

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

SHELDON LEHMAN, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

CITIGROUP GLOBAL MARKETS,
INC., SUCCESSOR IN INTEREST TO
LEGG MASON WOOD WALKER,
INC.; LEGG MASON, INC; and DOES
1 through 10, inclusive,

Defendants.

Civil Action No. 06-02484

Judge Sylvia H. Rambo

**DECLARATION OF ROBERT J. GRAY IN SUPPORT OF JOINT
MOTION FOR FINAL APPROVAL OF SETTLEMENT AND UNOPPOSED
MOTION OF CLASS COUNSEL FOR AN AWARD OF ATTORNEYS'
FEES, REIMBURSEMENT OF COSTS AND EXPENSES, AND AN
ENHANCEMENT AWARD TO THE CLASS REPRESENTATIVE**

I, Robert J. Gray, respectfully submit this Declaration in support of the Parties' Joint Motion for Final Approval of Settlement and the Unopposed Motion of Class Counsel for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, and an Enhancement Award to the Class Representative. This Settlement, if approved by the Court, will resolve this class and collective action in its entirety.

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am an attorney with the law firm of Barroway Topaz Kessler

Meltzer & Check, LLP (“BTKMC” or the “Firm”), and practice in the firm’s Employment & Labor Law Group.

2. BTKMC is Counsel for Plaintiff Sheldon Lehman and the Settlement Classes he seeks to represent (as defined below) in the above-styled action (the “Action”). I have been involved in all aspects of the investigation, prosecution and settlement of the Action. The information set forth in this Declaration is based on my personal knowledge gained during the course of the litigation and settlement of the Action, as well as information shared with me by other attorneys at the firm who worked on the Action.

3. This Declaration is submitted in support of the Court’s consideration of: (a) the fairness, reasonableness and adequacy of the settlement of the Action (the “Settlement”) on the terms and conditions reflected in the parties’ Joint Stipulation and Settlement Agreement (the “Stipulation”),¹ attached hereto as Exhibit “A” (with additional exhibits to the Stipulation attached thereto as Exhibits 1-6); and (b) Class Counsel’s request for fees, reimbursement of costs and expenses, and an Enhancement Award to the Class Representative.

4. Because this Declaration is submitted in support of a settlement, it is privileged and inadmissible in any subsequent proceeding, other than in connection

¹ All capitalized terms not defined herein shall have the same meaning ascribed to them in the Stipulation.

with the Settlement of the Action. This Declaration and the statements contained herein are without prejudice to Plaintiff's position on the merits in the event that the Settlement is not approved by the Court.

I. SUMMARY OF THE LITIGATION

A. Background Regarding The Parties In This Action

5. The proposed Settlement Class covers all individuals who were employed by Legg Mason Wood Walker, Inc. in the positions of Financial Advisor, Securities Broker, Financial Services Representative, Investment Broker, Account Executive, Account Representative or Financial Consultant (the "Covered Positions"), during all or part of the applicable Class Period.

6. For purposes of Plaintiff's FLSA claims, the applicable Class Period is June 30, 2005 through December 30, 2005. For purposes of Plaintiff's Pennsylvania state-law class action claims, the applicable Class Period is December 29, 2003 through December 30, 2005. *See* Stipulation Section I.16, I.32.

7. Legg Mason Wood Walker, Inc. ("Legg Mason") was the retail division of Legg Mason, Inc. ("LMI"), and operated as a brokerage firm with branch offices located throughout the country. The company offered a variety of financial products and advice which were provided to individual investors by a Legg Mason network of approximately 1,400 Securities Brokers.

8. On December 1, 2005, LMI and Citigroup Global Markets, Inc. (“CGMI”) engaged in a financial transaction in which CGMI exchanged its worldwide asset management business for LMI’s brokerage and capital markets business (the “transaction”). Legg Mason brokerage offices are now branded as Smith Barney—the name of CGMI’s brokerage division. CGMI was sued in this action as a successor-in-interest to Legg Mason.

B. Allegations, Procedural History, And Discovery

9. This action was originally filed on December 29, 2006 against LMI. (Dkt. Entry No.1).

10. On April 25, 2007, Plaintiff filed his Amended Complaint which alleged claims against both LMI and CGMI as a collective action pursuant to the Fair Labor Standards Act (“FLSA”) § 216(b) and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure for claims under the Pennsylvania Minimum Wage Act (“PMWA”), 43 P.S. § 333.102 *et seq.* and the Pennsylvania Wage Payment and Collection Law (“PWPCCL”), 43 P.S. § 2601.1 *et seq.* (together with the PMWA, the “Pennsylvania labor laws”) (Dkt. Entry No. 13).

11. Plaintiff defeated two motions filed by LMI and CGMI to dismiss his complaint. The first of these was filed by LMI in which it moved to dismiss all counts alleged against it in Plaintiff’s Amended Complaint (Dkt. Entry No. 14). LMI argued that Plaintiff’s claims had to be dismissed because LMI was never

Plaintiff's "employer" and, therefore, Plaintiff could not "impute" liability against it. Opposing LMI's motion, Plaintiff argued that whether LMI was an employer under the FLSA or whether LMI conveyed or retained liability for alleged state and federal labor law violations occurring prior to its sale of Legg Mason to CGMI could not be resolved on a FED. R. CIV. P. 12(b)(6) motion (Dkt. Entry No. 24). LMI also contended that Plaintiff's Pennsylvania state law class action claims had to be dismissed because they irreconcilably conflicted with the Congressional intent of the FLSA and violated the Rules Enabling Act, 28 U.S.C. § 2072(b) (2005) ("REA").

12. Lastly, LMI sought to dismiss Plaintiff's claims under the PWPCCL, 43 P.S. 260.3, on the grounds that it does not give rise to a claim unless an employer fails to pay wages agreed as already owing and due. LMI's motion was granted only as to Plaintiff's PWPCCL claims for failure to pay all wages due (Dkt. Entry No. 50).

13. CGMI's motion to dismiss was substantially similar to LMI's in that it also argued Plaintiff's state law claims ran counter the Congressional intent behind the FLSA. It also contended that the opt-out provisions of a Rule 23 class action were not superior to the FLSA's opt-in procedures (Dkt. Entry Nos. 39, 40). CGMI's motion to dismiss was denied in all respects (Dkt. Entry No. 50).

14. On December 28, 2007, the Court ordered that discovery in this action

be bifurcated (Dkt. Entry No. 55). The first phase of discovery was intended to determine (i) the identity of Plaintiff's employer; and (ii) whether there exists a group of employees who were originally hired by Legg Mason who continued to work following the transaction between CGMI and LMI whose putative claims were not covered by the settlement of claims in *Bahramipour v. Citigroup Global Mkts., Inc.*, No. 04-CV-4440 (N.D. Cal. Mar. 18, 2008).

15. The second phase of discovery was to focus on whether the Named Plaintiff, Sheldon Lehman, was entitled to overtime compensation as a matter of law. The second phase of discovery ended on June 15, 2009. Any and all motions relating to the second phase of discovery were due to be filed by July 17, 2009.

II. THE SETTLEMENT

A. Settlement Negotiations

16. Prior to the filing of any such motions, counsel for Plaintiff and counsel for CGMI expressed a desire to engage in meaningful and comprehensive settlement negotiations in an effort to resolve the litigation. The Court granted the Parties' joint request to extend the deadline for filing any motions relating to the second phase of discovery by approximately three months to enable the parties to engage in settlement negotiations, including a mediation session that was conducted on October 8, 2009.

17. On October 8, 2009, the Parties and their counsel engaged in a full

day of formal mediation before the Honorable Diane M. Welsh, a retired magistrate judge for the U.S. District Court for the Eastern District of Pennsylvania, who is experienced in wage and hour class actions. During the course of the mediation there was an extensive exchange of information and analyses between the parties regarding their respective settlement positions, including information regarding the number of putative class members and work months as well as information about Defendant's compensation practices and applicable law.

18. The Parties were successful in reaching a settlement during the mediation. The agreement was achieved through arm's length negotiating and the Parties believe the settlement represents a fair and reasonable compromise in light of the risks, costs and uncertainties of continued litigation.

B. Terms of the Settlement

19. The terms of the proposed Settlement are set forth in the Parties' Stipulation and accompanying exhibits attached thereto.

20. Pursuant to the terms of the Settlement, the Parties agreed to: (a) collective action certification for settlement purposes only of Plaintiff's claims for violations of the FLSA pursuant to 29 U.S.C. § 216(b); and (b) class certification, for settlement purposes only, of Pennsylvania labor law claims pursuant to FED. R. CIV. P. 23. *See* Stipulation, Section VII.B.1.a. The Pennsylvania Settlement Class

is comprised of persons employed by Legg Mason in a Covered Position at a Pennsylvania branch at any time between December 29, 2003 and December 30, 2005. *Id.*, Section I.32. The FLSA Settlement Class is comprised of persons employed by Legg Mason in a Covered Position at any branch outside of Pennsylvania at any time between June 30, 2005 and December 30, 2005. *Id.*, Section I.16.

21. Subject to the occurrence of the Effective Date,² CGMI will pay to the Claims Administrator, within ten days thereafter, the sum of \$394,220.00, which reflects the sums of \$246,620.00 (the “Pennsylvania Settlement Consideration”) and \$147,600.00 (the “FLSA Settlement Consideration”).³ The Claims Administrator shall deposit the Settlement Consideration in a qualified settlement fund until distribution of Administrative Costs⁴ and distribution to the Participating

² The term “Effective Date” as defined in the Joint Stipulation and Stipulation means the date on which the Judgment becomes a Final Judgment.

³ The Settlement Agreement submitted with the Parties’ Joint Motion for Preliminary Approval of Settlement stipulated an amount of \$139,200.00 for the FLSA Settlement Consideration and a Settlement Consideration in the amount of \$385,820.00. Pursuant to the Parties’ Stipulation and Order Amending the Joint Stipulation and Settlement Agreement, the FLSA Settlement Consideration was increased to \$147,600.00 to reflect additional FLSA Class Members identified by Defendant. Attached hereto as Exhibit “B” is a true and correct copy of the stipulation entered by the Court on September 20, 2010.

⁴ The term “Administrative Cost” as defined in the Stipulation means, subject to Court approval: (a) a sum of \$45,000.00, available to be paid to the Claims Administrator, with any additional costs incurred by the Claims Administrator to be deducted from the Net Settlement Amount and not charged to CGMI; (b) the

Class Members of his or her individual share of the Net Settlement Consideration. Within thirty (30) days of the Effective Date, the Claims Administrator shall mail to each Participating Class Member his or her individual payment less tax deductions and withholdings. *See generally*, Stipulation Section VII.B.8.

22. The Settlement is only a partial claims made settlement. Ninety-five percent (95%) of the Pennsylvania Settlement Consideration will be paid directly to the Pennsylvania Settlement Class Members for settlement of their Pennsylvania labor law claims without the need for them to file a claim form. Unless a Pennsylvania Settlement Class Member elected to opt-out of the Settlement (which none did), they receive a share of the Pennsylvania Settlement Consideration. *See* Stipulation, Section VII.B.7.c. In addition to the consideration for their Pennsylvania labor law claims, members of the Pennsylvania Settlement Class employed during the FLSA Class Period may receive additional consideration for their Released Federal Claims by submitting a valid Claim Form and Consent to Join Settlement Class. *Id.*, Section VII.B.7.d. Members of the FLSA Settlement Class needed to submit a valid Claim Form and Consent to Join to Settlement

maximum amount of \$65,589.40 to be paid to Counsel for attorneys' fees; (c) the maximum amount of \$15,000.00 available to be paid to Counsel for reasonable litigation costs incurred; (d) the maximum amount of \$7,500.00 available to be paid as an Enhancement to the Class Representative; and (e) any and all other costs in connection with the consummating the terms of this Stipulation, including the costs of all notices described in Section VII and its subsections. *See* Stipulation, Section I.1.

Class to participate in the Settlement. *Id.*, Section VII.B.7.e.

23. The Settlement is largely non-reversionary, that is, the only money that could revert to CGMI are funds attributed to members of the Pennsylvania Settlement Class who opt-out of the Settlement.⁵ If any portion of the Pennsylvania Settlement Consideration allocated to the Released Federal Claims is not distributed to members of the Pennsylvania Class employed during the FLSA Class Period because those members did not file timely and complete Claim Form and Consent to Join Settlement Class, such consideration shall not revert to CGMI, but instead shall be reapportioned for distribution among the Participating Pennsylvania Class Members who submitted valid Claim and Consent to Join Settlement Forms. Likewise, if any portion of the FLSA Settlement Consideration is not distributed to members of the FLSA Settlement Class because those members did not file timely and complete Claim Form and Consent to Join Settlement Class, that consideration shall not revert to CGMI, but instead shall be reapportioned for distribution among the Participating FLSA Class Members. Finally, any portion of Class Counsel's fees and costs that are not approved or awarded by the Court shall be included in the Net Settlement Amount and distributed to Participating Class Members. *See* Stipulation, Section VII.B.2.

⁵ As of the date of this Declaration, no members of the Pennsylvania Settlement Class elected to exclude themselves from the Settlement; thus the Settlement, if approved, will be completely non-reversionary.

24. Pursuant to the terms of the Settlement, each Settlement Class Member received either a “Notice to Pennsylvania Settlement Class Members Regarding Pendency of a Class and Collective Action and Notice of Hearing on Proposed Settlement” (the “PA Class Notice”) or a “Notice to FLSA Settlement Class Members Regarding Pendency of a Class and Collective Action and Notice of Hearing on Proposed Settlement” (the “FLSA Class Notice”) in substantially the same form attached as Exhibits 1 and 2, respectively, to the Stipulation. The Parties retained the professional claims administration firm of Settlement Services, Inc. (“SSI” or the “Claims Administrator”) to mail the Class Notice and to perform other required claims administration services as set forth in the Stipulation. Class Notice recipients had the option to: (1) file a valid and timely Claim Form and Consent to Join Settlement Class to join or “opt-in” to the lawsuit pursuant to 29 U.S.C. § 216(b) and accept the terms of the FLSA settlement (“FLSA Settlement Class Members”); (2) “Opt-out” of the Pennsylvania Settlement Class and thus exclude themselves from the Litigation, the Settlement, any distributions and not be bound by the release of claims (“Pennsylvania Settlement Class Members”); (3) Object to the settlement (Pennsylvania and FLSA Settlement Class Members); or (4) do nothing which will have the effect, depending on class membership, of (i) accepting the terms of the settlement, receive payment and be bound by the settlement’s terms (Pennsylvania Settlement Class Members) or (ii) not receiving

a settlement payment for failure to opt-in but also not releasing FLSA claims (FLSA Settlement Class Members and Pennsylvania Settlement Class Members' Released Federal Claims). *See* Stipulation, Section VII.B.6.

25. Pennsylvania Settlement Class Members who did not opt-out of the Settlement are deemed to have released the Released State Law Claims that accrued during the period beginning on December 29, 2003 and ending on December 30, 2005. In addition, only FLSA Settlement Class Members and Pennsylvania Settlement Class Members who filed Claim Forms and Consent to Join Settlement Class will release their Released Federal Law Claims that accrued during the period beginning on June 30, 2005 and ending on December 30, 2005. *See* Stipulation, Section VII.B.9.

26. The Stipulation provides that Plaintiff's attorneys may request an award of attorney's fees of up to \$65,589.40, which represents approximately 17% of the Settlement Consideration, and up to \$15,000.00 for all allowable litigation costs and expenses. *See* Stipulation, Section VII.B.10.a.

27. In addition, Plaintiff's attorneys may request an Enhancement not to exceed \$7,500.00 for the Plaintiff for his efforts in this case, including the burden and risks associated with bringing this action publicly. *See* Stipulation, Sections I(1), VII.B(2)(iii) .

1. Distribution Of Net Settlement Amount To Participating Settlement Class Members

28. The proposed plan of allocation fairly and adequately addresses the issues of settlement administration, claims procedures, and allocation among the members of the Settlement Class. The proposed allocation will provide the distribution of: (i) the PMWA share of the Pennsylvania Settlement Consideration to Participating Pennsylvania Settlement Class Members who do not opt-out; (ii) the Released Federal Claims share of the Pennsylvania Settlement Consideration to Participating Pennsylvania Settlement Class Members who submit a valid Claim Form and Consent to Join Settlement Class; and (iii) the FLSA Consideration to members of the FLSA Settlement Class who submit a valid Claim Form and Consent to Join Settlement Class.

29. Under the Parties' proposal, all Pennsylvania Settlement Class members will automatically receive a fixed monthly amount for each "Compensable Month" they were employed in a Covered Position during the Pennsylvania Class Period unless they elect to opt-out of the Settlement. The FLSA Settlement Class Members and Pennsylvania Settlement Class Members who have claims subject to the Released Federal Claims and who submit a Claim Form and Consent to Join Settlement Class will receive a fixed monthly amount for each "Compensable Month" they were employed in a Covered Position during

the FLSA Class Period. “Compensable Months” means the calendar months a Class Member was actively employed in a Covered Position for more than seven (7) calendar days within the applicable class period(s). Notwithstanding the foregoing, in no event shall a Class Member’s Compensable Months be less than one (1) even if a Class Member was employed in a Covered Position for less than seven (7) calendar days during the applicable class period.

30. Since the crux of Plaintiff’s claims involves failure to pay overtime wages, the plan of allocation is reasonable in that it values the overtime claims of each Class Member in the applicable settlement class equally.

31. According to the plan of allocation, the Net Settlement Amount for the appropriate Settlement Class is to be divided by the total number of Compensable Months worked by all Participating Settlement Class Members for the respective Settlement Class. This calculation will produce a Work Month Multiplier. Each Participating Settlement Class Member will then have their individual Compensable Months multiplied by the aforementioned Work Month Multiplier which will result in the final amount that a Participating Settlement Class Member shall receive under the terms of this Settlement. As noted above, no Participating Settlement Class Member who worked at least one day in a Covered Position during the Class Period will receive credit for less than one Compensable Month.

32. Having overseen numerous wage and hour settlements, Plaintiff's Counsel believes that the proposed allocation methodology treats all Settlement Class Members fairly. Moreover, this is the basic approach that has been used in settlements of other wage and hour cases, and it has been approved by judges in numerous other actions. This methodology has worked well in other cases, and Plaintiff's Counsel believes it will serve the Settlement Class Members well here.

33. Importantly, the payment an individual Settlement Class Member may receive can rise in value as a result of the claims process. The Settlement of the Released Federal Claims is entirely non-reversionary and the total Net Settlement Amount allocated to the Released Federal Claims will be paid to class members. Since less than 100% of all Class Members submitted claims, the monthly payments to Class Members will increase proportionally. Further, Class Members had an opportunity to demonstrate to the satisfaction of the Claims Administrator that they were employed for more work months than are reflected in Legg Mason's records.

2. Notice Plan

34. In conformity with this Court's May 11, 2010 Order granting preliminarily approval of this Action, the Parties, together with SSI, an experienced claims administrator in class action litigation, effectuated the Notice Plan approved by the Court. The Notice Plan entailed: (1) mailing the PA Class

Notice to 243 Pennsylvania Settlement Class members at their last known address provided by Defendants on May 17, 2010; and (2) mailing the FLSA Class Notice to 1,187 FLSA Settlement Class members at their last known address provided by Defendants on May 17, 2010. Notice was mailed to Settlement Class Members on June 10, 2010. In addition, Settlement Class Members who did not respond to the Notice twenty days before the claims deadline were mailed a postcard reminding them of the approaching deadline to submit their forms. Attached hereto as Exhibit "C" is a true and correct copy of the Declaration of Loree Kovach ("Kovach Declaration") detailing the work performed by SSI in this Action.

35. Subsequent to the Court's May 11, 2010 Order granting preliminary approval of this Action, Defendant identified seventy-six (76) additional FLSA Settlement Class Members. Pursuant to the Parties' Stipulation and Order Amending the Joint Stipulation and Settlement Agreement, the FLSA Class Notice was mailed to these additional Class Members. *See* Exhibit B, Stipulation and Order Amending the Joint Stipulation and Settlement Agreement. This mailing was effectuated on October 1, 2010 by the Claims Administrator. *See* Exhibit C, Kovach Declaration.

36. In addition, Counsel received several telephone calls from Class Members throughout the Notice process, answered their questions and, where

appropriate, directed them to SSI for further information/additional materials.

37. In settlements of class actions, the form of notice must be “reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

38. Here, the form and method of notice of proposed settlement agreed to by the Parties satisfied all due process considerations and meets the requirements of FED. R. CIV. P. 23(e)(1)(B).

39. In short, the Notice Plan fully informed Settlement Class Members of the lawsuit, the proposed Settlement, and the information they needed to make informed decisions about their rights. The mailed Notice provided detailed information about the Settlement, including: (1) a comprehensive summary of its terms; (2) Counsel’s intent to request attorneys’ fees and a reimbursement of costs and expenses; and (3) detailed information about the Released Claims.

40. The Notice advised all recipients that Settlement Class Members who do not believe that the Settlement and/or the request for an award of attorneys’ fees and reimbursement of expenses are fair, reasonable and adequate, have the right to object to either of the foregoing.

41. To date, not a single objection has been filed, nor a single complaint

lodged by any Settlement Class Member.

42. Moreover, no Pennsylvania Settlement Class Members elected to exclude themselves from the Settlement.

43. Accordingly, the form of notice utilized by the Parties satisfies the due process requirements of FED. R. CIV. P. 23.

C. The Proposed Settlement Is Fair, Reasonable And Adequate

44. The proposed Settlement was only achieved through arm's length negotiations under the guidance of an experienced mediator well-versed in the claims asserted here. In short, every facet of the proposed Settlement was meticulously scrutinized and thoroughly vetted.

45. Plaintiff's Counsel believes that the proposed Settlement is fair, reasonable and adequate considering the strength of CGMI's defenses and the risk, expense, complexity and delay associated with further litigation. In addition, the proposed Settlement at this time avoids costly and time consuming litigation and the risk associated therewith, which would not necessarily guarantee a larger recovery for the Settlement Class.

46. The Third Circuit considers nine criteria for determining whether a proposed class action settlement is fair, reasonable, and adequate: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of

discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

1. Complexity, Expense and Likely Duration Of The Litigation

47. The first factor is the complexity, expense and likely duration of the litigation. This factor warrants approval. Prior to the Parties reaching a settlement at mediation, this litigation had gone on for almost three years and was diligently litigated by both sides. LMI and CGMI filed motions to dismiss—each fully briefed. In addition, much work was undertaken as far as document review, interviews and other fact gathering, investigation into Plaintiff's proper employer, implications of the *Bahramipour* settlement, damage analysis, legal research and comparison of analogous cases. If the Settlement is not approved, additional litigation will be required. A trial on the merits, and preparing for the same, would entail considerable expenses to be incurred by both sides. The trial result would not necessarily end the litigation, giving the losing party the right to appeal. All of these facts weigh in favor of the Settlement.

2. Reaction Of The Class To The Settlement

48. As noted above, the Class has responded favorably to the Settlement. Not a single objection to the Settlement has been lodged. Further, no members of the Pennsylvania Settlement Class have excluded themselves from the Settlement. Moreover, no objections to Counsel's fee⁶ and expense request have been filed. As such, Counsel believe that the Class favors this Settlement and the terms contained therein.

3. Stage Of The Proceedings And The Amount Of Discovery Completed

49. The factual background comprising this factor has been addressed above. Further, the Parties have engaged in significant discovery to date—including propounding and responding to Interrogatories and Requests for Production and depositions of the Plaintiff and Defendant's corporate witnesses. In short, Plaintiff has engaged in sufficient discovery to be fully informed about the appropriateness of the proposed settlement. This factor weighs in favor of approval of the Settlement.

4. Risks Of Establishing Liability And Damages

50. Courts reviewing settlements in analogous actions have combined

⁶ As noted herein, for the Court's consideration, Counsel have submitted the time incurred in the course of litigating this Action in determining the appropriateness of the fee request.

their analysis of the inherently related fourth and fifth “fairness” factors. In the instant matter, liability and damages and class certification would clearly be a hotly contested issue. Invariably, Defendant would assert that it had a very strong claim that all FLSA claims are time-barred since the Settlement Class Members’ employment with Legg Mason ceased on December 30, 2005. Moreover, Defendant asserts that it has a very strong defense to the FLSA and Pennsylvania labor law claims on the merits, based on its view that Plaintiff was properly classified as an exempt employee; indeed, Defendant was prepared to file a Motion for Summary Judgment on the merits when the parties agreed to mediate. Further, Defendant would have argued that proof of any liability would require individual fact inquiries, which precludes class certification. The issue of damages and certification alone would have invariably triggered a proverbial battle of the experts. This would have added additional risk that the class could end up receiving no compensation (or a significantly reduced amount) if the Defendant prevailed on its arguments.

51. It is Counsel’s considered opinion that settlement on the proposed terms at this juncture in the case, given the potential downside risks, likelihood of all FLSA claims being time-barred, upside rewards and concomitant costs of going forward, is the most prudent course for Plaintiff and the Settlement Classes to take.

5. Risks Of Maintaining The Class Action Through The Trial

52. Based on Plaintiff's Counsel's extensive experience in these kinds of cases, and Defendant's prior submissions to the Court, it is clear that Defendant would have vigorously opposed class certification. Although it is Plaintiff's strong belief that certification of the proposed classes would have been granted by the Court for all of his claims, there was certainly cause for doubt. Further, absent this Stipulation, there is a real likelihood that members of the FLSA Settlement Class would receive no recovery for any potential claims against Legg Mason pursuant to the FLSA if this Action proceeded to trial.

6. Ability Of Defendants To Withstand A Greater Judgment

53. The Settlement Consideration is being paid directly by Defendant as it has not asserted any insurance coverage for the wage and hours claims asserted here. Plaintiff was able to negotiate and obtain a non-reversionary settlement (that is, if this Settlement becomes Final, no money will revert to CGMI). This settlement provision stands in stark contrast to the majority of wage and hour cases brought on behalf of brokers—where the standard provision is that unclaimed funds revert back to the defendant.

54. While it is arguable that CGMI—a global financial institution—could easily afford to pay a greater judgment, each dollar obtained by Plaintiff's counsel came directly from Defendant's assets. Especially given the economic climate, this factor also militates in favor of Settlement.

7. Range Of Reasonableness Of The Settlement Fund In Light Of The Best Possible Recovery And All The Attendant Risks Of Litigation

55. Prior to entering into the Settlement, Plaintiff's Counsel considered the uncertain outcome and the risk of any litigation, especially in a complex action such as this one, as well as the difficulties and delays inherent in any such litigation. Plaintiff's Counsel is also mindful of the inherent problems of proof (including the difficulty of establishing damages) and possible defenses available to Defendant. While Plaintiff's Counsel believes strongly in the merits of Plaintiff's claims, they nonetheless are cognizant of the developing body of adverse case law.

56. Consequently, this factor also favors settlement.

III. REQUESTED ATTORNEYS' FEES AND COSTS

57. Plaintiff's Counsel respectfully requests a fee award of just under seventeen percent (17%) of the Settlement Consideration, or \$65,589.00, and reimbursement of expenses totaling \$15,000.00. This request is less than established precedent in this District, the Third Circuit, and in federal courts throughout the country, as fee awards in excess of the requested fee percent have been consistently awarded in class actions to plaintiffs' counsel working on a contingent fee basis and obtaining a common fund for the benefit of the class. *See* Memorandum of Law in Support of Unopposed Motion of Class Counsel for an

Award of Attorneys' Fees, Reimbursement of Costs and Expenses, and an Enhancement Award for the Class Representative filed contemporaneously herewith.

58. I submit that the requested fees and cost reimbursement are fair and reasonable in light of the criteria followed in the Third Circuit as set forth below, and are consistent with fee awards in comparable cases.

59. Courts in the Third Circuit consider seven factors for evaluating a request for attorneys' fees: (a) the size of the fund created and number of persons benefiting from the settlement; (b) the presence/absence of substantial objections to the fee; (c) the skill of plaintiffs' counsel; (d) the complexity and duration of the litigation; (e) the risk of nonpayment; (f) the amount of time devoted to the litigation; and (g) awards in similar cases. An analysis of the relevant criteria demonstrates that the requested fee award is fair and reasonable.

A. The Size and Nature of the Common Fund Created and the Number of Persons Benefited by the Settlement to Date

60. The proposed settlement, a cash payment of \$394,220.00 (less the Administration Costs) is very favorable to the Class. Indeed, unlike the majority of analogous wage and hour settlements, Counsel here were able to negotiate a non-reversionary settlement with an automatic payment to the Pennsylvania Class Members, without the need for them to submit a claim form to receive their share

of the Pennsylvania Settlement Consideration.

61. The number of Pennsylvania Settlement Class Members is 243 individuals and the number of Participating FLSA Settlement Class Members is 458 individuals.

B The Presence or Absence of Any Objections to the Request for Fees

62. The parties complied with the Notice provisions embodied in this Court's May 11, 2010 Preliminary Approval Order, as set forth above. The Court-approved Notice scheme included notification to Settlement Class Members that Counsel would request this Court to approve a fee award not to exceed 17% of the Settlement, and that litigation, notice and settlement administration expenses would be deducted from the Settlement. Furthermore, the Notice advised Settlement Class Members of their right to object to these requests and the required procedures for lodging such objections.

63. As of the date of the declaration, no Settlement Class Member has lodged an objection to the proposed Settlement, much less Counsel's request for attorneys' fees or expense reimbursement. The absence of objections counsels in favor of approving Counsel's fee request.

C. The Skill and Efficiency of Plaintiff's Counsel

64. This Settlement was achieved by Plaintiff's Counsel—who have years

of substantial experience in prosecuting and trying complex actions. Counsel's experience and skill were demonstrated by the effective prosecution of this Action culminating with the proposed Settlement presently before the Court for approval.

65. The quality of opposing counsel is also relevant to the evaluation of class representation. Here, Defendants were ably represented by counsel from Morgan Lewis & Bockius, a prominent firm with ample resources. In particular, defense attorney Michael J. Ossip has extensive expertise and experience in complex litigation, including employment and labor law litigation. The fact that Counsel was able to negotiate such a favorable settlement when Defendant was being represented by such a high caliber of lawyers militates in favor of awarding the requested fee.

D. The Complexity and Duration of the Litigation

66. Employment and labor law class actions are novel and complex. Several analogous actions have resulted in either denial of class certification or summary judgment in favor of defendant. *See, e.g., In re RBC Dain Rauscher Overtime Litig.*, 70 F. Supp. 2d 910 (D. Minn. 2010) (denying class certification for financial consultants); *Bachrach v. Chase Investment Svs. Corp.*, No. 06-CV-2785 (D.N.J. Nov. 1, 2007) (denying class certification); *Handler v. Oppenheimer & Co.*, No. BC343542 (L.A. Super. Ct. Oct. 9, 2007)(denying class certification in wage and hour case on behalf of stock brokers); *Hein v. PNC Fin. Servs. Group*,

Inc., 511 F. Supp. 2d 563 (E.D. Pa. 2007) (granting summary judgment and finding stock broker exempt from overtime laws). This element of unpredictability influenced Plaintiff and Counsel's evaluation of this case.

67. In this matter, Counsel thoroughly and methodically investigated all underlying factual and legal issues related to Plaintiff's allegations that Defendant misclassified certain of its employees. Counsel's prosecution of this matter throughout the litigation, including motion practice and document review, enabled them to aggressively negotiate the proposed Settlement on behalf of Plaintiff and the Settlement Classes as a whole.

68. While extensive time and resources were expended, Counsel did their best to staff this case efficiently. Work was allocated so as to avoid duplication. In addition, where appropriate, work was assigned to associates or paralegals with lower billing rates. These approaches demonstrate a suitable and appropriate allocation of resources.

69. In sum, given (1) the time needed for discovery, both merits and expert, in these type of cases; (2) the relative paucity of guiding Circuit or Supreme Court precedent; (3) the dispositive motions that were likely to be filed and subsequently argued; (4) the likely additional motions that would be filed for the Court's consideration before trial; and (5) the fact that the FLSA Settlement Class Members may have had no claims due to expiring statutes of

limitation, reaching such a beneficial settlement at this stage of the litigation confers a true benefit on the Class.

E. The Risk of Nonpayment

70. Absent settlement here and now, there is a real possibility that the Class Members will recover nothing. Further litigation will not guarantee a higher recovery. Moreover, given the recent turmoil in the financial industry and the economy in general, Defendant's ability to satisfy a greater judgment is speculative.

F. The Amount of Time Devoted to the Litigation

71. Plaintiff's Counsel have spent approximately 1,000 hours prosecuting this case on behalf of the Class. Plaintiff's Counsel strived to efficiently and economically litigate this Action and avoid duplication of effort. However, the inherent complexity of class actions require a significant amount of time and effort by attorneys to properly investigate, research and litigate these claims, as reflected in the number of hours incurred by Plaintiff's Counsel in prosecuting this matter.

72. Plaintiff's Counsel performed comprehensive research and investigation into the factual and legal bases supporting Plaintiff's claims, including but not limited to drafting and filing complaints and engaging in contentious motion practice opposing Defendants' motions to dismiss.

Plaintiff's Counsel expended an extraordinary amount of time and incurred substantial expense litigating this case on behalf of the Class, with absolutely no guarantee of remuneration. Plaintiff's Counsel litigated this case over the course of more than three years—and their efforts have produced a substantial benefit to the Class and should be rewarded.

G. The Fee Request is Lower than Fees Awarded in Comparable Settlements

73. The fee sought in the instant petition is lower than fee requests routinely approved by courts in this Circuit that range between 20 and 33-1/3 %.

74. Furthermore, the fee request is lower than a contingent fee that could be privately negotiated in the marketplace.

75. A one-third contingency fee is generally standard in individual cases. Complex class actions alleging violations of state and federal wage and hour laws are anything but standard; rather, they entail an extraordinary amount time and expense to properly research, investigate, file, and litigate. Here, given the FLSA's nascent stage of jurisprudential development (especially with regard to its interplay with state wage and hour laws), prosecuting such claims are inherently risky with no guarantee of payment.

76. The requested fee award is below the one-third that Counsel could negotiate on the open market.

77. Finally, the requested fee award is below fee awards in analogous actions in this Circuit. Moreover, Counsel's fee request is consistent with fees awarded in similar employment class actions. *See, e.g., Simel v. JPMorgan and Chase Co.*, No. 05-CV-9750 (S.D.N.Y. Jan. 5, 2011) (approving fees of thirty-three percent (33%) of settlement); *Farhy v. Janney Montgomery Scott, LLC*, No. 06-CV-3202, (E.D. Pa. Jul. 16, 2009) (approving fees of thirty percent (30%) of the settlement); *Byers v. PNC Fin. Servs. Group, Inc.*, No. 07-CV-123 (W.D. Pa. July 9, 2008) (approving attorneys fees of thirty-five percent (35%) of the settlement); *Battaline v. Advest, Inc.*, No. 06-CV-569 (W.D. Pa. Sept. 16, 2008) (approving attorneys fees of thirty-three percent (33%) of the settlement).

IV. CLASS COUNSEL'S LODESTAR AND EXPENSES CONFIRMS THE REASONABLENESS OF THE REQUESTED FEE

78. The fee requested, \$65,589.40, represents a fraction of the time expended by counsel in the prosecution of this Action. Indeed, Plaintiff's Counsel has a lodestar of \$420,963.00. Under the circumstances of this litigation, the lack of a lodestar multiplier evinces the reasonableness of the fee request.

79. Further, the absence of a lodestar multiplier is *prima facie* evidence of the propriety of this fee request.

80. Below is a list of the attorneys and paralegals who worked on this matter, their time incurred, and corresponding lodestar. For those individuals who

are no longer with the firm, the billable rate used was the applicable hourly rate in effect on such individual's last day of association with the firm.

NAME	TITLE	TOTAL HOURS	HOURLY RATE	TOTAL FEES
Marc A. Topaz	Partner	1.00	\$725.00	\$725.00
Joseph H. Meltzer	Partner	2.50	\$675.00	\$1,687.50
Edward Ciolko	Partner	4.50	\$625.00	\$2,812.50
Peter A. Muhic	Partner	32.30	\$600.00	\$19,380.00
Terence S. Ziegler	Partner	2.25	\$600.00	\$1,350.00
Gerald D. Wells, III	Associate	130.50	\$495.00	\$64,597.50
Richard Maniskas	Associate	24.90	\$495.00	\$12,325.50
Robert J. Gray	Associate	162.25	\$465.00	\$75,446.25
Katherine B. Bornstein	Associate	59.25	\$465.00	\$27,551.25
Robert Biela	Associate	128.50	\$435.00	\$55,897.50
Katie Anderson	Associate	17.00	\$450.00	\$7,650.00
Lisa Mellas	Associate	80.50	\$450.00	\$36,225.00
Michelle A. Coccagna	Associate	197.80	\$375.00	\$74,175.00
Julie Siebert-Johnson	Associate	28.25	\$345.00	\$9,746.25
Jason Conway	Staff Attorney	51.50	\$275.00	\$14,162.50
Jill Belack	Paralegal/Case Asst.	14.25	\$225.00	\$3,206.25
Julie Wotring	Paralegal/Case Asst.	37.50	\$225.00	\$8,437.50
Lacey Loper	Paralegal/Case Asst.	19.00	\$225.00	\$4,275.00
Tiffany Melvin	Paralegal/Case Asst.	7.50	\$175.00	\$1,312.50

TOTAL		1,001.25		\$420,963.00
--------------	--	-----------------	--	---------------------

81. A review of the summarized chart evidences the effort of BTKMC to staff the litigation in such a way that partners billing at the highest rates did not expend the majority of the time on the litigation.

82. The hourly rates utilized by the firm in computing its lodestar are at or below its usual and customary hourly rates charged for other complex litigation. No upward adjustment in billing rate was made, notwithstanding the contingency and risk of the matters involved, the opposition encountered, the preclusion of other employment, the delay in payment, or other factors present in this case which would justify a higher rate of compensation.

83. All of the services performed by BTKMC in connection with this litigation were reasonable and necessary in the prosecution of this litigation. The time and services provided by BTKMC for which fees are sought in the petition are reflected in contemporaneously maintained records of the firm.

84. In a recent analogous wage and action class action settlement, the court commented favorably on BTKMC's hourly rates and its internal division of work amongst its attorneys. *See* Docket No. 106, "Memorandum," *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, No. 06-CV-03202 (E.D. Pa.).

85. The lodestar figures also do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in the

firm's billing rates.

86. BTKMC has incurred a total of \$15,304.05 in unreimbursed expenses in connection with the prosecution of this litigation, but is seeking reimbursement of only \$15,000.00.

87. My firm's expenses are as follows:

Expense Description	Final
Meals, Hotels & Transportation	\$2,614.13
Photocopying	\$2,859.22
Messenger, Courier & Overnight Mail	\$415.02
Filings & Service of Process	\$150.00
Research – Direct Charge Beyond Subscription Service ⁷	\$1,105.23
Court Reporters and Transcripts	\$5,135.45
Mediation	\$3,025.00
Total	\$15,304.05

88. With respect to airfare and hotel accommodations, my firm has an in-house travel administrator whose duties include obtaining the best possible price for such services.

⁷ This amount is above the flat fee charged for all subscription-based research including LexisNexis, Westlaw, Thompson Research and Bloomberg, for which BTKMC does not seek reimbursement. The \$1,105.23 in research charges for which BTKMC does seek reimbursement is for premium research that is not covered by a particular subscription (*e.g.*, when a particular research request extends beyond the scope of the firm's subscription agreement).

89. Plaintiff's Counsel believes these requested amounts are appropriate in light of the amount of work done to date in this Action and are lower than similar awards in directly analogous cases.

V. REQUESTED "ENHANCEMENT AWARD" FOR THE CLASS REPRESENTATIVE

90. Plaintiff Sheldon Lehman is the named Plaintiff and Class Representative in the Action, and is a party and signatory to the Parties' Joint Stipulation and Settlement Agreement, which completely resolves the litigation of the Action.

91. The Stipulation provides that Plaintiff's Counsel may seek from the Court an Enhancement Award for Mr. Lehman in an amount not to exceed \$7,500.00

92. Plaintiff's Counsel respectfully requests that this Court approve the payment of an Enhancement Award in the amount of \$7,500.00 for Named Plaintiff/Class Representative Sheldon Lehman, whose time and efforts in assisting the prosecution of this Action have conferred benefits upon all other class members, in addition to the burden and risks associated with bringing this action publicly.

93. In addition to stepping forward and filing the Action, Mr. Lehman provided documents and information essential to the successful prosecution and

settlement of the Action, including providing valuable information in the course of investigating the claims prior to filing the initial complaint in the Action. He complied with all reasonable demands and provided significant assistance to Counsel as needed in the prosecution and settlement of this case, including making himself available during the course of the mediation.

94. Further, Mr. Lehman answered discovery requests served upon him by Defendant, and made himself available for a deposition, which required him to devote substantial personal time to the preparation for and attendance of the deposition.

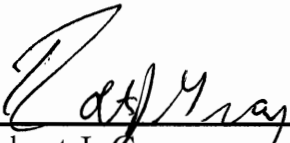
95. By stepping forward as a named plaintiff and initiating the Action on behalf of himself and the putative classes of Securities Brokers he sought to represent, Mr. Lehman undertook a significant risk. He exposed himself to serious professional risks in the brokerage industry in coming forward to act as a plaintiff and class representative in an action against his former employer, including the possibility of being blackballed from hire by future employers.

96. The amount of the requested Enhancement is eminently reasonable as class representative enhancements up to \$25,000.00 have been awarded in analogous overtime settlements. For example, *Godshall v. The Franklin Mint Co.*, No. 01-CV-6539 (E.D. Pa 2004) (awarding \$20,000.00 to each of two named

plaintiffs in employment class action); *Burns v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, Case No. 04-4135 (N.D. Cal. 2006) (\$25,000.00 awarded as an enhancement); *Janney Montgomery Scott LLC Fin. Consultant Litig.*, Case No. 06-cv-3202, 2009 WL 2137224 (E.D. Pa. 2009) (\$20,000.00 awarded as enhancement to each of the three class representatives); *Garett v. Morgan Stanley DW Inc.*, Case No. 04-cv-1858 (S.D. Cal. 2006) (awarding named plaintiffs enhancement awards of \$20,000.00 each). Importantly, and unlike in some of the above cases, the Class Representative here was deposed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of January, 2011 at Radnor, Pennsylvania.



Robert J. Gray
Attorney for Plaintiff Sheldon Lehman