SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BLACKROCK CORE BOND PORTFOLIO, et al., Plaintiffs, -against- WELLS FARGO BANK, NATIONAL ASSOCIATION, Defendant.	Index No. 656587/2016 Justice Andrew Borrok (Part 53)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR (1) FINAL APPROVAL OF SETTLEMENT AND PROPOSED PLAN OF ALLOCATION; (2) CERTIFICATION OF THE ACTION AS A CLASS ACTION FOR SETTLEMENT PURPOSES PURSUANT TO CPLR 901, *ET SEQ.*; AND (3) AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

SECONDARY AUTHORITIES

Plaintiffs and Plaintiffs' Counsel respectfully submit this memorandum in support of their motion for: (i) final approval of the proposed settlement and plan of allocation as fair, reasonable and adequate, and in the best interests of the class; (ii) certification of the Action as a class action for settlement purposes pursuant to CPLR 901, *et seq.*; and (iii) an award of attorneys' fees and reimbursement of litigation expenses. Defendant Wells Fargo[1] does not oppose this motion for settlement purposes only[2] and, to date, no members of the proposed Settlement Class have objected to the Settlement.

I. INTRODUCTION

Subject to the Court's approval, the Parties have agreed to settle all claims in this Action in exchange for substantial relief: specifically, payment of $43 million in cash and the release of $70 million of Reserve Funds withheld or reserved by Defendant in connection with certain Trusts at issue in this litigation. Plaintiffs and their counsel respectfully submit that the proposed Settlement is an excellent result for the Settlement Class, resolving more than four years of hard-fought litigation and providing a real and immediate benefit for Class members, and satisfies the standards for final approval under CPLR 908. As detailed in the accompanying Affidavit of Timothy A. DeLange, the Settlement represents a favorable outcome for the Settlement Class, particularly given

[1] Unless otherwise stated, capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement, dated November 9, 2018, and the accompanying Affidavit of Timothy A. DeLange in Support of Plaintiffs' Motion for: (i) Final Approval of Settlement and Proposed Plan of Allocation; (ii) Certification of the Action as a Class Action for Settlement Purposes Pursuant to CPLR 901, *et seq.*; and (iii) Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("DeLange Aff."). Citations to "¶" in this Motion refer to paragraphs in the DeLange Affidavit.

[2] Pursuant to and according to the terms of the Settlement Agreement, Wells Fargo does not oppose this motion for settlement purposes only. *See* Stipulation of Settlement ¶3. Wells Fargo, however, reserves all rights and makes no concession or admission regarding the merits of Plaintiffs' claims, Wells Fargo's liability, or certification of the putative class for litigation purposes. *See Id.* ¶4.

the significant risks in this litigation with respect to liability and damages, and avoids the expense and uncertainty of protracted proceedings if the litigation were continued.[3]

This Action presented a number of significant risks to establishing liability and damages. The litigation generally alleged that Wells Fargo failed to enforce repurchase and servicing obligations as Trustee, despite its awareness of defective loans and servicing violations. While Plaintiffs maintain that the claims asserted against Defendant have merit, they recognize that there are very substantial risks to establishing liability and damages and securing certification of a litigation class. To defeat summary judgment and prevail at trial, Plaintiffs would have been required to prove, among other things, that Defendant discovered breaches of representations and warranties and had actual knowledge of servicing violations with respect to individual loans in the Trusts. In addition, Plaintiffs would have had to establish the amount of class-wide damages.

Defendant would have had substantial arguments to make concerning each of these issues. For example, Defendant would have argued that Plaintiffs must prove, on a loan-by-loan basis, Defendant's discovery of the alleged breaches of representations and warranties and actual knowledge of the alleged servicing violations. Defendant also would have argued that Plaintiffs could not prove that Defendant had any obligation to pursue breaches of representation and warranty claims against the underlying sellers or that any such claim would have been successful. In addition, Defendant would have argued that any damages to Plaintiffs and the Class were caused by factors unrelated to the purported breaches of representations and warranties or servicing violations. Had any of these arguments been accepted in whole or in part, it could have eliminated or, at a minimum, drastically limited any potential recovery.

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[3] The DeLange Affidavit provides a detailed description of, *inter alia*: the history of the Action (¶¶13-36); the negotiations leading to the Settlement (¶¶41-42, 60-61); the risks and uncertainties of continued litigation (¶¶43-58); the terms of the Plan of Allocation for the Settlement proceeds (¶¶62-67); and the services that Plaintiffs' Counsel provided and the nature of the litigation expenses incurred for the benefit of the Settlement Class (¶¶77-97).

Further, in order to obtain a recovery for the Class, Plaintiffs would have to prevail at several stages, including class certification, summary judgment, and trial. Even if Plaintiffs prevailed at each stage, Plaintiffs would also have to succeed on appeals that would likely follow. Against these very real and significant risks, and the expense and length of continued proceedings necessary to pursue their claims against Defendant through trial and appeals, the Settlement provides an immediate and substantial recovery of $43 million in cash and the release of $70 million in Reserve Funds for the benefit of Settlement Class Members. Plaintiffs and Plaintiffs' Counsel respectfully submit that the Settlement is fair, reasonable and adequate, and in the best interests of the Settlement Class.

Plaintiffs and Plaintiffs' Counsel also submit that the requested award of attorneys' fees of 20% of the Settlement Fund and reimbursement of litigation expenses of $8,979,500.72 are commensurate with the settlement benefits and are also fair and reasonable. The Settlement was the result of Plaintiffs' Counsel's diligent prosecution of the Action and the Parties' extensive good-faith settlement negotiations. DeLange Aff., ¶¶60-61. After more than four years of litigation, including voluminous discovery and extensive motion practice, the Parties agreed to mediation before a mutually-selected neutral, Layn R. Phillips of Phillips ADR. In advance of the mediation, the Parties exchanged a draft term sheet and counsel for the Parties participated in a full-day pre-mediation conference on August 3, 2018, to discuss non-monetary terms under the supervision of Mr. Phillips' associate. Representatives of the Parties and their counsel participated in a full-day mediation on August 4, 2018. Following the mediation, negotiations continued with the assistance of the mediator, and the Parties reached a preliminary agreement to settle the Action and executed a confidential Term Sheet on August 15, 2018. *Id.* ¶42. Due to the complexity of the issues, additional negotiations followed regarding the terms of the Stipulation. *Id.* ¶60. On November 9, 2018, the

Parties entered into the Stipulation, which sets forth the full terms and conditions of the Settlement. *Id*.

The mediator, Mr. Phillips, has endorsed the Settlement, which he believes "is the product of arm's-length negotiations, conducted fairly and argued zealously by all parties involved." Phillips Aff. ¶16. For these reasons, Mr. Phillips "strongly support[s] the Court's approval of the Settlement in all respects." *Id*. The reaction of the Settlement Class thus far also supports approval. To date, no Settlement Class Member has objected to the adequacy of the Settlement or the attorneys' fee award and litigation expense reimbursement request or excluded themselves from the Settlement Class.

II. THE PROPOSED SETTLEMENT WARRANTS FAIRNESS APPROVAL

A. The Settlement Is Fair, Adequate, And Reasonable And Should Be Approved

New York has a well-established public policy favoring compromises of litigation, especially class litigation. *See Hallock v. State of N.Y.*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 512 (1984) (recognizing that settlements "are favored by the courts and not lightly cast aside"); *In re N.Y. Cty. Data Entry Worker Prod. Liab. Litig.*, 616 N.Y.S.2d 424, 427 (N.Y. Sup. 1994) (recognizing the policy favoring settlement is particularly compelling in the context of class actions). Under New York law, "[a] class action shall not be dismissed, discontinued or compromised without the approval of the Court." CPLR 908.

Once potential class members have been notified of the proposed settlement, courts then look to the terms of the proposed settlement and relevant evidence to analyze whether the settlement should be given final approval. The court must find that the settlement is fair, reasonable and adequate and in the best interests of the class. *See*, *e.g.*, *Klein v. Robert's Am. Gourmet Food, Inc.*, 808 N.Y.S.2d 766, 772 (N.Y. App. Div. 2d Dep't 2006); *In re Colt Indus. S'holder Litig.*, 77 N.Y.2d

185, 194, 565 N.Y.S.2d 755, 760 (1991); *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 188 (N.Y. App. Div. 1st Dep't 1998).

On January 30, 2019, the Court entered an order directing that notice be mailed to the class members. As of March 29, 2019, the Claims Administrator disseminated a total of 10,172 Notice Packets by first-class mail to potential Settlement Class Members and nominees. Ewashko Aff. ¶4. On March 4, 2019, Defendant published the Notice, Summary Notice, Proof of Claim Form and a list of the Trusts on the home page of its website www.ctslink.com ("CTS Link"). DeLange Aff. ¶74. Defendant also issued these notices via CTS Link for each of the Trusts' individual pages, which included the Notice, Summary Notice, and Proof of Claim Form. *Id*. ¶74. Finally, Defendant also caused the Depository Trust & Clearing Corporation to issue the Notice, Summary Notice, and Proof of Claim Form to all known, registered certificateholders in the Trusts via its LENS legal notice system. *Id*. ¶74. On May 6, 2019, the Court will hold a fairness hearing, inviting arguments on the fairness, adequacy, and reasonableness of the proposed class settlement and allowing Class Members an opportunity to be heard on the merits of the Settlement.

Although CPLR 908 does not set forth specific criteria for evaluating proposed class action settlements, New York courts agree that determining whether a settlement is fair, adequate, and reasonable requires an analysis of: (1) the likelihood that plaintiffs will succeed on the merits; (2) the extent of support from the parties; (3) the judgment of counsel; (4) the presence of good faith bargaining; and (5) the complexity and nature of the issues of law and fact. *See In re Colt Indus. S'holder Litig.*, 155 A.D.2d at 160, 553 N.Y.S.2d 138, 141 (1990); *Klurfeld v. Equity Enters., Inc.*, 79 A.D.2d 124, 133, 436 N.Y.S.2d 303, 308 (N.Y. App. Div. 2d Dep't 1981); *Michels v. Phoenix Home Life Mut. Ins. Co.*, No. 95/5318, 1997 WL 1161145, at *26 (N.Y. Sup. Jan. 7, 1997). Here, all of the factors weigh in favor of this Court granting final approval of the proposed Settlement Agreement.

1. The Value Of The Benefits Offered To The Class Outweighs The Likelihood Of Plaintiffs' Success On The Merits

The first key factor in determining fairness, adequacy, and reasonableness of a proposed settlement is to "balance[e] the value of th[e] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." *Klein*, 808 N.Y.S.2d at 774; *see also Colt Indus.*, 553 N.Y.S.2d at 142 (finding that fairness is determined by weighing the plaintiff's likelihood of success against the settlement offered).

Here, the risk that Plaintiffs and the Class would not secure a meaningful recovery – or any recovery at all – was real. Indeed, there was no assurance that Plaintiffs would establish that a litigation class should be certified, overcome dispositive motions, succeed in establishing the elements of their claims at trial, and prevail in any eventual appeal. Continued litigation would be prolonged, costly and extremely risky, particularly given Defendant's substantial defenses with respect to liability, causation and damages. *See* DeLange Aff. ¶¶44-58. Moreover, while Plaintiffs believe their claims are meritorious, they recognize that this case navigates uncharted legal waters, as one of the very first to challenge the duties and obligations of an RMBS trustee. Accordingly, in light of the legal obstacles facing Plaintiffs, this factor supports approval of the settlement.

2. The Parties And Class Members Overwhelmingly Support The Settlement

Under New York law, support for a proposed settlement from the opposing parties and class members demonstrates its fairness and reasonableness. *See, e.g., Hibbs v. Marvel Enters.*, 797 N.Y.S.2d 463, 464 (N.Y. App. Div. 1st Dep't 2005); *Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S.2d 531, 539 (N.Y. Sup. Ct. 2010) (approving settlement when small fraction of class members objected or opted out); *Michels*, 1997 WL 1161145, at *26 (same).

All parties here have expressed their support for the Settlement by signing the Settlement Agreement. The deadline for Settlement Class Members to file objections to the Settlement, adequacy of representation by Plaintiffs and their counsel, the proposed Plan of Allocation, the entry

of an order and final judgment approving the Settlement, or to request exclusion from the Settlement Class, is April 15, 2019. To date, no objections or requests for exclusions have been received. Ewashko Aff. ¶11.

3. Plaintiffs' And Defendants' Counsel Are Experienced Litigators Of Class Actions And Support The Settlement

New York courts grant significant weight to the judgment of experienced counsel in determining the fairness of a class action settlement. *See Colt Indus.*, 553 N.Y.S.2d at 141; *Fiala*, 899 N.Y.S.2d at 538. The Settlement presented here is the product of intense negotiations between two experienced law firms. As set forth more specifically in the DeLange Affidavit, Plaintiffs' Counsel, Bernstein Litowitz Berger & Grossmann LLP, have many years of experience litigating and settling complex class actions, and in their view, the Settlement represents a fair value. Defendant was represented by Jones Day, a top international firm also specializing in complex disputes involving financial institutions, securities and other litigation. Defense counsel included some of the country's most prominent and experienced defense lawyers, who vigorously represented their client, and support the Settlement.

4. The Settlement Is The Result Of Good Faith, Arm's Length Negotiations Between The Parties

A class settlement's fairness, adequacy, and reasonableness are presumed when "a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Fiala*, 899 N.Y.S.2d at 538 (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). The duration, rigor, and well-informed nature of the prior negotiations demonstrate that the arrived compromise was conducted at arm's length and in good faith. *See Michels*, 1997 WL 1161145, at *29 (finding "no evidence that suggests collusion or lack of arm's-length bargaining" when parties negotiated settlement over nine months and experienced counsel weighed strengths and weaknesses of the case); *see also Marisol A. ex rel. Forbes v. Giuliani*, 185 F.R.D. 152, 163 (S.D.N.Y. 1999), *aff'd sub nom*, 218 F.3d 132 (2d Cir. 2000) (holding

that, after two years of vigorous litigation, the action had progressed to a point where counsel could "obtain a thorough understanding of the complexity of the issues and the strengths and weaknesses of their claims and defenses"). Additionally, the opinion of a respected mediator in favor of the Settlement and as to the arm's-length nature of the negotiations supports the conclusion that the settlement is "fair, adequate, reasonable and in the best interest of the Class." *In re HSBC Bank U.S.A., N.A., Checking Account Overdraft Litig.*, 49 Misc. 3d 1211(A), 29 N.Y.S.3d 847, 2015 WL 6698518, at *10 (N.Y. Sup. Ct. N.Y. Cty. Oct. 27, 2015) (citing *Klein*, 808 N.T.S.2d at 770) (finding opinion of the Hon. Layn R. Phillips (Ret.) in support of settlement supported fairness conclusion).

Here, the Settlement Agreement at issue was the product of several months of intense arm's-length negotiations overseen by a highly-experienced mediator, former United States District Judge Layn Phillips. DeLange Aff. ¶¶60-61. In early June 2018, the mediator received a proposed term sheet from the Plaintiffs, which was shared confidentially for the purpose of exploring the possibility of settlement among the Parties. The mediator shared that proposal with Defendant. Once Defendant reviewed that proposal, the Parties agreed to hold a confidential mediation, which was scheduled for Saturday, August 4, 2018. To maximize the efficiency of the mediation session, in addition to email communications with the mediator and his associates, the Parties held three different conferences to discuss the Parties' positions and proposed terms. During these supervised sessions, counsel for the Parties discussed non-monetary terms and the format and content for a potential settlement term sheet. During the August 4, 2018 mediation, the Parties made presentations and responded to questions regarding liability, damages, and the remaining expert testimony and motion practice that would be necessary to prepare the case for trial. At the time of the mediation, the litigation had been ongoing for more than four years.

Throughout the course of the mediation session, the Parties engaged in zealous and hard-fought discussions over their respective positions. The Parties were unable to reach a settlement on

August 4. They did, however, make significant progress toward resolution, in part because the Parties had thoroughly considered their positions and had reflected upon the numerous interactions facilitated by the mediator over the preceding months. After the mediation, the mediator continued to assist the Parties via numerous additional telephone negotiations over the course of the next ten days. On August 15, 2018, the Parties reached an agreement in principle to settle the Action. Due to the complexity of the issues, additional negotiations followed regarding the terms of the Stipulation. On November 9, 2018, the Parties entered into a Stipulation and Agreement of Settlement setting forth the full terms and conditions of the Settlement.

Importantly, the settlement mediator, the Hon. Layn R. Phillips (Ret.), has endorsed the Settlement, which he believes "is the product of arm's-length negotiations, conducted fairly and argued zealously by all parties involved." Phillips Aff. ¶16. For these reasons, Judge Phillips "strongly support[s] the Court's approval of the Settlement in all respects." *Id*. As Justice Bransten has noted, "[Phillips'] respected opinion supports the conclusion that the Settlement Agreement is fair, adequate, reasonable and in the best interest of the Class." *HSBC Bank U.S.A.*, 49 Misc. 3d 1211(A), 29 N.Y.S.3d 847, 2015 WL 6698518, at *10.

In sum, the Settlement is the product of arm's-length negotiations conducted fairly and argued zealously by all Parties involved.

5. The Nature Of The Legal And Factual Issues Was Complex And Untried

Finally, courts consider the complexity of the case, and whether continued litigation would be "expensive and protracted" in determining whether to approve the settlement. *Lowenschuss v. Bluhdorn*, 613 F.2d 18, 19 (2d Cir. 1980) (settlement approved where further litigation would have been "expensive and protracted" with no guarantee of any relief to class); *Michels*, 1997 WL 1161145, at *29 (approving settlement because continued litigation would be lengthy and expensive).

Here, the nature of the legal and factual issues supports settlement approval. This case was extremely complex. While Plaintiffs believe their claims are meritorious, they are not without substantial risk. For example, to defeat summary judgment and win at trial, Plaintiffs would have been required to prove, among other things, that Defendant discovered breaches of representations and warranties and had actual knowledge of servicing violations with respect to individual loans in the Trusts. Defendant would have argued that Plaintiffs must prove, on a loan-by-loan basis, the Defendant's discovery of breaches of representations and warranties and actual knowledge of servicing violations. Defendant also would have argued that Plaintiffs could not prove that Defendant had any obligation to pursue breaches of representation and warranty claims against the underlying sellers or that any such claim would have been successful. *See, e.g.*, *Blackrock Allocation Target Shares: Series S Portfolio, et al. v. Wells Fargo Bank, N.A.*, 2017 WL 3610511, at *7 (S.D.N.Y. Aug. 21, 2017); *Phoenix Light SF Ltd. v. Bank of N.Y. Mellon*, 2017 WL 3973951 (S.D.N.Y. Sept. 7, 2017); *Fixed Income Shares: Series M v. Citibank, N.A.*, 314 F. Supp. 3d 552 (S.D.N.Y. 2018); *W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, No. A1302490 (Ohio Common Pleas Aug. 4, 2017). The Settlement eliminates these risks and will provide a recovery for all Class Members immediately.

In sum, the Settlement Agreement readily meets all of the relevant factors weighed by courts in determining whether it is fair, adequate, and reasonable, and therefore should be approved by this Court.

III. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

The benefits of the proposed settlement can only be realized through certification of the Settlement Class. The U.S. Supreme Court has held that certification of a class for settlement

purposes is appropriate. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).[4] Having notified Settlement Class Members of the proposed settlement, Plaintiffs respectfully request the Court certify the following class for settlement purposes:

> All persons or entities who purchased or otherwise acquired a beneficial interest in a security issued from the Trusts and (i) hold on the date on which the Court enters an order finally approving the Settlement or (ii) held at any time on or after June 18, 2014, but no longer hold as of the date on which the Court enters an order finally approving the Settlement (herein, the "Class" or the "Settlement Class").[5]

The decision to certify a class solely for settlement purposes is within the court's discretion. *See*, *e.g.*, *Jacobs v. Macy's, Inc.*, 792 N.Y.S.2d 574, 576 (N.Y. App. Div. 2d Dep't 2005). The Court does not determine the merits of the claims at the certification stage; it instead inquires as to whether "on the surface there appears to be a cause of action for relief which is neither spurious nor sham." *Simon v. Cunard Line Ltd.*, 428 N.Y.S.2d 952, 955 (N.Y. App. Div. 1st Dep't 1980). Class certification should be granted even in the closest cases. *Brown v. State*, 682 N.Y.S.2d 170, 174 (N.Y. App. Div. 3d Dep't 1998).

To certify a class for settlement purposes, a court must find that the class satisfies the requirements of CPLR Article 9. *See Michels*, 1997 WL 1161145, at *9; *Klein v. Robert's Am. Gourmet Food, Inc.*, 808 N.Y.S.2d at 772 ("Where, as here, a class is certified for settlement

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[4] Under the terms of the Settlement, Wells Fargo agreed not to oppose certification of a settlement class only here. Stipulation of Settlement ¶¶3-4. The proposed Settlement preserves Wells Fargo's rights on these issues. *Id*.

[5] Excluded from the Class are Defendant, the Originators, the Sellers, the Master Servicers and the Servicers to the Trusts, and their officers and directors, their legal representatives, successors or assigns, and any entity in which they have or had a controlling interest; provided, however, that Wells Fargo is not excluded from the Class to the extent that Wells Fargo holds Certificates in the Trusts as assets in its capacity as a trustee or indenture trustee (or similar capacity) for the benefit of third-party investors. Also excluded from the Class are IKB International, S.A., IKB Deutsche Industriebank A.G., and the plaintiffs or any entity a court determines to be the proper plaintiff(s) in the following actions: (i) *Royal Park Invs. SA/NV v. Wells Fargo Bank, N.A.*, Case No. 14-cv-9764 (S.D.N.Y.); (ii) *Nat'l Credit Union Admin. Bd., et al. v. Wells Fargo Bank, N.A.*, Case No. 14-cv-10067 (S.D.N.Y.); (iii) *Phoenix Light SF Ltd., et al. v. Wells Fargo Bank, N.A.*, Case No. 14-cv-10102 (S.D.N.Y.); (iv) *Commerzbank AG. v. Wells Fargo Bank, N.A.*, Case No. 15-cv-10033 (S.D.N.Y.) and (v) any person or entity that properly requests exclusion from the Class.

purposes only, these prerequisites – and particularly those designed to protect absent class members – must still be met.").

"CPLR 901(a) sets forth five prerequisites to class certification: 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4. the representative parties will fairly and adequately protect the interests of the class; and 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *City of New York v. Maul*, 14 N.Y.3d 499, 508 (2010) (quotation marks omitted). "These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority." *Id.* Where certification is proposed for settlement purposes only, these criteria are to be "liberally construed" by the reviewing court. *Wilder v. May Dep't Stores Co.*, 804 N.Y.S.2d 423, 426 (N.Y. App. Div. 2d Dep't 2005). Because the proposed Settlement Class meets all five of CPLR 901(a)'s requirements, it should be certified for purposes of the Settlement.

A. The Settlement Class Is So Numerous That Joinder Of All Members Is Impracticable

CPLR 901(a)(1) requires that the proposed settlement class be so numerous that joinder of all members is impracticable. Courts have found that the numerosity requirement was satisfied in a proposed bondholder class action upon a showing of "an estimated 80 record holders" and many more beneficial owners residing throughout the United States. *Roth v. Phoenix Cos., Inc.*, 50 N.Y.S.3d 835, 839 (N.Y. Sup. Ct. 2017). Here, the proposed Settlement Class readily satisfies the numerosity requirement. Plaintiffs' expert Dr. Hartzmark has identified at least 163 Settlement Class Members and determined there are likely more. Pursuant to the Notice Order, the Claims

Administrator has mailed Notice Packets to 10,172 potential Settlement Class Members. Ewashko Aff. ¶7.

B. There Are Questions Of Law And Fact Common To All Settlement Class Members

CPLR 901(a)(2) requires that there are questions of law and fact common to the settlement class and that these questions predominate over individual questions. To meet this standard, a plaintiff's claims and those of other settlement class members need only be substantially similar, not identical in every respect. *See Michels*, 1997 WL 1161145, at *10; *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d 693, 697 (N.Y. App. Div. 1st Dep't 1986).

The "'fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action.'" *Lamarca v. Great Atl. & Pac. Tea Co., Inc.*, 847 N.Y.S.2d 897, 898 (N.Y. Sup. Ct. N.Y. Cty. 2007) (quoting *Friar v. Vanguard Holding Co.*, 434 N.Y.S.2d 698, 707 (N.Y. App. Div. 2d Dep't 1980)). Instead, the principle inquiry is whether the defendant's alleged wrongdoing is a common nucleus of all the settlement class members' claims. *Id*. In evaluating commonality, the court should weigh whether a class action achieves economies of time, effort and expense and promotes uniformity of resolution of claims for persons similarly situated. *See In re Coordinated Title Ins. Cases*, 784 N.Y.S.2d 919 (N.Y. Sup. Ct. 2004) (citing *Friar*, 434 N.Y.S.2d at 707).

Here, Plaintiffs allege common questions of law and fact that arise from a common nucleus of wrongdoing by Defendant that predominate over any individual issues. Moreover, Plaintiffs and Settlement Class Members share common claims that involve the same legal questions, including whether the loans in the Trusts contained material breaches of representations and warranties, whether the loans were serviced in accordance with prudent servicing standards, whether the Defendant discovered or became aware of representation and warranty breaches and servicing violations, and whether Plaintiffs and the Settlement Class were damaged thereby. Prosecution of

this lawsuit would require the Court to address these common legal and factual questions, the resolution of which would affect all Settlement Class Members, and would predominate over any issues affecting individual Settlement Class Members, including the amount of their respective damages. *See Pludeman v. N. Leasing Sys., Inc.*, 904 N.Y.S.2d 372, 377 (N.Y. App. Div. 1st Dep't 2010) (commonality and predominance requirements met where class-wide liability can be established with common evidence).

C. Plaintiffs' Claims Are Typical Of The Claims Of The Settlement Class

CPLR 901(a)(3) requires that a representative party's claims be typical of the claims of the settlement class. The typicality requirement is satisfied where the plaintiff's and the settlement class members' claims "arise out of the same course of conduct" and "are based on the same causes of action." *Lamarca*, 847 N.Y.S.2d at 897. The named plaintiff's claims and those of all other settlement class members need not be identical in every respect; rather, there must be substantial similarity. *Michels*, 1997 WL 1161145, at *10; *Weinberg* 499 N.Y.S.2d at 697. The purpose of the "typicality" requirement is to ensure that the class representatives "have suffered injuries in the same general fashion as absent class members." *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 260 (D.D.C. 2002).

Typicality is satisfied here because Plaintiffs' claims and those of the Settlement Class arise from the same alleged course of conduct and are derived from the same claims, resting on the same legal and damages theories.

D. Plaintiffs And Plaintiffs' Counsel Have And Will Fairly And Adequately Protect The Interests Of The Settlement Class

CPLR 901(a)(4) requires the settlement class representative to "fairly and adequately protect the interests of the class." Relevant factors include: (a) whether there is a conflict of interest between the plaintiff and the settlement class members; (b) the experience and competence of plaintiff's counsel; (c) the financial resources available to prosecute the action; and (d) the plaintiff's

background, involvement in the litigation and supervision of counsel. *Pruitt v. Rockefeller Ctr. Props., Inc.*, 574 N.Y.S.2d 672, 678 (N.Y. App. Div. 1st Dep't 1991).

Here, there are no conflicts between Plaintiffs and the proposed Settlement Class. All Settlement Class Members are aligned in recovering the maximum amount of damages caused by Defendant's alleged wrongdoing under the Settlement. Plaintiffs and their counsel have demonstrated an unwavering commitment to the prosecution of this Action for more than four years. No conflict exists between the Plaintiffs and Settlement Class Members, nor is there any conflict apparent from the claims or liability and damages theories.

Plaintiffs have also retained counsel with the requisite experience and competence to serve as settlement class counsel. *See*, *e.g.*, *Bellifemine v. Sanofi-Aventis U.S. LLC*, 2010 WL 3119374, at *5 (S.D.N.Y. Aug. 6, 2010); DeLange Aff. ¶83. Moreover, Plaintiffs' Counsel have devoted the resources necessary to responsibly and efficiently prosecute this Action. *Id*. ¶¶85-86. And Plaintiffs and their counsel have unquestionably demonstrated their dedication and commitment to securing a recovery for themselves and the Settlement Class. Plaintiffs have participated in the litigation and supervised and worked with counsel. In response to Plaintiffs' 40 requests for production in the Federal Action, Wells Fargo produced approximately 260,000 documents. Plaintiffs similarly produced approximately 5.2 million documents in response to Wells Fargo's 519 requests for production in the Federal Action. The Parties also deposed numerous witnesses. For example, Plaintiffs deposed 28 Wells Fargo witnesses and Wells Fargo deposed approximately 47 current and former employees of Plaintiffs. The Parties also received and analyzed over 700,000 documents from non-parties in response to more than 160 third-party subpoenas. DeLange Aff. ¶¶33-34.

E. A Class Action Is Superior To Any Other Method To Adjudicate Settlement Class Members' Claims

CPLR 901(a)(5) requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." The alternative to settlement class treatment of

this case would be potentially hundreds of individual lawsuits. Such an alternative would be inefficient and burdensome on litigants and the Court, particularly in light of the common legal theories and factual underpinnings to all Settlement Class Members' claims.

F. CPLR 902 Factors Also Support Settlement Class Certification

"Once all [of the] CPLR 901 prerequisites are satisfied, the court must then consider factors listed in CPLR 902." *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 766 N.Y.S.2d 241, 244 (N.Y. App. Div. 3d Dep't 2003). These factors are known as the "feasibility considerations." *Chimenti v. Am. Express Co.*, 467 N.Y.S.2d 357, 359 (N.Y. App. Div. 1st Dep't 1983). The CPLR 902 factors are:

1. The interests of members of the class individually in controlling the prosecution or defense of separate actions;
2. The impracticality or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; and
5. The difficulties likely to be encountered in the management of a class action.

See CPLR 902.

The feasibility factors also favor settlement class certification here. The first and third factors support certification because there is no evidence that individual settlement class members have an interest in controlling their own actions. To date, no Settlement Class Members have excluded themselves from the Settlement Class. Plaintiffs are aware of a few certificateholders who have initiated their own actions, but those certificateholders have been excluded from the Settlement Class, allowing their claims and litigation to continue. *See* Weinstein, Korn & Miller, N.Y. Civil Practice, § 902.07 (2004) ("The strongest indication of a significant interest on the part of class members in controlling their own actions is the existence of individual suits that have been or are

about to be commenced."); *Ammon v. Suffolk Cty., Dep't of Consumer Affairs*, 396 N.Y.S.2d 317, 318 (Sup. Ct. N.Y. 1977), *aff'd sub nom.*, 413 N.Y.S.2d 469 (N.Y. App. Div. 2d Dep't 1979) (absence of similar litigation by class members supported certification).

The second, fourth, and fifth considerations also support settlement class certification. New York is the most desirable and suitable forum for the litigation because the Governing Agreements designate New York law as the choice of law for the claims at issue. *See* CPLR 902(4). Numerous separate actions would be impracticable and inefficient due to the relatively small value of the claims, the number of claimants and the common issues applicable to all Settlement Class Members. *See* CPLR 902(2).

Importantly, because the parties have now settled the litigation, any manageability concerns are not significant. *See* CPLR 902(5); *Michels*, 1997 WL 1161145, at *12 ("the difficulties likely to be encountered in the management of a class action are … minimal in light of the extensively negotiated provisions of the Settlement Agreement"); *see also Amchem Prods., Inc.*, 521 U.S. at 620 (internal citation omitted) ("Confronted with a request for settlement-only class certification, a [trial] court need not inquire whether the case, if tried, would present intractable management problems, ... for the proposal is that there be no trial."). This is a key distinction here between certification of a class for litigation purposes and the proposed settlement-only class. In sum, the CPLR 902 factors support certification of this case for settlement purposes.

IV. PLAINTIFFS' REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES IS FAIR AND REASONABLE

A. Plaintiffs' Counsel Is Entitled To Attorneys' Fees Under The Substantial Benefit Doctrine

CPLR 909 permits courts to award attorneys' fees in class action litigation. Pursuant to CPLR 909, "if a judgment in an action maintained as a class action is rendered in favor of the class,

the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered..." *Id*. 909.

In awarding attorneys' fees in class actions, courts have developed the "substantial benefit" theory, which recognizes that an award of attorneys' fees is appropriate when a party, proceeding in a representative capacity, obtains a result which creates a "substantial benefit" of a pecuniary or non-pecuniary nature. *See In re Cablevision Sys. Corp. S'holder Litig.*, 868 N.Y.S.2d 456, 467 (Sup. Ct. Nassau Cty. 2008) ("Thus, in a shareholder litigation, the plaintiff shareholders are entitled to an award of attorneys' fees if they confer a substantial benefit on the corporation or the other shareholders"). Courts agree that the contingent nature of class litigation combined support a finding of a reasonable fee. *See Willson v. N.Y. Life Ins. Co.*, 1995 N.Y. Misc. LEXIS 652, at *92 (N.Y. Sup. Ct. July 31, 1995); *Denco v. Genesco, Inc.*, N.Y.L.J., Feb. 22, 1982, at 15, col. 2 (N.Y. Sup. Ct. 1982); *see also Low v. Van Nostrand*, 270 N.Y.S.2d 111 (N.Y. App. Div. 1st Dep't 1966). Moreover, courts have recognized that awarding fees "serve the dual purpose of encouraging plaintiffs' attorneys to act as private attorneys general and discouraging wrongdoing." *Michels*, 1997 WL 1161145, at *31 (citing *Denco v. Genesco, Inc.*, N.Y.L.J., Feb. 22, 1982, at 15 (N.Y. Sup. Ct. 1982)).

Here, Plaintiffs' Counsel respectfully moves this Court for an award of $6,804,100 in attorneys' fees, or 20% of the net $43 million Settlement Fund, incurred in the successful prosecution of this class action. Notably, Plaintiffs' Counsel's fee award request does not include an award request relating to the release of the $70 million Reserve Funds.

The "factors ordinarily considered by New York courts when evaluating requests for attorney's fees" include "the time and skill required in litigating the case, the complexity of issues, the customary fee for the work, and the results achieved." *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir. 1992); *see also Gordon v. Verizon Commc'ns*, 2017 WL 442871, at *11 (N.Y. App. Div. 1st Dep't Feb. 2, 2017). Here, these factors militate in favor of the requested award,

which is more than reasonable. Plaintiffs' Counsel have done substantial work identifying, investigating, prosecuting, and settling Plaintiffs' and Class Members' claims. As described in the accompanying Affidavit of Timothy A. DeLange, Plaintiffs' Counsel have substantial experience prosecuting and settling class actions, and the lawyers assigned to this matter are well-versed in class action practice and are well-qualified to represent the class. DeLange Aff. ¶80.

There is no question that the issues in this case are complex. The attorneys' fee award of 20% of the net settlement fund is below the percentage award for similar complex class actions and is fair and reasonable when compared to the lodestar amount expended to successfully prosecute this complex and novel case.

In fact, although Plaintiffs' Counsel's lodestar totals more than $27 million, Plaintiffs' Counsel is applying for an award representing a negative multiplier of the time spent prosecuting this case on behalf of the Class. *See* DeLange Aff. ¶¶87-88. Considering this discount, and the results achieved in this novel and hard-fought case, the requested amount is more than reasonable.

B. The Requested Fee Is Fair When Compared To Plaintiffs' Counsel's Lodestar

In awarding attorneys' fees in class actions, the "two acceptable options [for determining fees] are the percentage approach and the lodestar method, the latter having originated in class action litigation." *Flemming v. Barnwell Nursing Home & Health Facilities, Inc*., 56 A.D.3d 162, 165 (N.Y. App. Div. 2008); *see also Rahmey v. Blum*, 95 A.D.2d 294, 300-05 (N.Y. App. Div. 2d Dep't 1983).

Attorney fee awards in class action litigation that has produced a substantial benefit are established through the "lodestar" method. Under this approach, the "lodestar" figure, comprised of the reasonable number of hours spent by counsel multiplied by the reasonable hourly rate for counsel's services, is enhanced through the use of multipliers. *See*, *e.g. Rahmey*, 95 A.D.2d at 300-302. The court may then adjust the resulting lodestar fee by taking into account various case-specific

considerations, including: (1) the novelty and difficulty of the questions presented; (2) the skill requisite to perform the legal services properly; (3) the preclusion of other employment by the attorney due to acceptance of the case; (4) whether the fee is fixed or contingent; (5) time limitations imposed by the client or the circumstances; (6) the amount involved and the results obtained; and (7) awards in similar cases. *Id.* at 303-304.

New York courts find this approach useful as a starting point for evaluating the reasonableness of a requested fee. *See, e.g., Wash. Fed. Sav. & Loan Ass'n v. Village Mall Townhouses, Inc.*, 90 Misc. 2d 227, 230-31 (N.Y. Sup. Ct. 1977); *Sternberg v. Citicorp Credit Servs., Inc.*, 110 Misc. 2d 804, 810-11 (N.Y. Sup. Ct. 1981). Because "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success," courts ordinarily apply a multiplier to the lodestar to account for various factors. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) (quoting *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)). The class counsel's lodestar is typically multiplied by a number representing the risk undertaken by class counsel, who prosecuted the case on a contingent fee basis. *See, e.g., Michels*, 1997 WL 1161145, at *32 (multiplier of 3.3 awarded); *Willson*, 1995 N.Y. Misc. LEXIS 652, at *92 (multiplier of 4.6 approved); *The Bear Stearns Cos., Inc. v. Jardine Strategic Holding Ltd*, N.Y.L.J., Aug. 7, 1991, at 22, col. 3 (N.Y. Sup. Ct. 1991) (multiplier of 3 approved) *aff'd*, 143 A.D.2d (1st Dep't 1998).

Here, all the relevant factors support the reasonableness of the fee requested. As detailed in the Affirmation of Timothy A. DeLange, the fee amount requested, 20% of the net settlement fund, or $6,804,100, is well below the dollar amount determined by multiplying each attorney's hours by her or his hourly rate (lodestar of $27.2 million), *see* DeLange Aff., Ex. 4B (Time Summary), even though the substantial risk and other factors justifying a multiplier were present in this case.

Plaintiffs' Counsel dedicated 62,426 hours to the prosecution of this Action without any guarantee of payment. *Id.*

To date, Plaintiffs' Counsel have not received any payment for their services in prosecuting this Action on behalf of the Class, nor have Plaintiffs' Counsel been reimbursed for their out-of-pocket expenses. The fee requested would compensate Plaintiffs' Counsel for their efforts in achieving the Settlement for the benefit of the Settlement Class and for their risk in undertaking this representation on a contingency basis. As discussed further below, this amount is more than reasonable given that the amount reflects a negative multiplier of 0.25.

1. The Novelty And Difficulty Of The Questions Involved And The Skill Displayed In Presenting Them

There is little doubt this litigation was extremely difficult and complex, involving novel and difficult issues regarding structured finance, contract interpretation and loan review and analysis. Plaintiffs' Counsel were required to develop a mastery of the RMBS market, the standards for loan origination and underwriting, the applicable prudent servicing standards, the standards of care for a trustee, relevant government regulations and activity, and a host of related issues. Counsel worked extensively with subject-matter experts in these areas and this collaboration contributed greatly to the favorable result achieved for the Settlement Class. Substantial experience and skill in structured finance and RMBS litigation was required to review the Governing Agreements as well as millions of pages of documents, loan files and servicing files obtained through discovery. The novelty, difficulty and skill requisite to perform the legal services support the fee request.

2. The Preclusion Of Other Employment To Pursue This Contingent Action

Plaintiffs' Counsel devoted substantial resources to this Action that could have been devoted elsewhere through the acceptance of other employment, all on a contingent basis. The preclusion of other employment without promise of payment supports the requested award of attorneys' fees. In

addition, Plaintiffs' Counsel undertook this representation on a wholly contingent basis and allocated all necessary resources to prosecute the litigation on behalf of the Class.

3. The Results Obtained

As detailed herein, Plaintiffs and the Class faced the very real risk that they would not secure a meaningful recovery – or any recovery at all. There was no assurance that Plaintiffs would establish that a litigation class should be certified, overcome dispositive motions, succeed in establishing the elements of their claims at trial, and prevail in any eventual appeal. Moreover, continued litigation would be prolonged, costly and extremely risky, particularly given Defendant's substantial defenses with respect to liability, causation and damages. Plaintiffs and Plaintiffs' Counsel believe that the Settlement, which provides an immediate benefit to Settlement Class Members of $43 million in cash and the release of $70 million of the Reserve Funds, is fair and reasonable, particularly in light of the significant risks of continued litigation and the possibility of a lesser or no recovery at all after class certification, summary judgment, trial and any appeal.

4. Awards In Similar Cases

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and typically in the range of 30% to 33% of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

The 20% attorney fee requested by Plaintiffs' Counsel pursuant to their fee agreement with Plaintiffs is below the range of percentage fees that have been awarded in securities class actions and other similar litigation with comparable recoveries. *See, e.g.*, *In re Amaranth Natural Gas*

Commodities Litig., 2012 WL 2149094, at *2 (S.D.N.Y. June 11, 2012) (awarding 30% of $77.1 million settlement); *Cornwell v. Credit Suisse Grp.*, 2011 WL 13263367, at *1-2 (S.D.N.Y. July 18, 2011) (awarding 27.5% of $70 million settlement); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million settlement); *In re Philip Servs. Corp. Sec. Litig.*, 2007 WL 959299, at *1, *3 (S.D.N.Y. Mar. 28, 2007) (awarding 26% of $79.75 million settlement); *see also Cen. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming district court's award of 30% of $42.5 million settlement fund).

C. Plaintiffs' Counsel Should Be Awarded Reimbursement Of Expenses Advanced During The Litigation

Plaintiffs' Counsel's fee application includes a request for payment of the litigation expenses that Plaintiffs' Counsel paid or incurred, which were reasonable in amount and necessary to the prosecution of the Action. *See* DeLange Aff. ¶¶89-98. These expenses are properly recovered by counsel. *See In re Facebook Inc. IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 418 (S.D.N.Y. 2018) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation") (citation omitted); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (same); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *30 (S.D.N.Y. Nov. 8, 2010) ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class"); *Colt Indus. S'holder Litig.*, 77 N.Y.2d at 186 ("The foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation."). As set forth in detail in the DeLange Affidavit, Plaintiffs' Counsel incurred $8,979,500.72 in litigation expenses in the prosecution of the Action.

The expenses for which payment are sought are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, expert fees, document management costs, on-line research, court reporting and transcripts, photocopying, travel costs, and telephone and postage expenses.

The largest expense is for document management and litigation support, which included the cost of retaining the electronic discovery vendor which managed the enormous database of documents received, which total $5,666,246.15, or 63% of the total amount of expenses. DeLange Aff. ¶93. In this regard, Plaintiffs' Counsel worked principally with established, experienced litigation support vendors to host, process and manage the enormous quantities of electronic information involved in this litigation. Plaintiffs' Counsel negotiated billing rates that were favorable to the market rates at that time with the expectation that there would be significant data volume associated with the Action. DeLange Aff. ¶93. The document management, hosting and support for this Action was unprecedented and required the largest litigation database ever established, totaling more than 20 terabytes of data. *Id*.

Another significant category of expenses was for retention of Plaintiffs' experts, in the amount of $2,468,561.32, or 27% of the total litigation expenses. *Id*. ¶94. Plaintiffs' Counsel worked closely with Dr. Hartzmark, a professor of economics and financial economics at the University of Chicago and University of Michigan, President of Hartzmark Economics Litigation Practice LLC, and a specialist in the application of economics and finance to legal, commercial, and regulatory issues. Plaintiffs' Counsel consulted with Dr. Hartzmark regarding economic and quantitative analysis, industry custom and practice regarding trading of RMBS securities, and subjects related to the proposed litigation class, including class member numerosity, identification of members, and calculation of class-wide damages. Plaintiffs also consulted with Peter Vinella of

PVA International/Toucan Partners, a consultancy focused on capital markets and risk management, and an RMBS trustee's duties and standard of care, and violations thereof.

A complete breakdown by category of the expenses incurred by Plaintiffs' Counsel is set forth in Exhibit 4C to the DeLange Affidavit. All of the expenses detailed were directly connected to the prosecution of this Action and were necessarily incurred by Plaintiffs' Counsel for the benefit of the members of the Class. DeLange Aff. ¶98.

The Notice informed potential Class Members that Plaintiffs' Counsel would apply for reimbursement of litigation expenses in an amount not to exceed $9,500,000. To date, there has been no objection to the request for reimbursement of expenses.

V. CONCLUSION

As detailed above, the proposed Settlement is fair, adequate, and reasonable and warrants final approval. Plaintiffs respectfully request that the Court certify the Class for purposes of settlement and order the Parties to comply with the terms of the Settlement Agreement, as set forth in the accompanying proposed Final Order and Judgment, and approve Plaintiffs' Counsel's Motion for Attorneys' Fees and Reimbursement of Litigation Expenses.

Dated: April 1, 2019
New York, New York

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