UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE AMBAC FINANCIAL GROUP, INC. SECURITIES LITIGATION

Case No. 08-cv-00411-NRB

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MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR (1) FINAL APPROVAL OF SETTLEMENT OF CLAIM FILED IN THE SIPA LIQUIDATION OF LEHMAN BROTHERS INC., (2) APPROVAL OF THE PROPOSED ALLOCATION OF THE PROCEEDS OF THE SETTLEMENT, AND (3) REIMBURSEMENT OF EXPENSES

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Lead Plaintiffs the Public School Teachers' Pension & Retirement Fund of Chicago, Arkansas Teacher Retirement System, and Public Employees' Retirement System of Mississippi ("Lead Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement resolving the Claim filed by Lead Plaintiffs on behalf of themselves and the Class in the SIPA liquidation proceeding of Lehman Brothers Inc. ("Lehman"); for approval of the proposed allocation of the proceeds of the Settlement; and for reimbursement of $79,246.33 in remaining litigation expenses incurred in connection with the SIPA liquidation proceeding.[1]

PRELIMINARY STATEMENT

In 2011, Lead Plaintiffs achieved two settlements in the Action with all defendants in the Action other than Lehman for a total of $33 million: (i) a $27.1 million settlement with Ambac Financial Group Inc. ("Ambac") and certain of its former officers and directors, and (ii) a $5.9 million settlement with the underwriters of Ambac's February 2007 offering of Directly-Issued Subordinated Capital Securities ("DISCS") other than Lehman (the "Underwriter Settlement").

Lehman was not included in either of the 2011 settlements due to the filing of Lehman's SIPA liquidation proceeding, which was commenced in September 2008. However, in order to protect the interests of Lead Plaintiffs and the Class, Lead Plaintiffs filed claims in Lehman's SIPA Proceeding in the United States Bankruptcy Court for the Southern District of New York, on behalf of themselves and the Class. Lead Plaintiffs have now achieved a proposed resolution of those

[1] All capitalized terms used herein that are not otherwise defined herein shall have the meanings ascribed to them in the Stipulation Regarding Proofs of Claims of Public School Teachers' Pension, et al. (Nos. 5626, 5627, 5628 and 5629) (ECF No. 177-1) (the "Stipulation") or in the Stipulation of Settlement with the Underwriter Defendants dated May 4, 2011 (ECF No. 123-6) (the "Underwriter Stipulation").

claims. The proposed Settlement, agreed to with James W. Giddens, as trustee for the liquidation of Lehman under SIPA (the "SIPA Trustee"), if approved by this Court, will provide for a $550,000 Allowed Claim against Lehman's estate on behalf of the Class in the SIPA Proceeding. The amount that will ultimately be recovered from Lehman's estate with respect to the Allowed Claim is currently unknown but is estimated to be approximately 50% of the value of the Allowed Claim, or $275,000. *See* Joint Declaration of Lauren A. Ormsbee and Frederic S. Fox in Support of Lead Plaintiffs' Motion for (1) Final Approval of Settlement of Claim Filed in the SIPA Liquidation of Lehman Brothers Inc., (2) Approval of the Proposed Allocation of the Proceeds of the Settlement, and (3) Reimbursement of Expenses, filed herewith (the "Joint Declaration" or "Joint Decl."), at ¶¶ 4, 22.[2] If any Class Members have timely filed their own proofs of claim in Lehman's SIPA Proceeding, the Settlement does not bar, release or otherwise affect such claims.

Lead Plaintiffs and Lead Counsel believe that the proposed Settlement is a very favorable result for Class Members in light of the substantial costs of litigating a disputed claim in the SIPA Proceeding and the uncertainty as to the amount, if any, that could be recovered in the SIPA Proceeding. *Id*. ¶¶ 5, 25. The Settlement was reached only after extensive arm's-length settlement negotiations between counsel for the SIPA Trustee, on one hand, and Lead Counsel and Lead Plaintiffs' retained bankruptcy counsel Lowenstein Sandler LLP ("Bankruptcy Counsel"), on the other. Joint Decl. ¶ 16. The Settlement is the result of lengthy efforts by Lead Plaintiffs, Lead Counsel, and Bankruptcy Counsel to pursue claims against Lehman in this Action and through the

[2] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the prosecution of the claims against Lehman (Joint Decl. ¶¶ 8-20); the terms of the Settlement (*id*. ¶¶ 21-24); the benefits of the Settlement in light of the risks and uncertainties of continued litigation (*id*. ¶¶ 25-29); Lead Plaintiffs' dissemination of notice of the Settlement (*id*. ¶¶ 30-34); the proposed method of allocating the proceeds of the Settlement (*id*. ¶¶ 35-39); and Lead Plaintiffs' application for reimbursement of litigation expenses (¶¶ 40-46).

SIPA Liquidation, which included: (a) an extensive initial investigation of potential claims against Ambac and other defendants in this Action, including the underwriters of Ambac's securities such as Lehman; (b) the filing of a detailed consolidated complaint which included claims against Lehman; (c) the filing of timely proofs of claim in the SIPA Proceeding to preserve the claims of Plaintiffs and the Class against Lehman's estate after Lehman' SIPA Proceeding commenced; (d) extensive monitoring of the Lehman's SIPA Proceeding over the course of several years; (e) responding to requests for information and pleadings filed in the SIPA Proceeding where necessary; and (f) arm's-length negotiations of the Settlement with counsel for the SIPA Trustee. *Id*. ¶¶ 6, 8-16.

Lead Plaintiffs and Lead Counsel believe that the proposed Settlement is fair, reasonable and adequate and in the best interests of the Class in light of the amount recovered pursuant to the Settlement, the substantial costs of litigating a disputed claim in the SIPA Proceeding and the uncertainty as to the amount, if any, that could be recovered in the SIPA Proceeding. Joint Decl. ¶ 25. In the absence of the Settlement, Lead Plaintiffs would be required to seek certification of a class in the Bankruptcy Court, engage in extensive discovery, and prove liability and damages in order to obtain any recovery. *Id*. ¶ 27. Securing a recovery in the SIPA Proceeding through litigation would, therefore, require substantial expense and time and, because all other claims in this litigation have been resolved, the costs incurred would come solely out of any recovery that could be obtained from Lehman. *Id*. Moreover, the size of any potential recovery would be limited because Lehman underwrote only 5% of the securities offering at issue in the Action. *Id*. ¶ 26. Indeed, Lead Counsel estimate that the costs of pursuing the Claim through continued litigation could equal or exceed the amount that could be recovered from Lehman's estate. *Id*. ¶ 27. Finally, risks in establishing liability and damages – including risks of proving that the alleged

misstatements in Ambac's registration statements were false and misleading (and were not merely statements of opinion), and risks in rebutting Lehman's anticipated defenses that it exercised due diligence or that the drop in price of Ambac DISCS was due to reasons other than the alleged misstatements – created a possibility that, in the absence of the Settlement, Lead Plaintiffs and the Class could achieve no recovery at all, or a lesser recovery than the Allowed Claim after years of additional protracted litigation. *Id*. ¶ 28. Based on these factors, Lead Plaintiffs, Lead Counsel and Bankruptcy Counsel have concluded that the Settlement is in the best interests of the Class.

In addition, Lead Plaintiffs respectfully submit that the method of allocating the proceeds of the Settlement they have proposed is fair and reasonable and should be approved for use in this Settlement. The proposed allocation method employs the same plan of allocation that was previously used to calculate claims and distribute the proceeds of the Underwriter Settlement to members of the Class. This method will minimize administrative expenses and burden on Class Members because Class Members will not need to submit new claim forms, and those who previously submitted valid claims forms and cashed their distribution checks related to the prior settlements will automatically be included in the distribution of the funds obtained from this Settlement.

Lead Plaintiffs also submit that their request for reimbursement of litigation expenses, consisting of $79,246.33 for the remaining litigation expenses incurred by Lead Plaintiffs related to the necessary retention of Bankruptcy Counsel, is reasonable and should be approved. Lead Counsel are not seeking any award of their own attorneys' fees, or reimbursement of any other litigation expenses incurred in connection with obtaining the Settlement.

BACKGROUND

On August 25, 2008, Lead Plaintiffs filed the Consolidated Amended Class Action Complaint in this Action which included claims against Lehman for violations of Sections 11 and

12(a)(2) of the Securities Act of 1933 in connection with Ambac's February 2007 offering of DISCS. Joint Decl. ¶ 10. Lehman underwrote 5% of the February 2007 DISCS offering. *Id*. ¶ 26. However, all claims asserted against Lehman in the Action were stayed pursuant to Section 362(a) of the Bankruptcy Code as a result of the filing of Lehman's SIPA liquidation proceeding, which was commenced in September 2008. *Id*. ¶ 11.

On May 29, 2009, Plaintiffs timely filed four general unsecured claims in Lehman's SIPA Proceeding based on Lehman's alleged violations of federal securities laws as asserted in this Action. One claim (Claim No. 5626) was filed on behalf of Lead Plaintiffs and other investors in Ambac securities (the "Claim"). Joint Decl. ¶ 13 & n.4. Three other claims (Claim Nos. 5627, 5628, and 5629) were filed individually on behalf of Plaintiffs Arkansas Teacher Retirement System, Painting Industry Insurance and Annuity Funds, and Public Employees' Retirement System of Mississippi, respectively (the "Individual Claims" and, together with the Claim, the "Claims"). *Id*.

In 2011, Lead Plaintiffs achieved two settlements totaling $33 million with all defendants in this Action other than Lehman: (1) a $27.1 million settlement with Ambac and certain of its former officers and directors, on behalf of purchasers of all Ambac securities during the period from October 19, 2005 through July 18, 2009; and (2) a $5.9 million settlement with the underwriters of the February 2007 DISCS offering other than Lehman, on behalf of the Class. Joint Decl. ¶ 14. Lehman was not included as a settling defendant or released party in either of the 2011 settlements. *Id*.

At the time of the 2011 settlements, it was not clear whether or to what extent Lehman's estate would have funds available to pay claims asserted by unsecured creditors, including the Claim asserted by Lead Plaintiffs on behalf of the Class. Joint Decl. ¶ 15. Accordingly, Lead

Plaintiffs, through Lead Counsel and Bankruptcy Counsel, continued to monitor the progress of the SIPA Proceeding. *Id*. Bankruptcy Counsel also responded to requests for information from the SIPA Trustee's counsel and responded to pleadings and motions filed in the SIPA Proceeding where necessary. *Id*.

After it became apparent that Lehman's estate might have funds available to make meaningful distributions to holders of unsecured claims, Lead Plaintiffs, though Bankruptcy Counsel, began negotiations with counsel for the SIPA Trustee to resolve the Claim. Joint Decl. ¶ 16. Following extensive arm's-length negotiations, Plaintiffs and the SIPA Trustee reached an agreement providing for the resolution of the Claims that Plaintiffs filed in the SIPA Proceeding on the terms and conditions set forth in the Stipulation. *Id*.

The Settlement provides that Plaintiffs, on behalf of themselves and as lead plaintiffs on behalf of the Class in the Action, will have an allowed, general unsecured creditor claim against the Lehman general estate in the SIPA Proceeding in the amount of $550,000 (the "Allowed Claim"). *See* Stipulation ¶ 7. Pursuant to the Allowed Claim, Plaintiffs, on behalf of themselves and as lead plaintiffs on behalf of the Class will receive proportionately the same in payments or distributions (including with respect to the timing and type of payments or distributions) as are generally received by holders of allowed, general unsecured claims against the Lehman estate. *Id*. As noted above, the amount that will ultimately be recovered from Lehman's estate with respect to the Allowed Claim is currently unknown but is estimated to be approximately 50% of the value of the Allowed Claim. Joint Decl. ¶ 4. This estimate is based on the distributions already made in the SIPA Proceeding, which are being held in reserve for the Allowed Claim if the Settlement is approved, and the estimated amount of all future distributions, which will depend on several

factors, including how other disputed unliquidated contingent claims are resolved as well as litigation in which the SIPA Trustee is currently involved. *Id*.

On January 30, 2015, the Bankruptcy Court entered a Stipulation and Order providing that "the automatic stay pursuant to section 362(a) of the Bankruptcy Code and the LBI Liquidation Order shall be modified solely to the extent necessary to permit Claimants to seek and obtain District Court Approval of the settlement of the Claim as set forth in the . . . Stipulation, including, but not limited to, approval of distribution, notice and hearing procedures." ECF No. 177-2, at ¶ 2.

On March 11, 2015, this Court entered the Order Preliminarily Approving Proposed Settlement of Claim Filed in the SIPA Liquidation of Lehman Brothers Inc. (ECF No. 179) (the "Preliminary Approval Order"), which preliminarily approved the proposed Settlement; approved the proposed form and manner of providing notice of the Settlement to Class Members; and scheduled a hearing regarding final approval of the Settlement and related matters for June 9, 2015.

The Court also certified for purposes of this Settlement the class that was previously certified for purposes of the settlement with the Underwriter Defendants: "all persons or entities who purchased or acquired Ambac securities in or traceable to the February 2007 Directly-Issued Subordinated Capital Securities offering." Preliminary Approval Order ¶ 3.[3]

[3] Excluded from the Class are: Ambac; Defendants; members of the immediate families of any Defendant; and their legal representatives, heirs, successors or assigns. Also excluded from the Class are any persons or entities who or which were excluded from the Class in response to a request for exclusion in connection with the Underwriter Settlement.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that the claims of a certified class may be settled, voluntarily dismissed or compromised only with the court's approval. Public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (citations and internal quotations omitted); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012) ("we emphasize that [] there is a 'strong judicial policy in favor of settlements, particularly in the class action context'") (citation omitted).

Here, both the negotiating process leading to the Settlement and the Settlement's substantive terms support final approval. *See Wal-Mart*, 396 F.3d at 116; *In re Citigroup Inc. Sec. Litig.*, No. 09 MD 2070 (SHS), 2014 WL 2112136, at *2-*3 (S.D.N.Y. May 20, 2014); *IMAX*, 283 F.R.D. at 188; *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011).

A. The Settlement Was Reached After Extensive Arm's-Length Negotiations

The Settlement was achieved after extensive arm's-length negotiations with counsel for the SIPA Trustee that occurred over several months. Joint Decl. ¶ 16. The arm's-length nature of the settlement negotiations support the conclusion that the Settlement is fair and was achieved free of collusion. *See Yang v. Focus Media Holding Ltd.*, No. 11 Civ. 9051 (CM) (GWG), 2014 WL 4401280, at *4 (S.D.N.Y. Sept. 4, 2014) ("A class action settlement enjoys a 'presumption of correctness' where it is the product of arm's length negotiations conducted by experienced, capable counsel."); *Hanifin v. Accurate Inventory & Calculating Serv., Inc.*, No. 11 Civ. 1510 (MAD) (ATB), 2014 WL 4352060, at *4 (N.D.N.Y. Aug. 20, 2014) ("The proposed settlement is

procedurally fair because it was reached through vigorous, arm's-length negotiations and after experienced counsel had evaluated the merits of Plaintiffs' claims.").

The conclusion of Lead Plaintiffs and Lead Counsel that the Settlement is fair and reasonable and in the best interests of the Class also supports its approval. *See In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 05 Civ. 10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007) ("Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement."). Lead Counsel and Bankruptcy Counsel, who have substantial experience in securities class actions and bankruptcy litigation, respectively, have carefully analyzed the strengths and weaknesses of the Class's claim and the circumstances of the parties and have concluded that the proposed Settlement is in the best interests of the Class. Joint Decl. ¶¶ 5, 25. That judgment is entitled to "great weight." *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation") (citation omitted).

B. Application of the *Grinnell* Factors Supports Approval of the Settlement

The Settlement is also substantively fair, reasonable, and adequate. The standards governing approval of class action settlements are well established in this Circuit. In *City of Detroit v. Grinnell Corp.*, the Second Circuit held that the following factors should be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and]

> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also Wal-Mart*, 396 F.3d at 117; *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014); *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 154, 155 (S.D.N.Y. 2013).

"In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)); *see Advanced Battery Techs.*, 298 F.R.D. at 175 (same). Here, the Settlement satisfies the criteria for approval set forth in *Grinnell*.

1. The Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement

To recover on the Claim asserted on behalf of the Class in Lehman's SIPA Proceeding, Lead Plaintiffs would be required to seek certification of a class in the Bankruptcy Court, engage in extensive discovery in the Bankruptcy Court, including potential expert discovery on issues such as Lehman's due diligence obligations and loss causation, and then prove liability and damages. Joint Decl. ¶ 27. Even if Lead Plaintiffs successfully established the Claim, the SIPA Trustee could then appeal the determination of the Bankruptcy Court. Accordingly, achieving a recovery on the Claim in the absence of the Settlement would be lengthy and costly.

Moreover, because all other claims in this litigation have been resolved, all of the costs that would be incurred in such further litigation would come solely out of any recovery that could ultimately be obtained from Lehman. Joint Decl. ¶ 27. That potential recovery was limited by the fact Lehman underwrote only 5% of the DISCS offering. *Id.* ¶ 26. In addition, the same

discount applied to the Allowed Claim based on the funds available to pay general unsecured claims (currently estimated to be approximately 50%) would also be applied to the Claim if it were resolved through litigation, further limiting the potential recovery. *Id*. ¶ 28. Indeed, Lead Counsel have estimated that the costs of pursuing the Claim through continued litigation in the Bankruptcy Court could equal or exceed the amount that could be recovered from Lehman's estate. *Id*. ¶ 27.

In contrast, resolving the Claim through the Settlement now will prevent further litigation expenses and will allow the Class to benefit from economies of scale because the administration and distribution of the Settlement can be combined with the prior recoveries obtained in this Action, thus reducing overall administrative costs. *Id*. ¶¶ 27, 38.[4]

In sum, the costly, lengthy and uncertain nature of further litigation in the SIPA Proceeding, in contrast to a recovery that can be distributed with the prior settlement funds, strongly supports approval of the Settlement.

2. The Reaction of the Class to the Settlement

The reaction of the class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g., In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010).

[4] If the Settlement is approved, Lead Plaintiffs expect that they will receive payment of the portion of the Allowed Claim that is based on distributions that have already been made in the SIPA Proceeding shortly after the Effective Date of the Settlement, with other distributions made in connection with the Allowed Claim as further distributions to unsecured creditors occur in the SIPA Proceeding. The initial distribution of the net settlement funds obtained in the earlier settlements in this Action occurred in February 2014 and the Claims Administrator anticipates that it will be able to conduct a second distribution of those settlement funds, based on funds available as a result of uncashed checks or other reasons, in the coming months. Accordingly, proceeds of the Settlement should be able to be distributed to Authorized Claimants together with distributions of funds remaining from the earlier settlements, reducing administrative costs. Joint Decl. ¶ 38.

In accordance with the Preliminary Approval Order, on March 25, 2015, Rust Consulting, Inc. ("Rust"), the Court-appointed Claims Administrator, mailed the Summary Notice to all Class Members who previously received a distribution from the settlement with the Underwriter Defendants in this Action and who cashed their distribution check. *See* Declaration of Jason Rabe Regarding Mailing and Publication of Notice ("Rabe Decl."), attached to the Joint Declaration as Exhibit 1, at ¶ 2. The Summary Notice included a summary of the terms of the Settlement, Lead Plaintiffs' reasons for recommending the Settlement, the date of the Settlement Hearing, information on how to obtain more information (including a copy of the longer Notice), and an explanation of Class Members' right to object to the Settlement. *See* Rabe Decl. Ex. A. In addition, Rust also caused the Summary Notice to be published over the *PR Newswire* and made both the Summary Notice and the more detailed Notice available on the case website, www.AmbacSecuritiesLitigation.com. Rabe Decl. ¶¶ 3, 4. The Notice was also made available on both of Lead Counsel's websites. Joint Decl. ¶ 33.

While the deadline set by the Court for Class Members to object to the Settlement has not yet passed, to date, no objections to the Settlement, the proposed allocation of the proceeds of the Settlement or the application for reimbursement of expenses have been received. The deadline for submitting objections is May 19, 2015. As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers no later than June 2, 2015 addressing any objections that may be received or confirming that no objections have been received.

3. The Stage of the Proceedings and the Amount of Information Available to Counsel Support Approval of the Settlement

This factor examines the amount of information available about the claims and defenses and the positions of parties in the litigation to ensure that plaintiffs and their counsel were able to properly evaluate the merits of the case and assess the adequacy of the settlement. *See In re AOL*

Time Warner, Inc. Sec. & ERISA Litig., No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) ("The relevant inquiry for this factor is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement."); *Shapiro*, 2014 WL 1224666, at *9 (question is whether "plaintiffs had access to sufficient information to evaluate their case properly and to assess the adequacy of any settlement proposal"). No specific amount of discovery is required – instead the question is whether the parties have sufficient information to evaluate the case and to assess the adequacy of the Settlement. *See Advanced Battery Techs.*, 298 F.R.D. at 177; *AOL Time Warner*, 2006 WL 903236, at *10; *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002).

Lead Plaintiffs, through Lead Counsel, had a full understanding of the strengths and weaknesses of the claims against Lehman and the substantial costs and difficulties that the Class would face in obtaining a recovery through litigation in the SIPA Proceeding. Having sufficient information to evaluable the strengths and weaknesses of the Settlement, Lead Plaintiffs and Lead Counsel believe that the proposed Settlement represents a resolution that is highly favorable to the Class.

4. The Risks of the Litigation Support Approval of the Settlement

In assessing the fairness, reasonableness and adequacy of a settlement, courts should consider the "risks of establishing liability . . . the risks of establishing damages [and] the risks of maintaining the class action through the trial." *Grinnell*, 495 F.2d at 463 (citations omitted). In assessing these factors, the Court is not required to "decide the merits of the case or resolve unsettled legal questions," *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981), or to "foresee with absolute certainty the outcome of the case." *Shapiro*, 2014 WL 1224666, at *10. "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the

proposed settlement." *Id*. (quoting *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004)).

Lead Plaintiffs and Lead Counsel believe that the proposed Settlement is in the best interests of the Class in light of the uncertainty as to the amount, if any, that could be recovered in the SIPA Proceeding and the substantial costs of recovering from the Lehman estate though litigation of a disputed claim. As discussed in the Joint Declaration, in the absence of the Settlement, Lead Plaintiffs would be required to seek certification of a class in the Bankruptcy Court, engage in extensive discovery, and prove liability and damages in order to obtain any recovery. Joint Decl. ¶ 27.

The Securities Act claims that formed the underlying basis of the Claim asserted against Lehman's estate were subject to the same risks and uncertainties as the claims asserted against other underwriter defendants in the Action, including, among others, risks of proving that the alleged misstatements in Ambac's registration statements were false and misleading (and were not merely statements of opinion), and risks in rebutting Lehman's anticipated defenses that it exercised due diligence or that the drop in price of Ambac DISCS was due to reasons other than the alleged misstatements. Joint Decl. ¶ 28. These litigation risks created a possibility that, in the absence of the Settlement, Lead Plaintiffs and the Class might achieve no recovery at all, or a lesser recovery than the Allowed Claim after years of additional protracted litigation. *Id*. Moreover, although Lead Plaintiffs and Lead Counsel believe that the Claim is appropriate for class treatment, Lead Plaintiffs would have been required to seek a separate certification of a Class under the Bankruptcy Rules in order to pursue the Claim on behalf of a class in the Bankruptcy Court. *Id*. ¶ 27.

Based on their consideration of these risks, and the costs that would be incurred in pursuing this litigation, Lead Plaintiffs, Lead Counsel and Bankruptcy Counsel have concluded that the Settlement, providing for an Allowed Claim in the amount of $550,000, is fair, reasonable and adequate to Lead Plaintiffs and the Class, and in their best interests.

5. The Ability of Lehman to Withstand a Greater Judgment

This factor considers the "ability of the defendant to pay a judgment greater than the amount offered in a settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y.) *aff'd*, 117 F.3d 721 (2d Cir. 1997). For example, where a larger judgment could push a defendant into bankruptcy, courts find that this factor strongly support approval of the settlement. *See id*. ("evidence that the defendant will not be able to pay a larger award at trial tends to weigh in favor of approval of a settlement, since the 'prospect of a bankrupt judgment debtor down at the end of the road does not satisfy anyone involved in the use of class action procedures'") (citation omitted); *see also In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, No. 05-232, 2008 WL 4974782 at *8 (E.D. Pa. Nov. 21, 2008) (where a larger judgment would risk "forcing the defendant to file bankruptcy," this factor "weighs heavily in favor of settlement").

Here, Lehman is already in bankruptcy proceedings. The Securities Investor Protection Corporation initiated a liquidation proceeding against Lehman in September 2008. In these circumstances, where Lehman is no longer a going business and its estate has limited assets, and where the SIPA Trustee, which is entrusted with guarding the interests of the estate, would vigorously oppose a larger recovery on the Claim, this factor strongly supports approval of the Settlement.

6. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and All the Attendant Risks of Litigation Support Approval of the Settlement

The last two substantive factors courts consider are the range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation. 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." *Grinnell*, 495 F.2d at 462 (citations omitted). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *PaineWebber*, 171 F.R.D. at 130 (citation and internal quotations omitted). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Lead Plaintiffs submit that the proposed Settlement is well within the range of reasonableness in light of the best possible recovery, the situation of the parties, and all the attendant costs and risks of litigation. The potential recovery was limited here because Lehman underwrote only 5% of the DISCS offering in question and because of the limited funds available for payment of general unsecured creditors in Lehman's SIPA Proceeding. When the possible recovery is weighed against the substantial costs, delay and risks of continued litigation of the Claim in the SIPA Proceeding, the proposed Settlement is a very favorable outcome for the Class.

In sum, the *Grinnell* factors – including the substantial costs and delay of pursuing further litigation of the Claim in the SIPA Proceeding, Lead Plaintiffs' well-developed understanding of the strengths and weaknesses of the case, and the risks of the litigation – support final approval of the Settlement.

II. THE PROPOSED ALLOCATION OF THE PROCEEDS OF THE SETTLEMENT IS FAIR AND REASONABLE

A plan for allocating settlement proceeds should be approved if it is fair, reasonable and adequate. *See IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation is fair and reasonable as long as it has a "rational basis." *FLAG Telecom*, 2010 WL 4537550, at *21; *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). In determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See Giant Interactive*, 279 F.R.D. at 163 ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel") (citation omitted).

Here, Lead Plaintiffs propose that, if the Settlement is approved, the net funds received as a result of the Allowed Claim in the SIPA Proceeding pursuant to the Settlement be allocated to Authorized Claimants with respect to their purchases or acquisitions of Ambac DISCS from February 12, 2007 to July 18, 2009 on a *pro rata* basis based on their Recognized Loss Amounts as calculated under the Plan of Allocation that was previously approved by the Court.[5]

Lead Plaintiffs believe that this is a fair and reasonable method of allocating the proceeds of the Settlement because the claims that were asserted in the Action against Lehman are the same as the claims that were asserted against the underwriters that resulted in the Underwriter Settlement. Joint Decl. ¶ 36. Accordingly, the provisions of the original Plan of Allocation providing for the allocation of the net proceeds of the Underwriter Settlement to claimants based

[5] If approved by the Court, the following expenses related to the Settlement would be deducted from the gross recovery: Lead Plaintiffs' expenses incurred due to the necessary retention of Bankruptcy Counsel, as requested below; any taxes which may be due on the recovered amounts; and the reasonable expenses of the Claims Administrator in providing notice of the Settlement and disseminating the Settlement funds.

on their purchases or acquisitions of Ambac DISCS from February 12, 2007 to July 18, 2009 and providing for the calculation of Recognized Loss Amounts for those purchases are equally applicable to the allocation of funds obtained in this Settlement. *Id*.

In addition, as discussed above, the proposal will minimize administrative expenses and burden on Class Members because they will not be required to re-submit a claim form or take any other action to be eligible to receive funds obtained as a result of the Settlement. *Id*. ¶ 37. Instead, Rust will use the information obtained from previously submitted Claim Forms to calculate the additional payments due to Authorized Claimants as a result of funds received in the Settlement, which can then be distributed to Authorized Claimants together with further distributions from the funds obtained in the 2011 settlements, which will reduce administrative costs. *Id*. ¶¶ 37-38.

A description of the proposed method for the allocation of the proceeds of the Settlement was included in both the Summary Notice and Notice, *see* Summary Notice at pp. 1, 2; Notice ¶¶ 4, 5, 16, and, to date, no objections to the proposed method of allocation have been received. Joint Decl. ¶¶ 34, 39. Lead Plaintiffs respectfully suggest that the proposed method for allocating the proceeds of the Settlement should be approved as fair and reasonable

III. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

As noted above, in accordance with the Court's Preliminary Approval Order, Rust mailed the Summary Notice by first-class mail to all Class Members who previously received a distribution from the settlement with the Underwriter Defendants in this Action and who cashed their distribution check. *See* Rabe Decl. ¶ 2. The direct mailing of the Summary Notice to the Class Members who submitted a valid Claim Form including the purchase of Ambac's DISCS, received a distribution from the Underwriter Settlement, and cashed their distribution check, was targeted at those Class Members who would stand to benefit from the proposed Settlement.

In addition, Rust caused the Summary Notice to be transmitted over the *PR Newswire* on March 25, 2015. Rabe Decl. ¶ 3. Copies of the Notice, Summary Notice and Stipulation were made available on the Settlement website maintained by Rust, www.AmbacSecuritiesLitigation.com, and on Lead Counsel's websites, www.blbglaw.com and www.kaplanfox.com, beginning on March 25, 2015. *See* Rabe Decl. ¶ 4; Joint Decl. ¶ 33.

The notice provided complied with all requirements of the Preliminary Approval Order and satisfied the requirements of Rule 23(e) and due process that notice be provided "in a reasonable manner" to class members. Fed. R. Civ. P. 23(e)(1); *see Wal-Mart*, 396 F.3d at 113 ("[t]he standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness."); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 345 (E.D.N.Y. 2010); *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), slip op. at 3 (S.D.N.Y. Oct. 2, 2012), ECF No. 3358 (ordering that mailed notice of an additional settlement recovery be sent only to class members who previously submitted claims and would be eligible to receive additional distributions); *In re McKesson HBOC, Inc. Sec. Litig.*, No. 99-CV-20743 RMW (PVT), slip op. at 3 (N.D. Cal. Nov. 28, 2012), ECF No. 1789 (same).

IV. CERTIFICATION OF THE CLASS REMAINS WARRANTED

On March 11, 2015, the Court granted Lead Plaintiffs' motion for preliminary approval of the Settlement and certified the Class for settlement purposes only, pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. Nothing has changed to alter the propriety of certification for settlement purposes and, for all the reasons stated in Plaintiffs' preliminary approval brief (ECF No. 178 at 10-12), Lead Plaintiffs request that the Court confirm certification of the Class for purposes of this Settlement.

V. REIMBURSEMENT OF EXPENSES SHOULD BE APPROVED

Lead Plaintiffs are applying to the Court for reimbursement of litigation expenses in the amount of $79,246.33 for the remaining expenses incurred by Lead Plaintiffs in connection with the necessary retention of bankruptcy counsel, Lowenstein Sandler LLP ("Bankruptcy Counsel" or "Lowenstein"). Litigation expenses that were reasonable and necessary to pursuing the claim on behalf of a class may be recovered from the common fund created for the benefit of the class. *See Yang*, 2014 WL 4401280, at *18 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses"); *FLAG Telecom*, 2010 WL 4537550, at *30 (same). Indeed, "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *Shapiro*, 2014 WL 1224666, at *25.

As set forth in the Joint Declaration, in addition to the services that Lowenstein provided in connection with the bankruptcy proceedings of Ambac (for which reimbursement has already been approved by the Court), Lowenstein has provided substantial assistance to Lead Counsel and the Class in connection with Lehman's SIPA Proceeding and in obtaining this Settlement. For example, Lowenstein monitored Lehman's SIPA Proceeding, reviewed documents and pleadings filed in the SIPA Proceeding and responded where necessary, negotiated the terms of the Settlement with counsel for the SIPA Trustee, assisted in drafting the Stipulation and other papers related to the Settlement, obtained a modification of the automatic stay by the Bankruptcy Court to permit review and approval of the Settlement by this Court, and assisted Lead Counsel with preparation of the motion papers in support of preliminary and final approval of the Settlement. Joint Decl. ¶ 42.

The Court's Order Approving Distribution Plan dated November 15, 2013 (ECF No. 171) ordered that "if there is any recovery received in connection with the resolution of the Class's proof of claim filed in the Lehman Brothers, Inc. SIPC proceeding pending in the Bankruptcy

Court in New York, the balance due to Lowenstein Sandler LLP of $16,524.83 and any additional reasonable fees and expenses incurred by Lowenstein Sandler LLP and approved by Lead Counsel with respect to the prosecution and settlement of that claim in the Bankruptcy Court shall be paid out of that recovery." ECF No. 171 at ¶ 5.

Lead Plaintiffs now seek reimbursement of the total amount of the expenses incurred for Lowenstein's services performed on behalf of the Class in the Lehman SIPA Proceeding in the amount of $79,246.33, which includes the $16,524.83 that was previously approved by the Court, as well as the additional expenses that have been incurred since that date, and the amounts anticipated to be incurred through final approval of the Settlement. Joint Decl. ¶ 44. If approved, the expenses will be paid from the funds received as a result of the Allowed Claim in the SIPA Proceeding pursuant to the Settlement.

Lead Plaintiffs submit that reimbursement of these expenses incurred is fair and reasonable because Lowenstein's efforts were essential to achieving the Settlement with the SIPA Trustee and the amounts are reasonable for counsel specializing in bankruptcy litigation in this District. Joint Decl. ¶ 45. In addition, the Summary Notice and Notice informed Class Members that Lead Plaintiffs would be seeking reimbursement of expenses in an amount not to exceed $85,000 (more than the amount actually requested now), and, to date, no objection has been raised to the expenses sought. *Id*.

Lead Counsel are not seeking any award of their own attorneys' fees, or reimbursement of any other litigation expenses incurred in connection with obtaining the Settlement.

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement, the proposed allocation of the proceeds of the Settlement, and the reimbursement of litigation expenses in the amount of $79,246.33.

Dated: May 5, 2015

Respectfully submitted,

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