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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

17 IN RE NEW CENTURY

Case No. 2:07-cv-00931-DDP (FMOx)
(Lead Case)

**LEAD COUNSEL'S
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
ATTORNEYS' FEES AND
REIMBURSEMENT OF
LITIGATION EXPENSES**

Date: November 8, 2010
Time: 10:00 a.m.
Courtroom: 3
Judge: Hon. Dean D. Pregerson

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|----|---|-----------|
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1 **I. PRELIMINARY STATEMENT**

2 Lead Plaintiff, the New York State Teachers' Retirement System ("Lead
3 Plaintiff" or "NYSTRS") and Plaintiffs Carl Larson and Charles Hooten
4 (collectively, "Plaintiffs"), and Lead Counsel, Bernstein Litowitz Berger &
5 Grossmann LLP ("Lead Counsel" or "Bernstein Litowitz"), have achieved an
6 outstanding recovery of approximately \$125 million in cash (the "Settlement
7 Amount") plus accrued interest for the benefit of the Class.¹

8 Lead Counsel undertook the prosecution of this action on an entirely
9 contingent basis. Pursuant to the retainer agreement with Lead Plaintiff, as
10 compensation for the efforts expended to achieve the recovery for the Class, Lead
11 Counsel requests a fee award of approximately 11.5% of the Settlement Amount,²
12 and for reimbursement of \$3,064,348.82 in out-of-pocket expenses, plus accrued
13

14
15 ¹ The three Settlements are as follows: (a) the settlement with the New Century
16 Financial Corp. ("New Century" or the "Company") director and officer
17 Defendants ("Individual Defendants") in the amount of \$65,077,088 for the Class;
18 (b) the settlement with KPMG LLP ("KPMG") in the amount of \$44,750,000 for
19 the Class; and (c) the settlement with the Underwriter Defendants in the amount of
20 \$15,000,000 for the Class. The settlement with the New Century officers and
21 directors is a global settlement, and includes payments to resolve the other claims
22 brought against certain Defendants by the U.S. Securities and Exchange
23 Commission ("SEC"), the New Century Liquidating Trustee ("Trustee"), and
24 separate plaintiffs ("Kodiak"). That global settlement provides for a total of
25 \$91,102,331.51 in cash and \$944,029.49 in other consideration to be paid to
26 resolve all of the claims against the New Century officers and directors by the
27 Class, the SEC, the Trustee and Kodiak. The Class is receiving over 70% of the
28 amount paid by or on behalf of the New Century officers and directors in that
global settlement, or \$65,077,088, all in cash. Capitalized terms not otherwise
defined herein, are defined in the Stipulations of Settlement previously filed with
the Court on July 30, 2010.

² The exact fee request is \$14,410,933.80, which is approximately 11.5% of the
Settlement Amount. No attorneys' fees in Lead Counsel's request are based upon,
or sought with respect to, any disgorgement or penalties obtained by the SEC in
SEC v. Morrice, et al., Case No. 09-1426-DDP (the "SEC Action").

1 interest. In addition, Lead Counsel requests, on behalf of Plaintiffs, reimbursement
2 of a total of \$10,261.27 for Plaintiffs' costs and expenses directly relating to their
3 representation of the Class.

4 The substantial monetary recovery obtained for the Class was achieved only
5 after a three-year hard-fought litigation through the skill, work, tenacity, and
6 advocacy of Plaintiffs' Counsel.³ Plaintiffs' Counsel's prosecution of this action
7 included, *inter alia*: (i) drafting three detailed complaints after extensive review
8 and analysis of the Company's SEC filings and press releases, media and news
9 reports about the Company, publicly available trading data relating to New
10 Century's Common Stock and Preferred Shares, the 551-page Final Report of the
11 Bankruptcy Court Examiner, and other available information, and meeting with the
12 Bankruptcy Court Examiner; (ii) locating and interviewing approximately 200
13 former employees of New Century and other witnesses; (iii) thoroughly
14 researching the law pertinent to the claims against Defendants and potential
15 defenses thereto; (iv) opposing Defendants' five separate motions to dismiss the
16 Consolidated Complaint; (v) opposing Defendants' six separate motions to dismiss
17 the Second Amended Complaint; (vi) opposing KPMG's motion for summary
18 judgment; (vii) filing motions to compel documents from KPMG; (viii) reviewing
19 and analyzing over 38 million pages of documents ultimately obtained from
20 Defendants and third-parties in discovery; (ix) consulting with loan underwriting,
21 due diligence, accounting and damages experts; (x) preparing for depositions of
22 KPMG auditors; (xi) exchanging confidential mediation statements with
23 Defendants; and (xii) participating in eleven mediation sessions before Judge
24
25
26

27
28 ³ "Plaintiffs' Counsel" herein includes Lead Counsel, and counsel for Plaintiffs
Hooten and Larson.

1 Daniel Weinstein, an experienced mediator, and extensive related negotiations.
2 These efforts led to an outstanding result for the Class.⁴

3 Lead Plaintiff NYSTRS – a sophisticated institutional investor – negotiated
4 the fee agreement with Lead Counsel, and has reviewed and approved Lead
5 Counsel’s fee request. *See* Declaration of Wayne Schneider (“Schneider Decl.,”
6 Ex. B), ¶13. In enacting the Private Securities Litigation Reform Act of 1995
7 (“PSLRA”), Congress sought to encourage sophisticated institutional investors to
8 play an active role in prosecuting cases under the securities laws.⁵ Congress
9 believed that increasing the role of institutional investors would “ultimately benefit
10 shareholders and assist courts by improving the quality of representation in
11 securities class actions.” H.R. Conf. Rep. No. 104-369, at 34. Sophisticated
12 investors with large financial stakes in litigation have a particular interest in
13 ensuring that class counsel seek reasonable fees upon final resolution of the case.
14 *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 356 (S.D.N.Y. 2005)
15 (“The establishment of criteria for the appointment of a lead plaintiff capable of
16 exercising a significant supervisory role in the litigation, including management of
17 the fees and costs, was an important innovation of the PSLRA.”) (citation omitted).

22 ⁴ Detailed information about the history of the litigation and work performed by
23 Lead Counsel is set forth in the accompanying Declaration of Salvatore J. Graziano
24 in Support of Lead Plaintiff’s Motion for Final Approval of Settlements and Plan
25 of Allocation, and in Support of Lead Counsel’s Motion for an Award of
26 Attorneys’ Fees and Reimbursement of Expenses (“Graziano Decl.”). References
herein to Exhibits (“Ex.”) refers to those attached to the Graziano Decl. unless
otherwise indicated.

27 ⁵ *See In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d 39, 43 (D. Mass. 2001)
28 (citing H.R. Conf. Rep. No. 104-369, at 32 (1995) (reprinted in 1995 U.S.C.C.A.N.
730, 731)).

1 Furthermore, the requested 11.5% fee is well below the 25% benchmark
2 established by the Ninth Circuit, and also below the fee awards granted in other
3 sub-prime mortgage securities class actions.⁶

4 The reaction thus far from Class Members further supports Lead Counsel's
5 request for attorneys' fees and expenses. Pursuant to the Court's Preliminary
6 Approval Order, beginning on August 17, 2010, the Court-approved Notice of
7 Pendency of Class Action and Proposed Settlements, Settlement Fairness Hearing,
8 and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the
9 "Notice") was sent to more than 50,000 potential Class Members and their
10 nominees.⁷ In addition, the Court-approved Summary Notice was published in *The*
11 *Wall Street Journal* and over the *PR Newswire* on August 24, 2010. *Id.* ¶10. The
12 Notice informed Class Members that Lead Counsel would seek fees not to exceed
13 12% of the Settlement Amount and reimbursement of Plaintiffs' Counsel's
14 expenses not to exceed \$4.5 million, plus interest, and would seek reimbursement
15 to Plaintiffs for their reasonable costs and expenses directly related to their
16 representation of the Class. *See* Ex. A to Simmons Decl. ¶94. The Notice further
17 informed Class Members of their rights relating to the Settlements, including their
18 right to seek exclusion from the Class or to object. *Id.* ¶105.

19 Pursuant to the Preliminary Approval Order, the deadline for Class Members
20 to file objections to the Settlements, Plan of Allocation or the fee and expense
21

22 ⁶ *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002)
23 (recognizing 25% benchmark); *see also In re MoneyGram Int'l, Inc. Sec. Litig.*,
24 08-cv-883 (D. Minn. June 18, 2010) (awarding 23.75% in sub-prime securities
25 class action); *In re American Home Mortg. Sec. Litig.*, 07-MD-1898 (E.D.N.Y.
26 Jan. 14, 2010) (20%); *In re RAIT Financial Trust Sec. Litig.*, 07-cv-03148 (E.D.
27 Pa. Dec. 14, 2009) (20%); *In re Beazer Homes USA, Inc. Sec. Litig.*, 07-cv-725
(N.D. Ga. Sept. 15, 2009) (18%); *Atlas v. Accredited Home Lenders Holding Co.*,
07-cv-00488 (S.D. Cal. Nov. 4, 2009) (25%).

28 ⁷ *See* Declaration of Richard W. Simmons: Notice Dissemination and Publication
("Simmons Decl.," Ex. C) ¶¶3-8.

1 application, or to seek exclusion from the Class, will expire on October 18, 2010.
2 To date, there are *no objections*. In addition, only one Class Member representing
3 300 shares has sought exclusion from the Class.⁸

4 **II. THE REQUESTED FEES ARE FAIR AND REASONABLE**

5 **A. Lead Counsel Seeks A Reasonable Percentage Of The Fund**

6 Lead Counsel seeks a reasonable percentage of the common fund recovered
7 for the benefit of the Class. The Ninth Circuit has recently confirmed its approval
8 of the percentage-of-recovery approach, and this approach has become the
9 prevailing method for awarding fees in common fund cases in the Ninth Circuit.⁹
10 The percentage method is desirable because it most fairly correlates the
11 compensation of counsel with the benefit conferred upon the class. *See*
12 *Omnivision*, 559 F. Supp. 2d at 1046 (citing authorities that have “described
13 thoroughly” the advantages of using the percentage method). First, it closely
14 aligns the lawyers’ interest in being paid a fair fee with the interest of the class in
15 achieving the maximum possible recovery in the shortest amount of time. Second,
16 the percentage method decreases the burden imposed on courts by eliminating a
17 detailed and time-consuming lodestar analysis and assuring that the beneficiaries
18 do not experience undue delay in receiving their share of the settlement.

19 As Judge Cote articulated in *In re WorldCom, Inc. Sec. Litig.*, 2004 WL
20 2591402 (S.D.N.Y. Nov. 12, 2004):

21
22 ⁸ *See* Graziano Decl. ¶14. A list of those seeking exclusion will be included in
23 Ex. 1 attached to the proposed Judgments that will be submitted to the Court
following expiration of the deadline for seeking exclusion.

24 ⁹ *See Glass v. UBS Fin. Servs., Inc.*, 331 Fed. Appx. 452, 456-57 (9th Cir. 2009)
25 (unpubl.) (affirming 25% fee award, overruling objection based on use of
26 percentage-of-the-fund approach); *see also Paul, Johnson, Alston & Hunt v.*
27 *Grauly*, 886 F.2d 268 (9th Cir. 1989); *Six Mexican Workers v. Arizona Citrus*
28 *Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Torrise v. Tucson Elec. Power Co.*,
8 F.3d 1370, 1376 (9th Cir. 1993); *Vizcaino*, 290 F.3d 1043; *In re Omnivision*
Techs., Inc., 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (citations omitted).

1 [O]ne of the benefits of using the percentage-based method for assessing an
2 award of attorney's fees is that it relieves a court of the need to undertake a
3 mind-numbing detailed review of time records and removes some of the
4 incentive to pad those records¹⁰

5 The percentage method is also consistent with the private marketplace where
6 contingent-fee attorneys are customarily compensated by a percentage of the
7 recovery, and with the PSLRA's mandate that attorneys' fees "shall not exceed a
8 reasonable percentage" of the class recovery. 15 U.S.C. § 78u-4(a)(6).

9 **B. A Fee Of 11.5% Of The Fund Is Reasonable**

10 The Ninth Circuit has recognized 25% of the settlement amount as the
11 appropriate benchmark for attorneys' fees awarded under the percentage method.
12 *See, e.g., Glass*, 331 Fed. Appx. at 457; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
13 1029 (9th Cir. 1998) (referring to 25% in attorneys' fees as a "benchmark award").

14 Here, in view of, among other circumstances, the risks faced, the result
15 achieved, the skill required and the quality of the representation, and the support of
16 the Class, an award of approximately 11.5% of the Settlement Amount – less than
17 half of the Ninth Circuit's 25% benchmark – is fair and reasonable.

18 **C. Factors Considered By Courts In The Ninth Circuit Justify**
19 **Approval Of The Requested Fee As Fair And Reasonable**

20 Courts in this Circuit consider the following factors when determining
21 whether a fee is fair and reasonable: (1) the results achieved; (2) the risks of
22 litigation; (3) the skill required and quality of work; (4) the contingent nature of the
23 fee and financial burden carried by the plaintiffs; (5) awards made in similar cases;
24 (6) the reaction of the class; and (7) the amount of a lodestar cross-check. *See*

25 ¹⁰ *Id.* at *21; *see also Gerstein v. Micron Tech. Inc.*, 1993 U.S. Dist. LEXIS 21215,
26 at *14 (D. Idaho Sept. 10, 1993) ("This court favors the percentage approach
27 because it conserves scarce judicial resources by saving the court from having to
28 make a series of largely judgmental decisions with respect to the actual fees
claimed."); *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D.
Cal. 1989).

1 *Vizcaino*, 290 F.3d at 1048-50; *Omnivision*, 559 F. Supp. 2d at 1046-48.
2 Application of each of these factors confirms that the requested fee is justified.

3 **1. The Results Achieved**

4 Courts have consistently recognized that the settlement achieved is a major
5 factor to be considered in determining a fee award. *See Omnivision*, 559 F. Supp.
6 2d at 1046 (citation omitted). Here, Lead Counsel succeeded in obtaining a total of
7 approximately \$125 million in cash for the Class, which Lead Counsel believes is
8 the second highest sub-prime securities class action settlement to date.¹¹

9 The Settlements achieved here are extraordinary, especially in light of the
10 complexity of, and multiple parties involved in, the negotiations. The negotiations
11 were particularly complex due to the parties' disputes over the claims and defenses
12 in the action, New Century's bankruptcy, the number of defendants in this case,
13 and the existence of claims that were made against certain of the Defendants (with
14 diminishing insurance coverage) by the New Century Trustee, the Kodiak
15 plaintiffs, and the SEC.

16 In the words of Judge Weinstein, the negotiations – which included more
17 than 32 parties and 11 insurance carriers and their respective counsel, and 11
18 mediation sessions over a 1-year period – were “*procedurally one of the most*
19 *challenging that I have encountered.*” Declaration of The Honorable Daniel H.
20 Weinstein (“Weinstein Decl.,” Ex. A) ¶13. In the end, Lead Counsel was able to
21 obtain global settlements on all claims, including not only those claims alleged in
22 the instant class action, but also the claims brought by the Trustee, Kodiak, and the
23 SEC which were necessary to achieve the Settlements here. *See id.* ¶¶6-19;

24
25 ¹¹ Lead Counsel is aware of the settlements reached in the sub-prime securities
26 class action settlements in the *In re Merrill Lynch & Co., Inc. Sec., Deriv., and*
27 *ERISA Litig.*, cases, 07-cv-9633 (S.D.N.Y. Aug. 4, 2009 and Dec. 2, 2009),
28 totaling \$625 million, but is aware of no other higher sub-prime related securities
class action that have been granted final approval as of the preparation of this
motion. *See Graziano Decl.* ¶8.

1 Graziano Decl. ¶¶129-36. Lead Counsel obtained substantial sums from the New
2 Century insurance carriers that are allocated to settle the claims asserted by the
3 Class, the Trustee, and the Kodiak plaintiffs. The Class will be paid over 70% of
4 the cash portion of that settlement, or \$65,077,088. In addition, the Settlements
5 provide for payment of additional funds by KPMG (\$44,750,000 in cash) and the
6 Underwriter Defendants (\$15,000,000 in cash), solely for the benefit of the Class,
7 and a release of KPMG's potential claims against the former New Century officers
8 and directors.

9 As detailed below and in the Graziano Declaration, these Settlements were
10 obtained in the face of numerous obstacles, including in particular, establishing
11 loss causation and the full extent of the Class' damages, as well as significant
12 limitations on sources of recovery. Lead Counsel took into account the fact that
13 the Class could have a far less recovery if, for example, KPMG succeeded on its
14 motion for summary judgment because KPMG's loss causation arguments
15 threatened to eliminate all claims against KPMG and to greatly reduce damages
16 recoverable against the Underwriter Defendants. *See* Graziano Decl. ¶114.

17 In addition, New Century was bankrupt and could not contribute to the
18 Settlements. Continued litigation as to the Individual Defendants would have
19 further depleted the available insurance which was the primary source of available
20 recovery as to those Defendants. Moreover, the claims of the competing claimants
21 – the Trustee, the Kodiak plaintiffs, and the SEC – had to be factored into the
22 availability of the Director and Officer ("D&O") insurance. Plaintiffs had to
23 obtain the cooperation of the Trustee, the Kodiak plaintiffs, and the SEC (not to
24 mention each of the 11 different insurance carriers and each of the 28 defendants)
25 before the Settlements could be reached. In addition, Defendant KPMG threatened
26 to sue the Individual Defendants for various claims in this case that the parties
27 could not bar through a Class settlement that excluded KPMG. *Id.* ¶130.

28 Lead Counsel also obtained cash contributions to the global Officer and

1 Director Settlement from certain of the New Century officers and directors after
2 hard fought negotiations and after having conducted an assessment of their
3 financial statements and ability to pay. Those contributions to the Settlements
4 were limited by the individuals' assets and the fact that Plaintiffs would have had
5 to give up significantly more in insurance proceeds before they could get to their
6 assets through the enforcement of any successful post-trial judgment.¹²

7 Notwithstanding these complicated dynamics and New Century's
8 bankruptcy, Lead Counsel achieved an excellent recovery of approximately \$125
9 million in cash for the Class. As discussed below, this substantial recovery was
10 obtained in the face of extensive risks in this case which could have significantly
11 reduced the recoverable damages, or eliminated them altogether. Particularly in
12 light of these circumstances, the amount obtained is a substantial achievement on
13 behalf of the Class, and weighs in favor of granting the requested fee.

14 **2. Risks Of Litigation**

15 Risk that further litigation might result in plaintiffs not recovering at all is an
16 important factor in determining a fair fee award.¹³ While courts have always

17
18 ¹² As explained in the Graziano Decl. (¶¶130-32), by the time the mandatory
19 discovery stay of the PSLRA was lifted after the Defendants' motions to dismiss
20 were denied, the primary layer of the insurance – \$10 million – had already been
21 used for defense costs. Moreover, the D&O insurance was complex. Not only did
22 the D&O policy consist of 14 excess policies underwritten by 10 different
23 insurance companies, but the 14 excess policies were divided into 3 different towers
24 consisting of ABC coverage, Side A coverage and Independent Directors Liability
25 (“IDL”) coverage, which meant that cooperation and agreement to payment from
26 numerous insurance carriers were required to achieve the Settlements. In addition,
the IDL tower applied only to New Century's independent directors, and then only
with respect to one seventh of the IDL tower for each of the independent directors
who was found liable.

27 ¹³ See, e.g., *Omnivision*, 559 F. Supp. 2d at 1047; *In re Washington Pub. Power*
28 *Supply Sys. Sec. Litig.* (“WPPSS”), 19 F.3d 1291, 1299-1301 (9th Cir. 1994); *In re*
Heritage Bond Litig., 2005 WL 1594389, at *14 (C.D. Cal. June 10, 2005) (“The
risks assumed by Class Counsel, particularly the risk of non-payment or

1 recognized that securities class actions carry significant risks, post-PSLRA rulings
2 make it clear that the risk of no recovery has increased significantly. Courts have
3 noted that “securities actions have become more difficult from a plaintiff’s
4 perspective in the wake of the PSLRA.” *In re Ikon Office Solutions, Inc. Sec.*
5 *Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000).

6 In this action, Lead Counsel, like the Class Members, faced the substantial
7 risk of lesser or no recovery. To prevail on their claims under § 10(b) of the
8 Exchange Act of 1934 (“Exchange Act”), Plaintiffs would have the burden of
9 establishing that: (1) Defendants made a material misrepresentation or omission of
10 a material fact; (2) scienter; (3) Plaintiffs’ reliance on the misrepresentation; and
11 (4) the misrepresentations caused Plaintiffs’ damages (“loss causation”). *See In re*
12 *New Century*, 588 F. Supp. 2d 1206, 1222, 1236 (C.D. Cal. 2008); *see also Dura*
13 *Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). With respect to their claims
14 under § 11(a) of the Securities Act of 1933 (“Securities Act”), Plaintiffs would
15 have the burden of establishing that (1) the registration statements contained an
16 omission or misrepresentation, and (2) the omission or misrepresentation was
17 material, that is, it would have misled a reasonable investor about the nature of the
18 investment. *See New Century*, 588 F. Supp. 2d at 1238 (citing *In re Stac Elecs.*
19 *Sec. Litig.*, 89 F.3d 1399, 1403-04 (9th Cir. 1996)). Defendants can attempt to
20 establish an affirmative defense to a § 11 claim of “negative causation,” *i.e.*, that
21 the alleged misrepresentation did not cause plaintiffs’ damages.¹⁴

22
23
24 reimbursement of expenses, is a factor in determining counsel’s proper fee
25 award.”).

26 ¹⁴ *See New Century*, 588 F. Supp. 2d at 1238 (citing 15 U.S.C. § 77k(e)). The
27 control person claims require that Plaintiffs establish: (1) an underlying primary
28 violation of the securities laws; and (2) the defendant controlled the person or
entity committing the primary violation. *See New Century*, 588 F. Supp. 2d at
1233; *see also Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000).

1 Here, there was a risk that Defendants could successfully argue at summary
2 judgment or at trial that the stock price drops on the alleged corrective disclosure
3 dates were only partially recoverable on one of those days, or not at all, which
4 would have significantly reduced – or eliminated altogether – the recoverable
5 damages against those Defendants with sufficient assets to satisfy a judgment. *See*
6 Declaration of H. Nejat Seyhun, Ph.D. (“Seyhun Decl.,” Ex. D) ¶¶55-57; Graziano
7 Decl. ¶109.

8 Specifically, at the time of the Settlements, KPMG’s summary judgment
9 motion for complete dismissal on the grounds of loss causation was fully briefed
10 and scheduled for oral argument. If successful, KPMG’s motion would have
11 ended all of Plaintiffs’ claims against KPMG and greatly diminished Plaintiffs’
12 damage claim against the Underwriter Defendants.¹⁵

13 With regard to the February 7, 2007 disclosure, Defendants argued that the
14 disclosure of the restatement only pertained to the first three quarters of 2006 and
15 did not pertain at all to the Company’s financial results in 2005. Defendants thus
16 argued that the financial results issued prior to the first quarter of 2006 were not
17 actionable. If successful, this argument would have ended Plaintiffs’ case against
18 KPMG and greatly reduced Plaintiffs’ case against the Underwriter Defendants,
19 leaving only the Individual Defendants whose insurance coverage would likely
20 have been greatly expended by that point in the litigation. *See* Graziano Decl.
21 ¶114.

22 With regard to the March 2, 2007 corrective disclosure, Defendants also
23 would have argued that the fall in the price of New Century securities was not
24

25
26 ¹⁵ *See* Graziano Decl. ¶¶108-17. For example, in *In re Omnicom Group, Inc. Sec.*
27 *Litig.*, following 5½ years of litigation and millions of dollars in time and expense
28 incurred by plaintiff’s counsel, the district court granted defendant’s motion for
summary judgment based on loss causation, dismissing all claims in their entirety.
The Second Circuit affirmed. 597 F.3d 501 (2d Cir. 2010).

1 caused by the fraud. Indeed, in its motion for summary judgment, KPMG argued
2 that it could not be held liable for losses from this disclosure because the disclosure
3 revealed nothing about KPMG's misconduct or New Century's 2005 financial
4 results. Moreover, all of the Defendants would have argued that the loss from the
5 March 2, 2007 disclosure did not cause New Century investors' losses because the
6 drop was caused by other news and information announced by New Century and
7 had nothing to do with the fraud or restatement. Thus, Plaintiffs also faced the risk
8 of no recovery for the March 5, 2007 stock price drop. *See id.* ¶115.

9 Additionally, with regards to the March 13, 2007 corrective disclosure,
10 Defendants would have argued that the delisting of New Century's securities from
11 the NYSE was not caused by Defendants' fraud but, instead, by the decline in the
12 mortgage industry or other news. Thus, Plaintiffs also faced the risk of no
13 recovery for the March 13, 2007 stock price drop. *See id.* ¶116.

14 Defendants also would have continued to argue that they could not be held
15 liable under § 10(b) of the Exchange Act because they did not have the requisite
16 scienter. The Individual Defendants would have argued that their transactions in
17 New Century stock and their retention of shares negate scienter. They also would
18 have argued that they relied on the audit opinion of KPMG in connection with
19 New Century's financial results, and that any financial misstatements were
20 committed by lower level employees without their knowledge. *See id.* ¶109.

21 Defendants also would have contended that there were no material
22 misstatements; that the Company's statements during the Class Period were true
23 when made; that the Company repeatedly warned investors of the risk that loans
24 may default; and that Defendants adequately disclosed the risks that eventually
25 materialized, rendering the alleged omissions non-material.¹⁶

26
27 ¹⁶ *See* Graziano Decl. ¶110. Moreover, even if Plaintiffs prevailed through
28 summary judgment, risks to the Class remained. Plaintiffs considered that certain
contested issues would have been decided by a jury in the event of a trial. Even a

1 Lead Counsel countered many of Defendants' contentions both in opposing
2 the multiple rounds of motions to dismiss, and in opposing KPMG's summary
3 judgment motion, which was pending at the time the Settlements were reached. In
4 opposing summary judgment and through the submission of three expert reports,
5 Lead Counsel argued that fact-for-fact disclosures were not required for loss
6 causation, that written analyst confirmation was not required for loss causation,
7 that investor losses were caused by disclosure of the facts related to KPMG's
8 misconduct, and that disaggregation of the losses caused by KPMG is not required.
9 Lead Counsel also argued that summary adjudication with respect to certain
10 disclosures was inappropriate because the disclosures reflected the materialization
11 of the foreseeable risks that emanated from the misconduct relating to KPMG's
12 2005 audit. *See* Graziano Decl. ¶¶95. The Settlements were reached just prior to
13 the hearing date on KPMG's summary judgment motion. *Id.* ¶¶98-99. Under
14 these circumstances, the requested fee is fully justified.

15 **3. The Skill Required And Quality Of The Work Performed**

16 The third factor to consider in determining what fee to award is the skill
17 required and quality of work performed. *See Gustafson v. Valley Ins. Co.*, 2004
18 WL 2260605, at *2 (D. Or. Oct. 6, 2004). "The 'prosecution and management of a
19 complex national class action requires unique legal skills and abilities.' [citation
20
21
22
23

24 meritorious case can be lost at trial. *See In re JDS Uniphase Corp. Sec. Litig.*,
25 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (after a lengthy trial, jury returned a
26 verdict against plaintiffs, the action was dismissed and plaintiffs were ordered to
27 pay defendants the costs of defending the action). Even success at trial does not
28 eliminate the risk. For example, in *In re Apple Computer Sec. Litig.*, 1991 WL
238298 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for plaintiffs after an
extended trial. The court, however, overturned the verdict.

omitted]. This is particularly true in securities cases because the [PSLRA] makes it much more difficult for securities plaintiffs to get past a motion to dismiss.”¹⁷

Here, Lead Counsel has extensive experience in complex litigation and is a nationally known leader in the field of securities class actions, including in this District.¹⁸ Lead Counsel’s reputation as experienced counsel in complex class action cases, both willing and able to litigate the case to resolution, facilitated Lead Counsel’s ability to negotiate the Settlements.

From the outset, Plaintiffs’ Counsel engaged in a concerted effort to obtain the maximum recovery for the Class. Plaintiffs’ Counsel demonstrated that they would work to develop sufficient evidence to support a convincing case. As detailed in the Graziano Declaration, through Plaintiffs’ Counsel’s persistent and skillful work, Plaintiffs were able to plead detailed allegations based on their extensive investigation, defeat Defendants’ motions to dismiss, and oppose KPMG’s summary judgment motion. *See* Graziano Decl. ¶¶34-71, 92-100.

Plaintiffs’ Counsel also filed two largely successful motions to compel against KPMG and ultimately obtained over 38 million pages of documents from Defendants and third parties during discovery. *Id.* ¶¶73-91. Plaintiffs’ Counsel also worked effectively with several experts, including three publicly-identified experts in opposing KPMG’s summary judgment motion. *Id.* ¶¶101-07.

¹⁷ *Omnivision*, 559 F. Supp. 2d at 1047; *see also Heritage Bond*, 2005 WL 1594389, at *12 (“The experience of counsel is also a factor in determining the appropriate fee award.”).

¹⁸ *See, e.g., In re Int’l Rectifier Corp. Sec. Litig.*, 07-02544-JFW (C.D. Cal.) (serving as Co-Lead Counsel, Bernstein Litowitz successfully obtained a settlement in the amount of \$90 million); *In re Gemstar-TV Guide Int’l Inc. Sec. Litig.*, 02-CV-2775-MRP (C.D. Cal.) (serving as Lead Counsel, Bernstein Litowitz successfully obtained settlements in the amount of \$92.5 million); *see also* Firm Resume of Bernstein Litowitz, attached as Ex. 3 to the Declaration of Edward Grossmann in Support of Petition for Attorneys’ Fees and Reimbursement of Expenses on Behalf of Bernstein Litowitz Berger & Grossmann LLP, Ex. F.

1 As a result of Plaintiffs' Counsel's skill and efforts, by the time the
2 Settlements were reached, Plaintiffs' Counsel and Plaintiffs had a thorough
3 understanding of the strengths and weaknesses of the claims asserted in the case.
4 Plaintiffs' Counsel engaged in hard-fought and protracted settlement negotiations,
5 including eleven mediation sessions and extensive additional negotiations. *Id.*
6 ¶¶125-36; *see also* Weinstein Decl. ¶¶5-19. Plaintiffs' Counsel's extensive efforts
7 and skill leading to the Settlements strongly support the requested percentage fee.

8 The quality and vigor of opposing counsel is also important in evaluating the
9 services rendered by Plaintiffs' Counsel. *See, e.g., In re Equity Funding Corp.*
10 *Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Defendants have been
11 represented by experienced counsel from prominent law firms.¹⁹ Counsel for the
12 eleven separate insurance carriers also were involved in the negotiations. The fact
13 that Plaintiffs' Counsel achieved these Settlements for the Class in the face of
14 formidable legal opposition further evidences the quality of their work.

15 **4. The Contingent Nature Of The Fee And**
16 **The Financial Burden Carried By Counsel**

17 The Ninth Circuit has confirmed that a determination of a fair and
18 reasonable fee must include consideration of the contingent nature of the fee:

19 It is an established practice in the private legal market to reward attorneys
20 for taking the risk of non-payment by paying them a premium over their
21 normal hourly rates for winning contingency cases. *See* Richard Posner,
22 *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Contingent fees
23 that may far exceed the market value of the services if rendered on a non-
24 contingent basis are accepted in the legal profession as a legitimate way of

25 ¹⁹ The Individual Defendants were represented by, among others, Munger, Tolles &
26 Olson LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Latham & Watkins LLP;
27 Crowell & Moring LLP; and Gibson Dunn & Crutcher LLP. Defendant KPMG
28 was represented by Sidley Austin LLP, and the Underwriter Defendants were
represented by Paul, Hastings, Janofsky & Walker LLP.

1 assuring competent representation for plaintiffs who could not afford to pay
2 on an hourly basis regardless whether they win or lose.²⁰

3 Here, Plaintiffs' Counsel received no compensation during the course of this
4 3-year action and invested over 29,251.45 hours for a total lodestar of
5 \$12,671,645.25, and incurred expenses totaling \$3,064,348.82 in prosecuting the
6 case. See Graziano Decl. ¶¶159, 161. In addition to the advancement of costs,
7 lawyers working on the case have forgone the business opportunity to devote time
8 to other cases. See *Vizcaino*, 290 F.3d at 1050. Any fee award has always been at
9 risk, and completely contingent on the result achieved and on this Court's
10 discretion in awarding fees and expenses.

11 Indeed, the risk of no recovery in complex cases is very real. Lead Counsel
12 knows from personal experience that, despite the most vigorous and competent
13 efforts, their success in contingent litigation such as this is never guaranteed. The
14 commencement of a class action is no guarantee of success. These cases are not
15 always settled, nor are plaintiffs' lawyers always successful.²¹ Hard, diligent work
16 by skilled counsel is required to develop facts and theories to prosecute a case or
17 persuade defendants to settle on terms favorable to the Class.

18 **5. Awards Made In Similar Cases**

19 At the direction of Lead Plaintiff, Lead Counsel seeks a fee of approximately
20 11.5% of the Settlement Amount – less than half of the Ninth Circuit's 25%
21 benchmark for common fund cases. Indeed, "in most common fund cases, the
22 award exceeds that benchmark."²² This fee percentage – negotiated with the

24 ²⁰ *WPPSS*, 19 F.3d at 1299; see *In re Dynamic Random Access Memory (DRAM)*
25 *Antitrust Litig.*, 2007 WL 2416513, at *1 (N.D. Cal. Aug. 16, 2007); see also
Omnivision, 559 F. Supp. 2d at 1047.

26 ²¹ See, e.g., *Omnicom*, 597 F.3d 501 (affirming summary judgment in favor of
27 defendant on loss causation grounds); see also *JDS Uniphase*, 2007 WL 4788556.

28 ²² *Omnivision*, 559 F. Supp. 2d at 1047 (approving 28% fee award in securities
class action) (citing *Activision*, 723 F. Supp. at 1377-78 (surveying securities cases

sophisticated Lead Plaintiff at the beginning of the litigation – is also less than the fee percentages awarded in other sub-prime mortgage securities class actions.²³

In addition, many courts weigh the customary fee in the marketplace for non-class action contingency cases as a significant measure in approving fees.²⁴

nationwide and noting, “This court’s review of recent reported cases discloses that nearly all common fund awards range around 30%”)); *see also Waldrep v. ValueClick, Inc.*, CV 07-54411 DDP (C.D. Cal.), Order Granting Final Approval of Settlement and Plan of Allocation and Awarding Attorney’s Fees and Reimbursement of Expenses filed Nov. 25, 2009, ECF No. 160 (granting fees equaling 25% of settlement fund in securities class action); *Oh v. Chan*, 07-04891 DDP (C.D. Cal.), Order For Award of Attorneys’ Fees and Reimbursement of Expenses filed July 28, 2009, ECF No. 99 (granting fees equaling 25% of settlement fund in securities class action); *In re Int’l Rectifier Corp. Sec. Litig.*, 07-02544 JFW (C.D. Cal.), Order Awarding Attorneys’ Fees and Reimbursement of Litigation Expenses filed Feb. 8, 2010, ECF No. 316 (granting fees equaling 25% of settlement fund in securities class action); *In re THQ, Inc. Sec. Litig.*, CV-00-01783-JFW (C.D. Cal.), Order Awarding Lead Counsel’s Attorneys’ Fees And Reimbursement Of Expenses filed June 30, 2003, ECF No. 128 (granting fees equaling 30% of the settlement amount in a securities class action); *In re CV Therapeutics, Inc. Sec. Litig.*, 2007 WL 1033478 (N.D. Cal. Apr. 4, 2007) (approving 30% fee award in securities class action); *In re Informix Corp. Sec. Litig.*, 1999 U.S. Dist. LEXIS 23579, at *6 (N.D. Cal. Nov. 23, 1999) (awarding 30% of \$132 million settlement fund in securities class action); *see also Silva v. Banco Popular North America*, Case No. CV 08-06300-JFW (C.D. Cal.), Order Granting Final Approval Of Settlement And Awarding Fees And Costs filed June 22, 2009, ECF No. 42 (granting fees equaling 28% of the class settlement fund); *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009) (approving 30% fee award).

²³ *See In re MoneyGram Int’l, Inc. Sec. Litig.*, 08-cv-883 (D. Minn. June 18, 2010) (awarding 23.75%); *In re American Home Mortg. Sec. Litig.*, 07-MD-1898 (E.D.N.Y. Jan. 14, 2010) (20%); *In re RAIT Financial Trust Sec. Litig.*, 07-cv-03148 (E.D. Pa. Dec. 14, 2009) (20%); *In re Beazer Homes USA, Inc. Sec. Litig.*, 07-cv-725 (N.D. Ga. Sept. 15, 2009) (18%); *Atlas v. Accredited Home Lenders Holding Co.*, 07-cv-00488 (S.D. Cal. Nov. 4, 2009) (25%).

²⁴ *See e.g., In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001); *In re RJR Nabisco, Inc. Sec. Litig.*, 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992); *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003).

1 Although the Ninth Circuit has not adopted the marketplace analogy as a factor to
2 consider in setting fees in class actions, the Circuit expressly recognized it as at
3 least “probative” of what fee is reasonable. *Vizcaino*, 290 F.3d at 1049. If this was
4 a non-class action litigation, the customary contingent fee would likely range
5 between 30% and 40% of the recovery.²⁵

6 Plaintiffs’ Counsel’s work was performed, and the results achieved, on a
7 wholly contingent basis in the face of determined opposition. Under these
8 circumstances, Plaintiffs’ Counsel are entitled to the award of a reasonable
9 percentage fee based on the benefit conferred and the common fund obtained.
10 Under all of the circumstances present here, an 11.5% fee is fair and reasonable.

11 **6. Reaction Of The Class Supports The Fee Request**

12 The reaction of the class to a proposed settlement and fee request is a
13 relevant factor in approving fees. *See Red Door Salons*, 2009 WL 248367, at *7;
14 *Omnivision*, 559 F. Supp. 2d at 1048. Here, beginning on August 17, 2010, the
15 Notice was sent to more than 50,000 potential Class Members and their nominees,
16 and the Summary Notice was published in *The Wall Street Journal* and over the
17 *PR Newswire* on August 24, 2010. *See Simmons Decl.* ¶10.

18 The Notice informed Class Members that Lead Counsel would seek fees not
19 to exceed 12% of the Settlement Amount and reimbursement of expenses not to

21 ²⁵ *See, e.g., Ikon*, 194 F.R.D. at 194 (“in private contingency fee cases, particularly
22 in tort matters, plaintiffs’ counsel routinely negotiate agreements providing for
23 between thirty and forty percent of any recovery”); *In re United States Bioscience*
24 *Sec. Litig.*, 155 F.R.D. 116, 119 (E.D. Pa. 1994) (finding that 30% would likely
25 have been negotiated in securities action); *see also Kirchoff v. Flynn*, 786 F.2d 320,
26 323 (7th Cir. 1986) (observing that 40% is the customary fee in tort litigation); *In*
27 *re Pub. Service Co. of New Mexico*, 1992 WL 278452, at *7 (S.D. Cal. July 28,
28 1992); (“[i]f this were a non-representative litigation, the customary fee
arrangement would be contingent, on a percentage basis, and in the range of 30%
to 40% of the recovery”); *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, at
*7 (S.D. Cal. Aug. 30, 1990) (“fee contracts have traditionally ranged between
30% and 40%”).

1 exceed \$4.5 million, plus interest, and would seek reimbursement to Plaintiffs for
2 their reasonable costs and expenses directly related to their representation of the
3 Class. See Ex. A to Simmons Decl. ¶¶94. The Notice further advised Class
4 Members of their right to opt out of the Class or to object to the Settlements, the
5 Plan of Allocation or the request for attorneys' fees and expenses. While the
6 deadline for filing any objections does not expire until October 18, 2010, to date,
7 no Class Member has filed an objection.²⁶ This factor further supports the
8 requested fee.²⁷

9 **7. The Lodestar Crosscheck Confirms The Fee Is Reasonable**

10 Although courts in this Circuit typically apply the percentage approach to
11 determine attorneys' fees in common-fund cases, courts may use a lodestar
12 analysis as a "cross-check" on the percentage method. Here, such a "cross-check"
13 confirms that the requested fee is reasonable.²⁸

14 In *Vizcaino*, 290 F.3d at 1051, the Ninth Circuit noted that
15

16 ²⁶ The Settlements also received favorable reaction by an experienced commentator
17 as follows: "I suspect that this was an enormously difficult settlement to pull off.
18 Given the number of parties, the number of proceedings, the number of insurers,
19 and the amount of money at stake, trying to settle this case undoubtedly was
20 challenging, particularly since continuing defense expenses eroded the amount of
21 insurance remaining as the settlement negotiations went forward. I tip my hat to
22 the lawyers involved in bringing this settlement together." Ex. J.

23 ²⁷ See *Silva v. Banco Popular North America*, CV 08-06300 (C.D. Cal.), Order
24 Granting Final Approval Of Settlement And Awarding Fees And Costs filed June
25 22, 2009, ECF No. 42 (awarding 28% based in part on no objections); *Red Door*
26 *Salons*, 2009 WL 248367, at *7 (no objection supports 30% award); *Omnivision*,
27 559 F. Supp. 2d at 1048 (only three objections supports 28% award).

28 ²⁸ See *Glass*, 331 Fed. Appx. at 456; *In re Immunex Sec. Litig.*, 864 F. Supp. 142,
144 (W.D. Wash. 1994); *WPPSS*, 19 F.3d at 1296-98. Under the lodestar method,
the court multiplies the number of hours each attorney spent on the case by each
attorney's reasonable hourly rate; and second, the court adjusts that lodestar figure
(by applying a multiplier) to reflect such factors as the risk and contingent nature
of the litigation, the result obtained and the quality of the attorney's work.

1 “courts have routinely enhanced the lodestar to reflect the risk of non-
2 payment in common fund cases. . . . This mirrors the established practice in
3 the private legal market of rewarding attorneys for taking the risk of
4 nonpayment by paying them a premium over their normal hourly rates for
5 winning contingency cases.” . . . In common fund cases, “attorneys whose
6 compensation depends on their winning the case [] must make up in
compensation in the cases they win for the lack of compensation in the cases
they lose.”

7 Here, Plaintiffs’ Counsel’s total lodestar is \$12,671,645.25. *See* Graziano Decl.

8 ¶159. Plaintiffs’ Counsel’s lodestar is evidenced not only by counsel’s detailed
9 sworn declarations (Exs. F-H), but also by the fact that the Court-appointed Lead
10 Plaintiff, NYSTRS, received from Lead Counsel on a quarterly basis detailed
11 reports regarding Plaintiffs’ Counsel’s lodestar and expenses. *See* Schneider Decl.

12 ¶13. Lead Counsel’s fee request amounts to a multiplier of only 1.1. Courts have
13 routinely held that much larger multipliers are fair and reasonable. *See, e.g.,*
14 *Vizcaino*, 290 F.3d 1043 (affirming fee award equaling 28% of the settlement fund,
15 resulting in a 3.65 multiplier). Indeed, ““multipliers of between 3 and 4.5 have
16 been common.””²⁹

17
18 ²⁹ *Rabin v. Concord Assets Group, Inc.*, 1991 WL 275757, at *2 (S.D.N.Y.
19 Dec. 19, 1991) (multiplier of 4.4); *Van Vranken v. Atlantic Richfield Co.*, 901 F.
20 Supp. 294, 298 (N.D. Cal. 1995) (“Multipliers in the 3-4 range are common in
lodestar awards for lengthy and complex class action litigation.”); *see also Keith v.*
21 *Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5); *In re Brocade*
22 *Sec. Litig.*, 05-CV-2042-CRB (N.D. Cal.), Final Order and Judgment filed January
26, 2009, at 13, ECF No. 496 (multiplier of 3.5); *In re Rite Aid Corp. Sec. Litig.*,
23 146 F. Supp. 2d 706 (E.D. Pa. 2001) (multipliers of 4.5-8.5); *In re Infospace, Inc.*,
24 330 F. Supp. 2d 1203 (W.D. Wash. 2004) (multiplier of 3.5); *see also In re*
25 *NASDAQ Market-Makers Anti-Trust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998)
(multiplier of 3.97; finding fee awards representing multipliers of 3 to 4.5 to be
26 “common”); *see also Kurzweil v. Philip Morris Cos., Inc.*, 1999 WL 1076105, at
27 *3 (S.D.N.Y. Nov. 30, 1999) (recognizing that multipliers of between 3 and 4.5 are
common in federal securities cases); *Wal-Mart Stores, Inc. v. VISA USA, Inc.*, 396
28 F.3d 96 (2d Cir. 2005) (affirming fee award representing a 3.5 multiplier); *Maley v.*
Del Global Tech. Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (multiplier of

1 Further, Plaintiffs' Counsel's lodestar does not account for the time
2 expended by bankruptcy and estate counsel, and for additional time that will be
3 required of Lead Counsel to participate in the final approval process and to oversee
4 the claims administration process and the distribution of the net settlement funds.
5 *See* Graziano Decl. ¶160.

6 In sum, the attorneys' fees requested are well within the range of what courts
7 in this Circuit commonly award in complex class actions. The requested fee is,
8 therefore, reasonable and fair, whether calculated as a percentage of the fund or in
9 relation to Plaintiffs' Counsel's lodestar, and warrants the Court's approval.

10 **III. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE**

11
12 Lead Counsel also requests that the Court grant its application for
13 \$3,064,348.82 to reimburse Plaintiffs' Counsel's incurred costs in connection with
14 the prosecution of this litigation. *See* Graziano Decl. ¶163. Expenses are
15 reimbursable in a common fund case where they are of the type typically billed by
16 attorneys to paying clients in the marketplace.³⁰

17 From the beginning of the case, Plaintiffs' Counsel were aware that they
18 might not recover any of their expenses, and, at the very least, would not recover
19 anything until the action was successfully resolved. Plaintiffs' Counsel also
20

21 4.65, which was "well within the range awarded by courts in this Circuit and courts
22 throughout the country"); *In re Interpublic Sec. Litig.*, 2004 WL 2397190, at *12
23 (S.D.N.Y. Oct. 26, 2004) (multiplier of 3.96; noting that "[I]n recent years
24 multipliers of between 3 and 4.5 have been common in federal securities cases.");
25 *WorldCom*, 388 F. Supp. 2d 319 (multiplier of 4.0); *In re Bisys Sec. Litig.*, 2007
WL 2049726 (S.D.N.Y. July 16, 2007) (multiplier of 2.99).

26 ³⁰ *See, e.g., Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their
27 reasonable expenses that would typically be billed to paying clients in non-
28 contingency matters."); *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.'").

1 understood that, even assuming that the case was ultimately successful, an award
2 of expenses would not compensate them for the lost use of the funds advanced to
3 prosecute this action. Thus, Plaintiffs' Counsel were motivated to, and did, take
4 significant steps to minimize expenses whenever practicable without jeopardizing
5 the vigorous and efficient prosecution of the action. *See* Graziano Decl. ¶162.

6 Plaintiffs' Counsel's expenses are supported by three sworn declarations
7 detailing the expenses by category, *see* Exs. F-H; and further supported by the fact
8 that, as discussed above, NYSTRS received reports of Plaintiffs' Counsel's
9 expenses on a quarterly basis throughout the litigation. *See* Schneider Decl. ¶13.

10 The expenses which Plaintiffs' Counsel seek are the type of expenses
11 routinely charged to hourly paying clients. For example, a large portion of the
12 expenses were incurred for professional expert and consultant fees. Of the total
13 amount of expenses, \$2,116,142.55, or over 69%, was expended on experts in the
14 areas of market efficiency, loss causation, damages, accounting, loan underwriting,
15 underwriters' due diligence, and to assist with the Plan of Allocation. *See*
16 Schedule of All Plaintiffs' Counsel's Expenses, Ex. E. Lead Counsel negotiated
17 competitive fee rates for these experts, each of whom played a significant part in
18 the prosecution of the action. *See* Ex. 2 to Grossmann Decl.; Graziano Decl.
19 ¶¶101, 164-68.

20 The expenses also include the costs of on-line legal and factual research in
21 the amount of \$195,799.56. *See* Graziano Decl. ¶169, Exs. E-H. These are the
22 charges for factual and legal research services such as *Lexis-Nexis* and *Westlaw*. It
23 is standard practice for attorneys to use *Lexis-Nexis* and *Westlaw* to assist them in
24 researching legal and factual issues. *See In re Media Vision Tech. Sec. Litig.*, 913
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1 F. Supp. 1362, 1371 (N.D. Cal. 1996). Indeed, courts recognize that these tools
2 create efficiencies in litigation and, ultimately, save clients and the class money.³¹

3 Further, Plaintiffs' Counsel were required to travel in connection with
4 prosecuting and mediating this matter and, thus, incurred the related costs of travel
5 tickets, meals, parking, and lodging. Included in the expense request is \$34,338.60
6 for out-of-town travel expenses necessarily incurred for the prosecution of this
7 litigation. *See* Graziano Decl. ¶170; Ex. E-H. The expenses in this category are
8 reasonable in amount, and are properly charged against the fund created. The other
9 expenses are the types of expenses that are necessarily incurred in litigation and
10 routinely charged to clients billed by the hour. These expenses include long
11 distance telephone and facsimile charges, postage and delivery expenses, filing
12 fees, photocopying, and document support.³²

13 And finally, the Notice provided to potential Class Members informed them
14 that Lead Counsel intends to apply for the reimbursement of litigation expenses in
15 an amount not to exceed \$4.5 million, plus interest at the same rate and for the
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19 ³¹ *See, e.g., In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992). In
20 approving expenses for computerized research, the court in *Gottlieb v. Wiles*
21 underscored the time-saving attributes of computerized research as a reason
22 reimbursement should be encouraged. 150 F.R.D. 174, 186 (D. Colo. 1993), *rev'd*
23 *and remanded on other grounds sub nom. Gottlieb v. Barry*, 43 F.3d 474 (10th Cir.
1994).

24 ³² *Id.* ¶171; *see Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir.
1982), *vacated and remanded on other grounds*, 461 U.S. 952 (1983); *see also Red*
25 *Door Salon*, 2009 WL 248367, at *7; *Omnivision*, 559 F. Supp. 2d at 1048. The
26 amount for Outside Copying includes \$136,933.50 invoiced from KPMG as costs
27 for conversion and copying in connection with its production of documents in this
28 case. Magistrate Judge Olguin's July 8, 2009 Order allowed KPMG to seek costs
for this production to Plaintiffs, and pursuant to that Order, KPMG seeks a total of
\$136,933.50 from Plaintiffs.

1 same time period as earned by the settlement fund.³³ The amount of expenses now
2 sought – \$3,064,348.82 – is significantly *less* than the amount stated in the Notice.
3 The deadline for objecting to the fee and expense application or opting out of the
4 Class expires on October 18, 2010. To date, there have been no objections to any
5 aspect of the Settlements, the Plan of Allocation, or the request for attorneys’ fees
6 and reimbursement of litigation expenses.

7 **IV. PLAINTIFFS NYSTRS AND HOOTEN SHOULD BE**
8 **REIMBURSED FOR THEIR COSTS AND EXPENSES**

9 Under the PSLRA, the Court may award “reasonable costs and expenses
10 (including lost wages) directly relating to the representation of the class to any
11 representative party serving on behalf of a class.” 15 U.S.C. § 78u-4(a)(4). Courts
12 have noted that it is important to reimburse time and expenses of class
13 representatives because doing so “encourages participation of plaintiffs in the
14 active supervision of their counsel.” *Varljen v. H.J. Meyers & Co.*, 2000 WL
15 1683656, at *5 n.2 (S.D.N.Y. Nov. 8, 2000). Expenses and time spent by class
16 representatives in managing the case are properly reimbursable.³⁴

17 The Notice informed the Class that Lead Counsel would request an award of
18 costs and expenses (including lost wages) incurred by Plaintiffs directly related to
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20
21 ³³ Pursuant to the PSLRA, the Notice further informed Class Members that if the
22 Court approves Lead Counsel’s fee and expense application, assuming that all
23 Class Members participate in the Settlements, the average distribution per damaged
24 share will be approximately \$0.69 per share of New Century Common Stock,
25 approximately \$2.08 per share of New Century Preferred Stock, approximately
\$0.11 per Call Option, and approximately \$0.25 per Put Option, before deduction
of Court-approved fees, expenses and costs. *See* Simmons Decl. at Ex. A p.2.

26 ³⁴ *See In re Broadcom Corp. Class Action Litig.*, 06-cv-05306 (C.D. Cal.), Order
27 Awarding Lead Counsel Attorneys’ Fees and Reimbursement of Litigation
28 Expenses filed Aug. 11, 2010, ECF No. 355 (awarding \$12,250 for lead plaintiff
expenses); *see also Atlas v. Accredited Home Lenders Holding Co.*, 2009 WL
3698393, at *5 (S.D. Cal. Nov. 4, 2009); *Omnivision*, 559 F. Supp. 2d at 1049.

1 their representation of the Class. Such costs and expenses incurred by Lead
2 Plaintiff NYSTRS are \$6,611.27, and such costs and expenses incurred by Plaintiff
3 Hooten are \$3,650, for a total of \$10,261.27. The amounts are supported by sworn
4 declarations detailing the incurred expenses.³⁵ These costs and expenses are
5 directly related to Plaintiffs' representation of the Class and are properly
6 reimbursable from the Settlement Fund.

7 **V. CONCLUSION**

8 Based on the foregoing and the entire record herein, Lead Counsel
9 respectfully requests that the Court award \$14,410,933.80 as payment for
10 attorneys' fees, and \$3,064,348.82 in reimbursement for Plaintiffs' Counsel's
11 expenses incurred in connection with the prosecution of the action, with interest on
12 both sums at the same rate as earned by the Settlement Amount. Additionally,
13 Lead Plaintiff NYSTRS should be awarded \$6,611.27, and Plaintiff Hooten should
14 be awarded \$3,650, in reimbursement of their reasonable costs and expenses
15 (including lost wages) related to their representation of the Class.

16 Dated: October 4, 2010

Respectfully submitted,

17 BERNSTEIN LITOWITZ BERGER
18 & GROSSMANN LLP

19
20 /s/ Salvatore J. Graziano

SALVATORE J. GRAZIANO

21
22 BLAIR A. NICHOLAS
23 ELIZABETH LIN
24 NIKI L. MENDOZA
BENJAMIN GALDSTON

25
26 ³⁵ See Schneider Decl., Ex. B ¶¶15-16.; Declaration of Named Plaintiff Charles
27 Hooten in Support of Request for Reimbursement of Litigation Expenses, Ex. I
28 ¶¶3-4. Plaintiff Larson does not seek reimbursement for any costs or expenses, and
only Plaintiff Hooten seeks recovery for his time spent prosecuting the case for the
benefit of the Class.

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