UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION This Document Applies To: *In re Lehman Brothers Equity/Debt Securities Litigation*, 08-CV-5523 (LAK)	This document relates to ECF No. 341 in 08-CV-5523 ECF No. 805 in 09-MD-2017 Case No. 09-MD-2017 (LAK) ECF CASE

LEAD COUNSEL'S REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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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 between June 12, 2007, and September 15, 2008, through

ABBREVIATION	DEFINED TERM
	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
"*Equity/Debt* Action" or "*Equity/Debt*"	*In re Lehman Brothers Equity/Debt Securities Litigation*, 08 Civ. 5523 (LAK)
"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
"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"	Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (ECF No. 342)
"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
"Girard Gibbs"	Girard Gibbs LLP (f/k/a Girard, Gibbs & De Bartolomeo, LLP)
"GGRF"	Government of Guam Retirement Fund
"Joint Declaration" or "Joint Decl."	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 (ECF No. 342)

ABBREVIATION	DEFINED TERM
"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
"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
"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
"SEC"	Securities and Exchange Commission
"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
"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

ABBREVIATION	DEFINED TERM
	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; 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. 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.
"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"	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 (ECF No. 340)
"Settlements"	The D&O Settlement ($90,000,000), the First Underwriter Settlement ($417,000,000), and the Second Underwriter Settlement ($9,218,000), collectively

ABBREVIATION	DEFINED TERM
"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
"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 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

ABBREVIATION	DEFINED TERM
	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

Lead Counsel respectfully submit this reply memorandum of law in further support of their Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses. (ECF No. 341).[1]

INTRODUCTION

As set forth in their opening papers, Lead Counsel have successfully achieved two recoveries on behalf of the Settlement Classes – $90,000,000 in cash from the D&O Defendants and $426,218,000 in cash from the Settling Underwriter Defendants. Both recoveries are particularly remarkable because no claims of any kind were ever brought by the SEC or any governmental agency (much less convictions or civil recoveries) against any of the Defendants for violations of any federal or state securities laws arising out of the events at issue in this Action. Both Settlements were achieved only through the substantial efforts of Lead Counsel who, together with the additional Plaintiffs' Counsel, devoted nearly four years and over 91,000 hours prosecuting and resolving this Action, all on a purely contingent fee basis. For their extensive efforts on behalf of the Settlement Classes, Lead Counsel respectfully request an award of attorneys' fees in the amounts of 16% of the D&O Settlement Amount and 16% of the Underwriter Settlement Amount and reimbursement of expenses in the amount of $1,619,669.27 (the "Fee and Expense Application"), to be paid *pro rata* from the Settlement Amounts. To put the fee request into context, it represents a reasonable lodestar multiplier of approximately 2.18 – well within the range approved by this and other courts in complex securities actions.

The positive reaction of the Settlement Classes also supports approval of the requested fee. Through publication and direct mail to potential Settlement Class members, Lead Counsel notified them of the application for an award of attorneys' fees not to exceed 17.5% of each of

[1] For defined terms, Lead Counsel respectfully refer the Court to the "Table of Abbreviations" set forth above at pages iv-ix.

the Settlement Amounts, plus reimbursement of their litigation expenses not to exceed $2.5 million. Likewise, the Fee and Expense Applications themselves were filed with the Court on March 8, 2012, and posted on the settlement websites established by Lead Counsel on March 9, 2012. The deadline for submitting objections has elapsed; and after dissemination of over 900,000 copies of the Notice Packet, no objections have been received related to the Underwriter Settlement application, and only ***four*** objections have been received related to the D&O Settlement application.[2] Moreover, despite widespread institutional holdings of Lehman securities, none of the objections were submitted by institutional investors.

As explained below, the objections are devoid of merit. Mr. Andrews' rambling 95-page objection accuses Lead Counsel, the Honorable John S. Martin and others of various conspiracies and improprieties. Stripped of its vitriol, however, the objection ignores and mischaracterizes the record and raises unfounded points that are easily addressed. The second objection does not dispute the amount of the fee application for the D&O Settlement; rather, the objector believes that the Settling Defendants should separately pay such fees. Smith Obj. at 1. The final identical objections assert generally that attorneys' fees are "out of control," and the objectors apparently harbor the misunderstanding that fees somehow increase "as the case drags on" when, in truth, Plaintiffs' Counsel's interest in maximizing the recovery is perfectly aligned with that of the Settlement Classes. Putnam Obj. at 2.

[2] For the Court's convenience, redacted copies of the objections are provided in the accompanying Compendium of Objections. Herein, Chris Andrews' objection is referred to as "Andrews Obj." and Ronald R. Smith's as "Smith Obj." Randy Putnam and Judith Putnam submitted two, identically-worded objections. For ease of reference, they are addressed herein as a single objection, the "Putnam Obj."

I. THE REQUESTED FEE, REPRESENTING A 2.18 LODESTAR MULTIPLIER, IS FAIR, REASONABLE AND WARRANTS APPROVAL

As detailed in Lead Counsel's Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Fee Memorandum") (ECF No. 342), application of each of the *Goldberger* factors strongly supports Lead Counsel's Fee and Expense Applications.[3] A 2.18 lodestar multiplier, reflecting a 16% fee award, is not only appropriate under the facts and circumstances of this case, but is well within the range of fees that courts throughout the Second Circuit have found to be fair and reasonable. *See* Fee Memorandum at § 1(C); Joint Decl. Ex. 8 (collecting decisions from 83 settlements of securities class actions for amounts between $100 million and $1 billion, reflecting ranges from 15.33% to 21.6%).

Moreover, the lodestar "crosscheck" confirms the reasonableness of Lead Counsel's fee request, particularly in view of the substantial litigation risks and the results achieved. Plaintiffs' Counsel have collectively devoted nearly four years and over 91,000 hours in connection with the prosecution and/or resolution of this Action against the Settling Defendants, all of which was reasonably necessary and appropriate to achieve the Settlements. *See* Fee Memorandum at § 1(D)(1). The requested fee award results in a multiplier of 2.18 to Plaintiffs' Counsel's lodestar (*i.e.*, $37,819,510), which falls squarely within the range of multipliers awarded in complex securities cases of a similar size. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk

[3] *Goldberger* sets forth the following criteria for courts to consider when analyzing fee applications in a common fund case: (1) the magnitude and complexities of the action; (2) the litigation risks involved; (3) the quality of class counsel's representation; (4) the size of the requested fee in relation to the recoveries obtained; (5) the time and labor expended by class counsel; and (6) public policy considerations. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors."). Consequently, for the reasons set forth in the Fee Memorandum and herein, the Fee and Expense Applications should be approved in their entirety.

II. THE OVERWHELMINGLY POSITIVE REACTIONS OF THE SETTLEMENT CLASSES SUPPORT THE FEE REQUEST, AND THE FEW OBJECTIONS LACK MERIT

The class's reaction to a request of attorneys' fees is entitled to significant weight by the Court. *See Flag Telecom*, 2010 WL 4537550, at *29 (noting that the lack of objection from members of the class is one of the most important factors in determining the reasonableness of a requested fee); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) ("overwhelmingly positive response by the Class attests to the approval of the Class with respect to the Settlement and the fee and expense application"). Here, following publication of the Notices, settlement website posting and direct mailing of over 900,000 Notice Packets alerting members of the Settlement Classes that Lead Counsel would be applying for fees not to exceed 17.5% of each of the Settlement Amounts, not a single member of the Underwriter Settlement Class objected, and Lead Counsel are applying for a lesser amount. The uniform reaction from the Underwriter Settlement Class strongly supports Lead Counsel's application.

Likewise, there are only ***four*** objections to the fee application for the D&O Settlement, each from individual investors, representing a tiny fraction of the D&O Settlement Class. There are no objections from institutional investors. Such overwhelmingly positive reaction from the D&O Settlement Class to Lead Counsel's fee and expense request further supports approval of the application.[4]

[4] *See, e.g.*, *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *22 (S.D.N.Y. Dec. 23, 2009) (finding strong support for fee request where notice was sent to hundreds of thousands of prospective class members and only two objections to the fee request were submitted); *In re Xcel Energy, Inc., Sec., Derivative & ERISA Litig.*, 364 F.

A. Andrews Objection

Mr. Andrews submits a "kitchen sink" objection, asserting unfounded accusations and largely ignoring the record. He accuses Plaintiffs' Counsel of creating fictitious clients, breaching fiduciary duties and over-reporting their time. Mr. Andrews also accuses Judge Martin of malfeasance and speculates that he received a "success kicker" for his conclusions. Andrews Obj. at 8. Likewise, Mr. Andrews demands that the Court disqualify itself for even considering approval of the D&O Settlement due to "material misrepresentations and lack of proper procedures in handling this case." Andrews Obj. at 42.

First, Mr. Andrews characterizes the case against the D&O Defendants as a "slam dunk" based on the Examiner's Report, making all of Plaintiffs' Counsel's efforts following the Examiner's Report purportedly unnecessary. Andrews Obj. at 10-12. Mr. Andrews ignores that Defendants moved to dismiss the Complaint based on non-frivolous arguments (certain of which prevailed) and that Defendants themselves affirmatively relied on the Examiner's Report, claiming that it contained exonerating facts. *See* Fee Memorandum at § I(D)(2)(b)(1). Had this case been the "slam dunk" that Mr. Andrews suggests, the Department of Justice and the SEC undoubtedly would have asserted claims against one or more of the Settling Defendants, but they have not. Moreover, Mr. Andrews also ignores that the Examiner's Report did not specifically address causation or additional issues germane to claims under the federal securities laws.

By assuming the case is a "slam dunk," Mr. Andrews disregards the risks that pervaded Lead Plaintiffs' case against the D&O Defendants and which remained following the issuance of

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Supp. 2d 980, 996-99 (D. Minn. 2005) (where seven objectors from a class of 265,000 objected to attorneys' fees, the court found this to be a "minuscule number" that demonstrated that the class supported the fee award); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 103 (S.D.N.Y. 1996) (court determined that an "isolated expression of opinion" with respect to the settlement and fee request should be considered "in the context of thousands of class members who have not expressed themselves similarly"), *aff'd*, 107 F.3d 3 (2d Cir. 1996).

the Examiner's Report. From the outset of the Action, the D&O Defendants asserted significant arguments and defenses, *see* Fee Memorandum at § 1(D), which, in addition to the substantial funding risk, affected Lead Plaintiffs' chances of obtaining a recovery anywhere near the D&O Settlement Amount after continued litigation.

While Mr. Andrews contends that Plaintiffs' Counsel should have just relied exclusively on the Examiner's Report and that all of the work performed after its issuance was unnecessary (Andrews Obj. at 13), he fails to recognize that analyzing the Examiner's Report and available exhibits was only one aspect of prosecuting the claims. Mr. Andrews does not mention the extensive efforts of Plaintiffs' Counsel, and their resulting $7.25 million lodestar, for the nearly two years of litigation ***before*** issuance of the Examiner's Report. Joint Decl. at ¶111. And, as detailed in the Joint Declaration, the prosecution and successful resolution necessarily went far beyond reviewing the Examiner's Report; it required substantial effort on Plaintiffs' Counsel's behalf to successfully oppose the thorough motions to dismiss filed by the Settling Defendants (*id.* at ¶¶25-29), to independently develop legal theories (including loss causation) and a strong record through close consultation with experts (*id.* at ¶¶35-40), to prepare detailed and well-supported mediation briefs and present at multiple, in-person mediation sessions (*id.* at ¶¶56-61, 73-76), to navigate complex issues in the context of the ongoing bankruptcy (*id.* at ¶¶41-42), to negotiate detailed settlement agreements and prepare plans of allocation (*id.* at ¶¶62-66, 77-83, 98-104), and to perform all of the required additional tasks against well-represented Defendants in order to obtain the recoveries. Clearly, Plaintiffs' Counsel's work did not end with the Examiner's Report as Mr. Andrews suggests.

In this regard, Lead Counsel pushed for and successfully obtained the vast majority of the wasting insurance proceeds, despite arbitration awards and competing claims that were well in

excess of the available insurance coverage, which we respectfully submit was extraordinary under the circumstances. Even after negotiating for such recovery, Lead Counsel insisted upon the retention of a highly-respected neutral to confirm the Officer Defendants' liquid net worth in order to evaluate the fairness of the recovery in light of alternative potential sources of recovery other than insurance. Thus, Mr. Andrews' contention that the recovery was guaranteed once the Examiner's Report was issued is simply baseless.

Second, Mr. Andrews speculates that Plaintiffs' Counsel have engaged in overbilling and duplicative billing. Andrews Obj. at 14, 15 and 24. Such contentions are based on his mistaken belief that the work performed by Plaintiffs' Counsel was limited to work on behalf of each law firm's individual clients and that multiple firms performed duplicative work on behalf of the same clients. Andrews Obj. at 12, 24. To the contrary, as described in great detail in the Joint Declaration and the Fee Memorandum, Plaintiffs' Counsel's work contributed to the overall prosecution and resolution of claims against the Settling Defendants and was done, not only on behalf of specific clients, but for the collective benefit of the Settlement Classes.

At the outset of the litigation, the Court established protocols through Pretrial Order No. 1, charging the Executive Committee and its Chair with monitoring the work of Plaintiffs' Counsel in order to avoid duplication and promote efficiency. As explained in the opening papers, Lead Counsel maintained control over the work performed by the attorneys and paraprofessionals on this case by regularly obtaining lodestar reports from Plaintiffs' Counsel, preparing nine confidential periodic reports regarding work performed at the direction of Lead

Counsel, and approving only the time necessary for actions undertaken at the specific direction or with the permission of the Chair of the Executive Committee or the Executive Committee.[5]

Third, Mr. Andrews further contends that Plaintiffs' Counsel used inflated hourly rates. Andrews Obj. at 13-14. To the contrary, Lead Counsel's rates are based on their annual survey of the market rates for practitioners in the field using available sources and are comparable to, or less than, the known hourly rates charged by defense counsel. Joint Decl. at ¶112. Putting aside the contingency fee arrangement and that Plaintiffs' Counsel were not billing or being compensated on a regular basis, the hourly rates of the attorneys and paraprofessionals involved in this Action as set forth in Plaintiffs' Counsel's individual firm declarations (*see* Exhibits 7A-7N to the Joint Declaration) have been accepted in other securities or shareholder litigation in this District and elsewhere.[6]

Fourth, after accusing Plaintiffs' Counsel of billing at inflated rates, Mr. Andrews insists that the Fee and Expense Applications should have allocated such time between the Settling Defendants in this multi-defendant litigation. Andrews Obj. at 13. Such allocation is not possible as the work, detailed extensively in the Joint Declaration, was for and benefitted both

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[5] Mr. Andrews also questions the role of certain counsel on Plaintiffs' Executive Committee (*i.e.*, Gainey & McKenna and Wolf Haldenstein Adler Freeman & Herz LLP) in the allocation of work in this Action. Andrews Obj. at 22. As set forth in Pretrial Order No. 1, Plaintiffs' Executive Committee is comprised of not only lead counsel in the *Equity/Debt* Action, but also lead counsel in the ERISA Action and the MBS Action. In accordance with the process set up by this Court, Lead Counsel for the ERISA Action - Gainey & McKenna and Wolf Haldenstein Adler Freeman & Herz LLP - and lead counsel in the MBS Action - Cohen Milstein Sellers & Toll, PLLC - are each responsible for allocating work assignments in their respective cases and not in the *Equity/Debt* Action. More importantly, none of these firms have submitted any time in connection with the instant Fee and Expense Applications.

[6] *See* Joint Decl. at ¶112 (explaining rates). The hourly rates for Lead Counsel have been approved by Judge Rakoff (*Pub. Emps. Ret. Sys. of Miss. v. Merrill Lynch & Co. Inc*., No. 08-cv-10841-JSR-JLC); Judge Jones (*In re Satyam Computer Servs. Ltd. Sec. Litig.*, No: 09-MD-2027-BSJ), and Judge Sullivan (*In re Wachovia Preferred Sec. and Bond/Notes Litig.*, Master File No. 09 Civ. 6351 (RJS)), in the Southern District of New York in fee applications submitted and approved in 2011 or 2012.

the D&O Settlement Class and the Underwriter Settlement Class. Courts recognize the inherent difficulty in allocating time incurred in connection with the prosecution of a case against multiple defendants where the work performed benefits multiple classes as a whole.[7] Thus, Mr. Andrews' argument that the separation of time is required for this Court to opine on the fairness of the Fee and Expense Applications is without merit.

Finally, Mr. Andrews attempts to rely on the Ninth Circuit's inapposite decision in *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). *Bluetooth* involved neither a securities class action nor a common fund settlement. Rather, it involved products liability, and the settlement required additional disclosures of safety information, a *cy pres* payment to non-profit organizations, and a payment of $800,000 in attorneys' fees to plaintiffs' counsel, which, if not approved by the Court, would revert to defendants. The Ninth Circuit was unable even to perform a lodestar evaluation because the record failed to disclose information about hours and rates. *Id*. at 943.

In stark contrast, Plaintiffs' Counsel have submitted detailed firm-by-firm and lawyer-by-lawyer information as to the hours devoted to the case and the billing rates of each lawyer and paraprofessional. Furthermore, unlike *Bluetooth,* Plaintiffs' Counsel recovered a $90 million fund for the benefit of the D&O Settlement Class. The Ninth Circuit's concern that the class

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[7] *See, e.g.*, *In re Parmalat Sec. Litig.*, Case No. 04 MD 1653 (LAK), transcript at 12 (S.D.N.Y. Mar. 2, 2009), ECF No. 1689. To counsels' knowledge, in every securities class action involving separate settlements with multiple defendants and a common course of conduct, there was no unscrambling of the work performed because such efforts inherently advance the claims against all defendants. For example, there was no unscrambling of time in the separate settlements in *In re WorldCom, Inc. Sec. Litig*., No. 02 Civ. 3288 (DLC) (S.D.N.Y. 2004 & 2005); *In re Wachovia Preferred Sec. & Bond/Notes Litig.*, No. 09 Civ. 6351 (RJS) (S.D.N.Y. 2011); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, No: 09-MD-2027-BSJ (S.D.N.Y. 2011); *In re Refco, Inc. Sec. Litig.*, No. 05 Civ. 8626 (JSR) (S.D.N.Y. 2010 & 2011), or *In re Bennett Funding Grp., Inc. Sec. Litig.*, No. 96-CIV-2583 (JES) (S.D.N.Y. 2003).

received no monetary distribution while counsel would "receive a disproportionate distribution of the settlement," simply does not exist. *Bluetooth*, 654 F. 3d at 947.

Equally without merit is Mr. Andrews' attempted criticism of the provision in the D&O Settlement, in which Defendants take no position with respect to the amount of attorneys' fees to be sought from the D&O Settlement Amount. Andrews Obj. at 49-50. The "clear sailing" provision in *Bluetooth* is different because the settlement there provided for the payment of attorneys' fees ***separate and apart*** from class funds, which, according to the Ninth Circuit, carried "the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class." *Bluetooth*, 654 F.3d at 947. Here, there is no separate attorneys' fee fund, and there is no agreement with Defendants on the amount of fees and, unlike in *Bluetooth*, there is no reversion of funds to Defendants.

Furthermore, far from being disfavored, "clear sailing" agreements in class actions are generally well-received. Absent such agreements, settling defendants may attempt retribution against plaintiffs' counsel for exacting a costly settlement. Such provisions, therefore, are common and routinely approved. As the Second Circuit stated in *Malchman v. Davis*, abrogated on other grounds by *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), "settlements of disputes must be encouraged" and "[a]bsent special circumstances, … the negotiation of attorneys' fees cannot be excluded from this principle" (citations omitted).[8] Indeed, Fed. R. Civ. P. 23(h) provides that in a class action the court may

[8] 761 F.2d 893, 905 (2d Cir. 1985). In *Malchman*, an antitrust case where the settlement provided a separate amount for plaintiffs' attorneys' fees and included a "clear sailing" clause, the Second Circuit upheld the District Court's award of attorneys' fees. With respect to "clear sailing" provisions, Judge Oakes, the author of the Court's majority opinion, stated that "an agreement 'not to oppose' an application for fees up to a point is essential to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." *Id*. at 905 n.5; s*ee also Blatt v. Dean Witter Reynolds*

award attorneys' fees that are authorized "by the parties' agreement," and the Advisory Committee's 2003 notes on Rule 23(h) state: "The agreement by a settling party not to oppose a fee application up to a certain amount . . . is worthy of consideration."[9]

Mr. Andrews' remaining objections related to the D&O Settlement Fee and Expense Application are equally baseless and should be overruled.

B. Smith Objection

Mr. Smith does not object to the amount of fees but believes these fees and expenses should be paid by Defendants ***in addition*** to the Settlement Amounts. Smith Obj. at 1. Where, as here, Lead Counsel have created a common fund, Supreme Court and Second Circuit precedent clearly provide for payment of attorneys' fees and expenses from the common fund created. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 759 (1980) (noting that courts have 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" and citing 100 years of precedent); *In re Veeco Instruments Inc. Sec. Litig.*, MDL No. 05-1695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) ("[f]ees and

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Intercapital, Inc., 732 F.2d 304, 306-07 (2d Cir. 1984) (affirming fee award, where the defendant had agreed it would not object to a fee application); *In re Excess Value Ins. Coverage Litig.*, No. M-21-84RMB, MDL-1339, 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004) ("Nor does the so-called 'clear sailing agreement' by Defendants not to oppose Class Counsel's Fee Application bar approval of the Settlement, where, as here, the Court has strictly scrutinized both the process and substance of the Settlement.").

[9] *See also* 5 NEWBERG ON CLASS ACTIONS § 15:34 (4th ed. 2002) (footnote omitted):

> [A]n agreement by the defendant to pay such sum of reasonable fees as may be awarded by the court, and agreeing also not to object to a fee award up to a certain sum, is probably still a proper and ethical practice. This practice serves to facilitate settlements and avoids a conflict, and yet it gives the defendant a predictable measure of exposure of total monetary liability for the judgment and fees in a case. To the extent it facilitates completion of settlements, this practice should not be discouraged.

expenses are paid from the common fund so that all class members contribute equally towards the costs associated with litigation pursued on their behalf.").

C. Putnam Objection

The Putnams generally assert that the requested fees and expenses are "completely out of control." Putnam Obj. at 2. Such objection provides no grounds to deny the Fee and Expense Application, particularly because Lead Counsel have amply supported it with declarations and case law. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 378 (D.D.C. 2002) (rejecting broad, unsupported objections because "[they] are of little aid to the Court in determining whether these settlements are fair, adequate, and reasonable"). Further, the Putnams state that "[a]s the case drags on, [the attorneys'] piece of the pie continues to grow and the claimant's settlement fund continues to shrink." To the contrary, Plaintiffs' Counsel only recover if they achieve a successful result, and the risk of receiving nothing after years of litigation was very real. *See, e.g.*, Joint Decl. at ¶122. By applying for a percentage of the recovery, Plaintiffs' Counsel's interest is perfectly aligned with members of the Settlement Classes. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (stating that the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation" and noting that the "trend in this Circuit is toward the percentage method.") (citation omitted).

III. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NEEDED TO ACHIEVE THE SETTLEMENTS

"It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class." *Flag Telecom*, 2010 WL 4537550, at *30. As explained in Lead Counsel's opening papers, the expenses incurred were appropriate

and necessary to the advancement and ultimate resolution of the Action against the Settling Defendants.[10]

Nevertheless, Mr. Andrews questions certain expenses included in the Fee and Expense Application. Andrews Obj. at 14-15, 26-27. The overwhelming majority of Plaintiffs' Counsel's expenses relate to experts that were reasonably necessary to prosecute and resolve the claims. *See* Joint Decl. at ¶135. While Mr. Andrews demands greater particularity in the identification of separate experts, providing such information is unnecessary and actually against Mr. Andrews' interests and the interests of the D&O Settlement Class because of the ongoing case against E&Y and UBSFS. Lead Counsel will identify their experts in accordance with the schedule that will be established by the Court.

The expert and mediator/neutral expenses for which Lead Counsel seek reimbursement reflect only what Lead Counsel were billed. The amount for mediation services over the course of protracted negotiations total $238,236.80, and the amount for the neutral's services (along with the investigation firm that assisted in the evaluations) is $82,755.78.

Finally, Mr. Andrews objects to the per page copying costs. The costs are appropriate, and numerous Courts in this District have approved similar or higher reimbursement costs. *See infra,* note 6 (listing recent cases and courts that accepted similar or higher reimbursement).

[10] In class action settlements nationwide, litigation costs and expenses average about 2.8 percent of the total recovery. *See Velez v. Novartis Pharms. Corp.*, 04 Civ. 09194 (CM), 2010 WL 4877852, at *24 (S.D.N.Y. Nov. 30, 2010).

IV. CONCLUSION

For all of the reasons set forth above and in the their opening papers, Lead Counsel respectfully request that the Court approve their Fee and Expense Application.

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