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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Levanna C. Traylor, *et al.*

Plaintiffs,

vs.

Avnet, Inc.; Avnet Pension Plan,

Defendants.

No. 08-cv-00918-PHX-FJM

PLAINTIFFS' MOTION FOR (1) FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLANS OF ALLOCATION, AND FOR (2) CLASS COUNSEL'S ATTORNEY'S FEES AND EXPENSES AND CASE CONTRIBUTION PAYMENTS FOR PLAINTIFFS, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: **March 5, 2010**
Time: **2:00 p.m.**

The Honorable Frederick J. Martone
Courtroom 506

On November 25, 2009, the Court granted preliminary approval of the proposed settlement of this certified ERISA pension benefits class action involving two groups of former employees of Defendant Avnet, Inc. ("Avnet"), who are either current or former participants in Defendant Avnet Pension Plan ("Plan"). *See* Doc. 192. In accordance with the Preliminary Approval Order, individualized notice was mailed to each of the members of the two certified Classes on December 16 and 17, 2009, *see id.* ¶¶ 10-12, and a website dedicated to the proposed settlement (www.traylorpensionclassaction.com) was established, *id.* ¶ 13, with copies of the major filings and orders issued in the case posted for Class members' inspection.[1] The mailed notice told each participant about the lawsuit; explained the proposed Settlement and Class Counsel's recommended Plans of Allocation in detail; and stated that Class Counsel would seek attorney's fees in an amount not to exceed 25% of the gross settlement proceeds plus expenses, and case contribution payments for the named plaintiffs not to exceed $3,000 each. Doc. 191-1, Exs. B-C. The mailed notice also provided instructions for objecting to the proposed settlement and/or the fee request, directed Class members to the traylorpensionclassaction website, and told Class members how they may obtain further information about the case or proposed settlement directly from the parties. *Id.*

Pursuant to Fed. R. Civ. P. 23(e) and 23(h), Plaintiffs now move for final approval of the proposed settlement, the recommended plans of allocation, Class Counsel's request for attorney's fees and expenses and the request for case contribution payments for each of the named plaintiffs.[2]

[1] As the Court will recall, as originally certified, the Lump Sum Class was an opt-out class of which twelve (12) participants opted-out. *See* Pl. Mtn. for Prelim. Approval (Doc. 191) at 7. The Restricted Participant Class was and is a non-opt-out class. *Id.*

[2] Because the factors the Court is to consider in assessing whether to grant final approval overlap to a considerable degree with the factors the Court is to consider in assessing the reasonableness of Counsel's requested fee award, and as authorized by the Court's Order (at ¶ 13), Plaintiffs are filing one combined submission in support of both applications.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

As detailed in Plaintiffs' November 2009 motion for preliminary approval (Doc. 191), and as set forth in the parties' November 6, 2009 Class Settlement Agreement ("Agreement") (Doc. 191-1), Defendants have agreed to pay $34 million to settle this case, with $29 million going to the 3,470 member Lump Sum Class and $5 million going to the 976 member Restricted Participant Class. *Id.*, Preamble and §§ 1, 8. Plaintiffs and Class Counsel submit that this is an exceptional result in a case that on multiple levels posed the very real risk that absent a settlement some or all Class members would receive nothing at all or would receive additional benefits only after long delays in amounts less than the amounts guaranteed and immediately available via the proposed settlement. For one or more specialized ERISA reasons or more simply due to the running of the statute of limitations, all Class members faced the prospect of zero recovery or a recovery, after all trial, post-trial and appellate proceedings were concluded, worth less than what can now be had through compromise.

Plaintiffs and Counsel are confident that they could surmount the various defenses, alternative damages methodologies and other obstacles to full recovery that Defendants have put in their way. They firmly believe that they could convince the Court that Defendants' positions lack merit. At the same time, Plaintiffs and Counsel are no less convinced that settling on the terms achieved after two years of hard-fought litigation is in the best interests of the Class.

The proposed settlement would provide Class members with very substantial relief at no risk and without further delay. As previously shown, the $34 million Total Settlement Amount represents an aggregate recovery of between 40% and 80% of the total Class damages, with 40% representing Plaintiffs' realistic best case damages scenario, assuming liability to both Classes, and 80% representing Defendants' estimated liability to the Classes, assuming its preferred damages methodologies were employed.

See Doc. 191 (Pl. Mtn. for Prelim. Approval) at 2. The $29 million recovery for the Lump Sum Class represents a gross recovery of over 52% of what Plaintiffs contend they were underpaid, conservatively calculated to include prejudgment interest compounded from the date of the original underpayment at the IRC § 417(e) rate, which is the rate Plaintiffs and their actuarial experts argued to the Court was necessary to make them whole. *See* Doc. 191 at 2. That rate is higher than the 28 U.S.C. § 1961 rate that courts in the Ninth Circuit presumptively use as the prejudgment interest rate. *E.g., Blanton v. Anzalone*, 813 F.2d 1574, 1576 (9th Cir. 1987) ("this circuit has a strong policy in favor of the [§ 1961] rate"). If prejudgment interest were calculated using the presumptive § 1961 rate, the Lump Sum Class's recovery would represent over 72% of Class damages. *See* Declaration of Eli Gottesdiener ("Gottesdiener Decl.") ¶ 2.[3] That percentage would be even higher if the Court agreed with Defendants' alternative argument that prejudgment interest should only run from the date suit was filed, akin to what the district court in the *AK Steel* whipsaw case did.[4]

Restricted Participant Class members would realize lower recovery ratios under the settlement because, as detailed below, they faced additional obstacles to recovery that the Lump Sum Class did not. A $5 million recovery for the Restricted Participant Class represents a gross recovery of over 31% of what Plaintiffs contend under their realistic best case scenario should be the additional amount, over and above their existing notional account balances, they should be paid if they establish their entitlement to a lump sum and now elect one. *See* Doc. 191 at 2. However, there are upwards of a dozen different ways the parties and their experts calculated Restricted Participant Class damages. *See* Gottesdiener Decl. ¶ 3. Under Defendants' best case scenario (assuming liability), $5

[3] Prejudgment interest is discretionary with the Court. *E.g., Shaw v. Int'l Ass'n. of Mach. & Aero. Workers Pens. Plan*, 750 F.2d 1458, 1465 (9th Cir. 1985). Defendants maintain Plaintiffs should not receive prejudgment interest at all.

[4] *West v. AK Steel, Corp. Ret. Accum. Pension Plan*, No. 1:02-CV-01, 2005 WL 3465637, *7-8 (S.D. Ohio Dec. 19, 2005) (awarding no prejudgment interest prior to the date that the named plaintiff first asserted his claim and § 1961 prejudgment interest for the subsequent period).

million is actually more than 100% of Class damages. *Id.*[5] Under a second defense scenario, $5 million represents approximately 65% of Class damages. *Id.* Under a third defense-oriented outcome, $5 million represents approximately over 45% of Class damages. *Id.*

By any measure, given the difficulties and complexities posed by this case (sufficient to keep both of Plaintiffs' actuarial experts busy much of the time), these are very favorable results for both Classes. This is especially clear when these results are compared to the typical recoveries in the vast majority of class action settlements.[6]

Translated into net pay-outs and assuming approval of the maximum possible requested fees and expenses, the average Lump Sum Class member would receive an additional, tax-qualified payment of $6,140, while the average Restricted Participant Class member would receive an additional payment or credit of $3,760. *See* Doc. 191 at 3. In a case with the very real risk of zero recovery or substantially reduced recoveries only after further delay, these kinds of results alone suggest final approval of the proposed settlement is appropriate.

The Court can be assured that negotiations were both arm's-length and fully informed at the time the settlement was reached: the proposed settlement was reached after two years of full-scale litigation, with the assistance of a professional mediator with expertise in large class action mediation, and only after discovery was complete, the parties had cross-moved for judgments on the pleadings on the merits, and summary judgment briefing was in full swing. It is supported by all named plaintiffs and Class Counsel who are of the view that this is indeed an excellent result for the Class. To date,

[5] The declaration provides more details of the specifics of this and other potential outcomes referenced in the text above.

[6] While Plaintiffs are not aware of statistics available for only ERISA cases, "[t]he typical recovery in most class actions generally is three-to-six cents on the dollar." *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 804 (S.D. Tex. 2008); *see also Recent Trends in Securities Class Action Litigation: 2003 Early Update*, 1430 PLI/Corp. 429, 440, 437 (May 20-21, 2004) ("In 2003, the median percentage of investor losses paid in settlement remained near its all-time low at 2.8%, up from 2.7% in 2002, but down from a high of 7.2% in 1996").

none of the approximately 4,500 total Class Members, persons with a significant stake in the outcome, have objected to any aspect of the settlement, which should be taken as a sign of overwhelming support.

Plaintiffs also request the Court also approve Plaintiffs' request for attorney's fees, reimbursement of expenses and case contribution payments. Class Counsel's fee request of 25% of the $34 million common fund ($8.5 million) seeks the benchmark rate in this Circuit and is fair given the results achieved, the difficulty, complexity and magnitude of the case, and the highly-specialized expertise, time and substantial resources required to prosecute it successfully. Similarly, the named plaintiffs, all of whom were deposed and who ably assisted Counsel, are deserving of the separate additional payment requested for them in light of the services they rendered to the Classes during the two and a half years this case has been pending.

FACTUAL BACKGROUND

A. Plaintiffs' Contentions

This lawsuit covers the period January 1, 1994 through August 17, 2006. Plaintiffs allege that throughout that time period Defendants violated federal pension law by calculating lump sum distributions of participants' pension benefits as the amount equal to the amount of the participant's notional account balance versus the actuarial equivalent present value of the annual benefit commencing at normal retirement age (age 65) the participant could have received under the terms of the Plan. Plaintiffs contend that these incorrect calculations – short-handed by pension practitioners as "whipsaw" violations – adversely affected members of the Lump Sum and Restricted Participant Classes in distinct ways.

1. Lump Sum Class.

Plaintiffs contend that Lump Sum Class members who only received their notional "account" balance did not receive their entire vested, ERISA-guaranteed, non-forfeitable benefit. More specifically, Plaintiffs allege that Defendants underpaid these Class members their benefits because they failed to calculate their lump sums by projecting the

participant's notional account balances to normal retirement age using the Plan's 7%-to-8.65% (increasing by age) interest crediting rate and then discounting the projected retirement age benefits to the present at the statutory ("417(e)") interest rate.[7] As relief, the Lump Sum Class seeks the difference between the amounts paid (the account balance) and the amounts due (the "whipsawed" account balance), plus appropriate prejudgment interest.

2. Restricted Participant Class.

The Restricted Plaintiffs allege that as a direct result of Defendants' failure to perform or properly perform the whipsaw calculation, they and members of the Restricted Participant Class who had accrued a benefit under the traditional, pre-January 1, 1994 Plan (the "old Plan") were improperly restricted after terminating with Avnet from receiving a lump sum. These participants were denied the right to elect a lump sum under Plan § 6.10(B), which provides that a participant is not eligible to "receive a distribution of his Cash Balance Account," (*i.e.*, a lump sum distribution) if "the Actuarial Equivalent of the Pre-1994 Retirement Benefit ... is greater than his Cash Balance Account." Plan § 6.10(B). Plaintiffs contend that had Defendants performed proper whipsaw calculations, there would have been no impediment to the Restricted Participants electing lump sums because the value of their cash balance accounts would have always exceeded the value of their old Plan benefits. As relief, the Restricted Participant Class asks for the right to elect a lump sum now, calculated in accordance with the law as it stood prior to PPA (*i.e.*, using a whipsaw calculation).

B. Defendants' Responses

At the time the agreement in principle to settle this matter was reached, the merits had yet to be decided and Defendants disputed on several different grounds that they were

[7] The class period is January 1, 1994 to August 17, 2006 because January 1, 1994 is the effective date of the Plan's cash balance formula and August 17, 2006 is the effective date of the provision of the Pension Protection Act of 2006 ("PPA") that changed the law to exempt most cash balance plans from the lump sum whipsaw requirement.

liable to either Class, disputed that any relief is available for even established ERISA violations, and argued that damages are a fraction of what Plaintiffs claim, assuming liability were established. More specifically, Defendants dispute: (1) liability as to either Class, on both (i) pre-PPA and/or (ii) post-PPA statutory-merits grounds, and, in the case of the Restricted Participants, (iii) under the terms of the Plan; (2) the availability of damages or monetary relief in the event liability is established; (3) the amount of damages; and (4) that any of the claims asserted are still timely. Additionally, as to the Restricted Participant Class, Defendants dispute (5) that causation or injury can be established or (6) that Restricted Participant claims can be pursued as a class action.

Before outlining the obstacles to full recovery they would face absent a settlement, Plaintiffs reiterate they believe they could overcome all of Defendants' defenses and objections. However, Plaintiffs recognized the risks inherent in passing up a generous settlement in favor of achieving possibly more through continued litigation.

1. Statutorily-Based Merits Defenses – Both Classes.

As to both Classes, Defendants deny that the Plan violated ERISA or paid or calculated lump sums as less than what participants were legally due. Defendants contend that a participant's then-current account balance represented each participant's lawfully calculated lump sum. Defendants acknowledge that four federal appeals court decisions support the whipsaw calculation advocated by Plaintiffs, but they argue that lower courts (including in the referenced circuits) have held that certain types of cash balance plans are not required to make whipsaw calculations,[8] and further argue that no court has yet decided that a plan designed like the Avnet Plan is indeed required to perform whipsaw

[8] Defendants point to *Fry v. Exelon Corp. Cash Balance Pension Fund*, 571 F.3d 644, 646-48 (7th Cir. 2009) (no whipsaw calculation required in light of the design of the cash balance plan at issue) and *Lyons v. Ga.-Pac. Corp. Salaried Employees' Ret. Plan*, 196 F. Supp. 2d 1260 (N.D. Ga. 2002) (no whipsaw calculation required for lump sum distributions made after 2000).

calculations in the manner Plaintiffs claim.[9] As set forth in detail in their motion for judgment on the pleadings (Docs. 136, 142), Defendants argue that the whipsaw calculation, if required at all, could have been performed under the governing Treasury Department regulations in a way which would result in the two principal steps of the calculation cancelling each other out because of the unique way in which the Avnet Plan expresses a participant's "accrued benefit."

Even though Plaintiffs are confident that this Court would agree with their interpretation of the statute and governing regulations, they could obviously not be certain of that nor could they ignore the possibility that the Court of Appeals might side with Defendants. Defendants would presumably emphasize that even if PPA does not eliminate Defendants' potential liability for pre-PPA calculations, Congress' supposed "rejection" of the whipsaw calculation is relevant to the correct interpretation of the statute. Assuming the Court disagreed with Defendants that the Avnet Plan's terms render the whipsaw calculation a "wash," Defendants would almost certainly appeal that ruling, along with the Court's February 2009 denial of Defendants' motion to dismiss on the grounds that PPA eliminated the whipsaw rule retroactively. *See* Doc. 104.[10]

In their summary judgment motion, Defendants also pursued a statutory merits defense, also under PPA, against the Restricted Participant Class, which Defendants maintained was entirely consistent with the Court's ruling in favor of the Lump Sum Class on the PPA retroactivity point. Doc. 161 at 14. Defendants argued PPA rather than the

[9] Defendants point to the Sixth Circuit's decision in *West v. AK Steel Corp. Ret. Accum. Pension Plan*, 484 F.3d 395 (6th Cir. 2007) which recognized a potential interpretation of ERISA akin to the one Defendants offer here but which the Court of Appeals in that case concluded it had no need to reach. *Id.* at 408-09.

[10] Even if the Ninth Circuit agreed with this Court that the statute was not retroactive, it could adopt a middle-ground approach that would still effectively deprive Plaintiffs of any meaningful remedy: it could hold that the new law still allowed a participant receiving less than the actuarial equivalent of his normal retirement benefit to re-make his original benefit elections and exchange the lump sum received for an annuity but that it absolved the Plan from making any curative monetary "distributions" on an going-forward basis to right past whipsaw wrongs. Such an outcome would defeat Plaintiffs' right of recovery just as surely as if the statute were retroactive.

pre-PPA statute controls due to the very nature of the Restricted Participants' claims: in their case, there *were* no pre-PPA "distributions" as there were in the case of the Lump Sum Plaintiffs. *Id.* Again, even if this Court rejected Defendants' distinction as one without a difference for these purposes, it was a non-frivolous position that could have prevailed in the Court of Appeals.

2. Plan-Based Merits Defenses – Restricted Participant Class.

As to the Restricted Participants' claims, Defendants argue that even if Plaintiffs prevail on their whipsaw arguments, Restricted Class members would have still been ineligible for a lump sum even if whipsaw were required during the relevant time because the term "Cash Balance Account" in § 6.10(B) refers only to the *bookkeeping entry* notional account balance, not the *value* of the cash balance account (under either the Plan or as a matter of law). In other words, Defendants argue that the whipsaw calculation is irrelevant to Plan § 6.10(B) because it is a provision merely governing *eligibility* for a lump sum, not the manner in which the *amount* of the lump sum is to be calculated. Doc. at 11-13. Moreover, Defendants argue that to the extent Plan § 6.10(B) is ambiguous, the Plan's interpretation of it is entitled to deference. *See id.*; Doc. 66 at 6-9; Doc. 73 at 1-4.

While Plaintiffs dispute that this even properly frames the question, there is no dispute that benefit claims based on an interpretation of an ambiguous provision of a plan document are notoriously difficult to win where, as here, the plan document gives discretion to interpret the document to a designated fiduciary.[11]

3. Statute of Limitations Defenses – Both Classes.

Defendants also argue that all claims of both Classes are time-barred. With respect to the Lump Sum Class, Defendants contend the statute of limitations began running on the date that each class member received his or her lump sum payment; that ERISA

[11] *See, e.g., De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989) (deferring to plan in rejecting early retirees' claim that its use of the term "Actuarial Equivalent" entitled them not only to a lump sum that was the actuarial equivalent of an annuity commencing at normal retirement, but also (if more favorable) the actuarial equivalent of an immediate annuity).

borrows the relevant limitations period from Arizona law; and that the applicable Arizona limitations period is the one-year period that Arizona applies to claims for breach of employment contract. *See* Doc. 161 at 1-9.

Plaintiffs disagree with each of these contentions. *See* Pl. SJ Mtn. (Doc. 169) at 11-17. However, there are cases, including cases raising whipsaw claims, where courts have found that the limitations period on a miscalculation claim invariably begins to run on the date of payment. *See* Doc. 161 at 2-4. Coupled with a ruling that the one-year breach of employment contract statute supplies the borrowed limitations period, not a single claim would have survived since the class period ends in August 2007 and this case was not filed until September 2007.[12] Even if the Court rejected a one-year rule in favor of a six-year rule (an outcome it could reach under either Arizona or Ohio law), Class damages would have been cut in half if the limitations period began to run on the date of payment.[13]

Given the current trend in the case law, and the size of the recovery on offer, Plaintiffs and Counsel decided not to "roll the dice" on the statute of limitations because

[12] If the Court agreed with Defendants that under Ninth Circuit precedents, Arizona rather than Ohio law, supplies the borrowed limitations period, it could have also agreed that Arizona's one-year statute of limitations for breach of employment contracts was the most analogous state statute, as Defendants argue the court held in *Fallar v. Compuware Corp.*, 202 F. Supp.2d 1067 (D. Ariz. 2002). *See* Doc. 161 at 5-9. Defendants argued that because no party raised the applicability of the breach of employment contract statute in *Loewy v. Ret. Comm.*, No. 03-CV-2284-PHX-FJM, Doc. 103 (D. Ariz. Mar. 30, 2005), *Loewy*'s holding that the benefit claims in that case were governed by the six-year contract limitations period should be revisited, especially in light of the fact that both federal appeals courts that have addressed whether the general limitations period for breach of contract claims or the more specific limitations period for employment disputes should govern an ERISA claim concluded that the more specific period applied. *See Syed v. Hercules, Inc.*, 214 F.3d 155 (3d Cir. 2000) (borrowing Delaware's one-year limitations period for employment disputes); *Adamson v. Armco, Inc.*, 44 F.3d 650 (8th Cir. 1995) (borrowing Minnesota's two-year period for wage claims).

[13] In November 2008, the Sixth Circuit effectively overturned prior precedents applying the 15 year limitations period identically supplied by Ohio and Kentucky law in favor of the six-year (Ohio) or five-year (Kentucky) statute of limitations for "[a]n action upon a liability created by statute, when no other time is fixed by the statute creating the liability." *Redmon v. Sud-Chemie*, 547 F.3d 531 (6th Cir. 2008) (citing KRS § 413.120(2)). Although Plaintiffs believe the case wrongly decided, attempts to show courts bound by it that it can be distinguished have thus far not succeeded. *See Moody v. Turner Corp.*, No. 1:07-cv-692, Doc. 25, at 26 (S.D. Ohio Aug. 6, 2008).

success (*i.e.*, doing better than $34 million) depended on all stars aligning just so, *i.e.*, on Plaintiffs prevailing on almost every **other** argument they made, through summary judgment, trial/post-trial proceedings and appeal.[14] Others may have pressed on but when it became clear just how much Defendants were willing to pay to avoid the risk of even greater liability, Plaintiffs and Counsel decided at that point that compromise was the better part of valor.[15]

4. Damages Defense – Both Classes.

Plaintiffs also faced objections from the defense that their experts' damages methodologies were flawed and considerably overstated Defendants' exposure. Because of the unique way in which the Avnet Plan was designed (*i.e.*, to cosmetically resemble the typical cash balance plan but to exactly reproduce the ***pre***-cash balance plan's substantive formula, *see* Doc. 167-2 (expert report)), there was an almost dizzying number of disputes over the ways damages could be calculated for each of the two Classes. The parties disputed , for example, whether to apply a "full," "partial" or no pre-retirement mortality discount ("PRMD") in calculating lump sums, whether to use an "underpayments" or a "partial payments" approach for calculating Lump Sum Class member damages, *see* Doc. 167 at 4 (expert declaration in support of Plaintiffs' summary judgment motion), and how to compute damages for Restricted Participants who might have elected to take a lump sum had they had the right to do so earlier. *Id.* at 5-6. Like the prejudgment interest issue, each of these and other disputes did not necessarily admit

[14] Plaintiffs note that some 425 Lump Sum Class members were also facing a one-year limitations period by virtue of the fact that they signed "Mutual Agreement to Arbitrate Claims" forms in exchange for being hired that contained a one-year contractual statute of limitations. Doc. 161 at 9-10.

[15] The Restricted Participants also faced limitations arguments that could have eliminated their claims entirely. Specifically, Defendants argued that the Restricted Participants' claims are time-barred almost no matter what limitations period applies because the restriction was clearly disclosed to participants in the Plan SPD and in post-termination letters Defendants sent to Class members specifically informing them of the restriction and the basis for it. *See* Doc. 161 at 11. Again, Plaintiffs have shown why Defendants' arguments are wanting, *see* Doc. 169 at 11-17, but could not ignore the possibility they would persuade this Court or the Court of Appeals.

of a binary choice; depending on how the calculations were performed, for what period, and using what interest rates, the possible outcomes differed markedly. *Id.*

5. Lack of Causation/Injury Defenses – Restricted Participant Class.

As noted above, Restricted Participant Class members faced an additional set of challenges that made recovery arguably doubtful. As explained below, these challenges – which Defendants articulated as alleged absences of "proof of causation and/or injury," Doc. 161 at 13-16 – included a request that that the Court decertify the Class, *id.* at 16, which if granted would have doomed their chances of recovery.[16]

To understand Defendants' objections, one must start with the Restricted Participant Class's definition. The Court's certification order defined the Restricted Participant Class as the class of participants who were not offered a lump sum payment "because the Plan determined that the present value of their pre-1994 benefit exceeded their Cash Balance Account." Doc. 141 at 10. Defendants contend there are only 458 such persons, not 976 as Plaintiffs claim. Doc. 161 at 16-17.[17] Defendants argue that the other 518 Avnet's records indicate that such determinations were made for only 458 participants and that accordingly, these 458 participants are the only participants who meet the Class definition adopted by the Court. *Id.* Absent the settlement, Plaintiffs would have continued to argue that the other 518 participants are and were included because they were subject to Section 6.10(B). But Defendants argue there is no evidence that any of these 518 participants were denied a lump sum payment "because the Plan determined that the present value of their pre-1994 benefit exceeded their Cash Balance

[16] Defendants vigorously opposed class certification for the Lump Sum Class but took no position as to the Restricted Participant Class pending the outcome of their motion to dismiss the Restricted Participant Plaintiffs' claims for failure to exhaust the Plan's internal claims process prior to filing suit. *See* Doc. 92 at 15; *see also* Cert. Order (Doc. 141) at 8. Under Rule 23, a party can request decertification at any time prior to final judgment. Fed. R. Civ. P. 23(c)(1)(C).

[17] Once the Agreement to settle was reached, the parties jointly requested, via Plaintiffs' motion for preliminary approval, that the Court modify the definition of the Class to make clear that it was as broad as Plaintiffs alleged so all Class members under Plaintiffs' reading of the Order could participate in the settlement. *See* Doc. 191 at 8-9. The modified definition was approved and is set forth in the Preliminary Approval Order and all notices to the Restricted Participant Class.

Account." Rather, Defendants argue that the reason these participants did not receive a lump sum payment is because they never *asked* for one. As a result, Defendants argue, these participants are not members of the Class. Doc. 161 at 16-17. The settlement provides for a recovery for all 976 members that Plaintiff claims are in the Restricted Participant Class, not just the 458 participants that Defendant contends are in the class.

Defendants also argue that with few exceptions, even the 458 individuals who they agree are properly included in the Class cannot prove that they were actually injured by Plan § 6.10(B). Doc. 161 at 13-16. Defendants argue that the Plan § 6.10(B) restriction inflicted no injury on these participants unless they would have elected a lump sum payment in the absence of the restriction, a matter which Plaintiffs could not have proved on a class-wide basis. *Id.* Defendants thus contend that virtually all Restricted Participant claims would have failed for lack of proof of causation and injury, and/or because they would need to be pursued individually if at all. *Id.*

C. Case History, Settlement Negotiations, Settlement Terms, and Proposed Plans of Allocation.

The case history, the negotiations leading to the Agreement, the terms of the Agreement and the proposed Plans of Allocation are all set forth in considerable detail in the motion for preliminary approval, which discussions are respectfully incorporated as if set forth fully here by reference. *See* Doc. 191 at 4-16.

ARGUMENT

I. THE SETTLEMENT SHOULD BE APPROVED

Federal Rule of Civil Procedure 23(e)(1) requires the Court to determine whether a settlement is "fair, reasonable, and adequate." In making this determination, the Court should assess the following factors:

> [1] the strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel ... and [7] the reaction of the class members to the proposed settlement.

Stanton v. Boeing Co., 327 F.3d 938, 959 (9th Cir.2003) (*quoting Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir.2003)).[18] When examined under these criteria, the Settlement is not only fair, reasonable, and adequate, but an excellent result for the Classes.

a. The Strength of Plaintiffs' Case and the Risk of Continued Litigation

As shown above, while both Classes' claims (in particular the Lump Sum Class claims) are strong, Plaintiffs face numerous hurdles before they can establish liability or damages in an amount higher than the amount they can obtain now, risk-free. All Class members face the substantial risk of non-recovery or greatly diminished recovery in the absence of a settlement. The proposed settlement would remove those risks and provide substantial benefits to both Classes immediately. This weighs heavily in favor of approving the proposed settlement.[19]

b. The Expense, Complexity and Likely Duration of Further Litigation

This case is one of undeniable complexity involving the legal adequacy of tens of millions of dollars of lump sum payments made or not made over the course of a twelve year period to some 4,500 participants. Liability, damages, and limitations are disputed and despite the very considerable time and resources thus far devoted by both sides to the litigation and internal assessment of liability and damages, further time-consuming, costly, and complicated proceedings would be required to obtain judicial resolution and closure. The outcome would likely turn on esoteric actuarial concepts or the interpretation and application of ambiguously worded Treasury regulations.

Even if matters largely went Plaintiffs' way, it is possible Plaintiffs will not have

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[18] In addition, the settlement must not be the product of collusion among the parties. *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir.2000).

[19] *See, e.g., National Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 558, 526 (C. D. Cal. 2004) ("The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, 'it has been held proper to take the bird in hand instead of a prospective flock in the bush.'") (citations and quotations omitted).

established that their losses exceeded the $34 million settlement amount to which the parties have agreed. Defendants, represented by highly experienced and competent counsel, have forcefully defended their actions and have indicated that they would continue their defense up through trial and a probable appeal regardless of the trial's outcome. Delay, not just at the summary judgment and trial stage but through post- trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value. Settlement eliminates those risks.[20]

c. The Risk of Maintaining Class Action Status

This is a very significant issue for the Restricted Participant Class. Thus, this factor also favors approval of the proposed settlement. Defendants would definitely challenge the suitability of the certification of Restricted Participant Class absent a settlement.

d. The Amount Offered in Settlement

$34 million is a significant sum, the net proceeds of which will be available to Class members on a tax-qualified basis. A recovery of 40% in the aggregate of damages under Plaintiffs' realistic best case scenario is a remarkable result well in excess of the range that courts traditionally have found to be fair and adequate under the law. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement comprising 16.6% of plaintiffs' potential recovery).

e. The Extent of Discovery Completed and the Stage of the Proceedings

The purpose of considering the extent of discovery and the stage of proceedings is to ensure that the litigants had access to sufficient information to evaluate the case and determine the adequacy of the proposed settlement. The advanced stage of the proceedings at which this settlement was reached – after more than two years of hotly contested litigation – militates in favor of final approval of the settlement.

[20] *Draney v. Wilson, Morton, Assaf & McElligott*, Civ. 79-1029, 1985 WL 5820, *1 (D. Ariz. Sept. 30, 1985) ("settlement at this stage obviates the need for lengthy and expensive trial (and possibly appellate) proceedings which might well diminish any net recovery to the class").

The proposed settlement was reached only after: (a) exhaustive investigation and analysis of thousands of Defendants' documents (and benefits data and calculations); (b) the drawing-up of a detailed, 40-page amended complaint; (c) the taking of 13 fact depositions; (d) the exchange of opening and rebuttal expert reports and extensive internal analysis of multiple competing and alternative calculations methodologies, together with the implications for liability and damages; (e) 3 expert depositions; (f) successful challenges to many of Defendants' withholdings and apparent failures to produce requested documents and the resolution on highly favorable terms of another discovery-related dispute for which the parties engaged the services of a private mediator; (g) extensive written discovery, with Plaintiffs propounding, and ultimately obtaining responsive answers to, carefully-drawn interrogatories and requests to admit; (g) full briefing on three rounds of dispositive motions; and (h) the filing of opening summary judgment cross-motions encompassing all issues of liability, damages, statute of limitations and the continued viability of certification of the Restricted Participant Class. *See* Gottesdiener Decl. ¶ 4. After the close of discovery, the parties engaged the services of one of the country's leading class action mediators, and, once their cross-motions for summary judgment had been filed, extensively prepared for the mediation. *Id.* ¶ 5. This preparation included more consultation with the experts, informal exchanges of further analyses of Defendants' exposure under multiple scenarios, and the exchange of formal submissions to the mediator surveying the legal, factual and numerical fields of battle. *Id.*

In sum, no stone was left unturned: Plaintiffs had a thorough understanding of the strengths and weaknesses of the parties' claims and defenses before the agreement in principle to settle this matter was reached.[21]

f. Experience and View of Counsel

As the Court knows from direct experience as well as from the declarations counsel

[21] *See Draney*, 1985 WL 5820, *1 ("[e]xtensive discovery has allowed the Court an excellent evidentiary basis upon which to decide whether the settlement is fair").

submitted in support of their motion for class certification and appointment of class counsel, *see* Docs. 89-91, Class Counsel have extensive experience in ERISA class action litigation and were well equipped to negotiate a fair settlement for Plaintiffs and the two Classes. It is the view of experienced counsel that the proposed settlement is an excellent result for the class. Class Counsel's opinion deserves great weight both because of their familiarity with the litigation and because of their extensive experience in similar actions.[22]

g. The Reaction of Class Members to the Proposed Settlement

The reaction to date of Class members to the proposed settlement further supports final approval. Notice was sent to the class more than seven weeks ago and no Class Member has filed any objections so far. To the contrary, the Settlement Administrator and Class Counsel and their firms have received calls, letters and emails from hundreds of Class members, none of whom have expressed objections or reservations as to any aspect of proposed settlement. Gottesdiener Decl. ¶ 6; Declaration of Eric Miller, Rust Consulting, Inc. ("Rust") ¶ 4. Under the Preliminary Approval Order, the deadline for filing and service of objections is February 19, 2010. Class Counsel will respond to any objections they receive prior to the Fairness Hearing if there are any.

II. THE PLANS OF ALLOCATION SHOULD BE APPROVED

Plaintiffs also seek approval of the Plans of Allocation described in detail in Plaintiffs' motion for preliminary approval. Doc. 191 at 11-16. After consultation with the named plaintiffs and their actuarial experts, Plaintiffs and Class Counsel recommend apportioning the Lump Sum Class's settlement proceeds between four distinct subgroups of participants based on their respective risk of possible non-recovery resulting from Defendants' statute of limitations defenses. *Id.* at 11-14. Plaintiffs and Class Counsel recommend weighting the Restricted Participant Class's proceeds more heavily to those

[22] *National Rural Telecomms. Coop.*, 221 F.R.D. at 528 ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation").

Class members who can show via Defendants' records that they made affirmative inquiry into the possibility of receiving a lump sum versus those who cannot to reflect their respective risks vis-à-vis Defendants' lack of causation/lack of injury/class certification defenses.

Assessment of a plan of allocation under Rule 23 is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284, 1292 (9th Cir. 1992). The proposed allocation formulas, which were set forth and explained in the Mailed Notices, meet this standard and should be approved.

III. THE NOTICE PROVIDED THE CLASSES WAS ADEQUATE.

Plaintiffs previously demonstrated to the Court's satisfaction that the form and content of both the mailed individualized notice to both Classes ("Mailed Notice") and a general publication notice for the Lump Sum Class ("Publication Notice"), attached to the Agreement and motion for preliminary approval and incorporated by reference in the Court's Order granting preliminary approval, complied with the standards of due process and Rule 23. *See* Preliminary Approval Order (Doc. 192) at 6. The attached declaration of Mr. Miller of Rust Consulting, appointed by the Court to distribute the Mailed Notice to the Lump Sum Class, confirms that the Mailed Notice went out as the Court directed and that as of February 2, 2010 only 13 packets are undeliverable. Miller Decl. ¶¶ 1-6.[23] Mr. Miller also confirms the publication of the Publication Notice in *USA Today*. *Id.* ¶ 7. He additionally confirms the establishment of the Class Member website and toll-free number and provides statistics as to their usage. *Id.* ¶¶ 8-10. Defendants will be separately filing proofs that the Mailed Notice to Restricted Participants was timely distributed.

In sum, the Court should confirm the adequacy of the notice and grant final approval to the proposed settlement in all respects.

[23] Class Counsel is working with Rust to resolve these 13 cases.

IV. CLASS COUNSEL'S REQUEST FOR ATTORNEY'S FEES AND EXPENSES SHOULD BE APPROVED

A. Introduction

Assuming the settlement is approved, Class Counsel request an award of attorney's fees of $8.5 million, based on a 25% share of the $34 million Total Settlement Amount pursuant to the common fund doctrine and percentage-of-the-fund method. Counsel submits for the reasons set forth below that the requested award is fair and reasonable given the results achieved in light of the risks run, the difficulty, complexity and magnitude of the case, and the highly-specialized expertise, time and substantial resources required to prosecute it successfully. Counsel also request that the Court authorize reimbursement from the common fund for the reasonable and necessary expenses advanced to prosecute this litigation since its inception in September 2007, and the assessment of administrative costs associated with the distribution of the Lump Sum Class net settlement benefits from the Lump Sum Class proceeds. (Defendants agreed to absorb all such costs with respect to the Restricted Participant Class).

B. The Common Fund Doctrine Applies.

For over a century, the Supreme Court has recognized the "common fund" exception to the general rule that a litigant bears his or her own attorney's fees. *Trustees v. Greenough*, 105 U.S. 527 (1882). The rationale for the common fund principle was explained in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), as follows:

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole... Jurisdiction over the fund involved in the litigation allows a court to prevent ... inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Id. at 478. The purpose of this doctrine is to avoid unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*In re WPPSS*").

This is a common fund case because, with the case settling, the statute's fee shifting provision (ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1)) is inapplicable, yet Class Counsel's efforts have conferred a substantial benefit on thousands of Class members through the creation of the settlement fund. The common fund doctrine applies where, as here, an identifiable fund has been created that confers a substantial benefit upon a class of beneficiaries and "each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum [settlement] recovered on his behalf." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989) (quotation omitted). The right to recovery of common fund fees under statutes like ERISA (where a fee shifting statute is also present) is well-settled. *Staton*, 327 F.3d at 967; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (ERISA case).

C. The Court Should Adopt the Percentage-of-the Fund Approach

Although it is well settled in the Ninth Circuit that a court has discretion to award either a percentage-of-the-fund or a lodestar/multiplier fee, *see, e.g., In re WPPSS,* 19 F.3d at 1295, courts predominantly use, and strongly prefer, the percentage method. *In re Omnivision Tech., Inc.*, No. C-04-2297 SC, 2007 WL 4293467, *8 (N.D. Cal. Dec. 6, 2007). There are three basic reasons why the percentage method is rightly perceived as superior to the lodestar/multiplier method. *First*, the percentage method is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery. *See, e.g., In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1374-77 (N.D.Cal.1989). *Second*, it more closely aligns the lawyer's interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. *Id.* By contrast, as the Ninth Circuit has observed, "the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee." *Vizcaino,* 290 F.3d at 1050.[24] *Third*, use of the percentage method decreases the burden imposed on the

[24] *Accord Manual for Complex Litigation (Fourth)* § 14.121 (2004) ("in practice, the lodestar method is difficult to apply, time consuming to administer, inconsistent in result, ... capable of manipulation, ... [and] creates inherent incentive to prolong the litigation").

court by eliminating the detailed and time-consuming lodestar analysis while assuring that the beneficiaries do not experience undue delay in receiving their share of the settlement. *In re Activision Sec. Litig.*, 723 F. Supp. at 1375.

D. A 25% Award of the Fund Created Is Reasonable in This Case

Assuming the Court elects to employ the percentage method, its determination of what constitutes a fair and reasonable percentage of the settlement fund for awarding fees should be made with reference to the 25% "benchmark" established by the Ninth Circuit. *Paul, Johnson*, 886 F.2d at 272. The Ninth Circuit has said that while the 25% benchmark rate "can be adjusted upward or downward to account for any unusual circumstances . . . [s]uch an adjustment, however, must be accompanied by a reasonable explanation of why the benchmark is unreasonable under the circumstances." *Id.* at 272-73.

Here, there is no basis to conclude the benchmark would be unreasonable. To the contrary, the benchmark under the circumstances is eminently fair in light of the benefits conferred through Counsel's efforts, the financial and other risks and burdens assumed, the skill and tenacity Counsel exhibited, and the fact that a 25% fee is at or below the percentage that has been repeatedly awarded by the courts in this Circuit and elsewhere (as shown below). Here, in view of the risks faced and overcome, the excellent recovery obtained for the Classes under difficult circumstances, the quality of representation and the financial commitment of Counsel, an award of 25% of the common fund Counsel's effort created for the two Classes is appropriate.

This is confirmed by reviewing the five factors the Ninth Circuit has articulated as pertinent criteria for deciding the reasonableness of a requested award: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the representation; (4) the contingent nature of the fee and the financial burden carried by plaintiffs' counsel; and (5) awards made in similar cases. *See, e.g., Vizcaino*, 290 F.3d at 1048-50. Each factor here weighs in favor of granting the requested award.

a. Results Achieved

The results achieved here are excellent. *See, e.g., In re Heritage Bond Litig.*, No.

02-ML-1475, 2005 WL 1594403, *8 (C.D. Cal. June 10, 2005) (settlement which equaled 36% of the class' losses was an "exceptional result" justifying a 33.3% award of the $28 million common fund).

b. Risks of Litigation

The risks undertaken in mounting this litigation were considerable. While most ERISA class actions are difficult to prosecute, this case was one of unusual complexity and risk. *See In re Pacific Enters. Sec. Litig*.**,** 47 F.3d at 379 (affirming award of 33.3% of $12 million recovery in shareholder litigation that counsel justified due to the complexity of issues and attendant risks). Moreover, Counsel knew, given the stakes, that whichever law firm was going to represent Defendants would be well-financed and well-versed in these matters. As it happened, the case was defended by two firms which, together, aggressively challenged every aspect of Plaintiffs' case. The Covington lawyers in particular, having previously spent years litigating, advising and lobbying on behalf of cash balance plan sponsors, were passionately committed to their clients' cause and leveraged their experience to maximum effect.

c. Skill of Counsel

Any attorney who intends to successfully prosecute any class-wide statutorily-based claim for pension benefits – cash balance or otherwise – must not only have the litigation skills required for any complex class action, but must obtain a substantive command of actuarial science and significant portions of ERISA, the Internal Revenue Code, regulations and regulatory guidance issued by the Department of the Treasury, the IRS and the Department of Labor and their interrelationships. These skills and knowledge base are possessed by a very small number of plaintiffs' counsel. Even for such counsel, *cash balance* litigation is uniquely complicated, as Judge Kravitz in the District of Connecticut recently summed up the unusual complexity of cash balance litigation as part of his 122-page cash balance decision in *Amara v. Cigna Corp*., 534 F.Supp.2d 288 (D. Conn. 2008), by observing: "ERISA, and the regulations under it, are often lamentably obscure – to describe them as a tangled web does not do them justice." *Id.* at 296.

d. Contingent Nature of the Fee and Financial Burdens Borne

In the two and a half years since this case was filed, the three firms representing Plaintiffs (principally, the Gottesdiener Law Firm – effectively "lead counsel" here) have spent over 6049.05 hours litigating this case, without receiving any compensation, foregoing other financial opportunities and advancing $400,000 in expenses related to prosecution of this action with no guarantee that these monies would ever be recovered. All of "[t]hese burdens are relevant circumstances" that support the requested award. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993) (approving 25% fee award from $30 million common fund).

e. Fee Awards in Similar Cases

Courts often look to fees awarded in comparable cases to determine if the fee requested is reasonable. *See Vizcaino.*, 290 F.3d at 1050 n.4. Numerous awards have been made at the benchmark rate, including in ERISA cases. *E.g., Allen v. Honeywell Ret. Earnings Plan*, 2:04-cv-00424- PHX-ROS, Doc. 402 (D. Ariz. Feb. 7, 2008) (ERISA case awarding 25% of common fund); *Loewy v. Ret. Comm.*, No. 03-CV-2284-PHX-FJM, Doc. 103 (D. Ariz. Oct. 7, 2005) (same); *In re Calpine Corp. ERISA. Litig.*, No. 03-01685 (N.D. Cal. Oct. 23, 2008); *In re Providian Fin. Corp.*, No.. 01-5027, 2003 WL 22005019, *2 (N.D.Cal. June 30, 2003). By contrast, Plaintiffs are not aware of any case in this Circuit comparable to this one in which a court has departed downward from the 25% benchmark rate based on a finding that the benchmark rate would be "unreasonable." *Paul, Johnson*, 886 F.2d at 273. Indeed, given the very high comparative recovery ratios Counsel's efforts obtained here, Plaintiffs submit it would be unreasonable to award Counsel less than 25% of the common fund.

This is especially true given that frequently, in cases of comparable complexity, risk and success, fees have been awarded at rates higher than the benchmark rate, including in ERISA cases in the Ninth Circuit. *See, e.g., Vizcaino*, 290 F.3d at 1050 (ERISA case awarding 28% of the $97 million common fund); *Blyler v. Agee*, No. 97-0332 (D. Idaho Aug. 25, 2004) (ERISA case awarding 30% of the common fund);

Keehner v. Retirement Plan for Non-Bargaining Unit Employees, 3:03-cv-01973 (N.D. Cal. Oct. 1, 2004) (ERISA case awarding 29.8% of the common fund created).[25] Moreover, outside of this Circuit in analogous ERISA cases, the awards are typically at or higher than the benchmark rate. *See, e.g., Clevenger v. Dillards, Inc.*, No. C-1-02-558, 2007 WL 764291 (S.D.Ohio Mar. 9, 2007) (ERISA case awarding 29% of $35 million common fund); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499, *3 (E.D.Mich. June 27, 2006) (28.5% of $28 million fund, plus interest); *Millsap v. McDonnell Douglas Corp.*, No. 94-CV-633-H(M), 2003 WL 21277124, *15 (N.D.Okla May 28, 2003) (25% of $36 million common fund). These facts support a finding that Counsel's request is reasonable.

f. Reaction of the Class

Although not articulated specifically in *Vizcaino*, district courts in the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *See In re Heritage Bond Litig.*, 2005 WL 1594389, at *15. Here, the reaction of Class members, which has thus far been uniformly positive toward the settlement, also supports the requested fee. Mailed notice of the proposed settlement and possible attorney's fee award to all approximately 4,500 members of the two Classes members included a court-ordered procedure by which an individual Class member could object to the fee requested by Class Counsel. There are only two weeks remaining for Class members to file objections and the lack of objections to Counsel's fee application to date suggests the requested fee is fair.

A low rate of objections is especially significant in this case for two reasons. First, in the Notice, Class members were shown their estimated benefit, told it assumed a 25% attorney's fee award, that they could object to the request and that their benefits would be

[25] *See also Williams v. MGM-Pathe Comm. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (33.3% awarded); *In re Cons. Pinnacle West Sec. Litig.*, No. CIV-88-1830-PHX-PAR (D. Ariz. Dec. 30, 1993) (35%); *Draney v. Wilson, Morton, Assaf & McElligott, supra*, Civ. 79-1029 (D. Ariz. 1985) (33.33%); *In re AMERCO Sec. Litig.*, No. 04-2182-PHX-RJB (D. Ariz. Nov. 2, 2006) (30%).

increased proportionately to the extent Counsel's fee decreased. *See* Miller Decl., Ex. 1. Second, mailed notice to the 3,470 Lump Sum Class members achieved a remarkably high success rate (Defendants will present the data as to the mailing to the 976 Restricted Participant Class members), especially compared to class actions in which class members are unknown, direct notice is impossible, and notice is instead provided solely through public outlets. Coupled with extremely low number of objections, the high rate of success of the Class notification would strongly support the reasonableness of the requested fee because it would show not just satisfaction with the settlement result, but implicit agreement with its terms, including the Class's willingness to see Counsel rewarded for his efforts with the percentage requested.

E. The Lodestar Method Confirms the Requested 25% Common Fund Award is Reasonable.

The Ninth Circuit has held that the court may, but is not required to, compare counsel's lodestar and the 25% benchmark in determining the reasonableness of the requested award. *See Vizcaino*, 290 F.3d at 1048-50.[26] The cross-check is not designed to be a "full-blown lodestar inquiry," but rather an estimation of the value of counsel's investment in the case. *See Vizcaino*, 290 F.3d at 1050 (lodestar cross-check "may provide a useful perspective" on a fee award's reasonableness but "the primary basis of the fee award remains the percentage method"); Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340, 422-23 (2002) (noting that "[t]he lodestar remains difficult and burdensome to apply, and it positively encourages counsel to run up the bill, expending hours that are of no benefit to the class").

The cross-check analysis is a two-step process. First, the lodestar is determined by multiplying the number of hours reasonably expended by the reasonable rates requested by the attorneys. *See Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th Cir. 2000). Second, the court determines the multiplier required to match the lodestar to the

[26] *See also Glass v. UBS Financial Services, Inc.*, No. C-06-4068 MMC, 2007 WL 221862, *16 (N.D.Cal.2007) (electing not to perform cross-check; awarding 25% of $45 million common fund), *aff'd* 2009 WL 1360920 (9th Cir. May 14, 2009).

percentage-of-the-fund request made by counsel, and determines whether the multiplier falls within the accepted range for such a case. Here, the lodestar cross-check confirms that the 25% request is reasonable.

Lead Class Counsel has submitted, along with his declaration, the detailed time entries for each of the three firms appointed by the Court to represent the two Classes in this action. *See* Gottesdiener Decl., Ex. 1. The total number of hours billed by Class Counsel and their respective firms as of the date of this filing (thus excluding the future settlement administration work that will be necessary following final approval) is 6049.05 hours. Plaintiffs submit the amount of time Counsel and their firms have billed is appropriate and reasonable in the light of scope and complexity of this case.

Plaintiffs also submit that Counsel's billing rates, ranging from between $290 and $625 per hour, based on each attorney's experience, position, and location are reasonable. Gottesdiener Decl. ¶ 12. These rates were established based on each attorney's experience, position, and location. *Id.* The billing rates for paralegal and law clerks range from between $125 and $190 per hour. *Id.* These rates are the normal hourly rates that Counsel has frequently been awarded in prior fee petitions and the same rates that Counsel charge private clients on the occasions that they do retained work. Gottesdiener Decl. ¶¶12-16; *see also Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal.2008). They reflect the market for attorneys of comparable skill, experience and expertise in complex federal litigation. *Id.* ¶¶ 14-16; *Craft,* 624 F. Supp. 2d at 1125. The court in *McAfee v. Metropolitan Life Ins. Co.,* 625 F.Supp.2d 956 (E.D.Cal. 2008), summarized the law as regards the determination of the appropriate hourly lodestar rate to apply in an ERISA action, as follows:

> "[T]he established standard when determining a reasonable hourly rate is the 'rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.'" *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir.2008) (quoting *Barjon v. Dalton,* 132 F.3d 496, 502 (9th Cir.1997)). 'Generally, the relevant community is the forum in which the district court sits," *Barjon,* 132 F.3d at 500, although "it is appropriate to consider ... other jurisdictions because ERISA cases involve a national standard, and

> attorneys practicing ERISA law in the Ninth Circuit tend to practice in different districts," *Mogck v. Unum Life Ins. Co. of Am.*, 289 F.Supp.2d 1181, 1191 (S.D.Cal.2003). "[A]ffidavits of the plaintiff['s] attorney[ ] ... and rate determinations in other cases ... are satisfactory evidence of the prevailing market rate." *Id.* at 980 (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir.1990)).

Id. at 975. Counsel's declaration – and the declarations it incorporates by reference (*see* Gottesdiener Decl. ¶ 10) from some of the few other practitioners nationwide who handle complex ERISA class cases such as this one and have also repeatedly had their comparable rates approved – provides satisfactory evidence that Counsel's rates are in line with prevailing market rates for similar services by similarly qualified counsel.[27]

Thus, as of the date of this filing, Counsel's combined total lodestar for this case is $2,484,986, resulting in an implied multiplier, via Counsel's request for an amount equal to 25% of the common fund, of 3.42.

The Ninth Circuit has recognized that where a lodestar analysis is employed to calculate attorney's fees or used as a "cross-check" for a percentage of recovery analysis, counsel are entitled to a multiplier of their lodestar rate to compensate them for the risk assumed, the quality of their work, and the result achieved for the class. *In re WPPSS*, 19 F.3d at 1299-1300. In cases presenting similar result/risk profiles, courts in this Circuit have repeatedly awarded class counsel multipliers that equaled or exceeded the multiplier requested here. *See, e.g., Vizcaino*, 290 F.3d at 1051 (ERISA case approving 28% award of $97 million common fund resulting in a multiplier of 3.65); *Steiner v. American Broadcasting Co., Inc.*, 248 F. App'x 780, 783, 2007 WL 2460326, at *2 (9th Cir. 2007) (approving 25% award and multiplier of approximately 6.85, finding it "well within the range of multipliers that courts have allowed"); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal.2008) (approving 25% fee award resulting in a multiplier

[27] The rates used are current rates because the courts have repeatedly endorsed the use of current rates for the calculation of lodestar fees as a means of accounting for the delay in payment inherent in class actions and for inflation. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989).

of 5.2, and collecting similar cases); *Van Vranken* v. *ARCO*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) (approving 25% fee award resulting in a multiplier of 3.6); *Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (awarding attorney fee multiplier of 3.5).

Other ERISA cases outside the Ninth Circuit confirm that a multiplier of 3.42 is reasonable. *See In re Household Int'l Inc. ERISA Litig.*, No. 02-7921 (N.D. III. Nov. 22, 2004) (4.8 multiplier); *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F.Supp.2d 980 (D.Minn.2005) (4.7 multiplier); *Kolar v. Rite Aid Corp*, No. 01-CV-1229, 2003 U.S. Dist. LEXIS 3646, at *5 (E.D. Pa. Mar. 11, 2003) (4.5 multiplier); *In re Dynegy ERISA Litig.*, No. 02-3076 (S.D. Tex. Nov. 24, 2004) (4.4 multiplier); *In re Bristol Myers Squibb Co, ERISA Litig.*, No. 02-10129 (S.D.N.Y. Oct. 12, 2005) (3.9 multiplier); *In re Honeywell Int'l ERISA Litig.*, No. 03-1214 (D.N.J. July 20, 2005) (3.7 multiplier).

F. Counsel's Expenses Are Reasonable and Were Necessarily Incurred to Achieve the Benefit Obtained

Counsel also request that the Court to authorize reimbursement from the common fund for the reasonable and necessary expenses advanced to prosecute this litigation since its inception in September 2007, and the assessment of administrative costs associated with the distribution of the Lump Sum Class net settlement benefits from the Lump Sum Class proceeds.[28] In the Agreement and notice sent to the Class, Counsel limited themselves to seeking reimbursement of expenses in an amount not to exceed $400,000. Doc. 191-1, III.A.(3). As shown in the Gottesdiener Declaration, Counsel has incurred expenses in the aggregate amount of $405, 206.55 in prosecuting this Litigation. Gottesdiener Decl. ¶ 17. The lion's share of these expenses ($323,770) were for Plaintiffs' two actuarial experts. *Id.* Mediation costs totaled $32,260; the cost of providing the Lump Sum Class with notice and the right to opt-out per the Court's class certification ruling last year was another $23,554.09; and travel and the cost of transcripts for the 16 depositions taken amounted to approximately $15,919.50. *Id.* The remaining expenses of

[28] As noted, Defendants agreed to absorb all such costs with respect to the Restricted Participant Class.

approximately $3,703 arise from photocopies, on-line legal research, messenger services, postage, express mail and next day delivery, long distance telephone and facsimile expenses, and other incidental expenses directly related to the prosecution of this action. These are all the type of expenses routinely charged to hourly clients and, therefore, should be reimbursed out of the common fund. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Counsel respectfully requests the Court authorize reimbursement in the amount of $400,000.

Additionally, Counsel seeks an order authorizing the Settlement Administrator to assess, against the Lump Sum Class's proceeds, $100,000. This was Counsel's disclosed estimate to the Class of the amount of total settlement administration were not likely to exceed. *See* Miller Decl., Ex. 1. As it happens, settlement administration has already cost $77,448.78 and Rust expects the total to be approximately $111,500. Gottesdiener Decl. ¶ 18. Counsel do not believe the Class should be assessed more than $100,000 if the original estimate is exceeded. Counsel will be responsible for any difference and hence only seeks authorization up to the $100,000 estimate.

V. CASE CONTRIBUTION PAYMENTS FOR THE NAMED PLAINTIFFS SHOULD BE APPROVED

Finally, Class Counsel respectfully requests that the Court approve the payment of case contribution payments for the named plaintiffs in the amount of $3,000 each. The enforcement of the ERISA laws by private litigants is in the interest of the public and should be encouraged. Courts have recognized that named plaintiffs in class actions are entitled to individual awards as compensation for their time and effort in asserting the interests of the class, meeting discovery and other litigation responsibilities, and working with counsel to advance the interests of the class. *Linney v. Cellular Alaska Partnership*, Nos. C-96-3008 DLJ, 1997 WL 450064 (N.D.Cal. July 18, 1997) ("[i]ncentive fees for class representatives serve much the same function as attorneys' fees do in the class action context: they provide the economic incentive necessary to ensure that meritorious actions are prosecuted"). In this case, not only did each of the named plaintiffs step forward to

serve, but each provided documents and information in response to requests, aided Class Counsel in describing such facts as they knew relevant to the case and helped make strategic decisions, including negotiation and approval of the settlement's terms. Gottesdiener Decl. ¶ 19.[29] The remaining Class Members were put on notice that Plaintiffs would request compensation and, as noted above, no objection has been filed as of yet. In short, a consideration of all applicable factors here shows compensation in the amount of $3,000 for each named plaintiff is fully justified.

Respectfully submitted this 5th day of February 2010.

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ATTORNEYS FOR PLAINTIFFS AND THE CLASSES

[29] Each of the two groups of four named plaintiffs nominated one of their number (Mr. Coy for the Lump Sum Class, and Ms. Phillips for the Restricted Participant Class) to attend the October 1 all-day mediation session in person, held in New York. However, all eight plaintiffs played active roles in the preparation leading up to the mediation and the mediation itself. *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2010, I caused the foregoing document and accompanying exhibits to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants listed below:

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