UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 3

A. Lead Counsel Are Entitled To An Award Of Attorneys' Fees From The Common Fund 3

B. The Court Should Award A Reasonable Percentage Of The Common Fund 4

C. The Requested Attorneys' Fees Are Reasonable Under The Percentage-of-the-Fund Method 6

D. A Review Of The *Goldberger* Factors Confirms That The Requested 17% Fee Is Fair And Reasonable 9

1. The Time And Labor Expended By Plaintiffs' Counsel Support The Requested Fee 10

2. The Magnitude And Complexity Of The Action Support The Requested Fee 13

3. The Risks Of The Litigation Support The Requested Fee 14

4. The Quality Of Lead Counsel's Representation Supports The Requested Fee 16

5. Second Circuit Precedent Supports The 17% Fee As A Reasonable Percentage Of The Total Recovery 17

6. Public Policy Considerations Support The Requested Fee 18

7. Lead Plaintiffs' Approval And The Settlement Class' Reaction Support The Requested Fee 18

E. A Lodestar Cross-Check Confirms The Reasonableness Of The Fee Request 19

F. Plaintiffs' Counsel's Expenses Are Reasonable And Should Be Approved For Recovery 22

G. Lead Plaintiff MissPERS Should Be Awarded Its Reasonable Costs And Expenses Under 15 U.S.C. § 77z-1(a)(4) 23

III. CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.,
No. 03 MDL 1529 LMM, 2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006),
aff'd, 272 Fed. Appx. 9 (2d Cir. 2008) (unpubl.)....................8, 17

In re Am. Int'l Grp., Inc. Sec. Litig.,
No. 04 Civ. 8141 (DAB), 2010 WL 5060697 (S.D.N.Y. Dec. 2, 2010)....................24

In re AremisSoft Corp. Sec. Litig.,
210 F.R.D. 109 (D.N.J. 2002)....................9, 20

In re AT&T Corp. Sec. Litig.,
455 F.3d 160 (3d Cir. 2006)....................6

In re Bank of Am. Corp. Sec., Derivative, and ERISA Litig.,
No. 13-1573, --- F.3d ---, 2014 WL 5687301 (2d Cir. Nov. 5, 2014) ....passim

In re BankAmerica Corp. Sec. Litig.,
228 F. Supp. 2d 1061 (E.D. Mo. 2002)....................9

Bateman Eichler, Hill Richards, Inc. v. Berner,
472 U.S. 299 (1985)....................4

In re Bisys Sec. Litig.,
No. 04 Civ. 3840 (JSR), 2007 WL 2049726 (S.D.N.Y. July 16, 2007) 20

Blum v. Stenson,
465 U.S. 886 (1984)....................5, 7

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)....................3

In re Bristol-Myers Squibb Sec. Litig.,
2007 WL 2153284 (3d Cir. July 27, 2007) (unpubl.) 9

In re Buspirone Antitrust Litig.,
MDL No. 1413 (JGK), 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 11, 2003)....................8

Camden I Condo. Ass'n v. Dunkle,
946 F.2d 768 (11th Cir. 1991) 6

In re Cardinal Health Inc. Sec. Litig.,
528 F. Supp. 2d 752 (S.D. Ohio 2007) 9, 20

In re Checking Account Overdraft Litig.,
830 F. Supp. 2d 1330 (S.D. Fla. 2011) 9

In re China Sunergy Sec. Litig.,
No. 07 Civ. 7895 (DAB), 2011 WL 1899715 (S.D.N.Y. May 13, 2011)........ 22

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974)........ 14

In re CMS Energy Sec. Litig.,
No. 02 CV 72004 (GCS), 2007 U.S. Dist. LEXIS 96786
(E.D. Mich. Sept. 6, 2007) 9

In re Comverse Tech., Inc. Sec. Litig.,
No. 06-CV-1825 (NGG) (RER), 2010 WL 2653354 (E.D.N.Y. June 24, 2010) .... passim

Davis v. J.P. Morgan Chase & Co.,
827 F. Supp. 2d 172 (W.D.N.Y. 2011) 5, 6, 20

In re Deutsche Telekom AG Sec. Litig.,
No. 00-CV-9475 (NRB), 2005 U.S. Dist. LEXIS 45798 (S.D.N.Y. June 9, 2005)........ 8, 20

In re FLAG Telecom Holdings, Ltd. Sec. Litig.,
No. 02-CV-3400, 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010)........ passim

In re Giant Interactive Grp., Inc. Sec. Litig.,
279 F.R.D. 151 (S.D.N.Y. 2011) 4

In re Global Crossing Sec. & ERISA Litig.,
225 F.R.D. 436 (S.D.N.Y. 2004) 8, 16

In re Global Crossing Sec. Litig.,
No. 02 Civ. 910 (GEL), 2005 WL 1668532 (S.D.N.Y. July 12, 2005) 8

Goldberger v. Integrated Res., Inc.,
209 F.3d 43 (2d Cir. 2000)........ passim

Gottlieb v. Barry,
43 F.3d 474 (10th Cir. 1994) 6

Harman v. Lyphomed, Inc.,
945 F.2d 969 (7th Cir. 1991) 6

Hayes v. Harmony Gold Min. Co. Ltd.,
509 Fed. Appx. 21 (2d Cir. 2013) (unpubl.) 4

Hicks v. Morgan Stanley,
No. 01 Civ. 10071 (RJH), 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005)........ 4, 18, 23

In re Initial Pub. Offering Sec. Litig.,
671 F. Supp. 2d 467 (S.D.N.Y. 2009)..8

J.I. Case Co. v. Borak,
377 U.S. 426 (1964)..4

Kurzweil v. Philip Morris Cos.,
No. 94 Civ. 2373 (MBM), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)..................................8

In re Linerboard Antitrust Litig.,
MDL No. 1261, 2004 WL 1221350 (E.D. Pa. June 2, 2004) 9

In re Lucent Techs., Inc. Sec. Litig.,
327 F. Supp. 2d 426 (D.N.J. 2004) 9, 19

Maley v. Del Global Techs. Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002)..6, 18, 20

In re Marsh ERISA Litig.,
265 F.R.D. 128 (S.D.N.Y. 2010) 16, 17

In re The Mills Corp. Sec. Litig.,
265 F.R.D. 246 (E.D. Va. 2009) 9

Missouri v. Jenkins,
491 U.S. 274 (1989)...7, 21

In re Monster Worldwide, Inc. Sec. Litig.,
No. 07-cv-02237-JSR, 2008 WL 9019514 (S.D.N.Y. Nov. 24, 2008)...23

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.
693 F.3d 145 (2d Cir. 2012)..12

Ohio Pub. Emps. Ret. Sys. v. Freddie Mac,
No. 03-CV-4261 (JES), 2006 U.S. Dist. LEXIS 98380 (S.D.N.Y. Oct. 26, 2006) 8

In re Oxford Health Plans, Inc. Sec. Litig.,
MDL No. 1222 (CLB), 2003 U.S. Dist. LEXIS 26795 (S.D.N.Y. June 12, 2003) 8

Parker v. Time Warner Entm't Co.,
631 F. Supp. 2d 242 (E.D.N.Y. 2009) 14

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,
991 F. Supp. 2d 437 (E.D.N.Y. 2014) ....passim

Petrovic v. Amoco Oil Co.,
200 F.3d 1140 (8th Cir. 1999) 6

Police & Fire Ret. Sys. v. IndyMac MBS, Inc.,
721 F. 3d 95 (2d Cir. 2013) 12

Rawlings v. Prudential-Bache Props., Inc.,
9 F.3d 513 (6th Cir. 1993) 6

In re Rite Aid Corp. Sec. Litig.,
362 F. Supp. 2d 587 (E.D. Pa. 2005) 9

In re Rite Aid Corp. Sec. Litig.,
146 F. Supp. 2d 706 (E.D. Pa. 2001) 9, 21

Savoie v. Merchs. Bank,
166 F.3d 456 (2d Cir. 1999) 5

In re Schering-Plough Corp. Sec. Litig.,
No. 01-CV-0829 (KSH/MF), 2009 WL 5218066 (D.N.J. Dec. 31, 2009) 9

Sullivan v. DB Invs., Inc.,
667 F.3d 273 (3d Cir. 2011) 9

In re Sumitomo Copper Litig.,
189 F.R.D. 274 (S.D.N.Y. 1999) 13

Swedish Hosp. Corp. v. Shalala,
1 F.3d 1261 (D.C. Cir. 1993) 6

Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,
No. 01-CV-11814 (MP), 2004 WL 1087261 (S.D.N.Y. May 14, 2004) 16

In re Telik, Inc. Sec. Litig.,
576 F. Supp. 2d 570 (S.D.N.Y. 2008) 4, 6, 14, 20

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 4

In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.,
56 F.3d 295 (1st Cir. 1995) 6

Union Asset Mgmt. Holding A.G. v. Dell, Inc.,
669 F.3d 632 (5th Cir. 2012) 6

In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,
724 F. Supp. 160 (S.D.N.Y. 1989) 21

In re Veeco Instruments Inc. Sec. Litig.,
No. 05 MDL 01695 (CM), 2007 WL 4115808 (S.D.N.Y. Nov. 7, 2007) .... passim

In re Vitamins Antitrust Litig.,
No. 99-197 (THF), 2001 WL 34312839 (D.D.C. July 16, 2001) 9

Vizcaino v. Microsoft Corp.,
290 F.3d 1043 (9th Cir. 2002) 6

Wal-Mart Stores, Inc. v. Visa U.S.A.,
396 F.3d 96 (2d Cir. 2005) 4, 6, 20

In re Waste Mgmt., Inc. Sec. Litig.,
No. 97 C 7709, 1999 WL 967012 (N.D. Ill. Oct. 18, 1999) 9

In re WorldCom, Inc. Sec. Litig.,
388 F. Supp. 2d 319 (S.D.N.Y. 2005) 6

In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.,
364 F. Supp. 2d 980 (D. Minn. 2005) 24

STATUTES, RULES, REGULATIONS, AND OTHER AUTHORITIES

15 U.S.C. § 77z-1(a) .... passim

H.R. Conf. Rep. No. 104-369, (1995),
reprinted in 1995 U.S.C.C.A.N. 730 18

I. INTRODUCTION

Court-appointed Co-Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") and Coughlin Stoia Geller Rudman & Robbins LLP ("Robbins Geller," collectively, "Lead Counsel" or "Co-Lead Counsel"), having recovered $95 million in cash for the Settlement Class, respectfully apply for an award of attorneys' fees in the amount of 17% of the Settlement Amount, plus interest.[1] Lead Counsel also seek $1,110,072.81 in Litigation Expenses that Plaintiffs' Counsel reasonably and necessarily incurred to prosecute the Action, as well as $19,925.00 in Lead Plaintiff MissPERS' costs and expenses, plus interest.[2]

From the outset, Lead Counsel faced issues of first impression and complex factual and legal questions surrounding class litigation over residential mortgage-backed securities ("RMBS"). When the case began in December 2008, there was no precedent and no road map for successfully asserting class-wide Securities Act claims arising from the sale of RMBS. No court had yet accepted Plaintiffs' theory of damages or certified a class in such litigation. Lead Counsel nevertheless undertook this representation on a contingency basis, with no guarantee of success or recovery. They faced substantial risks establishing liability, defeating affirmative defenses, proving damages, and establishing that a class action was appropriate for litigation purposes. Indeed, a number of other putative RMBS class actions had been dismissed or materially narrowed.

As detailed in the accompanying Lead Counsel Declaration, Lead Counsel vigorously

---

[1] Lead Counsel respectfully refer the Court to 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 ("Lead Counsel Decl.") for a detailed description of the case and the Settlement. Unless otherwise noted, capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated September 5, 2014 (ECF No. 307) and in the Lead Counsel Decl.

[2] "Plaintiffs' Counsel" refers to Co-Lead Counsel for the Settlement Class and additional counsel for Lead Plaintiff MissPERS, Pond Gadow & Tyler.

pursued this litigation for nearly six years after filing the first complaint in December 2008, while committing the extensive resources necessary to prosecute this complex action to a successful result. Among other things, Lead Counsel conducted a thorough investigation, filed six complaints, overcame three rounds of motions to dismiss, conducted substantial discovery, moved for class certification, obtained more than 15 million pages of documents, obtained testimony through 13 depositions, engaged and worked with experts on issues such as damages, negative causation, materiality, mortgage-loan underwriting and statistics, analyzed hundreds of loan files related to the offerings, researched the law applicable to the claims and potential defenses, and successfully negotiated a favorable settlement. *See* Lead Counsel Decl. ¶¶12-68.

Given the substantial recovery obtained for the Settlement Class, the complexity and amount of work involved, the skill and expertise required, and the significant risks that counsel undertook, the requested award of 17% of the Settlement Amount is fair and reasonable. Federal courts in this District and throughout the nation have awarded the same or substantially greater percentage fee in other similarly complex class litigation, including other RMBS actions. A lodestar cross-check confirms that the requested fee, which represents a multiplier of less than 1.23, is fair and reasonable.

Moreover, the Lead Plaintiffs have reviewed and endorsed the fairness and reasonableness of the requested fee. *See* Declaration of George W. Neville, Special Assistant Attorney General, Legal Counsel to 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, attached as Exhibit ("Ex.") 1 to the Lead Counsel Declaration ("Neville Decl."), ¶¶8-10.

In addition, as required by the Court's September 10, 2014 Order Preliminarily Approving Settlement and Providing for Notice (the "Preliminary Approval Order," ECF No. 309), copies of the Notice have been mailed to more than 6,700 potential Settlement Class Members and their nominees, and a Summary Notice was published in *Investor's Business Daily* and over the *Business Wire*. *See* Declaration of Nashira D. Washington Re Notice Dissemination and Publication, attached as Ex. 2 to the Lead Counsel Decl. ("Washington Decl."), ¶¶9-10. The Notice advised potential Settlement Class Members that Lead Counsel would seek fees of 17% of the Settlement Amount and recovery of Litigation Expenses – including the expenses of Lead Plaintiffs in accordance with the PSLRA – in an amount not to exceed $2 million. *See* Washington Decl. Ex. A, ¶¶5, 43. While the deadline for Settlement Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no one has objected to Lead Counsel's application for fees and expenses.[3]

For the reasons set forth below, Lead Counsel respectfully request that the Court approve their application for attorneys' fees and expenses.

II. ARGUMENT

A. Lead Counsel Are Entitled To An Award Of Attorneys' Fees From The Common Fund

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts recognize that awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to

[3] The deadline for the receipt and filing of objections is November 26, 2014. Should any objections be received, Lead Counsel will address them in reply papers to be filed on or before December 11, 2014.

represent those who seek redress for damages inflicted on entire classes of persons," and therefore to discourage future alleged misconduct of a similar nature.[4] Indeed, the Supreme Court has emphasized that private securities actions, such as this one, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC.[5] Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

B. The Court Should Award A Reasonable Percentage Of The Common Fund

Most courts find that the percentage-of-the-fund method, under which counsel is awarded a percentage of the fund that they created, is the preferred means to determine a fee because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also Hayes v. Harmony Gold Min. Co. Ltd.,* 509 Fed. Appx. 21, 24 (2d Cir. 2013) (unpubl.) ("[A]s the district court recognized, the prospect of a percentage fee award from a common settlement fund, as here, aligns the interests of class

---

[4] *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008*); see In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (same); *see also In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (an award of appropriate attorneys' fees should "provid[e] lawyers with sufficient incentive to bring common fund cases that serve the public interest" and "attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so") (citations omitted).

[5] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

counsel with those of the class.").[6] The percentage approach also recognizes that the quality of counsel's services is measured best by the results achieved and is most consistent with the system typically used in the marketplace to compensate attorneys in non-class contingency cases.[7] The Supreme Court has indicated that attorneys' fees in common-fund cases generally should be based on a percentage of the fund. *See Blum v. Stenson,* 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class").

The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-50 (holding that either the percentage-of-the-fund method or lodestar method may be used to determine appropriate attorneys' fees); *see also In re Bank of Am. Corp. Sec., Derivative, and ERISA Litig*. ("*BofA*"), No. 13-1573, --- F.3d ---, 2014 WL 5687301 (2d Cir. Nov. 5, 2014) (affirming award, over objections, of attorneys' fees equaling over 6% of $2.425 billion settlement fund); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise

---

[6] Courts have also historically used the lodestar method for awarding plaintiffs' counsel attorneys' fees, where counsel are awarded the product of their number of hours, multiplied by their reasonable rate, and enhanced by a "multiplier." Specifically, under the lodestar method, a court first multiplies the number of hours each attorney or paraprofessional spent on the case by each attorney's and paraprofessional's reasonable hourly rate; and second, the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained and the quality of the attorney's work. A lodestar cross-check on the requested percentage-of-the-fund fee request is addressed below in Section II.E.

[7] *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) ("The percentage method better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, rather than on the number of motions they file, documents they review, or hours they work. The percentage method also accords with the overwhelming prevalence of contingency fees in the market for plaintiffs' counsel . . . .") (citation omitted); *Davis v. J.P. Morgan Chase & Co.,* 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011) (the "advantages of the percentage method . . . are that it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made, and that it is consistent with the system typically used by individual clients to compensate their attorneys").

when the lodestar method is used in common fund cases."). The Second Circuit also has acknowledged that the "trend in this Circuit is toward the percentage method." *Wal-Mart*, 396 F.3d at 121; *see also Davis*, 827 F. Supp. 2d at 183-85; *Payment Card Interchange Fee,* 991 F. Supp. 2d at 440 ("The trend in this Circuit, and the method I adopt here, is a percentage of the fund."); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG) (RER), 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010). All federal Courts of Appeal to consider the matter have approved of the percentage method, with two circuits ***requiring*** its use in common-fund cases.[8]

The PSLRA also supports use of the percentage-of-the-fund method, as it provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a *reasonable percentage* of the amount" recovered for the class. 15 U.S.C. § 77z-1(a)(6) (emphasis added). Several courts have concluded that Congress, in using this language, expressed a preference for the percentage method when determining attorneys' fees in securities class actions. *See, e.g., Telik*, 576 F. Supp. 2d at 586; *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002).

C. The Requested Attorneys' Fees Are Reasonable Under The Percentage-of-the-Fund Method

The Supreme Court has recognized that an appropriate court-awarded fee is intended to

[8] *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305-07 (1st Cir. 1995); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642-43 (5th Cir. 2012); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). The Eleventh and District of Columbia Circuits have required the use of the percentage method in common fund cases. *See Camden*, 946 F.2d at 774; *Swedish Hosp.*, 1 F.3d at 1271.

approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 33% of the recovery. *See Blum*, 465 U.S. at 904 ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

At 17%, the requested fee is consistent with or less than the percentage fee awards granted in other RMBS class actions, including several recently within the Second Circuit:

Case/Fee Order	**Percentage of the Fund**	**Settlement Amount**
N.J. Carpenters Vacation Fund v. The Royal Bank of Scot. Grp., PLC, No. 08-CV-5093 (LAP) ("*RBS*"), ECF No. 286 (S.D.N.Y. Nov. 5, 2014)	17%	$275 million
Plumbers' & Pipefitters' Local #562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp., No. 08-cv-1713 (PKC) ("*J.P. Morgan*"), ECF No. 229 (E.D.N.Y. July 24, 2014)	17%	$280 million
Mass. Bricklayers & Masons Trust Funds v. Deutsche Alt-A Sec., Inc., No. 08-cv-3178-LDW-ARL, ECF No. 147 (E.D.N.Y. July 11, 2012)	26.5%	$32.5 million
MissPERS v. Goldman Sachs Grp., Inc., No. 09-cv-1110-HB ("*Goldman Sachs*"), ECF No. 150 (S.D.N.Y. Nov. 8, 2012)	17%	$26,612,500
MissPERS v. Merrill Lynch & Co. Inc., No. 08-cv-10841-JSR-JLC ("*Merrill Lynch*"), ECF No. 186 (S.D.N.Y. May 8, 2012)	17%	$315 million
In re Wells Fargo Mortgage-Backed Certificates Litig., No. 09-CV-1376-LHK (PSG) ("*Wells Fargo*"), ECF No. 475 (N.D. Cal. Nov. 14, 2011)	19.75%	$125 million

Moreover, the Honorable John Gleeson recently reviewed the fee awards in class actions. *Payment Card Interchange Fee*, 991 F. Supp. 2d at 443. Based on Judge Gleeson's graduated fee schedule, settlements of this magnitude ($95 million) would receive fees of

approximately 28%.[9] Indeed, the requested 17% is well within the range of percentage fees awarded within the Second Circuit in other comparable non-RMBS cases, many with larger awards:

Case/Fee Order	Percentage of the Fund	Settlement Amount
In re Comverse Tech., Inc. Sec. Litig., No. 06-CV-1825 (NGG) (RER), 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010)	25%	$225 million
In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009)	33-1/3 %	$586 million
In re Adelphia Commc'ns Corp. Sec. & Derivative Litig., No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006), *aff'd*, 272 Fed. Appx. 9 (2d Cir. 2008)	21.4%	$455 million
Ohio Pub. Emps. Ret. Sys. v. Freddie Mac, No. 03-CV-4261 (JES), 2006 U.S. Dist. LEXIS 98380, at *4 (S.D.N.Y. Oct. 26, 2006)	20%	$410 million
In re Deutsche Telekom AG Sec. Litig., No. 00-CV-9475 (NRB), 2005 U.S. Dist. LEXIS 45798, at **12-13 (S.D.N.Y. June 9, 2005)	28%	$120 million
In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 464-68 (S.D.N.Y. 2004)	18.7%	$205 million[10]
In re Oxford Health Plans, Inc. Sec. Litig., MDL No. 1222 (CLB), 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003)	28%	$300 million
In re Buspirone Antitrust Litig., MDL No. 1413 (JGK), 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003)	33-1/3%	$220 million
Kurzweil v. Philip Morris Cos., No. 94 Civ. 2373 (MBM), 1999 WL 1076105, at *1 (S.D.N.Y. Nov. 30, 1999)	30%	$123.8 million

---

[9] Judge Gleeson's research revealed that courts generally awarded 33% of the first $10 million, and decreased the marginal percentage of recovery to 25% of the settlement value between $50 million and $100 million. *Id.* at **6-7. Applied here, the award would be 33% of the first $10 million; 30% of the next $40 million; and 25% of the remaining $45 million, resulting in an award of $26.55 million, or approximately 28% of the $95 million settlement amount.

[10] Subsequent settlements in the *Global Crossing* securities litigation brought the total settlement amount to an aggregate $408 million from which total fees of 17.8% were awarded. *See In re Global Crossing Sec. Litig.*, No. 02 Civ. 910 (GEL), 2005 WL 1668532, at *5 (S.D.N.Y. July 12, 2005); ECF No. 655 (Nov. 4, 2005); ECF No. 722 (Oct. 30, 2006); and ECF No. 773 (Oct. 1, 2007).

See also In re SMART Techs., Inc. S'holder Litig., No. 11-CV-7673 (KBF) (S.D.N.Y. Sept. 17, 2013), ECF No. 195 (Order granting request for attorneys' fees equaling 21.25% of the $15.25 million settlement fund); *In re Direxion Shares ETF Trust*, No. 09-CV-08011 (KBF) (S.D.N.Y. May 10, 2013), ECF No. 201 (Order granting request for attorneys' fees equaling 30% of the $8 million settlement fund).[11]

D. A Review Of The *Goldberger* Factors Confirms That The Requested 17% Fee Is Fair And Reasonable

The Second Circuit recently reiterated that the appropriate criteria to consider when reviewing a request for attorneys' fees in a common-fund case include the "*Goldberger*" factors:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (internal quotes and citation omitted), *cited in BofA,* 2014 WL 5687301, at *5 (affirming attorneys' fee award, over objection, that was "based upon an

---

[11] A review of fee awards in other securities cases and other complex class actions from other jurisdictions, with larger settlement amounts, further confirms the reasonableness of the requested 17% award. *See, e.g.*, *Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 332-33 (3d Cir. 2011) (*en banc*) (affirming award of 25% of a $295 million settlement fund in an antitrust case); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1359-60 (S.D. Fla. 2011) (awarding 30% of $410 million settlement fund, net of expenses); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 770-71 (S.D. Ohio 2007) (awarding 18% of $600 million settlement fund, net of expenses); *In re Williams Sec. Litig.*, No. 02-CV-72-SPF (FHM), ECF No. 1638 (N.D. Okla. Feb. 12, 2007) (awarding 25% of $311 million settlement fund, net of expenses); *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) (awarding 17% of $517 million settlement fund); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590-91 (E.D. Pa. 2005) and 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001) (awarding 25% of $319.6 million in combined settlement funds); *In re DaimlerChrysler AG Sec. Litig.*, No. 00-0993 (KAJ), ECF No. 973 (D. Del. Feb. 5, 2004) (awarding 22.5% of $300 million settlement fund, net of expenses); *In re BankAmerica Corp. Sec. Litig.*, 228 F. Supp. 2d 1061, 1070 (E.D. Mo. 2002) (awarding 18% of $490 million settlement fund, net of expenses)*; In re Vitamins Antitrust Litig.*, No. 99-197 (THF), 2001 WL 34312839, at **9-10 (D.D.C. July 16, 2001) (awarding 33.7% of $365 million common fund); *In re 3Com Corp. Sec. Litig.*, No. C-97-21083 (JW), ECF No. 167 (N.D. Cal. Mar. 9, 2001) (awarding 18% of $259 million settlement fund); *see also, e.g., In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 266 (E.D. Va. 2009) (awarding 18% of $202.75 million settlement fund); *In re Schering-Plough Corp. Sec. Litig.*, No. 01-CV-0829 (KSH/MF), 2009 WL 5218066, at **5-6 (D.N.J. Dec. 31, 2009) (awarding 23% of $165 million settlement fund); *In re CMS Energy Sec. Litig.*, No. 02 CV 72004 (GCS), 2007 U.S. Dist. LEXIS 96786, at **14-15 (E.D. Mich. Sept. 6, 2007) (awarding 22.5% of $200 million settlement fund); *In re Bristol-Myers Squibb Sec. Litig.*, No. 00-1990 (SRC), ECF No. 367 (D.N.J. May 11, 2006) (awarding 19.77% of $185 million settlement fund), *aff'd* 2007 WL 2153284 (3d Cir. July 27, 2007) (unpubl.); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *5, *19 (E.D. Pa. June 2, 2004) (awarding 30% of $202.5 million settlement fund); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 130-35 (D.N.J. 2002) (awarding 28% of $194 million settlement fund); *In re Waste Mgmt., Inc. Sec. Litig.*, No. 97 C 7709, 1999 WL 967012, at *3 (N.D. Ill. Oct. 18, 1999) (awarding 20% of $220 million settlement fund).

application of the criteria set out in *Goldberger*”).

Consideration of these factors demonstrates that the fee requested by Lead Counsel is reasonable.

1. The Time And Labor Expended By <u>Plaintiffs' Counsel Support The Requested Fee</u>

Over the past six years, Lead Counsel dedicated an enormous amount of labor, time, and money to resolve this case successfully. Lead Counsel's efforts included an extensive and thorough investigation necessary to prepare six class action complaints. The investigations included, among other things, locating and interviewing witnesses; carefully analyzing the offering documents; and reviewing such additional sources as court filings, investigations, media reports, performance and downgrade data, Congressional testimony, SEC filings, press releases, and public statements made by Morgan Stanley, the rating agencies and the originators. Lead Counsel also opposed three rounds of motions to dismiss, which required extensive briefing and numerous supplemental submissions, and subsequent motions for reconsideration, on myriad complex and novel legal issues. Lead Counsel Decl. ¶¶15-37.

Lead Counsel also devoted considerable resources to developing a compelling record to prove Plaintiffs' claims. In addition to obtaining key documents over Defendants' objections, discovery required service of approximately 100 third-party subpoenas from 58 financial institutions that possessed information about the number and identity of investors in the Certificates, 2 companies that provided due-diligence services for Defendants, 28 companies that originated the loans underlying the 2006 Offerings, 4 companies that serviced the loans securitized in the 2006 Offerings, 3 rating agencies that rated the 2006 Offerings, and a consultant that Defendants hired to evaluate their securitization operation. Lead Counsel Decl. ¶¶40-49.

Lead Plaintiffs also successfully litigated numerous discovery-related disputes before Judge Netburn, including those related to: (i) the production of transcripts and documents from prior litigations and government investigations; (ii) the number of custodians to which Defendants would apply electronic search terms and the relevant search period; (iii) the number of originators to be included in the Defendants' electronic search protocol; and (iv) the production of class member identities pursuant to a subpoena served by Plaintiffs on third-party Bank of New York Mellon. After considering the parties' extensive briefing and argument on these issues, Judge Netburn issued orders: (i) compelling Defendants to produce certain transcripts and financial incentive information; (ii) ordering that Defendants apply the agreed-upon search terms to 34 custodians in various departments, including Mortgage Finance, Collateral Analysis, Residential Mortgage Loan Trading, Credit and Compliance Due Diligence, Structuring, Capital Markets and Principal Finance, ECF No. 248; (iii) granting Plaintiffs' proposal regarding discovery related to originators; and (iv) ordering Bank of New York Mellon to provide to Plaintiffs, in a sworn statement, the number of unique Bank of New York Mellon customers that purchased in each relevant Offering. ECF No. 249. Lead Counsel Decl. ¶¶53-57.

In total, Lead Counsel obtained over 15 million pages of documents from Defendants and third parties. Lead Counsel developed a sophisticated system to categorize the documents by issue, custodian, and relevance; identify and prepare witness files for prospective deponents (five of whom Lead Counsel eventually deposed); and identify the "hot" documents that supported Plaintiffs' claims. Lead Counsel also obtained the original loan files for the loans backing the Certificates and retained a team of experts to re-underwrite a sample of the loans. Lead Counsel Decl. ¶¶46-47.

Lead Counsel also worked with Plaintiffs in responding to discovery propounded by

Defendants, coordinating the collection and production of documents in response, and prepared for the eight depositions taken of Plaintiffs and their asset managers. Lead Counsel Decl. ¶¶50-52.

In addition, Lead Counsel fully briefed the motion for class certification. Lead Counsel Decl. ¶¶61-66. In support, Plaintiffs submitted extensive briefing, deposition testimony, documentary evidence and the expert declaration of Joseph R. Mason, Ph.D.[12] Dr. Mason's declaration, which described the RMBS industry generally and the interconnectedness of each Offering, supported Plaintiffs' contentions that predominance, numerosity and commonality were established, as well as rebutted Defendants' anticipated "negative-causation" and due-diligence defenses.

In sum, Lead Counsel devoted substantial time and resources to prosecute this action in an environment where the law governing key aspects of the case continued to evolve. As reflected in the lengthy and complicated procedural history (*see* Joint Decl. ¶¶12-68), issues surrounding standing and the statute of repose were unsettled at the outset of the case. Such issues were the subject of repeated motion practice throughout the litigation. Even after the Second Circuit decided *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* ("*NECA*" or *"Goldman Sachs*"), 693 F.3d 145 (2d Cir. 2012), and *Police & Fire Retirement System v. IndyMac MBS, Inc.,* 721 F. 3d 95 (2d Cir. 2013), the parties continued to dispute the application of the new precedent to the facts of this case. *Id.* ¶¶36-37, 67.

In total, as set forth in the respective declarations, Plaintiffs' Counsel expended 29,123.30 hours prosecuting this Action. Exs. 4A, 4B, 4C. The significant amount of time and effort

---

[12] Dr. Mason is the Hermann Moyse Jr./Louisiana Bankers Association Chair of Banking at the Ourso School of Business, Louisiana State University, a Senior Fellow at the Wharton School, and a Senior Consultant at Precision Economics, LLC.

devoted to this case by Plaintiffs' Counsel confirms that the fee requested here is reasonable.

2. The Magnitude And Complexity Of The Action Support The Requested Fee

Courts have long recognized that securities class actions are "notably difficult and notoriously uncertain." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999)). This case was no exception. It raised many novel and complex issues surrounding structured securities and the nationwide economic downturn.

As discussed in the Lead Counsel Declaration, the case involved 13 Offerings from Morgan Stanley in 2006 and 16 offerings in 2007. The process for originating the loans, securitizing them, structuring the offerings, creating offering documents and selling the loans is necessarily complex. Moreover, complicated issues of valuation and causation pervade. Lead Counsel undertook to create a compelling record addressing these and other complicated issues.

The litigation also raised a number of complex questions that required substantial efforts by Lead Counsel, often through analysis of the factual record and consultation with experts. Lead Counsel's consultation with experts was necessarily extensive given the complex nature of the subject matter underlying the Settlement Class' claims and the structured nature of the securities. Lead Counsel consulted with experts to prepare the mediation brief, analyze estimated damages, review Defendants' affirmative defenses, and prepare for trial. Experts were consulted in the complex and specialized areas of the RMBS industry, class certification issues, and damages. Lead Counsel ¶¶59-60.

Many of the arguments raised in Defendants' motions to dismiss, the substantial supplemental briefing, and motions for reconsideration raised complex and rapidly evolving legal issues, including issues of standing, cognizable damages, the statute-of-limitations defense,

and others. If the Action had not been settled, there would have been further fact discovery; expert discovery that would have been critical to the case; contested motions for summary judgment; and a trial that would certainly require substantial percipient and expert testimony. Accordingly, the magnitude and complexity of this Action support the conclusion that the requested fee is fair and reasonable.

3. The Risks Of The Litigation Support The Requested Fee

The risk of the litigation is often considered the most important *Goldberger* factor. *See Goldberger*, 209 F.3d at 54; *Comverse*, 2010 WL 2653354, at *5; *Telik*, 576 F. Supp. 2d at 592. The Second Circuit has recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974) (citation omitted), *abrogated on other grounds by Goldberger*, 209 F.3d 43. When considering the reasonableness of attorneys' fees in a contingency action, the Court should consider the risks of the litigation at the time the suit was brought. *See Goldberger*, 209 F.3d at 55; *Parker v. Time Warner Entm't Co.,* 631 F. Supp. 2d 242, 276 (E.D.N.Y. 2009) (the court should consider "the contingent nature of the expected compensation" and the "risk of non-payment viewed as of the time of the filing of the suit"). The Court should bear in mind that "[l]ittle about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Comverse*, 2010 WL 2653354, at *5.

While Lead Counsel believe that the claims of Plaintiffs and the Settlement Class have merit, they recognized that this case presented substantial risks and uncertainties from the outset,

which made it far from certain that any recovery, let alone a substantial recovery of $95 million in cash, would ultimately be obtained for the Settlement Class. As discussed in the Lead Counsel Declaration and in the memorandum of law in support of the Settlement, there were substantial risks here with respect to the ability to sustain the Action and prove that Defendants had made material misstatements or omissions and to establish that the alleged misstatements, rather than other factors (such as the overall economic downturn, housing price declines or reduced liquidity in the market for mortgage-backed securities), were the cause of the Settlement Class' losses. Lead Counsel Decl. ¶76. If Defendants were to prevail, the Settlement Class – and therefore counsel – would receive nothing.

These risks were enhanced in this Action because many of the legal and factual issues were issues of first impression when the case began, or for which there was no controlling authority, in the context of RMBS litigation. *Id*. ¶77. As demonstrated by the briefing and orders in this case, the jurisprudence on standing of representative plaintiffs was evolving during this litigation. Accordingly, the risks faced by Lead Counsel from the outset of the Action were very real. In the face of these uncertainties, Lead Counsel undertook this case on a wholly contingent basis, knowing that the litigation could last for years and would require them to devote substantial attorney time and a significant expenditure of Litigation Expenses with no guarantee of compensation. Lead Counsel Decl. ¶10. "There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise." *Veeco*, 2007 WL 4115808, at *6. Plaintiffs' Counsel's assumption of this contingency-fee risk strongly supports the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *27 ("the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award"); *In re Marsh ERISA*

Litig., 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

4. The Quality Of Lead Counsel's Representation Supports The Requested Fee

The quality of the representation is another important factor that supports the reasonableness of the requested fee. The quality of the representation here is best evidenced by the quality of the result achieved. *See Goldberger*, 209 F.3d at 55; *Veeco*, 2007 WL 4115808, at *7; *Global Crossing*, 225 F.R.D. at 467. Lead Counsel developed a strong record over the course of almost six years of litigation. The quality of Lead Counsel's efforts in the litigation to date, together with their substantial experience in securities class actions and their commitment to the litigation, provided Lead Counsel with the leverage necessary to negotiate the significant $95 million Settlement.

The skill and substantial experience of counsel in the specialized field of shareholder securities litigation also support the reasonableness of the requested fee. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,* No. 01-CV-11814 (MP), 2004 WL 1087261, at *6 (S.D.N.Y. May 14, 2004) (the skill and prior experience of counsel in the field is relevant to determining fair compensation). Lead Counsel specialize in complex securities litigation, including litigation involving mortgage-backed securities, and are highly experienced in such litigation, with a successful track record in securities cases throughout the country. *See* Lead Counsel Decl. ¶109 and Lead Counsel's firm biographies attached thereto as Exs. 4A-H and 4B-H.

Finally, courts repeatedly recognize that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of counsel's performance. *See, e.g., Marsh*, 265 F.R.D. at 148 ("The high quality of defense counsel

opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement"); *Veeco*, 2007 WL 4115808, at *7 (among the factors supporting a 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"); *Adelphia*, 2006 WL 3378705, at *3 ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work"). Here, Defendants were represented by Davis Polk & Wardwell LLP, a highly respected law firm whose individual attorneys presented a very skilled defense, and spared no effort in representing their clients. *See* Lead Counsel Decl. ¶110. Notwithstanding this formidable opposition, Lead Counsel's ability to present a strong case and to demonstrate their willingness to continue to vigorously prosecute the Action enabled Lead Counsel to achieve a favorable Settlement for the benefit of the Settlement Class.

5. Second Circuit Precedent Supports The 17% Fee As A Reasonable Percentage Of The Total Recovery

Courts have interpreted the next factor – the requested fee in relation to the settlement – as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3. As discussed above, the requested 17% fee is well within the range of percentage fees that courts in the Second Circuit and around the country have awarded in comparable cases, and in other RMBS class actions in particular. Accordingly, the 17% fee requested is reasonable in relation to the size of the Settlement.

6. <u>Public Policy Considerations Support The Requested Fee</u>

Public policy strongly favors rewarding firms for bringing successful securities actions like this one. *See FLAG Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *Hicks*, 2005 WL 2757792, at *9 ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."). Accordingly, public policy favors granting Lead Counsel's fee and expense application here.

7. <u>Lead Plaintiffs' Approval And The Settlement Class' Reaction Support The Requested Fee</u>

Lead Plaintiffs were actively involved in the prosecution and settlement of this Action, and have approved the requested fee. *See* Neville Decl., attached as Ex. 1 to Lead Counsel Decl. ¶¶5, 7-10. Lead Plaintiffs are precisely the type of sophisticated and financially interested investors that Congress envisioned serving as fiduciaries for the class when it enacted the PSLRA. The PSLRA was intended to encourage institutional investors to assume control of securities class actions in order to "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at *32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Congress believed that these institutions would be in the best position to monitor the prosecution and to assess the reasonableness of counsel's fee requests. In this Action, representatives of Lead Plaintiffs played an active role in the litigation and closely supervised the work of Lead

Counsel. *See* Neville Decl. ¶¶5, 7. Accordingly, Lead Plaintiffs' endorsement of the fee request supports its approval as fair and reasonable. *See, e.g., Veeco*, 2007 WL 4115808, at *8 ("public policy considerations support the award in this case because the Lead Plaintiff . . . – a large public pension fund – conscientiously supervised the work of lead counsel and has approved the fee request"); *Lucent*, 327 F. Supp. 2d at 442 ("[s]ignificantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request") (approving fee of 17% of $517 million recovery).

The reaction of the Settlement Class also supports the requested fee. As of November 10, 2014, the Claims Administrator has sent the Notice to over 6,700 potential Settlement Class Members and their nominees (Washington Decl. ¶9), informing them that, among other things, Lead Counsel intended to apply to the Court for an award of attorneys' fees in the amount of 17% of the Settlement Fund. Washington Decl. Ex. A, ¶¶5, 43. While the time to object to the fee-and-expense application does not expire until November 26, 2014, to date, not a single objection has been received. Lead Counsel Decl. ¶122. Should any objections be received, Lead Counsel will address them in their reply papers.

E. A Lodestar Cross-Check Confirms The Reasonableness Of The Fee Request

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, the Second Circuit encourages district courts to cross-check the proposed award against counsel's lodestar. *See Goldberger*, 209 F.3d at 50; *Payment Card Interchange Fee*, 991 F. Supp. 2d at 447-48. In cases like this, fees representing multiples of the lodestar are regularly awarded to reflect the contingency-fee risk and other relevant factors. *See, e.g.*, *FLAG Telecom*, 2010 WL 4537550, at *26 ("Under the lodestar method, a positive multiplier is typically applied

to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors."); *Comverse*, 2010 WL 2653354, at *5 ("Where … counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar."); *Cardinal Health*, 528 F. Supp. 2d at 761 ("the Court rewards [] lead counsel that takes on more risk, demonstrates superior quality, or achieves a greater settlement with a larger lodestar multiplier").

Accordingly, in complex contingent litigation, lodestar multipliers between 2 and 5 are commonly awarded. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *Payment Card Interchange Fee*, 991 F. Supp. 2d at 447-48 (awarding fee representing a multiplier of 3.41, which was "comparable to multipliers in other large, complex cases"); *Davis*, 827 F. Supp. 2d at 185 (awarding fee representing a multiplier of 5.3, which was "not atypical" in similar cases); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), ECF No. 117 (S.D.N.Y. July 18, 2011) (awarding fee representing a multiplier of 4.7); *Comverse*, 2010 WL 2653354, at *5 (awarding fee representing a 2.78 multiplier); *Telik*, 576 F. Supp. 2d at 590 ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court."); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding 30% fee representing a 2.99 multiplier and finding that the multiplier "falls well within the parameters set in this district and elsewhere"); *Deutsche Telekom*, 2005 U.S. Dist. LEXIS 45798, at **13-14 (awarding fee representing a 3.96 multiplier); *AremisSoft*, 210 F.R.D. at 135 (a 4.3 multiplier was appropriate in light of the contingency risk and the quality of the result achieved); *Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country").

Here, a lodestar cross-check fully supports the requested percentage fee. In this entirely contingent action that raised myriad complex and novel issues, Lead Counsel and additional Plaintiffs' Counsel Pond Gadow & Tyler collectively devoted over 29,123.30 hours of attorney and other professional support time in the prosecution and investigation of the Action.[13] Plaintiffs' Counsel's total lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is $13,150,005.75.[14] The requested fee of 17% of the Settlement Amount will equal $16.15 million (plus interest), which represents a multiplier of less than 1.23 on Plaintiffs' Counsel's lodestar amount. Thus, the 17% fee requested is well within the range awarded in cases of this type. The Second Circuit very recently affirmed a $152.4 million attorneys' fee award resulting in a 1.73 multiplier.[15]

In sum, Lead Counsel's requested 17% fee award is well within the range of what courts in this Circuit and throughout the country commonly award in complex class actions such as this

---

[13] As noted above, "Plaintiffs' Counsel" consist of the Court-appointed Co-Lead Counsel for the Settlement Class, and additional counsel for MissPERS, Pond Gadow. *See* Exs. 4A to 4C thereto.

[14] Lead Counsel Decl. ¶106. As set forth in Lead Counsel's respective declarations, attached hereto as Exhibits 4A and 4B, the hourly rates are the same as the rates submitted for lodestar cross-checks in other securities class action litigation for fee applications that have been granted within this Circuit. *See, e.g., J.P. Morgan*, *supra* (E.D.N.Y.) (ECF No. 222-5); *SMART, supra* (KBF) (S.D.N.Y.) (ECF No. 182-4); *In re The Reserve Primary Fund Sec. & Derivative Class Action Litig.,* 08-cv-8060-PGG (S.D.N.Y. Nov. 11, 2013) (ECF No. 101-4, utilizing comparable 2013 rates); *Goldman Sachs, supra* (S.D.N.Y.) (ECF No. 147-2) (utilizing comparable 2012 rates); *Merrill Lynch, supra* (S.D.N.Y.) (ECF No. 181-6) (same). Both the Supreme Court and courts in this Circuit have long approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment that is inherent in class actions, inflationary losses, and the loss of access to legal and monetary capital that could otherwise have been employed had class counsel been paid on a current basis during the pendency of the litigation. *See In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989); *Veeco*, 2007 WL 4115808, at *9; *Missouri,* 491 U.S. at 284.

[15] *See BofA,* 2014 WL 5687301, at *5; *see also RBS, supra* (awarding fees representing 2.27 multiplier); *Merrill Lynch, supra* (awarding fees representing 2.3 multiplier); *J.P. Morgan, supra* (awarding fees representing 1.83 multiplier); *Wells Fargo, supra* (awarding fees representing 2.82 multiplier). Moreover, it should be emphasized that the lodestar "crosscheck" is exactly that – a rough crosscheck that is not intended to supplant the primacy of the percentage-based method. If higher multipliers are not allowed in cases involving large dollar recoveries, then the lodestar approach "begins to dominate and supersede the percentage of the recovery formula," *Rite Aid*, 146 F. Supp. 2d at 736 n.44, eroding the many advantages of the percentage-of-the-fund method.

one, including in other RMBS class actions, when calculated as a percentage of the fund, and pursuant to a lodestar cross-check.

F. Plaintiffs' Counsel's Expenses Are Reasonable And Should Be Approved For Recovery

Lead Counsel's fee application includes a request for Litigation Expenses that were reasonably incurred in furtherance of the claims on behalf of the Settlement Class. These expenses are properly recovered by counsel. *See, e.g.*, *In re China Sunergy Sec. Litig.,* No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation'"); *FLAG Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class.").

As set forth in detail in the Lead Counsel Declarations (Exs. 4A and 4B), and summarized at Exs. 4 and 4D, Lead Counsel request $1,110,072.81 in expenses for prosecuting this Action for the benefit of the Settlement Class. The expenses are the types that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include expert fees, document-management/litigation support, computerized research, mediation costs, travel expenses, photocopying, long distance telephone and facsimile charges, postage and delivery expenses, and filing fees. *See* Ex. 4D, Schedule of Expenses by Category.

The Notice informed potential Settlement Class Members that Lead Counsel would apply for Litigation Expenses in an amount not to exceed $2 million, including expenses of Lead Plaintiffs directly related to their representation of the Settlement Class. Washington Decl. Ex. A ¶¶5, 43. The expenses requested, approximately $1.1 million, are well below that amount. To

date, no one has objected to the request for expenses. Lead Counsel Decl. ¶122.

G. Lead Plaintiff MissPERS Should Be Awarded Its Reasonable Costs And Expenses Under 15 U.S.C. § 77z-1(a)(4)

As part of the request for Litigation Expenses, Lead Counsel also seek approval for $19,925.00 in costs and expenses incurred by Lead Plaintiff MissPERS directly relating to its representation of the Settlement Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 77z-1(a)(4). Numerous courts have approved such awards under the PSLRA to compensate class representatives for the time and effort they spent on behalf of the class. *See BofA,* 2014 WL 5687301, at *4 (affirming district court's award of costs totaling over $453,000 to representative plaintiffs); *see also Hicks*, 2005 WL 2757792, at *10 ("Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place."); *SMART, supra* (awarding lead plaintiff costs totaling $15,000); *In re Direxion Shares ETF Trust*, No. 09-cv-8011 KBF, at 7 (S.D.N.Y. May 10, 2013) (awarding lead plaintiffs costs totaling $27,600); *In re Monster Worldwide, Inc. Sec. Litig.*, No. 07-cv-02237-JSR, 2008 WL 9019514, at *2 (S.D.N.Y. Nov. 24, 2008) (awarding class representative costs totaling $7,303.08); *see also J.P. Morgan, supra* (awarding lead plaintiff costs totaling $19,572.50); *Goldman Sachs*, *supra* (awarding lead plaintiff costs totaling $25,230); *Wells Fargo, supra* (awarding lead plaintiffs costs totaling $17,700).

As set forth in the Neville Declaration (Exhibit 1 to the Lead Counsel Declaration), Lead Plaintiff MissPERS took an active role in the prosecution of the Action, including

communicating extensively with Lead Counsel regarding issues and developments in the Action, reviewing significant pleadings and briefs, supervising the production of discovery, providing deposition testimony, attending mediation, and consulting with Lead Counsel concerning the settlement negotiations as they progressed. Neville Decl. ¶¶5-6. Pursuant to the PSLRA, MissPERS requests $19,250.00 based on the value of the 111 hours that MissPERS and the Mississippi Office of the Attorney General employees expended participating in and managing this litigation on behalf of the Settlement Class. These are precisely the types of activities that courts have found to support awards to class representatives. *See, e.g., In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04 Civ. 8141 (DAB), 2010 WL 5060697, at *3 (S.D.N.Y. Dec. 2, 2010) (granting PSLRA award of $30,000 to institutional lead plaintiffs "to compensate them for the time and effort they devoted on behalf of a class"); *FLAG Telecom*, 2010 WL 4537550, at *31 (approving award of $100,000 to Lead Plaintiff for time spent on the litigation); *Veeco*, 2007 WL 4115808, at *12 (characterizing such awards as "routine" in this Circuit); *see also In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding $100,000 collectively to lead plaintiffs who "fully discharged their PSLRA obligations and have been actively involved throughout the litigation [including] . . . communicat[ing] with counsel . . . [and] review[ing] counsels' submissions").

The Notice sufficiently informed potential Settlement Class Members that such expenses would be sought. *See BofA*, 2014 WL 5687301, at *4 (affirming district court's finding of sufficiency of notice, finding that comparable notice "unequivocally conveys the relevant information to the respective class members"). The request by Lead Plaintiff MissPERS is supported by a declaration including a detailed accounting of the hours dedicated to the litigation and an explanation that the hours constituted lost work time. The Second Circuit very recently

confirmed that such time is compensable. *BofA*, 2014 WL 5687301, at *4 (affirming district court's award of over $453,000 in costs to representative plaintiffs). Lead Plaintiff MissPERS' request is reasonable and fully justified under the PSLRA and should be granted.

III. CONCLUSION

For all of these reasons, Lead Counsel respectfully request that the Court award them attorneys' fees of 17% of the Settlement Amount, $1,110,072.81 in Plaintiffs' Counsel's expenses, and $19,925.00 in Lead Plaintiff MissPERS' costs and expenses, plus interest earned at the same rate and for the same time period as the Settlement Amount.

Dated: November 13, 2014
San Diego, California

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By: /s/ David R. Stickney

David R. Stickney
Niki L. Mendoza
Richard D. Gluck
Matthew P. Jubenville
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323
davids@blbglaw.com
nikim@blglaw.com
richard.gluck@blbglaw.com
matthewj@blbglaw.com
- and -
Max W. Berger
David L. Wales
Jeroen Van Kwawegen
Katherine Stefanou
1285 Avenue of the Americas, 38th Floor
New York, NY 10019
Tel: (212) 554-1400
Fax: (212) 554-1444
MWB@blbglaw.com
davidw@blbglaw.com

jeroen@blbglaw.com
katherine.stefanou@blbglaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP

By: /s/ Daniel S. Drosman

Arthur C. Leahy
Daniel S. Drosman
Darryl J. Alvarado
Angel P. Lau
655 W. Broadway, Suite 1900
San Diego, CA 92101-3301
Tel: (619) 231-1058
Fax: (619) 231-7423
art@rgrdlaw.com
dand@rgrdlaw.com
dalvarado@rgrdlaw.com
alau@rgrdlaw.com

Co-Lead Counsel for Plaintiffs and the Settlement Class