

1 David M. Birka-White (State Bar No. 085721)
Stephen Oroza (State Bar No. 084681)
2 LAW OFFICES OF DAVID M. BIRKA-WHITE
744 Montgomery Street, Fourth Floor
3 San Francisco, CA 94111-3339
Telephone: (415) 616-9999
4 Facsimile: (415) 616-9494

5 William R. Friedrich (State Bar No. 044731)
John D. Green (State Bar No. 121498)
6 FARELLA BRAUN & MARTEL LLP
235 Montgomery Street, 30th Floor
7 San Francisco, CA 94104
Telephone: (415) 954-4400
8 Facsimile: (415) 954-4480

9 [Plaintiffs' Class Co-Counsel listed on signature
page]

10 Attorneys for Individual and Representative
11 Plaintiffs, and Class Members

12
13 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 IN AND FOR THE COUNTY OF CONTRA COSTA

15
16 Coordination Proceeding
Special Title [Rule 1550(b)]

17 **SHAKE ROOF CASES**

Judicial Council Coordination
Proceeding No. 4208

Superior Court of Contra Costa County,
C99-00318

18
19 **MEMORANDUM OF POINTS AND**
20 **AUTHORITIES IN SUPPORT OF CLASS**
21 **COUNSEL'S APPLICATION FOR AN**
AWARD OF ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES

22 Date: November 14, 2005
23 Time: 1:30 p.m.
24 Dept: 6
25 Judge: Hon. David B. Flinn

TABLE OF CONTENTS

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

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	2
I. THIS COURT HAS WIDE DISCRETION CONCERNING THE AMOUNT OF THE FEE AWARD.....	2
II. WHERE THE EFFORTS OF CLASS COUNSEL CREATE A COMMON FUND FOR THE PAYMENT OF CLAIMS, CLASS COUNSEL’S FEES AND COSTS SHOULD BE PAID FROM THE FUND CREATED.....	3
III. THE FEE SOUGHT BY CLASS COUNSEL IS APPROPRIATE UNDER BOTH THE PERCENTAGE OF COMMON FUND AND LODESTAR METHOD.....	3
A. California And Federal Authority Favor The “Percentage Of Benefit” Method For Setting Fees In Common Fund Class Action Cases.....	3
B. The Fee Requested By Plaintiff Is Consistent With Awards In Similar Common Fund Cases	5
C. The Fee Sought By Class Counsel Is Also Supported By The Lodestar/Multiplier Method.....	7
D. The Fees Requested By Class Counsel Are Supported By An Analysis Of The Facts Commonly Considered By Courts.....	8
1. The Result Obtained.....	9
2. The Time and Labor Required By The Litigation	10
3. The Contingent Nature Of The Case And The Delay In Payment To Class Counsel.....	13
4. The Extent The Litigation Precluded Other Employment By Class Counsel.....	14
5. The Experience, Reputation, And Ability Of The Class Counsel, The Skill They Displayed In The Litigation, And The Novelty, Complexity And Difficulty Of The Case.....	14
a. Experience, Reputation and Ability Of Class Counsel.....	14
6. The Informed Consent Of The Clients To The Fee Agreement.....	16
7. Future Work Required.....	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

1

2

3

4 *Arenson v. Board of Trade*
(N.D. Ill. 1974) 372 F. Supp. 1349 7

5

6 *Bello v. Integrated Resources, Inc.*
(S.D.N.Y. 1990) 1990 WL 200670 6

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(1984) 465 U.S. 886 4

8

9 *Brown v. Steinberg*
(S.D.N.Y. 1990) 1990 WL 161023 6

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(N.D. Cal. 1989) 723 F. Supp. 1373 5, 6

11

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(E.D. Ky.1986) 639 F. Supp. 915 7

13 *In re Cenco, Inc. Sec. Litig.*
(N.D. Ill. 1981) 519 F. Supp. 322 7

14

15 *In re Gulf Oil/Cities Service Tender Offer Litig.*
(S.D.N.Y. 1992) 142 F.R.D. 588 6

16 *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*
(1985) 108 F.R.D. 237 5

STATE CASES

17

18 *Glendale City Employees' Ass'n v. City of Glendale*
(1975) 15 Cal. 3d 328 4

19

20 *Glendora Committee Redev. Agency v. Demeter*
(1984) 155 Cal. App. 3d 465 2, 7, 9

21

22 *In re California Indirect Purchaser X-Ray Film Antitrust Litig*
(Alameda Super. Ct., Oct. 22, 1998) 1998 WL 1031494 4, 6

23 *In re Vitamin Cases*
(2003) 110 Cal. App. 4th 1041 9

24

25 *Ketchum v. Moses*
(2001) 24 Cal. 4th 1122 8

26 *Lealao v. Beneficial California Inc.*
(2000) 82 Cal. App. 4th 19 4, 5

27

28 *Serrano v. Priest*
(1977) 20 Cal. 3d 25 2, 3, 4, 9

1	<i>Weeks v. Baker & McKenzie</i>	
2	(1998) 63 Cal. App. 4th 1128	8

DOCKETED CASES

4	<i>Abzug v. Kerkorian</i>	
	(L.A. Sup. Ct., Nov. 1990) CA-000981	6
5	<i>Andrews v. First Interstate Bank of California</i>	
6	(San Francisco Sup. Ct. 1997) Case No. 953575	6
7	<i>California Indirect-Purchaser Plasticware Antitrust Litigation</i>	
	(San Francisco Sup. Ct. 1995) Civ. Case Nos. 961814, 963201 and 963590	6
8	<i>Coleman, et al. v. GAF Building Materials Corporation,</i>	
9	(Circuit Court of Mobile County, Alabama) No. CV-96-0954-Galanos	15
10	<i>Fang, et al. v. United Bank, et al.</i>	
	(S.F. Superior Court, July 10, 1992) No. 873365	7
11	<i>Haitz v. Meyer, et al.</i>	
12	(Alameda Sup. Ct., Aug. 20, 1990) No. 572968-3	6
13	<i>In re ABS Pipe Cases/II,</i>	
	J.C.C.P. No. 3126.....	6
14	<i>In re California Indirect-Purchaser Infant Formula Antitrust Class Action Litigation</i>	
15	(L.A. Sup. Ct. 1993) J.C.C.P. No. 2557.....	6, 7
16	<i>In re Facsimile Paper Antitrust Litigation</i>	
	(San Francisco Sup. Ct. 1997) Civ. Case Nos. 963598, 964899 and 967137.....	6
17	<i>In re GCG Richmond Works Cases, J.C.C.P. No. 2906</i>	
18	(Contra Costa Co. Sup. Ct)	7
19	<i>In re Liquid Carbon Dioxide Cases</i>	
	(San Diego Sup. Ct. 1996) J.C.C.P. 3012	6
20	<i>In re Milk Antitrust Litigation</i>	
21	(L.A. Sup. Ct. 1998) Civ. Case No. BC070061	6
22	<i>In re Trilogy Sec. Litig.</i>	
	(N.D. Cal. 1986) C-84-20617 (A).....	7
23	<i>Moshopoulous v. Shake Company of California</i>	
24	(Alameda County Superior Court) Case No. 810685-0.....	9
25	<i>Richison et al. v. American Cemwood Corp., et al.</i>	
	(San Joaquin Sup. Ct. 2003) Civ. Action No. 005532	6, 16
26	<i>Sebago, Inc., et al. v. Beazer East, Inc., et al.,</i>	
27	(D. Mass. 2000) C. A. No. 96-10069	15

28

1	<i>Sconce/Lamb Cremation Cases</i>	
	(L.A. Superior Court, Feb. 1989) J.C.C.P. No. 2085.....	7
2		
3	<i>Shah v. Re-Con Building Products, Inc.,</i>	
	(Contra Costa Superior Court) Case No. C99-10929.....	6
4	<i>Steiner v. Whittacker Corp.</i>	
	(L.A. Superior Court, March 13, 1989) CA 00817.....	6
5		
6	<i>Williams v. Weyerhaeuser</i>	
	(San Francisco County Sup. Ct. 2000) Case No. 995787.....	7
7	<i>Wilson v. Bank of Am. Nat'l Trust & Sav. Ass'n</i>	
	(Cal. Sup. Ct. Aug. 16, 1982) No. 643872.....	7
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
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1 INTRODUCTION

2 The settlement of this litigation with Cal-Shake, Inc. ("Cal-Shake") and its insurers will
3 provide substantial recoveries for tens of thousands of Cal-Shake homeowners in several states.
4 The settlement is the product of more than six years of intensive litigation undertaken by four law
5 firms who spent almost \$11 million in time and over \$4 million in costs with no assurance that
6 any of this time and expense would ever be compensated. The risks and efforts undertaken by
7 Class Counsel and the result they achieved merit fully the compensation they seek.

8 The risks undertaken by Class Counsel in this case were substantial. Cal-Shake had
9 ceased doing business and had destroyed many of its records, making proof of key factual issues
10 immeasurably more difficult. Cal-Shake was also defended by five different insurance carriers
11 who were not concerned with protecting the ongoing business of their insured and were able to
12 assert not only defenses to the litigation but also defenses to the payment of claims under their
13 policies. Settlement was made considerably more difficult because Cal-Shake's carriers included
14 both primary and excess insurers whose internal issues added considerably to the complexity of
15 settling the case. In addition, Class Counsel were required to pursue class action proof utilizing
16 methods which were at the cutting edge of class action litigation practice and which were, until
17 relatively late in the litigation, not expressly sanctioned by California courts.

18 The amount of time, effort and expense required to pursue the litigation was
19 extraordinary. Class Counsel expended many thousands of hours of time in pursuit of this
20 litigation over a period of six years. During this period, Class Counsel brought and defended
21 dozens of motions, took and defended almost one hundred depositions, supervised the work of
22 more than a dozen experts and assembled a formidable body of proof which – at the end of the
23 day – made settlement of the litigation advisable for Cal-Shake and its insurers.

24 Settlement of the litigation also required many years of effort by Class Counsel, effort
25 which continued past the commencement of the trial. The result of these efforts was that Cal-
26 Shake's carriers agreed to pay \$61,420,000 (the "Settlement Amount") into a settlement fund for
27 the payment of claims. This fund will provide significant relief to thousands of homeowners who
28 otherwise would have received nothing.

1 Class Counsel seek reimbursement for out-of-pocket expenses of \$4,044,125 and
2 attorneys' fees of \$19,125,291. The attorneys' fees represent the amount of Class Counsel's
3 lodestar of \$10,538,419¹ and a multiplier of approximately 1.81. This figure equates to a
4 contingency fee award of 33.3% of the Settlement Amount after recovery of costs.² This fee
5 comports with contingent fees awarded in comparable class actions. In light of the risks and
6 effort required to litigate these claims and the results achieved, the fee requested has been fairly
7 earned.

8 ARGUMENT

9 **I. THIS COURT HAS WIDE DISCRETION CONCERNING THE AMOUNT OF** 10 **THE FEE AWARD**

11 Trial courts are ideally situated to assess the value of class counsel's services. For this
12 reason, trial courts are given considerable discretion in determining an appropriate fee award:

13 The experienced trial judge is the best judge of the value of
14 professional services rendered in his court, and while his judgment
15 is of course subject to review, it will not be disturbed unless the
appellate court is convinced that it is clearly wrong.

16 *Serrano v. Priest* (1977) 20 Cal. 3d 25, 49 (citations and internal quotation marks omitted);
17 *Glendora Community Redev. Agency v. Demeter* (1984) 155 Cal. App. 3d 465, 474 ("The rule
18 with respect to attorney[s'] fees is that the amount to be awarded as attorney[s'] fees is left to the
19 sound discretion of the trial court. The trial judge is in the best position to evaluate the services

20 _____
21 ¹ This time includes the lodestar from David Birka-White Law Offices, Farella Braun & Martel, Berding &
22 Weil and Gilman and Pastor. Each firm has provided detailed time records for the Court's *in camera*
review. Because the detailed time records reflect attorney work product and because litigation with both
Cal-Shake entities has not yet been concluded, the detailed time records have not been filed publicly.

23 The lodestar excludes any time spent in litigation with Old Cal-Shake and any time spent in the
24 preparation of this fee application. Declaration Of David M. Birka-White In Support Of Plaintiffs'
25 Application For An Award Of Attorneys' Fees And Reimbursement Of Expenses ("Birka-White
26 Declaration"), ¶ 31; Declaration Of William R. Friedrich In Support Of Plaintiffs' Application For An
27 Award Of Attorneys' Fees And Reimbursement Of Expenses ("Friedrich Declaration"), ¶¶ 19, 22;
28 Declaration Of Kenneth G. Gilman In Support Of Plaintiffs' Application For An Award Of Attorneys'
Fees And Reimbursement Of Expenses ("Gilman Declaration"), ¶¶ 13-14; Declaration Of Geoffrey B.
Cereghino In Support Of Plaintiffs' Application For An Award Of Attorneys' Fees And Reimbursement
Of Expenses ("Cereghino Declaration"), ¶¶ 19-20.

² Calculation of a percentage fee award after the deduction of costs is customary, and the most
conservative method for calculating such fees.

1 rendered by an attorney in his courtroom; his judgment will not be disturbed on review unless it is
2 clearly wrong.”)

3 This Court has presided over the Shake Roof litigation since its inception and has had the
4 opportunity (perhaps more than it would have liked) to observe the conduct of the litigation by
5 Class Counsel. Its determination of the amount of the fee properly awarded in this case is entitled
6 to and will be treated with an appropriate level of deference.

7 **II. WHERE THE EFFORTS OF CLASS COUNSEL CREATE A COMMON FUND**
8 **FOR THE PAYMENT OF CLAIMS, CLASS COUNSEL’S FEES AND COSTS**
9 **SHOULD BE PAID FROM THE FUND CREATED**

10 Where the efforts of class counsel have produced a common fund for the payment of class
11 claims, the court may award class counsel their fees and costs from the fund created. *Serrano v.*
12 *Priest, supra*, 20 Cal. 3d at 34-35. In *Serrano*, the California Supreme Court held that “when a
13 number of persons are entitled in common to a specific fund, and an action brought by a plaintiff
14 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
15 or plaintiffs may be awarded attorney’s fees out of the fund.” *Serrano v. Priest, supra*, 20 Cal. 3d
16 at 34, quoting *D’Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 25. This rule “is
17 grounded in ‘the historic power of equity to permit the trustee of a fund or property, or a party
18 preserving or recovering a fund for the benefit of others in addition to himself, to recover his
19 costs, including his attorneys’ fees, from the fund or property itself or directly from the other
20 parties enjoying the benefit.” *Serrano, supra*, 20 Cal. 3d at 35, quoting *Alyeska Pipeline Co. v.*
Wilderness Society (1975) 421 U.S. 240, 257.

21 **III. THE FEE SOUGHT BY CLASS COUNSEL IS APPROPRIATE UNDER BOTH**
22 **THE PERCENTAGE OF COMMON FUND AND LODESTAR METHOD**

23 **A. California And Federal Authority Favor The “Percentage Of Benefit”**
24 **Method For Setting Fees In Common Fund Class Action Cases**

25 California courts have utilized two principal methods to determine the amount of the fee
26 earned by class counsel. Where the efforts of class counsel have resulted in the creation of a
27 common fund, the preferred method is to award to class counsel a percentage of the fund. Both
28 the United States Supreme Court and the California Supreme Court have approved this method of

1 determining class counsel's compensation. *Blum v. Stenson* (1984) 465 U.S. 886, 900 n.16;
2 *Glendale City Employees' Ass'n v. City of Glendale* (1975) 15 Cal. 3d 328,341 n. 19.

3 California courts have the discretion to use the percentage of common fund method to
4 determine the fees of class counsel, at least in classic "common fund" cases:

5 California law does not require that this Court impose on itself and
6 Class Counsel the time-consuming effort of examining the details
7 of the services provided in order to award Class Counsel attorneys'
8 fees. The opposite is true. California law provides for the efficient
9 award of attorneys' fees, vesting discretion in the trial court to
10 make a practical assessment of Class Counsel's efforts. . . . The
11 discretion afforded the trial court includes use of the percentage-of-
12 the-fund method for calculating attorneys' fees.

13 *In re California Indirect Purchaser X-Ray Film Antitrust Litig* (Alameda Super. Ct., Oct. 22,
14 1998) 1998-2 Trade Cas. ¶ 72,336, 1998 WL 1031494 at *9 (awarding class counsel 30% of
15 common fund as attorneys' fees, and holding that percentage method is "well-established by
16 California law and practice, and is appropriately used here.")

17 In cases where there is no common fund – or the value of the result achieved by class
18 counsel is difficult to quantify – courts have also used the "lodestar/multiplier" method. This
19 method takes as its starting point the value of the attorney time expended on the case and then
20 enhances or reduces that figure to account for various factors, including the result achieved, the
21 risk of the case and other factors identified by case law. *See, e.g., Serrano v. Priest* (1977) 20
22 Cal. 3d at 49. The lodestar method is also utilized as a benchmark or "check" against which to
23 assess the reasonableness of the percentage of the fund award. *Lealao v. Beneficial California*
24 *Inc.* (2000) 82 Cal. App. 4th 19, 45.

25 In the federal courts, which have very broad experience with both the lodestar and
26 percentage compensation methods, the lodestar method has been almost universally rejected in
27 true common fund cases. California appellate courts have recognized that the overwhelming
28 weight of federal authority supports the use of the percentage method in true common fund cases:

During the nearly quarter of a century since *Serrano III*, many
federal courts, heavily burdened with the class and derivative
actions that give rise to the need to adjudicate fee issues, became
disillusioned with the lodestar method. This shift is perhaps most
dramatically exemplified by the Third Circuit, whose 1973 opinion

1 in *Lindy I, supra*, 487 F.2d 161, which was relied upon in *Serrano*
2 *III*, 20 Cal.3d at p. 49, fn. 23, 141 Cal.Rptr. 315, 569 P.2d 1303,
3 pioneered adoption of the lodestar methodology.

4 *Lealao v. Beneficial California Inc., supra*, 82 Cal. App. 4th at 28. As indicated in *Lealao*, in
5 1985 the federal Third Circuit convened a task force to study attorney compensation in class
6 action cases. The task force determined that the Third Circuit should abandon its prior
7 precedent – favoring the lodestar method – and adopt a percentage of benefit approach in
8 common fund cases.

9 The task force found that the lodestar method (1) “increases the workload of an already
10 overtaxed judicial system,” (2) is “insufficiently objective and produce[s] results that are far from
11 homogenous,” (3) “creates a sense of mathematical precision that is unwarranted in terms of the
12 realities of the practice of law,” (4) “is subject to manipulation by judges who prefer to calibrate
13 fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of
14 an overall dollar amount,” (5) “encourages lawyers to expend excessive hours, and . . . engage in
15 duplicative and unjustified work,” (6) “creates a disincentive for the early settlement of cases,”
16 (7) deprives trial courts of “flexibility to reward or deter lawyers so that desirable objectives, such
17 as early settlement, will be fostered,” (8) “works to the particular disadvantage of the public
18 interest bar,” and (9) results in “confusion and lack of predictability.” *Report of the Third Circuit*
Task Force, Court Awarded Attorney Fees (1985) 108 F.R.D. 237, 246-249.

19 As these authorities demonstrate, in true “common fund” cases, the great weight of
20 authority is that class counsel should be awarded a percentage of the common fund. As discussed
21 below, the fee requested by Class counsel is consistent with similar “percentage of fund” cases
22 and with relevant “lodestar” cases as well.

23 **B. The Fee Requested By Plaintiff Is Consistent With Awards In Similar**
24 **Common Fund Cases**

25 Federal courts both within and outside of California have recognized that 30% of the
26 common fund is a benchmark for common fund cases. For example, in *In re Activision Sec. Lit.*,
27 Judge Patel of the Northern District of California held that “absent extraordinary circumstances
28 that suggest reasons to lower or increase the percentage, the rate should be set at 30%.” *In re*

1 *Activision Secs. Lit.* (N.D. Cal. 1989) 723 F. Supp. 1373. Federal courts outside of California
2 have also found that the fee awards in common fund in the 30% range are commonplace. *E.g., In*
3 *re Gulf Oil/Cities Service Tender Offer Litig.* (S.D.N.Y. 1992) 142 F.R.D. 588, 596 (citing cases
4 awarding 30%); *Bello v. Integrated Resources, Inc.* (S.D.N.Y. 1990) 1990 WL 200670 [1991
5 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,731,98,471 (collecting cases awarding 30%);
6 *Brown v. Steinberg* (S.D.N.Y. 1990) 1990 WL 161023 [1990-1991 Transfer Binder] Fed. Sec.L.
7 Rep. (CCH) ¶ 95,680, 98,165 (collecting cases awarding 30 percent and noting that fee awards in
8 the Southern District of New York range from 20-50%).

9 Numerous California state trial courts, including this Court, have awarded attorneys' fees
10 equal to 30% or more of a common fund. *See, e.g., Shah v. Re-Con Building Products, Inc.,*
11 (Contra Costa Superior Court) Case No. C99-10929 (combined lodestar/percentage analysis
12 yielded 30% contingent fee in both partial settlements); *In re ABS Pipe Cases/II*, (Contra Costa
13 Sup. Ct.) J.C.C.P. No. 3126 (Contra Costa Superior Court Judge Simons – now Justice Simons –
14 awarded attorneys' fees of 30% from nine different common funds valued at approximately
15 \$77 million); *Richison et al. v. American Cemwood Corp., et al.* (San Joaquin Sup. Ct. 2003) Civ.
16 Action No. 005532 (30% fee award, including costs); *In re California Indirect Purchaser X-Ray*
17 *Film Antitrust Litigation* (Alameda Sup. Ct. 1998) 1998 WL 1031494, No. 960886 (30% fee
18 award plus costs)(Robinson, J.); *In re Milk Antitrust Litigation* (L.A. Sup. Ct. 1998) Civ. Case
19 No. BC070061 (33 1/3% award); *In re Facsimile Paper Antitrust Litigation* (San Francisco Sup.
20 Ct. 1997) Civ. Case Nos. 963598, 964899, and 967137 (33 1/3% fee award plus costs) (Garcia,
21 J.); *In re Liquid Carbon Dioxide Cases* (San Diego Sup. Ct. 1996) J.C.C.P. 3012 (33 1/3% award
22 plus costs); *California Indirect-Purchaser Plasticware Antitrust Litigation* (San Francisco Sup.
23 Ct. 1995) Civ. Case Nos. 961814, 963201, and 963590 (33 1/3% fee award plus costs) (Garcia,
24 J.); *Abzug v. Kerkorian* (L.A. Sup. Ct., Nov. 1990) CA-000981 (45% fee award plus costs); *Haitz*
25 *v. Meyer, et al.* (Alameda Sup. Ct., Aug. 20, 1990) No. 572968-3 (45% fee award); *Steiner v.*
26 *Whittacker Corp.* (L.A. Superior Court, March 13, 1989) CA 00817 (Reporter's Transcript) (35%
27 fee award); *Andrews v. First Interstate Bank of California* (San Francisco Sup. Ct. 1997) Case
28 No. 953575 (30% fee award including costs) (Garcia, J.); *In re California Indirect-Purchaser*

1 *Infant Formula Antitrust Class Action Litigation* (L.A. Sup. Ct. 1993) J.C.C.P. No. 2557 (30%
2 fee award including costs); *Fang, et al. v. United Bank, et al.* (S.F. Superior Court, July 10, 1992)
3 No. 873365 (30% fee award plus costs) (McCabe, C.J.); *Sconce/Lamb Cremation Cases* (L.A.
4 Superior Court, Feb. 1989) J.C.C.P. No. 2085 (30% fee award plus costs).

5 As the above cases demonstrate, attorneys' fee awards in excess of 30% of common fund
6 are well established by California law and practice. Accordingly, the fee requested here – 33%
7 plus costs – is well warranted, especially because of the tremendous amount of time and work
8 Class Counsel expended over the last six and one-half years.

9
10 **C. The Fee Sought By Class Counsel Is Also Supported By The
Lodestar/Multiplier Method**

11 The fee requested by Class Counsel is also appropriate under the lodestar-multiplier
12 method. As stated previously, Class Counsel seek reimbursement of out of pocket expenses and
13 attorneys' fees of 33.3% after costs. Class Counsel request a modest multiplier of approximately
14 1.81 on their lodestar to arrive at the award of \$19,125,291 in fees, plus \$4,044,125 in costs.

15 Numerous cases have applied a multiplier of between 4 and 12 to Class Counsel's lodestar
16 in awarding fees. See *Wilson v. Bank of Am. Nat'l Trust & Sav. Ass'n* (Cal. Sup. Ct. Aug. 16,
17 1982) No. 643872 (10 multiplier awarded) (cited in 3 Newberg & Conte, *Newberg on Class*
18 *Actions*, § 1403, at 14-5 n.21); *Glendora, supra*, 155 Cal. App. 3d at 465 (12 multiplier awarded);
19 *In re Trilogy Sec. Litig.* (N.D. Cal. 1986) C-84-20617 (A); *In re Cenco, Inc. Sec. Litig.* (N.D. Ill.
20 1981) 519 F. Supp. 322 (4 multiplier awarded); *In re Beverly Hills Fire Litig.* (E.D. Ky.1986) 639
21 F. Supp. 915 (5 multiplier awarded); *Arenson v. Board of Trade* (N.D. Ill. 1974) 372 F. Supp.
22 1349 (4 multiplier awarded); *In re GCG Richmond Works Cases* (Contra Costa Co. Sup. Ct)
23 J.C.C.P. No. 2906 (4.54 multiplier awarded); *Williams v. Weyerhaeuser* (San Francisco County
24 Sup. Ct. 2000) Case No. 995787 (4.48 multiplier awarded).

25 The Shake Roof litigation was complex and hotly-contested, requiring over six years of
26 litigation and \$4 million in out-of-pocket costs. Both the length of the proceedings and their
27 expense required Class Counsel to assume extraordinary risk in the pursuit of cutting-edge class
28 action procedural and proof strategies. Under the circumstances, a multiplier of approximately

1 1.8 is modest. It is well below the multipliers approved by the courts in the cases cited above.
2 And, as discussed in detail below, the compensation requested by Class Counsel is supported
3 fully by an analysis of the factors which courts commonly consider in setting class action fees.

4 Class Counsel further request that the awarded fees and expenses be disbursed into an
5 account at Citi National Bank for subsequent allocation by and distribution to Class Counsel.
6 Because of their intimate knowledge of the case and the contributions made by each firm, Class
7 Counsel are uniquely qualified to allocate the fees in a manner which reflects each firm's
8 contribution to the institution, prosecution and resolution of this litigation. In the unlikely event
9 there is any dispute arising from the distribution of fees, Class Counsel have agreed that it may be
10 resolved by this Court in the exercise of its continuing jurisdiction. Birka-White Declaration,
11 ¶ 28; Friedrich Declaration, ¶ 24; Gilman Declaration, ¶ 18 and Cereghino Declaration, ¶ 25.

12 **D. The Fees Requested By Class Counsel Are Supported By An Analysis Of The**
13 **Facts Commonly Considered By Courts**

14 As the Supreme Court explained in *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1138,
15 application of a significant multiplier to Plaintiffs' Counsel's "lodestar" does not result in unfair
16 compensation but, rather, appropriately results in market-level compensation for such services:

17 Nor is it true that applying a fee enhancement will inevitably result
18 in unfair double counting or a windfall to attorneys. . . . Under our
19 precedents, the unadorned lodestar reflects the general local hourly
20 rate for a fee-bearing case; it does not include any compensation for
21 contingent risk, extraordinary skill, or any other factors a trial court
22 may consider under *Serrano III*. The adjustment to the lodestar
23 figure, e.g., to provide a fee enhancement reflecting the risk that the
24 attorney will not receive payment if the suit does not succeed,
25 constitutes earned compensation; unlike a windfall, it is neither
26 unexpected nor fortuitous. Rather, it is intended to approximate
27 market-level compensation for such services, which typically
28 includes a premium for the risk of nonpayment or delay in payment
of attorney fees.

24 *See also Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128.

25 In determining the amount of class counsel's fees, California courts have considered a
26 number of factors. These factors include: (1) the result obtained; (2) the time and labor required;
27 (3) the contingent nature of the case and the delay in payment to class counsel; (4) the extent the
28 litigation precluded other employment by class counsel; (5) the experience, reputation, and ability

1 of the class counsel, the skill they displayed in the litigation, and the novelty, complexity and
2 difficulty of the case; (6) the informed consent of the clients to the fee agreement. *See, e.g.,*
3 *Serrano v. Priest, supra*, 20 Cal. 3d at 49; *Glendora Comm. Redev. Agency v. Demeter, supra*,
4 155 Cal. App. 3d at 474; and (7) the amount of future work which will be required to administer
5 proceedings related to distribution of the settlement fund. *In re Vitamin Cases* (2003) 110 Cal.
6 App. 4th 1041, 1057. The fee requested by Class Counsel is fully justified by a consideration of
7 these factors.

8 **1. The Result Obtained**

9 Because Cal-Shake ceased doing business and disbanded, this litigation was hard even to
10 commence. It took considerable effort to find persons who could be served with a complaint and
11 even greater effort to find the documents which Cal-Shake did not destroy, including its warranty
12 records. The difficulty of commencing this litigation is evidenced by the fact that similar
13 litigation was commenced in Alameda County in 1999, but was abandoned when plaintiff's
14 counsel was unable to effect service of the complaint. *Moshopoulous v. Shake Company of*
15 *California* (Alameda County Superior Court) Case No. 810685-0; Birka-White Declaration, ¶ 22.

16 Class Counsel also expended considerable time and effort to locate the insurance policies
17 which ultimately provided the source of recovery in the case. This effort resulted in raising the
18 amount of potential coverage from approximately \$7 million to approximately \$84 million.
19 Friedrich Declaration, ¶ 6.

20 Class Counsel were ultimately able, after considerable effort, to effect service of the
21 complaint, pursue the litigation, engage Cal-Shake's insurance carriers and achieve a settlement
22 which is the most favorable recovery for which the Class might reasonably have hoped. As the
23 Court is aware, Cal-Shake's only meaningful assets are insurance policies. \$61.42 million
24 constitutes approximately 75% of the maximum available policy limits of \$84 million. Shortly
25 before the settlement, the insurance carriers were still contending that the maximum available
26 limits were only \$11 million.

27 The insurers also contended that the policies' product exclusion would exclude the bulk of
28 any recovery by the Class and asserted various other coverage defenses, which they would have

1 been free to litigate following a final outcome of the underlying litigation. If Plaintiffs were
2 unable to reach the proposed Settlement, they would have proceeded to trial against Cal-Shake, to
3 defend the result on appeal, and then following final judgment, sue the insurers under Insurance
4 Code Section 11580 to enforce the judgment. At that point, the carriers would have defended on
5 the basis of the various coverage defenses they had raised, and would have the right to appeal any
6 adverse determination on these issues.

7 Accordingly, even if there were no risk that the Class might lose the litigation on the
8 merits, the settlement for 75% of available policy limits avoids what could have easily been seven
9 more years of litigation and appeals.

10 Settlement also avoided the significant risks associated with Cal-Shake's defenses on the
11 merits and issues raised by Cal-Shake regarding class action certification and proof. Because the
12 Court presided over the myriad, highly contentious proceedings related to these issues – and
13 because the Court presided over the trial of the litigation with Old Cal-Shake – Class Counsel will
14 not detail all of the substantive and procedural issues raised by Cal-Shake or discuss in detail the
15 risks to the Class posed by these issues. It suffices to state that Cal-Shake raised a significant
16 number of serious issues which made them a reasonable ground for settlement.

17 By any reasonable measure, the settlement represents a very favorable result for the Class.

18 **2. The Time and Labor Required By The Litigation**

19 This case was filed in February of 1999. The case was hotly contested from the beginning
20 until the date of the settlement, over six years later and after the trial had commenced. Class
21 counsel have expended tens of thousands of hours – having a value in excess of \$10 million –
22 litigating the issues raised by this case.³ In the course of the litigation, Class Counsel:

23 1. Investigated the performance of Cal-Shake's product and worked with experts to
24 determine the nature and consequences of the defects in Cal-Shake shakes.

25
26
27 ³ Detailed statements of the work done by each firm are contained in the declarations filed by Class
28 Counsel. The information summarized below is contained in the following declarations: Birka-White
Declaration, ¶¶ 4-18, Friedrich Declaration, ¶¶ 6-13; Gilman Declaration, ¶¶ 4-9; Cereghino Declaration,
¶¶ 6-11.

- 1 2. Determined the corporate history of the Cal-Shake entities and determined how
2 they could be served.
- 3 3. Discovered and reviewed the available information concerning Cal-Shake entities
4 which still could be obtained.
- 5 4. Conducted extensive discovery and investigation to locate insurance policies
6 issued to New Cal-Shake, including substantial formal discovery from existing brokers,
7 disbanded brokers, former employees and insurers, resulting in increasing the potentially
8 available insurance from approximately \$7 million to \$84 million.
- 9 5. Worked with investigators to determine how to serve Cal-Shake entities and
10 deposed officers of these companies.
- 11 6. Undertook the discovery required to certify the class, including approximately 20
12 class member depositions.
- 13 7. Filed and successfully prosecuted a motion for certification of the class.
- 14 8. After obtaining class certification, responded to writ pleadings filed by defendants.
- 15 9. Worked with statistical and roofing materials experts to develop a means for
16 demonstrating appreciable harm on a class-wide basis, utilizing procedures developed specially
17 for the case.
- 18 10. Developed and negotiated inspection protocols for randomly selected homes.
- 19 11. Located, contacted and secured permission to perform statewide inspections of
20 Cal-Shake homes.
- 21 12. Attended dozens of site inspections of Cal-Shake properties to investigate class
22 wide defect, damage and appreciable harm.
- 23 13. Oversaw and worked with co-lead counsel to defend approximately fifty
24 depositions of class members and representatives.
- 25 14. Secured and oversaw all consultants and disclosed Plaintiff trial experts, many of
26 whom are nationally recognized, to testify regarding: defect, causation, and damages caused by
27 Cal-Shake shakes.
- 28

1 15. Oversaw management of all random inspections and evidence obtained from the
2 field.

3 16. Along with Kinsella-Novak, developed, briefed and implemented a notice plan
4 requiring mailed, published and web-based communications with members of the class.

5 17. Drafted and responded to literally dozens of pre-trial motions, including a motion
6 to decertify the class and a motion for summary judgment.

7 18. Participated in the development and briefing of a fully-elaborated trial plan for the
8 case, allowing for the resolution of key class issues in a practical and measured manner.

9 19. Prepared for, took and defended approximately 30 expert depositions, most of
10 which extended over many days.

11 20. Reviewed tens of thousands of pages of defense expert work product together with
12 defense photographs and evidence.

13 21. Delivered and briefed evidentiary presentations at mediation sessions before the
14 Honorable Coleman O. Fannin.

15 22. Developed and selected all trial evidence.

16 23. Maintained communications with class members throughout the litigation,
17 including response from class members concerning the conduct of the litigation.

18 24. Developed and maintained a database containing the names and information
19 regarding all absent Class members who contacted Class Counsel.

20 25. Created and maintained the document depository for all Plaintiff and Defense
21 Expert files.

22 26. Prepared the case for trial, including the preparation of a trial brief, preparation
23 and defense of numerous motions in limine, preparation of jury instructions and prosecution of
24 pleadings related thereto and the selection of a jury.

25 27. Participated in extensive proceedings related to the settlement of the case with Cal-
26 Shake and its carriers, proceedings which necessitated extensive briefing and negotiations
27 regarding issues related to the merits of the litigation, the collective responsibility of the insurers
28 to settle the claims under their various policies and the resolution of inter-carrier issues.

1 28. Developed and pursued subclassing to allow for the separate settlement of claims
2 related to Cal-Shake and the continued pursuit of litigation against Old Cal-Shake.

3 29. Negotiated, prepared and oversaw the publication of notice related to the
4 settlement and the effect thereof on all subclasses.

5 **3. The Contingent Nature Of The Case And The Delay In Payment To**
6 **Class Counsel**

7 Class Counsel pursued this litigation on a pure contingent fee basis. Birka-White
8 Declaration, ¶ 29; Friedrich Declaration, ¶ 21; Gilman Declaration, ¶ 3; Cereghino Declaration,
9 ¶ 18. In addition to over \$10 million of time, Class Counsel were required to expend over
10 \$4 million in out-of-pocket costs in order to pursue the litigation effectively. There was a
11 significant risk to Class Counsel that both the fees and costs incurred would never be recovered.
12 Given the difficulty of proving class-wide liability and damages in this case, the risks undertaken
13 by Class Counsel were extraordinary. Because this Court presided over every aspect of the
14 litigation, the Court is fully aware of the difficulties and risks of class litigation in products
15 liability cases requiring proof of appreciable harm to the class. Accordingly, Class Counsel will
16 not recite in detail the legal and practical risks undertaken by Class Counsel in pursuit of this
17 litigation.

18 Class Counsel have also been compelled to wait for a significant period of time to receive
19 the compensation which they risked so much to earn. As noted previously, this litigation has
20 been pending since February of 1999. Many of the hours – and a significant portion of the out-of-
21 pocket expenses – expended by Class Counsel were expended years ago and Class Counsel will
22 not receive compensation for them until after the hearing on this fee application. Accordingly,
23 even if the fees and costs incurred by Class Counsel were risk-free, payment today of the fees and
24 costs incurred by Class Counsel without a multiplier would result in a significant discount
25 represented by the time value of money.

1 4. **The Extent The Litigation Precluded Other Employment By Class**
2 **Counsel**

3 Three of the four firms which represented the Class in this case are small firms which
4 have a limited capacity to undertake major litigation. For example, Birka-White Law Offices has
5 only two attorneys and undertakes a relatively small number of cases generally. The Shake Roof
6 cases represent a significant investment of time and money to a firm of this size and preclude
7 substantial additional employment opportunities. Birka-White Declaration, ¶ 26. While Berding
8 & Weil and Gilman & Pastor are somewhat larger than Birka-White Law Offices, a case of this
9 magnitude also represents a significant undertaking for these firms and precludes them from
10 accepting other major cases. Cereghino Declaration, ¶ 16.

11 Farella Braun & Martel is a firm of significant size and has the capacity to accept a
12 significant amount of work. The attorneys employed in this litigation, however, are some of the
13 most senior and experienced insurance litigators in the firm. Friedrich Declaration, ¶¶ 2-3.
14 Undertaking this litigation made them unavailable to take advantage of opportunities for hourly
15 work in a field – insurance coverage – which could have significant value in this market.

16 5. **The Experience, Reputation, And Ability Of The Class Counsel, The**
17 **Skill They Displayed In The Litigation, And The Novelty, Complexity**
18 **And Difficulty Of The Case**

19 a. **Experience, Reputation and Ability Of Class Counsel**

20 All of the counsel involved in this litigation are experienced major-case litigators with
21 excellent reputations. Birka-White Law Offices specializes in the area of products liability
22 relating to defective building materials. Since 1993, Birka-White Law Offices has worked
23 exclusively on class action cases related to such product failures. For the last six years, the vast
24 majority of the practice has been spent prosecuting class action cases involving cedar wood
25 “replacement” shakes similar to Cal-Shake shakes. Birka-White Law Offices has worked closely
26 with materials experts to test and analyze cement fiber shakes similar to Cal-Shake shakes to
27 develop the scientific evidence needed to try such cases.

28 Birka-White Law Offices has acted as court-appointed class counsel in nineteen class
 action cases involving building products and has pursued this litigation successfully in courts

1 throughout this and other states. David Birka-White is a contributing author for "California Class
2 Actions Practice and Procedure", 2003, edited by Elizabeth Cabraser. He has also spoken at the
3 Fall Meeting of the American Bar Association Forum on the Construction Industry on the subject
4 of defective building product class actions. He has successfully tried several product liability
5 cases. Birka-White Declaration, ¶¶ 1-3.

6 Farella Braun + Martel has substantial experience representing clients throughout the
7 United States and abroad in complex litigation and, specifically, in the fields of product liability,
8 class actions, and insurance coverage. William Friedrich's practice for the past 30 years has
9 focused on insurance coverage and bad faith litigation. John Green, who also worked extensively
10 on this case, has 20 years of experience in insurance coverage and bad faith litigation. Farella,
11 Braun + Martel devoted substantial time and resources to this matter which would otherwise have
12 been devoted to other hourly work and contingent opportunities, including one of the firm's most
13 senior litigation partners, two partners with 20 years insurance experience, various other attorneys
14 who are experienced in construction, products liability, and insurance coverage litigation, a non-
15 attorney insurance specialist, and several paralegals. Friedrich Declaration, ¶¶ 2-3, 14-15.

16 Gilman and Pastor concentrates in class action litigation on behalf of investors, consumers
17 and small businesses. The firm has been actively involved in the prosecution of products liability
18 actions, including actions involving defective building products on behalf of homeowners and
19 consumers. Gilman and Pastor has served as court appointed class counsel in product liability
20 actions in both federal and state courts. For example, the firm was appointed Lead Class Counsel
21 in *Sebago, Inc., et al. v. Beazer East, Inc., et al.*, (D. Mass. 2000) C. A. No. 96-10069, a nation-
22 wide class action on behalf of owners of buildings with corrosive phenolic foam roofing
23 insulation which was resolved after five years of hotly contested litigation in settlements having a
24 combined present value of more than \$240 million. Gilman and Pastor was also appointed Co-
25 Lead Counsel in *Coleman, et al. v. GAF Building Materials Corporation* (Circuit Court of Mobile
26 County, Alabama) No. CV-96-0954-Galanos, a nation-wide class action on behalf of property
27 owners with defective asphalt fiberglass roofing shingles that was resolved after four years of
28

1 vigorously contested litigation in a settlement valued at more than \$75 million. Gilman
2 Declaration, ¶ 2 and firm resume attached thereto.

3 Berding & Weil has been involved in hundreds of cases involving building product claims
4 related to the construction of commercial buildings, residential developments, townhomes and
5 condominiums, including numerous product defect class actions. The firm has extensive expertise
6 in construction issues which is central to its successful representation of class plaintiffs in
7 building product liability cases. Members of the firm have lectured extensively before various
8 property owner groups, local governments and California governmental health and safety
9 professionals regarding building product liability, class actions, claims procedures and other
10 litigation issues.

11 Three of the firms involved in this litigation, Birka-White Law Offices, Farella Braun &
12 Martel and Berding and Weil, were also involved in the prosecution and settlement of *Richison v.*
13 *American Cemwood*, identified previously, litigation similar in many respects to the current case.
14 Class Counsel believe that the experiences gained in this litigation and the reputation these firms
15 developed in pursuit of this litigation – described by the trial judge William Bettinelli as
16 “exemplary,” “exceptional,” and “outstanding” – contributed significantly to the resolution of the
17 issues raised in this case. In addition to their expertise in addressing the numerous class action
18 and products liability issues raised by this case, Class Counsel brought to bear their considerable
19 experience with the multiple policy and carrier issues which impeded settlement of the case. This
20 experience was crucial in achieving a settlement of this case. Birka-White Declaration, ¶ 25.

21 **6. The Informed Consent Of The Clients To The Fee Agreement**

22 Although this issue is of less significance in a class action case in which applications for
23 fees must be approved by the court, all clients in this case were aware of the contingent nature of
24 the fee in this case and the implications of such an arrangement. Birka-White Declaration, ¶ 29;
25 Gilman Declaration, ¶ 3.

26 **7. Future Work Required**

27 Because the settlement of this case contemplates a claims procedure, Class Counsel will
28 have to do substantial additional work after the fee is awarded in this case – work for which they

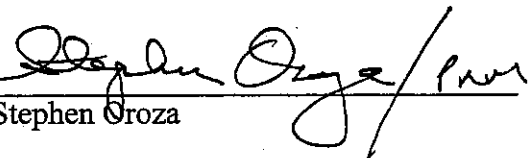
1 will receive no additional compensation. Based on their experience in similar litigation involving
2 claims proceedings, Class Counsel estimate that they will spend hundreds of additional hours in
3 administration of the claims process. Birka-White Declaration, ¶ 27; Cereghino Declaration,
4 ¶ 17.

5 **CONCLUSION**

6 For the reasons stated herein, Class Counsel respectfully request that their application for
7 an award of attorneys' fees and reimbursement of costs be granted as prayed.

8
9 DATED: September 30, 2005

BIRKA-WHITE LAW OFFICES

10
11 By: 
12 Stephen Oroza

13 Attorneys for Plaintiffs

14 BIRKA-WHITE LAW OFFICES
15 David M. Birka-White (State Bar No. 085721)
16 Stephen Oroza (State Bar No. 084681)
17 744 Montgomery Street, Fourth Floor
18 San Francisco, CA 94111-3339
19 Telephone: (415) 616-9999

BERDING & WEIL LLP
Daniel L. Rottinghaus (State Bar No. 131949)
Jeffrey B. Cereghino (State Bar No. 99480)
3240 Stone Valley Road West
Alamo, CA 94507

20 GILMAN AND PASTOR, LLP
21 Kenneth G. Gilman, Esq.
22 John C. Martland, Esq.
23 60 State Street, 37th Floor
24 Boston, MA 02109
25 Telephone: 617-742-9700