

1 PETER P. MERINGOLO (State Bar No. 197136)
2 REBECCA L. KASSEKERT (State Bar No. 226043)
3 SNYDER MILLER & ORTON LLP
4 180 Montgomery Street, Suite 700
5 San Francisco, CA 94104
6 Telephone: (415) 962-4400
7 Facsimile: (415) 962-4401
8 pmeringolo@smollp.com

9 Attorneys for Plaintiffs
10 KATHLEEN MILLER, SONDRÉ BILET,
11 MARK J. HOLLAND AND KATHERINE DOOLITTLE

12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA
14 WESTERN DIVISION – LOS ANGELES

15 KATHLEEN MILLER, SONDRÉ
16 BILET, MARK J. HOLLAND AND
17 KATHERINE DOOLITTLE

18 Plaintiffs,

19 vs.

20 PALM DESERT INVESTMENTS,
21 PALM DESERT NATIONAL BANK,
22 KEVIN MCGUIRE AND RHONDA
23 SWANSON, AND DOES 1- 100,

24 Defendants.

Case No. CV-11-02454 CBM (RZx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ATTORNEYS' FEES
AND COSTS**

Date: May 22, 2012
Time: 9:00 A.M
CTRM.: 2
Judge: Consuelo B. Marshall

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES AND COSTS**

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Snyder
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I. INTRODUCTION

On December 28, 2011, the Court preliminarily approved the proposed settlement ("Settlement") of this ERISA class action. See Amended Order Granting Preliminary Approval of Class Action Settlement, Dkt #49. The Settlement provides a common fund of \$950,000, less attorneys' fees (requested in the amount of \$247,000) and costs (\$55,045 requested) and up to \$25,000 in administrative costs, paid to the Palm Desert Investments Employee Stock Ownership Plan (the "Plan") and allocated among approximately 200 Plan participants, as defined by the Settlement. The Settlement was achieved following a year and a half of investigation and litigation through the dedicated efforts of Class Counsel.

Class Counsel devoted over 1,000 hours of time and more than \$55,000 in unreimbursed expenses on behalf of the Class Members. See Declaration of Peter P. Meringolo in Support of Plaintiffs' Motion for Award of Attorneys' Fees and Costs and Named Plaintiff Incentive Awards ("Meringolo Decl.") at ¶9, Exhibit A and Exhibit E. Class Counsel now seek an attorneys' fee award of \$247,000, which represents 26 percent of the Settlement Amount. Class Counsel's lodestar - their hours reasonably expended throughout the year and a half of investigation and litigation times their reasonable hourly rates - far exceeds the amount sought by this motion, at \$525,783 as of January 3, 2012. Id at ¶9. The fees sought by this motion, 26 percent of the Settlement Amount, is within the usual range of percentages awarded by courts in common fund cases of this size and complexity.

Class Counsel also seek reimbursement of unreimbursed litigation costs and expenses in the amount of \$55,045 as of January 3, 2012. Meringolo Decl. at ¶21, Exhibit E. These costs were incurred throughout the investigation and prosecution of the action, as well as the execution of the settlement and are reasonable and proper given the complexity of this action.

1 **II. BACKGROUND**

2 Plaintiffs' Memorandum of Points and Authorities in Support of Motion for
3 Preliminary Approval of the Proposed Settlement sets forth a detailed discussion of
4 the litigation, the strengths and weaknesses of Plaintiffs' claims, the Settlement and
5 the fairness and adequacy of the Settlement. *See* Plaintiffs' Memorandum of Points
6 and Authorities in Support of Motion for Preliminary Approval of the Proposed
7 Settlement, Dkt. #43 (filed November 14, 2012).

8 Plaintiffs filed this case on behalf of the Palm Desert Investments Employee
9 Stock Purchase Plan (the "Plan") to recover retirement savings for current and former
10 Bank employees. The Plan was a pension plan established for the benefit of Palm
11 Desert National Bank (the "Bank") employees. Plaintiffs allege that from 2006 to
12 2009 (and beyond), the Plan lost millions of dollars due in large part to the Plan
13 fiduciaries' failure to divest the Plan's investment of assets in stock of Palm Desert
14 Investments, Inc. ("PDI"), the holding company for Defendant Bank, which declined
15 in value over this time period. In sum, Plaintiffs allege that: the decline in value was
16 due to a risky strategy by the Bank to invest heavily in real estate; the Plan fiduciaries
17 knew or should have known about the risky strategy; the strategy made the
18 investment in Bank stock imprudent; and the Plan fiduciaries took no steps to divest
19 the Plan of the stock.

20 Defendants deny any wrongdoing and have vigorously defended the litigation.
21 On April 25, 2011, the Defendants moved to dismiss the Complaint. *See* Dkt. #14.
22 On July 19, 2011, the Court issued an Order granting in part and denying in part
23 Defendants' motion to dismiss (the "Order"). *See* Dkt. #31. The Court's Order
24 dismissed Count VI (failure to monitor fiduciaries) as to Defendant Kevin McGuire,
25 dismissed Count III (conflicts of interest) with prejudice as to all Defendants and
26 dismissed all counts as to previously named Defendant Rhonda Swanson. The Court
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1 allowed all remaining claims to proceed, including Plaintiffs' claim that the
2 Defendants failed to prudently manage the Plan's assets. *Id.*

3 Following extensive written discovery and in advance of scheduled depositions
4 and costly discovery of electronically stored information, the parties agreed to
5 participate in mediation. In September 2011, the parties and their lawyers attended a
6 full-day mediation with the assistance of professional mediator Jeffrey Lewis, a well-
7 respected attorney who has served as class counsel in several similar ERISA cases.
8 Mr. Lewis was instrumental in the parties' assessment of the risks involved in this
9 case and the ultimate settlement of this matter. Through the mediation, the parties
10 reached agreement on the terms of the Settlement now before the Court. The
11 Settlement provides for a payment of \$950,000, inclusive of payments to the Class,
12 attorneys' fees and costs and up to \$25,000 in administrative and class notice costs, in
13 return for a release that extinguishes Class Member claims against the Defendants.

14 For well over a year, Class Counsel devoted more than 1,000 hours to
15 investigating, litigating and settling this case. Meringolo Decl., ¶9, Exhibit A.
16 These hours include time devoted to, among other things:

- 17 • Investigating the factual basis for Plaintiffs claims;
- 18 • Analyzing public information on the market for residential land,
19 development and construction loans during the Class period;
- 20 • Analyzing public information on the residential real estate market
21 generally;
- 22 • Researching publicly available information about the real estate /
23 mortgage crisis in general and Palm Desert National Bank in particular;
- 24 • Researching and analyzing the corporate history of Palm Desert
25 Investments and Palm Desert National Bank;
- 26 • Researching and analyzing Bank's banking practices and the effect
27 of those practices on the prudence of PDI stock as a Plan investment;
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- Conducting legal research;
- Drafting the Complaint;
- Retaining and working with experts, including an expert on damages and an expert on ERISA plan administration;
- Researching, drafting and responding to Defendants’ Motion to Dismiss;
- Conferring with defense counsel about case matters, deadlines, and filings;
- Drafting discovery to Defendants;
- Inspecting, reviewing, and analyzing documents produced by Defendants;
- Drafting responses to Defendants’ discovery;
- Meeting and conferring with Defendants with regard to discovery disputes;
- Negotiating and drafting a stipulated protective order;
- Analyzing the available insurance policy;
- Drafting a mediation statement and participating in mediation;
- Preparing the Settlement Agreement and Exhibits;
- Preparing the Pleadings for Approval of the Settlement; and
- Preparing for, traveling to and attending Court hearings.

Id. at ¶4.

The work on this case represents approximately \$525,783 at Class Counsel’s standard hourly rates under the lodestar method. *Id.* at ¶9, Exhibit A. In addition, Class Counsel has incurred \$55,045 in out-of-pocket expenses investigating and litigating this action to date. Meringolo Decl., ¶21, Exhibit E. Class Counsel will continue to devote additional attorney hours in connection with final approval of the Settlement, responding to inquiries from Class members, interacting with the

1 Independent Fiduciary, and generally overseeing implementation of the Settlement.
2 Meringolo Decl., ¶15.

3 The Named Plaintiffs affirmatively support the Settlement of this action and
4 this motion for attorneys’ fees and costs. See Declaration of Kathleen Miller in
5 Support of Motion for Final Approval of Settlement and Motion for Attorneys’ Fees
6 and Costs; and Declaration of Katherine Doolittle in Support of Motion for Final
7 Approval of Settlement and Motion for Attorneys’ Fees and Costs.

8 Given Class Counsel’s work to date, the additional work to be completed and
9 the excellent result obtained for the Class, Class Counsel respectfully request the
10 Court grant this motion.

11 **III. ARGUMENT**

12 Class Counsel requests an award of attorneys’ fees of \$247,000, which
13 represents 26 percent of the \$950,000 Settlement. This percentage-of-the-fund
14 method of calculating the fee award is straightforward and fair under the
15 circumstances of the case, including the significant efforts of counsel to investigate,
16 prosecute and settle this complex action and provide a common fund to the Class
17 Members. A comparison of this method to the lodestar fee calculation confirms the
18 reasonableness of Class Counsel’s fee request.

19 **A. A Reasonable Percentage of the Fund Recovered is an Appropriate**
20 **Method for Awarding Class Counsel’s Attorneys’ Fees.**

21 The percentage-of-the-fund method of awarding fees is the prevailing method
22 for awarding fees in common fund cases in the Ninth Circuit and throughout the
23 United States. Indeed, Courts have long recognized that “a private plaintiff, or his
24 attorney, whose efforts create, discover, increase or preserve a fund to which others
25 also have a claim is entitled to recover from the fund the costs of his litigation,
26 including attorneys’ fees.” *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th
27 Cir. 1977). The purpose of the doctrine is that “those who benefit from the creation of
28 the fund should share the wealth with the lawyers whose skill and effort helped create

1 it.” *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir.
2 1994) (“WPPSS”) (citations omitted).

3 District courts have discretion to award fees in common fund cases based on
4 either the percentage-of-the-fund method or the lodestar/multiplier method. *Id.* at
5 1296. The Ninth Circuit has expressly approved the use of the percentage method in
6 common fund cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002); *Six*
7 *Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *Torrissi*
8 *v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993). The lodestar method is rarely
9 used other than as a cross-check or in limited circumstances, where, for example,
10 “there has been no discovery, no lengthy settlement negotiations, no protracted
11 litigation of any kind.” *Fischel v. Equitable Life Assur. Soc’y of the United States*,
12 307 F.3d 997, 1003 (9th Cir. 2002) (citations omitted) (holding that it was not an
13 abuse of discretion for the district court to use the lodestar method in an ERISA health
14 benefits class action that was settled within three and a half months of being filed).

15 Here, the parties engaged in dispositive motion practice and substantial formal
16 and informal discovery. *See* Meringolo Decl., at ¶4. Accordingly, the percentage-of-
17 the-fund method is appropriate and Class Counsel request that the Court award
18 attorneys’ fees based on that method.

19 **B. A Fee Award Based on 26% of the Common Fund Is Fair and**
20 **Reasonable.**

21 The Ninth Circuit has adopted a 25 percent “benchmark” for attorneys’ fee
22 awards in common fund cases. *See, e.g., Paul, Johnson, Alston & Hunt v. Graulty*,
23 886 F.2d 268, 272 (9th Cir. 1989); *Fischel*, 307 F.3d at 1006; *Vizcaino*, 290 F.3d at
24 1047. The Ninth Circuit’s 25% benchmark can then be adjusted upward or downward
25 to account for unusual circumstances. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th
26 Cir. 2000). In California cases in which the common fund is relatively small, courts
27 tend to award attorneys’ fees above the 25 percent benchmark. *See Vasquez v. Coast*
28 *Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2010) (discussion of

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1 California common fund cases under \$10 million and award of attorneys' fees in the
2 30 – 40% range); *Craft v. County of San Bernadino*, 624 F.Supp.2d 1113, 1127 (C.D.
3 Cal. 2008) (holding attorneys' fees for large fund cases are typically under 25% and
4 cases below \$10 million are often more than the 25% benchmark); *Van Vranken v.*
5 *Atlantic Richfield Co.*, 901 F.Supp. 294, 297-98 (N.D. Cal. 1995) (same).

6 The Court may consider the following factors in setting an appropriate fee:

- 7 (1) whether counsel achieved exceptional results;
- 8 (2) the degree of risk assumed by counsel;
- 9 (3) whether counsel's performance generated benefits beyond the cash
10 settlement;
- 11 (4) whether the fee lies above or below the market rate; and
- 12 (5) the length of time counsel represented the class on a contingency basis.

13 *Vizcaino*, 290 F.3d at 1048-1050.

14 Here, Class Counsel seeks a slight upward adjustment of the benchmark with an
15 award of 26 percent of the common fund. Application of the relevant factors for an
16 upward adjustment strongly supports the 26 percent fee requested in this case.

17 **1. The Results Achieved and the Litigation Risk.**

18 The first and second *Vizcaino* factors weigh in favor of an attorneys' award of
19 26 percent of the Settlement amount. The result achieved is an important factor to be
20 considered in making a fee award. *Vizcaino*, 290 F.3d at 1048 (result supported 28%
21 fee). Uncertainty that an ultimate recovery would be obtained is highly relevant in
22 determining risk. *WPPSS*, 19 F.3d at 1300-02. Class Counsel obtained a Settlement
23 of \$950,000 on behalf of the Settlement Class, despite the complexity of the case and
24 the risks of recovering nothing were the case taken to trial. The Settlement of
25 \$950,000, allocated among approximately 200 class members, is well within the range
26 of potential recoveries for the Class in this case and, given the very high risks
27 presented by continued litigation, is fundamentally fair to the Class. *See* Plaintiff's
28

1 Memorandum of Points and Authorities in Support of Motion for Preliminary
2 Approval of Proposed Settlement, Dkt. #43; and Amended Order Granting
3 Preliminary Approval of Class Action Settlement, Dkt. #49.

4 ERISA company stock cases such as this one contain a number of risks, in part
5 because ERISA is a specialized and complex area of the law, which is still being
6 developed. *In re Enron Corp. Sec., Derivative and "ERISA" Litig.*, 228 F.R.D. 541,
7 565 (S.D. Tex. 2005) (the "complexity, expense and likely duration of the litigation ...
8 are self evident and exceptional"); *In re Global Crossing Sec. & ERISA Litig.*, 225
9 F.R.D. 436, 456 (S.D.N.Y. 2004) ("numerous legal issues concerning fiduciary
10 liability in connection with company stock in 401(k) plans remain
11 unresolved...[t]hese uncertainties would substantially increase the ERISA cases'
12 complexity, duration, and expense – and thus militate in favor of settlement
13 approval"). ERISA cases in particular present substantial risk to Class Counsel, as
14 courts have recognized that "ERISA cases are often considered to be complex [and]
15 ERISA plaintiff cases are often undesirable." *Mogck v. Unum Life Ins. Co. of Am.*, 289
16 F. Supp.2d 1181, 1191 (S.D. Cal. 2003); *see also Morgan v. Admin. Comm. of Wal-*
17 *Mart Stores, Inc. Associates' Health & Welfare Plan*, 214 F. Supp. 2d 1047, 1054 (D.
18 Ariz. 2002) ("ERISA issues are often perceived as complex by the relevant
19 community ... [and] ERISA plaintiff cases are generally undesirable"). Financially,
20 the undesirability of a case is determined by "the uncertain nature of the fee, the
21 wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that
22 the risks of failure and nonpayment are extremely high." *McCoy v. Health Net, Inc.*,
23 569 F. Supp. 2d 448, 477 (D.N.J. 2008) (internal citations and quotations omitted); *see*
24 *also In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1270 (D. Kan. 2006)
25 (characterizing "undesirability" as whether "the issues presented were inherently
26 risky"). Each of those concerns is present in this case.

1 Class Counsel believe that the discovery and research to date support Plaintiffs'
2 core allegations that PDI stock became an imprudent investment for the Plan during
3 the Class Period. Nonetheless, Plaintiffs and Class Counsel also recognized the risk
4 of an adverse outcome. The complex factual and legal issues involved in this action
5 are heavily contested, and the law on claims of this type remains somewhat unsettled.
6 One key contested issue is whether Defendants are entitled to a presumption that they
7 acted prudently by investing in PDI stock under *Quan v. Computer Sciences Corp.*,
8 623 F.3d 870 (9th Cir. 2010), and, if so, whether Plaintiffs could rebut that
9 presumption. Another contested issue is whether there was a market by which the
10 Trustee could have sold the PDI shares even if the Trustee determined that it was
11 imprudent to continue to hold the shares, and who bears the burden of proof on this
12 issue. The parties also disagree about whether the loss to the Plan should include an
13 analysis of all Plan investments or just the loss on the PDI stock. *See Meringolo*
14 *Decl.*, ¶17.

15 Significant time and expense would be required to address these and other
16 complex legal and factual questions. Class Counsel and defense counsel estimated
17 that in addition to substantial preparation time and expense, a trial would take
18 approximately ten court days. Continued litigation would risk delaying potential
19 recovery for years. *See Meringolo Decl.*, ¶18. The only viable source of recovery,
20 were Plaintiffs to succeed, is the fiduciary liability insurance policy covering the
21 Defendants, which has a coverage limit of \$5 million. However, the policy is a
22 “wasting policy,” meaning that the legal costs of defending this action have already
23 eroded and will continue to erode the amount of insurance funds available to satisfy a
24 judgment. Moreover, the policy applies to all fiduciary liability claims and is not
25 merely limited to this action. *See Meringolo Decl.*, ¶19. Given the likelihood of an
26 appeal in the event of a judgment in Plaintiffs’ favor, the cost of defense would
27 potentially deplete the only monies available to satisfy the judgment. The Settlement
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1 eliminates the time and expense of continued litigation, conserves parties' and judicial
2 resources and provides the Plan with a substantial benefit.

3 Class Counsel accepted this matter on a contingent basis with the attendant risk
4 that they could receive no fee or expense reimbursement. Class Counsel invested
5 significant time to the case, showing the commitment to litigate the case through trial
6 and beyond. Given the wide range of potential damage outcomes at trial, the
7 possibility of a verdict in favor of Defendants, and the wasting insurance policy, the
8 \$950,000 Settlement provides a substantial recovery to the Plan. Accordingly, the
9 first and second *Vizcaino* factors, results achieved and litigation risk, strongly favor an
10 award of 26 percent of the Settlement.

11 2. Percentage Rate Relative to Market Rate.

12 Courts throughout the Ninth Circuit and elsewhere have routinely awarded fees
13 of 25 to 30 percent or more of the common fund in ERISA company stock litigation.
14 *See, e.g., In re Fremont General Corp. Litig.*, No. 07-02693, Dkt. #285 (C.D. Cal.
15 Aug. 8, 2011) (awarding 30%) (attached to the Meringolo Decl. at Exhibit H); *In re*
16 *Calpine Corp. ERISA Litig.*, No. 03-01685, Dkt. #163 (N.D. Cal. Oct. 23, 2008)
17 (awarding 25%) (attached to the Meringolo Decl. at Exhibit I); *In re Providian Fin.*
18 *Corp. ERISA Litig.*, No. 01-05027, Dkt #80 (N.D. Cal. June 30, 2003) (awarding
19 25%) (attached to the Meringolo Decl. at Exhibit J); *In re Merrill Lynch & Co., Inc.,*
20 *Sec., Derivative and ERISA Litig.*, No. 07-10268, Dkt. #272-2 (S.D.N.Y. Aug. 21,
21 2009) (awarding 25%) (attached to the Meringolo Decl. at Exhibit K); *In re Xerox*
22 *ERISA Litig.*, No. 02-1138, Dkt. #354 (D. Conn. Apr. 14, 2009) (awarding 30%)
23 (attached to the Meringolo Decl. at Exhibit L); *In re CMS Energy ERISA Litig.*, No.
24 02-72834, Dkt. #226 (E.D. Mich. June 27, 2006) (awarding 28.5%) (attached to the
25 Meringolo Decl. at Exhibit M); *In re Household Int'l ERISA Litig.*, No. 02-7921, Dkt.
26 #141 (N.D. Ill. Nov. 22, 2004) (awarding 30%) (attached to the Meringolo Decl. at
27 Exhibit N). “[C]ase law surveys suggest that 50% is the upper limit, with 30 – 50%

1 commonly being awarded in case[s] in which the common fund is relatively small.”
 2 *Cicero v. DirecTV*, No. 07-1182, 2010 WL 2991486 at *6 (C.D. Cal. July 27, 2010);
 3 *Craft*, 624 F.Supp.2d at 1127 (“Cases of under \$10 million will often result in fees
 4 above 25%”).

5 Class Counsel’s request for 26 percent is similar to the awards in similar ERISA
 6 and small common fund cases. Accordingly, the fourth *Vizcaino* factor weighs in
 7 favor of the slight upward adjustment from the 25 percent benchmark.

8 **3. The Length of Time Counsel Represented the Class on a** 9 **Contingency Fee Basis.**

10 The Ninth Circuit recognizes that attorneys who assume representation on a
 11 contingent basis may receive an enhanced fee to compensate them for the risk they
 12 might be paid nothing at all. *See WPPSS*, 19 F.3d at 1299. This practice encourages
 13 the legal professional to assume the risks of contingent fee representation and
 14 promotes competent representation for plaintiffs who could not otherwise hire an
 15 attorney. *Id.* “A contingent fee must be higher than a fee for the same legal services
 16 paid as they are performed. The contingent fee compensates the lawyer not only for
 17 the legal services he renders but for the loan of those services.” Richard A. Posner,
 18 *Economic Analysis of Law* 534, 567 (4th ed. 1992).

19 Counsel represented Plaintiffs on a contingency fee basis for a year and a half,
 20 Meringolo Decl. at ¶4, during which time they conducted extensive pre-suit
 21 investigations and legal research, filed this action, successfully defended against
 22 Defendants’ motion to dismiss, engaged in discovery and negotiated the \$950,000
 23 settlement. *Id.* The case required the dedicated focus of a number of attorneys and
 24 other legal professionals for over 1,000 hours. Meringolo Decl. at ¶¶5, 9. This
 25 commitment by Class Counsel precluded them from spending significant time on
 26 other cases. Given the length of time of the contingent fee representation and the
 27 significant resources dedicated to this matter, the fifth *Vizcaino* factor supports an
 28 upward adjustment of the benchmark.

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1 A review of the relevant *Vizcaino* factors confirms that Class Counsel’s request
 2 for an attorneys’ fee award of 26% of the common fund is reasonable and merited.
 3 The results obtained by Class Counsel, despite vigorous defense by a leading defense
 4 firm, the high risk and complexity of the case, the market rate for similar cases and
 5 length of time counsel dedicated to this case confirm the reasonableness of the award.
 6 Moreover, the Named Plaintiffs fully support Class Counsel’s motion and believe the
 7 requested fees are reasonable under the circumstances of this case. *See* Declaration
 8 of Kathleen Miller in Support of Motion for Final Approval of Settlement and
 9 Motion for Attorneys’ Fees and Costs; and Declaration of Katherine Doolittle in
 10 Support of Motion for Final Approval of Settlement and Motion for Attorneys’ Fees
 11 and Costs.

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

14 Courts in the Ninth Circuit often examine the lodestar calculation as a cross-
 15 check on the percentage fee award. *Vizcaino*, 290 F.3d at 1050. “Calculation of the
 16 lodestar, which measures the lawyers’ investment of time in the litigation, provides a
 17 check on the reasonableness of the percentage award.” *Id.* The lodestar cross-check
 18 analysis involves a two-step analysis. First, the lodestar is determined by multiplying
 19 the number of hours reasonably expended by the reasonable rates requested by
 20 counsel. *Id.*; *see also Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th
 21 Cir. 2000). Second, the court determines the multiplier required to match the lodestar
 22 to the percentage-of-the-fund request made by counsel, and determines whether the
 23 multiplier falls within the accepted range for such a case. *See, e.g., Vizcaino*, 290 F.3d
 24 at 1051. Here, the lodestar "cross-check" demonstrates that the 26 percent requested
 25 attorneys' fees award is reasonable, as the award falls far short of compensating the
 26 attorneys for all their time expended on this case.

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1 **1. Class Counsel's Lodestar Is Reasonable.**

2 As of January 3, 2012, Class Counsel have invested a total of 1,074 hours on
3 this case. *See* Meringolo Decl., ¶9, Exhibit A. The hours incurred by Class Counsel
4 include time devoted to, among other things, investigating the claims against
5 Defendants, reviewing and analyzing the Plans' documents, preparing the Complaint,
6 conducting necessary legal research, briefing Defendants' motion to dismiss,
7 conducting extensive discovery, engaging in a mediation and preparing the necessary
8 agreements and pleadings related to the Settlement. Meringolo Decl., ¶4. Given
9 Class Counsel's actions, the complexity of the legal issues involved and the intensity
10 of Defendants' defense, the hours incurred are reasonable. In addition, Class Counsel
11 anticipate expending additional hours to bring this litigation to a close, for which we
12 will not seek additional compensation. Accordingly, the lodestar cross-check does not
13 account for all time devoted to this case. *Id.* at ¶15.

14 The hourly rates charged by Class Counsel on this matter, between \$170 and
15 \$575 per hour, are reasonable based on each person's position, experience level, and
16 location. *See* Meringolo Decl., ¶8. The hourly rates for Peter Meringolo and Rebecca
17 Kassekert, the two attorneys who were predominately responsible for the work in this
18 case, are \$575 and \$515, respectively. *Id.* at ¶¶6, 8. These lawyers are experienced
19 litigators with offices in San Francisco and regularly litigate complex multi-party
20 actions. *Id.* at ¶¶6, 8. These rates are comparable to the prevailing rates in the
21 communities in which Class Counsel practices or on hourly rates obtained by counsel
22 in other complex litigation. *Id.* at ¶11-14, Exhibits B - D; *see also Bouman v. Block*,
23 940 F.2d 1211, 1235 (9th Cir. 1991) (finding that declarations submitted by counsel of
24 the "prevailing market rate in the relevant community ... [are] sufficient to establish
25 the appropriate [billing] rate for lodestar purposes"); *Mogck*, 289 F. Supp. 2d at 1191.
26 Specifically, SMO's rates are comparable to the rates of at least three other firms that
27 routinely handle ERISA class actions around the country. *See, e.g.,* Meringolo Decl.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES AND COSTS**

1 at Exhibit B (detailing current Keller Rohrback rates of \$147 to \$740 per hour),
 2 Exhibit C (detailing current Hagens Berman rates of \$150 to \$650 per hour), and
 3 Exhibit D (detailing current Lewis Feinberg rates of \$190 to \$750 per hour). Taking
 4 into account the complexity and risk of the litigation and the skill and experience of
 5 counsel, Class Counsel's rates are reasonable and appropriate in this case. Thus, Class
 6 Counsel's reasonable hours and reasonable rates produced a lodestar of \$525,783 as of
 7 January 3, 2012. Meringolo Decl., at ¶9.

8 **2. The Multiplier Requested Here is Well Below the Accepted**
 9 **Range.**

10 To complete the second step of the lodestar crosscheck, the proposed fee award
 11 is divided by the lodestar calculation, resulting in a lodestar multiplier. *See, e.g.,*
 12 *Vizcaino*, 290 F.3d at 1051; *In re AT & T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006).

13 In this case, a 0.46 multiplier is produced by cross-checking the 26 percent
 14 requested award against the lodestar of \$525,783. This multiplier is *well below* the
 15 accepted range in the Ninth Circuit. *See, e.g., Vizcaino*, 290 F.3d at 1051 (approving
 16 25% fee after lodestar crosscheck resulted in multiplier of 3.65); *Craft*, 624 F. Supp.
 17 2d at 1125 (approving 25% fee award resulting in a multiplier of 5.2, and collecting
 18 similar cases). Similarly, other ERISA cases outside the Ninth Circuit confirm that
 19 the requested multiplier is reasonable. *See generally In re Sulzer Hip Prosthesis &*
 20 *Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 938 n.45 (N.D. Ohio 2003) (relying
 21 on a 2003 study of fee awards in 1,120 cases to conclude that "the courts' effective
 22 multipliers averaged ... 3.89 across all 1,120 cases").

23 The 0.46 lodestar multiplier in this case is well below that of multipliers used in
 24 other actions and is particularly reasonable given the risk and complexity of the
 25 litigation. As such, the lodestar cross-check supports Class Counsel's 26 percent
 26 requested award.

D. CLASS COUNSEL SHOULD BE REIMBURSED FOR EXPENSES

Class Counsel also request reimbursement for the reasonable and necessary out-of-pocket expenses advanced during this litigation. These expenses, totaling \$55,045, are detailed in the Meringolo Declaration and supporting exhibit. See Meringolo Decl., ¶21, Exhibit D.

Reimbursement for these expenses from the common fund is appropriate for the same reasons attorney’s fee should be paid out of the fund: all beneficiaries should bear their fair share of the costs of the litigation, and these are the normal costs of litigation that counsel traditionally bill their paying clients. See 1 Alba Conte, *Attorney Fee Awards* § 2:8 at 50-51 (3d ed. 2004) (“The prevailing view is that expenses are awarded in addition to the fee percentage.”). As one commentator has written:

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

1 Alba Conte, *Attorney Fee Awards*, § 2.19 at 73-74 (citing *Trustees v. Greenough*, 105 U.S. 527 (1881)). The expenses that may be reimbursed from the common fund include "all reasonable expenses." *Id.* In deciding which expenses are compensable in a common fund case, the courts analyze whether the particular costs are the type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (allowing recovery of “out-of-pocket expenses that would normally be charged to a fee paying client”) (citations omitted); see also *Linney v. Cellular Alaska P’ship*, No. C-96-3008, 1997 WL 450064 at *7



1 (N.D. Cal. July 18, 1997) (“It appears to the Court that the costs requested are
2 reasonable in light of the complexity of the litigation and the number of counsel
3 involved, and [the costs of litigation] are therefore approved by the Court.”).

4 To date, Class Counsel have incurred \$55,045 in costs and expenses, and will
5 incur additional costs through the conclusion of this matter. Meringolo Decl., ¶¶15,
6 21. The expenses for which Class Counsel seek reimbursement in this action are the
7 type routinely charged to hourly clients and, therefore, the full requested amount
8 should be reimbursed. Specifically, Class Counsel incurred costs related to
9 photocopying, legal research, service and federal express fees, court filing fees, travel
10 expenses, expert and mediator fees and other reasonable litigation-related costs.
11 Meringolo Decl., ¶21, Exhibit E. Given the complexity and duration of this action,
12 the expenses sought by Class Counsel are reasonable and should be awarded.

13 **IV. CONCLUSION**

14 For the reasons discussed above, Plaintiffs respectfully request that the Court:
15 (1) award Class Counsel payment of attorneys’ fees in the amount of 26 percent of the
16 Settlement amount, or \$247,000; and (2) order reimbursement of litigation expenses
17 incurred by Class Counsel in the amount of \$55,045.

18 Dated: February 1, 2012

SNYDER MILLER & ORTON LLP

19
20
21 By: //s// Peter P. Meringolo
22 PETER P. MERINGOLO
23 REBECCA L. KASSEKERT
24 Attorneys for Plaintiffs
25 KATHLEEN MILLER, SONDRÉ
26 BILLET, MARK J. HOLLAND and
27 KATHERINE DOOLITTLE
28