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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION – LOS ANGELES

KATHLEEN MILLER, SONDRE BILET, MARK J. HOLLAND AND KATHERINE DOOLITTLE Plaintiffs, vs. PALM DESERT INVESTMENTS, PALM DESERT NATIONAL BANK, KEVIN MCGUIRE AND DOES 1- 100, Defendants.	Case No. CV-11-02454 CBM (RZx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT** Date: November 28, 2011 Time: 11:00 a.m. Courtroom: 2 – 2nd Floor Judge: Hon. Consuelo B. Marshall

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. PROCEDURAL AND FACTUAL BACKGROUND 2

A. Description of the Litigation 2

B. The Terms of the Settlement Agreement 3

C. Proposed Schedule 5

III. ARGUMENT 6

A. The Proposed Settlement Merits Preliminary Approval. 6

B. Class Certification Of Plaintiffs' Claims Is Appropriate 12

1. The Requirements of Rule 23(a) are Satisfied 13

a. The Proposed Class Satisfies the Numerosity Requirement 13

b. The Proposed Class Satisfies the Commonality Requirement 13

c. Plaintiffs' Claims Satisfy the Typicality Requirement 14

d. Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Class 15

2. The Requirements of Rule 23(b)(1) are Satisfied 15

3. Plaintiffs' Counsel Should Be Appointed Class Counsel. 18

C. Nicholas Saakvitne Should Be Appointed Independent Fiduciary And Administrator Of The Settlement 19

D. The Proposed Notice To Class Members Satisfies Rule 23 And Due Process Requirements 20

IV. CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Alvidres v. Countrywide Fin. Corp., CV07-5810, 2008 WL 1766927 (C.D. Cal. Apr. 16, 2008) 13, 14

Banyai v. Mazur, 205 F.R.D. 160 (S.D.N.Y. 2002) 14

Donovan v. Bierwirth, 754 F.2d 1049 (2nd Cir. 1982) 10

General Tel. Co. v. Falcon, 457 U.S. 147 (1982) 14

Grabek v. Northrop Grumman Corp., No. 07-56448, 346 Fed. Appx. 151 (9th Cir. 2009) 17

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) 7, 13, 15

Immigrant Assistance Project of Los Angeles County Federation of Labor v. I.N.S., 306 F.3d 842 (9th Cir.2002) 13

In re Computer Sciences Corp. ERISA Lit., No. 08-02398, 2008 WL 7527872 (C.D. Cal. Dec. 29, 2008) 14

In re Fremont General Corp. Litig., No. 07-02693 (C.D. Cal. Apr. 26, 2011) 16

In re Northrop Grumman Corp. ERISA Litig., No. 06-06213, 2011 WL 3505264 (C.D. Cal. Mar. 29, 2011) 17

In re Schering-Plough Corp. ERISA Litig., 589 F.3d 585 (3d Cir. 2009) 16

In re Syncor ERISA Litig., 227 F.R.D. 338 (C.D. Calif. 2005) 13, 14, 15, 16

In re Syncor ERISA Litig., 516 F.3d 1095 (9th Cir.2008) 6

Kanawi v. Bechtel Corp., 254 F.R.D. 102 (N.D. Cal. 2008) 17

Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1995) 15

LaRue v. DeWolff, Boberb & Assocs., Inc.,
552 U.S. 248 (2008) 17

Martin v. Feilen,
965 F.2d 660 (8th Cir. 1992) 10

Mendoza v. Tucson Sch. Dist. No. 1,
623 F.2d 1338 (9th Cir. 1980) 21

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 20

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,
221 F.R.D. 523 (C.D. Cal. 2004) 7

Officers for Justice v. Civil Service Commission,
688 F.2d 615 (9th Cir.1982) 6, 7

Ortiz v. Fibreboard Corp.,
527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) 16

Quan v. Computer Sciences Corp.,
623 F.3d 870 (9th Cir. 2010) 8, 9

Rodriguez v. West Publ'g Corp.,
No. 05-3222,
2007 WL 2827379 (C.D. Cal. Sept. 10, 2007),
rev'd on other grounds, 563 F.3d 948 (9th Cir. 2009) 20

Silber v. Mabon,
18 F.3d 1449 (9th Cir. 1994) 21

Taylor v. ANB Bancshares, Inc.,
No. 08-5170, W.D. Ark 11

Wilson v. Venture Financial Group, Inc.,
No. C09-5768BHS, W.D. Wash 11, 16

CODES

28 U.S.C. § 1715 6

ERISA § 502(a)(2),
29 U.S.C. §1132(a)(2) 2, 14, 17

ERISA § 502(a)(3)
29 U.S.C. §1132(a)(2) 3

ERISA §§ 409(a),
29 U.S.C. §§ 1109 14

Fed. R. Civ. P. 23(a) 12, 13, 17
Fed. R. Civ. P. 23(a)(1) 13
Fed. R. Civ. P. 23(a)(2) 13, 14
Fed. R. Civ. P. 23(a)(3) 14
Fed. R. Civ. P. 23(a)(4) 15
Fed. R. Civ. P. 23(b)(1) 12, 15, 16, 17, 18
Rule 23(b)(1)(B) 16, 17
Fed. R. Civ. P. 23(c)(2) 21
Fed. R. Civ. P. 23(e)(1) 20
Fed. R. Civ. P. 23(g) 18
Fed. R. Civ. P. 23(g)(1)(A) 18
Fed. R. Civ. P. 23(g)(1)(B) 18
Fed. R. Civ. P. 23(g)(4) 18

OTHER AUTHORITIES

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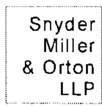

I. INTRODUCTION

Plaintiffs Kathleen Miller, Sondre Bilet, Mark J. Holland, and Katherine Doolittle are former employees of Palm Desert National Bank ("Bank") and participants of the Palm Desert Investments Employee Stock Ownership Plan ("Plan"). The Plan was a pension plan established for the benefit of Bank employees. Plaintiffs allege that from 2006 to 2009 (and beyond), the Plan lost millions of dollars due in large part to the Plan fiduciaries' failure to divest the Plan's investment of assets in the stock of the Bank, which declined in value over this time period. In sum, Plaintiffs allege that: the decline in value was due to a risky strategy by the Bank to invest heavily in real estate; the Plan fiduciaries knew or should have known about the risky strategy; the strategy made the investment in Bank stock imprudent; and the Plan fiduciaries took no steps to divest the Plan of the stock.

Plaintiffs filed this case on behalf of the Plan to recover retirement savings for current and former Bank employees. Plaintiffs are well aware that this case is rife with difficult legal and factual matters. These matters are discussed below. Suffice it to say, there is a risk that if this case proceeds, Plaintiffs could recover and/or collect nothing on behalf of the Plan, after protracted contentious and time-consuming litigation. In light of these risks, Plaintiffs and Defendants Palm Desert Investments, Palm Desert National Bank, and Kevin McGuire[1] propose to settle this matter for $950,000, less attorneys' fees and costs, paid in to the Plan's trust and allocated among approximately 200 Plan participants, as defined by the Settlement.

Plaintiffs believe that the Settlement is fair, reasonable, and adequate. As such, Plaintiffs move this Court for an Order (1) granting preliminary approval of the proposed settlement ("Settlement"); (2) preliminarily certifying for settlement purposes a settlement class; (3) appointing Nicholas Saakvitne as independent

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[1] All claims against Rhonda Swanson were dismissed on July 19, 2011, and she is no longer a defendant in this case. Dkt. # 31.

fiduciary and administrator of the settlement; (4) approving the form and manner of notice of the Settlement to the certified Class ("Class Notice"); and (5) setting a date for a Fairness Hearing. For the reasons discussed herein, Plaintiffs respectfully request that the motion be granted.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Description of the Litigation

This action was filed on March 23, 2011. *See* Docket ("Dkt.") #1. Plaintiffs are former employees of Defendant Bank and current participants in the Plan. *See* Dkt. #1 at ¶¶6-9. They bring this action on their own behalf and on behalf of the Plan pursuant to ERISA § 502(a)(2) and (a)(3), 29 U.S.C. §1132(a)(2) and (a)(3), and assert several causes of action. In sum, Plaintiffs allege that Defendants were the fiduciaries of the Plan entrusted with responsibility for investing the Plan's assets prudently and solely in the interests of the Plan's participants and beneficiaries. The Complaint seeks to recover losses that Plaintiffs allege were suffered by the Plan as a result of alleged breaches of fiduciary duty. Plaintiffs allege the Defendants continued to hold the investment of assets of the Plan in stock of Palm Desert Investments, Inc. ("PDI"), the holding company for Defendant Bank, at a time when the fiduciaries knew or should have known that the stock was an imprudent investment because, according to Plaintiffs' allegations, Defendant Bank was engaged in unsafe and unsound banking practices and was in troubled condition. Plaintiffs allege that, as a result of the Defendants' breaches, the Plan has lost substantially all of its assets, diminishing the retirement savings of Plaintiffs and other Plan participants.

Defendants deny any wrongdoing and have vigorously defended the litigation. On April 25, 2011, the Defendants moved to dismiss the Complaint. *See* Dkt. #14. On July 19, 2011, the Court issued an Order granting in part and denying in part Defendants' motion to dismiss (the "Order"). *See* Dkt. #31. The Court's Order

1 dismissed Count VI (failure to monitor fiduciaries) as to Defendant Kevin McGuire,
2 dismissed Count III (conflicts of interest) with prejudice as to all Defendants and
3 dismissed all counts as to previously named Defendant Rhonda Swanson. The Court
4 allowed all remaining claims to proceed, including Plaintiffs' claim that the
5 Defendants failed to prudently manage the Plan's assets.
6 In September 2011, the parties and their lawyers attended a full-day mediation
7 with the assistance of professional mediator Jeffrey Lewis, a well-respected attorney
8 who has served as class counsel in several similar ERISA cases. Mr. Lewis was
9 instrumental in the parties' assessment of the risks involved in this case and the
10 ultimate settlement of this matter. Kassekert Decl. at ¶11. Through the mediation, the
11 parties reached agreement on the terms of the Settlement now before the Court.
12 **B. The Terms of the Settlement Agreement**
13 The Settlement Agreement is attached as Exhibit A to the Kassekert
14 Declaration. In short, the Settlement provides for a payment of $950,000, inclusive of
15 payments to the Class, attorneys' fees and costs and up to $25,000 in administrative
16 and class notice costs, in return for a release that extinguishes Class Member claims
17 against the Defendants. The following is a summary of the principal terms of the
18 Settlement:
19 - Class Notice will be provided to all Class Members within seven (7) days
20 of the Court's entry of the preliminary approval order, in the following
21 manner:
22 - The Administrator will mail the Class Notice to the last known
23 address of Settlement Class Members; and
24 - Class Counsel make an Internet posting of the Class Notice and
25 related documents on Class Counsel's website, www.smollp.com
26 (a copy of the Class Notice is attached as Exhibit 1 to the
27 Settlement Agreement – Kassekert Decl., Exhibit A);
28

- The Settlement Class consists of a non-opt out class consisting of all persons, other than Defendants and the directors of Defendants, who were Participants in or beneficiaries of the Palm Desert Investments Employee Stock Ownership Plan and Trust and whose individual Share Accounts held vested shares of stock of Palm Desert Investments from September 30, 2006 through September 1, 2011;
- Within ten business days after the Court preliminarily approves the Settlement, Defendants' insurer will deposit into escrow $950,000 (the "Settlement Fund"), which will be invested for the benefit of the class pending final approval of the Settlement (Exhibit A, §9.2);
- Under a class exemption contained in regulations promulgated by the United States Department of Labor, Defendants will retain Nicholas Saakvitne as an independent fiduciary to determine whether the Settlement is reasonable from the point of view of the Plan and, if he considers it appropriate, to approve the Settlement's release of claims on behalf of the Plan (Exhibit A, §6.1). The cost of the independent fiduciary will not be paid from the Settlement Fund. The Insurer will pay the cost of the independent fiduciary. (Exhibit A, §6.3);
- Following final approval of the Settlement, the Settlement Fund, including interest that may be earned during the final approval period and net of Court-approved attorneys' fees and costs and up to $25,000 of administration costs ("Net Settlement Fund"), will be paid into an account in the name of the Plan upon the direction of the Administrator (Exhibit A, §10.5);

- Nicholas L. Saakvitne, an experienced pension attorney and professional trustee with experience in administering terminated plans[2] will act as the Administrator to ensure that the Settlement is properly implemented and administered (Exhibit A, §§2.2, 9.3, 9.4, 10.5). All of the Administrator's fees and expenses incurred for administration of the settlement will be paid from the Settlement Fund, in an amount not to exceed $25,000 (Exhibit A, §10.4);
- Mr. Saakvitne will oversee the allocation and distribution of Class Members' shares of the Net Settlement Fund, including communicating with Class Members about the tax consequences of their distribution elections and handling the tax reporting of distributions (Exhibit A, §§9.3, 9.4, 10.5);
- The Net Settlement Fund will be allocated among Class Members according to a Plan of Allocation. A copy of the proposed Plan of Allocation is attached to the Settlement Agreement as Exhibit 5 (Kassekert Decl., Exhibit A);
- All claims of Class Members against Defendants that are defined as Released Claims in the Settlement Agreement, including claims that relate to the Defendants' duties, responsibilities, acts, or omissions in connection with the Plan or its assets, will be released (Exhibit A, §§5.1, 5.2, 5.3).

C. Proposed Schedule

As set forth in the Proposed Preliminary Approval Order, the Parties have agreed to the following schedule of events, the dates of which will be determined after the Court enters the Preliminary Approval Order and sets a Fairness Hearing date:

[2] A statement of Mr. Saakvitne's qualifications is attached to the Kassekert Declaration as Exhibit B.

Event	Time for Compliance
Deadline for Mailing of Class Notice and posting Settlement Agreement and Notice on www.smollp.com	7 days after entry of Preliminary Approval Order
Deadline for filing Class Counsel's motion for attorneys' fees and costs	35 days after entry of Preliminary Approval Order
Deadline for Class Members to comment upon or object to the proposed Settlement	60 days after entry of Preliminary Approval Order
Deadline for filing responses to objections	90 days after the Preliminary Approval Order is issued
Deadline for filing Plaintiffs' Motion for Final Approval	90 days after the Preliminary Approval Order is issued
Deadline for filing Plaintiffs' reply in support of motions for final approval and for attorneys' fees and costs	5 days prior to the proposed Fairness Hearing
Proposed Fairness Hearing in District Court[3]	To be determined by the Court

III. ARGUMENT

A. The Proposed Settlement Merits Preliminary Approval.

"[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1011 (9th Cir.2008); *Officers for Justice v. Civil Service Commission,* 688 F.2d 615, 625 (9th Cir.1982) ("[I]t must not be overlooked that voluntary conciliation and

[3] The date of the Fairness Hearing must be at least 90 days after notices are served on the appropriate state and federal officials. 28 U.S.C. §1715. Notice will be provided to the Office of the Comptroller of the Currency by November 24, 2011.

settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation"). Rule 23(e) of the Federal Rules of Civil Procedure provides that "[a] class action shall not be dismissed or compromised without the approval of the court ..." Approval under Rule 23(e) involves a two-step process in which the court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004); Federal Judicial Center, Manual for Complex Litigation § 21.632, at 320-21 (4th ed. 2004).

To grant preliminary approval, the court must determine whether the proposed settlement is "fundamentally fair, adequate and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The settlement as a whole must be examined for overall fairness, adequacy and reasonableness. *Id.*

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Federal Judicial Center, Manual for Complex Litigation § 30.41, at 237 (3d ed. 1995).

The proposed Settlement satisfies the preliminary approval requirements. The Settlement will provide the Plan with a substantial recovery for the benefit of its participants and beneficiaries.

Several key issues were considered by Class Counsel in assessing the strengths and weaknesses of Plaintiffs' claims. Plaintiffs believe that the discovery and research to date support Plaintiffs' core allegations that PDI stock became an imprudent investment for the Plan during the Class Period. Plaintiffs' have alleged that Bank engaged in risky conduct that imperiled the Bank, evidence of which Plaintiffs believe to include: (1) one of the Bank's federal regulators, the Office of the Comptroller of Currency ("OCC"), finding in 2008 that Bank engaged in "unsafe and unsound" practices and declaration of the Bank to be in "troubled condition," (2) the OCC's 2009 consent order and cease and desist proceedings which again deemed the Bank to be in "troubled condition," and which Plaintiffs believe required the Bank to make significant managerial changes; (3) operating with ineffective risk management policies; (4) the deterioration of the Bank's financial health; and (5) the 96% decline in the value of the PDI stock from December 31, 2006 to December 31, 2009. *See* Kassekert Decl., ¶12. Plaintiffs further allege that the Bank provided false and misleading disclosures to Plan participants regarding the financial health of the Bank and PDI.

Nonetheless, Plaintiffs also recognize the risk of an adverse outcome. The complex factual and legal issues involved in this action are heavily contested, and the law on claims of this type remains somewhat unsettled. One key contested issue is whether Defendants are entitled to a presumption that they acted prudently by investing in PDI stock under *Quan v. Computer Sciences Corp.,* 623 F.3d 870 (9th Cir. 2010), and, if so, whether Plaintiffs could rebut that presumption. Another contested issue is whether there was a market by which the Trustee could have sold the PDI shares even if the Trustee determined that it was imprudent to continue to hold the shares, and who bears the burden of proof on this issue. The parties also disagree about whether the loss to Plan should include an analysis of all Plan investments or just the loss on the PDI stock. *See* Kassekert Decl., ¶13.

Significant time and expense would be required to address these and other complex legal and factual questions. Class Counsel and defense counsel have estimated that in addition to substantial preparation time and expense, a trial would take approximately ten court days. Continued litigation would risk delaying potential recovery for years. *See* Kassekert Decl., ¶14. The only viable source of recovery, were Plaintiffs to succeed, is the fiduciary liability insurance policy covering the Defendants, which has a coverage limit of $5 million. However, the policy is a "wasting policy," meaning that the legal costs of defending this action have already eroded and will continue to erode the amount of insurance funds available to satisfy a judgment. Moreover, the policy applies to all fiduciary liability claims and is not merely limited to this action. *See* Kassekert Decl., ¶15. Given the likelihood of an appeal in the event of a judgment in Plaintiffs' favor, the cost of defense would potentially deplete the only monies available to satisfy the judgment. The Settlement eliminates the time and expense of continued litigation, conserves parties' and judicial resources and provides the Plan with a substantial benefit.

Resolution of these issues would have a significant impact on this case, including how to calculate the loss incurred by the Plan, in at least the following three ways:

First, Plaintiffs allege that Defendants knew or should have known that PDI stock was imprudent by September 30, 2006, when PDI shares were valued at $162.75 and the total value of the shares held by the Plan was approximately $5.4 million. *See* Dkt. #1 at Ex. V at 257. Defendants argue that Plaintiffs can not overcome the presumption of prudence as required by *Quan*, and, even if they could, the PDI stock became imprudent, if ever, on a date after the 2008 stock market collapse and the OCC's examinations and agreements with the Bank. At that point, the loss to the Plan, if any, was *de minimis*. The date of imprudence is an open question of fact to be

decided by the Court that could significantly impact the amount of loss recoverable by the Plan.

Second, Defendants argue that because the Bank was privately held, there was no market upon which the Trustee could have sold the shares even if the Trustee determined that it was imprudent to continue to hold the shares. Plaintiffs argue that they do not need to prove the existence of a buyer, but instead, need only prove that Defendants should have taken steps to locate a buyer but did nothing. Plaintiffs also believe that they could prove that a buyer existed. However, Plaintiffs recognize that there is a risk that the Court could find for Defendants on this issue.

Third, if the case were to go forward, Plaintiffs will argue for a measure of damages that calculates the Plan's losses by comparing the actual performance of the *all* of the Plan's investments with the performance had those investments been allocated in a prudently invested portfolio. *See, e.g., Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2nd Cir. 1982); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). Defendants likely will oppose any attempt to calculate damages over all of the Plan assets and would have urged the Court to measure the loss on the PDI stock alone.

The total value of the Plan as of December 31, 2006 was about $8.4 million. *See* Dkt. #1 at Ex. V at 257. By December 31, 2009, it was about $1.9 million. After accounting for distributions, Plaintiffs project the total loss of the Plan over this time period was between $4 and 5 million. This is likely to be the "best case" range for loss that Plaintiffs would recover at trial. The best case assumes that Plaintiffs could prove that the investment in PDI became imprudent as of September 30, 2006, that the Trustee could have sold the shares to someone at that time, and the Trustee should have invested all the Plan assets under a prudently allocated portfolio. However, the amount of loss would be significantly less (or nothing at all) if Defendants were to prevail at convincing the Court that: Plaintiffs did not overcome the presumption of prudence; the investment became imprudent at a later date; the shares were not

marketable; and/or the loss should be on the PDI stock alone, which accounted for only 50-60% of the Plan assets.

Given the wide range of potential damage outcomes at trial, the possibility of a verdict in favor of Defendants, and the wasting insurance policy, the $950,000 Settlement provides a substantial recovery within the range that courts traditionally have found to be fair and adequate under law. For example, in *Wilson v. Venture Financial Group, Inc.*, No. C09-5768BHS, W.D. Wash., Plaintiffs brought a lawsuit on behalf of over 200 class member seek to recover a loss of over $12 million. Kassekert Decl., Exhibit C at ¶14 and 172. The Court approved a settlement of $750,000. Kassekert Decl., Exhibit C at ¶14 and Exhibit D at ¶172. In *Taylor v. ANB Bancshares, Inc.,* No. 08-5170, W.D. Ark., Plaintiffs brought a lawsuit on behalf of over 250 class member seek to recover a loss of Plans that were once valued over $56 million. Kassekert Decl., Exhibit E at ¶21(a). The court approved an ERISA class action settlement of $2 million. Kassekert Decl., Exhibit E and Exhibit F at ¶1.30.

Further, the Settlement does not provide for "unduly preferential treatment of class representatives, or segments of the class." Manual For Complex Litigation (3d ed.), §30.41, at 237. The Settlement shares of all Class Members, including the named Plaintiffs, will be calculated according to the same plan of allocation and will be based on their proportionate share of the Plan's loss attributed to the Plan's investment in shares of stock in Palm Desert Investments from September 30, 2006 through September 1, 2011. The Settlement payment of $950,000, allocated among the approximately 200 Class Members, is well within the range of potential recoveries for the Class in this case and is fundamentally fair to the Class.

While Plaintiffs and Class Counsel believe this is a strong case for Plaintiffs, the outcome of continued litigation remains uncertain. Likelihood of success on the merits, weighed against the complexity, expense, and duration of litigation necessary

to prosecute this action through trial, post-trial motions, and likely appeals, the significant uncertainties in predicting the outcome of this complex litigation, and the depleting resources available support approval of the Settlement.

B. Class Certification Of Plaintiffs' Claims Is Appropriate

Plaintiffs request, and Defendants do not oppose, certification of a non-opt-out class under Fed. R. Civ. P. 23(b)(1) for settlement purposes only. *See* Exhibit A, §3.1.1. Plaintiffs respectfully request that the Court make appropriate findings and certify the following non-opt out Class, for purposes of settlement only:

> All Persons who were participants in or beneficiaries of the Palm Desert Investments Employee Stock Ownership Plan and whose individual Share Accounts held vested shares of stock of Palm Desert Investments from September 30, 2006 through September 1, 2011; provided, however, that Defendants, former and present directors of Palm Desert Investments and/or Palm Desert National Bank 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.

Rule 23(b)(1) provides that a class action may be maintained if Rule 23(a) is satisfied and if "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1).

1 As described in detail below, Plaintiffs believe the proposed Class meets all
2 four prerequisites of Rule 23(a) and Rule 23(b)(1), making this Class appropriate for
3 class certification for settlement purposes only. *See In re Syncor ERISA Litig.*, 227
4 F.R.D. 338 (C.D. Ca. 2005).

5 **1. The Requirements of Rule 23(a) are Satisfied**

6 To be certified as a class action, a claim must meet the four requirements of
7 Rule 23(a): numerosity, commonality, typicality, and adequacy of representation.
8 Fed. R. Civ. P. 23(a). Each of the four basic prerequisites enumerated in Rule 23(a) is
9 satisfied in this case for settlement purposes.

10 **a. The Proposed Class Satisfies the Numerosity Requirement**

11 "One or more members of a class may sue or be sued as representative parties
12 on behalf of all only if . . . the class is so numerous that joinder of all members is
13 impracticable . . . ." Fed. R. Civ. P. 23(a)(1). In the Ninth Circuit, numerosity is
14 presumed to be satisfied when the class exceeds 40 members. *Immigrant Assistance*
15 *Project of Los Angeles County Federation of Labor v. I.N.S.*, 306 F.3d 842, 869 (9th
16 Cir.2002); *see also Alvidres v. Countrywide Fin. Corp.*, CV07-5810, 2008 WL
17 1766927 at *2 (C.D. Cal. Apr. 16, 2008). Here, Plaintiffs seek to bring this suit on
18 behalf of more approximately 200 putative Class Members. Joinder of so many
19 plaintiffs in a suit is impracticable. Plaintiffs have met their burden to establish
20 numerosity for settlement purposes.

21 **b. The Proposed Class Satisfies the Commonality Requirement**

22 Under Rule 23(a)(2), Plaintiffs must show that there are questions of law or fact
23 common to the class. Fed. R. Civ. P. 23(a)(2). There is no requirement that all
24 questions of law or fact be the same for all class members. *Hanlon,* 150 F.3d at 1019.
25 Courts have found the commonality requirement is satisfied when the proposed class
26 alleges breaches of fiduciary duty under ERISA. *See, e.g., Alvidres,* 2008 WL
27 1766927 at *2 (ERISA participants alleging depreciation in benefit assets due to
28

defendants' breach of fiduciary duties met commonality requirement); *In re Syncor,* 227 F.R.D. at 344 (commonality existed when participants sued corporation and directors for breaches of ERISA fiduciary duties in choosing to invest in company stock); *In re Computer Sciences Corp. ERISA Litig.,* No. 08-02398, 2008 WL 7527872 at *2 (C.D. Cal. Dec. 29, 2008) (same); *see also Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002) ("In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries.").

This case presents multiple questions of law and fact common to all prospective Class Members, including the following:

(1) whether Defendants owed fiduciary duties to the Plan and its participants;

(2) whether Defendants breached their fiduciary duties to the Plan and its participants;

(3) the measure and aggregate amount of losses sustained by the Plan; and

(4) the proper remedy for the Plan's losses.

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

c. Plaintiffs' Claims Satisfy the Typicality Requirement

The "claims . . . of the representative parties [must be] typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). The typicality inquiry examines whether the proposed class representatives "possess the same interest and suffer the same injury." *General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotations omitted).

The typicality requirement is often satisfied in claims of breaches of fiduciary duty under ERISA. *See, e.g.* ERISA §§409(a) and 502(a)(2), 29 U.S.C. §§1109 and 1132(a)(2) (allowing plan participants to sue on behalf of the plan for breach of fiduciary duty, which liability is "to the plan"); *Alvidres*, 2008 WL 1766927 at *2 (Typicality requirement met when plaintiffs alleged exposed to the same breach of fiduciary duties by the same ERISA trustee Defendants); *In re Syncor*, 227 F.R.D. at

344 (typicality requirement satisfied when plaintiffs alleged breaches of fiduciary duty arising out of investment of plan assets because "[i]f the allegations . . . are true, each member of the purported class suffered injuries as an indirect result of the same breaches of fiduciary duty by the . . . defendants"); *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir. 1995) ("There is no doubt that the named plaintiffs' claims [breach of fiduciary duties under ERISA] are typical of the class claims.").

In this action, all members of the Plan seek recovery on behalf of the Plan as a whole. Plaintiffs contend that they, like all other members of the proposed Class, were injured by Defendants' alleged breach of fiduciary duties. The Court should find that Plaintiffs' claims are typical of the claims of the Class for settlement purposes.

d. Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Class

The proposed class representatives have and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement has two prongs: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

The settlement interests of the named Plaintiffs are consistent with and not in conflict with the interests of the proposed Class. As such, named Plaintiffs' interests in the lawsuit are the same as absent Class Members. Accordingly, Plaintiffs should be appointed class representatives under Rule 23(a)(4) for settlement purposes.

2. The Requirements of Rule 23(b)(1) are Satisfied

This case is appropriate to be maintained as a class action for settlement purposes only under Rule 23(b)(1), because "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish

1 incompatible standards of conduct for the party opposing the class; or (B)
2 adjudications with respect to individual class members that, as a practical matter,
3 would be dispositive of the interests of the other members not parties to the individual
4 adjudications or would substantially impair or impede their ability to protect their
5 interests." Fed. R. Civ. P. 23(b)(1). Defendants do not oppose certification pursuant
6 to Rule 23(b)(1) for settlement purposes only.

7 The Settlement provides for a release of all claims by each Class Member
8 against all Defendants that relate to any of the acts or omissions alleged in the
9 Complaint, including any losses suffered by the Plan as a result of investment in PDI
10 stock from September 30, 2006, through September 1, 2011. In this regard, the
11 release has Plan-wide effect in that all Class Members are Plan participants and the
12 settlement proceeds are intended to benefit the Class as a whole. An independent
13 fiduciary will review the fairness of the release on behalf of the Plan and provide the
14 Court with his assessment of the fairness of the settlement and release prior to the
15 final fairness hearing. Accordingly, class certification under Rule 23(b)(1) for
16 settlement purposes only is appropriate. *See e.g., In re Fremont General Corp. Litig.*,
17 No. 07-02693, Dkt. #257 (C.D. Cal. Apr. 26, 2011) (attached to the Kassekert Decl. as
18 Exhibit G) (certifying class pursuant to Rule 23(b)(1) for settlement purposes only);
19 *Wilson,* No. C09-5768BHS, Dkt. #116 (W.D. Wash. Jan. 21, 2011) (attached to the
20 Kassekert Decl. as Exhibit D) (same). Courts routinely certify non-opt-out classes of
21 cases of this type for settlement purposes. A classic example of a Rule 23(b)(1)(B)
22 action is "one which charges a breach of trust by an indenture trustee or other
23 fiduciary similarly affecting the members of a large class of beneficiaries, requiring an
24 accounting or similar procedure to restore the subject of the trust." *In re Syncor*
25 *ERISA Litig.*, 227 F.R.D. at 346 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815,
26 834, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999)); *see also In re Schering-Plough Corp.*
27 *ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (finding that § 502(a)(2) claims are
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"paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class"); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008) (certifying class and stating that "[m]ost ERISA class action cases are certified under Rule 23(b)(1)"); *Grabek v. Northrop Grumman Corp.*, No. 07-56448, 346 Fed. Appx. 151 (9th Cir. 2009) (remanding case for class certification and stating ERISA action "appears to meet the requirements of Fed. R. Civ. P. 23(a) and (b)"); *In re Northrop Grumman Corp. ERISA Litig.*, No. 06-06213, 2011 WL 3505264 at *17-18 (C.D. Cal. Mar. 29, 2011) (certifying §502(a)(2) class pursuant to Rule 23(b)(1)(B)).

Although *LaRue v. DeWolff, Boberb & Assocs., Inc.*, 552 U.S. 248 (2008) may allow an individual Plan participant to seek relief for losses solely to his own Plan account, in this case the Plaintiffs sought relief on behalf of the Plan as a whole, as expressly authorized under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). As a result, the relief obtained in this Settlement will be allocated on a pro rata basis to each Class Member based on the relationship of his or her loss to the Plans' total losses. Given the relief obtained in the case and the manner in which it will be distributed, allowing individual opt-outs would create the risk that participants subject to the exact same conduct would not all be treated the same, which is inconsistent with ERISA's duty of impartiality. *See In re Northrop Grumman Corp. ERISA Litig.*, 2011 WL 3505264 at *17-18 (collecting cases and stating that "a majority of courts addressing the propriety of certifying an ERISA class under §502(a)(2) following *LaRue*, however, have continued to find Rule 23(b)(1)(B) certification appropriate"). Moreover, given the relatively modest loss to each Class Member's individual Plan account, it is unlikely that any individual Plan participant would pursue a claim solely for his or her own loss. Nevertheless, as a 23(b)(1)(B) class, individual Class Members retain the ability to object to the Settlement or voice concerns about the Settlement.

Accordingly, Plaintiffs respectfully submit that because the relief obtained is for the benefit of the Plan and not any one Plan participant, the Settlement proceeds will

be allocated to all Class Members on a pro rata basis, the release resolves the total liability of the fiduciaries to the Plans, and Defendants do not oppose Rule 23(b)(1) certification for settlement purposes only, there is both good reason and just cause to certify the case for settlement purposes only under Rule 23(b)(1).

3. Plaintiffs' Counsel Should Be Appointed Class Counsel.

Rule 23(g) requires the Court appoint class counsel that will fairly and adequately represent the interests of the Class. Fed. R. Civ. P. 23(g)(4). In making its decision, the Court must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). The Court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Snyder Miller & Orton LLP meets the standards of Rule 23(g). Snyder Miller & Orton LLP has extensive experience handling complex claims, including class actions and breach of fiduciary duty claims. *See* Kassekert Decl., ¶¶ 18-19. As set forth in the Kassekert Declaration, Snyder Miller & Orton LLP has conducted extensive litigation and pre-settlement investigation of the proposed Class's claims, has committed significant resources to representing the proposed Class, and has experience representing clients in long-term litigation. *Id.* at ¶¶10, 18-19. In particular, counsel: (1) interviewed Plaintiffs and analyzed documents collected from Plaintiffs; (2) requested and analyzed Plan documents and records from the Plan Administrator; (3) requested and analyzed Plan documents filed with the Department

of Labor; (4) researched and analyzed the corporate history of Palm Desert Investments and Palm Desert National Bank; (5) researched and analyzed Bank's banking practices and the effect of those practices on the prudence of PDI stock as a Plan investment; (6) discovered and analyzed relevant public documents from the FDIC and Office of the Comptroller of the Currency; (7) analyzed public information on the market for residential land, development and construction loans during the Class period; (8) analyzed public information on the residential real estate market generally; (9) inspected, reviewed, and analyzed document productions from Defendants; (10) researched applicable law; (11) filed a Complaint, propounded and responded to discovery, and defended against Defendants' Motion to Dismiss; and (12) prepared for and participating in an all-day mediation session. Kassekert Decl. at ¶10. In addition, Class Counsel briefed and prevailed on many aspects of a key dispositive motion in this case, Defendants' Motion to Dismiss. *See* Dkt. #18 and #31. Significantly, Plaintiffs' primary claim, that the Defendants failed invest the Plan's assets prudently and solely in the interests of the Plan's participants and beneficiaries, survived the Motion to Dismiss.

C. Nicholas Saakvitne Should Be Appointed Independent Fiduciary And Administrator Of The Settlement

The parties have agreed to the appointment of Nicholas L. Saakvitne to act as the Administrator to ensure that the Settlement is properly implemented and administered. *See* Exhibit A, §§2.2, 9.3, 9.4, 10.5. Mr. Saakvitne is an experienced pension attorney and professional trustee with experience in administering terminated plans. *See* Kassekert Decl. at Exhibit B. As Administrator, Mr. Saakvitne will transmit the Class Notice to the Settlement Class and will oversee the allocation and distribution of Class Members' shares of the Net Settlement Fund, including communicating with Class Members about the tax consequences of their distribution elections and handling the tax reporting of distributions. The parties have also agreed

to the appointment of Mr. Saakvitne to act as Independent Fiduciary to review the Settlement Agreement under the Department of Labor's Prohibited Transaction Class Exemption 2003-29, as amended. *See* Exhibit A, §2.19. In this capacity, Mr. Saakvitne will determine, among other things, whether the terms and conditions of the Settlement are no less favorable to the Plan than comparable arms-length terms and conditions that would have been agreed to by unrelated parties under similar circumstance and whether the Plan should approve of the release required under the Settlement. *See* Exhibit A, §6.1.

D. The Proposed Notice To Class Members Satisfies Rule 23 And Due Process Requirements

Rule 23(e) requires the court to "direct notice in a reasonable manner to all class members who would be bound by the proposed settlement." Fed. R. Civ. P. 23(e)(1). To satisfy due process, notice to the Class must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice is proper if it provides:

(a) the material terms of the proposed settlement;

(b) disclosure of any special benefit to the class representatives;

(c) disclosure of the attorneys' fees provisions;

(d) the time and place of the final approval hearing and the method for objecting to the settlement;

(e) an explanation regarding the procedures for allocating and distributing the settlement funds; and

(f) the address and phone number of class counsel and the procedures for making inquiries.

Rodriguez v. West Publ'g Corp., No. 05-3222, 2007 WL 2827379 at *6 (C.D. Cal. Sept. 10, 2007), *rev'd on other grounds*, 563 F.3d 948 (9th Cir. 2009).

Here, the proposed Class Notice (*see* Exhibit 1 to the Settlement) plainly describes the terms of the Settlement, the fairness and adequacy and reasonableness of the Settlement, the maximum counsel fees and class representative service awards that may be sought, the procedure for comments and objects to the Settlement, and the date and place of the Fairness Hearing. *See* Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 8.32 (4th ed. 2002). With the Court's approval, the Class Notice will be mailed to Class Members no later than seven (7) days after entry of the Preliminary Approval Order. In addition, an Internet Notice will make information about the Settlement available at www.smollp.com.

These proposed forms of Notice will fairly apprise Class Members of the Settlement and their options, as well as fully satisfy due process requirements. *See Silber v. Mabon*, 18 F.3d 1449, 1452-54 (9th Cir. 1994) (approving notice by first class mail as the "best notice practicable"); *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980) (stating that notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard"). Accordingly, the Class Notice fulfills all requirements of adequate notice and should be duly approved. *See* Fed. R. Civ. P. 23(c)(2); Manual for Complex Litigation, § 30.212 at 227-229, (3d ed. 1993).

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IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the Proposed Preliminary Approval Order field herewith.

Dated: November 14, 2011

SNYDER MILLER & ORTON LLP

By: //s// Rebecca L. Kassekert
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PROOF OF SERVICE

I, Michelle Traina, declare:

I am a resident of the State of California and over the age of eighteen years, 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:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

☑ 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.

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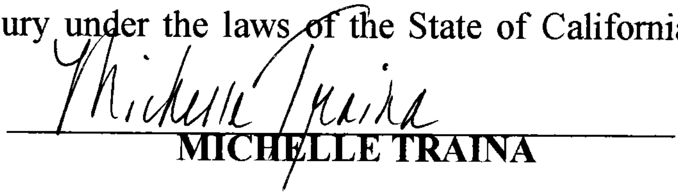
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party 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.

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



MICHELLE TRAINA