

1 THE HONORABLE MARSHA J. PECHMAN

2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

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

**No. 2:08-md-01919-MJP**

**ERISA PLAINTIFFS' MOTION AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PRELIMINARY  
APPROVAL OF PROPOSED  
SETTLEMENT, PRELIMINARY  
CERTIFICATION OF SETTLEMENT  
CLASS, APPROVAL OF NOTICE  
PLAN, AND TIME FOR FAIRNESS  
HEARING**

14  
15 IN RE WASHINGTON MUTUAL, INC.  
16 ERISA LITIGATION

Lead Case No. C07-1874 MJP

17 This Document Relates to:  
18 All Actions

NOTE ON MOTION CALENDAR:  
July 9, 2010

**[ERISAPL-13]**

**TABLE OF CONTENTS**

1

2 I. MOTION..... 1

3 II. INTRODUCTION ..... 1

4 III. PROCEDURAL AND FACTUAL BACKGROUND..... 1

5 A. Description of Litigation ..... 1

6 B. Investigation of Claims and Discovery ..... 3

7 C. Settlement Negotiations ..... 6

8 D. Terms of the Settlement Agreement ..... 7

9 E. Bankruptcy Court Approval..... 8

10 F. Reasons for Settlement..... 8

11 IV. PROPOSED SCHEDULE ..... 9

12 V. DISCUSSION ..... 9

13 A. The Settlement Agreement Meets the Judicial Standards for

14 Preliminary Approval Under Ninth Circuit Law and Rule 23..... 9

15 1. The Strength of Plaintiffs’ Case Favors Approval of the

16 Proposed Settlement..... 11

17 2. The Risk, Expense, Complexity, and Likely Duration of

18 Further Litigation Weigh in Favor of Approval..... 13

19 3. The Risk of Maintaining Class Action Status Throughout the

20 Trial Weighs in Favor of Approval..... 14

21 4. The Amount Offered in Settlement Weighs in Favor of

22 Approval..... 14

23 5. The Extent of Discovery Completed and the Stage of the

24 Proceedings Weigh in Favor of Approval..... 16

25 6. The Experience and View of Counsel Weigh in Favor of

26 Approval..... 17

7. The Presence of a Governmental Participant..... 17

8. The Reaction of Class Members to the Proposed Settlement ..... 18

B. The Proposed Form of Notice to Class Members Satisfies Rule 23  
and Due Process Requirements..... 18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

VI. CLASS CERTIFICATION OF PLAINTIFFS’ CLAIMS IS APPROPRIATE..... 19

    A. The Proposed Class Meets the Requirements of Rule 23(a)..... 20

        1. Numerosity..... 20

        2. Commonality..... 20

        3. Typicality ..... 21

        4. Adequacy..... 21

    B. The Proposed Class Meets the Requirements of Rule 23(b)(1)..... 22

        1. Rule 23(b)(1)(A) ..... 23

        2. Rule 23(b)(1)(B)..... 23

    C. Keller Rohrback and Hagens Berman Should Be Appointed Counsel  
        for the Class. .... 24

VII. CONCLUSION ..... 25

**TABLE OF AUTHORITIES**

**Cases**

*Ahern v. Cent. Pac. Freight Lines*,  
846 F.2d 47 (9th Cir. 1988)..... 9

*Amchem Products, Inc. v. Windsor*,  
521 U.S. 591 (1997)..... 19

*Carson v. Am. Brands, Inc.*,  
450 U.S. 79 (1981)..... 10

*Church v. Consol. Freightways, Inc.*,  
No. 90-2290, 1991 WL 284083 (N.D. Cal. June 14, 1991)..... 24

*Cotton v. Hinton*,  
559 F.2d 1326 (5th Cir. 1977)..... 17

*Donovan v. Bierwirth*,  
754 F.2d 1049 (2d Cir. 1985)..... 15

*Gen. Tel. Co. of Sw. v. Falcon*,  
457 U.S. 147 (1982)..... 21

*Green v. Occidental Petroleum Corp.*,  
541 F.2d 1335 (9th Cir. 1976)..... 22

*Hanlon v. Chrysler Corp.*,  
150 F.3d 1011 (9th Cir. 1998)..... passim

*Harris v. Palm Springs Alpine Estates, Inc.*,  
329 F.2d 909 (9th Cir. 1964)..... 20

*In re Ikon Office Solutions, Inc.*,  
191 F.R.D. 457 (E.D. Pa. 2000)..... 23

*In re Mego Fin. Corp. Sec. Litig.*,  
213 F.3d 454 (9th Cir. 2000)..... 16

*In re PaineWebber Ltd. P’ships Litig.*,  
171 F.R.D. 104 (S.D.N.Y. 1997) ..... 17

*In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*,  
227 F.R.D. 553 (W.D. Wash. 2004) ..... 10

*In re Schering Plough Corp. ERISA Litig.*,  
589 F.3d 585 (3d Cir. 2009)..... 14, 22

1 *In re Syncor ERISA Litig.*,  
2 227 F.R.D. 338 (C.D. Cal. 2005) ..... 20, 24

3 *In re Wash. Mut., Inc. Sec., Derivative & ERISA Litig.*,  
4 536 F. Supp. 2d 1377 (J.P.M.L. 2008)..... 2

5 *Jones v. NovaStar Fin., Inc.*,  
6 257 F.R.D. 181 (W.D. Mo. 2009) ..... 23

7 *LaRue v. DeWolff, Boberg & Assocs., Inc.*,  
8 552 U.S. 248 (2008) ..... 21

9 *Linney v. Cellular Alaska P’ship*,  
10 151 F.3d 1234 (9th Cir. 1998)..... 14

11 *Mass. Mut. Life Ins. Co. v. Russell*,  
12 473 U.S. 134 (1985) ..... 21

13 *Mendoza v. Tucson Sch. Dist. No. 1*,  
14 623 F.2d 1338 (9th Cir. 1980)..... 19

15 *Morelock Enters., Inc. v. Weyerhaeuser Co.*,  
16 No. 04-583, 2004 WL 2997526 (D. Or. Dec. 16, 2004) ..... 24

17 *Mullane v. Cent. Hanover Bank & Trust Co.*,  
18 339 U.S. 306 (1950) ..... 18

19 *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*,  
20 221 F.R.D. 523 (C.D. Cal. 2004) ..... passim

21 *Officers for Justice v. Civil Serv. Comm’n & County of S.F.*,  
22 688 F.2d 615 (9th Cir. 1982)..... 10, 14, 16

23 *Ortiz v. Fibreboard Corp.*,  
24 527 U.S. 815 (1999) ..... 23

25 *Parra v. Bashas’, Inc.*,  
26 536 F.3d 975 (9th Cir. 2008)..... 20

*Rodriguez v. West Publ’g Corp.*,  
No. 05-3222, 2007 WL 2827379 (C.D. Cal. Sept. 10, 2007) ..... 10, 18

*Silber v. Mabon*,  
18 F.3d 1449 (9th Cir. 1994)..... 19

*Staton v. Boeing Co.*,  
327 F.3d 938 (9th Cir. 2003)..... 20, 21

*United States v. McInnes*,  
556 F.2d 436 (9th Cir. 1977)..... 10

1 **Statutes**

2 11 U.S.C. § 362(a) ..... 2

3 28 U.S.C. § 1292(b) ..... 3

4 28 U.S.C. § 1715(d) ..... 9

5 Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 ..... 1

6 ERISA § 409, 29 U.S.C. § 1109 ..... 3, 21

7 ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) ..... 3, 14, 21, 22

8 **Rules**

9 Fed. R. Civ. P. 23 ..... 10, 18, 19

10 Fed. R. Civ. P. 23(a)..... 19, 22

11 Fed. R. Civ. P. 23(a)(1) ..... 20

12 Fed. R. Civ. P. 23(a)(2) ..... 20

13 Fed. R. Civ. P. 23(a)(3) ..... 21

14 Fed. R. Civ. P. 23(a)(4) ..... 21, 22

15 Fed. R. Civ. P. 23(b) ..... 22

16 Fed. R. Civ. P. 23(b)(1)..... 14, 19, 22

17 Fed. R. Civ. P. 23(b)(1)(A) ..... 23

18 Fed. R. Civ. P. 23(b)(1)(B) ..... 23

19 Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee Note (1966 Amendment)..... 23

20 Fed. R. Civ. P. 23(b)(3)..... 22

21 Fed. R. Civ. P. 23(e)(1) ..... 18

22 Fed. R. Civ. P. 23(g) ..... 2, 24

23 Fed. R. Civ. P. 26(f) ..... 4, 5

24 Fed. R. Civ. P. 41(a)..... 3

25 Fed. R. Civ. P. 42(a)..... 2

26 Fed. R. Civ. P. 54(b) ..... 3

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

W.D. Wash. CR 37.....5

**Other Authorities**

4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* (4th ed. 2002)..... 10, 13, 18

5 James Wm. Moore, et al., *Moore’s Federal Practice* (3d ed. 2010) ..... 11, 16

7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2005) .....21

*Manual for Complex Litigation (Fourth)* (2004) ..... 10

Restatement (Second) of Trusts (1959) ..... 15

1 **I. MOTION**

2 Plaintiffs Gregory Bushansky, Dana Marra, and Marina Ware (“Plaintiffs”) respectfully  
3 move the Court for an Order: (1) granting preliminary approval of the proposed settlement  
4 (“Settlement”); (2) preliminarily certifying a settlement class; (3) approving the form and manner  
5 of notices of the Settlement to the certified Class (“Class Notice,” “Publication Notice” and  
6 “Internet Notice”, collectively “Notices”); and (4) setting a date for a Fairness Hearing.

7 **II. INTRODUCTION**

8 The proposed Settlement, consisting of a cash payment of \$49 million and other  
9 consideration, provides substantial benefits to members of the Class and resolves all claims  
10 asserted by Plaintiffs against Defendants.<sup>1</sup> The Settlement represents an excellent recovery for the  
11 Class and is fair, reasonable, and adequate under the governing standards for evaluating class  
12 action settlements in this Circuit. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th  
13 Cir. 1998). Moreover, the proposed Notices satisfy the requirements of due process and are similar  
14 to Notices approved in similar cases. As set forth below, all prerequisites for preliminary approval  
15 of the Settlement have been met and Plaintiffs respectfully request that their motion be granted.<sup>2</sup>

16 **III. PROCEDURAL AND FACTUAL BACKGROUND**

17 **A. Description of Litigation**

18 The first case filed under the Employee Retirement Income Security Act of 1974, as  
19 amended, 29 U.S.C. §1001, et seq. (“ERISA”), was filed on November 20, 2007 on behalf of the  
20 participants and beneficiaries of the WaMu Savings Plan (“Plan”). Thereafter, eight additional  
21 substantially identical cases were filed. The nine actions were transferred to the District Court for  
22 coordinated or consolidated pretrial proceedings by order of the Judicial Panel on Multidistrict  
23

24 <sup>1</sup> A copy of the Settlement Agreement is attached as Exhibit A to the Joint Declaration of Derek Loeser and Andrew  
25 Volk in Support of Motion for Preliminary Approval of Proposed Settlement (“Loeser/Volk Declaration”).  
Capitalized terms not otherwise defined in this memorandum have the same meanings ascribed to them in the  
Settlement Agreement.

26 <sup>2</sup> Attached to the Settlement Agreement as Exhibit C is the [Proposed] Findings and Order Preliminarily Approving  
Proposed Settlement, Preliminarily Certifying Settlement Class, Approving Form and Dissemination of Notices, and  
Setting Date for Hearing on Final Approval (“Preliminary Approval Order”).

1 Litigation, *see In re Wash. Mut., Inc. Sec., Derivative & ERISA Litig.*, 536 F. Supp. 2d 1377  
2 (J.P.M.L. 2008), and were consolidated by this Court pursuant to Rule 42(a) by order dated May 7,  
3 2008 [Dkt. #25]. On May 20, 2008, this Court appointed Keller Rohrback L.L.P. and Hagens  
4 Berman Sobol Shapiro LLP as Interim Co-Lead Counsel pursuant to Rule 23(g) [Dkt. #41] (“Class  
5 Counsel”).

6 Plaintiffs filed a Consolidated Amended Complaint for Breaches of Duty Under the  
7 Employee Retirement Income Security Act (“Consolidated Amended Complaint”) [Dkt. #66] on  
8 August 5, 2008. The Consolidated Amended Complaint asserted claims under ERISA against  
9 members of either the Plan Investment Committee (“PIC”) or the Plan Administration Committee  
10 (“PAC”), certain members of the Board of Directors of Washington Mutual, Inc. (“WMI” or the  
11 “Company”) who were members of the Human Resources Committee (“HR Committee  
12 Defendants”), and former defendants Kerry Killinger and WMI.

13 The Defendants named in the Consolidated Amended Complaint moved to dismiss that  
14 complaint on September 19, 2008 [Dkt. #148]. Prior to Plaintiffs’ responses to Defendants’  
15 motions to dismiss, WMI filed for bankruptcy protection in the United States Bankruptcy Court for  
16 the District of Delaware. *See In re Wash. Mut., Inc.*, No. 08-12229 (Bankr. D. Del. filed Sept. 26,  
17 2008) (“Chapter 11 Case”). As a result of the Chapter 11 Case, all claims against WMI in the  
18 ERISA action were stayed pursuant to 11 U.S.C. § 362(a). Plaintiffs in the ERISA action filed  
19 proofs of claim (the “Bankruptcy Claims”) in the Chapter 11 Case.<sup>3</sup>

20 Plaintiffs sought and were granted leave to amend the Consolidated Amended Complaint in  
21 light of the WMI bankruptcy proceedings. Plaintiffs filed their Consolidated Second Amended  
22 Complaint for Breaches of Duty Under the Employee Retirement Income Security Act  
23 (“Complaint”) on February 18, 2009 [Dkt. #223], without WMI and Mike Amato as defendants  
24 and added JPMorgan Chase Bank, N.A. (“Chase”) as a defendant. The Complaint asserted claims  
25 on behalf of all persons who were participants in or beneficiaries of the Plan at any time between

26 <sup>3</sup> Claim Nos. 1001, 1002, and 1003 were filed by Plaintiffs in their individual capacities. Claim No. 999 was filed by Plaintiffs in their capacity as Named Plaintiffs in the ERISA action.

1 October 19, 2005 and September 26, 2008 (“Class Period”) and whose individual Plan account  
2 included investment in Company stock.

3 Upon the stipulation of the parties and pursuant to Rule 41(a), on March 19, 2009, the  
4 District Court dismissed without prejudice all claims against defendant Tony Meola [Dkt. #238].

5 By April 27, 2009, all Defendants filed their respective motions to dismiss. The motions  
6 were fully briefed by July 6, 2009. Oral argument was heard by the Court on August 6, 2009. On  
7 October 5, 2009, the Court entered an Order in which Defendants’ motions to dismiss were granted  
8 in part and denied in part. Among other things, the Court dismissed all claims against defendants  
9 Killinger and Chase [Dkt. #362].

10 On October 8, 2009, Plaintiffs filed a Rule 54(b) Motion to Direct the Entry of Final  
11 Judgment for Chase [Dkt. #366], which Chase opposed. On October 19, 2009, the PIC and PAC  
12 Defendants filed a Cross-Motion for Certification pursuant to 28 U.S.C. § 1292(b) [Dkt. #372],  
13 which Plaintiffs opposed on November 2, 2009 [Dkt. #383]. On January 11, 2010 [Dkt. #417], the  
14 Court denied Plaintiffs’ 54(b) Motion without prejudice to revisit the issue after the Court ruled on  
15 class certification, and denied as moot the PIC and PAC Defendants’ Cross-Motion.

16 On October 20, 2009, the HR Committee Defendants filed a Motion for Reconsideration  
17 [Dkt. #373], which the Plaintiffs opposed [Dkt. #385]. On November 30, 2009, the Court denied  
18 the HR Committee Defendants’ Motion for Reconsideration [Dkt. #394].

19 The Defendants who had not been dismissed filed their respective answers, which included  
20 their respective affirmative defenses, on January 15, 2010 [Dkt. #427 and #429]. On February 5,  
21 2010, Plaintiffs moved to strike certain of Defendants’ affirmative defenses [Dkt. #442]. On  
22 February 25, 2010, the parties filed a Stipulation and Proposed Order Resolving the Motion to  
23 Strike [Dkt. #458], which the Court entered on March 4, 2010 [Dkt. #464].

24 **B. Investigation of Claims and Discovery**

25 The Complaint seeks to recover losses under ERISA §§ 409 and 502(a)(2), 29 U.S.C.  
26 §§ 1109 and 1132(a)(2), suffered by the Plan as a result of alleged breaches of fiduciary duty. The

1 Complaint alleges six causes of action: (1) failure to prudently and loyally manage the Plan's  
2 investment in Company stock; (2) failure to monitor fiduciary appointees; (3) failure to disclose  
3 necessary information to co-fiduciaries; (4) failure to provide Plan participants with complete and  
4 accurate information regarding Company stock; (5) failure to prevent breaches by co-fiduciaries of  
5 their duties of prudent and loyal management, adequate monitoring, and complete and accurate  
6 communications; and (6) knowing participation in breaches. Class Counsel have conducted a  
7 thorough investigation into Plaintiffs' claims and the allegations set forth in the Complaint.

8 Investigative efforts have included: (1) setting up and executing a search term-based  
9 document review for over 8 million pages of documents—documents that were publically available  
10 as well as documents received during discovery—concerning the Company's financial condition  
11 and the performance of Company stock during the relevant time period, including but not limited  
12 to: news articles, related complaints and pleadings, press releases, analyst reports, regulatory  
13 filings, the SEC investigation of WMI, the DOL investigation of WMI, the Senate Permanent  
14 Subcommittee's investigation of WMI, and the Offices of the Inspector General's evaluation of  
15 Washington Mutual Bank; (2) inspecting, reviewing, and analyzing numerous documents  
16 concerning the Plan and the administration of the Plan, including but not limited to: the Plan  
17 documents, Plan committee meeting minutes and charters, presentations to the Plan committees,  
18 and class-wide communications regarding the Plan; (3) interviewing Plan participants and  
19 reviewing and analyzing documents collected from participants; and (4) researching the applicable  
20 law with respect to the claims asserted and the potential defenses thereto.

21 In addition to the above, the parties' discovery included the following:

22 **Rule 26(f) conferences and production of ESI**

23 The parties held Rule 26(f) conferences on August 11, 2008 and September 5, 2008, and on  
24 September 15, 2008, the parties filed their first Rule 26(f) Report. Following the addition of Chase  
25 as a Defendant, the parties held additional Rule 26(f) conferences on March 2, 2009 and March 20,  
26 2009, and then filed a Revised Rule 26(f) Report on March 30, 2009.

1 Both Rule 26(f) Reports contained detailed discovery plans, which included phasing the  
2 discovery into six separate categories of information repositories, with the first category of  
3 documents being Windows-based ESI (“WESI”) maintained by individual custodians. The 26(f)  
4 Reports also contained carefully negotiated forms of production and production protocols for the  
5 six categories of information repositories.

6 Plaintiffs diligently worked through the production protocol for obtaining custodial-based  
7 WESI. With input from their ESI experts, Plaintiffs created search terms to be run against  
8 20 initial custodians. The search terms had to be modified when the documents migrated from  
9 WMI’s Onsite3 platform to a Xerox platform, which occurred after Chase became the custodian of  
10 certain documents. Plaintiffs then, with the assistance of Chase, further modified the search terms  
11 several times in order to reduce the costs of electronic discovery by reducing the number of search  
12 term “hits.” After numerous meet and confers, as well as exchanging briefs under Western District  
13 of Washington local rule CR 37, Plaintiffs and Chase were able to agree on a procedure whereby  
14 Plaintiffs would obtain ERISA-specific WESI. Prior to receiving the ERISA-specific custodial-  
15 based WESI from Chase (but after Class Counsel had begun a search-term based document review  
16 of over 8 million pages of documents, including numerous documents produced by Chase), the  
17 case settled.

18 **Initial Disclosures**

19 Plaintiffs and Defendants served their Initial Disclosures on August 25, 2008. Defendants  
20 supplemented their disclosures on February 25, 2009. Former defendant Chase served its Initial  
21 Disclosures on April 27, 2009. Plaintiffs served their Second Disclosures on April 27, 2009. On  
22 December 19, 2009, the ERISA officers, outside directors, and Killinger served Disclosures.

23 **Parties’ Written Discovery**

24 Plaintiffs served their first Requests for Production on all Defendants on June 13, 2008, and  
25 their second Requests on June 27, 2008. On August 25, 2008, Plaintiffs re-served their first  
26 Requests for Production on all Defendants and their revised second Requests. Plaintiffs served

1 their first Interrogatories and first Requests for Admission, and third Requests for Production on  
2 December 17, 2009. On January 27, 2010, Plaintiffs served their second Interrogatories and fourth  
3 Requests for Production to all Defendants.

4 On October 1, 2008 Plaintiffs issued subpoenas to the Federal Deposit Insurance  
5 Corporation and Chase. Plaintiffs requested documents from the Office of Thrift Supervision on  
6 October 23, 2008. On January 21, 2009, Plaintiffs issued an additional subpoena to Chase and  
7 submitted their first Requests for Production to Chase on February 18, 2009. Plaintiffs also issued  
8 a subpoena to Fidelity on March 9, 2009 and subpoenaed documents from Gibson, Dunn &  
9 Crutcher LLP and Towers Watson & Co. on February 5, 2010.

10 Plaintiffs responded to the Director Defendants' First Interrogatories and Requests for  
11 Production on February 2, 2010.

12 On November 25, 2009, the Court set a fact discovery cut-off date of July 5, 2011, and a  
13 trial date for July 16, 2012.

#### 14 **C. Settlement Negotiations**

15 Class Counsel were cognizant of the impact of the bankruptcy proceedings on the ability of  
16 Plaintiffs to fully recover the Plan's losses in this case, and the risk of depletion of available  
17 insurance coverage. Accordingly, following a detailed review of the applicable insurance policies,  
18 as well as an analysis of the merits of the litigation, Class Counsel extended an initial offer to  
19 Defendants to settle the case on February 12, 2009. Settlement discussions ensued and revised  
20 settlement offers were extended on February 27, 2009 and November 12, 2009.

21 On February 8, 2010, the parties (except for Chase) retained a mediator, the Honorable  
22 Edward A. Infante, to assist them in mediating a settlement. The mediation was scheduled for  
23 April 21, 2010. Prior to the mediation, the Plaintiffs and bankruptcy counsel for WMI initiated  
24 settlement discussions with regard to the claims against WMI in the bankruptcy proceedings, and  
25 the related claims against Defendants. These discussions subsequently were broadened to include  
26 counsel for the Defendants (other than Chase). Following extensive negotiation, the parties (except

1 for Chase) reached an agreement in principle to settle the ERISA action for \$49 million, and on  
2 April 19, 2010, Plaintiffs and Defendants (except for Chase) signed the Memorandum of  
3 Understanding. Following additional discussions, on May 27, 2010, Plaintiffs and Chase reached  
4 an agreement in principle to settle the ERISA action. The parties executed the final Settlement  
5 Agreement on June 18, 2010.

6 In sum, the Settlement Agreement was the result of lengthy and contentious arm's-length  
7 negotiations. This process was in all respects thorough, adversarial, and professional.

8 **D. Terms of the Settlement Agreement**

9 The complete terms and conditions of the proposed Settlement are set forth in Exhibit A to  
10 Loeser/Volk Declaration. The following is a summary of the principal terms of the Agreement:

11 **1. Class Notice and Summary Notice.** A proposed Preliminary Approval Order is  
12 attached to the Settlement Agreement as Exhibit C. The Preliminary Approval Order provides for  
13 the following notices:

- 14 (a) A mailed Class Notice (Exhibit 1 to the Preliminary Approval Order), to be  
15 mailed to the last known address of Settlement Class Members; and
- 16 (b) A Publication Notice (Exhibit 2 to the Preliminary Approval Order), to be  
17 published in the *Seattle Times* and by newswire.
- 18 (c) An Internet Notice on multiple websites with extensive information about  
19 the Settlement.

20 **2. Plan of Allocation.** The plan or formula of allocation of the Net Settlement  
21 Amount, subject to approval by this Court, whereby the Net Settlement Amount will be distributed  
22 for the benefit of the Settlement Class.<sup>4</sup>

23 **3. Releasees.** The Defendants and their parents, subsidiaries, affiliates, directors,  
24 officers, partners, employees, agents, attorneys, professionals, estates, heirs, successors, assigns,  
25 spouses and marital communities, and the Blended Policy Carriers (certain Lloyd's Underwriters  
26 and Companies, the Steadfast Insurance Company, Federal Insurance Company, National Union  
Fire Insurance Co. of Pittsburgh, Pa., and Arch Insurance Company).

---

<sup>4</sup> A copy of the proposed Plan of Allocation is attached to the Loeser/Volk Declaration as Exhibit B.

1           **4. Settlement Amount.** The parties agreed to settle this action for the sum of  
2 \$49,000,000 in cash. In addition, Chase has agreed to pay the reasonable costs of notice and  
3 allocation of the Settlement proceeds. Chase will not contribute to the \$49 million settlement fund  
4 or provide any consideration other than the reasonable costs of notice and allocation of the  
5 Settlement proceeds.

6           **5. Settlement Class.** A non-opt out class consisting of all persons who were  
7 participants in or beneficiaries of the Plan at any time between October 19, 2005 and September  
8 26, 2008 and whose individual Plan account included investment in Company Stock.

9           **6. Released Claims.** Section 4.2 of the Settlement Agreement defines the Released  
10 Claims, which include, in general terms, all claims raised or that could have been raised in this  
11 action that pertain to the allegations of the Complaint.

12 **E. Bankruptcy Court Approval**

13           Within seven days of this Court's issuance of the Preliminary Approval Order, Plaintiffs'  
14 and WMI will move to obtain an order from the Bankruptcy Court in the Chapter 11 Case for  
15 approval of the Settlement Agreement. The parties expect that the hearing in Bankruptcy Court  
16 shall occur prior to, or at the same time as, the Final Approval Hearing in this District Court.

17 **F. Reasons for Settlement**

18           Plaintiffs have entered into this proposed Settlement with an understanding of the strengths  
19 and weaknesses of their claims. This understanding is based on: (1) the motion practice undertaken  
20 by the parties; (2) the investigation, research, and discovery as outlined above; (3) the likelihood  
21 that Plaintiffs would prevail on summary judgment; (4) the likelihood that Plaintiffs would prevail  
22 at trial; (5) the range of possible recovery; (6) the substantial complexity, expense, and duration of  
23 litigation necessary to prosecute this action through trial, post-trial motions, and likely appeals, and  
24 the significant uncertainties in predicting the outcome of this complex litigation; and (7) the  
25 significant risk that available insurance would be depleted over the course of the litigation, and  
26 Plaintiffs would be unable to collect on a substantial judgment in the event they prevailed in the

1 litigation. Having undertaken this analysis, Class Counsel and Plaintiffs have concluded that the  
2 Settlement is fair, reasonable, and adequate, and should be presented to the Court for approval.

#### 3 IV. PROPOSED SCHEDULE

4 As laid out in the Preliminary Approval Order, the parties have agreed to the following  
5 schedule of events, the dates of which will be determined after the Court enters the Preliminary  
6 Approval Order and sets a Fairness Hearing date:

7 Event	8 Time for Compliance
9 Motion for Approval of Settlement in Bankruptcy Court	7 days after entry of Preliminary Approval Order
10 Deadline for Mailing of Class Notice, publication of Publication Notice, and posting Settlement Agreement and Notice on websites listed in Settlement Agreement	30 days after entry of Preliminary Approval Order
11 Deadline for filing Plaintiffs' motions for final approval and for attorneys' fees and costs	30 days prior to the proposed Fairness Hearing
12 Deadline for Class Members to comment upon or object to the proposed Settlement	10 court days prior to the proposed Fairness Hearing
13 Deadline for filing Plaintiffs' reply in support of motions for final approval and for attorneys' fees and costs	3 days prior to the proposed Fairness Hearing
14 Proposed Fairness Hearing in District Court <sup>5</sup>	No sooner than Sept. 27, 2010
15 Final Approval Hearing in Bankruptcy Court	Prior to or at the same time as the Fairness Hearing in District Court

#### 21 V. DISCUSSION

##### 22 A. The Settlement Agreement Meets the Judicial Standards for Preliminary Approval 23 Under Ninth Circuit Law and Rule 23.

24 "The Ninth Circuit is firmly 'committed to the rule that the law favors and encourages  
25 compromise settlements.'" *Ahern v. Cent. Pac. Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988)

26 <sup>5</sup> Pursuant to the U.S. Class Action Fairness Act of 2005, at 28 U.S.C. § 1715(d), the date of the Fairness Hearing must be at least 90 days after notices are served on the appropriate state and federal officials.

1 (citing *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977)). Rule 23 of the Federal Rules  
2 of Civil Procedure governs settlements of class action lawsuits. Although the procedure for  
3 approval of a class action settlement is not specifically delineated in Rule 23, a two-step procedure  
4 is set forth and approved in the Federal Judicial Center’s *Manual for Complex Litigation (Fourth)*  
5 § 21.632, at 320-21 (2004), and is universally followed by federal courts. *See, e.g., In re*  
6 *Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 556 (W.D. Wash. 2004); *Nat’l*  
7 *Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). First, the court  
8 must determine “whether a proposed class action settlement deserves preliminary approval.” *Nat’l*  
9 *Rural Telecomms. Coop.*, 221 F.R.D. at 525 (citing *Manual for Complex Litigation (Third)* § 30.41,  
10 at 236-37 (1995)). Second, following notification of the class members, the court must determine  
11 whether final approval is warranted. *Id.*

12 During the first stage, the parties submit the settlement to the court for preliminary approval  
13 and the court makes a preliminary fairness evaluation. *Manual for Complex Litigation (Fourth)*  
14 § 21.632, at 320-21. In granting preliminary approval, the court determines whether the proposed  
15 settlement is “fundamentally fair, adequate, and reasonable.” *Hanlon*, 150 F.3d at 1026. The court  
16 does “not decide the merits of the case or resolve unsettled legal questions.” *Carson v. Am.*  
17 *Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Officers for Justice v. Civil Serv. Comm’n &*  
18 *County of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982). Rather, the settlement as a whole must be  
19 examined for overall fairness, adequacy, and reasonableness, standing or falling in its entirety.  
20 *Hanlon*, 150 F.3d at 1026.

21 A settlement is presumptively fair if: “(1) the negotiations occurred at arm’s length;  
22 (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar  
23 litigation; and (4) only a small fraction of the class object[s].” *Rodriguez v. West Publ’g Corp.*,  
24 No. 05-3222, 2007 WL 2827379, at \*7 (C.D. Cal. Sept. 10, 2007), *rev’d on other grounds*, 563  
25 F.3d 948 (9th Cir. 2009) (citing 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*  
26 § 11.41 (4th ed. 2002)).

1 The Settlement easily satisfies the first three fairness factors.<sup>6</sup> Negotiations occurred at  
2 arm's length for over one year. The parties also engaged in significant discovery, allowing  
3 Plaintiffs to understand the factual and legal issues of the case. And finally, Class Counsel have  
4 extensive experience litigating claims of this same type, and, thus, are well informed of the  
5 potential strengths and weaknesses of the case. As a result, the proposed Settlement should be  
6 afforded a presumption of fairness.

7 Further, the Settlement satisfies the eight factors articulated by the Ninth Circuit to  
8 determine whether a settlement is fair, adequate, and reasonable:

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

17 *Hanlon*, 150 F.3d at 1026.

18 Consideration of the above criteria demonstrates that the proposed Settlement is well within  
19 the possible range for approval. As such, the proposed Settlement should be approved.

### 20 **1. The Strength of Plaintiffs' Case Favors Approval of the Proposed Settlement.**

21 When evaluating a settlement for preliminary approval, courts need only weigh plaintiff's  
22 case against the amount offered in settlement, rather than consider the strength of plaintiff's case  
23 on the merits. *See* 5 James Wm. Moore, et al., *Moore's Federal Practice* ¶ 23.164[2] (3d ed.  
24 2010)). As evidenced by the vigor with which Class Counsel have prosecuted this action and the  
25 amount of time expended toward that end, Class Counsel believe strongly in the merits of this case  
26 and the claims of the Complaint. Discovery conducted by Plaintiffs, together with ample public  
information, including media reports, congressional hearings, and federal investigations, in  
Plaintiffs' view, support Plaintiffs' core allegation that Company stock became an imprudent

---

<sup>6</sup> The fourth factor will become relevant after the Class has been notified of the Settlement following preliminary approval.

1 investment for the Plan during the Class Period. Again, in Plaintiffs' view, this is because, during  
2 the Class Period, WMI engaged in reckless conduct that imperiled the Company, including:  
3 (1) over-reliance on the origination, securitization, purchase and sale of subprime mortgage loans  
4 and other risky mortgage loan products such as "negative amortization" loans; (2) lax underwriting  
5 policies for mortgage loans and related loan products; (3) participation in the systematic  
6 manipulation of the loan origination and property appraisal processes; (4) failure to implement and  
7 maintain risk management control processes; and (5) failure to properly account for its subprime  
8 lending and related business operations, all of which caused the Company's financial statements to  
9 be misleading and artificially inflated the value of shares of Company stock and the Company  
10 Stock Fund in the Plan.

11 Furthermore, Plaintiffs believe the evidence would show that each Defendant (other than  
12 Chase, which was sued on a successorship theory) was a Plan fiduciary and failed to take action to  
13 protect the Plan and serve the participants' best interests as required by ERISA. Therefore,  
14 Plaintiffs believe that by failing to take action to protect the Plan from significant losses during the  
15 Class Period, Defendants (other than Chase) breached their fiduciary duties.

16 Nonetheless, Plaintiffs also recognize the risks of continued litigation and an adverse  
17 outcome. Plaintiffs readily acknowledge that many of the complex factual and legal issues  
18 involved in this action are contested, and both sides have proffered evidence to support their  
19 competing views of the case. Moreover, courts have come to different conclusions regarding the  
20 circumstances under which Plan fiduciaries must act to divest a plan of its investment in company  
21 stock, and a number of cases have been dismissed at the summary judgment stage on this basis.  
22 Thus, while Plaintiffs and Class Counsel believe this is a strong case for Plaintiffs, the outcome of  
23 continued litigation remains uncertain. Accordingly, the overall strength of the case and the  
24 substantial recovery obtained as a result of its strength supports preliminary approval of the  
25 proposed Settlement.

1           **2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**  
2           **Weigh in Favor of Approval.**

3           “Unless the settlement is clearly inadequate, its acceptance and approval are preferable to  
4 lengthy and expensive litigation with uncertain results.” *Nat’l Rural Telecomms. Coop.*, 221 F.R.D.  
5 at 526 (citing *Newberg on Class Actions* § 11:50 at 155). Courts favor settlement, as it preserves  
6 resources by avoiding protracted litigation and the likely subsequent appeals. *Id.* at 527.

7           As indicated above, litigation of this case poses risks for both Plaintiffs and Defendants.  
8 Although Class Counsel believe strongly in the merits of this case, Class Counsel are cognizant of  
9 the risk that continued litigation could end in non-recovery. Moreover, Defendants have denied  
10 and vigorously defended against the allegations made by Plaintiffs and are expected to continue to  
11 do so should this action proceed through trial.

12           In addition to the risks presented by continued litigation, proceeding through trial and the  
13 likely subsequent appeals would undoubtedly require a significant undertaking by both parties.  
14 This case presents many complex legal and factual issues in a rapidly developing area of law. To  
15 address the complexities and nuances of this case adequately, significant expenditures of time and  
16 money would be required. Class Counsel and this Court have estimated that in addition to  
17 substantial preparation time and expense, a trial would take approximately two weeks.

18           Furthermore, because of the complexity of WMI’s business and accounting practices, all  
19 parties would be required to consult with experts to support or defend the allegations of the  
20 Complaint. Given the nature of this case, a judgment at trial would likely be appealed by the losing  
21 party. As a result, continued litigation would risk delaying the Class’s potential recovery for years,  
22 further reducing its value.

23           The Settlement cuts short the additional months of contested discovery, and eliminates the  
24 time and expense of the substantial motion practice that would likely occur going forward in this  
25 case. Thus, the Settlement conserves judicial resources and reduces the expense associated with  
26 continued litigation. As a result, this factor weighs in favor of preliminary approval of the  
proposed Settlement.

1           **3. The Risk of Maintaining Class Action Status Throughout the Trial Weighs in**  
2           **Favor of Approval.**

3           Though Defendants certainly have a contrary view, Plaintiffs do not accord this factor much  
4 weight in the context of this case. As discussed below in Section VI, ERISA class actions of this  
5 type are often considered a “paradigmatic example” of a Rule 23(b)(1) class because they  
6 constitute claims brought on behalf of an ERISA-governed plan under ERISA § 502(a)(2) and are,  
7 therefore, derivative in nature. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d  
8 Cir. 2009) (collecting cases).

9           **4. The Amount Offered in Settlement Weighs in Favor of Approval.**

10           A proposed settlement should be viewed as a whole rather than in individual pieces.  
11 *Officers for Justice*, 688 F.2d at 628. It “may be acceptable even though it amounts to only a  
12 fraction of the potential recovery that might be available to the class members at trial.” *Nat’l Rural*  
13 *Telecomms. Coop.*, 221 F.R.D. at 527. Moreover, a settlement should not be judged against a  
14 “speculative measure” of what could have been attained in negotiation. *Linney v. Cellular Alaska*  
15 *P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

16           Here there is a broad range of potential recovery if the case were litigated to a conclusion  
17 rather than settled. It is possible that Defendants could prevail on one or more of their legal or  
18 factual arguments to defeat liability entirely. While Plaintiffs are confident of the strength of the  
19 claims asserted here, they recognize that this possibility cannot be discounted completely.

20           Assuming liability can be established, several variables would be at work in fixing the  
21 actual amount of recoverable damages. Key among these variables are (1) the legal framework for  
22 the measure of damages, and (2) the determination of when the failure to divest the Plan’s holdings  
23 of WMI stock or to discontinue acquisition of WMI stock constituted breaches of fiduciary duty  
24 (“breach date”). Plaintiffs anticipate that these matters would be hotly contested in the absence of  
25 a settlement, and the Court’s ultimate determinations would impact greatly the recoverable  
26 damages.

1 If the case were to go forward without a settlement, Plaintiffs would argue for a measure of  
2 damages that compares the results of the investment in Company stock during the Class Period to  
3 the results that would have been realized if the Plan investments in Company stock had been  
4 invested in the most favorable investment alternative available under the Plan. Plaintiffs believe  
5 that this approach is consistent with the case law. *See Donovan v. Bierwirth*, 754 F.2d 1049, 1056  
6 (2d Cir. 1985) (explaining that “[o]ne appropriate remedy in cases of breach of fiduciary duty is the  
7 restoration of the trust beneficiaries to the position they would have occupied but for the breach of  
8 trust”) (citing Restatement (Second) of Trusts § 205(c) (1959)). Plaintiffs further would argue that  
9 damages should be calculated on the basis that Defendants were in breach of their fiduciary duties,  
10 both with respect to the Plan’s continued holding of, and continuing investment in, WMI stock as  
11 of the outset of the Class Period, October 19, 2005. Plaintiffs anticipate that if they were to prevail  
12 at trial on these points—which would be a complete victory for Plaintiffs—the principal damages  
13 would be over \$300 million, and the damages based on a “best plan alternative” model could be  
14 even higher.

15 Undoubtedly, Defendants would, in addition to disputing liability for any loss suffered by  
16 the Plan, present legal and factual arguments for a much lower damages amount even if they are  
17 found to be liable. For example, Defendants would likely argue that it is inappropriate to compare  
18 the Company stock investment results to what would have been realized under the most favorable  
19 Plan investment alternative. If a different measure of damages were employed (for example, by  
20 using less favorable investment alternatives in the damages model), damages could be reduced  
21 substantially, if not completely.

22 In addition, Defendants would also likely argue that it was only much later than October 19,  
23 2005, if ever, that their conduct at any point constituted a breach of fiduciary duty. If the breach  
24 date were found to be not October 19, 2005, but, for example, December 20, 2007 (when WMI  
25 confirmed that the SEC had launched an inquiry into its lending practices), damages would be  
26 reduced by approximately 60 percent.

1 Further, Plaintiffs anticipate that Defendants would argue that any calculation of damages  
2 should be limited to the losses resulting from the Plan's continued acquisition of Company stock  
3 during the Class Period, and that no damages should be assessed with respect to their failure to  
4 divest the Plan's existing holdings of Company stock at the beginning of or during the Class  
5 Period. If Defendants were to prevail on this point, the amount recoverable would be significantly  
6 reduced. Indeed, if Plaintiffs were able to establish liability, but the breach date were found to be  
7 December 20, 2007, and only purchases of Company stock were to be considered, principal  
8 damages would be \$12 million, which is significantly less than the Settlement amount.

9 Given the wide range of potential damages outcomes at trial, as well as the possibility of  
10 summary judgment or a verdict in favor of Defendants, the Settlement provides a substantial  
11 recovery well in excess of the range that courts traditionally have found to be fair and adequate.  
12 *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving  
13 settlement with all defendants that comprised one sixth of plaintiffs' potential recovery); *Officers*  
14 *for Justice*, 688 F.2d at 624 (“[T]he very essence of a settlement is compromise, a yielding of  
15 absolutes and an abandoning of highest hopes.”) (citations and internal quotations omitted)).  
16 Accordingly, the likelihood of success on the merits, weighed against the potential recovery,  
17 supports approval of the Settlement.

18 **5. The Extent of Discovery Completed and the Stage of the Proceedings Weigh in**  
19 **Favor of Approval.**

20 The extent of discovery conducted helps to determine the parties' grasp of the strengths and  
21 weaknesses of the case. *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527 (citing *Manual for*  
22 *Complex Litigation (Third)* § 30.42 (1995)). Preliminary approval of a settlement is more likely if  
23 the settlement was reached after careful investigation and consideration of the ““legal and factual  
24 issues surrounding the case.”” *5 Moore's Federal Practice* ¶ 23.164[2].

25 Class Counsel have undertaken extensive discovery in this action. As described previously,  
26 Plaintiffs propounded numerous Requests for Production and Interrogatories to Defendants, and  
served multiple third parties with subpoenas for additional documents. Moreover, Plaintiffs have

1 obtained considerable public documents and information from other lawsuits, congressional  
2 hearings and research. Class Counsel received over 8 million pages of document, including many  
3 from Chase. Class Counsel conducted a search-term based review of these documents, and had  
4 coded over 1.6 million pages of documents at the time of settlement.

5 Based on this formal and informal discovery, Class Counsel have in-depth knowledge of  
6 the factual and legal issues of this case. Although much remains to be done to prepare for trial,  
7 Plaintiffs and Class Counsel are fully aware of the strength of the claims and potential risks, and  
8 believe without hesitation that the Settlement is fair, reasonable, adequate, and in the best interest  
9 of the Plan and the Class. Thus, the extent of discovery conducted weighs in favor of both  
10 preliminary and final approval of the Settlement.

#### 11 **6. The Experience and View of Counsel Weigh in Favor of Approval.**

12 “‘Great weight’ is accorded to the recommendation of counsel, who are most closely  
13 acquainted with the facts of the underlying litigation.” *Nat’l Rural Telecomms. Coop.*, 221 F.R.D.  
14 at 528 (citing *In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997)). Thus,  
15 in the absence of fraud or collusion during negotiation, deference should be afforded to the  
16 judgment of counsel. *Id.* at 528 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

17 As discussed below, Class Counsel have extensive experience in handling ERISA class  
18 action cases and other complex litigation. Keller Rohrback and Hagens Berman Sobol Shapiro are  
19 national leaders in this area of litigation. *See* Loeser/Volk Declaration, ¶¶ 8-10.

20 Based on Class Counsel’s experience and the specific facts and circumstances of this  
21 particular case, Class Counsel have concluded that the Settlement is fair, reasonable, and adequate.  
22 This factor supports preliminary approval of the proposed Settlement.

#### 23 **7. The Presence of a Governmental Participant**

24 In this case, the Government is not a party or a formal participant. Consequently, this  
25 factor is not applicable.

26

1           **8.       The Reaction of Class Members to the Proposed Settlement**

2           Plaintiffs support the proposed Settlement. Nonetheless full discussion of this factor cannot  
3 occur until after Class Notice is issued and the Class as a whole has the opportunity to evaluate the  
4 Settlement. As such, Plaintiffs suggest that evaluation of this factor occur at the final approval  
5 stage of the Settlement.

6           **B.       The Proposed Form of Notice to Class Members Satisfies Rule 23 and Due Process**  
7           **Requirements.**

8           Following preliminary approval of the terms of the Settlement, the Class must be notified of  
9 the proposed settlement. Rule 23 provides that “[t]he court must direct notice in a reasonable  
10 manner to all class members who would be bound by the [proposed settlement].” Fed. R. Civ. P.  
11 23(e)(1).

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). More specifically, notice is proper if it provides:

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

22           *Rodriguez*, 2007 WL 2827379, at \*6.

23           Here, the proposed form of Class Notice (*see* Exhibit 1 to Preliminary Approval Order)  
24 describes in plain English the terms and operation of the Settlement Agreement, the considerations  
25 that caused Plaintiffs and Class Counsel to conclude that the Settlement is fair and adequate, the  
26 maximum counsel fees and class representative service awards that may be sought, the procedure  
for objecting to the Settlement, and the date and place of the Fairness Hearing. *See Newberg on*  
*Class Actions* § 8.32. With the Court’s approval, the Class Notice will be mailed to Class  
Members no later than 30 days after entry of the Preliminary Approval Order. In addition, a

1 Publication Notice (*see* Exhibit 2 to Preliminary Approval Order) will be published in the *Seattle*  
2 *Times* and by electronic publication on a newswire 30 days after entry of the Preliminary Approval  
3 Order. Finally, an Internet Notice will make information about the Settlement available on  
4 multiple websites.

5 These proposed forms of Notice will fairly apprise Class members of the Settlement and  
6 their options, as well as fully satisfy due process requirements. *See Silber v. Mabon*, 18 F.3d 1449,  
7 1452-54 (9th Cir. 1994) (approving notice by first class mail as the “best notice practicable”);  
8 *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980), *rev’d on other grounds*,  
9 475 U.S. 717 (1986) (stating that notice is satisfactory if it “generally describes the terms of the  
10 settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come  
11 forward and be heard”).

## 12 VI. CLASS CERTIFICATION OF PLAINTIFFS’ CLAIMS IS APPROPRIATE

13 Plaintiffs respectfully request that the Court make appropriate findings and certify the  
14 following Class, for purposes of settlement only:

15 All persons who were participants in or beneficiaries of the Plan at any time between  
16 October 19, 2005 and September 26, 2008 and whose individual Plan account included  
17 investment in Company Stock. Defendants and their heirs, Successors-in-Interest, or  
assigns, to the extent such persons acquire an interest held by Defendants, are excluded  
from the Settlement Class.

18 As described in detail below, the proposed Class meets all four prerequisites of Rule 23(a)  
19 necessary to class certification. Rule 23(b)(1) is also satisfied, making this Class appropriate for  
20 class certification.

21 Under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997), a court faced with a  
22 request for a settlement-only class like this one need not inquire whether the case would present  
23 intractable problems of trial management, but the other requirements under Rule 23 must still be  
24 satisfied. Because Plaintiffs and the proposed Class have satisfied all of the Rule 23 requirements,  
25 class certification is appropriate.

1 **A. The Proposed Class Meets the Requirements of Rule 23(a)**

2 **1. Numerosity**

3 To warrant certification under Rule 23(a)(1), a proposed class must be so numerous that  
4 joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1). Plaintiffs need not show  
5 that the number of class members is so large that it would be impossible to join every class  
6 member, only that it is impracticable. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909,  
7 913-14 (9th Cir. 1964). Here the Class satisfies the numerosity requirement because it has  
8 thousands of members and it is plainly impracticable to join all of them. *See* Complaint ¶ 469.

9 **2. Commonality**

10 Under Rule 23(a)(2), Plaintiffs must show that “there are questions of law or fact common  
11 to the class.” The burden imposed by this requirement is minimal and easily met. *See Hanlon*, 150  
12 F.3d at 1019-20 (emphasizing the “minimal requirements” and “permissive” interpretation of Rule  
13 23(a)(2)); *see also Parra v. Bashas’, Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008). Plaintiffs may  
14 satisfy the commonality requirement by demonstrating the existence of either a common legal issue  
15 with divergent factual predicates or a common nucleus of facts with divergent legal remedies.  
16 *Hanlon*, 150 F.3d at 1019; *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003).

17 In ERISA breach of fiduciary duty cases such as this one, courts routinely hold that  
18 common questions of law and fact exist such that Rule 23(a)(2) is satisfied. *See, e.g., In re Syncor*  
19 *ERISA Litig.*, 227 F.R.D. 338, 344 (C.D. Cal. 2005) (plaintiffs satisfied commonality where the  
20 court found that “their possession of Syncor stock and the Defendants’ alleged breaches of duty to  
21 the Plan” presented questions of law and fact common to all prospective class members). Indeed,  
22 this case presents multiple common questions of law and fact, including:

- 23 (1) whether Defendants owed fiduciary duties to the Plan and its participants;  
24 (2) whether Defendants breached their fiduciary duties to the Plan and its participants;  
25 (3) the measure and aggregate amount of losses sustained by the Plan; and  
26 (4) the proper remedy for the Plan’s losses.

For settlement purposes, these common issues of law and fact satisfy Rule 23(a)(2).

1           **3.     Typicality**

2           Under Rule 23(a)(3), Plaintiffs’ claims must be “typical” of those of the Class. The  
3 analysis focuses on the similarities between the legal theories of the proposed class representatives  
4 and the legal theories of the class members who they seek to represent. *Hanlon*, 150 F.3d at 1020;  
5 *Staton*, 327 F.3d at 957. Because both commonality and typicality focus on the similarity of the  
6 claims, the two requirements “tend to merge.” *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157  
7 n.13 (1982). Here, Plaintiffs’ claims satisfy the typicality requirement because their claims are  
8 substantially identical to the claims of absent Class Members – the claims rise and fall under  
9 ERISA’s fiduciary duty provisions. Plaintiffs’ claims are not individual claims in the first place  
10 because they are brought under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), on behalf of the Plan  
11 as a whole, and any relief obtained in the lawsuit would necessarily flow to the Plan as a whole, not  
12 to Plaintiffs as individual participants. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248,  
13 254 (2008) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985)); *accord id.* at  
14 261 (Thomas, J., concurring) (“The plain text of § 409(a), which uses the term ‘plan’ five times,  
15 leaves no doubt that § 502(a)(2) authorizes recovery only for the plan.”).

16           **4.     Adequacy**

17           The proposed class representatives have and will continue to “fairly and adequately protect  
18 the interests of the class.” Fed. R. Civ. P. 23(a)(4). The adequacy requirement has two prongs:  
19 “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class  
20 members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on  
21 behalf of the class?” *Hanlon*, 150 F.3d at 1020. The law governing the adequacy of  
22 representatives is well settled: “[O]nly a conflict that goes to the very subject matter of the  
23 litigation will defeat a party’s claim of representative status.” 7A Charles Alan Wright, Arthur R.  
24 Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1768 at 389-90 (2005).

25           The interests of the Plaintiffs are aligned with, not antagonistic to, the interests of the  
26 proposed Class. Each member of the proposed Class, just like Plaintiffs, has an interest in

1 recovering losses suffered by the Plan as a result of the decimation of WMI's stock. As such,  
2 Plaintiffs' interests in the lawsuit are the same as absent Class Members. Plaintiffs have also  
3 shown their ability and willingness to prosecute this action vigorously on behalf of the Class in the  
4 litigation to date, having responded to discovery, reviewed pleadings, and otherwise kept abreast of  
5 the litigation. *See* Loeser/Volk Declaration, ¶ 7. Accordingly, Plaintiffs should be appointed class  
6 representatives under Rule 23(a)(4).

7 **B. The Proposed Class Meets the Requirements of Rule 23(b)(1).**

8 In addition to demonstrating that the requirements of Rule 23(a) are met, Plaintiffs must  
9 also establish that at least one subsection of Rule 23(b) is satisfied. Here, certification is proper  
10 under Rule 23(b)(1). Because of "the derivative nature of ERISA § 502(a)(2) claims, breach of  
11 fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate  
12 for certification as a Rule 23(b)(1) class, as numerous courts have held." *Schering Plough*, 589  
13 F.3d at 604 (collecting cases).

14 While an ERISA class may be certified under Rule 23(b)(3), it is preferable to certify it  
15 under Rule 23(b)(1) because of the superior res judicata effect of the litigation with regard to  
16 claims of all class members. *See Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th  
17 Cir. 1976) (citations omitted).

18 Under Rule 23(b)(1), a class may be certified if:

19 (1) the prosecution of separate actions by or against individual members of the class would  
20 create a risk of

21 (A) inconsistent or varying adjudications with respect to individual members of the  
22 class which would establish incompatible standards of conduct for the party  
opposing the class, or

23 (B) adjudications with respect to individual members of the class which would as a  
24 practical matter be dispositive of the interests of the other members not parties to the  
adjudications or substantially impair or impede their ability to protect their  
interests[.]

1 Thus, Rule 23(b)(1)(A) “considers possible prejudice to the defendants, while 23(b)(1)(B) looks to  
2 possible prejudice to the putative class members.” *In re Ikon Office Solutions, Inc.*, 191 F.R.D.  
3 457, 466 (E.D. Pa. 2000).

4 **1. Rule 23(b)(1)(A)**

5 Here, Rule 23(b)(1)(A) is satisfied. This case has approximately 32,000 prospective Class  
6 Members. In the absence of class certification there is potential for a large number of individual  
7 cases based on the same underlying facts, creating a high risk of inconsistent or varying  
8 adjudications that would establish incompatible standards of conduct. *Ikon*, 191 F.R.D. at 466  
9 (finding a “risk of inconsistent dispositions that would prejudice the defendants: contradictory  
10 rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in  
11 this context, acted as fiduciaries, or whether the alleged misrepresentations were material would  
12 create difficulties in implementing such decisions”). Moreover, the claims Plaintiffs allege on  
13 behalf of the proposed Class are derived from core issues that are not individual in nature: whether  
14 Defendants were fiduciaries, whether Defendants breached their fiduciary duties, and whether  
15 Plaintiffs were harmed by Defendants’ breaches. *See Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181,  
16 194 (W.D. Mo. 2009) (finding that “central questions concerning whether the fiduciaries breached  
17 their duties to the Plan are not individual” matters).

18 **2. Rule 23(b)(1)(B)**

19 Rule 23(b)(1)(B) is also satisfied. The Advisory Committee Note to Rule 23(b)(1)(B)  
20 emphasizes that this provision is particularly applicable where trust beneficiaries charge a breach  
21 of trust by a fiduciary:

22 The same reasoning applies to an action which charges a breach of trust by an indenture  
23 trustee or other fiduciary similarly affecting the members of a larger class of security  
24 holders or other beneficiaries, and which requires an accounting or like measure to restore  
25 the subject of the trust.

26 Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee Note (1966 Amendment); *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999); *Church v. Consol. Freightways, Inc.*, No. 90-2290, 1991 WL

1 284083, at \*14 (N.D. Cal. June 14, 1991) (invoking Advisory Committee note in certifying breach  
2 of fiduciary duty claim under (b)(1)(B)).

3 Here, were the Court to adjudicate Plaintiffs' claims that Defendants breached their  
4 fiduciary duties by imprudently investing Plan assets, making misrepresentations, failing to  
5 disclose information, and failing to monitor co-fiduciaries, it would effectively dispose of the  
6 absent Class Members' claims. *See Syncor*, 227 F.R.D. at 346 (certifying a class under (b)(1)(B)  
7 and finding that "[i]f the primary relief is to the Plan as a whole, then adjudications with respect to  
8 individual members of the class would 'as a practical matter' alter the interests of other members of  
9 the class – if one plaintiff forces the Defendants to pay damages to the Plan, the benefit would  
10 affect everyone who has a right to disbursements from the Plan"). Rule 23(b)(1)(B), therefore, is a  
11 proper vehicle for certification of Plaintiffs' claims for settlement purposes.

12 **C. Keller Rohrback and Hagens Berman Should Be Appointed Counsel for the Class.**

13 Rule 23(g) requires that courts consider the following four factors when appointing class  
14 counsel: whether counsel (1) has investigated the class claims, (2) is experienced in handling class  
15 actions and complex litigation, (3) is knowledgeable regarding the applicable law, and (4) will  
16 commit adequate resources to representing the class. *Morelock Enters., Inc. v. Weyerhaeuser Co.*,  
17 No. 04-583, 2004 WL 2997526, at \*5-6 (D. Or. Dec. 16, 2004).

18 Keller Rohrback and Hagens Berman meet the standards of Rule 23(g) because, as set forth  
19 in the declarations of counsel filed herewith, they have extensive experience litigating ERISA class  
20 actions and are knowledgeable regarding the applicable law. *See Loeser/Volk Declaration*, ¶¶ 8-  
21 10. They have conducted extensive litigation and pre-settlement investigations of the proposed  
22 Class's claims, have committed significant resources to representing the proposed Class, and have  
23 demonstrated the ability to represent classes throughout complex litigation and to respond to the  
24 unique issues associated with representing employees in ERISA litigation. *See Loeser/Volk*  
25 *Declaration*, ¶¶ 11-12.

1 **VII. CONCLUSION**

2 For the reasons discussed above, the Settlement is a fair, adequate, and reasonable  
3 resolution of the claims against Defendants in this complex and contested ERISA class action.  
4 Thus, Plaintiffs respectfully ask the Court to grant their motion and to enter the proposed  
5 Preliminary Approval Order which: (1) grants preliminary approval of the proposed Settlement;  
6 (2) preliminarily certifies the settlement class; (3) approves the form and manner of the Notices;  
7 and (4) sets a date for a Fairness Hearing.

8 DATED this June 18, 2010.

9 **KELLER ROHRBACK L.L.P.**

**HAGENS BERMAN SOBOL SHAPIRO LLP**

10 By:     /s/ Erin M. Riley      
11 Lynn L. Sarko, WSBA #16569  
12 Derek W. Loeser, WSBA # 24274  
13 Erin M. Riley, WSBA # 30401  
14 1201 Third Avenue, Suite 3200  
15 Seattle, WA 98101-3052  
Telephone: (206) 623-1900  
Facsimile: (206) 623-3384  
lsarko@kellerrohrback.com  
dloeser@kellerrohrback.com  
eriley@kellerrohrback.com

By:     /s/ Steve W. Berman      
Steve W. Berman, WSBA #12536  
Andrew M. Volk, WSBA #27639  
Genessa Stout, WSBA #38410  
1918 8th Avenue, Suite 3300  
Seattle, WA 98101  
Telephone: (206) 623-7292  
Facsimile: (206) 623-0594  
steve@hbsslaw.com  
andrew@hbsslaw.com  
genessa@hbsslaw.com

16 Interim Co-Lead Counsel for Plaintiffs

Interim Co-Lead Counsel for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 18, 2010, I electronically filed the following documents  
3 with the Clerk of the Court using the CM/ECF system, which will send notice of such  
4 filing to all known counsel of record:

- 5 • ERISA Plaintiffs’ Motion and Memorandum of Points and Authorities in Support of  
6 Motion for Preliminary Approval of Proposed Settlement, Preliminary Certification  
7 of Settlement Class, Approval of Notice Plan, and Time for Fairness Hearing;
- 8 • Joint Declaration of Derek W. Loeser and Andrew M. Volk in Support of ERISA  
9 Plaintiffs’ Motion and Memorandum of Points and Authorities in Support of Motion  
10 for Preliminary Approval of Proposed Settlement, Preliminary Certification of  
11 Settlement Class, Approval of Notice Plan, and Time for Fairness Hearing; and
- 12 • [Proposed] Findings and Order Preliminarily Approving Proposed Settlement,  
13 Preliminarily Certifying Settlement Class, Approving Form and Dissemination of  
14 Class Notice, and Setting Date For Hearing on Final Approval.

15 DATED this 18th day of June, 2010.

16 By: /s/Erin M. Riley  
17 KELLER ROHRBACK L.L.P.  
18 Erin M. Riley, WSBA # 30401  
19 1201 Third Avenue, Suite 3200  
20 Seattle, WA 98101-3052