UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WACHOVIA PREFERRED SECURITIES AND BOND/NOTES LITIGATION	Master File No. 09 Civ. 6351 (RJS) **ECF Case**

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF (A) LEAD BOND PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS AND PLAN OF ALLOCATION AND (B) LEAD BOND COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Lead Bond Plaintiffs (Orange County Employees' Retirement System, Louisiana Sheriffs' Pension and Relief Fund, and the Southeastern Pennsylvania Transportation Authority) and Lead Bond Counsel respectfully submit this single reply memorandum in further support of (i) Lead Bond Plaintiffs' motion for final approval of the proposed Settlements and Plan of Allocation (the "Final Approval Motion"); and (ii) Lead Bond Counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses (the "Fee Request").[1]

I. PRELIMINARY STATEMENT

Lead Bond Counsel are pleased to report that the Settlement Class's response to all aspects of the proposed Settlements has been overwhelmingly positive. Although copies of the Court-approved Notice were mailed to more than 214,000 potential Settlement Class Members,[2]

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[1] Unless otherwise noted, capitalized terms have the same meaning as set forth in the Joint Declaration of William C. Fredericks, John J. Rice and David Kessler dated October 10, 2011 ("Joint Declaration" or "Joint Decl.") (Dkt. No. 148) and/or in the Stipulation and Agreements of Settlement dated August 5, 2011 (the "Stipulation") (Dkt. No. 136-1).

[2] Pursuant to the Court's August 9, 2011 Preliminary Approval Order (Dkt. No. 139), the Court-authorized Claims Administrator, The Garden City Group, Inc. ("GCG"), began disseminating copies of the Notice and Claim Form on August 26, 2011. *See* Affidavit of Stephen J. Cirami, dated October 7, 2011 (Dkt. No. 148-2) ("Cirami Aff."), at ¶¶ 2-4. The Notice informed potential Settlement Class Members of, *inter alia*, (a) the terms of the proposed Settlements and Plan of Allocation; (b) Lead Bond Counsel's intent to apply for an attorneys' fee award of up to 17.5% of the Settlement Fund, plus expenses of up to $1.8 million; (c) their rights to object to any aspect of the proposed Settlements, Plan of Allocation and/or Fee Request, and to exclude themselves from the Settlement Class; and (d) the October 25, 2011 deadline for exercising these rights. *See* Notice (Cirami Aff. Exhibit A) at ¶¶ 2-7, 76, 80-81, 85-92. In addition, in September 2011 the Summary Notice – which notified readers of the Settlements, of how to obtain copies of the Notice and Claim Form, and of the deadlines for submitting objections and requests for exclusion – was published in three national newspapers and transmitted over the Internet via the *PR Newswire*. *See* Cirami Aff. at ¶ 8. GCG also posted copies of the Notice, Claim Form, Stipulation and Amended Bond Complaint, as well as the papers filed in support of the Final Approval Motion and Fee Request, on the settlement website (www.WachoviaBondLitigation.com). *See id*. at ¶ 10; *see also* Supplemental Affidavit of Stephen J. Cirami dated November 7, 2011, filed simultaneously herewith ("Suppl. Cirami Aff.") at ¶ 3. As noted above, as of November 4, 2011, copies of the Notice and Claim Form had been mailed to over 214,000 potential Settlement Class Members. Suppl. Cirami Aff. at ¶ 2.

only one investor (the "Objector") has objected to the Wachovia Settlement (but not the KPMG Settlement) or the Fee Request. Tellingly, the lone Objector is an individual with claimed losses of $155, and his unsigned objection (the "Objection") did not give the Objector's real name or provide competent evidence of any transactions establishing his membership in the Settlement Class or standing to object (*see* Part III below). In addition, not a single objection to the proposed Plan of Allocation has been received. Equally remarkable here is the tiny number of requests for exclusion: as of November 4, 2011 (ten days after the October 25 deadline for submitting opt-out requests), only 32 requests for exclusion have been received, which equates to an astonishingly low opt-out rate of roughly $^{1}/_{100}$ of 1% of the investors to whom the Notice was sent. Moreover, a review of the requests for exclusion that have been received indicates that several purported opt-outs are not even members of the certified Settlement Class because they suffered no damage as a result of their transactions in Bond Class Securities.[3]

The all-but-unanimous reaction of the Settlement Class to both the Settlements and the Fee Request is particularly significant here, because the Settlement Class includes dozens (if not hundreds) of the world's largest and most sophisticated institutional investors. The absence of *any* objections by *any* institutional investors (which have by far the largest stake in the proposed Settlements and Fee Request) provides further strong support under *Grinnell* and *Goldberger* for this Court to approve the Settlements, the Plan of Allocation, and the Fee Request.

The bases for, and failings of, the sole objection received in this case are discussed in detail below. In sum, the Objector's arguments that the Wachovia Settlement should be rejected

[3] The Settlement Class, which the Court has already certified in its August 9, 2011 Order (Dkt. No. 139), is limited to those "who purchased or otherwise acquired Bond Class Securities during the Settlement Class Period [*i.e.*, the time period from the first date on which any of the Bond Class Securities were offered through and including February 27, 2009], *and were damaged thereby*" (emphasis added).

because of purported "intra-class" conflicts and alleged standing issues are devoid of any factual support that would justify decertifying the Settlement Class under controlling Second Circuit law. Moreover, if the Objector's position were adopted, it would make it effectively impossible for parties to negotiate global settlements (including settlements of dismissed claims) that plainly arise out of the *same* course of conduct and the *same* (or substantially the same) alleged misstatements and omissions, and that caused the *same* type of harm to all Settlement Class Members.

The Objector's attacks on Lead Bond Counsel's Fee Request are equally unfounded, as he relies on a combination of inapposite cases and a studious disregard of, *inter alia,* (a) the ample precedent that establishes that the requested fee here is well within the range of fees that courts in this Circuit and around the country have found to be reasonable in comparably sized cases; (b) the fact that the Settlements represent an indisputably *outstanding* (if not unprecedented) result in the face of significant risk and the absence of *any* "parallel" government action (let alone recovery) on behalf of investors; and (c) the fact that the requested fee has been approved on *both* an *ex ante* and *ex post* basis by Lead Bond Plaintiffs who are sophisticated institutional investors (in contrast to the Objector's completely unsupported – and unsupportable – suggestion (Objection at 19, 23) that Lead Bond Plaintiffs are "not fully informed" or lack "the leverage or ability to negotiate reductions on [allegedly] excessive rates sought by Class Counsel").[4] Indeed, in the absence of *any* other objection from any other investor, Lead Bond Counsel respectfully submit that the lone Objector has failed to offer any good basis in fact or

[4] The failure of the fee-related portion of the Objection to address the facts of *this* case is perhaps explained by the fact that it appears to have been "cut and pasted," with virtually no modifications, from an objection filed in a California Superior Court in an unrelated case. *See* Part V below and the accompanying Declaration of Chad Johnson, dated November 7, 2011 ("Johnson Decl.") at ¶ 10.

law for the Court to adopt his views here over the expressly stated positions of the sophisticated Lead Bond Plaintiffs and the implicit ratification of Lead Bond Plaintiffs' judgment by the rest of the investor community.

Rather than have the Court simply accept Lead Bond Counsel's characterization of the existing state of fee award jurisprudence, and to give the Court the benefit of an independent opinion as to (a) the quality of the Settlements in relation to other large settlements, (b) the objective reasonableness of the requested fee, and (c) the merits of the Objection, Lead Bond Counsel are also submitting herewith an expert opinion prepared by Columbia University Law School Professor John C. Coffee. *See* Declaration of John C. Coffee, sworn to on November 4, 2011 ("Coffee Decl."). Prof. Coffee is perhaps the country's foremost expert in the combined fields of securities law, class actions and attorneys' fee awards, and his often sharply critical writings on fee awards and class actions include an article that the Objector himself cites with approval. *See* Objection at 19, citing John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation,* 48 J. Law & Contemp. Probs. 5, 26-33 (1985). Yet as even this frequent critic of certain class action and fee award practices states:

> I recognize that an expert's role is limited and that the ultimate decision necessarily remains with the Court. Thus, I will conclude simply that, based on all the factors in this case, a 17.5% fee award is well justified, both because it is consistent with the more recent practice in large cases in the $400 to $700 million recovery range and, more importantly, because the extraordinary success obtained in the absence of any prior governmental enforcement proceeding merits judicial recognition. Ultimately, the "proof is in the pudding," and an exemplary recovery justifies a fee that is at least comparable with the normal recovery rate.

Coffee Decl. at ¶ 38.

In sum, for all of the reasons set forth herein, in the accompanying Coffee Declaration and in the parties' prior submissions, the Court should reject the Objection and approve the Settlements, the Plan of Allocation, and Lead Bond Counsel's Fee Request in their entirety.

II. THE REACTION OF THE SETTLEMENT CLASS SUPPORTS GRANTING FINAL APPROVAL TO ALL ASPECTS OF THE SETTLEMENTS, THE PLAN OF ALLOCATION AND THE FEE REQUEST

In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), the Second Circuit listed the "reaction of the class" as the second factor to be considered in weighing approval of a proposed class settlement, and that Court has more recently described "the favorable reaction of the overwhelming majority of class members" as "perhaps the *most* significant factor in our *Grinnell* inquiry." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005); *accord In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007) ("[t]he strong favorable reaction of the class is overwhelming evidence that the Settlement is fair, reasonable and adequate"); *Maley v. Del. Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (same). The lack of objections by institutional investors, who have the largest stake in a settlement, carries particular weight in favor of approving a proposed settlement. *See*, *e.g.*, *In re AT&T Corp. Sec. Litig.*, No. 00-5364 (GEB), 2005 WL 6716404, at *4 (D.N.J. Apr. 25, 2005); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 479 (S.D.N.Y. 1998).

With respect to approval of the proposed Plan of Allocation, courts give great weight to the opinion of experienced counsel. *See* Mem. of Law in Support of Lead Bond Plaintiffs' Motion for Final Approval (Dkt. No. 145), at 24. However, courts also consider the class's reaction in deciding whether to approve a proposed plan to allocate settlement proceeds among class members – and where (as here) there are no objections to the proposed plan "[it] should be approved." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007); *see also Maley*,186 F. Supp. 2d at 367 ("the favorable reaction of the Class supports approval of the proposed Plan of Allocation" where "no Class

member has objected to [it]"); *In re Am. Bank Note Holographics, Inc. Sec. Litig.,* 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001) (same).

Similarly, courts also routinely take into account "the reaction of the class" in determining whether to approve a requested fee and expense award. *See, e.g., Maley*, 186 F. Supp. 2d at 374 (the "overwhelmingly positive response by the Class attests to the approval of the Class with respect to … the fee and expense application"); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (same); *In re AT&T Corp.*, 455 F.3d 160, 165 (3d Cir. 2006) (courts should consider "the presence or absence of substantial objections by members of the class to the … fees requested by counsel"); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *21 (C.D. Cal. June 10, 2005) (same); *see also In re Flag Telecom Holdings, Ltd., Sec. Litig.,* No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *29, *31 (S.D.N.Y. Nov. 8, 2010) (noting absence of any objections to lead counsel's fee and expense request, and finding that this "overwhelmingly positive reaction … attests to the approval of the Class").

With the deadline for the receipt of objections and requests for exclusion having passed roughly two weeks ago (on October 25, 2011), Lead Bond Counsel can now give a full report on the reaction of the Settlement Class to all aspects of the Settlements, including the Plan of Allocation and Fee Request. As noted above, the Settlement Class's reaction can only be characterized as extraordinarily positive – particularly for a case where the potential class members number not in the mere thousands, or even in the tens of thousands, but in the *hundreds of thousands*. Specifically, Notices have been mailed to over 214,000 potential Settlement Class Members, yet only ***one*** objection to the Wachovia Settlement and the Fee Request (submitted by a lone individual investor) has been received – and ***no*** objections to the KPMG Settlement or

proposed Plan of Allocation have been submitted. See Johnson Decl. ¶¶ 3-4. For the reasons set forth in the cases cited above, such an overwhelmingly positive reaction of the Settlement Class – like the rest of the *Grinnell* and *Goldberger* factors discussed in the relevant opening briefs – also weighs strongly in favor of approval of the Settlements, the Plan of Allocation, and Fee Request.[5]

III. THRESHOLD ISSUES CONCERNING OBJECTOR "HENRY JOSHUA HOLDEN'S" PURPORTED OBJECTION, THE OBJECTOR'S PURPORTED STANDING, AND THE CIRCUMSTANCES SURROUNDING THE SUBMISSION OF THE OBJECTION

Although each substantive aspect of the Objection is addressed below, as a threshold matter Lead Bond Plaintiffs and Lead Bond Counsel note that there are a number of irregularities and other unusual facts associated with the Objection that Lead Bond Counsel are in the process of investigating further. These issues are further detailed in the accompanying Johnson Declaration, but can be briefly summarized as follows:

- the Objection (Johnson Decl. Exh. A) is unsigned, and contains no return address or other contact information;
- after Lead Bond Counsel were unable to identify a single "Henry Joshua Holden" resident in the United States (or elsewhere), a search of the Claims Administrator's mailing records for potential Settlement Class Members in this Action identified a "Joshua Holden Henry" of Dallas, Texas;
- following Lead Bond Counsel's successful efforts to reach Mr. Joshua Holden Henry by phone, Mr. Henry confirmed that he had talked to "his wife's lawyer" about filing an objection in this case, but that he would have to get back to us with the name of the lawyer;

[5] That only about 0.01% of the more than 214,000 potential Settlement Class Members has requested exclusion also weighs in favor of approving the Settlements. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (opt-outs amounting to less than 0.2% weighed in favor of approval); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (opt-out rate of less than 1% "strongly" favors approval).

- although Mr. Henry never got back to Lead Bond Counsel concerning the identity of "his wife's" lawyer, based on information from the FedEx mailing label that accompanied "his" objection, Lead Counsel were able to determine that the Dallas law firm of Gibson McClure & Wallace was likely the firm of Mr. Henry's "wife's lawyer";

- in a subsequent call with Dennis Gibson, Esq., of Gibson McClure & Wallace, Mr. Gibson advised that he had "talked to" the Objector, but that the Objector had "not yet" retained either him or his firm;

- neither Lead Counsel's call with Mr. Henry nor their call with attorney Dennis Gibson have explained how it happened that a seemingly lawyer-drafted – but facially "pro se" – objection could be filed that obviously *misstated* the Objector's name as "Henry Joshua Holden" on each and every page of "Mr. Holden's" 25-page Objection;

- the purported "proof" of "Henry Joshua Holden's" membership in the Settlement Class – and the purported basis for his standing to assert "his" objection (referenced at the Objection at 1) – consists of what appears to be a copy of a one-page screen print from a home computer printed as of "10/17/11" that purports to reference a single buy and subsequent sale (within a two month time period in 2007) of 200 shares of one particular series of Bond Class Security (Johnson Decl. Exh. B). However, this single page "screen print" does not reference the name of any brokerage firm, and is unaccompanied by any customary or otherwise credible evidence of any transactions in any Bond Class Securities (such as broker-issued trade confirmations or brokerage statements).

See Johnson Declaration at ¶¶ 4-7.

Lead Bond Counsel are continuing to investigate these matters. On October 31, attorney Gibson advised Lead Counsel that he has now been retained by "Henry Joshua Holden" (presumably meaning Mr. Henry), and that he would accept service of a *subpoena ad testificandum* on his behalf. *Id.* at ¶ 8. Lead Bond Plaintiffs and Lead Bond Counsel expressly reserve all their rights with respect to these and any related matters pending the completion of their ongoing inquiries (*see, e.g., In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2011 WL 3792825, at *2 (S.D.N.Y. Aug. 25, 2011) (finding objector's documentation insufficient to establish membership in the class by a preponderance of the evidence)), and will further update the Court on or before the November 14, 2011 hearing.

IV. THE OBJECTION'S ATTACKS ON THE PROPOSED SETTLEMENTS ARE DEVOID OF MERIT

A. The Objection's Arguments That No Named Plaintiff Has Standing to Bring the Settled Claims Is Not a Bar to the Parties' Ability to Settle Those Claims

The Objector argues that the Settlement Class may not be maintained because none of the named Bond Plaintiffs allegedly has standing to bring claims with respect to 16 of the 30 offerings covered by the Settlements. Objection at 5-6.[6] The Objector is wrong. Under Second Circuit law, class representatives have the ability (upon notice to the class and subject to court approval) to *settle* claims that they may lack standing to prosecute, provided that the settlement (a) does not present "the danger that a class representative not sharing common interests with other class members would 'endeavor[] to obtain a better settlement by sacrificing the claims of others at no cost to themselves'" and (b) provides a benefit for all released claims. *Joel A. v. Giuliani*, 218 F.3d 132, 143 (2d Cir. 2000) (alteration in original, citation omitted).

Here, neither of the grounds for rejecting a settlement on "standing" grounds established in *Giuliani* is present: to the contrary, both Settlements provide for a recovery to Settlement

[6] This Court has already certified the Settlement Class in its August 9, 2011 Order (Dkt. No. 139), finding that:

> (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class which predominate over any individual questions; (c) the claims of the Lead [Bond] Plaintiffs are typical of the claims of the Settlement Class; (d) Lead [Bond] Plaintiffs and Lead [Bond] Counsel have and will fairly and adequately represent the interests of the Settlement Class; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the Action.

Id. at 3-4. As shown below, Objector has shown no good cause for the Court to revisit or modify this decision.

Class Members in each of the Offerings alleged in the Amended Bond Complaint,[7] and no Settled Claims are being released without corresponding benefit.[8] There is thus no reason for this Court to refuse to approve the Settlements simply because the Lead Bond Plaintiffs did not themselves purchase pursuant or traceable to each of the 30 Offerings at issue. *See also TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) ("to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.").[9]

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[7] As the Objector purports only to have purchased in an Offering that was not dismissed, he is clearly not arguing that the dismissed claims relating to the "dismissed Offerings" are being released without corresponding benefit. Instead, he appears to be arguing only that the investors in the "dismissed Offerings" should receive *no* compensation, which is exactly what *Giuliani* prohibits.

[8] Lead Bond Plaintiffs note that the Plan of Allocation does provide for a 50% discount to "recognized losses" attributable to purchasers of Bond Class Securities as to which the Court's March 31 Order held that there was no named plaintiff with standing. However, the fact that no Settlement Class Member has objected to the Plan of Allocation (including the Objector, who maintains only that such purchasers should not be a part of the Settlement Class at all), confirms that this discount, which is based on the March 31 Order, is fair and reasonable. *See infra* at n.12.

[9] Courts have concluded as much in similar, though not identical, circumstances. For example, in *Cornwell v. Credit Suisse Group*, No. 08-cv-03758 (VM) (S.D.N.Y.), the court approved the settlement of claims of individuals who had purchased shares of the defendant corporation on foreign exchanges, even though the court had previously dismissed such claims as a matter of law on the basis that it lacked the authority to adjudicate such claims after the Supreme Court's decision in *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869 (2010). *See Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010) (dismissing claims); *id* at Dkt. No. 97 (stipulation of settlement settling claims of purchasers on both domestic and foreign exchanges); *id.* at Dkt. No. 100 (Order preliminarily approving settlement); *id* at Dkt. No. 105 (settlement brief noting dismissal of foreign claims due to *Morrison*); and *id.* at Dkt. No. 116 (order granting final approval of settlement of all claims, both foreign and domestic). *See also In re L.G. Philips Sec. Litig.*, No. 07-cv-00909 (S.D.N.Y.) (RJS), Dkt. No. 83 (final judgment approving class settlement, post-*Morrison*, of securities claims of persons who purchased on foreign, as well as U.S., exchanges). Similarly, in *In re Insurance Brokerage Antitrust Litig.*, 579 F.3d 241, 264 (3d

In addition, the Objector overlooks the fact that this Court's March 31 standing ruling – which held that an investor purchasing pursuant or traceable to the *same* shelf registration statement cannot represent investors who purchased in an offering issued pursuant to a slightly different prospectus *but the same shelf registration statement* (*see In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 370 (S.D.N.Y. 2011)) – did not constitute a final adjudication as to the question of standing, as that ruling remains subject to appeal. *See, e.g., Wingate v. Gives,* 05 Civ. 1872 (LAK) (DF), 2009 U.S. Dist. LEXIS 12592, at *24 n.5 (S.D.N.Y. Feb. 13, 2009) (adjudication not final until dismissal with prejudice entered). Indeed, based on the sharp split in authority in this District on the specific standing question at issue (and the lack of any relevant appellate cases on point),[10] it strains credulity to suggest that the dismissed claims with respect to

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Cir. 2009), an objector (represented by the same Dallas law firm as here) argued that the named plaintiffs lacked standing to settle class claims because – even though they had shown that a subset of the settlement class of insurance consumers had been harmed through the use of improper contingent commission agreements – the named plaintiffs had not shown that they had actually purchased policies that were subject to contingent commission agreements. In rejecting the objector's arguments, the Third Circuit reasoned that the contingent commission agreements had the net effect of increasing costs for all consumers, and that accordingly the named plaintiffs had alleged an injury in fact sufficient to confer standing for all claims. Here, it is beyond dispute that Lead Bond Plaintiffs have alleged an "injury-in-fact" sufficient to confer standing for their own claims (which include claims against each Settling Defendant), and, accordingly, it follows that they have "standing" to settle not only those claims, but also those of persons similarly injured. *See, e.g., In re Mutual Funds Litig.*, 519 F. Supp. 2d 580, 586-87 (D. Md. 2007) (finding injury-in-fact requirement satisfied even though lead plaintiffs themselves purchased only some, but not all, of the separate mutual funds covered in the proposed class); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 208 (S.D.N.Y. 1995) (investors in a handful of similar real estate partnerships could also represent investors in 700 other partnerships sponsored by same group of related issuers in which lead plaintiffs themselves did not invest), *cited with approval in Hevesi v. CitiGroup, Inc.*, 366 F.3d, 70, 82-83 (2d Cir. 2004).

[10] *See*, *e.g.*, *In re Citigroup, Inc. Bond Litig.*, No. 08 Civ. 6613 (SHS), 2010 WL 2772439, at *14 (S.D.N.Y. July 12, 2010) (plaintiffs who bought securities in 19 offerings had standing to pursue claims for 29 other offerings, as all offerings were based on the same three shelf registration statements).

certain Offerings do not continue to have potentially significant settlement value – and hence it is equally without merit to suggest that they cannot be settled for value in the context of a global settlement of *all* Securities Act claims that arise out of common facts, common legal theories, and a common type and theory of damages.

Indeed, in addition to being contrary to the Second Circuit's decision in *Giuliani,* the Objector ignores the obvious negative practical implications of his argument. In short, if the Objector's arguments were adopted, the ability of parties to negotiate for and obtain global resolution of claims in cases (such as this one) involving multiple offerings (or multiple form contracts, or multiple insurance contracts, *etc.*) that are based on common false statements would be severely limited. This, of course, would not only create a dangerous precedent that would inhibit the ability of parties to reach global settlements of substantively similar (if not functionally identical) claims, but would likely inhibit the ability of parties to settle claims as to which there are no alleged "standing" issues (given that frequently defendants or their insurers will be unwilling to settle *any* claims unless they can be made part of a broader deal to settle all substantively similar claims that arise out of the same course of conduct against the same defendants). *See, e.g., Varacallo v. Mass. Mut. Life Ins. Co*., 226 F.R.D. 207, 218 (D.N.J. 2005) (defendants interested in global, not piecemeal, resolution of class claims). The inevitable result of such a dangerous precedent would be to not only harm the interests of litigants, but to burden the courts with increased numbers of fragmented litigations that can be resolved, if at all, only on a piecemeal basis. *Cf. In re Vioxx Prods. Liab. Litig*., 760 F. Supp. 2d 640, 658 (E.D. La. 2010) (global settlement preferable to piecemeal settlement or litigation).

The Objector's authority does not compel a different result. *See* Objection at 5, citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *La Mar v. H&B Novelty & Loan Co.*,

489 F.2d 461 (9th Cir. 1973). In *Amchem*, plaintiffs (consisting of persons exposed to asbestos products) and defendants (a group of 20 former asbestos product manufacturers) reached an agreement to settle all present and future claims and to stipulate to a single settlement class. The district court approved the settlement and certified the proposed settlement class. On appeal, the Third Circuit reversed, and decertified the class because the settlement class presented too many factual and legal differences to be certified under Fed. R. Civ. P. 23. *See Georgine v. Amchem Prods*., 83 F.3d 610, 625-30 (3d Cir. 1996) ("class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases"). The Supreme Court agreed, holding that "the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." But the issues driving the result in *Amchem* are simply not present here. All members of the certified Settlement Class here suffered the *same* type of injury as a result of purchasing similar securities issued by the same company pursuant to the *same* shelf registration statements that incorporated the *same* (or substantially similar) misstatements or omissions – and all Settlement Class Member's interests are essentially identical in terms of proving the same facts and obtaining a current recovery for the same type of harm under the identical liability and damages theories. *See Giuliani*, 218 F.3d at 139-40 (distinguishing the proposed settlement class in *Amchem* as presenting an "obvious conflict").[11]

[11] Nor does the Objector's reliance on *La Mar* remotely salvage his position. That case, in addition to being almost 40 years old and from the Ninth Circuit, is inapposite as it did not consider "standing" issues in the context of settlement – and in any event it plainly cannot supersede the considerably more recent authority from *this* Circuit.

The Objector's inability to cite any on-point case law to support his assertion that the lack of a representative for each separate Offering destroys typicality (Objection at 6) is not surprising. The Plan of Allocation is fair and reasonable, and neither Objector nor any other Settlement Class Member has objected to its apportionment of recovery. Moreover, it is well established that mere differences in individual damage determinations are only rarely grounds for denying class certification, especially when common issues of liability predominate. *See, e.g.*, 7 Alba Conte & Hebert B. Newberg, *Newberg on Class Actions* (4th ed. 2002, updated through 2011) at §§ 22.64-65. The requirement of typicality is therefore satisfied.[12] *See also In re Flag Telecom Holdings Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (typicality requirement satisfied where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability"); *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 178 (S.D.N.Y. 2006) ("differences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims").[13] The Settlements should be approved, and the Objection to the Wachovia Settlement overruled.

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[12] Although no objection to the Plan of Allocation has been filed, we note that differing treatment of different categories of claims in a plan of allocation based on the risks of recovery on each claim is plainly appropriate. *See Am. Bank Note*, 127 F. Supp. 2d at 429 ("Allocation formulas, including certain discounts for certain securities, are recognized as an appropriate means to reflect the comparative strengths and values of different categories of the claim."); *In re PaineWebber P'ships Litig.*, 171 F.R.D. 104, 135 (S.D.N.Y. 1997) (a court's review of a proposed plan of allocation must be with an eye to the "goal of matching each plaintiff's recovery to the strength of his or her claim") (citing *Grinnell*, 495 F.2d at 463).

[13] Nor do any issues in connection with the proposed settlement of the §12(a)(2) claims present any impediment to approval of the Settlements. The named Bond Plaintiffs have already established their standing to pursue §12 claims with respect to multiple offerings, including each of the five common shelf registrations at issue here. *See* Certifications Pursuant to the Federal Securities Laws, attached as Exhs. A-I to the Bond Complaint; *see also* Amended Bond Complaint at ¶¶ 13-21. As shown above, nothing more is required. Moreover, even if it were

B. Objector's Arguments that Common Issues of Fact and Law Do Not Predominate With Respect to Plaintiffs' § 11 Claims Are Baseless

The Objector next argues that a Settlement Class cannot be certified and that the Wachovia Settlement should not be approved because "[b]ased on the Plaintiffs' pleadings and outside media reports, whether a particular class member had knowledge is an individualized rather than common question." Objection at 17. This objection is without merit.

1. Lack of Knowledge is Not an Affirmative Element of Plaintiffs' Section 11 Claims

What each individual class member allegedly "knew" about the undisclosed "truth" concerning Wachovia – *i.e.*, whether they allegedly relied on the contents of the allegedly inaccurate Offering Materials – is not an element of plaintiffs' §11 claims. *See Rombach v. Chang*, 355 F.3d 164, 169 n.4 (2d Cir. 2004) ("[n]either Section 11 nor Section 12(a)(2) requires that plaintiffs allege the . . . reliance elements of a fraud cause of action."); *In re Initial Pub. Offering Sec. Litig.* ("*IPO II*"), 483 F.3d 70, 73 (2d Cir. 2007) (same); *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 375315, at *1 (S.D.N.Y. Feb. 17, 2005) (same).[14]

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correct, Objector's suggestion (Objection at 6-7) that a "substantial number" of class members have standing to bring §12(a)(2) claims – while a "substantial number" of others allegedly do not – has no practical significance here with respect to issues of typicality or predominance. Under the Plan of Allocation, there is no separate recovery for Settlement Class Members' §12(a)(2) claims vs. their §11 claims, for the simple reason that Lead Bond Plaintiffs' damages expert concluded that in all cases any Settlement Class Member's recoverable damages would be *as high or higher* under §11 than they would be under §12. Thus, in contrast to Objector's suggestion, there is no set of facts under which one subset of claimants could recover more under §12 to the detriment of other Settlement Class Members.

[14] As the Third Circuit in *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774 (3d Cir. 2009) held:

> [B]ecause reliance is not an element under §11, 'the conduct of the defendants, not the knowledge of the plaintiffs, is determinative' of materiality. [] The crucial questions are: "[W]as there a misrepresentation? And, if so, was it objectively material?" [] ***Since reliance is irrelevant in a §11 case, a §11 case will never demand individualized proof as to an investor's reliance or knowledge*** . . . .

Accordingly, even though defendants may assert as an affirmative defense that '"the plaintiff knew of the untruth or omission at the time of his or her acquisition of the security"' (*IPO II*, 483 F.3d at 73 n.1 (citation omitted)), and hence did not "rely" on any alleged misstatements, courts in the Second Circuit "'focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions."' *Pub. Emps. Ret. Sys. of Miss. v. Merrill Lynch & Co.*, No. 08-Civ. 10841 (JSR), 2011 WL 3652477, at *9 (S.D.N.Y. Aug. 22, 2011) (quoting *Dura-Bilt Corp. v. Chase Manhattan Corp.,* 89 F.R.D. 87, 93 (S.D.N.Y. 1981)); *In re Marsh & McLennan Cos. Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *11 (S.D.N.Y. Dec. 23, 2009); *Feit v. Leasco Data Processing Equip. Corp*., 332 F. Supp. 544, 575 (E.D.N.Y. 1971) (Section 11 "does provide all defendants with an affirmative defense that the plaintiff knew of the omission, but . . . [p]roof that any particular member of the class had such knowledge may be presented at the next stage of the litigation on the issue of whether that individual is entitled to his share of damages.").

To prevail in asserting the affirmative defense of knowledge in opposition to class certification, a defendant must show by a preponderance of direct, admissible evidence that individual investors knew of the misstatements or omissions at issue. Simply stated, no such showing has been made here. *See, e.g., N.J. Carpenters Health Fund v. DLJ Mortg. Capital, Inc*., No. 08 Civ. 5653 (PAC), 2011 U.S. Dist. LEXIS 92597, at *20-21 & n.1 (S.D.N.Y. Aug. 16, 2011) (holding that where "there is no testimonial or documentary evidence directly suggesting that a potential plaintiff had knowledge of the misstatements or omissions … the Court finds by a preponderance of the evidence that the potentially individual issue of knowledge

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Id. at 784 (emphasis added).

does *not* predominate over the issues common to the potential class members") (emphasis added).

2. Any Partial Corrective Disclosures of Defendants' Misstatements and Omissions Do Not Raise Individualized Issues of Knowledge

The Objector also argues that "Plaintiffs' pleadings and outside media reports" demonstrate that defendants' "corrective disclosures" during the Settlement Class Period raise individual issues of investors' knowledge, and thus preclude a finding that common questions predominate. Objection at 17. The argument is factually and legally incorrect.

As alleged in the Amended Bond Complaint (the "Complaint") and demonstrated in media reports, while the truth about Wachovia's Pick-A-Pay portfolio and its exposure to collateralized debt obligations ("CDOs") and residential mortgage backed securities ("RMBS") was *partially* disclosed during the Settlement Class Period – and the Objector cites to various partial disclosures that were made between October 2007 and February 27, 2009 (citing Complaint at ¶¶ 94-95, 134-38, 140-44, 149, 150, 152-56, 159-162, 169-72, 188-89, 192-201 and 258) – there are ***no*** allegations in the Complaint that investors learned the *full* truth of Defendants' misstatements and omissions prior to the end of the Settlement Class Period on February 27, 2009. For example, Wachovia's belated but partial disclosures late in the Settlement Class Period concerning the Pick-A-Pay portfolio (such as its April 14, 2008 revelation that $51 billion (or nearly 62%) of the total portfolio was subprime) were *incomplete* and failed to disclose, *inter alia*, the true nature and full extent of the underwriting problems that plagued the Pick-A-Pay portfolio or of the inadequacies of the Company's loan loss reserves – and were in fact accompanied by renewed false reassurances that Wachovia had adhered to a "conservative in-house appraisal and underwriting approach." Complaint at ¶¶ 133-139. Similarly, the Complaint further alleges that as late as September 15, 2008, Wachovia's CEO,

Robert Steel, was continuing to actively reassure investors that the Pick-A-Pay portfolio "will yield quite attractive returns." Complaint at ¶¶ 192-193.

Similarly, the truth regarding defendants' misstatements and omissions about the Company's significant exposure to subprime CDOs and RMBS was also only partially disclosed during the Settlement Class Period. For example, Wachovia failed to report *any* exposure to risky subprime CDOs and RMBS until October 2007, when the Company disclosed it had accumulated more than $8 billion of CDO exposure, and announced a $438 million write-down of CDOs due to "disruption" in the capital markets. Complaint at ¶¶ 159-71. Two months later, Wachovia announced that it had reduced its "net" CDO exposure from $1.79 billion to $680 million after taking a $1.1 billion write-down, and disclosed for the first time that it had RMBS exposure of $2.5 billion. It was not until January 2008, however, that Wachovia revealed that its remaining "gross" CDO exposure was $5 billion – yet even then it misleadingly described the vast bulk of this exposure as "hedged with financial guarantors" without disclosing that those "guarantors" lacked the means to cover more than a fraction of this exposure. Complaint at ¶¶ 170-88.

Indeed, the Complaint alleges a series of disclosures that continued up until February 27, 2009 (the last day of the Settlement Class Period):

> Significantly, as Wells Fargo stated in its Form 10-K for 2008, *filed on February 27, 2009*, Wells Fargo took these massive write-downs because "[c]ertain of the loans acquired from Wachovia have evidence of credit deterioration since origination and it is probable that we will not collect all contractually required principal and interest payments."

Complaint at ¶ 153 (emphasis added). Accordingly, there is nothing in the Complaint's allegations which supports the Objector's contention that a Settlement Class Period that runs through February 27, 2009 is somehow improper.

In re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 43 (2d Cir. 2006) ("*IPO I*"*)*, the sole authority cited in the Objection on this point, does not support a finding here that individual issues predominate. Objection at 7. In *IPO,* the plaintiffs themselves alleged that certain members of the proposed class had knowledge of the scheme, and that this knowledge was widespread in the securities industry and widely reported by the media. *IPO I,* 471 F.3d at 43. Indeed, the *IPO* plaintiffs alleged that thousands of institutional investors who were part of the proposed class had personally participated in the scheme. *Id* at 43-44. The Second Circuit, based on the unusual facts presented in that case, held that "[p]laintiffs' allegations, evidence, and discovery responses demonstrate that the predominance requirement is defeated because common questions of [class members'] knowledge do not predominate over individual questions." *Id*. at 43. However, in its later *IPO II* decision, the Second Circuit clarified that *IPO I* does *not* require plaintiffs to demonstrate class members' lack of knowledge to certify a class for violations of §11, and that a class member's alleged knowledge of the misrepresented truth is an affirmative defense that must be proven by a defendant. *IPO II,* 483 F.3d at 73; *Merrill Lynch*, 2011 WL 3652477, at *19-20. On remand, the district court certified a settlement class that excluded those investors that participated in the fraudulent scheme. *In re Initial Pub. Offering Sec. Litig.,* 260 F.R.D. 81, 114-15 (S.D.N.Y. 2009).

Here, there is no evidence in the record, let alone a preponderance, which shows that Settlement Class Members "knew the truth" – either when they acquired their Bond Class Securities or at any other time before the end of the Settlement Class Period – concerning the numerous material facts that were allegedly misstated or omitted in the Offering Materials at issue in this case. *See, e.g., Merrill Lynch*, 2011 WL 3652477, at *20 ("to the extent Defendants argue that actual knowledge can be inferred from the slew of newspaper articles and public

reports they have submitted to the Court, this again is an issue subject to generalized proof"); *N.J. Carpenters Health*, 2011 U.S. Dist. LEXIS 92597, at *20-21. Accordingly, the Objector's reliance on *IPO* is misplaced.

V. THE OBJECTION'S ATTACKS ON LEAD BOND COUNSEL'S FEE REQUEST IGNORE THE FACTS OF THIS CASE, MAKE NO SERIOUS ATTEMPT TO PROPERLY APPLY THE *GOLDBERGER* FACTORS, RELY ON A SKEWED AND INAPPOSITE "SAMPLE" OF "REPRESENTATIVE" CASES, AND OTHERWISE LACK MERIT

The Objector opposes Lead Bond Counsel's fee application on the grounds that it is purportedly unreasonable on the facts of this case. *See* Objection at 24. The Objector then proceeds to all but completely disregard the facts of this case, the application of the *Goldberger* factors in light of the relevant facts, and essentially all of the extensive case law authorities cited in Lead Bond Counsel's opening brief. As noted above, the Objector's "ignore the facts of this case" approach is perhaps best explained by the fact that the section of his Objection that "addresses" fee-related issues has been copied, virtually without modification, from a fee objection submitted in another unrelated case pending in California Superior Court. Johnson Decl. at ¶ 10.

First, the Objector simply ignores the fact that the $627 million recovery achieved by Lead Bond Counsel here reflects an *unprecedented* and extraordinary achievement. As noted in Lead Bond Counsel's opening brief and the accompanying Joint Declaration, the $627 million recovery ranks as the 14th largest securities class action recovery in history, as well as the single largest recovery ever in a "pure" Securities Act case that did not involve any underlying claims of fraud. Moreover, as confirmed by Prof. Coffee's Declaration, the $627 million recovery here also represents the largest securities class action settlement ever in the absence of any SEC or other government enforcement action alleging any violations of the securities laws. Coffee Decl. at ¶¶ 2, 24-25. In addition, when compared to the universe of other securities class actions

settlements from 1996 through mid-2011, it appears that the settlement in this case is "between 25 and 43 times the median recovery" in similarly sized cases, based on the most recently available published literature. Coffee Decl. at ¶¶ 21-23, citing Milev, Patton & Starykh, "Recent Trends in Securities Class Action Litigation: 2011 Mid-Year Review" (NERA 2011), at 29. In short, as the foregoing objective measures confirm, the results obtained on behalf of the Settlement Class here were truly outstanding.

Second, the Objector also ignores the fact that the extraordinary results here were achieved by Lead Bond Counsel in the face of exceptional risks. For example, the Objector ignores not only the absence of any "parallel" government investigations (let alone any actual actions or recoveries by the government), but also ignores that the results obtained here were achieved in the absence of any accounting restatement by Wachovia, or the withdrawal of any audit opinions by KPMG. *See, e.g.*, *In re Xcel Energy, Inc. Sec., Deriv. & ERISA Litig.*, 364 F. Supp. 2d 980, 994, 999 (D. Minn. 2005) (fact that lead counsel had not benefited from any "meaningful governmental investigation . . . [or] restatement of financials" supported 25% fee award); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (affirming second fee award of 25% in case involving $319.6 million in total recoveries where plaintiffs' counsel had obtained "unprecedented results without relying on the fruits of any official investigation"). The Objector also ignores the fact that $627 million in settlements were obtained in the face of numerous other significant litigation risks, including (a) the risks of establishing liability as illustrated by *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011) ("*Fait*") (a Second Circuit case that was pending throughout the course of settlement negotiations and that was ultimately decided adversely to plaintiffs just weeks after the Stipulation was signed); and (b) the risks of establishing damages in the face of Defendants'

expert's arguments that the vast majority (if not all) of any losses suffered by purchasers of Bond Class Securities were caused by the unprecedented "financial tsunami" of 2008, and not by any alleged misstatements in the Offering Materials at issue.

Third, the Objector's submission relies on a skewed, outdated and patently incomplete list of "comparable" cases to try to argue that the requested 17.5% fee is excessive. For example, the Objector relies heavily on a list of four "comparable" cases set forth in the Third Circuit's decision in *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001), each of which awarded a percentage fee lower than that requested here. Objection at 20-22. However, the Objector ignores the fact that these cases (in addition to all being more than a decade old) did not purport to constitute a full or even a representative sample of fee awards that were available in 2001, but were instead being used by the Third Circuit in the *Cendant PRIDES* decision as justification for *reducing* a fee award in a case which the Third Circuit concluded involved essentially *zero* risk from the outset. *See* 243 F.3d at 735 & 742-43 (noting that from the outset the *Cendant PRIDES* case involved well-publicized government enforcement actions and a financial restatement in which the company conceded the material falsity of its previously issued offering materials, and describing the case as "being neither legally nor factually complex"). Indeed, even though the Third Circuit essentially found that *Cendant PRIDES* involved no risk of proving liability or damages, the Third Circuit still suggested that the district court could appropriately approve a "crosscheck multiplier" as high as 3.0 – a figure comparable to the requested 3.35 multiplier here in a vastly more complex and risky case. *Id.* at 742.[15] Similarly,

[15] Subsequently decided cases, including those decided by the Third Circuit itself, have had little difficulty in distinguishing the facts in *Cendant PRIDES.* For example, in *In re Rite Aid,* 362 F. Supp. 2d at 589, the district court cited the Third Circuit's post-*Cendant PRIDES* decision in *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 307 (3d Cir. 2005) as having emphasized that

although the Objector cites several times to *Goldberger,* he ignores the fact that there the Second Circuit expressly noted – in sharp contrast to the facts here – that that case was "low risk" from the start and that the results achieved there were significantly aided by the fruits of parallel government actions. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 n.3, 56 (2d Cir. 2000).

Ultimately, the Objector cannot seriously dispute that the "reasonable range" of percentage-based fee awards that have been approved both in this District and across the country in cases settling for similar amounts as here is far broader than the narrowly low range posited in his cherry-picked group of cases. As the multitude of cases presented in Lead Bond Counsel's opening brief shows, the requested 17.5% fee is actually comfortably *within* the range of percentage-based fee awards that have been approved in other securities class actions of similar size. Indeed, the requested 17.5% fee falls *squarely in the middle* of the range of fees awarded by courts across the nation (and in this Circuit) in other large securities cases settling in the $100 million to $1 billion range (Fee Memorandum at 9, 29), and is actually *less* than the 18.4% average for fees awarded in those securities class action cases that have settled for between $500 million and $750 million. *See id.* Moreover, although the Objector does not separately contest the reasonableness of the requested 17.5% fee based on a "lodestar crosscheck," as confirmed by Prof. Coffee, the "crosscheck" multiplier of 3.35 is unexceptional here (and, if anything, is below the 4.5 norm for large cases identified in the most recently published empirical research). *See* Coffee Decl. at ¶¶ 28-29.

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crosscheck multipliers "need not fall in any particular range." The district court, on remand, then proceeded to award a second 25% fee, equating to a 6.96 multiplier, where (as here) "plaintiffs' counsel obtained an historic recovery for the class in a … complex case" where "victory at trial" was far from certain. 362 F. Supp. 2d at 590.

Fourth, the Objector's cursory attempts to belittle Lead Bond Counsel's hard work and outstanding accomplishments here are unavailing. For example, the fact that the Settlements were executed a little more than five months after the Court issued its decision on the motions to dismiss is hardly indicative of a "quick settlement" accomplished with a minimum of effort. To the contrary, as set forth in detail in the Joint Declaration, this case was vigorously litigated for over 2½ years, beginning with a comprehensive investigation that involved (*inter alia*) the review of tens of thousands of documents and the identification and interviewing of literally hundreds of witnesses before the operative complaint was even filed. The Court itself is personally familiar with the extensive work that went into the briefing (on all sides) of the multiple rounds of motions to dismiss filed by each of the three defendant groups in this Action (the Wachovia Defendants, KPMG, and the Underwriter Defendants). And the Joint Declaration further attests to the hard work that was done over multiple mediation sessions with Judge Daniel Weinstein (ret.), and in the course of extensive informal discovery begun during the course of negotiations in order for Lead Bond Counsel to be able to assure themselves, their clients and this Court that the Settlements achieved did indeed fully merit approval in all respects. *See, e.g., In re Sony Corp. SXRD Michael Ouellette v. Sabrina Cardenas*, 10-3806-cv(L), 2011 U.S. App. LEXIS 19550 (2d Cir. Sept. 21, 2011) (citing with approval the discovery taken pursuant to agreement as providing a sound basis for providing counsel and courts with comfort that a proposed settlement is in the best interests of the class).

Fifth, the Objection asserts that because "Class members do not have the leverage or ability to negotiate reductions on excessive [fees] sought by Class Counsel," it follows that "this Court must perform that duty by imposing upon Class Counsel the prevailing market rates," Objection at 23, and elsewhere conclusorily asserts that "class members' stakes in the litigation

are too small to motivate them to supervise the lawyers." *Id.* at 18. Once again, however, it is apparent that the Objector has ignored both the relevant facts and law. For example, the Objector does not seem to be aware – or has chosen to ignore – that, consistent with the types of procedures that Congress clearly sought to promote in passing the "lead plaintiff" provisions of the PSLRA in 1995, Lead Bond Counsel's Fee Request is both (a) authorized under an *ex ante* fee cap agreement negotiated with one of the institutional Lead Bond Plaintiffs at the outset of this Action (*see* Staffieri Decl. (Joint Decl. Exh. 5) at ¶ 10), and (b) fully endorsed on an *ex post* basis by all three large and sophisticated institutional investors that the Court appointed to serve as lead plaintiffs for the "bond class" in this case. *See, e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 n.16 (S.D.N.Y. 2004) ("[a] fee agreement between … Lead Counsel and [an institutional lead plaintiff] is *prima facie* evidence of the reasonableness of a fee calculated according to its terms," and reflects a business judgment "to which a court reasonably may give substantial deference"). *See also* Coffee Decl. at ¶ 13 (notwithstanding his criticisms of fee arrangements in other contexts, "[i]f sophisticated parties have struck an arm's length and well-informed [*ex ante*] bargain, there is generally little reason for a court to substitute its judgment for theirs, absent special factors"). Moreover, that not even one other investor – let alone any of the many institutional investors who have by far the biggest stakes in the outcome of this Action – has joined the Objector in opposing the Fee Request strongly suggests that satisfaction with the extraordinary results achieved, rather than some supposed "inability" on their part to object, is the explanation for the lack of any other criticism of the Fee Request here.

Sixth, the Objector contends that Lead Bond Counsel's regular hourly rates, which were used in calculating their base lodestar, are unreasonably high. Objection at 22-24. However, Lead Bond Counsel's hourly rates are plainly reasonable when compared to rates charged by

comparable New York or other securities litigation specialist firms, and have been routinely approved as reasonable by courts in this District. More specifically, here Lead Bond Counsel's hourly rates for partners range from $650 to $800 for BLBG,[16] from $565 to $775 for RGRD, and from $625 to $725 for KTMC; and with two minor exceptions (one higher and one lower), for all three firms the rates for associates and staff attorneys fall between $305 and $550, and their rates for paralegals fall between $200 and $295. *See* Joint Decl. Exhs. 6A-1, 6B-1, and 6C-1. Even two to four years ago, such rates would have been in line with those charged by other top-tier securities litigation firms practicing in New York City or other major metropolitan centers, and with the rates that have been routinely accepted in performing a lodestar crosscheck in this Circuit. *See, e.g.*, *In re Comverse Tech. Inc. Sec. Litig.*, No. 06-CV-1825 (NGG)(RER), 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) (hourly rates from $125 to $880 for attorneys and support staff were "not extraordinary for top New York law firms"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 589-90 (S.D.N.Y. 2008) (noting that hourly rates of $700-$750 for partners and $300-$550 for associates in 2008 were consistent with the rates charged by the defense bar for similar work, and that comparable rates have been found reasonable by other courts for class action work); *In re Gilat Satellite Networks, Ltd.*, No. 02-cv-1510 (CPS), 2007 WL 2743675, at *17 (E.D.N.Y. Sept. 18, 2007) (attorney rates from $325 to $725 in 2007 were "not out of line with the rates of major law firms engaging in [securities class action] litigation"). *A fortiori*, such rates are reasonable under the materially higher rate structures that now prevail in 2011, where senior partner rates at top defense firms now commonly exceed $1000 per hour. *See also* Coffee Decl. at ¶ 34.

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[16] Two attorneys who worked on this case – BLBG's founding partner Max Berger and its former managing partner Sean Coffey (who resigned from BLBG in 2009 to run for New York Attorney General) – billed at the somewhat higher rates of $975 and $850 per hour, respectively.

In sum, the Objector simply ignores the application of the *Goldberger* factors to the facts of this case and relies on a skewed and entirely unrepresentative analysis of what the reasonable range of fee awards is for a case of this size. Similarly, the Objector ultimately refuses to accept that even a fee request that is in the *middle* of customary ranges for a percentage-based fee (and in the middle of accepted ranges for any lodestar "crosscheck") is merited in a case where counsel's efforts alone (without the assistance of government investigations or a financial restatement) have produced an unprecedented and truly outstanding result. Objector's approach is not supported by *Goldberger* or any other line of authorities cited by the Objector (or otherwise known to Lead Bond Counsel). Accordingly, Lead Bond Counsel respectfully submit that the Objection is not well-founded as a matter of either fact or law, and should therefore be rejected.

VI. CONCLUSION

For all of the reasons set forth herein, in Lead Bond Plaintiffs' and Lead Bond Counsel's opening memoranda and accompanying declarations, and in the accompanying Coffee Declaration, it is respectfully submitted that the Court should (1) grant final approval to the proposed Wachovia and KPMG Settlements; (2) approve the Plan of Allocation; (3) grant Lead Bond Counsel's request for a 17.5% percentage fee award; and (4) grant Lead Bond Counsel's unopposed request for reimbursement of their litigation expenses in the amount of $860,877.47.

Dated: November 7, 2011

Respectfully submitted,

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