

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

6 Attorneys for Plaintiffs
KATHLEEN MILLER, SONDRÉ BILET,
7 MARK J. HOLLAND AND KATHERINE DOOLITTLE

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10 WESTERN DIVISION – LOS ANGELES

11 KATHLEEN MILLER, SONDRÉ
12 BILET, MARK J. HOLLAND AND
KATHERINE DOOLITTLE

13 Plaintiffs,

14 vs.

15
16 PALM DESERT INVESTMENTS,
17 PALM DESERT NATIONAL BANK,
KEVIN MCGUIRE AND DOES 1-
18 100,

19 Defendants.

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

**DECLARATION OF REBECCA L.
KASSEKERT IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF THE
PROPOSED SETTLEMENT**

Date: November 28, 2011
Time: 11:00 a.m.
Courtroom: 2 – 2nd Floor
Judge: Consuelo B. Marshall

20 I, Rebecca L. Kassekert declare as follows:

21 1. I am an attorney duly licensed to practice law in the State of California. I
22 am an associate in the law firm of Snyder Miller and Orton LLP (“SMO”), attorneys of
23 record for plaintiffs Kathleen Miller, Sondre Bilet, Mark J. Holland and Katherine
24 Doolittle. I have personal knowledge of the facts stated in this declaration. If called
25 upon to testify in this matter, I could and would do so competently.

26 2. I make this declaration in support of Plaintiffs’ Motion for an order from
27 the Court preliminarily approving the proposed settlement (“Settlement”),
28 preliminarily certifying a Settlement Class, appointing Nicholas L. Saakvitne as

1 Administrator and Independent Fiduciary, approving the form and manner of notice of
2 the Settlement to the Settlement Class, and setting a date for the Fairness Hearing.

3 **A. The Settlement**

4 3. A true and correct copy of the Settlement Agreement is attached hereto as
5 *Exhibit A.*

6 4. The terms of the Settlement are set forth entirely in the Settlement
7 Agreement and the exhibits to the Agreement, and in the Notice of Settlement that will
8 be mailed to the last known address of members of the Settlement Class via first class
9 mail.

10 5. The parties propose that Nicholas L. Saakvitne act as Administrator for
11 the purpose of implementing the Settlement. Mr. Saakvitne shall be fully responsible
12 for transmitting Class Notice to the Settlement Class and overseeing the distribution of
13 the proceeds to the Settlement Class, including all related tax issues. Mr. Saakvitne's
14 fee and costs shall be paid out of the Settlement Fund in an amount not to exceed
15 \$25,000.

16 6. The parties also propose that Mr. Saakvitne act as Independent Fiduciary
17 to review the Settlement Agreement under the Department of Labor's Prohibited
18 Transaction Class Exemption 2003-29, as amended. Mr. Saakvitne shall: (i) review
19 and evaluate the terms and conditions of the Settlement, including the consideration
20 received by the Plan, proposed attorneys fees and other sums paid from the Settlement
21 Fund, the proposed plan of allocation and the scope of the release; (ii) determine
22 whether the terms and conditions of the transaction are no less favorable to the Plan
23 than comparable arms-length terms and conditions that would have been agreed to by
24 unrelated parties under similar circumstance; (iii) determine if the transaction is part of
25 an agreement, arrangement, or understanding designed to benefit a party in interest to
26 the Plan; and (iv) determine whether the Plan should approve of the release required
27 under the Settlement. Mr. Saakvitne's fee and costs for his work as the Independent
28 Fiduciary shall be paid by the Insurer.

1 7. Mr. Saakvitne is well-qualified to perform these tasks. A true and correct
2 statement of Mr. Saakvitne's credentials is attached hereto as *Exhibit B*.

3 **C. Investigation and Prosecution of Claims**

4 8. The Action seeks to recover losses under ERISA §§409 and 502(a)(2)
5 suffered by the Plan as a result of alleged breaches of fiduciary duty.

6 9. SMO has invested significant time and effort investigating and analyzing
7 the allegations set forth in the Complaint and in prosecuting this Action.

8 10. SMO's investigative efforts have included the following:

- 9 (a) Interviewing Plaintiffs and analyzing documents collected from
10 Plaintiffs;
- 11 (b) Requesting and analyzing Plan documents and records from the
12 Plan Administrator;
- 13 (c) Requesting and analyzing Plan documents filed with the
14 Department of Labor;
- 15 (d) Researching and analyzing the corporate history of Palm Desert
16 Investments and Palm Desert National Bank;
- 17 (e) Researching and analyzing Bank's banking practices and the effect
18 of those practices on the prudence of PDI stock as a Plan
19 investment;
- 20 (f) Discovering and analyzing relevant public documents from the
21 FDIC and Office of the Comptroller of the Currency;
- 22 (g) Analyzing public information on the market for residential land,
23 development and construction loans during the Class period;
- 24 (h) Analyzing public information on the residential real estate market
25 generally;
- 26 (i) Serving requests for production and interrogatories to Defendants;
27 and
- 28

1 (j) Inspecting, reviewing, and analyzing document productions from
2 Defendants.

3 In addition to SMO's investigative efforts, attorneys at SMO have spent significant
4 time researching the applicable law with respect to the claims asserted and the
5 potential defenses thereto. SMO drafted and filed the Complaint and propounded and
6 responded to discovery. SMO briefed and prevailed in large part on the key
7 dispositive motion in this case, Defendants' Motion to Dismiss. See Dkt. #18 and #31.
8 SMO also prepared for and participated in the all-day mediation session before Jeffrey
9 Lewis.

10 **D. Settlement Negotiations**

11 11. On September 29, 2011, the parties and their lawyers attended a full-day
12 mediation in with the assistance of professional mediator Jeffrey Lewis. Mr. Lewis is
13 a well-respected attorney who has served as class counsel in numerous similar ERISA
14 cases. Mr. Lewis was instrumental in the parties' assessment of the risks involved in
15 this case and the ultimate settlement of this matter.

16 12. SMO considered a number of issues in assessing the strengths and
17 weaknesses of Plaintiffs' claims, including evidence of which plaintiffs believe
18 include: (1) one of the Bank's federal regulators, the Office of the Comptroller of
19 Currency ("OCC"), finding in 2008 that Bank engaged in "unsafe and unsound"
20 practices and declaration of the Bank to be in "troubled condition," (2) the OCC's
21 2009 consent order and cease and desist proceedings which again deemed the Bank to
22 be in "troubled condition," and which Plaintiffs believe requiring required the Bank to
23 make significant managerial changes; (3) operating with ineffective risk management
24 policies; (4) the deterioration of the Bank's financial health; and (5) the 96% dramatic
25 96% decline in the value of the PDI stock from December 31, 2006 to December 31,
26 2009.

27 13. SMO also considered the risk of an adverse outcome and the complex
28 factual and legal issues involved in this action, all of which are heavily contested.

1 Specifically, in negotiating the Settlement, SMO considered that the law on claims of
2 this type remains somewhat unsettled, and a number of key questions of fact remained
3 in dispute, including the following issues: (1) whether Defendants are entitled to a
4 presumption that they acted prudently by investing in PDI stock under *Quan v.*
5 *Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010), and, if so, whether Plaintiffs
6 could rebut that presumption; (2) whether there was a market by which the Trustee
7 could have sold the PDI shares even if the Trustee determined that it was imprudent to
8 continue to hold the shares, and who bears the burden of proof on this issue;
9 (3) whether the loss to Plan should include an analysis of all Plan investments or just
10 the loss on the PDI stock; (4) when, if ever, it became imprudent to continue to hold
11 the PDI shares; and (5) the effect of the date of imprudence on the amount of loss
12 recoverable by the Plan.

13 14. In assessing this case for settlement purposes, SMO also considered the
14 significant time and expense required to address the complex legal and factual
15 questions raised by this case. SMO and defense counsel have estimated that, in
16 addition to substantial preparation time and expense, a trial would take approximately
17 ten court days. Continued litigation would risk delaying potential recovery for years.

18 15. The Defendants were insured by a \$5 million fiduciary liability policy
19 which provided coverage for the claims in this Action. The policy is a "wasting"
20 policy which is depleted by attorneys' fees and costs associated with the litigation.
21 Moreover, the policy applies to all fiduciary liability claims and is not merely limited
22 to this action.

23 16. Following a detailed review of insurance policy, as well as an analysis of
24 the merits of the litigation, the Named Plaintiffs and SMO agreed to settle the Action
25 for \$950,000. SMO firmly believes that this is the best deal available for the Class
26 under the circumstances and supports the proposed Settlement.
27
28

1 **E. Snyder Miller & Orton LLP**

2 17. SMO is a five partner law firm with a national reputation for handling
3 complex litigation matters. Partners Steve Snyder, Luther Orton, and Jim Miller
4 previously were partners at Brobeck, Phleger & Harrison.

5 18. SMO is well equipped to serve as Class Counsel. SMO lawyers have
6 substantial experience handling cases dealing with the issues at the crux of this matter,
7 including breach of fiduciary duties, improper stock sales (or lack thereof), conflicts of
8 interest, corporate mismanagement, and federal statute interpretation. For example,
9 the lawyers at SMO are currently working on or have recently worked on the following
10 cases:

11 (a) *Hopkins v. Plant Insulation Co.*, No. CGC-06-450944 (San
12 Francisco, CA Superior Court) (complex litigation involving claims
13 arising from the Uniform Fraudulent Transfer Act and Uniform
14 Fraudulent Conveyance Act, as well as claims of breach of
15 fiduciary duty). This case also required litigating the applicability
16 of certain federal statutes. *See Hopkins v. Plant Insulation Co.*, 349
17 B.R. 805 (N.D. Cal. 2006) (analysis of section 544(b) of the
18 Bankruptcy Code and jurisdictional questions, ultimately equitably
19 remanding the claims made by a Chapter 11 debtor); and *Hopkins*
20 *v. Plant Insulation Co.*, 342 B.R. 703 (D. Del. 2006) (analysis of
21 section 157(b)(5) of the Bankruptcy Code and jurisdictional
22 questions, ultimately equitably abstaining from jurisdiction over the
23 claims made by a Chapter 11 debtor)

24 (b) *Oxford Industries, Inc. v. Richard Sexton*, No. C 07-06360 (N.D.
25 Cal.) (Successful prosecution of claims for trademark
26 counterfeiting, trademark infringement and unfair competition in
27 violation of the Federal Lanham Act, and for unfair and deceptive
28

1 trade practices in violation of the California Unfair Business
2 Practices Act)

3 (c) *Keithley v. Homestore, Inc.*, No. C03-04447 (N.D. Cal.) (awarding
4 summary judgment to our defendant clients in patent infringement
5 case)

6 (d) *St. Paul Fire and Marine Insurance Co. v. API, Inc.*, (jury award of
7 \$15 million in damages for claims of breach of fiduciary duty in
8 favor of policyholder client)

9 19. SMO lawyers have significant experience litigating cases that seek a
10 benefit for a large number of persons. For example, Steve Snyder, one of the founders
11 of the firm, represented Fibreboard Corporation in the design and negotiation of a
12 multi-billion dollar "global" settlement between and among Fibreboard, its remaining
13 insurers and representatives of all present and future asbestos claims against
14 Fibreboard in the landmark class action case *Ortiz v. Fibreboard*, 527 U.S. 815 (1999).
15 Peter Meringolo, managing partner of the firm, defended class actions involving the
16 California energy crisis in the late 1990's and involving class claims alleging the
17 unlawful dissemination of private information by a major national retailer. Moreover,
18 SMO has negotiated billions of dollars of settlements on behalf of its clients, many of
19 which benefit large classes of individuals. In particular, over the past decade, SMO
20 lawyers have worked on the following complex insurance coverage cases, which
21 sought coverage for claims arising from asbestos-containing products and which
22 garnered billions of dollars for the benefit of thousands of asbestos claimants:

23 (a) *Plant Insulation Co. v. Fireman's Fund Insurance Co., et al.*, No.
24 CGC-06-448618 (San Francisco County, CA Superior Court)

25 (b) *In re Plant Insulation Co.*, Case No. 09-31347 TC (Northern
26 District of CA Bankruptcy Court)

27 (c) *In re Thorpe Insulation Co. and Pacific Insulation Co.*, No. 07-
28 19271 (Central District of CA Bankruptcy Court)

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
27
28

- (d) *Plooy v. Metropolitan Life Insurance Co.*, No. RG07329961 (Alameda County, CA Superior Court)
- (e) *St. Paul Fire and Marine Insurance Co. v. API, Inc.*, No. C9-02-8084 (Ramsey County, MN District Court)
In re API, Inc., No. 05-30073 (Minnesota Bankruptcy Court)
- (f) *Lila Mitchell v. Argonaut Insurance Co., et al.*, No. 2002 06 7900 (Alameda County, CA Superior Court)
- (g) *In re Western Asbestos, Western MacArthur Co. and Mac Arthur Co.*, No. 02-46284-T (Northern District of CA Bankruptcy Court)
- (h) *Western MacArthur Co. and Mac Arthur Co. v. United States Fidelity & Guaranty Co., et al.*, No. 721595-7 (Alameda County, CA Superior Court)

20. Based on SMO's knowledge of ERISA law and experience litigating complex cases and SMO's assessment of the strengths, weaknesses and risks of this case, SMO and Plaintiffs have concluded that the Settlement is fair, reasonable, and adequate and should be presented to the Court for approval.

21. Attached hereto as *Exhibit C* is the Complaint in *Wilson v. Venture Financial Group, Inc.*, No. C09-5768BHS, (filed in the W.D. Wash., Dec, 16, 2009).

22. Attached hereto as *Exhibit D* is the Western District of Washington's order approving a settlement of \$750,000 in an ERISA lawsuit on behalf of 200 class members in *Wilson v. Venture Financial Group, Inc.*, No. C09-5768BHS, Dkt. #116 (W.D. Wash., Jan. 24, 2011).

23. Attached hereto as *Exhibit E* is the Complaint in *Taylor v. ANB Bancshares, Inc.*, No. 08-5170, (filed in the W.D. Ark. Jul. 29, 2008).

24. Attached hereto as *Exhibit F* is the Western District of Arkansas' order approving a settlement of \$2 million in an ERISA lawsuit on behalf of over 250 class members in *Taylor v. ANB Bancshares, Inc.*, No. 08-5170, Dkt. # 156 (W.D. Ark., Oct. 26, 2011).

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
27
28

25. Attached hereto as *Exhibit G* is the Central District of California's preliminary approval order in *In re Fremont General Corp. Litigation*, No. 07-02693, Dkt. #257 (C.D. Cal., Apr. 26, 2011).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at San Francisco, California on this 14th day of November, 2011.

SNYDER MILLER & ORTON LLP

By: /s/ Rebecca L. Kassekert
REBECCA L. KASSEKERT
Attorneys for Plaintiffs

PROOF OF SERVICE

1 I, Michelle Traina, declare:

2
3 I am a resident of the State of California and over the age of eighteen years,
4 and not a party to the within action; my business address is **180 Montgomery
Street, Suite 700, San Francisco, California 94104**. On November 14, 2011, I
served the within documents:

5 **DECLARATION OF REBECCA L. KASSEKERT IN SUPPORT OF**
6 **MOTION FOR PRELIMINARY APPROVAL OF**
7 **CLASS ACTION SETTLEMENT**

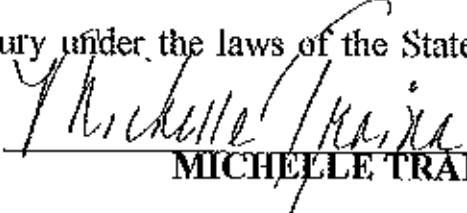
8 by transmitting via **E-Filing** the document(s) listed above to the person(s) at the
address(es) set forth below or on the attached service list.

9 *Attorneys for Defendants*
10 *Palm Desert Investments, Palm Desert National Bank,*
Kevin McGuire and Rhonda Swanson

11 Nicole A. Diller
12 ndiller@morganlewis.com
13 Alison B. Willard
awillard@morganlewis.com
14 Gregory C. Braden
gbraden@morganlewis.com
15 MORGAN, LEWIS & BOCKIUS LLP
16 One Market, Spear Street Tower
San Francisco, CA 94105-1126
Direct: 415.442.1312
Fax: 415.442.1001

17
18 I am readily familiar with the firm's practice of collection and processing
19 correspondence for mailing. Under that practice it would be deposited with the U.S.
20 Postal Service on that same day with postage thereon fully prepaid in the ordinary
course of business. I am aware that on motion of the party served, service is
presumed invalid if postal cancellation date or postage meter date is more than one
day after date of deposit for mailing in affidavit.

21 I declare under penalty of perjury under the laws of the State of California
22 that the foregoing is true and correct.

23 
MICHELLE TRAINA