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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISON

Robert T. DeVaney, et al. Plaintiffs, v. Davis Wright Tremaine LLP, a Washington limited liability partnership, Defendant.	Civil No. 10-CV-6134-HO MEMORANDUM IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES
Ken and Patricia Houghmaster, et al. Plaintiffs, v. K&L Gates LLP, a Delaware limited liability partnership; and Thompson & Knight LLP, a Texas limited liability partnership, Defendant.	Case No. 10-cv-6321-HO

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I. INTRODUCTION

The Court has appointed Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") as co-lead counsel for the putative class in this litigation. *See* Order Approving Class Action Settlements, Docket No. 18 at 2.[1] On behalf of Cohen Milstein and certain co-counsel (Justine Fischer, Kit Pierson, and Herbert Adelman) (collective "Plaintiffs Counsel"), Plaintiffs' Counsel respectfully submit this memorandum of points and authorities in support of their fee request in this litigation.

As explained below, in actions of this kind, District Courts in the Ninth Circuit typically award fees to counsel based on the percentage method, with 25% being a common benchmark for the fee award. Counsels' lodestar is often used as a cross-check to determine the reasonableness of the percentage award (i.e., to confirm that the percentage fee award is a reasonable multiplier of the actual lodestar). Based on Ninth Circuit law, and the exceptional results obtained for the class in this case, Plaintiffs' Counsel believe that a fee award of 25% of the Class recovery – allocated among Plaintiffs' Counsel and the other attorneys involved (*see* note 1) – is appropriate here. Because the work of Plaintiffs' Counsel was overwhelmingly undertaken in connection with the Davis Wright Tremaine LLP litigation, Plaintiffs' Counsel has no objection to their fee being based largely on a percentage of the $30 million recovery in that matter. (Plaintiffs' Counsel understands that the Receiver has indicated support for a 12% fee award in this case, an amount lower than that ordinarily approved by the Ninth Circuit).

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[1] Separate requests for fees are being submitted by the law firms of Esler Stephens & Buckley ("Esler Stephens"), Landye Bennett Blumstein LLP ("Landye Bennett"), Grenley, Rotenberg, Evans, Bragg & Bodie ("Grenley Rotenberg") and other counsel in connection with this and certain other third party actions. We believe these counsel contributed substantially to the results in this litigation and should receive an appropriate portion of the fee award in this matter based on each firm's relative lodestar.

If the Court instead awards fees on a lodestar basis, a reasonable multiplier of the lodestar is appropriate. This multiplier should reflect the fact that these cases were litigated on a contingency fee basis (*i.e.*, that counsel would receive no compensation for their time unless they achieve a successful result); that counsel has been litigating these matters for more than two years without receiving payment; and that an exceptional result was achieved for the class in this matter.[2] The lodestar of Plaintiffs' Counsel in this matter is $1,018,487.50 (using rates that are downwardly adjusted from their ordinary rates to reflect Oregon rates) – and $62,841.20 in expenses. The basis for that lodestar is described in the declarations appended hereto.[3]

II. Background

This case is a class action brought by Plaintiffs on behalf of a class of investor claimants (the "Class") who invested in a consolidated enterprise consisting of several hundred affiliated businesses owned by or under the financial control of Sunwest Management, Inc., Jon M. Harder, and/or Darryl E. Fisher. These businesses were operated through closely affiliated and interrelated entities and individuals. These businesses attracted significant investment by means of offerings that included material misrepresentations and omissions and a substantial portion of

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[2] In *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) and other cases discussed *infra*, the Ninth Circuit has explained the standards governing fee awards in representative actions such as this. The Ninth Circuit also included, as an Appendix to its opinion, a "Table of Percentage-Base Attorneys' Fee Awards in Common Fund Cases of $50-200 million (1996-2001)." In the majority of those cases, a fee percentage of 25% or more was used. In the limited number of cases where a percentage of less than 10% was awarded (representing only four of the 34 cases surveyed), counsel's lodestar multiplier was 2.4, 3.3, 2.1 and 1.7 respectively. *See id*. at 1052 (Appendix 1).

[3] Plaintiffs' Counsel did not bring claims or participate in the mediation of claims against the law firms other than Davis Wright Tremaine LLP. As explained below, those claims were also settled on a class basis and subsequently consolidated with the Davis Wright Tremaine LLP action. The class papers in connection with the claims brought against those firms were substantially based on the pleadings drafted by Plaintiffs' Counsel and, because of their expertise on class issues, Plaintiffs' Counsel had primary responsibility for preparing the final approval papers for the consolidated cases.

those investments were lost when Sunwest Management and the affiliated companies were no longer able to sustain their operations. The law firms of Davis Wright Tremaine LLP, K&L Gates, and Thompson & Knight played substantial roles in connection with those offerings.

In investigating and ultimately pursuing claims against DWT, Plaintiffs' Counsel made a professional judgment that this was the most efficient means to pursue these claims and was consistent with the policies that underlie Oregon's class action procedures (as well as Federal Rule of Civil Procedure 23). Before proceeding with those claims, counsel engaged in significant due diligence to confirm that there was an adequate factual and legal basis for the claims; that the requirements for proceeding as a class action ultimately could be satisfied; and that the class action claims were framed in a manner that would permit the case to proceed on a class action basis under Oregon (or federal) law and have the best chance of succeeding on the merits. These efforts are described in the declarations of Kit A. Pierson; Herbert E. Adelman, and Justine Fisher submitted herewith, and are reflected in the time records submitted with those declarations.

Plaintiffs' Counsel recognized that this was a complex matter and that there was room for reasonable disagreement about the most efficient way to gain relief for injured investors. Based on their evaluation of the circumstances, Plaintiffs' Counsel concluded that the class action device offered substantial advantages to members of the class, avoided legal uncertainties (and potential conflicts) that could arise from alternative approaches, and could offer a fair and conclusive resolution for both members of the class and the Defendants. This professional judgment about the appropriateness and advantages of class proceedings has ultimately been supported by counsel for many of the individual investors, counsel for the Receiver, and counsel for the Defendants. The reasonableness of this approach is supported by the following:

- As the Court is aware, on July 26, 2010, a Memorandum in Support of Amended Joint Motion for Preliminary Approval of Class Action Settlement was filed in *DeVaney v. Davis Wright Tremaine LLP*, 10-CV-6134-HO, by the law firms of Cohen Milstein Sellers & Toll, Esler Stephens & Buckley, other counsel for the Plaintiff Class, and counsel for the Defendant, Kennedy, Watts, Arellano & Ricks LLP. Counsel explained that "all of the parties have recognized the very significant benefits provided by resolution of this matter as a class action. Prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications and could also substantially impair or impede the ability of other members of the Class who are not parties to those adjudications to protect their interests or recovery from DWT. Resolution on a class basis contemporaneously with resolution of the Receiver's claims also assures the finality that DWT has sought as a basis for resolving the claims." Mem. in Supp. of Am. Joint Motion at 9-10, Docket No. 9.

- The counsel in subsequently filed actions against the Law Firms of K&L Gates LLP and Thompson & Knight LLP also reached the judgment that those actions could most efficiently and appropriately proceed on a class basis. This is reflected in the Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, at 10, in *Houghmaster v. K&L Gates LLP*, Case No. 6:10-cv-06321-HO (D. Or.), filed by the law firm of Esler Stephens & Buckley, Allen Matkins (counsel for the Receiver), and other counsel on October 7, 2010 (Docket No. 9). This Memorandum recognizes "the very significant benefits" afforded by class action treatment of these claims. *Id*.

- The Defendants in these cases have also recognized that class action treatment is an efficient means to address the claims against them and provides the necessary assurance of finality. Accordingly, the Defendants have taken the position that class action treatment is appropriate and is, in fact, a required condition for resolving the claims against them.

- The Court has also made a preliminary determination that "the prerequisites for a class action under Federal Rules of Civil Procedure 23(a) and (b)(3) have been met" in this case. Order Approving Class Action Settlements at 2, Docket No. 18 (Oct. 8, 2010). To satisfy these prerequisites, the class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. Pro. 23(b)(3).

- Subsequently, counsel for the class Plaintiffs filed a motion for final approval of the class settlements on December 21, 2010 (today), which again explains the superiority of the class approach in connection with this litigation.

Based on their professional judgment that use of the class action approach in these circumstances was "superior to other available methods for fairly and efficiently adjudicating the controversy," Plaintiffs' Counsel filed a class action suit, *D. Kurtz's Canyon Crest, LLC v. Davis*

Wright Tremaine LLP, No. 0902-02841 (Ore. Cir. Ct. 2009), against DWT in Oregon state court on February 26, 2009. Pierson Decl. ¶ 9. Other counsel had filed individual actions against DWT. From the outset, Plaintiffs' Counsel communicated their interest in coordinating these efforts to counsel for other investors.

The class action complaint against DWT alleged that the offering memoranda and related representations pertaining to investments in Sunwest properties contained misstatements and omissions of material fact which rendered the statements therein misleading. These allegations are set forth in greater detail in the Complaint filed in this action. Plaintiffs further alleged that DWT participated in and/or materially aided the sale of these securities to the Plaintiffs and the Class and was therefore liable for the resulting damages under applicable securities laws. Defendant DWT has denied these allegations and made clear its willingness to vigorously contest its alleged liability.

Shortly after the class action case was filed, the SEC commenced litigation against the Sunwest enterprise. *SEC v. Sunwest Mgmt., Inc.*, No. 09-CV-6056-HO (D. Or.) ("SEC Action"). By Orders dated March 10, 2009 and May 27, 2009 in that litigation, Michael A. Grassmueck was appointed Receiver for most of these businesses. The Receiver later brought a separate action against DWT. *Grassmueck v. DWT*, No. 09-cv-651-HO (D. Or.).

As the state actions against DWT were proceeding, the Court entered an Order, on June 23, 2009, providing for mediation of the cases against DWT. Order, *SEC v. Sunwest Mgmt., Inc.*, No. 09-CV-6056-HO (D. Or. June 23, 2009), Docket No. 376. The Order provided that the Receiver was "temporarily authorized from the date of entry of this Order until October 15, 2009, to participate in the mediation of third party claims on behalf of those investors not already represented by [certain listed counsel]" and authorized the Receiver to employ the law firms of

Esler Stephens & Buckley and Landye Bennett & Blumstein as special litigation counsel to assist the Receiver. *Id*. at 3-4. The Court's Order indicated that "Other Represented Investors shall be entitled to participate to the same extent as any other investor's counsel or counsel for the Receiver" and specified that "Other Represented Investors have designated Cohen, Milstein, [Sellers] & Toll as their representative counsel for this purpose." *Id*. Finally, the Order stated that "[a]ll objections to the right of the Receiver or his counsel to proceed on behalf of any persons other than the Receivership Entities are preserved." *Id*.

The parties in the DWT litigation then proceeded with discovery, including review of voluminous DWT documents, over the course of several months for the purposes of evaluating the claims against DWT, their respective litigation positions, and the possibility of a mediated resolution. After engaging in this discovery, and subsequent mediation, the parties – including the investor plaintiffs and the Receiver – negotiated a settlement in principle, which was subsequently memorialized in the Settlement Agreement previously submitted to the Court. *See* Mem. in Supp. of Am. Joint Mot. for Preliminary Approval of Class Action Settlement, Ex. A, Docket No. 9. In connection with this settlement, DWT made clear that it regarded class action treatment as an appropriate basis for resolving the case and, in fact, insisted that the case be resolved on that basis. As contemplated by the Settlement Agreement, this class action litigation was commenced in federal court on May 28, 2010 for purposes of effectuating the settlement. The parties jointly filed a Motion for Preliminary Approval of Class Action Settlement on July 9, 2010 and filed an amended motion on July 26, 2010.

As the litigation against DWT was proceeding, separate actions were filed by other counsel against the law firms of K&L Gates LLP and Thompson & Knight LLP, based on similar allegations. *Houghmaster v. K&L Gates*, No. 10-cv-6321-HO (D. Or.). Those actions

were also settled on a class basis. The *Houghmaster* and *Delaney* actions were then consolidated and, on October 8, 2010, the Court entered an Order preliminarily approving the class action settlement. *See* Order Approving Class Action Settlements, Docket No. 18, at 3. As set forth above, the Court appointed Cohen Milstein and Esler Stephens as co-lead counsel to represent the settlement class. *Id*. at 2.

III. ARGUMENT

A. Plaintiffs' Counsel are Entitled to a Fee from the Common Fund

For over a century, the Supreme Court has accepted the "common fund" exception to the general rule that litigants bear their own attorneys' fees. *Trustees v. Greenough*, 105 U.S. 527 (1882). As *Boeing Co. v. Van Gemert*, explains, the Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." 444 U.S. 472, 478 (1980) (citations omitted). In other words, one purpose of the common fund doctrine is to avoid unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*").

The doctrine also encourages counsel to protect the rights of those with small claims. Private actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [Securities and Exchange] Commission action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). Fee awards in successful cases, such as the instant one, encourage the prosecution of other actions on behalf of individuals with small but valid claims, thereby promoting private enforcement of, and compliance with securities laws. *See, e.g., Mashburn v.*

Nat'1 Healthcare, Inc., 684 F. Supp. 679, 687 (M.D. Ala. 1988) ("[C]ourts also have acknowledged the economic reality that in order to encourage . . . class actions brought to enforce the securities laws on behalf of persons with small individual losses, a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid.").[4] As a practical matter, a large segment of the public would be denied a remedy for violations of the securities laws if fees awarded by the courts did not fairly and adequately compensate counsel for the services provided, the serious risks undertaken, and the delay before any compensation is received.

B. The Court Should Award Fees Based on a Percentage of the Settlement Fund

In awarding attorneys fees in a securities class action a court "may use either the lodestar or the percentage approach to derive a reasonable fee." *In re Critical Path, Inc., Sec. Litig.*, No. C 01-00551, U.S. Dist. LEXIS 26399, at *24 (N.D. Cal. June 18, 2002) (citing *Powers v. Eichen,* 229 F.3d 1249, 1256 (9th Cir. 2000)). While the percentage approach awards a portion of the total recovery as a fee, the lodestar method "calculates the fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and then enhancing that figure, if necessary, to account for the risks associated with the representation." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). The Ninth Circuit and District Courts within the Ninth Circuit have made clear that use of the percentage method is ordinarily appropriate in common fund cases. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir.

[4] *See also Ressler v. Jacobson*, 149 F.R.D. 651, 657 (M.D. Fla. 1992) (citing *In re Warner Comm'ns Sec. Litig.*, 618 F. Supp. 735, 750-51 (S.D.N.Y. 1985)) ("Attorneys who bring class actions are acting as 'private attorneys general' and are vital to the enforcement of the securities laws. Accordingly, public policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions.").

1993) (awarding 25% of $30 million settlement fund based on percentage approach, while indicating that other approaches may be used in some circumstances).

In recent years, District Courts within the Ninth Circuit have almost uniformly shifted to the percentage method in awarding fees in representative actions. *See, e.g., Tasso Koumoulis v. LPL Fin. Corp.*, No. 09-1973, 2010 U.S. Dist. LEXIS 124117, at *13-15 (S.D. Cal. Nov. 19, 2010) (approving fee of 25% of common fund); *HCL Partners Ltd. P'ship v. Leap Wireless Int'l, Inc.*, No. 07-2245, 2010 U.S. Dist. LEXIS 109829, at *7 (S.D. Cal. Oct. 15, 2010) (approving fee of 25% of common fund); *Stuart v. RadioShack Corp.*, No. 07-4499, 2010 U.S. Dist. LEXIS 92067, at *18 (N.D. Cal. Aug. 9, 2010) (approving fee of 33.3% of common fund); *Cicero v. DirecTV, Inc.*, No. 07-1182, 2010 U.S. Dist. LEXIS 86920, at *16-18 (C.D. Cal. July 27, 2010) (approving fee of 30% of common fund); *Castaneda v. Burger King Corp.*, No. 08-4262, 2010 U.S. Dist. LEXIS 78299, at *9-10 (N.D. Cal. July 12, 2010) (approving fee of approximately 33% of common fund); *Sandoval v. Tharaldson Emple. Mgmt.*, No. 08-482, 2010 U.S. Dist. LEXIS 69799, at *23 (C.D. Cal. June 15, 2010) (approving fee of 25% of common fund); *Singer v. Becton Dickinson & Co.*, No. 08-821, 2010 U.S. Dist. LEXIS 53416, at *23 (S.D. Cal. June 1, 2010) (approving fee of 33.3% of common fund). Indeed, the common practice within this District is to award a percentage of the recovery. *See, e.g., Rausch v. Hartford Fin. Servs. Group*, 2007 U.S. Dist LEXIS 14740, at *6-7 (D. Or. Feb. 26, 2007) (approving fee of 30% of common fund); *Razilov v. Nationwide Mut. Ins. Co.*, ., No. 01-CV-1466-BR, 2006 U.S. Dist. LEXIS 82723, at *10 (D. Or. Nov. 13, 2006) (approving fee of 30% of common fund). Supporting authority for the percentage method in other circuits is similarly overwhelming.[5]

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[5] *See, e.g., In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-17 (6th Cir.

Compensating counsel in common fund cases on a percentage basis makes good sense. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery.[6] Second, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. *See* Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809 (June 2000). Third, use of the percentage method decreases the burden imposed on the court by eliminating the detailed and time-consuming lodestar analysis while assuring that the beneficiaries do not experience undue

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1993); *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 564-65 (7th Cir. 1994); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994) (authorizing percentage approach and holding that use of lodestar method was abuse of discretion); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("[W]e believe that the percentage of the fund approach is the better reasoned in a common fund case."); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (percentage of the fund recovered is the only permissible measure of awarding fees in common fund cases).

[6] Courts are encouraged to look to the private marketplace in setting a percentage fee:

> The judicial task might be simplified if the judge and the lawyers bent their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character. This was a contingent fee suit that yielded a recovery for the "clients" (the class members) . . . . The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.

In re Cont'l Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992).

delay in receiving their share of the settlement. *See In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989).[7]

Within the Ninth Circuit, the benchmark attorney fee is 25% of the fund recovered. *See Paul, Johnson*, 886 F.2d at 272; *Torrist*, 8 F.3d at 1376. The guiding principle is that fees must be "reasonable under the circumstances." *WPPSS*, 19 F.3d at 1295. In *Vizcaino*, the Ninth Circuit approved a $27.1 million fee that constituted 28% of the recovery, explaining that "[t]he district court based its percentage award on *Bowles*, which states that '[i]n common fund cases, the 'benchmark' award is 25 percent of the recovery obtained,' with 20-30% as the usual range. Ninth Circuit cases echo this approach." 290 F.3d at 1047 (citing *Bowles v. Dep't of Ret. Sys.*, 121 Wash.2d 52, 72-73 (1993) and *Paul, Johnson, Alston & Hunt v.* Graulty, 886 F.2d 268, 272 (9th Cir. 1989)); *see also Paul, Johnson, Alston & Hunt*, 886 F.2d at 272 (explaining that court can determine appropriate amount of award, but "ordinarily" percentage fee awards "range from 20 percent to 30 percent of the fund created" and "[w]e note with approval that one court has concluded that the 'bench mark' percentage for the fee should be 25 percent."). In the Appendix to the Ninth Circuit's decision in *Vizcaino*, the percentage awards were 10% or more in 30 of the 34 common fund cases listed; and 20% or more in 22 of the 34 cases. (As noted *supra*, in the

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[7] Professor John C. Coffee of Columbia Law School argues that a percentage of the recovery is the only reasonable method of awarding fees in common fund cases:

> If one wishes to economize on the judicial time that is today invested in monitoring class and derivative litigation, the highest priority should be given to those reforms that restrict collusion and are essentially self-policing. The percentage of the recovery fee award formula is such a "deregulatory" reform because it relies on incentives rather than costly monitoring. Ultimately this "deregulatory" approach is the only alternative . . . .

John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 724-25 (May 1986).

only cases where the percentage was below 10%, counsel received multipliers on their actual lodestar of 2.4, 3.3, 2.1 and 1.7).

In this case numerous factors, including the results achieved, the contingent nature of the fee, the risks of the litigation and the quality of representation weigh in favor of awarding the 25% requested.

1. The Result Achieved Supports the Fee Request

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976). Here, a certain and substantial recovery has been achieved through the efforts of Plaintiffs' Counsel and other counsel for the investors.[8] The settlement is an excellent result, particularly when considered in view of the substantial risks and obstacles to recovery presented in this case if litigation were to continue (including the potential for substantial delay in compensation to investors), as discussed below. While Plaintiffs' Counsel believe that their claims have substantial merit, if litigation were to proceed, there is nonetheless a significant risk that the class could recover less than the amount of the settlement or nothing at all, or that any payment to the class could be substantially delayed as a result of extended discovery, trial and the possibility of subsequent appeals. As a result of the settlement, each class member will be compensated for a meaningful part of their losses and will avoid the substantial expense and uncertainty of continued litigation.

[8] Early settlements are encouraged by courts and are consistent with the purposes of the Federal Rules of Civil Procedure, which "shall be construed and administered to ensure the *just, speedy, and inexpensive determination* of every action." *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 992 (D. Minn. 2005) (quoting Fed. R. Civ. P. 1) (emphasis in original). The *Xcel* court, in awarding a 25% fee of an $80 million securities class action settlement, complimented counsel for the efficient prosecution and prompt resolution of the case.

Here, the recovery represents a substantial percentage of the damages suffered by the class (calculated after compensation from various sources). In *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036 (N.D. Cal. 2007), the court described a recovery of 9% of possible damages as "a substantial achievement on behalf of the class" and noted that the average recovery in securities class actions is less than 3% of possible damages. *Id*. at 1046.[9] In contrast, the Class Settlements against the law firm defendants have resulted in a recovery of approximately 20-25% of the investors' losses (i.e., the loss incurred after taking into account payments from the estate). Plaintiffs' Counsel and other counsel involved in these matters should be appropriately compensated for achieving a result well above the norm for similar cases.

The Receiver has informed Plaintiffs' Counsel that he intends to seek $5 million of the recovery in the Davis Wright Tremaine LLP litigation to resolve claims brought on behalf of the Receivership. This amount was capped during the mediation process. Of that amount, the Receiver's counsel has indicated that over three-quarters will be paid to Class members, with the remaining going to unsecured creditors.

2. The Difficulty of This Case and the Contingent Nature of the Fee Supports the Fee Request

Plaintiffs' Counsel voluntarily undertook this litigation on a contingent fee basis, knowing from the beginning that there was a risk that the case might yield no recovery or only a limited recovery, leaving them uncompensated for their work, and/or that they would obtain compensation for their time and expenses only after years of litigation, potentially including appeals. Fischer Decl. ¶ 3; Pierson Decl. ¶ 18; Adelman Decl. ¶ 9. Unlike counsel for defendants, who are normally paid an hourly rate and reimbursed for their expenses, Plaintiffs'

[9] According to the *Omnivision* court, in securities class actions the "mediation amount [of maximum potential damages] recovered in settlement was 2.7% in 2002, 2.8% in 2003, 2.3% in 2004, 3% in 2005, and 2.2% in 2006." *Id*. at 1042.

Counsel have not been compensated for their time or expenses litigating these claims since their investigation and subsequent litigation of these claims began in 2008. *Id*.

Courts have consistently recognized that the risk of receiving little or no recovery is a factor in considering an award of attorneys' fees. For example, the Ninth Circuit has explained that:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose. . . . [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.

WPPSS, 19 F.3d at 1299-1300 (citations and internal quotation marks omitted).[10]

Class action securities litigation is inherently uncertain. There are numerous cases where plaintiffs' counsel in contingent cases such as this, after the expenditure of thousands of hours and substantial amounts in litigation costs, have received no compensation. Plaintiffs' Counsel are aware of many hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, or changes in the law during the pendency of the case, or a decision of

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[10] Courts around the country have expressed similar views. In *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, MDL No. 888, 1994 U.S. Dist. LEXIS 6621 (E.D. La. May 18, 1994), the court explained that:

> Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

Id. at *16; *see also Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) (reversing fee award where "the district court failed to provide for the risk of loss" because "the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated"); *King Res.*, 420 F. Supp. at 632, 636-37 ("appropriate consideration must be given to the risks assumed by plaintiffs' counsel in undertaking the litigation.").

a judge or jury following a trial on the merits, excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel. Two recent examples highlight this point. In a case against JDS Uniphase Corporation, after a lengthy trial involving securities claims, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, No. 02-1486, Verdict Questions Form (N.D. Cal. Nov. 27, 2007). Similarly, in *In re Apollo Group, Inc. Sec. Litig.*, No. CV 04-2147, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008), the court overturned a jury verdict of $277 million on a motion for judgment as a matter of law because insufficient evidence had been presented at trial to establish loss causation. There are many other appellate decisions affirming summary judgment and directed verdicts for defendants or overturning jury verdicts in securities class actions.[11]

In this case, the risk that there would be no recovery, or that any recovery would be secured only after an extended period of litigation, was substantial. First, DWT made clear from the outset that it did not believe it had any liability, that it would dispute the allegations that misrepresentations and omissions were made, that investors were unaware of the risks attending these investments, and that it either knew or should have known that misrepresentations and omissions were being made. Not only did Defendants vigorously contest liability, but the related SEC litigation threatened to eliminate Plaintiffs' rights to sue Defendants on their own behalf. In the SEC Action, the Receiver asked the Court for the power to bring claims on behalf of the

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[11] *See, e.g., Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (reversing substantial jury verdict and dismissing case—after 11 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversing multimillion dollar judgment after lengthy trial); *In re Apple Computer Sec. Litig.*, No. C-84-20148, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991) (verdict against two individual defendants, but vacating judgment on motion for judgment notwithstanding the verdict); *Robbins v. Koger Props. Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing jury verdict of $81 million on loss causation grounds after 19-day trial); *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988) (reversing plaintiffs' jury verdict for securities fraud).

investors against third parties, such as DWT. *See* Proposed Order, *SEC v. Sunwest Mgmt., Inc.*, No. 09-CV-6056-HO (D. Or. May 21, 2009), Docket No. 294. This action by the Receiver created significant risks to the class action litigation. Although the Receiver's pursuit of those claims again reflects a litigation judgment made by able counsel in a complex situation (and it is unnecessary to revisit those issues here), it raised significant legal issues, about which reasonable counsel could disagree, regarding the most appropriate way to seek relief for investors and presented substantial risks for the class action litigation (and individual actions). The Court denied the Receiver's request, Order, *SEC v. Sunwest Mgmt., Inc.*, No. 09-CV-6056-HO (D. Or. June 9, 2009), Docket No. 346, but did so without prejudice and there remained the possibility that the class members could lose control over their claims. In short, both the vigorous defenses raised and the strategic decisions made by Receiver's counsel, created substantial risks that Plaintiffs' Counsel and other counsel representing investors would not be compensated for their time, or that any such compensation would be significantly delayed.

Even though a successful result was far from certain, Plaintiffs' Counsel expended great effort and substantial sums of their own money to vigorously litigate this case. In determining whether Plaintiffs' Counsel's fee request is reasonable, the Court should consider the risk that Lead Counsel took in taking this case and vigorously litigating it.

3. The Quality of Representation Supports the Fee Request

The "'prosecution and management of a complex national class action requires unique legal skills and abilities.'" *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475, 2005 U.S. Dist. LEXIS 13627, at *39 (C.D. Cal. June 10, 2005) (citation omitted). Plaintiffs' Counsel includes nationally known leaders in securities class action litigation. *See* Cohen Milstein Firm Resume, Pierson Decl. Ex. A. From the outset of this case, Plaintiffs'

Counsel engaged in a concerted effort to obtain the maximum recovery for the class. Plaintiffs' Counsel devoted a substantial amount of its own money and marshaled considerable resources to the prosecution of this matter. The diligence of their efforts to secure appropriate relief for the Court is reflected both in the fact that – as explained in this Court's June 23, 2009 Order – "Other Represented Investors have designated Cohen, Milstein, [Sellers] & Toll as their representative counsel" for purposes of the discovery and mediation process that resulted in settlement of the DWT action, and the Court's October 8, 2010 Order appointing Cohen Milstein and the Esler Stephens law firm as Co-Lead Class Counsel to represent the settlement class.

In evaluating the quality of Plaintiffs' Counsel's work it is also appropriate to consider the quality of opposing counsel and the resources opposing counsel devoted to this case. *See In re The Mills Corp. Sec. Litig.*, No. 06-cv-0007, 265 F.R.D. 246, 262 (E.D. Va. 2009) (citing *In Re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y.1985) ("quality of opposing counsel is a factor to be considered in evaluating Lead Counsel's performance"). Defendants in this case were represented by extremely capable attorneys from Kennedy, Watts, Arellano, & Ricks LLP, a highly respected and dedicated law firm.

4. The Fee Request is Reasonable Under the Lodestar Cross-Check

A lodestar analysis is unnecessary here because the requested fee is within the accepted benchmark. *See HCL Partners Ltd. P'ship v. Leap Wireless Int'l, Inc.*, No. 07-2245, 2010 U.S. Dist. LEXIS 109829, at *6 (S.D. Cal. Oct. 15, 2010) ("Courts have found that a lodestar analysis is not necessary when the requested fee is within the accepted benchmark."). The Court may nevertheless perform a "Lodestar cross-check" to confirm the reasonableness of the fee award. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on

the reasonableness of the percentage award."); *id*. at 1050 n.5 ("The lodestar method is merely a cross-check on the reasonableness of a percentage figure[.]").

Here, the requested fee is also reasonable under the lodestar method. The current lodestar of each of Plaintiffs' Counsel is as follows:

Law Firm	**Lodestar**
Justine Fischer	$62,160
Cohen Milstein	$661,780
Kit A. Pierson PLLC	$53,685
Law Offices of Herbert E. Adelman	$240,862.50
Total	$1,018,487.50

See Fischer Decl. Ex. A; Pierson Decl. Ex. B, C; Adelman Decl. Ex. A.

The basis for these lodestar figures is set forth in the attached declaration. Fischer Decl. ¶¶ 2-5; Pierson Decl. ¶¶ 6-24; Adelman Decl. ¶¶ 6-11.[12] The lodestars have been adjusted to reflect Oregon rates. (The attached declaration of Kit A. Pierson indicates that absent this downward adjustment the lodestar would be significantly higher, Pierson Decl. ¶¶ 21, 24. Thus, the lodestar reflected above arguably understates the reasonableness of the fee request using lodestar as a cross-check). Plaintiffs' Counsel have also submitted detailed records of work performed in this case in order to demonstrate the reasonableness of the hours expended on the litigation. *See* Fischer Decl. Ex. A; Pierson Decl. Ex. B, C; Adelman Decl. Ex. A. This lodestar can be added to the fee requests for this matter submitted by the law firms of Esler Stephens, Grenley Rotenberg, and other counsel for work on this matter. Based on preliminary discussions regarding those submissions, Plaintiffs' counsel expect that a total fee award of 25% will be within the range of reasonableness approved by the Ninth Circuit in other matters, *see, e.g.*,

[12] Although a substantial amount of work in the state court proceedings was undertaken before fee guidance was provided in connection with the *SEC* proceedings, the fee information submitted in support of this motion substantially confirms with that guidance. In very limited instances, time has been submitted based on activities undertaken over a multi-day period.

Vizcaino, 290 F.3d at 1051 (upholding an attorneys' fee award that resulted in a multiplier of 3.65), although this will need to be confirmed once fee petitions by each firm have been submitted. Moreover, if the lodestar were calculated using Plaintiffs' Counsel's normal and customary rates, instead of reduced rates, the lodestar would be somewhat higher (and, as a result, the lodestar multiplier used as a cross check would be lower). *See* Pierson Decl. ¶¶ 20, 21, 24.

C. Plaintiffs' Counsel Has Proposed a Reasonable Division of Fees

Multiple law firms have contributed to the success of this litigation. In order to fairly compensate each attorney, Plaintiffs' Counsel propose that the total fee award in this matter based on a percentage of the recovery be allocated to each of Plaintiffs' Counsel, and the law firms of Esler Stephens, Landye Bennett, Grenley Rotenberg and other firms representing plaintiffs be allocated in amounts proportionate to each counsel's lodestar. Doing so will appropriately compensate each law firm for the risks it assumed and its overall assistance in the litigation and resolution of this class action case. As noted above, because the work of Plaintiffs' Counsel has substantially been undertaken in connection with the Davis Wright Tremaine LLP litigation, Plaintiffs' Counsel has no objection to their fee being awarded largely on the basis of a percentage of the recovery in that action.

D. Plaintiffs' Counsel's Expenses Are Reasonable And Were Necessary To Achieve the Benefit Obtained For The Class

Plaintiffs' Counsel also request reimbursement of expenses incurred by counsel in connection with the prosecution of this litigation. They have submitted detailed declarations with supporting attachments attesting to the accuracy of their expenses. Fischer Decl. ¶ 5, Ex. A; Pierson Decl. ¶¶ 22, 23, Ex. D; Adelman Decl. ¶ 10, Ex. A . Plaintiffs' Counsel have incurred expenses totaling $ 62,841.20 in prosecuting this lawsuit. Fischer Decl. Ex. A ($721.25 in

expenses); Pierson Decl. Ex. D ($54,047.95 in expenses); Adelman Decl. Ex. A ($8,072 in expenses).

The standard for determining whether expenses are compensable in a common fund case of this type is whether the expenses are of the type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *see also Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted); *TBK Partners, Ltd. v. Warshow*, No. 77 Civ. 972, 1977 U.S. Dist. LEXIS 13597, at *8 (S.D.N.Y. Oct. 6, 1977) (noting in securities case that "of course, [plaintiffs' counsel] are also entitled to reimbursement for their expenses"). The expenses for which Plaintiffs' Counsel seeks payment are the type of expenses routinely charged to hourly clients and, therefore, should be paid out of the common fund. *See* Fischer Decl. Ex. A; Pierson Decl. Ex. D; Adelman Decl. Ex. A.

E. If the Court Awards a Fee Based on Lodestar, it Should Award Counsel a Reasonable Multiplier of Their Lodestar

For the reasons explained above, Plaintiffs' Counsel believes the award of a percentage of the Settlement fund is appropriate in this case, consistent with prevailing Ninth Circuit law, and consistent with the approach now overwhelmingly used by District Courts in the Ninth Circuit. If the Court instead were to award fees based on the lodestar approach, however, it would be appropriate to provide counsel a reasonable multiplier of their lodestar. This reflects

the inherent risk involved in this litigation, the fact that counsel was working without compensation, the substantial delay in receipt of any compensation and the outstanding results achieved for the Class. In the cases surveyed by the Ninth Circuit in *Vizcaino* that included a multiplier analysis, the multipliers typically were 1.7 or greater (and, in more than seventy percent of the cases undertaking a multiplier analysis, the multiplier was 2.0 or a substantially greater amount). *See Vizcaino*, 290 F.3d at 1043, Appendix. In the only cases where the District Court reported a lodestar multiplier below 1.7, the award as a percentage of the recovery ranged from 12% - 37.1% of the recovery. In total, the lodestar multiplier was reported in 24 of the cases surveyed in *Vizcaino* and the *median* lodestar multiplier in those cases was approximately 2.5.[13] Although these are cases where the award was ultimately based on a percentage (and the lodestar multiplier was used as a check on reasonableness), there is no reason to provide a lower multiplier or fee, when the award is instead based on a lodestar approach. Given the considerations set forth above, including the outstanding results achieved in this case, if a lodestar approach were used, a multiplier of 2.5 or greater would be appropriate.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Counsel respectfully submit that the requested attorneys' fees and expenses are fair and reasonable and, accordingly, should be approved by the Court.

Dated: December 21, 2010

Respectfully submitted,

__/s/ Justine Fischer_____
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[13] In 11 of the cases, the lodestar multiplier was 2.3 or lower; in four cases it was 2.4 or 2.5; and in nine cased was at higher levels. *See id*.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2010, copies of the foregoing were electronically served on counsel of record in this matter who are registered with the Court's ECF filing system through ECF notification.

/s/ Justine Fischer
Justine Fischer