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 COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND REIMBURSEMENT OF COSTS TO PLAINTIFF'S PRINCIPAL

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Lead Counsel[1] for Plaintiff Dodona I, LLC ("Plaintiff") and the Settlement Class respectfully submit this memorandum in support of Lead Counsel's accompanying motion for an award of attorneys' fees and expenses and reimbursement of costs to Plaintiff's Principal. A proposed Order Granting Lead Counsel's requests is attached as Exhibit 1 to Lead Counsel's accompanying motion.

I. INTRODUCTION

The $27.5 million proposed Settlement is an excellent recovery for the Settlement Class. The contingent risks here were particularly acute. The many obstacles to any recovery included substantial defenses not only to liability and damages, but also to certifying any class of sophisticated investors in privately-placed structured finance instruments. The procedural and substantive difficulties of proof were present throughout this case, and no doubt help explain why it is the only class action brought on behalf of CDO investors of which we are aware, much less one successful in producing a proposed classwide recovery. The Settlement is an especially commendable and meritorious achievement because it was accomplished after the Court dismissed certain of Plaintiff's claims at the motion to dismiss phase, and *despite* the Court's ruling dismissing Plaintiff's remaining claims on summary judgment.

For the work of all Plaintiff's Counsel undertaken on behalf of the Settlement Class, Lead Counsel request an award of attorneys' fees in the amount of 25% of the Settlement, or $6,875,000; $1,273,377.29 in reimbursement of out-of-pocket Litigation Expenses Plaintiff's Counsel incurred and disbursed on behalf of the Settlement Class; and $50,000 to reimburse Plaintiff's Principal for his costs and expenses directly relating to Plaintiff's representation of the Settlement Class pursuant to 15 U.S.C. § 78u-4(a)(4).

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[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.

The requested 25% attorneys' fee is fair given the benefits of the Settlement for the Settlement Class, and the work Plaintiff's Counsel expended to achieve that result. It accords with fee awards in other cases, and represents a negative multiplier of approximately 0.379, or approximately 37.9%, of Plaintiff's Counsels' overall lodestar of approximately $18.1 million for the over 32,000 hours worked on this case throughout the nearly six years it has been pending.

Notice of this fee and expense request was given to Settlement Class Members. To date, there have been no objections. The absence of any objections is particularly notable since the Settlement Class includes numerous financial institutions and other sophisticated investors some of whom issued their own CDOs, and many of whom have their own counsel.

Plaintiff's Counsel undertook substantial contingent risk in litigating this Action on behalf of the Settlement Class. There was a real and distinct possibility of no recovery at all, especially in the face of the barren landscape for CDO class actions. Given the many risks assumed, the complexity and amount of work involved, and the skill and expertise required in this *sui generis* class action, Lead Counsel respectfully request that the Court approve the requested 25% attorneys' fee and reimbursement of expenses in full.

II. FACTUAL BACKGROUND[2]

Plaintiff's amended complaint (Dkt. 40) was filed on Feb. 4, 2011. By Order on Mar. 21, 2012 (Dkt. 73), the Court granted in part and denied in part Defendants' motions to dismiss. *See Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624 (S.D.N.Y. 2012).

[2] This Memorandum summarizes only some in the events of 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.

The Settling Parties engaged in extensive discovery. ¶¶ 28-47, 57-62. Among other things, Plaintiff's Counsel obtained over 1.5 million pages of documents from Defendants and multiple non-parties (¶ 40); deposed 18 current or former Goldman employees and each of Defendants' three experts (two of whom Plaintiff deposed twice as they initially submitted an expert report on class certification and subsequently a supplemental report) (¶ 41); defended the depositions of Plaintiff's Principal and Plaintiff's expert, Dr. Joseph R. Mason ("Mason"), both of whom Defendants also deposed twice (¶ 45); participated in the non-party depositions taken by Defendants (¶ 45); took a Fed. R. Civ. P. 30(b)(6) deposition of Goldman on several issues (¶ 41); and obtained thousands of pages of additional relevant documents from non-parties and others, including internal Goldman email and other documents that were released publicly by the U.S. Senate's Permanent Subcommittee on Investigations (the "PSI") which 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. (¶¶ 28-29).

By Order entered Jan. 23, 2014 (Dkt. 138), and following extensive submissions by the parties, the Court certified the Class and appointed Plaintiff as the Class representative and Lead Counsel as Class counsel. *Dodona I, LLC v. Goldman, Sachs & Co.*, 296 F.R.D. 261 (S.D.N.Y. 2014). *See* ¶¶ 58-61, 63-72 (describing further proceedings concerning Class certification). The Second Circuit denied Defendants' Rule 23(f) petition to appeal that ruling on June 27, 2014 after further proceedings and argument. ¶ 72; Dkt. 162.

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 mediation conducted by an independent mediator, David Brodsky of Brodsky ADR

LLC ("Brodsky). ¶ 84. By Order on Sept. 8, 2015 (Dkt. 264) (the "Sept. 8 Order"), the Court granted Defendants' "main" motion for summary judgment, dismissed Plaintiff's remaining claims in their entirety, and denied without prejudice Defendants' two other motions.

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 Court approval pursuant to Fed. R. Civ. P. 23. Dkt. 272. Thereafter, Lead Counsel drafted the Settlement documents, including the Stipulation setting forth the Settlement, Plan of Allocation, Notice, Summary Notice, Proof of Claim, Preliminary Approval Order and accompanying motion papers seeking preliminary approval of the Settlement. Dkt. 273-274. By Order on Feb. 16, 2016, the Court entered the Preliminary Approval Order. Dkt. 276.

Beginning on Mar. 1, 2016, the Claims Administrator mailed the Notice to 236 putative Settlement Class Members or their nominees. *See* Declaration of Edward Sincavage ("Sincavage Decl.") (Ex. 2 to Lederer Decl.) ¶¶ 5-6. This included investors to whom the Claims Administrator sent the First Notice concerning the pendency of this Action (Dkt. 181), plus additional parties. Sincavage Decl. ¶¶ 6-8, 11-12. On Mar. 14, 2016, the Summary Notice was published in *The Wall Street Journal* and issued over *PR Newswire*. *Id.* ¶ 15. The Claims Administrator also provided online access via its website to the Notice and other documents (*id.* ¶ 16) as did Lead Counsel (¶ 95).

The May 27, 2016 deadline originally set by the Preliminary Approval Order for Settlement Class Members to object to the Settlement or the requested attorneys' fees and

expenses has not yet passed.[3] However, through May 12, 2016, no Settlement Class Member has filed any objection to Lead Counsel's requested fees and expenses. ¶ 119.

III. ARGUMENT

A. The Requested Attorneys' Fees Should Be Granted In Full

1. Plaintiff's Counsel Are Entitled to An Award Of Fees From the Common Fund

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *accord Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008); *accord In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007). Fairly compensating counsel for the risks they assume is essential because "[s]uch actions could not be sustained if Plaintiff's counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

2. The Court Should Award a Reasonable Percentage of the Common Fund

The "percentage-of-the-fund" method, under which counsel is awarded a percentage of the fund that they created, is frequently used to determine a fee because it "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient

[3] *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 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").

prosecution and early resolution of litigation.'" *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 122 (2d Cir. 2005); *accord Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 24 (2d Cir. 2013). The percentage approach also recognizes that the quality of counsel's services is best measured by the results achieved, and is consistent with the system typically used in the marketplace to compensate attorneys in non-class contingency cases. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) ("The percentage method better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, rather than on the number of motions they file, documents they review, or hours they work .... The percentage method also accords with the overwhelming prevalence of contingency fees in the market for plaintiffs' counsel ....").

The Supreme Court has endorsed the percentage method in common fund cases. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' ... a reasonable fee is based on a percentage of the fund bestowed on the class"). The Second Circuit has also approved the percentage method, recognizing that "the lodestar method proved vexing" and results in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-50. *Accord Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999); *Wal-Mart*, 396 F.3d at 122 (the "trend in this Circuit is toward the percentage method"); *Anwar v. Fairfield Greenwich Ltd.*, 2012 WL 1981505 (S.D.N.Y. June 1, 2012) (Marrero, J.); *Rubin v. MF Global, Ltd.*, 08-cv-2233(VM), Dkt. 198 (S.D.N.Y. Nov. 18, 2011) (Marrero, J.); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 183-85 (W.D.N.Y. 2011).[4] The PSLRA also supports the use of the

[4] Other courts of appeal approve the percentage method, with the Eleventh and District of Columbia Circuits requiring its use in common-fund cases. *See In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305-07 (1st Cir. 1995); *In re*

percentage method, providing that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount" recovered for the class. 15 U.S.C. §77z-1(a)(6).[5]

3. The Requested 25% Fee Is Reasonable Under the Percentage Method

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a typical contingent fee tort case, the customary fee would be in the range of 33% of the recovery. *See Blum*, 465 U.S. at 904 ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

While expressly disapproving of any fixed benchmark, the Second Circuit has noted that courts commonly award fees equal to 25% of the common fund. *See Goldberger*, 209 F.3d at 51-52; *In re Comverse Tech., Inc., Sec. Litig.*, 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding 25% of $225 million fund); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, Inc.*, 2012 WL 2064907, at *1-2 (S.D.N.Y. June 7, 2012) (25% of $110 million fund); *In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475 (NRB), 2005 U.S. Dist.

AT&T Corp. Sec. Litig., 455 F.3d 160, 164 (3d Cir. 2006); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642-43 (5th Cir. 2012); *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993).

[5] Courts have concluded that, in using this language, Congress expressed a preference for the percentage method to determine attorneys' fees in securities class actions. *See, e.g., Telik*, 576 F. Supp. 2d at 586; *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005).

LEXIS 45798, at *12-13 (S.D.N.Y. June 9, 2005) (28% of $120 million fund); *In re Computer Assocs. Class Action Sec. Litig.*, 2003 WL 25770761, at *4 (E.D.N.Y. Dec. 8, 2003) (25.3% of approximately $133.5 million fund). Other courts are in accord.[6]

A 25% fee is also in line with fees awarded in residential mortgage-backed securities ("RMBS") class actions. *See, e.g., Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, No. 08-cv-10446-RGS, Dkt. 210 (D. Mass. Dec. 19, 2013) (25% fee of $21.2 million settlement); *Mass. Bricklayers & Masons Trust Funds v. Deutsche Alt-A Sec., Inc.*, No. 2:08-cv-3178-LDW-ARL, Dkt. 147 (E.D.N.Y. July 11, 2012) (26.5% fee of $32.5 million settlement).

The requested 25% fee is also lower than the range negotiated with, and approved by, Plaintiff at the time this representation was undertaken, and is supported by Plaintiff here. *See* Declaration of Alan S. Brody ("Brody Decl.") (Ex. 1 to Lederer Decl.) ¶ 6. *Accord* ¶ 110. The Second Circuit has directed that district courts should:

> give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable. In many cases, the agreed-upon fee will offer the best indication of a market rate, thus providing a good starting position for a district court's fee analysis.

In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 133-34 (2d Cir. 2008); *accord In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001) ("courts should afford a presumption of

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[6] *See, e.g., In re Bank of New York Mellon Corp. Forex Trans. Litig.*, 12 MD 2335 (LAK), ECF 292 at 2 (S.D.N.Y. Dec. 4, 2015) (awarding 25% of $180 million fund); *Alaska Elec. Pension Fund v. Pharmacia Corp.*, No. 03-1519 (AET), ECF 405 at 4 (D.N.J. Jan. 30, 2013) (awarding 27.5% of $164 million fund); *Silverman v. Motorola, Inc.*, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) (awarding 27.5% of $200 million fund), *aff'd*, 739 F.3d 956, 958-59 (7th Cir. 2013); *In re Broadcom Corp. Sec. Litig.*, No. 01-275, 2005 U.S. Dist. LEXIS 41993, at *14 (C.D. Cal. Sept. 14, 2005) (25% of $150 million fund); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (25% of $126.6 million fund).

reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel").

This reasoning is consistent with the PSLRA, which was intended to encourage sophisticated and financially interested investors like Plaintiff to assume control of securities class actions. *See* H.R. Conf. Rep. No. 104-369, at *32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Congress believed that these institutions would be in the best position to monitor the prosecution of the Action, to assess the quality of counsel's representation, and to determine a fair fee.

Plaintiff's Principal played an active role in this litigation throughout, and closely worked with Plaintiff's Counsel. ¶ 124; Brody Decl. ¶ 4. Plaintiff was the only investor that sought appointment to lead this Action. Accordingly, particularly in the circumstances of this case, Plaintiff's endorsement of the fee request supports its approval. *See, e.g., Veeco*, 2007 WL 4115808, at *8 ("public policy considerations support the award in this case because the Lead Plaintiff ... -- a large public pension fund -- conscientiously supervised the work of lead counsel and has approved the fee request").

4. The *Goldberger* Factors Confirm that the Requested 25% Fee Is Fair

The Second Circuit has identified six factors that courts should consider in reviewing a request for attorneys' fees in a common-fund case. As summarized in *Goldberger*, 209 F.3d at 50, these factors include:

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

Each *Goldberger* factor indicates that the requested fee is appropriate, fair and reasonable.

a. The Time and Labor Expended by Plaintiff's Counsel Supports the Requested Fee

Plaintiff's Counsel dedicated substantial time and resources in prosecuting this Action. Specifically, Plaintiff's Counsel spent over 32,000 hours litigating this case over the past nearly six years for the Settlement Class, resulting in a total lodestar of approximately $18.1 million when multiplied by Counsels' normal hourly billing rates. ¶ 108. This consists of 30,966.83 hours for a lodestar of $17,378,472.62 for Lead Counsel; 942.8 hours for a lodestar of $350,280.00 for co-local counsel Gusrae Kaplan Nusbaum PLLC ("GKN"); and 656.85 hours for a lodestar of $402,182.50 for co-local counsel Frydman LLC ("FLLC").[7] Hence, the requested fee award of $6,875,000 represents approximately 0.379, or approximately 37.9%, of the total time expended by Plaintiff's Counsel.

The considerable risk of nonpayment that Plaintiff's Counsel assumed in undertaking this case on a contingent basis, and the fact that the requested fee will compensate Plaintiff's Counsel for less than their hourly rates, is strong evidence that the requested fee is reasonable. *See Flores v. Anjost Corp.*, 2014 WL 321831, at *9 (S.D.N.Y. Jan. 29, 2014) ("[T]he Court finds that the fee that Co-Lead Counsel seeks is reasonable and does not represent an exorbitant multiplier -- indeed, there is no multiplier."); *Diaz v. E. Locating Serv. Inc.*, 2010 WL 5507912, at *8 (S.D.N.Y. Nov. 29, 2010) (same); *Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 CM, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) ("negative" lodestar multiplier indicates reasonableness of fee).

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[7] *See* ¶ 108. *See also* Lederer Decl. Ex. 4 (attaching Schedule of Plaintiff's Counsels' lodestar), Ex. 6 (attaching Declaration of Martin Kaplan of GKN), Ex. 8 (attaching Declaration of David Frydman of FLLC). Bailey & Glasser LLP ("BG") also served as Plaintiff's Counsel from the time BG appeared in this Action. *See* Dkt. 205 (BG's notice of appearance). BG's hours and lodestar are excluded from these totals. The reported hours and lodestar also exclude time spent preparing Lead Counsel's request for attorneys' fees and reimbursement of expenses. ¶ 108 n.19.

If the Settlement is approved, Lead Counsel will also have to expend substantial additional time going forward in connection with supervising the Claims Administrator, claims administration, and overseeing distribution of the Net Settlement Fund to eligible Settlement Class Members consistent with the Plan of Allocation and subject to the approval of the Court. ¶¶ 98, 110. This also supports the requested fees.

b. The Magnitude and Complexity of the Action Support the Requested Fee

Courts have long recognized that securities class actions are "'notably difficult and notoriously uncertain.'" *In re Flag Telecom Hldgs., Ltd. Sec. Litig.*, 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (quoting *In re Sumitomo Copper Litig*., 189 F.R.D. 274, 281 (S.D.N.Y. 1999)). This Action was no exception; in fact, it was far more complex in many respects than a typical securities class action.

This case raised numerous novel and complex issues relating to, among other things, RMBS, structured finance, and synthetic CDOs which the Court stated were "a form of investment 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 offering documents included a 187 page Offering Circular for the Hudson 1 CDO (Dkt. 50-1), and a 173 page Offering Circular for the Hudson 2 CDO (Dkt. 50-2). The Hudson 1 CDO referenced 140 separate issues of RMBS (which also included the 80 RMBS that the Hudson 2 CDO referenced). ¶ 15. All of the RMBS referenced in the Hudson CDOs were identified in the Offering Circulars (*see* Dkt. 50-1 ECF 159-167; 50-2 ECF 148-153), and the majority of the RMBS referenced in the Hudson CDOs were contained in the ABX BBB and BBB- indices (¶ 15). The parties retained four experts in this litigation whose reports addressed RMBS, CDOs, the ABX indices and several other aspects of mortgage lending and finance, from the "front-end"

characteristics of mortgage loans to the "back-end" causes of losses to investors from mortgage securitizations. *See, e.g.,* Dkt. 109-1 (opening report from Plaintiff's expert, Mason); Dkt. 120-1, 120-2 (expert reports of, respectively, Defendants' experts John Dolan ("Dolan") and René M. Stulz ("Stulz")); Dkt. 128-1, 128-2 (rebuttal report of Mason); Dkt. 253-14 (expert report of Defendants' expert Dr. Bradford Cornell).

Hence, this case revolved around "difficult, complex, hotly-disputed and expert-intensive issues." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *16 (S.D.N.Y. May 9, 2014). The magnitude and complexity of the Action support the 25% fee request.

c. The Risks of the Litigation Support the Requested Fee

The risk undertaken by counsel is often considered the most important *Goldberger* factor. *Goldberger*, 209 F.3d at 54; *Detroit v. Grinnell Corp*., 495 F.2d 448, 470 (2d Cir. 1974); *Comverse*, 2010 WL 2653354, at *5; *Telik*, 576 F. Supp. 2d at 592. The Court should consider the risks of the litigation at the time the suit was brought. *Goldberger*, 209 F.3d at 55.

The fee requested is reasonable in light of the risks that Plaintiff's Counsel assumed. Plaintiff's Counsel and particularly Lead Counsel committed substantial time and money to prosecuting this Action for nearly six years despite the many complexities and risks this litigation posed from inception. When this Action was filed in 2010, there were many difficult hurdles rendering it far from certain that any recovery would ultimately be obtained or that any class would be certified, as there was then -- and remains now -- no legal precedent for any other CDO investor class action litigation. Although the lack of controlling or even guiding precedent alone posed significant risk, there were also substantial uncertainties concerning issues relating to materiality, duty to disclose, falsity, reliance, loss causation and damages, among other things. These risks and uncertainties were magnified by the fact that Plaintiff's Counsel undertook the Action knowing it would likely require the investment of thousands of hours over several years

and very substantial out-of-pocket expenses for which they would be at risk and which, here, have totaled over $1.2 million. Plaintiff's Counsel knew that if Defendants were to prevail on any of their procedural or substantive defenses, the Settlement Class -- and Plaintiff's Counsel -- could receive nothing.

From the outset, Plaintiff faced considerable hurdles in even proving a threshold actionable omission. At the motion to dismiss phase, the Court held that Defendants had no duty to disclose that they structured the Hudson CDOs as part of an admitted strategy to reduce Goldman's multi-billion dollar long position to RMBS assets, and therefore that this theory could not form the basis of any claims. *Dodona*, 847 F. Supp. 2d at 646. The Court also dismissed Plaintiff's Rule 10b-5(a) and (c) market manipulation claim, holding that such a claim "carries with it an assumption of an efficient market." *Id*. at 651. The Court held that Plaintiff had adequately pleaded its fraud-based claims on a single omissions theory: whether Defendants genuinely believed that the Hudson CDOs did not have a realistic chance of being profitable for investors, and did not adequately disclose those beliefs. *Id*. at 646.

In subsequently granting summary judgment on the remaining claims, the Court found that the record demonstrated that Goldman held substantial long positions on subprime RMBS in 2006 and 2007, and that the Hudson CDOs were part of Goldman's internal strategy to reduce that exposure. However, the Court found insufficient evidence supporting the sole claim in dispute: that Defendants structured the Hudson CDOs with the expectation that they would fail, or that Defendants were particularly aware of an undisclosed risk of investing in the RMBS market. *Dodona I, LLC v. Goldman, Sachs & Co.*, 132 F. Supp. 3d 505, 510 (S.D.N.Y. 2015).

Although the Court's ruling on summary judgment alone starkly illustrates some of the risk Plaintiff's Counsel assumed, obtaining certification of any class posed additional obstacles.

Defendants advanced numerous arguments against class certification. For example, Defendants argued that Plaintiff failed to meet Rule 23(b)(3)'s requirement of predominance because Plaintiff could not invoke any presumption of classwide reliance for its § 10(b) or state law claims. *See, e.g.*, Dkt. 119 ECF 13. Defendants also argued that, unlike the usual § 10(b) case in which passive investors have the same interests and obtain information from a common source, the sophisticated investors and their advisors here actively pursued unique strategies, sought varying information from multiple sources about the Hudson CDOs, and formed their own views about the subprime RMBS to which the Hudson CDOs provided financial exposure, all without relying on Goldman's purported views. *Id.* Defendants further argued that assessing Plaintiff's claims and Defendants' defenses would entail individualized inquiries into multiple factual issues. *Id.* ECF 13-14.

Even the numerosity requirements of Rule 23(a)(1) were hotly disputed. Defendants claimed that investors in Hudson 1 and Hudson 2 could not be grouped into a single class because the securities were issued in two separate and distinct offerings at different times with different offering materials and differences in their reference portfolios and capital structures. *Id.* They also contended that, even considering the two offerings together, there were only 31 investors which, even on a combined basis, is below their asserted 40 member threshold for class certification. *Id.* ECF 37. They claimed that Plaintiff was an inadequate and atypical representative because it shorted certain of the RMBS the Hudson CDOs referenced. *Id.* ECF 14. They also claimed that the class mechanism was not superior to individual litigation because the sophisticated institutional investors and their investment advisors made their own decisions and are fully capable of pursuing their own actions. *Id.* ECF 15.

Although ultimately the Class was certified and Plaintiff successfully opposed Defendants' Rule 23(f) petition (Dkt. 162), Defendants continued to argue that class certification was not warranted. Dkt. 215, 217. They stated that they would move to decertify the Class if the Action survived summary judgment. *See* Dkt. No. 226 ECF 3 n.4.

Despite these many difficulties and uncertainties, Plaintiff's Counsel nonetheless undertook and maintained the Action on a wholly contingent basis, knowing that this case would likely last for years, would require substantial attorney time and significant expenses, and provided no guarantee of compensation. Plaintiff's Counsels' assumption of these risks and our tenacity overly nearly six years of hard fought litigation support the reasonableness of the requested fee. *See, e.g., In re Flag Telecom*, 2010 WL 4537550, at *27 ("Lead Counsel undertook this Action on a wholly contingent basis, investing substantial amounts of time and money to prosecute this litigation with no guarantee of compensation or even the recovery of out-of-pocket expenses .... Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) ("The Second Circuit long ago recognized that courts should consider the risks associated with lawyers undertaking a case on a contingent fee basis."); *Bellifemine*, 2010 WL 3119374, at *5 ("The foremost of these factors is the attorney's 'risk of litigation, *i.e.*, the fact that, despite the most vigorous and competent of efforts, success is never guaranteed.'") (citation omitted); *In re Am. Bank Note Holographics, Inc. Secs. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) ("'Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award.'") (citation omitted); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case,

and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

d. The Quality of Counsel's Representation Supports the Requested Fee

The quality of the representation is also relevant in determining fee awards. Here, the quality of Plaintiff's Counsel's representation, as well as our skill and experience in the specialized field of securities litigation, support the requested fee.[8] The quality of the representation here is best evidenced by the result achieved -- a $27.5 million recovery in circumstances where Plaintiff's claims were dismissed in their entirety, and Plaintiff would have to successfully appeal the Court's summary judgment ruling to continue to prosecute its claims at all. *See Goldberger*, 209 F.3d at 55; *Veeco*, 2007 WL 4115808, at *6; *In re Global Crossing Secs.& ERISA Litig*., 225 F.R.D. 436, 467 (S.D.N.Y. 2004).

Even if Plaintiff successfully appealed the Court's summary judgment ruling, the Class would still be subject to renewed arguments on summary judgment that the Court denied without prejudice as well as other pretrial defenses, and the Class could have been decertified or subject to an adverse jury verdict or ruling on any further appeal. The risk of no recovery here, and in complex cases of this type more generally, is real. In numerous hard-fought lawsuits, plaintiffs' attorneys have received no fee -- despite *years* of excellent, professional work -- due to the discovery of facts unknown when the case started, changes in the law while the case was pending, or a decision of a judge, jury, or court of appeals. *See, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming district court's ruling overturning jury verdict in favor of plaintiff class); *In re Oracle Corp. Secs. Litig.*, 2009 WL

[8] *See* ¶ 112; Lederer Decl. Ex. 5, 7, 9 (attaching firm resumes of Berger & Montague, GKN and FLLC).

1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (affirming summary judgment for defendants after eight years of litigation). The quality of representation here led to the proposed Settlement despite the many obstacles.

Courts have recognized that the quality of opposing counsel should also be taken into consideration in assessing the quality of counsel's performance. *See, e.g.*, *Marsh*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."); *Veeco*, 2007 WL 4115808, at *7 (30% fee award fair where defendants were represented by "one of the country's largest law firms"); *Adelphia*, 2006 WL 3378705, at *3 ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work."). Defendants here were represented by some of the nation's foremost defense firms -- Sullivan & Cromwell; Emmet, Marvin & Martin; Schulte Roth & Zabel; Cohen & Gresser; and Nixon Peabody. Defendants' counsel spared no expense in representing their clients.

e. The Requested Fee is a Reasonable Percentage of the Settlement

As discussed above, the requested 25% fee is within the range of fees that courts in the Second Circuit and elsewhere have awarded in RMBS class actions and other complex securities cases. *See, e.g.*, *AFTRA Ret. Fund*, 2012 WL 2064907, at *3; *Comverse*, 2010 WL 2653354, at *3;

The requested 25% fee is also reasonable in relation to the size of the Settlement. As discussed above, the Settlement provides the Settlement Class with a cash benefit that was achieved despite many obstacles and risks. Fee awards of even 30% of settlements have frequently been approved by courts. *See, e.g.*, *Anwar v. Fairfield Greenwich Ltd.*, Master File

No. 09-cv-118(VM)(FM), Dkt. 1457 ¶ 21 (S.D.N.Y. Nov. 20, 2015) (Marrero, J.) (awarding 30% fee and over $4.4 million in expenses plus interest); *Velez v. Novartis Pharms. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) ("District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater."); *accord In re Priceline.com, Inc. Secs. Litig.*, 2007 WL 2115592, at *4-5 (D. Conn. July 20, 2007); *In re Bisys Secs. Litig.*, 2007 WL 2049726, at *2-3 (S.D.N.Y. July 16, 2007); *Kurzweil v. Philip Morris Cos., Inc.*, 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999).

f. Public Policy Supports the Requested Fee

Public policy also favors rewarding firms for bringing securities actions like this one. *See Flag Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) (same); *Hicks*, 2005 WL 2757792, at *9 (same).

As recognized by Congress through the passage of the PSLRA, vigorous private enforcement of the federal securities laws can only occur if private plaintiffs take an active role in protecting the interests of investors. If this important public policy is to be carried out, plaintiff's counsel should be adequately compensated, taking into account the risks undertaken in prosecuting complex securities class actions. Here, Plaintiff's Counsel should be rewarded not only for bringing the Action and vigorously prosecuting it for over five years, but also for successfully negotiating a significant (and, indeed, *sui generis*) Settlement that provides a substantial recovery for the Settlement Class despite the dismissal of Plaintiff's claims in full. *See also* Brody Decl. (Ex. 1 to Lederer Decl.) ¶ 6 (approving requested fee); *Veeco*, 2007 WL

4115808, at *8 (holding that "public policy considerations support the award" where lead plaintiff approves the fee request).

B. PLAINTIFF'S COUNSELS' EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED

Plaintiff's Counsel's request for reimbursement of $1,273,377.29 in Litigation Expenses incurred and disbursed in prosecuting this Action on behalf of the Settlement Class should also be approved. *See, e.g., In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (attorneys in class actions should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation'") (citation omitted); *Flag Telecom*, 2010 WL 4537550, at *30. The total amount of expenses is reasonable in the circumstances of this case particularly given the number of years it has been pending, and that it was litigated through the class certification phase, comprehensive fact and expert discovery, and summary judgment.

As set forth in the Lederer Decl. (at ¶¶ 121-123), a large portion of the expenses -- $598,708.37 (¶ 123), or over 47% -- were for payments to Plaintiff's experts, including Dr. Mason, who was retained early in this case and, *inter alia*, submitted three expert reports. *See, e.g.*, Dkt. 109-1, 128-1 to 128-2, 253-15. This included a 51 page detailed rebuttal report addressing several arguments Defendants made in opposing certification of the Class, from the parties' disputes concerning whether investors or investment advisors should be counted in determining numerosity, to reliance, the causes of the decline in the Hudson CDOs' value, and whether damages could be measured classwide.

Other large items include legal and other computer research regarding the claims and defenses ($197,011.88) and for electronically hosting ($225,618.81) for more than three years the over 1.5 million pages of documents Plaintiff obtained in this Action, the bulk of which

themselves were produced to Plaintiff electronically. The $1,021,339.06 total of expert, computer research, and document hosting charges comprises over 80% of the total expenses. Other large expenses included Court and deposition transcripts ($83,751.60), and document preparation (*e.g.*, velobinding) and copying charges ($81,231.22).

Plaintiff's Counsel strived throughout to minimize the expenses they had to advance whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action. ¶ 122. For example, Lead Counsel hosted all documents produced to Plaintiff in this case exclusively in-house at costs far lower than if an outside document management vendor had been used. ¶ 40. All of the expenses were necessary and appropriate for the prosecution of this Action, and all are of the type that are customarily incurred in litigation and routinely charged to clients billed by the hour. From the beginning of the case, Plaintiff's Counsel were aware that they might not obtain any recovery as discussed above and, at the very least, would not recover anything until the Action was successful in producing a recovery. Plaintiff's Counsel also understood that, even if the case was ultimately successful, an award of expenses would not compensate counsel for the lost use of the funds advanced to prosecute this Action.

The Notice informed Settlement Class Members that Lead Counsel would apply for expenses in an amount not to exceed $1.5 million. Sincavage Decl., Ex. A (containing the Notice). The expenses actually requested of $1,273,377.29 are below that amount. No Settlement Class Member has objected thus far to this request.

C. PLAINTIFF'S PRINCIPAL SHOULD BE AWARDED HIS COSTS AND EXPENSES DIRECTLY RELATING TO THE REPRESENTATION OF THE SETTLEMENT CLASS

The PSLRA states that "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

Plaintiff's Principal, Brody, has been actively involved in this litigation since its inception. *See* Brody Decl. ¶ 4.

Over the past nearly six years, Brody spent well in excess of 500 hours participating in this litigation and carrying out Plaintiff's duties as the sole Court-appointed Lead Plaintiff and Class and Settlement Class representative. *Id.* ¶ 7. Throughout the course of this litigation, Brody worked closely with Plaintiff's Counsel; participated in each phase of this litigation and oversaw Lead Counsel in leading the prosecution of this case; assisted Plaintiff's Counsel in investigating the facts before filing the complaints and continuing thereafter; reviewed the initial and amended complaints; helped respond to Defendants' discovery requests; produced thousands of documents in this case relating to Plaintiff, Plaintiff's investments in the Hudson CDOs, and various related matters; received both written and oral case status updates from Plaintiff's Counsel; consulted regarding case strategy; reviewed briefs and other filings; and, on behalf of Plaintiff, appeared for and gave testimony during two separate depositions conducted by Defendants' counsel, Sullivan & Cromwell. *Id.* ¶ 4. *Accord* ¶ 124. Brody also participated in and consulted extensively with Plaintiff's Counsel in connection with settlement and mediation conferences and proceedings that occurred in 2015 and early 2016 leading to the Settlement; advocated actively in favor of accepting the Settlement; and supports final Court approval of the Settlement. Brody Decl. ¶ 4.

In addition to the substantial time spent, Brody also directly incurred out-of-pocket costs in prosecuting this case. For example, Brody directly incurred a total of $8,423.67 in out-of-pocket costs to resurrect and maintain Plaintiff and its managing member, BrodyCo, LLC (*see* Dkt. 40 ECF 86), in good standing in Delaware from 2010, when Plaintiff first filed this case, through the present. Brody Decl. ¶ 7. Absent this litigation and Plaintiff's duties as sole

Plaintiff and Class and Settlement Class representative, Brody would not have paid any such costs. *Id.* Brody also incurred other costs, such as for copying certain documents and sending them to counsel, attending depositions and meetings and speaking with counsel on multiple occasions, among other things. *Id.*

Lead Counsel believes that it is fair and reasonable in the circumstances for Brody to be awarded $50,000 pursuant to the PSLRA to reimburse him for his reasonable costs and expenses incurred in managing this litigation via Plaintiff and representing the Settlement Class. ¶ 124. Reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel." *Varljen v. H.J. Meyers & Co.*, No. 97 CIV 6742 (DLC), 2000 U.S. Dist. LEXIS 16205, at *14 n.2 (S.D.N.Y. Nov. 8, 2000). Courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks*, 2005 WL 2757792, at *10.

In *In re Xcel Energy, Inc. Secs., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005), the court awarded $100,000 collectively to the lead plaintiff group in view of the important policy considerations involved in encouraging enforcement of the federal securities laws by shareholders, stating as follows:

> In granting compensatory awards to the representative plaintiff in PSLRA class actions, courts consider the circumstances, including the personal risks incurred by the plaintiff in becoming a lead plaintiff, the time and effort expended by that plaintiff in prosecuting the litigation, any other burdens sustained by that plaintiff in lending himself or herself to prosecuting the claim, and the ultimate recovery. *Denney v. Jenkens & Gilchrist*, 2005 WL 388562, at *31 (S.D.N.Y. Feb. 18, 2005). Furthermore, courts consider not only the efforts of the representative plaintiffs in pursuing claims, but also the important policy role they play in the

> enforcement of the federal securities laws on behalf of persons other than themselves. *See In re Dun & Bradstreet Credit Servs. Customer Litig*., 130 F.R.D. 366, 374 (S.D. Ohio 1990) (awarding two class representatives $55,000 and three class representatives $35,000 each). Such enforcement is vital because if there were no individual shareholders willing to step forward and pursue a claim on behalf of other investors, many violations of law might go unprosecuted.

See also Flag Telecom, 2010 WL 4537550, at *31 (awarding $100,000 to plaintiff).

The Notice mailed to Settlement Class Members stated that Lead Counsel intend to ask the Court to award "reimbursement of the costs and expenses of Plaintiff's principal of up to $50,000." To date, no objection has been made to this request. *See, e.g.*, *In re Facebook, Inc. IPO Secs. & Derivative Litig.*, 2015 WL 6971424, at *13 (S.D.N.Y. Nov. 9, 2015) (approving request for award where no objections were made).

CONCLUSION

Lead Counsel respectfully request that the Court award attorneys' fees of $6,875,000, or 25% of the Settlement, to Plaintiff's Counsel; $1,273,377.29 for reimbursement of Litigation Expenses incurred and disbursed by Plaintiff's Counsel on behalf of the Settlement Class; and $50,000 to Plaintiff's Principal for the reasonable costs and expenses he incurred and disbursed on behalf of Plaintiff directly relating to the representation of the Settlement Class.

A proposed Order Granting Lead Counsel's requests is attached as Exhibit 1 to Lead Counsel's accompanying Motion for an Award of Attorneys' Fees and Expenses and Reimbursement of Costs to Plaintiff's Principal.

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

Kal7116717