UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FANNIE MAE 2008 SECURITIES LITIGATION	:	Master File No. 08 Civ. 7831 (PAC)

LEAD COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND PAYMENT OF EXPENSES

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Berman DeValerio and Labaton Sucharow LLP ("Labaton Sucharow"), court-appointed Lead Counsel for the Common Stock Class, and Kaplan Fox & Kilsheimer LLP ("Kaplan Fox"), court-appointed Lead Counsel for the Preferred Stock Class (collectively, "Lead Counsel")[1] respectfully submit this memorandum of law in support of their motion, pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for: (i) an award of attorneys' fees in the amount of 17.65% of the Settlement Fund; (ii) payment of litigation expenses incurred in prosecuting the Action; and (iii) payment of the expenses of Lead Plaintiffs[2], pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").

PRELIMINARY STATEMENT

Lead Counsel have successfully negotiated a settlement of this class action with Defendants Federal National Mortgage Association ("Fannie Mae") and the Federal Housing Finance Agency ("FHFA"), Conservator for Fannie Mae, for a total Settlement Amount of $170,000,000. As set forth in the Stipulation and Notice, the Settlement Amount is being apportioned between the Common Stock Class and the Preferred Stock Class as follows: $123.76 million or 72.8% of the Settlement Amount to the Common Stock Class (the "Common Stock Allocated Amount") and $46 million or 27.2% of the Settlement Amount to the Preferred Stock Class (the "Preferred Stock Allocated Amount").

The proposed Settlement is an excellent result that will bring to a close more than six years of contentious and challenging litigation between Lead Plaintiffs and Defendants – made all the more so by the Second Circuit's recent affirmance of the dismissal of claims against

[1] All capitalized terms not defined herein have the same meanings set forth in the Stipulation and Agreement of Settlement, dated October 24, 2014 (the "Stipulation") (ECF No. 522-1).

[2] Lead Plaintiffs for the Common Stock Class are Massachusetts Pension Reserves Investment Management Board ("PRIM") and the State Boston Retirement Board ("SBRB"). TheLead Plaintiff for the Preferred Stock Class is the Tennessee Consolidated Retirement System ("TCRS").

Fannie Mae's sibling government-sponsored entity Freddie Mac.[3] The Settlement would be among the top 35 post-PSLRA class action securities settlements in cases not involving a restatement of financial statements, according to the ISS Securities Class Action Services' report through the first half of 2014. *See* Ex. 1 at 4, 33.[4] In 2013, the median securities class action settlement was $6.5 million and the average was $71.3 million. *See* Cornerstone Research, *Securities Class Action Settlements—2013 Review and Analysis* (2014), Ex. 2 at 1. Only 8.4% of all securities class actions since 2004 have settled for $100 million or more. *Id.* at 4. And, in fact, the recovery here is greater than the $153 million settlement reached in the $9 billion restatement case against Fannie Mae in *In re Fannie Mae Securities Litigation*, No. 04-cv-01639-RJL (D.D.C.), in 2013.

For their efforts in achieving this result, Lead Counsel seek a fee of 17.65% of the Settlement Fund. Lead Counsel also seek payment of $2,057,321 in litigation expenses incurred in prosecuting this Action, and $113,953.39 (in total) to reimburse Lead Plaintiffs for the time they spent representing the Settlement Classes in the litigation.

The substantial and certain recovery obtained for the Settlement Classes — an all cash recovery of $170 million — was achieved through the skill, experience, and effective advocacy of Lead Counsel. Lead Counsel's efforts to date have been without compensation of any kind

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[3] *See Kuriakose v. Fed. Home Loan Mortg. Corp.*, 897 F. Supp. 2d 168, 173 (S.D.N.Y. 2012), *aff'd sub nom. Cent. States Se. & Sw. Areas Pension Fund v. Fed. Home Loan Mortg. Corp.*, 543 Fed. App'x. 72 (2d Cir. 2013) ("*Freddie Mac*"), discussed below.

[4] Citations to "Ex.___" or "Exhibit" herein refer to exhibits attached to the Joint Declaration of Glen DeValerio, Thomas A. Dubbs, and Frederic S. Fox in Support of (A) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and (B) Lead Counsel's Motion for Attorneys' Fees and Payment of Expenses, dated January 16, 2015 (the "Joint Declaration" or "Joint Decl."). For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. __-___." The first numerical reference refers to the designation of the entire exhibit attached to the Joint Declaration and the second reference refers to the exhibit designation within the exhibit itself.

and the fee has been wholly contingent upon the result achieved.[5]

The attorneys' fee request is fair and reasonable when one considers, among other things, (i) the excellent result achieved; (ii) the amount of work done by Lead Counsel on this case over the past six years; (iii) the risk involved in the litigation; (iv) that Lead Plaintiffs, sophisticated institutional investors, have endorsed the request; and (v) the amount of fees awarded by courts within the Second Circuit and within other circuits in comparable cases.

Lead Counsel respectfully submit that their creative and diligent services contributed significantly to Lead Plaintiffs' ability to secure the Settlement. For the reasons set forth herein and in the Joint Declaration, Lead Counsel respectfully submit that the attorneys' fees and expenses requested are fair and reasonable under the applicable legal standards and in light of the contingency risk undertaken, and they should therefore be awarded by the Court. The expenses requested are reasonable in amount and were necessarily incurred for the successful prosecution of the Action. Finally, the award requested by Lead Plaintiffs reflecting compensation for lost wages and expenses incurred during the prosecution of this Action is reasonable and should be awarded.

ARGUMENT

I. A REASONABLE PERCENTAGE-OF-THE-FUND RECOVERED IS THE APPROPRIATE METHOD FOR AWARDING ATTORNEYS' FEES IN COMMON FUND CASES

Attorneys who achieve a benefit for class members in the form of a "common fund" are entitled to be compensated for their services from that settlement fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 n.1 (1980) ("a litigant or a lawyer who recovers a common fund for

[5] The Joint Declaration and Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, along with the Memorandum in support thereof (the "Settlement Memorandum"), describe the history of the litigation, the claims asserted in the Action, the investigation undertaken, the negotiation and substance of the Settlement, and the substantial risks of the litigation.

the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"). 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). Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature. *See, e.g.*, *Hicks v. Morgan Stanley*, No. 01-cv-10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (Holwell, J.) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.").

The Second Circuit has authorized district courts to employ the percentage-of-the-fund method when awarding fees in common fund cases. *See Goldberger,* 209 F.3d at 47. In expressly approving the percentage method, the Second Circuit recognized that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger,* 209 F.3d at 48, 49; *Savoie v. Merchs. Bank,* 166 F.3d 456, 460 (2d Cir. 1999) (the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"). The trend now within the Second Circuit is to apply the percentage method. *See Aboud v. Charles Schwab & Co*., *Inc*. No. 14 Civ. 271(PAC), 2014 WL 5794655, at *5 (S.D.N.Y. Nov. 4, 2014) (Crotty, J.) (citations omitted). *See also The City of Providence v. Aeropostale, Inc*., No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) (McMahon, J.) ("The trend among district courts in the Second Circuit is to award fees using the percentage method.").

Given the Second Circuit's explicit approval of the percentage method in *Goldberger*, and the trend among the district courts in this Circuit, the Court should award Lead Counsel attorneys' fees based on a percentage of the fund.

II. THE FEE AND EXPENSE REQUEST IS ENDORSED BY LEAD PLAINTIFFS AND CONSISTENT WITH FEES AWARDED IN SIMILAR CASES

A. The Fee and Expense Request Was Negotiated with Lead Plaintiffs and Their Approval Is Entitled to Great Weight

Lead Plaintiffs are sophisticated institutional investors that manage, collectively, billions of dollars in assets for their beneficiaries or investors. *See* Exs. 6 – 8. As set forth in more detail below, each of the Lead Plaintiffs was substantially involved in the prosecution of the Action and had direct involvement from the Action's commencement through settlement. Lead Plaintiffs have evaluated the Fee and Expense Application and believe that it is fair and reasonable and warrants approval by the Court. *See* Exs. 6 ¶¶ 9-12; 7 ¶¶ 7-8; and 8 ¶¶ 9-10. In reaching this conclusion, Lead Plaintiffs considered factors such as the substantial amount of work performed, the size of the recovery obtained, and the considerable risks of litigation. *Id*.

Approval of the fee and expense request by Lead Plaintiffs strongly supports approval of the request. "[P]ublic policy considerations support fee awards where, as here, large public pension funds, serving as lead plaintiffs, conscientiously supervised the work of lead counsel, and gave their endorsement to lead counsel's fee request." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *16 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.); *see also In re WorldCom*, *Inc. Sec. Litig*., 388 F. Supp. 2d 319, 356 (S.D.N.Y. 2005) (Cote, J.) ("When class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight.").

Accordingly, Lead Plaintiffs' endorsement of the fee and expense request supports its approval.

A. The Fee Request Is Consistent with Fees Awarded in Similar Cases

On a percentage basis, the 17.65% award falls within the range of other percentage fee awards within the Second Circuit in comparable securities class action settlements. *See*, *e.g.*, *In re AT&T Wireless Tracking Stock Sec. Litig.*, No. 1:00-cv-08754, slip op. at 1 (S.D.N.Y. Jan. 30, 2007) (Cederbaum, J.) (awarding 21.25% of $150 million settlement) (submitted herewith as part of compendium of unpublished opinions, Ex. 15); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 178 (S.D.N.Y. 2007) (Keenan, J.) (awarding 24% of $133 million settlement)*; In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475 (NRB), 2005 U.S. Dist. LEXIS 45798, at *12 (S.D.N.Y. June 14, 2005) (awarding 28% of $120 million settlement); *In re Comverse Techs. Inc. Sec. Litig.*, No. 06-1825, 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding 25% of $225 million settlement).[6]

An examination of fee decisions in securities class actions with comparable settlements in other federal jurisdictions also shows that an award of 17.65% is within the range of awards. *See, e.g., Alaska Electrical Pension Fund v. Pharmacia Corp.*, No. 03-1519 (AET), slip op. at 2 (D.N.J. Jan. 30, 2013) (awarding 27.5% of $164 million settlement) (Ex. 15); *In re Brocade Sec. Litig.*, No. C 05-02042 CRB, slip op. at 2 (N.D. Cal. Jan. 26, 2009) (awarding 25% of $160,098,500 settlement) (Ex. 15); *In re Bristol-Myers Squibb Sec. Litig.*, No. 00-cv-1990-SRC-JJH, slip op. at 2 (D.N.J. May 11, 2006) (awarding 19.77% of $185 million settlement) (Ex. 15); *In re Broadcom Corp. Sec. Litig.*, No. SACV 01-275 DT (MLGx), slip op. at 8 (C.D. Cal. Sept. 14, 2005) (awarding 24.38% of $150 million settlement) (Ex. 15); *In re CMS Energy Sec. Litig.*,

[6] In *Fire Retirement System of the City of Detroit v. SafeNet, Inc*, No. 06 Civ. 5797 (PAC), slip op at 2 (S.D.N.Y. Dec. 20, 2010) (Crotty, J.), this Court awarded 28.5% of the $25 million securities settlement as attorneys' fees. Ex. 15.

No. 02-cv-72004 (GCS), 2007 U.S. Dist. LEXIS 96786, at *14-15 (E.D. Mich. Sept. 6, 2007) (awarding 22.5% of $200 million settlement); *In re Wash. Mut. Inc. Sec. Litig*., 08-md-1919, slip op. at 2 (W.D. Wa. Nov. 4, 2011) (awarding 21% of $208.5 million settlement) (Ex. 15).

Accordingly, the requested fee is in line with fees regularly approved by courts.

III. THE RELEVANT FACTORS CONFIRM THAT THE REQUESTED FEE IS REASONABLE

The Second Circuit in *Goldberger* explained that whether a court uses the percentage method or the lodestar approach, it should continue to consider the traditional criteria that reflect a reasonable fee in common fund cases, including: (i) the time and labor expended by counsel; (ii) the risks of the litigation; (iii) the magnitude and complexity of the litigation; (iv) the requested fee in relation to the settlement; (v) the quality of representation; and (vi) public policy considerations. *Goldberger*, 209 F.3d at 50. An analysis of these factors demonstrates that the requested fee is fair and reasonable.

A. The Time and Labor Expended by Lead Counsel

Lead Counsel have expended substantial time and effort pursuing the Action on behalf of the Settlement Classes. *See generally* Joint Declaration and Exs. 9-A, 10-A, and 11-A thereto. Since 2008, Lead Counsel have devoted more than 68,000 hours to this Action with a lodestar value of $35,548,004.50. *See* Ex 12 (Summary Lodestar and Expenses Table), Exs. 9-A, 10-A, and 11-A. The Settlement follows more than six years of litigation efforts by Lead Counsel that included, *inter alia*:

- Preparation of the filing of the Joint Consolidated Amended Class Action Complaint after an extensive pre-filing investigation that included, *inter alia,* review and analysis of: (i) filings with the U.S. Securities and Exchange Commission ("SEC"); (ii) research reports by analysts and transcripts of investor conference calls; (iii) publicly available information about Fannie Mae, its securities, and other legal actions/investigations involving Fannie Mae and Freddie Mac; and (iv) documents from the Office of Federal Housing Enterprise Oversight ("OFHEO"). Counsel's investigation also included (i)

identifying 200 potential witnesses and interviewing 87 former employees - a number of whose accounts were included in the complaint as confidential witness accounts; and (ii) consultation with experts. Joint Decl. ¶¶ 30-36;

- Responding to Defendants' complex motions to dismiss (*id.* ¶¶ 37-43, 63-65);
- Research and preparation of a motion for class certification (*id.* ¶¶ 53-58);
- Preparation and the filing of the operative Second Amended Consolidated Class Action Complaint (the "Complaint") against Fannie Mae, FHFA, and the Non-Settling Individual Defendants after an investigation that included review of materials from the SEC's two-year investigation (*id.* ¶¶ 61-62);
- Fact discovery that involved, *inter alia*: (i) receipt, review and/or analysis of more than 75 million pages of documents produced from Defendants and non-parties; and (ii) preparing for and taking 18 depositions (*id.* ¶¶ 66-78, 83-88);
- Class discovery that involved, *inter alia*: (i) responding to Defendants' document requests and subpoenas, which entailed working with Lead Plaintiffs to ensure that all responsive documents were searched and reviewed; and (ii) defending three depositions, including the deposition of one representative of SBRB, one representative of TCRS, and an investment consultant of SBRB and PRIM (*id.* ¶¶ 54-56, 79-82, 87);
- Consultation and extensive work with experts on market efficiency, loss causation, damages, the mortgage industry, and internal controls (*id.* ¶¶ 89-91); and
- Exchange of detailed mediation statements in preparation for mediation sessions, preparation and participation in the mediation sessions, and ultimately negotiation of the terms of the Settlement (*id.* ¶¶ 121-28).

The legal work on this Action will not end with the Court's approval of the proposed Settlement. Additional hours and resources necessarily will be expended shepherding the claims process, responding to inquiries from Settlement Class Members, and moving for a distribution order.

B. The Risks of the Litigation

1. Risks Concerning Liability

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814

(MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (Pollack, J.). Indeed, the "Second Circuit has identified 'the risk of success as perhaps the foremost factor to be considered in determining [a reasonable award of attorneys' fees].'" *Marsh & McLennan*, 2009 WL 5178546, at *18 (citing *Goldberger*, 209 F.3d at 54).

While Lead Plaintiffs remain confident in their ability to prove their claims and to effectively rebut Defendants' defenses, proving liability was far from certain and reaching the stage where a favorable resolution could be achieved required substantial legal work by Lead Counsel. Although the Court sustained Lead Plaintiffs' Exchange Act claims at the motion to dismiss stage, Lead Plaintiffs faced substantial risks if the Action continued. As set forth in the Joint Declaration, Defendants strongly disputed the existence of falsity, materiality, scienter, and loss causation, and have continued to present strong arguments and defenses that would require considerable legal skill to rebut. *See* Joint Decl. ¶¶ 102-08, 163. Defendants likely would have offered plausible non-fraudulent explanations contextualizing their allegedly false statements, supported by experts, testimony from former Fannie Mae employees, and company documents. With this evidence, they likely would have argued, among other things that: (i) Fannie Mae properly disclosed the risk characteristics of its loan portfolio, which allowed investors to determine the percentage of "risky" mortgages with certain FICO scores or LTV ratios and (ii) the Company's disclosures with regard to its subprime loans and the risks associated with them did not change significantly even after FHFA imposed a conservatorship on Fannie Mae. *Id*. ¶¶ 103-05.[7]

[7] Defendants would also likely argue that Fannie Mae's loan portfolio was not unduly risky. *See* Nov. 12, 2014 Preliminary Approval Transcript, 21:20-23, Ex. 3 ("[O]ne of the reasons that [billions of dollars are] flowing into Fannie is because these so-called risky loans that weren't disclosed, they ain't so risky. They're paying off.").

For example, a jury could find that the alleged misstatements were not false or material and were cured beginning on August 16, 2007, when Fannie Mae publicly disclosed additional credit characteristics of its mortgage book of business, with no alleged stock drop. (Such summaries were issued throughout the Class Period.) *See* http://www.fanniemae.com/portal/about-us/investor-relations/quarterly-annual-results.html. If Defendants are able to convince a jury that no new material information relating to the alleged fraud was publicly disclosed after Fannie Mae published its detailed credit characteristics, the jury could have ended the Class Period on August 16, 2007, eliminating all damages. *Id*. ¶¶ 106-07.

Defendants also would argue that Lead Plaintiffs could not establish scienter and that the subprime and Alt-A definitions at issue were created by Fannie Mae employees who were experts in their fields and far removed from the senior officers of the Company. Defendants would also likely argue that the emails from Mudd and Dallavecchia regarding the insufficiency of risk controls are not sufficient to prove scienter by showing that the emails overstated their concerns and that they truly believed that the relevant risk controls were adequate. *Id*. ¶ 108.

Lead Counsel closely analyzed, and would have to continue to piece together, complicated and technical financial evidence to rebut these defenses.

2. Risks Concerning Loss Causation and Damages – Heightened by *Freddie Mac*

Whether Lead Plaintiffs could prove damages was also unsettled and would continue to require a significant effort on the part of Lead Counsel. "Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony." *Aeropostale,* 2014 WL 1883494, at *15.

From the outset of the case, a major risk for Lead Plaintiffs in terms of establishing loss causation was the confounding impact of the financial crisis.[8] However, this risk was significantly heightened in 2013 with the Second Circuit's affirmance of the dismissal of claims against Freddie Mac, for, among other things, failure to adequately allege loss causation. *See Freddie Mac*, 543 Fed. App'x. at 72. As explained by the Second Circuit, "[w]here, as here, the plaintiff's stock purchases and losses coincided with a marketwide phenomenon – the housing bubble burst – the prospect that the plaintiff's loss was caused by the fraud decreases, and therefore the plaintiff must plead facts sufficient to show that its loss was caused by the alleged misstatements as opposed to intervening events." *Id*. at 74. Significantly, the final disclosure that ends the Class Period in the Action as the final materialization of risk – the September 7, 2008 announcement that FHFA was placing Fannie Mae into conservatorship – was in the exact same press release rejected as a corrective disclosure by the District Court and Second Circuit in *Freddie Mac*. *Id*. at 77 ("The fact of the conservatorship was obviously not a corrective disclosure of anything previously concealed."); Joint Decl. ¶¶ 93-101.

Lead Counsel worked diligently with their experts to understand the multi-faceted economic environment surrounding the alleged misstatements and disclosures, and to craft vigorous rebuttals to Defendants' anticipated arguments. However, the damage assessments of the parties' experts would be sure to vary substantially, and expert discovery and trial would become a "battle of experts" requiring significant additional work on the part of Lead Counsel. *See, e.g., In re FLAG Telecom Holdings Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010

[8] For instance, in the Court's September 30, 2010 Order denying the motion to dismiss the Exchange Act claims, the Court expressed skepticism that Lead Plaintiffs would succeed in proving loss causation, noting that a significant portion of plaintiffs' losses were the result of the housing market downturn. Joint Decl. ¶ 98.

WL 4537550, at *28 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) (burden in proving the extent of the class's damages weighed in favor of approving fee request).

3. Risk of Non-Payment

A litigated judgment here, if liability and damages were established on all claims, could theoretically have amounted to billions of dollars. However, from the inception of this case it was clear that there were significant hurdles to being able to enforce a judgment. Joint Decl. ¶ 113-18. The Non-Settling Individual Defendants could not have satisfied even a small part. Moreover, FHFA placed Fannie Mae into conservatorship at the end of the Class Period and Fannie Mae then entered into agreements with the United States Treasury for continued funding. *Id*. At the time of the conservatorship, and for several years thereafter, as Fannie Mae drew more than one hundred billion dollars from Treasury, it appeared highly unlikely that the Company would ever become financially viable again. Thus, when Lead Counsel took on the case there was a significant risk that Fannie Mae would be placed into receivership and that securities litigation claims would never be paid. *See, e.g.*, Fannie Mae, Annual Report (Form 10-K) for the year ended Dec. 31, 2008 at 46 ("We do not know whether we will exist in the same or a similar form or continue to conduct our business as we did before the conservatorship, or whether the conservatorship will end in receivership.").

In addition, after Fannie Mae was placed into conservatorship, FHFA promulgated a regulation, FHFA Rule 1237, 12 C.F.R. § 1237.13, which could enable it to prevent Fannie Mae from ever paying an eventual judgment in this litigation. Joint Decl. ¶ 113. The regulation states that FHFA will not pay a securities claim brought against Fannie Mae, "except to the extent the [FHFA] Director determines is in the interest of the conservatorship." 12 C.F.R. § 1237.13. The plaintiffs in *Fannie I* sought an injunction prohibiting enforcement of the regulation and requesting that it be set aside and motions for summary judgment were filed. *See Ohio Pub.*

Emps. Ret. Sys. v. FHFA, Civil Case No. 11–01543 (D.D.C.) (ECF No. 1); *see also In re Fed. Nat'l Mortgage Ass'n Sec.*, *Derivative, & ERISA Litig*., 4 F. Supp. 3d 94, 99-100 (D.D.C. 2013); Joint Decl. ¶ 114. The impact of the regulation was not determined by the Court in *Fannie I*, given the settlement in that case. Here, after originally notifying the Court that it intended to seek a stay of the Action in light of Rule 1237, FHFA later advised that it would not seek a stay "at the present time." If it did seek a stay or summary judgment on this ground, there was a risk that the regulation could be enforced to bar a recovery. Joint Decl. ¶ 114.

Accordingly, Lead Counsel faced a significant risk that they would not be able to collect on a judgment both at the beginning of the case and even today.

4. The Contingent Nature of Lead Counsel's Representation

Lead Counsel undertook this Action on an entirely contingent fee basis, assuming a substantial risk that the litigation would yield no or potentially little recovery and leave them uncompensated for their significant investment of time and expenses. Courts within the Second Circuit have consistently recognized that this risk is an important factor favoring an award of attorneys' fees. *See, e.g.*, *In re Am. Bank Note Holographics, Inc. Sec. Litig*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (McMahon, J.) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award") (citation omitted); *In re Prudential Sec. Ltd P'ships Litig.*, 985 F. Supp. 410, 417 (S.D.N.Y. 1997) (Pollack, J.) ("Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.").

Unlike counsel for Defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel have not been compensated for any time or expenses since this case began in 2008, and would have received no compensation or reimbursement had this case not been successful. In undertaking their responsibility, Lead

Counsel were obligated to ensure that sufficient attorney and professional resources were dedicated to the prosecution of the Action and that funds were available to compensate staff and to pay for the costs entailed. Indeed, there have been many class actions in which plaintiffs' counsel took on the risk of pursuing claims on a contingent basis, expended thousands of hours and hundreds of thousands of dollars and received nothing for their efforts.[9]

Accordingly, the contingency risk in this case strongly supports the requested attorneys' fee.

C. The Magnitude and Complexity of the Litigation

The complexity of the litigation is another factor examined by courts evaluating the reasonableness of attorneys' fees requested by class counsel. *See Chatelain v. Prudential-Bache Sec. Inc.*, 805 F. Supp. 209, 216 (S.D.N.Y. 1992) (Lowe, J.). The complex and multifaceted subject matter involved in this securities class action supports the fee request. *See Fogarazzo v. Lehman Bros. Inc.*, No. 03 Civ. 5194(SAS), 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) (Scheindlin, J.) ("courts have recognized that, in general, securities actions are highly complex"); *In re Merrill Lynch & Co. Inc., Research Reports Sec. Litig*., No. 02 MDL 1484, 2007 WL 313474, at *14 (S.D.N.Y. Feb. 1, 2007) (Keenan, J.) ("Securities class litigation is notably difficult and notoriously uncertain.").

[9] *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), *aff'd*, *Herman v. Legent Corp*., 50 F.3d 6 (4th Cir. 1995) (directed verdict after plaintiffs' presentation of its case to the jury); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (directed verdict for defendant s 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, 1991 WL 238298, at *1-2 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *In re JDS Uniphase Corp. Sec. Litig*., No. CO2-1486 CW, 2007 WL 4788556 (N.D. Cal.Nov. 27, 2007) (defense verdict after four weeks of trial).

The Action presented serious challenges from the outset and raised a number of complex issues that required extensive efforts by Lead Counsel and consultation with experts. *See generally* Joint Declaration. The extremely complicated subject matter of the Action – Fannie Mae's role in the secondary mortgage market in the years prior to and during the credit crisis – created additional levels of complexity, requiring extensive consultation with experts proficient in accounting, the mortgage industry, market efficiency, loss causation, and damages.

Accordingly, the magnitude of the claims, complexity of the Action, and the difficulty of the legal and factual issues involved support the requested fee.

D. The Quality of Representation

The quality of the representation and the standing of counsel are important factors that support the reasonableness of the requested fee. *See FLAG Telecom,* 2010 WL 4537550, at *28. It took a great deal of skill to achieve a settlement at this level in this particular case. Specifically, this Action required investigation and mastery of nuanced factual circumstances related to Fannie Mae's role in the secondary mortgage market, the ability to develop creative legal theories regarding loss causation and damages, and the skill to respond to a host of legal defenses.

Lead Counsel are among the most experienced and skilled firms in the securities litigation field, and each firm has a long and successful track record in securities cases throughout the country. *See* Joint Decl. ¶¶ 157-160, Exs. 9-A, 10-A, and 11-A. Lead Counsel are firms with highly experienced securities class action litigators and have not only used their knowledge and skills from past cases, but have also developed specific expertise in the unique issues presented here to overcome significant obstacles raised by Defendants. This favorable Settlement is attributable to the diligence, determination, hard work, and reputation of Lead

Counsel who developed, litigated, and successfully negotiated the settlement of this Action, an immediate cash recovery in a very challenging case.

The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work. *See FLAG Telecom*, 2010 WL 4537550, at *28; *Teachers Ret. Sys*., 2004 WL 1087261, at *20. Indeed, the current and former defendants in the Action were represented by firms with well-noted expertise in corporate litigation practices.[10] The highly skilled attorneys representing Defendants zealously fought Lead Plaintiffs' claims at every turn. In response to this formidable opposition, Lead Counsel expended enormous effort to develop Lead Plaintiffs' case so as to resolve the litigation on terms favorable to the Settlement Classes. See also Joint Decl. ¶ 162.

E. Public Policy Considerations

The federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). The Supreme Court has emphasized that private securities actions such as this 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) (internal citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the 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).

Courts in the Second Circuit have held that "[p]ublic policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *FLAG Telecom*, 2010 WL

[10] Among these firms are O'Melveny & Myers LLP, Duane Morris LLP, Dechert LLP, and DLA Piper.

4537550, at *29. Specifically, "[i]n order 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 WorldCom,* 388 F. Supp. 2d at 359. The significant expense combined with the high degree of uncertainty of ultimate success means that contingent fees are virtually the only means of recovery in such cases. Indeed, one court in this district recently noted the importance of "private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis" in *Shapiro v. J.P. Morgan Chase & Co.*:

> [C]lass actions serve as private enforcement tools when . . . regulatory entities fail to adequately protect investors . . . plaintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences . . . awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

No. 11-Civ. 8331, 2014 WL 1224666, at *24 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.) (citing *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515-16 (S.D.N.Y. 2009) (Scheindlin, J.)); *see also Chatelain*, 805 F. Supp. at 216 ("an adequate award furthers the public policy of encouraging private lawsuits in pursuance of the remedial federal securities laws"). Lawsuits such as this one can only be maintained if competent counsel can be retained to prosecute them. This will occur if courts award reasonable and adequate compensation for such services where successful results are achieved. Public policy therefore supports awarding Lead Counsel's reasonable attorneys' fee request.

F. The Requested Attorneys' Fees in Relation to the Settlement

"In determining whether the Fee Application is reasonable in relation to the settlement amount, the Court compares the Fee Application to fees awarded in similar securities class-action settlements of comparable value." *Marsh & McLennan*, 2009 WL 5178546, at *19; *see*

also In re Veeco Instruments Inc. Sec. Litig., No. 05 MDL 0165 (CM), 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007) (McMahon, J.) (noting that the fee awarded is "consistent with fees awarded in a [] similar class actions settlements of comparable value"). As discussed above, the compensation requested here is within the range of percentage fee awards given in comparable cases within the Second Circuit and in other district courts throughout the country.

G. The Requested Attorneys' Fees are Also Reasonable Under the Lodestar Cross-Check

To ensure the reasonableness of a fee awarded under the percentage method, the Second Circuit encourages a "crosscheck" against counsel's lodestar. *Goldberger*, 209 F.3d at 50. Under the lodestar method, the court must engage in a two-step analysis: first, to determine the lodestar, the court multiplies the number of hours each attorney spent on the case by each attorney's reasonable hourly rate; and second, the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work. *See, e.g., FLAG Telecom*, 2010 WL 4537550, at *25-26. Performing the lodestar cross-check here confirms that the fee requested by Lead Counsel is reasonable and should be approved.

Lead Counsel have spent more than 68,000 hours in the prosecution of this case. *See* Joint Decl. ¶ 156; Exs. 12 (Summary Lodestar and Expense Table); 9- B; 10-B; and 11-B. This represents time spent on the Action by partners, of counsel, associates, staff attorneys, paralegals, investigators, and professional analysts. *Id*. The resulting lodestar at Lead Counsel's current billing rates is $35,548,004.50. *See* Ex. 12 . The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *New York State Ass'n for Retarded*

Children Inc. v. Carey, 711 F.2d 1136, 1153 (2d Cir. 1983) (use of current rates appropriate where services were provided within two or three years of application).

The hourly billing rates of Lead Counsel attorneys range from $550 to $975 for partners, $500 to $800 for of counsels and senior counsel, and $250 to $700 for other attorneys. *See* Joint Decl. ¶ 155. "In determining the propriety of the hourly rates charged by plaintiffs' counsel in class actions, courts have continually held that the standard is the rate charged in the community where the services were performed for the type of services performed by counsel." *In re Telik Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 589 (S.D.N.Y. 2008) (McMahon, J.). In fact, "perhaps the best indicator of the "market rate" in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that *defend* class actions on a regular basis." *Id*. Defense firm billing rates gathered and analyzed by Lead Counsel from bankruptcy court filings nationwide in 2014, in many cases, exceeded these rates. *See id*.; Ex. 13.

Thus, the amount of attorneys' fees requested by Lead Counsel, 17.65% of $170 million, plus interest, represents a negative multiplier of 0.84 of Lead Counsel's lodestar. Such a multiplier is well below the parameters used throughout district courts in the Second Circuit and is additional evidence that the requested fee is reasonable. Indeed, in the Second Circuit or district courts within the Second Circuit, lodestar multiples between 1 and 5 are commonly awarded. *See, e.g., Wal-Mart Stores Inc. v. Visa USA Inc.*, 396 F. 3d 96, 123 (2d Cir. 2005) (upholding a multiplier of 3.5 as reasonable on appeal); *In re Telik*, 576 F. Supp. 2d at 589 (awarding a multiple of 1.6 as well within the range of reasonableness and noting that lodestar multiples of over 4 are awarded by this Court); *Comverse*, 2010 WL 2653354, at *5-6 (awarding 25% of $225 million settlement, representing a 2.78 multiplier, and noting that "[w]here, . . .

counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar").

With respect to the hours worked, Lead Counsel submit that the substantial time devoted reflects the tremendous effort needed to prosecute the claims and to bring them to a favorable resolution. As summarized above (*see* § III.A) and set forth in detail in the Joint Declaration substantial effort went into investigating the claims; drafting two amended complaints; responding to various motions to dismiss; moving for class certification (motions were subsequently withdrawn without prejudice), reviewing and analyzing tens of millions of pages of documents produced; preparing for and taking/defending depositions (including those of Lead Plaintiffs); and consulting with various experts, among many other things.

Lead Counsel invested substantial time and effort into prosecuting this Action to a successful completion. The requested fee, therefore, is manifestly reasonable, whether calculated as a percentage-of-the-fund or in relation to Lead Counsel's lodestar.

H. The Settlement Classes' Reaction to the Fee and Expense Request

In accordance with this Court's Preliminary Approval Order, 567,563 copies of the Notice were sent to potential Members of the Settlement Classes. *See* Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Members of the Settlement Classes and Publication of Summary Notice ¶ 10, Ex. 4. The Notice informed Members of the Settlement Classes that Lead Counsel will seek award(s) of attorneys' fees of no more than 20%, in the aggregate, of the Settlement Fund and payments of litigation expenses that will not exceed $2,950,000. The time to object to the fee requests expires on February 2, 2015.

To date, not a single objection to the fee and expense request has been received.[11] This fact strongly evidences that the fee request is fair and reasonable.

IV. LEAD COUNSEL'S EXPENSES WERE REASONABLY INCURRED AND NECESSARY TO THE PROSECUTION OF THIS ACTION

Lead Counsel also respectfully request $2,057,321 in expenses incurred in prosecuting this Action. These expenses are set forth in the individual firm declarations submitted herewith, *see* Exs. 9-B, 10-B, and 11-B, and are of the type generally approved by courts for reimbursements. *See In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (Scheindlin, J.) (court may compensate class counsel for reasonable expenses necessary to the representation of the class).

Much of Lead Counsel's expenses were for professional services rendered by Lead Plaintiffs' experts and consultants. In addition to the expert report from Chad Coffman, CFA, regarding market efficiency prepared and utilized in connection with Lead Plaintiffs' class certification motion, Lead Counsel employed experts to opine and assist on such areas as accounting, loss causation, and the purchasing and classification of mortgages. *See* Joint Decl. ¶¶ 89-91, 174. For example, Lead Counsel retained experts from Forensic Economics, Inc., to provide expert opinion on loss causation and damages. Among other things, the experts at Forensic Economics prepared a detailed event study using (i) a two-trader institutional model; (ii) statistical significance threshold; and (iii) peer group to control for market and industry conditions. *Id.* ¶ 90. Additionally, Lead Counsel retained accounting and mortgage industry consultants to help Lead Counsel understand the inner workings of Fannie Mae and its purchasing and classification of mortgages. *Id.* ¶ 91.

[11] The amounts requested are less than the maximum amounts reported in the Notice. Lead Counsel will address any objections to the fee and expense request, if any, in their reply papers which will be filed with the Court by February 17, 2015.

Lead Counsel utilized these experts and consultants in order to efficiently frame the issues, gather relevant evidence, make a realistic assessment of provable damages, and structure a resolution of the Action. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (Lynch, J.) ("The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which 'the paying, arms' length market' reimburses attorneys . . . [and] [F]or this reason, they are properly chargeable to the Settlement fund.") (citation omitted). Likewise, the remaining expenses are of the type typically paid by clients in non-contingent cases, such as travel for depositions and for mediation, the costs of computerized research, and duplicating documents. Joint Decl. ¶¶ 175-79.

Not a single objection to the expense request has been received to date. Accordingly, Lead Counsel respectfully request payment for these expenses.

V. LEAD PLAINTIFFS ARE ENTITLED TO REIMBURSEMENT OF REASONABLE COSTS AND EXPENSES, INCLUDING LOST WAGES

Finally, Lead Counsel seek an expense award of $113,953.39 for Lead Plaintiffs to reimburse them for lost wages and expenses, pursuant to the PSLRA which provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4). Courts "routinely award such costs and expenses to both reimburse named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as provide an incentive for such plaintiffs to remain involved in the litigation and incur such expenses in the first place." *Morgan Stanley*, 2005 WL 2757792, at *10; *see also Varljen v. H.J. Meyers & Co.*, No. 97 CIV 6742 (DLC), 2000 WL 1683656, at *6 n.2 (S.D.N.Y.

Nov. 8, 2000) (Cote, J.) (reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel").

Here, Lead Plaintiffs, PRIM, SBRB, and TCRS seek reimbursement of their reasonable lost wages and expenses incurred in fulfilling their duties to ably represent the interests of the Settlement Classes and achieve the substantial result reflected in the Settlement in the amounts of $42,433.39, $13,410, and $58,110, respectively. The amount of time and effort devoted to this Action by the Lead Plaintiffs is detailed in the accompanying declarations of their respective representatives, annexed as Exhibits 5, 7, and 8 to the Joint Declaration.

Numerous cases have approved payments to compensate lead plaintiffs for the time and effort devoted by them. *See, e.g., In re Satyam Computer Servs. Ltd. Sec. Litig*., No. 09-MD-2027-BSJ, slip op. at 3-4 (S.D.N.Y. Sept. 13, 2011) (Jones, J.) (awarding a combined $193,111 to four institutional lead plaintiffs) (Ex. 15); *Marsh & McLennan Co.,* 2009 WL 5178546, at *21 (awarding a combined $214,657 to two institutional lead plaintiffs); *In re Computer Sciences Corp. Sec. Litig*., 11-cv-0610, slip op. at 2 (E.D. Va. Sept. 20, 2013) (awarding $60,905 to institutional plaintiff) (Ex. 15).

Lead Plaintiffs have collectively spent more than 1,500 hours actively and effectively fulfilling their obligations as class representatives, complying with all demands placed upon them during the prosecution and settlement of this Action, and providing valuable oversight and assistance to their respective counsel for more than six years. *See* Exs. 5 - 8. In particular, Lead Plaintiffs: (i) responded to document requests and produced almost 40,000 pages of documents; (ii) prepared for depositions; (iii) reviewed pleadings and motions and other court filings; (iv) communicated regularly with Lead Counsel; and (v) were continuously and directly involved in

the litigation process including the mediation and other settlement negotiations. *See* Exs. 5 ¶ 6; 6 ¶ 5; 7 ¶ 4; 8 ¶ 4-6; Joint Decl. ¶ 82.

Accordingly, Lead Counsel respectfully request that the Court reimburse Lead Plaintiffs for reasonable lost wages and expenses incurred in fulfilling their duties and achieve the substantial result reflected in the Settlement.

CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully request the Court award attorneys' fees of 17.65% of the Settlement Fund; authorize payment of litigation expenses in the amount of $2,057,321; and authorize payment of Lead Plaintiffs' expenses in the amount of $113,953.39. A proposed order will be submitted with Lead Counsel's reply papers after the deadline for objections has passed.

Dated: January 16, 2015

Respectfully submitted,

s/ Glen DeValerio

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2015, I caused the foregoing Memorandum of Law in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Payment of Expenses to be served electronically on all ECF participants and mailed via first class mail to the following non-ECF participant.

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