

The Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL, INC. SECURITIES & ERISA LITIGATION)	No. 2:08-md-1919 MJP
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)	
)	
IN RE WASHINGTON MUTUAL, INC. SECURITIES LITIGATION)	Lead Case No. C08-387 MJP
)	
This Document Relates to: ALL CASES)	PLC-31
)	LEAD COUNSEL’S MOTION
)	FOR AN AWARD OF
)	ATTORNEYS’ FEES AND
)	REIMBURSEMENT OF
)	LITIGATION EXPENSES
)	
)	NOTE ON MOTION CALENDAR
)	(Settlement Hearing Date):
)	February 5, 2016 at 9:00 a.m.
)	
)	

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3 **RULES**

4 Fed. R. Civ. P. 23(h) 1

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1 Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP (“Lead
 2 Counsel” or “BLB&G”), respectfully submits this motion, pursuant to Fed. R. Civ. P. 23(h), for
 3 an award of attorneys’ fees for work performed in obtaining the Lehman Settlement to itself,
 4 Liaison Counsel Byrnes Keller Cromwell LLP (“Liaison Counsel”), and Saxena White P.A.,
 5 counsel for Class Representative Brockton (collectively, “Plaintiffs’ Counsel”). The amount of
 6 the fee requested is \$163,000.00, to be paid from the proceeds of the Lehman Settlement. Lead
 7 Counsel also seeks reimbursement of \$182,896.50 in unreimbursed litigation expenses that were
 8 reasonably and necessarily incurred in prosecuting and settling the Class Claim against Lehman
 9 in its SIPA Proceeding. The substantial majority of the expenses relate to the continued retention
 10 of bankruptcy counsel Lowenstein Sandler LLP (“Bankruptcy Counsel” or “Lowenstein”).

11 Lead Counsel is simultaneously submitting herewith (i) the Declaration of Hannah Ross
 12 in Support of Class Representative’s Motion for Final Approval of Settlement of Class Claim
 13 Filed in the SIPA Liquidation of Lehman Brothers Inc. and Lead Counsel’s Motion for an Award
 14 of Attorneys’ Fees and Litigation Expenses (the “Ross Declaration” or “Ross Decl.”); and (ii)
 15 Class Representative’s Motion for Final Approval of Lehman Settlement (the “Settlement
 16 Motion”). The Ross Declaration and the Settlement Motion set forth a detailed description of,
 17 among other things, the history of the prosecution of the claims against Lehman and the efforts
 18 of Plaintiffs’ Counsel and Bankruptcy Counsel; the terms of the Lehman Settlement; the benefits
 19 of the Lehman Settlement in light of the risks and uncertainties of continued litigation; and the
 20 services that Plaintiffs’ Counsel provided for the benefit of the Class.¹

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 25 ¹ All capitalized terms not otherwise defined herein have the meaning set forth in the Ross
 26 Declaration, the Stipulation and Order Regarding Proofs of Claim of Brockton Contributory
 27 Retirement System, *et al.* (No. 5765, as Amended by No. 6802, and 5762) and Limited Related
 Stay Relief dated March 20, 2015 (the “Stipulation”), or the Stipulation of Settlement with the
 Underwriter Defendants dated June 30, 2011 (ECF No. 874-2).

PRELIMINARY STATEMENT

1

2 Following an extensively litigated case that resulted in an aggregate recovery for the

3 Class of \$208.5 million in three earlier settlements, Lead Counsel has now obtained a substantial

4 financial recovery from the last culpable party in the downfall of Washington Mutual, Inc.

5 (“WaMu”): Lehman Brothers Inc. (“Lehman”), one of the underwriters of WaMu securities.

6 The claims against Lehman in this Action were stayed as a result of the filing of Lehman’s SIPA

7 Proceeding and could only be pursued in Lehman’s SIPA Proceeding in bankruptcy court. Lead

8 Counsel, with the assistance of Liaison Counsel and retained Bankruptcy Counsel, pursued the

9 claims against Lehman in the SIPA Proceeding on a fully contingent basis for several years after

10 the resolution of all other claims in this Action, investing a substantial amount of attorney time

11 and funding out of pocket over \$180,000 in additional litigation expenses. Following extensive

12 arm’s-length negotiations that took place only after it became clear that the Lehman estate would

13 have funds available to pay substantial claims to unsecured creditors in the SIPA Proceeding,

14 Lead Counsel has now obtained an additional recovery for the Class. The additional recovery

15 consists of a \$16.5 million Allowed Class Claim in Lehman’s SIPA Proceeding, which is

16 expected to ultimately result in payment of approximately \$8.25 million to the Class. This

17 additional settlement will bring the aggregate total recovery achieved for the Class to

18 approximately \$216.75 million.

19 As compensation for their efforts on behalf of the Class in obtaining this additional

20 settlement, Lead Counsel is applying, on behalf of Plaintiffs’ Counsel, for attorneys’ fees in the

21 amount of \$163,000.00 to be paid from the proceeds received from the Lehman Settlement. The

22 fee request is based on Plaintiffs’ Counsel’s total lodestar for work performed in obtaining the

23 Lehman Settlement, adjusted to Seattle rates by capping counsel’s rates at the hourly rate of

24 Liaison Counsel Bradley S. Keller, as was done by the Court in its 2011 fee decision. *See In re*

25 *Washington Mut., Inc. Sec. Litig.*, No. 08-md-1919 MJP, 2011 WL 8190466, at *1 (W.D. Wash.

26 Nov. 4, 2011). Counsel are not requesting any multiplier on the lodestar, and the fee requested

27 represents only 2% of the total expected recovery under the Settlement.

1 Lead Counsel believes that fee requested is fair and reasonable. First, Lead Counsel
2 believes that Lehman Settlement is an excellent result for the Class. As discussed in the Ross
3 Declaration and the Settlement Motion, there were many costs and risks associated with
4 litigating the Class Claim in the SIPA Proceeding, including the risks of proving that the alleged
5 misstatements in WaMu's registration statements were false and misleading when made (and
6 were not merely statements of opinion or later made false by changed circumstances), and risks
7 in rebutting Lehman's anticipated due diligence and "negative causation" defenses. In light of
8 these risks, Lead Counsel believes that the proposed Settlement is an excellent result for the
9 Class.

10 The Settlement was achieved only after lengthy efforts by Plaintiffs' Counsel and
11 Bankruptcy Counsel to pursue claims against Lehman in this Action and through the SIPA
12 Liquidation, which included: (a) an extensive initial investigation of potential claims against
13 WaMu and other defendants such as Lehman; (b) the filing of a detailed Consolidated Class
14 Action Complaint including claims against Lehman; (c) extensive litigation of similar claims in
15 this Action against the non-debtor Defendants (including underwriter defendants situated
16 similarly to Lehman) through motion practice, class certification, the review of millions of pages
17 of documents and taking of 25 merits depositions; (d) the filing of timely proofs of claim in the
18 SIPA Proceeding to preserve the claims of Plaintiffs and the Class against Lehman's estate;
19 (e) extensive monitoring of the SIPA Proceeding over the course of several years; (f) responding
20 to requests for information and pleadings filed in the SIPA Proceeding; and (g) lengthy arm's-
21 length negotiations of the Settlement with counsel for the SIPA Trustee.

22 As with the prosecution of the other claims in this Action, the pursuit of the Class Claim
23 against Lehman in its SIPA Proceeding was undertaken on an entirely contingent basis in the
24 face of the significant risks. While other class counsel might have been satisfied with \$208.5
25 million recovery obtained in the 2011 Settlements, which was expected to be the full amount of
26 the recovery for the Class at the time of those settlements, Plaintiffs' Counsel here continued
27 their efforts and put additional attorney time at risk and invested substantial expenses in order to

1 continue to pursue the Class Claim against Lehman in the SIPA Proceeding, and to obtain this
2 additional and substantial recovery for the Class.

3 Where a common fund is recovered for the benefit of a class, attorneys' fees may be
4 awarded either as a percentage of the common fund or using the lodestar method, in which
5 counsel's reasonable lodestar for the work performed is adjusted by a multiplier to account of the
6 risks of the litigation, the quality of the result, and other factors. *See Hanlon v. Chrysler Corp.*,
7 150 F.3d 1011, 1029 (9th Cir. 1998). Lead Counsel's fee request here is based on the lodestar
8 method, but is reasonable under either analysis.

9 Lead Counsel seeks a fee in the amount of \$163,000.00, which represents Plaintiffs'
10 Counsel's total lodestar for work related to obtaining the Lehman Settlement from September 1,
11 2013 through December 21, 2015. Ross Decl. ¶ 51. In calculating this lodestar, the hourly rate
12 for all of Plaintiffs' Counsel's attorneys has been capped at the hourly rate of Liaison Counsel
13 Bradley S. Keller (\$550 an hour), in order to reflect Seattle-area legal rates, as the Court did
14 when considering the 2011 fee application. *See Washington Mut.*, 2011 WL 8190466, at *1.
15 The fee request based on counsel's lodestar is reasonable and especially so here where no
16 upward multiplier is sought, notwithstanding the substantial contingency risks presented by the
17 litigation.

18 The requested fee – which is 2% of the expected recovery – is also extremely reasonable
19 when viewed on a percentage basis. The total amount that will ultimately be recovered as a
20 result of the Lehman Settlement through the \$16.5 million Allowed Class Claim is currently
21 unknown but it is expected to be approximately \$8,250,000 (or 50% of the value of the Allowed
22 Class Claim). Ross Decl. ¶ 5. Moreover, the SIPA Trustee has reserved funds for the Class
23 Claim based on the amounts of distributions already made on other allowed general unsecured
24 claims in the SIPA Proceeding in the amount of 35% of the Allowed Class Claim, or \$5,775,000.
25 *Id.* This amount will be payable to the Class once the Settlement becomes final and all
26 conditions to such payment have been satisfied, with the balance of the total recovery to be paid
27 as future distributions are made in the SIPA Proceeding. The requested fee of \$163,000.00

1 represents only 2% of the total expected recovery of \$8,250,000 and 2.8% of the \$5,775,000 that
2 has already been reserved. These percentages are far below both the 25% benchmark for
3 percentage fees in common fund awards established by the Ninth Circuit (*see Vizcaino v.*
4 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002)), and the 21% award made in connection
5 with the 2011 Settlements. *See Washington Mut.*, 2011 WL 8190466, at *1.

6 Lead Counsel is also seeking reimbursement of expenses incurred by Plaintiffs' Counsel
7 in connection with work performed in obtaining the Lehman Settlement in the amount of
8 \$182,896.50 to be paid from the proceeds of the Lehman Settlement. The largest portion of
9 these expenses are those incurred in connection with the continued retention of Bankruptcy
10 Counsel, which provided substantial assistance to Lead and Liaison Counsel in connection with
11 Lehman's SIPA Proceeding and obtaining this Settlement, including monitoring Lehman's SIPA
12 Proceeding, reviewing documents and pleadings filed in the SIPA Proceeding, assisting in
13 responding to requests for information from the SIPA Trustee's counsel, assisting in responding
14 to relevant pleadings and motions filed in the SIPA Proceeding, assisting Lead Counsel in
15 negotiating the terms of the Settlement with counsel for the SIPA Trustee, assisting in drafting
16 the Stipulation and other papers related to the Settlement, and obtaining a modification of the
17 automatic stay by the Bankruptcy Court to permit review and approval of the Settlement by this
18 Court. Ross Decl. ¶ 60. The other expenses for which reimbursement is sought were also
19 reasonable and necessary to the prosecution and successful resolution of the Class Claim against
20 Lehman and Lead Counsel respectfully requests that they be approved for reimbursement from
21 the proceeds of the Lehman Settlement.

22 On July 6, 2015, the Claims Administrator for this Action mailed the Summary Notice of
23 the Lehman Settlement to 1,693 Class Members who had submitted claims in the Action and are
24 eligible to receive further distributions from the earlier Underwriter Settlement, and who would
25 thus stand to benefit from the additional funds obtained through the Lehman Settlement. Ross
26 Decl. ¶ 44. The Summary Notice informed Class Members of Lead Counsel's intent to apply for
27 an award of attorneys' fees in an amount not to exceed 7.5% of the proceeds of the Settlement

1 and for reimbursement of litigation expenses in an amount not to exceed \$225,000, and
 2 information on how to object to the motion for fees and expenses. *Id.* The fees and expenses
 3 sought are far less than the maximum fees and expenses set forth in the Notice and, to date, no
 4 objections to the request for fees and expenses have been received. *Id.* ¶ 47. Should any
 5 objections be received, they will be addressed in Lead Counsel’s reply papers, which will be
 6 filed on January 29, 2015, seven days before the Settlement Hearing.

7 For these reasons, as discussed further below, Lead Counsel respectfully submits that the
 8 requested fees and expenses are fair and reasonable and should be granted.

9 ARGUMENT

10 **I. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND REASONABLE**

11 The Supreme Court has long recognized that, when a representative plaintiff successfully
 12 establishes a common fund in which others have a beneficial interest, the costs of the litigation,
 13 including an award of reasonable attorneys’ fees, should be paid from the fund. *See Boeing Co.*
 14 *v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[A] litigant or a lawyer who recovers a common fund
 15 for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee
 16 from the fund as a whole.”). The purpose of the common fund doctrine is to fairly and
 17 adequately compensate class counsel for their services and prevent the unjust enrichment of
 18 persons who benefit from a lawsuit without bearing its costs. *See Boeing*, 444 U.S. at 478; *Paul,*
 19 *Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989).

20 Courts traditionally have used two methods when determining a reasonable attorneys’ fee
 21 in common fund cases: (1) the percentage method, which awards attorneys’ fees as a percentage
 22 of the fund created for the benefit of the class; and (2) the lodestar approach, in which a lodestar
 23 based on the number of hours expended by counsel and the reasonable hourly rate of the
 24 attorneys is adjusted by an appropriate multiplier to reflect the risks of the litigation, the quality
 25 of the results achieved, the complexity and novelty of the issues presented and other factors. *See*
 26 *Hanlon*, 150 F.3d at 1029; *Graulty*, 886 F.2d at 272.

1 Whether the percentage or lodestar method is used, the court must determine that the
 2 amount of the award is reasonable under the circumstances. *See, e.g., Rodriguez v. West. Publ'g*
 3 *Corp.*, 563 F.3d 948, 968 (9th Cir. 2009). Here, in view of the result achieved, the litigation
 4 risks faced, and the effort expended by counsel, the requested fee is reasonable under either
 5 method.

6 **A. The Requested Fee Is Reasonable Under The Lodestar Method**

7 Here, Plaintiffs' Counsel expended 298.3 hours in work related to the Lehman
 8 Settlement, with a resulting lodestar of \$163,000.00, based on rates capped at \$550 an hour. *See*
 9 *Ross Decl. Exhibit 2*. The requested fee of \$163,000.00 is reasonable under the lodestar method
 10 in light of the adjustment made to counsel's lodestar to reflect Seattle-area billing rates and the
 11 fact that no multiplier is requested. In cases of this nature, fees representing multiples of the
 12 lodestar are typically awarded to reflect the contingency fee risk and other relevant factors.

13 In *Vizcaino*, the Ninth Circuit noted that

14 courts have routinely enhanced the lodestar to reflect the risk of non-payment in
 15 common fund cases. . . . This mirrors the established practice in the private legal
 16 market of rewarding attorneys for taking the risk of nonpayment by paying them a
 17 premium over their normal hourly rates for winning contingency cases. . . . In
 18 common fund cases, attorneys whose compensation depends on their winning the
 19 case [] must make up in compensation in the cases they win for the lack of
 20 compensation in the cases they lose.

21 290 F.3d at 1051 (citations and internal quotation marks omitted).

22 The Ninth Circuit has found that multipliers ranging up to four are frequently awarded in
 23 common fund cases. *See Vizcaino*, 290 F.3d at 1051 (affirming a 28% award resulting in a 3.65
 24 multiplier); *City of Roseville Employees' Ret. Sys. v. Micron Tech., Inc.*, 2011 WL 1882515, at
 25 *7 (D. Idaho Apr. 28, 2011) (a "multiplier of 2.72 . . . is relatively standard"); *In re Mercury*
 26 *Interactive Corp. Sec. Litig.*, No. 5:05-cv-03395-JF, 2011 WL 826797, at *2 (N.D. Cal. Mar. 3,
 27 2011) (awarding fee resulting in a multiplier of 3.08, which the court said was "within the
 acceptable range").

1 Here, the Plaintiffs' Counsel did not cease their efforts after obtaining the prior \$208.5
 2 million in settlements from the other defendants and their prior fee award. Instead, they
 3 continued (i) to expend an additional 298.3 hours in work related to the Lehman Settlement, with
 4 a resulting lodestar of \$163,000, based on capped rates; and (ii) to fund out of pocket what ended
 5 up being over \$180,000 in additional litigation expenses, in the face of significant contingency
 6 risks. Therefore, the fact that Lead Counsel seeks only Plaintiffs' Counsel's straight lodestar
 7 strongly supports the reasonableness of the requested fee.

8 **B. The Requested Fee Is Reasonable Under The Percentage Method**

9 The requested fee is also reasonable when considered under the percentage method.
 10 Indeed, the requested fee, which represents just 2% of the total expected value of the Settlement
 11 and 2.8% of the value of the funds that will be made available promptly after the Settlement
 12 received final approval, is well below the 21% awarded by the Court in connection with the 2011
 13 Settlements in this Action and the 25% benchmark established by the Ninth Circuit.

14 The Ninth Circuit has recognized that attorneys' fees awarded as a percentage of a
 15 common fund ordinarily range from 20% to 30% of the fund (*see Grauly*, 886 F.2d at 272), and
 16 has established 25% of the settlement amount as the appropriate "benchmark" for such awards.
 17 *See Fischel v. Equitable Life Assur. Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002); *Vizcaino*, 290
 18 F.3d at 1047-48; *Hanlon*, 150 F.3d at 1029. The 25% benchmark can "be adjusted upward or
 19 downward to account for any unusual circumstances involved in [the] case." *Grauly*, 886 F.2d
 20 at 272. Indeed, "in most common fund cases, the award exceeds that benchmark." *In re*
 21 *Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008); *accord In re Heritage*
 22 *Bond Litig.*, 2005 WL 1594403, at *19 & n.14 (C.D. Cal. June 10, 2005).

23 The fee requested here is far below the benchmark established by the Ninth Circuit and
 24 the range of percentage fees generally awarded in this Circuit in securities class actions and other
 25 complex class actions. *See, e.g., McGuire v. Dendreon Corp.*, Case No. C07-800 MJP, ECF No.
 26 235, slip op. at 3-4 (W.D. Wash. Dec. 20, 2010) (awarding 25% of \$16.5 million settlement
 27

1 fund); *In re BP Prudhoe Bay Royalty Trust Sec. Litig.*, No. C06-1505 MJP, ECF No. 27, slip op.
2 at 2 (W.D. Wash. June 30, 2009) (awarding 27% of \$43.25 million settlement fund).

3 The fee is also reasonable when considered in the aggregate with the previously awarded
4 fee. In 2011, the Court awarded fees of 21% of the \$208.5 million in settlements then obtained.
5 Assuming that the value of the Lehman Settlement is \$8.25 million as estimated, the requested
6 fee of \$163,000.00 plus the previous awarded fee would be equal to approximately 20.3% of the
7 aggregate total of \$216.75 million in settlements achieved. This percentage is also well within
8 the range of reasonableness for comparable cases. *See, e.g., In re Merck & Co., Inc.*
9 *Vytorin/Zetia Sec. Litig.*, No. 08-2177 (DMC)(JAD), 2013 WL 5505744, at *3 (D.N.J. Oct. 1,
10 2013) (awarding 28% of \$215 million settlement fund); *Silverman v. Motorola, Inc.*, No. 07 C
11 4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) (awarding 27.5% of \$200 million
12 settlement fund), *aff'd*, 739 F.3d 956, 958-59 (7th Cir. 2013); *In re Comverse Tech., Inc. Sec.*
13 *Litig.*, 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) (awarding 25% of \$225 million
14 settlement fund); *In re Brocade Sec. Litig.*, No. 05-CV-2042-CRB, slip op. at 13 (N.D. Cal. Jan.
15 26, 2009) (awarding 25% of \$160 million settlement fund); *In re CMS Energy Sec. Litig.*, 2007
16 U.S. Dist. LEXIS 96786, at *14-*15 (E.D. Mich. Sept. 6, 2007) (awarding 22.5% of \$200
17 million settlement fund); *In re Broadcom Corp. Sec. Litig.*, 2005 U.S. Dist. LEXIS 41993, at
18 *15-*22 (C.D. Cal. Sept. 12, 2005) (awarding 25% of \$150 million settlement fund); *Dusek v.*
19 *Mattel, Inc.*, No. 99-10864-MRP, slip op. at 2 (C.D. Cal. Sept. 29, 2003) (awarding 27% of \$122
20 million settlement fund).

21 In sum, the requested fee is fair and reasonable, whether calculated under the lodestar
22 method or as a percentage of the Settlement. As discussed below in Section I.C, an analysis of
23 all of the relevant case-specific factors, including the quality of the results achieved, the time and
24 effort expended by counsel, and the risks faced in the litigation also bolsters the reasonableness
25 of the requested fee.

1 **C. Consideration Of The Relevant Factors Used**
2 **By Courts In The Ninth Circuit Supports The Fee Request**

3 Courts in the Ninth Circuit have considered the following criteria in analyzing the
4 reasonableness of a request for attorneys' fees in a common fund case: (1) the result achieved;
5 (2) the risks of litigation; (3) the skill required and quality of work; (4) the contingent nature of
6 the fee and financial burden carried by the plaintiffs; (5) awards made in similar cases; (6) the
7 reaction of the class; and (7) public policy considerations. *See Vizcaino*, 290 F.3d at 1048-50;
8 *Omnivision*, 559 F. Supp. 2d at 1046-48; *Heritage Bond*, 2005 WL 1594403, at *18. As
9 discussed below, application of these factors confirms that the fee request is reasonable.

10 **1. The Result Achieved**

11 Courts have consistently recognized that the settlement achieved is a major and perhaps
12 the most important factor to be considered in determining an appropriate fee award. *See*
13 *Omnivision*, 559 F. Supp. 2d at 1046; *Heritage Bond*, 2005 WL 1594403, at *19. Here,
14 Plaintiffs' Counsel have achieved a substantial additional financial recovery for members of the
15 Class. The Settlement is expected to provide approximately \$8,250,000 to eligible Class
16 Members and will, at the very least, provide \$5,770,000 to the Class (the amount that has been
17 reserved for payment of the Class Claim based on distributions already made with respect to
18 allowed general unsecured claims in the SIPA Proceeding). In light of the significant litigation
19 risks, this recovery is an excellent result for members of the Class. Accordingly, this factor
20 supports the attorneys' fees requested.

21 **2. The Risks Of The Litigation**

22 Risks of the litigation are also a very important factor in determining a fair fee award.
23 *See, e.g., In re Washington Pub. Power Supply Sys. Sec. Litig. ("WPPSS")*, 19 F.3d 1291, 1299-
24 1301 (9th Cir. 1994); *Omnivision*, 559 F. Supp. 2d at 1046-47 ("The risk that further litigation
25 might result in Plaintiffs not recovering at all, particularly [in] a case involving complicated legal
26 issues, is a significant factor in the award of fees.").

1 As discussed in the Ross Declaration and Settlement Motion, Plaintiffs' Counsel faced
2 substantial risks of non-recovery (or of a lesser recovery) in pursuing the Class Claim in the
3 SIPA Proceeding. In the absence of the Settlement, Plaintiffs would have been required to seek
4 certification of a class in the Bankruptcy Court, engage in extensive discovery, and prove
5 liability and damages in order to obtain any recovery. Ross Decl. ¶ 33.

6 The Securities Act claims that formed the underlying basis of the Class Claim asserted
7 against Lehman's estate in the SIPA Proceeding were subject to the same risks and uncertainties
8 as the claims asserted against the other underwriter defendants in the Action, including, among
9 others, risks of proving that the alleged misstatements in WaMu's registration statements were
10 false and misleading when made and risks in rebutting Lehman's anticipated defenses that it
11 exercised due diligence or that the drop in price of the WaMu securities was due to reasons other
12 than the alleged misstatements. Ross Decl. ¶ 34.

13 First, Plaintiffs would have faced challenges in establishing the falsity of statements
14 made in the Offering Materials. There had been no restatement of WaMu's financial results and
15 Defendants had vigorously denied that the statements were false or materially misleading. On
16 the contrary, Defendants had argued that the statements in the Offering Materials which
17 Plaintiffs alleged were false (a) were true at the time they were made and only subsequently
18 became false because of market conditions, (b) were not misleading when considered in the
19 context of other statements, (c) were nonactionable puffery, or (d) were statements of opinion.
20 Ross Decl. ¶ 35. Lehman would have made the same arguments to establish that the statements
21 in the Offering Materials were not actionable. For example, Lehman would have tried to
22 characterize certain alleged misstatements, such as WaMu's reporting of its allowance for loan
23 losses, as forecasts or predictions that were not false when made but that simply proved to be
24 inaccurate as a result of later, unpredicted market changes. If the Court accepted this view, there
25 could be no liability for these statements under the Securities Act.

26 Lehman would also have been able to make substantial arguments that the statements
27 about the adequacy of WaMu's allowance for loan loss reserves were statements of opinion,

1 which would require proving not only that the statement was false but that the maker of the
2 statement subjectively believed the statement to be false (or that facts showing that the speaker
3 lacked a reasonable basis for making the statement were omitted). *See, e.g., Fait v. Regions Fin.*
4 *Corp.*, 655 F.3d 105, 113 (2d Cir. 2011) (characterizing statements “regarding the adequacy of
5 loan loss reserves” as opinions requiring proof of subjective falsity); *see also Omnicare, Inc. v.*
6 *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1328-30 (2015).

7 Moreover, Plaintiffs faced additional significant hurdles with respect to the claims
8 asserted against Lehman arising out of the October 2007 and December 2007 Offerings, which
9 comprised the largest portion of the claims asserted against Lehman. Establishing the falsity of
10 the statements (and overcoming “negative causation” defenses) with respect to these two
11 Offerings would be particularly difficult because they occurred after WaMu had already
12 announced substantial increases to its loan loss provisions and some analysts were openly
13 commenting on the company’s dire financial condition and bleak prospects. *See* Ross Decl. ¶ 37.
14 The December 2007 Offering of Series R Stock, which suffered the largest damages of any of
15 the Offering Securities – and was the Offering with the largest percentage underwritten by
16 Lehman – also occurred after the New York Attorney General’s lawsuit alleging fraud in
17 connection with appraisals of WaMu’s loans was publicly filed, which Defendants had argued
18 acted as a *complete* corrective disclosure of the misstatements alleged in the Consolidated
19 Complaint. These and other similar hurdles to establishing the falsity of the Offering Materials
20 created substantial risks that Plaintiffs would not be able to establish Lehman’s liability – or
21 might only be able to establish Lehman’s liability with respect to the Floating Rates Notes
22 Offering in August 2006. Because Lehman underwrote only 4% of this Offering (\$20 million of
23 the \$500 million offering), such an outcome would have dramatically reduced the potential
24 damages recoverable.

25 In addition, Lehman could also have asserted plausible defenses of due diligence and
26 negative causation under the Securities Act. Lehman might have been able to prevail on the
27 grounds that it conducted adequate due diligence with respect to the Offerings but simply did not

1 uncover facts showing that WaMu’s statements about its underwriting practices or appraisal
 2 process were false or that WaMu’s allowance for loan losses was improper. Ross Decl. ¶ 38.
 3 Lehman could also have asserted a plausible defense of “negative causation” – arguing that some
 4 or all of the declines in the value of the Securities Act Securities resulted from market
 5 movements and the “fear contagion” that prevailed during the financial crisis rather than from
 6 the revelation of misstatements in the Offering Materials. *Id.* ¶ 39.

7 In the face of these risks, Plaintiffs’ Counsel nonetheless invested additional attorney
 8 time and incurred significant additional litigation expenses in order to pursue the Class Claim
 9 against Lehman and ultimately were able to obtain the proposed Settlement, which is expected to
 10 provide approximately \$8.25 million in additional recovery for the Class.

11 **3. The Skill Required And Quality Of The Work Performed**

12 The third factor to consider is the skill required and quality of work performed. *See In re*
 13 *Am. Apparel, Inc. S'holder Litig.*, No. 10-06352, 2014 WL 10212865, at *22 (C.D. Cal. July 28,
 14 2014); *Gustafson v. Valley Ins. Co.*, No. CV 01-1575-BR, 2004 WL 2260605, at *2 (D. Or.
 15 Oct. 6, 2004).

16 Lead Counsel is among the most experienced and skilled practitioners in the securities
 17 litigation field and has a long and successful track record in such cases. *See* BLB&G Firm
 18 Resume, attached as Exhibit 2A-5 to the Ross Declaration. Liaison Counsel is also a highly
 19 skilled and experienced litigator and trial attorney and played an active role in analyzing the
 20 strategic and practical implications of the Lehman bankruptcy; stayed abreast of and monitored
 21 the filing of the claims in the bankruptcy proceedings; participated in the analysis conducted to
 22 quantify the claim against the Lehman bankruptcy estate; and provided input and advice with
 23 regard to strategy and other issues regarding the negotiation of the Settlement. *See* Declaration
 24 of Bradley S. Keller, attached as Exhibit 2B to the Ross Declaration, at ¶ 2. Saxena White
 25 represented Class Representative Brockton and assisted in Brockton’s filings of proofs of claim
 26 on behalf of itself and the Class in Lehman’s SIPA Proceeding and participated in discussions
 27

1 with Lead Counsel and Brockton concerning the negotiation of the Lehman Settlement. *See*
2 Declaration of Joseph E. White, III, attached Exhibit 2C to the Ross Declaration, at ¶ 2.

3 As detailed in the Ross Declaration, Plaintiffs' Counsel engaged in extensive efforts to
4 pursue claims against Lehman, first in this Action (until such claims were stayed) and then
5 through the filing of the Class Claim in Lehman's SIPA Proceeding. Lead Counsel ensured that
6 any Class claims against Lehman in the SIPA Proceeding were preserved by specifically
7 excluding Lehman as a released party in each of the 2011 Settlements. Lead Counsel and
8 Bankruptcy Counsel also amended the Class Claim submitted in the SIPA Proceeding and
9 provided informal discovery to the SIPA Trustee. Once it became apparent that Lehman's estate
10 would have sufficient funds to make meaningful distributions to holders of unsecured claims,
11 Lead Counsel (together with Bankruptcy Counsel) began negotiations with counsel for the SIPA
12 Trustee to resolve the Class Claim. The settlement negotiations were at arm's length and
13 lengthy, occurring over a period of many months. Lead Counsel rejected the SIPA Trustee's
14 initial offers to settle the Class Claim at lower amounts and held out for the best result it believed
15 was reasonably available for the Class. During the negotiation process, Lead Counsel prepared a
16 detailed analysis to quantify the claim against Lehman (based on work prepared by Plaintiffs'
17 damages expert in the earlier litigation against the Underwriter Defendants) and prepared
18 responses to the SIPA Trustee's arguments regarding due diligence and class certification issues.
19 Lead Counsel respectfully suggest that the quality of the work that they performed and the
20 knowledge they accrued through the extensive litigation of the claims against the non-debtor
21 Defendants, played a crucial role in obtaining the excellent Settlement for the Class. Thus,
22 Plaintiffs' Counsel's extensive efforts and skill leading to the Lehman Settlement strongly
23 support the requested fee.

24 **4. The Contingent Nature Of The Fee And**
25 **The Financial Burden Carried By Counsel**

26 The Ninth Circuit has confirmed that a determination of a fair and reasonable fee must
27 include consideration of the contingent nature of the fee and the obstacles surmounted in

1 obtaining the settlement. *See WPPSS*, 19 F.3d at 1299 (“It is an established practice in the
 2 private legal market to reward attorneys for taking the risk of non-payment by paying them a
 3 premium over their normal hourly rates for winning contingency cases”); *Omnivision*, 559 F.
 4 Supp. 2d at 1047 (“The importance of assuring adequate representation for plaintiffs who could
 5 not otherwise afford competent attorneys justifies providing those attorneys who do accept
 6 matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat
 7 fee.”); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2007 WL 2416513, at
 8 *1 (N.D. Cal. Aug. 16, 2007) (“Plaintiffs’ counsel risked time and effort and advanced costs and
 9 expenses with no ultimate guarantee of compensation.”).

10 Here, Plaintiffs’ Counsel pursued the Class Claim against Lehman in the SIPA
 11 Proceeding for several years following the resolution of all other claims in the Action, investing
 12 over \$160,000 in attorney time, and incurring over \$180,000 in expenses to obtain the Lehman
 13 Settlement. *See* Ross Decl. ¶ 49. Any fee award has always been at risk, and was completely
 14 contingent on achievement of a successful result. In light of the significant challenges to
 15 establishing liability and damages, as discussed above, the contingent nature of the fee strongly
 16 supports the fee request.

17 **5. Awards Made In Similar Cases**

18 As discussed in Sections I.A and I.B above, Lead Counsel’s requested fee is within or
 19 below the range of fee awards typically made in similar cases on either a lodestar or percentage
 20 basis.

21 **6. The Reaction Of The Class**

22 The reaction of the class to a proposed settlement and fee request is a relevant factor in
 23 approving fees. *See Omnivision*, 559 F. Supp. 2d at 1048. The Summary Notice was sent to
 24 over 1,600 Class Members and was issued over the *PR Newswire* stating that Lead Counsel
 25 intended to apply to the Court for an award of attorneys’ fees in an amount not to exceed 7.5% of
 26 the proceeds of the Settlement and reimbursement of expenses in an amount not to exceed
 27 \$225,000. The Summary Notice further advised Class Members of their right to object to the

1 request for attorneys' fees and expenses. A more detailed Notice was published on the case
2 website, www.WashingtonMutualSecuritiesLitigation.com (to which recipients of the Summary
3 Notice were directed) and on Lead Counsel's website, www.blbglaw.com, and it also set forth
4 Lead Counsel intent to apply to the Court for an award of attorneys' fees in the amount not to
5 exceed 7.5% of the proceeds of the Settlement and Class Members' right to object to request for
6 attorneys' fees and expenses, as well as more detailed procedures for submitting an objection.

7 The \$163,000.00 fee actually requested by Lead Counsel, representing 2% of the
8 expected proceeds of the Settlement, is substantially less than the maximum fee disclosed in the
9 Summary Notice and Notice. While the deadline for submitting objections does not expire until
10 January 15, 2016, to date, no Class Member has filed an objection. This factor further supports
11 the requested fee award.

12 7. **Public Policy Considerations**

13 The Supreme Court has "long recognized that meritorious private actions to enforce
14 federal antifraud securities laws are an essential supplement to criminal prosecutions and civil
15 enforcement actions." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). In
16 furtherance of this important public policy, courts should award fees that are sufficient to
17 encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the
18 SEC, taking into account the risks undertaken in such actions. *See Broadcom*, 2005 U.S. Dist.
19 LEXIS 41993, at *20-*21 ("Recognizing that the federal securities laws are remedial in nature,
20 the courts have encouraged fee awards that fairly reward attorneys who have served the
21 Congressional purpose of enforcing the laws with private lawsuits."); *Hicks v. Morgan Stanley*,
22 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is
23 represented by talented and experienced trial counsel, the remuneration should be both fair and
24 rewarding.").

1 **II. THE LITIGATION EXPENSES ARE**
 2 **REASONABLE AND WERE NECESSARILY INCURRED**
 3 **TO ACHIEVE THE BENEFITS OBTAINED FOR THE CLASS**

4 Lead Counsel also requests that the Court grant its application for \$182,896.50 in
 5 reimbursement of costs incurred by Plaintiffs' Counsel in connection with obtaining the Lehman
 6 Settlement. *See* Ross Decl. ¶ 58. Litigation expenses incurred are typically reimbursed in
 7 common fund cases if the expenses are of the type typically billed by attorneys to paying clients
 8 in the marketplace. *See, e.g., Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (class counsel
 9 "may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would
 10 normally be charged to a fee paying client.'"); *Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys
 11 may recover their reasonable expenses that would typically be billed to paying clients in non-
 12 contingency matters.").

13 The expenses for which Lead Counsel seeks reimbursement are the type of expenses
 14 routinely charged to hourly paying clients. The largest portion of the litigation expenses for
 15 which reimbursement is sought (\$177,599.19) were incurred for the fees of Bankruptcy Counsel,
 16 Lowenstein Sandler LLP, which played a significant role in the prosecution of the claims against
 17 Lehman in the SIPA Proceeding and their resolution through the Settlement.

18 Plaintiffs retained Lowenstein to assist Lead Counsel in protecting the interests of class
 19 members in the SIPA Proceeding relating to Lehman pending in the U.S. Bankruptcy Court in
 20 the Southern District of New York, as well as WaMu's own bankruptcy proceedings. Lead
 21 Counsel previously sought and received reimbursement for expenses relating the work
 22 Lowenstein performed in WaMu's own bankruptcy proceedings. However, expenses incurred
 23 relating to Lowenstein's services performed in connection with Lehman's SIPA Proceeding and
 24 achieving this Settlement remain outstanding.

25 Lowenstein's specialized efforts were essential to achieving the Settlement with the SIPA
 26 Trustee. Lowenstein provided substantial expert assistance to Lead Counsel on behalf of the
 27 Class in connection with Lehman's SIPA Proceeding and obtaining the Settlement by, among

1 other things, filing the proof of claims on behalf of Plaintiffs and the Class; monitoring the SIPA
2 Proceeding; reviewing documents and pleadings filed in the SIPA Proceeding, including reports
3 of the SIPA Trustee concerning amounts available for distribution to general unsecured creditors;
4 assisting in responding to requests for information from the SIPA Trustee’s counsel; assisting in
5 responding to relevant pleadings and motions filed in the SIPA Proceeding; assisting Lead
6 Counsel in negotiating the terms of the Settlement with counsel for the SIPA Trustee; assisting in
7 drafting the Stipulation and other papers related to the Settlement; and obtaining a modification
8 of the automatic stay by the Bankruptcy Court to permit review and approval of the Settlement
9 by this Court.

10 The other expenses for which reimbursement is sought are the costs of online legal and
11 factual research, postage and express delivery, copying and out-of-town travel (for Lead Counsel
12 to attend the Settlement Hearing in Seattle). *See* Ross Decl. Exhibits 2A-3, 2B-2 and 2C-3.
13 These types of expenses are necessarily incurred in litigation and routinely charged to clients
14 billed by the hour. *See Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir. 1982),
15 *vacated and remanded on other grounds*, 461 U.S. 952 (1983); *see also Omnivision*, 559 F.
16 Supp. 2d at 1048 (approving of expenses relating to “photocopying, printing, postage and
17 messenger services, court costs, legal research on Lexis and Westlaw, experts and consultants,
18 and the costs of travel for various attorneys and their staff throughout the case”).

19 The Summary Notice and Notice that were disseminated to Class Members informed
20 them that Lead Counsel intended to apply for the reimbursement of litigation expenses in an
21 amount not to exceed \$225,000. The amount of expenses now sought – \$182,896.50 – is less the
22 amount stated in the Summary Notice and Notice. The deadline for objecting to the fee and
23 expense application is January 15, 2016. To date, there have been no objections to the request
24 for reimbursement of expenses.
25
26
27

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court approve its Fee and Expense Application and award attorneys' fees in the amount of \$163,000.00 and reimbursement of litigation expenses in the amount of \$182,896.50, to be paid from the proceeds of the Lehman Settlement.

Dated: December 31, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, I electronically filed the foregoing and all of its attachments 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.

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