The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL, INC. SECURITIES & ERISA LITIGATION	No. 2:08-md-1919 MJP
IN RE WASHINGTON MUTUAL, INC. SECURITIES LITIGATION This Document Relates to: ALL CASES	Lead Case No. C08-387 MJP PLC-21 **LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS** NOTE ON MOTION CALENDAR (Settlement Hearing Date): November 4, 2011 at 9:00 a.m.

Bernstein Litowitz Berger & Grossmann LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

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Lead Plaintiff Ontario Teachers' Pension Plan Board ("Ontario Teachers" or "Lead Plaintiff"), pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, respectfully submits this motion for final approval of the proposed settlements of this class action (the "Action") with the Individual Defendants and Washington Mutual Inc. ("WaMu" or the "Company") for payment of $105,000,000 in cash (the "D&O/WaMu Settlement"); with the Underwriter Defendants for payment of $85,000,000 in cash (the "Underwriters Settlement"); and with Deloitte & Touche ("Deloitte") for payment of $18,500,000 in cash (the "Deloitte Settlement") (collectively, the "Settlements"). The Settlements, if approved, will resolve all claims in the Action.

Lead Plaintiff is simultaneously submitting herewith the Declaration of Hannah Ross in Support of Lead Plaintiff's Motions for Final Approval of Class Action Settlements and Approval of Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses (the "Ross Declaration" or "Ross Decl."). The Ross Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action through the submission of the Settlements to the Court; the nature of the claims asserted in the Action; the negotiations leading to the Settlements; the value of the Settlements to the Class, as compared to the risks and uncertainties of continued litigation; and a description of the services Lead Counsel, Liaison Counsel, and the other Plaintiffs' Counsel provided for the benefit of the Class.[1]

I. PRELIMINARY STATEMENT

Following nearly three years of hard-fought litigation, Lead Plaintiff has achieved three Settlements providing an aggregate total recovery of $208.5 million for the Class. As set forth in detail below and in the accompanying Declaration of In Ha Jang of Ontario Teachers (the "Jang Decl.") (attached as Exhibit 2 to the Ross Decl.) and in the Ross Declaration, Lead Plaintiff and

[1] Unless otherwise noted, capitalized terms shall have the meaning set out in the Ross Declaration or in the Stipulations of Settlement (ECF Nos. 874-1, 874-2 and 874-3).

Lead Counsel believe that each of the Settlements represents an excellent result and that, collectively, the Settlements create an excellent recovery for the Class.

The Settlements were achieved only after Lead Plaintiff, through Lead Counsel, Liaison Counsel and the other Plaintiffs' Counsel, had (i) conducted an intensive investigation of WaMu's loan business that included interviews with nearly 500 witnesses; (ii) drafted two detailed consolidated complaints and prepared extensive briefing in opposition to five separate motions to dismiss each of the complaints; (iii) reviewed over 26 million pages of documents produced in discovery by the Settling Defendants and third parties; (iv) taken or participated in 25 depositions of fact witnesses and defended 12 depositions of potential class representatives and their advisors; (v) consulted extensively with experts in accounting and auditing, loan underwriting and statistical analysis, risk management, loss reserve modeling, loss causation, and damages; (vi) successfully moved for class certification over Defendants' vigorous opposition and successfully opposed three petitions by Defendants to obtain interlocutory review of the class certification rulings; (vii) successfully opposed Defendants' motion for judgment on the pleadings; and (viii) participated in prolonged settlement negotiations, including multiple mediation sessions before the Honorable Layn R. Phillips. As a result, Lead Plaintiff and Lead Counsel were well informed of the strengths and weaknesses of the case at the time of the Settlements and, based on this information, concluded that the Settlements are fair, adequate and reasonable and in the best interests of the Class.

The recoveries achieved here also are noteworthy because of the significant risks that Lead Plaintiff and the Class faced in establishing liability and damages and recovering on a judgment if they prevailed. Following WaMu's bankruptcy in September 2008, Lead Plaintiff faced a substantial risk that the Defendants most directly involved in the alleged misconduct would be not be able to pay a substantial judgment at the conclusion of the litigation. The Individual Defendants' ability to pay was limited and the insurance available to them – the most significant source of recovery from the Individual Defendants – was rapidly being exhausted by the costs for multiple national law firms and other expenses incurred in defending this Action,

other litigations pending before this Court and certain government investigations. Indeed, a significant amount, if not all, of the Individual Defendants' available insurance would likely be exhausted before a litigated judgment could be achieved in this Action. Accordingly, there was a substantial risk that, even if Lead Plaintiff prevailed, following a trial and any appeals, the Individual Defendants would not be able to pay any judgment, let alone one anywhere near as large as the $105 million settlement achieved now.

Lead Plaintiff and the Class would also have faced significant challenges in establishing liability and proving damages against all of the Defendants. Despite a number of governmental investigations into the collapse of WaMu, no criminal prosecutions or SEC enforcement actions were ever brought against anyone. Nor were there any restatements of WaMu's financial statements or admissions of wrongdoing by any of the Defendants. On the contrary, Defendants vigorously contended that there had been no actionable misstatements and they and their experts forcefully argued that the declines in the value of the WaMu's securities resulted from volatile and uncertain market conditions – including the 2008 global economic meltdown – rather than from the correction of any allegedly false statements about the quality of WaMu's loans and WaMu's allowance for loan losses as alleged by Lead Plaintiff. Accordingly, Lead Plaintiff would have faced real challenges in (i) proving loss causation and rebutting the Securities Act Defendants' negative causation arguments; (ii) establishing the *scienter* of the Exchange Act Defendants; (iii) proving that the alleged misstatements were false when they were made and not mere opinions or puffery; and (iv) overcoming the Underwriter Defendants' and Deloitte's due diligence defenses. Lead Plaintiff also had to consider the risks of bringing claims involving complex financial and accounting issues to trial, including the risk that a jury might ultimately credit Defendants' experts' view of these issues. Thus, although Lead Counsel and Lead Plaintiff believe that the Action has substantial merit, they also believe that the certainty of the substantial recovery to the Class achieved by the Settlements outweighs the potential and very uncertain outcome of continued litigation.

The outstanding quality of the Settlements is further evidenced by the views of the mediator, the Honorable Layn R. Phillips. *See* Declaration of Layn R. Phillips (attached as Exhibit 1 to the Ross Decl.) (the "Phillips Decl."), ¶ 18. Judge Phillips, a former U.S. Attorney and Federal District Judge and an experienced mediator of complex cases, directly oversaw the protracted mediation process, which involved multiple in-person mediation sessions with each group of Settling Defendants as well as numerous additional communications among Judge Phillips, the parties and counsel. Based on his involvement in the mediation, Judge Phillips endorses each of the Settlements as "represent[ing] a recovery and outcome that is reasonable and fair for the Class and the parties involved." *Id*. The Settlements have also been endorsed by Lead Plaintiff Ontario Teachers, a sophisticated institutional investor with a substantial financial stake in the litigation. *See* Jang Decl. ¶ 23.

As discussed in greater detail below, because the proposed Settlements are fair, adequate and reasonable and satisfy all applicable criteria for approval, Lead Plaintiff respectfully asks that they be approved.

II. NOTICE TO THE CLASS

On July 21, 2011, the Court preliminarily approved the Settlements and approved the dissemination of the Notice to potential Class Members and the publication of the Summary Notice. As of September 18, 2011, 950,930 Notices had been mailed to potential Class Members. *See* Affidavit of Jennifer M. Keough Regarding (A) Mailing of the Notice and the Proof of Claim and Release; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion ("Keough Aff."), attached as Exhibit 3 to the Ross Decl., at ¶ 7. In addition, the Summary Notice was published in *The Seattle Times* and the national edition of *The Wall Street Journal* and released over the *PR Newswire* on August 23, 2011. *See* Keough Aff. ¶ 8. The Notice contained, among other things, a description of the Action, the definition of the certified Class, the amounts and basic terms of the Settlements, the reasons for the Settlements, the proposed Plan of Allocation, the attorneys' fees and expenses that would be requested, and the procedures that Class Members must follow to opt out of the Class or object to the Settlements,

the Plan of Allocation and/or the application for attorneys' fees and expenses. Information regarding the Settlements, including downloadable copies of the Notice and Claim Form, was posted on a website dedicated to the settlements, www.WashingtonMutualSecuritiesLitigation Settlement .com. The Notice and Claim Form were also made available on Lead Counsel's website, www.blbglaw.com. *See* Ross Decl. ¶ 19; Keough Aff. ¶ 10.

The deadline for Class Members to file objections to the Settlements is October 10, 2011. While the Notice was mailed to over 950,000 potential Class Members, to date, no Class Members have filed any objection to the Settlements and, as of September 20, 2011, only 29 requests for exclusion have been received. *See* Ross Decl. ¶ 20; Keough Aff. ¶ 11. Lead Plaintiff will address the requests for exclusion and any objections that may be received in its reply brief, which will be filed on or before October 28, 2011.

III. ARGUMENT

A. The Standards For Judicial Approval Of Class Action Settlements

In the Ninth Circuit, "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). It is well-established that "voluntary conciliation and settlement are the preferred means of dispute resolution," and that this is particularly so in class action cases. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *see also Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Class actions readily lend themselves to compromise because of "the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006); *see also In re Skilled Healthcare Grp., Inc. Sec. Litig.*, 2011 WL 280991, at *2 (C.D. Cal. Jan. 26, 2011) ("judicial policy favors settlement in class actions and other complex litigation where substantial resources can be conserved by avoiding the time, cost and rigors of formal litigation").

Under Rule 23(e) of the Federal Rules of Civil Procedure, a class action may be settled upon notice of the proposed settlement to class members, and a court finding, after a hearing,

that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In exercising its discretion to approve the settlement of a class action, the Court should consider the following non-exclusive factors:

> (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Churchill Vill., LLC v. Gen. Elec., 361 F.3d 566, (9th Cir. 2004); *accord In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 458 (9th Cir. 2000); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625.

In exercising its sound discretion, the district court should not adjudicate the merits of the case. As the Ninth Circuit has noted:

> [T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.

Officers for Justice, 688 F.2d at 625; *see also Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) ("in order to avoid a trial, the judge must [not] in effect conduct one").

In addition to considering the substantive fairness, adequacy and reasonableness of a proposed settlement, the Court should also consider its procedural fairness and assure itself that the settlement is not the product of fraud or collusion among the settling parties. *See Officers for Justice,* 688 F.2d at 625; *City of Roseville Employees' Ret. Sys. v. Micron Tech., Inc.*, 2011 WL

1882515, at *4 (D. Idaho Apr. 28, 2011); *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 542 (W.D. Wash. 2009).

B. The Settlements Meet The Ninth Circuit Standard For Approval

Consideration of all the applicable factors set out by the Ninth Circuit strongly supports a finding that the proposed Settlements are fair, reasonable and adequate and should be approved.

1. The Significant Risks Of Continued Litigation Support Approval Of The Settlements

In considering the fairness and adequacy of a settlement, the Court should consider both "the strength of the plaintiffs' case" and "the risk . . . of further litigation." *Mego,* 213 F.3d at 458. While Lead Plaintiff believes that all of the claims asserted against Defendants were meritorious, it recognized that it and the Class faced a number of significant risks in prosecuting the litigation and recovering a judgment from the Settling Defendants in this Action.

First, the Individual Defendants would not have been able to meaningfully satisfy any judgment if the case proceeded to trial. *See* Ross Decl. ¶ 102. The bankruptcy of WaMu in September 2008, combined with the sale by the FDIC of WaMu's assets to JPMorgan Chase, left the Individual Defendants as the only Defendants in the case subject to Exchange Act liability and the only Defendants potentially liable for the massive losses suffered by purchasers of WaMu common stock. Lead Plaintiff had to consider the fact that the available insurance for the Individual Defendants was a "wasting asset" that was rapidly being depleted by their substantial defense costs, not only in this Action but in several other cases pending before this Court in which the Individual Defendants or other WaMu executives were named, as well as certain governmental investigations. *See id*. Indeed, Lead Plaintiff concluded that the insurance funds available to pay any judgment obtained against the Individual Defendants would be nearly, if not entirely, exhausted if the Action proceeded through to trial and the appeals that were sure to follow. Thus, even if Lead Plaintiff ultimately prevailed, the amount that could be recovered at that time could be substantially less than the current D&O/WaMu Settlement. *See id*. Thus,

this factor weighs heavily in favor of settlement with the Individual Defendants. *See Torrisi v. Tuscon Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (the deteriorating financial condition of the company defendant was the "predominat[ing]" factor supporting the reasonableness of the settlement); *Skilled Healthcare*, 2011 WL 280991, at *4 (approving settlement where plaintiffs had a well-founded concern that "prolonging [the] action entails a significant risk of not recovering anything at all"); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) (this factor favored settlement where the company defendant lacked money to fund a judgment and its "wasting insurance policies" meant that the "longer litigation went on, less and less money was available to satisfy a judgment or settlement").

In addition, as set forth in greater detail in the Ross Declaration, there were other significant risks with respect to establishing liability and damages against all Defendants in the Action. One significant litigation risk, applicable with respect to all claims asserted in the Action, was the need to prove loss causation or overcome "negative causation" arguments by Defendants. *See* Ross Decl. ¶ 104. Lead Plaintiff faced a heightened risk that it would not be able to establish the necessary causal connection between the alleged misstatements and the declines in WaMu's securities prices in this case because the declines in the prices of WaMu's securities occurred essentially contemporaneously with the broad financial crisis of 2007 and 2008. Between the pre-crisis market peak in September 2007 and the March 2009 trough, both the Dow Jones Average and the S&P Index decreased by over 50%. Defendants would have had plausible (and, they argued, "common sense") arguments that some or all of the declines in the value of the WMI Class Securities resulted from market movements and the "fear contagion" that prevailed during those times rather than from the revelation of Defendants' misstatements. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005) (noting that the likelihood of demonstrating loss causation decreases if a "plaintiff's loss coincides with a marketwide phenomenon"); *Micron*, 2011 WL 1882515, at *3 (difficulty in "distinguish[ing] between movements in Micron stock caused by artificial inflation and those caused by external market forces" was a risk supporting settlement); *Taft v. Ackermans*, 2007 WL 414493, at *6 (S.D.N.Y. Jan. 31,

2007) (approving settlement where "[e]xternal factors such as the industry-wide telecommunications 'meltdown' could make loss causation difficult to prove"). Even partial success by Defendants on this argument could have greatly reduced the damages that the Class would have been able to recover.

Moreover, proof of loss causation and calculation of damages at trial would ultimately have required expert testimony before the jury. While Lead Plaintiff would have been able to present a cogent and persuasive expert's view establishing loss causation and damages, there is little doubt that Defendants would also have been able to produce a well-qualified expert who would opine against a finding of loss causation for many or all of the price declines, giving rise to the well-known risk of the "battle of experts." Lead Plaintiff could not be certain which expert's view would prevail at trial. *See, e.g., In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *18 (S.D.N.Y. Nov. 8, 2010) ("The jury's verdict with respect to damages would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *4 (D.N.J. Nov. 28, 2007) ("there is risk associated with trying a case before a jury involving a likely battle of economic experts").

Lead Plaintiff would also have faced substantial challenges in proving that WaMu and the Officer Defendants who faced Exchange Act claims had acted with *scienter*. Here, the Officer Defendants would have argued that they did not act with any knowledge of the falsity of their statements or with recklessness because the housing crisis was completely unexpected and that they could not have anticipated the loan losses suffered. *See* Ross Decl. ¶ 105. Courts have often recognized the difficulty of proving *scienter*, particularly in circumstances such as this. *See Immune Response*, 497 F. Supp. 2d at 1172 ("The Court . . . recognizes that the issues of scienter and causation are complex and difficult to establish at trial."); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1388 (D. Ariz. 1989) ("The legal requirements associated with proof of this mental state are exceedingly stringent and laden with peril."). The Officer Defendants would have been able to argue that they lacked a motive to commit fraud

because the majority of them had not sold any WaMu securities during the Class Period, did not profit from the collapse of WaMu, and in fact claimed to have lost substantial money on their WaMu investments, thus making *scienter* that much harder to establish. *See Mego*, 213 F.3d at 458-59 (the fact that "none of the insider defendants sold any of their shares of . . . stock, or profited from the alleged inflation" was a risk that supported settlement in a Section 10(b) case); *see also Schuster v. Symmetricon, Inc.,* 2000 WL 33115909, at *7 (N.D. Cal. Aug. 1, 2000) (granting defendants' motion for summary judgment for lack of *scienter* in Section 10(b) case where key insiders did not sell their holdings in the company). Moreover, while there were government investigations into wrongdoing at WaMu, no prosecution alleging fraud had been brought against the Officer Defendants. *See* Ross Decl. ¶ 105.

Lead Plaintiff and the Class would also have faced challenges in establishing the falsity of statements made in the Offering Materials and in other public statements by WaMu and its officers. There had been no restatement of WaMu's financial results and Defendants vigorously denied that the statements were false or materially misleading. Defendants had argued and would have continued to argue that the statements which Lead Plaintiff alleged were false were true at the time they were made and only subsequently became false because of market conditions, were not misleading when considered in context of other statement by Defendants, were nonactionable puffery, or were statements of opinion. *See id*. ¶ 106. For example, as several of the Defendants had argued in their motions to dismiss, Defendants would have tried to characterize certain alleged misstatements, including WaMu's reporting of its Allowance for loan losses, as forecasts or predictions that were not false when made but that simply proved to be inaccurate as a result of later, unpredicted market changes. If the Court on summary judgment or the jury accepted this view, there could be no liability for these statements under either the Securities Act or Exchange Act. *See, e.g., In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 389 (9th Cir. 2010) (that a "forecast turned out to be incorrect does not retroactively make it a misrepresentation"); *Coronel v. Quanta Capital Holdings, Ltd.*, 2009 WL 174656, at *29 (S.D.N.Y. Jan. 26, 2009) (holding that the fact that "later announcements about reserve losses

differed from earlier ones . . . [did not establish that prior] reserve estimates were false"); *In re CIT Group, Inc. Sec. Litig.*, 349 F. Supp. 2d 685, 690-91 (S.D.N.Y. 2004) (holding that later increases to loan loss reserves provided no basis for concluding that statements regarding the adequacy of prior period reserves were false). Defendants also had colorable arguments that Defendants' statements about the adequacy of WaMu's Allowance for loan loss reserves should be considered statements of opinion, which would require proving not only that the statement was false but that the relevant defendant believed it to be false. *See, e.g., Fait v. Regions Fin. Corp.*, 2011 WL 3667784, at *7 (2d Cir. Aug. 23, 2011) (characterizing statements "regarding the adequacy of loan loss reserves" as opinions requiring proof of subjective falsity).

With respect to the claims asserted against the Underwriter Defendants and Deloitte arising out of the October 2007 and December 2007 Offerings, Lead Plaintiff would have faced additional significant hurdles in establishing the falsity of the statements (or overcoming "negative causation" defenses) because these offerings occurred after WaMu had already announced substantial increases to its loan loss provisions and some analysts were openly commenting on the company's dire financial condition and bleak prospects. *See* Ross Decl. ¶ 108. The December 2007 Offering of Series R Stock, which suffered the largest damages of any of the Offering Securities, also occurred after the NYAG's lawsuit alleging fraud in connection with appraisals of WaMu's loans was publicly filed, which Defendants argue acted as a complete corrective disclosure of the misstatements alleged in the Complaints. These and other similar hurdles to establishing the falsity of WaMu's public statements and the Offering Materials would have affected both the Exchange Act and Securities Act claims.

Finally, the Underwriter Defendants and Deloitte would also have asserted plausible due diligence defenses to liability under the Securities Act. Many WaMu executives had signed and certified WaMu's financial statements and the effectiveness of its internal controls that both the Underwriter Defendants and Deloitte would likely point to as providing them comfort regarding the company's controls and financial condition and prospects. At summary judgment or trial, the Underwriter Defendants and Deloitte might have been able to prevail on the grounds that they

conducted adequate due diligence with respect to the Offerings but simply did not uncover facts showing that WaMu's statements about its underwriting practices or appraisal process were false or that its allowance for loan losses was improper. *See* Ross Decl. ¶ 107.

Even if Lead Plaintiff had prevailed through summary judgment, risks to the Class would remain. A meritorious case can be lost at trial, s*ee, e.g., In re JDS Uniphase Corp. Sec. Litig*., 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (after a lengthy trial, jury returned a verdict against plaintiffs and the action was dismissed), and even success at trial does not eliminate the risk. For example, in *In re Apple Computer Sec. Litig.*, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for plaintiffs after an extended trial, but the court overturned the verdict and entered judgment for the individual defendants and ordered a new trial with respect to the corporate defendant. Any verdict for Lead Plaintiff would also have been subject to appeal on many of the same issues discussed above.

In sum, in light of the number of substantial challenges to establishing liability and damages and recovering on a judgment in this Action, Lead Plaintiff and Lead Counsel believe that the proposed Settlements are in the best interests of the Class.

2. The Expense, Complexity, And Likely Duration Of Further Litigation Support Approval Of The Settlements

The certainty of immediate and substantial recoveries for Class Members under the Settlements also strongly weighs in favor of approval of the Settlements given the expense, complexity and likely duration of continued litigation. *See McPhail v. First Command Fin. Planning, Inc.*, 2009 WL 839841, at *4 (S.D. Cal. Mar. 30, 2009) ("The expense and possible duration of the litigation should be considered in evaluating the reasonableness of settlement.") (quoting *Mego*, 213 F.3d at 458); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *6 (C.D. Cal. June 10, 2005) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.") (internal quotation marks omitted).

Indeed, Courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute," *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007), and that litigating a "complex securities fraud class action to completion" will result "in substantial delay and expense." *Atlas v. Accredited Home Lenders Holding Co.*, 2009 WL 3698393, at *3 (S.D. Cal. Nov. 4, 2009); *see also Cervantez v. Celestica Corp.*, 2010 WL 2712267, at * 4 (C.D. Cal. July 6, 2010) ("Trial of a class action is a lengthy, expensive proposition."). Moreover, as detailed in the Ross Declaration, there can be no doubt that this Action, which arose from the largest bank failure in the history of the United States and raised complex legal, financial and accounting questions (such as issues about WaMu's underwriting standards, appraisal practices and the proper accounting for WaMu's Allowance, among others) presented a level of complexity well beyond the typical securities class action.

At the time the Settlements were reached, the bulk of the massive document discovery (over 26 million pages of documents were produced) had been completed, the parties had already taken 37 depositions – including 25 fact depositions and 12 depositions in connection with class certification – and they had scheduled and were preparing for the depositions of dozens of additional witnesses. If there were no Settlements, the litigation would have proceeded, following the completion of fact discovery, to the preparation of expert reports, taking of expert depositions, briefing of motions for summary judgment and motions *in limine*, and finally a trial, which was scheduled to begin in June 2012. Given the stakes involved in this litigation, an appeal was virtually assured regardless of the result of trial, which could have led to several years of additional delay before Class Members could enjoy the benefit of the verdict, if any, obtained by Lead Plaintiff.

In addition, there can be no doubt that the costs of continued litigation, which would, among other things, require a substantial amount of time by experts and a trial estimated to last five weeks, would be considerable. The substantial additional expenses that would necessarily be incurred to prosecute the case to its completion would cut directly into any litigated judgment obtained for the Class. Moreover, in addition to the costs that would be incurred in continuing to

prosecute the Action on behalf of the Class, another very significant consideration, as discussed above, was the substantial expenses that the Individual Defendants could be expected to incur in defending the Action. These defense costs were depleting the insurance available to pay a judgment or later settlement and, indeed, could well have exhausted the policies. This consideration provides additional support for a settlement at this time.

Instead of the lengthy, costly, and uncertain course of further litigation, the Settlements provide immediate and certain recoveries for the Class. Lead Plaintiff and Lead Counsel believe that the benefits of the Settlements outweigh the substantial risks associated with lengthy and costly continued litigation.

3. The Risks Of Maintaining Class Action Status Support Approval Of The Settlements

Although class certification was hotly contested by Defendants and there is always a risk that the Court could revisit its certification decision, *see Micron*, 2011 WL 1882515, at *4 ("a court can decertify a class at any time"), Lead Plaintiff believes the potential risks of decertification of the Class were minimal in this case and were not a factor in the decision to settle.

However, the related risk that Defendants might be able to substantially shorten the class period, following summary judgment or at trial, was a significant risk considered by Lead Plaintiff. Defendants had previously advanced arguments based on loss causation and negative causation that the class period should end in October or November 2007, rather than July 2008. In certifying a Class including persons and entities who purchased WMI Class Securities from October 19, 2005 to July 23, 2008, the Court rejected Defendants' arguments, which went to the merits of the Class's claims, as inappropriate for a motion for class certification but noted that the issue was "open . . . for the parties to explore through discovery, dispositive motions and trial." Order on Class Certification, dated October 12, 2010 (ECF No. 759), at 26. If Defendants had succeeded in their efforts to shorten the class period at a later stage in the litigation, the maximum potential damages recoverable by the Class would have been substantially reduced.

Moreover, the shortened class period might have entirely eliminated one or more of the Offerings which provided the bases for the Underwriter Defendants' and Deloitte's liability in the Action, including the December 2007 Offering of Series R Stock, which accounted for the largest amount of damages to the Class of any of the Offering Securities. The Settlements eliminate the risk of an unfavorable decision on this issue.

4. The Amounts Obtained Support Approval Of The Settlements

The settlement amounts obtained support approval of the Settlements. The total settlement amount achieved – $208.5 million in cash – is believed to be the largest settlement ever achieved in a securities class action in the Western District of Washington. *See* Ross Decl. ¶ 4. It is also one of the five largest settlements in a securities class action arising from the subprime mortgage crisis – and the largest of these settlements to be achieved where the issuer defendant had filed for bankruptcy. *See id.*

As discussed above, there were substantial risks with respect to loss causation, proof of *scienter* and falsity, and the recoverability on a judgment. In addition, litigating this complex action to completion would have resulted in significant expense and delay. The recoveries achieved – obtained in the face of the risk of no recovery at all, a substantially smaller recovery or an outcome that eliminated recovery on all claims against certain defendants or on certain of the WMI Class Securities – support approval of the Settlements.

The determination of a "reasonable" settlement is not susceptible to a mathematical equation yielding a particularized sum. Rather, "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). Courts in the Ninth Circuit have "long deferred to the private consensual decision of the parties" in evaluating the adequacy of a settlement amount. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Indeed, the Court of Appeals has cautioned that evaluation of the settlement amount should be "limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties," and that the settlement as a whole is fair, reasonable and adequate. *Hanlon*, 150 F.3d at 1027 (quoting

Officers for Justice, 688 F.2d at 625). A proposed settlement may be acceptable even though it amounts to only "a fraction of the potential recovery" that might be available to the class members at trial. *See Mego*, 213 F.3d at 459; *see also Micron*, 2011 WL 1882515, at *4; *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004).

Here, the Settlements confer immediate and valuable cash benefits to eligible Class Members. Given the complexities of this litigation and the continued risks if the parties were to proceed through the conclusion of discovery, summary judgment motions and trial, the Settlements represent a reasonable resolution of this Action and eliminate the risk that the Class might not otherwise recover.

5. The Extent Of Discovery Completed And The Stage Of The Proceedings Support Approval Of The Settlements

The stage of the proceedings and the amount of information available to the parties to assess the strengths and weaknesses of their case is another factor that courts consider. *See Mego*, 213 F.3d at 459; *McPhail*, 2009 WL 839841, at *5.

As detailed in the Ross Declaration, at the outset of this litigation, Lead Counsel conducted an extensive investigation and analysis of the merits of their claims, including interviewing nearly 500 witnesses; reviewing and analyzing extensive publicly available information about WaMu including SEC filings, analyst reports, new articles, press releases and other public statements; consulting with experts in accounting and auditing, loan underwriting and statistical analysis, risk management, loss reserve modeling, loss causation, and damages; and researching the law regarding the claims and possible defenses asserted. *See* Ross Decl. ¶¶ 31-34. Lead Counsel's investigation uncovered substantial information and critical internal documents that had never previously been made public and Lead Plaintiff was able to present evidence from numerous confidential witness statements and cite to many previously-undisclosed documents in the Complaints.

Following the Court's denial of the Defendants' second round of motions to dismiss, Lead Plaintiff actively pursued discovery. By the time the Settlements were reached, Plaintiffs'

Counsel had engaged in a massive amount of discovery on the merits which included the review of over 26 million pages of documents produced by Defendants and third parties in response to 16 subpoenas as well as 37 depositions, and had begun preparing for expert discovery. *See* Ross Decl. ¶¶ 48-66, 68, 78. Lead Plaintiff's briefing in response to two rounds of motions to dismiss, its motion for class certification and the detailed mediation statements submitted by all parties also enhanced Lead Plaintiff and Lead Counsel's understanding of the key issues in the case. *See id*. ¶¶ 40-42, 43-47, 67-73, 87.

In light of the significant discovery completed and the relatively advanced stage of the proceedings, Lead Plaintiff and Lead Counsel were fully aware of the strengths and weaknesses of the case at the time the Settlements were reached. Accordingly, this factor strongly supports approval of the Settlements. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008); *Heritage Bond*, 2005 WL 1594403, at *9.

6. Experienced Lead Counsel And A Sophisticated And Involved Lead Plaintiff Both Support Approval Of The Settlements

Courts recognize that the opinion of experienced counsel supporting a settlement is entitled to considerable weight. *See Pelletz*, 255 F.R.D. at 543 ("Class counsel are highly experienced in class action litigation . . . The fact that they view the settlement as fair, adequate and reasonable supports the Court finding same."); *Omnivision*, 559 F. Supp. 2d at 1043 ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness."). Courts give considerable weight to the opinions of counsel because counsel are "most closely acquainted with the facts of the underlying litigation." *Heritage Bond*, 2005 WL 1594403, at *9 (internal quotation marks omitted); *see also Glass v. UBS Fin. Servs., Inc.*, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007), *aff'd*, 331 Fed. Appx. 452 (9th Cir. 2009). Indeed, "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Thus, "the trial judge, absent fraud, collusion, or the like, should be

hesitant to substitute its own judgment for that of counsel." *Heritage Bond*, 2005 WL 1594403, at *9 (internal quotation marks omitted).

This Action has been litigated by experienced and competent counsel on both sides. Lead Counsel Bernstein Litowitz Berger & Grossmann LLP ("BLB&G") has many years of experience in litigating complex securities fraud actions throughout the country, and in assessing the merits of each side's case. *See* Firm Resume of BLB&G, attached as Exhibit 6-3 to the Ross Declaration. Liaison Counsel Byrnes Keller Cromwell LLP, which played a substantial role in the prosecution of the case, including taking and defending multiple depositions, conducting witness interviews, and working with experts, also brought significant experience and skill to the prosecution of the Action. *See* Firm Resume of Liaison Counsel, attached as Exhibit 7-3 to the Ross Declaration. Moreover, the Settlement was reached through the substantial assistance of an experienced mediator, former United States District Judge Layn Phillips. It is Lead Counsel's and Liaison Counsel's informed opinion that, given the uncertainty and further substantial expense of pursuing this Action through the balance of discovery, summary judgment motions, trial and appeals, and the constraints on the Individual Defendants' ability to pay, the proposed Settlements are fair, reasonable and adequate and in the best interests of the Class. *See* Ross Decl. ¶ 12.

Moreover, approval of a settlement by a Lead Plaintiff appointed under the PSLRA should be accorded "special weight because [the Lead Plaintiff] may have a better understanding of the case than most members of the class." *DIRECTV,* 221 F.R.D. at 528 (quoting *Manual for Complex Litigation (Third)* § 30.44 (1995)); *see In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *5 (N.D. Cal. Nov. 26, 2007) (the fact that a PSLRA lead plaintiff was "intimately involved in the settlement negotiations" and approved the settlement supported its approval); *In re Veeco Instrs. Sec. Litig.*, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (a settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is entitled to an even greater presumption of reasonableness") (internal quotation marks omitted). Congress enacted the PSLRA in large part to encourage sophisticated institutional

investors to take control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at *27 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731 (1995).

Here, Lead Plaintiff Ontario Teachers actively supervised the prosecution, mediation and settlement of this Action and has fully endorsed each of the Settlements. *See* Jang Decl. ¶¶ 2-23, attached as Exhibit 2 to the Ross Decl. Lead Plaintiff's approval is strong evidence that the Settlements are fair, reasonable and adequate.

7. Reaction Of The Class To The Proposed Settlements

Another factor to be weighed in determining the fairness and adequacy of the Settlements is the reaction of the Class. *See Mego*, 213 F.3d at 459; *Skilled Healthcare*, 2011 WL 280991, at *4. Indeed, courts have explained that "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Omnivision*, 559 F. Supp. 2d at 1043.

To date, the reaction of the Class is overwhelmingly positive and supports approval of the Settlements. Pursuant to the Preliminary Approval Order, as of September 18, 2011, 950,930 copies of the Notice were mailed to potential Class Members, and a Summary Notice was published in *The Seattle Times* and *The Wall Street Journal* and issued over the *PR Newswire* on August 23, 2011. *See* Keough Aff. ¶¶ 7-8, attached as Exhibit 3 to the Ross Declaration. While the deadline set by the Court for Class Members to exclude themselves or object to the Settlements has not yet passed, to date no objections to the Settlements and, as of September 20, 2011, only 29 requests for exclusion have been received. The deadline for submitting objections and requesting exclusions from the Class is October 10, 2011 and Lead Plaintiff will file reply papers after that date addressing any objections and the requests for exclusion.

8. The Settlements Are The Product Of Arm's-Length Negotiations

Each of the Settlements was the product of prolonged and hard-fought negotiations between Lead Plaintiff and the respective groups of Settling Defendants. The Settlements were negotiated by experienced counsel for all parties and the process included multiple in-person mediation sessions led by Judge Phillips. Judge Phillips has described the negotiations as "intense" and "fully at arm's length" and has endorsed the Settlements as "represent[ing] a recovery and outcome that is reasonable and fair for the Class and the parties involved." Phillips Decl. ¶¶ 13, 17, 18.

The fact that the Settlements are the product arm's-length negotiations between experienced and well-informed counsel supports approval of the Settlements. *See Lundell v. Dell, Inc.*, 2006 WL 3507938, at *3 (N.D. Cal. Dec. 5, 2006) (approving class action settlement that was "the result of intensive, arms'-length negotiations between experienced attorneys familiar with the legal and factual issues of this case"). Indeed, where settlement agreements are reached in arm's-length negotiations after an opportunity for meaningful discovery, a presumption arises that the settlements achieved are fair. *See Immune Response*, 497 F. Supp. 2d at 1171; *Heritage Bond*, 2005 WL 1594403, at *3. The active involvement of an experienced mediator such as Judge Phillips in negotiating the Settlements adds further support to the presumption of fairness. The adversarial nature of the negotiations and the involvement of the mediator also rebut any suggestion that the Settlements are the product of collusion. *See HCL Partners Ltd. P'ship v. Leap Wireless Int'l, Inc.*, 2010 WL 4027632, at *2 (S.D. Cal. Oct. 14, 2010); *Immune Response*, 497 F. Supp. 2d at 1174.

C. Notice To The Class Satisfied The Requirements Of Rule 23 and Due Process

The notice provided to potential Class Members of certification of the Class and the Settlements satisfied the requirements of both Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," Fed. R. Civ. P. 23(c)(2)(B), and Rule 23(e)(1), which

requires that notice of a settlement be directed to a class members in a "reasonable manner." Fed. R. Civ. P. 23(e)(1). Notice of a class action settlement is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *West Publ'g*, 563 F.3d at 962 (quoting *Churchill Vill.*, 361 F.3d at 575).

Both the substance of the Notice and the method of its dissemination to potential Class Members satisfied these standards. The Court-approved Notice and Claim Form (the "Notice Packet") fairly apprised Class Members of their rights with respect to the Settlements and included all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. §§ 77z-1(a)(7), 78u-4(a)(7), including: (a) an explanation of the nature of the Action and the Class's claims; (b) a definition of the Class; (c) the amount of the Settlements; (d) a description of the Plan of Allocation; (e) an explanation of the reasons why the parties are proposing the Settlements; (e) a statement indicating the attorneys' fees and costs sought; (f) a description of Class Members' rights to request exclusion from the Class or object to the Settlements, the Plan of Allocation, or the requested attorneys' fees or expenses; and (g) notice of the binding effect of a judgment on Class Members.

In accordance with the Preliminary Approval Order, beginning on August 10, 2011, Garden City Group, Inc. ("GCG"), the Court-appointed Claims Administrator, mailed copies of the Notice Packet by first-class mail to potential Class Members, brokers and nominees. *See* Keough Aff. ¶ 3. Brokers and nominees were instructed to forward the Notice Packet to the beneficial owners of WMI Class Securities or to provide GCG with a list of such beneficial owners within 14 days. *See* Keough Decl. Ex. A at ¶ 94. As of September 18, 2011, 950,930 Notice Packets had been mailed to potential Class Members. *See* Keough Aff. ¶ 7. On August 23, 2011, the Summary Notice was published in *The Seattle Times*, the national edition of *The Wall Street Journal* and was released over the *PR Newswire*. *See id.* ¶ 8. The Notice and the Summary Notice also referenced the Internet websites for Lead Counsel and the Claims

Administrator where investors could view and download the Notice and Proof of Claim form. *See id.* ¶ 10; Ross Decl. ¶ 19.

This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in relevant, widely-circulated publications, was "the best notice . . . practicable under the circumstances" Fed. R. Civ. P. 23(c)(2)(B). This method of providing notice has been repeatedly approved for use in securities class actions and other comparable class actions. *See Silber v. Mabon*, 18 F.3d 1449, 1452-54 (9th Cir. 1994); *HCL Partners*, 2010 WL 4027632, at *3-*4; *Immune Response*, 497 F. Supp. 2d at 1170-71; *Hughes v. Microsoft Corp.,* 2001 WL 34089697, at *1 (W.D. Wash. Mar. 26, 2001).

IV. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court grant final approval of the Settlements.

Dated: September 25, 2011

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By: /s/ *Hannah Ross*
Hannah Ross (pro hac vice)
Katherine M. Sinderson (pro hac vice)
1285 Avenue of the Americas
New York, New York 10019
Tel: (212) 554-1400
Fax: (212) 554-1444
Email: hannah@blbglaw.com
katherine@blbglaw.com

Counsel for Lead Plaintiff Ontario Teachers' Pension Plan Board and Lead Counsel for the Class

BYRNES & KELLER LLP
Bradley S. Keller, WSBA# 10665
Jofrey M. McWilliam, WSBA# 28441
1000 Second Avenue, Suite 3800
Seattle, Washington 98104
Tel: (206) 622-2000
Fax: (206) 622-2522
Email: bkeller@byrneskeller.com
jmcwilliam@byrneskeller.com

Liaison Counsel for the Class

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses on the Court's Electronic Mail Notice list.

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By: /s/ *Hannah Ross*
Hannah Ross (pro hac vice)
Katherine M. Sinderson (pro hac vice)
1285 Avenue of the Americas
New York, New York 10019
Tel: (212) 554-1400
Fax: (212) 554-1444
Email: hannah@blbglaw.com
katherine@blbglaw.com

Counsel for Lead Plaintiff Ontario Teachers' Pension Plan Board and Lead Counsel for the Class

BYRNES & KELLER LLP
Bradley S. Keller, WSBA# 10665
Jofrey M. McWilliam, WSBA# 28441
1000 Second Avenue, Suite 3800
Seattle, Washington 98104
Tel: (206) 622-2000
Fax: (206) 622-2522
Email: bkeller@byrneskeller.com
jmcwilliam@byrneskeller.com

Liaison Counsel for the Class

#575523