UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MASSACHUSETTS BRICKLAYERS AND MASONS TRUST FUNDS, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. DEUTSCHE ALT-A SECURITIES, INC., et al., Defendants.	Civil Action No. 2:08-cv-03178-LDW-ARL CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND LEAD PLAINTIFFS' EXPENSES PURSUANT TO 15 U.S.C. §77z-1(a)(4)

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

Page

SECONDARY AUTHORITIES

LEGISLATIVE HISTORY

I. PRELIMINARY STATEMENT

Lead Counsel have succeeded in obtaining a Settlement Amount of $32,500,000 in cash, for the benefit of the Settlement Class. This is an excellent result under the circumstances, achieved in the face of substantial risk, and is the result of Lead Counsel's vigorous, persistent and skilled efforts. Lead Counsel respectfully move this Court for an award of attorneys' fees in the amount of 26.5% of the Settlement Amount. The requested fee is less than Lead Counsel's lodestar and yields a "crosscheck" multiplier of less than one. Lead Counsel also seek $789,204.87 in litigation expenses that were reasonably and necessarily incurred in prosecuting and resolving the action, as well as $33,157.58 in expenses (including lost wages) incurred by the two institutional Lead Plaintiffs directly related to their representation of the Settlement Class.[1]

This Litigation presented complex and novel factual and legal issues regarding mortgage-backed securities sold to a class of purchasers. Prosecution of the Litigation was undertaken by Lead Counsel on a wholly contingent basis and was extremely risky and difficult from the outset. The Litigation is subject to the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). One effect of the PSLRA has been to make it harder for investors to bring and successfully conclude securities class actions. For example, a study of securities class actions filed after the passage of the PSLRA between 1996 through 2011, found that 32% of the cases that reached the point of a motion to dismiss were dismissed in defendants' favor.[2] Here, Lead Counsel faced and overcame not only this very real risk but additional risks specific to claims based on

---

[1] Unless otherwise noted all terms used herein are defined in the Stipulation and Agreement of Settlement dated as of March 15, 2012 (the "Stipulation"). ECF 137-2.

[2] *See Securities Class Action Filings - 2011 Year in Review*, at 18 (Cornerstone Research 2012) [http://www.cornerstone.com/securities_class_action_filings_2011_year_in_review/].

mortgage-backed securities and reached a substantial Settlement for the benefit of the Settlement Class.

As set forth in detail in the Joint Declaration of Arthur Leahy and Jonathan Gardner in Support of (1) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds and (2) Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Joint Decl."), Lead Counsel vigorously litigated this case for almost four years. In addition to the "normal" risks present in securities class actions in general, Lead Counsel faced novel and complex factual and legal questions regarding the viability of a class action arising from the sale of mortgage-backed securities. At every stage of the litigation, Defendants aggressively asserted their defenses, contending that Lead Plaintiffs could not prevail on the merits and that a class could not be certified. The proposed Settlement was only achieved after Lead Counsel, *inter alia*: (a) conducted an extensive factual investigation including interviews with numerous witnesses and a comprehensive review of publicly available material; (b) prepared two amended complaints; (c) opposed two rounds of motions to dismiss Lead Plaintiffs' complaints; (d) reviewed and analyzed several million pages of documents produced though discovery, including from Defendants and third parties, such as mortgage originators and the FDIC; (e) consulted with experts in securitizations, mortgage underwriting, statistics, mortgage-backed securities valuation, and damages; (f) fully briefed a motion for class certification, and conducted discovery thereon, including the depositions of each side's class certification experts and each Lead Plaintiff and their respective investment managers; and (g) prepared for and attended a mediation, followed by post-mediation settlement discussions.

The proposed Settlement achieved as a result of Lead Counsel's effort is an excellent recovery in the face of numerous hurdles and risks that threatened no recovery (or a substantially

lesser recovery) for the Settlement Class. For example, a number of other proposed class actions arising from the sale of mortgage-backed securities have been dismissed or substantially narrowed. Moreover, recent authority in this and other Circuits presented the serious risk that the Court might not certify a class at all, and if it did, might certify a much smaller class than the one proposed, thereby increasing the risk of no recovery, or a much lower recovery, for all Settlement Class Members. Lead Counsel confronted the substantial risks presented with respect to establishing liability, proving (and overcoming defenses to) damages, defeating affirmative defenses and certifying a class with no guarantee of payment.

Given the multi-million dollar recovery secured for the benefit of the Settlement Class, the complexity and novelty of the legal issues addressed, the amount of work performed, and the risk of undertaking representation with no guarantee of payment, Lead Counsel submit that it is fair and reasonable for the Court to award them 26.5% of the Settlement Amount as legal fees. The fee requested is well within the range of what courts in the Second Circuit and throughout the nation have awarded in similarly complex class action litigation. Furthermore, the requested fee represents a lodestar multiplier of less than 1 on the value of time Lead Counsel spent on this Litigation, and is well within the range that courts have regularly accepted when performing a "lodestar crosscheck" on a percentage-based fee.

Both Lead Plaintiffs, each of which is an institutional investor, support Lead Counsel's requested fee as fair and reasonable. *See* the accompanying Declaration of Peter A. Driscoll, Administrator of Pipefitters' Local 597 Retirement Fund, in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses ("Driscoll Decl."), at ¶6; Declaration of Charles Raso, Secretary-Treasurer of Massachusetts Bricklayers and Masons Trust Funds, in Support of (I)

Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Lead Counsel's Motion for Attorneys' Fees and Reimbursement of Litigation Expenses ("Raso Decl."), at ¶6.

Under the PSLRA, this endorsement is a significant factor in assessing fee and expense requests. Furthermore, the reaction of the Settlement Class to date also weighs in favor of the requested fee. Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice (ECF 139), the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses ("Notice") has been mailed to more than 1,650 potential Settlement Class Members and posted on the internet, and a summary notice was published in *Investor's Business Daily* and transmitted over *PR Newswire*. *See* paragraphs 3-9, 11-12 to the accompanying Declaration of Carole K. Sylvester Re A) Mailing of the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses and the Proof of Claim and Release Form, B) Publication of the Summary Notice, and C) Internet Posting ("Sylvester Decl."). The Notice advised potential Settlement Class Members that Lead Counsel would seek up to 29% of the Settlement Amount as a fee and the payment of no more than $950,000 in litigation expenses. While the deadline for Settlement Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no objections have been received.[3]

For the reasons set forth herein and in the accompanying declarations, Lead Counsel respectfully submit that the request for attorneys' fees and litigation expenses is reasonable and should be approved.

---

[3] If any objections are received, they will be addressed in Lead Counsel's reply submissions, which will be filed with the Court by July 3, 2012.

II. HISTORY OF THE ACTION

The risks and uncertainties involved in prosecuting the Litigation, the procedural history, claims and defenses asserted, investigation, discovery, and negotiations and details of the Settlement are set forth in greater detail in the accompanying Joint Declaration filed concurrently herewith and to which the Court is respectfully referred.

III. LEAD COUNSEL'S REQUESTED FEE IS FAIR AND REASONABLE

A. Lead Counsel Are Entitled to an Award of Attorneys' Fees from the Common Fund

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000); *see also Central States SE & SW Area Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007).

For nearly 50 years the Supreme Court has repeatedly emphasized that private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). In addition, courts in this Circuit have consistently adhered to the principle that "where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the fund are entitled to 'a reasonable fee – set by the court – to be taken from the fund.'" *In re*

Interpublic Sec. Litig., No. Civ. 6527 (DLC), 2004 U.S. Dist. LEXIS 21429, at *30-*31 (S.D.N.Y. Oct. 27, 2004) (citation omitted).

B. The Court Should Award a Reasonable Percentage of the Common Fund

The Second Circuit has expressly approved the "percentage-of-the-fund" method for awards of fees in common fund cases. *Goldberger*, 209 F.3d at 48-49; *see also Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999); *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (approving percentage of fund fee awards). More recently, the Second Circuit reiterated with approval how the percentage method "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation,'" and noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (citation omitted); *Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194 (SAS), 2011 WL 671745, at *2 (S.D.N.Y. Feb. 23, 2011) ("The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.").[4]

The text of the PSLRA also supports awarding attorneys' fees in securities cases using the percentage method, as it provides that the "total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount" recovered for the class. 15 U.S.C. §77z-1(a)(6); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (PSLRA expressly contemplates that "the percentage method will be used to

---

[4] *See also, e.g., In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at * 14 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.) ("the percentage method continues to be the trend of district courts in this Circuit and has been expressly adopted in the vast majority of circuits").

calculate attorneys' fees in securities fraud class actions"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (by using this language, Congress "indicated a preference for the use of the percentage method" rather than the lodestar method).

Given the Supreme Court's indication that the percentage method is proper in this type of case, the Second Circuit's explicit approval of the percentage method, the trend among the district courts in this Circuit, and the language of the PSLRA, we respectfully submit that the Court should award Lead Counsel attorneys' fees based on a percentage of the Settlement Amount.

C. The Requested Fee Is Well Within the Range of What Courts Have Found to Be Fair and Reasonable Under the Percentage Method

The requested fee of 26.5%, which is ***less*** than Lead Counsel's lodestar, falls within the range of percentage fees awarded in complex class action cases in the Second Circuit. In *Central States*, the Second Circuit affirmed a fee award of 30% of a $42.5 million settlement noting that the "District Court applied the *Goldberger* test and made specific and detailed findings from the record, as well as from its own familiarity with the case, including the fact that counsel expended substantial time and effort in the litigation [and] that the case was litigated on a purely contingent basis." 504 F.3d at 249. Numerous other courts in the Second Circuit have awarded fees which on a percentage basis are equal or greater than the fee requested here. *See*, *e.g.*, *Maley*, 186 F. Supp. 2d at 374 (awarding 33-1/3% fee); *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 U.S. Dist. LEXIS 14888, at *20 (E.D.N.Y. Aug. 7, 1998) (awarding 33-1/2% fee); *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, No. 96 Civ. 0583 (DAB), 2002 U.S. Dist. LEXIS 10732, at *8-*9 (S.D.N.Y. June 17, 2002) (awarding 30% fee); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33-1/3% fee); *In re Oxford Health Plans, Inc., Sec. Litig.*, No. MDL 1222(CLB), 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% fee); *In re Am. Express Fin. Advisors Sec. Litig.*, No. 04 Civ. 1773 (DAB), slip op. at 8 (S.D.N.Y. July 18,

2007) (awarding 27% fee), Joint Decl., Ex. 7; *Kurzweil v. Philip Morris Cos., Inc.*, No. 94 Civ. 2373 (MBM), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999) (awarding 30% fee); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393 (S.D.N.Y. 1999) (awarding 27.5% fee); *In re Prudential Secs. Ltd. P'ships Litig.*, 912 F. Supp. 97 (S.D.N.Y. 1996) (awarding 27% fee).

For the reasons set forth below and in the accompanying declarations, Lead Counsel respectfully submit that in light of the result achieved here in the face of significant risks, the requested 26.5% fee is reasonable.

D. The Requested Attorneys' Fees Are Reasonable Under the Lodestar "Crosscheck"

The Second Circuit also permits courts to utilize a lodestar "crosscheck" to further test the reasonableness of a percentage-based fee. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours reasonably expended on the litigation by each particular attorney or paraprofessional by their current hourly rate,[5] and totaling the amounts for all timekeepers. Additionally, "[u]nder the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger*, 209 F.3d at 47); *Savoie*, 166 F.3d at 460.

In this entirely contingent action, as of April 11, 2012, Lead Counsel collectively spent 21,076.90 hours, representing a lodestar of $8,765,088.75, in investigating, prosecuting and

---

[5] Although case law supports the use of current hourly rates (*see, e.g.*, *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989); *In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *9 (S.D.N.Y. Nov. 7, 2007); *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989), this fee application is based on 2011 rates.

ultimately settling these claims.[6] All time spent litigating this matter was reasonably necessary and appropriate, and the results achieved further confirm that the time spent on the case was entirely proportionate to the amounts at stake. Based on a 26.5% fee ($8,612,500.00), Lead Counsel's aggregate lodestar yields a "crosscheck" negative multiplier of .98.

In complex contingent class action litigation, fees representing positive lodestar multipliers significantly greater than the negative multiplier in this case have been frequently awarded in this Circuit and throughout the nation. *See Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to a 4.65 multiplier as "well within the range awarded by courts in this Circuit and courts throughout the country"). Here, whether calculated as a percentage of the Settlement Amount or in relation to Lead Counsel's lodestar, Lead Counsel's requested fee award of 26.5% falls well within the range of fees awarded in both this Circuit and other circuits in complex class litigation, and is fair and reasonable.

E. The Requested Fee Is Supported by the *Goldberger* Factors

In *Goldberger*, the Second Circuit set forth the following factors to be considered in analyzing fee awards in common fund cases: (1) the time and labor expended by class counsel; (2) the magnitude and complexities of the action; (3) the litigation risks involved; (4) the quality of class counsel's representation; (5) the size of the requested fee in relation to the settlement; and (6) public policy considerations. 209 F.3d at 50. These factors are non-exclusive, and, as noted below, courts in this District and elsewhere have also considered, among other things, the endorsement of a lead plaintiff.

Each of the foregoing factors weighs in favor of approving the requested 26.5% fee.

---

[6] The time expended by the legal professionals and professional support staff who worked on this matter (including their hourly rates and the resulting lodestar) is set forth in the declarations of Lead Counsel, submitted herewith. Joint Decl., Exs. 2 and 3.

1. The Fee Request Is Supported by the Substantial Time and Labor Expended by Lead Counsel

Lead Counsel committed substantial time and resources to achieve the significant recovery on this case. As noted above and in the Joint Declaration, Lead Counsel spent more than 21,000 hours prosecuting this Litigation. Lead Counsel's effort began with a substantial investigation of the facts underlying the Settlement Class's claims, including interviews with numerous witnesses and an analysis of publicly available information about the Certificates at issue and the underlying mortgage pools. Lead Counsel prepared two detailed consolidated complaints and opposed two rounds of motions to dismiss by Defendants, which required substantial briefing on a number of complex issues. Lead Counsel conducted extensive fact discovery, included preparing numerous document requests, and interrogatories, issuing subpoenas to more than 40 non-parties, including custodial banks, due diligence firms, originating lenders, loan servicers, and insurers. Lead Counsel dedicated a team of lawyers to review the several million pages of documents produced by Defendants and non-parties. Lead Counsel also engaged in discovery-related motion practice including filing two motions to compel and opposing three discovery motions by Defendants or third parties. Lead Counsel also consulted extensively with experts in mortgage-backed securities, loan underwriting, statistics, damages, and valuation. Lead Counsel litigated the class certification motion, which required deposing Defendants' expert, and preparing for and defending the depositions of Lead Plaintiffs' expert, Lead Plaintiffs and their investment advisors. Finally, Lead Counsel engaged in a full-day mediation with the Honorable Judge Layn R. Phillips (Ret.), including preparing detailed, comprehensive opening and reply mediation statements, in order to bring the Litigation to a successful resolution. Joint Decl., ¶¶3-4, 52-53, 75-77, 100, 116. The reasonableness of the fee request is supported by the substantial amount of time and resources dedicated to the Litigation by Lead Counsel.

2. The Magnitude and Complexity of the Litigation Support the Requested Fee

Courts have long recognized that securities class actions are notoriously complex and difficult to prove. *See, e.g., Mathes v. Roberts*, 85 F.R.D. 710, 713-14 (S.D.N.Y. 1980); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825(NGG)(RER), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the [PSLRA]"); *Fogarazzo*, 2011 WL 671745, at *3 ("securities actions are highly complex"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400(CM)(PED), 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (courts have long recognized that securities class litigation is "'notably difficult and notoriously uncertain'") (citation omitted).

As detailed in the Joint Declaration at paragraphs 86-89, 92-99, virtually every aspect of the Litigation confirmed its complexity. The Litigation alleged factually and legally complex claims focusing on mortgage-backed securities. Lead Plaintiffs alleged that Defendants made false and misleading statements that:

- underwriting standards used by the key originators to originate the loans supporting the Certificates evaluated a prospective borrower's ability to repay the loan;
- property appraisals conformed to the Uniform Standards of Professional Appraisal Practice ("USPAP"), Fannie Mae, or Freddie Mac standards;
- the loans underlying the Certificates had certain, specific, loan-to-value ("LTV") ratios; and
- the Certificates had "investment grade" credit ratings.

Being able to adequately plead and prove these claims was an arduous and complex undertaking, in which Lead Counsel: (a) analyzed thousands of pages of SEC filings, financial data, and other publicly available information relating to the sale, performance, and value of the mortgage-backed securities at issue; (b) identified, located, and interviewed numerous witnesses

with relevant knowledge; (c) engaged in substantial document discovery, including the review and analysis of several million pages of documents produced by Defendants and third parties; and (d) consulted with numerous experts in securitization, mortgage underwriting, statistics, valuation and damages. Joint Decl., ¶3.

Moreover, in Defendants' answer, two motions to dismiss, and opposition to class certification, Defendants raised complex and novel defenses, including, without limitation, standing issues, statute of limitations defenses, the existence of cautionary risk disclosures, the predominance of individual rather than class-wide issues, causation issues, "due diligence" defenses, and damages issues. If the Litigation had not been settled, Lead Counsel would have been faced with additional complex and novel factual and legal issues as Defendants continued to mount a vigorous defense. There would have been further fact discovery, expert discovery, contested motions for summary judgment, and a trial that would require substantial fact and expert testimony, and certain appeals thereafter. Indeed, this mortgage-backed securities action raised numerous novel and complex issues never before litigated. In sum, the "magnitude and complexity" of this Litigation weighs strongly in favor of the requested fee.

3. The Risks of the Litigation Support the Requested Fee

The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable fee award]." *Goldberger*, 209 F.3d at 54 (citation omitted); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) ("Courts have repeatedly recognized that 'the risk of the litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award to plaintiffs' counsel in class actions."). Lead Counsel confronted and overcame a host of significant risks in reaching the Settlement.

There were substantial risks here with respect to Lead Plaintiffs' ability to sustain the action and prove that Defendants made material misstatements or omissions. Many of the legal and factual issues regarding mortgage-backed securities were novel and for which there was no or minimal controlling authority, and therefore presented substantial risks for Lead Counsel in proving the asserted claims. Joint Decl., ¶¶8-99. For example, in other cases alleging false statements in connection with the sale of mortgage-backed securities, defendants had obtained dismissal of the claims with prejudice. *See Plumbers' Union Local No. 12 Pension Fund v. Normura Asset Acceptance Corp.*, 658 F. Supp. 2d 299 (D. Mass. 2009), *aff'd in part and vacated in part*, 632 F.3d 762 (1st Cir. 2011); *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, 743 F. Supp. 2d 288 (S.D.N.Y. 2010); *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, No. 3:08-CV-0261-L, 2008 WL 4449508 (N.D. Tex. Sept. 30, 2008), *aff'd*, 594 F.3d 383 (5th Cir. 2010); *Boilermakers Nat'l Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates, Series AR1*, 748 F. Supp. 2d 1246 (W.D. Wash. 2010); *N.J. Carpenters Health Fund v. NovaStar Mortg., Inc.*, No. 08 Civ. 5310 (DAB), 2011 WL 1338195 (S.D.N.Y. Mar. 31 2011).

Courts had also narrowed the scope of other mortgage-backed securities cases by limiting standing to sue to specific tranches in which the named plaintiffs purchased. *See, e.g.*, *Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I*, No. 08 CV 1713 (ERK)(WDW), 2011 WL 6182121, at *7 (E.D.N.Y. Dec. 13, 2011) (petition for interlocutory appeal pending); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-0302 MRP (MANx), 2011 WL 4389689, at *2 (C.D. Cal. May 5, 2011). Defendants had also successfully opposed class certification. *See N.J. Carpenters Health Fund & Residential Capital, LLC*, 272 F.R.D. 160, 168-70 (S.D.N.Y. 2011); *aff'd sub nom. N.J. Carpenters Health Fund v. Rali Series 2006-QO1*, 2012 U.S. App. LEXIS 8675 (2d Cir. Apr. 30, 2012) (denying class certification on the

grounds that individual questions of investors' knowledge predominated over common issues). The risks faced by Lead Counsel in this Litigation were substantial.

In evaluating litigation risk like that faced by Lead Counsel here, the Third Circuit Task Force on *Selection of Class Counsel*, 208 F.R.D. 340 , 343 (Jan. 15, 2002), specifically recognized that: "The fact that there will be no payment if there is no settlement or trial victory means that there is greater risk for plaintiffs' counsel in these class action cases than in cases in which an hourly rate or flat fee is guaranteed. The quid pro quo for the risk, and for the delay in receiving any compensation in the best of circumstances, is some kind of risk premium if the case is successful." *See also Flag Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

The risk of no recovery in complex cases of this type is real, and is heightened when plaintiffs' counsel press to achieve the very best result for those they represent. Indeed, even if Lead Plaintiffs here had successfully certified a litigation class, defeated Defendants' anticipated summary judgment motions and prevailed at trial on both liability and damages, no judgment would have been secure until after the rulings on the inevitable post-judgment motions and appeals became final – a process that would likely take years. Lead Counsel know from experience that despite the most vigorous and skillful efforts, a firm's success in contingent litigation, such as this, is never assured, and there are many class actions in which plaintiffs' counsel expended tens of thousands of hours and received ***nothing*** for their efforts. Indeed, even judgments initially affirmed on appeal by an appellate panel are no assurance of a recovery. *See*, *e.g.*, *Backman v. Polaroid Corp.*, 910 F.2d 10

(1st Cir. 1990) (after 11 years of litigation, and following a jury verdict for plaintiffs and an affirmance by a First Circuit panel, plaintiffs' claims were dismissed by an *en banc* decision and plaintiffs recovered nothing).

Similarly, even the most promising cases can be eviscerated by a sudden change in the law after years of litigation. *See*, *e.g.*, *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469 (S.D.N.Y. 2010) (after completion of extensive foreign discovery, 95% of plaintiff class's damages were eliminated by the Supreme Court's reversal of 40 years of unbroken circuit court precedent in *Morrison v. Nat'l Austl. Bank Ltd.*, ___ U.S. ___, 130 S. Ct. 2869 (2010)). Other significant cases have been lost after the investment of tens of thousands of hours of attorney time and millions of dollars on expert and other litigation costs at summary judgment or after trial.[7]

Unlike counsel for the Defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel have not been compensated for any of their time (over 21,000 hours) with a lodestar value of over $8.76 million, or compensated for any of their more than $789,000.00 in litigation expenses incurred over the almost four years since the Litigation was commenced. Moreover, Lead Counsel would not have been compensated for their time or expenses at all had they been unsuccessful in this Litigation. Because the fee to be awarded in this

---

[7] For illustrative examples, *see*, *e.g.*, *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversal of jury verdict of $81 million against accounting firm after a 19-day trial); *Bentley v. Legent Corp.*, 849 F. Supp. 429 (E.D. Va. 1994) (directed verdict after plaintiffs' presentation of its case to the jury), *aff'd sub nom. Herman v. Legent Corp.*, 50 F.3d 6 (4th Cir. 1995); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (directed verdict for defendants after five years of litigation;); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict following two decades of litigation); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW(EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict after four weeks of trial).

matter is entirely contingent, the only certainties from the outset were that there would be no fee without a successful result, and that a successful result, if any, could be achieved only after lengthy and difficult effort. Lead Counsel therefore respectfully submit that the fully contingent nature of their retention in this high-risk action weighs strongly in favor of the requested fee.

4. The Quality of Lead Counsel's Representation Supports the Requested Fee

The reasonableness of the requested fee is further supported by the quality of representation provided by Lead Counsel. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Lead Counsel respectfully submit that the $32,500,000 result achieved in face of the novelty and complexity of the Litigation, and the real risk that the case could be dismissed and/or the class not certified, evidences the quality of Lead Counsel's representation.

The Court may, of course, also take into account its own observations of the quality of Lead Counsel's representation during the course of this Litigation. The Court has reviewed *inter alia* the Complaint, Lead Counsel's briefs in opposition to Defendants' motions to dismiss, discovery motions (including motions to compel), class certification briefs, and the papers submitted to the Court in connection with both preliminary and final approval of the Settlement. Joint Decl., ¶¶20-48. Although this work represents only a small fraction of the total work that Lead Counsel have performed in the course of litigating this case, it is respectfully submitted that the quality of that work is reflective of the quality, thoroughness and professionalism of the effort that Lead Counsel has devoted to all aspects of this Litigation on behalf of the Lead Plaintiffs and the Members of the Settlement Class.

The reputation, skill and experience of Lead Counsel in the field of securities class litigation further support the reasonableness of the requested fee. Both Robbins Geller Rudman & Dowd LLP

and Labaton Sucharow LLP are highly experienced in prosecuting securities class actions, and worked diligently and efficiently to prosecute the Litigation. Lead Counsel's experience and track record in securities class action litigation is summarized in the respective firm resumes attached as Exhibits 2 and 3 to the Joint Declaration. The firms are consistently ranked among the top plaintiffs firms in the country. Further, Lead Counsel have taken complex securities fraud class action cases to trial, and each is among the few firms to have done so. Lead Counsel respectfully submit that their willingness and ability to litigate cases through trial added critical leverage in the settlement negotiations.

The quality of the work performed by Lead Counsel in obtaining the Settlement should also be evaluated in light of the quality of the opposition. *See, e.g.*, *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsel's work.") (citation omitted). Here, Defendants were represented by one of the country's most prestigious law firms, Latham & Watkins LLP, which vigorously defended the Litigation throughout. That Lead Counsel were able to negotiate this recovery in the face of such formidable (and well-financed) opposition is a testament to the skill and dedication that Lead Counsel brought to every phase of this Litigation.

In sum, all of the customary metrics indicative of exceptional "quality of representation" weigh in favor of the requested fee.

5. The Requested Fee Is Fair and Reasonable in Relation to the Size of the Recoveries and Comparable Fee Awards

As discussed above, the requested 26.5% fee falls in the "range of reasonableness" based on fees awarded by courts in the Second Circuit in other securities cases. Moreover, a recent study

shows that between 1996 and June 2011, the median plaintiffs' attorneys' fees for settlements between $25 and $99.9 million was 27% of the settlement. *See* Dr. Jordan Milev, Robert Patton, Svetlana Starykh, and Dr. John Montgomery, *Recent Trends in Securities Class Action Litigation: 2011 Year-End Review*, at 22 (NERA Dec. 14, 2011) [http://www.nera.com/67_7557.htm]. This study further confirms that the requested 26.5% fee here is justified in relation to the size of the recovery.

6. Important Public Policy Considerations Further Support the Requested Fee

Finally, although it is a factor that is too often given only cursory attention, public policy considerations constitute a final but nonetheless very significant factor to consider in evaluating a fee request. *See Goldberger*, 209 F.3d at 50; *Flag Telecom*, 2010 WL 4537550, at *29; *see also WorldCom*, 388 F. Supp. 2d at 359 ("to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives"); *In re Priceline.com, Inc. Sec. Litig.*, No. 3:00-CV-1884 (AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (fee awards in complex securities cases "help[ ] to perpetuate the availability of skilled counsel for future cases of this nature"); *Hicks v. Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("'To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding'") (citation omitted); *Maley*, 186 F. Supp. 2d at 369 ("courts recognize that such awards serve the dual purposes of encouraging representatives to seek redress for injuries caused to public investors and discouraging future misconduct of a similar nature").

For decades the Supreme Court has consistently recognized that the public has a particularly strong interest in incentivizing top-quality plaintiffs' counsel to pursue private actions under the federal securities laws to protect investors, to deter violations, and to help maintain the integrity of

the nation's securities markets. Justice Ginsburg delivered the opinion of the Supreme Court: "This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).[8] Indeed, as Congress recognized in passing the PSLRA in 1995:

> Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely on government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs. This legislation seeks to return the securities litigation system to that high standard.

See H.R. Conf. Rep. No. 104-369, at 31, 1995 WL 709276, at 730 (1995) ("H.R. Conf. Rep."). If the vitally important public policy of supplementing SEC enforcement through effective private litigation is to be carried out, courts should award fees that appropriately reward plaintiffs' counsel for obtaining excellent results in prosecuting securities class actions. Public policy considerations provide strong further support for the requested attorneys' fees.

7. Lead Plaintiffs' Endorsement Confers an Initial Presumption of Reasonableness on the Requested Fee

In enacting the PSLRA, Congress sought to encourage institutional investors to play an active role in prosecuting cases under the securities laws, *see In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d 39, 43 (D. Mass. 2001) (citing H.R. Conf. Rep. at 32), and indicated its belief that

---

[8] *See also J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (private securities actions provide "a most effective weapon in the enforcement" of the securities laws and are "a necessary supplement to SEC action"); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in the marketplace" and "[t]hey do so by deterring fraud, in part, through the availability of private securities fraud actions.").

increasing the role of such sophisticated investors would "ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Conf. Rep. at 34. As a result of this improved representation provided by institutional investors such as Pipefitters' Retirement Local 597 Retirement Fund ("Pipefitters") and Massachusetts Bricklayers and Masons Trust Funds ("Massachusetts Bricklayers"), courts can have more confidence in the fairness of fee requests in cases subject to the supervision of institutional lead plaintiffs. *See* Elliott J. Weiss and John S. Beckerman, *Let the Money Do the Monitoring. How Institutional Investors Can Reduce Agency Costs in Securities Class. Actions*, 104 Yale L.J. 2053, 2105 (1995), cited with approval by H.R. Conf. Rep. at 34; *see also Comverse*, 2010 WL 2653354, at *3 (institutional investors have "'a powerful incentive to ensure that any fees resulting from that settlement are reasonable'") (citation omitted).

Both Lead Plaintiffs here are precisely the kind of large and sophisticated institutional investors that Congress wanted to supervise this type of litigation. Based on their thorough participation in and knowledge of the case, and their review of the relevant facts (including the results achieved in the face of significant litigation risks), Lead Plaintiffs have approved and support the requested fee. *See* Driscoll Decl., ¶6; Raso Decl., ¶6.[9]

The endorsement of Lead Counsel's fee request by the institutional Lead Plaintiffs supports approval of the requested fee. *See*, *e.g.*, *Comverse*, 2010 WL 2653354, at *4 ("The fact that this fee

---

[9] Specifically, the Lead Plaintiffs support a fee of $8,618,440.75 which was Lead Counsel's lodestar shortly after the agreement-in-principle to settle was reached. Lead Counsel have elected to apply for a 26.5% fee which results in an amount less than the lodestar at that time. Since then Lead Counsel have devoted substantial additional time to finalizing the settlement documentation and preparing the pleadings in support of final approval such that their lodestar at April 11, 2012 exceeds the requested fee by nearly $150,000.00. Joint Decl., ¶¶118, 119.

request is the product of arm's-length negotiation between Lead Counsel and the lead plaintiff is significant."); *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 262 (E.D. Va. 2009) (the fact that "Lead Plaintiffs, IPERS and MPERS – sophisticated institutional investors – clearly approve of the percentage sought" supported approval of the requested fee).

The reaction of the Settlement Class to date also supports the reasonableness of a requested fee. *See Veeco*, 2007 WL 4115808, at *10; *Maley*, 186 F. Supp. 2d at 374. Commencing on April 12, 2012, the Claims Administrator sent notice of the Settlement to more than 1,650 potential Settlement Class Members, which notified them that Lead Counsel would seek up to 29% of the Settlement Amount and payment of up to $950,000 in litigation expenses. Although the June 20, 2012 deadline for objections to the requested fee has not yet passed, no objections have been received to date.

IV. LEAD COUNSEL'S LITIGATION EXPENSE REQUEST SHOULD BE APPROVED

It is well established that counsel who create a common fund are entitled to an award of the expenses that they advance to a class. *LeBlanc-Sternberg v. Fletcher*, 143 F.3d. 748, 763 (2d Cir. 1998); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011); *Veeco*, 2007 WL 4115808, at *10.

The declarations submitted on behalf of each Lead Counsel summarize the various categories of expenses they incurred in the course of prosecuting the Litigation. *See* Joint Decl., Exs. 2-3. These expenses include the costs of experts and consultants, investigators, online legal and factual research, developing and maintaining the electronic discovery platform that counsel used to search, review and analyze documents produced by Defendants and third parties, court fees, travel expenses, copying costs, facsimile charges, court reporting services, postage and delivery expenses, and Judge Phillips' mediation fees. Lead Counsel respectfully submit that the $789,204.87 in expenses sought

here were all reasonably and necessarily incurred, and are of the type that is customarily awarded in securities cases. *See*, *e.g.*, *Global Crossing*, 225 F.R.D. at 468.

V. LEAD PLAINTIFFS SHOULD RECEIVE REIMBURSEMENT FOR THEIR EXPENSES

The PSLRA provides for reimbursement of expenses to representative plaintiffs in securities actions:

> Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.

15 U.S.C. §77z-1(a)(4). Courts have routinely granted reimbursements of time and expenses to representative parties reflecting the services undertaken for the benefit of the class. *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005); *Hicks*, 2005 WL 2757792, at *10 ("Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.").

Lead Plaintiff Pipefitters seeks reimbursement for fees and expenses in the amount of $23,387.58, which includes the cost of the time that Pipefitters devoted to supervising and participating in the Litigation, and attorneys' fees incurred in consulting with Pipefitters' outside fund counsel in connection with the Litigation. Peter A. Driscoll, the Administrator for Pipefitters, oversaw the efforts to compile and produce responsive documents, reviewed the responses to interrogatory requests, met with Lead Counsel numerous times throughout the course of the Litigation, traveled to New York to prepare for and be deposed by Defendants' counsel, analyzed and responded to Defendants' offers of settlement to Pipefitters and traveled to California to participate in the mediation session. Mr. Driscoll dedicated 60 hours to this Litigation on behalf of

Pipefitters, which reflected time that he did not spend conducting Pipefitters' usual business. Mr. Driscoll's customary hourly rate for work performed for various pension funds for which he provides services is $185.00 per hour. Thus, the total cost of his time is $11,100.00. Driscoll Decl., ¶8.

It is also Pipefitters' practice, where Pipefitters is acting in a representative capacity, to consult with outside fund counsel (counsel in addition to Lead Counsel) in connection with the litigation. In connection with this Litigation, Pipefitters consulted with its outside fund counsel, seeking their advice, services and analysis regarding the merits of the case, its decision to participate as a lead plaintiff, its review of significant pleadings and motions, its responses to discovery, Defendants' offers of judgment, deposition preparation, its review of major events in the case reported by Lead Counsel, settlement negotiations, and the mediation that led to the settlement of this Litigation. In connection with this Litigation, outside fund counsel billed Pipefitters by the hour, and Pipefitters paid $12,287.58 in legal expenses. Driscoll Decl., ¶9.

Lead Plaintiff Massachusetts Bricklayers also seeks reimbursement for the expenses it incurred in connection with its representation of the Settlement Class. Such costs and expenses total $9,770.00, consisting of the cost of the time that Massachusetts Bricklayers devoted to supervising and participating in the Litigation (approximately 104 hours at rates of between $45 per hour and $135 per hour).

Greg Sarno, the Executive Director of Massachusetts Bricklayers, was the primary point of contact between Massachusetts Bricklayers and Lead Counsel. Mr. Sarno oversaw the efforts to compile and produce responsive documents, respond to interrogatory requests, met on numerous occasions with Lead Counsel in the course of the Litigation, traveled to New York to prepare for and be deposed by Defendants' counsel, and traveled to California and participated in the settlement

negotiations that occurred at the mediation session. In total, Mr. Sarno dedicated approximately 78 hours to this Litigation on behalf of Massachusetts Bricklayers. This was time that he did not spend conducting Massachusetts Bricklayers' usual business. Mr. Sarno's effective hourly rate was $95 per hour. The total cost of his time is $7,410. Raso Decl., ¶8.

Charles Raso, Secretary-Treasurer of Massachusetts Bricklayers, spent approximately 7 hours overseeing Mr. Sarno and interacting with counsel. Mr. Raso was heavily involved in analyzing and responding to Defendants' offers of judgment directed to Massachusetts Bricklayers. Mr. Raso's effective hourly rate is $135 per hour. The total cost of his time is $945. Additionally, two members of Massachusetts Bricklayers' staff worked on compiling, copying and producing documents in response to Defendants' requests, Ms. Damigella and Charles Raso II. Ms. Damigella spent approximately 3 hours at a rate of $45 per hour for a total cost of $135 and Mr. Raso II spent approximately 16 hours at a rate of $80 per hour for a total cost of $1,280. Raso Decl., ¶¶9, 10.

Lead Plaintiffs' efforts are precisely the types of activities found by courts to support reimbursement to representative plaintiffs. *See*, *e.g.*, *In re Am. Int'l Group, Inc. Sec. Litig.*, No. 04 Civ. 8141 (DAB), 2010 WL 5060697, at *3 (S.D.N.Y. Dec. 2, 2010) (granting PSLRA award of $30,000 to institutional lead plaintiffs "to compensate them for the time and effort they devoted on behalf of a class"); *Pub. Emp. Ret. Sys. of Miss., et al. v. Merrill Lynch & Co., Inc., et al.*, No. 08-cv-10841-JSR-JLC, slip op. at 4 (S.D.N.Y. May 8, 2012) (approving award of $30,380 to lead plaintiff for "reasonable costs and expenses directly related to its representation of the . . . [c]lass"), Joint Decl., Ex. 7. Accordingly, Lead Counsel respectfully request a total award of $33,157.58 for the expenses of the two Lead Plaintiffs on behalf of the Settlement Class.

VI. CONCLUSION

The total recovery of $32.5 million under the proposed Settlement represents an excellent result achieved in a high risk case in the face of determined adverse parties. Accordingly, for all of the reasons set forth herein and in the Joint Declaration, Lead Counsel respectfully submit that the requested fee is fair and reasonable and request that the Court award attorneys' fees equal to 26.5% of the Settlement Amount, and their litigation expenses in the amount of $789,204.87, together with interest thereon at the same rate as earned on the Settlement Amount until paid, and expenses of $33,157.58 to the Lead Plaintiffs.

DATED: June 1, 2012

Respectfully submitted,

LABATON SUCHAROW LLP
CHRISTOPHER J. KELLER
JONATHAN GARDNER

s/ JONATHAN GARDNER
JONATHAN GARDNER

140 Broadway, 34th Floor
New York, NY 10005
Telephone: 212/907-0700
212/818-0477 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
srudman@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
ARTHUR C. LEAHY
KEITH F. PARK
JONAH H. GOLDSTEIN
RYAN A. LLORENS
NATHAN R. LINDELL
IVY T. NGO
L. DANA MARTINDALE
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
artl@rgrdlaw.com
keithp@rgrdlaw.com
jonahg@rgrdlaw.com
ryanl@rgrdlaw.com
ingo@rgrdlaw.com
dmartindale@rgrdlaw.com

Co-Lead Counsel for Plaintiffs