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Lead Counsel in the *Maine State* action only

18 [Additional counsel appear on signature page.]

19 UNITED STATES DISTRICT COURT  
20 CENTRAL DISTRICT OF CALIFORNIA

21 MAINE STATE RETIREMENT  
SYSTEM, Individually and On Behalf  
22 of All Others Similarly Situated,

23 Plaintiff,

24 vs.

25 COUNTRYWIDE FINANCIAL  
CORPORATION, et al.,

26 Defendants.

No. 2:10-cv-00302-MRP(MANx)

CLASS ACTION

MEMORANDUM IN SUPPORT OF  
STATEMENT IN NOTICE TO CLASS  
MEMBERS REGARDING  
PLAINTIFFS' COUNSEL'S MOTION  
FOR AN AWARD OF ATTORNEYS'  
FEES AND EXPENSES

DATE: July 10, 2013

TIME: 1:30 p.m.

CTRM: 12, The Honorable  
Mariana R. Pfaelzer

27 [Caption continued on following page.]  
28

1 WESTERN CONFERENCE OF  
2 TEAMSTERS PENSION TRUST  
3 FUND, Individually and On Behalf of  
4 All Others Similarly Situated,

Plaintiff,

vs.

5 COUNTRYWIDE FINANCIAL  
6 CORPORATION, et al.,

Defendants.

No. 2:12-cv-05122-MRP(MANx)

CLASS ACTION

8 DAVID H. LUTHER, et al.,  
9 Individually and On Behalf of All  
10 Others Similarly Situated,

Plaintiffs,

vs.

12 COUNTRYWIDE FINANCIAL  
13 CORPORATION, et al.,

Defendants.

No. 2:12-cv-05125-MRP(MANx)

CLASS ACTION

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1 **I. INTRODUCTION**

2 After five-plus years of litigation, on June 25, 2013, the parties to the above-  
3 captioned actions (“*Luther*,” “*Maine State*,” and “*Western Conference*,” collectively  
4 the “Actions”) entered into a Stipulation and Agreement of Settlement (the  
5 “Settlement Agreement”). Exhibit A-1 to the Settlement Agreement is the proposed  
6 Notice Plaintiffs intend to mail to the Class (the “Notice”), advising the Class of the  
7 terms of the settlement and, *inter alia*, Plaintiffs’ Counsel’s intent to request an award  
8 of attorneys’ fees not to exceed 17% of the Gross Settlement Fund.<sup>1</sup>

9 On June 26, 2013, the Court requested preliminary support for Plaintiffs’  
10 Counsel’s forthcoming request for attorneys’ fees in advance of the July 10, 2013  
11 hearing on Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action  
12 Settlement. Plaintiffs submit this response, which provides ample support for the 17%  
13 fee set forth in the Notice.<sup>2</sup>

14 \_\_\_\_\_  
15 <sup>1</sup> Unless otherwise noted, capitalized terms shall have those meanings ascribed to  
16 them in the Settlement Agreement. During the July 5, 2013 conference, the Court  
17 raised the issue of Class scope and Notice to be sent to Class Members. The Class is  
18 defined in the Settlement Agreement as all persons who purchased or acquired the  
19 Certificates which were the individual securities issued as part of the 429 Offerings.  
20 For purposes of the Plan of Allocation, the Certificates are grouped into three  
21 categories – the 58 live represented tranches (listed on Exhibit A to the Supplemental  
22 Agreement), the 111 dismissed represented tranches (listed on Exhibit B to the  
23 Supplemental Agreement) and the 9,214 dismissed unrepresented tranches (listed in  
24 Appendix A to the Settlement Agreement along with the other two categories). All  
25 three categories of Certificates will be listed on the settlement website  
26 ([www.countrywidembsssettlement.com](http://www.countrywidembsssettlement.com)), which is referenced in the Notice (*see* pages  
27 2, 5, 17 and 20 of the Notice). The Settlement Agreement provides that the Court-  
28 appointed Claims Administrator (currently Garden City Group) will mail the Notice to  
approximately 2,000 nominees (broker/dealers) that have records of purchasers of the  
Certificates. The nominees will either forward the Notice to the purchasers or provide  
the Claims Administrator with the necessary contact information so that the Claims  
Administrator can forward the Notice to the Class.

25 <sup>2</sup> Plaintiffs respectfully suggest that at this stage, the Court need only  
26 preliminarily determine if the request for fees is “within the range of acceptable  
27 attorneys’ fees” in this Circuit. *See, e.g., Gardner v. GC Servs., LP*, No. 10cv0997-  
28 IEG (CAB), 2011 U.S. Dist. LEXIS 126607, at \*18 (S.D. Cal. Nov. 1, 2011) (noting  
“at this [preliminary approval] stage, the request of 30% of the total settlement fund  
for attorneys’ fees appears to be reasonable as it is within the range of acceptable  
attorney’s fees in Ninth Circuit cases,” but reserving judgment on reasonableness until



1 Plaintiffs' Counsel have succeeded in obtaining a Settlement of \$500 million  
2 cash for the benefit of the Class. This recovery is the *largest* class-wide settlement in  
3 a mortgage backed security ("MBS") case to date, far surpassing the next largest \$315  
4 million settlement reached in *Public Employees' Retirement System of Mississippi v.*  
5 *Merrill Lynch & Co., Inc.*, No. 1:08-cv-10841-JSR-JLC (S.D.N.Y.) ("Merrill Lynch  
6 MBS Settlement") by \$185 million. The recovery is also the largest on a per "live"<sup>3</sup>  
7 certificate basis – \$24.96 per \$1,000 certificate versus \$19.05 per \$1,000 certificate in  
8 the Merrill Lynch MBS Settlement. By any measure, this is the best settlement in any  
9 MBS class action. Plaintiffs' Counsel achieved this exceptional result for the Class  
10 after more than five years of vigorous and extensive litigation followed by seven  
11 months of hard-fought settlement negotiations, during which they have not received  
12 any compensation for their efforts and have assumed all costs and expenses, despite  
13 significant risks of non-recovery. In fact, Plaintiffs' Counsel have persevered through

14  
15 final approval); *see also Carter v. Anderson Merchandisers, LP*, No. EDCV 08-  
16 00025-VAP (OPx), 2010 U.S. Dist. LEXIS 7793, at \*27 (C.D. Cal. Jan. 7, 2010)  
17 (noting a request of attorneys' fees in the amount of 25% of the settlement fund  
18 appears reasonable based upon the Ninth Circuit benchmark of 25%, but reserving  
judgment until presented with a proper fee application). Citations are omitted and  
emphasis is added throughout unless otherwise indicated.

19 Moreover, at this juncture, Lead Counsel need only, and have only indicated  
20 that they "will apply" for attorneys' fees in an amount of no more than 17% of the  
21 Gross Settlement Fund at final approval. *See* Memorandum of Law in Support of  
22 Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement.  
23 Dkt. No. 398 at 22; Notice at 23. Indeed, Lead Counsel are not seeking approval of  
attorneys' fees at this time, but will do so at final approval, based upon a more  
fulsome showing in conjunction with Plaintiffs' Motion for Final Approval of the  
Settlement and Request for Attorneys' Fees and Expenses in the Actions, including  
declarations from Plaintiffs and Plaintiffs' Counsel regarding the fee request.

24 <sup>3</sup> The Court's tranche-based standing rulings in the Actions have effectively  
25 reduced the collective size of the Actions to 58 "live" tranches. Eight of those  
26 tranches were sustained by the Court in the *Maine State* action. At the time the  
27 Settlement was reached, the Court had not yet ruled on the Defendants' motion to  
28 dismiss the *Luther* and *Western Teamsters* cases. Plaintiffs' Counsel's position was  
that if the Court followed its earlier standing decision in *Maine State*, it would have  
sustained the claims of an additional 50 unique tranches, thus giving rise to a total of  
58 actionable tranches.

1 numerous adverse rulings at both the California state and federal court levels,  
2 litigating issues of first impression in this Circuit and in California state court in order  
3 to maintain the viability of the Actions. It was only through Plaintiffs' Counsels'  
4 persistence that the Class was able to secure this exceptional settlement. For their  
5 substantial efforts on behalf of the Class and in accordance with applicable legal  
6 precedent, Plaintiffs' Counsels intend to seek a legal fee award of up to 17% of the  
7 Gross Settlement Fund.

8 The tandem efforts in the *Luther* and *Maine State* litigations, which this  
9 Settlement resolves, were critical to the recovery that the Plaintiffs' Counsels have  
10 achieved for the Class.

11 In *Maine State*, Plaintiffs' Counsel actively litigated the Securities Act claims in  
12 federal court through several motions to dismiss, class certification, merits discovery  
13 and mediation. Plaintiffs' Counsel's efforts in *Maine State* on behalf of the Class  
14 included:

- 15 • Filing three Amended Consolidated Class Action Complaints in July,  
16 2010; December, 2010; and June, 2011. The second and third  
17 complaints addressed the Court's November 2010 and May 2011 Orders  
18 that denied, in part, Defendants' motions to dismiss.
- 19 • Subpoenaing documents from more than 60 custodian banks, broker  
20 dealers, market-makers and investment banks to establish pricing  
21 information for the securities at issue as well as trading histories, trading  
22 volume of the securities, and numerosity for purposes of class  
23 certification pursuant to Rule 23.
- 24 • Engaging in motion practice in the Northern District of Illinois to compel  
25 third-party document production.
- 26 • Responding to discovery requests on behalf of the named plaintiffs from  
27 six defendant parties, including producing responsive discovery and  
28 subsequently defending their depositions. This effort also included

1 reviewing productions from Plaintiffs’ asset managers and investment  
2 consultants. Counsel reviewed over one million pages of documents in  
3 connection with its clients’ discovery obligations and their motion for  
4 class certification.

- 5 • Seeking to quash class certification discovery sought from absent class  
6 members.
- 7 • Retaining and overseeing the work of an expert who was deposed on  
8 issues pertaining to numerosity and commonality for purposes of  
9 demonstrating that class certification was appropriate.
- 10 • Obtaining a stipulation to class certification after filing a motion to  
11 certify the class, followed by the implementation of a comprehensive  
12 notice program to inform all potential class members of the scope of the  
13 certified class and their rights as class members.
- 14 • Obtaining and reviewing, in less than 12 months, the documents  
15 produced in *In re Countrywide Fin. Corp. Sec. Litig.*, No. 2:07-cv-05295  
16 (C.D. Cal.) (“New York Funds Action”), consisting of approximately 20  
17 million pages; Counsel reviewed 875,000 documents in that production.  
18 In particular, Counsel thoroughly reviewed the documents and  
19 deposition transcripts from an additional 51 witnesses who had  
20 knowledge relevant to the claims at issue in *Maine State*, with the goal of  
21 identifying relevant search terms and custodians and also to avoid  
22 seeking duplicative discovery. This process also resulted in the  
23 identification of 33 additional Countrywide witnesses with knowledge  
24 relevant to the claims at issue here, whom had not been custodians in the  
25 New York Funds production. In addition, Counsel researched and  
26 assured itself that testimony to the SEC and Federal Crisis Investigation  
27 Commission (“FCIC”) could be used as evidence, as if taken in the  
28 *Maine State* litigation.

- 1       •     Seeking, within the same time period, documents and information related  
2       to the viable MBS tranches in *Maine State* from Defendants and  
3       numerous non-parties, including loan files and due-diligence results. In  
4       total, Plaintiffs' Counsel received over 1.75 million documents related  
5       specifically to the *Maine State* claims. During the meet-and-confer  
6       process, Countrywide represented that it had retained 400 contract  
7       attorneys to review the materials being produced.
- 8       •     Conducting weekly meet-and-confer meetings with defendants on the  
9       status of discovery, document productions, and scheduling depositions.
- 10      •     Propounding six sets of requests for production on all defendants and on  
11      additional requests for production on certain underwriter defendants, as  
12      well as follow-up requests that came to light after certain depositions.
- 13      •     Fully and completely responding to more than 115 contention  
14      interrogatories and requests for admission propounded by defendants.  
15      Had defendants sought summary judgment, these responses would have  
16      formed the basis of the *Maine State* Plaintiffs' opposition.
- 17      •     Obtaining and working with five separate experts, whose reports were  
18      due in less than seven months, including experts in underwriting,  
19      investment bank due diligence, loan re-underwriting, certificate  
20      valuation, investor losses, damages, and a rebuttal expert on issues of  
21      loss causation and negative causation in anticipation of expert reports  
22      that Defendants would submit.
- 23      •     Drafting a mediation statement related to the eight tranches in the *Maine*  
24      *State* litigation.

25       The *Luther* action was the first and most extensive MBS case filed following  
26      the financial crisis. Plaintiffs' Counsel expended exhaustive efforts investigating and  
27      understanding the complicated issues related to the origination, underwriting,  
28      securitization, rating, and sale of the loans at issue. There was no pre-existing road-

1 map for Plaintiffs' Counsel to follow. At every turn there were unique issues not  
2 usually seen in a typical securities class action related to standing, statutes of  
3 limitations and repose, class certification, liability, loss causation and damages.<sup>4</sup>

4 The following are representative examples of the work Plaintiffs' Counsel  
5 performed in *Luther* over the past five and a half years:

- 6 • Investigated the substance of and filed extensive complaints in  
7 November 2007, June 2008, September 2008 and October 2008.
- 8 • Successfully litigated Defendants' 2008 removal of the action to federal  
9 court, before this Court and the Ninth Circuit Court of Appeals. *See*  
10 Order Granting Plaintiff's Motion for Remand to State Court and  
11 Denying an Award of Attorney's Fees and Expenses, No. 2:07-cv-  
12 08165-MRP-MAN (C.D. Cal. Feb. 28, 2008), Dkt. No. 26; Opinion, No.  
13 08-55865 (9th Cir. July 16, 2008).
- 14 • Filed an opposition to Defendants' Motion to Stay Discovery in October  
15 2008.
- 16 • Prepared an opposition to Defendants' demurrers (related to jurisdiction,  
17 liability, loss causation and damages) to Plaintiffs' Complaint in 2009.
- 18 • Prepared and propounded requests for production of documents and  
19 interrogatories on Defendants and third parties, and met and conferred on  
20 such discovery.
- 21 • Filed and briefed a Complaint for Declaratory Relief in this Court  
22 concerning whether SLUSA precludes state court jurisdiction over  
23 matters commenced under the Securities Act. *Luther v. Countrywide*

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24  
25 <sup>4</sup> As the Court noted during the hearing on Defendants' motions to dismiss,  
26 securitizations, such as MBS, represented a new area for securities law in that legal  
27 issues arising from securitizations did "not easily fit in these slots under the prior law  
28 that dealt with stock, or bonds, or offerings of various kinds." March 13, 2013  
Hearing Transcript at 40.

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*Fin. Corp.*, No. 2:09-cv-06162-MRP (MANx), Dkt. No. 1 (Aug. 24, 2009).

- On January 14, 2010, after the state court’s dismissal on jurisdictional grounds, Maine State Retirement System filed an action in federal court in an effort to preserve the statute of limitations of the Class’s Securities Act claims.
- Litigated and won a state court appeal, which reversed the trial court’s demurrer ruling dismissing the *Luther* matter on jurisdictional grounds. Order, No. B222889 (2d App. Div. May 18, 2011).
- Filed an answer to Defendants’ Petition for Review of the California Court of Appeal’s reversal of the state court dismissal.
- Prepared an opposition to Defendants’ new demurrer (related to standing, statute of limitations, and statute of repose) along with oppositions to demurrers filed by certain of the Individual Defendants.
- After a second removal to this Court by Defendants, fully briefed and argued a motion for remand.
- Prepared an extensive opposition to Defendants’ motion to dismiss that was pending at the time of settlement, along with oppositions to certain Individual Defendants’ motions to dismiss and Bank of America’s motion to dismiss the *Western Conference* action.
- Since 2009, Plaintiffs received 20 million pages of documents from Defendants and commenced an efficient review of the documents. Plaintiffs’ Counsel performed targeted searches of and reviewed, coded, and analyzed over 5.5 million of the 20 million pages in order to prepare for mediation, further discovery, summary judgment and trial. Plaintiffs’ Counsel also reviewed publicly-available documents, such as information produced regarding Countrywide by the FCIC.

- 1 • Throughout the five years of litigation, worked with consultants and
- 2 experts on complicated issues related to loan underwriting, econometric
- 3 and statistical analysis of loan pools, securities ratings, loan-to-value
- 4 ratios, owner occupied rates, loss causation, and damages.
- 5 • Prepared detailed mediation statements and presentations, and worked
- 6 with damages experts in connection with the mediation.

7 Notably, Plaintiffs' Counsel's filing of and efforts in the *Luther* action protected

8 a potential recovery for Class Members who purchased the 58 live tranches. Indeed,

9 but for the successful appeal resulting in the reversal of the state court's dismissal of

10 *Luther* on jurisdictional grounds in 2011, all of the Countrywide MBS tranches would

11 have been dismissed and ***there would have been no recovery for the Class*** following

12 this Court's ruling in *Strategic Capital Bank v. Countrywide Fin. Corp.*, No. 2:12-cv-

13 04354-MRP-MAN, (C.D. Cal. Nov. 21, 2012) ("*Strategic Capital*"), Dkt. No. 65.<sup>5</sup>

14 In addition to their litigation efforts, Plaintiffs' Counsel in *Maine State* and

15 *Luther/Western Conference* engaged in protracted settlement negotiations over a

16 period of seven months with Defendants and the assistance of mediator Eric Green

17 that resulted in an incredible recovery for the Class. The mediation process also

18 included separate negotiations with the Honorable Nancy Gertner (retired) on an

19 appropriate plan of allocation for the \$500 million settlement. It was the independent

20 and complementary efforts of Plaintiffs' Counsel in both *Luther* and *Maine State* that

21 led to this exceptional settlement.

22 Importantly, Plaintiffs' Counsels' 17% fee request has been approved by each

23 of the Plaintiffs in the Actions, which include three sophisticated state pension funds

24 (Iowa, Maine and Vermont) with large stakes in the outcome of this litigation. These

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25 <sup>5</sup> This Court in *Strategic Capital* held that the filing of the *Luther* case in state

26 court did not toll the statute of limitations for Securities Act cases concerning

27 Countrywide MBS filed later in federal court, rendering them time-barred in the

28 absence of a successful appeal. Dkt. No. 65 at 23-24.



1 Plaintiffs are exceptionally proud of the results achieved in the Actions and the efforts  
2 both they and Plaintiffs' Counsels expended in achieving them. As noted above,  
3 Plaintiffs intend to file declarations in support of final approval of the Settlement and  
4 Plaintiffs' Counsels' fee request.

5 The attorneys' fee that Plaintiffs' Counsel intend to request is fair and  
6 reasonable and accords with the legal fees requested and awarded in both other MBS  
7 cases, as well as securities class action cases in this jurisdiction and elsewhere. In the  
8 Merrill Lynch MBS Settlement, the court awarded a 17% fee after less than three  
9 years of litigation. In *In re Wells Fargo Mortg.-Backed Certificates Litig.*, No. 09-  
10 CV-1376-LHK, slip op., ¶4 (N.D. Cal. Nov. 14, 2011) (Dkt. No. 475) ("Wells Fargo  
11 MBS Settlement"), after only just over two years of litigation, the United States  
12 District Court for the Northern District of California awarded a fee of 19.75% of a  
13 \$125 million settlement. See also *In re Adelphia Commc'ns Corp. Sec. & Derivative*  
14 *Litig.*, No. 03-MD-1529, 2006 U.S. Dist. LEXIS 84621, at \*16 (S.D.N.Y. Nov. 16,  
15 2006) (21.4% fee in \$460 million settlement); *In re Cardinal Health, Inc. Sec. Litig.*,  
16 528 F. Supp. 2d 752, 755 (S.D. Ohio 2007) (18% fee in \$600 million settlement); *In*  
17 *re BankAmerica Corp. Sec. Litig.*, No. 99-MD-1264, slip op. (E.D. Mo. Oct. 15, 2002)  
18 (18% fee in \$490 million settlement); *In re Lucent Techs., Inc. Sec. Litig.*, 327  
19 F. Supp. 2d 426, 430 (D.N.J. 2004) (Dkt. No. 575) (17% fee in \$667 million  
20 settlement).

21 Although reasonable under the percentage method adopted by this Circuit, the  
22 requested fee of 17% (\$85 million) is also fair and reasonable under the lodestar cross-  
23 check. As of June 30, 2013, Plaintiffs' Counsels expended a lodestar (number of  
24 hours multiplied by per hour rate) of approximately \$39 million in litigating the  
25  
26  
27  
28



1 Actions and advanced approximately \$3.5 million in expenses.<sup>6</sup> The resulting  
2 multiplier of 2.2 is comparable or lower than those approved in similar cases. *See*,  
3 *e.g.*, *Vizcaino v. Microsoft*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming a fee that  
4 yielded a multiplier of 3.65 and noting that multipliers ranging from 1-4 are normally  
5 applied in common fund cases). *See* Merrill Lynch MBS Settlement (2.3 multiplier on  
6 17% fee in \$315 million settlement); Wells Fargo MBS Settlement (2.82 multiplier on  
7 19.75% fee of \$125 million settlement). *See also* *Cardinal Health*, 528 F. Supp. 2d at  
8 755 (5.9 multiplier on 18% fee in \$600 million settlement).

9 This was not a case where a settlement was achieved at an early stage – the first  
10 action was filed *more than five years* ago. Moreover, Plaintiffs’ Counsel prosecuted  
11 the Actions on a wholly contingent basis since the inception of *Luther* in 2007,  
12 receiving no payment for their efforts while being constantly exposed to the  
13 possibility that they would achieve no recovery at all and, therefore, no  
14 compensation.<sup>7</sup>

15 The risk of obtaining a smaller or even no recovery at trial was very substantial  
16 in this matter, just as it is in any major complex securities litigation. However, in this  
17 matter, the risk was greater than normal given the numerous novel legal and factual  
18 issues facing Plaintiffs in these MBS Actions. In fact, if the *Luther* Plaintiffs had not  
19 appealed and won the state court appeal in 2011, the Class would have had no viable  
20 claims following the Court’s November 2012 *Strategic Capital* decision. These risks  
21 \_\_\_\_\_

22 <sup>6</sup> Plaintiffs’ Counsels will submit detailed declarations of time spent by each  
23 timekeeper for Lead Counsel, and the other law firms working at their direction, in  
support of Plaintiffs’ Final Approval papers.

24 <sup>7</sup> Moreover, Plaintiffs’ Counsels will continue to expend considerable time in  
25 connection with obtaining preliminary and final approval of the Settlement, and once  
26 Notice is mailed, responding to inquiries from Class Members and assisting Class  
27 Members with their Proof of Claim forms. As the Court is aware, this Notice is being  
sent to purchasers of over 9,000 tranches and, thus, Plaintiffs’ Counsels will be  
responsible for administering and responding to extensive questions and issues that  
will inevitably arise in settlements of this breadth and complexity.

28

1 undertaken by Plaintiffs' Counsel on behalf of Plaintiffs and the Class, purely on a  
2 contingency basis, warrant the application of the reasonable multiplier of 2.2 to  
3 Plaintiffs' Counsel's lodestar. This risk premium is typically applied to a lodestar to  
4 compensate counsel for the possibility that they will not recover anything at all and for  
5 laying out time and expense over the lengthy course of litigation. For example, in the  
6 *Oracle Securities Litigation*, Robbins Geller expended tens of millions in attorney  
7 time and expenses only to see the case dismissed in its entirety at summary judgment.  
8 Similarly, Kessler Topaz expended millions litigating the *BankAtlantic Securities*  
9 *Litigation* through trial and a jury verdict in plaintiffs' favor, only to have the court  
10 overturn the verdict and enter judgment for defendants. Furthermore, given their  
11 novelty, the Actions presented more obstacles than the average securities class action.  
12 Here, standing, class certification, liability, loss causation and damages issues were  
13 complicated and rife with potential pitfalls. At every stage of the litigation, new  
14 issues arose, and the Court issued procedural and substantive rulings that considerably  
15 affected the scope and viability of the Actions. Despite Defendants' aggressive efforts  
16 and the real risks of continued litigation (including a potential bankruptcy of  
17 Countrywide), Plaintiffs' Counsel achieved an exceptional recovery for the Class.  
18 Plaintiffs' Counsel should be rewarded with a reasonable fee for their efforts and to  
19 incentivize them to hold out and negotiate for the largest settlement for the Class with  
20 the understanding that they could also benefit and not be limited in their fee request.  
21 Fee awards should encourage lawyers to take on the risks involved in prosecuting  
22 cases on behalf of investors by rewarding them for their successful efforts.

23 In sum, at the preliminary approval stage, where the Court's role is to determine  
24 if there is adequate support for the statements in the Notice rather than make a final  
25 determination on the merits of the attorneys' fee request, Plaintiffs' Counsel submit  
26 that there is ample support for the up to 17% attorney fee request set forth in the  
27 Notice.

28

1 **II. THE STANDARDS GOVERNING THE AWARD OF**  
2 **ATTORNEYS' FEES IN COMMON FUND CASES**

3 **A. Plaintiffs' Counsel Are Entitled to a Fee from the Common**  
4 **Fund They Created**

5 It is well-settled that an attorney who maintains a suit that results in the creation  
6 of a fund or benefit in which others have a common interest is entitled to obtain  
7 reasonable fees from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472,  
8 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676, 681 (1980) (“a litigant or a lawyer who  
9 recovers a common fund for the benefit of persons other than himself or his client is  
10 entitled to a reasonable attorney’s fee from the fund as a whole”).

11 In addition to providing just compensation, awards of fair attorneys’ fees from a  
12 common fund should also serve to encourage skilled counsel to represent those who  
13 seek redress for damages inflicted on entire classes of people, and to discourage future  
14 alleged misconduct of a similar nature. *See, e.g., Dolgow v. Anderson*, 43 F.R.D. 472,  
15 481-84 (E.D.N.Y. 1968). Indeed, the Supreme Court has emphasized that private  
16 securities actions, such as the instant action, provide “‘a most effective weapon in the  
17 enforcement’ of the securities laws and are ‘a necessary supplement to [SEC] action.’”  
18 *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310, 105 S. Ct. 2622,  
19 2628, 86 L. Ed. 2d 215, 224 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426,  
20 432, 84 S. Ct. 1555, 1560, 12 L. Ed. 2d 423, 428 (1964)).

21 **B. The Ninth Circuit Supports Awarding Attorneys’ Fees**  
22 **Using the Percentage Approach**

23 The Supreme Court has also consistently held that where a common fund has  
24 been created for the benefit of a class as a result of counsel’s efforts, the award of  
25 counsel’s fees should be determined as a percentage of the fund. *See, e.g., Boeing*,  
26 444 U.S. at 478-79, 100 S. Ct. at 749, 62 L. Ed. 2d at 682. By 1984, this point was so  
27 well established that the Supreme Court needed no more than a footnote to address it  
28 in *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 1550 n.16, 79 L. Ed. 2d  
891, 903 n.16 (1984) (“[U]nder the ‘common fund doctrine,’ . . . a reasonable fee is

1 based on a percentage of the fund bestowed on the class.”). *See also* Report of the  
2 Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (Oct. 8,  
3 1985) (fee awards in common fund cases have historically been computed based upon  
4 a percentage of the fund); 1 Alba Conte, *Attorney Fee Awards* §2.02, at 31-32 (2d ed.  
5 1993) (same). Although district courts retain discretion to award attorney’s fees in  
6 common fund cases based upon either the percentage-of-fund or lodestar method, *see*  
7 *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir.  
8 1994) (“WPPSS”), the Ninth Circuit has implicitly endorsed use of the percentage-of-  
9 fund method in most cases. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d at 1047-  
10 48; *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

### 11 **III. THE REQUESTED FEE IS REASONABLE UNDER THE** 12 **PERCENTAGE-OF-RECOVERY METHOD**

13 While the ultimate determination of the proper amount of attorneys’ fees rests  
14 within the sound discretion of the district court, *see Rodriguez v. Disner*, 688 F.3d  
15 645, 653 (9th Cir. 2012); *see also Garcia v. Gordon Trucking, Inc.*, No. 10-cv-0324  
16 AWI SKO, 2012 U.S. Dist. LEXIS 160052, at \*22 (E.D. Cal. Oct. 29, 2012), the  
17 guiding principle in this Circuit is that a fee award be “reasonable under the  
18 circumstances.” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009).  
19 The Ninth Circuit has approved a number of factors that are relevant to the district  
20 court’s determination including the: (1) result achieved, (2) risk of continued  
21 litigation, (3) financial burden of contingent representation, and (4) customary fees  
22 awarded in similar cases. *See Vizcaino*, 290 F.3d 1043. As demonstrated below,  
23 application of these factors confirms the reasonableness of and warrants including an  
24 up to 17% fee request in the Notice to Class Members.

#### 25 **A. The Result Achieved**

26 Courts have consistently recognized that the result achieved is a major factor to  
27 be considered in determining the reasonableness of a fee award. *Hensley v. Eckerhart*,

1 461 U.S. 424, 436, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40, 52 (1983) (“most critical  
2 factor is the degree of success obtained”); *Vizcaino*, *supra*, 290 F. 3d at 1250.

3 As noted above, this is the largest MBS class action settlement arising out of the  
4 subprime crisis. It is 59% larger than the \$315 million Merrill Lynch MBS  
5 Settlement, which was formerly the largest MBS settlement. It also provides for a  
6 greater recovery on a per “live” certificate basis (\$24.96 versus \$19.05 per \$1,000  
7 certificate in the Merrill Lynch MBS Settlement). By any measure, it is the best MBS  
8 class settlement. The Settlement is one of the largest (top 20) class action securities  
9 settlements of all time. *See* Securities Class Action Services, “The SCAS ‘TOP 100  
10 Settlements Semi-Annual Report’” (Dec. 2012). It was due to the tenacious efforts of  
11 Plaintiffs’ Counsel, as described herein, and in Plaintiffs’ forthcoming submission in  
12 connection with final approval of the Settlement that led to this exceptional result.

13 **B. The Risks of the Litigation and the Novelty and Difficulty of**  
14 **the Questions Presented**

15 Numerous cases have recognized that risk, as well as the novelty and difficulty  
16 of the issues presented, are important factors in determining an appropriate fee award.  
17 *E.g.*, *Vizcaino*, 290 F.3d at 1048; *WPPSS*, 19 F.3d at 1299-1301. Uncertainty that an  
18 ultimate recovery would be obtained is highly relevant in determining risk. *WPPSS*,  
19 19 F.3d at 1300.

20 There is no question that from the outset, the Actions presented a number of  
21 sharply contested legal and factual issues and that Plaintiffs faced formidable defenses  
22 to liability and damages. MBS actions involve complex legal and factual issues under  
23 the federal securities laws and present novel issues upon which district courts and  
24 even circuit courts have ruled differently, particularly in the context of standing.  
25 Beyond these hurdles, throughout the litigation Defendants have adamantly denied  
26 liability and asserted that they had absolute defenses to Plaintiffs’ claims, including  
27 most notably, that the recession rather than their own conduct caused Plaintiffs’  
28 losses. *See Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004)

1 (concluding that district court properly weighed risk when it evaluated defendant’s  
2 belief that it had strong case on merits supporting finding of risk).<sup>8</sup> Furthermore, if  
3 *Luther* was not revived by the California Appeals Court in 2011, four years of  
4 litigation by *Luther*’s counsel would have returned nothing. Also, the Court’s  
5 *Strategic Capital* decision could have resulted in the dismissal of the *Maine State*  
6 action after almost three years of litigation by *Maine State* counsel.

7 **C. The Contingent Fee Nature of the Case and the Financial**  
8 **Burden Carried by Plaintiffs’ Lead Counsel**

9 It is also well-settled that a determination of a fair fee must include  
10 consideration of the contingent nature of the fee and the difficulties that Plaintiffs’  
11 Counsel have overcome in obtaining the settlement.

12 It is an established practice in the private legal market to reward attorneys for  
13 taking the risk of non-payment by paying them a premium over their normal hourly  
14 rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law*  
15 §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value

16 <sup>8</sup> Some courts also look at the skill required and the quality and efficiency of the  
17 work. *See Rodriguez v. D.M. Camp & Sons*, No. 1:09-cv-00700-AWI-JLT, 2013 U.S.  
18 Dist. LEXIS 69282, at \*36 (E.D. Cal. May 15, 2013) (“The complexity of issues and  
19 skills required may support a fee award greater than the benchmark.”). Plaintiffs’  
20 Counsel committed considerable resources and time in the research, investigation, and  
21 litigation of this matter, at the expense of their other litigation matters. Counsel in  
22 both *Maine State* and *Luther/Western Conference* prosecuted in an efficient manner  
23 the complementary actions that involved eight tranches and 50 other tranches,  
24 respectively. Although some of the discovery was similar, discovery on a tranche-  
25 specific basis had to be performed in terms of proof at trial. Based upon Plaintiffs’  
26 Counsel’s diligent efforts on behalf of the Class and their skill and reputation,  
27 Plaintiffs’ Counsel were able to negotiate a favorable result under difficult and  
28 challenging circumstances. The quality of opposing counsel is also important in  
evaluating the quality of the work done by Plaintiffs’ Counsel. *See, e.g., In re Equity*  
*Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *In re King Res.*  
*Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *Arenson v. Bd. of Trade*, 372  
F. Supp. 1349, 1354 (N.D. Ill. 1974). Plaintiffs’ Counsel were opposed in the Actions  
by very skilled and highly respected counsel from Goodwin Procter and eight other  
law firms with well-deserved reputations for vigorous advocacy in the defense of  
complex civil cases such as this. These counsel fought Plaintiffs’ Counsel at every  
turn, necessitating Plaintiffs’ Counsel’s outlay of approximately \$3.5 million in  
expenses and expenditure of approximately \$39 million in attorney time since  
November 2007, and further supporting Plaintiffs’ Counsel’s fee request.



1 of the services if rendered on a non-contingent basis are accepted in the legal  
2 profession as a legitimate way of assuring competent representation for plaintiffs who  
3 could not afford to pay on an hourly basis regardless of whether they win or lose.  
4 *WPPSS*, 19 F.3d at 1299.

5 As noted above, the risk of no recovery in complex cases of this type is very  
6 real. There are numerous class actions in which plaintiffs' counsel expended  
7 thousands of hours and yet received no remuneration whatsoever despite their  
8 diligence and efforts. For example, in the *Oracle Securities Litigation*, Robbins  
9 Geller expended tens of millions in attorney time and expenses only to see the case  
10 dismissed in its entirety at summary judgment. Similarly, Kessler Topaz expended  
11 millions litigating the *BankAtlantic Securities Litigation* through trial and a jury  
12 verdict in plaintiffs' favor, only to have the court overturn the verdict and enter  
13 judgment for the defendants. See *In re BankAtlantic Bancorp, Inc.*, No. 07-61542-  
14 CIV, 2011 WL 1585605 (S. D. Fla. Apr. 25, 2011). As the court in *Xcel* recognized,  
15 "[p]recedent is replete with situations in which attorneys representing a class have  
16 devoted substantial resources in terms of time and advanced costs yet have lost the  
17 case despite their advocacy." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994  
18 (D. Minn. 2005). Even counsel who steer their clients past summary judgment and  
19 succeed at trial may find their judgment overturned on appeal or on a post-trial  
20 motion.<sup>9</sup>

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21  
22 <sup>9</sup> See, e.g., *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486-CW(EDL),  
23 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict by jury); *Robbins v.*  
24 *Koger Props., Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of \$81  
25 million for plaintiffs against an accounting firm reversed on appeal on loss causation  
26 grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77  
27 F.3d 1215, 1233 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class  
28 action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of  
1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-  
JW, 1991 U.S. Dist. LEXIS 15608, at \*1-\*2 (N.D. Cal. Sept. 6, 1991) (verdict against  
two individual defendants, but court vacated judgment on motion for judgment  
notwithstanding the verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10, 18 (1st Cir.  
1990) (where the class won a substantial jury verdict and motion for J.N.O.V. was

1 Because the fee in the Actions was entirely contingent, the only certainties were  
2 that there would be no fee without a successful result and that such a result would be  
3 realized only after considerable effort. Plaintiffs' Counsel committed significant  
4 resources of both time and money to the vigorous and successful prosecution of the  
5 Actions for the benefit of the Class, strongly militating in favor of awarding the  
6 requested fee.

7 **D. A 17% Fee Award Is Consistent with the Awards in Similar**  
8 **Complex, Contingent, Securities Litigation**

9 Courts often look to fees awarded in comparable cases to determine if the  
10 requested fee is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. A 17% fee award is  
11 consistent with awards in similar complex, securities class action litigation. *See*  
12 *Adelphia*, 2006 U.S. Dist. LEXIS 84621, at \*16 (21.4% fee in \$460 million  
13 settlement); *Cardinal Health*, 528 F. Supp. 2d at 755 (18% fee in \$600 million  
14 settlement); *BankAmerica*, No. 99-MD-1264, slip op. (18% fee in \$490 million  
15 settlement); *Lucent Techs.*, 327 F. Supp. 2d at 430 (17% fee in \$667 million  
16 settlement).

17 MBS class actions arguably involve more risky and complex issues than  
18 traditional securities class actions, including the risk of unique standing, tolling, class  
19 certification, loss causation and damages issues. This case presented an additional  
20 layer of risk given the Court's decision that Bank of America was not liable for  
21 Countrywide's liabilities in these Actions, and Countrywide's concession that it was  
22 and still is considering filing for bankruptcy protection. In the most comparable,  
23 albeit less successful, MBS settlement – *Merrill Lynch* – the court awarded 17% of the  
24 \$325 million settlement fund. Similarly, in the *Wells Fargo* MBS matter, the court  
25 awarded counsel a fee of 19.75%. Plaintiffs' Counsel's request for a 17% fee in a

26 denied, on appeal the judgment was reversed and the case was dismissed – after 11  
27 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 (2d  
28 Cir. 1979) (multimillion dollar judgment reversed after lengthy trial).



1 more protracted and successful litigation is thus clearly in line with fee awards in  
2 similar securities and MBS class action litigation.

3 **IV. THE REQUESTED FEE IS REASONABLE UNDER THE**  
4 **LODESTAR CROSS-CHECK**

5 Application of the *Vizcaino* factors demonstrates that the requested fee is fair  
6 and reasonable, and is not “clearly excessive,” thereby alleviating the need for the  
7 court to apply a lodestar cross-check. However, as noted above, even if the lodestar  
8 cross-check is applied, the requested fee is still fair and reasonable.

9 The lodestar method, as set forth in the seminal cases *Lindy Bros. Builders, Inc.*  
10 *v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (“*Lindy I*”)  
11 and *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d  
12 102 (3d Cir. 1976) (“*Lindy II*”), is a two-step process. *See Lindy I*, 487 F.2d at 167-  
13 68. The first step requires ascertaining the “lodestar” figure by multiplying the  
14 number of hours reasonably worked by the current hourly rate of counsel. *Id.* at 167.  
15 “Calculation of the lodestar, however, is simply the beginning of the analysis.” *In re*  
16 *Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985), *aff’d*, 798 F.3d  
17 35 (2d Cir. 1986). In the second step of the analysis, a court adjusts the lodestar to  
18 take into account, among other things, the risk of non-payment, the result achieved,  
19 the quality of representation, the complexity and magnitude of the litigation, and  
20 public policy considerations. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d  
21 Cir. 1984); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d  
22 283, 341 (3d Cir. 1998). To account for the foregoing factors the court then applies an  
23 appropriate multiplier to the lodestar number.

24 The lodestar for the services performed by Plaintiffs’ Counsels in these Actions  
25 are approximately \$39 million. Therefore, the requested fee of 17% (\$85 million)  
26 represents a multiplier of approximately 2.2 times Plaintiffs’ Counsels’ lodestar. This  
27 multiplier is comparable or lower than those awarded by other courts in similar cases,  
28 thus demonstrating the reasonableness of the requested fee. *See Merrill Lynch MBS*

1 Settlement (2.3 multiplier); Wells Fargo MBS Settlement (2.8 multiplier); *see also*  
2 *Cardinal Health*, 528 F. Supp. 2d at 755 (multiplier of 5.9 for a \$108 million fee in a  
3 \$600 million settlement); *Adelphia*, 2006 U.S. Dist. LEXIS 84621, at \*16 (2.89  
4 multiplier for a \$97.36 million fee in a \$460 million settlement); *In re NASDAQ Mkt.-*  
5 *Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (3.97 multiplier for a  
6 \$143.7 million fee in a \$1.027 billion settlement). A multiplier of time is needed to  
7 reward attorneys for assuming the risk of non-payment in these highly risky, complex  
8 MBS class actions. Thus, the requested fee is plainly reasonable under both the  
9 percentage method and the lodestar cross-check method. Additional support will be  
10 provided in connection with Plaintiffs' Motion for Final Approval.

11 **V. CONCLUSION**

12 For the foregoing reasons, Plaintiffs' Counsel respectfully requests that the  
13 Court issue the Notice that includes Plaintiffs' Counsel's intention to apply for an  
14 award of attorneys' fees of up to 17% of the Gross Settlement Fund.

15 DATED: July 8, 2013

Respectfully submitted,

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s/ STEVEN J. TOLL  
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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 8, 2013.

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