Daniel Feinberg – CA State Bar No. 135983
Nina Wasow – CA State Bar No. 242047
LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.
476 9th Street
Oakland, CA 94607
Telephone: (510) 839-6824
Facsimile: (510) 839-7839
Email: dfeinberg@lewisfeinberg.com
Email: nwasow@lewisfeinberg.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWARD CLARKE, Plaintiff, vs. MICHAEL LINDEMAN, LORRAINE LINDEMAN, DAVID NICKUM, VALLEY AGGREGATE TRANSPORT, INC., the BOARD OF DIRECTORS OF VALLEY AGGREGATE TRANSPORT, INC., and ADMINISTRATION COMMITTEE FOR THE VALLEY AGGREGATE, INC. EMPLOYEE STOCK OWNERSHIP PLAN. Defendants.	Case No. C 09-03467-JAM-DAD **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: September 21, 2011 Time: 9:30 a.m. Location: Courtroom 6 Judge: Hon. John A. Mendez

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NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

NOTICE IS HEREBY GIVEN that on September 21, 2011, or as soon thereafter as the matter may be heard in the above-entitled Court, Plaintiff Edward Clarke will and hereby does move the Court as follows:

1. To certify a Class of all persons who were participants in the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan (ESOP) on January 9, 2004, or at any time thereafter, and/or beneficiaries of ESOP participants on January 9, 2004, or at any time thereafter. Excluded from the Class are the individual Defendants and their immediate family and legal representatives and assigns of any such excluded persons.

2. To preliminarily approve the Stipulation and Agreement of Settlement of Class Action ("Settlement" or "Settlement Agreement") between Plaintiff, on behalf of himself and the Class, and Defendants Michael Lindeman, Lorraine Lindeman, David Nickum, Valley Aggregate Transport, Inc., the Board of Directors of Valley Aggregate Transport, Inc., and the Administration Committee for the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan (collectively, "Defendants"), by and through their respective counsel.

2. To set dates for the submission of any objections to the Settlement Agreement.

3. To set a final approval hearing.

4. To approve the form and authorize the mailing of the Notice of Class Action Settlement to Class Members.

This motion is based on the Settlement Agreement, the Memorandum of Points and Authorities filed herewith and in support of this Motion, the Declaration of Nina Wasow in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, and all other papers filed in this action.

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Dated: August 24, 2011

Respectfully submitted,

LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.

By: /s/ *Nina Wasow*
Nina Wasow

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I. INTRODUCTION

Plaintiff Edward Clarke, on behalf of himself and all others similarly situated, moves this Court for an order certifying the Class, preliminarily approving the Parties' Stipulation and Agreement of Settlement[1] ("Settlement") and approving the form and manner of class notice, and request that this Court schedule a Fairness Hearing for final approval of the Settlement. Plaintiff's proposed form of Notice to the Class is attached as Exhibit 2.

The proposed settlement includes a payment of $2.2 million in cash – less attorneys' fees, costs, and an incentive payment to Plaintiff – to the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan ("the ESOP" or "the Plan"), as well as the forfeiture of shares in the ESOP accounts of Defendants Lindeman and Nickum. The cash payment and the forfeited shares will be allocated among the approximately 150 Class Members as additional benefits under the Plan.

Plaintiff requests that the Court set the following deadlines:

- **One week (7 days) after entry of the Court's Preliminary Approval Order:** Class Notice to be mailed, and motion for attorneys' fees to be filed;
- **35 days after the Class Notice is mailed:** Postmark deadline for class member objections;
- **56 days after entry of the Court's Preliminary Approval Order:** Motion for final approval to be filed; and
- **84 days after entry of the Court's Preliminary Approval Order:** Hearing on final approval and motion for attorneys' fees.

In further support of this Motion, Plaintiff provides the following memorandum.

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[1] Declaration of Nina Wasow ("Wasow Dec.") filed herewith, Exhibit 1. All references to "Exh." are to the Exhibits to the Wasow Declaration.

II. ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiff alleges that Defendants caused the ESOP to pay more than fair market value for stock of Valley Aggregate Transport, Inc. ("Valley Aggregate" or the "Company") and this, along with the purchase of the ESOP Promissory Note at a discount by David Nickum, the President of Valley Aggregate, caused losses to the Plan. Plaintiff claims that Defendants were fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21); that they breached their fiduciary duties of prudence and loyalty under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) and engaged in prohibited transactions under ERISA § 406, 29 U.S.C. § 1106; and that Defendants are liable to make good the losses to the Plan pursuant to ERISA § 409, 29 U.S.C. § 1109. Defendants dispute these claims and have vigorously defended the litigation.

Plaintiff filed this action on December 15, 2009. Dkt. 1. Defendants David Nickum, Valley Aggregate, and the Administration Committee of the ESOP sought dismissal of the case on the grounds that, *inter alia*, Defendant Nickum was not a fiduciary of the ESOP at the time he purchased the Promissory Note from the Lindemans or at the time the ESOP made the prepayment on the note, Defendant Nickum did not have a duty to remedy any overpayment for stock purchased by the ESOP prior to the date he became a fiduciary of the ESOP, and the Note transaction was not prohibited under ERISA and/or did not result in any losses to the ESOP. Dkt. 29. On October 19, 2010, the Court denied the Motion. Dkt. 42.

Plaintiff conducted discovery including reviewing thousands of pages of documents produced by Defendants, and subpoenaing and reviewing additional documents from the valuator who prepared the initial valuation of Valley Aggregate on which the price in the January 2004 Transaction was based. Wasow Dec. at ¶¶ 4-5. Plaintiff and Defendants exchanged and responded to Interrogatories and Requests for Admission. *Id*. at ¶ 6. Plaintiff took the depositions of Mr. Lindeman and Mr. Nickum. *Id*. at ¶ 7.

On February 10, 2011, all parties and their lawyers attended a full-day mediation with the Honorable Layne Phillips (Ret.), a retired judge and highly experienced mediator. As a result of this meeting and subsequent negotiations between the parties' counsel and Judge Phillips, the parties reached this Settlement on behalf of the Plan and all of its participants. *Id.* at ¶ 9.

III. TERMS OF THE PROPOSED SETTLEMENT

The terms of the proposed settlement are set forth in the Settlement Agreement, which was executed by the parties and counsel on August 23, 2011. Exh. 1. In short, the Settlement Agreement provides for a cash payment of $2.2 million – inclusive of payments to the Class, attorneys' fees, costs, and an incentive award to Plaintiff – and forfeiture of the shares in the individual Defendants' ESOP accounts, in return for a release that extinguishes the claims against the Defendants. The following summarizes the principal terms of the Settlement:

The Settlement Class

The Settlement provides for a mandatory, non-opt-out Settlement Class. The Settlement Class is defined as follows: all persons who were participants or beneficiaries in the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan on January 9, 2004, or at any time thereafter, and/or beneficiaries of ESOP participants on January 9, 2004, or at any time thereafter. Excluded from the Class are the individual Defendants Michael Lindeman, Lorraine Lindeman and David Nickum and the immediate family, legal representatives and assigns of any such excluded persons. Exh. 1 at §§ 1(b), 7.

If the Court does not certify the case as a class action for settlement purposes and approve the Settlement without opt-out rights, Defendants have the right to withdraw from the Settlement. *Id*. at § 7.

Settlement Amount, Forfeitures and Timing of Payment

The Settlement Agreement provides that Defendants and their insurer, XL Specialty Insurance Company, will pay the cash portion of the Settlement Amount – $2,200,000.00 – into an interest-bearing escrow account within thirty calendar days of execution of the Settlement Agreement. *Id*. at §§ 2, 9(c).

In addition, Defendants Michael and Lorraine Lindeman and David Nickum will each forfeit any right, title or benefit related to the shares in their ESOP accounts. *Id*. at §§ 2(a)(1), 2(a)(2). Defendants Valley Aggregate Transport, Inc. and the Administration Committee for the Valley Aggregate Transport, Inc. ESOP will take any necessary steps to amend the ESOP to

permit the forfeitures. *Id*. at § 8. Defendant Valley Aggregate Transport, Inc. will not terminate the ESOP until at least fifteen days after the settlement becomes final. *Id*.; *see also id*. at § 9(c).

The Settlement Amount, plus any interest accrued in the escrow account, less any approved service payment to Plaintiff, costs of settlement administration, attorneys' fees, costs, and expenses will be distributed to the ESOP when the settlement becomes final. *Id*. at §§ 1(g), 1(l), 9(c). The Net Settlement Amount will then be allocated to the participants and beneficiaries of the ESOP. *Id*. at § 3(d).

<u>Settled Claims</u>

The parties have agreed to release all "Settled Claims," which are defined as any and all claims

> against any of the Released Persons (as Released Persons is defined in Section 5 (a) of this Stipulation), under federal or state law, arising between January 1, 2003 and the date of Effective Final Approval out of the facts, claims, transactions and allegations in the Action, held by Plaintiff and/or Class Members or held by any past, present or future trustee of the ESOP on behalf of or for the benefit of Plaintiff and Class Members, including, but not limited to any claims arising out of (a) the purchase of Valley Aggregate Transport, Inc. stock by the ESOP in January 2004, (b) the alleged failures of Defendants David Nickum, Valley Aggregate Transport, Inc., the Board of Directors of Valley Aggregate Transport, Inc., and the Administration Committee for the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan to pursue claims against the ESOP's prior fiduciaries for the purchase of Valley Aggregate Transport, Inc. stock by the ESOP in January 2004, (c) the purchase of the ESOP Note by David Nickum and the ESOP's associated pre-payment of $1.5 million on the ESOP Note in December 2004 or January 2005, and (d) the alleged failures of Defendants Valley Aggregate Transport Inc., the Board of Directors of Valley Aggregate Transport Inc., and the Administration Committee for the Valley Aggregate Transport Inc. Employee Stock Ownership Plan to pursue claims against the ESOP's other fiduciaries for the purchase of the ESOP Note by David Nickum and the ESOP's associated pre-payment of $1.5 million on the ESOP Note in December 2004 or January 2005. Additionally, "Settled Claims" includes any and all legal or beneficial claims, rights, demands, obligations, controversies, debts, damages, losses, costs, expenses (including attorneys' fees and costs), causes of action or liabilities of any kind or nature whatsoever in law or in equity, including both known or unknown, held by Plaintiff in his individual capacity. "Settled Claims" does not include any claims relating to or arising out of the sale of the assets of Valley Aggregate Transport Inc. to Fresno Trucking Center or the termination of the ESOP.

Id. at §§ 1(n), 5.

Independent Fiduciary and Plan of Allocation

In order to comply with Department of Labor Class Exemption 2003-39, which is designed to ensure that settlement of fiduciary litigation does not constitute a prohibited transaction, the Settlement will be reviewed by an Independent Fiduciary. The Independent Fiduciary will, at least five days before the date set for hearing on final approval of the settlement, agree to release on behalf of the Plan the same claims released by Plaintiff, and determine that the requirements of Exemption 2003-39 have been met. *Id*. at § 3(c). If the Independent Fiduciary refuses to do so, the Settlement Agreement is void. *Id*. at § 12(a). Defendants shall retain the Independent Fiduciary. *Id*. at § 3(a).

Attorneys' Fees and Costs

All attorneys' fees and costs approved by the Court will be paid out of the Settlement Amount. *Id*. at § 4(a). Defendants will not oppose Class Counsel's petition for fees up to 25% of the cash component of the Settlement Amount and up to $50,000 in costs. *Id*.

Incentive Payment

Defendants will not oppose Class Counsel's petition for a service incentive payment of up to $5,000 to the named Plaintiff, which shall be paid out of the Settlement Amount. *Id*. at § 4(b).

Notice to the Settlement Class

Plaintiff will select a Settlement Administrator who will be responsible for giving notice to the Class in a form to be approved by the Court. *Id*. at § 10. Plaintiff requests that the Court approve the form of Class Notice appended as Exhibit 2 to the Wasow Declaration.

IV. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES.

Plaintiff respectfully requests that the Court make appropriate findings and certify the following Class, for purposes of settlement only:

> All persons who were participants in the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan (ESOP) on January 9, 2004, or at any time thereafter, and/or beneficiaries of ESOP participants on January 9, 2004, or at any time thereafter. Excluded from the Class are Defendants and their immediate family and legal representatives and assigns of any such excluded persons.

As described in detail below, the proposed Class meets all four prerequisites of Rule 23(a) necessary to class certification: numerosity, commonality, typicality, and adequacy of representation. Rule 23(b)(1) is also satisfied, making this Class appropriate for class certification.

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

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

1. Numerosity.

To warrant certification under Rule 23(a)(1), a proposed class must be so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1). Plaintiff need not show that the number of class members is so large that it would be impossible to join every class member, only that joinder is impracticable. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). The Ninth Circuit has held that as few as 39 class members may be sufficient to satisfy the numerosity requirement. *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319-20 (9th Cir. 1982), *rev'd on other grounds*, 713 F.2d 503 (9th Cir. 1983). Here, the Class satisfies the numerosity requirement because it has approximately 150 members, many of whom are no longer employed by the Company, so it would be impracticable to join all of them. Wasow Dec. ¶ 8; *see Aguilar v. Melkonian Enterprises, Inc.*, 2006 WL 3199074, at *3 (E.D. Cal. Nov. 3, 2006) (holding that joinder of approximately 50 current and former participants in an employee benefit plan would "only further clog this court's already overburdened docket").

2. Commonality.

Under Rule 23(a)(2), Plaintiffs must show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement is met through the existence of a "common contention" that is of "such a nature that it is capable of classwide resolution." *Wal-*

Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011). The presence of merely one common issue of law or fact is sufficient. *Id.* at 2556.

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

(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;

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

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

These common issues of law and fact satisfy Rule 23(a)(2).

3. Typicality.

Under Rule 23(a)(3), Plaintiff's claims must be "typical" of those of the Class. The typicality analysis focuses on the similarities between the legal theories of the proposed class representatives and the legal theories of the Class Members who they seek to represent. *See, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Because both commonality and typicality focus on the similarity of the claims, the two requirements "tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Here, Plaintiff's claims satisfy the typicality requirement because his claims are substantially identical to the claims of absent Class Members – the claims rise and fall under ERISA's fiduciary duty provisions. In fact, Plaintiff's claims are not individual claims in the first place, because they are brought pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), on behalf of the Plan as a whole, and any relief obtained in the lawsuit would necessarily flow to the Plan as a whole, not to Plaintiff as an individual participant. Dkt. 28 at ¶¶ 42-56; *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 552 U.S.

248, 253-54 (2008) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985)); *accord id.* at 261 (Thomas, J., concurring) ("The plain text of § 409(a), which uses the term 'plan' five times, leaves no doubt that § 502(a)(2) authorizes recovery only for the plan."); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 106-07, 109 (N.D. Cal. 2008).

4. Adequacy.

The proposed Class Representative has "fairly and adequately protect[ed] the interests of the class" and will continue to do so. 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 v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). The law governing the adequacy of representatives is well settled: "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." 7A Wright, et al., *Fed. Prac. & Proc. Civ.*, § 1768 at 326-27 (3d ed. 2011).

Plaintiff's interests are aligned with, not antagonistic to, the interests of the proposed Class. Each member of the proposed Class, just like Plaintiff, has an interest in recovering losses suffered by the Plan as a result of its overpayment for Valley Aggregate stock. As such, Plaintiff's interest in the lawsuit is the same as absent Class Members'. Plaintiff has also shown his ability and willingness to prosecute this action vigorously on behalf of the Class in the litigation to date and hired counsel experienced in complex ERISA class action litigation. Wasow Dec. at ¶¶ 12-19. Accordingly, Plaintiff should be appointed Class Representative under Rule 23(a)(4).

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

In addition to demonstrating that the requirements of Rule 23(a) are met, Plaintiff must also establish that at least one subsection of Rule 23(b) is satisfied. Here, certification is proper under Rule 23(b)(1). Because of "the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims

appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *In re Schering Plough Corp. ERISA Litig*., 589 F.3d 585, 604 (3d Cir. 2009) (collecting cases); *see also Colesberry v. Ruiz Food Prods., Inc*., 2006 WL 1875444, at *5 (E.D. Cal. Jun. 30, 2006) (noting the "vast number of cases in which courts have certified ERISA class actions pursuant either to Rule 23(b)(1)(A) or Rule 23(b)(1)(B)"); *Kanawi*, 254 F.R.D. at 111 (noting that "[m]ost ERISA class action cases are certified under Rule 23(b)(1)" and citing cases).

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

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

> (1) 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.

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

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

Here, Rule 23(b)(1)(A) is satisfied. This case has approximately 150 Class Members. Wasow Dec. at ¶ 8. In the absence of class certification there is potential for a large number of individual cases based on the same underlying facts, creating a high risk of inconsistent or varying adjudications that would establish incompatible standards of Defendant conduct. *See Alvidres v. Countrywide Fin. Corp.*, 2008 WL 1766927, at *3 (C.D. Cal. Apr. 16, 2008); *Ikon*, 191 F.R.D. at 466 (finding a "risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the

individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions"). Moreover, the claims Plaintiff alleges on behalf of the proposed Class are derived from core issues that are not individual in nature: whether Defendants breached their fiduciary duties by causing the ESOP to pay more than fair market value for Valley Aggregate stock, and whether the Plan was harmed by Defendants' breaches. *See Jones v. NovaStar Fin. Inc*., 257 F.R.D. 181, 194 (W.D. Mo. 2009) (finding that "central questions concerning whether fiduciaries breached their duties to the Plan are not individual" matters).

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

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

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

Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee Note (1966 Amendment); *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999); *Church v. Consolidated Freightways, Inc.*, 1991 WL 284083, *14 (N.D. Cal. Jun. 14, 1991) (invoking Advisory Committee note in certifying breach of fiduciary duty claim under (b)(1)(B)).

Here, were the Court to adjudicate Plaintiff's claims that Defendants breached their fiduciary duties by causing the ESOP to pay more than fair market value for Valley Aggregate stock, engaging in prohibited transactions, and failing to remedy the breaches of co-fiduciaries, it would, as a practical matter, dispose of the absent Class Members' claims in those regards. *See Syncor*, 227 F.R.D. at 346 (certifying a class under (b)(1)(B) and finding that "[i]f the primary relief is to the Plan as a whole, then adjudications with respect to individual members of the class would 'as a practical matter' alter the interests of other members of the class – if one plaintiff forces the Defendants to pay damages to the Plan, the benefit would affect everyone who has a right to disbursements under the Plan"). Rule 23(b)(1)(B), therefore, is a proper vehicle for certification of Plaintiff's claims for settlement purposes.

C. Lewis, Feinberg, Lee, Renaker & Jackson Should Be Appointed Class Counsel.

Rule 23(g) requires that courts consider the following four factors when appointing class counsel: whether counsel (1) has investigated the class claims, (2) is experienced in handling class actions and complex litigation, (3) is knowledgeable regarding the applicable law, and (4) will commit adequate resources to representing the class. Fed. R. Civ. P. 23(g); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 493-94 (E.D. Cal. 2006).

Lewis, Feinberg, Lee, Renaker & Jackson ("LFLRJ") meets the standards of Rule 23(g) because, as set forth in the declaration of counsel filed herewith, the firm has extensive experience litigating ERISA class actions and is knowledgeable regarding the applicable law. Wasow Dec. at ¶¶ 12-19. LFLRJ has conducted significant pre-litigation and pre-settlement investigations of the proposed Class's claims, has committed more than adequate resources to representing the proposed Class, and has demonstrated the ability to represent classes throughout complex litigation and to respond to the unique issues associated with representing employees in ERISA litigation. Wasow Dec. at ¶¶ 4-7, 12-19.

V. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL.

Preliminary approval is an initial assessment of the fairness of the proposed settlement by the Court, on the basis of written submissions and informal presentations from the settling parties. The *Manual for Complex Litigation* summarizes the preliminary approval criteria as follows:

> 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.

Manual for Complex Litigation (Third) § 30.41 (1995) ("*Manual for Complex Litigation*"), p. 237.

The purpose of the preliminary approval process is to determine whether the proposed settlement is within the range of reasonableness and thus whether notice to the class of the terms and conditions and the scheduling of a formal fairness hearing is worthwhile. 4 *Newberg on*

1 *Class Actions* ("*Newberg*") § 11.25 (4th ed. 2002); *West v. Circle K Stores, Inc*., 2006 WL
2 1652598, at *1-2 (E.D. Cal. Jun. 13, 2006); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d
3 1052, 1062-63 (C.D. Cal. 2010).

4 Here, the proposed Settlement satisfies the preliminary approval requirements. Class
5 Counsel believe that the proposed Settlement is an excellent result, reached after over a year of
6 hard-fought litigation and a day-long mediation.

7 The Settlement will provide the Plan with a substantial recovery, which will inure to the
8 benefit of its participants and beneficiaries, the Class Members. The parties entered into the
9 Settlement before the Court ruled as to whether the Defendants breached their fiduciary duties
10 and, if they did, what amount, if any, would be recoverable by the Plan. While Plaintiff believes
11 that Defendants failed to meet ERISA's fiduciary standards and would be held liable for
12 investment losses to the Plan, Defendants have asserted numerous defenses, including lack of
13 fiduciary status and lack of loss causation. Differences of expert opinion exist as to whether and
14 by how much the Plan overpaid for the stock it bought in 2004 and whether investment losses
15 suffered by the Plan resulted from any breach by Defendants.

16 Even if Plaintiff succeeded in proving a breach of fiduciary duty, there was no guarantee
17 that the Court would have selected the damages model most favorable to Plaintiff and the
18 proposed Class. Further, the costs of defense were being paid out of Defendants' $3 million
19 insurance policy, and litigating the case through trial would likely have used the entire policy,
20 leaving Plaintiff with the risk of not being able to collect a judgment. Wasow Dec. ¶ 11.

21 Thus, the Settlement payment of $2.2 million (plus the individual Defendants' stock
22 forfeitures) is well within the range of potential recoveries for the Class in this case and, given
23 the risks presented by the litigation, including the risk of outright loss on either liability or
24 damages and the risk of Defendants' inability to satisfy a judgment, is fundamentally fair to the
25 Class.

26 The Settlement does not provide for "unduly preferential treatment of class
27 representatives, or of segments of the class." *Manual for Complex Litigation*, § 30.41, p. 237.
28 All Class Members' shares, including those of the Class representative, will be calculated based

1 on their proportionate share of the total stock held by the ESOP. Class Counsel intend to ask the
2 Court to award an incentive payment to the Class representative of $5,000, in recognition of his
3 service to the Class in responding to discovery requests, preparing for his deposition (which was
4 cancelled the day before it was scheduled to take place due to ongoing settlement discussions),
5 traveling to Oakland to attend the mediation, monitoring the progress of the litigation, and
6 consulting with Class Counsel regarding litigation decisions. Wasow Dec. ¶ 10. The Ninth
7 Circuit has recognized that "[i]ncentive awards are fairly typical in class action cases."
8 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (emphasis omitted). "Such
9 awards are discretionary,. . ., and are intended to compensate class representatives for work done
10 on behalf of the class, [and] to make up for financial or reputational risk undertaken in bringing
11 the action." *Id. See also Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, *17 n.8
12 (N.D. Cal. Apr. 22, 2010) ("Numerous courts in the Ninth Circuit and elsewhere have approved
13 incentive awards of $20,000 or more where, as here, the class representative has demonstrated a
14 strong commitment to the class."). The contemplated request for an incentive award of $5,000 to
15 the Class representative in this case will be disclosed to the Class in the Class Notice, so that the
16 Court may consider any objections that the Class Members raise to the incentive award. Exh. 2
17 at p. 5.

18 Finally, the Settlement does not provide for "excessive compensation for attorneys."
19 *Manual for Complex Litigation*, § 30.41, p. 237. The Settlement Agreement provides that Class
20 Counsel will seek Court-awarded fees and reimbursement of costs. Exh. 1, § 4. As disclosed in
21 the Class Notice, Class Counsel intend to seek an award of fees of 25 percent of the Settlement
22 Fund ($550,000), plus costs of approximately $50,000. Exh. 2 at p. 4-5. As also disclosed in the
23 Class Notice, the motion for attorneys' fees and costs will be filed contemporaneously with the
24 mailing of the Class Notice, and the motion and supporting papers will be posted on Class
25 Counsel's website so that Class Members may review the motion and all supporting
26 documentation well in advance of the deadline for submitting objections. *Id.*

27 Twenty-five percent is a benchmark in the Ninth Circuit for common-fund attorneys' fees
28 awards. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-49 (9th Cir. 2002). Circumstances to

be considered include the result obtained for the class, the risk involved in litigating the case on a contingent fee basis, and the complexity of the legal and factual issues. *Id.; see also Newberg* § 14.6 ("The common fund doctrine"). These factors support a 25 percent award in this case. As described above, Class Counsel have vigorously prosecuted the Class claims and have achieved an excellent result. Likewise, the costs to be requested were reasonably expended in the litigation, primarily on expert witness fees and deposition costs.

For all of these reasons, the proposed Settlement falls within the range of reasonableness, and should be submitted to Class Members for their comments.

VI. THE PROPOSED NOTICE SATISFIES DUE PROCESS AND SHOULD BE APPROVED.

Under Rule 23(e), the court "must direct notice in a reasonable manner to all class members who would be bound by the propos[ed settlement]." Fed. R. Civ. P. 23(e)(1). Class members are entitled to receive "the best notice practicable under the circumstances." *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985) (quoting Fed. R. Civ. P. 23(c)(2)). "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.'" *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)). In addition, notice that is mailed to each member of a settlement class "who can be identified through reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). *See also Garner*, 2010 WL 1687832 at *4 (finding that the parties' notice plan met the "best practicable notice" standard where it provided that defendant would provide names and addresses for all potential class members from its internal records, and the settlement administrator would take reasonable steps to ensure the addresses were current and then mail a copy of the proposed notice to each class member).

Plaintiff's proposed Notice satisfies this standard. Plaintiff proposes to use individualized notice by first-class mail to send the proposed Notice of Class Action Settlement to the Class Members. First-class mail is the means best calculated to reach each Class Member

who is affected by the terms of the proposed Settlement. In addition, Class Counsel will post the Notice and related documents on Class Counsel's website.

Plaintiff's proposed Notice describes the terms of the Settlement, sets forth the procedure for comments and objections, provides specifics on the date, time, and place of the final settlement approval hearing, enables Class Members to exercise their rights and make informed decisions regarding their views of the fairness, adequacy and reasonableness of the proposed settlement, and provides information as to how to obtain additional information regarding this litigation and the Settlement Agreement (including providing the website for Class Counsel, www.lewisfeinberg.com).

Plaintiff proposes that the Notice be mailed no later than seven days after entry of an Order granting preliminary approval of the Settlement. Plaintiff further proposes that the Class Members have 35 days after the mailing of the Class Notice within which to submit objections to the Settlement, including to the requested attorneys' fees, costs, or incentive awards. This period will be more than sufficient to give Class Members the opportunity to comment on the Settlement. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993) (notice mailed 31 days before objection deadline was sufficient) (citing *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (approving timing of a notice mailed 26 days before the deadline for opting out of a settlement)). Accordingly, the notice plan along with the accompanying Class Notice fulfills all requirements of adequate notice and should be approved. *See Torrisi*, 8 F.3d at 1374-75; Fed. R. Civ. P. 23(c)(2); *Manual for Complex Litigation*, 3d, § 30.21.

VII. CONCLUSION.

In conclusion, Class Counsel recommends the following schedule for Settlement approval:

One week (7 days) after entry of the Court's Preliminary Approval Order	Class Notice mailed to Class Members; motion for attorneys' fees and costs filed and posted on Class Counsel's website

35 days after mailing of the Class Notice	Postmark deadline for objections to the Settlement
56 days after entry of the Court's Preliminary Approval Order	Motion for final approval of Settlement filed
84 days after entry of the Court's Preliminary Approval Order	Final approval hearing

For the reasons set forth above, Plaintiff respectfully requests that the Court grant the Proposed Preliminary Approval Order filed herewith.

Dated: August 24, 2011

LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.

By: /s/ Nina Wasow
Nina Wasow
Attorneys for Plaintiff