UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PLUMBERS' & PIPEFITTERS' LOCAL #562 SUPPLEMENTAL PLAN & TRUST and PLUMBERS' & PIPEFITTERS' LOCAL #562 PENSION FUND, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. J.P. MORGAN ACCEPTANCE CORP. I, *et al.*, Defendants.	No. 08-cv-1713 (PKC) (WDW) ECF CASE

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, the Public Employees' Retirement System of Mississippi ("Lead Plaintiff" or "MissPERS"), on behalf of itself and the Class (defined below), respectfully submits this memorandum of law in support of its motion for final approval of the proposed settlement of this securities class action (the "Action") against defendants J.P. Morgan Securities Inc. (now known as J.P. Morgan Securities LLC); J.P. Morgan Acceptance Corporation I (collectively, "J.P. Morgan"); and David M. Duzyk, Louis Schioppo, Jr., Christine E. Cole, and Edwin F. McMichael (the "Individual Defendants" and, together with J.P. Morgan, the "Defendants"), and for approval of the proposed plan of allocation of the settlement proceeds (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

The Settlement achieved – which provides for payment of $280,000,000 in cash plus interest – is an excellent result for the Class. The Settlement is the product of more than five years of hard-fought litigation, and follows intensive arm's-length negotiations conducted under the auspices of Judge Daniel H. Weinstein, a former judge and highly-respected mediator with extensive experience overseeing negotiations of complex securities class actions, and who recommended the Settlement. *See* Lead Counsel Decl. ¶4. Lead Plaintiff and Lead Counsel believe that the Settlement is a very positive result for Class Members considering the risks of continued litigation, including the risks surrounding liability and damages, and overcoming defenses based on causation, due diligence, the statute of limitations, and others. It is Lead

[1] The accompanying Joint Declaration of David R. Stickney and Marian P. Rosner in Support of Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation, and Lead Counsel's Motion for Approval of Attorneys' Fees and Expenses (the "Lead Counsel Declaration" or "Lead Counsel Decl.") is an integral part of this submission. For the sake of brevity, Lead Plaintiff respectfully refers the Court to it for a detailed description of: the history of the Action; the nature of the claims asserted in the Action; the negotiations leading to the Settlement; the value of the Settlement to the Class, as compared to the risks and uncertainties of continued litigation; the terms of the Plan of Allocation for the Settlement proceeds; and a description of the services Lead Counsel provided for the benefit of the Class. Unless otherwise noted, capitalized terms have the meanings set out in the Stipulation and Agreement of Settlement, dated March 7, 2014 (ECF No. 211).

Plaintiff's and Lead Counsel's informed opinion that, in light of the significant risks and the delay, expense, and uncertainty of pursuing the Action through trial and any subsequent appeals, the Settlement is an exceptional result for the Class.

The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement, dated March 7, 2014, which was previously submitted to the Court. ECF No. 211. In the Court's Order Preliminarily Approving Settlement and Providing for Notice, entered May 2, 2014 (ECF No. 219, the "Preliminary Approval Order"), the Court preliminarily approved the Settlement, certified the Class for purposes of the Settlement, and directed that notice of the Settlement be provided to potential Class Members.[2] The $280 million Settlement Amount was deposited into an escrow account on May 23, 2014, and has been invested for the benefit of the Class. If the Settlement becomes Final, it will resolve the Action.

The parties reached settlement only after vigorous litigation of the case, at a time when Lead Plaintiff and Lead Counsel had developed a thorough understanding of the strengths and weaknesses of the claims and defenses in the Action. Throughout the litigation, Lead Counsel conducted a substantial investigation into the facts and the preparation of a detailed, 97-page Consolidated Class Action Complaint (the "Complaint," ECF No. 47); extensively consulted with experts concerning the mortgage-backed securities ("MBS") industry, class certification issues, and damages; litigated motions to dismiss, motions to stay, and intervention motions; and prepared and served Lead Plaintiff's class certification motion and opening briefs and evidence

[2] The Class is defined as: "All Persons who purchased or otherwise acquired Certificates [as defined therein and set forth in Table A to the Plan of Allocation] pursuant or traceable to the Offerings [as defined therein] and were damaged thereby. Excluded from the Class are (1) Defendants and [certain related Persons as set forth in the Stipulation]; (2) Persons that have separately asserted and/or pursued their claims against Defendants, including by filing individual actions and/or privately entering into confidential tolling agreements with Defendants, as such Persons are identified on Appendix 1 to the Stipulation, which shall be kept confidential by the Settling Parties and the Claims Administrator and redacted or filed under seal in any public filing of the Stipulation. Also excluded from the Class are any Persons or entities who exclude themselves by filing a valid request for exclusion in accordance with the requirements set forth in the Notice." Preliminary Approval Order ¶4.

in support thereof, which addressed many of Defendants' key defenses in the Action. Lead Counsel also conducted extensive fact discovery, including reviewing and analyzing over one million documents from Defendants and dozens of non-parties; and conducting depositions of six J.P. Morgan employees. In addition, the process of engaging in intense settlement negotiations with Defendants, which included the exchange of mediation briefs and reply briefs and mediation discussions with Judge Weinstein, helped further illuminate the strengths and weaknesses of the claims and Defendants' defenses.

In reaching the Settlement, Lead Plaintiff and Lead Counsel considered the numerous risks associated with continuing the litigation, including the risks of recovering less than the Settlement Amount after substantial delay or of no recovery at all. Although Lead Plaintiff had overcome J.P. Morgan's motion to dismiss in large part, there were nonetheless significant hurdles to getting a litigation class certified, establishing liability and proving damages in the Action.

Even if Lead Plaintiff prevailed on liability at trial, Defendants would still have the opportunity to persuade the finder of fact that the statutory damages pursuant to the Securities Act should be reduced or eliminated because a portion – or even all – of the losses were attributable to causes other than the alleged misstatements and omissions, such as the overall economic downturn, housing price declines, or reduced liquidity in the market for MBS. Defendants would also have raised numerous additional defenses including that they had conducted a reasonable investigation of the underlying mortgages and reasonably believed that the Offering Documents were accurate; that Lead Plaintiff's claims were untimely under the Securities Act's one-year statute of limitations because certain information related to the alleged misstatements was purportedly in the market more than one year before suit was filed; and that

certain Class Members who had actual knowledge of the alleged misstatements or omissions were not harmed because they had received all principal and interest payments due to them under the Certificates, or would have to prove individual reliance based on the time that they bought their Certificates. Additionally, Defendants would have opposed Lead Plaintiff's motion for class certification, likely arguing (as defendants in similar litigations have done before trial and appellate courts) that a number of individual issues, including the application of the statute of limitations and the knowledge of Class Members concerning the alleged misstatements, predominated over common issues.

All of these litigation risks were exacerbated by the lack of established precedent in class actions by purchasers of MBS at the time the case was filed, which increased the level of uncertainty and the risks of appellate reversal. Finally, many of these contested issues, including proof of damages and Defendants' "negative causation" and due diligence defenses, would have required expert testimony, and there can be no certainty as to how a jury would have responded to such a "battle of the experts." Accordingly, while Lead Plaintiff and Lead Counsel believe that the Class had strong claims, they recognized that the Class would have faced significant risks in overcoming these arguments and establishing all the elements of Lead Plaintiff's claims against Defendants.

The $280 million Settlement achieved by Lead Plaintiff avoids these risks and provides an immediate and substantial financial benefit for the Class. In light of the significant obstacles to recovery, and the substantial time and expense that continued litigation would require, Lead Plaintiff and Lead Counsel respectfully submit that the Settlement is an outstanding result for the Class, and provides a fair and reasonable resolution of the claims against Defendants in this Action. *See* Declaration of George W. Neville, Special Assistant Attorney General, Legal

Counsel to the Public Employees' Retirement System of Mississippi, in Support of (A) Lead Plaintiff's Motion for Approval of Settlement and Plan of Allocation; (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses; and (C) Lead Plaintiff's Request for Reimbursement of Costs and Expenses ("Neville Decl."), attached as Exhibit 1 to the Lead Counsel Decl.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Under Rule 23(e) of the Federal Rules of Civil Procedure, class action settlements are subject to court approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("The District Court must carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion.") (internal citations omitted). "A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

In this Circuit, public policy favors the settlement of disputed claims among private litigants, particularly in complex class actions such as this one. *See id.* ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'"); *Chavarria v. N.Y. Airport Serv., LLC*, 875 F. Supp. 2d 164, 171 (E.D.N.Y. 2012) ("Settlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.'") (citation omitted).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough

investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Because "'[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial.'" *Newman v. Stein*, 464 F.2d 689, 691-92 (2d Cir. 1972); *see Chavarria*, 875 F. Supp. 2d at 172 (a court may not "conduct a mini-trial of the merits of the action."); *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("In deciding whether to approve a settlement, a court 'should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another.'") (citation omitted).

A. The Settlement Was Reached After Arm's-Length Negotiations With The Assistance Of An Experienced Mediator And Is Procedurally Fair

A strong initial presumption of fairness attaches to a proposed settlement if it is reached as a result of arm's-length negotiations between experienced counsel after meaningful discovery. *See Wal-Mart*, 396 F.3d at 116; *Padro v. Astrue*, No. 11-CV-1788 (CBA)(RLM), 2013 WL 5719076, at *3 (E.D.N.Y. Oct. 18, 2013) ("Where the integrity of the negotiation process is preserved, a strong initial presumption of fairness attaches to the proposed settlement.").

The Settlement here is entitled to this strong presumption of fairness because all parties in the Action are represented by counsel well experienced in litigating these types of claims (Lead Counsel Decl. ¶¶105, 106); the Settlement was the result of intense, arm's-length negotiations (*id.* ¶¶70-72); and the parties understood the strengths and weaknesses of the claims and defenses before settlement was reached (*id.* ¶¶74-81). Lead Counsel had obtained and analyzed more than

one million documents from Defendants and dozens of non-parties; consulted with experts; and taken several depositions. *Id.* ¶¶51-65.

Moreover, Judge Weinstein, a retired judge and experienced mediator who oversaw the mediation and ultimately recommended the $280 million Settlement Amount to the parties, states that the Settlement was the "reasonable result of a hard-fought, arm's-length process" and believes that the Settlement "represents a well-reasoned and sound resolution of this complex and highly uncertain litigation." *See* Declaration of the Mediator, Hon. Daniel H. Weinstein (Ret.), in Support of Motion for Final Approval of Settlement and Plan of Allocation, and Motion for Approval of Attorneys' Fees and Expenses, at ¶3, attached to the Lead Counsel Decl. as Exhibit 5. The active involvement of an experienced and independent mediator like Judge Weinstein in the negotiation of the Settlement is strong evidence of the absence of any collusion and further supports the presumption of fairness. *See D'Amato*, 236 F.3d at 85 (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *Moore v. Verizon Commc'ns, Inc.*, No. C 09-1823 SBA, 2013 WL 4610764, at *8 (N.D. Cal. Aug. 28, 2013) (approving a settlement mediated by Judge Weinstein); *In re Marsh*, 265 F.R.D. at 141 (same, and referring to Judge Weinstein as "a highly regarded mediator" and noting that, in light of Judge Weinstein's declaration "strong[ly] support[ing]" the settlement, "the Court has no reason to doubt that the Settlement is procedurally fair").

B. Application Of The *Grinnell* Factors Supports Approval Of The Settlement As Fair, Reasonable, And Adequate

The Settlement is also substantively fair, reasonable and adequate and in the best interests of the Class. The standards governing approval of class action settlements are well established in

this Circuit. In *Grinnell*, the Second Circuit held that the following were factors to be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463 (internal citations omitted); *see also McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009); *Wal-Mart*, 396 F.3d at 117. "A court need not find that every factor militates in favor of a finding of fairness; rather, a court considers the totality of these factors in light of the particular circumstances." *Padro*, 2013 WL 5719076, at *4 (citation omitted). Here, the Settlement easily satisfies the criteria set forth in *Grinnell*.

1. The Complexity, Expense And Likely Duration Of <u>The Litigation Support Approval Of The Settlement</u>

"In evaluating the settlement of a securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (citation omitted). Indeed, courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006).

Lead Plaintiff would have to overcome numerous hurdles in order to achieve a litigated verdict in this Action. Assuming a successful motion for class certification, and that Lead Plaintiff's claims on behalf of a certified litigation class survived summary judgment, the Action

would have culminated in a jury trial that would have required a substantial amount of factual and expert testimony. Finally, whatever the outcome at trial, it is virtually certain that an appeal would be taken. All of the foregoing would have posed considerable expense and would have delayed the Class' recovery for several years – assuming that Lead Plaintiff was ultimately successful on its claims.

The subject matter involved in the Action, as well as the structured nature of the securities, also added to the complexity of the litigation. Lead Plaintiff and Lead Counsel recognized that if the Class were to prevail on the claims at trial they would need to marshal and analyze a great deal of complex information concerning the design and structure of the Certificates; the disclosures in the Offering Documents; and the relevant details about the numerous loans underlying the MBS, including the true nature of the underwriting of the loans and the related appraisals. Lead Plaintiff obtained and reviewed over one million documents. Lead Counsel Decl. ¶¶58, 74-81. Because there were over 94,000 individual residential mortgages underlying the MBS at issue, Lead Plaintiff also intended to make use of sampling and statistical analyses to draw conclusions about the loan pools underlying the Offerings. *See id.* ¶53. Lead Plaintiff and Lead Counsel would have worked closely with their experts to present the voluminous supporting data to a jury in a simple and comprehensible manner at trial. It cannot be disputed that achieving a litigated verdict in this Action was far from certain. The multiple defenses that Defendants were expected to interpose to liability and damages, as previewed in their motions to dismiss and confidential mediation briefs – including negative causation, due diligence, the statute of limitations, and Class Members' knowledge of the alleged misstatements, among others – would also have added significantly to the complexity of the case. *Id.* ¶¶74-81.

In contrast to this complex, lengthy, and uncertain litigation, the Settlement here provides an immediate, significant and certain recovery of $280 million for members of the Class. Accordingly, this factor supports approval of the Settlement.

2. The Reaction Of The Class <u>Supports Approval Of The Settlement</u>

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *See, e.g., Chavarria*, 875 F. Supp. 2d at 173; *see also Padro*, 2013 WL 5719076, at *5 ("The fact that a small number of objections were received weighs in favor of settlement," as does "the positive reaction of the class, particularly in light of its size.").

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, The Garden City Group, Inc. ("GCG"), began mailing copies of the Notice and Claim Form to potential Class Members and nominees on May 9, 2014. *See* Declaration of Jennifer M. Keough Re Notice Dissemination and Publication, Exhibit 2 to the Lead Counsel Declaration ("Keough Decl."), at ¶4. As of June 12, 2014, 7,454 copies of the Notice and Claim Form had been disseminated to potential Class Members and their nominees. *Id.* ¶9. In addition, a Summary Notice was published in the national edition of the *Investor's Business Daily* on May 14, 2014. *Id.* ¶10. The Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to opt out of the Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for Class Members to exclude themselves or object to the Settlement has not yet passed, to

date, Lead Counsel has received no objections to the Settlement or the Plan of Allocation and no requests for exclusion.[3]

3. The Stage Of The Proceedings And The Amount Of Discovery Completed Support Approval Of The Settlement

The successful resolution of this Action required more than five years of hard fought litigation that included extensive motion practice, reviewing and analyzing over one million documents, taking six depositions of Defendants' witnesses, reviewing more than forty deposition transcripts conducted in related litigations, and consulting with multiple experts. Lead Counsel Decl. Section II. Accordingly, Lead Plaintiff and Lead Counsel had a firm grasp of the strengths and weaknesses of the case when negotiating and evaluating the proposed Settlement.

As set forth in greater detail in the Lead Counsel Declaration, Lead Counsel extensively developed the claims against Defendants by, among other things:

- conducting a thorough factual investigation, including interviewing numerous individuals with first-hand knowledge of the events alleged; performing an in-depth review and analysis of the Offering Documents and a careful analysis of other court filings, investigations, media reports, Congressional testimony, SEC filings, press releases, and public statements made by J.P. Morgan, the Rating Agencies and various Originators that contributed loans to the Offerings at issue (Lead Counsel Decl. ¶23);

- drafting two complaints, including a detailed, 97-page, Complaint based on this extensive factual investigation and legal research into the applicable claims (*id.* ¶¶20, 24-25);

- preparing extensive briefing in response to motions to dismiss the Complaint, including multiple submissions addressing supplemental authority that could potentially affect the outcome of the motions to dismiss (*id.* ¶¶26-35);

- preparing briefing in response to motions to intervene and Defendants' motion to stay the Action pending the outcome of an appeal of the Court's ruling on the

[3] The deadline for submitting objections and requesting exclusion from the Class is July 3, 2014. As provided in the Preliminary Approval Order, Lead Plaintiff will file reply papers on July 17, 2014, addressing any objections and requests for exclusion that may be received.

intervention motions and – following the Second Circuit's decision in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012) ("*NECA-IBEW*") – additional briefing in response to Defendants' motion to stay the Action pending the Supreme Court's ruling on the *NECA-IBEW certiorari* petition (*id.* ¶¶39-42, 44-50);

- serving the opening brief in support of the motion for class certification, including an accompanying expert report (*id.* ¶68);
- preparing and issuing document requests, interrogatories and requests for admission to Defendants (and responding to same from Defendants) and over 50 document subpoenas to non-parties, including custodial banks that cleared MBS transactions, due diligence firms that reviewed the loans underlying the MBS, lenders that originated the loans, and servicers that had possession of the loan files (*id.* ¶¶51-61, 64-65);
- reviewing and analyzing over one million documents produced by Defendants and non-parties, including several of the loan origination files underlying the MBS (*id.* ¶¶3, 53-58, 100, 118);
- deposing six fact witnesses, including J.P. Morgan's two Rule 30(b)(6) designees and other J.P. Morgan employees; reviewing more than 40 deposition transcripts from related or similar actions against J.P. Morgan obtained through discovery (*id.* ¶¶57, 62);
- conferring extensively with experts and consultants concerning mortgage-backed securities, damages, causation and class certification issues (*id.* ¶¶66-67); and
- drafting and exchanging mediation statements and responses, and participating in other discovery-related negotiations with Defendants (*id.* ¶¶54, 70).

Lead Plaintiff and Lead Counsel were familiar with Defendants' defenses through briefing of the motions to dismiss and from their analysis of the Defendants' posture on discovery and Defendants' mediation statements.

Thus, at the time the Settlement was reached, Lead Plaintiff and Lead Counsel "obtained sufficient information to be able to intelligently assess the strengths and weaknesses of the case and appraise settlement proposals." *Padro*, 2013 WL 5719076, at *6. As a result, Lead Plaintiff and Lead Counsel had a well-informed basis for their belief that the Settlement is a favorable resolution of the Action for the Class and this factor strongly supports approval of the

Settlement. *See, e.g.*, *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 333-34 (E.D.N.Y. 2010) ("Extensive discovery ensures that the parties have had access to sufficient material to evaluate their case and to assess the adequacy of the settlement proposal in light of the strengths and weaknesses of their positions."); *see also In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 161 (S.D.N.Y. 2011) (this factor supported settlement where the action had proceeded through substantial document production, five depositions, "a round of mediation submissions and sessions, and expert consultations on damages and causation," and, thus, "the parties were able to make an intelligent appraisal of the value of the case"); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (settlement approved where the parties "have a clear view of the strengths and weaknesses of their cases").

4. The Risks of Establishing Liability And Damages Support Approval Of The Settlement

Grinnell holds that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability [and] . . . the risks of establishing damages." 495 F.2d at 463. While Lead Plaintiff and Lead Counsel believe that the claims asserted against Defendants have merit, they also recognize that there were significant risks as to whether they would ultimately be able to prove liability and establish damages on their claims in the Action, as well as with respect to the amount of damages that Lead Plaintiff could establish. These risks included challenges in proving that there were misstatements and omissions in Offering Documents that also contained warnings. Further risks included, for example, overcoming Defendants' arguments that some or all of the declines in the value of the Certificates were due to causes other than the alleged misstatements or omissions ("negative causation" defenses); that Defendants had conducted a "reasonable investigation" and

thus could satisfy their "due diligence" defense; that Lead Plaintiff's claims were untimely; and that various members of the Class had actual knowledge of the misstatements and thus could not bring valid claims. Lead Counsel Decl. ¶¶74-81.

Risks of Establishing Liability. To avoid summary judgment and prevail at trial, Lead Plaintiff would need to present evidence that the Offering Documents contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein related to (i) the underwriting of the loans underlying the MBS, and/or (2) the appraisals and loan-to-value ratios of the loans underlying the MBS. Defendants had argued and would continue to argue that the Offering Documents contained no untrue statements or omissions.

Risks of Establishing Damages. Defendants also contended that establishing damages under the Securities Act posed significant obstacles for Lead Plaintiff and the Class. Under § 11(e) of the Securities Act, damages may be reduced or eliminated if the defendant proves that a portion or all of the statutory damages are attributable to causes other than the misstatements or omissions. Defendants asserted throughout the litigation – and were expected to continue to assert through summary judgment and trial – that the overall economic downturn, housing price declines and reduced liquidity in the market for mortgage-backed securities – and not the alleged misstatements and omissions – were responsible for the declines in the Certificates' value. Lead Counsel Decl. ¶75. Moreover, given that the timing of the price declines at issue coincided with the national economic downturn, Defendants' "negative causation" defense was an argument that, at the very least, would have to be resolved through expert testimony at trial. *See, e.g., Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005) (the likelihood of demonstrating loss causation decreases if a "plaintiff's loss coincides with a marketwide

phenomenon"); *Giant Interactive*, 279 F.R.D. at 161-62 (approving settlement where the litigation risks included a "credible defense of 'negative causation'").

Risks of Getting A Class Certified. Lead Plaintiff faced significant risks at class certification, including the possibility that the Court might not certify a litigation class at all, of course. For example, Defendants were likely to argue that individual issues of "knowledge" predominated over common issues and precluded class certification. *See, e.g., N.J. Carpenters Health Fund v. Rali Series 2006-Q01 Trust*, 477 F. Appx. 809, 813-14 (2d Cir. 2012) (finding no abuse of discretion in court's denial of class certification in §§ 11 and 12(a)(2) MBS action on grounds that individual questions of investors' knowledge predominated over common issues). Moreover, even if the Court did certify a class, Defendants would argue to certify a smaller class than Lead Plaintiff proposed by limiting it to the specific tranches that Lead Plaintiff purchased. *See NECA-IBEW*, 693 F.3d at 165 ("We emphasize that it is by no means a foregone conclusion that, because plaintiff has standing to assert §§ 11 and 12(a)(2) claims on behalf of Certificate-holders from different tranches of Offerings (or within Offerings) backed by loans originated by the same originators, a putative class comprised of such Certificate-holders should be certified.").

Risks Related to Other Defenses. Defendants raised numerous other defenses in this Action, which they could be expected to continue to press, including, *inter alia*, (i) a statutory "due diligence" defense; (ii) the statute of limitations; (iii) that certain Class Members had "knowledge" of the alleged misstatements; and (iv) that Lead Plaintiff and certain Class Members had suffered no loss.

- ***Due Diligence.*** Defendants would likely assert a defense to liability under § 11 based on their contention that they had conducted a "reasonable investigation" of the loans and the Certificates at issue and, therefore, "had reasonable ground to believe and did believe" that the Offering Documents contained no untrue

statements or omissions.[4] While these Defendants would have the burden of establishing this "due diligence" defense, if they were successful in establishing the reasonableness of their investigation, it could provide a complete defense to liability. Moreover, the question as to what constituted a "reasonable investigation" in these circumstances would likely have been the subject of competing expert testimony at trial. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 338 (S.D.N.Y. 2005) (risks of litigation supported the settlement where defendants "had asserted due diligence defenses and might have been successful at establishing the adequacy of their efforts at trial").

- ***Statute of Limitations.*** Defendants would also have continued to argue that Lead Plaintiff's claims were untimely because, according to Defendants, certain information related to the alleged misstatements was in the market more than one year before the suit was filed. Lead Counsel Decl. ¶77. Thus, Defendants would have argued that this Action, first initiated in March 2008, fell outside the applicable one-year limitations period. *See* 15 U.S.C. § 77m.

- ***Knowledge.*** Defendants would argue that certain Plaintiffs and various members of the Class had actual knowledge of the alleged untrue statements and omissions at the time they purchased the Certificates and thus could not bring claims. Lead Counsel Decl. ¶77.

Several of these contested issues, notably the "negative causation" defense and the "due diligence" defense would ultimately have required expert testimony before the jury. While Lead Plaintiff expected to present persuasive expert testimony establishing causation and damages and opining that Defendants' investigation was not sufficient, Defendants likely would have been able to present experts who would support their position. Defendants, moreover, undoubtedly would assert *Daubert* challenges to each expert. Assuming that Lead Plaintiff prevailed in such challenges, Lead Plaintiff could not be certain which experts' views would be credited by the jury and who would prevail at trial in this "battle of the experts." *See, e.g., Metlife*, 689 F. Supp. 2d at 332 ("The proof on many disputed issues – which involve complex financial concepts – would likely have included a battle of experts, leaving the trier of fact with difficult questions to

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[4] 15 U.S.C. § 77k(b)(3)(A); *see* Lead Counsel Decl. ¶79. With respect to Lead Plaintiff's claims under § 12(a)(2) of the Securities Act, a similar defense is available, precluding liability where the defendant can show that it "did not know, and in the exercise of reasonable care could not have known" of the untruth or omission. 15 U.S.C. § 77l(a)(2).

resolve."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("In such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants.").

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

5. The Risks Of Maintaining The Class Action Through Trial Support Approval Of The Settlement

Apart from the risk that a litigation class might not be certified, discussed *supra*, even if Lead Plaintiff was successful in getting a class certified, there was no guarantee that it would be able to maintain it. This is so because courts may always exercise their discretion to re-evaluate the appropriateness of class certification at any time. The Settlement avoids any uncertainty with respect to this issue, which militates in favor of approval. *See, e.g., Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[W]e cannot find that the district court abused its discretion in finding that the class faced significant risks of decertification, that decertification would drastically reduce the chances of any member of the class achieving meaningful relief, and that the litigation risks attendant to these possibilities weighed heavily in favor of the fairness of a settlement.").

Moreover, although the motion for class certification was not fully briefed by the time the parties entered into the Settlement, even when such motions have been granted in similar MBS cases, the Second Circuit has granted petitions to appeal pursuant to Fed. R. Civ. P. 23(f). *See, e.g., Tsereteli v. Residential Asset Securitization Trust 2006-A8*, 283 F.R.D. 199 (S.D.N.Y. 2012), *permission to appeal granted*, No. 12-2790 (2d Cir. Mar. 19, 2014); *Pub. Emps.' Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc.*, 280 F.R.D. 130 (S.D.N.Y. 2012), *permission to appeal granted*, No. 12-614 (2d Cir. Jan. 4, 2013). Thus, there was a risk that the Class may not have

been certified or may have been de-certified. At the very least, such a petition would cloud the certainty of certification for an extended period of time.

6. The Ability Of The Defendant To Withstand A Greater Judgment Supports Approval Of The Settlement

Although Defendants may have been able to pay a judgment in excess of the Settlement Amount, "defendants' ability to withstand a higher judgment . . . standing alone, does not suggest that the settlement is unfair." *D'Amato*, 236 F.3d at 86; *see Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242, 261 (E.D.N.Y. 2009) ("The fact that a defendant is able to pay more [than] it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate.") (citation omitted); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, at *12 (S.D.N.Y. Apr. 6, 2006) ("the mere ability to withstand a greater judgment does not suggest that the Settlement is unfair"); *see also In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC)(JO), 2012 WL 5289514, at *6 (E.D.N.Y Oct. 23, 2012) (noting that courts have observed that "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement").

Here, there could be no guarantee as to the financial capability of Defendants to withstand a substantially larger judgment several years in the future at the conclusion of trial and any appeals. Indeed, at the time the Settlement was reached, J.P. Morgan was litigating numerous other lawsuits (some related to mortgage-backed securities) that increased J.P. Morgan's exposure.

In any event, the fact that Defendants may have the ability to pay a greater judgment is outweighed here by the other strong considerations favoring the Settlement, most notably, the

risks to the Class of establishing liability and damages and the reasonableness of the Settlement Amount in light of those risks.

7. The Range Of Reasonableness Of The Settlement Fund, In Light Of The Best Possible Recovery And All Of The Attendant Risks Of Litigation, Supports Approval Of The Settlement

The last two substantive factors that courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks. In analyzing these two factors, the issue for the court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. A court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462 (citations omitted). "The determination of a reasonable settlement 'is not susceptible of a mathematical equation yielding a particularized sum,' but turns on whether the settlement falls within a range of reasonableness." *Chavarria*, 875 F. Supp. 2d at 174 (citation omitted). Thus, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. "In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Chavarria*, 875 F. Supp. 2d at 175 (citation omitted).

The Settlement here is well within the range of reasonableness in light of the substantial risks presented by this litigation. Although Lead Plaintiff's damages consultant estimated that statutory damages under § 11 – before taking into account causation or other defenses to damages – could amount to billions of dollars in the aggregate based on certain assumptions,

Defendants had substantial arguments with respect to various defenses to the claims at issue that could greatly reduce or eliminate altogether the amount of damages for which they were liable.[5] Lead Plaintiff and Lead Counsel have concluded that, in light of these risks, the Settlement, which provides an immediate and substantial benefit to Class Members, outweighs the benefits of continued litigation. Lead Counsel Decl. ¶¶74-81; *see also* Neville Decl. ¶7-8, attached as Exhibit 1 to the Lead Counsel Declaration. A court may not "substitute its judgment for that of the parties who negotiated the settlement." *Chavarria*, 875 F. Supp. 2d at 172.

Lead Counsel are intimately familiar with the facts in the case and have extensive experience prosecuting comparable securities class actions. In these circumstances, Lead Counsel's opinion that the Settlement is reasonable is entitled to "great weight." *Padro*, 2013 WL 5719076, at *7 ("Where, as here, settlement has been reached after an arms-length negotiation, 'great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.'") (citation omitted). The recommendation of Lead Plaintiff, a sophisticated institutional investor, also strongly supports the fairness of the Settlement. Representatives of Lead Plaintiff took an active role in supervising this litigation, as envisioned by the Private Securities Litigation Reform Act of 1995 ("PSLRA") (Neville Decl. ¶¶5-6), and Lead Plaintiff "strongly endorses the Settlement" (*id.* ¶8). A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec.*

[5] For example, under § 11, recoverable damages are based on the difference between the purchase price of the security and the value of the security on the date the lawsuit was filed, subject to reduction for "negative causation." As discussed above, Defendants here contended that any losses were caused by factors other than untrue statements in the Offering Documents, such as the downturn in the economy and the housing market. Given that the timing of the price declines at issue coincided with the national economic downturn, Defendants' "negative causation" defense was an argument that, at the very least, would have to be resolved through expert testimony at trial.

Litig., No. 05 MDL 0165 CM, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (citation omitted).

In sum, a review of the *Grinnell* factors, including the complexity, expense and delay of further litigation, discovery completed and the stage of the proceedings, and the substantial risks of the Action, strongly supports a finding that the Settlement is fair, reasonable and adequate.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

Lead Plaintiff has proposed a plan to allocate the proceeds of the Settlement among Class Members who submit valid Claim Forms that are approved for payment from the Net Settlement Fund ("Authorized Claimants"). The objective of the proposed Plan of Allocation is to equitably distribute the Settlement proceeds to those Class Members who suffered economic losses as a result of the alleged misrepresentations and omissions. *See* Lead Counsel Decl. ¶87.

The Plan, as set forth in the Notice, allocates the settlement proceeds based principally on the statutory measure of damages set out in § 11(e) of the Securities Act, 15 U.S.C. § 77k(e). Lead Plaintiff engaged Brett Brandenberg, a Director at AlixPartners and a Chartered Financial Analyst, to examine the Plan of Allocation.

The Declaration of Brett Brandenberg ("Brandenberg Decl."), attached to the Lead Counsel Declaration as Exhibit 3, explains the methodology for determining each Authorized Claimant's Recognized Claim under the Plan and the basis for the analysis. As explained more fully in the Notice – including through illustrative examples – and in the Brandenberg Declaration, a "Recognized Loss Amount" or "Recognized Gain Amount" will be calculated for each purchase or acquisition of a Certificate. Brandenberg Decl. ¶7. The calculation of a Claimant's Net Recognized Loss will depend on several factors, including: (a) the face value of the Certificates purchased; (b) when the Certificates were purchased or acquired and the price

paid; (c) any principal payments received; (d) whether the Certificates were sold, and if so, when they were sold and for how much; and/or (e) if held on the applicable Date of Suit for the Certificates, the price of the Certificates on that date. *Id.* ¶6. Although the formula has a degree of complexity necessary to allocate the settlement funds fairly among Authorized Claimants and based on the statutory damage calculations mandated by § 11 of the Securities Act, investors in mortgage-backed securities are typically highly sophisticated investors, and the language utilized in the Plan is consistent with industry terminology. *Id.* ¶7. In addition, specific examples of how to calculate hypothetical examples under various scenarios are included in the Plan for clarification. *Id.*

"To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized namely, the plan must be fair and adequate." *See Chavarria*, 875 F. Supp. 2d at 175. A plan that allocates settlement funds to class members based on the extent of their injuries or the strengths of their claims is fair and reasonable. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) ("A reasonable plan may consider the relative strength and values of different categories of claims."). Moreover, in assessing a proposed plan of allocation, the Court may give great weight to the opinion of informed counsel. *See, e.g., In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2013 WL 6510737, at *27 (E.D.N.Y. Dec. 13, 2013) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.") (citation omitted); *Chavarria*, 875 F. Supp. 2d at 175 ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel. That is, as a general rule, the adequacy of an allocation plan turns on whether counsel has

properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information.") (citations omitted).

The proposed Plan of Allocation in this case is based on the statutory damages permitted under § 11 of the Securities Act and was fully explained in the Notice sent to Class Members. It was prepared in consultation with Lead Plaintiff's consultant and tracks the theory of damages asserted by Lead Plaintiff. Accordingly, it is the opinion of Lead Counsel that the Plan is fair, reasonable and adequate to the Class as a whole. Lead Counsel Decl. ¶90. Following dissemination of 7,454 Notices, to date, there are no objections to the Plan of Allocation. *Id.* ¶91.

Accordingly, for all of the reasons set forth herein, in the Lead Counsel Declaration, and in the Brandenberg Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

III. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable." Fed. R. Civ. P. 23(e)(1). Notice of a settlement is reasonable if it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114.

Both the substance of the Notice and the method of its dissemination to potential Class Members satisfied these standards. The Notice includes all the information required by Rule

23(c)(2)(B) and the PSLRA, 15 U.S.C. § 77z-1(a)(7), including: (i) an explanation of the nature of the Action and claims; (ii) the Class definition; (iii) the Settlement Amount and structure of the Settlement; (iv) the Plan of Allocation; (v) an explanation of the reasons for the Settlement; (vi) a statement of the Class Members' expected recovery; (vii) a statement indicating the attorneys' fees and costs that will be sought; (viii) a description of the right to opt-out of the Class or object; and (ix) notice of the binding effect of a judgment.

As noted above, in accordance with the Court's Preliminary Approval Order, as of June 12, 2014, the Claims Administrator has disseminated 7,454 copies of the Notice to potential Class Members and their nominees. Keough Decl. ¶¶4, 9. During discovery, Lead Counsel (i) reviewed Defendants' internal files for information about the initial purchasers of the MBS; and (ii) served subpoenas to dozens of major custodial banks whose internal records reflect holdings and transactions in the MBS at issue. Lead Counsel Decl. ¶82. The list of potential Class Members was supplemented by mailing to a collection of the largest and most common U.S. nominees (*i.e.*, brokerage firms, banks, and institutions who hold securities in the name of the nominee on behalf of beneficial purchasers). Keough Decl. ¶5; Lead Counsel Decl. ¶83. In addition, Lead Plaintiff caused the Summary Notice to be published in the national edition of the *Investor's Business Daily* and copies of the Notice and Claim Form were made available on a dedicated website maintained by GCG and on Lead Counsels' websites. *See* Keough Decl. ¶¶10, 12; Lead Counsel Decl. ¶84.

This combination of individual mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, and set forth on Internet websites, was "the best notice . . . practicable under the circumstances" and satisfies the requirements of due process and Rule 23. Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.,*

Padro, 2013 WL 5719076, at *3 ("Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members."); *see also Arace v. Thompson*, No. 08 Civ. 7905 (DC), 2011 WL 3627716, at *4 (S.D.N.Y. Aug. 17, 2011) (describing Investor's Business Daily as "a nationally-circulated business-oriented publication catering to investors," and finding notice of settlement published therein "sufficient[] [to] apprise[] . . . shareholders of the nature of the proposed settlement") (citations omitted).

IV. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

On May 2, 2014, the Court granted Lead Plaintiff's motion for preliminary approval of the Settlement and preliminarily certified the Class for settlement purposes only, pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. *See* Preliminary Approval Order, ECF No. 219. Nothing has changed to alter the propriety of certification and, for all the reasons stated in Lead Plaintiff's preliminary approval brief (ECF No. 210-2), incorporated herein by reference, Lead Plaintiff now requests that the Court grant final certification of the Class pursuant to Rules 23(a) and (b)(3).

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable and adequate.

Dated: New York, New York
June 19, 2014

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