

THE HONORABLE MARSHA J. PECHMAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL, INC.
SECURITIES, DERIVATIVE AND ERISA
LITIGATION

No. 2:08-md-01919-MJP

**ERISA PLAINTIFFS' MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AWARD OF
ATTORNEYS' FEES, EXPENSES,
AND SERVICE AWARDS FOR
NAMED PLAINTIFFS**

IN RE WASHINGTON MUTUAL, INC.
ERISA LITIGATION

Lead Case No. C07-1874 MJP

This Document Relates to:
All Actions

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[ERISAPL-16]

TABLE OF CONTENTS

1

2 I. MOTION..... 1

3 II. INTRODUCTION 1

4 III. BACKGROUND 1

5 IV. CLASS COUNSEL’S INVESTMENT OF TIME AND MONEY IN THE

6 CASE 2

7 V. AWARD OF ATTORNEYS’ FEES AND EXPENSES 2

8 A. A Reasonable Percentage of the Fund Recovered is the

9 Appropriate Method For Awarding Class Counsel’s Attorneys’

10 Fees in this Common Fund Settlement 2

11 B. A Fee Award Based on 25% of the Common Fund Is Fair and

12 Reasonable 4

13 1. Class Counsel Obtained Exceptional Results 5

14 2. This Litigation Was Extremely Risky..... 6

15 3. The Settlement Provides Benefits Beyond the Settlement

16 Fund 7

17 4. Class Counsel Carried the Financial Burdens of this

18 Litigation..... 7

19 5. Class Counsel Are Highly Skilled and Acted Efficiently..... 8

20 6. Attorneys’ Fee Awards in Other Cases Support a 25% Fee

21 Here..... 8

22 C. The Lodestar Cross-Check Confirms the Reasonableness of the

23 Requested Fee 9

24 1. Class Counsel’s Lodestar Is Reasonable..... 9

25 2. A Lodestar Cross-Check Also Support the Requested Fee

26 Award..... 10

VI. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR

EXPENSES..... 11

VII. SERVICE AWARDS ARE WARRANTED FOR NAMED PLAINTIFFS 12

VIII. CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

1

2

3 *Blum v. Stenson,*

4 465 U.S. 886 (1984)..... 4

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6 444 U.S. 472 (1980)..... 4

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8 940 F.2d 1211 (9th Cir. 1991) 10

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20 No. 09-2058, 2010 WL 3448197 (S.D.N.Y. Aug. 27, 2010)..... 7

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22 No. 02-10129 (S.D.N.Y. Oct. 12, 2005)..... 11

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24 No. 03-01685 (N.D. Cal. Oct. 23, 2008)..... 8

25 *In re Citigroup ERISA Litig.,*

26 No. 07-9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009)..... 7

In re CMS Energy ERISA Litig.,

No. 02-72834, 2006 WL 2109499 (E.D. Mich. June 27, 2006) 8

In re Dynegy, Inc. ERISA Litig.,

No. 02-3076 (S.D. Tex. Dec. 10, 2004)..... 10

In re Enron Corp. Sec., Derivative and "ERISA" Litig.,

228 F.R.D. 541 (S.D. Tex. 2005)..... 6, 7

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225 F.R.D. 436 (S.D.N.Y. 2004) 6

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 No. 03-1214 (D.N.J. July 20, 2005)..... 11

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 No. 02-7921 (N.D. Ill. Nov. 22, 2004) 8, 10

4 *In re Huntington Bancshares Inc. ERISA Litig.*,
 No. 08-175, 2009 WL 330308 (S.D. Ohio Feb. 9, 2009) 7

5

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 No. 07-10268 (S.D.N.Y. Aug. 21, 2009)..... 8

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 No. 02-1001, 2003 WL 22005019 (N.D. Cal. June 30, 2003)..... 8

8

9 *In re Royal Dutch/Shell Transport ERISA Litig.*,
 No. 04-1398 (D.N.J. Aug. 30, 2005) 11

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 268 F. Supp. 2d 907 (N.D. Ohio 2003)..... 11

11

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 516 F.3d 1095 (9th Cir. 2008) 5

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 No. 09-262, 2010 WL 3081359 (W.D.N.C. Aug. 6, 2010) 7

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 19 F.3d 1291 (9th Cir. 1994) 3

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 No. 02-1138 (D. Conn. Apr. 14, 2009)..... 8

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 No. 96-3008, 1997 WL 450064 (N.D. Cal. July 18, 1997) 11

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 684 F. Supp. 679 (M.D. Ala. 1988) 4

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 289 F. Supp. 2d 1181 (S.D. Cal. 2003)..... 10

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 886 F.2d 268 (9th Cir. 1989) 3, 4, 5

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 592 F. Supp. 2d 1322 (W.D. Wash. 2009)..... 12

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 No. 09-56190 (9th Cir. Sept. 30, 2010) 6

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 No. 01-1466, 2006 WL 3312024 (D. Or. Nov. 13, 2006) 12

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 904 F.2d 1301 (9th Cir. 1990) 3

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 307 U.S. 161 (1939)..... 4

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 327 F.3d 938 (9th Cir. 2003) 12

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 8 F.3d 1370 (9th Cir. 1993) 3, 7

8

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 557 F.2d 759 (9th Cir. 1977) 2

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 290 F.3d 1043 (9th Cir. 2002) passim

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Recent Trends IV: What Explains Filings and Settlements in Shareholder
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Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action
Plaintiffs, Defendants and Lawyers, 51 BUS. LAW. 1009 (1996)..... 6

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1 **I. MOTION**

2 Plaintiffs Gregory Bushansky, Dana Marra and Marina Ware (“Plaintiffs”) respectfully
3 move the Court for an Order awarding Class Counsel attorneys’ fees and reimbursement of
4 expenses, as well as granting Service Awards for the Named Plaintiffs.

5 **II. INTRODUCTION**

6 Following hard-fought litigation that encompassed extensive investigation, motion
7 practice, class and merits discovery, and contentious settlement negotiations, the Parties have
8 now settled this ERISA fiduciary breach class action for a cash payment of \$49,000,000 and
9 additional consideration. This Settlement was achieved through the dedicated efforts of Class
10 Counsel¹ working diligently to represent the Plan and Plan participants.

11 While the concurrently-filed Motion and Memorandum of Points and Authorities in
12 Support of Motion for Final Approval of the Settlement and Plan of Allocation, and Certification
13 of the Settlement Class (“Final Approval Memo”) documents why the Settlement is an excellent
14 result for the Class and should be approved, this memorandum addresses Class Counsel’s request
15 for: (i) an award of attorneys’ fees in the amount of \$12.25 million, which represents 25% of the
16 gross Settlement amount, and reimbursement of out-of-pocket litigation expenses of
17 \$156,258.75; and (ii) approval of a \$5,000 Service Award to each Named Plaintiff in recognition
18 of their valuable service to the Class.

19 As demonstrated below, the record in this case and the case law in the Ninth Circuit fully
20 support the requested fees, expenses, and Service Awards.

21 **III. BACKGROUND**

22 Because the Final Approval Memo and the Loeser/Volk Decl. filed herewith contain
23 detailed discussions of this litigation’s progress, risks, and ultimate success, Plaintiffs ask the

24 _____
25 ¹ “Class Counsel” refers to Keller Rohrback L.L.P. and Hagens Berman Sobol Shapiro LLP. Capitalized Terms not
26 otherwise defined herein have the meanings set forth in the Settlement Agreement, which appears as Exhibit A the
Joint Declaration of Derek W. Loeser and Andrew M. Volk in Support of ERISA Plaintiffs’ Motion for Final
Approval of the Settlement and Plan of Allocation and Certification of Settlement Class, and ERISA Plaintiffs’
Petition for Award of Fees and Expenses and Service Awards for Named Plaintiffs (“Loeser/Volk Decl.”).

1 Court to consider these documents in connection with this request for fees, expenses, and Service
2 Awards, and Plaintiffs incorporate by reference those documents herein.

3 **IV. CLASS COUNSEL’S INVESTMENT OF TIME AND MONEY IN THE CASE**

4 As of September 28, 2010, Class Counsel has devoted more than 16,698 hours to this
5 case, representing a lodestar of \$6,038,951.85 at their hourly rates, and has incurred \$156,258.75
6 in out-of-pocket expenses. Loeser/Volk Decl. ¶¶ 58, 63-65, 86-88 and Exs. F–I attached thereto.
7 Class Counsel will continue to incur additional attorney hours in connection with final approval
8 of the Settlement, responding to inquiries from Class members, interacting with Chase (the
9 Allocation Administrator), and generally overseeing implementation of the Settlement.
10 Loeser/Volk Decl. ¶¶ 66-67. Since Class Counsel will not apply later for additional fees, we will
11 analyze our fee request using a lodestar cross-check based on total fees including a very
12 conservative estimate of \$100,000 for future work required to implement the Settlement and Plan
13 of Allocation, yielding a lodestar of \$6,138,951.85. *Id.*

14 **V. AWARD OF ATTORNEYS’ FEES AND EXPENSES**

15 Class Counsel requests an award of attorneys’ fees of 25% of the \$49 million Settlement:
16 \$12.25 million. This method of calculating the fee award, based on a percentage-of-the-fund, is
17 both straightforward and fair under the circumstances of the case. Moreover, cross-checking this
18 fee request against the lodestar fee calculation validates its reasonableness, as explained below.

19 **A. A Reasonable Percentage of the Fund Recovered is the Appropriate Method For**
20 **Awarding Class Counsel’s Attorneys’ Fees in this Common Fund Settlement**

21 The percentage-of-the-fund method of awarding fees has become an accepted if not the
22 prevailing method for awarding fees in common fund cases in this Circuit and throughout the
23 United States. Indeed, Courts have long recognized that “a private plaintiff, or his attorney,
24 whose efforts create, discover, increase or preserve a fund to which others also have a claim is
25 entitled to recover from the fund the costs of his litigation, including attorneys’ fees.” *Vincent v.*
26 *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this doctrine is to

1 avoid unjust enrichment so that “those who benefit from the creation of the fund should share the
2 wealth with the lawyers whose skill and effort helped create it.” *In re Washington Pub. Power*
3 *Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) (“WPPSS”).

4 In this Circuit, the district court has discretion to award fees in common fund cases based
5 on either the lodestar/multiplier method or the percentage-of-the-fund method. *Id.* at 1296. In
6 *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), *Torrise v.*
7 *Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), and *Vizcaino v. Microsoft Corp.*, 290 F.3d
8 1043 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the percentage method in
9 common fund cases.

10 Since *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268 (9th Cir. 1989) and its
11 progeny, district courts in this Circuit have almost uniformly shifted to the percentage method in
12 awarding fees in representative actions. The rationale for compensating counsel in common fund
13 cases on a percentage basis is sound. First, it is consistent with the practice in the private
14 marketplace where contingent fee attorneys are customarily compensated with a percentage of
15 the recovery. Second, it more closely aligns the lawyers’ interest in being paid a fair fee with the
16 interest of the class in achieving the maximum possible recovery in the shortest amount of time.
17 Indeed, one of the nation’s leading scholars in the field of class actions and attorneys’ fees,
18 Professor Charles Silver of the University of Texas School of Law, has concluded that the
19 percentage method of awarding fees is the only method of fee awards that is consistent with class
20 members’ due process rights. Charles Silver, *Class Actions in the Gulf South Symposium: Due*
21 *Process and the Lodestar Method: You Can’t Get There from Here*, 74 Tul. L. Rev. 1809 (June
22 2000). Third, use of the percentage method decreases the burden imposed on the court by
23 eliminating a full-blown, detailed and time consuming “lodestar” analysis while assuring that the
24 beneficiaries do not experience undue delay in receiving their share of the settlement. *See In re*
25 *Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989).

1 Furthermore, the Supreme Court has consistently endorsed awarding attorneys' fees
 2 using the percentage-of-the-fund method. *See, e.g., Sprague v. Ticonic Nat'l Bank*, 307 U.S.
 3 161, 165-67 (1939); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980); *Blum v. Stenson*,
 4 465 U.S. 886, 900 n.16 (1984). Consequently, the Ninth Circuit has instructed district courts
 5 reviewing a common fund fee award to first consider the percentage-of-the-fund method, and
 6 then use the lodestar to "cross-check" the reasonableness of the award. Indeed, the lodestar
 7 method is used other than as a cross-check only in limited circumstances, where, for example,
 8 "[t]here has been no discovery, no lengthy settlement negotiations, no protracted litigation of any
 9 kind." *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1003 (9th Cir. 2002)
 10 (citations omitted) (holding that it was not an abuse of discretion for the district court to use the
 11 lodestar method in an ERISA health benefits class action that was settled within three and a half
 12 months of being filed). Thus, Class Counsel request that the Court rely on the percentage-of-the-
 13 fund method.

14 **B. A Fee Award Based on 25% of the Common Fund Is Fair and Reasonable**

15 The Ninth Circuit has adopted a 25% "benchmark" for attorneys' fee awards in cases
 16 with a common fund recovery. *See, e.g., Graulty*, 886 F.2d at 272 (citing with approval, the
 17 adoption of a 25% benchmark in *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 692
 18 (M.D. Ala. 1988)); *Fischel*, 307 F.3d at 1006; *Vizcaino*, 290 F.3d at 1047). The Ninth Circuit's
 19 benchmark is very much in keeping with nationwide practice. A Federal Judiciary Center study
 20 of all class action attorneys' fees in four federal district courts with a high number of class
 21 actions found: "Median rates ranged from 27% to 30%." Thomas E. Willging, Laural L. Hooper
 22 & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final*
 23 *Report to the Advisory Committee on Civil Rules*, at 69 (Fed. Judicial Ctr. 1996). A separate
 24 study conducted by National Economic Research Associates similarly concluded: "Regardless
 25 of case size, fees average approximately 32 percent of the settlement." Denise N. Martin, Vinita
 26

1 M. Juneja, Todd S. Foster & Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and*
 2 *Settlements in Shareholder Class Actions?* Stan. J.L. Bus. & Fin. (1996).

3 While the Ninth Circuit's 25% benchmark "can then be adjusted upward or downward to
 4 account for any unusual circumstances," any such "adjustment . . . must be accompanied by a
 5 reasonable explanation of why the benchmark is unreasonable under the circumstances."

6 *Graultry*, 886 F.2d at 272-73. For instance, in *Vizcaino*, the Ninth Circuit found that a fee award
 7 of 28% of the common fund was reasonable because of: (1) the exceptional results achieved for
 8 the class; (2) the extreme riskiness of the litigation; (3) the benefits generated beyond the cash
 9 settlement fund; and (4) the financial burdens of representing the class on a contingency basis.

10 290 F.3d at 1048-50. The *Manual for Complex Litigation* recommends consideration of three
 11 additional factors: (1) any objections by class members, (2) the skill and efficiency of the
 12 attorneys involved, and (3) attorneys' fee awards in other cases. *Manual for Complex Litigation*
 13 (*Fourth*) § 14.121 at 257-58 (2004). Application of all relevant factors strongly supports the
 14 requested fee of 25% of the common fund here.²

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

16 The \$49 million recovery represents a substantial amount of the Plan's total potential
 17 recovery in this case. There is a broad range of potential recoveries if the case were to be
 18 litigated to judgment depending upon the date (if any) on which Defendants' actions amounted
 19 to breaches of fiduciary duty, as well as the legal framework for the measure of damages. *See*
 20 *Loeser/Volk Decl.* ¶¶ 45-48; 69. Thus, assuming liability were established, principal damages
 21 could range from approximately \$300 million down to \$9 million, with the Settlement
 22 representing 17% to 544% (respectively) of total possible losses. *Id.* ¶ 69.

23 As explained in Plaintiffs' Final Approval Memorandum, courts are not of one mind as to
 24 what Plaintiffs must show to prove that company stock became an imprudent investment for a
 25 retirement plan. *Compare In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008)

26 ² As the objection deadline has not passed, that factor cannot be considered as of this writing.

1 (holding that a “myriad of circumstances” can require fiduciaries to divest company stock under
 2 ERISA’s “prudent man” standard) with *Quan v. Computer Scis. Corp.*, No. 09-56190 (9th Cir.
 3 Sept. 30, 2010) (requiring plaintiffs to show either that “the company’s viability as an ongoing
 4 concern” is threatened or there was “a precipitous decline in the employer’s stock . . . combined
 5 with evidence that the company is on the brink of collapse or is undergoing serious
 6 mismanagement”). Whatever the standard, Plaintiffs’ likelihood of success increases as the
 7 condition of the company deteriorated. Accordingly, the start of Class Period \$300 million
 8 damage figure is far less likely an outcome than the damages resulting from later breach dates –
 9 such as December 20, 2007 or June 6, 2008. Loeser/Volk Decl. ¶¶ 47-48. Evaluating the range
 10 of potential losses, and the more likely provable losses in particular, is clear that the results
 11 achieved in this case are outstanding. *Id.* ¶ 69; *see also* Richard M. Phillips & Gilbert C. Miller,
 12 *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards*
 13 *for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUS. LAW. 1009, 1029 & n.131 (1996)
 14 (typical recoveries are within range of 7-11% of claimed losses).

15 2. This Litigation Was Extremely Risky

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

24 While Plaintiffs believe the claims in this case are solidly grounded in ERISA law,
 25 several similar ERISA company stock cases involving the financial meltdown of 2008 were
 26 dismissed at the pleading stage after the Complaint was filed. *See, e.g., In re Citigroup ERISA*

1 *Litig.*, No. 07-9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009); *In re Huntington Bancshares*
2 *Inc. ERISA Litig.*, No. 08-175, 2009 WL 330308 (S.D. Ohio Feb. 9, 2009); *In re Wachovia Corp.*
3 *ERISA Litig.*, No. 09-262, 2010 WL 3081359 (W.D.N.C. Aug. 6, 2010); *In re Bank of Am. Corp.*
4 *Sec., Derivative, & ERISA Litig.*, No. 09-2058, 2010 WL 3448197 (S.D.N.Y. Aug. 27, 2010).

5 Those cases demonstrate the significant risks plaintiffs face in cases of this type.

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

7 The Settlement provides the Class with the benefit of substantial financial recovery
8 without further delay inherent in continued litigation. This is particularly important here given
9 the composition of the Class-current and former WaMu employees, many of whom have suffered
10 significant financial hardships (including the loss of retirement savings along with their jobs).
11 The immediate restoration to their retirement accounts of their allocable share of the recovery
12 here will provide a meaningful benefit beyond the dollar amount recovered in the form of
13 liquidity for Class members in the immediate need of the funds and reduced financial anxiety for
14 many others.³ As Judge Harmon aptly put it when approving one of the settlements in the Enron
15 ERISA litigation: “The settlement at this point would save great expense and would give the
16 Plaintiff hard cash, a bird in the hand.” *Enron*, 228 F.R.D. at 566.

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

18 Class Counsel accepted this matter on a contingent basis with the attendant risk that they
19 would receive no fee or expense reimbursement. As is evident from the attorney time and
20 expenses invested in the case to date, Class Counsel were committed to litigating the case
21 through trial and beyond. Furthermore, litigating this case required Class Counsel to forgo
22 significant other work, and resulted in a decline in the firm’s annual income. *Torrisci v. Tucson*
23 *Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993).

24
25 ³ In *Vizcaino*, the Ninth Circuit noted the potential significance of a prompt settlement for “class members in need of
26 immediate relief.” 290 F.3d at 1050 n.5. In the current economic circumstances, many of the Class Members
likely find themselves in exactly that situation.

1 **5. Class Counsel Are Highly Skilled and Acted Efficiently**

2 Class Counsel is or has been lead or co-lead counsel in important ERISA breach of
3 fiduciary duty cases throughout the nation. For example, Keller Rohrback is lead or co-lead
4 counsel in ERISA fiduciary breach class actions filed against Fremont General Corp., IndyMac
5 Bank, and Bear Stearns and served as co-lead counsel in ERISA fiduciary class actions against
6 Enron, WorldCom, Merrill Lynch, Countrywide and Global Crossing. Similarly, Hagens
7 Berman was co-lead counsel in the ERISA litigations against Enron and General Motors, and in
8 other major class actions around the nation. Additional information regarding Hagens Berman
9 and Keller Rohrback can be found in their firm resumes. *See* Loeser/Volk Decl., Exs. D & E.

10 **6. Attorneys' Fee Awards in Other Cases Support a 25% Fee Here**

11 Courts in this Circuit and elsewhere have routinely awarded fees of 25 to 30% or more of
12 the common fund in ERISA company stock litigation. *See, e.g., In re Calpine Corp. ERISA*
13 *Litig.*, No. 03-01685 (N.D. Cal. Oct. 23, 2008) (awarding 25%); *In re Providian Fin. Corp.*
14 *ERISA Litig.*, No. 02-1001, 2003 WL 22005019 (N.D. Cal. June 30, 2003) (awarding 25%); *In re*
15 *Merrill Lynch & Co., Inc., Sec., Derivative and ERISA Litig.*, No. 07-10268 (S.D.N.Y. Aug. 21,
16 2009) (awarding 25%); *In re Xerox ERISA Litig.*, No. 02-1138 (D. Conn. Apr. 14, 2009)
17 (awarding 30%); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499 (E.D. Mich.
18 June 27, 2006) (awarding 29%); *In re Household Int'l ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov.
19 22, 2004) (awarding 30%).

20 A review of the above factors confirms that Class Counsel's request for 25% of the
21 common fund as an award for attorneys' fees is reasonable and merited. The exceptional results
22 obtained by Class Counsel, despite vigorous defense by several leading defense firms, the high
23 risk and complexity of the case, and the skill and efficiency with which the case was brought to
24 successful resolution by Class Counsel confirm the reasonableness of the award.

1 **C. The Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee**

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

10 The cross-check analysis is a two-step process. First, the lodestar is determined by
11 multiplying the number of hours reasonably expended by the reasonable rates requested by the
12 attorneys. *See Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th Cir. 2000) Second,
13 the court determines the multiplier required to match the lodestar to the percentage-of-the-fund
14 request made by counsel, and determines whether the multiplier falls within the accepted range
15 for such a case. Here, the lodestar cross-check confirms that the 25% request is reasonable.

16 **1. Class Counsel’s Lodestar Is Reasonable**

17 Class Counsel and staff have spent a total of 16,698.10 hours working on this case. *See*
18 *Loeser/Volk Decl. Exs. F & G*. As explained in the Final Approval Memo and the Loeser/Volk
19 Declaration, the stated hours were incurred by, among other things, investigating the claims
20 against Defendants, reviewing and analyzing Plan documents and information, preparing the
21 Complaint, conducting necessary legal research, briefing and arguing Defendants’ motions to
22 dismiss, engaging in settlement negotiations, conducting extensive discovery, and preparing the
23 necessary agreements and pleadings related to the Settlement. Given these activities, the
24 complexity of the legal issues involved, and the intensity of Defendants’ defense, the hours
25 incurred are reasonable. Class Counsel anticipate expending substantial additional hours on this
26 litigation to bring it to a close, for which we will not seek additional compensation; thus, these

1 hours are appropriately taken into account in performing the lodestar cross-check. Loeser/Volk
2 Decl. ¶¶ 66-67.

3 The hourly rates charged by Class Counsel, between \$150 and \$740 per hour, are
4 reasonable based on each person's position, experience level, and location. *See* Loeser/Volk
5 Decl. ¶¶ 62-64; 80; Exs. D & E. These rates can be based on the prevailing rates in the
6 communities in which Class Counsel practices or on hourly rates obtained by counsel in other
7 complex or class action litigation. *Bouman v. Block*, 940 F.2d 1211, 1235 (9th Cir. 1991)
8 (finding that declarations submitted by counsel of the "prevailing market rate in the relevant
9 community . . . [are] sufficient to establish the appropriate [billing] rate for lodestar purposes");
10 *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2003). Taking into
11 account the several factors discussed above, including the result achieved, the complexity and
12 risk of the litigation, and the skill and experience of counsel, Class Counsel's rates are
13 reasonable and appropriate in this case.

14 Thus, Class Counsel's reasonable hours and reasonable rates produce a current lodestar
15 of \$6,038,951.85, and estimating and taking into account work that will be necessary following
16 Final approval, a total lodestar of \$6,138,951.85.

17 **2. A Lodestar Cross-Check Also Support the Requested Fee Award**

18 The 2.03 and 2.00 multiplier produced by cross-checking the 25% against the current
19 \$6,038,951.85 lodestar and the \$6,138,951.85 estimated total lodestar is well within the accepted
20 range in the Ninth Circuit. *See, e.g., Vizcaino*, 290 F.3d at 1051 (approving 25% fee after
21 lodestar crosscheck resulted in multiplier of 3.65); *Craft v. Cnty. of San Bernardino*, 624 F.
22 Supp. 2d 1113, 1125 (C.D. Cal. 2008) (approving 25% fee award resulting in a multiplier of 5.2,
23 and collecting similar cases). Similarly, other ERISA company stock cases outside the Ninth
24 Circuit confirm that the requested multiplier is reasonable. *See In re Household Int'l Inc. ERISA*
25 *Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (Minute Order) (4.8 multiplier); *In re Dynege, Inc.*
26 *ERISA Litig.*, No. 02-3076 (S.D. Tex. Dec. 10, 2004) (Final Order) (4.4 multiplier); *In re Bristol*

1 *Myers Squibb Co, ERISA Litig.*, No. 02-10129 (S.D.N.Y. Oct. 12, 2005) (Order) (3.9 multiplier);
 2 *In re Honeywell ERISA Litig.*, No. 03-1214 (D.N.J. July 20, 2005) (Order) (3.7 multiplier); and
 3 *In re Royal Dutch/Shell Transport ERISA Litig.*, No. 04-1398 (D.N.J. Aug. 30, 2005) (Order
 4 Approving Settlement) (3.3 multiplier). These cases are, again, consistent with nationwide
 5 practice. *See generally In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp.
 6 2d 907, 938 n.45 (N.D. Ohio 2003) (relying on a 2003 study of fee awards in 1,120 cases to
 7 conclude that “the courts’ effective multipliers averaged ... 3.89 across all 1,120 cases”).

8 While this litigation presented substantial risk and complexity, Class Counsel
 9 demonstrated considerable ability to produce consistently favorable results for the Class. Thus, a
 10 multiplier of 2.00 to 2.03 is reasonable because it accounts for the risk and complexity of the
 11 litigation while also recognizing that the Settlement resolves this litigation before trial and any
 12 other steps in the proceedings that would have generated a substantially larger lodestar than
 13 presented at this point.

14 **VI. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR EXPENSES**

15 Class Counsel also request reimbursement for the reasonable and necessary expenses
 16 advanced to prosecute this litigation since its inception in November 2007. These expenses,
 17 totaling \$156,258.75, are detailed in the Loeser/Volk Declaration and supporting exhibits. *See*
 18 *Loeser/Volk Decl.* ¶¶ 85-88; Exs. H & I.

19 The appropriate analysis to apply in deciding which expenses are compensable in a
 20 common fund case of this type is whether the particular costs are the type typically billed by
 21 attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.
 22 1994) (allowing recovery of “out-of-pocket expenses that would normally be charged to a fee
 23 paying client”); *see also Linney v. Cellular Alaska P’ship*, No. 96-3008, 1997 WL 450064, at *7
 24 (N.D. Cal. July 18, 1997) (“It appears to the Court that the costs requested are reasonable in light
 25 of the complexity of the litigation and the number of counsel involved, and [the costs of
 26 litigation] are therefore approved by the Court.”). The categories of expenses for which Class

1 Counsel seek reimbursement here are the type of expenses routinely charged to hourly clients
2 and, therefore, the full requested amount should be reimbursed.

3 **VII. SERVICE AWARDS ARE WARRANTED FOR NAMED PLAINTIFFS**

4 Finally, Class Counsel request that the Court award \$5,000 to each Named Plaintiff for
5 the time they have expended in representing the Class members. The criteria courts consider
6 when determining whether to reward a class representative and the amount of the award include
7 “[] the actions the plaintiff has taken to protect the interests of the class, the degree to which the
8 class has benefitted from those actions, ... [and] the amount of time and effort the plaintiff
9 expended in pursuing the litigation.” *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003).

10 Here, Named Plaintiffs have diligently fulfilled their obligations as Class
11 Representatives. They alone represented the Class, despite the potential negative effects their
12 involvement in a case of this type might have on their careers. Throughout the two-plus years of
13 litigation, Named Plaintiffs kept informed of the litigation and communicated with Class
14 Counsel as necessary to assist with the effective prosecution of the case. Loeser/Volk Decl. ¶¶
15 89-92. For these reasons, Service Awards of \$5,000 for each Named Plaintiff is warranted.

16 This award is fair and in line with what other courts have awarded in similar cases. *See*,
17 *e.g.*, *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1330 (W.D. Wash. 2009) (awarding
18 \$30,000 to four plaintiffs); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-1466, 2006 WL
19 3312024, at *3-4 (D. Or. Nov. 13, 2006) (approving \$10,000 award to each class representative).
20 Thus, Class Counsel respectfully request that the Court award Service Awards in the amount of
21 \$5,000 for each Named Plaintiff for the valuable services they provided to the Class.

22 **VIII. CONCLUSION**

23 Plaintiffs respectfully request that the Court: (1) award Class Counsel payment of
24 attorneys’ fees in the amount of 25% of the Settlement amount; (2) order reimbursement of
25 litigation expenses incurred by Class Counsel in the amount of \$156,258.75; and (3) award
26 Service Awards in the amount of \$5,000 for each Named Plaintiff.

DATED this October 1, 2010.

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