS
14 for consideration and approval no later than July 1, 2010, and will endeavor to obtain such
15 approval as soon as possible.

16 **h. The Reaction of Class Members to the Proposed Settlement**

17 The Named Plaintiffs and other Class Members with whom Lead Counsel have consulted
18 support the proposed Settlement. However, full discussion of this factor cannot occur until after
19 notice is issued and the Class as a whole has the opportunity to evaluate the Settlement.
20 Accordingly, Named Plaintiffs submit that evaluation of this factor occur at the final approval
21 stage of the Settlement.

22 **B. The Settlement Subclasses Should Be Preliminarily Certified**

23 By Order dated July 24, 2008, this Court granted in part and denied in part Named
24 Plaintiffs' motion for class certification, and certified four subclasses (the "Class Certification
25 Order," Dkt. # 127). Named Plaintiffs filed a motion to add two new subclasses on August 8,
26 2008. (Dkt. #138). Named Plaintiffs now request the Court, for purposes of settlement, to

1 certify the same two subclasses (the "Settlement Subclasses") that were the subject of the
2 pending motion, with the exception that the parties' settlement does not allow double recovery of
3 class members who are both members of the 1997 and 1998 Great Western Subclasses. The
4 Settlement Subclasses are:

5 (i) all participants, whether active, inactive or retired, their beneficiaries and
6 estates, who were participants in and entitled to accrue benefits under the H.F.
7 Ahmanson & Company Retirement Plan immediately prior to July 1, 1999, and
8 whose accrued benefits or pension benefits are based in part on the WaMu
9 Pension Plan's cash balance formula, from July 1, 1999 to the present; and (ii) all
10 participants, whether active, inactive, or retired, their beneficiaries and estates,
11 who were participants in and entitled to accrue benefits under the Great Western
12 Retirement Plan immediately prior to January 1, 1998, and whose accrued
13 benefits or pension benefits are based in whole or in part on the WaMu Pension
14 Plan's cash balance formula, from January 1, 1998 to the present, but only with
15 respect to such participants not described in subsection VI(II) of the Court's July
16 24, 2008 Order Granting Class Certification at p. 16 (Dkt. #127).

17 Here, for the reasons previously set forth in greater detail in Lead Counsel's previously
18 filed motion for class certification, and motion to amend class certification, Lead Counsel
19 respectfully submit that the proposed Settlement Subclasses also satisfy the requirements of
20 Fed. Civ. P. 23. See Dkt # 127 & 138.

21 **1. All Requisites for Class Certification under Rule 23(a) are Satisfied with
22 Respect to the Settlement Subclasses.**

23 The Settlement Subclasses meet the four requirements of Rule 23(a). First, the
24 Settlement Subclasses satisfy the numerosity requirement because there are hundreds of class
25 members in the 1998 GW Plan subclass, and thousands of class members in the 1999 H.F.
26 Ahmanson Plan subclass. See *Leyva v. Buley*, 125 F.R.D. 512, 515-17 (E.D. Wash. 1989)
(certifying class that plaintiff asserted would contain approximately fifty members.)

Second, the commonality requirement is satisfied because the Settlement Subclasses
share the same common issues previously identified by the Court in its Class Certification Order,
namely whether Defendants committed disclosure or notice violations when reducing
participants' future benefit accruals through conversion and merger of one plan formula to
another plan formula. See Class Certification Order at 9; *Dukes v. Wal-Mart, Inc.*, 474 F.3d

1 1214, 1225 (9th Cir. 2007) (citations omitted) (“The commonality test is qualitative rather than
2 quantitative -- one significant issue common to the class may be sufficient to warrant
3 certification.”).

4 Third, the typicality requirement is satisfied because proposed class representative Bryan
5 Buck was an H.F. Ahmanson plan participant who experienced the same conversion of the H.F.
6 Ahmanson plan to the WaMu Pension plan on July 1, 1999, and was entitled to receive the same
7 notice given to all H.F. Ahmanson plan participants who experienced the 1999 conversion.
8 Thus, Mr. Buck was a participant of the 1999 Ahmanson Plan, and is typical of the 1999
9 Ahmanson subclass. Similarly, Audrey Schulman is typical of the 1998 Great Western subclass.
10 Ms. Schulman was a 1998 Great Western plan participant who experienced the conversion of the
11 Great Western Cash Balance Plan to the WaMu Pension Plan, and was entitled to receive the
12 same notice given to all Great Western plan participants who experienced the 1998 conversion.
13 Though Ms. Schulman was previously dismissed for lack of standing to represent the 1997 Great
14 Western subclass, there is no dispute that she experienced the 1998 Great Western conversion,
15 and has standing to serve as the class representative for the 1998 Great Western subclass. Thus,
16 the proposed class representatives suffered the same losses as other subclass members as a result
17 of precisely the same course of conduct by Defendants. *See, e.g., Jordan v. Los Angeles County*,
18 669 F.2d 1311, 1321 (9th Cir. 1982) (The named plaintiffs’ claims are typical of the class where
19 they stem “from the same event, practice, or course of conduct that forms the basis of the class
20 claims and [are] based upon the same legal or remedial theory.”).

21 Finally, Ms. Schulman and Mr. Buck are each adequate class representatives because
22 they lack any conflicts with absent Class members, and are prepared to vigorously pursue the
23 Class’s claims in this case. *Hickey v. City of Seattle*, 236 F.R.D. 659, 666 (W.D. Wash. 2006)
24 (citing *Hanlon*, 150 F.3d at 1020). Ms. Schulman meets the adequacy requirement. She has
25 submitted a declaration stating that she does not have any conflicts of interest with other 1998
26 Great Western Subclass members, and she will vigorously prosecute this action on behalf of the

1 class. *See* Dkt # 67. Mr. Buck also meets the adequacy requirement. Mr. Buck has also
2 submitted a declaration stating that he does not have any conflicts of interest with other
3 Ahmanson Subclass members and that he will vigorously prosecute this action on behalf of the
4 class. *See* Dkt # 141.

5 Previously, based on Defendants' opposition, the Court declined to certify the 1998 Great
6 Western Plan subclass because it found there was no evidence that the conversion caused a
7 reduction requiring notice to participants. This deficiency has now been cured. First,
8 Defendants have agreed to stipulate to certification of this subclass for settlement purposes.
9 Second, in support of Plaintiffs' August 8, 2008 motion to add a subclass for the 1998 Great
10 Western Plan (and for the Ahmanson Plan), Plaintiffs submitted evidence in the form of expert
11 testimony that the merger and transition from the 1998 Great Western cash balance plan to the
12 WaMu cash balance plan on January 1, 1998 did in fact cause a reduction in the participants' rate
13 of future benefit accrual. *See*, Dkt. #138 at 3-6 & 139. That motion was pending at the time the
14 Settlement was reached. Thus, in addition to the parties' stipulation to certify the 1998 Great
15 Western Plan subclass for settlement purposes, the court has evidence that substantiates the bases
16 for the 1998 Great Western Plan certification. Hence, pursuant to Fed. R. Civ. P. 23(c)(1)(C),
17 which allows the Court to revisit class certification determinations at any time, certification of
18 the previously denied 1998 Great Western subclass is appropriate.

19 Likewise, certification of the 1999 H.F. Ahmanson subclass is appropriate at this time.
20 The Court previously denied class certification of the 1999 H.F. Ahmanson subclass based on the
21 Court's determination that Named Plaintiffs did not propose a class representative who was a
22 participant of the 1999 H.F. Ahmanson plan. However, as noted above, and as previously set
23 forth in the pending Motion to Amend Class Certification (Dkt #138), Mr. Buck – the proposed
24 subclass representative - was a member of the Ahmanson Plan and subject to the 1999
25 conversion at issue. Accordingly, all Fed. R. Civ. P. 23(a) requirements for certification of the
26 1999 Ahmanson Subclass are satisfied.

1 **2. The Subclasses are Properly Certified Under Rule 23(b)(1) and (b)(2)**

2 The two Settlement Subclasses satisfy the requirements of Fed. R. Civ. P. 23(b)(1) and
3 (b)(2) for the same reasons that the Court certified the four subclasses in its Certification Order.
4 See Class Certification Order at p. 15.

5 **a. Rule 23(b)(1)(A).**

6 The requirement of Fed. R. Civ. P. 23(b)(1)(A) is met here because the members of each
7 of the Settlement Subclasses all allegedly suffered the same statutory violations and the same
8 lack of notice as other members of the subclass. As the Court previously held in its Class
9 Certification Order, “[i]f successful on the merits, they will be entitled to the same type of relief.
10 Adjudication of Plaintiffs’ claims by different courts carries a substantial risk of varying orders –
11 risk that is particularly problematic in cases, such as this one, where Plaintiffs request injunctive
12 relief.” Class Certification Order at p. 16. The same finding is applicable here to certify the
13 Settlement Subclasses under Rule 23(b)(1). *See e.g. In re Citigroup Pension Plan ERISA Litig.*,
14 241 F.R.D. 172, 179-180 (S.D.N.Y. 2006)(applying Rule 23(b)(1) in the context of an ERISA §
15 204 action and noting that Rule 23(b)(1)(A) “speaks directly to ERISA suits”).

16 **b. Rule 23(b)(2).**

17 Similarly, Rule 23(b)(2) is met because Named Plaintiffs seek injunctive and equitable
18 relief to each subclass as a whole. As the Court previously held in its Class Certification Order,

19 Rule 23(b)(2) is satisfied because “Plaintiffs [] seek equitable relief in the form of
20 an injunction prohibiting enforcement of the Plan’s unlawful provisions.
21 Plaintiffs also seek equitable relief in the form of a recalculation of the accrued
benefits of class members based upon the old pre cash balance formula for
calculating benefits. This relief applies to each subclass as a whole.

22 *Id.* at p. 16. The Court’s previous finding is applicable here. *See, also., Richards v. FleetBoston*
23 *Fin. Corp.*, 235 F.R.D. 165, 174 (D. Conn. 2006) (applying Rule 23(b)(2) in the context of an
24 ERISA § 204(h) action).

25 In sum, this Court has already determined in this case that “[I]tigation by individual
26 subclass members poses a substantial risk of creating varying or inconsistent orders by difference

1 courts” and “[f]inal equitable relief is appropriate respecting each subclass as a whole.” Dkt.
2 # 127 at 17-18. The two additional Settlement Subclasses meet the Rule 23(b)(1) and (b)(2)
3 requirements for the same reasons.

4 **C. The Proposed Form of Notice to Class Members Meets the Due Process**
5 **Requirements of Rule 23.**

6 Following preliminary approval of the terms of the Settlement, the Class must be notified
7 of the proposed settlement. Fed. R. Civ. P. 23(e)(1). Where the names and last known addresses
8 of all class members are available from the parties’ records, mailing the notice to the class
9 members at those addresses satisfies Rule 23(e)(1). *See Thompson v. Midwest Found. Indep.*
10 *Physicians Ass’n*, 124 F.R.D. 154, 157 (S.D. Ohio) (citing *Mullane v. Cent. Hanover Bank Trust*
11 *Co.*, 339 U.S. 306, 315 (1950)).

12 To satisfy due process, notice to the Class must be “reasonably calculated under all the
13 circumstances, to apprise interested parties of the pendency of the action and afford them an
14 opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S.
15 306, 314 (1950); *see also Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977)
16 (finding that due process requires notice to “present a fair recital of the subject matter and
17 proposed terms and give[] an opportunity to be heard to all class members”). More specifically,
18 notice is proper if it provides:

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

25 *Rodriguez*, 2007 WL 2827379, at *6.

26 In the instant case, the proposed Class Notice (*see* Exhibit 3 to the Preliminary Approval
Motion) satisfies the criteria described above. The Class Notice will be mailed to the last known
address of Settlement Class Members who have been identified after reasonable efforts and

1 based upon the reasonably accessible records maintained by the WaMu Pension Plan and/or the
 2 Plan Administrator.

3 The Class Notice describes the terms and operation of the Settlement, the considerations
 4 that caused the parties to conclude that the Settlement is fair and adequate, the maximum
 5 attorneys' fees and class representative compensation that may be sought, the procedure for
 6 objecting to the Settlement, and the date and place of the Final Fairness Hearing. It also contains
 7 Lead Counsel's contact information and the procedure for communicating with Lead Counsel.
 8 With the Court's approval, the Class Notice will be mailed via First Class Mail to each class
 9 members' last known address no later than 60 days after the issuance of the Preliminary
 10 Approval Order. In addition, a Publication Notice (*see* Exhibit 3 to the Preliminary Approval
 11 Motion) will be published in the *Seattle Times* and by electronic publication, and posted at
 12 www.kellersettlements.com no later than 60 days after entry of the Preliminary Approval Order.

13 These proposed forms of Notice will fairly apprise Class members of the Settlement and
 14 their options related thereto, as well as fully satisfy due process requirements. *See Silber v.*
 15 *Mabon*, 18 F.3d 1449, 1452-54 (9th Cir. 1994) (approving notice by first class mail as the "best
 16 notice practicable"); *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980),
 17 *rev'd on other grounds*, 475 U.S. 717 (1986) (stating that notice is satisfactory if it "generally
 18 describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to
 19 investigate and to come forward and be heard").

20 **IV. PROPOSED SCHEDULE**

21 The parties propose the following schedule regarding notice to the Class and final
 22 approval of the Settlement.

Event	Time for Compliance
Motion for Approval of Settlement in Bankruptcy Court	7 days after entry of Preliminary Approval Order
Deadline for mailing of individual notice to members of the Class	60 days after entry of Preliminary Approval Order

1 2 3	Deadline for filing Named Plaintiffs' motion for attorneys' fees and costs and Plan of Allocation	21 days prior to the Final Fairness Hearing
4 5	Deadline for the Class to object to the proposed Settlement	14 days prior to the Final Fairness Hearing
6 7	Deadline for filing a motion for final approval of the settlement.	7 days prior to the Final Fairness Hearing
8 9	Final Fairness Hearing	No sooner than October 8, 2010
	Final Approval Hearing in Bankruptcy Court	Prior to or at the same time as the Fairness Hearing in District Court

10 The events set forth above are tied to the Final Fairness Hearing date, which, pursuant to
 11 the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1715(b) & (d), may not occur earlier than
 12 100 days after the parties file the Settlement Agreement with the Court.

13 **V. CONCLUSION**

14 For the reasons discussed above, the Settlement is a fair, adequate and reasonable
 15 resolution of the claims against Defendants in the complex and contested ERISA class action.
 16 Thus, Named Plaintiffs respectfully submit this Memorandum in support of the Parties' joint
 17 motion filed herewith to grant their motion and to enter the proposed Order For Notice and
 18 Hearing, (1) granting preliminary approval of the proposed Settlement; (2) approving the form
 19 and manner of the Notices; (3) preliminarily certifying the two Settlement Subclasses; and (4)
 20 setting a date for a Fairness Hearing.

1 DATED this 30th day of June, 2010.

2 KELLER ROHRBACK L.L.P.

3
4 By s/Derek W. Loeser

5 Lynn Lincoln Sarko, WSBA #16569
6 Derek W. Loeser, WSBA #24274
7 Amy Williams-Derry, WSBA #28711
8 Karin B. Swope, WSBA #24015
9 Gretchen S. Obrist, WSBA #37071
10 1201 Third Avenue, Suite 3200
11 Seattle, WA 98101
12 (206) 623-1900
13 (206) 623-3384 (FAX)
14 lsarko@kellerrohrback.com
15 dloeser@kellerrohrback.com
16 awilliams-derry@kellerrohrback.com
17 kswope@kellerrohrback.com
18 gobrist@kellerrohrback.com

19
20 *Attorneys for Named Plaintiffs and the*
21 *Subclasses*
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23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record, listed below:

Ladd B. Leavens, Fred B. Burnside, Anne E. Rea, Danielle J. Carter and Rachel Blum Niewoehner.

DATED this 30th day of June, 2010.

s/Derek W. Loeser
Derek W. Loeser, WSBA #24274
KELLER ROHRBACK L.L.P.
1201 3rd Avenue, Suite 3200
Seattle, WA 98101
Tel: (206) 623-1900
Fax: (206) 623-3384
kswope@kellerrohrback.com