UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| In re LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION<br><br>This Document Applies To:<br><br>*In re Lehman Brothers Equity/Debt Securities Litigation*, 08-CV-5523 (LAK) | Case No. 09-MD-2017 (LAK)<br><br>ECF CASE |

**MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS WITH D&O DEFENDANTS AND SETTLING UNDERWRITER DEFENDANTS AND APPROVAL OF PLANS OF ALLOCATION**

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**STATUTES, RULES & REGULATIONS**

Federal Rules of Civil Procedure

## TABLE OF ABBREVIATIONS

| ABBREVIATION | DEFINED TERM |
|---|---|
| "ACERA" | Alameda County Employees' Retirement Association |
| "Action" | *In re Lehman Brothers Equity/Debt Securities Litigation*, 08 Civ. 5523 (LAK) |
| "Bankruptcy Court" | The United States Bankruptcy Court for the Southern District of New York |
| "Bernstein Litowitz" | Bernstein Litowitz Berger & Grossmann LLP |
| "Claim Form" or "Proof of Claim Form" | Form that claimants must complete and submit in order to be potentially eligible to share in the distribution of the proceeds of the Settlements |
| "Complaint" | Third Amended Class Action Complaint |
| "Defendants" | The Settling Defendants and the non-settling defendants, E&Y and UBSFS, collectively |
| "Director Defendants" | Michael L. Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman, and John D. Macomber |
| "D&O Defendants" | Former Lehman officers Richard S. Fuld, Jr., Christopher M. O'Meara, Joseph M. Gregory, Erin Callan, and Ian Lowitt; and former Lehman directors Michael L. Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman, and John D. Macomber |
| "D&O Notice" | Notice of Pendency of Class Action and Proposed Settlement with the Director and Officer Defendants, Settlement Fairness Hearing and Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses |
| "D&O Plan" | Plan of Allocation for the D&O Net Settlement Fund, attached as Appendix C to the D&O Notice |
| "D&O Settlement" | The proposed settlement with the Lehman directors and officers for $90 million on behalf of the D&O Settlement Class |
| "D&O Settlement Amount" | $90 million |
| "D&O Settlement Class" | All persons and entities who (1) purchased or acquired Lehman securities identified in Appendix A to the D&O Stipulation pursuant or traceable to the Shelf Registration Statement and who were damaged thereby, (2) purchased or acquired any Lehman Structured Notes identified in Appendix B to the D&O Stipulation pursuant or traceable to the Shelf Registration Statement and who were damaged thereby, or (3) purchased or acquired Lehman common stock, call options, and/or sold put options |

| ABBREVIATION | DEFINED TERM |
|---|---|
| | between June 12, 2007 and September 15, 2008, through and inclusive, and who were damaged thereby. Excluded from the D&O Settlement Class are (i) Defendants, (ii) Lehman, (iii) the executive officers and directors of each Defendant or Lehman, (iv) any entity in which Defendants or Lehman have or had a controlling interest, (v) members of Defendants' immediate families, and (vi) the legal representatives, heirs, successors or assigns of any such excluded party. Also excluded from the D&O Settlement Class are any persons or entities who exclude themselves by filing a timely request for exclusion in accordance with the requirements set forth in the D&O Notice. |
| "D&O Stipulation" | Stipulation of Settlement and Release dated October 14, 2011, between Lead Plaintiffs and the D&O Defendants |
| "E&Y" | Ernst & Young LLP, a non-settling defendant |
| "Eligible UW Security or Securities" | One or more of the following:<br>1. February 5, 2008 Offering of 7.95% Non-Cumulative Perpetual Preferred Stock, Series J (CUSIP 52520W317)<br>2. July 19, 2007 Offering of 6% Notes Due 2012 (CUSIP 52517P4C2)<br>3. July 19, 2007 Offering of 6.50% Subordinated Notes Due 2017 (CUSIP 524908R36)<br>4. July 19, 2007 Offering of 6.875% Subordinated Notes Due 2037 (CUSIP 524908R44)<br>5. September 26, 2007 Offering of 6.2% Notes Due 2014 (CUSIP 52517P5X5)<br>6. September 26, 2007 Offering of 7% Notes Due 2027 (CUSIP 52517P5Y3)<br>7. December 21, 2007 Offering of 6.75% Subordinated Notes Due 2017 (CUSIP 5249087M6)<br>8. January 22, 2008 Offering of 5.625% Notes Due 2013 (CUSIP 5252M0BZ9)<br>9. February 5, 2008 Offering of Lehman Notes, Series D (CUSIP 52519FFE6)<br>10. April 24, 2008 Offering of 6.875% Notes Due 2018 (CUSIP 5252M0FD4)<br>11. April 29, 2008 Offering of Lehman Notes, Series D (CUSIP 52519FFM8)<br>12. May 9, 2008 Offering of 7.50% Subordinated Notes Due 2038 (CUSIP 5249087N4) |
| "*Equity/Debt* Action" or "*Equity/Debt*" | *In re Lehman Brothers Equity/Debt Securities Litigation*, 08 Civ. 5523 (LAK) |

| ABBREVIATION | DEFINED TERM |
|---|---|
| "ERISA Action" | *In re Lehman Brothers ERISA Litigation*, 08 Civ. 5598 (LAK) |
| "Examiner" | Anton R. Valukas, Esq., the court-appointed examiner in Lehman's Chapter 11 bankruptcy proceedings, *In re Lehman Brothers Holdings Inc.*, 08-13555 (JMP) (Bankr. S.D.N.Y.) |
| "Examiner's Report" | Report of Anton R. Valukas, Examiner, dated March 11, 2010 |
| "Exchange Act" | Securities Exchange Act of 1934 |
| "Executive Committee Chair" | Max W. Berger of Bernstein Litowitz |
| "Fee and Expense Application" | Lead Counsel's application for an award of attorneys' fees and reimbursement of litigation expenses on behalf of all Plaintiffs' Counsel |
| "Fee Memorandum" | The Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses |
| "First Group of Settling Underwriter Defendants" | A.G. Edwards & Sons, Inc. ("A.G. Edwards"); ABN AMRO Inc. ("ABN Amro"); ANZ Securities, Inc. ("ANZ"); Banc of America Securities LLC ("BOA"); BBVA Securities Inc. ("BBVA"); BNP Paribas; BNY Mellon Capital Markets, LLC ("BNY"); Caja de Ahorros y Monte de Piedad de Madrid ("Caja Madrid"); Calyon Securities (USA) Inc. (n/k/a Crédit Agricole Corporate and Investment Bank) ("Calyon"); CIBC World Markets Corp. ("CIBC"); Citigroup Global Markets Inc. ("CGMI"); Commerzbank Capital Markets Corp. ("Commerzbank"); Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited) ("Daiwa"); DnB NOR Markets Inc. (the trade name of which is DnB NOR Markets) ("DnB NOR"); DZ Financial Markets LLC ("DZ Financial"); Edward D. Jones & Co., L.P. ("E.D. Jones"); Fidelity Capital Markets Services (a division of National Financial Services LLC) ("Fidelity Capital Markets"); Fortis Securities LLC ("Fortis"); BMO Capital Markets Corp. (f/k/a Harris Nesbitt Corp.) ("Harris Nesbitt"); HSBC Securities (USA) Inc. ("HSBC"); ING Financial Markets LLC ("ING"); Loop Capital Markets, LLC ("Loop Capital"); Mellon Financial Markets, LLC (n/k/a BNY Mellon Capital Markets, LLC) ("Mellon"); Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"); Mizuho Securities USA Inc. ("Mizuho"); Morgan Stanley & Co. Inc. ("Morgan Stanley"); nabCapital Securities, LLC (n/k/a nabSecurities, LLC) ("nabCapital"); National Australia Bank Ltd. ("NAB"); Natixis Bleichroeder Inc. (n/k/a Natixis Securities Americas LLC) ("Natixis"); |

| ABBREVIATION | DEFINED TERM |
|---|---|
| | Raymond James & Associates, Inc. ("Raymond James"); RBC Capital Markets, LLC (f/k/a RBC Dain Rauscher Inc.) ("RBC Capital"); RBS Greenwich Capital (n/k/a RBS Securities Inc.) ("RBS Greenwich"); Santander Investment Securities Inc. ("Santander"); Scotia Capital (USA) Inc. ("Scotia"); SG Americas Securities LLC ("SG Americas"); Sovereign Securities Corporation, LLC ("Sovereign"); SunTrust Robinson Humphrey, Inc. ("SunTrust"); TD Securities (USA) LLC ("TD Securities"); UBS Securities LLC ("UBS Securities"); Utendahl Capital Partners, L.P. ("Utendahl"); Wachovia Capital Finance ("Wachovia Capital"); Wachovia Securities, LLC n/k/a Wells Fargo Securities, LLC ("Wachovia Securities"); and Wells Fargo Securities, LLC ("Wells Fargo") |
| "First Underwriter Stipulation" or "First UW Stipulation" | Stipulation of Settlement and Release dated December 2, 2011, between Lead Plaintiffs and the First Group of Settling Underwriter Defendants |
| "GCG" | The Garden City Group, Inc., the Court-approved claims administrator for the Settlements |
| "Girard Gibbs" | Girard Gibbs LLP (f/k/a Girard, Gibbs & De Bartolomeo, LLP) |
| "GGRF" | Government of Guam Retirement Fund |
| "Joint Declaration" | Joint Declaration of David Stickney and David Kessler in Support of (A) Lead Plaintiffs' Motion for Final Approval of Class Action Settlements with D&O Defendants and Settling Underwriter Defendants and Approval of Plans of Allocation and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses |
| "Kessler Topaz" | Kessler Topaz Meltzer & Check, LLP |
| "Lead Counsel" | Bernstein Litowitz and Kessler Topaz |
| "Lead Plaintiffs" | ACERA, GGRF, NILGOSC, Lothian, and Operating Engineers |
| "Lehman" or "Company" | Lehman Brothers Holdings Inc. |
| "Lothian" | The City of Edinburgh Council as Administering Authority of the Lothian Pension Fund |
| "MBS Action" | *In re Lehman Brothers Mortgage-Backed Securities Litigation*, 08 Civ. 6762 (LAK) |
| "NILGOSC" | Northern Ireland Local Governmental Officers' Superannuation Committee |
| "Notice Orders" | Pretrial Order Nos. 27 & 28, collectively |
| "Notice Packet" | The D&O Notice, UW Notice, Claim Form and a cover letter, sent to potential members of the Settlement Classes |
| "Notices" | The D&O Notice and UW Notice |

| ABBREVIATION | DEFINED TERM |
|---|---|
| "Officer Defendants" | Richard S. Fuld, Jr., Christopher M. O'Meara, Joseph M. Gregory, Erin Callan, and Ian Lowitt |
| "Operating Engineers" | Operating Engineers Local 3 Trust Fund |
| "Plaintiffs' Counsel" | Lead Counsel; Girard Gibbs; Grant & Eisenhofer P.A.; Kirby McInerney LLP; Labaton Sucharow LLP; Law Offices of Bernard M. Gross, P.C.; Law Offices of James V. Bashian, P.C.; Lowenstein Sandler PC; Murray Frank LLP; Pomerantz Haudek Grossman & Gross LLP; Saxena White P.A.; Spector Roseman Kodroff & Willis, P.C.; and Zwerling, Schachter & Zwerling, LLP |
| "Plaintiffs' Executive Committee" or "Executive Committee" | Bernstein Litowitz; Kessler Topaz; Gainey & McKenna LLP; Wolf Haldenstein Adler Freeman & Herz LLP; and Girard Gibbs LLP |
| "PPN" | The Lehman/UBS Structured Products that purported to offer full or partial principal protection |
| "Pretrial Order No. 27" | The Court's December 15, 2011 Order Concerning Proposed Settlement With The Director And Officer Defendants |
| "Pretrial Order No. 28" | The Court's December 15, 2011 Order Concerning Proposed Settlement With The Settling Underwriter Defendants |
| "PSLRA" | The Private Securities Litigation Reform Act of 1995 |
| "Repo 105" | A repurchase agreement (*i.e.*, a "repo") that Lehman accounted for as a sale instead of a financing, which removed the assets from Lehman's balance sheet. In a second step, Lehman used the cash obtained in exchange for the assets to pay down other liabilities. The Repo 105 transactions reduced the size of Lehman's balance sheet and reduced its net leverage ratio. The transactions were called Repo 105 because Lehman provided 5% overcollateralization.<br><br>Repo 105 and Repo 108 are referred to collectively as "Repo 105." |
| "Repo 108" | Similar to Repo 105 transactions, except Lehman provided 8% overcollateralization instead of 5% |
| "SEC" | Securities and Exchange Commission |
| "Second Group of Settling Underwriter Defendants" | Cabrera Capital Markets LLC ("Cabrera"); Charles Schwab & Co., Inc. ("Charles Schwab"); HVB Capital Markets, Inc. ("HVB"); Incapital LLC ("Incapital"); MRB Securities Corp., as general partner of M.R. Beal & Company (M.R. Beal & Company, together with its owners and partners) ("MRB Securities"); Muriel Siebert & Co., Inc. and Siebert Capital Markets ("Muriel Siebert"); and Williams Capital Group, L.P. ("Williams") |

| ABBREVIATION | DEFINED TERM |
|---|---|
| "Second Underwriter Stipulation" or "Second UW Stipulation" | Stipulation of Settlement and Release dated December 9, 2011, between Lead Plaintiffs and the Second Group of Settling Underwriter Defendants |
| "Securities Act" | Securities Act of 1933 |
| "Settlement Amounts" | The D&O Settlement Amount and the Underwriter Settlement Amount |
| "Settlement Classes" | The D&O Settlement Class and the Underwriter Settlement Class |
| "Settlement Class Period" | The period between June 12, 2007 and September 15, 2008, through and inclusive |
| "Settlement Class Representatives" | The proposed Settlement Class Representatives for the D&O Settlement Class are Lead Plaintiffs and additional named plaintiffs Brockton Contributory Retirement System; Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Police and Fire Retirement System of the City of Detroit; American European Insurance Company; Belmont Holdings Corp.; Marsha Kosseff; Stacey Oyler; Montgomery County Retirement Board; Fred Telling; Stuart Bregman; Irwin and Phyllis Ingwer; Carla LaGrassa; Teamsters Allied Benefit Funds; Francisco Perez; Island Medical Group PC Retirement Trust f/b/o Irwin Ingwer; Robert Feinerman; John Buzanowski; Steven Ratnow; Ann Lee; Sydney Ratnow; Michael Karfunkel; Mohan Ananda; Fred Mandell; Roy Wiegert; Lawrence Rose; Ronald Profili; Grace Wang; Stephen Gott; Juan Tolosa; Neel Duncan; Nick Fotinos; Arthur Simons; Richard Barrett; Shea-Edwards Limited Partnership; Miriam Wolf; Harry Pickle (trustee of Charles Brooks); Barbara Moskowitz; Rick Fleischman; Karim Kano; David Kotz; Ed Davis; and Joe Rottman.<br><br>The proposed Settlement Class Representatives for the UW Settlement Class are Lead Plaintiffs ACERA and GGRF, and additional named plaintiffs Brockton Contributory Retirement System; Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Police and Fire Retirement System of the City of Detroit; American European Insurance Company; Belmont Holdings Corp.; Marsha Kosseff; Montgomery County Retirement Board; Teamsters Allied Benefit Funds; John Buzanowski; and Ann Lee. |

| ABBREVIATION | DEFINED TERM |
|---|---|
| "Settlement Fairness Hearing" | The hearing scheduled for April 12, 2012 at 4:00 p.m. at which the Court will consider, among other things, whether the Settlements and the Plans of Allocation are fair, reasonable and adequate |
| "Settlement Memorandum" | The Memorandum of Law in Support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlements with D&O Defendants and Settling Underwriter Defendants and Approval of Proposed Plans of Allocation |
| "Settlements" | The D&O Settlement ($90,000,000), the First Underwriter Settlement ($417,000,000), and the Second Underwriter Settlement ($9,218,000), collectively |
| "Settling Defendants" | The D&O Defendants and Settling Underwriter Defendants, collectively |
| "Settling Underwriter Defendants" | The First Group of Settling Underwriter Defendants and Second Group of Settling Underwriter Defendants, collectively |
| "Stipulations" | The D&O Stipulation, the First Underwriter Stipulation and the Second Underwriter Stipulation, collectively |
| "Summary Notice" | Summary Notice of Pendency of Class Action and Proposed Settlements with the Director and Officer Defendants and Settling Underwriter Defendants, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses |
| "UBSFS" | UBS Financial Services, Inc., a non-settling defendant |
| "Underwriter Defendants" | The non-Lehman underwriters of Lehman securities named as defendants in the Action |
| "Underwriter Settlement" | The proposed settlement with the Settling Underwriter Defendants for $426,218,000 on behalf of the Underwriter Settlement Class |
| "Underwriter Settlement Class" or "UW Settlement Class" | All persons and entities who purchased or otherwise acquired Lehman securities identified in Appendix A to the First UW Stipulation pursuant or traceable to the Shelf Registration Statement and Offering Materials incorporated by reference in the Shelf Registration Statement and who were damaged thereby. The UW Settlement Class includes registered mutual funds, managed accounts, or entities with nonproprietary assets managed by any of the Released Underwriter Parties including, but not limited to, the entities listed on Exhibit C attached to the First UW Stipulation, who purchased or otherwise acquired Lehman Securities (each, a "Managed Entity"). Excluded from the UW Settlement Class are (i) Defendants, (ii) the officers and directors of each Defendant, (iii) any entity (other than a Managed Entity) in which a Defendant owns, or during the period July 19, 2007 to September 15, 2008 (the "Underwriter Settlement |

| ABBREVIATION | DEFINED TERM |
|---|---|
| | Class Period") owned, a majority interest; (iv) members of Defendants' immediate families and the legal representatives, heirs, successors or assigns of any such excluded party; and (v) Lehman. Also excluded from the UW Settlement Class are any persons or entities who exclude themselves by filing a timely request for exclusion in accordance with the requirements set forth in the UW Notice. |
| "Underwriter Settlement Class Period" | July 19, 2007 through September 15, 2008, inclusive |
| "Underwriter Stipulations" | The First Underwriter Stipulation and the Second Underwriter Stipulation, collectively |
| "UW Notice" | Notice of Pendency of Class Action and Proposed Settlement with the Settling Underwriter Defendants, Settlement Fairness Hearing and Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses |
| "UW Plan" | Plan of Allocation for the Underwriter Net Settlement Fund, attached as Appendix B to the UW Notice |
| "UW Settlement Amount" | $426,218,000 |

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs, on behalf of themselves and the Settlement Classes, respectfully submit this memorandum of law in support of their Motion for Final Approval of Class Action Settlements with D&O Defendants and Settling Underwriter Defendants and Approval of Plans of Allocation.[1]

## PRELIMINARY STATEMENT

Lead Plaintiffs have achieved two proposed settlements for a combined recovery of over $516 million – one with the Settling Underwriter Defendants for $426,218,000 (the "Underwriter Settlement") on behalf of the Underwriter Settlement Class, and another with the Lehman directors and officers for $90 million (the "D&O Settlement") on behalf of the D&O Settlement Class.[2] Lead Plaintiffs continue to prosecute the claims against the non-settling defendants – Ernst & Young LLP ("E&Y") and UBS Financial Services, Inc. ("UBSFS").

The Settlements are the product of nearly four years of hard-fought litigation, which included an extensive investigation into the claims, preparation of three detailed complaints, two rounds of dispositive motions, protracted settlement negotiations overseen by the Honorable Daniel J. Weinstein (Ret.) of JAMS, a review by Judge John S. Martin (Ret.) of the liquid net worth of the former Lehman officers who are defendants in the Action, extensive consultation with experts in areas requiring specialized knowledge, and the review and analysis of a

[1] Lead Plaintiffs are simultaneously submitting the Joint Declaration of David Stickney and David Kessler in Support of (A) Lead Plaintiffs' Motion for Final Approval of Proposed Class Action Settlements with D&O Defendants and Settling Underwriter Defendants and Approval of Plans of Allocation, and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."). The Joint Declaration is an integral part of this submission and, for the sake of brevity, Lead Plaintiffs respectfully refer the Court to that document for a detailed description of, among other things: the history of the Action; the negotiations leading to the Settlements; the value of the Settlements to the Settlement Classes, as compared to the risks and uncertainties of continued litigation; the terms of the proposed Plans of Allocation; and a description of the services Lead Counsel provided for the benefit of the Settlement Classes.

[2] Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Joint Declaration and the "Table of Abbreviations" set forth above.

substantial volume of internal Lehman and underwriter documents during confirmatory discovery for the Underwriter Settlement.

Lead Plaintiffs succeeded in recovering over $516 million in the absence of any actions filed by the Department of Justice or the SEC, and when Lehman itself, having filed for bankruptcy three months after the Action commenced, is not a viable source of recovery. Lead Plaintiffs and Lead Counsel believe that each of the Settlements represents an outstanding achievement in light of the risks of continued litigation, including the risks of establishing liability and damages and limitations on the ability of Lehman's former officers to pay a substantial judgment. After consideration of these significant risks and the delay, expense and uncertainty of pursuing the Action against the Settling Defendants through trial and any subsequent appeals, Lead Plaintiffs and Lead Counsel believe that the Settlements provide exceptional results for the Settlement Classes.

The Settlements were reached at a time when Lead Plaintiffs and Lead Counsel had developed a thorough understanding of the strengths and weaknesses of the claims and defenses in the Action and the limitations on the collectability of any judgment. This understanding was based upon Lead Counsel's extensive investigation into the facts underlying the claims; their close monitoring of Lehman's bankruptcy proceedings and detailed review of the Examiner's Report, supporting documents and additional material; their extensive consultation with experts and consultants; and the prolonged settlement negotiations. *See* Joint Decl. ¶¶11-88.

In reaching the Settlements, Lead Plaintiffs and Lead Counsel considered the numerous risks associated with continuing the litigation against the Settling Defendants, including the risks of recovering less than the respective Settlement Amounts after substantial delay, or of no recovery at all. For example, the Settling Defendants argued that there were no material

misstatements or actionable omissions and that Lehman's disclosures were sufficient. *See, e.g.*, Joint Decl. ¶¶25, 35, 72, 86. Establishing Exchange Act liability against the Officer Defendants would also have required proving that they had acted with *scienter* when Lehman's outside audit firm, E&Y, had signed off on Lehman's financial statements. *Id.* ¶¶25, 35. The Settling Defendants also asserted several affirmative defenses to liability, including that they had conducted adequate "due diligence" concerning the statements in the Offering Materials and had reasonably relied on statements by E&Y, and they contended that such defenses were supported by certain findings in the Examiner's Report. *Id*. ¶¶35-36, 72, 86. Further, throughout the litigation, the Settling Defendants had asserted – and were expected to continue to assert through summary judgment and trial – that factors other than the alleged untrue statements and omissions caused the decline in value of Lehman's securities. *Id.* ¶¶25, 35, 72, 87.

Accordingly, while Lead Plaintiffs and Lead Counsel believe that members of the Settlement Classes had very strong claims, the risks of establishing liability and damages and of recovering on any judgment amply support the Settlements. The more than $516 million in Settlements achieved by Lead Plaintiffs avoid the risks of litigation and provide immediate and substantial financial benefits for the Settlement Classes. In light of the size of the Settlements, the potential obstacles to recovery, and the additional time and expense that continued litigation would require, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlements are excellent results for the Settlement Classes and should be approved.

In addition to seeking final approval of the Settlements, Lead Plaintiffs seek approval of the proposed Plans of Allocation as fair and reasonable and certification of the Settlement Classes for settlement purposes only. As discussed below, the proposed Plans of Allocation, which were prepared by Lead Counsel in consultation with an expert in the areas of economics

and damages, will apportion the net proceeds of each settlement among those members of the Settlement Classes who submit claims that are approved for payment. Lead Counsel believe that each of the Plans of Allocation is fair and reasonable to the respective Settlement Class.

## ARGUMENT

### I. THE PROPOSED SETTLEMENTS WARRANT FINAL APPROVAL

Under Rule 23(e) of the Federal Rules of Civil Procedure, a class action settlement must be approved by the Court. A settlement should be approved if the Court finds it "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *In re Giant Interactive Grp., Inc. Sec. Litig.*, No. 07 Civ. 10588 (PAE), --- F.R.D. ----, 2011 WL 5244707, at *4 (S.D.N.Y. Nov. 2, 2011); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *3 (S.D.N.Y. May 13, 2011). "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 Wal-Mart*, 396 F.3d at 116 ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'"); *Giant Interactive*, 2011 WL 5244707, at *4 ("Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." (citations and internal quotations omitted)); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) ("federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources").

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); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). Because "the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial or a rehearsal of the trial." *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972) (citations and internal quotation marks omitted); *see also White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007) (in deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another").

### A. The Settlements Were Reached After Arm's-Length Negotiations With The Assistance Of An Experienced Mediator And Are Procedurally Fair

An initial presumption of fairness attaches to a proposed settlement if it is "reached by experienced counsel after arm's length negotiations." *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *1 (S.D.N.Y. Dec. 28, 2011); *see also In re Canadian Super. Sec. Litig.*, No. 09 Civ. 10087 (SAS), 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.) ("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).

Both of these Settlements are entitled to the presumption of fairness because: (1) all parties to the Settlements were represented by counsel who are experienced in litigating these types of claims and who were well informed about the strengths and weaknesses of the claims in

the Action (Joint Decl. ¶¶11-88); and (2) the Settlements were the result of intense and prolonged arm's-length negotiations (*id*. ¶¶56-61, 73-76).

Settlement discussions with the D&O Defendants began following the briefing of Defendants' motions to dismiss the Third Amended Complaint in 2010 and included two separate two-day mediation sessions before Judge Weinstein in December 2010 and February 2011. Joint Decl. ¶¶56-57. In connection with the mediations, the parties submitted detailed mediation statements, participated in face-to-face negotiations, and prepared and delivered presentations. *Id*. Although a settlement was not reached during either of these mediation sessions, Lead Plaintiffs and the D&O Defendants continued negotiations with the assistance of Judge Weinstein and, in August 2011, reached an agreement in principle to settle for $90 million in cash, subject to the satisfaction of certain conditions, including a confidential assessment of the liquid net worth of the Officer Defendants. *Id*. ¶60.

The negotiations leading to the Underwriter Settlement also included mediation overseen by Judge Weinstein and included negotiations over the course of many months, both in person and by telephone. Joint Decl. ¶¶73-76. To prepare for the mediation, Lead Counsel consulted extensively with experts concerning estimated recoverable damages relating to the Lehman Offerings underwritten by the Settling Underwriter Defendants and their negative causation defense. *Id*. ¶73. Ultimately, after the parties reached an impasse, Judge Weinstein recommended a settlement amount of $417 million for claims against the First Group of Settling Underwriter Defendants, based on his familiarity with the issues, the claims, defenses and arguments on both sides. *Id*. ¶74. Lead Plaintiffs agreed to the mediator's recommendation with the First Group of Settling Underwriter Defendants in early October 2011, but negotiated to obtain assurance through confirmatory discovery of the fairness and reasonableness of the

settlement. *Id*. The parties executed the First UW Stipulation on December 2, 2011. *Id*. ¶77. Negotiations continued with the Second Group of Settling Underwriter Defendants, most of which represented that they did not have the financial ability to participate in the First UW Stipulation. After obtaining financial information from certain of these defendants, Lead Plaintiffs entered into the Second UW Stipulation with these defendants on December 9, 2011 for the aggregate amount of $9,218,000. *Id*. ¶¶75, 81. Against this backdrop, the active involvement of an experienced and independent mediator like Judge Weinstein in the negotiations is strong evidence of the absence of any collusion and further supports the presumption of fairness. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *Giant Interactive*, 2011 WL 5244707, at *4 (the fact that negotiations were "facilitated by a respected mediator" supported the presumption of fairness); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576-77 (S.D.N.Y. 2008) ("Judge Weinstein's role in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion . . . [and that] the process leading to the Settlement was fair to absent Class Members.").

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

Both of the Settlements are also substantively fair, reasonable and adequate and in the best interests of the Settlement Classes. The standards governing approval of class action settlements are well established in this Circuit. In *Grinnell*, the Second Circuit held that the following were factors to be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the

> trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463 (citations omitted), *see also McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009); *Wal-Mart*, 396 F.3d at 117; *Giant Interactive*, 2011 WL 5244707, at *5; *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *Global Crossing*, 225 F.R.D. at 456 (citation omitted).

Here, both Settlements clearly satisfy the criteria for approval articulated by the Second Circuit in *Grinnell*.

**1. The Complexity, Expense And Likely Duration Of The Litigation Support Approval Of The Settlements**

"[I]n 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.'" *FLAG Telecom*, 2010 WL 4537550, at *15 (citation omitted). Courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute," *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007), and that "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citations omitted). These concerns are particularly apparent in this Action, which strongly supports approval of the Settlements.

This Action is complex by any standard. It arises from the historic failure of one of the world's largest investment banks, seeks recovery from over 60 defendants, involves more than one hundred securities offerings, and focuses on the application of disputed accounting

principles and auditing standards. Lead Plaintiffs would have to overcome numerous hurdles in order to achieve a litigated verdict against the Settling Defendants in this Action. In the absence of the Settlements, continued litigation of the Action against the Settling Defendants would require considerable factual and expert discovery, and the litigation of summary judgment motions that would undoubtedly have been vigorously pursued by Settling Defendants' counsel. Assuming that Lead Plaintiffs' claims against the Settling Defendants survived summary judgment, the Action would have culminated in a complex jury trial that would have required a substantial amount of factual and expert testimony. Finally, whatever the outcome at trial, it is virtually certain that an appeal (or appeals) would be taken. All of the foregoing would have posed considerable expense for the Settlement Classes and would substantially delay any recovery from the Settling Defendants – assuming, of course, that Lead Plaintiffs were ultimately successful on their claims.

The subject matter involved in the Action also added to the complexity of the litigation. At the time the Settlements were reached, Lead Plaintiffs and Lead Counsel had expended significant efforts in investigating the claims, reviewing a vast number of publicly available documents and consulting extensively with experts in a broad range of subject areas, including economics, finance, valuation, accounting and auditing principles, and financial analysis. Joint Decl. ¶¶11-53. The multiple defenses to liability and damages that Settling Defendants had asserted in their motions to dismiss and would continue to assert, including negative causation, due diligence, and reliance on experts, among others – would also have added to the complexity of the case. *Id*. ¶¶25, 35, 72, 86, 87.

In contrast to this complex, lengthy, and uncertain litigation, the Settlements provide immediate, significant and certain recoveries for members of the respective Settlement Classes. Accordingly, this factor supports approval of the Settlements.

**2. The Reaction To Date Of The Settlement Classes**

The reaction of a class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g.*, *FLAG Telecom*, 2010 WL 4537550, at *16; *Veeco*, 2007 WL 4115809, at *7; *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002).

Pursuant to the Notice Orders, the Court-appointed claims administrator, The Garden City Group, Inc. ("GCG"), began mailing copies of the Notice Packet to potential members of the Settlement Classes on January 18, 2012. *See* Affidavit of Stephen J. Cirami Regarding (A) Mailing of the Notices and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date, Exhibit 2 to the Joint Decl. ("Cirami Aff."), at ¶¶3, 6-9. As of March 6, 2012, more than 800,000 copies of the Notice Packet had been mailed to potential members of the Settlement Classes. *Id*. ¶11. In addition, the Summary Notice was published in *The Wall Street Journal* and *Investor's Business Daily* on January 30, 2012. *Id*. ¶12. The Notices set out the essential terms of the respective Settlements and informed potential members of the Settlement Classes of, among other things, their right to opt out of the Settlement Classes or object to any aspect of the Settlements, as well as the procedure for submitting Claim Forms.

While the deadline set by the Court for members of the Settlement Classes to exclude themselves or object to the Settlements has not yet passed, to date, Lead Counsel have received only two objections to the Settlements and only ten requests for exclusion. The two objections

received to date provide no basis for rejecting the Settlements.[3] The deadline for submitting objections and requesting exclusion from the Settlement Classes is March 22, 2012, and, as provided in the Notice Orders, Lead Plaintiffs will file reply papers on April 5, 2012 comprehensively addressing all objections and requests for exclusion received.

### 3. The Stage Of The Proceedings And Amount Of Discovery Support Approval Of The Settlements

The Settlements were reached after nearly four years of litigation that included an extensive investigation, substantial motion practice, consultation with multiple experts, and, with regard to the Underwriter Settlement, extensive confirmatory discovery. Accordingly, Lead Plaintiffs and Lead Counsel had a firm grasp of the strengths and weaknesses of the case when negotiating and evaluating the proposed Settlements.

Lead Counsel's investigation prior to the filing of the first consolidated complaint included, among other things, a detailed review and analysis of the Offering Materials and a substantial volume of public information by and about Lehman, including Lehman's SEC filings;

[3] To date, Lead Counsel have received objections from Raymond Gao (attached as Exhibit 5 to the Joint Declaration) and from Jane Eisenberg (attached as Exhibit 6 to the Joint Declaration). Neither objector has provided information and documents concerning their transactions in the eligible securities as required by the Notices and Notice Orders in order to establish membership in one or both of the Settlement Classes. In any event, both objections are without merit. Mr. Gao's letter claims the entire D&O settlement proposal "is an effort in perpetrating financial frauds" and raises a number of objections and questions about the D&O Settlement, including questions pertaining to calculations in the Plan of Allocation, the selection of eligible securities and alleged collusion by the law firms involved. Mr. Gao requests that the Court bar Lead Counsel and certain of Defendants' counsel from the case and order Lehman to take certain actions including holding an annual shareholder meeting and electing new officers and directors. Lead Plaintiffs and Lead Counsel will address Mr. Gao's questions and concerns in more detail in their reply papers to be filed on April 5, 2012. For now, Lead Plaintiffs and Lead Counsel observe that Mr. Gao's letter demonstrates certain fundamental misunderstandings of the nature of the D&O Settlement and strongly deny that the Settlement involves any collusion or fraud.

Ms. Eisenberg objects to the ***exclusion*** of Lehman 6.375% Preferred Securities, Series K ("Series K Preferred") from the securities eligible to participate in the Settlements. The Series K Preferred was never included in the securities that formed the basis for this Action because that security was first offered to the public in March 2003, well before the alleged misstatements in this Action were made. Thus, to the extent Ms. Eisenberg transacted only in the Series K Preferred security, she would not be a member of either of the Settlement Classes.

Lehman's annual and quarterly financial statements; Lehman's press releases; transcripts of Lehman's quarterly analyst conference calls; and a large volume of news articles and wire service reports concerning Lehman and its real estate related businesses. Joint Decl. ¶¶12-14, 16. Lead Counsel's investigation also encompassed extensive consultation with experts and the use of investigators to locate and interview former employees of Lehman and others who might be reasonably expected to have relevant knowledge concerning matters at issue in the case. *Id*. Following Lehman's bankruptcy in September 2008, Lead Counsel continued their vigorous investigation, including locating and interviewing witnesses, analyzing the substantial volume of publicly available information in the aftermath of Lehman's bankruptcy, and working with specially-retained bankruptcy counsel. *Id*. ¶16.

After the release of the Examiner's detailed report in Lehman's bankruptcy case (the "Examiner's Report") on March 11, 2010, Lead Counsel carefully analyzed the 2,200-page report and its supporting documentation. Joint Decl. ¶¶31, 33. During that process, Lead Counsel compared and confirmed many of the Examiner's findings with Lead Counsel's own prior conclusions based upon their own independent and ongoing investigation. *Id*. ¶33.

Lead Plaintiffs and Lead Counsel also became familiar with Settling Defendants' defenses through extensive briefing of the two rounds of the motions to dismiss and the oral argument held on the first round of motions. Joint Decl. ¶¶25-27, 29, 35-39. Throughout these stages of the litigation, Lead Counsel worked extensively with experts to help understand the strengths and weaknesses of Lead Plaintiffs' claims and to estimate possible recoverable damages under various scenarios. *Id*. ¶¶52-53. Lead Counsel's understanding of the strengths and weakness of the case was also enhanced by the prolonged and vigorous settlement negotiations, which included preparation of detailed mediation statements, presentations, and

analyses, and by Lead Counsel's consideration of the Settling Defendants' arguments at the mediations and the well-informed input of Judge Weinstein. *Id*. ¶¶56-57, 60, 73-76.

Lead Plaintiffs have also had the benefit of the review of a substantial volume of documents obtained from the Lehman estate, the Settling Underwriter Defendants and others. With respect to the Underwriter Settlement, conduct of this due diligence discovery was a condition of the agreement to settle, and Lead Plaintiffs had the right to withdraw from the proposed settlement if information produced during due diligence rendered the proposed settlement unfair, unreasonable or inadequate. Joint Decl. ¶¶74, 83. In connection with this due diligence discovery, Lead Counsel obtained, reviewed, and/or analyzed over 10 million pages of documents. *Id*. ¶¶48, 83, 105, 136. Following this review, Lead Counsel and Lead Plaintiffs continue to believe that both of the Settlements are fair, reasonable and adequate. *Id.* ¶83.

As a result of all these efforts, Lead Plaintiffs and Lead Counsel clearly have a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy" of the Settlements. *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, *10 (S.D.N.Y. Apr. 6, 2006). "The question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed . . . ." *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *12 (E.D. La. Mar. 2, 2009). Here, where Lead Plaintiffs and Lead Counsel have vigorously litigated this matter for nearly four years, they have clearly obtained sufficient information to evaluate the Settlements. *See, e.g.*, *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06-cv-5173 (RPP), 2008 WL 1956267, at *7 (S.D.N.Y. May 1, 2008) ("pre-settlement informal

discovery and confirmatory discovery . . . allowed the parties to develop the facts necessary to evaluate the claims and adequacy of the Settlement"); *Maley*, 186 F. Supp. 2d at 364 (even where discovery had not begun, "Plaintiffs' Counsel possessed a record sufficient to permit evaluation of the merits of Plaintiffs' claims, the strengths of defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement").

**4. The Risks Of Establishing Liability And Damages Support Approval Of The Settlements**

*Grinnell* holds that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability [and] the risks of establishing damages." 495 F.2d at 463 (citations omitted). While Lead Plaintiffs and Lead Counsel believe that the claims asserted against the Settling Defendants have merit, they also recognize that there were risks as to whether they would ultimately be able to prove liability and damages on their claims in the Action, as well as risks with respect to the amount of damages that Lead Plaintiffs could establish.

***Risks of Establishing Liability Against the D&O Defendants***. In addition to the risk concerning the collectability of any judgment (discussed below), there were also risks in establishing liability and damages against the D&O Defendants. The D&O Defendants would continue to argue that statements at issue about Lehman's net leverage, risk management policies and concentration-of-credit risk were not materially false and misleading, and that the accounting for Repo 105 transactions was appropriate. Joint Decl. ¶¶25, 35, 72. With respect to Exchange Act claims, the Officer Defendants would also have continued to argue that they lacked *scienter* and that they could rely upon the determinations of E&Y. *Id.* ¶¶25, 35, 72. The D&O Defendants also raised numerous defenses to the Securities Act claims in this Action, including the "due diligence" defense and "expert-reliance" defense. For example, the D&O Defendants

facing Securities Act claims argued that statements in the Examiner's Report support their position that they had conducted a "reasonable investigation" and had a "reasonable ground to believe" that the Offering Materials were accurate. *Id*. ¶¶35, 36, 72. Similarly, these Defendants relied upon conclusions in the Examiner's Report to argue that they "had no reasonable ground to believe and did not believe" that the statements made by experts in the Offering Materials were false or misleading. *Id*. ¶72.

***Risks of Establishing Liability Against the Settling Underwriter Defendants***. The risks involved in succeeding at trial against the Settling Underwriter Defendants were also significant. These Defendants claimed that there were no material misstatements or actionable omissions in the Offering Materials. Joint Decl. ¶¶25, 35, 72. Assuming that Lead Plaintiffs established the existence of an untrue statement or material omission, these defendants would assert due diligence defenses with respect to the offerings at issue. *Id*. ¶72. In this regard, Lead Plaintiffs anticipated that the Underwriter Defendants would rely on Lehman's position as the senior underwriter for most of the offerings and the audit opinions and quarterly review reports of E&Y approving Lehman's financials. *Id*.

***Risks Relating to Causation and Damages***. Moreover, all of the Settling Defendants raised arguments concerning loss causation and damages. Under Section 11(e) of the Securities Act, damages may be reduced or eliminated if a defendant proves that a portion or all of the statutory damages are attributable to causes other than the alleged misstatements or omissions.[4] Throughout the litigation, the Settling Defendants asserted – and were expected to continue to assert through summary judgment and trial – that causes other than the alleged untrue statements and omissions were to blame for the decline in value of Lehman's securities. Joint Decl. ¶¶35,

[4] Similarly, with respect to the Exchange Act claims against the Officer Defendants, proof of loss causation would be an element of the claim that Lead Plaintiffs would need to establish.

72. Moreover, these Defendants have argued that the "materialization of the risk" theory of loss causation does not apply. *Id*.

A large number of these contested issues, including proving the falsity of the accounting-related statements, proving loss causation or overcoming negative causation defenses, and overcoming the due diligence and expert-reliance defenses, would have likely required expert testimony before the jury. While Lead Plaintiffs expected to present persuasive expert testimony on each of these topics, the Settling Defendants could be expected to raise *Daubert* challenges and to present their own experts in support of their positions. 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," which contributes to the unpredictable nature of any litigated outcome. *See, e.g., FLAG Telecom*, 2010 WL 4537550, at *18 ("The jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants").

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

The risks of maintaining the Action as a class action through trial also support approval of the Settlements. While Lead Plaintiffs are confident that the claims against the Settling Defendants are appropriate for class treatment, at the time the Settlements were reached, no class or classes had been certified. Absent the Settlements, Lead Counsel expect that the Settling Defendants would oppose class certification and seek to have certain claims not certified for class purposes and may have sought to alter the class period. The Settlements avoid any uncertainty with respect to these issues.

### 6. The Risk That The Settlings Defendants Could Not Pay A Greater Judgment Supports Approval Of The Settlements

Lead Plaintiffs could not prosecute this Action against Lehman itself because the Company had declared bankruptcy, and all litigation against it was stayed under the Bankruptcy Code, 11 U.S.C. § 362. Joint Decl. ¶¶13-14. This foreclosed an important potential source of recovery for both the D&O Settlement Class and the UW Settlement Class.

Lehman's D&O insurance, which was a substantial source of potential funding for any settlement or verdict, was being rapidly and continually depleted by the ongoing defense costs and the costs of other litigation pending against Lehman's former directors and officers. Joint Decl. ¶¶58-59. Although the 2007-2008 D&O insurance policies applicable to Lead Plaintiffs' claims against the D&O Defendants provided for $250 million in total insurance coverage, this insurance was a wasting asset that was rapidly dwindling as the litigation progressed. By the end of February 2011, at least $70 million of that coverage had already been expended, and, just four months later, on June 29, 2011, Lehman's Estate requested that the bankruptcy court authorize payment from excess layers covering the $85 to $110 million range. *Id*. ¶58. In a November 9, 2011 Bankruptcy Court filing, Lehman stated that, "taking into account settlement payments that have been or are contemplated to be made, as well as defense costs that have been or are contemplated to be paid by Lehman's third party insurers under the Debtor's 2007-08 D&O Policies, the Debtors anticipate that the limits of liability of the 2007-2008 D&O policies will be fully exhausted before the end of the year." *Id*. ¶59.

While Defendant Fuld reportedly had enormous wealth before the Lehman bankruptcy, it was subsequently learned that most of this wealth was in Lehman stock, and, as a result, it was unlikely that Lead Plaintiffs could have collected a substantial judgment from him personally. *Id*. ¶69.

As a condition of the D&O Settlement, the parties retained a highly-respected neutral, the Honorable John S. Martin (Ret.), to perform an unconstrained confidential review of the Officer Defendants' liquid net worth in order to assure Lead Plaintiffs that recovering $90 million from insurance in the D&O Settlement, which would otherwise be depleted by defense costs, was the best option to maximize the recovery for the D&O Settlement Class. Joint Decl. ¶¶66, 70. Judge Martin, a retired United States District Judge and former United States Attorney for the Southern District of New York, conducted this review with the aid of an outside investigation company. *Id*. ¶70. Judge Martin concluded that the Officer Defendants' liquid net worth was substantially below $100 million. *Id*. If, therefore, Lead Plaintiffs passed on the definite $90 million recovery for the D&O Settlement Class and instead continued to pursue the claims against Lehman's former officers (with an uncertain outcome and resolution likely years in the future), the policy would have evaporated and the officers' combined liquid net worth likely would have been an inadequate alternative source for recovery. Balancing the amount of the certain recovery against the uncertain and risky potential recovery after trial and appeals, as well as the ability to collect and convert a judgment in the event of success and taking into account the time-value of money, the $90 million proposed D&O Settlement maximizes the result for the D&O Settlement Class.

Courts have frequently found that similar circumstances strongly support approval of a settlement. *See, e.g.*, *In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, No. 05-232, 2008 WL 4974782, at *8 (E.D. Pa. Nov. 21, 2008) (where the company was bankrupt and the individual defendants had limited assets, "[c]ontinuing to trial in the hopes of obtaining a higher penalty would merely deplete the insurance policy proceeds . . . leaving the class, if successful, with a lesser judgment, not a greater one. This factor weighs heavily in favor of settlement"); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05-cv-10240 (CM), 2007 WL 2230177, at *8

(S.D.N.Y. July 27, 2007) (defendant's "uncertain financial condition and the consequent threat of non-collectibility" strongly supported approval of settlement); *Global Crossing*, 225 F.R.D. at 460 (this factor strongly supported settlement where the companies had filed for bankruptcy and the "main settlement funds available to the individuals are the insurance proceeds, which . . . would be largely consumed by defense costs if this litigation were to continue").[5]

Although the risks of collecting on any judgment against the majority of the Settling Underwriter Defendants were not as substantial, this factor also weighs in favor of the Underwriter Settlement. First, while many of the Settling Underwriter Defendants may possess the resources to withstand judgments greater than the settlement amounts they agreed to, a number of the underwriter defendants did not have the financial ability to participate in the First Underwriter Settlement at the levels being required of those underwriters and provided Lead Counsel with financial information to support their contentions. Joint Decl. ¶75. In addition, in light of the 2008 financial crisis and other recent events, it is far from certain that the Settling Underwriter Defendants as a whole would have been able to pay a substantially greater judgment in the future – after years of litigation, including formal discovery, additional motion practice and trial. Finally, the mere "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," especially where, as here, the other *Grinnell* factors weigh heavily in favor of settlement approval. *See Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242, 261 (E.D.N.Y. 2009) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y.), *aff'd* 117 F.3d 721 (2d Cir.

[5] *See also Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *4 (S.D.N.Y. May 14, 2004) (limitations on the individual defendants' ability to pay and the likely depletion of D&O insurance before trial were the "overriding consideration driving the settlement negotiations" and supported approval of the settlement); *Maley*, 186 F. Supp. 2d at 366 (defendant's "dire financial condition" and the likelihood that insurance policies "would be significantly depleted" by the costs of continued litigation, supported settlement).

1997)); *AOL Time Warner*, 2006 WL 903236, at *12 ("the mere ability to withstand a greater judgment does not suggest that the Settlement is unfair").

**7. The Range Of Reasonableness Of The Settlement Amounts In Light Of The Best Possible Recoveries And All The Attendant Risks Of Litigation Support Approval Of The Settlements**

The last substantive factors that courts consider, the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks, further support approval of the Settlements. In analyzing these two factors, the issue for the reviewing 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 reviewing court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. The fact that a proposed settlement "may only amount to a fraction of the potential recovery" does not necessarily suggest that settlement is inadequate. *Grinnell*, 495 F.2d at 455. Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d at 693; *see FLAG Telecom*, 2010 WL 4537550, at *20.

Lead Plaintiffs submit that each of the Settlements here is well within the range of reasonableness for independent reasons. With respect to the D&O Settlement, the potential damages against the D&O Defendants could have amounted to many billions of dollars, but there were obvious and substantial risks in collecting on any judgment for many billions of dollars that might be obtained through trial. Under the circumstances, the D&O Settlement Class may have actually recovered less if the case were litigated to trial. The D&O Settlement Amount is reasonable notwithstanding the fact it represents a small percentage of the total damages.

With respect to the Underwriter Settlement, Lehman itself underwrote approximately 83% of the $20.2 billion sold in the twelve offerings at issue, Joint Decl. ¶84, and, as explained

above, Lehman is no longer a viable source of recovery. The Underwriter Defendants underwrote approximately $3.5 billion. *Id.* The $426 million settlement represents approximately 13% of the $3.3 billion in maximum statutory damages that could have been recovered against the Settling Underwriter Defendants, even before consideration of these Defendants' arguments concerning causation or other defenses. *Id*. ¶¶5, 85. This level of recovery compares favorably with many other securities class action settlements. For example, one recent analysis found that the median settlement recovery in securities cases alleging only Section 11 or 12(a)(2) claims is 9.5% of the total estimated damages, and the median recovery in all cases naming underwriters as defendants is only 5.5% of estimated damages. *See* Ellen M. Ryan & Laura E. Simmons, Securities Class Action Settlements: 2010 Review and Analysis at 9 (attached to the Joint Declaration as Exhibit 3). Courts have frequently found percentage recoveries similar or less substantial than the recovery here to be within the range of reasonableness for settlement. *See, e.g.*, *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *7 (S.D.N.Y. Oct. 24, 2005) (in case involving Section 11 and 12(a)(2) claims, the court found that a settlement representing 3.8% of plaintiffs' damage calculation was "within the range of reasonableness"); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2000 WL 661680, at *4 (S.D.N.Y. May 19, 2000) (approving settlement representing 5% to 17% of plaintiffs' estimated damages on Section 11 and 12(2) claims). Moreover, as noted above, Lead Plaintiffs faced significant risks in establishing liability and damages against the Settling Underwriter Defendants.

Lead Plaintiffs and Lead Counsel have concluded, after careful consideration of the limitations on recoverability and the other litigation risks, that the advantages of the Settlements, which provide immediate and substantial benefits to members of the Settlement Classes,

outweigh the benefits of continued litigation against the Settling Defendants. Joint Decl. ¶¶9, 67-72, 84-88, 97; *see also* the declarations submitted on behalf of Lead Plaintiffs in support of final approval of the Settlements, attached as Exhibits 4A-4E to the Joint Decl.

"Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *EVCI*, 2007 WL 2230177, at *4; *see also Clark v. Ecolab Inc.*, No. 07 Civ. 8623 (PAC), 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) ("The Court gives weight to the parties' judgment that the settlement is fair and reasonable."). Lead Counsel were intimately familiar with the facts in the case and have extensive experience prosecuting comparable securities class actions. In these circumstances, the opinion of Lead Counsel that the Settlements are reasonable is entitled to "great weight." *PaineWebber*, 171 F.R.D. at 125; *see also Veeco*, 2007 WL 4115809, at *12. The recommendations of Lead Plaintiffs, who are sophisticated institutional investors, also strongly support a finding that the Settlements are fair.[6]

In sum, all the *Grinnell* factors – including the complexity, expense and delay of further litigation, the well-developed stage of the proceedings, the substantial risks of the litigation, and the limitations on the D&O Defendants' ability to pay a larger judgment – support a finding that the Settlements are fair, reasonable and adequate.

## II. THE PROPOSED PLANS OF ALLOCATION ARE FAIR AND REASONABLE AND SHOULD BE APPROVED

Lead Plaintiffs have proposed plans to allocate the proceeds of the Settlements among members of the Settlement Classes who submit Claim Forms that are approved for payment from the relevant Net Settlement Fund. The objective of the proposed Plans of Allocation is to

[6] Settlements that are reached "under the supervision and with the endorsement of a sophisticated institutional investor" are "entitled to an even greater presumption of reasonableness." *Veeco*, 2007 WL 4115809, at *5 (citation omitted); *see also EVCI*, 2007 WL 2230177, at *4 (same).

equitably distribute the Settlement proceeds to the members of the respective Settlement Class who suffered economic losses as a result of the alleged misrepresentations and omissions. Joint Decl. ¶¶98-104.

Approval of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable and adequate. *See, e.g.*, *Giant Interactive*, 2011 WL 5244707, at *8; *AOL Time Warner*, 2006 WL 903236, at *17. A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *FLAG Telecom*, 2010 WL 4537550, at *21 (quoting *Maley*, 186 F. Supp. 2d at 367); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). In general, courts have recognized that "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." *PaineWebber*, 171 F.R.D. at 133. A plan that allocates settlement funds to class members based on the extent of their injuries or the strengths of their claims is fair and reasonable. *See In re Telik*, 576 F. Supp. 2d at 580 ("A reasonable plan may consider the relative strengths and values of different categories of claims."). Moreover, in assessing a proposed plan of allocation, courts give great weight to the opinion of informed counsel. *See, e.g.*, *FLAG Telecom*, 2010 WL 4537550, at *21 (the conclusion of "experienced and competent counsel . . . that the Plan of Allocation is fair and reasonable is . . . entitled to great weight"); *EVCI*, 2007 WL 2230177, at *11 ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel.").

Both of the proposed Plans of Allocation were developed by Lead Counsel after consultation with a damages expert. Joint Decl. ¶99. The D&O Plan will allocate the D&O Net Settlement Fund among members of the D&O Settlement Class who submit Claim Forms that

are approved for payment. *Id.* ¶100. The D&O Plan will calculate Recognized Loss or Recognized Gain amounts for transactions in Lehman common stock and exchange-traded options during the Settlement Class Period based principally on the differences in the estimated amounts of artificial inflation (or deflation) in these securities on the date of purchase and the date of sale. *Id.* For transactions in Lehman Preferred Stock, Lehman Senior Unsecured Notes and Subordinated Notes, and Lehman common stock purchased or acquired in the Secondary Offering, Recognized Losses and Recognized Gains are calculated using the Section 11 measure of damages and are generally based on the difference between the purchase price of the security (not to exceed the issue price) and either its sale price or the price on the date the suit was filed (in the case, October 28, 2008). *Id.* Each Claimant's Recognized Claim will be calculated by combining the Claimant's Recognized Losses in all eligible securities and offsetting all Recognized Gains, and, finally, a Distribution Amount will be calculated based on the Claimant's *pro rata* share of the Net D&O Settlement Fund (based on the size of the Claimant's Recognized Claim compared to the aggregate Recognized Claims of all Authorized Claimants).[7]

Similarly, the UW Plan will allocate the Underwriter Net Settlement Fund among members of the UW Settlement Class who submit Claim Forms that are approved for payment. First, the Underwriter Net Settlement Fund will be allocated among the twelve eligible securities as set forth in Exhibit 2 to the UW Plan. Joint Decl. ¶102. Then, under the UW Plan, a Recognized Loss or Recognized Gain will be calculated for each Eligible UW Security that was purchased or acquired during the Underwriter Settlement Class Period consistent with the Section 11 measure of damages. *Id.* An Authorized Claimant's Distribution Amount under the

[7] *Id.* ¶101. If a Claimant has an overall trading gain on the Claimant's transactions in eligible securities during the relevant time period, that Claimant will not be eligible for a recovery from the D&O Settlement. If a Claimant's overall trading loss is less than the Claimant's Recognized Claim, then that Claimant's Recognized Claim will be capped at the amount of the Claimant's overall trading loss.

UW Plan will be the sum of the Claimant's *pro rata* shares of the portions of the Underwriter Net Settlement Fund allocated to each particular Eligible UW Security.[8]

It is the opinion of Lead Counsel that the each of the Plans of Allocation is fair, reasonable and adequate to the respective Settlement Class. Joint Decl. ¶99. In response to over 800,000 Notice Packets that have been mailed to potential members of the Settlement Classes, only one objection has been received to date which relates to the proposed Plans of Allocation.[9] Accordingly, for all of the reasons set forth herein and in the Joint Declaration, both of the Plans of Allocation are fair and reasonable, and should be approved.

## III. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

Lead Plaintiffs move for final certification of the Settlement Classes for purposes of the Settlements only, certification of the Settlement Class Representatives, and approval of Class

[8] *Id*. ¶103. Under each of the Plans of Allocation, if a Claimant's Distribution Amount calculates to less than $50, then no distribution will be made to that Claimant with respect to that Settlement and the disallowed amount will be reallocated to the remaining Authorized Claimants in that Settlement with allocations greater than $50. Joint Decl. ¶104. Use of similar minimum payment thresholds has been repeatedly approved by Courts in the interests of reducing unnecessary expenses to the class as a whole. *See, e.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 4526593, at *12 (S.D.N.Y. Dec. 20, 2007) (approving plan of allocation with $50 minimum "in order to foster the efficient administration of the settlement"); *Global Crossing*, 225 F.R.D. at 463 (holding that inclusion of *de minimis* threshold in plan was reasonable "in order to preserve the settlement fund from excessive and unnecessary expenses in the overall interests of the class as a whole").

[9] *Id.* ¶¶93, 96. Mr. Gao's objection, discussed above, includes certain questions or objections that relate to the D&O Plan of Allocation. In points 1 and 2 of his letter, Mr. Gao asks why the figures provided in Exhibit 1 to the D&O Plan of Allocation do not match the actual trading prices of Lehman stock. This is because Exhibit 1 lists the level of daily inflation in Lehman stock and is not intended to reflect the actual trading price of the stock on the listed days. In point 3, Mr. Gao questions why the October 28, 2011 date is used as a reference date for the Preferred Stock and Senior Unsecured Notes and Subordinated Notes in Exhibits 2 and 3. This is because the calculation of Recognized Losses for these securities is based on Section 11 and the relevant date of suit for these securities (when the first complaint raising Section 11 claims for these securities was filed) was October 28, 2011. In point 4, Mr. Gao questions why there are negative numbers in Exhibit 4 to the D&O Plan of Allocation. The numbers listed on the Exhibit 4 do not reflect the actual prices of the option contracts (as Mr. Gao appears to believe), but the level of inflation or – as reflected by the negative numbers – deflation in the option price, which has been calculated based on the Black-Scholes option pricing model and the estimated inflation per common share as listed in Exhibit 1.

Counsel.[10] On December 15, 2011, in its Order Concerning Proposed Settlement with the Director and Officer Defendants (ECF No. 548) and Order Concerning Proposed Settlement with the Settling Underwriter Defendants (ECF No. 549) (the "Notice Orders"), the Court found "upon a preliminary evaluation," and for purposes of the Settlements only, that each of the Settlement Classes met the requirements of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure, and directed that notice of the Settlements be provided to potential members of the Settlement Classes.

The settling parties have stipulated to certification of settlement classes, which are described in the Notices. The proposed D&O Settlement Class is defined as:

> All persons and entities who (1) purchased or acquired Lehman securities identified in Appendix A to the D&O Stipulation pursuant or traceable to the Shelf Registration Statement and who were damaged thereby, (2) purchased or acquired any Lehman Structured Notes identified in Appendix B to the D&O Stipulation pursuant or traceable to the Shelf Registration Statement and who were damaged thereby, or (3) purchased or acquired Lehman common stock, call options, and/or sold put options between June 12, 2007 and September 15, 2008, through and inclusive, and who were damaged thereby. Excluded from the D&O Settlement Class are (i) Defendants, (ii) Lehman, (iii) the executive officers and directors of each Defendant or Lehman, (iv) any entity in which Defendants or

[10] The proposed Settlement Class Representatives for the D&O Settlement Class are all of the Lead Plaintiffs and additional named plaintiffs Brockton Contributory Retirement System; Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Police and Fire Retirement System of the City of Detroit; American European Insurance Company; Belmont Holdings Corp.; Marsha Kosseff; Stacey Oyler; Montgomery County Retirement Board; Fred Telling; Stuart Bregman; Irwin and Phyllis Ingwer; Carla LaGrassa; Teamsters Allied Benefit Funds; Francisco Perez; Island Medical Group PC Retirement Trust f/b/o Irwin Ingwer; Robert Feinerman; John Buzanowski; Steven Ratnow; Ann Lee; Sydney Ratnow; Michael Karfunkel; Mohan Ananda; Fred Mandell; Roy Wiegert; Lawrence Rose; Ronald Profili; Grace Wang; Stephen Gott; Juan Tolosa; Neel Duncan; Nick Fotinos; Arthur Simons; Richard Barrett; Shea-Edwards Limited Partnership; Miriam Wolf; Harry Pickle (trustee of Charles Brooks); Barbara Moskowitz; Rick Fleischman; Karim Kano; David Kotz; Ed Davis; and Joe Rottman. *See* Pretrial Order No. 27 at ¶4. The proposed Settlement Class Representatives for the UW Settlement Class are: Lead Plaintiffs ACERA and GGRF, and additional named plaintiffs Brockton Contributory Retirement System; Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Police and Fire Retirement System of the City of Detroit; American European Insurance Company; Belmont Holdings Corp.; Marsha Kosseff; Montgomery County Retirement Board; Teamsters Allied Benefit Funds; John Buzanowski; and Ann Lee. *See* Pretrial Order No. 28 at ¶3.

> Lehman have or had a controlling interest, (v) members of Defendants' immediate families, and (vi) the legal representatives, heirs, successors or assigns of any such excluded party. Also excluded from the D&O Settlement Class are any persons or entities who exclude themselves by filing a timely request for exclusion in accordance with the requirements set forth in the D&O Notice.

Pretrial Order No. 27 at ¶3.

> The proposed UW Settlement Class is defined as:
>
> All persons and entities who purchased or otherwise acquired Lehman securities identified in Appendix A to the UW Stipulation pursuant or traceable to the Shelf Registration Statement and Offering Materials incorporated by reference in the Shelf Registration Statement and who were damaged thereby. The UW Settlement Class includes registered mutual funds, managed accounts, or entities with nonproprietary assets managed by any of the Released Underwriter Parties including, but not limited to, the entities listed on Exhibit C attached to the First UW Stipulation, who purchased or otherwise acquired Lehman Securities (each, a "Managed Entity"). Excluded from the UW Settlement Class are (i) Defendants, (ii) the officers and directors of each Defendant, (iii) any entity (other than a Managed Entity) in which a Defendant owns, or during the period July 19, 2007 to September 15, 2008 (the "Underwriter Settlement Class Period") owned, a majority interest; (iv) members of Defendants' immediate families and the legal representatives, heirs, successors or assigns of any such excluded party; and (v) Lehman. Also excluded from the UW Settlement Class are any persons or entities who exclude themselves by filing a timely request for exclusion in accordance with the requirements set forth in the UW Notice.

Pretrial Order No. 28 at ¶2.

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *8 (S.D.N.Y. Dec. 23, 2009); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995) (certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants"). The proposed Settlement Classes meet all the requirements of Rule 23(a) and Rule 23(b)(3).

*First*, the numerosity requirement of Rule 23(a)(1) is satisfied because the number of members for each Settlement Class is likely to be in the thousands. Thus, the members of the Settlement Classes are sufficiently numerous that joinder of all members would be impracticable. *See, e.g., Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 175 (S.D.N.Y. 2008) (class of shareholders numbering in hundreds or thousands satisfied the numerosity requirement).

*Second*, the commonality requirement of Rule 23(a)(2) is readily satisfied. The claims alleged present many questions of law and fact which are common to all members of each Settlement Class, including, *inter alia*: (i) whether the federal securities laws were violated by the Defendants' acts and omissions as alleged in the Complaint; (ii) whether the statements in the offering materials or other statements by Defendants were materially false and misleading; and (iii) the extent to which the members of the Settlement Classes have sustained damages and the proper measure of damages. *See In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 85 (S.D.N.Y. 2007) (commonality requirement satisfied where "putative class members have been injured by similar material misrepresentations and omissions"); *In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 374 (S.D.N.Y. 2000) ("Where the facts as alleged show that Defendants' course of conduct concealed material information from an entire putative class, the commonality requirement is met.").

*Third*, the typicality requirement of Rule 23(a)(3) is established because "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (citation omitted); *see also Oxford Health Plans*, 191 F.R.D. at 375. The claims

of Lead Plaintiffs and the other proposed Settlement Class Representatives are based on the same theories and would be proven by the same evidence as the claims of absent class members.

*Fourth*, the adequacy requirement of Rule 23(a)(4) is satisfied because the claims of the Lead Plaintiffs and the other Settlement Class Representatives do not conflict with those of other Settlement Class members, and Lead Counsel are qualified, experienced, and generally able to conduct the litigation. *See Marsh & McLennan*, 2009 WL 5178546, at *10; *Oxford Health Plans*, 191 F.R.D. at 376; *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992).

Finally, the predominance and superiority requirements of Rule 23(b)(3) are also satisfied. There are numerous common issues relating to the liability of Defendants which predominate over any individualized issues. In addition, class certification is the superior method of litigating the Settlement Class members' claims. *See Marsh & McLennan*, 2009 WL 5178546, at *12 (recognizing that the "class action is uniquely suited to resolving securities claims," because "the prohibitive cost of instituting individual actions" in such cases gives class members "limited interest in individually controlling the prosecution or defense of separate actions"); *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 139 (S.D.N.Y. 2008) ("as a general rule, securities fraud cases 'easily satisfy the superiority requirement [as] [m]ost violations of the federal securities laws . . . inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible'"). Moreover, the manageability concerns of Rule 23(b)(3) are not at issue in a class certified for settlement purposes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593, 117 S. Ct. 2231, 2235 (1997) ("Whether trial would present intractable

management problems . . . is not a consideration when settlement-only certification is requested").

## IV. NOTICE TO THE SETTLEMENT CLASSES SATISFIED THE REQUIREMENTS OF THE PSLRA, RULE 23 AND DUE PROCESS

The notice provided to the Settlement Classes satisfied the requirements of both 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), and Rule 23(e)(1), which requires that notice of a settlement be "reasonable." Fed. R. Civ. P 23(e)(1).[11]

Both the substance of the Notices and the method of their dissemination to potential members of the Settlement Classes satisfied these standards. Each of the Court-approved Notices included all the information required by Rule 23(c)(2)(B) and the PSLRA, 15 U.S.C. §§ 77z-1(a)(7), 78u-4(a)(7), including: (i) an explanation of the nature of the Action and claims; (ii) a definition of the Settlement Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of the right to opt-out of the Settlement Class or object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on members of the Settlement Class.

As noted above, in accordance with the Court's Notice Orders, since January 18, 2012, the claims administrator has mailed over 800,000 copies of the Notice Packet by first-class mail to potential members of the Settlement Classes. Cirami Aff. ¶11. In addition, Lead Plaintiffs

[11] 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.

have caused the Summary Notice to be published in *Investor's Business Daily* and the national edition of *The Wall Street Journal*, and copies of the Notices and Claim Form have been made available on a dedicated settlement website maintained by GCG and on Lead Counsels' websites. Cirami Aff. ¶¶12, 14; Joint Decl. ¶¶94-95.

This combination of individual first-class mail to all Settlement Class members who could be identified with reasonable effort, supplemented by notice in widely-circulated publications and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., FLAG Telecom*, 2010 WL 4537550, at *13; *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008); *Global Crossing*, 225 F.R.D. at 448-49.

## CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlements as fair, reasonable and adequate; approve the Plans of Allocation as fair and reasonable; and certify the Settlement Classes and Settlement Class Representatives for purposes of the Settlements.

Dated: March 8, 2012

Respectfully submitted,

**BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP**

*/s/ David R. Stickney*
DAVID R. STICKNEY

MAX W. BERGER
STEVEN B. SINGER
1285 Avenue of the Americas, 38th Floor
New York, NY 10019
Telephone: (212) 554-1400
Facsimile: (212) 554-1444
-and-

DAVID R. STICKNEY
BRETT MIDDLETON
JON F. WORM
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Telephone: (858) 793-0070
Facsimile: (858) 793-0323

**KESSLER TOPAZ**
**MELTZER & CHECK, LLP**

*/s/ David Kessler*
DAVID KESSLER

DAVID KESSLER
JOHN A. KEHOE
JENNIFER L. ENCK
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7707
Facsimile: (610) 667-7056

*Co-Lead Counsel for Lead Plaintiffs and the Settlement Classes*