

1 **GUTRIDE SAFIER REESE LLP**

Michael R. Reese (Cal. State Bar No. 206773)

2 Kim E. Richman (admitted *pro hac vice*)

230 Park Avenue, Suite 963

3 New York, New York 10169

Telephone: (212) 579-4625

4 Facsimile: (212) 253-4272

5 - and -

6 **GUTRIDE SAFIER REESE LLP**

Adam J. Gutride (Cal. State Bar No.181466)

7 Seth A. Safier (Cal. State Bar No. 197427)

Kate J. Stoia (Cal. State Bar No. 183471)

8 835 Douglass Street

San Francisco, California 94114

9 Telephone: (415) 271-6469

Facsimile: (415) 449-6469

10 *Court Appointed Class Counsel*

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 RONALD SIEMERS and FORREST
16 MCKENNA, Individually And On Behalf Of All
17 Others Similarly Situated,

18 Plaintiffs,

19 vs.

20 WELLS FARGO & COMPANY, WELLS
21 FARGO INVESTMENTS, LLC, WELLS FARGO
22 FUNDS MANAGEMENT, LLC, WELLS
23 CAPITAL MANAGEMENT INC., STEPHENS
24 INC., WELLS FARGO FUNDS DISTRIBUTOR,
25 LLC, and WELLS FARGO FUNDS TRUST,

26 Defendants.

) Case No. 05-04518 WHA
)
)
) NOTICE OF MOTION AND MOTION
) FOR AWARD OF ATTORNEYS' FEES
) AND REIMBURSEMENT OF
) EXPENSES; MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) SUPPORT THEREOF
)
) DATE: JANUARY 31, 2008
) TIME: 8:00 AM
) CTRM: 9, 19TH FLOOR
) JUDGE: JUDGE WILLIAM ALSUP
)
)
)

27 Notice of Motion and Motion ISO Application for Award of Attorneys' Fees and Costs; MPA in Support
28 Thereof - Case No.: 05-cv-4518 (WHA)

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION 1

MEMORANDUM OF POINTS AND AUTHORITIES..... 2

I. INTRODUCTION..... 2

II. ARGUMENT..... 3

A. Class Counsel Should Be Awarded Attorneys’ Fees In The Amount of \$287,500...... 3

1. A Reasonable Percentage of the Fund Recovered is the Appropriate Method for Awarding Attorneys’ Fees in Common Fund Cases...... 3

2. The Requested Fee Award Is Justified By A Cross-Check With The Lodestar/Multiplier Analysis. 5

3. Other Relevant Factors Considered by Courts in the Ninth Circuit Justify the Requested Fee Award...... 6

a) The Result Achieved 6

b) The Risks of Litigation 7

c) The Skill Required and the Quality of the Work..... 8

d) The Contingent Nature of the Fee and the Financial Burden Carried by Class Counsel..... 8

e) Awards Made in Similar Cases..... 9

4. Reaction of the Class Supports Approval of the Attorneys’ Fees...... 10

B. Plaintiff’s Counsel’s Expenses Are Reasonable and Were Reasonably Incurred in this Litigation...... 10

C. Lead Plaintiff Is Entitled To Reimbursement Of His Lost Wages Directly Related To His Representation Of The Class In Prosecuting This Action...... 11

III. CONCLUSION 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Abrams v. Lightolier Inc., 50 F.3d 1204, 1225 (3d Cir. 1995) 11

Arenson v. Bd. of Trade, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974)..... 8

Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 547-48 (S.D. Fla. 1988), *aff'd without op.*,
899 F.2d 21 (11th Cir. 1990) 6

Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984) 5, 10

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)..... 3

Bratcher v. Bray-Doyle Indep. Sch. Dist., 8 F.3d 722, 725-26 (10th Cir. 1993)..... 11

Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) 5

Brown v. Pro Football, 839 F. Supp. 905, 916 (D.D.C. 1993)..... 11

Camden I Condo. Assn v. Dunkle, 946 F.2d 768, 774-75 (11th Cir. 1991)..... 4

Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000)..... 5

Gottlieb v. Barry, 43 F.3d 474 (10th Cir. 1994) 4

Harman v. Lyphomed, Inc., 945 F.2d 969, 975 (7th Cir. 1991)..... 5

Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994)..... 11

Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) 6

In re Cont'l Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir.1992), amended, No. 90-3701, 1992
U.S. App. LEXIS 11317 (7th Cir. May 22, 2002) 4

In re Crazy Eddie Sec. Litig., 824 F. Supp. 320, 325 (E.D.N.Y. 1993)..... 10

In re Equity Funding Corp. Sec. Litig., 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) 8

In re Fluor Corp. Sec. Litig., SA CV 97-0734-HHS (EEx) 1999 U.S. Lexis 22128 (C.D. Cal.
June 27, 1995)..... 9

In re Heritage Bond Litigatin, CV-102-ML-1475, 2005 U.S. Dist. Lexis 13627, at *50-*52 (C.D.
Cal. June 10, 2005) passim

In re IBP, Inc. Sec. Litig., 328 F. Supp. 2d 1056 (D.S.D. 2004) 10

In re Ikon Office Solutions, Inc., 194 F .R.D. 166, 194 (E.D. Pa. 2000) 10

In re KeySpan Corp. Sec. Litig., Civ. 01-5852, 2005 U.S. Dist. LEXIS 29068 (E.D.N.Y. Aug. 25,
2005) 12

1 *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976)..... 6, 7, 8
 2 *In re M.D.C. Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at *22
 (S.D. Cal. Aug. 30, 1990) 10
 3 *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) 11
 4 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000), *amended*, 2000 C.D.O.S. 4890
 5 (9th Cir. 2000)..... 9
 6 *In re Musicmaker.com Sec. Litig.*, Civil No. 00- 02018, slip op. at 6 (C.D. Cal. Nov. 25, 2002).. 9
 7 *In re Patriot Am. Hospitality Inc. Sec. Litig.*, MDL No. C-00-1300, 2005 U.S. Dist. LEXIS
 40993, at *14-15 (N.D. Cal. Nov. 30, 2005) 6
 8 *In re Petroleum Prods. Antitrust Litig.*, 109 F.3d 602 (9th Cir. 1997)..... 5
 9 *In re Ravisent Techs. Inc., Sec. Litig.*, No. Civ. A. 00-CV-1014, 2005 WL 906361, at * 1, * 12
 10 (E.D. Pa. Apr. 18, 2005) 10
 11 *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) .. 4, 7, 9
 12 *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F .2d 102, 117 (3d Cir.
 1976) 7
 13 *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989) 4
 14 *Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77 C 39, 1984 U.S. Dist. LEXIS 23595, at
 15 *40-*41 (N.D. Ill. Sept. 14, 1984) 4
 16 *Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000) 4
 17 *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)..... 4
 18 *Swack v. Credit Suisse First Boston*, Civ. Action No. 02-11943-DPW, 2006 U.S. Dist. LEXIS
 75470, 16-17 (D. Mass. Oct. 4, 2006) 12
 19 *Swedish Hosp. Corp. v. Shalala*, 303 U.S. App. D.C. 94, 1 F.3d 1261 (D.C. Cir. 1993)..... 4
 20 *Taubenfeld v. Aon*, 415 F.3d 597 (7th Cir. 2005) 10
 21 *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977)..... 3
 22 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002)..... 5, 6, 9
 23 **STATUTES**
 24 15 U.S.C. § 78U-4(a)(4) 12
 25
 26
 27
 28

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 31, 2008, at 8:00 a.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable William Alsup, United District Court, 450 Golden Gate Avenue, San Francisco, CA 94102-3434, Lead Plaintiff Ronald Siemers (“Lead Plaintiff”) will respectfully move the Court, pursuant to Fed. R. Civ. P. 23(e), for an order approving Gutride Safier Reese LLP’s (“Class Counsel”) application for: (1) an award of attorneys’ fees in the amount of \$287,500.00; (2) reimbursement of \$54,078.90 in expenses that were incurred in prosecuting this Litigation; and (3) reimbursement of lost wages sustained by Lead Plaintiff for the prosecution of the Action for the in the amount of \$6,922.80.

This motion is based on this Notice of Motion and Motion; the following Memorandum of Points and Authorities; the Declaration of Adam Gutride in Support of Approval of Award of Attorneys’ Fees Expenses (the “Gutride Decl.”); the Declaration Of Ronald Siemers (“Siemers Decl.”); the Stipulation of Settlement (the “Stipulation”); all prior pleading and papers filed in this action; and any additional evidence or argument presented at the Settlement Fairness Hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Under the terms of the Settlement, negotiated on behalf of the Class by Class Counsel, Defendants have agreed to pay \$1.15 million in cash into a Settlement Fund. From the Settlement Fund, \$50,000 is to be paid to the Small Cap Growth Fund to settle the derivative claim on behalf of that fund, \$1,500 is to be paid to the named Plaintiff to settle his individual claims that were severed and stayed before the class was certified, and the balance of \$1,098,500 is for the benefit of the Class. This Settlement is a significant result for the Class because it represents a recovery of at least 35% of the “best case scenario” had the Class succeeded on its claims at trial.¹

The substantial recovery for the Class is due, at least in significant part, to hard work by Class Counsel. Class Counsel was appointed in June 2006, after the Milberg Weiss firm was indicted and Lead Plaintiff terminated that firm’s services, and before the Court had decided Defendants’ first round of motions to dismiss. Class Counsel filed two rounds of amended consolidated complaints, briefed two further rounds of motions to dismiss, a motion for leave to amend, and a motion for class certification (including responding to numerous requests for supplemental briefing). Class Counsel also engaged in extensive discovery (including several weeks of depositions, reviewing hundreds of thousands of documents, serving numerous sets of interrogatories and requests for admission, and negotiating and litigating several discovery disputes). Class Counsel then proposed a settlement structure, negotiated and drafted detailed settlement documents, and worked with the claims administrator to administer the Settlement. In total, Class Counsel expended more than 2531 hours on the case, for a total lodestar of \$1,188,400. Charts summarizing Class Counsel’s work are attached to the Gutride Declaration filed herewith.

¹ The settlement also represented 65% of the total revenue sharing payments made by the three mutual funds as to which a class was certified. Had the Court certified a class of all 100+ mutual funds, the equivalent settlement value, as a percentage of revenue sharing payments, would have exceeded \$84 million. (See Plaintiff’s Supplemental Submission Re Preliminary Approval Of Settlement, filed July 25, 2007.)

1 The settlement notice informed Class Members that Class Counsel would apply for an
 2 award, from the Settlement Fund, of their fees and litigation expenses, and of the Lead Plaintiff's
 3 expenses including lost wages, in a total amount not to exceed \$400,000. Class Counsel now
 4 respectfully requests that the Court award them fees in the amount of \$287,500 and litigation
 5 expenses in the amount of \$54,078.90 and that it award the Lead Plaintiff compensation for lost
 6 wages in the amount of \$6922.80, for a total of \$347,634.20.² If Class Counsel's application is
 7 approved, the total attorney fee awarded would be 25% of the Settlement Fund, which is the
 8 benchmark fee in this Circuit. Even if the award is granted in full, Class Counsel would recover
 9 for less than a quarter of the time they devoted to this case.

10 II. ARGUMENT

11 A. Class Counsel Should Be Awarded Attorneys' Fees In The Amount of \$287,500.³

12 1. A Reasonable Percentage of the Fund Recovered is the Appropriate 13 Method for Awarding Attorneys' Fees in Common Fund Cases.

14 For their efforts in creating a common fund for the benefit of the Class, Class Counsel
 15 seek a reasonable percentage of the fund recovered as attorneys' fees. In recent years, the
 16 percentage method of awarding fees has become an accepted, if not the prevailing, method for
 17 awarding fees in common fund cases. A percentage fee award encourages counsel to obtain the
 18 maximum recovery for the class at the earliest possible stage of the litigation and, hence, most
 19 fairly correlates counsel's compensation to the benefit achieved for the class.

20 It has long been recognized in equity that "a private plaintiff, or his attorney, whose
 21 efforts create, discover, increase or preserve a fund to which others also have a claim is entitled
 22 to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes*
 23 *Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)
 24 ("a lawyer who recovers a common fund for the benefit of persons other than himself or his

25 ² The amount requested in litigation expenses includes Lead Plaintiff's out-of-pocket travel
 26 expenses, for which Class Counsel previously advanced reimbursements to Lead Plaintiff.

27 ³ Class Counsel reserves the right to apply for additional attorneys' fees or expense
 28 reimbursement based, without limitation, on any remainder or unclaimed funds in the Settlement
 Fund, additional work, subsequent expenses, etc.

1 client is entitled to a reasonable attorney's fee from the fund as a whole"). The purpose of this
 2 doctrine is to avoid unjust enrichment so that "those who benefit from the creation of the fund
 3 should share the wealth with the lawyers whose skill and effort helped create it." *See In re*
 4 *Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994)
 5 ("Washington Pub.") (approving approach of awarding fees as percentage of fund).

6 The Ninth Circuit has established that the benchmark for fee awards in common fund
 7 cases is 25% of the fund recovered for the benefit of the class. *See Powers v. Eichen*, 229 F.3d
 8 1249, 1256-57 (9th Cir. 2000); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301,
 9 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir.
 10 1989). District courts in this Circuit have also predominantly applied the percentage method in
 11 awarding fees in common fund cases, for three reasons. First, it is consistent with the practice in
 12 the private marketplace where contingent fee attorneys are customarily compensated by a
 13 percentage of the recovery.⁴ Second, it more closely aligns the lawyers' interest in being paid a
 14 fair fee with the interest of the class in achieving the maximum possible recovery in the shortest
 15 amount of time. Third, use of the percentage method decreases the burden imposed on the court
 16 by eliminating a full-blown, detailed and time consuming "lodestar analysis while assuring that
 17 the beneficiaries do not experience undue delay in receiving their share of the settlement." *In re*
 18 *Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989).⁵

19 _____
 20 ⁴ Courts are encouraged to look to the private marketplace in setting a percentage fee:

21 The judicial task might be simplified if the judge and the lawyers bent their efforts on
 22 finding out what the market in fact pays not for the individual hours but for the ensemble
 23 of services rendered in a case of this character. This was a contingent fee suit that yielded
 24 a recovery for the clients (the class members) of \$45 million. 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. Suppose a large investor
 had sued Continental for securities fraud, and won \$45 million. What would its lawyers
 have gotten pursuant to their contingent fee contract?

25 *In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir.1992), amended, No. 90-3701, 1992
 26 U.S. App. LEXIS 11317 (7th Cir. May 22, 2002); *see also Phemister v. Harcourt Brace*
Jovanovich, Inc., No. 77 C 39, 1984 U.S. Dist. LEXIS 23595, at *40-*41 (N.D. Ill. Sept. 14,
 1984).

27 ⁵ Courts in other circuits also favor the percentage-of-recovery approach for the award of
 28 attorneys' fees in common fund cases. Two circuits have, in fact, ruled that the percentage

1 The Private Securities Litigation Reform Act (“PSLRA”) also provides support for the
 2 use of the percentage method for determining attorneys’ fees. It states that, “[t]otal attorneys’
 3 fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a
 4 reasonable percentage of the amount of any damages and prejudgment interest actually paid to
 5 the class....” 15 U.S.C. §78u-4(a)(6) (emphasis added.)

6 **2. The Requested Fee Award Is Justified By A Cross-Check With The**
 7 **Lodestar/Multiplier Analysis.**

8 Although an analysis of the lodestar is not required for an award of attorneys’ fees in the
 9 Ninth Circuit, the requested fee here is certainly fair and reasonable when considered from a
 10 lodestar/multiplier approach. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir.
 11 2002); *see also In re Petroleum Prods. Antitrust Litig.*, 109 F.3d 602 (9th Cir. 1997) (comparison
 12 of the lodestar fee to the percentage fee is an appropriate measure of a percentage fee’s
 13 reasonableness); *In re Heritage Bond Litigatin*, CV-102-ML-1475, 2005 U.S. Dist. Lexis 13627,
 14 at *50-*52 (C.D. Cal. June 10, 2005) (same).

15 Class Counsel spent a total of 2531.25 hours on this case, for a total lodestar in excess of
 16 \$1,186,000.00.⁶ (Gutride Decl. Ex. A.) The requested fee represents less than a quarter of the
 17 lodestar. Typically, multipliers are awarded to *increase* the lodestar, usually one to four times.
 18 *See Vizcaino*, 290 F.3d at 1048-50 (affirming award of 28% of \$97,000,000 settlement fund,
 19 equating with multiplier of 3.65); *In re Patriot Am. Hospitality Inc. Sec. Litig.*, MDL No. C-00-

20 method is mandatory in common fund cases. *See, e.g., Swedish Hosp. Corp. v. Shalala*, 303 U.S.
 21 App. D.C. 94, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Assn v. Dunkle*, 946 F.2d 768,
 22 774-75 (11th Cir. 1991). Other circuits and commentators have expressly approved the use of the
 23 percentage method. *See, e.g., Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips*
 24 *Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (*citing Blum v. Stenson*, 465 U.S. 886, 900
 25 n.16 (1984), recognizing both “implicitly and “explicitly that a percentage recovery is reasonable
 26 in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991);
 27 *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

28 ⁶ This figure does not include the approximately 30-50 additional hours Class Counsel will spend
 preparing for and attending the final approval hearing, addressing shareholder opt-outs and
 objections, and consulting with the claims administrator to facilitate settlement administration.
 (Gutride Decl. ¶ 4.)

1 1300, 2005 U.S. Dist. LEXIS 40993, at *14-15 (N.D. Cal. Nov. 30, 2005) (awarding multiplier
2 of approximately 2.63).⁷

3 **3. Other Relevant Factors Considered by Courts in the Ninth Circuit Justify**
4 **the Requested Fee Award.**

5 The Ninth Circuit has articulated five factors as pertinent criteria for evaluating the
6 reasonableness of a fee request: (1) the results achieved; (2) the risk of litigation; (3) the skill
7 required and the quality of the work; (4) the contingent nature of the fee and the financial burden
8 carried by the Plaintiffs; and (5) awards made in similar cases. *See Vizcaino*, 290 F. 3d at 1048-
9 50. Consideration of each of these factors supports approval of the requested attorneys' fees.

10 **a) The Result Achieved**

11 The first factor to be considered in granting a fee award is the degree of success obtained.
12 *See In re Heritage Bond Litig*, 2005 U.S. Dist. LEXIS 13627, at *27 (*citing Hensley v.*
13 *Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical factor is the degree of success obtained));
14 *see also In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) (“the amount of
15 the recovery, and end result achieved are of primary importance, for these are the true benefit to
16 the client”); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988), *aff’d*
17 *without op.*, 899 F.2d 21 (11th Cir. 1990) (“The quality of work performed in a case that settles
18 before trial is best measured by the benefit obtained.”)

19 A review of recoveries in other securities class action settlements demonstrates the
20 significant achievement by Class Counsel. A recent study by National Economic Research
21 Associates states that in 2003, the median percentage of investor losses recovered in shareholder
22 class action settlements was 2.8%, up from 2.7% in 2002. *See Elaine Buckberg, Todd Foster and*
23 *Stephanie Plancich, Recent Trends in Securities Class Action Litigation*, 2003 Early Update at 8
24 (NERA Feb. 2004). Here, the Settlement represents a recovery of approximately 35% of “best

25 ⁷ *See also In re Prudential Ins. Co. Sales Practice Litig.*, 148 F.3d 283, 341 (3rd Cir. 1998)
26 (“Multiples ranging from one to four are frequently awarded in common fund cases when the
27 lodestar method is applied.” (quoting 3 Newberg 14.03 at 14-5)); *In re Sumitomo Copper Litig.*,
28 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (“In recent years multipliers of between 3 and 4.5 have
been common in federal securities cases.”)

1 case” proved losses. (See Plaintiff’s Supplemental Submission Re Preliminary Approval Of
 2 Settlement, filed July 25, 2007.) Thus, the recovery here was approximately 12 times as great as
 3 the average settlement.

4 **b) The Risks of Litigation**

5 Numerous cases have recognized that risk is an important factor in determining a fair fee
 6 award. See, e.g., *Washington Pub.*, 19 F.3d at 1299-1301; *Lindy Bros. Builders v. Am. Radiator*
 7 *& Standard Sanitary Corp.*, 540 F .2d 102, 117 (3d Cir. 1976). The uncertainty of recovery is
 8 relevant in determining risk. See *Washington Pub.*, 19 F.3d at 1300; *Lindy*, 540 F .2d at 117.
 9 As the court observed in *King Resources*:

10 The litigation also involved unique and substantial issues of law in the technical area of
 11 SEC Rule 10b-5,...difficult, complex and oft-disputed class action questions, and difficult
 questions regarding computation of damages....

12 * * *

13 In evaluating the services rendered in this case, appropriate consideration must be given
 14 to the risks assumed by Class Counsel in undertaking the litigation. The prospects of
 success were by no means certain at the outset, and indeed, the chances of success were
 highly speculative and problematical.

15 *King Res.*, 420 F. Supp. at 632, 636-37.

16 Substantial risks and uncertainties were present from the outset of this case that made it
 17 far from certain that any recovery would be obtained. Because this action is subject to the
 18 provisions of the PSLRA, which makes it more difficult for investors to bring and successfully
 19 conclude securities class actions, there were substantial risks that class members’ claims would
 20 not survive motions to dismiss regarding scienter, loss causation, liability and damages. Indeed,
 21 a high percentage of other cases in this Circuit have been dismissed at the pleading stage under
 22 the PSLRA. Furthermore, there were many additional challenges presented by the fairly novel
 23 attempt to bring direct claims for securities laws violations against a mutual fund adviser.

24 At trial, very difficult issues of proof remained as to key elements of the claims.
 25 Defendants would have argued that all of the fees received from these mutual funds were fair and
 26 reasonable, consistent with fees paid by comparable funds, and were properly approved by
 27 independent fund trustees relying on independent data. Defendants further would have asserted
 28 that their disclosures were truthful, that the amounts of revenue sharing payments were

1 immaterial when compared to overall fund assets, that the Class did not rely on any omissions or
2 misstatements, and that the revenue sharing payments had no impact on fund performance,
3 thereby causing no recoverable damages. Lead Plaintiff would have had to overcome these
4 arguments as well as the expert testimony that Defendants would have presented in support of
5 them. The jury's reaction to the anticipated testimony and argument was highly unpredictable.
6 There was a risk that even if Lead Plaintiff was successful in proving liability, a jury would
7 award little or no damages. Given the undecided legal and factual issues, and the almost certain
8 appeal of any verdict adverse to defendants, it is quite possible that the Class would have
9 recovered nothing.

10 **c) The Skill Required and the Quality of the Work**

11 The prosecution of these complex claims required the participation of skilled attorneys.
12 *See, e.g., In re Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *39 (the "prosecution and
13 management of a complex national class action requires unique legal skills and abilities.") As
14 the court found in appointing them, Class Counsel are experienced practitioners in securities
15 litigation.

16 The quality of opposing counsel is also important in evaluating the quality of the work
17 done by Class Counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303,
18 1337 (C.D. Cal. 1977) (court recognized that "plaintiffs' attorneys in this class action have been
19 up against established and skillful defense lawyers, and should be compensated accordingly");
20 *King Resources*, 420 F. Supp. at 634; *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill.
21 1974). Defendants here were vigorously represented by two prominent law firms with extensive
22 experience in defending securities class actions. The ability of Class Counsel—a relatively
23 small, young firm—to obtain a favorable settlement for the Class in the face of such formidable
24 opposition further reflects the quality of Class Counsel's work.

25 **d) The Contingent Nature of the Fee and the Financial Burden** 26 **Carried by Class Counsel**

27 A determination of a fair fee must include consideration of the contingent nature of the
28 fee and the difficulties that were overcome in obtaining the settlement. It has been a long-

1 recognized rule that an attorney is entitled to a larger fee when the compensation is contingent
2 rather than being fixed on a time or contractual basis. *See Vizcaino*, 290 F.3d at 1048-50. As
3 established by the Ninth Circuit in *Washington Public Power Supply*:

4 It is an established practice in the private legal market to reward attorneys for taking the
5 risk of non-payment by paying them a premium over their normal hourly rates for
6 winning contingency cases...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.

7 *Washington Pub.* at 1299-1300 (citations and quotations omitted).

8 When Class Counsel undertook this matter two years ago on a wholly contingent basis,
9 and especially when they agreed to be substituted as Lead Counsel approximately 18 months
10 ago, it was with the knowledge that they would likely commit thousands of hours of work
11 against very qualified defense lawyers with no assurance of ever obtaining compensation.
12 Indeed, Class Counsel often prosecutes cases without receiving any compensation at all. Thus
13 far in this case, Class Counsel have invested over \$50,000 of their own money and over 2500
14 hours of their time without compensation.

15 e) Awards Made in Similar Cases

16 While the Ninth Circuit has established 25% of the fund as a benchmark for fee awards in
17 common fund cases, *see supra*, district courts in this Circuit frequently award fees in excess of
18 25%. *See Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *20 (awarding 33 1/3% of the
19 common fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000), *amended*, 2000
20 C.D.O.S. 4890 (9th Cir. 2000) (33.3% fee award upheld); *In re Musicmaker.com Sec. Litig.*,
21 Civil No. 00- 02018, slip op. at 6 (C.D. Cal. Nov. 25, 2002) (awarding 30% of \$13.15 million
22 settlement where settlement reached soon after formal discovery initiated); *In re Fluor Corp.*
23 *Sec. Litig.*, SA CV 97-0734-HHS (EEx) 1999 U.S. Lexis 22128 (C.D. Cal. June 27, 1995)
24 (awarding 30% of \$18 million settlement fund where settlement reached following reversal of
25 dismissal and filing of Fourth Amended Complaint.)

26 In 1996, the Federal Judiciary studied all class actions in four selected federal district
27 courts with a high number of class actions, one of which was the Northern District of California,
28 and it found that as to the size of attorneys' fees: "Median rates ranged from 27% to 30%."

1 Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in*
2 *Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, at 69
3 (Federal Judicial Center 1996). In the same year, National Economic Research Associates
4 concluded based on data from 43 shareholder class actions that “Regardless of case size, fees
5 average approximately 32 percent of the settlement.” Denise N. Martin, Vinita M. Juneja, Todd
6 S. Foster, Frederick C. Dunbar, *Recent Trends IV- What Explains Filings and Settlements in*
7 *Shareholders Class Actions?* at 12-13 (NERA Nov. 1996). The same is true in recent years.
8 *See, e.g., Taubenfeld v. Aon*, 415 F.3d 597 (7th Cir. 2005) (upholding award of one-third of
9 \$7.25 million settlement fund in securities class action); *In re Ravisent Techs. Inc., Sec. Litig.*,
10 No. Civ. A. 00-CV-1014, 2005 WL 906361, at * 1, * 12 (E.D. Pa. Apr. 18, 2005)
11 (acknowledging that attorney fees of 30-35% were commonly granted in awarding 30% in fees
12 of a \$7 million fund); *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056 (D.S.D. 2004) (awarding
13 28% where motion to dismiss pending).⁸

14 **4. Reaction of the Class Supports Approval of the Attorneys’ Fees.**

15 District courts also are empowered to consider the reaction of the class when deciding
16 whether to award the requested fee. *See Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *48-
17 *50 (“The presence or absence of objections ... is also a factor in determining the proper fee
18 award.”) Class Members were informed in the Notice that Class Counsel were moving the Court
19 for an award of attorneys’ fees and expenses in an amount up to \$400,000. Objections are due
20 by January 7, 2008; as of the date of this brief, none have been received. The lack of objections
21 to date can be seen as compelling evidence that the request fee is fair. *See, e.g., In re Crazy*
22 *Eddie Sec. Litig.*, 824 F. Supp. 320, 325 (E.D.N.Y. 1993).

23 **B. Plaintiff’s Counsel’s Expenses Are Reasonable and Were Reasonably Incurred** 24 **in this Litigation.**

25 _____
26 ⁸ In private contingent fee arrangements, the fee is usually in the range of 30% to 40% of the
27 recovery. *In re M.D.C. Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS
28 15488, at *22 (S.D. Cal. Aug. 30, 1990); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194
(E.D. Pa. 2000) (same); *see also Blum*, 465 U. S. at 904 (“In tort suits, an attorney might receive
one-third of whatever amount the plaintiff recovers.”)

1 Class Counsel also request reimbursement of expenses incurred in prosecuting this
2 action. In total, Class Counsel have incurred expenses in the amount of \$54,078.90. These
3 expenses are set forth in Exhibit E to the Gutride Declaration. Class Counsel's out-of-pocket
4 expenses include: (1) photocopies, reproduction, printing; (2) postage and notice costs; (3)
5 messengers and filing services; (4) filing and witness fees; (5) legal research services; (6) experts
6 and consultants; (7) meals, hotels and transportation (for both counsel and the named plaintiffs);
7 and (8) court reporter/deposition expenses. These expenses are reasonable in light of the work
8 performed, the legal and factual issues presented, the vigorous defense, and the results obtained.

9 Litigation expenses may be paid from the common fund if they are of the type typically
10 billed by attorneys to paying clients. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)
11 ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that
12 would normally be charged to a fee paying client."); *see also In re Media Vision Tech. Sec.*
13 *Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). Expenses may be reimbursed even if they
14 could not be taxable as costs. *Id.*; *see also Bratcher v. Bray-Doyle Indep. Sch. Dist.*, 8 F.3d 722,
15 725-26 (10th Cir. 1993); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995); *Brown v.*
16 *Pro Football*, 839 F. Supp. 905, 916 (D.D.C. 1993) (awarding "Plaintiffs' out-of-pocket costs for
17 telephone, telecopier, air and local couriers, postage, photocopying, Westlaw research, secretarial
18 overtime, and counsels' travel expenses" and finding that all were normally paid by paying
19 clients.)

20 **C. Lead Plaintiff Is Entitled To Reimbursement Of His Lost Wages Directly**
21 **Related To His Representation Of The Class In Prosecuting This Action.**

22 Lead Plaintiff committed substantial time and resources to aid in the prosecution and
23 resolution of the Litigation. Mr. Siemers reviewed and commented upon all key pleadings
24 before they were filed, closely monitored the litigation and consulted with Class Counsel
25 regarding all strategic decisions from inception to settlement. (Siemers Decl. ¶ 2). He appeared
26 at deposition, produced documents, and responded to written discovery requests. He undertook
27 independent research and consulted with outside attorneys. He also attended, in person, all the
28 key hearings and the mediation that ultimately culminated in the Settlement, for which he had to

1 use 72 hours of vacation pay. (*Id.* ¶ 3.) Had he not used those vacation days, he would have
2 been paid for them on termination of his employment in the amount of \$6922.80. (*Id.*) Mr.
3 Siemers does not seek any compensation for his time, except for the value of the lost vacation
4 days.

5 The PSLRA forbids compensation to a Lead Plaintiff from a settlement in excess of his
6 pro rata share of the settlement, except for “reasonable costs and expenses (including lost wages)
7 directly relating to the representation of the class.” 15 U.S.C. § 78U-4(a)(4). Mr. Siemers’ out-
8 of-pocket expenses were advanced by Class Counsel, so they are included in the amount sought
9 as expenses above. Mr. Siemers accordingly requests compensation for lost wages (in the form
10 of lost vacation pay) of \$6922.80. *See Swack v. Credit Suisse First Boston*, Civ. Action No. 02-
11 11943-DPW, 2006 U.S. Dist. LEXIS 75470, 16-17 (D. Mass. Oct. 4, 2006) (“the representative
12 plaintiff should document the value of any lost opportunities -- such as lost employer-granted
13 vacation time, lost sales commissions, or missed business opportunities -- and costs paid in
14 relation to the litigation.”); *accord In re KeySpan Corp. Sec. Litig.*, Civ. 01-5852, 2005 U.S.
15 Dist. LEXIS 29068 (E.D.N.Y. Aug. 25, 2005).⁹

16
17
18
19
20
21
22
23
24
25
26 ⁹ Lead Plaintiff also is receiving \$1,500 in settlement of his severed and stayed (uncertified)
27 claims against Wells Fargo Investments for purchase of non-Wells Fargo mutual funds. That
28 payment compensates him only for his actual losses due to the decreased value of those funds.
(Siemers Decl. ¶ 5.)

1 **III. CONCLUSION**

2 For the foregoing reasons, Lead Plaintiff respectfully requests that, from the Gross
3 Settlement Fund, the Court award attorneys' fees in the amount of \$287,500.00 and
4 reimbursement of litigation expenses in the amount of \$54,078.90 to Class Counsel, and
5 reimbursement of lost wages to him in the amount of \$6922.80.

6 DATED: December 21, 2007

GUTRIDE SAFIER REESE LLP
By: /s/ Adam J. Gutride
Adam J. Gutride (Cal. State Bar No. 181446)
Seth A. Safier (Cal. State Bar No. 197427)
835 Douglass Street
San Francisco, California 94114

9
10 - and -

GUTRIDE SAFIER REESE LLP
Michael R. Reese (Cal. State Bar No. 206773)
Kim E. Richman (admitted *pro hac vice*)
230 Park Avenue, Suite 963
New York, New York 10169

11
12
13
14 ***Court Appointed Class Counsel***

DECLARATION OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of San Francisco, California, over the age of 18 years, and not a party to or interest in the within action; that declarant’s business address is 835 Douglass Street, San Francisco, California 94114.

2. That on December 21, 2007, declarant served the NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEYS’ FEES AND REIMBURSEMENT OF EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF ADAM J. GUTRIDE IN SUPPORT OF PLAINTIFF’S MOTION FOR AWARD OF ATTORNEYS’ FEES AND EXPENSES; DECLARATION OF RONALD SIEMERS IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS’ FES AND REIMBURSEMENT OF EXPENSES, by electronic notice to the parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of December, 2007, at San Francisco, California.

/s/ Seth A. Safier

SETH A. SAFIER

Wells Fargo & Co.

Service List

Bruce A. Ericson
 Jacob R. Sorensen
 Kristin M. Lefevre
PILLSBURY WINTHROP SHAW PITTMAN LLP
 50 Freemont Street
 P.O. Box 7880
 San Francisco, CA 94105-7880
 Tel.: (415) 983-1000
 Fax: (415) 983-1200

-and-

Clifford C. Hyatt
 David L. Stanton
PILLSBURY WINTHROP SHAW PITTMAN LLP
 725 South Figueroa Street, Suite 2800
 Los Angeles, CA 90017-5406
 Tel.: (213) 488-7100
 Fax: (213) 629-1033

*Counsel for Defendants Wells Fargo & Co.,
 Wells Fargo Investments, LLC, and H.D. Vest
 Investment Services*

Gilbert R. Serota
 Patrica J. Medina
 Jason M. Skaggs
**HOWARD RICE NEMEROVSKI CANADY FALK
 & RABIN LLP**
 Three Embarcadero Center – Seventh Floor
 San Francisco, California 94111-4024
*Counsel for Defendants, Wells Fargo Funds
 Management, LLC, Wells Capital
 Management, Inc., Wells Fargo Funds
 Distributor, LLC and Stephens, Inc.,*

Thomas O. Jacob
 Vanessa M. Hoffmann
**OFFICE OF GENERAL COUNSEL, WELLS
 FARGO & CO.**
 633 Folsom Street, 7th Floor
 San Francisco, CA 94107
 Tel.: (415) 622-6656
 Fax: (415) 975-7864

*Counsel for Defendants Wells Fargo & Co.,
 Wells Fargo Funds Management, LLC, Wells
 Capital Management, Inc., Wells Fargo Funds
 Trust, and Wells Fargo Investments, LLC*