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 PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

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Pursuant to Rules 23(b)(3) and 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs, Massachusetts Bricklayers and Mason Trust Funds and the Pipefitters' Retirement Fund Local 597 ("Lead Plaintiffs"), by and through their counsel ("Lead Counsel"), respectfully move this Court for an order approving the proposed settlement of the above-captioned class action (the "Litigation") with the Defendants,[1] and approving the proposed Plan of Allocation of settlement proceeds, each of which this Court preliminarily approved by its Order Preliminarily Approving Settlement and Providing for Notice, entered April 5, 2012 (the "Preliminary Approval Order").

I. PRELIMINARY STATEMENT

Under the terms of the proposed settlement (the "Settlement"), as set forth in the Stipulation and Agreement of Settlement dated as of March 15, 2012 (the "Stipulation"),[2] the Defendants have caused to be paid $32,500,000 in cash into an escrow account maintained on behalf of the Settlement Class (the "Settlement Fund"), in exchange for the dismissal of all claims brought in this Litigation and a release of claims. *See* 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."), submitted herewith at ¶¶3-4. Lead Counsel respectfully submits that this Settlement represents an excellent recovery for the Settlement Class, particularly when viewed in light of the considerable expense, delay, and risks posed by continued litigation. Those risks include

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[1] The Defendants are Deutsche Alt-A Securities, Inc. ("Deutsche-Alt"), Deutsche Bank Securities, Inc. ("DBSI"), DB Structured Products, Inc. ("DBSP"), Anilesh Ahuja ("Ahuja"), Jeffrey Lehocky ("Lehocky"), Richard W. Ferguson ("Ferguson"), Joseph J. Rice ("Rice"), and Richard D'Albert ("D'Albert"). Ahuja, Lehocky, Ferguson, Rice, and D'Albert are referred to collectively as the "Individual Defendants."

[2] All capitalized terms that are not defined herein are defined in the Stipulation. ECF 137-2.

successfully certifying the class, prevailing at summary judgment and at trial (including establishing liability and damages), and the inevitable post-trial appeals.

In addition to the complexities and litigation risks inherent in any securities class action, given that few class actions had previously been brought on behalf of purchasers of mortgage-backed securities ("MBS"), many of the legal and factual issues in this case were novel issues of first impression for which there was no or minimal controlling authority. This further compounded the risks associated with continued litigation, trial, and appellate proceedings. As discussed below and in the Joint Declaration, the significant risks involved in taking the Litigation further, when measured against the immediate benefit of the Settlement, justify the Court's final approval of it.

On April 5, 2012, the Court entered its Preliminary Approval Order (ECF 139), which directed that a hearing be held on July 11, 2012, to determine the fairness, reasonableness, and adequacy of the Settlement (the "Final Approval Hearing"). Pursuant to the Preliminary Approval Order, the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses (the "Notice") was mailed to over 1,650 potential Settlement Class Members commencing on April 12, 2012.[3] Also in accordance with the Preliminary Approval Order, the Stipulation and its Exhibits, the Notice, and Proof of Claim and Release form were posted on the Claims Administrator's website, and a Summary Notice was published in the national edition of *Investor's Business Daily* and transmitted over *PR Newswire* on April 24, 2012. *Id.*, ¶¶11-12.

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[3] *See* paragraphs 3-9 to the 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."), attached as Exhibit 1 to the Joint Declaration.

The Notice, attached to the Sylvester Declaration as Exhibit A, contained a description of the nature and procedural history of the Litigation, as well as the material terms of the Settlement, including: (i) Lead Plaintiffs' estimate of the per share recovery; (ii) the manner in which the Net Settlement Fund (as defined below) will be allocated among participating Settlement Class Members; (iii) a description of the claims that will be released in the Settlement; (iv) the right and mechanism for Settlement Class Members to opt-out or exclude themselves from the Settlement Class; and (v) the right and mechanism for Settlement Class Members to object to the Settlement.

The reaction of Settlement Class Members to the Settlement, to date, confirms the wisdom of Lead Plaintiffs' decision to resolve the Litigation with Defendants in exchange for the payment of the Settlement Amount. While the deadline for the submission of objections or requests for exclusion has yet to pass, to date no objections have been filed concerning the Settlement, the Plan of Allocation, or request for an award of attorneys' fees and expenses. This supports the inference that the Settlement Class agrees that the Settlement and Plan of Allocation are fair, reasonable, and adequate.

In light of Lead Counsel's informed assessment of the strengths and weaknesses of the claims and defenses asserted, the absence of opposition to the Settlement, the considerable risks and delays associated with continued litigation and trial, and the significant recovery, Lead Plaintiffs and Lead Counsel believe that the Settlement is eminently fair, reasonable, and adequate and represents an excellent result for the Settlement Class. Accordingly, Lead Plaintiffs and Lead Counsel respectfully request that the Court grant final approval of this Settlement. Moreover, the Plan of Allocation, which was developed with the assistance of Lead Plaintiffs' MBS valuation and damages consultant, is fair and reasonable and therefore should also be approved by the Court.

II. HISTORY AND BACKGROUND OF THE LITIGATION

The Court is respectfully referred to the accompanying Joint Declaration for a fuller discussion of, *inter alia*, the factual background, procedural history of the Litigation, the litigation efforts of Lead Counsel, a discussion of the negotiations leading to this Settlement, and the reasons why the Settlement and Plan of Allocation are fair and reasonable.

III. THE TERMS OF THE SETTLEMENT

The Settlement Amount consists of $32,500,000 in cash, which has been placed into an interest-bearing segregated account for the benefit of the Settlement Class. The Settlement Fund will be used for the payment of taxes, notice and administrative costs, and for attorneys' fees and expenses. The remainder will be the "Net Settlement Fund." The Net Settlement Fund will be distributed to Settlement Class Members who timely submit valid Proof of Claim and Release forms ("Proofs of Claim") to the Claims Administrator ("Authorized Claimants"). Each Authorized Claimant will be allocated a percentage of the Net Settlement Fund based upon the relationship that each Authorized Claimant's claim bears to the total of all Authorized Claimants' claims, as explained in the Notice. *See* Sylvester Decl., Ex. A, at pp.5-9.

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

A. The Law Favors and Encourages Settlements

Rule 23(e) requires that the settlement of a class action be approved by the court. The court may approve a settlement that is binding on the class only if it determines that the settlement is "'fair, adequate, and reasonable.'" *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (citation omitted); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895(DAB), 2011 WL 1899715, at *3 (S.D.N.Y. May 13, 2011). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v.*

VISA U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005). While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, a general policy favoring settlement exists, especially with respect to class actions. *In re Ashanti Goldfields Sec. Litig.*, No. CV-00-717 (DGT), 2005 U.S. Dist. LEXIS 28431, at *3-*4 (E.D.N.Y. Nov. 15, 2005); *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 U.S. Dist. LEXIS 9144, at *13-*14 (S.D.N.Y. Jan. 31, 2007) (same). *See also Giant Interactive*, 279 F.R.D. at 159-60 ("'Settlement approval is within the Court's discretion, which "should be exercised in light of the general judicial policy favoring settlement."'") (citations omitted); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173 (S.D.N.Y. 2000) ("the law favors settlements of disputed claims, particularly in the context of complex class actions"), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). Moreover, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006); *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.").

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165(CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). As stated by the court in *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972),

> the role of a court in passing upon the propriety of the settlement of a derivative or other class action is a delicate one. . . . [W]e recognized that since "'the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with

> wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial.'"

Id. at 691-92 (citation omitted).

B. The Settlement Is Procedurally Fair

A strong initial presumption of fairness attaches to the proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *Luxottica Grp.*, 233 F.R.D. at 315, *see also In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528(SAS), 2011 WL 6825235, at *1 (S.D.N.Y. Dec. 28, 2011); *In re Canadian Superior Sec. Litig.*, No. 09 Civ. 10087(SAS), 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011). A court may find the negotiating process is fair where, as here, "the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability . . . necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted).

This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations with the assistance of a highly experienced mediator. Joint Decl., ¶¶75-79, 100-103. "So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997). In addition, no question exists that Lead Counsel was fully informed of the merits and weaknesses of the case by the time the Settlement was reached in March 2012. Lead Counsel had conducted an extensive factual investigation of Lead Plaintiffs' claims, including significant document discovery from Defendants and third-parties and the retention of and consultation with experts. *See* Joint Decl., ¶¶50-73.

Moreover, the Settling Parties took part in a full-day mediation in front of former United States District Judge Layn R. Phillips (Ret.), a highly respected and experienced mediator. The active involvement of an experienced and independent mediator like Judge Phillips in the negotiation of the Settlement is strong evidence of the absence of any collusion and further supports the presumption of fairness. *See D'Amato*, 236 F.3d at 85 (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *Giant Interactive*, 279 F.R.D. at 160 (speaking of Judge Phillips, the court noted that the settlement negotiations were "facilitated by a respected mediator"). Thus, little doubt exists that this Settlement is entitled to the presumption of procedural fairness dictated by Second Circuit law.

C. The Second Circuit's Standards Governing the Substantive Fairness of Class Action Settlements

The universal standard for determining whether a proposed class settlement is substantively fair is whether the proposed settlement is "'fair, reasonable, and adequate.'" *Luxottica Grp.*, 233 F.R.D. at 310 (citation omitted); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689 (SAS), 2003 U.S. Dist. LEXIS 17090, at *9 (S.D.N.Y. Sept. 29, 2003). In assessing a settlement, the court need not substitute its judgment for that of the parties who negotiated it, nor conduct a mini-trial on the merits of the action. *Weinberger*, 698 F.2d at 74; *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993). Furthermore, "in any case there is a range of reasonableness with respect to a settlement." *Newman*, 464 F.2d at 693. The Settlement proposed in this case clearly falls within the "range of reasonableness."

The Second Circuit has identified nine factors that courts should consider in deciding whether to approve a proposed settlement of a class action:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of

> establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted). All nine factors need not be satisfied. Instead, the court should look at the totality of these factors in light of the specific circumstances involved. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004).

As demonstrated below, the Settlement satisfies each of the relevant criteria set forth above. Indeed, this Settlement represents an excellent recovery for the Settlement Class, and, in the judgment of Lead Counsel, there is serious doubt that a more favorable result was possible if this case were litigated against Defendants through trial and the inevitable post-trial motions and appeals. As such, the Settlement clearly satisfies the relevant factors set forth above, thereby warranting this Court's final approval.

D. The Settlement Satisfies the Second Circuit Criteria for Approval

1. The Complexity, Expense, and Likely Duration of the Litigation Justifies the Settlement

"'[I]n evaluating the settlement of a securities class action, federal courts, including this Court, "have long recognized that such litigation is notably difficult and notoriously uncertain."'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400(CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citations omitted). Here, Lead Plaintiffs litigated this case for almost four years and the securities claims advanced by the Lead Plaintiffs involved numerous complex and novel legal and factual issues dealing with the structure of the MBS at issue. For example, Lead Plaintiffs alleged that Defendants made numerous false and misleading statements, including that underwriting standards used by the key originators to originate the loans supporting the Certificates properly evaluated a prospective borrower's ability to repay the loan; that property appraisals

conformed to the Uniform Standards of Professional Appraisal Practice ("USPAP"), Fannie Mae or Freddie Mac standards; that the loans underlying the Certificates had certain, specific, loan-to-value ("LTV") ratios; and that the Certificates had "investment grade" credit ratings. Joint Decl., ¶¶7-13.

Indeed, the presence of these unique issues would add considerably to the expense and duration of the Litigation. At the time the Settlement was reached, Lead Plaintiffs had reviewed thousands of pages of U.S. Securities and Exchange Commission ("SEC") filings, financial data, and other publicly available information relating to the sale, performance, and value of the MBS; identified, located, and interviewed (or overseen interviews of) over 60 witnesses with relevant knowledge; engaged in extensive written discovery with Defendants and third-parties; filed several discovery related motions; reviewed and analyzed several million pages of documents from Defendants and third-parties; and consulted with several experts in securitizations, mortgage underwriting, statistics, valuation, and damages. Joint Decl., ¶¶50-73. Conducting discovery, by itself, was a complex and lengthy endeavor.

There can be no doubt that because the Litigation is settling with the Defendants at this time, the litigants have been spared the delay and expense of continued litigation. Many hours of the Court's time and resources have also been spared. Moreover, even if the Settlement Class could recover a larger judgment after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Settlement Class any recovery for years, which would further reduce its value. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *16 (S.D.N.Y.

Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

The Settlement, for $32,500,000, at this juncture, results in an immediate and substantial tangible recovery, without the considerable risk, expense, and delay of continued discovery, trial preparation, summary judgment, and trial. Therefore, Lead Counsel submits that the Court should find that this first factor weighs heavily in favor of the proposed Settlement.

2. The Reaction of the Class to the Settlement

The reaction of the class to the settlement is a significant factor in assessing its fairness and adequacy, and "'the absence of objectants may itself be taken as evidencing the fairness of a settlement.'" *PaineWebber*, 171 F.R.D. at 126 (citation omitted); *see also FLAG Telecom*, 2010 WL 4537550, at *16. Over 1,650 Notices describing the nature and procedural history of the Litigation, and the terms of the Settlement, were disseminated to potential Settlement Class Members. Sylvester Decl., ¶9. In addition, a Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on April 24, 2012. *Id.*, ¶12. Although the deadline for objecting or seeking exclusion has not yet passed, to date, no Settlement Class Members have objected to approval of the Settlement or sought exclusion.[4] Thus, the reaction of the Settlement Class underscores the propriety of the Settlement and provides additional support for the approval of the Settlement. Joint Decl., ¶¶82-84. Therefore, Lead Counsel submits that the favorable reaction, to date, of the Settlement Class to the Settlement strongly supports approval.

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[4] If any objections are received, they will be responded to in Lead Plaintiffs' reply submissions, which will be filed by July 3, 2012.

3. The Stage of the Proceedings and Discovery Completed

"There is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. . . . At minimum, the court must possess sufficient information to raise its decision above mere conjecture." 4 Alba Conte, Herbert B. Newberg, *Newberg on Class Actions* §11.45, at 127-28 (4th ed. 2002). As previously noted, "[f]ormal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims." *Global Crossing*, 225 F.R.D. at 458. *See also Austrian & German Bank Holocaust*, 80 F. Supp. 2d at 176 (not necessary for court to find parties engaged in extensive discovery; must merely find that they engaged in sufficient investigation to enable court to make intelligent appraisal of case) (citing *Plummer v. Chem. Bank*, 668 F.2d 654 (2d Cir. 1982)).

The volume and substance of Lead Counsel's knowledge of this case is unquestionably adequate to support the Settlement. Lead Counsel conducted an extensive investigation and informal discovery relating to the Litigation, including the: (i) review and analysis of filings made by, and/or concerning, Defendants with the SEC; (ii) review and analysis of the loan pools comprising the trusts at issue, and the underlying mortgages; (iii) review and analysis of wire and press releases, public statements, news articles, and other publications disseminated by, and/or concerning, Defendants; (iv) review and analysis of governmental reports and investigations about the mortgage and securitization markets; and (v) interviews of at least 63 potential witnesses. *See* Joint Decl., ¶¶50-52.

Following denial of Defendants' second motion to dismiss, Lead Plaintiffs propounded document requests and interrogatories on Defendants, and served subpoenas on over 40 third-parties

with relevant information concerning Defendants' activities during the Relevant Time Period. In response to these requests, Defendants and third-parties produced nearly 5 million pages of documents, several million of which were reviewed and analyzed by Lead Counsel and its experts. Joint Decl., ¶¶53, 69.

The documents reviewed by Lead Counsel included a substantial number of documents produced by third-parties, including the Federal Deposit Insurance Corporation in its capacity as receiver ("FDIC Receiver") for key originator IndyMac. Lead Counsel engaged in extensive negotiations regarding the production of documents from the FDIC Receiver and a protective order aimed to protect the confidential nature of such documents. *See* Joint Decl., ¶¶57-62. Further, Lead Counsel was forced to file two motions to compel and opposed three discovery motions filed by Defendants or third-parties. *Id*., ¶¶67-69.

To assist Lead Counsel with its prosecution and analysis of this case, Lead Counsel retained and consulted extensively with experts in mortgage-backed securities, loan underwriting, statistics, damages, and valuation. Lead Plaintiffs utilized the expertise of various experts to file a class certification motion and to write a cogent and persuasive mediation brief and presentation, which set forth Lead Plaintiffs' theory of their case, the facts supporting their position, and a reasonable estimate of the losses suffered by the Settlement Class as a result of Defendants' alleged misconduct.

The extensive investigation and discovery that Lead Counsel conducted, therefore, provided it with a strong basis to assess the strengths and weaknesses of its case, the parties' positions on liability and damages, and to knowledgeably assess a possible settlement. Thus, the Litigation had advanced to a stage where the parties certainly "were able to make an intelligent appraisal of the value of the case." *Giant Interactive*, 279 F.R.D. at 161. *See also In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 333-34 (E.D.N.Y. 2010) ("Extensive discovery ensures that the parties

have had access to sufficient material to evaluate their case and assess the adequacy of the settlement proposal in light of the strengths and weaknesses of their positions."); *Heyer v. N.Y. City Hous. Auth.*, No. 80 Civ. 1196 (RWS), 2006 U.S. Dist. LEXIS 25089, at *9 (S.D.N.Y. Apr. 28, 2006) (although limited discovery was completed before settlement negotiations began, the familiarity of counsel for all parties with the case justifies settlement). Therefore, this Court should find that this factor also supports the Settlement.

4. The Substantial Risks of Establishing Liability and Damages Support Approval of the Settlement

In assessing the Settlement, the Court should balance the benefits afforded the Settlement Class, including the immediacy and certainty of a recovery against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. There were substantial risks here with respect to Lead Plaintiffs' ability to sustain the action, prove that Defendants had made material misstatements or omissions, and establish damages. Many of the legal and factual issues regarding mortgage-backed securities were extremely novel issues of first impression for which there was no or minimal controlling authority, and therefore presented numerous risks for Lead Plaintiffs and the Settlement Class in proving their claims. While Lead Counsel believes that it would have been successful in certifying the Settlement Class, surviving Defendants' motions for summary judgment, and prevailing at trial and on appeal, it recognizes that ultimate success is not assured, and further believes that this substantial Settlement, when viewed in light of the risks of proving liability and damages, is undoubtedly fair, adequate, and reasonable. *See Michael Milken*, 150 F.R.D. at 53 (when evaluating securities class action settlements, courts have long recognized such litigation to be "'notably difficult and notoriously uncertain'") (quoting *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973)); *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("Stockholder litigation is notably difficult and unpredictable.").

To begin, Lead Plaintiffs faced significant risk at class certification. Recent authority in this and other Circuits presented the risk that the Court might not certify a class at all, and if it did, might certify a much smaller one than proposed by limiting the class to the specific tranches within the Certificates in which Lead Plaintiffs purchased. *See N.J. Carpenters Health Fund v. 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-Q01*, No. 11-1683-cv, 2012 U.S. App. LEXIS 8675 (2d Cir. 2012) (denying class certification on the grounds that individual questions of investors' knowledge predominated over common issues). Joint Decl., ¶¶86-91.

Moreover, Lead Plaintiffs faced numerous additional hurdles to establishing liability. To survive summary judgment and succeed at trial, Lead Plaintiffs would need to show that the Offering Documents contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein related to (i) the underwriting of the loans underlying the MBS; (ii) the appraisals and LTV ratios of the loans underlying the MBS; or (iii) the ratings assigned to the MBS.

Defendants maintained throughout the Litigation that the Offering Documents contained no material misrepresentations and that the risk disclosures in the Offering Documents insulated them from liability. Joint Decl., ¶94. Defendants also argued that Lead Plaintiffs' claims were time-barred and sought to present evidence that the facts Lead Plaintiffs alleged to have been misrepresented or omitted in the Offering Documents were known to Certificate investors prior to one year from the date of the first suit. Joint Decl., ¶96. Additionally, Defendants would proffer testimony from multiple experts on structured finance, the mortgage market, mortgage loan underwriting, and damages. Joint Decl., ¶97.

Indeed, as demonstrated by the dismissal of numerous other cases where it was alleged that false or misleading statements in connection with the sale of MBS were made, the risks in this

Litigation were significant. *See Plumbers' Union Local No. 12 Pension Fund v. Nomura 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).

Lead Plaintiffs also faced significant challenges in proving damages. Defendants were expected to advance, primarily through expert testimony, a "negative causation" argument – *i.e.*, that any losses were caused by external factors unrelated to the alleged misrepresentations or omissions, that Defendants would have asserted would dramatically reduce or eliminate recoverable damages. Defendants also would be expected to present testimony that the inherent complexities in MBS valuation precluded Lead Plaintiffs from proving any damages at all, and that such damages, if any, had to be reduced by amounts claimed by plaintiffs in individual actions involving the same Certificates as well as foreign purchasers of those Certificates.

Lead Plaintiffs, on the other hand, would respond with expert testimony that Defendants' attempt to disaggregate the causes for the Certificates' decline in value should fail. Moreover, Lead Plaintiffs would assert that the Certificates could be valued, and that any damage reduction arguments for individual cases or foreign transactions were either overstated or not required. While Lead Plaintiffs were confident in their arguments, they nonetheless recognized the very real risk that the Court or a jury might have accepted some or all of Defendants' arguments, and that uncertainty presented a real risk to recovery. And while Lead Plaintiffs believe they could rebut those

arguments with expert testimony, survive summary judgment, and prevail at trial, battles between experts are notoriously difficult to assess.

In light of all these risks of establishing liability and damages in the Litigation, the proposed Settlement is fair, reasonable, and adequate.

5. The Risks of Maintaining the Class Action Through Trial

If the Litigation were not to settle, even after certification of a litigation class, Defendants would likely continue to present numerous arguments throughout the proceedings against class certification, including that Lead Plaintiffs lacked standing and could not satisfy the numerosity, predominance, and superiority requirements of Rule 23. Joint Decl., ¶¶87-89.

Courts may always exercise their discretion to re-evaluate the appropriateness of class certification at any time. *See Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."); *see also Berger v. Compaq Computer Corp.*, 257 F.3d 475 (5th Cir. 2001) (decertifying class, finding proposed class representatives did not sufficiently remain apprised of status and claims of litigation). The Settlement avoids any uncertainty with respect to this issue.

Lead Plaintiffs would continue to assert strong arguments supporting class status, including relying on two recent District Court rulings from within the Second Circuit that each certified a class of all tranches of securities within the trust at issue. *See Pub. Emps. Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 108 (S.D.N.Y. 2011) and *N.J. Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, No. 08 Civ. 5653(PAC), 2011 U.S. Dist. LEXIS 92597 (S.D.N.Y. Aug. 16, 2011). However, the risk of being able to maintain certification of the class as proposed were real, as courts in similar MBS cases both within this District and Circuit have denied class certification or recently narrowed the scope of the class by limiting them to specific tranches in which the named plaintiffs

purchased. *See, e.g.*, *Plumbers' & Pipefitters' Local #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); *N.J. Carpenters Health Fund*, 272 F.R.D. at 168-70 (denying class certification on the grounds that individual questions of investors' knowledge predominated over common issues). Thus, the risks involved with maintaining class certification were substantial.

6. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted); *Newman*, 464 F.2d at 693 ("[I]n any case there is a range of reasonableness with respect to a settlement."). *See also Indep. Energy*, 2003 U.S. Dist. LEXIS 17090, at *13 (noting few cases tried before a jury result in full amount of damages claimed). In addition, in considering the reasonableness of the Settlement, the Court should consider that the Settlement provides for payment to the Settlement Class now, rather than a speculative payment many years down the road. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, MDL No. 1500, 2006 U.S. Dist. LEXIS 17588, at *44 (S.D.N.Y. Apr. 6, 2006) (where settlement fund is in escrow and earning interest for the class, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery"). Moreover, there are numerous risks involved in litigation - especially litigation which involves the extremely complex issues inherent in securities class actions in general, and these MBS class actions

specifically. In light of the complex legal and factual issues typically present in securities class actions, the unpredictability of a lengthy and complex trial, and the appellate process that would most likely follow, the fairness of a substantial settlement is clearly apparent. *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002).

Further, courts agree that the determination of a "reasonable" settlement "'is not susceptible of a mathematical equation yielding a particularized sum.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted). The fact that a proposed settlement "may only amount to a fraction of the potential recovery" does not necessarily suggest that settlement is inadequate. *Grinnell*, 495 F.2d at 455. Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman*, 464 F.2d at 693; *see FLAG Telecom*, 2010 WL 4537550, at *20. Here, the Settlement of $32,500,000 in cash represents an excellent recovery for the Settlement Class and is well within the range of reasonableness, given the risks of proceeding to trial.

Indeed, based on the total initial face dollar value of the Certificates as stated in the Offering Documents, pursuant to which the Certificates were sold (without subtracting the principal pay-downs received on the Certificates), and assuming claims are submitted for 100% of the eligible Certificates, the estimated average recovery is $12.80 per $1,000 in initial certificate value of the Certificates. This is a very favorable recovery, especially when compared to the estimated recoveries in other recent MBS litigation. For example, on November 14, 2011, the court in the *In re Wells Fargo Mortgage-Backed Certificates Litig.*, No. 09-CV-1376-LHK (PSG), slip op. (N.D. Cal. Nov. 14, 2011), gave final approval of a settlement in a similar MBS action where plaintiffs' estimated recovery was $2.70 per $1,000 in initial certificate value before any award of attorneys' fees or expenses. Likewise, on May 7, 2012, Judge Rakoff gave final approval to a settlement in a MBS case that had proceeded through class certification where plaintiffs' estimated recovery was

$19.05 per $1,000 in initial certificate value before any award of attorneys' fees or expenses in the matter of *Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co., Inc.*, No. 08-cv-10841-JSR-JLC, slip op. (S.D.N.Y. May 7, 2012).[5]

Considering the present and time value of money, the probability of lengthy litigation in the absence of a settlement, the risk that the Settlement Class would not have been able to succeed on liability, and the possibility that damages awarded by a jury could have been lower than those demanded by the Settlement Class, the Settlement is an excellent recovery.

7. The Ability of the Defendants to Withstand a Greater Judgment

The fact that Defendants could withstand a judgment greater than the proposed Settlement does not render the Settlement unreasonable. *See Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 261 (E.D.N.Y. 2009) ("'[t]he fact that a defendant is able to pay more [than] it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate'") (citation omitted); *McBean v. City of New York*, 233 F.R.D. 377, 388 (S.D.N.Y. 2006) ("the ability of defendants to pay more, on its own, does not render the settlement unfair . . . ."); *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *42 ("the mere ability to withstand greater judgment does not suggest that the Settlement is unfair"). Rather, the reasonableness of the proposed Settlement is better analyzed in light of the substantial risks Lead Plaintiffs faced on class certification, proving

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[5] Additionally, a recent study of securities class action settlements by NERA Economic Consulting reported that in 2011 the median settlement amount for securities class actions was $8.7 million and that between 1996 and 2011, since the passage of the PSLRA, median settlement amounts in securities class actions ranged from $3.7 - $11 million. *See* Recent Trends in Securities Class Action Litigation: 2011 Year-End Review, at 18 (NERA Economic Consulting 2011) [http://www.nera.com/67_7557.htm].

liability and damages, and not on whether Defendants could have paid more money to resolve the Litigation.

Accordingly, Lead Counsel submits that this Court should find that the above factors, taken together, weigh strongly in favor of the Settlement and that the Settlement should be approved.

V. FINAL CERTIFICATION OF THE SETTLEMENT CLASS

In presenting the Settlement to the Court for preliminary approval, Lead Plaintiffs requested that the Court preliminarily certify the Settlement Class so that notice of the proposed Settlement could be issued. In its Preliminary Approval Order, this Court did so. Nothing has changed to alter the propriety of the Court's certification and, for all the reasons stated in Lead Plaintiffs' Memorandum of Law in Support of Unopposed Motion for: (I) Preliminary Approval of Settlement, (II) Certification of the Class for Purposes of Settlement, (III) Approval of Notice to the Class, and (IV) Scheduling of a Final Approval Hearing (ECF 137-1) incorporated herein by reference, Lead Plaintiffs now request that the Court grant final certification of the Settlement Class for purposes of carrying out the Settlement pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3), appoint Lead Plaintiffs as Class Representatives, and appoint Lead Counsel as Class Counsel.

VI. THE PLAN OF ALLOCATION OF THE NET SETTLEMENT FUND IS FAIR AND REASONABLE AND SHOULD BE APPROVED BY THE COURT

If the Court approves the proposed Settlement, upon completion of the claims administration process, the Net Settlement Fund will be distributed to Members of the Settlement Class who submit valid claims according to the Plan of Allocation as set forth in the Notice. "[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133; *Luxottica Grp.*, 233 F.R.D. at 316-17. *See also Taft*, 2007 U.S.

Dist. LEXIS 9144, at *26. As with the Settlement, the opinion of experienced and informed counsel carries considerable weight. *Indep. Energy*, 2003 U.S. Dist. LEXIS 17090, at *15.

Here, experienced and informed counsel formulated the Plan of Allocation after extensive discussions with their MBS valuation and damages consultant, which involved careful assessments of the strengths and weaknesses of Lead Plaintiffs' claims, as well as a careful assessment of the most equitable manner in which the Settlement should be allocated to the Settlement Class in light of those strengths and weaknesses.[6] As a result, the Plan of Allocation clearly has a "'reasonable, rational basis'" and should be approved by the Court. *Global Crossing*, 225 F.R.D. at 462 (citation omitted). To date, there have been no objections to the proposed plan by Settlement Class Members.

VII. CONCLUSION

The Settlement reached in this Litigation is an excellent result that provides an immediate and substantial benefit for the Settlement Class. For the foregoing reasons, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement and Plan of Allocation are fair, reasonable, and adequate, and request the Court to grant final approval of the Settlement and Plan of Allocation.

DATED: June 1, 2012

Respectfully submitted,

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[6] An explanation of the Plan of Allocation is set forth in the Joint Declaration. *See* Joint Decl., ¶¶107-114.

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