UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE THE RESERVE PRIMARY FUND SECURITIES & DERIVATIVE CLASS ACTION LITIGATION	No. 08-cv-8060-PGG (Class Action)

DECLARATION OF JOHN C. BROWNE IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT AND MOTION FOR APPROVAL OF ATTORNEYS' FEES AND EXPENSES

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Dated: November 11, 2013

TABLE OF CONTENTS

I, John C. Browne, do hereby state as follows:

I. INTRODUCTION

1. I am a partner of the law firm of Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz"), Court-appointed Lead Counsel in this Action and counsel for Court-appointed Lead Plaintiff Third Avenue Institutional International Value Fund, L.P. ("Lead Plaintiff" or "Third Avenue").[1] I have personal knowledge of all material matters related to the Action based upon my active supervision and participation in the prosecution of this Action since its inception. If called upon to do so, I could and would testify to the matters set forth herein.

2. I submit this declaration in support of the proposed Settlement that will resolve all the claims asserted in this securities class action against all defendants. The Settlement is on behalf of a Class of investors who purchased or otherwise acquired shares of the Primary Fund between September 28, 2006 through September 17, 2008 (as defined in the Stipulation, the "Class Period"). This declaration is also submitted in support of the proposed Plan of Allocation and in support of Lead Counsel's application for an award of attorneys' fees and reimbursement of litigation expenses.

3. As described in more detail below, Lead Plaintiff respectfully submits that it has negotiated an excellent Settlement for the benefit of the Class. If the Settlement is approved by the Court, it will result in a substantial payment to Class Members, resolve this Class Action in its entirety, and allow for the prompt distribution of the majority of the approximately $97 million in shareholder funds that are currently being withheld in an Expense Fund pursuant

[1] Unless otherwise noted, capitalized terms have the meanings set out in the Stipulation and Agreement of Settlement, dated August 14, 2013, which was previously filed with the Court on September 6, 2013 (ECF No. 91-1), as amended by the Amendment No. 1 to the Stipulation and Agreement of Settlement Dated August 14, 2013 (ECF No. 94-2) (collectively, the "Stipulation" or the "Settlement").

to this Court's November 25, 2009 Order (ECF No. 201 in SEC Action; the "November 25, 2009 Order").[2]

4. The Settlement requires Defendants to pay $10 million in cash (the "Cash Contribution"), and to relinquish more than $42 million of the approximately $72 million in claims for indemnification, expenses and attorneys' fees that they have asserted against the Expense Fund. Moreover, the Settlement requires Defendants to release all potential claims involving State Street Bank and Trust Company ("State Street") relating to the Primary Fund, which enables the $2.5 million "State Street Set-Aside" established by this Court's November 30, 2010 Order (ECF No. 351 in SEC Action) to be released and distributed to shareholders.

5. The Settlement also requires Defendants to release the claims asserted in their January 22, 2013 Third Party Complaint against the Independent Trustees, which will, in turn, eliminate the necessity to hold back (and potentially expend) funds to defend against those claims. Defendants are further required to make their "best efforts" to resolve the malpractice lawsuit RMCI filed against Willkie Farr & Gallagher LLP. Finally, the Settlement required Defendants to substantiate to an independent mediator, the Honorable Layn R. Phillips (Fmr.), that they do not have substantial personal assets with which to pay a judgment of the magnitude sought by the Class. Based upon his review, Judge Phillips concluded that Defendants would be unable to pay a material judgment to the Class. *See* Declaration of Layn R. Phillips (Former U.S. District Judge) in Support of Final Approval of Class Action Settlement ("Phillips Decl."), attached hereto as Ex. A, ¶6.

6. In addition to the true, tangible economic benefits the Settlement provides to Class Members, it will also benefit shareholders by resolving this long-running matter. The

[2] "SEC Action" refers to *Securities and Exchange Commission v. Reserve Management Company, Inc.,* 09-cv-4346-PGG (S.D.N.Y.).

comprehensive resolution negotiated by Lead Plaintiff, Defendants and the Independent Trustees resolves numerous complex and uncertain issues. If the Settlement is approved by the Court, it will allow for the prompt distribution of tens of millions of dollars of shareholder money that has been withheld for more than five years and has been steadily depleted during that time, as multiple parties have lodged ever-increasing claims against those funds. If this case continues to be litigated through further discovery, trial and appeals, tens of millions of dollars in shareholder funds would be held back for many more years while more operational costs would be incurred against the Fund and additional – and potentially significant – expense and legal claims would be lodged.

7. The Settlement is fair, reasonable, and adequate, and should be approved by the Court. The Settlement is fully supported by Lead Plaintiff and the Independent Trustees of the Primary Fund. The Independent Trustees, in the exercise of their reasonable business judgment, agree that the terms and conditions of the Settlement are fair and reasonable and in the best interests of the Primary Fund and its shareholders.

8. The Court-appointed Lead Plaintiff is a sophisticated institutional investor of the type favored by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Lead Plaintiff was represented by experienced in-house legal counsel throughout the litigation and was directly involved in all significant aspects of the litigation and mediation process. Moreover, the Lead Plaintiff and Lead Counsel have been actively involved in this matter since the earliest days of the crisis at the Primary Fund. As a result, Lead Plaintiff and Lead Counsel are fully informed about the facts of this case and are well positioned to make a judgment as to the adequacy of the Settlement.

9. The Settlement is also the product of intensive arm's-length negotiations involving the direct participation of principals from Lead Plaintiff, Defendants, and the Independent Trustees. As described below, the Settlement was ultimately reached under the supervision of an experienced and highly respected mediator, Judge Phillips, who is a former U.S. District Judge and the former United States Attorney for the Northern District of Oklahoma.

Judge Phillips has submitted a declaration in support of the Settlement setting forth the arms'-length nature of the negotiations and the reasons why the Settlement, in his view, is fair and reasonable. *See* Exhibit A.

10. The many benefits of the Settlement are particularly noteworthy in light of the significant litigation risks inherent in this Action. As discussed in more detail below, this was a unique and extraordinarily difficult case where there was no clear path to recovery for investors. As this Court recognized many times, the Defendants in this case "confronted conditions not seen since the Great Depression" during a time when the financial markets were "in chaos." ECF No. 648 in SEC Action, at p. 37.

11. If this case were to proceed through dispositive motions and trial, Lead Plaintiff would have to overcome numerous defenses as to both liability and damages, including substantial arguments that (i) Defendants' alleged misrepresentations were immaterial "puffery" and protected by the "bespeaks caution" doctrine; (ii) Defendants fully disclosed the Primary Fund's investments in all assets, including its investment in Lehman Brothers Holdings Inc. ("Lehman"), in each Registration Statement and in multiple other public filings disseminated during the Class Period; (iii) all investments made by the Primary Fund were Prime-rated and were widely perceived to be safe and conservative; (iv) the Class could not rely on the "fraud-on-the-market" theory to prove class-wide reliance; (v) the collapse of the Primary Fund was caused by an unprecedented panic in the financial markets rather than any wrongdoing on the part of Defendants; and (vi) the vast majority of potential Class Members merely "held" shares after September 15, 2008, and Lead Plaintiff cannot assert Section 10(b) claims on behalf of these "holders."

12. The reasonableness of the Settlement is further confirmed by the result obtained after trial in the SEC Action. In that case, a jury returned a verdict finding that Bent Sr. was not liable on all counts asserted against him; Bent II was found liable only for a single negligent violation of the Securities Act of 1933 (the "Securities Act"); and RMCI and Resrv Partners were found liable for violating non-fraud provisions of the Securities Act and the Investment Advisers

Act. In so doing, the jury rejected each of nine separate fraud counts asserted by the SEC against the Defendants. Based on that verdict, the Court awarded total penalties of $750,000. *See* ECF No. 648 in SEC Action. Notably, as discussed further below, Lead Plaintiff and the Class faced significant legal hurdles that the SEC did not – including questions of reliance and the applicability of the fraud-on-the-market presumption to money market funds.

13. In addition to seeking final approval of the Settlement, Lead Plaintiff seeks approval of the proposed Plan of Allocation as fair and reasonable. The Plan of Allocation is a straightforward *pro rata* distribution based on the same methodology as prior distributions made to investors under Court supervision. Given the framework already in place to make distributions to investors, there was no requirement in this case for individual investors to complete and submit claim forms, which reduced administration costs and saved money for the entire Class.

14. For its extensive years-long efforts in achieving this extremely beneficial Settlement in the face of significant risk, Lead Counsel is applying for an award of attorneys' fees in the amount of $5 million, and reimbursement of litigation expenses in the amount of $126,008.62. As set forth below and in the accompanying Memorandum of Law in Support of Lead Counsel's Motion for Attorneys' Fees and Reimbursement of Litigation Expenses, the requested fee, which is approximately 9 percent of the minimum value of the Settlement, results in a modest multiplier of 1.33, well below the range of multipliers routinely awarded by courts in this Circuit and across the country. The institutional investor appointed by the Court as Lead Plaintiff (Third Avenue) has approved Lead Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses, and believes strongly that it is fair and reasonable under the circumstances. *See* Declaration of W. James Hall, General Counsel of Third Avenue Institutional International Value Fund, L.P. ("Third Avenue Decl.") ¶¶13-14, attached hereto as Exhibit B.

15. While the deadline for submitting "opt outs" or objecting to the Settlement has not yet passed, currently there has not been a single objection and only one exclusion request from a potential Class Member.[3]

II. HISTORY OF THE ACTION

16. The history of this litigation and the facts underlying it are well-known to the Court and will not be repeated at length here. This Class Action arises from the Primary Fund's disclosure on September 16, 2008, that its Net Asset Value ("NAV") had declined below $1.00 per share – called "breaking the buck" – due to losses on more than $785 million in investments in commercial paper and other debt issued by Lehman. The Primary Fund subsequently entered into liquidation, the SEC filed a civil lawsuit, and billions of dollars in shareholder money was effectively frozen for more than a year. Even now, more than five years after the Fund broke the buck, approximately $97 million in shareholder money is being withheld in a Court-ordered fund as litigation against Defendants and others continues.[4]

A. Third Avenue Acted Quickly To Preserve Assets For All Shareholders In The First Few Days After The Crisis At The Primary Fund

17. Lead Plaintiff was one of the first investors to respond to the crisis at the Primary Fund. On September 17, 2008, the day after the Fund announced that it had broken the buck, Third Avenue contacted Lead Counsel to discuss potential claims against Defendants and others, with an eye towards protecting all shareholders of the Fund. On September 19, 2008, following an investigation into potential claims involving the Primary Fund, Lead Plaintiff and Lead Counsel filed a class action complaint asserting claims under the federal securities laws and state

[3] The single exclusion request received to date is from an individual who is not a registered shareholder and purports to own 8,071 shares. Following the expiration of the opt-out and objection deadline, Lead Counsel will address all opt-outs and objections in its Reply brief.

[4] As stated in the agreed-upon form of Notice to be sent to the Class, the current trustees of the Primary Fund represent that, as of the end of April 2013, the Primary Fund included approximately $97 million in assets.

law. *See Third Avenue Inst. Int'l Value Fund, L.P. v. The Reserve Fund, et al.,* Civ. Action No. 08-cv-8103 (PGG) (S.D.N.Y.) ("Third Avenue Action"). Lead Plaintiff also filed papers on that day seeking a temporary restraining order ("TRO") preventing the Primary Fund from distributing assets in a manner that may have benefited a limited group of shareholders while causing substantial harm to others.

18. On September 19, 2008, the Court issued an Order scheduling a hearing on Lead Plaintiff's request for a TRO for the following Monday, September 22, 2008. *See* ECF No. 3 in Third Avenue Action. Over the course of the weekend, as the parties prepared for the Monday hearing, Lead Plaintiff, Lead Counsel, and Defendants engaged in intense negotiations that resulted in a Court-ordered stipulation on September 22, 2008, which prohibited Defendants from making an imminent distribution from the Primary Fund.

19. That stipulation was negotiated at a time of considerable uncertainty for the Fund's shareholders (for instance, this was before the involvement of the SEC was known). Indeed, the Fund's previous announcements suggested that it was uncertain whether the Fund would be required to make distributions that would favor certain shareholders (by honoring their redemption requests at $1.00) over others (by honoring their requests at $0.97). Thus, the actions of Lead Plaintiff and Lead Counsel helped preserve assets for all shareholders by ensuring that the Fund did not distribute assets in a potentially inequitable manner.

20. The actions of Lead Plaintiff and Lead Counsel were particularly important for shareholders because they occurred at a time when shareholders lacked clear information regarding the value of the Fund's remaining assets, the Fund's calculation of its NAV, and valuation of the Fund's Lehman investments and other debt.

B. Third Avenue's Efforts On Behalf Of The Class Prior To Being Appointed Lead Plaintiff

21. In the ensuing months, as many additional class action complaints were filed, Lead Plaintiff and Lead Counsel were in regular contact with Defendants' counsel and were active in various related litigations as events surrounding the Primary Fund continued to unfold.

Among other things, Lead Plaintiff and Lead Counsel convened calls among large investors of the Primary Fund to discuss strategic and tactical issues that impacted the litigation, and made filings in related litigation pending in the District of Minnesota seeking to unseal deposition transcripts and exhibits that Defendants were designating "confidential" in that case. *See Ameriprise Financial, Inc. and Securities America, Inc. v. The Reserve Fund, et al*, No 08-CV-5219 (PAM/JK) (D. Minn. Oct. 20, 2008), ECF No. 83. *See* Exhibit F.

22. Lead Plaintiff and Lead Counsel also closely monitored related litigation involving the Reserve International Liquidity Fund, Ltd., which was then pending in the Supreme Court in New York before Justice Kapnick. *See Caxton International Limited, et al. v. Reserve International Liquidity Fund, Ltd.*, 08/602875 (Sup. Ct. NY). These efforts included attending multiple hearings, seeking and obtaining permission to address the court on issues that overlapped with issues in the Primary Fund litigation, and developing a beneficial working relationship with the plaintiffs in the *Caxton* case.

23. On November 18, 2008, Third Avenue filed a motion seeking appointment as lead plaintiff under the PSLRA. Competing motions for lead plaintiff appointment were fully briefed on or about December 22, 2008. Lead Counsel recognized that the Primary Fund was a wasting asset and that the interests of all investors would be best served by a single, unitary civil class action led by one lead plaintiff who asserted all relevant claims in one complaint. Accordingly, Lead Plaintiff opposed the motions of various lead plaintiff movants who sought to fragment the case into separate lead plaintiffs and lead counsel for state law claims, derivative claims, and securities law claims. Lead Plaintiff argued that divvying the case into separate actions for each type of claim would not serve the interests of judicial efficiency and would result, ultimately, in

shareholders recovering less than they would if the case was consolidated under one leadership structure. *See* ECF Nos. 17, 24, 45.[5]

24. Third Avenue and Lead Counsel continued to take an active role in asserting the rights of all shareholders during the time that Lead Plaintiff motions were pending. Among other things, Lead Counsel initiated discussions with Defendants regarding a case management plan and discovery schedule. As part of those efforts, Lead Counsel submitted a proposed case management plan to the Court on March 20, 2009. *See* Exhibit G. Throughout this time, Third Avenue and Lead Counsel continued to monitor and participate in related actions, including the ongoing state court litigation before Justice Kapnick and others. Lead Counsel also had numerous discussions with potential class members seeking information on the status of the Primary Fund litigation and the likelihood of the Primary Fund releasing the substantial funds that it was at that time withholding.

25. On May 5, 2009, while lead plaintiff motions were pending, the SEC filed a complaint against Bent, Bent II, RMCI and Resrv Partners asserting claims under the Securities Exchange Act of 1934 (the "Exchange Act," the Securities Act, and the Investment Advisers Act of 1940 ("Investment Advisers Act"). Unlike the class action filed against the Fund by Lead Plaintiff, which, as discussed below, alleges that Defendants made misleading statements to investors over the course of nearly two years, the SEC Action focused solely on Defendants' conduct on September 15 and 16, 2008. The SEC asserted that during September 15 and 16, 2008, in the wake of the Lehman bankruptcy, Defendants made materially false statements to investors, ratings agencies and the Fund Board and were therefore liable for (1) fraud under Section 10(b) of the Exchange Act; (2) fraud and negligence under Section 17(a) of

[5] Unless otherwise indicated, "ECF No." refers to the docket entries in this Class Action, Case No. 08-cv-8060-PGG (S.D.N.Y.).

the Securities Act; and (3) fraud and negligence under Section 206 of the Investment Advisers Act.

26. In May 2009, the SEC submitted to the Court a "Proposed Plan of Distribution" regarding the assets of the Primary Fund. Third Avenue and Lead Counsel closely reviewed the Proposed Plan of Distribution, conferred with other large investors in the Primary Fund, and held discussions with Defendants and the SEC regarding the Plan. On July 27, 2009, Third Avenue filed a brief in the SEC Action responding to the Proposed Plan and requesting certain modifications. *See* ECF No. 65 in SEC Action.

27. On August 5, 2009, the Court held a hearing on the motions for appointment of Lead Plaintiff in this Class Action. On August 26, 2009, the Court appointed Third Avenue as Lead Plaintiff pursuant to the PSLRA, and appointed the firm of Bernstein Litowitz Berger & Grossmann LLP to serve as Lead Counsel. *See* ECF No. 45. The Court agreed with Lead Plaintiff that the interests of the Class and of judicial efficiency would be best served by having one single institutional investor act as lead plaintiff for the class, with the power to assert any and all claims on behalf of the class, whether they were derivative or direct, or arose under state or federal law.

C. The Court's November 25, 2009 Injunction And Establishment Of The Expense Fund

28. In its new role as Court-appointed Lead Plaintiff, Third Avenue and Lead Counsel continued to investigate potential claims against Defendants and others. *See* ECF No. 46. At the same time, Lead Plaintiff was closely involved in the negotiation of the SEC's request for injunctive relief regarding the Fund. These efforts included numerous discussions with multiple Class Members, conversations with the SEC, and filings with the Court. *See* Exhibit H.

29. On November 25, 2009, the Court issued an order providing for a pro rata distribution of the remaining assets of the Primary Fund and enjoining all claims against (1) Primary Fund assets; and (2) any of the Defendants and any of the Defendants' officers, directors, trustees or representatives to the extent that the claims were subject to indemnification

by the Primary Fund if successful. The November 25, 2009 Order also set aside an initial Expense Fund in the amount of $83.5 million in order to pay any claims for expenses, legal fees or management fees. *See* ECF No. 201 in SEC Action. This amount was later increased to more than $100 million.

D. Preparation Of The Consolidated Amended Class Action Complaint And Summary Of The Claims Asserted

1. Preparation Of The Amended Class Action Complaint

30. On January 5, 2010, Lead Plaintiff filed the consolidated class action complaint (the "Complaint," ECF No. 50). In the course of drafting the Complaint, Lead Plaintiff recognized that the narrow "two-day fraud" theory that underpinned the SEC's complaint was not likely to result in a material recovery for investors in the private action. Among other things, Lead Plaintiff and the Class faced significant legal risks to establishing reliance and damages for the period of time spanning just September 15 and September 16. Accordingly, Lead Plaintiff conducted an extensive and independent investigation into potential claims pre-dating the September 15 time period. This investigation included the review and use of a substantial number of documents obtained through Lead Counsel's proactive involvement in other related litigations and discussions with certain plaintiffs in related litigations.

31. Lead Plaintiff's investigation also included a detailed review and analysis of a large volume of publicly available information concerning the Primary Fund. For example, Lead Counsel reviewed each of the SEC filings made by the Primary Fund during the Class Period, numerous news articles discussing the Primary Fund, press releases issued by the Primary Fund and even viewed video and Audio-taped instances where Bent Sr. was interviewed in the popular or financial press concerning the Reserve Family of Funds and the money market industry. Lead Counsel also thoroughly researched the law applicable to the claims asserted in the Complaint and Defendants' potential defenses thereto.

32. Moreover, Lead Plaintiff communicated with plaintiffs in other individual actions asserted against the Primary Fund. Lead Counsel discussed potential case theories and evidence

with these individual plaintiffs and also shared drafts of the Complaint. One of Lead Plaintiff's goals in doing so was to increase the likelihood that the individual actions would dismiss their claims and become part of the putative class. This effort was largely successful and numerous individual actions were dismissed or no longer actively litigated following the filing of Lead Plaintiff's consolidated complaint. This, in turn, reduced the amount of money the Primary Fund had to spend on litigation-related expenses, and increased efficiencies for the Court.

33. Based on its comprehensive investigation, Lead Plaintiff was able to draft a Complaint alleging that Defendants' wrongdoing began several years prior to the September 15, 2008 date identified in the SEC Complaint. Ultimately, Lead Plaintiff's strategic decision to assert broader claims than those asserted in the SEC Action was critical in allowing investors to negotiate the beneficial settlement obtained here. Indeed, even after the jury verdict in the SEC's case, Lead Plaintiff was able to achieve the substantial additional recovery this Settlement represents for investors.

2. Summary Of Claims And Allegations

34. The Complaint asserts the following three types of claims:

- Securities Act. Counts I, II and III assert claims for violations of Section 11, 12(a)(2) and 15 (control person) of the Securities Act in connection with allegedly false and misleading registration statements and SEC filings issued by the Primary Fund prior to September 15, 2008;

- Exchange Act. Counts IV, V and VI assert claims for violations of Section 10(b) and 20 (control person) of the Exchange Act for false statements made both pre- and post-September 15, 2008; and

- State Law and Investment Company Act. Counts VII, VIII, IX, X, XI and XII assert a number of state law claims and claims asserted under the Investment Company Act.

35. The Complaint alleges that, throughout the Class Period, Defendants' SEC filings emphasized the Fund's supposedly conservative investment philosophy. For instance, Defendants' SEC filings routinely stated that "money market funds only invest in securities with

a lower level of risk" and that "investments in money market funds provide greater security and liquidity than other types of investments." Complaint, ¶38. Defendants also repeatedly distinguished the Primary Fund from its peers on the basis that it was supposedly safer and more conservative than other money market funds. *Id.* ¶¶41-42. Indeed, Defendants marketed the fund has having an "unwavering discipline focused on protecting your principal . . . all the while boring you into a sound sleep." *Id.* ¶¶41, 58.

36. The Complaint alleges that for the first 25 years of the Primary Fund's existence, it refused to invest in commercial paper, with Bent Sr. being openly critical of other money market funds that did. This policy remained in place at the Primary Fund until mid-2006 when Defendants went on an unprecedented commercial paper buying spree. By August 2007, more than 18% of the Fund's assets were in commercial paper and by August of 2008, that amount had increased to 57% of the Fund's holdings. *Id.* ¶¶63-64.

37. Through these higher risk investments, Defendants were able to significantly boost the Primary Fund's yield and attract billions of dollars in additional capital. This enticed thousands of new investors, and, as reported in *The Wall Street Journal*, the Primary Fund had "tripled its assets in just two years." *Id.* ¶67. Ballooning assets led to increases in the management and advisory fees earned by RMCI and Defendants.

38. In mid-2007, Defendants purchased $375 million in Lehman commercial paper and other short term instruments. In February 2008, the Fund acquired an additional $250 million in Lehman medium-term notes and $150 million in Lehman commercial paper.

39. In the early hours of September 15, 2008, Lehman announced that it was filing for Chapter 11 bankruptcy. *Id.* ¶100. As redemption requests began to pour into the Fund, the Complaint alleges that Defendants learned that Lehman debt was trading at 30 to 40 cents on the dollar. The Complaint alleges that they nonetheless recommended to the Board of Trustees that the debt be valued at par – a valuation that was unsupported by market prices but would ensure that the Primary Fund's NAV remained at $1.00 per share. *Id.* ¶102. Ultimately, the Board

decided to price the debt at $0.80, which caused the NAV to decline to approximately $0.9975, which could be rounded up to $1.00. *Id.* ¶115.

40. The Complaint further alleges that, in order to stop the flood of redemptions streaming into the Fund, Defendants falsely told the Board, the ratings agencies, and the Funds' investors that RMCI would enter into a credit support agreement to protect the Primary Fund's NAV. *Id.* ¶¶124-52. At a 1:00 p.m. Board meeting, Bent II assured the Trustees that RMCI intended to implement a credit support agreement, and that RMCI had sufficient capital to support the NAV. *Id.* ¶136. In addition, neither Bent Sr. nor Bent II expressed any conditions or reservations to the Board about the ability or willingness of RMCI to support the Fund. Likewise, throughout the day and into the evening of September 15, Bent and Bent II actively reviewed and approved other communications with the investing public about the credit support agreement. For example, at 5:38 p.m. on September 15, Bent II received an email with the proposed "anonymous" language to be provided for a *Wall Street Journal* article stating that Defendants would protect the NAV to "whatever degree is required." *Id.* ¶146.

41. Unbeknownst to investors, however, Defendants never intended to support the Primary Fund NAV. *Id.* ¶136. As alleged, at approximately 10:00 a.m. on September 16, the Board reconvened for the first time since the previous day. At the meeting, Bent II revealed that RMCI had decided not to enter into a credit support agreement to protect the Primary Fund's $1.00 NAV. He also revealed for the first time that the level of redemption requests as of 9:00 a.m. on September 16, 2008, was about $24.6 billion, and that the Primary Fund had only been able to meet redemption request for the first $10.7 billion. *Id.* ¶161.

42. The Board entered into an executive session, outside the presence of RMCI's officers. At 3:45 p.m. on September 16, 2008, the Board decided that the Primary Fund had "broken the buck" and was in liquidation mode. Later in the day on September 16, 2008, RMCI disclosed to the public that the Primary Fund had "broken the buck" at 4:00 p.m. that day, announcing that the Lehman Brothers debt was going to be valued at zero and "as a result, the NAV of the Primary Fund, effective as of 4:00 PM, is $0.97 per share." *Id.* ¶164.

43. The Primary Fund subsequently entered liquidation proceedings, as discussed above, the SEC filed a civil lawsuit, and billions of dollars in shareholder money was frozen for more than a year. Even now, more than five years after the Fund broke the buck, approximately $100 million in shareholder money is being withheld in a Court-ordered escrow account.

E. The Court Adopts Lead Plaintiff's Discovery Proposal Providing For Efficient Coordination With The SEC Case

44. In the months after the Complaint was filed, and throughout this litigation, Lead Plaintiff was proactive in coordinating its case with the SEC Action. Lead Plaintiff and Lead Counsel recognized and took seriously the responsibility to ensure that this case was litigated in the most efficient and effective manner possible. Those concerns were particularly heightened in the context of this case because, as discussed herein, Defendants were asserting that they were entitled to be reimbursed from shareholder funds for all attorneys' fees and expenses incurred in defending these lawsuits. Thus, any duplication of effort or other inefficiency could have had a direct negative effect on any recovery that might be achieved by Class Members.

45. As part of its efforts on behalf of Lead Plaintiff and the Class, Lead Counsel developed and maintained an open line of communication with the SEC, attended numerous Court conferences relating to matters in the SEC Action that were relevant to Lead Plaintiff's case, and made constructive suggestions to the SEC, Defendants and the Court as to how to coordinate discovery between the Class Action and the SEC Action.

46. For example, in June 2010, Lead Counsel learned that the parties to the SEC Action were submitting a joint case management letter to the Court. Lead Counsel was not privy to the discussions between the SEC and Defendants about that submission, but learned that each of them was invoking this civil class action in connection with their case management plan in the SEC Action. Specifically, Defendants told the Court that they were willing to share discovery between the SEC Action and this Class Action, but they sought to delay the start of depositions in either action until after the motions to dismiss were decided in this Class Action. The SEC, on

the other hand, refused to allow the Class Action to participate in any discovery being obtained in the SEC Action.

47. Lead Counsel realized that neither of these proposals was the most efficient, as the Defendants' proposal would have delayed discovery in the SEC Action, and the SEC proposal would have forced the parties in this Class Action to duplicate discovery obtained in the SEC Action – an inefficient and wasteful proposition. Accordingly, on June 17, 2010, Lead Plaintiff wrote to the Court stating:

> We propose a compromise. As an initial matter, we agree with defendants that some coordination of discovery between the SEC Action and the Class Action could result in savings of defense costs and, potentially, investor resources. But we are also sensitive to the SEC's apparent concern that its case not become sidetracked or delayed by issues relating only to the Class Action.

Exhibit E. Lead Plaintiff then set forth a detailed discovery and case management plan that allowed Lead Plaintiff to participate, in a narrowly-tailored fashion, in discovery that was taking place in the SEC Action. *See id.*

48. On June 24, 2010, the Court issued an order "adopt[ing] Lead Plaintiff's proposal." *See* ECF No. 322 in SEC Action. As a result of the Order, Lead Plaintiff was able to obtain and review more than 500,000 pages of document discovery exchanged in the SEC Action. Moreover, Lead Plaintiff was able to attend depositions, and review transcripts obtained in that case. This was critical because, as discussed below, it allowed Lead Plaintiff to conduct settlement discussions with the SEC and Defendants throughout the case on a fully-informed basis.

F. Defendants' Motions To Dismiss And The Court's Order

49. On June 25, 2010, Defendants served their motion to dismiss the Complaint, which was filed, pursuant to the Court's "bundling" rule, on September 3, 2010 (ECF Nos. 66-67). In their motion, Defendants argued that the Complaint should be dismissed in its entirety for a host of reasons. *First*, Defendants argued that the Complaint alleged "two distinct" frauds – one starting in 2006 and ending in 2008, and another that took place over a "two day" period on

September 15. According to Defendants, the fact that the SEC did not assert any claims based on conduct occurring prior to September 15, 2008 demonstrated that Lead Plaintiff's per-September 15 claims were "completely meritless." ECF No. 67 at p. 2.

50. *Second*, Defendants argued that the Complaint did not adequately allege any materially misleading statements or omissions. In support of this argument, Defendants contended that they had "clearly, expressly, and repeatedly informed investors" that the Primary Fund was investing in commercial paper, including Lehman commercial paper, and that those investments were subject to an increased credit risk. Defendants also argued that certain of Lead Plaintiff's alleged false statements were immaterial puffery that was inactionable as a matter of law.

51. *Third*, Defendants argued that the Complaint failed to adequately allege scienter pursuant to the PSLRA. They contended that the Complaint was "devoid of any scienter allegations" other than allegations that Defendants received management fees in return for managing the Fund and its investments. Defendants claimed that Lead Plaintiff did not point to any documents, witness statements, internal emails or reports, or any other evidence to suggest that any of the Defendants had a subjective belief that the Fund's Lehman investment was risky prior to September 15, 2008. Defendants also argued that Lead Plaintiff's scienter allegations were undercut by the fact that Lehman made certain misrepresentations regarding its financial health that Defendants and others relied upon in good faith.

52. *Fourth*, Defendants noted that "Plaintiffs have affirmative pleading burdens that were not imposed upon the SEC," and argued that Plaintiff's complaint had to be dismissed for a failure to plead reliance. In particular, Defendants argued that the "fraud-on-the-market" theory is inapplicable to money-market funds that, like the Primary Fund, base their share price on NAV because market information about the fund does not impact share price, which is calculated based on asset values, and not determined by the market. Accordingly, the NAV does not react to new information disclosed to the market.

53. *Fifth*, Defendants argued that Lead Plaintiff's Investment Company Act claims should be dismissed because (1) there was no private right of action under Section 13(a) of the Investment Company Act; and (2) the Complaint failed to allege "unreasonable fees" sufficient to support a claim under Section 36(b) of the Investment Company Act.

54. *Sixth*, Defendants argued that certain derivative claims that Lead Plaintiff had asserted – for breach of fiduciary duty, gross negligence and unjust enrichment – should be dismissed for failure to make a demand.

55. *Finally*, Defendants argued that Lead Plaintiffs common law claims should be dismissed pursuant to the Securities Litigation Uniform Standards Act ("SLUSA").

56. On August 13, 2010, Lead Plaintiff served its opposition to Defendants' motion to dismiss, which was filed on September 3, 2010 (ECF No. 70). Lead Plaintiff argued that the Exchange Act claims asserted in the Complaint satisfied the heightened pleading standards of the PSLRA because it pled particularized facts showing that Defendants' class period statements were materially false at the time they were made, and they were not protected by the doctrines of "bespeaks caution" or "puffery." Lead Plaintiff also argued that the Complaint adequately pled scienter under the "motive and opportunity" theory.

57. Lead Plaintiff also argued that the "fraud-on-the-market" theory of reliance was applicable to this case and that Lead Plaintiff could assert claims on behalf of "holders." Finally, Lead Plaintiff argued that Defendants' attacks on the Securities Act claims, derivative claims, Investment Company Act claims, and state law claims lacked merit. Defendants filed their reply brief on September 3, 2010 (ECF No. 72).

58. On September 30, 2012, the Court issued a "bottom line" order, which dismissed the state law and Investment Company Act claims, but sustained Lead Plaintiffs fraud claims under Section 10(b) of the Exchange Act which were asserted against all Defendants, and sustained Lead Plaintiff's Securities Act claims against all Defendants other than RMCI. *See* ECF No. 78. The Court stated in the September 30 Order that "the reasons for these rulings will be explained in a forthcoming written opinion" that was not issued by the Court. *Id.*

G. The Court's Establishment Of The "State Street Set-Aside"

59. On November 30, 2010, the Court issued an Order directing that $2.5 million of the money in the Expense Fund be "set aside and preserved to satisfy potential claims for indemnification by State Street." ECF No. 351 in SEC Action, at p. 1. The Court ordered that this money "shall not be distributed to any party other than State Street unless and until all potential indemnification claims of State Street have been finally adjudicated, including any appeals." *Id*. at p. 2. The Court also held that the Order did not prohibit State Street from seeking indemnification in an amount greater than $2.5 million.

H. The Court's Order Awarding The Insurance Proceeds To Defendants

60. One of the many obstacles to recovery that Lead Plaintiff faced in this case was that there was an extremely limited amount of insurance available to cover any judgment that Lead Plaintiff might have obtained. Defendants' only insurance policy was in the amount of $10 million, and claims against that policy very quickly exceeded the policy limits.

61. On November 25, 2009, the Court ordered that the proceeds of that policy "be held in a joint account of RMCI, the Fund, and the Independent Trustees." *See* ECF Nos. 201, 202 in SEC Action. On January 11, 2011, the Court held a conference in the SEC Action and invited Defendants to submit a proposed order regarding the proper disposition of the insurance proceeds, which Defendants submitted the next day. On or about January 26, 2011, the Independent Trustees and the SEC objected to Defendants' proposed order. In their objections, the Independent Trustees and the SEC argued that Defendants were not entitled to receive the proceeds of the insurance policy.

62. On September 10, 2012, the Court issued an Opinion and Order in the SEC Action that awarded the full $10 million in insurance proceeds to Defendants. *See* ECF No. 540 in SEC Action.

I. The Trial, Verdict And Post-Verdict Motions In The SEC Action

63. As discussed in more detail below, Lead Plaintiff instituted and participated in numerous settlement discussions with Defendants and the SEC at various points throughout the

case. The goal of these discussions was to achieve a global resolution that would have included the SEC Action, as well as this private Class Action. Despite repeated and significant efforts during the summer of 2012, no global settlement was achieved before the scheduled start of the trial in the SEC Action.

64. On October 9, 2012, the trial in the SEC Action began and continued for several weeks. On November 12, 2012, the jury returned a verdict that found Bent not liable on all counts asserted against him; Bent II was found liable only for a single negligent violation of Sections 17(a)(2) or (3) of the Securities Act; Resrv Partners was liable for violating Section 17(a)(2) or (3) of the Securities Act; and RMCI was liable for violating Section 17(a)(2) or (3) of the Securities Act and Section 206 of the Investment Advisers Act. *See* ECF No. 571 in the SEC Action. The Court entered its judgment on November 15, 2012.

65. Beginning on December 21, 2012, the parties submitted competing post-verdict motions for judgment as a matter of law. *See* ECF Nos. 617, 622, 624, 626, 627, 628, 631 and 635 in SEC Action. In its post-verdict motion the SEC did not challenge the Jury's verdict that Bent Sr. was not liable on the primary violations asserted against him, but sought:

(a) Judgment as a matter of law on its Section 10(b) and Rule 10(b)-5 claims against RMCI and Resrv Partners;

(b) A new trial on their secondary liability claims against the Bents;

(c) Penalties in the amount of $130 million against RMCI and Resrv Partners;

(d) Penalties and disgorgement from Bent II in the amount of $1.3 million; and

(e) Injunctions against RMCI, Resrv Partners, and Bent II under Section 20(B) of the Securities Act and Section 209(d) of the Investment Advisers Act enjoining them from future violations of the antifraud provisions of the federal securities laws.

66. In their post-verdict motions, Defendants did not attempt to disturb the jury's finding that RMCI and Resrv Partners violated Section 17(a)(2)-(3) of the Securities Act and

Section 206(4) of the Investment Advisers Act negligently, nor did they challenge the jury's finding that Bent II violated Section 17(a) or (2) negligently. Defendants, however, challenged the jury's finding that RMCI and Resrv Partners violated the negligence provisions of Section 17(a) "knowingly or recklessly," which they contended was "mere surplusage" that should have been set aside, and further was unsupported by the evidence. *See* ECF 628 in SEC Action.

67. In connection with the post-verdict motions, the parties also simultaneously briefed the issue of Defendants' rights to payment from the Expense Fund to reimburse them for out-of-pocket expenses, management fees, and indemnification. The SEC took the position that:

(a) RMCI was entitled to no management fees under the management agreement because RMCI (i) breached the general "compliance with law" provision management agreement, and (ii) was defining the term "Net Assets" improperly to include funds that were subject to unpaid redemption requests;

(b) Resrv Partners was entitled to no 12b-1 fees under the distribution agreement because Resrv Partners breached the "compliance with law" provision of the distribution agreement;

(c) "Millions of dollars" in Fund and Trustee expenses should be assessed against RMCI and Resrv Partners because "had there been no fraud," all fund assets would have been distributed as of October 30, 2008[6];

(d) Any amounts awarded to RMCI or Resrv Partners should be disgorged as ill-gotten gains; and

(e) Bent II should be required to disgorge any salary paid to him from the Expense Fund.

68. The Independent Trustees filed a separate post-trial submission challenging the majority of Defendants' fee and expense claims, but conceding that Defendants were owed at least $11,086,013. *See* ECF No. 631-1.

[6] The SEC took the position that "the Trustees are in the best position to know what expenses the Fund incurred as a result of the Entity Defendants' fraud."

69. Defendants argued that the jury's verdict exonerating Bent Sr., and finding that Bent II violated only negligent provisions of the Securities Act, entitled them to payment of attorneys' fees and legal expenses under their contracts with the Primary Fund. Defendants took the position that:

(a) Absent a finding of "disabling conduct" – *i.e.,* gross negligence or fraud – the governing "Declaration of Trust" entitled Defendants to reimbursement of attorneys' fees and expenses spent defending the SEC litigation;

(b) Bent Sr., Bent II, and Arthur Bent (who was never charged) were subjected to a seven-month SEC investigation that included sixteen days of sworn investigative examinations and numerous other unsworn interviews, which caused the Bents to incur substantial defense costs;

(c) The jury rejected nine separate opportunities to find that Bent Sr. or Bent II engaged in "disabling conduct" under the Declaration of Trust; and

(d) The costs incurred in defending the Bents overlapped almost entirely with the defense of RMCI and Resrv Partners.

70. Defendants also argued that their management agreement with the Fund entitled them to fees and expenses for their work managing the Fund after September 2008. Defendants argued that the costs managing the Fund *increased* in that time as they had to deal with complex issues relating to distribution of investor funds and a flood of investor inquiries. Defendants also argued that the Independent Trustees accepted Defendants' services under the management agreement. *See* ECF No. 628 in SEC Action, at p. 34. Defendants also sought reimbursement of expenses incurred in providing Court-ordered assistance to Crederian and KPMG, and for the reimbursement of Independent Trustee compensation which RMCI had advanced on behalf of the Fund, as well as prejudgment interest on amounts allegedly owed. In total, Defendants sought reimbursement of $72,323,871.

71. The parties' post-verdict submissions were fully briefed on February 13, 2013.

J. Defendants' Third Party Complaint Against The Independent Trustees

72. On January 22, 2013, Defendants filed a Third Party Complaint asserting claims against the Independent Trustees. *See* ECF No. 80. Specifically, Defendants asserted claims for (1) Indemnification/Contribution based on allegations that the Independent Trustees "dominated and controlled" the Fund; (2) Derivative Claims for Breach of Fiduciary Duty for payment of fees to the Independent Trustees from the Fund; (3) Direct Claims for Unjust Enrichment, Fraudulent Inducement, Breach of Contract, Promissory Estoppel, and Tortious Interference with Contract for, *inter alia*, a supposed failure to pay Bent, Bent II and Bent III's management fees and expenses; and (4) a direct claim for fraud based on the Independent Trustee's alleged alteration of minutes from a 1:00 p.m. ET Board Meeting on September 15, 2008.

73. On or about February 6, 2013, counsel for the Independent Trustees wrote to the Court attaching the Third Party Complaint and stating that the Independent Trustees were entitled to be indemnified by the Primary Fund for the claims asserted in the Third Party Complaint.

K. The Court's September 30, 2013 Decision And Order In The SEC Action

74. As set forth above, in the post-verdict motions filed in the SEC Action, both the SEC and Defendants sought judgment as a matter of law on certain issues, and the SEC also sought a new trial and requested approximately $132 million in disgorgement and civil penalties against Defendants, as well as the entry of a permanent injunction barring RMCI, Resrv Partners and Bent II from future violations of the securities laws.

75. On September 30, 2013, the Court issued a Decision and Order on the post-verdict motions. The Court noted that the SEC had "moved for disgorgement, penalties and injunctive relief." ECF No. 648 in SEC Action, at p. 2. The Court also noted that it was not determining the portion of the post-verdict motions relating to management fees, expenses and indemnification because those requests were the subject of the proposed Settlement in this Class Action. *Id.* at p. 2, n.1.

76. The Court denied the SEC's motion for judgment as a matter of law on its Section 10(b) and Rule 10b-5 claims against RMCI and Resrv Partners. The Court held that the SEC's argument was an attack on the "consistency of the jury's verdict," which is a possible ground for a new trial, but not for entry of judgment as a matter of law. The Court went on to hold that the SEC had waived its objection to any inconsistency in the jury's verdict. *Id.* at p. 12.

77. The Court also denied Defendants' motion for judgment as a matter of law on the SEC's claim that RMCI and Resrv Partners knowingly or recklessly violated Section 17(a)(2) or (3) of the Securities Act and that RMCI knowingly or recklessly violated Section 206(4) of the Investment Advisers Act. The Court held that there was sufficient evidence from which a jury could have found that there was a scheme to defraud. The Court also found that there was sufficient evidence to find that Ledford's misrepresentations to Moody's were material. *Id.* at pp. 15-17. Further, the Court denied Defendants' motion to amend the judgment to strike the "knowingly or recklessly" language from the jury's verdict as it related to RMCI and Resrv Partners.

78. The Court then turned to the SEC's argument for disgorgement of management fees and expenses. The SEC had argued that "but for [RMCI and Resrv Partner's] fraud, there would have been an orderly liquidation of Fund assets in a much shorter period of time, leaving no assets to manage." *Id.* at p. 16. The Court rejected this argument, holding that the SEC failed to demonstrate that "any fees or expenses Defendants have or will receive in connection with their management of the Fund after its collapse are 'causally connected' to the securities violations established in this case." *Id.* at p. 28. The Court further held:

> There is simply no connection between the claims on which Defendants were found liable and the collapse of the Fund. Given that the Lehman bankruptcy threw this nation's, and indeed, the world's, financial markets into chaos, the billions of dollars in assets held by the Fund required management for a significant period of time. The trustees of the Fund recognized this obvious fact, and entered into a contract with the Defendants providing for their continued management of the Fund. (See Dkt. No. 241 (Birch Decl.) ¶ 4 & Ex. A (Management Agreement), Ex. B (Distribution Agreement)).

Id. at p. 28.

79. The Court then turned to the SEC's request to impose "substantial third tier penalties on RMCI and Resrv Partners totaling $130 million." *Id.* at p. 29. The Court held that (1) the SEC was judicially estopped from arguing that the violations committed by RMCI and Resrv Partners resulted in substantial losses to investors; (2) even if the SEC was not estopped from doing so, "it has not established the requisite connection between a violation involving fraud, deceit, [or] manipulation . . . and a risk of substantial loss." *Id.* at p. 30. The Court then concluded that a single second tier penalty – on each of RMCI and Resrv Partners – was proper, and assessed a penalty of $350,000 against each entity. In making this determination, the Court noted that:

> Their wrongful conduct took place over a period of less than 36 hours and during a time of enormous economic stress. Indeed, these defendants confronted conditions not seen since the Great Depression. The markets were in chaos and the ramifications of Lehman's bankruptcy were not initially well understood, even by sophisticated fund managers and Government regulators. Finally, these entities are now defunct. For all these reasons, only a single second tier penalty on each defendant is appropriate.

Id. at p. 37.

80. The Court then turned to the SEC's request to assess a $1.3 million civil penalty against Bent II. The Court noted that:

> The civil penalty imposed on Bent II must reflect his culpability. In this regard, it must be acknowledged that the jury found in Bent II's favor as to the most serious claims against him. The jury rejected every charge of scienter lodged against Bent II, and ultimately found him liable on only a single violation based on negligent conduct. Moreover, the Court's statements about the corporate entities' culpability apply with equal force to Bent II. He has no prior record of regulatory violations. His wrongful conduct took place over a period of less than 36 hours and under extremely stressful and unprecedented economic conditions.

Based on this, the Court assessed a civil penalty of $100,000 against Bent II. *Id.* at p. 38.

81. Finally, the Court rejected the SEC's request to issue a permanent injunction barring Defendants from committing future violations of the securities laws.

III. SETTLEMENT DISCUSSIONS AND MEDIATION BEFORE JUDGE PHILLIPS

82. Although Lead Plaintiff has aggressively litigated its claims against Defendants for the benefit of all shareholders since the very first days of the crisis at the Primary Fund, Lead Plaintiff always held the view that shareholders of the Fund would benefit immensely if the disputes surrounding the Primary Fund could be resolved voluntarily. Consequently, throughout the course of this litigation, Lead Plaintiff endeavored to negotiate a settlement of the Class Action as well as the partially-related SEC Action.

A. Settlement Discussions In 2009 Through 2011

83. Starting in late 2009, as Lead Plaintiff was drafting the Complaint, Defendants and Lead Plaintiff discussed potential frameworks for reaching a global resolution of these cases. Among other things, in December 2009, Lead Counsel arranged for numerous discussions with counsel for the Independent Trustees in order to explore the feasibility of asserting claims against the Independent Trustees and/or obtaining a settlement from them. Based on these discussions, which included an exchange of information, Lead Counsel determined that it was not in the best interests of the Class to press claims against the Independent Trustees.

84. In April 2010, Lead Counsel reached out to the SEC and set up a direct meeting between representatives of the SEC and Lead Counsel, which took place on or about April 21, 2010, at the SEC's offices. Lead Plaintiff wrote to the Court on April 22, 2010, noting that the parties were involved in settlement negotiations and that Lead Plaintiff had consulted with the SEC about participating in a mediation that was scheduled in the SEC Action.

85. On May 14, 2010, Lead Plaintiff wrote to the Court again seeking to participate in a second round of negotiations between Defendants and the SEC – this time, the negotiations were to be overseen directly by the Court and were scheduled for June 9, 2010. On May 19, 2010, the Court issued an order inviting Lead Plaintiff to make itself available "to permit the parties to this [SEC] action to include them in the settlement conference should their participation be deemed valuable as the conference progresses." *See* ECF No. 314 in SEC

Action. Counsel for Lead Plaintiff attended the June 9, 2010 mediation along with a representative of Lead Plaintiff, but the discussions between the SEC and Defendants were unavailing.

86. On numerous additional occasions throughout 2010 and 2011, Lead Plaintiff was involved in settlement discussions with the various counsel that represented Defendants at different points in time. Lead Plaintiff also kept an open line of communication with the SEC regarding efforts to settle the Class Action and resolve other matters relating to the Primary Fund. Despite the significant efforts of all parties, no settlement was achieved.

B. Settlement Discussions In 2012

87. On April 6, 2012, following denial of summary judgment motions in the SEC Action, and with settlement discussions stalled, Lead Plaintiff wrote to the Court asking the Court to order "the parties in the SEC action and the class action to conduct by April 30 an in-person conference to explore whether progress can be made towards settlement." *See* ECF No. 93, Exhibit 3. The SEC and Defendants responded, and Lead Plaintiff sent a follow-up letter on April 12, 2012. *See* Exhibit 4 to ECF No. 93.

88. On May 22, 2012, the Court held a conference in the SEC Action. Lead Counsel attended the conference and asked to be heard. At the conference, Lead Counsel again requested that all parties be ordered to conduct settlement discussions and Lead Plaintiff offered to pay for a private mediator. The Court directed the parties to hold a "tripartite" settlement meeting after June 15, 2012. Lead Plaintiff acted quickly to coordinate with Defendants and the SEC.

89. On June 19, 2012, an all-day in-person settlement conference was held at Lead Counsel's office with counsel for all parties, including the SEC, and representatives from Defendants (Bent II) and Lead Plaintiff (the General Counsel) attending in person. The June 19, 2012 conference included an exchange of settlement proposals and considerable back-and-forth between the parties regarding potential settlement framework.

90. Significant progress was made during that meeting, and the parties held numerous follow-up discussions over the ensuing weeks. Despite these substantial efforts, which were

spearheaded by Lead Counsel and Lead Plaintiff, it ultimately became clear that the parties were going to be unable to reach a resolution prior to the scheduled start of the trial in the SEC Action.

C. Settlement Discussions And Mediation With Judge Layn Phillips

91. As discussed above, the trial in the SEC Action began on October 9, 2012, and concluded on November 12, 2012. Following the jury's verdict, Defendants and Lead Plaintiff began once again to explore the possibility of settlement. The parties retained the services of Judge Phillips and scheduled a formal mediation session for Saturday, February 2, 2013.

92. In advance of that formal mediation, and with the aim of making it as productive as possible, Lead Counsel and counsel for Defendants convened an in-person settlement conference on December 17, 2012. This conference was attended by Lead Counsel, counsel for Defendants, counsel for the Independent Trustees, attorneys from Wilkie Farr & Gallagher, and attorneys representing Wilkie Farr & Gallagher in connection with Defendants' malpractice suit against that firm. Defendants' counsel prepared several volumes of material relating to Defendants' indemnity, fee and expense claims, and a broad outline of a potential global resolution.

93. During the December 17, 2012 meeting, the Parties engaged in a frank discussion over numerous items, and a framework for approaching the February 2013 mediation was established. In the weeks following the December 17, 2012 meeting, Lead Counsel had several discussions with Defendants' counsel to further refine this framework.

94. In January 2013, the Parties drafted and exchanged lengthy mediation statements and exhibits setting out their respective settlement positions. An all-day formal mediation session was held on Saturday, February 2, 2013, with Judge Phillips. That session was attended by Lead Counsel and counsel for Defendants, as well as by Bent II and the General Counsel for Lead Plaintiff, James Hall.

95. Over the next week, there were numerous follow-up communications with Judge Phillips and between the Parties directly. Judge Phillips then reached out to counsel for the

Independent Trustees and asked them to attend a second mediation session held into the evening on February 8, 2013.

96. Over the course of the next several weeks the Parties and Judge Phillips exchanged several proposals and continued to vigorously negotiate a possible settlement. Finally, on February 27, 2013, a term sheet was entered setting forth the major points of a settlement between the Class, Defendants, and the Independent Trustees.

97. Throughout the mediation process the Parties were well informed as to the strengths and weaknesses of the case. For example, Lead Plaintiff's knowledge about the case was strengthened by its participation in the merits of this action since the earliest days of the collapse of the Primary Fund, as well as discovery obtained in the SEC Action, including review of documents and deposition transcripts, as well as the evidence introduced at the trial in the SEC Action. Moreover, during the nearly month-long process of negotiations between counsel and through the mediator, all counsel advocated vigorously for their clients' positions. They also had the opportunity to receive the mediator's candid assessments of their respective stances, which allowed counsel and the Parties to further assess the strengths and weaknesses of the claims. With this base of knowledge, the intensive efforts of highly-experienced counsel – and the enormous effort of Judge Phillips – Lead Plaintiff was able to obtain the favorable Settlement described herein.

98. As detailed in Judge Phillips' Declaration attached hereto as Exhibit A, the Settlement was the result of intensive arm's-length negotiations and a "Mediator's Recommendation" by Judge Phillips. Judge Phillips fully supports the Settlement as a fair and reasonable outcome for all Fund investors and all parties involved.

D. Settlement Discussions Regarding The SEC Action In 2013

99. On February 28, 2013, Lead Counsel wrote to the Court, together with counsel for the Independent Trustees and Defendants, to inform the Court of the Settlement. Because all Parties to the Settlement recognized that it would be in investor's interest if the litigation between the SEC and Defendants also could be resolved voluntarily, the Parties informed the

Court that Defendants intended to explore the possibility of using Judge Phillips to broker a Settlement with the SEC, so a truly global resolution could be submitted to the Court.

100. Lead Counsel was subsequently informed that, while the SEC declined to use Judge Phillips as a mediator, Defendants and the SEC were involved in discussions and meetings in March and April 2013 in an effort to achieve a global settlement. When it appeared that those negotiations had broken down, Lead Counsel prepared to file preliminary approval papers.

101. In early May 2013, Defendants' counsel informed Lead Counsel that negotiations with the SEC had restarted, and Lead Plaintiff agreed to delay filing preliminary approval papers for a short period of time in order to allow Defendants and the SEC to fully explore the possibility of settlement.

102. On June 26, 2013, as part of the ongoing efforts to achieve a global resolution, Lead Counsel attended a settlement conference at the SEC's offices. The conference was also attended by Bent II, Defendants' counsel and several representatives of the SEC. Numerous issues were discussed between the parties at that conference but no resolution was reached. Later that day, Lead Counsel informed all parties that it was Lead Plaintiff's intent to file preliminary approval papers on July 15, 2013, unless a global settlement was reached prior to that date.

103. Over the next two weeks, Lead Counsel had numerous discussions with the SEC and other parties regarding questions about the Class settlement and varying proposals to reach a global resolution that would include a settlement of the SEC Action.

104. On July 15, 2013, Lead Counsel was preparing the preliminary approval motion for filing when Defendants' counsel requested a short delay due to progress made in their negotiations with the SEC. Shortly thereafter, Lead Counsel was informed that the majority of the issues between the SEC and Defendants had been resolved but there were still certain issues under negotiation.

105. On July 24, 2013, the Court contacted Lead Counsel and inquired into the status of the preliminary approval papers. Lead Counsel informed the Court that the delay had been

due to ongoing efforts to resolve the SEC Action and present a global resolution to the Court. Lead Counsel further informed the Court that Lead Counsel believed that a potential global resolution was attainable. Lead Counsel informed all parties of its conversation with the Court by email on July 24, 2013.

106. Over the next few weeks, Lead Counsel, counsel for the Independent Trustees, and the SEC were involved in numerous discussions regarding the class Settlement and a potential settlement of the SEC Action. As part of those discussions, Lead Plaintiff agreed to make certain relatively minor changes to the proposed Settlement at the SEC's request.

107. On August 23, 2013, the SEC, Defendants' counsel, and Lead Counsel convened a call with the Court to discuss the status of the potential global settlement. During that call, the parties informed the Court that they believed material progress towards a global settlement had been achieved, and they stated that they would report back to the Court within approximately two weeks.

108. By the first week of September 2013, it was Lead Counsel's understanding that all major issues had been resolved between Defendants and the SEC and their settlement was in the final stage of documentation. Indeed, Lead Counsel had revised the preliminary approval papers to describe a global settlement.

109. Much to Lead Counsel's surprise, on September 5, 2013, the SEC informed Lead Counsel that the SEC was no longer willing to settle with the Defendants. The next day, on September 6, 2013, Lead Plaintiff filed its motion for preliminary approval.

IV. TERMS OF THE SETTLEMENT

110. As outlined above, the Settlement resolves a host of outstanding issues, claims, and litigation surrounding the Primary Fund and, if approved by the Court, will enable the majority of the funds remaining in the Court-ordered Expense Fund to be distributed to shareholders. It is estimated that the benefit of the Settlement to the Members of the Class and other Primary Fund investors is in excess of $54.5 million. *See* Phillips Decl., attached as Exhibit A hereto, at ¶5. The principal terms of the Settlement are as follows:

1. Defendants were required to substantiate to the Mediator that they do not have substantial personal assets with which to pay a judgment of the magnitude sought by the Class in this case.

2. Defendants will pay $10 million in cash to the Class.

3. Defendants will relinquish more than $42 million of the approximately $72 million in claims for indemnification, expenses and management fees from the Expense Fund (Defendants will receive $29.95 million from that account in settlement of all such claims).

4. Defendants will release all claims against State Street, which will allow for the distribution to shareholders of the $2.5 million hold-back established by this Court's November 30, 2010 Order (ECF No. 351 in SEC Action).

5. A hold-back from the Expense Fund, in the maximum amount of $4 million will be created for the exclusive use of covering the future defense costs of defendants in the SEC Action, the Massachusetts Action, this Class Action or other Private Investor Suits that may choose to opt out of this Settlement. Any defense costs purportedly incurred in connection with this provision must be submitted to Judge Phillips and he will review them for reasonableness before authorizing payment. This holdback will be reduced to $500,000 (with the $3.5 million difference being distributed to shareholders) if the SEC and Defendants reach a negotiated resolution of the SEC Action prior to the Final Approval Hearing for this Settlement.

6. The parties will release claims asserted against one another including, but not limited to, the Defendants' claims against the Independent Trustees as set forth in Defendants' Third Party Complaint filed on January 22, 2013 (ECF No. 80).

7. Defendants are required to use their "best efforts" to resolve their malpractice lawsuit against the law firm of Willkie Farr & Gallagher, captioned *Reserve Management Company, Inc. v. Willkie Farr & Gallagher LLP, et al.,* 11 Civ. 7045 (PGG) (S.D.N.Y.).

8. The Independent Trustees will submit for Court approval a proposed budget setting forth anticipated future expenditures for the Fund and the payments that the Independent Trustees will be seeking. All parties will

have an opportunity to object to the Independent Trustees' proposed budget.[7]

9. All remaining shareholder funds in the Primary Fund will be available for immediate distribution to shareholders upon the Effective Date of the Settlement, after accounting for the payments authorized under the terms of the Settlement.

111. As discussed herein, the proposed Settlement is an excellent result for investors for multiple reasons. *First*, the Class will receive a true, tangible economic benefit as a result of the personal Cash Contribution of $10 million being made by Defendants, as well as the relinquishment of more than $42 million in claims Defendants have asserted against the Fund, and the extinguishment of the $2.5 million holdback for State Street. This represents a significant value to Class Members, particularly in light of the fact that the Settlement required Defendants to verify that they do not have sufficient assets to satisfy a judgment of the magnitude sought by the Class.

112. *Second*, and just as importantly, the Settlement brings this long-running matter to a conclusion and allows for the immediate distribution of tens of millions of dollars of shareholder money that have been effectively frozen since September 15, 2008. During that time, these Funds have been steadily depleted as operational costs associated with the Fund have been incurred and ever-increasing claims for legal and other costs have been lodged. If this case continued to be litigated through further discovery, trial and appeals, tens of millions of dollars in shareholder funds would be held back for many more years while costs would continue to be incurred and additional – and potentially significant – expense and legal claims would be asserted.

[7] The Independent Trustees filed the proposed budget with the Court for consideration October 11, 2013. The Court's review – and approval or revision thereto – of the Independent Trustees' proposed budget is independent of the Settlement, and does not impact the finality of the Settlement in the event the Court grants final approval of the Settlement.

113. The Settlement also eliminates the risk that substantial amounts of shareholder funds would go to pay Defendants' attorneys' fees and legal costs in the event that Lead Plaintiff were unable to convince a jury that Defendants acted with fraudulent intent. As noted, Defendants argue that they are entitled to reimbursement from the Fund of defense costs and attorneys' fees incurred in defending this case unless the Class is able to prove at trial that they committed fraud. Thus, absent the proposed Settlement, it is likely that tens of millions of dollars in shareholder funds also would be held back throughout the duration of this litigation – and given the many hurdles to establishing fraud in this case, there was a significant risk that, absent the Settlement, this money would eventually have been paid to Defendants or their attorneys and never distributed to shareholders.

114. *Finally*, by achieving a voluntary resolution of Defendants' claims for indemnification, expenses and attorneys' fees, the Settlement also eliminates a significant uncertainty regarding shareholder funds. Defendants' applications for indemnification, expenses and attorneys' fees raised numerous complex and nuanced issues, and it was difficult to predict when these complicated claims would be resolved and the amount that Defendants ultimately would be awarded on these claims (there was essentially no dispute that Defendants were entitled to at least $11 million of these funds, *see, e.g.,* ECF No. 631-1 and ECF No. 628 at pp. 28-39 in SEC Action). Moreover, any decision by the Court would almost certainly have been appealed, which would have resulted in potentially significant additional delays and costs before any shareholder funds could be distributed.

V. THE RISKS OF CONTINUED LITIGATION

115. There were serious risks as to whether Lead Plaintiff or the Class could prevail on the merits in this litigation, as Defendants had substantial defenses to both liability and damages. The Class also faced the risk that Defendants could be awarded all or most of their $72 million in claims asserted against the Expense Fund. The very real litigation risks present in this case were compounded by the fact that, as the litigation continued, claims against the Expense Fund increased. These claims against the Fund included both (i) operational and administrative

expenses (which were being incurred at an estimated minimum $150,000 per month), and (ii) potentially tens of millions of dollars in attorneys' fees and litigation expenses relating to the legal expenses of the Independent Trustees and the Defendants, both of which claimed to be entitled to indemnification from the Primary Fund. Thus, the resolution of this litigation provides a substantial benefit to investors simply by virtue of distributing the bulk of their money residing in the Expense Fund, without subjecting it to further depletion and uncertainty.

A. Risks Relating To Liability

116. The Parties disagree on numerous aspects of Defendants' alleged liability. As an initial matter, the parties disagree on whether Defendants made any material misstatements. For example, Defendants argued that their pre-September 15, 2008 statements accurately described the level of risk at the Primary Fund and, at best, amounted to nothing more than non-actionable "puffery." They contend that the Primary Fund's small (approximately 1%) investment in Lehman commercial paper was fully disclosed to investors in each Registration Statement and in multiple other public filings disseminated during the Class Period. This fact alone presented a stark challenge to Lead Plaintiff proving its claim that Defendants misstated the riskiness of the Primary Fund.

117. Moreover, Defendants argued that all investments made by the Primary Fund – including the Lehman debt – were Prime-rated and were widely perceived to be safe investments. At summary judgment and trial, Defendants would have advanced compelling arguments that the bankruptcy filing by Lehman and the subsequent panic in the financial markets was completely unanticipated, and prior to Lehman's bankruptcy, Defendants reasonably assumed, consistent with their public statements, that the approximately 1% Lehman investment was safe and would not endanger the Fund. In short, Lead Plaintiff faced significant risks in establishing that Defendants made material misstatements prior to September 15, 2008.

118. The parties also disagree about whether Defendants made material misstatements after September 15, 2008. As they did during the trial in the SEC Action, at summary judgment and trial in this case, Defendants would have argued vigorously that in the two days after the

Lehman bankruptcy filing, they were doing their best to provide accurate information in light of a fast-changing and unprecedented market collapse. Indeed, this Court has repeatedly recognized that Defendants were faced with unprecedented economic conditions "not seen since the Great Depression" and that "the ramifications of Lehman's bankruptcy were not initially well understood, even by sophisticated fund managers and Government regulators." ECF No. 648 in SEC Action, at p. 37. Moreover, Defendants would have contended that they reviewed, and were misled by, Lehman's publicly filed financial statements, which were materially false and misleading in that they reported higher values for Lehman's assets than in fact turned out to be the case. Finally, Defendants would have pointed to the fact that they realized no personal financial gain as a result of the collapse of the Primary Fund – indeed, they suffered enormous losses – as evidence that they were acting in good faith and were simply caught up in a perfect storm of market chaos.

119. Defendants also would have pointed to the fact that they contacted attorneys, consulted with the Independent Trustees, and were in repeated contact with the SEC during the short period of time between Lehman's bankruptcy and the September 16, 2008 announcement that the Fund had broken the buck. Indeed, it appears that these arguments had traction in the SEC Action, where the jury found that Bent did not make any misstatements, and found Bent II liable only for a single count of negligence under the Securities Act (a claim that the SEC could pursue but is not available to private plaintiffs).

120. The jury verdict in the SEC Action demonstrates the difficulties that Lead Plaintiff would have faced in establishing scienter. Indeed, for post September 15 conduct, the jury rejected all of the true fraud counts against Bent Sr. and Bent II, and although it added a scienter finding against RMCI and Resrv Partners, the jury also rejected the true fraud counts asserted against those entities. Because Lead Plaintiff – unlike the SEC – was enjoined from asserting negligence based claims, if a jury were to return a similar verdict in this class action, it would result in no recovery for the Class (and would likely have led to substantial claims for reimbursement of attorneys' fees and litigation expenses to be paid from investor funds).

121. As for Lead Plaintiff's pre-September 15 claims, Defendants would have argued that the choice of investments for the Primary Fund was made by an investment committee, and that they always selected assets with the highest ratings. Defendants would also state that the collapse of Lehman brothers was wholly unforeseen and not only took Defendants by surprise, but also shocked Government regulators and thousands of other sophisticated market professionals.

122. Notably, Lead Plaintiff also faced significant legal hurdles that the SEC did not. For instance, in order to maintain this case as a class action, Lead Plaintiff would have had to rely on the "fraud on the market" theory of reliance. Defendants, however, contended that the fraud on the market theory is not available here because the calculation of the NAV did not depend on information disseminated to the market. Moreover, Defendants would have argued that the vast majority of potential Class Members either "held" their shares after September 15, 2008, or sold their shares notwithstanding any alleged misrepresentations, and therefore could not have relied on any misrepresentations in deciding to "purchase or sell" securities on or after that date. Defendants would have argued that Lead Plaintiff was not permitted to bring Section 10(b) claims on behalf of these "holders."

B. Risks Relating To Damages And Collectability

123. The parties also disagreed on the size of damages potentially recoverable in this action. Defendants contend that Lead Plaintiff would be unable to establish the required element of "loss causation" for its Section 10(b) claims. Defendants would have argued that the losses suffered by Primary Fund investors were not due to the revelation that prior statements by Defendants were materially false, but instead were attributable to market-wide phenomena stemming from the unexpected collapse of Lehman, which sent worldwide financial markets into a panic.

124. Indeed, in its opinion and order on the post-verdict motions in the SEC Action, the Court held that Defendants' post September 15 conduct, even if actionable, was not responsible for the collapse of the Primary Fund. *See* ECF No. 648 in SEC Action, at p. 28. Defendants also

would have stressed to a jury that Class Members have recovered more than 99% of their investment, and contended that Defendants themselves contributed to that recovery through their own efforts to manage the Fund in the wake of the Lehman bankruptcy filing.

125. If Defendants had been successful, even in part, in advancing these arguments, the consequences to the Class's recoverable damages could have been substantial. If, for example, the Court or a jury would have accepted Defendants' loss causation arguments, it would have eliminated any damages that Lead Plaintiff and the Class could recover under the federal securities laws.

126. Finally, there were concerns that, even if the Class were able to obtain a judgment against Defendants in the face of the significant risks outlined above, the Class would have difficulty collecting significant amounts. As set forth in the Phillips Declaration, the Settlement required Defendants to submit personal financial information to Judge Phillips, who verified that Defendants did not have sufficient assets to pay a judgment of the size sought by the Class in this case.

C. Risks Relating To Further Depletion Of The Expense Fund

127. The proposed Settlement also eliminates the risk that the Expense Fund would be depleted by Defendants' $72 million in expense, indemnity and management fee claims and by the costs of ongoing litigation and future indemnity and expense claims that would have been lodged against the Expense Fund absent this Settlement.

128. *First*, the Settlement eliminates the risk and uncertainty surrounding Defendants' $72 million in claims for indemnification, management fees, and expenses. Indeed, there was virtually no dispute between the parties that Defendants were likely to receive at least $11 million dollars in payment of out-of-pocket expenses that Defendants actually incurred in managing the Primary Fund. The Court on prior occasions has recognized that the process of returning tens of billions of dollars to investors was quite complicated, and ordered that Defendants be reimbursed for their out-of-pocket expenses. *See, e.g.,* ECF Nos. 343, 348 in SEC

Action. There was a significant likelihood that Defendants would be awarded additional amounts here.

129. Indeed, at an earlier stage of the case, the Court had ruled that:

> Here, it is undisputed that between September 15th, 2008, and November 2010, defendants managed the money of investors who had not sought to redeem or had not successfully redeemed as of September 15th, 2008. During the period between September 15th, 2008, and November 2010, the Fund, under Court supervision, returned to investors approximately 99 percent of the monies they had invested in the Primary Fund. But the process of returning tens of billions of dollars to investors was quite complicated, and the Fund's assets required care, custody and management during the time it took to accomplish that task.

(Mar. 28, 2012 Tr. 62:12-22.)

130. Moreover, the Court rejected the SEC's request that Defendants be ordered to disgorge any management fees that would have resulted in profits to Defendants (ECF No. 648 in SEC Action, at pp. 28-29), which illustrates the risk to investors that Defendants would have been awarded a substantial portion of their claimed management fees, and pre-judgment interest thereon. There was also a risk that Defendants would have been awarded all (or at least a substantial portion) of the more than $26 million in legal fees and interest they sought. This risk was particularly stark given that Bent Sr. was found not liable on any count asserted against him, and Bent II was found liable only for negligent violations of the Securities Act.

131. The Settlement not only eliminates the risk that Defendants may have been awarded much of the $42 million in expense, indemnity and management fee claims that they agreed to relinquish under the Settlement, but it also eliminates the uncertainty that would ensue if these issues were litigated. As the Court has recognized many times, the legal and factual issues surrounding these claims were complex and unsettled. If the Court were forced to rule on these issues, it was a virtual guarantee that one or more parties would appeal. While those appeals ran their course, investors could receive no distribution from the Fund and operational costs and, as discussed above, additional claims for fees and expenses would continue to be incurred.

132. For all of these reasons, Lead Plaintiff, along with the Independent Trustees, as the Fund fiduciaries, exercising their good faith business judgment, have determined that reaching a voluntary resolution of these claims is in the best interests of all investors in the Primary Fund.

133. *Second*, the Settlement also eliminates a significant risk that *future* indemnity and expense claims would deplete the Expense Fund and delay a distribution to investors. For instance, the Independent Trustees contend that they are entitled to indemnification and reimbursement of their attorneys' fees and expenses in connection with the claims asserted in Defendants' Third Party Complaint. By securing the release and dismissal of these claims, the Settlement ensures that millions of dollars that otherwise would be held back (and potentially expended) to cover defense costs of those claims are instead promptly distributed to shareholders. In addition, if litigation of this matter continued, absent the Settlement it was likely that issues surrounding State Street would have caused the $2.5 million State Street Set-Aside to be expended, and that money, too, would have been lost to shareholders.

134. Similarly, Defendants have taken the position that, unless the Class is able to prove at trial that they acted with fraudulent intent, they are entitled to reimbursement from the Fund of defense costs and attorneys' fees incurred in defending this case. Thus, absent the proposed Settlement, it is likely that tens of millions of dollars in shareholder funds also would be held back throughout the duration of this litigation to account for Defendants' indemnity claims. Given the many hurdles to establishing fraud in this case, there was a significant risk that, absent the Settlement, this money eventually would have been paid to Defendants and their attorneys and never distributed to shareholders.

135. In sum, the parties disagreed on numerous complex issues of law and fact, and the Settlement enables the Class to recover a very substantial sum without incurring the many risks of continued litigation.

VI. PRELIMINARY APPROVAL AND NOTICE TO THE CLASS

136. As set forth above, on September 6, 2013, Lead Plaintiff filed the motion for preliminary approval of the Settlement. On September 9, 2013, the SEC wrote to the Court in response to Lead Plaintiff's preliminary approval motion. While the SEC did not dispute that the Settlement was fair and reasonable, the SEC asked that the Court delay granting preliminary approval until after the Court ruled on the post-verdict motions in the SEC Action. On September 11, 2013, Lead Plaintiff responded on behalf of itself, the Independent Trustees, and the Defendants. *See* Exhibit I. Further correspondence was submitted by the SEC and Defendants on September 14, 2013.

137. During this time, counsel for the Independent Trustees was contacted by counsel for State Street. State Street requested that the Parties make a minor change to the release provisions of the Settlement in order to more fully set forth the intent of the agreement, which was to release any claims the parties may have had against State Street, and thus allow for the distribution to investors of the $2.5 million State Street Set-Aside described above. Lead Plaintiff, Defendants and the Independent Trustees agreed to make these changes, and State Street informed us that it has no objection to the release of the State Street Set-Aside.

138. On October 1, 2013, Lead Plaintiff filed a reply memorandum in further support of its motion for preliminary approval. Lead Plaintiff noted that no Class Member had objected to the motion for preliminary approval.

139. On October 7, 2013, the Court issued its Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 95; the "Preliminary Approval Order"). In 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.

140. In accordance with the Court's Preliminary Approval Order, the Court-approved Claims Administrator, Crederian Fund Services LLC ("Crederian"), caused the Court-approved Notice to be mailed beginning on October 21, 2013, to Class Members, through the record

holders, pursuant to the contact information that Crederian previously obtained in connection with the Court's prior orders appointing Crederian as the liquidation agent of the Primary Fund. *See* Declaration of Eugene P. Grace Regarding Notice ("Grace Decl."), attached hereto as Exhibit C, at ¶2. Crederian also posted the Notice on the Primary Fund's website, and published the Summary Notice in the national edition of the *Investor's Business Daily* and over the *PR Newswire* on October 22, 2013. *Id.* ¶¶5, 7.

141. This combination of individual direct mailing, supplemented by notice in an appropriate, widely-circulated publication, transmitted over a newswire, and set forth on a dedicated internet website, was designed to reach as many Class Members as practicable, and Lead Plaintiff believes it is the best notice practicable under the circumstances.

VII. THE PLAN OF ALLOCATION

142. As explained in paragraphs 27 through 31 of the Class Notice, the Plan of Allocation that Lead Plaintiff proposes for distribution to Class Members and other Primary Fund Shareholders is the pro rata distribution plan in this Court's November 25, 2009 Order in the SEC Action, and all subsequent orders of the Court related to the pro rata distribution of the Expense Fund, with the addition that if the prorated payment calculates to less than $10.00, it will not be included in the calculation and no distribution will be made for that Class Member.

143. It is the opinion of Lead Counsel that the Plan of Allocation – which is principally the pro rata distribution plan previously fully vetted by relevant parties and counsel and ordered by the Court – is fair, reasonable and adequate to the Class as a whole.

144. In the event that the Settlement and Plan of Allocation are approved, pursuant to paragraph 27 of the Stipulation, Lead Counsel and the Fund Board will apply to the Court, with reasonable notice to Defendants, for a Final Distribution Order, *inter alia*: (i) approving the administrative determinations of Crederian concerning the calculation and distribution of the remaining assets of the Primary Fund, including the Net Settlement Fund, to Class Members and/or Shareholders as set forth in the Stipulation and Plan of Allocation; (ii) approving payment of any outstanding administration fees and expenses associated with the administration of the

Settlement Fund from the Settlement Fund; and (iii) if the Effective Date has occurred directing payment of the remaining assets of the Primary Fund, including the Net Settlement Fund, to Class Members and/or other Shareholders as set forth in the Stipulation.

145. Notably, Notice and Administration Costs in this case are expected to be less than are typically expended because, among other things, the pro rata plan of allocation is relatively straightforward, and prior distributions made to investors under Court supervision provide a framework for distributing the settlement proceeds. In addition, for these same reasons, Class Members are not required to complete and submit claim forms.

VIII. THE FEE APPLICATION

146. In addition to seeking final approval of the Settlement and Plan of Allocation, Lead Counsel is applying to the Court for an award of attorneys' fees in the amount of $5 million, and reimbursement of litigation expenses of $126,008.62 on behalf of Plaintiffs' Counsel.[8] As discussed below, this fee represents a multiplier of just 1.3 on Plaintiffs' Counsel's lodestar, and approximately 9.2% of the minimum $54.5 million value of the Settlement. *See* Phillips Decl., attached hereto as Exhibit A, at ¶5.

147. Lead Counsel accepted this case on a contingency basis, committed significant resources to it, and diligently prosecuted it since the first days of the Primary Fund's collapse in September 2008. During the ensuing five years, Lead Counsel prosecuted the case without any compensation or guarantee of success. At all times, Lead Counsel endeavored to build relationships with the many parties involved in this litigation, and strove to litigate the case efficiently while maximizing the benefits for all Class Members. Based on the excellent result obtained, the quality of the work performed, the risks of the litigation, and the contingent nature

[8] In addition to Lead Counsel, the application is supported by the time and expenses of the firm Girard Gibbs LLP, *see* Exhibit D-2 attached hereto.

of the representation, Lead Counsel respectfully submits that the requested fee and expense request should be granted.

148. As discussed below, each of the factors regularly considered by Court's in the Second Circuit weighs in favor of granting the fee and expense request.

A. An Institutional Lead Plaintiff Has Approved Lead Counsel's Fee Request

149. Lead Plaintiff, Third Avenue, is a sophisticated institutional investor with a direct interest in maximizing the overall recovery to the Class. As set forth in the Declaration of James W. Hall (attached as Exhibit B hereto), Third Avenue has reviewed and approved the fee request and believes it to be fair and reasonable under all the circumstances of this case. Third Avenue is precisely the type of institutional Lead Plaintiff that Congress had in mind when expressing a preference for large investors to act as Lead Plaintiffs under the PSLRA.

150. In this case, Lead Plaintiff took its responsibilities seriously and closely supervised and monitored both the prosecution and the settlement of the Action. Based on its close involvement in the litigation, Lead Plaintiff has concluded that Lead Counsel has earned the requested fee based on the outstanding recovery obtained for the Class in a case that involved serious risks and considerable uncertainty. *See* Exhibit B attached hereto. The fact that the requested fee was agreed to by a sophisticated institutional investor is confirmation of its reasonableness.

B. The Work Of Counsel And The Quality Of Lead Counsel's Representation

151. The significant amount of work done by Plaintiffs' Counsel in this case has been challenging and fraught with risk. Attached as Exhibits D-1 and D-2 are declarations in support of an award of attorneys' fees and reimbursement of litigation expenses from Lead Counsel and one other firm that served as Plaintiffs' Counsel. Paragraph 3 of Exhibit D-1 contains a summary chart of the hours expended and lodestar amounts for each of the two firms that did work on this matter. The firm of Girard Gibbs LLP did work under the direction of, and supervision of, Lead Counsel. As explained in the Declaration of Daniel C. Girard (Exhibit D-2), the work performed

by that firm assisted in the prosecution of the Action by providing a perspective from retail investors, as well as contributing to the drafting of portions of the Complaint and assisting in the preparation of materials for various settlement meetings and discussions.

152. As detailed above, throughout this case Lead Counsel devoted substantial time to the prosecution of this Action. I maintained control of and monitored the work performed by lawyers on this case. While I personally devoted substantial time to this case, and personally reviewed and edited all pleadings, court filings, and other correspondence prepared on behalf of Lead Plaintiff, other experienced attorneys at my firm assisted in Settlement negotiations. More junior attorneys and paralegals also assisted in working on matters appropriate to their skill and experience level. Throughout the litigation, Lead Counsel maintained a very "lean" level of staffing that avoided unnecessary duplication of effort and ensured the efficient prosecution of this litigation.

153. As set forth in paragraph 3 of Exhibit D-1, Plaintiffs' Counsel have expended 7,596.55 hours in the prosecution and investigation of this Action. The resulting lodestar is $3,759,958.50. Time expended in preparing this application for fees and reimbursement of expenses has not been included in this request. Under the lodestar approach, the requested fee of $5 million yields a multiplier of approximately 1.3 – that is, a multiple of 1.3 times the value of the time expended by Plaintiffs' Counsel. As discussed in the accompanying Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorney's Fees and Reimbursement of Litigation Expenses, this multiplier is well within the range of multipliers awarded in actions where similar settlements have been achieved.

154. As set forth above, Lead Counsel has been working on this matter since the very start of the crisis at the Primary Fund. Lead Plaintiff contacted Lead Counsel to investigate potential claims and draft a class action complaint beginning on September 17, 2008. The Complaint that Lead Counsel drafted over the course of a day sought, among other things, a temporary restraining order to benefit all shareholders. Moreover, since this Action began more

than five years ago, Lead Counsel has continued to work diligently to represent the interests of Lead Plaintiff and all investors.

155. Among other things, Lead Counsel developed close working relationships with other individual plaintiffs, the Independent Trustees, the SEC, and numerous absent Class Members. Lead Counsel also took care to maximize judicial efficiency wherever possible. For example, Lead Counsel immediately recognized that investors would be best served by a unified civil class action leadership structure and a single complaint that asserted all potential claims in against Defendants in one pleading – whether those claims arose under state law or federal securities law, and regardless of whether they were derivative or direct in nature. Accordingly, Lead Counsel and Lead Plaintiff sought and obtained (over the objection of competing movants) the consolidation of multiple complaints under a single leadership structure. This served the interests of all Class Members while promoting judicial efficiency, which was a particularly important consideration here given the wasting nature of the Primary Fund's assets.

156. In drafting the Complaint, Lead Counsel did not simply rely on the work performed by the SEC. To the contrary, Lead Counsel conducted a detailed and thorough investigation that included meeting with representatives of the Independent Trustees, discussions with numerous other individual plaintiffs and absent class members, seeking and obtaining thousands of documents that had been placed in the public record as a result of the state law case before Justice Kapnick, and other cases pending throughout the Country against Defendants, and conducting a comprehensive review of all publicly available information and researching all potential legal theories of liability.

157. Based on this investigation, Lead Counsel drafted a class action complaint that was considerably broader than the complaint filed by the SEC. Unlike the "two day fraud" theory pursued by the SEC, Lead Counsel asserted claims based on wrongdoing alleged to have occurred starting in September 2006. This strategic decision was critical in allowing investors to negotiate the beneficial settlement obtained here. Indeed, even after the jury largely rejected the SEC's fraud case and the Court ordered Defendants to pay a collective total of $750,000, Lead

Plaintiff was able to differentiate itself from the SEC's Action and achieve a substantial additional recovery for investors.

158. Lead Counsel drafted a compelling opposition to Defendants' motions to dismiss that resulted in Lead Plaintiff's core claims – including claims not asserted by the SEC – being sustained in the face of the significant pleading burdens imposed by the PSLRA. Moreover, as set forth in detail above, during the pendency of the motions to dismiss and throughout the case, Lead Counsel worked productively with the SEC, Defendants and the Court to propose efficient case management plans and to participate in ongoing discovery in the SEC Action. These efforts served the Class well, as they allowed Lead Counsel to be fully informed regarding the merits of the case without unnecessarily depleting the Expense Fund by subjecting Defendants to duplicative and unnecessary discovery.

159. Perhaps even more critically, Lead Counsel used its expertise and sophistication to engage in productive settlement discussions throughout this litigation. Even in the uniquely trying circumstances of this case, where other parties were unable to reach a voluntary resolution of issues that Lead Counsel respectfully submits should have been resolved voluntarily for the benefit of investors, Lead Counsel was able negotiate this extremely beneficial settlement.

160. Finally, Lead Counsel is highly experienced in prosecuting securities class actions, and worked diligently and efficiently in prosecuting this case. As demonstrated by the firm resume attached as Exhibit J, Bernstein Litowitz Berger & Grossmann LLP is among the most experienced and skilled practitioners in the securities litigation field, and has a long and successful track record in such cases. It is internationally recognized as one of the preeminent securities litigation firms in the Country, and it has been responsible for many of the largest recoveries in history on behalf of investors asserting claims under the federal securities laws.

C. Quality Of The Opposition

161. Another factor that courts consider is the quality of the opposing counsel. In this case, Defendants were represented by experienced attorneys at some of the most prestigious law firms in the Country. At various times throughout this litigation, Defendants were represented by

Wilkie Farr & Gallagher LLP, WilmerHale LLP, Dewey Lebouf LLP, Duane Morris LLP, and Morgan, Lewis & Bockius LLP. Each of these law firms is/was well-recognized as being among the very best practitioners in their field. Each has a vast amount of experience defending securities class actions, they are among the most respected firms in the nation, and they had the expertise and resources to try this case to a jury if necessary. Indeed, as the Court is aware, the attorneys at Duane Morris LLP (one of whom has since moved to Morgan Lewis & Bockius LLP) tried the SEC Action before a jury, and there was no question that they were willing and able to take the civil class case to trial if necessary.

162. In addition, the Independent Trustees were represented by the well-respected law firm of Goodwin Proctor LLP, and the lawyers at that firm brought an enormous amount of experience and skill to bear on issues relating to the Investment Advisers Act, settlement issues, and litigation of the Action.

163. In the face of this knowledgeable, formidable, and well-financed opposition, Lead Counsel was nonetheless able to prosecute its case sufficiently to persuade Defendants to settle on terms that, Lead Counsel respectfully submits, are highly favorable to the Class.

D. The Risks Of Litigation And The Need To Ensure The Availability Of Competent Counsel In High-Risk Contingent Securities Cases

164. Lead Counsel undertook this prosecution entirely on a contingent-fee basis and assumed significant risk in bringing these claims. Indeed, as set forth above, Lead Counsel worked diligently on behalf of the Class for nearly a year *before it was even appointed Lead Counsel*. The commitment and dedication that Lead Counsel brought to this case never wavered throughout five years of often fast-paced developments and a constantly changing risk landscape. Lead Counsel had substantial concerns from the outset that the particular legal challenges associated with bringing claims in this case under the federal securities laws, such as the "puffery," "bespeaks caution," "fraud on the market," "reliance," and "loss causation" issues discussed above, would ultimately prove difficult to circumvent and could have resulted in the Class recovering nothing in this case.

165. Moreover, as the Court is aware, this case presented unique challenges because of the indemnity, expense and other claims that have been lodged (and would continue to be lodged absent this Settlement) against shareholder funds in the Expense Fund. If Defendants had managed to defeat Lead Plaintiff's fraud claims, not only would the Class have recovered nothing, but it was virtual certainty that Defendants' legal expenses – which would have been many millions of dollars – would have been *paid from investor money in the Expense Fund*, and that money would never have been distributed to investors.

166. Lead Counsel firmly believes that it takes hard work, diligence, and aggressive prosecution by skilled counsel to induce sophisticated defendants to engage in serious settlement negotiations at meaningful levels. Courts have repeatedly recognized that it is in the public interest to have experienced and able counsel enforce the securities law. Moreover, as recognized by Congress through the passage of the PSLRA, vigorous private enforcement of the federal securities laws can only occur if private plaintiffs, particularly institutional investors, take an active role in protecting the interests of shareholders. If this important public policy is to be carried out, the courts should award fees that adequately compensate plaintiffs' counsel, taking into account the risks undertaken in prosecution of an action, the result obtained, and the contingency nature of the representation

167. As a result of Lead Counsel's extensive, persistent and aggressive efforts in the face of substantial risks and uncertainties, Lead Counsel achieved a significant recovery for the benefit of the Class. In circumstances such as these, the requested $5 million fee is reasonable and should be approved.

IX. LITIGATION EXPENSE APPLICATION

168. Plaintiffs' Counsel seek reimbursement of $126,008.62 in litigation expenses reasonably incurred by Plaintiffs' Counsel in connection with commencing and prosecuting the claims against the Defendants. Plaintiffs' Counsel do not seek any interest on those amounts. From the start of the case Plaintiffs' Counsel were aware that they might not recover any of their out-of-pocket expenses, and, at the very least, would not recover anything until the action was

successfully resolved. Even assuming that the case was ultimately successful, reimbursement for expenses would not compensate counsel for the lost use of the funds advanced to prosecute the Action. Therefore, Plaintiffs' Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable.

169. The litigation expenses were necessary and appropriate for the prosecution of the claims on behalf of investors. These include, for examples, charges for mediation, online factual and legal research, court reporting and transcripts, and photocopying, telephone, postal and express mail charges; and similar case-related costs. *See* Exhibits D-1 and D-2. Courts have typically found that such expenses are reimbursable.

170. Some of the larger, but still very modest, expenses include the following (the total for both Lead Counsel and additional Plaintiff's Counsel as indicated on Exhibits D-1 and D-2): $26,575.00 incurred as mediation expenses; $63,668.41 incurred for online factual and legal research (such as Westlaw and Lexis), $16,775.86 incurred for court reporting and transcripts, and $13,943.52 incurred for internal and external copying costs.

X. CONCLUSION

171. For all the reasons set forth above, Lead Plaintiff and Lead Counsel respectfully submit that the Settlement and the Plan of Allocation should be approved as fair, reasonable and adequate. Lead Plaintiff and Lead Counsel further submit that the requested fee of $5 million and the request for reimbursement of total litigation costs and expenses in the amount of $126,008.62 should also be approved.

Dated: November 11, 2013
New York, New York

/s/ John C. Browne
John C. Browne