Matthew T. Hurst, (admitted *pro hac*)
Email: mhurst@heffnerhurst.com
HEFFNER HURST
30 N. LaSalle Street, 12th Floor
Chicago, Illinois 60602
Telephone: (312) 346-3466
Facsimile: (312) 346-2829

R. Joseph Barton (admitted *pro hac*)
jbarton@cohenmmilstein.com
COHEN MILSTEIN SELLERS & TOLL
1100 New York Ave. NW, Suite 500, West Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699

Class Counsel Continued on Signature Page

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

RONNIE DOOLEY, *et al.*, individually and on behalf of all others similarly situated Plaintiffs, v. RONALD SAXTON, RODERICK C. WENDT, R. NEIL STUART, and JELD-WEN EMPLOYEE STOCK OWNERSHIP & RETIREMENT PLAN, Defendants.	Case No. 1:12-CV-1207-MC Consolidated with Case Nos: 1:13-CV-177-MC & 1:13-CV-395-MC PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR UNOPPOSED MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT AND THE PLAN OF ALLOCATION

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT AND THE PLAN OF ALLOCATION

This Court should approve the proposed class-action settlement here. The settlement provides for substantial and important relief to the Class—$15.5 million in cash (which is approximately 45% of the losses that the Class has incurred) and valuable non-monetary relief. It was reached at end of a seventeen-month-long, hard-fought negotiation and mediation process between highly experienced ERISA class-action litigators. Notice has been given to the Class, the U.S. Attorney General, and the attorneys general of the 50 states – of which only 2 Class Members, out of 11,035, have objected. The settlement has been recommended not only by Plaintiffs and their counsel, but also by a neutral Independent Fiduciary hired by the Plan to opine on the fairness and reasonability of the settlement. For these reasons and those discussed in this brief, this Court should approve the proposed settlement in its entirety.

BACKGROUND

A. Factual background

This is an action brought pursuant to the Employee Retirement Security Income Act of 1974 ("ERISA") by participants in the JELD-WEN, Inc. Employee Stock Ownership and Retirement Plan ("JELD-WEN ESOP" or "Plan") who were adversely affected by breaches of fiduciary duty and a Plan amendment in 2010. The Plan, established in 1995, allowed employees to defer and invest a portion of their salaries and provided a vehicle for matching contributions from JELD-WEN. Consolidated Amended Complaint, Dkt. 100 at ¶¶ 53-55. The assets of the Plan were invested primarily in JELD-WEN stock. *Id.* at ¶ 2. There was not, and still is not, a nationally-recognized market for JELD-WEN stock. *Id.* ¶ 52. The value of the shares for purchase or distribution was declared annually by JELD-WEN's management. *Id.* at ¶ 54.

Prior to November of 2010, the Plan provided that a participant who had separated

from service with JELD-WEN, but was not yet 55 years of age ("Terminated Employee"), would have his or her vested accrued benefit under the Plan calculated based on the annual valuation of JELD-WEN stock in the year that he or she terminated employment. *Id.* at ¶¶ 3 & 73. This value would then be placed in an "Undistributed Account" and that value would then continue to accrue interest at the "Local Passbook Rate" until the participant received a full distribution of his or her benefits. *Id.* at ¶¶ 3 & 74. As a result, the amount the Plan was obligated to pay out was based on the value of the Company stock in the year of severance, not the value at the time of payout. *Id.* at ¶ 4. Despite the Plan's obligation to pay benefits to Terminated Employees unrelated to the value of JELD-WEN stock, the ESOP Committee Defendants failed to properly invest the assets of the Plan in anything other than JELD-WEN stock. *Id.* at ¶¶ 4, 289-294. So long as the price of JELD-WEN stock increased, the Plan's obligations to pay benefits could be satisfied through the sale of JELD-WEN stock. *Id.* at ¶ 5. Once the value of JELD-WEN stock collapsed, beginning in 2008, the Plan had insufficient assets to pay the vested benefits of Terminated Employees. *Id.* at ¶ 6.

To address this shortfall, JELD-WEN amended the Plan on November 19, 2010, retroactive to January 1, 2010. *Id.* at ¶ 91. The 2010 Amendment eliminated the Local Passbook Rate of interest and provided that the Undistributed Accounts of Terminated Employees would now be valued at the fair market value of the stock on January 1, 2010 ($417 per share), rather than the lower value of the stock on the date the amendment was actually enacted. *Id.* at ¶¶ 7, 92 & 94.[1] As a result, at the end of the 2011 Plan year, the 2010

[1] To give an example, if a Terminated Employee's Plan Account had a value of $50,000 on January 1, 2010, it would have had a value of $51,250 on November 1, 2010, prior to the amendment, due to 10 months of accrued interest. By pegging the value of the account to the value of JELD-WEN's stock on January 1, 2010 rather than its value on the date of the Amendment, the Amendment not only eliminated ten months of accrued interest, it built in ten months of additional loss in stock value (JELD-WEN stock was valued at $417 per share on December 31, 2009, but only $364 per share on December 31, 2010, just six weeks after the amendment). Thus, the amendment caused an immediate, and very significant, loss in value.

Amendment had decreased the value of the Undistributed Accounts of Terminated Employees by 44%. *Id.* at ¶ 106. The 2010 Amendment also permitted the assessment of certain expenses (the "New Expenses") against the accounts of the participants, most of which were expenses involved in paying distributions to certain participants whose accounts were not affected by the 2010 Amendments (the "Grandfathered Accounts"). *Id.* at ¶¶ 7, 92 & 103. Thus, the New Expenses charged non-Grandfathered Accounts the costs of maintaining the Grandfathered Accounts.

B. Procedural background

In June of 2013, the Court consolidated several separate actions that had been filed against the Plan and its fiduciaries concerning the 2010 Amendments, appointed Cohen Milstein Sellers and Toll PLLC and Heffner Hurst (formerly Susman Heffner & Hurst) as Interim Co-Lead Counsel, and appointed Johnson Johnson Larson & Schaller PC as Interim Liaison Counsel (the three firms are collectively referred to herein as "Class Counsel"). Dkt. 94. Class Counsel filed the Consolidated Amended Class Action Complaint on July 24, 2013 (the "Complaint"), alleging that Defendants violated various provisions of ERISA. Dkt. 100. The two primary claims in the Complaint alleged violations of ERISA's anti-cutback provision and breaches of fiduciary duty. *Id*. The Complaint alleges that the 2010 Amendment violated ERISA and damaged the Terminated Class by (1) requiring Terminated Class Members' accounts to be valued using JELD-WEN stock, (2) backdating the valuation of the stock in 2010 to January 1, 2010, (3) eliminating the guaranteed passbook interest going forward, and (4) eliminating passbook interest which accrued in 2010. *Id*. With respect to the New Expense Class, the Complaint alleged that, beginning in 2010, participants were assessed expenses above and beyond what is permissible by ERISA. *Id*.

After Class Counsel prevailed on two motions, and sustained them on review by the District Court, the parties agreed to explore the possibility of a negotiated settlement. Dkt. 55

& 76. This began a lengthy mediation process, aided by retired Magistrate Judge Morton Denlow. As part of that process, Defendants produced approximately 11,000 pages of documents. Hurst Decl., Dkt. 169-1 at ¶ 15. The mediation included two formal mediation sessions with Judge Denlow in Chicago in August of 2013 and January of 2014. *Id.* at ¶¶ 17 & 19. Numerous conversations between the parties continued after the mediation. Although the Parties failed to reach agreement even after the second mediation session, they continued negotiations, had a follow-up meeting in Philadelphia on January 27, 2014, and reached an Agreement in Principle. *Id.* at ¶ 20. This agreement provided, among other things, for $14 million in cash to the two Classes and a prohibition on the assessment of future expenses of the type assessed against the New Expense Class. *Id*. The Agreement in Principle was subject to several conditions, including confirmatory discovery. *Id*.

As part of the confirmatory discovery, Class Counsel obtained an additional 19,000 pages of documents from Defendants, interviewed a representative member of the Committee, and conducted a Rule 30(b)(6) deposition of the Plan. *Id.* at ¶¶ 22 & 23. During the course this follow-up discovery, in August of 2014, Class Counsel learned that there were approximately 740 accounts which were not included in the initial data. *Id.* at ¶ 24. Class Counsel insisted that Defendants provide the account data for those participants, who consisted of persons who had terminated between January and November 2010. *Id.* at ¶¶ 24 & 27. After receiving the data, the parties then engaged in additional protracted and heated negotiations. *Id.* at ¶ 28. Ultimately, the parties agreed to an additional $1.5 million, to compensate these accounts and for additional losses relating to a further decline in the stock price, bringing the total monetary recovery to $15.5 million. *Id*. The parties signed the Settlement Agreement in January 2015. *Id.* at ¶ 30.

Following the finalization of the Settlement Agreement, Class Counsel filed the Motion for Preliminary Approval with the Court on March 16, 2015. Dkt. 146. Plaintiffs

subsequently filed a final amended proposed Plan of Allocation. Dkt. 158. The Court preliminarily approved the settlement, certified the settlement Class, and approved the Notice on May 26, 2015. Dkt. 163.

C. The terms of the settlement

The terms of the proposed settlement provide both substantial cash consideration and valuable ongoing non-monetary equitable relief. The settlement provides for Defendants to make an immediate cash payment in the amount of $15.5 million, (the "Settlement Fund"). Class Action Settlement Agreement ("Agreement"), Dkt. 145 at ¶ I.D. After payment of taxes, any court-approved attorney's fees and expenses, and any reserve held back under the Plan of Allocation, the balance shall be distributed pursuant to the Plan of Allocation to be approved by the Court. *Id.* at ¶ V.4.

To preserve the tax-favored status of the payments, the Plan of Allocation proposed by Class Counsel proposes that the Net Settlement Fund will be paid to participants through their Plan accounts. To protect Class Members, though, the Settlement Administrator will also have a hand in the process. *See id.* at ¶ V.5. For example, the Settlement Administrator will instruct the Plan Administrator as to the allocation of each Class Member's share of the settlement proceeds. *Id.* at ¶ V.4. Further, Class Members will have the ability to control to a certain extent the timing of the distribution of their settlement proceeds, *id.* at ¶ V.5(a), and the Plan Administrator must follow these instructions from the Class Member within 30 days after the settlement monies are paid into their accounts. *Id.* at ¶ V.5(c). If Class Members eligible to elect a distribution fail to do so prior to Final Judgment, the Plan Administrator is required to send an updated benefit election form six months after the settlement becomes final and then make any distributions within 30 days from receipt of a valid election form. *Id.* at ¶ V.5(d).

For accounts that will not be immediately distributed, a Plan fiduciary will determine

how the amounts shall be invested in accordance with the terms of the Plan except that they may not be invested in, treated as invested in, or valued with JELD-WEN stock unless: (1) a fiduciary of the Plan determines that an offer to invest any Class Member's allocation in JELD-WEN stock is consistent with ERISA's fiduciary duties; and (2) the fiduciary makes such an offer to a Class Member or Members in a writing which has been reviewed by Class Counsel; and (3) the Class Member affirmatively elects to have the proceeds invested in JELD-WEN stock. *Id.* at ¶ V.5 (e)-(f).

Moreover, the settlement effectively and entirely ends the alleged imposition of improper expenses against the Class Members. For example, it specifically requires Defendants to pay for administering the settlement (other than the costs of notice). *Id.* at ¶¶ V.5 and XII.1. And none of the settlement, nor any of the expenses incurred in the administration of this settlement, nor any future payments to any of the Grandfathered Accounts, may be charged against the account of any participant in the Plan. *Id.* at ¶ XII.1. As if that weren't enough, the settlement requires any distributions made to Terminated Employee Class Members after 2014 to be based on a valuation performed by a qualified independent appraiser in accordance with the requirements of DOL Proposed Regulation § 2510.3-18 (a copy of which must be provided to Class Counsel). *Id.* at ¶ XII.2-3. That valuation date shall be determined by a fiduciary of the Plan in accordance with Plan terms, procedures, and applicable law. *Id.* at ¶ XII.2. Finally, the Plan is explicitly prohibited from assessing the complained-of New Expenses on or after January 31, 2014, *id.* at ¶ XII.4, a prohibition that actually extends back to 2013, since the first mediation in this case. Dkt. 169-1 at ¶ 31.

In exchange for these benefits, the Classes will release Defendants and Defendant Releasees from any and all claims that were or could have been asserted that relate to, or arise out of, the facts or claims asserted in the Complaint. Dkt. 145 at ¶ XV.1-2. These released

claims are expressly tied to the claims and allegations in the Complaint. *Id.* That is, the Class is not releasing any claims: (a) based only on errors unrelated to the allegations in the Action regarding that Class Member's salary, age, years of service, or other circumstances specific to that Class Member; (b) regarding the manner by which Class Members' accounts are valued after the execution of the Final Settlement Agreement, except to the extent based on the valuation of such accounts before execution of the Final Settlement Agreement; or (c) concerning the validity of the settlement (including the representations upon which the settlement was based). *Id.* at ¶ XV.4. The Plan and its fiduciaries will release any claims against the Terminated Employee Class challenging the accuracy of any distribution of allocations to the accounts that are the subject of the settlement. *Id.* at ¶ XV.3. Finally, Defendants will release any claims that could have been asserted in this litigation related to the filing of this litigation. *Id.*

D. Notice to the settlement Class

After preliminary approval, the Class received notice of the settlement and each Class Member was provided with an opportunity to object to either the settlement or the 30% attorney's fee request. Preliminary Approval Order, Dkt. 163 at ¶ 13. The Court appointed a Settlement Administrator, Gilardi & Co. LLC ("Gilardi"), to send the Class Notice to each member of the Class who was identifiable by reasonable effort, either by email or by first-class mail, postage prepaid. *Id.* at ¶ 13; Declaration of McCoy, Dkt. 167 at ¶ 4 ("Gilardi Decl."). Using the mailing lists for both email and physical addresses provided by the Defendants, Gilardi initially mailed 10,448 notices and emailed 587 notices on June 30, 2015. Gilardi Decl. at ¶ 5. Of these notices, only 400 were returned as undeliverable. Declaration of Murray, Dkt. 173 at ¶ 6. Two of these were then sent to the Class Members at their request via U.S. Mail on July 15, 2015. *Id.* at ¶ 7. Gilardi performed additional address searches for the Class Members

and was able to find updated addresses for 309 Class Members. *Id.* at ¶ 8. Per this Court's order, Gilardi promptly re-mailed Class Notices to those updated addresses. *Id.* at ¶ 9.

The Settlement Administrator also created and maintained a dedicated website, www.jeldwenesoplitigation.com, to assist Class Members in filing their claims and learning about the lawsuit. Gilardi Decl. at ¶ 8. The website has been operational since June 30, 2015, and is accessible 24 hours a day, 7 days a week. *Id.* It contains a summary of the case; the Class and the settlement; posts important documents from the case; and lists important dates including the objection and claim filing deadlines, as well as the date and time of the Court's October 19, 2015 fairness hearing. *Id.*

The deadline, August 14, 2015, for submitting objections to either the settlement or the requested attorney's fees has now passed. Dkt. 166. The extended objection deadline for the re-mailed Class Notices returned as undeliverable, September 21, 2015, has also passed. Dkt. 172. Of the 11,035 Class Members, only two have objected to the settlement. Dkt. 174 & 175.

E. Review of the settlement by the Independent Fiduciary

The Plan retained Nicholas L. Saakvitne to serve as an independent fiduciary to provide an unbiased expert evaluation of the settlement here. Third Report Independent Fiduciary, Dkt. 169-2 at 1-2 (June 19, 2015). Mr. Saakvitne is an experienced and respected expert on ERISA and fiduciary matters—trusted and vetted by both the Department of Labor and the Pension Benefit Guarantee Corporation to serve as a Trustee and Independent Fiduciary for orphaned retirement plans, retained as a Trustee and Independent Fiduciary for more than 200 Employee Stock Ownership Plans, and appointed as a plan fiduciary by many federal courts. *Id.*, Statement of Credentials of Independent Fiduciary. And importantly, neither Mr. Saakvitne, nor his law firm, have any relationship with any of the parties. *Id.* at 2.

In his role as the independent fiduciary here, Mr. Saakvitne opined that the settlement in all respects is fair and reasonable to the Class and the Plan. *Id.* at 6 & 9. He concluded that

the Defendants had "strong defense arguments" and that litigation "would have been ongoing, hard fought and risky for an extended period of time." *Id.* at 7. He also noted that the regulations "are not totally clear" and "even ESOP legal experts do not uniformly agree" on the legal requirements for ESOPs. *Id*. Further, in reviewing the substantive terms of the settlement, the Independent Fiduciary has opined that Class Counsel achieved "excellent results." *Id*.

ARGUMENT

I. The Court should approve the settlement because it is fair, reasonable, and adequate and was the result of arms-length negotiation.

A. The Ninth Circuit favors settlement of class-action lawsuits, especially where they are the product of arms-length negotiation.

"[V]oluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'n of City and Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, the Ninth Circuit "particularly" favors settlement in class-action lawsuits. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008); *see also Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) ("[T]here is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits."); *In re Howrey LLP*, No. 14-03062, 2014 WL 3427304, at *5 (N.D. Cal. July 14, 2014) (same).

Further, the Ninth Circuit "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution" in approving a class action settlement. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). One court has gone so far as to conclude that such agreements are "entitled to a presumption of fairness." *In re Toys R Us-Delaware, Inc.--Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 450 (C.D. Cal. 2014); *see also Wixon v. Wyndham Resort Dev. Corp.*, No. 07–2361, 2010 WL 3630124, at *2

(N.D. Cal. Sept. 14, 2010) ("intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned"), *quoting* *Officers for Justice*, 688 F.2d at 625.

Based on the reasoning of *In re Toys R Us*, this settlement is entitled to a presumption of fairness. There was clearly no collusion here. The parties negotiated the terms of this settlement for *seventeen months*. Hurst Decl., Dkt. 169-1 at ¶ 17 & 30. They contested and exchanged multiple proposals on nearly every material term of the nearly 50 page Settlement Agreement. Dkt. 145. Furthermore, the parties' counsel conducted most of the negotiations in front of an experienced mediator, former Magistrate Judge Morton Denlow. Dkt. 169-1 at ¶ 14. He witnessed first-hand the arms-length nature of these negotiations.[2] This fact "confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, No. 03-2878, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *see also* *Harris v. Vector Mktg. Corp.*, No. 08-5198, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011).

B. The proposed settlement is fair, reasonable, and adequate.

To determine that the proposed settlement is fair, reasonable, and adequate, the Court may look at a variety of factors.

> [Whether a class action settlement should be approved] will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

[2] If the Court would like to speak with Judge Denlow, Class Counsel can provide his contact information.

Officers for Justice, 688 F.2d at 625 (citations omitted); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1040-41 (same); *In re Charles Schwab Corp. Sec. Litig.*, No. 08–1510, 2011 WL 1481424, at *4 (N.D. Cal. Apr. 19, 2011) (same). "'The relative degree of importance to be attached to any particular factor will depend upon . . . the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.'" *Woo v. Home Loan Grp. L.P.*, No. 07-202, 2008 WL 3925854, at *3 (S.D. Cal. Aug. 25, 2008), *quoting* *Officers for Justice*, 688 F.2d at 625.

As shown below, all of the relevant factors here weigh overwhelming in favor of approval.

1. The risky nature of this case supports approval of the settlement.

Despite Class Counsel's confidence in the likelihood of success at trial, continued litigation was risky. As the Independent Fiduciary's report noted, Plaintiffs' ability to establish liability was not assured:

> I have to weigh . . . (a) that the Plan document (prior to the November 19, 2010 amendment) apparently did not specifically require that the accounts of terminated employees be invested in Local Passbook account investments or similar investments; b) that the Internal Revenue Code section 411(d)(6) anti-cutback regulations are perhaps not totally clear on the difference between an accrued benefit (which generally would be protected) and the right to have one's account invested in a specific investment (which would not be protected), and even ESOP legal experts do not uniformly agree on the scope of the exemption for ESOP benefits contained in those regulations.

Dkt. 169-2 at 6. The Independent Fiduciary is correct. As fully detailed in the Memorandum for an Award of Attorney's Fees and the Independent Fiduciary report, Defendants had "strong defense arguments" to the claims. Dkt. 169 at 13-15; Dkt. 169-2 at 7. Defendants attacked the merits of Plaintiffs' case on nearly every ground. Dkt. 169 at 13-15. Given the complex factual and legal issues involved here, proving liability was not certain. Moreover, the amount of losses was highly contested. Dkt. 169-1 at ¶ 26. Finally, ERISA is a complex area

law with numerous unsettled areas, particularly in the area of ESOPs. *See* Dkt. 169 at 13-15; *see also* *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 744 F. Supp. 1061, 1069 (M.D. Ala. 1988) ("ERISA is extremely complex and substantially still unsettled. It is almost essential that claimants have the assistance of attorneys willing to spend many hours researching their way through this legal forest."); *Smith v. Krispy Kreme Doughnut Corp.*, No. 05-187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) (ERISA "is a highly complex and quickly-evolving area of the law."). All of these factors point towards a very risky case.

2. The risk, expense, complexity, and likely duration of further litigation supports approval of the settlement.

In assessing whether the proposed settlement is fair, reasonable, and adequate, "the Court must balance against the continuing risks of litigation (including the strengths and weaknesses of the plaintiff's case), the benefits afforded to members of the Class, and the immediacy and certainty of a substantial recovery." *Johansson-Dohrmann v. Cbr Sys., Inc.*, No. 12-1115, 2013 WL 3864341, at *4 (S.D. Cal. July 24, 2013), *citing* *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 458, 459 (9th Cir. 2000).

The expense, risk, and length of continued proceedings necessary to prosecute this case against Defendants through trial and appeals was substantial. Dkt. 169-1 at ¶ 34. If this litigation were to continue, it might not be finally resolved for years given the amount of additional time needed to reach trial. Considerable fact discovery would need to be performed and depositions taken, both of Defendants' witnesses and of Plaintiffs. Expert discovery on merits and remedies issues would likely consume more time, as would motions for class certification and summary judgment. Assuming all of those hurdles were overcome, the parties would then engage in evidentiary motions and trial. The ERISA claims advanced by Plaintiffs involve detailed factual issues implicating two highly complex sets of laws: ERISA and the Internal Revenue Code. *Conkright v. Frommert*, 559 U.S. 506, 509 (2010) (describing

ERISA as "an enormously complex and detailed statute"), *quoting* *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993). Prosecuting this case through trial would both entail substantial risks and require significant expenditures for experts by all parties and countless hours of attorney time. And even if Plaintiffs were to prevail at trial and be able to collect a judgment, any remedies awarded might be much smaller than those that Plaintiffs obtained in this settlement.

Even assuming that Plaintiffs achieved complete success at trial, Defendants would undoubtedly appeal any adverse decision to the Ninth Circuit and, if they lost there, could seek *en banc* review or a writ of certiorari from the United States Supreme Court or both. Such appeals would be time consuming and might lead to the reversal, in whole or in part, of any favorable verdict. If this litigation were to continue there is a real possibility that Class Members might collect little or nothing and, even if eventually able to recover a meaningful amount, Class Members would not receive any payment until well into the future. By contrast, the proposed settlement provides a prompt, substantial and assured all-cash benefit to Class Members within a few months. A prompt, certain recovery is considerably more valuable to the Class than an uncertain recovery at some undetermined point in the future. *See* *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.").

These risks were exacerbated by the risk of non-payment here due to JELD-WEN's financial condition (particularly at the time of the settlement negotiations). The company—a manufacturer of windows and doors—is still struggling to recover from the housing-market implosion. Recently, Moody's reaffirmed its rating of company debt at B1—essentially "junk bond" status—with a default probability rating of B1-PD. Moody's Rating, Dkt. 169-14 (June 15, 2015). Debts of B1 are a "high credit risk" and the "PD" designation means they are "speculative" and "subject to high default risk." Moody's Rating Symbols and Definitions,

Dkt. 169-15 at 5 & 15 (Mar. 2015). Debt of this rating has a mean five-year cumulative default rate of 26.8%, which grows to 43.3% at ten years. Moody's Confidence Intervals for Corporate Default Rates, Dkt. 169-16 at 5 (April 2007). In other words, the longer this litigation continued, the greater the risk to the Class of receiving absolutely nothing no matter how successful they are in the litigation.

The *immediacy* and *certainty* of this settlement is a factor for the Court to balance in determining whether this proposed settlement is fair, adequate, and reasonable. Courts consistently have held that "[t]he expense and possible duration of the litigation [should] be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *see also Officers for Justice*, 688 F.2d at 626. Here, this factor is significant as Class Counsel understood that Defendants' insurance policies, which provided less coverage than the total amount of losses claimed, was being dissipated by the cost of defending the case. Second Hurst Decl., Dkt. 179 at ¶ 3. Moreover, ERISA does not allow punitive or exemplary damages. No matter how egregious a defendant's conduct was, a trial and years of appeals will still only yield, at best, the actual losses sustained by the class. But the litigation and appeal time would take its toll on the Class's recovery here even if Plaintiffs prevailed on the merits and remedies. In the Ninth Circuit, the presumptive prejudgment, and statutory post-judgment, interest rate is the one-year constant maturity treasury rate. 28 U.S.C. § 1961(a); *W. Pac. Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984). Due to extremely low interest rates, this has the practical effect of turning the losses into a wasting asset. For example, in the five years from 2010 through the end of 2014, an index fund in the S&P 500 would have returned 104%.[3] Applying the § 1961(a) rate would yield

[3] The annual returns were as follows: 2010: 14.82%, 2011: 2.1%, 2012: 15.89%, 2013: 32.15%, and 2014: 13.48%. *Returns for Annual Returns on Stock, T. Bonds and T. Bills: 1928 – Current*, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html (last accessed June 23, 2015).

a 1.4% return over those same five years.[4] Not only is this a lost opportunity cost, it is substantially less in real dollars due to a 10.4% rise in inflation over the same period.[5] Thus, continued litigation erodes the value of any recovery and increases the value of immediate settlement.

Accordingly, the factors of risk, expense, complexity, and likely duration of further litigation weigh heavily in favor of approving the settlement.

3. The risk of maintaining class action status throughout trial supports approval of the settlement.

ERISA actions are routinely certified and with good reason – they are archetypical class actions. However, Defendants would likely have vigorously contested certification and, if the case was certified, sought interlocutory review by the Ninth Circuit pursuant to Rule 23(f). Although Class Counsel is confident this matter would be certified, there are no guarantees. Therefore, this factor is mildly in favor of approval.

4. The amount recovered supports approval of the settlement.

While courts have approved class action settlements with cash components amounting to only a small fraction of the potential recovery, *see* *Officers for Justice*, 688 F.2d at 628, this is not such a case. Here, the cash component of the settlement represents a significant 45% percent of the losses incurred to date if Plaintiffs prevailed on the all of their claims and theories for monetary relief. Dkt. 169-1 at ¶ 29. This compares very favorably with settlements that have been approved throughout this circuit. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213

[4] For the week ending June 19, 2015, the one year constant maturity Treasury yield was 0.27%. *Selected Interest Rates*, http://www.federalreserve.gov/releases/h15/data.htm (last accessed June 23, 2015).

[5] The annual average Consumer Price Index was as follows: 2010: 1.6%, 2011: 3.2%, 2012: 2.1%, 2013: 1.5%, and 2014: 1.6%. *CPI Detailed Report*, http://www.bls.gov/cpi/cpid1505.pdf at 71 (last accessed June 23, 2015).

F.3d 454, 459 (9th Cir. 2000) (17%); *Elliott v. Rolling Frito-Lay Sales, LP*, No. 11-01730, 2014 WL 2761316, at *7 (C.D. Cal. June 12, 2014) (31%); *Khanna v. Intercon Sec. Sys., Inc.*, No. 09-2214, 2014 WL 1379861, at *8 (E.D. Cal. Apr. 8, 2014) (19% of maximum damages); *Greko v. Diesel U.S.A., Inc.*, No. 10-02576, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24%); *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (9% of maximum damages); *In re Portal Software, Inc. Sec. Litig.*, No. 03-5138, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) (25%); *Glass v. UBS Fin. Servs., Inc.*, No. 06-4068, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007) (25% of maximum damages) *aff'd*, 331 F. App'x 452 (9th Cir. 2009).

The recovery percentage here also exceeds numerous approved ERISA class action settlements that recovered far, far less. *In re Syncor ERISA Litig.*, No. 03-2446, Dkt. 309 (C.D. Cal. Oct. 22, 2008) & Dkt. 300 at 9 (approving settlement recovering 8.7% of maximum damages); *In re Fremont Corp. Litig.*, No. 07-2693, Dkt. 277 at 10 & Dkt. 286 (C.D. Cal. Aug. 10, 2011) (approving settlement recovering 11% of maximum losses); *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 463 (D. Md. 2014) (approving settlement that recovered 3.2% of maximum damages); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011) (settlement recovered 24.3% of maximum damages); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 462 (E.D. Pa. 2008) (20% recovery); *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816, 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (recovered 7% of maximum damages); *compare Am. Med. Ass'n v. United Healthcare Corp.*, No. 00-2800, 2009 WL 1437819, at *2 (S.D.N.Y. May 19, 2009) *with id.*, 2009 WL 4403185, at *1 (S.D.N.Y. Dec. 1, 2009) (7.4% recovery). Thus, even without taking into account the other benefits obtained by the settlement, this is an exceptional result for the Class.

But there are other benefits to the settlement. For example, the prospective relief obtained significantly increases the value of the settlement. Class Counsel secured a prohibition against charging any further "New Expenses" against the 11,000 Class Members'

accounts as of 2013. Hurst Decl., Dkt. 169-1 at ¶ 31. These expenses were millions of dollars more than the Plan reported to the Department of Labor as the Plan's actual operating costs. In 2010 and 2011 alone, these expenses amounted to over $11 million in Class Members' losses. Dkt. 100 at ¶¶ 179-80. But Class Counsel negotiated a stop to those charges in 2013 and beyond. Dkt. 169-1 at ¶ 31. As such, this equitable relief substantially increases the value of the settlement, likely by millions.

Additionally, the settlement prohibits the Plan from reinvesting proceeds of the settlement in JELD-WEN stock unless the participant explicitly consents in writing. *Id.* at ¶ 30. This prohibition protects Class Members from the risk of non-diversification of their retirement nest egg in a wildly fluctuating, non-publically traded stock; that has real value to the Class since an ESOP fiduciary does not normally have the obligation to diversify assets. 29 U.S.C. § 1104(a)(2); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004). This diversification is a significant benefit.

Finally, the settlement requires the Plan to provide Class Counsel the yearly valuation reports for the ESOP until 2022, when all Terminated Employee Class Members will have been completely divested of their benefits in the Plan. Dkt. 169-1 at ¶ 32. That is, for the next seven years, Class Counsel will continue to protect Class members from any harm such as alleged in this suit.

5. The extent of discovery completed and stage of proceedings supports approval of the settlement.

The amount of discovery and stage of proceedings favor approval of a settlement where they demonstrate counsel's familiarity with the case and enough information to make informed decisions. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) ("In the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision

about settlement." (internal quotations omitted)); *Omnivision*, 559 F. Supp. 2d at 1042. Here, Class Counsel conducted a substantial and thorough investigation into Plaintiffs' claims prior to filing the Complaint. Dkt. 169-1 at ¶ 5. Prior to the mediation, Class Counsel obtained and reviewed almost 11,000 pages of documents from Defendants. *Id.* at ¶ 15. During confirmatory discovery, Class Counsel were able to explore key factual issues in even greater depth, reviewing an additional 19,000 documents and conducting oral discovery of key witnesses. *Id.* at ¶¶ 22 & 23. This discovery directly led to Class Counsel obtaining an additional $1.5 million for the Class. *Id.* at ¶¶ 24-28. Thus, "the parties h[ad] sufficient information to make an informed decision about settlement," which weighs in favor of approval. *Mego*, 213 F.3d at 459 (affirming approval of settlement because parties had adequate information to evaluate settlement, and based on class counsel's significant investigation and work with damages and accounting experts, despite that "extensive formal discovery had not been completed").

6. The experience and views of Class Counsel supports approval of the settlement.

Courts recognize that, in determining whether a proposed settlement is fair, "[g]reat weight" should be accorded to the views of experienced class counsel "who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (citation omitted); *see also In re First Capital Holdings Corp. Fin. Products Sec. Litig.*, No. MDL 901, 1992 WL 226321, at *2 (C.D. Cal. June 10, 1992) (finding belief of counsel that the proposed settlement represented the most beneficial result for the class to be a compelling factor in approving settlement). As the Ninth Circuit has observed, "[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (2009); *see also Omnivision*, 559 F. Supp. 2d at 1043 ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." (citations and

quotations omitted)). Indeed, "the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight." *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) *aff'd*, 661 F.2d 939 (9th Cir. 1981); *see also Omnivision*, 559 F. Supp. 2d at 1043 ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." (citations and quotations omitted)).

Here, Cohen Milstein Sellers & Toll PLLC and Heffner Hurst, firms with extensive class-action litigation and ERISA litigation experience, strongly recommend the settlement. *See* Barton Decl., Dkt. 169-11 at ¶¶ 5-6; Hurst Decl., Dkt. 169-1 at ¶ 2. Class Counsel have successfully handled many large, complex class actions, particularly ERISA ones. *Id.* Their judgment that the settlement is fair, reasonable, and adequate is based both on their overall experience and the specific knowledge they gained about this case.

7. The lack of a governmental investigation or objection supports approval of the settlement.

This settlement was achieved without the assistance of any governmental inquiry or prosecution. Plaintiffs did not ride the coattails of a governmental agency's investigation and findings. *See*, *e.g.*, *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 360 (S.D.N.Y. 2002) (noting with approval that settlement "negotiations were made without the benefit of any governmental or agency investigation or prosecution"); *In re RJR Nabisco Sec. Litig.*, MDL No. 818, 1992 WL 210138, at *8 (S.D.N.Y. Aug. 24, 1992) (approving settlement and noting that plaintiffs' counsel, not a governmental agency, exclusively developed the facts in aid of the plaintiffs' case.) In fact, Class Counsel directly conferred with the Department of Labor about the issues with the JELD-WEN ESOP raised by the Complaint and the terms of the settlement. Second Hurst Decl., Dkt. 179 at ¶ 4. The Department decided not to intervene. *Id.*

Since this settlement was obtained without the government's help, it is a factor in favor of approval. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009).

Further, under CAFA, 28 U.S.C. § 1711, *et seq.*, the U.S. Attorney General and the attorney general in every state was provided with notice of the settlement and none have raised a concern. Higgins Decl., Dkt. 178 at ¶¶ 4 & 8; *see also In re Google Referrer Header Privacy Litig.*, No. 10-04809, 2015 WL 1520475, at *8 (N.D. Cal. Mar. 31, 2015). This further favors approval of the settlement. *Id.*; *see also Van Ba Ma v. Coviden Holding, Inc.*, No. 12-2161, 2014 WL 2472316, at *4 (C.D. Cal. May 30, 2014).

8. The reaction of Class Members to the proposed settlement supports approval of the settlement.

The reaction of the class to the settlement is a significant factor in assessing its fairness and adequacy. *See In re Rambus Inc. Derivative Litig.*, No. 06-3513, 2009 WL 166689, at *3 (N.D. Cal. Jan. 20, 2009). "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Omnivision*, 559 F. Supp. 2d at 1043; *see also Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528–29.

Out of 11,035 Class Members, only two have objected. This is an objection rate of 0.018%, or less than two one-hundredths of one percent. That rate, in and of itself, provides the Court with a "strong presumption" that the terms here are reasonable and should be approved. *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528–29 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."); *see also Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming approval where 0.05% objection rate); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 641 (S.D. Cal. 2011) (reaction of class favorable when only three objections out of 9,000

notices).

Objectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement. *In re Linkedin User Privacy Litig.*, No. 12- 03088, 2015 WL 5440975, at *13 (N.D. Cal. Sept. 15, 2015) *citing* *United States v. State of Or.*, 913 F.2d 576, 581 (9th Cir. 1990) ("In this circuit, we have usually imposed the burden on the party objecting to a class action settlement"). The substance of both objections simply misapprehend the nature of this suit, and litigation in general, and do not rebut the strong presumption of reasonableness this settlement enjoys.[6] Both essentially complain that the settlement should not be approved because it does not restore the *full* amount of the claimed losses. Objection by David Weigant, Dkt. 175; Objection by Richard Cooper, Dkt. No. 174. But that is simply not realistic—why would any defendant settle for 100% of the amount it might owe in a case where the law was unsettled? *See* Dkt. 169-2 at 7. Settlements involve compromises, which almost by definition, require less than 100% recovery.

In addition, neither objection contemplates the certainty a settlement now provides, let along the value of having that recovery now versus years from now. Both Co-Lead Class Counsel have tried ERISA class action cases to judgment. *E.g.* *Chesemore v. Alliance Holdings, Inc.*, 948 F. Supp. 2d 928 (W.D. Wis. 2014) (awarding $17.2 million plus prejudgment interest in ESOP case after trial); *Young v. Verizon's Bell Atl. Cash Balance Plan*, 667 F. Supp. 2d 850 (N.D. Ill. 2009) (awarding partial judgment to plaintiffs in ERISA case) *aff'd*, 615 F.3d 808 (7th Cir. 2010); *Severstal Wheeling, Inc. Ret. Comm. v. WPN Corp.*, No. 10-954, 2015 WL 4726860 (S.D.N.Y. Aug. 10, 2015) ($15 million judgment in ERISA breach of fiduciary duty case after trial). Class Counsel have witnessed first-hand the length of the litigation process and its effect on the net recovery for a class. For example, in *Chesemore* (an ESOP case), after 5

[6] Procedurally, both objections should be time barred. Both were filed on August 17, 2015, Dkt. 174 & 175; all objections were required to be filed by August 14, 2015. Dkt. 166.

years of litigation including two trials (one on liability and one on remedies), the plaintiffs finally reached a settlement with all but one of the defendants that "[a]fter fees and costs," provided the class with "roughly 62% of the total remedies award, inclusive of prejudgment interest." *Chesemore*, 2014 WL 4415919, *3 (W.D. Wis. Sept. 5, 2014). Even so, the efforts to collect still continue against the one non-settling defendant. *Id.*, No. 09-413, 2015 WL 5093334, at *1 (W.D. Wis. Aug. 28, 2015).

Further, each objection contains a logical flaw. Mr. Cooper argues that the settlement should be 100% of the losses because of a rumor that JELD-WEN may take the company public, and so the share price might spike. Dkt. No. 174. But that is a non-sequitur—the causes of action here did not involve the company being taken public and a spiking share price in the future could only help the Class, not hurt it. Mr. Weigant, on the other hand, illogically infers that by settling the case, Defendants have admitted liability and so should pay 100% of the losses. Dkt. 175. As the Court knows, however, and as the settlement explicitly states, the Defendants did not admit liability by entering into a settlement. Dkt. 145 at IX.1. Rather, Defendants, like Plaintiffs, have examined the risks and costs of litigation and reached a compromise.

Finally, the unqualified endorsement of the named Plaintiffs here provides strong support of the fairness, reasonableness, and adequacy of the settlement. *See* Jimerson Decl., Dkt. 169-3 at ¶ 8; Dooley Decl., Dkt. 169-4 at ¶¶ 5 & 6; Kitt Decl., Dkt. 169-5 at ¶¶ 5 &6; Bellotti Decl., Dkt. 169-6 at ¶ 8; Wolf Decl., Dkt. 169-7 at ¶ 7; Snodgrass Decl., Dkt. 169-8 at ¶ 7; Woerner Decl., Dkt. 169-9 at ¶¶ 5 & 6; Powell Decl., Dkt 169-10 at ¶¶ 5 & 6.

9. The Independent Fiduciary's support of the settlement should be considered as an additional factor in favor of approval.

ERISA class-action settlements involving breach-of-fiduciary-duty claims are unique. In other class cases, only the court reviews the settlement for final approval and it is often

unaided by a party who has reviewed or challenged the underlying settlement. But when plan fiduciaries settle litigation against them (ostensibly with the plan as well as the class members), the Department of Labor requires review by a non-conflicted independent fiduciary. 29 U.S.C. § 1108; 68 FR 75632-01 (2003). The independent fiduciary must review the settlement and determine if the plan received fair value for any release negotiated for the allegedly breaching fiduciaries. *See* 68 FR 75632(I)(C); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 139 (S.D.N.Y. 2010) (under the regulation, "the independent fiduciary must determine that the plan received fair value for the release.").

Here, the Plan hired Nicholas L. Saakvitne to serve as the Independent Fiduciary. Mr. Saakvitne has extensive ERISA experience, practicing in this area—specializing on ESOP plans—for the last 18 years. Dkt. 169-2, Statement of Credentials of Independent Fiduciary. Moreover, Mr. Saakvitne has previously been hired by the Department of Labor to act as a fiduciary for several orphaned ERISA plans. *Id*. Mr. Saakvitne conducted a thorough review of the settlement with the sole purpose of determining whether that request was fair and reasonable to the Plan and its participants and he has concluded that it is. His unbiased conclusion is that the settlement "provides a substantial recovery" to the Class and that it is "a reasonable and attractive settlement for the Plan." *Id*. at 6 & 9. He has noted that the Defendants had "strong defense arguments" and that litigation "would have been ongoing, hardfought and risky for an extended period of time." *Id*. at 7. He also noted that the regulations "are not totally clear" and "even ESOP legal experts do not uniformly agree" on the legal requirements for the ESOP. *Id*. In reviewing the substantive terms of the settlement, the Independent Fiduciary has opined that Class Counsel achieved "excellent results." *Id*.

This unique fact—that an experienced, unbiased, expert fiduciary has reviewed and approved the settlement on behalf of the Plan and the participants—strongly supports final approval. *See Bezio v. Gen. Elec. Co.*, 655 F. Supp. 2d 162, 166 (N.D.N.Y. 2009) (approval of

independent fiduciary a factor supporting approval); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 375 (S.D. Ohio 2006) (same).

II. The Court should confirm class certification under Rules 23(b)(1) and (b)(2).

The Court preliminary certified the Class under Rule 23(b)(1) and (b)(2) for settlement purposes only. Dkt. 163 at ¶ 2. Nothing has changed about the Class since the preliminary certification was granted and no Class Member has objected to the certification. As described in detail in the Preliminary Approval Memorandum, this settlement is especially well-suited for certification under Rule 23(b)(1) and (b)(2). Dkt. 146 at 18-32.

The Notice, as approved by the Court and implemented by Class Counsel, consisted of: (1) mailing the Notice on June 30, 2015, to 10,448 Class Members at their last known addresses provided by Defendants; (2) emailing the Notice on June 30, 2015, to 587 Class Members for whom Defendants provided an email address; (3) creating a dedicated website run by the Settlement Administrator to provide information to Class Members; and (4) providing a toll-free telephone number that participants may call to obtain further information regarding the settlement. Gilardi Decl., Dkt. 167 at ¶¶ 5 & 8.

In summary, the Notice provided detailed information about the settlement, including: (1) a description of the litigation and the proceedings; (2) a comprehensive summary of its terms; (3) individualized notifications of losses for New Expense Class Members; (4) notice of Class Counsel's intent to request attorney's fees, reimbursement of expenses, and an case incentive award for Plaintiffs; (5) detailed information about the Released Claims; and (6) information on how to object to certification, the settlement, the incentive awards, or the request for fees and expenses. *Id.* at Ex. A. In addition, the Notice provided information about how to receive additional information. *Id.* It also provided Class Members with contact information for Class Counsel, information on the toll-free phone number and email address for inquiries, and a website address for further information. *Id.* Per the Preliminary Approval

Order, the Notice and Settlement Agreement were also posted on a dedicated website: www.jeldwenesoplitigation.com. *Id.* at ¶ 8.

The forms and methods of notice employed here constitute valid, due, and sufficient notice to members of the Class. *E.g.*, *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 844, 848 (N.D. Cal. 2005). Furthermore, they are substantially similar to those successfully used in many other ERISA class settlements. *E.g.*, *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 449 (S.D.N.Y. 2004) (noting that a notice plan similar to the one implemented here "went well beyond the requirements for the non-opt-out ERISA classes").

For all the reasons stated above, the forms and methods of notice satisfy the requirements of Rule 23 and due process. Accordingly, certification should be confirmed for purposes of final approval of the settlement.

III. The Court should approve the Plan of Allocation because it is fair, reasonable, and adequate.

Plaintiffs also seek the Court's final approval of the Plan of Allocation by which the settlement proceeds will be allocated among Class Members. Dkt. 158-1. The Plan of Allocation is set forth in the Notice mailed to Class members, and additional information regarding the Plan of Allocation is located on the www.jeldwenesoplitigation.com website. Dkt. 167 at ¶¶ 4 & 8. The Plan of Allocation should be reviewed in the same manner as the settlement as a whole – the plan must be fair, reasonable and adequate. *Redwen v. Sino Clean Energy, Inc.*, No. 11-3936, Dkt. 96 at 11 (C.D. Cal. July 9, 2013); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *In re Broadcom Corp. Sec. Litig.*, No. 01-275, Dkt. 684 at 4 (C.D. Cal. Sept. 12, 2005).

The objective of the Plan of Allocation here is to provide an equitable basis upon which to distribute the Net Settlement Fund among eligible Class Members. The Plan of Allocation

treats all losses equally and allocates the settlement proceeds on a *pro rata* basis across all Class Members. *See*, *e.g.*, *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 135 (S.D.N.Y. 1997) (*pro rata* plan of allocation provides "a straightforward and equitable nexus for allocation and will avoid a costly, speculative and bootless comparison of the merits of the Class Members' claims."). Administration is expensive so the proposed plan establishes a *de minimus* payment threshold to insure that the costs of providing a recovery do not outweigh its benefits. Class Counsel suggests a $5 cutoff for the first round of distributions. *See*, *e.g.*, *In re Global Crossing*, 225 F.R.D. at 463 (finding that setting $10 *de minimus* threshold to be "in the overall interests of the class."). This threshold means that approximately 100 Class Members, whose combined losses total approximately $230, would not be paid. Second Hurst Decl., Dkt. 179 at ¶ 5.

The *pro rata* distribution will occur after deducting a reserve amount to insure that the approximately 9,600 shares belonging to Terminated Class Members, which have yet to be distributed, will be properly compensated. Since these shares will be distributed between 2016 and 2022, at unknown share prices, the reserve exists to provide these individuals with some protection. The reserve amount is determined according to the following formula: the Effective Recovery Percentage (the recovery percentage, net of attorney's fees, expenses, and administrative costs) *times* 9,600 shares *times* ($417 (share price prior to amendment) *times* 1.194 (3% interest, compounded over six years) *minus* $290.05 (2015 value)) *plus* the Effective Recovery Percentage *times* (1 *minus* $290.05/$417 (the percentage decline in share value between 2010 and 2015) *times* 9,600 *times* $252.65 (September 2014 value).[7] Although this formula is complicated, it is designed to replicate what these shares would receive now, if they were eligible for distribution, while adding an extra amount that protects against further

[7] This is based on the assumption that the Effective Date, which is defined as when judgment becomes final and non-appealable, occurs in 2015.

decline in the share value using the worst historic decline for JELD-WEN stock. Thus, if the Effective Recovery Percentage is 31.5%, the reserve would be $861,125.94.

After the 2016 distribution, the number of shares to be distributed drops to 4,600 shares and continues to decline until 2022, when there are only 100 shares remaining. Class Counsel believes maintaining a reserve becomes uneconomical at this point due to costs associated with filing tax returns, maintaining the trust, and other related administrative costs. As such, the reserve amount should be allocated to the Undistributed Shares no later than 2016 if the judgment becomes effective this year. In the Plan of Allocation, Class Counsel proposed one of two methods for allocating the reserve amount. Plan of Allocation, Dkt. No. 158-1. Developments since the beginning of the year, specifically an increasing stock price for JELD-WEN stock, suggest that the second option is better choice for distributing the reserve amount. Under this method, so long as the share price for 2016 is under $512.83 (the value the Undistributed Shares would have been worth if the amendment had not been implemented),[8] the 9,600 Undistributed Shares will be allocated from the reserve the difference between $512.83 and the 2016 distribution value, multiplied by the Effective Recovery Percentage. Thus, for example, if the 2016 distribution price is $400 per share, and the Effective Recovery Percentage is 31.5%, the 9,600 shares will be allocated $341,197.92. The remainder of the reserve will revert to all Class Members and will be redistributed on a *pro rata* basis across all Class Members, with a $50 *de minimus* threshold due to the administrative costs of a second distribution. If, alternatively, the share price declines precipitously, the 9,600 shares will be allocated the entire reserve on a *pro rata* basis commensurate with their losses.

The Plan of Allocation treats all Class Members fairly and equally. Notably, no Class Member has objected to it. The Court should approve it as recommended by Class Counsel.

[8] If the share price is at or over $512.83 for the 2016 distribution, the entire reserve will revert to, and be distributed to, all Class Members.

CONCLUSION

For all of the above reasons, Plaintiffs and Class Counsel respectfully request that the Court grant Final Approval to the Settlement and the Plan of Allocation.

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Respectfully submitted,

By: s/ *Joseph Barton*
R. Joseph Barton (admitted *pro hac*)
jbarton@cohenmmilstein.com
Bruce Rinaldi (admitted *pro hac*)
brinaldi@cohenmilstein.com
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW
Suite 500, East Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699

Co-Lead Class Counsel

Derek C. Johnson OSB #882340
djohnson@jjlslaw.com
Jennifer Middleton OSB #071510
jmiddleton@jjlslaw.com
JOHNSON JOHNSON LARSON & SCHALLER
975 Oak Street, Suite 1050
Eugene, Oregon 97401
Telephone: (541) 484-2434
Facsimile: (541) 484-0882

Liaison Class Counsel

By: s/ *Matthew Hurst*
Matthew Hurst (admitted *pro hac*)
mhurst@heffnerhurst.com
Matthew T. Heffner (admitted *pro hac*)
mheffner@heffnerhurst.com
HEFFNER HURST
30 N. LaSalle Street, 12th Floor
Chicago, Illinois 60602
Telephone: (312) 346-3466
Facsimile: (312) 346-2829

Co-Lead Class Counsel

Robert A. Izard (admitted *pro hac*)
rizard@izardnobel.com
Mark P. Kindall (admitted *pro hac*)
mkindall@izardnobel.com
IZARD NOBEL LLP
29 South Main Street, Suite 215
West Hartford, CT 06017
Telephone: (860) 493-6293
Facsimile: (860) 493-6290