

**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

**LEAD BOND/NOTES PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR (I) PRELIMINARY APPROVAL OF SETTLEMENTS
WITH WACHOVIA DEFENDANTS AND KPMG LLP,
(II) CERTIFICATION OF THE SETTLEMENT CLASS FOR PURPOSES OF THE
SETTLEMENTS AND (III) APPROVAL OF NOTICE TO THE SETTLEMENT CLASS**

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Plaintiffs Orange County Employees' Retirement System ("Orange County"), Louisiana Sheriffs' Pension and Relief Fund ("Louisiana Sheriffs") and Southeastern Pennsylvania Transportation Authority ("SEPTA") (collectively, "Lead Bond/Notes Plaintiffs") respectfully submit this memorandum of law in support of their motion for (i) preliminary approval of the two proposed settlements of this securities class action (the "Bond/Notes Action") as set forth in the Stipulation and Agreements of Settlement dated as of August 5, 2011 (the "Stipulation"); (ii) certification of the proposed Settlement Class and Lead Bond/Notes Plaintiffs as class representatives and appointment of Lead Bond/Notes Counsel as class counsel for purposes of the Settlements; (iii) approval of the form and manner of giving notice of the proposed Settlements to the Settlement Class; and (iv) setting a hearing date for final approval of the Settlements and Lead Bond/Notes Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses (the "Settlement Hearing").¹

I. INTRODUCTION

The proposed settlements now before the Court for preliminary approval provide for a total recovery for the benefit of the Settlement Class of \$627 million in cash, plus interest thereon, consisting of: (i) a \$590 million cash settlement with Wachovia Corporation ("Wachovia"); Wachovia Capital Trust IV, Wachovia Capital Trust IX, Wachovia Capital Trust X (collectively, the "Wachovia Capital Trusts"); Wells Fargo & Company ("Wells Fargo") (as successor-in-interest to Wachovia); and certain of Wachovia's officers and directors during the relevant time period (the "Individual Defendants" (as defined in §I(1)(w) of the Stipulation) and, together with Wachovia, the Wachovia Capital Trusts and Wells Fargo, the "Wachovia Defendants") (the "Wachovia Settlement"); and (ii) a \$37 million cash settlement with defendant

¹ Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Stipulation.

KPMG LLP (“KPMG” and, together with the Wachovia Defendants, the “Settling Defendants”) (the “KPMG Settlement” and, together with the Wachovia Settlement, the “Settlements”). The Settlements, if approved by the Court, will resolve all claims in the Bond/Notes Action against the Settling Defendants, as well as certain other released parties set forth in the Stipulation.²

According to published figures, the Settlements, if approved, would rank among the fifteen largest recoveries in securities class action history and represent the single largest recovery for claims brought solely pursuant to the Securities Act of 1933 (the “Securities Act”). Perhaps even more impressive, the recoveries collectively represent roughly 30 to 50% of the reasonably recoverable total damages that Lead Bond/Notes Counsel would have been able to credibly present to a jury, well in excess of more typical recoveries in these types of actions.

The Settlements – which, together result in the complete resolution of all claims asserted in the Bond/Notes Action – were reached at a time when the Settling Parties had a thorough understanding of the strengths and weaknesses of their respective positions and only after intense, arms’-length negotiations with the assistance of a highly respected and experienced mediator (Judge Daniel J. Weinstein, ret.). Lead Bond/Notes Plaintiffs and their counsel believe that the proposed Settlements represent an excellent result and are in the best interests of the Settlement Class. Among other things, the Settlements provide a substantial monetary benefit to the Settlement Class in the form of cash payments totaling \$627 million. This result must be compared to the risks that protracted and contested litigation, including further discovery, dispositive motion practice, trial and likely appeals, might lead to a vastly smaller recovery, or

² The Wachovia Settlement also provides for the release of certain non-Wachovia underwriters who underwrote all or portions of the offerings at issue in the Bond/Notes Action (the “Underwriter Defendants” (as defined in §I(1)(kkk) of the Stipulation)), provided that each of the Underwriter Defendants provides a signed release of any and all of its claims against the Bond/Notes Plaintiff-Related Releasees to Lead Bond/Notes Counsel no later than five business days prior to the date of the Settlement Hearing.

no recovery at all, from Defendants. In addition, the Settlements were, notably, obtained in the absence of any civil or criminal actions for securities law violations having been initiated by the Department of Justice, U.S. Securities and Exchange Commission (“SEC”), or any other state or federal regulatory agency against any of the Wachovia Defendants, further underscoring the significance of this recovery and the value added by Lead Bond/Notes Plaintiffs’ efforts here.

At the Settlement Hearing, the Court will have before it more expansive motion papers in support of the proposed Settlements, and will be asked to make a determination as to whether the Settlements are fair, reasonable and adequate. At this time, Lead Bond/Notes Plaintiffs request only that the Court grant preliminary approval of the Settlements so that notice may be provided to the Settlement Class. Specifically, Lead Plaintiffs request that this Court enter the [Proposed] Order Preliminarily Approving Proposed Settlements and Providing for Notice (the “Preliminary Approval Order”), attached as Exhibit 2 to Lead Bond/Notes Plaintiffs’ Notice of Motion (and as Exhibit A to the Stipulation), which, among other things, will:

- (i) preliminarily approve the Settlements on the terms set forth in the Stipulation;
- (ii) certify, for purposes of the Settlements, the Settlement Class and Lead Bond/Notes Plaintiffs as class representatives and appoint Lead Bond/Notes Counsel as class counsel for the Settlement Class, under Rule 23 of the Federal Rules of Civil Procedure;
- (iii) approve the form and content of the Notice, Proof of Claim and Summary Notice attached as Exhibits A-1, A-2 and A-3 to the Stipulation, respectively;
- (iv) find that the procedures established for distribution of the Notice and Proof of Claim and publication of the Summary Notice in the manner and form set forth in the Preliminary Approval Order constitute the best notice practicable under the circumstances, and satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, due process, the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 77z-1(a)(7), the Rules of the Court, and all other applicable law and rules; and
- (v) set a schedule and procedures for: disseminating the Notice and Proof of Claim and publication of the Summary Notice; requesting exclusion from the Settlement

Class; objecting to the Settlements, the proposed Plan of Allocation and/or Lead Bond/Notes Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses; submitting papers in support of final approval of the Settlements; and the Settlement Hearing.

II. STATEMENT OF FACTS

A. Lead Bond/Notes Plaintiffs Conducted An Extensive Investigation And Vigorously Litigated The Bond/Notes Action For Over Two Years Prior To Achieving The Settlements

As described in detail below, the Settlements before the Court are the culmination of over two years of vigorous litigation, which included Lead Bond/Notes Plaintiffs' extensive investigation into the Settlement Class's claims; the filing of two detailed and robust consolidated complaints; two thoroughly briefed sets of motions to dismiss filed by three separate groups of defendants; protracted settlement negotiations under the auspices of the Hon. Daniel J. Weinstein (ret.) of JAMS, a former California state court judge and highly experienced mediator; and voluminous discovery in connection with the Settlements.

Beginning in December 2008, three related securities class actions alleging claims under the Securities Act relating to one or more preferred stock, bonds or notes offerings issued by Wachovia and/or certain of its affiliates were filed in the Superior Court of the State of California, Alameda County (the "California Court"). On January 29, 2009, the California Court ordered the consolidation of the three actions (the "Original Actions") under the caption *In re Wachovia Preferred Securities and Bond/Notes Litigation*, No. RG 08426378, and appointed the law firms of Bernstein Litowitz Berger & Grossmann LLP, Barroway Topaz Kessler Meltzer & Check, LLP (n/k/a known as Kessler Topaz Meltzer & Check, LLP) and Coughlin Stoia Geller Rudman & Robbins (n/k/a Robbins Geller Rudman & Dowd LLP) as co-lead counsel for the putative class (collectively, "Lead Bond/Notes Counsel").

On March 6, 2009, the consolidated Original Actions were removed from the California Court to the United States District Court for the Northern District of California (the “Northern District”), and on June 22, 2009, the Northern District granted a motion to relate the consolidated Original Actions and ordered their transfer, pursuant to 28 U.S.C. §1404(a), to the United States District Court for the Southern District of New York (the “Court”). By Order dated August 20, 2009, the Court (i) consolidated the Original Actions under the caption *In re Wachovia Preferred Securities and Bond/Notes Litigation*, Master File No. 09 Civ. 6351 (S.D.N.Y.) (RJS) (the “Bond/Notes Action”); (ii) appointed Orange County, Louisiana Sheriffs and SEPTA as co-Lead Plaintiffs in the Bond/Notes Action; and (iii) affirmed the California Court’s prior appointment of Lead Bond/Notes Counsel as co-Lead Counsel.³

On September 4, 2009, Lead Bond/Notes Plaintiffs filed their Consolidated Class Action Complaint (the “First Consolidated Complaint”), on behalf of themselves and all persons and entities (except Defendants and their affiliated or related Persons) who purchased or otherwise acquired certain Wachovia preferred securities, bonds or notes (“Bond Class Securities” as set forth in §I(1)(e) of the Stipulation) in or traceable to publicly registered offerings (the “Offerings”) conducted between July 31, 2006 and May 29, 2008 pursuant to one of five separate shelf registration statements, each of which incorporated by reference the prospectus

³ By its August 20, 2009 Order, the Court also ordered that the Bond/Notes Action be coordinated for pre-trial purposes with a putative class action brought solely on behalf of investors in Wachovia equity securities that was also pending before the Court, captioned *In re Wachovia Equity Securities Litigation*, No. 08 Civ. 6171 (S.D.N.Y.) (RJS). The aforementioned actions were also coordinated for pre-trial purposes with two individual actions that, like the *In re Wachovia Equity Securities Litigation*, were also brought by investors in Wachovia equity securities, which were respectively captioned *Stichting Pensioenfonds ABP, et al. v. Wachovia Corp., et al.*, No. 09 Civ. 04473 (S.D.N.Y.) (RJS), and *FC Holdings AB, et al. v. Wells Fargo & Co., et al.*, No. 09 Civ. 5466 (S.D.N.Y.) (RJS) (the *In re Wachovia Equity Securities Litigation* and the *Stichting Pensioenfonds ABP* and *FC Holdings AB* actions are hereafter collectively referred to as the “Equity Actions”). The present Settlements do not release or impact, in any way, claims that Settlement Class Members may have in their capacity as purchasers of Wachovia equity securities, including claims that may have been brought on their behalf in the Equity Actions.

and certain other materials for each given Offering (collectively, the “Offering Materials”), and which were filed with the SEC. The First Consolidated Complaint asserted claims under Sections 11, 12(a)(2) and 15 of the Securities Act against (i) the Wachovia Defendants (including Wells Fargo, in its capacity as successor-in-interest to the outstanding debts and pre-merger liabilities of Wachovia (which merged with and into Wells Fargo on December 31, 2008)); (ii) the Underwriter Defendants; and (iii) KPMG, Wachovia’s outside auditor which certified Wachovia’s 2006 and 2007 annual financial statements which were incorporated into the Offering Materials for a majority of the Offerings at issue in the Bond/Notes Action (collectively, “Defendants”). On November 3, 2009, the Wachovia Defendants, the Underwriter Defendants and KPMG each filed a separate motion to dismiss the First Consolidated Complaint. Lead Bond/Notes Plaintiffs filed a comprehensive opposition to Defendants’ motions on December 18, 2009, and Defendants filed their respective replies on February 4, 2010.

While Defendants’ motions to dismiss the First Consolidated Complaint were pending, Lead Bond/Notes Plaintiffs along with the Additional Bond Notes Plaintiffs⁴ (collectively, “Bond/Notes Plaintiffs”) filed, with permission of the Court, their Amended Consolidated Class Action Complaint on May 28, 2010 (the “Amended Complaint”) based on additional information uncovered by Lead Bond/Notes Counsel’s ongoing investigation. Lead Counsel’s extensive factual investigation – which commenced prior to the filing of the First Consolidated Complaint – was critical to the advancement of the Settlement Class’s claims and, ultimately, in obtaining the Settlements. Specifically, this investigation included, *inter alia*: (i) identifying, interviewing and analyzing the statements of well over 200 confidential witnesses, including former employees of Wachovia and Golden West Financial Group; (ii) collecting, reviewing and

⁴ “Additional Bond/Notes Plaintiffs” is defined in §I(1)(a) of the Stipulation.

analyzing hundreds of SEC filings, press releases, news articles and analyst reports concerning Wachovia and the events and circumstances at issue in the Bond/Notes Action; (iii) consulting with an experienced and well-regarded damages consultant; and (iv) thoroughly researching the applicable law with respect to the claims of Bond/Notes Plaintiffs and the Settlement Class, including Defendants' potential defenses thereto.

The Amended Complaint re-pled Lead Bond/Notes Plaintiffs' previously asserted claims under Sections 11, 12(a)(2) and 15 of the Securities Act against Defendants, and also supplemented their prior allegations with (among other things) the statements of numerous additional confidential witnesses. The Amended Complaint alleged that the Offering Materials materially misstated and failed to disclose the true nature and quality of Wachovia's mortgage loan portfolio, and materially misled investors as to Wachovia's exposure to tens of billions of dollars of losses on mortgage-related assets. The Amended Complaint (like its predecessor complaint) alleged that, *inter alia*, the Offering Materials contained material misstatements – and omitted to state facts necessary to make the representations contained in the Offering Materials not materially misleading – concerning, among other things, the risk profile and quality of Wachovia's \$120 billion Pick-A-Pay option adjustable rate residential mortgage loan portfolio (the "Pick-A-Pay Portfolio"); the nature and quality of the in-house appraisals and underwriting processes used in underwriting Wachovia's Pick-A-Pay Portfolio; Wachovia's publicly reported loan-to-value ratios for the Pick-A-Pay Portfolio; the adequacy of Wachovia's reported loan loss reserves; the valuation of Wachovia's holdings of collateralized debt obligations and subprime residential mortgage backed securities; the valuation of the goodwill that Wachovia carried as an asset on its financial statements in connection with its 2006 acquisition of Golden West Financial Corporation (whose primary asset, in turn, was the Pick-A-Pay Portfolio); Wachovia's stated net

income, total assets and Tier 1 capital; and Wachovia's compliance with Generally Accepted Accounting Principles.

On July 14, 2010, the Wachovia Defendants, the Underwriter Defendants and KPMG each filed separate motions to dismiss the Amended Complaint. Lead Bond/Notes Plaintiffs filed their consolidated brief in opposition to these motions on August 13, 2010, and the various Defendants filed replies on September 15, 2010. Thereafter, on March 31, 2011, the Court entered its Opinion and Order on the various motions to dismiss that had been filed in both the Bond/Notes Action and in each of the separate Equity Actions (the "March 31 Opinion"). The Court's March 31 Opinion dismissed in their entirety the claims asserted in the various Equity Actions, but denied in substantial part each of the motions to dismiss the Amended Complaint.⁵

Following the issuance of the March 31 Order, KPMG, on April 14, 2011, filed a Motion for Reconsideration, requesting the Court to reconsider its March 31 Opinion and grant KPMG's earlier motion to dismiss all claims asserted against it. Also on April 14, 2011, KPMG filed a letter with the Court requesting a pre-motion conference and permission to file a motion for leave to file an interlocutory appeal of the Court's March 31 Opinion under 28 U.S.C. §1292(b).

B. The Settlements Are The Result Of Intense And Protracted Settlement Negotiations, Mediation Sessions And Voluminous Agreed-Upon Discovery

The Settlements are the result of arms'-length discussions and negotiations that extended over more than six months and that included multiple face-to-face mediation sessions presided over by Judge Weinstein. Following preliminary discussions in late 2010, and while Defendants' motions to dismiss the Amended Complaint were still pending, Lead Bond/Notes Plaintiffs and the Wachovia Defendants commenced a formal mediation process under the

⁵ See *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d. 326, 2011 U.S. Dist. LEXIS 36129 (S.D.N.Y. March 31, 2011) (RJS).

auspices of Judge Weinstein. Following the exchange of detailed mediation statements and other materials setting forth their respective positions on liability and damages, Lead Bond/Notes Counsel and counsel for the Wachovia Defendants participated in a two-day face-to-face mediation session in New York City. Although a settlement was not reached at this mediation session, both sides concluded that enough progress had been made to warrant a further set of meetings under the auspices of Judge Weinstein in April 2011. After another full day of protracted face-to-face meetings, presentations and arm's-length negotiation on April 28, 2011, and with the continued assistance of Judge Weinstein, counsel for the Wachovia Defendants and Lead Bond/Notes Plaintiffs entered into a term sheet to settle and release all claims asserted against the Wachovia Defendants and the Underwriter Defendants, leaving KPMG as the only non-settling Defendant in the Bond/Notes Action.

Thereafter, in early May 2011, Lead Bond/Notes Counsel contacted KPMG's counsel to explore the possibility of commencing settlement discussions.⁶ Initial settlement discussions revealed that Lead Bond/Notes Plaintiffs' and KPMG's settlement positions were far apart. However, in late May 2011, Lead Bond/Notes Plaintiffs and KPMG agreed to involve Judge Weinstein to assist in their negotiations. Pursuant to an agreed pre-mediation schedule, Lead Bond/Notes Plaintiffs and KPMG exchanged comprehensive mediation briefs and other materials, and thereafter participated in a two-day face-to-face mediation session under the oversight of Judge Weinstein in New York City on June 13 and 14, 2011. Although Lead Bond/Notes Plaintiffs and KPMG did not reach a settlement at the June 2011 mediation, the parties continued to engage in separate one-on-one communications with Judge Weinstein in an

⁶ On May 5, 2011, counsel for both KPMG and Lead Bond/Notes Plaintiffs participated in a conference call with the Court, where the parties jointly requested – and the Court granted – an extension of all pending litigation deadlines for 45 days in order to allow the parties a reasonable opportunity to explore possible settlement discussions.

effort to narrow and, if possible, resolve their differences. On June 23, 2011, Lead Bond/Notes Plaintiffs and KPMG reached an agreement in principle to settle all claims asserted against KPMG for \$37 million in cash. Following further negotiations regarding certain non-monetary terms of the proposed settlement, counsel for KPMG and Lead Bond/Notes Plaintiffs entered into a term sheet on June 28, 2011.

One of the critical terms of Lead Bond/Notes Plaintiffs' agreement to settle with the Wachovia Defendants was their agreement to provide Lead Bond/Notes Counsel with access to important documents and witnesses to confirm the fairness of the proposed Wachovia Settlement (and which in turn also allowed Lead Bond/Notes Plaintiffs to better prepare their case against KPMG). With respect to the Wachovia Settlement, the Wachovia Defendants, in compliance with their settlement term sheet, produced to Lead Bond/Notes Counsel, and Lead Bond/Notes Counsel are continuing the process of reviewing and analyzing more than 9 million pages of internal Wachovia and Wells Fargo documents concerning the matters alleged in the Amended Complaint. In addition, prior to executing the Stipulation, Lead Bond/Notes Counsel conducted interviews of approximately fifteen current Wells Fargo and/or former Wachovia personnel (including former Wachovia personnel now employed by Wells Fargo) who had knowledge of the matters alleged in the Amended Complaint. The information gleaned from this ongoing discovery not only served to confirm Lead Bond/Notes Counsel's assessment to date of the reasonableness of the Wachovia Settlement, but was also very helpful to Lead Bond/Notes Plaintiffs in conducting their negotiations with KPMG this spring and summer.

Similarly, KPMG, in compliance with its settlement term sheet, produced to Lead Bond/Notes Counsel, and Lead Bond/Notes Counsel are in the process of reviewing and analyzing, over 285,000 pages of internal KPMG documents (including the relevant portions of

KPMG's work-papers) concerning the matters alleged in the Amended Complaint against KPMG. In addition, Lead Bond/Notes Counsel are in the process of interviewing a number of current KPMG personnel with knowledge of the matters alleged in the Amended Complaint that are the subject of Bond/Notes Plaintiffs' claims against KPMG (including matters concerning the nature, scope and content of KPMG's audits of Wachovia's financial statements).

While this discovery process has been going on, Lead Bond/Notes Counsel also negotiated and drafted the final terms of the accompanying "long-form" Stipulation and Agreements of Settlement and related exhibits with both the Wachovia Defendants and KPMG, which sets forth the specific and detailed terms of both the Wachovia and KPMG Settlements. These negotiations took additional weeks, and involved the exchange of numerous drafts and comments thereon (as well as additional extensive consultation by Lead Bond/Notes Counsel with their damages expert to develop the proposed Plan of Allocation), and which ultimately culminated in the execution of the Stipulation on the morning of August 5, 2011. As set forth below, Lead Bond/Notes Plaintiffs and Lead Bond/Notes Counsel believe that both Settlements reflect truly excellent results for the Settlement Class, and thus warrant preliminary approval by the Court.

III. THE PROPOSED SETTLEMENTS WARRANT PRELIMINARY APPROVAL

The settlement of complex class action litigation is favored by public policy and strongly encouraged by the courts. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (internal quotation marks and citation omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is

an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.”).

When reviewing a proposed settlement in the context of preliminary approval, courts make a preliminary determination regarding the fairness, reasonableness, and adequacy of settlement terms prior to allowing notice to be sent to the potential class. In making this preliminary determination, “[w]here the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.” *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); *see also Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009). Here, the terms of both of the proposed Settlements are plainly “within the range of possible approval.” *Initial Pub. Offering*, 243 F.R.D. at 87.

The Settling Parties here request only that the Court take the first step in the settlement approval process and grant preliminary approval of the proposed Settlements. The proposed Settlements, which provide a total of \$627 million in cash for distribution to eligible Settlement Class Members, after deduction of Court-awarded fees and expenses, are unquestionably beneficial to the Settlement Class. Given the complexities and the continued risks the parties would face if the Bond/Notes Action were to proceed, both Settlements represent reasonable resolutions to the parties’ disputes and eliminate the risk that the Settlement Class might recover nothing, or a vastly smaller amount, following trial and inevitable appeals. The factors supporting approval of both Settlements will be reviewed in detail in Lead Bond/Notes Plaintiffs’ final approval papers to be submitted to the Court prior to the Settlement Hearing, but

a brief review of some important factors, as set forth below, demonstrates that the Settlements clearly fall “within the range of possible approval.”

A. The Settlements Were Negotiated At Arms'-Length And Are Supported by Lead Bond/Notes Plaintiffs and Experienced Counsel

As set forth above, the Settlements were negotiated at arms'-length, independently from one another, by counsel who are experienced in complex securities litigation and who were acting in an informed manner. The Bond/Notes Action was vigorously prosecuted against Defendants for more than two years. Lead Bond/Notes Counsel not only conducted an extensive pre-filing investigation, but also obtained extensive discovery from both the Wachovia Defendants and KPMG following the execution of their relevant term sheets. This latter discovery has included the ongoing review and analysis of millions of pages of documents as well as preparing for and conducting the interviews of numerous Wachovia and KPMG personnel with relevant knowledge. Accordingly, Lead Bond/Notes Counsel are particularly well-informed as to the operative facts and potential risks of continuing to litigate the Bond/Notes Action compared to the immediate and certain benefits of resolving the Bond/Notes Action on the terms reflected in the Stipulation. Under these circumstances, a presumption of fairness attaches to the proposed Settlements. *See Wal-Mart*, 396 F.3d at 116 (A “presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.”) (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995)); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *4 (S.D.N.Y. Dec. 23, 2009) (same).

Moreover, the Settlements were negotiated under the direction and with the direct involvement of Lead Bond/Notes Plaintiffs, who are sophisticated institutional investors, as well as with the assistance of Judge Weinstein, a retired judge and highly experienced mediator.

These facts further strengthen the Settlements' presumption of fairness. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) (the use of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (participation of sophisticated institutional investor lead plaintiffs in settlement process supports approval of settlement).

B. The Risks of Establishing Liability and Damages If The Bond/Notes Action Continued Supports Approval Of The Settlements

In assessing a proposed settlement, the Court should balance the benefits afforded the class, including the *immediacy* and *certainty* of a recovery, against the continuing risks of litigation. *See Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). While Lead Bond/Notes Plaintiffs believe that their claims are meritorious, there were substantial risks to achieving a better result for the Settlement Class through continued litigation. *See In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) (when "evaluating securities class action [settlements], the Courts have long recognized such litigation to be 'notably difficult and notoriously uncertain'"). *See also In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 125 (D.N.J. 2002) ("Regardless of the strength of case counsel might present at trial, victory in litigation is never guaranteed.").

Here, Lead Bond/Notes Plaintiffs would have confronted a number of substantial challenges in establishing liability and damages at trial. Notably, certain claims alleged in the Amended Complaint were based on allegedly inaccurate statements concerning the nature and quality of the underwriting of the residential mortgages contained in Wachovia's "Pick-A-Pay"

loan portfolio – but those claims were found to be not actionable as a matter of law by the Court’s March 31 Opinion. Had the Bond/Notes Action continued, the impact of this aspect of the Court’s ruling on Lead Bond/Notes Plaintiffs’ other claims was far from certain.

Similarly, at the time the KPMG Settlement was reached, KPMG had filed motions to reconsider and requests for immediate interlocutory appeal on issues relating to the actionability of certain other key alleged statements, including whether inaccurate statements concerning a company’s loan loss reserves and asset valuations are “opinions” for which there is no liability unless (according to KPMG) the Defendants did not actually believe in the truth of their “opinions.” If KPMG’s view (which had also been urged by the Wachovia Defendants before they agreed to settle) had prevailed, either on reconsideration by the Court or on appeal, it would have greatly increased the risk that Lead Bond/Notes Plaintiffs would have been unable to establish liability on their core claims as to any of the Defendants, including both KPMG and the Wachovia Defendants. In addition, Lead Bond/Notes Plaintiffs’ proofs (and Defendants’ responses thereto) on the types of complex accounting and valuation issues at issue in this case would have inevitably boiled down to a “battle of the experts.” Although Lead Bond/Notes Plaintiffs were confident that they would have been able to support their claims with qualified and persuasive expert testimony, jury reactions to competing experts are inherently difficult to predict, and Defendants would have almost certainly retained highly experienced experts to argue their various defenses to liability, including arguments that they made timely disclosures in their successive Offering Materials as soon as they became aware of additional information relating to (among other things) expected losses in the Pick-A-Pay portfolio and the declining value of Wachovia’s CDO holdings.

Lead Bond/Notes Plaintiffs also faced substantial risks in establishing loss causation and damages had the litigation continued. Defendants would have argued that any losses suffered by Settlement Class Members on their investments in Bond Class Securities were attributable to various factors other than the alleged misstatements in the challenged Offering Materials. For example, Defendants argued that any losses suffered by Settlement Class Members here were caused primarily – if not entirely – by the “financial tsunami” and related financial and liquidity crisis of 2008, and not by any alleged misrepresentations concerning Wachovia’s Pick-A-Pay portfolio that were contained in the Offering Materials as alleged in the Amended Complaint. As with contested liability issues, issues relating to loss causation and damages would also have likely come down to an inherently unpredictable and hotly disputed “battle of the experts.” Accordingly, in the absence of a settlement, there was a very real risk that the Settlement Class would have recovered an amount significantly less than the Total Settlement Amount – or even nothing at all. Thus, the substantial payment of \$627,000,000 by the Settling Defendants, particularly when viewed in the context of the risks and the uncertainties involved in this litigation, clearly weighs heavily in favor of approving the Settlements.

C. The Stage Of The Proceedings Supports Approval Of The Settlements

In evaluating a settlement, “[t]here is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation.” ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 11.45 (4th ed. 2002). Here, Lead Bond/Notes Counsel negotiated substantial settlements with the Wachovia Defendants and KPMG, respectively, only after conducting an extensive and ongoing factual investigation and analysis relating to the events and transactions alleged in the Bond/Notes Action. Lead Bond/Notes

Plaintiffs and their counsel spoke with well over 200 former Wachovia employees and other confidential witnesses, reviewed enormous amounts of documents, crafted two exceptionally detailed amended complaints, briefed two rounds of motions to dismiss, consulted with an experienced damages consultant, and prepared for and participated in an extended mediation process under the auspices of (and with the substantial assistance of) a highly respected retired judge. In addition, first with respect to Wachovia and then with respect to KPMG, Lead Bond/Notes Counsel were able to negotiate and obtain very significant additional discovery in the form of both additional documents and witness interviews to confirm the reasonableness of both Settlements (and, in the case of discovery obtained as a result of the earlier Wachovia Settlement, to help build the case for a robust subsequent settlement with KPMG).

Thus, Lead Bond/Notes Plaintiffs and their counsel have a clear picture of the strengths and weaknesses of their case and of the legal and factual defenses that Defendants would likely raise at trial. *See Teachers' Ret. Sys. of La. v. A.C.L.N.*, 2004 U.S. Dist. LEXIS 8608, at *10 (S.D.N.Y. May 14, 2004) (citation omitted) (finding action had advanced to stage where parties “have a clear view of the strengths and weaknesses of their cases”); *see also Global Crossing*, 225 F.R.D. at 458 (“Formal discovery is not a prerequisite [to settlement]; the question is whether the parties had adequate information about their claims.”). Therefore, the Court should find that the stage of the proceedings and Lead Bond/Notes Plaintiffs’ efforts to date also support preliminary approval of the Settlements.

* * *

In sum, nothing in the course of the Settling Parties’ negotiations or the terms of the Settlements provides any grounds to doubt the fairness of the Settlements. On the contrary, the very substantial recovery for the Settlement Class, the extensive pre-filing investigation

undertaken and subsequent discovery obtained, the parties' vigorously contested litigation efforts over the course of more than two years, and the subsequent arms'-length nature of the parties' negotiations under the auspices of a highly experienced mediator, all amply support a finding that the proposed Settlements are well "within the range of possible approval" so as to justify the issuance of notice to the Settlement Class and the scheduling of a hearing for final approval.

IV. CERTIFICATION OF THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE

In granting preliminary settlement approval, the Court should also certify the Settlement Class for purposes of the Settlements under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The proposed Settlement Class, which has been stipulated and agreed to by the Settling Parties, consists of:

All Persons who purchased or otherwise acquired Bond Class Securities⁷ during the Settlement Class Period, and were damaged thereby (the "Settlement Class"). Excluded from the Settlement Class are all Defendants in the Action and their respective current or former Section 16 Officers, directors, partners, Immediate Family members, affiliates, legal representatives, heirs, successors or assigns, and any entity in which any Defendant has or had a controlling interest, and any Person who has entered into a tolling agreement in connection with this Action and his, her or its respective current or former Section 16 Officers, directors, partners, Immediate Family members, affiliates, legal representatives, heirs, successors or assigns, and any entity in which any such Person has or had a controlling interest, provided that any Investment Vehicle shall not be deemed an excluded Person by definition. Also excluded from the Settlement Class are any Persons who timely and validly request exclusion from the Settlement Class in accordance with the requirements set forth in the Notice.

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *Marsh & McLennan*, 2009 WL 5178546, at *8. Indeed, certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate

⁷ The Bond Class Securities are listed in §I(1)(e) of the Stipulation.

settlements involving large numbers of claims by relatively small claimants.” *Prudential*, 163 F.R.D. at 205. “[S]ettlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge.” *Id.*

A settlement class, like other certified classes, must satisfy all the requirements of Rules 23(a) and (b). *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). Nevertheless, the manageability concerns of Rule 23(b)(3) are not at issue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) (“Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested”). Here, all the requirements of Rule 23 are met, there is no likelihood of abuse of the class action device, and the Settlements are fair and reasonable and are subject to approval by the Court. Therefore, as demonstrated below, certification is appropriate here because the proposed Settlement Class meets all the requirements of Rule 23(a) and Rule 23(b)(3).

A. The Settlement Class Satisfies the Requirements of Rule 23(a)

Certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *See Fed. R. Civ. P. 23(a)*.

1. The Settlement Class Members Are Too Numerous to Be Joined

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be “impracticable.” *Fed. R. Civ. P. 23(a)*. “Impracticable does not mean impossible,” *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993), but “only that the difficulty or inconvenience of joining all members of the class make the use of the class action appropriate.” *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco*

Managed Care, LLC, 504 F.3d 229, 244-245 (2d Cir. 2007). Here, the Settlement Class is comprised of purchasers of multiple securities issued by Wachovia pursuant to common misstatements contained in common registration statements. Although the number of Settlement Class Members cannot be identified with specificity at this time, it is likely to be in the thousands, if not the tens of thousands. Thus, the Settlement Class is sufficiently numerous that joinder of all members would be impracticable and that Rule 23(a)(1) is satisfied. *See, e.g., Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 175 (S.D.N.Y. 2008) (class of shareholders numbering in hundreds or thousands satisfied the numerosity requirement).

2. There Are Common Questions Of Law And Fact

Rule 23(a)(2) requires the existence of at least one question of law or fact common to the class. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001); *In re Globalstar Sec. Litig.*, No. 01 Civ. 1748 (PKC), 2004 WL 2754674, at *4 (S.D.N.Y. Dec. 1, 2004). Federal securities cases like this one easily meet the commonality requirement, which is satisfied where “putative class members have been injured by similar material misrepresentations and omissions.” *Initial Pub. Offering*, 243 F.R.D. at 85; *see also In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369, 374 (S.D.N.Y. 2000) (“Where the facts as alleged show that Defendants’ course of conduct concealed material information from an entire putative class, the commonality requirement is met.”).

Lead Bond/Notes Plaintiffs have asserted claims against the Defendants for violations of Sections 11, 12(a)(2) and 15 of the Securities Act. These claims present many questions of law and fact which are common to all members of the Settlement Class, including: (i) whether Defendants violated the Securities Act as alleged in the Amended Complaint; (ii) whether the common statements of fact contained in each of the Offering Materials at issue were materially

false or misleading and/or omitted to disclose material facts; (iii) whether and to what extent the market prices of the Bond Class Securities were artificially inflated during the Settlement Class Period due to the alleged common misstatements or omissions in the Offering Materials; and (iv) whether and to what extent the Settlement Class Members sustained damages as a result of the alleged misconduct, and the determination of the proper measure of damages. Because these questions of law and fact are common to all members of the Settlement Class, the commonality requirement of Rule 23(a)(2) is easily met.

3. The Class Representatives' Claims Are Typical Of Those Of The Settlement Class

Rule 23(a)(3) requires that the claims of the class representatives be “typical” of the claims of the class. Fed. R. Civ. P. 23(a)(3). Typicality is established where “the claims of the named plaintiffs arise from same practice or course of conduct that gives rise to the claims of the proposed class members.” *In re Vivendi Sec. Litig.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (citation omitted); *see Oxford Health Plans*, 191 F.R.D. at 375. “Typical” does not mean “identical.” *See Marsh & McLennan*, 2009 WL 5178546, at *10. Accordingly, “[f]actual differences involving the date of acquisition, type of securities purchased and manner by which the investor acquired the securities will not destroy typicality if each class member was the victim of the same material misstatements and the same fraudulent course of conduct.” *Id.*; *see also Robidoux*, 987 F.2d at 936-37 (“When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.”).

Here, the injuries to Lead Bond/Notes Plaintiffs and the members of the Settlement Class are unquestionably attributable to the same alleged course of conduct by Defendants, and liability for this conduct is predicated on the same legal theories. Lead Bond/Notes Plaintiffs

allege that they, like the rest of the Settlement Class, paid artificially-inflated prices for Bond Class Securities issued by Wachovia as a result of material misstatements and omissions contained in the Offering Materials. Lead Bond/Notes Plaintiffs' claims, and the claims of absent Settlement Class Members, are based on the same theories and will be proven by the same evidence. As such, the Rule 23(a)(3) typicality requirement is satisfied.

4. The Class Representatives Will Fairly And Adequately Protect The Interests Of The Settlement Class

Rule 23(a)(4) is satisfied if “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Court must measure the adequacy of representation by two standards: (1) whether the claims of the lead plaintiffs' conflict with those of the class; and (2) whether the lead plaintiffs' counsel are qualified, experienced, and generally able to conduct the litigation. *See Marsh & McLennan*, 2009 WL 5178546, at *10; *Oxford Health Plans*, 191 F.R.D. at 376; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992).

Lead Bond/Notes Plaintiffs and Settlement Class Members share the common objective of maximizing their recovery, and there is no conflict between them. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) (“Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members”). Moreover, Lead Bond/Notes Counsel have extensive experience and expertise in complex securities litigation and class action proceedings throughout the United States, and are qualified and able to conduct this litigation, as the Court recognized when appointing them co-lead counsel for the putative class. Rule 23(a)(4) is satisfied.⁸

⁸ Lead Bond/Notes Counsel have and will continue to fairly and adequately represent the interests of the Settlement Class. Accordingly, Lead Bond/Notes Counsel should be appointed as co-lead counsel for the Settlement Class under Rule 23(g).

B. The Class Representatives' Claims Satisfy The Prerequisites Of Rule 23(b)(3)

Rule 23(b)(3) authorizes class certification if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) is “designed to secure judgments binding all class members save those who affirmatively elect[] to be excluded,” where a class action will “achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem*, 521 U.S. at 614-15 (citation omitted). Certification of the Settlement Class will serve these purposes.

1. Common Legal And Factual Questions Predominate

“Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.” *Marsh & McLennan*, 2009 WL 5178546, at *11. Common issues will predominate where each class member is alleged to have suffered the same kind of harm pursuant to the same legal theory arising out of the same alleged course of conduct, and the only individualized questions concern the amount of damages. *See Marsh & McLennan*, 2009 WL 5178546, at *11; *Initial Pub. Offering*, 243 F.R.D. at 92; *In re Blech Sec. Litig.*, 187 F.R.D. 97, 107 (S.D.N.Y. 1999) (“In determining whether common questions of fact predominate, a court’s inquiry is directed primarily toward whether the issue of liability is common to members of the class.”). As the Supreme Court has noted, predominance is a test “readily met” in cases alleging securities fraud. *Amchem* 521 U.S. at 625.

Here, the same alleged course of conduct by Defendants forms the basis of all Settlement Class Members' claims. There are numerous common issues relating to the liability of Defendants which predominate over any individualized issues. The predominance requirement of Rule 23(b)(3) is therefore satisfied for purposes of the Settlements.

2. A Class Action Is Superior To Other Methods Of Adjudication

Rule 23(b)(3) sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: “(A) the class members’ interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . members of the class; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.” *See* Fed. R. Civ. P. 23(b)(3).

Considering these factors, this consolidated class action is clearly “superior to other available methods for fairly and efficiently adjudicating” the claims of the large number of purchasers of Bond Class Securities. Indeed, courts have concluded that the class action device in securities cases is usually the superior method by which to redress injuries to a large number of individual plaintiffs. *See Blech*, 187 F.R.D. at 107; *Marsh & McLennan*, 2009 WL 5178546, at *12 (recognizing that the “class action is uniquely suited to resolving securities fraud claims,” because “the prohibitive cost of instituting individual actions” in such cases gives class members “limited interest in individually controlling the prosecution or defense of separate actions”); *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 139 (S.D.N.Y. 2008) (“as a general rule, securities fraud cases ‘easily satisfy the superiority requirement [as] [m]ost violations of the federal securities laws . . . inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible’”)

(quoting *Darquea v. Jarden Corp.*, No. 06 Civ. 722 (CLB), 2008 WL 622811, at *5 (S.D.N.Y. Mar. 6, 2006)) (alterations in original).

The scope and complexity of Lead Bond/Notes Plaintiffs' claims against Defendants, together with the high cost of individualized litigation, make it unlikely that the vast majority of the Settlement Class Members would be able to obtain relief without class certification. Moreover, it is clearly desirable to concentrate the claims of all Settlement Class Members in this forum, and Lead Bond/Notes Plaintiffs do not foresee any difficulties in the management of this action as a class action. Accordingly, the requirements of Rule 23(b)(3) are satisfied.

V. NOTICE TO THE SETTLEMENT CLASS SHOULD BE APPROVED

As outlined in the [Proposed] Preliminary Approval Order, Lead Bond/Notes Plaintiffs will notify Settlement Class Members of the Settlements by mailing the Notice and Proof of Claim to all Settlement Class Members who can be identified with reasonable effort.⁹ The Notice will advise Settlement Class Members of, among other things: (i) the pendency of the class action; (ii) the essential terms of the Settlements; and (iii) information regarding Lead Bond/Notes Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses. In addition, the Notice will provide specifics on the date, time and place of the Settlement Hearing and set forth the procedures, as well as deadlines, for opting out of the Settlement Class, objecting to any aspect of either or both of the Settlements, the proposed Plan of Allocation or the motion for attorneys' fees and reimbursement of Litigation Expenses and submitting a Claim Form. The [Proposed] Preliminary Approval Order further requires the Summary Notice to be published once in the national editions of *The Wall Street Journal* and *The New York Times* and

⁹ Lead Bond/Notes Plaintiffs, through the assistance of the claims administrator, will also use reasonable efforts to give notice to nominee purchasers such as brokerage firms and other Persons who purchased or otherwise acquired any of the Bond Class Securities during the Settlement Class Period as record owners but not as beneficial owners.

once in the *Financial Times* and transmitted once over *PR Newswire*. Lead Bond/Notes Counsel will also post a copy of the Notice on the website developed for the Settlements.¹⁰

The form and manner of providing notice to the Settlement Class satisfy the requirements of due process, Rule 23, and the PSLRA. The Notice and Summary Notice “fairly apprise the prospective members of the class of the terms of the proposed settlement[s] and of the options that are open to them in connection with the proceedings” *Wal-Mart*, 396 F.3d at 114 (internal quotation marks omitted). The manner of providing notice, which includes individual notice by mail to all Settlement Class Members who can be reasonably identified, represents the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. *See In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008); *Global Crossing*, 225 F.R.D. at 448-49.

VI. CONCLUSION

For all the foregoing reasons, Lead Bond/Notes Plaintiffs respectfully request that the Court: (i) preliminarily approve the proposed Settlements as within the range of possible fairness, reasonableness and adequacy; (ii) certify the Settlement Class for purposes of the Settlements; (iii) approve the proposed form and manner of notice to putative Settlement Class Members; and (iv) schedule a date and time for the Settlement Hearing to consider final approval of the Settlements and related matters.

¹⁰ Lead Bond/Notes Plaintiffs also respectfully request that the Court appoint The Garden City Group, Inc., an experienced and diligent class action claims administrator, to issue notice to the Settlement Class and administer the Settlements.

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Respectfully Submitted,

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