UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MORGAN STANLEY MORTGAGE PASS-THROUGH CERTIFICATES LITIGATION, This Document Relates To: ALL ACTIONS.	MASTER FILE NO. 09-CV-2137-KBF ECF Case CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

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I. INTRODUCTION

The parties have agreed to a settlement of the Action for the sum of $95,000,000 in cash plus interest. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs, the Public Employees' Retirement System of Mississippi ("MissPERS") and West Virginia Investment Management Board ("West Virginia") (collectively, "Lead Plaintiffs"), and former named plaintiffs and proposed class representatives NECA-IBEW Health and Welfare Fund, Pompano Beach Police and Firefighters' Retirement System, and Carpenters Pension Fund of West Virginia (collectively with Lead Plaintiffs, "Plaintiffs"), respectfully submit this Memorandum of Law in Support of their Motion for Final Approval of Class Action Settlement and for approval of the Plan of Allocation of Settlement proceeds.[1]

The Settlement, which represents a very favorable result for Plaintiffs and the Settlement Class, is the culmination of over five years of litigation and extensive arm's-length settlement negotiations. *See* Lead Counsel Decl. ¶69. Lead Plaintiffs believe that the Settlement is fair, adequate and reasonable, and represents a very good result for the Settlement Class, and that it, along with the Plan of Allocation, should be approved by the Court.

The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement dated September 5, 2014. ECF No. 307. In the Court's Order Preliminarily Approving Settlement and Providing for Notice, entered September 10, 2014 (ECF No. 309, the "Preliminary Approval Order"), the Court preliminarily approved the Settlement, certified the Settlement Class for purposes

[1] The accompanying Joint Declaration of David R. Stickney and Arthur C. Leahy in Support of Motion for Final Approval of Settlement and Plan of Allocation, and Application for An Award of Attorneys' Fees and Expenses (the "Lead Counsel Declaration" or "Lead Counsel Decl.") is an integral part of this submission. For the sake of brevity, Lead Plaintiffs respectfully refer the Court to it for a detailed description of the history of the Action, the nature of the claims asserted in the Action, the negotiations leading to the Settlement, the value of the Settlement to the Settlement Class as compared to the risks and uncertainties of continued litigation, the terms of the Plan of Allocation for the Settlement proceeds, and a description of the services Lead Counsel provided for the benefit of the Settlement Class. Unless otherwise noted, capitalized terms have the meanings set out in the Stipulation and Agreement of Settlement, dated September 5, 2014 (the "Stipulation," ECF No. 307).

of the Settlement, and directed that notice of the Settlement be provided to potential Settlement Class Members. Defendants deposited the $95 million Settlement Amount into an escrow account on September 22, 2014, and the amount has been invested for the benefit of the Settlement Class.

At the time the parties agreed to the Settlement, the Action had reached an advanced stage. The parties had developed a full and clear understanding of the strengths and weaknesses of the claims and defenses asserted in the Action. During the course of the Action, Lead Plaintiffs: (i) conducted an extensive investigation; (ii) filed six class action complaints; (iii) opposed three rounds of motions to dismiss; (iv) conducted substantial discovery; (v) moved for class certification; (vi) obtained more than 15 million pages of documents and analyzed millions of pages of documents; (vii) took and defended 13 depositions; (viii) engaged and consulted experts on issues such as damages, negative causation, materiality, mortgage loan underwriting and statistics; (ix) analyzed hundreds of loan files related to the Offerings; (x) researched the applicable law with respect to the claims and potential defenses; and (xi) participated in settlement negotiations with Defendants. Lead Counsel Decl. ¶¶3-4.

The quality of the Settlement is particularly apparent in light of the factual and legal challenges that Lead Plaintiffs would have faced during the process of achieving a final recovery for the Settlement Class. Lead Plaintiffs would have needed to defeat Defendants' inevitable summary judgment motions, prove Defendants' liability and the amount of recoverable damages at trial, and subsequently defeat any of Defendants' appeals. In addition to the burden of proving the falsity and materiality of Defendants' statements, Plaintiffs also faced numerous affirmative defenses, including the statute-of-limitations defense, the "actual knowledge" defense, and the due diligence defense. Moreover, at the time of the Settlement, Lead Plaintiffs' motion for class certification – which presented many unique and unsettled issues of law in the evolving residential mortgage-backed

securities ("RMBS") litigation landscape – was pending. While Lead Plaintiffs and Lead Counsel believe that class certification is warranted, if Defendants' arguments in opposition to class certification for litigation purposes were successful, the scope of the Settlement Class could have been reduced or eliminated altogether.

Because of the scarcity of precedent in RMBS cases, all these events carry with them a high level of uncertainty and could have resulted in dismissal of Lead Plaintiffs' claims or a reduction of recoverable damages. While Lead Plaintiffs and Lead Counsel believe that the Settlement Class has strong claims, they recognize that they would have faced significant risks in establishing all the elements of their claims.

The $95 million Settlement eliminates these risks and provides a certain recovery for the Settlement Class. In light of the obstacles to recovery, and the substantial time and expense that continued litigation would require, the Settlement is a very good result for the Settlement Class, and provides a fair and reasonable resolution of the claims against Defendants.[2]

Lead Plaintiffs also request that the Court approve the Plan of Allocation of Settlement proceeds. This Plan of Allocation will govern how Settlement Class Members' claims will be calculated and, ultimately, how money will be distributed to valid claimants. The Plan of Allocation was arrived at with the assistance of Lead Plaintiffs' damages consultant and is based on the methodology for calculating damages set forth in Section 11(e) of the Securities Act and takes into account the increased risk for claims that the Court did not sustain but that remained subject to appeal. *See* Declaration of Brett Brandenberg in Support of Plan of Allocation ("Brandenberg

[2] *See* Declaration of George W. Neville, Special Assistant Attorney General, Legal Counsel to the Lead Plaintiff the Public Employees' Retirement System of Mississippi, in Support of (a) Plaintiffs' Motion for Approval of Settlement and Plan of Allocation; (b) Lead Counsel's Application for Attorneys' Fees and Expenses; and (c) Lead Plaintiffs' Request for Reimbursement of Costs and Expenses ("Neville Decl."), attached as Exhibit 1 to the Lead Counsel Declaration.

Decl."), attached as Ex. 3 to the Lead Counsel Decl. It is substantively the same as plans that have been approved and successfully used to allocate recoveries in other RMBS class actions. The Plan of Allocation is fair, reasonable and adequate and should be approved.

II. ARGUMENT

A. The Proposed Settlement Warrants Final Approval

Under Rule 23(e) of the Federal Rules of Civil Procedure, class action settlements are subject to court approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate."[3] "A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

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

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), abrogated on other grounds by *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Because "'[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues

[3] Fed. R. Civ. P. 23(e)(2); *see D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("The District Court must carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion.") Citations are omitted and emphasis is added unless otherwise noted.

and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial.'"[4]

1. The Settlement Was Reached After Arm's-Length Negotiations And Is Procedurally Fair

A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *In re Luxottica Grp. S.P.A. Sec. Litig.*, 233 F.R.D. 306, 315 (E.D.N.Y. 2006). A court may find the negotiating process is fair where, as here, "the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability . . . necessary to effective representation of the class's interests.'"[5]

This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after extensive arm's-length negotiations. Lead Counsel Decl. ¶69. In mid-2013, the parties agreed to mediation before Professor Eric Green. In preparation for the mediation, the parties exchanged detailed mediation statements and submitted them to the mediator. No agreement was reached at the mediation, but direct negotiations resumed in the summer of 2014, led by senior attorneys for both sides. Intensive discussions continued and the parties eventually reached the Settlement. Lead Counsel Decl. ¶¶70-72. Lead Counsel were fully informed of the merits and weaknesses of the case at the time the Settlement was reached given

[4] *Newman v. Stein*, 464 F.2d 689, 691-92 (2d Cir. 1972); *see Chavarria*, 875 F. Supp. 2d at 172 (a court may not "conduct a mini-trial of the merits of the action."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("In deciding whether to approve a settlement, a court 'should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute[s] one complex, time consuming and expensive litigation for another.'").

[5] *D'Amato*, 236 F.3d at 85; *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at **3-4 (S.D.N.Y. May 13, 2011) (court must pay close attention to the negotiating process, that it was at arm's length, and that class counsel had the requisite experience and ability); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement."), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

the in-depth knowledge they had gained litigating the various phases of the case, including (1) investigation and evaluation of Lead Plaintiffs' claims; (2) consultation with experts; (3) repeated briefing of Defendants' motions to dismiss; (4) detailed document discovery, including taking and defending depositions; and (5) researching, composition and filing of Plaintiffs' class certification motion. Given these considerations, the Settlement is entitled to the presumption of procedural fairness. *D'Amato*, 236 F.3d at 85; *Luxottica Grp.*, 233 F.R.D. at 315.

2. The Second Circuit's Standards Governing The Substantive Fairness Of Class Action Settlements

The Second Circuit has identified nine factors that courts should consider in deciding whether to approve a proposed settlement of a class action as "fair, reasonable, and adequate":

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

Grinnell, 495 F.2d at 463. All nine factors need not be satisfied. Instead, the Court should look at the totality of these factors in light of the specific circumstances involved. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 4526593, at **9-10 (S.D.N.Y. Dec. 20, 2007); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455-56 (S.D.N.Y. 2004).

As demonstrated below, the Settlement satisfies the relevant *Grinnell* factors. This Settlement represents a very good recovery for the Settlement Class given the risks present in this case. As such, the Settlement warrants this Court's final approval.

3. The Settlement Satisfies The Second Circuit Criteria For Approval

a. The Complexity, Expense, And Likely Duration Of The Litigation Support The Settlement

"In evaluating the settlement of a securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012). Indeed, "[t]he expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *see also Strougo v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) ("'[I]t is beyond cavil that continued litigation in this multi-district securities class action would be complex, lengthy, and expensive, with no guarantee of recovery by the class members.'").

Here, Lead Plaintiffs' claims arose from the sale of structured investments that had been created by players in a complicated RMBS industry. Accordingly, the discovery process was extremely complex and time intensive. Lead Plaintiffs served detailed document discovery on Morgan Stanley and approximately 100 subpoenas on various third parties. Lead Counsel Decl. ¶42. Given the large number of mortgages and entities involved in constructing each offering, the document productions in response to these requests were massive. In total, Lead Counsel obtained more than 15 million pages of documents. *Id*. ¶46.

The documents produced addressed many issues that were critical to the litigation, including, for example: the process through which the mortgages were originated or acquired through Morgan Stanley's loan "conduit"; the process through which mortgages were acquired in "whole loan transactions"; the selection and approval of the counterparties in these whole loan transactions, including many of the originators described in the Complaint; the evaluation and due diligence

performed on the mortgages prior to purchase; communications between the Defendants and other relevant parties, including the rating agencies, due diligence firms, and originators; the approval of variances from underwriting guidelines that were identified through this diligence process; the selection of mortgages for inclusion in the Trusts; the structuring of the Trusts and the Certificates; the marketing and sale of Certificates to investors; the monitoring of the performance of the mortgages through the securitization process and beyond; the evaluation of the quality of originators that sold Morgan Stanley loans; and Defendants' evaluations of potential breaches of representations and warranties. *Id*. ¶48. The effective review of documents relevant to these issues required the analysis of not only emails and other routine correspondence, but also detailed analyses of spreadsheets and other complex compilations of financial data. *Id.* ¶47.

Given the subject matter, the factual and legal issues in this case were often complex. In some instances, Lead Plaintiffs and Defendants engaged experts and consultants to assist them in analyzing various factual issues. For example, Lead Plaintiffs engaged experts in statistical sampling and re-underwriting to assist in analyzing the massive number of loan files. Additionally, there are numerous legal issues – falsity, materiality, rebutting negative loss causation, and damages – that would have required expert testimony from both sides. Ultimately, the parties would have needed to work closely with their experts to present the complex issues and evidence to a jury in comprehensible manner. This process would have been challenging and would have unquestionably added to the complexity and length of the case.

Through this proposed Settlement, the litigants and the Court have avoided the delay and expense of continued litigation. Even if Lead Plaintiffs prevailed on their motion for class certification, summary judgment and trial, the additional delay through trial, post-trial motions, and

the appellate process could deny the Settlement Class any recovery for years, further reducing the value of any potential future recovery.[6] The Settlement avoids these additional risks.

The $95 million Settlement at this juncture results in a very good, certain and tangible recovery for the Settlement Class without the considerable risk, expense, and delay of proceeding with the Action. This factor weighs heavily in favor of approval of the proposed Settlement.

b. The Reaction Of The Settlement Class To The Settlement

The reaction of the class to a settlement is a significant factor in assessing its fairness and adequacy, and "'the absence of objectants may itself be taken as evidencing the fairness of a settlement.'" *PaineWebber*, 171 F.R.D. at 126; *see also Luxottica Grp.*, 233 F.R.D. at 311-12.

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Gilardi & Co. LLC ("Gilardi"), began mailing copies of the Notice and Claim Form to potential Class Members and nominees on September 17, 2014. *See* Declaration of Nashira D. Washington Re Notice Dissemination and Publication ("Washington Decl.") ¶3. As of November 10, 2014, Gilardi had sent out over 6,700 Claim Packages to potential Settlement Class Members and their nominees. *Id*. ¶9. In addition, a Summary Notice was published in the national edition of the *Investor's Business Daily* on September 24, 2014, and over the *Business Wire* on September 23, 2014. *Id.* ¶10. The Notice set out the essential terms of the Settlement and informed potential Settlement Class Members of, among other things, their right to opt out of the Settlement Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms.

[6] *See In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008); *Strougo*, 258 F. Supp. 2d at 261 ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

Though the deadline for objections and opt-outs has not passed, to date, not a single Settlement Class Member has objected to any of the terms of the Settlement or requested exclusion from the Settlement Class.[7] Thus, the reaction of the Settlement Class – those affected by the Settlement – underscores the propriety of the Settlement and militates in favor of approving the Settlement.

c. The Stage Of The Proceedings And Discovery Completed

"There is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. . . . At a minimum, the court must possess sufficient information to raise its decision above mere conjecture."[8]

Here, Lead Counsel negotiated the Settlement only after they had a clear view of the strengths and weaknesses of the parties' claims and defenses. Initially, Lead Counsel engaged in a thorough investigation in preparation for drafting the Initial Complaint, the West Virginia Complaint, and the Consolidated Complaint. Lead Counsel Decl. ¶16. The investigation included, among other things, locating and interviewing witnesses, carefully analyzing the offering documents, and reviewing additional sources such as court filings, investigations, media reports, performance and downgrade data related to the securities, Congressional testimony, SEC filings, press releases, and public statements made by Morgan Stanley, the rating agencies and the originators. *Id.* Further,

[7] Lead Counsel Decl. ¶116. The deadline for objections and opt-outs is November 26, 2014, and Lead Counsel will address any such objections or opt-outs in their reply papers due on December 11, 2014.

[8] 4 Alba Conte, Herbert B. Newberg, *Newberg on Class Actions* §11.45, at 127-28 (4th ed. 2002); *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (it is not necessary for a court to find parties engaged in extensive discovery; a court must merely find that they engaged in sufficient investigation to enable court to make intelligent appraisal of case) (citing *Plummer v. Chem. Bank*, 668 F.2d 654 (2d Cir. 1982)), *aff'd sub nom. D'Amato*, 236 F.3d 78; *see also In re Veeco Instr. Inc. Sec. Litig.*, 05 MDL 0165 (CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007) ("the parties need not have engaged in full discovery for a settlement to be approved as fair"); *Sony*, 2008 WL 1956267, at *7 (same).

Plaintiffs filed six complaints, and opposed three rounds of motions to dismiss. *Id.* ¶¶18, 19, 24, 27, 30, 31. The parties also completed detailed class certification briefing, including Lead Plaintiffs' expert report from Joseph R. Mason, Ph.D., in support of their motion for class certification. *Id.* ¶¶61-66.

In addition, Lead Plaintiffs propounded numerous discovery requests on Defendants and served approximately 100 third-party subpoenas requesting both documents and depositions. *Id.* ¶42. Pursuant to those requests, Lead Counsel obtained more than 15 million pages of documents. Plaintiffs analyzed documents using a sophisticated electronic system to categorize the documents by issue, prepare witness files, and identify documents supporting Plaintiffs' claims. *Id.* ¶47. In addition to document discovery, the parties deposed 13 witnesses. *Id.* ¶49. The parties also participated in a mediation session with Professor Green, wherein the parties submitted detailed mediation briefs. *Id*. ¶71. Further, during subsequent settlement negotiations, Lead Counsel held discussions with Defendants' counsel that crystallized for them the defenses that would be pressed if the case progressed.

Thus, Lead Counsel had a clear picture of the strengths and weaknesses of this case and of the legal and factual defenses that Defendants would likely raise at trial.[9] As such, Lead Counsel had sufficient information to negotiate intelligently the terms of the Settlement that is before the Court for approval. *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 426 (S.D.N.Y. 2001). This factor also supports the Settlement.

[9] *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (finding action had advanced to a stage where parties "'have a clear view of the strengths and weaknesses of their cases'"); *see also In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 161 (S.D.N.Y. 2011) (this factor supported settlement where the action had proceeded through substantial document production, five depositions, "a round of mediation submissions and sessions, and expert consultations on damages and causation," and, thus, "the parties were able to make an intelligent appraisal of the value of the case").

d. The Risk Of Establishing Liability And Damages

In assessing the Settlement, the Court should balance the benefits afforded to the Settlement Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463; *Veeco*, 2007 WL 4115809, at **8-9; *Austrian & German Bank*, 80 F. Supp. 2d at 177. While Lead Counsel believe that that they would eventually prevail at summary judgment and trial, it is also clear that ultimate success was not assured, and this Settlement, when viewed in light of the risks of proving liability and damages, and enforcing and collecting a judgment, is fair, adequate, and reasonable. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) (when evaluating securities class action settlements, courts have long recognized such litigation to be "'notably difficult and notoriously uncertain'") (quoting *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973)); *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("Stockholder litigation is notably difficult and unpredictable.").

The risks here included challenges in proving that there were misstatements and omissions in the offering documents that contained detailed risk disclosures. Further risks included, for example, overcoming Defendants' arguments that some or all of the declines in the value of the Certificates were due to causes other than the alleged misstatements or omissions ("negative causation" defenses); that Defendants had conducted a "reasonable investigation" and thus could satisfy their "due diligence" defense; that Plaintiffs' claims were untimely; and that various members of the class had actual knowledge of the misstatements and thus could not bring valid claims. Lead Counsel Decl. ¶¶75-82.

Risks of Establishing Liability. To avoid summary judgment and prevail at trial, Lead Plaintiffs would need to present evidence that the offering documents contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein related to (1) the

underwriting of the loans underlying the RMBS, and/or (2) the appraisals and loan-to-value ratios of the loans underlying the RMBS. Defendants had argued and would continue to argue that the offering documents contained no untrue statements or omissions.

Risks of Establishing Damages. Defendants also contended that establishing damages under the Securities Act posed significant obstacles for Lead Plaintiffs and the Settlement Class. Thus, even assuming that Plaintiffs prevailed at trial in establishing untrue statements and omissions in the offering documents for the 13 Offerings for which the Court sustained Lead Plaintiffs' claims, recoverable damages under Section 11 of the Securities Act are based on "the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought . . . ." 15 U.S.C. §77k(e).

Lead Counsel engaged a consultant to assist in estimating potentially recoverable damages using the statutory measure under Section 11 and certain assumptions. Lead Counsel Decl. ¶76. Such estimate, before taking into account causation or other defenses to damages, amounts to billions of dollars in the aggregate based on certain assumptions. However, damages under Section 11 may be reduced or eliminated if the defendant proves that a portion or all of the statutory damages are attributable to causes other than the misstatements or omissions. Throughout the course of the litigation, Defendants contended that any losses were caused by factors other than untrue statements in the offering documents (such as the overall economic downturn and general decline in

housing prices), and they would have had additional opportunities to persuade the Court or a jury that their position was meritorious. Moreover, given that the timing of the price declines at issue coincided with the national economic downturn, Defendants' "negative causation" defense was an argument that, at the very least, would have to be resolved through expert testimony at trial. *See, e.g.*, *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005) (the likelihood of demonstrating loss causation decreases if a "plaintiff's loss coincides with a marketwide phenomenon"); *Giant Interactive*, 279 F.R.D. at 161-62 (approving settlement where the litigation risks included a "credible defense of 'negative causation'").

Risks Related to Other Defenses. Defendants raised numerous other defenses in this Action, which they could be expected to continue to press, including, *inter alia*, (1) a "due diligence" defense; (2) the statute of limitations; and (3) that certain Settlement Class Members had "knowledge" of the alleged misstatements:

- ***Due Diligence***. Defendants asserted a "due diligence" defense and contended that they conducted appropriate reviews and analyses of the character and quality of loans prior to the loans being securitized in the Offerings. Lead Counsel Decl. ¶81. While Defendants would have the burden of establishing this "due diligence" defense, if they were successful in establishing the reasonableness of their investigation, it could provide a complete defense to liability. Moreover, the question as to what constituted a "reasonable investigation" in these circumstances would likely have been the subject of competing expert testimony at trial. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 338 (S.D.N.Y. 2005) (risks of litigation supported the settlement where defendants "had asserted due diligence defenses and might have been successful at establishing the adequacy of their efforts at trial").

- ***Statute of Limitations***. The Court dismissed claims arising from the 2007 Offerings based on the statute-of-limitations defense. Lead Counsel Decl. ¶78. While such claims remained subject to appellate review, there is no guarantee that the Second Circuit Court of Appeals would reverse such dismissal. Assuming West Virginia succeeded at the appellate level, Plaintiffs would have faced additional challenges to proving their claims based on the passage of time. Defendants also asserted that the claims arising from the 2006 Offerings were untimely. And though the Court rejected this argument at the pleading stage, Defendants would surely continue to press this defense. *Id.* ¶79.

- ***Knowledge***. Defendants would argue that certain Plaintiffs and various members of the Settlement Class had actual knowledge of the alleged untrue statements and omissions at the time they purchased the Certificates and thus could not bring claims. Lead Counsel Decl. ¶78.

Several of these contested issues, notably the "negative causation" defense and the "due diligence" defense, ultimately would have required expert testimony. While Lead Plaintiffs expected to present persuasive expert testimony, Defendants likely would have been able to present experts who would support their position. Defendants, moreover, undoubtedly would assert *Daubert* challenges against each of Lead Plaintiffs' experts. Assuming that Lead Plaintiffs prevailed in such challenges, Lead Plaintiffs could not be certain which experts' views would be credited by the jury and who would prevail at trial in this "battle of the experts."[10]

e. The Risks Of Maintaining The Class Action Through Trial

Had the Settlement not been reached, there is no assurance that Plaintiffs' motion for class certification would be granted or that class status, if granted, would have been maintained through trial. *See*, *e.g.*, *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[W]e cannot find that the district court abused its discretion in finding that the class faced significant risks of decertification, that decertification would drastically reduce the chances of any member of the class achieving meaningful relief, and that the litigation risks attendant to these possibilities weighed heavily in favor of the fairness of a settlement . . . ."); *see also Chatelain v. Prudential-Bache Sec., Inc.,* 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification.").

[10] *See, e.g.*, *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 332 (E.D.N.Y. 2010) ("The proof on many disputed issues – which involve complex financial concepts – would likely have included a battle of experts, leaving the trier of fact with difficult questions to resolve."); *Am. Bank Note*, 127 F. Supp. 2d at 426-27 ("In such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants.").

Plaintiffs' motion for class certification sought to certify for litigation purposes a class of RMBS investors in the 13 Offerings for which the Court had sustained claims. Lead Counsel Decl. ¶82. Defendants opposed Plaintiffs' motion on various grounds, including that the scope of the Settlement Class was far narrower, and that Plaintiffs had not satisfied various elements of Rule 23, including numerosity, typicality, adequacy, predominance and superiority. Although other courts have granted motions to certify classes of RMBS investors, at least one district court has denied such a motion. *Compare Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, No. 08-cv-10841 (S.D.N.Y. June 15, 2011), ECF No. 149 (certifying litigation class of RMBS investors); *N.J. Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, No. 08-cv-5653, 2011 WL 3874821 (S.D.N.Y Aug. 16, 2011) (certifying litigation class of RMBS investors), *with N.J. Carpenters Health Fund v. Residential Capital LLC*, 272 F.R.D. 160 (S.D.N.Y. 2011) (denying motion to certify litigation class of RMBS investors). Defendants also raised unique arguments concerning the former named plaintiffs that raised novel legal issues. Accordingly, there was a risk that, in the event that Defendants' challenges were successful, Plaintiffs' motion for class certification would be granted only as to a much narrower class, or denied altogether.[11]

Even if the class certification motion was granted, Defendants may have continued to attempt to find infirmities with the class representatives and to remove them from those roles. The Settlement avoids any uncertainty with respect to these issues.

[11] Courts have repeatedly held that it is appropriate to certify a class for purposes of a settlement that is broader than a litigation class that was previously proposed or certified. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 190 (S.D.N.Y. 2005) ("a court may approve a settlement class broader than a litigation class that has already been certified"); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 661 & n.12 (E.D. Va. 2001) (certifying a class for settlement that was broader than the original certified class and noting that "[s]uch an expansion is permissible under the circumstances, as all the requirements of Rule 23 . . . are satisfied"); *see also Spann v. AOL Time Warner, Inc.*, No. 02 Civ. 8238 DLC, 2005 WL 1330937, at *6 (S.D.N.Y. June 7, 2005) (certifying a settlement-only class after earlier denying class certification for failure to establish typicality, adequacy and predominance); *Ramirez v. DeCoster*, 142 F. Supp. 2d 104, 111 n.9 (D. Me. 2001) (certifying a settlement class after declining to certify a litigation class).

f. The Ability Of The Defendants To Withstand A Greater Judgment

Although Defendants may have been able to pay a judgment in excess of the Settlement Amount, "defendants' ability to withstand a higher judgment . . . standing alone, does not suggest that the settlement is unfair."[12] There could be no guarantee as to the financial capability of Defendants to withstand a substantially larger judgment several years in the future at the conclusion of trial and any appeals. Indeed, at the time the Settlement was reached, Morgan Stanley was litigating numerous other lawsuits (some related to RMBS) that increased Morgan Stanley's exposure. In any event, the fact that Defendants may have the ability to pay a greater judgment is outweighed here by the other strong considerations favoring the Settlement, most notably, the risks to the Settlement Class of establishing liability and damages and the reasonableness of the Settlement Amount in light of those risks.

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

The last two substantive factors that courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery; and (ii) litigation risks. In analyzing these two factors, the issue for the Court is not whether the Settlement represents the best possible recovery, but how the Settlement relates to the strengths and weaknesses of the case. A court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is

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

reasonable." *Grinnell*, 495 F.2d at 462. "The determination of a reasonable settlement 'is not susceptible of a mathematical equation yielding a particularized sum,' but turns on whether the settlement falls within a range of reasonableness." *Chavarria*, 875 F. Supp. 2d at 174. Thus, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. "In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Chavarria*, 875 F. Supp. 2d at 175.

The Settlement here is well within the range of reasonableness in light of the substantial risks in this litigation. Although Lead Plaintiffs' damages consultant estimated that statutory damages under Section 11 – before taking into account causation or other defenses to damages – could amount to billions of dollars in the aggregate based on certain assumptions, Defendants had substantial arguments with respect to various defenses to the claims at issue that could greatly reduce or eliminate altogether the amount of damages for which they were liable.[13] In light of these risks, the Settlement, which provides a certain and substantial benefit to Settlement Class Members, outweighs the benefits of continued litigation. Lead Counsel Decl. ¶¶76-83; *see also* Neville Decl. ¶¶7-8, attached as Ex. 1 to Lead Counsel Decl. A court need not "substitute its judgment for that of the parties who negotiated the settlement." *Chavarria*, 875 F. Supp. 2d at 172.

Lead Counsel are intimately familiar with the facts in the case and have extensive experience prosecuting comparable securities class actions. In these circumstances, Lead Counsel's opinion that

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

the Settlement is reasonable is entitled to "great weight." *Padro v. Astrue*, No. 11-cv-1788 (CBA)(RLM), 2013 WL 5719076, at *7 (E.D.N.Y. Oct. 18, 2013) ("Where, as here, settlement has been reached after an arms-length negotiation, 'great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.'"). The recommendation of Lead Plaintiffs, sophisticated institutional investors, also strongly supports the fairness of the Settlement. Representatives of Lead Plaintiffs took an active role in supervising this litigation, as envisioned by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), *see* Neville Decl. ¶¶5-6, and Lead Plaintiffs strongly endorse the Settlement. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *Veeco*, 2007 WL 4115809, at *5 .

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

B. The Plan of Allocation Is Fair, Reasonable, And Adequate

The standard for approval of a plan of allocation is the same as the standard for approving the settlement as a whole: "'namely, it must be fair and adequate.'" *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *WorldCom*, 388 F. Supp. 2d at 344. "'As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart*, 396 F.3d 96. A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *Am. Bank Note*, 127 F. Supp. 2d at 429-30; *see also WorldCom*, 388 F. Supp. 2d at 344 (same). Further, courts enjoy "broad supervisory powers over the administration

of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978).

The Plan of Allocation, which was fully described in the Notice, has a rational basis and was formulated by Lead Counsel, in consultation with their damages consultant, ensuring its fairness and reliability. *See Veeco*, 2007 WL 4115809, at *13. Under the proposed Plan of Allocation, each Authorized Claimant (as defined in ¶1(f) of the Stipulation) will receive a *pro rata* share of the Net Settlement Fund, with that share to be determined by the ratio that the Authorized Claimant's allowed claim bears to the total allowed claims of all Authorized Claimants. *See* Brandenberg Decl., attached as Ex. 3 to Lead Counsel Decl.

The Plan, as set forth in the Notice, allocates the Settlement proceeds based principally on the statutory measure of damages set out in Section 11(e) of the Securities Act, 15 U.S.C. §77k(e). Lead Plaintiffs engaged Brett Brandenberg, a Director at AlixPartners and a Chartered Financial Analyst, to examine the Plan of Allocation. The Brandenberg Declaration explains the methodology for determining each Authorized Claimant's Recognized Claim under the Plan and the basis for the analysis. As explained more fully in the Notice – including through illustrative examples – and in the Brandenberg Declaration, a "Recognized Loss Amount" or "Recognized Gain Amount" will be calculated for each purchase or acquisition of a Certificate. Brandenberg Decl. ¶7. The calculation of a Claimant's Net Recognized Loss will depend on several factors, including: (a) the face value of the Certificates purchased; (b) when the Certificates were purchased or acquired and the price paid; (c) any principal payments received; (d) whether the Certificates were sold, and if so, when they were sold and for how much; (e) if held on the applicable Date of Suit for the Certificates, the price of the Certificates on that date; and (f) whether the Court sustained claims asserted on behalf of purchasers of certain Certificates. *Id*. ¶6.

Although the formula has a degree of complexity necessary to allocate the Settlement Fund fairly among Authorized Claimants, investors in mortgage-backed securities are typically familiar with the language utilized in the Plan because it is consistent with industry terminology. *Id.* ¶7. In addition, specific examples of how to calculate hypothetical examples under various scenarios are included in the Plan for clarification. A similar approach has been accepted and used successfully in other RMBS class action settlement.[14]

"To warrant approval, the plan of allocation must also meet the standards by which the . . . settlement was scrutinized namely, the plan must be fair and adequate." *Maley*, 186 F. Supp. 2d at 367; *see also MicroStrategy*, 148 F. Supp. 2d 668. Indeed, it is appropriate for interclass distributions to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue.[15] Otherwise, certain class members may receive an inequitable windfall, to the detriment of others. *PaineWebber*, 171 F.R.D. at 133. Moreover, in assessing a proposed plan of allocation, the Court may give great weight to the opinion of informed counsel.[16]

The proposed Plan of Allocation in this case is based on the statutory damages permitted under Section 11 of the Securities Act and was fully explained in the Notice sent to Settlement Class

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[14] *See, e.g., Plumbers' & Pipefitters' Local #562 Suppl. Plan & Trust v. J.P. Morgan Acceptance Corp.,* No. 08-cv-1713 (PKC) (E.D.N.Y.); *MissPERS v. Goldman Sachs Grp., Inc.,* No. 09-cv-1110-HB (S.D.N.Y.); *MissPERS v. Merrill Lynch & Co. Inc.,* No. 08-cv-10841-JSR (S.D.N.Y.); *In re Wells Fargo Mortgage-Backed Certificates Litig.*, No. 09-cv-1376-LHK (N.D. Cal.).

[15] *See In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001). Here, for example, to account for the reduced likelihood of success on claims related to the 2007 Offerings (because the Court dismissed them), the Plan of Allocation applies a 70% discount to the value of those claims. *See, e.g., Am. Bank Note,* 127 F. Supp. 2d at 429 ("Allocation formulas, including certain discounts for certain securities, are recognized as an appropriate means to reflect the comparative strengths and values of different categories of the claim.").

[16] *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 240 (E.D.N.Y. 2013) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel."); *Chavarria*, 875 F. Supp. 2d at 175 ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel. That is, 'as a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information.'").

Members. It was prepared in consultation with Lead Plaintiffs' consultant and tracks the theory of damages asserted by Lead Plaintiffs. Accordingly, the Plan is fair, reasonable and adequate to the Settlement Class as a whole. Lead Counsel Decl. ¶94. The Plan is supported by the Brandenberg Declaration and should be approved by the Court. To date, there are no objections to the Plan. *Id.* ¶95. *See Veeco*, 2007 WL 4115809, at *14; *Maley*, 186 F. Supp. 2d at 367.

C. Notice To The Settlement Class Satisfied The Requirements Of Rule 23 And Due Process

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

Both the substance of the Notice and the method of its dissemination to potential Settlement Class Members satisfied these standards. The Notice includes all the information required by Rule 23(c)(2)(B) and the PSLRA, 15 U.S.C. §77z-1(a)(7), including: (i) an explanation of the nature of the Action and claims; (ii) the Settlement Class definition; (iii) the Settlement Amount and structure of the Settlement; (iv) the Plan of Allocation; (v) an explanation of the reasons for the Settlement; (vi) a statement of the Settlement Class Members' expected recovery; (vii) a statement indicating the attorneys' fees and expenses that will be sought; (viii) a description of the right to opt-out of the Settlement Class or object; and (ix) notice of the binding effect of a judgment. *See In re Bank of Am. Corp. Sec., Derivative and ERISA Litig.,* No. 13-1573, --- F.3d ---, 2014 WL 5687301, at *4 n.5 (2d Cir. Nov. 5, 2014) (affirming sufficiency of similar notice).

As noted above, in accordance with the Court's Preliminary Approval Order, as of November 10, 2014, the Claims Administrator has sent more than 6,700 copies of the Notice to potential Settlement Class Members and their nominees. Washington Decl. ¶9. During discovery, Lead Counsel (i) reviewed Defendants' internal files for information about the initial purchasers of the RMBS issued in the 2006 Offerings; and (ii) served subpoenas to dozens of major custodial banks whose internal records reflect holdings and transactions in the RMBS issued in the 2006 Offerings. Lead Counsel Decl. ¶84. In connection with the Settlement, Defendants provided contact information regarding purchases in the 2007 Offerings. The list of potential Settlement Class Members was supplemented by mailing to a collection of the largest and most common U.S. nominees (*i.e.*, brokerage firms, banks, and institutions who hold securities in the name of the nominee on behalf of beneficial purchasers). Washington Decl. ¶4; Lead Counsel Decl. ¶85. In addition, Lead Plaintiffs caused the Summary Notice to be published in the national edition of *Investor's Business Daily* and over the *Business Wire*, and copies of the Notice and Claim Form were made available on a dedicated website maintained by Gilardi and on Lead Counsel's websites. *See* Washington Decl. ¶¶10, 12; Lead Counsel Decl. ¶86.

This combination of individual mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, and set forth on Internet websites, was "the best notice . . . practicable under the circumstances" and satisfies the requirements of due process and Rule 23.[17]

[17] Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Padro*, 2013 WL 5719076, at *3 ("Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members."); *see also Arace v. Thompson*, No. 08 Civ. 7905 (DC), 2011 WL 3627716, at *4 (S.D.N.Y. Aug. 17, 2011) (describing *Investor's Business Daily* as "a nationally-circulated business-oriented publication catering to investors," and finding notice of settlement published therein "sufficient[] [to] apprise[] . . . shareholders of the nature of the proposed settlement").

D. Certification Of The Settlement Class Remains Warranted

On September 10, 2014, the Court granted Plaintiffs' motion for preliminary approval of the Settlement and preliminarily certified the Settlement Class for settlement purposes only, pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. *See* Preliminary Approval Order, ECF No. 309. The Settlement Class is defined as follows:

> All Persons who: (i) prior to December 2, 2008, purchased or otherwise acquired any of the 2006 Certificates pursuant or traceable to the 2006 Offerings and were damaged thereby; or (ii) prior to May 7, 2009, purchased or otherwise acquired any 2007 Certificates pursuant or traceable to the 2007 Offerings and were damaged thereby. Excluded from the Settlement Class are: (1) Defendants, originators of any loans underlying the Certificates, and Defendants' and originators' successors and assigns, and the directors and officers of such entities at all relevant times, as well as members of such Persons' immediate families and their legal representatives, heirs, successors or assigns, and any entity in which any excluded Person has or had a controlling interest, except that affiliates and entities in which such excluded Person has or had a controlling interest other than Investment Vehicles (which are excluded only to the extent provided for in the definition of Investment Vehicles) are excluded from the Settlement Class only to the extent that such entities themselves had a proprietary (*i.e.*, for their own account) interest in the Certificates and not to the extent that they held the Certificates in a fiduciary capacity or otherwise on behalf of any third-party client, account, fund, trust or employee benefit plan that otherwise falls within the Settlement Class; and (2) Persons that have separately asserted or pursued against Defendants their claims concerning any of the Certificates, including by filing individual actions or privately entering into confidential tolling agreements with Defendants concerning any of the Certificates, as such Persons are identified on Appendix 1 to the Stipulation. Also excluded from the Settlement Class are any Persons who exclude themselves by filing a valid request for exclusion in accordance with the requirements set forth in the Notice.

Preliminary Approval Order ¶4.

Nothing has changed to alter the propriety of certification for settlement purposes and, for all the reasons stated in Plaintiffs' preliminary approval brief (ECF No. 306), incorporated herein by reference, Plaintiffs now request that the Court grant final certification of the Settlement Class pursuant to Rules 23(a) and (b)(3).

III. CONCLUSION

The Settlement reached in this Action is a very good result under the difficult circumstances present here. For the foregoing reasons, the $95 million cash Settlement and Plan of Allocation of the Settlement proceeds are fair, reasonable, and adequate and should be finally approved by the Court.

Dated: November 13, 2014
San Diego, California

Respectfully submitted,

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