UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DODONA I, LLC, on Behalf of Itself and All Others Similarly Situated,	:	Case No. 10 Civ. 7497 (VM)(DCF)
	:	ECF Case
Plaintiff,	:	Class Action
v.	:	
GOLDMAN, SACHS & CO., et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Lead Plaintiff Dodona I, LLC ("Plaintiff"), on behalf of itself and the Settlement Class,[1] respectfully submits this memorandum in support of its accompanying motion for final approval of the proposed Settlement and Plan of Allocation. The Settling Parties' agreed-upon proposed Final Judgment approving the Settlement, and a proposed Order Approving the Plan of Allocation, are attached as Exhibits 1 and 2, respectively, to Plaintiff's accompanying motion.

I. INTRODUCTION

The proposed $27.5 million Settlement represents an excellent recovery for the Settlement Class. It provides a significant and assured cash recovery for the Settlement Class while eliminating the substantial risk and uncertainty of continued litigation.

The Settling Parties reached the Settlement after over five years of hard-fought litigation and extensive proceedings involving an independent mediator, David Brodsky of Brodsky ADR LLC ("Brodsky"). The proposed Settlement was reached after Plaintiff was fully informed about the strengths and weaknesses of its case, and in circumstances where the Court previously dismissed the claims in part on Defendants' motions to dismiss, and *despite* the Court's ruling dismissing Plaintiff's remaining claims on summary judgment.

Notice of the Settlement has been given to the Settlement Class consistent with the Preliminary Approval Order (Dkt. 276), Fed. R. Civ. P. 23, the PSLRA, and due process. To date, no Settlement Class Members have submitted objections or requests to be excluded from the Settlement Class. The Plan of Allocation proposes to distribute the Net Settlement Fund to Authorized Claimants on a *pro rata* basis depending on the losses suffered and other factors, and is also fair. The proposed Settlement and Plan of Allocation should be approved.

---

[1] Capitalized terms not otherwise defined have the meaning set forth in the parties' Stipulation and Agreement of Settlement dated as of Feb. 11, 2016 (the "Stipulation") filed previously with the Court. *See* Dkt. 273-1.

II. SUMMARY OF THE ACTION[2]

On Sept. 30, 2010, Plaintiff filed a class action complaint (Dkt. 1) against Defendants and the Hudson Entities on behalf of investors in the Hudson CDOs. By Order entered Dec. 7, 2010 (Dkt. 36), the Court appointed Plaintiff as the lead plaintiff and Berger & Montague, P.C. as Plaintiff's Lead Counsel. Plaintiff was the only applicant for lead plaintiff. ¶ 17.

On Feb. 4, 2011, Plaintiff filed an amended class action complaint (Dkt. 40) against Defendants and the Hudson Entities. In April 2011, Defendants and certain of the Hudson Entities filed motions to dismiss (Dkt. 48 and 53), which Plaintiff opposed (Dkt. 62 and 63). By Order entered Mar. 21, 2012 (Dkt. 73), the Court granted in part and denied in part those motions. *See Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624 (S.D.N.Y. 2012).

On May 21, 2012, Defendants and the Hudson Entities filed Answers to the amended complaint. Dkt. 81, 85, 86, 88. Defendant GS&Co also filed counterclaims against Plaintiff. Dkt. 81. On July 23, 2012, Plaintiff filed its Answer to GS&Co's counterclaims. Dkt. 91. On Dec. 14, 2012, the Court approved the voluntary dismissal of the Hudson Entities without prejudice given, *inter alia*, their inability to satisfy any judgment and continued obligation to provide discovery. *See* Dkt. 104 ECF 4-5 ¶¶ 2-6.

The Settling Parties engaged in extensive discovery. ¶¶ 28-62. Among other things, Plaintiff obtained over 1.5 million pages of documents from Defendants and multiple non-parties; deposed 18 current or former Goldman employees and each of Defendants' three experts (two of whom Plaintiff deposed twice) and defended the depositions of Plaintiff and Plaintiff's expert; participated in several other non-party depositions noticed by Defendants; took a Fed. R.

---

[2] This Memorandum summarizes only some of the events in this Action. A more detailed description of this Action is set forth in the Declaration of Lawrence J. Lederer (the "Lederer Decl.") filed contemporaneously herewith. References in this Memorandum to "¶ __" are to paragraphs in the Lederer Decl.

Civ. P. 30(b)(6) deposition of Goldman; and obtained thousands of pages of additional relevant documents from non-parties and others, including internal Goldman emails and other documents that were released publicly by the U.S. Senate's Permanent Subcommittee on Investigations (the "PSI") which had conducted an investigation of Goldman's mortgage securities activities and issued a detailed report that included findings concerning the Hudson 1 CDO and other investment products and practices. ¶¶ 28-30, 40-41, 45.

On Dec. 17, 2012, Plaintiff moved to certify the Class (Dkt. 107), which Defendants opposed (Dkt. 119). Thereafter, the parties submitted additional argument concerning class certification and Defendants' request to strike the rebuttal report of Plaintiff's expert, Dr. Joseph Mason ("Mason"). Dkt. 128, 130-132, 134-137. By Order entered Jan. 23, 2014 (Dkt. 138), the Court certified the Class and appointed Plaintiff as the Class representative and Lead Counsel as Class counsel. *See Dodona I, LLC v. Goldman, Sachs & Co.*, 296 F.R.D. 261 (S.D.N.Y. 2014).

On Feb. 6, 2014, Defendants filed with the U.S. Court of Appeals for the Second Circuit a Rule 23(f) petition for permission to appeal the Court's Class certification ruling which Plaintiff opposed. *See Goldman, Sachs & Co. v. Dodona I, LLC*, No. 14-419 (2d Cir.). By Order on June 27, 2014 (*see* Dkt. 162), the Second Circuit denied Defendants' petition.

On Jan. 30, 2015, Defendants filed motions for summary judgment (Dkt. 189, 193, 197), which Plaintiff opposed (Dkt. 206, 208, 210). Beginning in Mar. 2015, the Settling Parties engaged in a mediation process conducted by Brodsky. By Order on Sept. 8, 2015 (Dkt. 264) (the "Sept. 8 Order"), the Court granted in part and denied in part Defendants' motions for summary judgment, and dismissed Plaintiff's remaining claims in their entirety.

Following the Court's Sept. 8 Order, the Settling Parties continued their mediation efforts. ¶ 85. On Nov. 3, 2015, Plaintiff advised the Court that the Settling Parties had accepted

the mediator's proposal to settle the Action subject to entering into a formal settlement agreement and other documents and Court approval pursuant to Fed. R. Civ. P. 23. Dkt. 272.

III. THE PROPOSED SETTLEMENT AND NOTICE PROGRAM

The proposed $27.5 million Settlement provides that Authorized Claimants will be paid their share of the Net Settlement Fund on a *pro rata* basis depending on the losses suffered and other factors, including the aggregate value of all valid Proofs of Claim consistent with the Plan of Allocation. The proposed Plan of Allocation is set forth in the Notice. *See* Notice (Dkt. 273-1 ECF 67-68) at ¶¶ 82-89.

Among other things, the Notice also describes the terms of the Settlement, including that the Net Settlement Fund will be distributed to Settlement Class Members who submit valid and timely Proofs of Claim pursuant to the Plan of Allocation subject to the Court's approval (*id.*); advises Settlement Class Members of Lead Counsel's application for attorneys' fees and litigation costs and expenses, and the procedures for objecting to the Settlement, the Plan of Allocation, and/or the request for attorneys' fees and expenses, and the date, time, and location of the Final Approval Hearing (*id.* ¶¶ 5, 63, 74-76); and advises Settlement Class Members how they may exclude themselves from the Settlement (*id.* ¶ 69).

In accord with the Court's Preliminary Approval Order, Lead Counsel oversaw the dissemination of notice of the proposed Settlement. ¶¶ 94-97. Beginning on Mar. 1, 2016, the Claims Administrator commenced the initial mailing of the Notice via first-class U.S. Mail to 236 potential members of the Settlement Class and their nominees. *See* Declaration of Edward Sincavage (the "Sincavage Decl.") (attached to Lederer Decl. as Ex. 2) ¶¶ 5-6.[3] An additional

[3] The Claims Administrator previously sent to Class members the First Notice regarding the pendency of this Action following the Court's certification of the Class. *See* Dkt. 181. The

230 copies were also provided to banks, brokerage houses, financial institutions and others. *Id.* ¶¶ 7-12. Thus, through May 10, 2016, the Claims Administrator mailed or caused to be mailed a total of 466 copies of the Notice. *Id.* ¶ 12. On Mar. 14, 2016, the Summary Notice was published in *The Wall Street Journal* and issued over the *PR Newswire*. *Id.* ¶ 15. The Claims Administrator also provided online access via its website to both the Notice and the Proof of Claim form, among other documents. *Id.* ¶¶ 4, 16.[4] This method of providing notice to the Settlement Class is consistent with the method approved by the Court in providing the First Notice to members of the Class. *See* Dkt. 181.

The May 27, 2016 deadline originally set by the Preliminary Approval Order for investors to exclude themselves from, or object to, the Settlement has not yet passed.[5] However, through May 10, 2016, no requests for exclusion or objections have been received. Sincavage Decl. ¶ 18; Lederer Decl. ¶ 8.

IV. ARGUMENT

The settlement of a class action must be approved by the court. Fed. R. Civ. P. 23(e). "A court may approve a class action settlement if it is 'fair, adequate, and reasonable, and not a product of collusion.'" *Deangelis v. Corzine*, No. 11-cv-7866, 2015 U.S. Dist. LEXIS 161107, at *39 (S.D.N.Y. Nov. 25, 2015) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d

---

Claims Administrator sent the Notice regarding the Settlement also to investors to whom it sent the First Notice plus others. Sincavage Decl. ¶¶ 6-8, 11-12.

[4] Lead Counsel also posted the Stipulation, Preliminary Approval Order, Notice and Proof of Claim form and other documents on its website. ¶ 95.

[5] *See* Dkt. 276 ¶¶ 12-13. By Order on Mar. 24, 2016 (Dkt. 277), the Court adjourned the Final Approval Hearing to July 1, 2016. Plaintiff intends to update the Court in reply or supplemental papers to be filed on or before June 24, 2016 and address any opt-outs or objections that may be received hereafter. *See* Dkt. 276 ¶ 15 (providing that reply papers "shall be filed and served no later than seven days prior to the Final Approval Hearing").

96, 116 (2d Cir. 2005)). "Courts look to both the settlement's terms and the negotiating process leading to settlement in determining the settlement's fairness." *Id.* (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Id.* (quoting *Wal-Mart*, 396 F.3d at 116).

The Second Circuit has recognized that there is a "strong judicial policy in favor of settlements, particularly in the class action context" and that "compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart*, 396 F.3d at 116-17. *See also In re WorldCom, Inc. Secs. Litig.*, 388 F. Supp. 2d 319, 337 (S.D.N.Y. 2005) ("[P]ublic policy favors settlement, especially in the case of class actions.").

The approval of a settlement "is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.'" *In re Giant Interactive Group, Inc.*, 279 F.R.D. 151, 159-60 (S.D.N.Y. 2011) (citation omitted). "Consequently, when evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'" *Wright v. Stern*, 553 F. Supp. 2d 337, 343-44 (S.D.N.Y. 2008) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974)). "Rather, the Court's responsibility is to reach an intelligent and objective opinion of the probabilities of ultimate success should the claims be litigated and to form an educated estimate of the complexity, expense and likely duration of such litigation and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.'" *Id.* at 344 (quoting *In re Met. Life Derivative Litig.*, 935 F. Supp. 286, 292 (S.D.N.Y. 1996)).

A. The Settlement is Procedurally Fair

"Class action settlements are entitled to a 'presumption of fairness, adequacy, and reasonableness' when 'reached in arms's-length negotiations between experienced, capable counsel after meaningful discovery.'" *In re Facebook, Inc. IPO Secs. & Derivative Litig.*, MDL No. 12-2389, 2015 U.S. Dist. LEXIS 152668, at *7 (S.D.N.Y. Nov. 9, 2015) (quoting *Wal-Mart*, 396 F.3d at 116) (citations omitted). *Accord In re Telik, Inc. Secs. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (settlements that are the product of "arm's-length negotiations conducted by experienced, capable counsel" enjoy a presumption of fairness).

Courts give counsel's opinion considerable weight because they are closest to the facts and risks associated with the litigation. *In re Hi-Crush Partners L.P. Secs. Litig.*, No. 12-cv-8557-CM, 2014 U.S. Dist. LEXIS 177175, at *13 (S.D.N.Y. Dec. 19, 2014) ("[Counsel's] opinion is entitled to great weight." (quotation marks and citations omitted)). The participation of a neutral mediator also "reinforces that the Settlement Agreement is non-collusive." *Johnson v. Brennan*, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011). *Accord In re Flag Telecom Holdings, Ltd. Secs. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *40 (S.D.N.Y. Nov. 5, 2010) ("[The] presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation"); *D'Amato*, 236 F.3d at 85 (the use of a mediator "helps to ensure that the proceedings were free of collusion and undue pressure").

Here, the Settlement was the result of arm's-length negotiations among experienced counsel well-versed in the strengths and weaknesses of the claims. ¶¶ 6, 112-113. The Settlement was reached after the completion of extensive fact and expert discovery concerning the parties' claims and defenses, and following the Court's ruling on Defendants' motions for summary judgment. The Settlement was not only a product of informed, arm's-length

negotiations, but also substantial proceedings conducted under the auspices of the Settling Parties' independent mediator, Brodsky. ¶¶ 7, 83-85. Accordingly, the proposed Settlement is procedurally fair.

B. The Settlement is Substantively Fair

In examining the fairness, adequacy, and reasonableness of a class settlement, courts in the Second Circuit consider the following factors:

> "(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 the litigation."

Deangelis, 2015 U.S. Dist. LEXIS 161107, at *40 (quoting *Grinnell*, 495 F.2d at 463); *see also Wal-Mart*, 396 F.3d at 117-19 (applying *Grinnell* factors).

In deciding whether a settlement merits approval, "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.'" *In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (citation omitted).

The Settlement satisfies these criteria.

1. The Complexity, Expense and Likely Duration of the Action

Courts "have long recognized" that securities class actions are "notably difficult and notoriously uncertain." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (internal quotation marks and citation omitted). *See also In re Michael Milken & Assocs. Secs. Litig.*, 150 F.R.D. 46, 53 n.6 (S.D.N.Y. 1993) (acknowledging the "overriding public interest in

favor of settlement" of class actions because it is "common knowledge that class action suits have a well deserved reputation as being most complex"); *In re Luxottica Grp. S.p.A. Secs. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class 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.").

By its very nature, the prosecution of a securities class action is difficult. However, the subject matter of this securities class action is particularly complex. This Court described "the synthetic CDOs here in dispute [as] a form of investment instrument that, Rube Goldberg-like, few but a select group of its own designers, engineers and lawyers could clearly explain, let alone understand …." *Dodona*, 847 F. Supp. 2d at 640. The 187 page Offering Circular for the Hudson 1 CDO, the 173 page Offering Circular for the Hudson 2 CDO, and the other documents pursuant to which the Hudson CDOs were offered are similarly complex. *See, e.g.*, Dkt. 50-1, 50-2. The performance of the Hudson CDOs was linked to 140 separate issues of residential mortgage-backed securities ("RMBS") that the Hudson 1 CDO referenced, and 80 RMBS that the Hudson 2 CDO referenced. The majority of these RMBS were included in the ABX BBB and BBB- 2006-1 and 2006-2 indices, and all of the RMBS were referenced only synthetically, via credit default swaps. ¶ 15. The complexity of the instruments at issue here raises many difficulties and uncertainties in proof -- and, no doubt, helps explain why this appears to be the only securities class action that has been brought by CDO investors, although many billions of mortgage-related CDOs were sold. ¶¶ 4-5.

Beyond its inherent complexities, this Action posed many other factual and legal challenges particular to Plaintiff's claims. For example, as evidenced in the briefing on class certification and Defendants' motions to dismiss and for summary judgment, the parties hotly

disputed the propriety of certifying any class, standing, investor knowledge, reliance, loss causation, damages, and other issues. Defendants contended, for example, that even if Plaintiff demonstrated liability on a classwide basis, the Hudson CDOs declined in value as part of an overall decline in the market for mortgage-related CDOs, thus precluding any damages under the PSLRA. *See* 15 U.S.C. § 78u-4(b)(4) ("the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this Act caused the loss for which the plaintiff seeks to recover damages"). Defendants also contended that investors in the Hudson CDOs were sophisticated, and that the nearly 20 pages of risk disclosures in the Offering Circulars adequately apprised investors -- particularly the sophisticated investors at issue here, several of whom are financial institutions that issued or sponsored their own CDO offerings -- of investment risk. *See* Dkt. 50-1 ECF 42-60; Dkt. 50-2 ECF 39-57.

Further litigation would also entail expense, delay and substantial additional risk. Plaintiff would first have to successfully appeal the Court's summary judgment ruling to be able to even continue to prosecute any of its claims. That process alone could consume a year or more. If Plaintiff prevailed on appeal, the Class would still face, *inter alia*, potential adverse rulings on Defendants' summary judgment arguments that the Court denied without prejudice (Sept. 8 Order ECF 29), and Defendants' stated intent to move to decertify the Class. *See, e.g.*, Dkt. 180 ECF 3 (denying Defendants' request to file, with their summary judgment motions, a companion motion to decertify the Class; holding that the Court is "not persuaded that judicial economy would be served by a class decertification motion before the Court's ruling on summary judgment."); Dkt. 258 ECF 7 n.3 ("If any claims survive summary judgment, Defendants intend to move to decertify the class ….").

Even assuming Plaintiff overcame all of those pretrial obstacles, Plaintiff and the Class would face numerous additional defenses at trial and potential additional appeal. By contrast, the Settlement avoids the many risks, delays and costs of continued litigation, and assures the Settlement Class a significant recovery.

2. The Settlement Class's Reaction to the Settlement

The reaction of the Settlement Class to the Settlement is also relevant in considering its adequacy. *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002); *In re Am. Bank Note Holographics, Inc., Secs. Litig.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001); *In re Global Crossing*, 225 F.R.D. at 455.

The reaction of the Settlement Class to date supports the fairness of the Settlement. Pursuant to the Court's Preliminary Approval Order, 236 copies of the Notice were mailed to potential Settlement Class Members and their nominees, and an additional 230 copies were also provided to banks, brokerage houses, financial institutions and others. *See* Sincavage Decl. (Ex. 2 to Lederer Decl.) ¶¶ 5-12. On Mar. 14, 2016, the Summary Notice was published in *The Wall Street Journal* and issued over the *PR Newswire*. *Id.* ¶ 15. Although as noted the May 27, 2016 original deadline set by the Court for Settlement Class Members to exclude themselves or object to the Settlement has not yet passed, no requests for exclusion from the Settlement Class or objections to the Settlement have been received as of, respectively, May 10, 2016 and May 12, 2016. *Id.* ¶¶ 18-19; Lederer Decl. ¶¶ 8, 101. Hence, the Settlement Class's reaction to the Settlement thus far also warrants approval.

3. The Stage of Proceedings and Amount of Information Analyzed

In considering this factor, "'the question is whether the parties had adequate information about their claims,' such that their counsel can intelligently evaluate the 'merits of [p]laintiff's claims, the strengths of the defenses asserted by [d]efendants, and the value of [p]laintiffs'

causes of action for purposes of settlement.'" *In re IMAX Secs. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012) (alteration in original) (citation omitted). To satisfy this factor, the parties need not have even engaged in formal or extensive discovery. *Maley*, 186 F. Supp. 2d at 363.

At the time the Settlement was reached, the Settling Parties had completed fact and expert discovery concerning the claims and defenses. Discovery was substantial, spanned several years, and included the review of over 1.5 million of pages of documents, 30 depositions, and extensive written discovery, among other things. ¶¶ 28-62. This Action has been vigorously and extensively litigated over the nearly six years it has been pending. Lead Counsel analyzed a large amount of information in prosecuting this case. Even prior to filing this litigation, Lead Counsel conducted a comprehensive investigation into the facts and claims. Among other things, Lead Counsel's investigation and litigation efforts included:

- analyzing the Hudson CDO offering documents and other public and nonpublic filings and information, and reviewing governmental and media reports related to the Hudson CDOs and Goldman's mortgage-backed securities practices, including documents released publicly by the U.S. Senate PSI;
- drafting detailed pleadings including the complaint and amended complaint and conducting legal research into the applicable claims;
- preparing extensive briefing in response to Defendants' motions to dismiss;
- successfully litigating Plaintiff's motion for class certification, which included significant class certification discovery, and briefing and expert testimony;
- successfully opposing Defendants' Rule 23(f) petition in the Second Circuit;
- preparing and issuing document requests and subpoenas that resulted in the production of over 1.5 million pages of relevant documents;
- conducting and defending 30 depositions, including the parties' fact and expert witnesses;
- litigating before Judge Freeman a number of disputes that arose during discovery;

- consulting extensively with experts in the fields of mortgage-backed securities, loan underwriting, statistics, underwriter due diligence, damages and other issues;
- preparing briefing and opposition statements in response to Defendants' motions for summary judgment; and
- drafting and exchanging mediation statements and participating in multiple mediation sessions and direct negotiations with Defendants concerning the Settlement and Settlement documentation.

As a result, Plaintiff and Lead Counsel obtained "a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Secs. & ERISA Litig.*, No. MDL 1500, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). This factor likewise favors final approval.

4. The Risks of Establishing Liability and Damages

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." *Grinnell*, 495 F.2d at 463.

The Court's ruling on summary judgment alone starkly illustrates some of the risks in establishing Defendants' liability. While Plaintiff and Lead Counsel believe that the claims asserted against the Defendants have merit, significant risks would continue to exist even if Plaintiff successfully appealed the Court's summary judgment ruling. As noted, Plaintiff would still potentially face Defendants' additional arguments on renewed summary judgment motions, a motion to decertify the Class, and additional hurdles in proving liability.

To take just one issue, Defendants would likely move to exclude or limit the testimony of Plaintiff's expert, Mason. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (requiring that proffered expert evidence "rest[ ] on a reliable foundation and is relevant to the task at hand"). For example, in seeking leave to move to decertify the Class, Defendants contended that Mason "admitted that he was never asked to 'conduct any analysis …

to identify the cause or causes of … the Hudson CDO securities' losses, and conceded that '[t]here is a direct relationship between the decline in housing markets and the actual loss on the [Hudson CDO] securities.'" Dkt 180 ECF 3.

Defendants would also likely bring motions *in limine* such as to exclude any reference to Goldman's intent to use the Hudson CDOs to reduce its own overall financial exposures to the ABX indices, and to the U.S. Senate PSI's proceedings and findings. *See Dodona*, 847 F. Supp. 2d at 646 (holding that "Defendants had no duty to disclose that the Hudson CDOs were part of 'Goldman's then-existing strategy to reduce its financial exposures to subprime mortgage-related assets'"); Dkt. 157 ECF 6 ("the Proposed Notice attempts to mislead recipients into thinking that the … United States Senate ha[s] endorsed Dodona's lawsuit").

Defendants would also continue to assert that they did not make any of the statements in the Hudson CDO Offering Circulars which, instead, were issued or co-issued solely by the Hudson Entities. *See Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011) (only those who actually "make" an alleged misstatement may be liable under § 10(b)); *see also* Dkt. 258 ECF 19-20 (arguing that "no evidence" demonstrates the Individual Defendants "were responsible for preparing the Offering Circulars or made the allegedly incomplete statements").

An adverse ruling or finding on any of these issues could result in the Settlement Class receiving a substantially smaller recovery, or no recovery at all. Even if Plaintiff prevailed and overcame all of Defendants' defenses as to liability, Plaintiff would still face risk in maintaining certification of the Class and convincing a jury to impose damages classwide consistent with Plaintiff's claims and sustaining that result on appeal. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Dkt. 180 ECF 3 (citing *Comcast*). The risks of establishing liability and damages also support approval of the Settlement.

5. The Risk of Continued Litigation

The risks of continued litigation are substantial. Again, as noted, Plaintiff would have to successfully appeal the Court's summary judgment ruling to be able to continue to litigate any claims. Assuming Plaintiff survived that daunting obstacle, Plaintiff would still face additional hurdles in sustaining the Class and proving liability and damages as discussed above.

The Settlement ends future litigation and uncertainty. The potentially perilous risks of continued litigation also favor approval of the Settlement. *See In re Veeco Instruments Secs. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85629, at *21 (S.D.N.Y. Nov. 7, 2007) ("'The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class.'") (citation omitted); *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("[T]he complexity, expense and likely duration of the litigation going forward weigh in favor of approval of the Settlement .... Not only would Plaintiffs spend substantial sums in litigating this case through trial and appeals, it could be years before class members saw any recovery, if at all.").

6. Ability of Defendants to Withstand a Greater Judgment

Defendant Goldman Sachs would be able to withstand a judgment in this case greater than the $27.5 million Settlement. According to the Form 10-K filed with the U.S. Securities and Exchange Commission on Feb. 22, 2016, its parent, defendant The Goldman Sachs Group, Inc., reported net income of $6.08 billion for fiscal year 2015, and cash and cash equivalents of $75.11 billion as of Dec. 31, 2015. *See* http://www.goldmansachs.com/investor-relations/financials/current/10k/2015-10-k.pdf, at 116, 118.

However, as courts in this district recognize, "while relevant to settlement approval, the ability of defendants to withstand greater judgment does not alone suggest the settlement is

unfair or unreasonable." *In re Facebook*, 2015 U.S. Dist. LEXIS 152668, at *15 (citing *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001)). *Accord In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) *aff'd sub nom. In re PaineWebber Inc. Ltd. Partnerships Litig.*, 117 F.3d 721 (2d Cir. 1997).

In contrast to Goldman Sachs, the evidence indicates that the Hudson Entities lacked insurance and other substantial assets from which any judgment in this case could be satisfied (which led to their voluntary dismissal as defendants). *See* Dkt. 104 ECF 4-5 ¶¶ 1-3. It is also unclear whether the Individual Defendants could withstand a judgment greater than the Settlement. In sum, while this factor is mixed, the fairness of the Settlement in the circumstances here should be considered against the distinct possibility that the Settlement Class may be denied any recovery absent the Settlement.

7. <u>The Range of Reasonableness of the Settlement</u>

The last two factors courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks. *Grinnell*, 495 F.2d at 463. In analyzing these factors, the issue for the Court is not whether the Settlement represents the best possible recovery, but how the Settlement relates to the strengths and weaknesses of the case. The 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.'" *Id.* at 462 (citation omitted).

From the outset, Plaintiff faced substantial risk and uncertainty in obtaining class certification and in establishing liability and damages on a classwide basis as discussed above. Thus, "[i]nstead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery ... [such that] it may be preferable 'to

take the bird in the hand instead of the prospective flock in the bush.'" *Currency Conversion*, MDL No. 1409, 2006 U.S. Dist. LEXIS 81440, at *16 (S.D.N.Y. Nov. 8, 2006) (quoting *In re Prudential Secs. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995)).

Furthermore, the $27.5 million Settlement is within the range of fairness in pure monetary terms. As explained in the Notice (Dkt. 273-1 ECF 51 ¶ 3), a total of $1.2449 billion original face amount of Hudson CDO notes were offered. However, Goldman did not sell all of the notes, and one Class member opted-out following the First Notice. *See* Dkt. 216. Thus, approximately $756.5 million in total *face amount* of Hudson CDO notes are potentially eligible to participate in the Settlement. Dkt. 273-1 ECF 51 ¶ 3. The $27.5 million Settlement therefore represents a recovery of $36.35 per $1,000, or 3.6%, of face value of notes eligible to participate in the Settlement, before fees and expenses.

Courts have found similar recoveries to be an "excellent result" in a securities class action. *See In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 167, 170 (3d Cir. 2006) ("[t]he District Court did not abuse its discretion in concluding that in light of the risks of establishing liability and damages, the $100 million settlement was an 'excellent' result" at 4% of the total damages claimed); *Hicks v. Morgan Stanley & Co.*, No. 01-cv-10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *19 (S.D.N.Y. Oct. 24, 2005) (finding settlement of 3.8% of plaintiffs' estimated damages to be within the range of reasonableness); *In re China Sunergy Secs. Litig.*, No. 07-cv-7895 (DAB), 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (the "average settlement amounts in securities fraud class actions where investors sustained losses over the past decade ... have ranged from 3% to 7% of the class members' estimated losses"); *Grinnell*, 495 F.2d at 455 n.2 (holding that "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery");

In re Top Tankers, Inc. Secs. Litig., No. 06-cv-13761 (CM), 2008 U.S. Dist. LEXIS 58106, at *19 (S.D.N.Y. July 31, 2008) ("The adequacy of the amount offered in settlement must be judged 'not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.'") (citation omitted).

The Settlement is also within the range of the settlement approved in March 2016 in *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, No. 08-cv-10783 (S.D.N.Y.), a RMBS case against Goldman where the class reportedly recovered 2.49%. *See* Memorandum of Law in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation filed Feb. 18, 2016 (Dkt. 224) at ECF 7 n.3 (stating that "[t]he Settlement affords investors $24.90 per $1000 of initial face value, versus $16.73 in *Harborview*"). *See also New Jersey Carpenters Vacation Fund v. The Royal Bank of Scotland Group PLC*, No. 08-cv-5093-LAP (S.D.N.Y) (*Harborview*; reportedly recovering 1.673%).

The estimated 3.6% recovery here is conservative because several Settlement Class Members paid less than face value of their notes (such as Plaintiff), received certain payments of principal, and/or realized proceeds by selling their notes (again, such as Plaintiff), all of which will be included in computing losses under the Plan of Allocation and will increase the effective recovery rate. *See* Dkt. 273-1 ECF 67 ¶ 83. And finally, in the face of the adverse summary judgment ruling, there was a significant possibility of no recovery at all.

C. The Proposed Plan of Allocation is Fair and Reasonable

"'To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized -- namely, it must be fair and adequate.'" *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) (quoting *WorldCom*, 388 F. Supp. 2d at 344). "As many courts have held, a plan of allocation need not be perfect." *Id.* "Instead, '[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by

experienced and competent class counsel.'" *Id.* (quoting *WorldCom*, 388 F. Supp. 2d at 344); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000).

"In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel." *In re EVCI Career Colleges Holding Corp. Secs. Litig.*, No. 05-cv-10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *32 (S.D.N.Y July 27, 2007). *Accord In re IMAX*, 283 F.R.D. at 192 ("'When formulated by competent and experienced counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'") (citation omitted). "A Plan of Allocation is fair and reasonable as long as it has a 'reasonable, rational basis.'" *In re Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *61 (quoting *Maley*, 186 F. Supp. 2d at 367).

The Plan of Allocation is set forth in full in the Notice. *See* Dkt. 273-1 ECF 67-68 ¶¶ 82-89. The Plan is intended to equitably apportion the Net Settlement Fund among Settlement Class Members, and provides that Authorized Claimants will be paid their share of the Net Settlement Fund on a *pro rata* basis depending on the losses suffered and other factors, including the aggregate value of all valid Proofs of Claim and other factors. *Id.*

The Plan of Allocation was developed with the assistance of Plaintiff's expert, Dr. Mason, who believes that it is "the fairest way to allocate those proceeds and superior to any other method." *See* Declaration of Joseph R. Mason in Support of the Proposed Plan of Allocation (Ex. 3 to Lederer Decl.) ¶ 6. Lead Counsel also believes that the Plan of Allocation has a reasonable, rational basis in equitably apportioning the Net Settlement Fund among Settlement Class Members, and is therefore fair and reasonable and should be approved. ¶¶ 98-101.

D. Notice to the Settlement Class Satisfies Rule 23 and Due Process

Fed. R. Civ. P. 23(e)(1) provides that "the court must direct notice in a reasonable manner to all class members who would be bound by the proposal." *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) ("[T]he court is required to direct to class members 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'") (quoting Fed. R. Civ. P. 23(c)(2)(B)) (emphasis omitted).

"The purpose of the notice is to 'afford members of the class due process which, in the context of the [R]ule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment.'" *In re Advanced Battery Techs. Secs. Litig.*, 298 F.R.D. 171, 182 (S.D.N.Y. 2014) (quoting *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992)); *accord Eisen*, 417 U.S. at 173-74. "A notice program must provide the 'best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort.'" *Advanced Battery*, 298 F.R.D. at 182 (citing *Eisen*, 417 U.S. at 173). The Notice program here, as directed by the Court's Preliminary Approval Order, meets these standards.

In accordance with the Preliminary Approval Order, beginning on Mar. 1, 2016, the Claims Administrator caused 236 copies of the Notice to be mailed by first-class mail to potential Settlement Class Members and/or their nominees, as well as emailed the Notice to 13 of those entities. Sincavage Decl. (Ex. 2 to Lederer Decl.) ¶¶ 5-6. The Claims Administrator sent additional copies of the Notice to 230 brokers, financial institutions and others. *Id.* ¶¶ 7-12.

Also in accordance with the Preliminary Approval Order, the Claims Administrator caused the Summary Notice to be published on Mar. 14, 2016 in *The Wall Street Journal* and transmitted over the *PR Newswire*. *Id.* ¶ 15. The Claims Administrator also posted the Notice

and Proof of Claim form on its website for Settlement Class Members to access, as well as other relevant information. *Id.* ¶ 16. This combination of individual first-class mailed notice to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in a widely circulated publication, transmitted over a newswire, and set forth on an internet website, is "the best notice ... practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *Eisen*, 417 U.S. at 173. *Accord In re Hi-Crush,* 2014 U.S. Dist. LEXIS 177175, at *28-29 (finding use of individual mailings, newspaper publication and posting on administrator's website to be "best notice practicable under the circumstances").

The Notice also satisfies Rule 23(e)(1) since 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 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)). The Notice includes all the information required by Rule 23 and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and claims; (ii) the definition of the Settlement Class; (iii) the amount of the Settlement; (iv) an explanation of the reasons for the proposed the Settlement and the positions of the respective parties; (v) a statement indicating the attorneys' fees and costs that will be sought; (vi) a description of the right to opt-out of the Settlement Class or object to the Settlement, and/or the requested fees and litigation expenses and/or reimbursement of expenses for Plaintiff's Principal; and (vii) notice of the binding effect the Settlement will have on Settlement Class Members if finally approved. *See* Ex. A to Sincavage Decl. (attaching the Notice).

Accordingly, Settlement Class Members have been given due and proper notice of the proposed Settlement, the Final Approval Hearing, and related matters. ¶¶ 94-97.

E. The Court Should Approve the Settlement Class and the Settlement

Fed. R. Civ. P. 23(c)(1)(C) provides that the Court may alter or amend the definition of a previously certified class any time "before final judgment." For purposes of the Settlement only, the Court should grant final approval of the amended definition of the Settlement Class consistent with the Settling Parties' Stipulation (Dkt. 273-1 ECF 16 ¶ 2), and as the Court preliminarily approved in the Preliminary Approval Order (Dkt. 276 ¶ 1). *See also Tiro v. Public House Invs., LLC*, No. 11-cv-7679 (CM), 11-cv-8249 (CM), 2013 U.S. Dist. LEXIS 72826, at *11 (S.D.N.Y. May 22, 2013) (citing *In re MTBE Prods. Liab. Litig.*, 241 F.R.D. 435, 438 (S.D.N.Y. 2007) ("It is well established that a court has the inherent power and discretion to redefine and modify a class in a way which allows maintenance of an action as a class action.")).

The Settlement Class is substantially the same as the Class the Court certified in this Action. Specifically, the certified Class includes those "who, from their initial offering through April 27, 2010, purchased or otherwise acquired the Hudson CDOs in the United States, and were damaged thereby" except excluded persons and entities. *Dodona*, 296 F.R.D. at 264. Similarly, the Settlement Class includes those "who, from their initial offering through the date the Court approves the Preliminary Approval Order, purchased or otherwise acquired the Hudson CDO Securities and were damaged thereby (notwithstanding the existence of any indemnification, hedge or other provision that may have reduced or offset such damages in whole or in part)" except excluded persons and entities. *See* Stipulation (Dkt. 273-1 ECF 13) ¶ 1(ll); *accord* Dkt. 276 ¶ 1.

Thus, the revised Settlement Class definition a) extends the class period end to Feb. 16, 2016, the date the Court preliminarily approved the Settlement; b) includes purchases, if any, of Hudson CDO Securities made outside of the United States; and c) states that damages are measured independent of any indemnification, hedge or other provision. As a practical matter,

however, the revised definition does not materially change the composition of the Settlement Class from the original Class -- and likely does not even add one additional investor to the Settlement Class as explained more fully in the Lederer Decl. *See* ¶ 92.

Hence, the Settlement Class should be approved. *See also, e.g., Beck-Ellman v. Kaz USA, Inc.*, 2013 WL 1748729, at *1 n.1 (S.D. Cal. Jan. 7, 2013) (granting parties' request to modify class definition; "The parties request that the Court modify the class definition in order to include heating pads distributed, rather than only manufactured [and] … to modify the relevant time period …."); *Freebird, Inc. v. Merit Energy Co.*, 2012 WL 6085135, at *4 (D. Kan. Dec. 6, 2012) ("Because the proposed settlement class is substantially the same as the class the Court has already certified, the Court preliminarily certifies the settlement class for substantially the same reasons as those stated in the previous class certification order.").

For the reasons discussed above, the Settlement is both procedurally and substantively fair, reasonable and adequate; the Plan of Allocation is fair and reasonable; and the Settlement Class has received due and proper notice of the Settlement and related matters. Accordingly, the Court should grant final approval to the proposed Settlement.

V. CONCLUSION

Plaintiff respectfully requests that the Court enter the proposed Final Judgment approving the Settlement, and the proposed Order Approving the Plan of Allocation.

Dated: May 13, 2016

Respectfully submitted,

Berger & Montague, P.C.

/s/ Lawrence J. Lederer
Merrill G. Davidoff (mdavidoff@bm.net)
Lawrence J. Lederer (llederer@bm.net)
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604

Lead Counsel for Lead Plaintiff Dodona I, LLC and the Settlement Class

kal7135334