

TABLE OF CONTENTS

Page No.

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

 A. Work Performed by Class Counsel..... 2

 B. Relevant Terms of the Settlement Agreement and Class Notice. 3

III. THE REQUESTED AWARD OF ATTORNEYS’ FEES AND COSTS IS REASONABLE. 4

 A. Class Counsel Are Entitled to an Award of Attorneys’ Fees Out of the Common Fund. 5

 1. The Equitable Common Fund Doctrine Applies When, as in This Case, the Litigation Has Recovered a Certain and Calculable Fund on Behalf of a Group of Beneficiaries. 5

 2. The Fee Award Should Be Calculated as a Percentage of the Common Fund. 5

 3. The Requested Percentage of the Common Fund Is Within the Range of Reasonableness Established by the Ninth Circuit..... 7

 B. The Requested Fee Award Is Fair and Reasonable. 8

 1. Class Counsel Obtained Excellent Results for the Class..... 8

 2. Continued Litigation Presented a Significant Risk to the Class. 9

 3. Class Counsel Took On Significant Risks in Litigating this Case..... 9

 4. Awards in Similar Cases Demonstrate that the Requested Award Is Reasonable. 10

 5. Class Members Will Have the Opportunity to Review Class Counsel’s Request for an Award of Attorneys’ Fees Prior to the Deadline for Objections. 11

 C. Class Counsel Are Entitled to Recover Costs. 11

IV. THE INCENTIVE PAYMENT REQUESTED ON BEHALF OF THE NAMED PLAINTIFF IS REASONABLE AND OF THE TYPE ROUTINELY AWARDED..... 12

V. CONCLUSION..... 13

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

In re Activision Sec. Litig.,
723 F. Supp. 1373 (N.D. Cal. 1989) 6, 10

In re ADC Telecomms., Inc. ERISA Litig.,
No. 03-2989 (D. Minn. Oct. 16, 2006) 11

Alberto v. GMRI, Inc.,
252 F.R.D. 652 (E.D. Cal. 2008) 13

Alvarado v. Nederend,
2011 WL 1883188 (E.D. Cal. May 17, 2011) 4, 7

In re Ampicillin Antitrust Litig.,
526 F. Supp. 494 (D.D.C. 1981)..... 7

Berger v. Xerox Corp. Ret. Income Guarantee Plan,
2004 WL 287902 (S.D. Ill. Jan. 22, 2004)..... 11

Blum v. Stenson,
465 U.S. 886 (1984)..... 1, 4

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)..... 4, 5

Central R.R. & Banking Co. v. Pettus,
113 U.S. 116 (1885)..... 5

In re CMS Energy ERISA Litig.,
2006 WL 2109499 (E.D. Mich. June 27, 2006)..... 11

Edmonds v. United States,
658 F. Supp. 1126 (D.S.C.1987)..... 9

Garner v. State Farm Mutual Auto. Ins. Co.,
2010 WL 1687832 (N.D. Cal. Apr. 22, 2010) 13

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir.1998) 4

Harris v. Marhoefer,
24 F.3d 16 (9th Cir. 1994) 12

In re Heritage Bond Litig.,
2005 WL 1594403 (C.D. Cal. June 10, 2005) 8

Knight v. Red Door Salons, Inc.,
2009 WL 248367 (N.D. Cal. Feb. 2, 2009) passim

1	Lewis v. Starbucks Corp., 2008 WL 4196690 (E.D. Cal. Sept. 11, 2008).....	6
2		
3	In re Marsh ERISA Litig., 265 F.R.D. 128 (S.D.N.Y. 2010)	11
4	In re Mercury Interactive Corp. Sec. Litig., 618 F.3d 988 (9th Cir. 2010)	11
5		
6	Mogck v. Unum Life Ins. of Am., 289 F. Supp. 2d 1181 (S.D. Cal. 2003).....	10
7	In Re Omnivision Technologies, Inc., 2007 WL 4293467 (N.D. Cal. Dec. 6, 2007).....	10
8		
9	In re Pacific Enterprises Sec. Litig., 47 F.3d 373 (9th Cir. 1995)	7
10	Paul, Johnson, Alston & Hunt v. Gaulty, 886 F.2d 268 (9th Cir. 1989)	1, 5, 6, 7
11		
12	Rodriguez v. West Publ'g Corp., 563 F.3d 948 (9th Cir. 2009)	12
13	Romero v. Producers Dairy Foods, Inc., 2007 WL 3492841 (E.D. Cal. Nov. 14, 2007).....	7
14		
15	Six Mex. Workers v. Ariz. Citrus Growers, 904 F.2d 1301 (9th Cir. 1990)	1, 5
16	Spann v. AOL Time Warner Inc., 2005 WL 1330937 (S.D.N.Y. Jun. 7, 2005).....	11
17		
18	Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003)	4, 5
19	Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993).....	6
20		
21	Torrise v. Tucson Elec Power Co., 8 F.3d 1377 (9th Cir. 1993)	12
22	Trustees v. Greenough, 105 U.S. 527 (1881).....	12
23		
24	Vizcaino v. Microsoft Corp., 290 F.3d 1043 (9th Cir. 2002)	passim
25	In re Westar Energy, Inc., ERISA Litig., No. 03-4032 (D. Kan. July 27, 2006)	11
26		
27	FEDERAL STATUTES	
28	ERISA § 409, 29 U.S.C. § 1109	2, 4

1	ERISA § 3, 29 U.S.C. § 1002(16).....	2
2	ERISA § 3, 29 U.S.C. § 1002(21).....	2
3	ERISA § 404, 29 U.S.C. § 1104(a)(1).....	2
4	ERISA § 406, 29 U.S.C. § 1106.....	2

5
6
7
8
9
10
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14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

OTHER AUTHORITIES

Alba Conte, Attorney Fee Awards § 2:8 (3d ed. 2004).....	12
William Rubenstein, Alba Conte, Herbert Newberg 4 Newberg on Class Actions § 14.6 (4th ed. 2007)	7

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Class Counsel have devoted hundreds of hours of time and substantial out-of-pocket
4 expenses to this litigation on behalf of the Plaintiff Class of participants in the Valley Aggregate
5 Transport, Inc. Employee Stock Ownership Plan (“the Plan” or “the ESOP”). Class Counsel’s
6 efforts have secured an excellent result for the Class – a settlement fund consisting of \$2,200,000
7 in cash and the shares held in the individual Defendants’ forfeited ESOP accounts, the bulk of
8 which will be distributed to Class Members as tax-deferred benefits from the Plan.

9 Class Counsel now seek an attorneys’ fee award of \$550,000, which is 25 percent of the
10 cash portion of the common fund. The requested fee award is within the usual range of
11 percentages of the common fund awarded as attorneys’ fees. *See Vizcaino v. Microsoft Corp.*,
12 290 F.3d 1043, 1047 (9th Cir. 2002); *Paul, Johnson, Alston & Hunt v. Graftly*, 886 F.2d 268,
13 272 (9th Cir. 1989). The requested award is fair, reasonable, and appropriate under the common
14 fund doctrine. *See Six (6) Mex. Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.
15 1990) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)).

16 Class Counsel also seek reimbursement of litigation costs and expenses in the amount of
17 \$46,105.63. Wasow Dec. ¶ 19 and Exh. 1. As explained herein, the costs were incurred in
18 connection with the prosecution of the action and the execution of the settlement, and are
19 reasonable and proper.

20 Finally, Class Counsel seek payment of an incentive award to the Plaintiff in the amount
21 of \$5,000, in recognition of his service to the Class. This payment is consistent with those
22 previously awarded in this district and was well-earned by the time and effort expended by Mr.
23 Clarke on behalf of the Class.

24 The attorneys’ fees and expenses and the incentive award sought by Class Counsel are
25 described in the Notice of Class Action Settlement (“Notice”) sent to all Class Members on
26 September 29, 2011. All of the Class Members will have the ability to review the information
27 provided in the Settlement Notice and in this motion prior to the deadline for objections to the
28 Settlement, which is November 3, 2011.

1 **II. STATEMENT OF FACTS**

2 As described in Plaintiff’s Motion for Preliminary Approval of Class Action Settlement
3 (“Motion for Preliminary Approval” or “MPA”) (Dkt. 49), Plaintiff filed this action nearly two
4 years ago, and since then, Class Counsel and Plaintiff have aggressively prosecuted the claims of
5 the Class. MPA at 2, 11-12.

6 **A. Work Performed by Class Counsel**

7 Class Counsel investigated this case by interviewing numerous former employees of
8 Valley Aggregate Transport, Inc. regarding the ESOP, and by reviewing Plan instruments, IRS
9 Form 5500 filings, and other documents provided by class members. Wasow Dec. ¶ 3.

10 Following this investigation, Plaintiff filed his Complaint on December 15, 2009, naming
11 Michael Lindeman, Lorraine Lindeman, David Nickum, Valley Aggregate Transport, Inc., the
12 Board of Directors of Valley Aggregate Transport, Inc., and the Administration Committee of
13 the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan as Defendants. Dkt. 1.

14 The Complaint alleges that Defendants caused the ESOP to pay more than fair market
15 value for stock of Valley Aggregate Transport, Inc. (“Valley Aggregate” or the “Company”) and
16 this, along with the purchase of the ESOP Promissory Note at a discount by David Nickum, the
17 President of Valley Aggregate, caused losses to the Plan. Plaintiff claims that Defendants were
18 fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21) and/or parties
19 in interest as to the Plan within the meaning of ERISA § 3(16), 29 U.S.C. § 1002(16); that they
20 breached their fiduciary duties of prudence and loyalty under ERISA § 404(a)(1), 29 U.S.C. §
21 1104(a)(1) and engaged in prohibited transactions under ERISA § 406, 29 U.S.C. § 1106; and
22 that Defendants are liable to make good the losses to the Plan pursuant to ERISA § 409, 29
23 U.S.C. § 1109.

24 Defendants David Nickum, Valley Aggregate, and the Administration Committee of the
25 ESOP sought dismissal of the case on the grounds that, *inter alia*, Defendant Nickum was not a
26 fiduciary of the ESOP at the time he purchased the Promissory Note from the Lindemans or at
27 the time the ESOP made the prepayment on the note, Defendant Nickum did not have a duty to
28 remedy any overpayment for stock purchased by the ESOP prior to the date he became a

1 fiduciary of the ESOP, and the Note transaction was not prohibited under ERISA and/or did not
2 result in any losses to the ESOP. On October 19, 2011, the Court denied the Motion. Dkt. 42.

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

9 On February 10, 2011, all parties and their lawyers attended a full-day mediation with the
10 Honorable Layne Phillips (Ret.), a retired federal judge and highly experienced mediator. As a
11 result of this meeting and subsequent negotiations between the parties' counsel and Judge
12 Phillips, the parties reached this Settlement on behalf of the Plan and all of its participants. *Id.* at
13 ¶ 8.

14 The Settlement was reached after arms-length negotiations by and among the parties.
15 Additional details regarding the terms of the Settlement Agreement and its implementation have
16 continued to be negotiated between the parties as they have arisen. On August 24, 2011,
17 Plaintiff filed his unopposed Motion for Preliminary Approval. Dkt. 49.

18 Class Counsel has incurred \$46,105.63 in costs related to the litigation, in particular fact
19 discovery, expert discovery, and mediation. Wasow Dec. ¶ 19 and Exh. 1.

20 **B. Relevant Terms of the Settlement Agreement and Class Notice.**

21 Section 4 of the Settlement Agreement provides:

- 22 (a) Class Counsel will apply for, and Defendants will not oppose, an award of
23 attorney's fees in an amount up to, but not to exceed twenty-five percent
24 (25%) of the cash component of the Settlement Amount (i.e., 25% of
25 \$2,200,000 which is five hundred and fifty thousand dollars (\$550,000)), and
26 costs of up to, but not to exceed, fifty thousand dollars (\$50,000), all of which
27 shall be paid exclusively from the Settlement Amount, and will compensate
28 Class Counsel for all of the work already performed, and expenses already
incurred, in the Action and all work remaining to be performed in
consummating the Settlement. The substance of Class Counsel's application
for attorneys' fees and costs is not part of this Stipulation, and is to be
considered separately from the Court's consideration of the fairness,
reasonableness, adequacy, and good faith of the settlement of the Action.

1 (b) Class Counsel will apply for, and Defendants will not oppose, an incentive
2 award of five thousand dollars (\$5,000) to the Plaintiff, which payment shall
be paid exclusively from the Settlement Amount.

3 Dkt. 50-1 at § 4. In the Notice, mailed on September 29, 2011, Class Counsel notified
4 the Class that they would apply to the Court for an order awarding attorneys' fees of 25
5 percent of the cash portion of the settlement fund, totaling \$550,000, and reimbursing
6 expenses incurred as a result of the litigation up to \$50,000. *See* Dkt. 50-2, pp. 4-5. The
7 Notice also notified the Class that the Plaintiff would apply to the Court for compensation
8 up to \$5,000 in recognition of his service to the Class. *Id.*

9 **III. THE REQUESTED AWARD OF ATTORNEYS' FEES AND COSTS IS**
10 **REASONABLE.**

11 "Courts have long recognized the "common fund" or "common benefit" doctrine, under
12 which attorneys who create a common fund or benefit for a group of persons may be awarded
13 their fees and costs to be paid out of the fund." *Alvarado v. Nederend*, 2011 WL 1883188, at *8
14 (E.D. Cal. May 17, 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th
15 Cir.1998). "[A] lawyer who recovers a common fund for the benefit of persons other than
16 himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Staton*
17 *v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (quoting *Boeing Co. v. Van Gemert*, 444 U.S.
18 472, 478 (1980)). *See also Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *5 (N.D. Cal.
19 Feb. 2, 2009).

20 In *Blum*, 465 U.S. at 900 n.16, the Supreme Court stated that reasonable fees under the
21 common fund doctrine are determined as a percentage of the fund. "Awarding a percentage of
22 the common fund is particularly appropriate when each member of a certified class has an
23 undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on
24 his behalf." *Alvarado*, 2011 WL 1883188, at *8 (internal quotations omitted).

25 Here, the requested award of \$550,000, or 25 percent of the cash portion of the common
26 fund, is appropriate based on the facts of this case. Additionally, reimbursement of litigation
27 costs of \$46,105.63 incurred in pursuing this matter is reasonable, for the reasons set forth
28 below.

1 **A. Class Counsel Are Entitled to an Award of Attorneys’ Fees Out of the**
2 **Common Fund.**

3 **1. The Equitable Common Fund Doctrine Applies When, as in This**
4 **Case, the Litigation Has Recovered a Certain and Calculable Fund on**
5 **Behalf of a Group of Beneficiaries.**

6 It is a long-standing principle that when counsel’s efforts result in the creation of a
7 common fund that benefits plaintiffs and unnamed class members, counsel have an equitable
8 right to be compensated from that fund as a whole for their successful efforts in creating it. *See,*
9 *e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (stating that the Court “has recognized
10 consistently that a litigant or a lawyer who recovers a common fund . . . is entitled to a
11 reasonable attorney’s fee from the fund as a whole”); *Central R.R. & Banking Co. v. Pettus*, 113
12 U.S. 116, 127 (1885) (recognizing common fund doctrine); *Staton*, 327 F.3d at 967 (same). The
13 common fund doctrine rests on the understanding that attorneys should normally be paid by their
14 clients, and that when the attorneys’ unnamed class member clients have no express retainer
15 agreement, it would result in unjust enrichment not to pay attorneys’ fees out of the common
16 fund. *Boeing*, 444 U.S. at 478.

17 In this case, the litigation has resulted in a Settlement Amount of \$2,220,000 plus the
18 Lindeman and Nickum Forfeitures, less attorney’s fees, costs, and the incentive award, to be
19 distributed to participants in the Plan, with the exception of those participants named as
20 Defendants in the litigation. Because the participants have not paid Plaintiff’s counsel fees for
21 their efforts during the litigation, equity requires them to pay a fair and reasonable fee from the
22 settlement, based on what the market would traditionally require, no less than if they had hired
23 private counsel to litigate their cases individually. *See id.* at 479-81.

24 **2. The Fee Award Should Be Calculated as a Percentage of the Common**
25 **Fund.**

26 When contingency fee litigation has produced a common fund, the Ninth Circuit has held
27 that it is appropriate to calculate a reasonable fee by awarding a percentage of the total fund.
28 *See, e.g., Six Mex. Workers*, 904 F.2d at 1311 (“[A] reasonable fee under the common fund
doctrine is calculated as a percentage of the recovery.”); *Paul Johnson*, 886 F.2d at 272. *See*

1 *also, e.g., Lewis v. Starbucks Corp.*, 2008 WL 4196690, at *7 (E.D. Cal. Sept. 11, 2008); *In re*
2 *Activision Sec. Litig.*, 723 F. Supp. 1373, 1374-77 (N.D. Cal. 1989).

3 The percentage of the fund method is appropriate for a number of well-recognized
4 reasons. Importantly, the percentage method accomplishes fee spreading in a manner that
5 comports with the legal marketplace, where counsel’s success is frequently measured in terms of
6 the results achieved. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) (in
7 common fund cases “the monetary amount of the victory is often the true measure of [counsel’s]
8 success”). Further, when clients do not pay an ongoing hourly fee to their counsel, they typically
9 negotiate an agreement in which counsel’s fee is based upon a percentage of any recovery. The
10 percentage of the fund approach mirrors this aspect of the market and, accordingly, reflects the
11 fee that would have been negotiated by the class members in advance, had such negotiations
12 been feasible, given the prospective uncertainties and anticipated risks and burdens of the
13 litigation. *See, e.g., Paul Johnson*, 886 F.2d at 271.

14 The percentage approach helps incentivize highly-qualified attorneys to bring large,
15 complex class actions, even though it is impossible in such cases to negotiate a fee with the
16 unnamed class members in advance. Basing the common fund fee award on a percentage of the
17 fund also encourages counsel to spend time efficiently and to focus on maximizing the size of the
18 class’s recovery, rather than their own lodestar hours. *Swedish Hospital*, 1 F.3d at 1269. Finally,
19 the percentage method is far easier for courts to calculate than any alternative method. *Id.* at
20 1269-70; *Activision*, 723 F. Supp. at 1378-79.

21 In light of these benefits, courts have resoundingly approved the percentage of the fund
22 method to calculate a reasonable fee award in common fund cases. *See Activision*, 723 F. Supp.
23 at 1378 (collecting cases and describing the benefits of a percentage method over the lodestar
24 method for awarding attorneys’ fees in common fund settlements). Thus, in this case, counsel’s
25 common fund fees should be determined as a percentage of the total fund that will be distributed
26 to the class.

27 //

28 //

1 **3. The Requested Percentage of the Common Fund Is Within the**
2 **Range of Reasonableness Established by the Ninth Circuit.**

3 In determining what constitutes a fair and reasonable percentage of a settlement fund for
4 purposes of calculating common fund fees, the Ninth Circuit has stated that courts look to a
5 “benchmark” percentage of 25 percent of the total fund, with 20 to 30 percent as the usual range
6 for fee awards.¹ *Vizcaino*, 290 F.3d at 1047 & 1050 n.4; *Paul Johnson*, 886 F.2d at 272. More
7 recently, district courts in the Ninth Circuit have confirmed that “in most common fund cases,
8 the award exceeds that [25 percent] benchmark.” *Alvarado*, 2011 WL 1883188 at *8 (quoting
9 *Knight*, 2009 WL 248367, at *6 (awarding fee of 30% of \$500,000 settlement)); *see also* 4
10 Newberg and Conte, *Newberg on Class Actions* § 14.6 (4th ed. 2007) (noting that “fee awards in
11 class actions average around one-third of the recovery”).

12 In approving an award of 28 percent of the \$96,885,000 settlement fund, the Ninth
13 Circuit in *Vizcaino* emphasized that the court must “take into account all of the circumstances of
14 the case.” *Vizcaino*, 290 F.3d at 1048. The Ninth Circuit discussed five “relevant
15 circumstances” on which the district court had appropriately relied: (1) the results obtained for
16 the class; (2) the risk undertaken by counsel; (3) incidental or non-monetary benefits conferred
17 by the settlement; (4) the terms of the professional relationship with the client; and (5) the
18 financial burden of representation borne by Class Counsel.² *See id.* at 1048-50.

19
20 ¹ The Ninth Circuit’s observation in *Vizcaino* that the majority of fee awards in common fund
21 cases were “clustered in the 20-30 percent range” was based on a survey of settlements in so-
22 called “megafund” cases – common fund settlements of \$50 million to \$200 million. *Vizcaino*,
23 290 at 1050 n.4 & App. In common fund settlements of less than \$50 million, such as this one,
24 courts have awarded a higher percentage of the common fund as attorneys’ fees. *See, e.g., In*
25 *re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award equal to
26 33 percent of the common fund); *Knight*, 2009 WL 248367, at *6-7 (awarding 30 percent of
\$500,000 settlement fund); *Romero v. Producers Dairy Foods, Inc.*, 2007 WL 3492841, at *4
(E.D. Cal. Nov. 14, 2007) (awarding 33% of \$240,000 settlement fund); *see also In re*
Ampicillin Antitrust Litig., 526 F. Supp. 494, 498 (D.D.C. 1981) (awarding 45 percent of \$7.3
million settlement fund).

27 ² The district court in *Vizcaino* had also considered the market rate. *Id.* at 1049. The Ninth
28 Circuit stated that this was not an abuse of discretion, but it cautioned that in the context of class
action litigation, an “exclusively market based approach . . . may in many cases be illusory,”
because “[t]he ‘market’ is simply counsel’s expectation of court awarded fees.” *Id.* at 1049. It
observed that:

1 As discussed below, when all the circumstances of this case are considered and the
2 factors in *Vizcaino* are taken into account, an award of 25 percent of the common fund is
3 appropriate in light of the special circumstances present in this case.

4 **B. The Requested Fee Award Is Fair and Reasonable.**

5 The requested 25-percent common fund award is justified by facts of this case, including
6 the excellent results obtained for the class, the financial risks undertaken by Class Counsel, the
7 complexity of the legal and factual issues and the skill required to litigate this case, the nature of
8 Class Counsel's relationship with their clients, and awards in similar cases.

9 **1. Class Counsel Obtained Excellent Results for the Class.**

10 "The overall result and benefit to the class from the litigation is the most critical factor in
11 granting a fee award." *Knight*, 2009 WL 248367, at *9 (citing *In re Heritage Bond Litig.*, 2005
12 WL 1594403, at *19 (C.D. Cal. June 10, 2005)); *see also Vizcaino*, 290 F.3d at 1048. As
13 described in Plaintiff's Motion for Preliminary Approval, the \$2,200,000 recovery obtained by
14 Class Counsel in this case is well within the range of potential recoveries that could have been
15 awarded by this Court, had Plaintiff succeeded at trial. MPA at p. 12. Thus, the Settlement
16 likely obtained for the Class most or all of what could have been gained through trial, while
17 removing the risk of outright loss inherent in continued litigation.

18 In addition, Class Counsel obtained more than just the cash value of the settlement fund.
19 *See Vizcaino*, 290 F.3d at 1049 (noting value of "generat[ing] benefits beyond the cash
20 settlement fund"). Pursuant to the terms of the settlement agreement, the settlement funds will
21 be paid directly to the Plan and then allocated to the accounts of individual participants. Dkt. 50-
22 1, §§ 3(d), 9(c). Thus, because the Plan is tax-qualified, the settlement payment will not be
23 considered taxable income to participants, and when a participant is eligible for a distribution

24
25 Where evidence exists, such as here, about the percentage fee to which some
26 plaintiffs agreed *ex ante*, that evidence may be probative of the fee award's
27 reasonableness. But, to the extent that a market analogy is on point, in most cases
28 it may be more appropriate to examine lawyers' reasonable expectations, which
are based on the circumstances of the case and the range of fee awards out of
common funds of comparable size.

Id.

1 from the Plan (or the Plan terminates), the settlement payment will be eligible for direct rollover
2 to an individual retirement account or another employer's plan, where the amount can grow tax-
3 free until the participant withdraws it for retirement income. This treatment of the settlement
4 proceeds as Plan benefits has a direct financial benefit for each Class Member and significantly
5 increases the value of the Settlement fund. Finally, the Settlement Amount was placed in escrow
6 within 30 days of execution of the Settlement Agreement and has been invested for the benefit of
7 the Class until disbursement to the Plan for distribution to the Class Members.

8 **2. Continued Litigation Presented a Significant Risk to the Class.**

9 "The risk that further litigation might result in Plaintiffs not recovering at all, particularly
10 a case involving complicated legal issues, is a significant factor in the award of fees." *Knight*,
11 2009 WL 248367, at *5 (citing *Vizcaino*, 290 F.3d at 1038). Aside from the general risks and
12 complexity associated with protracted class action litigation (discussed below), this case had
13 specific risks. The parties entered into the Settlement before the Court ruled as to what amount, if
14 any, would be recoverable by the Plan for Defendants' alleged fiduciary breaches. While
15 Plaintiff believes that Defendants failed to meet ERISA's fiduciary standards and would be held
16 liable for investment losses to the Plan, Defendants asserted numerous defenses, including lack
17 of loss causation. Differences of expert opinion exist as to whether and by how much the Plan
18 overpaid for the stock it bought in 2004 and whether investment losses suffered by the Plan
19 resulted from any breach by Defendants. Thus, Plaintiff faced the risk of losing the case entirely.

20 Even if Plaintiff succeeded in proving a breach of fiduciary duty, there was no guarantee
21 that the Court would have selected the damages model most favorable to Plaintiff and the
22 proposed Class. Further, the costs of defense were being paid out of Defendants' \$3 million
23 insurance policy, and litigating the case through trial would likely have used the entire policy,
24 leaving Plaintiff with the risk being unable to collect a judgment. *Wasow* Dec. ¶ 10.

25 **3. Class Counsel Took On Significant Risks in Litigating this Case.**

26 "The 'prosecution and management of a complex . . . class action requires unique legal
27 skills and abilities.'" *Knight*, 2009 WL 248367, at *6 (quoting *Edmonds v. United States*, 658 F.
28 Supp. 1126, 1137 (D.S.C.1987)). The fairness of this fee award is further supported by the high

1 quality of Class Counsel’s legal representation in litigating and mediating a complex and risky
2 case. ERISA litigation is recognized to be time-consuming and difficult, and few attorneys will
3 represent plaintiffs in such cases. *See Mogck v. Unum Life Ins. of Am.*, 289 F. Supp. 2d 1181,
4 1191 (S.D. Cal. 2003). Class Counsel in this case have extensive knowledge and experience in
5 ERISA litigation, including breach of fiduciary duty cases and class actions. Wasow Dec. ¶¶ 11-
6 18. The effort and skill expended by Class Counsel to position the case to obtain the best
7 possible outcome at mediation is described above in Section III(A) and in the accompanying
8 Wasow Declaration.

9 Moreover, Class Counsel accepted and litigated this class action solely on a contingency
10 fee basis, and Class Counsel has received no compensation in the litigation to date. There has
11 never been certainty that counsel would be paid for their time or reimbursed for the considerable
12 expenses incurred. The Ninth Circuit has held that an award of attorneys’ fees is appropriate to
13 “reward[] class counsel not only for the hours they had in the case to the date of the settlement,
14 but for carrying the financial burden of the case, effectively prosecuting it and, by reason of their
15 expert handling of the case, achieving a just settlement for the class.” *Torrissi*, 8 F.3d at 1377;
16 *see also Knight*, 2009 WL 248367, at *6 (“The importance of assuring adequate representation
17 for plaintiffs who could not otherwise afford competent attorneys justifies providing those
18 attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by
19 the hour or on a flat fee.”); *Vizcaino*, 290 F.3d at 1050 (“These burdens are relevant
20 circumstances.”). Thus, the requested award of attorney’s fees is reasonable to reward Class
21 Counsel for accepting the risk and financial burden of litigating the case.

22 **4. Awards in Similar Cases Demonstrate that the Requested Award Is**
23 **Reasonable.**

24 As described above, “in most common fund cases, the award exceeds [a 25%]
25 benchmark. Where a court adopts the percentage method, ‘absent extraordinary circumstances
26 that suggest reasons to lower or increase the percentage, the rate should be set at 30%.’” *In re*
27 *Omnivision Technologies, Inc.*, 2007 WL 4293467, at *10 (N.D. Cal. Dec. 6, 2007) (quoting
28 *Activision*, 723 F. Supp. at 1378) (internal citations omitted).

1 Indeed, attorneys' fees awards in recent class action ERISA settlements are consistent
2 with this finding. Fee recoveries exceeding 25 percent have not been unusual. *See, e.g., In re*
3 *Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (awarding fee of 33.33% of \$35
4 million settlement); *In re ADC Telecomms., Inc. ERISA Litig.*, No. 03-2989 (D. Minn. Oct. 16,
5 2006) (awarding fee of 30% of \$3.25 million settlement); *In re Westar Energy, Inc., ERISA*
6 *Litig.*, No. 03-4032 (D. Kan. July 27, 2006) (awarding fee of 30% of \$9.25 million settlement);
7 *In re CMS Energy ERISA Litig.*, 2006 WL 2109499, at *2-3 (E.D. Mich. June 27, 2006)
8 (awarding fee of 28.5% of \$28 million settlement); *Spann v. AOL Time Warner Inc.*, 2005 WL
9 1330937, *8 (S.D.N.Y. Jun. 7, 2005) (awarding fee of 33% of \$2.9 million settlement); *Berger v.*
10 *Xerox Corp. Ret. Income Guarantee Plan*, 2004 WL 287902, at *2 (S.D. Ill. Jan. 22, 2004)
11 (awarding 29% of settlement fund).

12 Thus, the requested award is in line with those ordered in similar cases.

13 **5. Class Members Will Have the Opportunity to Review Class**
14 **Counsel's Request for an Award of Attorneys' Fees Prior to the**
15 **Deadline for Objections.**

16 Finally, Class Members will be afforded ample opportunity to review Class Counsel's fee
17 request and object if they choose before this Court grants final approval of the Settlement. *See In*
18 *re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994-95 (9th Cir. 2010). The Class Notice
19 informs Class Members that this motion is available for review on Class Counsel's website, and
20 also informs Class Members of their ability to object to any part of the Settlement, including the
21 attorneys' fees sought by Class Counsel. *See* Dkt. 50-2 at p. 5-7. Thus, Class Members will
22 have the opportunity to review the Notice and this motion prior to the deadline to raise objections
23 to the settlement. Any Class Member objections to Class Counsel's request will be heard by this
24 Court prior to its decision on this motion.

25 **C. Class Counsel Are Entitled to Recover Costs.**

26 Class Counsel request reimbursement from the fund of out-of-pocket expenses they
27 incurred during this litigation. Reimbursement for these expenses from the common fund is
28 appropriate for the same reasons attorneys' fees should be paid out of the fund: all beneficiaries
should bear their fair share of the costs of the litigation, and these are the normal costs of

1 litigation that counsel traditionally bill their paying clients. *See* 1 Alba Conte, *Attorney Fee*
2 *Awards* § 2:8 at 50-51 (3d ed. 2004) (“The prevailing view is that expenses are awarded in
3 addition to the fee percentage.”). As one commentator has written:

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

8 Conte, *supra*, § 2.19 (citing *Trustees v. Greenough*, 105 U.S. 527 (1881)). The expenses that
9 may be reimbursed from the common fund are not limited to those taxed in a judgment against
10 an opponent, but instead, encompass “all reasonable expenses.” *Id.* *See also Harris v.*
11 *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (A plaintiff “may recover as part of the award of
12 attorney’s fees those out-of-pocket expenses that would normally be charged to a fee paying
13 client.”).

14 To date, Class Counsel have incurred \$46,105.63 in litigation costs and expenses, and
15 will incur additional costs through the conclusion of this matter (specifically, the costs of mailing
16 the Settlement Notice are not reflected in the current costs). Wasow Dec. ¶ 19 and Exh. 1.
17 These costs include deposition-related expenses, photocopying and mailing expenses, expert and
18 mediator fees, and other reasonable litigation-related costs. All costs incurred here were
19 necessary to the prosecution of this litigation and would normally have been billed to a client
20 paying for counsel’s services on a regular basis. These costs are reasonable for a case of this
21 duration and complexity and should be compensated in full.

22 **IV. THE INCENTIVE PAYMENT REQUESTED ON BEHALF OF THE NAMED**
23 **PLAINTIFF IS REASONABLE AND OF THE TYPE ROUTINELY AWARDED.**

24 The Ninth Circuit has recognized that “[i]ncentive awards are fairly typical in class action
25 cases.” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (emphasis omitted).
26 “Such awards are discretionary, . . . and are intended to compensate class representatives for
27 work done on behalf of the class, [and] to make up for financial or reputational risk undertaken
28 in bringing the action.” *Id.* “Courts have generally found that \$5,000 incentive payments are

1 reasonable,” particularly where the incentive payment constitutes a small portion of the overall
2 settlement payment. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008). *See also*
3 *Garner v. State Farm Mutual Auto. Ins. Co.*, 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22,
4 2010) (“Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of
5 \$20,000 or more where, as here, the class representative has demonstrated a strong commitment
6 to the class.”) (collecting cases).

7 The payment of \$5,000 to the Plaintiff is intended to recognize the time and effort he
8 expended on behalf of the Class. Mr. Clarke has demonstrated his strong commitment to the
9 Class by initiating this litigation, providing information regarding the Plan to Class Counsel,
10 responding to discovery requests, producing relevant documents, preparing for his deposition,
11 traveling to Oakland to attend the mediation, monitoring the progress of the litigation, and
12 consulting with Class Counsel regarding litigation decisions. Wasow Dec. ¶ 9.

13 The dedication that Mr. Clarke has shown to this case and to the remaining members of
14 the Class meets the standard established in the Ninth Circuit for the award of incentive payments.
15 It is less than 0.25% of the total settlement amount. *See Alberto*, 252 F.R.D. at 669 (collecting
16 cases in which incentive payments of 0.5% of the total settlement or less have been approved).
17 The requested award of \$5,000 to the Plaintiff in this case has been disclosed to the Class in the
18 Class Notice, so that the Court may consider any objections that the Class Members raise to the
19 incentive awards prior to granting final approval of the Settlement.

20 Accordingly, the requested payment to the Class Representative is appropriate and
21 justified as part of the overall Settlement, in light of his service to and risks taken on behalf of
22 the Class.

23 **V. CONCLUSION.**

24 For all of the foregoing reasons, Plaintiff respectfully requests that the Court approve the
25 payment of \$550,000 as reasonable attorneys’ fees and the payment of \$46,105.63 as reasonable
26 costs, and approve the incentive award of \$5,000 to Named Plaintiff Edward Clarke.

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