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10 **UNITED STATES DISTRICT COURT**
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 ALICIA HARRIS, as an individual and on
 13 behalf of all others similarly situated,

14 Plaintiff,

15 v.

16 VECTOR MARKETING
 CORPORATION, a Pennsylvania
 17 corporation; and DOES 1 through 20,
 inclusive,

18 Defendants.

CASE NO. CV 08-5198 EMC
 (Assigned to Hon. Edward M. Chen)

**PLAINTIFF'S NOTICE OF MOTION AND
 MOTION FOR APPROVAL OF
 ATTORNEYS' FEES**

DATE: August 10, 2011
 TIME: 10:30 a.m.
 CTRM: C
 JUDGE: Hon. Edward M. Chen

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1 **MISCELLANEOUS**

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3 Charles Silver, *Due Process and the Lodestar Method:*
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5 Goodrich, Frank and Silver, Reagan, *Common Fund and Common Fund Problems:*
Fee Objections and Class Counsel's Response, 17 Rev. Litig. 525
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1 **TO: DEFENDANT AND ITS ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 10, 2011, at 10:30 a.m., or as soon thereafter as the
3 matter may be heard in the above-entitled court, located at 450 Golden Gate Avenue, Courtroom C,
4 15th Floor, San Francisco, California, 94102, Plaintiff will, and hereby does, move this Court for an
5 Order granting Class Counsels' application for attorneys' fees in the amount of \$4,190,000.00 (equal
6 to 32.2% of the gross settlement amount).

7 This motion will be based on this Notice, the Memorandum of Points and Authorities and
8 declarations filed herewith, and the pleadings and papers filed herein.

9

10 DATED: June 2, 2011

**MARLIN & SALTZMAN, LLP
DIVERSITY LAW GROUP
LAW OFFICES OF SHERRY JUNG**

11

By: /S/ Stanley D. Saltzman
Stanley D. Saltzman, Esq.
of Marlin & Saltzman
Attorneys for Plaintiff

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1 **1. NATURE OF RELIEF SOUGHT**

2 By this motion, plaintiff Alicia Harris, and her attorneys, seek an order approving Class
3 Counsel application for attorneys' fees in the amount of \$4,190,000.00 (equal to 32.2% of the gross
4 settlement amount). This request was set forth in the Notice of Settlement mailed to all class members
5 (Exhibit 1 hereto, at Section VI- C).¹ As set forth in the Settlement Agreement of the parties,
6 defendant will not object to the order sought herein.

7 The preliminarily approved settlement requires that defendant pay up to a maximum of \$13
8 million to the class members. This maximum payout, divided equally between the "training time"
9 claims and the "sample set" reimbursement claims, contemplates the creation of a settlement fund
10 which will entitle all those who submit a claim to a repayment of over 85% of the gross sums which
11 they could have recovered had the matter proceeded to trial, exclusive of penalties, assuming that the
12 class had prevailed at trial.²

13 Governing Ninth Circuit law, following the clear instruction of the United States Supreme
14 Court in *Boeing Co. v. Van Gemert* 444 U.S. 472, 478 (1980), establishes that percentage awards are
15 to measured against the entire common fund created in the settlement. In *Glass v. UBS Financial*
16 *Services, Inc.*, 2007 WL 474936, at 16 (N.D. Cal. Jan 26, 2007), citing to the Ninth Circuit authority,
17 the Court noted:

18 The New York Attorney General and Evans [objectors to the fee motion] further argue
19 that even if fees are awarded under the percentage method, the Court should base such
20 fees on the amount of the settlement fund actually claimed by the class. The Ninth
21 Circuit has held, however, that the district court must award fees as a percentage of the
22 entire fund, or pursuant to the lodestar method, not on the basis of the amount of the

23 ¹The attached Notice was the primary notice utilized; similar notices were sent to specific
24 groups of class members, depending on their circumstances (i.e. possibly already returned the sample
25 set), but all the Notices contained the same language relative to the fees requested, as well as the
posting of the motion for fees on counsel's website)

26 ²Vector has recently unveiled substantial changes to its "sample set" program, as a result of
27 which trainees are no longer required to pay for the sample set, but rather are issued a set "on loan"
28 by the company. It is Plaintiff's belief that this drastic change from Vector's historical practice of
selling the sample sets to the trainees, as alleged by the Class, is due to this lawsuit.

1 fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.*,
2 129 F.3d 1026, 1027 (9th Cir.1997).

3 Similarly, in the recent attorney fee ruling issued in *In Re Wal-Mart Stores, Inc Wage and Hour*
4 *Litigation*, No. C 06–2069, 2011 WL 31266, at *3 (N.D.Cal. Jan. 5, 2011), at footnote 5, the Court
5 again affirmed this position:

6 With respect to the amount of the fund created, ‘attorneys for a successful class may
7 recover a fee based on the entire common fund created for the class, even if some class
8 members make no claims against the fund so that money remains in it that otherwise
9 would be returned to the defendants.’

10 In relation to this settlement, in order to facilitate the presentation of claims by class members
11 eligible for the respective amounts payable for both the training time and the sample set claims, the
12 Notice packet mailed to all class members included a pre-paid self-addressed envelope for use in
13 submitting the “training time” claim, as well as a pre-paid UPS label to facilitate the return of the
14 “sample set”, for those who elect to do so. Additionally, to enhance the participation by class
15 members, a reminder postcard was mailed on June 2, 2011 to all class members who had not submitted
16 a claim by that date or otherwise excluded themselves from the settlement.

17 2. INTRODUCTION AND SUMMARY OF ARGUMENT

18 By the time this settlement was reached in March 2011, the case had been fully vigorously
19 litigated since its inception in November 2008. As the Court is aware, the claims alleged required two
20 separate and distinct phases of class certification motions, one for the FLSA opt-in class and one for
21 the California Rule 23 opt-out class. (Declaration of Stanley D. Saltzman (“Saltzman Dec.”) at ¶5).
22 This resulted in three separate class certification motions and one motion for de-certification. The
23 litigation also included two separate and distinct phases of motions for summary
24 judgment/adjudication, one of which was heard and ruled on by the Court in the early months of the
25 action, while two cross-motions for summary judgment had been fully briefed and pending for hearing
26 at the time the settlement. (*Id.*)

27 Additionally, numerous motions were filed during the litigation that ranged from the scope of
28 the pleadings to the scope of permissible discovery. (*Id.*) As the lengthy docket in this case

1 demonstrates, the parties availed themselves of the Court extensively during the litigation to resolve
2 all manner of dispute. Nonetheless, all of these motions, hearings and related matters fully informed
3 the parties and framed the action as it proceeded toward the scheduled trial date of June 6, 2011, only
4 three months following the mediation date. Finally, as further discussed herein, the parties had
5 conducted more than 50 depositions of class members and defendant employees and witnesses.
6 (Saltzman Dec. at ¶ 6.) Thus, at the time of settlement, the parties were extremely knowledgeable as
7 to the relative strengths and weaknesses of each other's positions.

8 This Court noted the parties' extensive litigation "work-up" throughout its Order Granting
9 Preliminary Approval (Docket No. 466), dated April 29, 2011. The 28-page Order granting the
10 preliminary approval summarized the action and many of the rulings issued by the Court.

11 Over the course of the action, Class Counsel have engaged in extensive efforts to contact and
12 interview large numbers of class members. A pre-certification letter was mailed to over 30,000 class
13 members - and resulted in Class Counsel fielding over 5,000 responding phone calls or emails.
14 (Saltzman Dec. at ¶ 8.) Notice of Conditional FLSA Certification was later mailed out to over 45,000
15 putative class members. Following final certification, yet another notice of certification was then
16 mailed out to over 67,000 putative class members. (*Id.*) Each of these mailings, and the handling of
17 all responses via counsel or the claims administrator, required class counsel to expend substantial time
18 and to advance or commit to the payment of hundreds of thousands of dollars of expenses for the
19 benefit of the class. (Saltzman Dec. at ¶ 2.)

20 When the Court granted in part and denied in part Defendant's initial summary judgment
21 motion, Defendant sought the trial court's permission, unsuccessfully, for leave to appeal that portion
22 which had been denied. Following the court's Order granting in part (and denying in part) final
23 certification, Defendant again sought leave to appeal that ruling, this time by way of a Rule 23(f)
24 petition. (Saltzman Dec. at ¶ 5.) Concurrent with that requested relief, Defendant also sought a stay
25 of proceedings from the trial court, and when that was denied, Defendant sought an emergency stay
26 in the Ninth Circuit, designed to avoid the mailing of the Notice of Final Certification. (Doc. 376)
27 These various requests for relief were opposed by Class Counsel on behalf of the class, and denied by
28 the courts involved; however, the issues raised would certainly have remained appealable following

1 any eventual trial on the merits. Simply stated, Defendant continually “flexed” the power of what
2 appeared to reflect a virtually open-ended litigation budget, all geared to protecting its traditional
3 business model.

4 Nonetheless, by the time this settlement was reached, Defendant had elected (without admitting
5 any wrongdoing) to modify its business model in relation to the providing “sample sets” to its trainees.
6 (Saltzman Dec. at ¶ 7.) In January, 2011, Defendant substituted a “loaner” program in place of the
7 prior practice of requiring that the “sample set” be paid for by the trainees. (Id.) This change alone
8 represents a substantial and meaningful modification to Defendant’s “way of doing business.”
9 Pursuant to the settlement, past trainees are also entitled to receive approximately 85% of the amount
10 they paid for the knives, subject to return of the knives under standard “restitution” principles
11 governing that claim. (Id.)

12 Also as noted in this Court’s Order granting preliminary approval, the settlement will create
13 a gross fund (prior to deduction of fees, costs, expenses, etc.) from which class members are eligible
14 to receive 85% of the value of the unpaid training time. At page 15 of the Order, the Court notes
15 correctly that \$6.5 million dollars is set aside for the training time fund. The maximum value of
16 damages for training time, if awarded at trial, is also correctly noted to be \$7.648 million (See, Order,
17 at 15:2-4, and footnote 6). Thus, the \$6.5 million fund represents 85% of the \$7.648 million. This
18 percentage is important to note in light of the discussion on what percentage of available settlement
19 was actually paid in the *Glass* case.

20 Preliminarily, it is critical to note that in the *Glass* decision, the Court specifically noted at
21 p. 10 of the ruling that the parties agreed that the \$45 million settlement amount represented 25% to
22 35% of the total potential trial verdict value of the case. If one were to apply the 25% figure, this
23 settlement would extrapolate to a potential recovery of \$180,000,000.00 at trial. The settlement fund,
24 therefore, before reductions for fees, costs, expenses, etc., already factored in a settlement reduction
25 of \$135,000,000.00. Then, following the claims process in which about 50% of the class members
26 submitted claims, and after deducting for all the fees and expenses, about \$21,000,000.00 was paid
27 out. This amount equates to 11.67% of the \$180 million potential value of the claims had the case
28 been successfully tried, and then upheld on the inevitable appeal. Nevertheless, this settlement,

1 including the attorneys fees sought, was fully approved by the Court.

2 In citing these numbers, Class Counsel do not in any way wish to imply that the *Glass*
3 settlement was lacking. On the contrary, the risk and reward analysis performed by counsel in *Glass*
4 mirrors that performed by class counsel in all class actions. The significance of the analysis offered
5 is that in the case now before this Court, there is simply no denying the fact that the starting number
6 for the analysis is the fixed sum of \$7.648 million, as that is the total value of the claim, *if the class*
7 *had won at trial, and if it had been able to defeat the inevitable appeals over the next two to three*
8 *years*. Against that fixed sum of \$7.648 million, the \$6.5 million fund achieved equates to 85% of that
9 amount. If even 30% of the class members elect to submit claims on the \$6.5million fund created, then
10 25.5% of the trial value of \$7.648 million of the claim will be paid out. This recovery would result in
11 a payout herein of more than twice the 11.67% of trial value paid out in *Glass*.

12 A 30% claim rate is suggested, because as noted infra, that is the projected claims rate based
13 on the number of claims submitted to date. As such, it appears that the Court's concerns expressed
14 in the Order Granting Preliminary Approval that the claim rate could conceivably be in the low 10%
15 range will not come to pass, as currently the claims rate is already approximately 15%, with more than
16 half the claims period remaining. (Saltzman Dec. at ¶ 9.) Even allowing for the fact that these are
17 relatively small dollar claims when compared to those involved in the *Glass* case, the end result will
18 likely be a payout about double (or even greater than double) the percentage paid in the fully approved
19 *Glass* case. Both *Glass* and this matter involve potential one-way fee shifting rights, and both cases
20 involve reversions, so those factors are equalized. As the Court noted in its Order, at 20:13-24, such
21 settlements are routinely approved. The *Glass* case is more fully discussed in Section 3. C. of this
22 brief.

23 In sum, Class Counsel submit that their commitment of resources, both in time and money, has
24 been extraordinary. No case result can ever be predicted with any certainty, and this matter is no
25 exception. The many court hearings, as to so many different issues, clearly demonstrated the
26 constantly evolving nature of the case. Repeatedly, the parties and this Court searched for guidance
27 in prior cases involving these issues, and as often as not, were left wanting. Thus, in the absence of
28 strong precedential guidance, uncertainty was the only predictable result. And in the face of

1 uncertainty, good counsel and astute clients generally seek resolution. That has been achieved here,
2 and counsel submit that the fee request arising from this settlement is both reasonable and warranted,
3 and should be approved. At the Final Fairness Hearing, they will also ask that the Court approve the
4 settlement as submitted.

5 As set forth herein, in relation to the expenditure of costs advanced and committed, as to which
6 final approval will be sought in connection with the final approval motion for the settlement as a
7 whole, class counsel has gone above and beyond the norm in pursuit of the claims for the class. To
8 date, approximately \$435,000.00 of costs have been advanced, and another \$75,000.00 is outstanding,
9 relating to the Rule 23 Notice of Certification. It has been clear throughout this action that in the
10 absence of this level of commitment of both time and money expended by Class Counsel, that Vector
11 had no intention of changing its long-standing business model, or of paying any of the class members
12 anything whatsoever for their time spent in training. Vector had not done so previously, and was not
13 volunteering to do so now.

14 Plaintiff and her counsel now seek this Court's approval of the attorney fees requested for all
15 of the effort they have put forth on behalf of the class members.

16 **3. ATTORNEY FEE AWARDS IN COMMON FUND CASES**

17 **A. The Award Requested**

18 The fee sought relates to all efforts expended by Class Counsel for the complete handling of
19 this case, including any additional work remaining to be performed by Class Counsel in securing final
20 Court approval of the Settlement, and later following through to ensure that the Settlement is fairly
21 administered and fully implemented.

22 An enormous amount of work on the part of Class Counsel went into achieving this resolution,
23 as noted by the Court. Based upon the factors relating to approval of percentage of the fund fee
24 awards, class counsel submit that the effort and result justify the requested percentage fee requested.
25 As a secondary "cross-check" to the percentage of the common fund award, class counsel are also
26 providing this Court with their detailed billing records, (redacted only sparingly where necessary to
27 protect the attorney-client privilege), so that the Court can conduct a lodestar analysis. The time
28 entries attribute time to the research for and creation of the numerous pleadings, motions and discovery

1 matters addressed in the case, and clearly reflected in the Court docket, plus the many hearings held
2 before this Court. Billing records also include entries for time spent preparing for, traveling to and
3 taking or defending the many depositions conducted in this action. Additional entries reflect time
4 spent responding to the thousands of telephone calls which were received over the course of the
5 litigation. Finally, other entries reflect time spent on the hundreds of telephone calls and conferences
6 conducted, both between class counsel themselves and with opposing counsel, and with the
7 hundreds/thousands of calls received from and returned to putative class members.

8 Judge Marilyn Patel remarked, in an oft-quoted and prescient ruling, that in essence the task
9 of tracking the tasks was itself a potential morass of its own making, and thus favored the application
10 of the percentage of the fund approach. *In re Activision Securities Litigation*, 723 F.Supp. 1373, 1375
11 (9th Cir. 1989) Notwithstanding Judge Patel's observation, detailed time entries are offered here
12 because they so clearly support the conclusion that even under the lodestar approach, when coupled
13 with an extremely modest multiplier of only 1.4, the fee request is fully justified. Secondly, the
14 billings are also offered so as to ensure full compliance with the recent Ninth Circuit decision in
15 *Mercury Interactive Corp. Secs. Litig. v. Mercury Interactive Corp.*, 618 F.3d 988 (9th Cir. 2010).

16 **B. The Percentage of the Fund Approach**

17 Class Counsel seek a fee based on a percentage of the gross recovery, which is appropriate, and
18 even desirable in cases like this. As stated in *Newberg on Class Actions, Fourth Edition*, vol. 4, p.
19 556, §14.6:

20 Unlike the lodestar method which can encourage class counsel to devote unnecessary
21 hours to generate a substantial fee, under the POR [percentage of recovery] method, the
22 more the attorney succeeds in recovering money for the client, and the fewer legal
23 hours expended to reach that result, the higher dollar amount of fees the lawyer earns.
24 Thus, one of the primary advantages of the POR method is that it is thought to equate
25 the interests of class counsel with those of the class members and encourage class
26 counsel to prosecute the case in an efficient manner.

27 See also, *Boeing Co. v. Van Gemert* 444 U.S. 472, 478 (1980).

28 The purpose of this doctrine is largely to avoid unjust enrichment, by spreading the litigation
costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
burden alone. It provides that when a litigant's efforts create or preserve a fund from which others
derive benefits, the litigant may require the passive beneficiaries to compensate those who created the

1 fund. Both California State and Ninth Circuit decisions have embraced this doctrine. *Vincent v.*
2 *Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977).

3 The Common Fund Doctrine is the oldest exception to the American rule of fee
4 shifting.

5 The Common Fund exception is grounded in the historic power of equity to permit the
6 trustee of a fund or property (or a party preserving or recovering a fund for the benefit
7 of others, as well as himself or herself) to recover costs, including attorneys fees.
Those costs and fees are paid out of the fund or property itself, or directly from the
other parties enjoying the benefit. R. Pearle, *California Attorney Fee Awards* (CEB,
1993) §7.4, p. 7-5.

8 It is clear that the settlement, in creating a fund of \$13 million available to the class herein,
9 results in a substantial common fund. When measured against the total potential recovery of \$7.648
10 million for the training time claimants, and no more than approximately \$7.5 million for the sample
11 set restitution claimants, each \$6.5 million fund is essentially equal to 85% of the amount that could
12 have been recovered. This is a substantial percentage recovery, far eclipsing that normally
13 accomplished by way of settlement. Under the Common Fund Doctrine, courts have historically and
14 consistently recognized that class litigation is increasingly necessary to protect the rights of individuals
15 whose injuries and/or damages are too small to economically justify individual representation. This
16 case is precisely such a case. In *Paul, Johnson, Alston & Hunt v. Gaulty* 886 F.2d 268, 271 (9th Cir.
17 1989) the Ninth Circuit embraced this principle when it stated:

18 Since the Supreme Court's 1885 decision in *Central Railroad & Banking Co. of Ga.*
19 *v. Pettus*, 113 U.S. 116, 5 S. Ct. 387, 28 L.Ed. 915 (1885), it is well settled that the
20 lawyer who creates a common fund is allowed an extra reward, beyond that which he
has arranged with his client, so that he might share the wealth of those upon whom he
has conferred a benefit. The amount of such a reward is that which is deemed
'reasonable' under the circumstance.

21
22 Accordingly, in the determination of a reasonable common fund fee award, courts award fees
23 to serve as economic incentive for lawyers to bring class actions in order to achieve increased access
24 to the judicial system for meritorious claims and to enhance deterrents to wrongdoing. See A. Conte,
25 *Attorney Fee Awards*, 2nd Ed. 1993, 104, p.6. In this case, it would have been difficult, if not
26 impossible, for these Vector trainees to bring separate actions for the small amounts of claimed unpaid
27 compensation. Collectively, the result has been that each class member who submits a claim for
28 training time will be entitled to \$94 gross, and about \$57 net. Similarly, the sample set claimants who

1 elect to return the knives and receive their restitution will be entitled to \$124 gross and about \$75 net.

2 When this case was originally filed, the prospect of a long drawn-out battle with defendant was
3 almost a certainty. Defendant has indeed asserted all available defenses, and challenged Class Counsel
4 in every manner legally available to them. In the face of these issues, Class Counsel pursued this
5 matter on behalf of the representative plaintiff, and the proposed class, and achieved a significant result
6 for the entire class. It is respectfully submitted that the result more than justifies the fee requested.

7 California law encourages attorneys to undertake the enormous risks of time and money
8 necessary to vindicate the public interest, or to protect the public policies underlying the wage and hour
9 laws. To fulfill this policy, California law provides that attorney fee awards should be equivalent to
10 fees paid in the legal marketplace to compensate for the result achieved and risk incurred. See, *Lealao*
11 *v. Beneficial Cal., Inc.* 82 Cal. App.4th 19,47 (2000).

12 In cases where class members present claims against a potential maximum settlement fund, the
13 appropriate method for determining the percentage of fees to be awarded to counsel is based upon the
14 total potential recovery available to the class, not the actual claimed amount. “In *Boeing Co. v. Van*
15 *Gemert*, 444 U.S. 472 (1980), the Supreme Court settled this question by ruling that class counsel are
16 entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the
17 amount actually claimed.” *Newberg on Class Actions, supra*, at page 570 (emphasis added). See also
18 *Glass, Wal-Mart, and MGM-Pathe Communications*, all cited above. The underlined and emphasized
19 language is certainly not to be read as an absolution for counsel to ignore the claims process and wash
20 their hands of the matter, and this is not the case here.

21 Here, Class Counsel negotiated for and obtained each of the claims process “small points”
22 which, when taken together, have historically increased claims rates. These enhancements include:
23 inclusion of the amount the claim will yield for each person on page one of the Notice; a self-addressed
24 stamped envelope for the return of the claim form; a simple one-page claim form; and a reminder
25 postcard mid-way through the claims process, mailed to all those who had not as of that date presented
26 claims. At the end of the claims process, if in fact the claim rate is two or three times the 10 to 15 %
27 rate that clearly troubled the Court, it may well be these “small points” insisted on by Class Counsel
28 accounted for the higher claim rate.

1 **C. The Measure of the Settlement Value Against Trial Value**

2 This Court understandably spent a good deal of time at the preliminary approval stage of the
3 case attempting to analyze the “value” of the settlement in relation to the potential trial value of a full
4 recovery, as a starting point to weigh the settlement itself. While this subject will be studied in further
5 depth in the final approval motion to be heard in August, 2011, it certainly merits attention in relation
6 to this motion.

7 Notably, the parties already have important data relating to the claims submitted for the training
8 time group, which group was of particular interest to this Court. From that information, certain broad
9 projections can already be made. This information can in turn be applied to the measures utilized in
10 the *Glass v. UBS* case which was referred to by this Court in its order granting preliminary approval
11 of this settlement, and specifically at pages 16, 20 and 21 of the subject Order in this case.

12 In *Glass*, as noted in footnote 8 of this Court’s Order, the Defendant agreed to pay up to
13 \$45 million to settle the many claims against it by its highly compensated stock brokers.³ With high
14 dollar value claims available, a participation rate of roughly 51% was achieved, and any funds
15 remaining unclaimed were subject to reversion to the Defendant, as is the case in this matter with
16 regard to the training time claims addressed by the Court in its Order. A critical issue which must be
17 factored into the analysis of the *Glass* settlement, however, is that the parties therein, when questioned
18 by the Court about the value of the gross settlement as compared to the potential losses which could
19 be recovered at trial (i.e. the starting number for the analysis), informed the Court that the \$45 million
20 gross figure represented 25% to 35% of the loss to the class. *Glass*, supra., at *10. With that estimate,
21 and even after noting the failure of the parties to present any detailed written analysis of the value of
22 the claims, the Court found that the settlement was fair and adequate. The mathematics of this
23 equation are relatively straightforward. The settlement computation in *Glass* therein **began** at 25%
24 of the total value of the damages available at trial with approximately 50% of that subtotal claimed,
25 resulting in **only 12.5%** of the real value of the potential damages being paid out.

26 The class herein is now extremely confident that the **percentage** to be paid here will eclipse

27 ³ The average claim in *Glass* equaled \$3415.00 calculated by dividing the \$45million by the
28 13,176 class members.

1 the percentage achieved in *Glass*. The training time gross recovery equals 85% of the total possible
2 minimum wage recovery for any one person. Fifteen hours times the weighted minimum wage of
3 \$7.39 per hour equals \$110.85, so the gross pre-deduction recovery of \$94 is 85% of the total. While
4 this Court expressed concern in its Order relating to the Defendant's estimate of a possible 10% claims
5 rate, that concern is now unfounded as early in the claims process, approximately 145% of the class
6 has submitted claims. At page 20 of its Order granting preliminary approval, the Court addressed this
7 possibility of only a 10% claims rate, and then perhaps a 20% claims rate. The Court made clear that
8 neither scenario bodes well for final approval. Fortunately, even as of the time of the submission of
9 this motion only three weeks into the eight week claims period, in order to assure compliance with *In*
10 *Re Mercury Interactive* - and before the mailing of the reminder postcard which was bargained for -
11 the claims rate on the training time claim has already well exceeded 10%, and is quickly heading
12 towards exceeding 20%. The claims rate, as of Thursday, June 2, 2011, stands at approximately 15%
13 relative to those whose Notice packets were not returned as non-deliverable. (*See*, (Saltzman Dec. at
14 ¶ 9 and Exhibit B thereto.). The final claims rate is certainly on target to reach the high 20% range,
15 and may very well exceed 30%, as hoped for by Class Counsel.

16 In relative terms, and compared to the *Glass* case which was granted approval over many
17 objections, including one by the Attorney General of the State of New York, the resulting percentage
18 of the total trial potential recovery under the training time claim which would be paid out if the 30%
19 claim rate was met, would equal just over 25%, or twice the 12.5% achieved in the *Glass* case. (85%
20 of the trial win value in gross recovery, and 30% of that 85% claimed equals 25.5%).

21 With regard to the sample set fund, this Court noted in its Order of April 29, 2011, at pp. 21 -
22 22, and specifically at 22:2 - 5, that given the restitutionary nature of the claims presented under
23 California *Business & Professions Code* § 17200, that there was only a small likelihood of a
24 substantial disparity between the settlement value of the fund created and the trial value. This is due
25 to the fact that whether at trial, or via settlement, return of the knives in order to avoid windfall
26 recovery would be both necessary and appropriate. If California permitted a direct action for a
27 violation of *Labor Code* §450, the dynamics would be different, but this Court has already ruled that
28 no such direct action is permitted. Thus, whether at trial or via settlement, the same result would

1 ensue. Accordingly, and once again following the dictates of the U.S. Supreme Court in the *Boeing*
2 decision, and the Ninth Circuit decisions in accord, the total value of the fund drives the fees
3 recoverable.

4 The *Glass* case is also interesting in light of that Court's decision not to utilize the lodestar
5 analysis as a cross-check where the parties acknowledged that very little litigation (actually, none) was
6 performed. The Court gave due deference to class counsel's strategy of settling the case early for the
7 stated 25 - 35% of total value, with a claims process and a reversion. Thereafter, the Court awarded
8 the fee sought based on a percentage of the gross fund created, without consideration of the lodestar.

9 **D. Evolution of the Percentage Method.**

10 Ever since the Common Fund Doctrine found its genesis in *Trustees v. Greenough*, 105 U.S.
11 527 (1881), courts often awarded fees on a percentage basis. Following the 1966 amendments to
12 Rule 23, the size of settlement funds began increasing significantly and the fees awarded pursuant to
13 the percentage method, taken out of context, were criticized by commentators and the general press.
14 In 1973, the revision for the Manual for Complex Litigation proposed that all common fund fee awards
15 be based on time reasonably expended on the action. This concept was then embraced in *Lindy Bros.*
16 *Bldrs., Inc. of Phila. v. American R. & R. San Corp.*, 487 F.2d 161 (3rd Cir. 1973), and *Lindy II*, 540
17 F.2d 102 (3rd Cir. 1976). Thereafter, a large number of courts adopted *Lindy's* rationale, and courts
18 generally began awarding fees based on the actual time expended (the lodestar) in conjunction with
19 a multiplier of between 2 and 4. *Fadhl v. Police Dept., City & County of San Francisco*, 1983 WL 514
20 (N.D. Cal. May 12, 1983)(finding multiplier of 2.5 to be appropriate.)

21 As courts were required to wade through the voluminous, complicated and privileged time
22 records, it became evident that utilization of the lodestar method had reached a point of diminishing
23 returns. As the court noted in *In re Activision Securities Litigation*, 723 F.Supp. at 1375:

24 The question this court is compelled to ask is, Is this process necessary? Under a cost-
25 benefit analysis, the answer would be a resounding, No! Not only do the *Lindy Kerr*
26 and *Johnson* analyses consume an undue amount of court time with little resulting
27 advantage to anyone, but, in fact, it may be to the detriment of the class members.
They are forced to wait until the court has done a thorough, conscientious analysis of
the attorney's fee petition.

28 Since *Blum v. Stenson*, 465 U.S. 886 (1984), where the Supreme Court approved a percentage

1 of the fund as being an appropriate fee award, courts have increasingly rejected the lodestar approach.
 2 This trend recognizes the fact that compensating class counsel on a percentage basis (out of a common
 3 fund) makes good sense because 1) it is consistent with the private marketplace where contingent fee
 4 attorneys are customarily compensated on such a basis; 2) it aligns the interests of class counsel and
 5 absent class members in achieving the maximum possible resolution of the case; and 3) it augers for
 6 the most efficient and expeditious resolution of the litigation by providing an incentive for early, yet
 7 reasonable, settlement. Class Counsel respectfully submit that the award in this case meets all those
 8 criteria, such that it should be made on a percentage basis.

9 One of the nation's most well respected scholars in the field of class actions and attorneys'
 10 fees, Professor Charles Silver of the University of Texas School of Law, has concluded that - among
 11 its many other benefits - the percentage method is also far superior to the lodestar plus multiplier
 12 method in aligning the interests of class counsel with the interests of absent class members:

13 **The consensus that the contingent percentage approach creates a closer harmony**
 14 **of interests between class counsel and absent plaintiffs than the lodestar method**
 15 **is strikingly broad.** It includes leading academics, researchers at the RAND Institute
 16 for Civil Justice, and many judges, including those who contributed to the Manual for
 17 Complex Litigation, the Report of the Federal Courts Study Committee, and the Report
 18 of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends
 19 otherwise. No one writing in the field today is defending the lodestar on the ground
 20 that it minimizes conflicts between class counsel and absent claimants.

21 **In view of this, it is as clear as it possibly can be that judges should not apply the**
 22 **lodestar method in common fund class actions.** The Due Process Clause requires
 23 them to minimize conflicts between absent claimants and their representatives. The
 24 contingent percentage approach accomplishes this.

25 Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74
 26 Tul.L.Rev. 1809, 1819-20 (June 2000) (emphasis added; footnotes omitted).

27 E. The Substantial Risk Taken By Class Counsel Justifies An Upward 28 Adjustment From The 9th Circuit's Benchmark

29 "The Ninth Circuit has adopted a benchmark of 25% in percentage of fund cases and adjusts
 30 this figure upward where the particular circumstances are extraordinary, or downward where, for
 31 example, recovery is a certainty." *Newberg on Class Actions, supra*, at page 566. The case now
 32 before this Court justifies an upward adjustment to the 32.2 % requested.

33 Class Counsel devoted over 6,000 hours (representing over \$3,000,000.00 in fees) and just over

1 \$500,000.00 of their own funds to bring this matter to settlement. This indicates a dogged pursuit of
2 that which is right - because certainly the risk/reward balance would never tip in favor of expending
3 these hours and these dollars for a case with an essentially “capped” value, *i.e.*, training time and
4 sample sets cannot exceed “x” value.⁴

5 Against this backdrop, and as the Court’s docket reflects, defendant’s counsel spared no effort
6 in its attempts to protect its client, to fight off discovery, to keep its business secrets “secret”, to defeat
7 class certification, and to then seek appellate relief from the Ninth Circuit. Class Counsel met each
8 of these challenges and refused to be overwhelmed by the other side. Class Counsel continually
9 moved the matter forward, never ceding control of the case and never forgetting their obligation to
10 protect the interests of the class by leaving “no stone unturned” in their case preparation. This high
11 risk and relatively low reward balance, all directed to a recovery for 15 hours of minimum wage
12 training time, reflects a determination to fight for a “right” that merits an upward adjustment. The
13 6,000 hours devoted to the cause, valued at over \$3 million dollars, support an upward adjustment
14 from the \$3.25 million which a 25% award would yield, up to the \$4.190 million which 32.2% will
15 yield.

16 **F. The Attorneys’ Fees Requested by Class Counsel Are Well Within the**
17 **Range of Fees Awarded in Comparable Cases**

18 The goal in a case such as this is to set a fee that approximates the probable terms of a
19 contingent fee contract negotiated by a sophisticated attorney and client in comparable litigation.
20 *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 46, 48, 97 Cal. Rptr. 2d 797, 818 (Cal. Ct.
21 App. 2000). A review of class action settlements shows that courts have historically awarded fees in
22 the range of 20% to 50%, depending upon the circumstances of the case. See, *In re Warner*
23 *Communications Sec. Lit.*, 618 F.Supp. 735, 749 (S.D.N.Y. 1985). “[T]he fact-specific nature of these
24 fee determinations leaves room for a wide range of awards. For example, in *Mister v. Illinois Central*
25 *Gulf Railroad Co.* [S.D. Ill 1993], 40% of a common fund of \$10 million was awarded to plaintiffs’
26

27 ⁴While the independent contractor claim was also pursued, the damages likely available even
28 if that claim had been certified, added little value, since they were mostly for unreimbursed mileage
and cell phone usage, neither of which would have greatly increased Defendant’s exposure.

1 counsel in an employment discrimination class action for extraordinary representation.” *Newberg*,
 2 *supra* at page 568. In this regard, an article in Class Action Reports points out the following
 3 percentages in multi-million dollar cases: *Construction Inc. v. National Council on Compensation Ins.*
 4 *Nos. 89-822 and 89-1186* (W.D. Okla. June 7, 1993) (anti-trust; **34%**); *In re Meldridge, Inc. Securities*
 5 *Litigation* (D. Or. March 19, 1992, and November 1993) 87-426 (**34%**); *Hwang v. Smith-Corona*
 6 *Corp.* (D. Conn. March 12, 1992) No. 89-450 (**35.8%**).⁵

7 G. The Percentage Awarded Should Mimic the Market

8 *Newberg on Class Actions, Fourth Edition*, vol. 4, p. 560, §14.6 contains an interesting
 9 discussion of the concept of a market place analysis and why it is so valuable in determining a
 10 percentage award:

11 [Goodrich and Silver⁶] ... suggest that fee awards should be consistent with contingent
 12 fee arrangements negotiated in non class litigation:

13 1. The percentage method is consistent with and is intended to mirror practice in the
 14 private marketplace where contingent fee attorneys typically negotiate percentage fee
 15 arrangements with their clients. As Judge Posner emphasized in *In re Continental*
 16 *Illinois Securities Litigations*, “[t]he object in awarding a reasonable attorney’s fee...is
 17 to simulate the market...**The class counsel are entitled to the fee they would have**
 18 **received had they handled a similar suit on a contingent fee basis, with a similar**
 19 **outcome, for a paying client.” In non-class litigations, one-third contingency fees**
 20 **are typical. In their concurring opinion in Blum, Justices Brennan and Marshall**
 21 **observed that “[i]n tort suits, an attorney might receive one-third of whatever the**
 22 **plaintiff recovers. In those cases, therefore, the fee is directly proportional to the**
 23 **recovery.”**

19 If named plaintiffs have agreed to pay a one-third contingent fee, that is powerful
 20 evidence of a reasonable fee. One of the best ways to demonstrate the value of
 21 counsel’s work to the class is to review the consideration agreed to be paid by the
 22 named plaintiffs in their contracts. **If the named plaintiffs have employed their**
 23 **counsel by contingent fee agreements that obligated them to pay one-third of the**
 24 **recovery, it would indeed be inequitable for the members of the class, who will**
 25 **enjoy the benefits of this settlement without incurring the risks of bringing the**
 26 **claim, to pay less than the named plaintiffs.**

23 The complex and heavily litigated nature of this litigation, and its successful result lead to the
 24 clear conclusion that the fee request herein is reasonable. In *Cambden I Condominium Association,*
 25 *Inc., v. Dunkel*, 946 F. 2d 768 (11th Cir. 1991), the court identified twelve factors to be considered in

26 ⁵Cases to be lodged with the Court.

27 ⁶ Goodrich, Frank and Silver, Reagan, *Common Fund and Common Fund Problems: Fee*
 28 *Objections and Class Counsel’s Response*, 17 Rev. Litig. 525 (Summer 1995).

1 arriving at a common fund fee determination. Each of the factors is now briefly addressed.

2 1. The time and labor required - this is overwhelmingly established in this motion, based
3 upon the work witnessed by this Court, and the supporting attorney declarations and billings
4 submitted;

5 2. The novelty and difficulty of the questions involved - the paucity of governing law and
6 the endless motions and rulings firmly establish that this case involved novel and difficult issues. The
7 discovery motions themselves often involved extensive briefing and detailed argument and rulings.
8 Indeed, the Defendant regularly argued to this Court that this was the first time anyone had challenged
9 this type of training program;

10 3. The skill requisite to perform the legal services properly - this goes hand in hand with
11 the first and second factors;

12 4. The preclusion of other employment by the attorney due to the acceptance of the case -
13 the case, as well known to this Court, required and demanded extraordinary attorney time on both
14 sides, extensive briefing and heavy deposition scheduling and handling. The result of this intensive
15 scheduling was that both plaintiff attorney offices were hindered from taking on other matters while
16 this intense two years of litigation was ongoing;

17 5. The customary fee - customary plaintiff contingency fees exceed 33%, so any matter
18 which falls below that and still risks a net-zero recovery upon loss is below the customary level;

19 6. Whether the fee is fixed or contingent- this matter was clearly contingent, and if the
20 defendant had its way, would have yielded a total loss of all time/money risked by Class Counsel;

21 7. Time limitation imposed by the client or the circumstances - the client did not impose
22 any time limitations, but the Court in the exercise of its normal scheduling powers certainly did keep
23 the matter moving at all times, at sometimes seemingly breathtaking speeds;

24 8. The amount involved and results obtained - this has been discussed extensively above,
25 in relation to the relatively small individual claims, and the 85% recovery analysis;

26 9. The experience, reputation and ability of the attorney - this has been addressed
27 numerous times in this matter, in connection with the certification process and approval of class
28 counsel;

1 10. The undesirability of the case - this factor joins together the issues relating to the
2 limited exposure to the Defendant given the 15 hour minimum wage damage cap and the high risk of
3 having to expend substantial time and expenses in pursuit of the claim, all without the benefit of
4 favorable existing law (in fact, limited law at all);

5 11. The nature and length of the relationship with the client - this does not apply; and

6 12. Awards in similar cases - there are so few training time and business tool purchase
7 cases reported, that this is difficult to address.

8 **4. THE LODESTAR CALCULATION “CROSS-CHECK”**

9 It has been noted that it is sometimes helpful to courts to “cross-check” a percentage award by
10 employing a lodestar with a multiplier analysis. While the lodestar method is generally considered
11 inappropriate in a common fund case where real cash benefits (as opposed to coupons or non-monetary
12 benefits) are made available to class members, its use can provide further validation of the
13 appropriateness of the percentage award approach. See, *In re Prudential Ins. Co. of America Sales*
14 *Practice Litigation* 106 F. Supp.2d 721 (D.N.J. 2000). Such is the case here.

15 The declarations of Stanley D. Saltzman and Larry W. Lee evidence the fact that Class Counsel
16 (including partners, associates and paralegals) devoted just under 6,000 hours (precisely 5,916.13) of
17 time to this litigation. The actual billing entries (subject as noted above to very modest “redaction”
18 for privilege purposes) are attached, and mirror the development of the case as it unfolded before this
19 Court, and the contributions of all counsel. Applying the various hourly rates of the law firms and
20 lawyers who dedicated their efforts to this matter, a lodestar of \$3,046,763.75 is established. The
21 percentage award sought by Class Counsel, if converted to the lodestar method, would entail slightly
22 less than a 1.4 multiplier, clearly on the low end of historically approved multipliers. Thus, as set forth
23 in the Introduction to this motion, the fee application is supported whether by the cross-check
24 lodestar/multiplier method discussed herein, or by the percentage of the common fund discussed in
25 the preceding sections.

26 **A. Plaintiff’s Counsels’ Lodestar Is Reasonable**

27 The hourly rates employed by Class Counsel, as declared to in the attorney declarations, are
28 reasonable. Plaintiff’s attorneys are entitled to the hourly rates charged by attorneys of comparable

1 experience, reputation, and ability for similar litigation. The background and experience of plaintiffs’
 2 counsel are fully set forth in the declarations filed in support of this motion. The basic hourly rates
 3 listed for each firm are fair, and representative of the combination of years of experience and the clear
 4 successes they have had in the past in connection with class action litigation. The chart which follows
 5 summarizes the total hours devoted to the matter by the various attorneys and paralegals in the Marlin
 6 & Saltzman firm, the hourly rates as set forth in the Saltzman declaration, and the total dollars billed
 7 per attorney/paralegal, and finally the total billed to the file. (Saltzman Dec. at ¶ 9.)

Attorney (A) / Paralegal(P)	Total Hours / Rate	Total Billed
Stanley D. Saltzman (A)	873.33 / \$725.00	\$633,142.50
Christina A. Humphrey (A)	922.90 / \$550.00	\$507,595.00
Lynn P. Whitlock (A)	100.00 / \$650.00	\$ 65,000.00
Dale A. Anderson (A)	75.00 / \$650.00	\$ 48,750.00
Kiley L. Grombacher (A)	425.05 / \$425.00	\$180,646.25
Alan A. Lazar (A)	22.00 / \$725.00	\$ 15,950.00
Denise Bauwens (P)	208.60 / \$150.00	\$ 31,290.00
Susan Joseph (P)	837.00 / \$150.00	\$125,550.00
	3463.88 total hours	\$ 1,607,923.75 total billed

18
 19 Based upon the foregoing chart, the total billed by the Marlin & Saltzman firm, to date, has
 20 been \$1,607,923.75. This includes 2,418.28 attorney hours and 1,045.6 paralegal hours. (Id.)

21 **In addition to these hours**, the Diversity Law Group and the Law Offices of Sherry Jung, who
 22 jointly filed this action, have spent a total of 2,396.7 hours, in a period of one year longer than the
 23 Marlin & Saltzman firm, which associated in as counsel slightly over a year after the filing.
 24 (Declaration of Larry W. Lee (“Lee Dec.” at Exhibit A; Declaration of Sherry Jung (“Jung Dec.”) at
 25 ¶8.) As declared to in the Declaration of Larry W. Lee, he and his partners have regularly been
 26 approved by various courts at rated of approximately \$600.00 per hour, depending on the year
 27 involved. . (Lee Dec at ¶ 10.) Using a blended rate for the four members of the Diversity Law Group
 28 who participated in the case, its total billings, to date, are \$1,320,480.00. (Lee Dec at ¶ 16.) Exhibit

1 Ms. Jung states in her declaration to her qualifications and that she spent a total of 295.9 hours at an
2 hourly rate of \$400.00 per hour, for a total lodestar for her firm of \$118,360.00. (Jung Dec at ¶ 8.)

3 The resulting total lodestar for all services to date equals the aforesaid \$3,046,763.75. The
4 final figure sometimes looked to by courts in reviewing billing rates is the average hourly rate amongst
5 all the attorneys or persons billed. In this case, if one includes only the attorneys, (thus excluding the
6 paralegals from the equation), the average billing rate crossing over all the firms and all the attorneys
7 equals \$593.00 per hour.⁷ (Saltzman Dec at ¶ 11.) The years of practice range from Mr. Saltzman at
8 32 years experience, to Ms. Grombacher at the M & S firm, with a total of five years, devoted entirely
9 to class action litigation. (*Id.*) The average is over 17 years experience per attorney involved in this
10 case. Finally, the two primary paralegals involved in the matter at M & S each have over fifteen years
11 average experience, with well over ten years average devoted to class action matters. Simply stated,
12 this is a very experienced group of litigators, and the experience was necessary at every stage of this
13 hotly contested matter.

14 Under California law, counsel are entitled to compensation for all hours reasonably spent on
15 the matter. *Ketchum vs. Moses*, 24 Cal. 4th 1122, 1133 (2001). Reasonableness of hours is assessed
16 by “the entire course of the litigation, including pretrial matters, settlement negotiations, discovery,
17 litigation tactics, and the trial itself” *Vo v. Las Virgenes Municipal Water Dist.* 79 Cal. App. 4th
18 440, 447 (2000). Here, counsel have attached their firms billing records to their declarations, to attest
19 to the hours spent. These contemporaneous records create the full expression of the litigation as it
20 unfolded, and clearly reflect the many hours which were necessarily spent on the case.

21 In the proceedings relating to the Motion for Preliminary Approval of the settlement, the class
22 set forth in some detail the nature and extent of the proceedings held throughout this litigation. That
23 discussion appears at pp. 4-9 of that motion (Document no. 450), and without repeating the same, it
24 is respectfully incorporated herein. The Court, as previously noted in this motion, summarized many
25 of the important proceedings which had been discussed in the prior motion. The billing records filed

26 ⁷It is respectfully noted that in the matter of *Stuart v. Radioshack Corporation* 2010 U.S.
27 District LEXIS 92067, this Court engaged in a similar review, and approved counsel of a slightly
28 higher range of experience (other than as is relates to Mr. Saltzman) at an average hourly rate of
\$708 per hour, over \$120 per hour more than requested for approval herein.

1 herewith, along with the summary of the proceedings set forth throughout this motion, fully and
 2 completely detail the actions of counsel taken in relation to the case. The total hours and billings thus
 3 generated are all supported herein.

4 In sum, it is submitted that the reasonableness of plaintiffs' lodestar is manifest. Accordingly,
 5 the question becomes whether the 1.38 multiplier suggested, which then yields a total lodestar billing
 6 roughly equivalent to the percentage of the common fund set forth above, is reasonable by marketplace
 7 standards. Class Counsel submit that the requested multiplier is not only reasonable, it is on the low
 8 end of awards in comparable cases.

9 **B. The Lodestar Enhancement Is Reasonable**

10 As the Supreme Court has explained, in determining the reasonableness of attorneys' fees "the
 11 most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436
 12 (1983); *see also Glendora Community Redev. Agency v. Demeter* 155 Cal. App. 3d 465, 475 (1984)
 13 Here, Class Counsel succeeded resoundingly and unequivocally, obtaining substantial relief far above
 14 the amount of the underlying claim for unpaid compensation.

15 The application of a 1.38 multiplier is comparable to what a sophisticated client would have
 16 freely negotiated. In a case such as the one at bar, where Class Counsel have taken substantial risk in
 17 bring the action, have faced aggressive opposition from the defense, and have been able to achieve a
 18 result that represents a potential recovery far above the underlying claim, it is entirely appropriate to
 19 use a multiplier to enhance the lodestar claim of counsel:

20 It is an established practice in the private legal market to reward attorneys for taking
 21 the risk of non-payment by paying them a premium over their normal hourly rates for
 22 winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* § 21.9, at
 23 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the
 24 services if rendered on a non-contingent basis are accepted in the legal profession as
 25 a legitimate way of assuring competent representation for plaintiffs who could not
 26 afford to pay on an hourly basis regardless whether they win or lose. *See Model Rules*
 27 *of Professional *1300 Conduct* Rule 1.5(a)(8) (1992); *Model Code of Professional*
 28 *Responsibility* DR 2-106(B)(8) (1980); *Canons of Ethics* § 12, 33 A.B.A.Rep. 575, 578
 (1908). As the court observed in *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 548
 (S.D.Fla.1988), *aff'd*, 899 F.2d 21 (11th Cir.1990), "[i]f this 'bonus' methodology did
 not exist, very few lawyers could take on the representation of a class client given the
 investment of substantial time, effort, and money, especially in light of the risks of
 recovering nothing." And in *In re Union Carbide Corp. Consumer Prods. Business*
Sec. Litig., 724 F.Supp. 160, 169 (S.D.N.Y.1989), the court addressed the negative
 impact the proscription of risk multipliers might have on the important goal of
 furthering the purposes of federal securities laws:

1 [I]ndividuals damaged by violations of the federal securities laws should have
2 reasonable access to counsel with the ability and experience necessary to analyze and
3 litigate complex cases.... A large segment of the public might be denied a remedy for
4 violations of the securities laws if contingent fees awarded by the courts did not fairly
compensate counsel for the services provided and the risks undertaken.
For these reasons, courts have routinely enhanced the lodestar to reflect the risk of non-
payment in common fund cases.

5 *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299-300 (9th Cir. 1994)

6 In this case, the hours expended equate to \$3,046,763.75 of billable time. This enormous
7 investment of time was always at risk. Had the second attempt at mediation not been successful, Class
8 Counsel were prepared to aggressively move the matter forward to trial on a contingency basis. While
9 Class Counsel continued to be at risk if the case were lost and thus subject to a loss of all time and
10 money expended, Defendant's counsel were being paid for all hours worked regardless of the outcome.
11 One side (Class Counsel) was spending its own money, and the opposing counsel was not.
12 Undeniably, Class Counsel took an enormous risk, managed that risk throughout the case, and now
13 submit that they should be rewarded for assuming that risk and eventually obtaining a substantial
14 settlement. A multiplier of 1.38 represents a modest upward adjustment of fees that properly rewards
15 class counsel for the efforts expended, as well as the results achieved.

16 The Ninth Circuit echoed this sentiment in an ERISA case, and specifically referred to class
17 actions in the context just mentioned:

18 Having determined that risk multipliers remain available in common fund cases after
19 *Dague*, we further note that we have held, in pre-*Dague* case, that a risk multiplier is
20 not merely available in common fund cases but mandated, if the court finds that
21 counsel had no sure source of compensation for their services...Moreover, we have
observed that the need for such an adjustment is particularly acute in class action suits.
The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is
inescapably contingent.

22 *Florin v. Nations Bank of Georgia* 34 F.3d 560, 564 (9th Cir. 1994) (Emphasis added)

23 **5. CONCLUSION**

24 Class Counsel respectfully submit that the motion for approval of attorney's fees should be
25 granted. Whether analyzed under the percentage of the fund approach, which is the dominant view,
26 or via the cross-check approach under the loadstar/multiplier approach, the fees are fully supported.
27 This entire case has been heavily litigated from the onset, demanded an extraordinary effort on the part
28 of Class Counsel, and further required almost \$500,000.00 of costs advanced. The claims rate under

