

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

IN RE SEMGROUP ENERGY PARTNERS, L.P.,
SECURITIES LITIGATION

CASE NO. 08-MD-1989-GKF-FHM

**MEMORANDUM IN SUPPORT OF LEAD PLAINTIFF’S MOTION TO
DEPOSIT CURRENT AND FUTURE PROCEEDS FROM THE SEMGROUP CLASS’S
CLAIM IN THE LEHMAN SIPA PROCEEDING INTO THE SETTLEMENT FUND
AND FOR ATTORNEYS’ FEES AND EXPENSES RELATED THERETO**

Court-appointed Lead Plaintiff, Harvest Fund Advisors LLC (“Harvest”), by and through its undersigned counsel, hereby advises the Court of the resolution of the claim, filed on behalf of the class certified in the above-referenced action (“SemGroup Class”), in the Lehman SIPA Proceeding (as defined and described below) (“Lehman Claim”) and submits this memorandum in support of its motion requesting the Court’s authorization to (i) deposit the proceeds that have been paid to or for the benefit of the SemGroup Class on the Lehman Claim into the Settlement Fund for the above-captioned action (the “Litigation”); and (ii) deposit any and all future proceeds paid to or for the benefit of the SemGroup Class from the Lehman Claim into the Settlement Fund.¹ Additionally, Lead Plaintiff respectfully seeks the Court’s approval of attorneys’ fees and reimbursement of expenses to Lead Counsel from the additional proceeds obtained for the SemGroup Class through the filing and ultimate resolution of the Lehman Claim. Specifically, Lead Counsel seeks approval of (i) 19% of the proceeds that have been received on the Lehman Claim to date (i.e., \$50,787.00) as attorneys’ fees; (ii) 19% of any future proceeds received on the Lehman Claim as attorneys’ fees; (iii) reimbursement of expenses in

¹ Unless otherwise defined, capitalized terms used herein shall have the meanings set forth in the Stipulation of Settlement dated May 3, 2011 (the “Stipulation”) (Dkt. No. 331-1).

the amount of \$41,909.07; and (iv) reimbursement of any additional expenses to be incurred by Lead Counsel following this submission in an amount up to \$2,500.00.

Pursuant to the Court's Final Judgment and Order of Dismissal with Prejudice entered in this Litigation on October 5, 2011 (the "Judgment") (Dkt. No. 361), the Court retains continuing jurisdiction over the Settlement Fund, including "disposition of the Settlement Fund," as well as all "applications for attorneys' fees, interest, and expenses in the Litigation." *See* Judgment at p. 5, ¶15. As a result, Lead Plaintiff respectfully submits that the Court may, in its discretion, order the relief sought herein.

I. PERTINENT PROCEDURAL SUMMARY

A. Background Regarding Claims Against SemGroup and Lehman

On July 22, 2008, the first of several complaints was filed against various SemGroup entities and current and former officers and directors of these entities for violations of the federal securities laws. Two days later, on July 24, 2008, the first of several follow-on complaints were filed alleging similar claims against the same entities, as well as against Lehman Brothers Inc., a wholly-owned subsidiary of Lehman Brothers Holdings, Inc. (collectively, "Lehman"), pursuant to the Securities Act of 1933 with respect to SemGroup's February 14, 2008 offering of 6 million common units (the "Secondary Offering"). *See* Dkt. No. 1, *Maurer v. SemGroup Energy Partners, L.P., et al.*, 08-CV-6598 (S.D.N.Y.).

On October 10, 2008, the Judicial Panel on Multidistrict Litigation ordered all of these actions, including the actions asserting claims against Lehman, transferred and consolidated before this Court for further proceedings. Thereafter, on January 23, 2009, the Court appointed Harvest as Lead Plaintiff and on April 2, 2009 ordered it to file a consolidated complaint on or before May 4, 2009. *See* Dkt. No. 19, 92. Lead Plaintiff filed the Consolidated Securities Class Action Complaint for Violations of the Federal Securities Laws on May 4, 2009 (*see* Dkt. No.

99) and subsequently filed the Corrected Consolidated Class Action Complaint For Violations of the Federal Securities Laws (the “CCAC”) on July 17, 2009. *See* Dkt. No. 188.

Meanwhile, on September 15, 2008, Lehman filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. *See* CCAC, ¶58. As a result of this filing, all claims then pending against Lehman, including those in this Litigation related to the Secondary Offering, were automatically stayed pending the resolution of the bankruptcy proceedings. Because of the automatic stay, Harvest could not reassert any claims against Lehman once appointed as the Lead Plaintiff. Each consolidated complaint filed thereafter, including the CCAC, identifies Lehman, as well as two SemGroup entities also subject to the automatic stay afforded litigants subject to bankruptcy proceedings, as a “Relevant Non-Party.” *Id.* ¶¶56-58.

On September 19, 2008, a proceeding, *Securities Investor Protection Corp. v. Lehman Bros. Inc.*, No. 08-01420 (S.D.N.Y), was commenced under the Securities Investor Protection Act of 1970 (“SIPA”) with respect to Lehman (the “Lehman SIPA Proceeding”) in the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”). On November 7, 2008, the Bankruptcy Court entered an order which, among other things, approved the form and manner of notification of the Lehman SIPA Proceeding and specified the procedures for filing claims in connection therewith, Lehman SIPA Proceeding Dkt. No. 241, (the “Claims Process Order”). In accordance with the Claims Process Order and to protect the then putative SemGroup Class’s interests in the Lehman SIPA Proceeding, after filing the consolidated complaint in this Litigation on May 4, 2009, Harvest filed general creditor claims on behalf of itself and the putative SemGroup Class on May 29, 2009 (the “Bankruptcy Claims”).

B. Background on the Settlement and Status of this Litigation

This Litigation was settled for \$28,000,000 (the “Settlement”), comprised of (i) \$22,800,000 in cash (the “Cash Settlement Amount”); and (ii) the number of Blueknight Energy Partners, L.P. common units that equaled \$5.2 million, or 767,414 units² (the “Settlement Units”) (together with the Cash Settlement Amount, the “Settlement Fund”). Following a hearing on October 5, 2011, the Court entered its Judgment approving the Settlement as fair, reasonable and adequate and in the best interests of the SemGroup Class. In addition, the Court entered its Order Approving Plan of Allocation of Settlement Proceeds (Dkt. No. 362), approving the proposed plan for allocating the Settlement Fund to eligible members of the SemGroup Class, and its Order Awarding Attorneys’ Fees and Expenses and Reimbursement to Lead Plaintiff (Dkt. No. 363), approving Lead Counsel’s request for 19% of the Settlement Fund as attorneys’ fees and reimbursement of expenses to Lead Counsel and Lead Plaintiff.

Pursuant to the Court’s Order Approving Distribution Plan and Authorizing Distribution of Settlement Proceeds dated July 8, 2013 (the “Distribution Order”) (Dkt. No. 375), the Court-authorized claims administrator, Rust Consulting, Inc. (“Rust”), conducted the initial distribution of the Net Cash Settlement Amount (*i.e.*, the Cash Settlement Amount, net of any taxes on the income thereof, and net of any proceeds used to pay Court-awarded attorneys’ fees and expenses and other costs, including notice and administrative costs) to eligible SemGroup Class Members on August 13, 2013. To date, checks representing 99.84% of the Net Cash Settlement Amount have been cashed. As of July 30, 2015, a balance of \$36,455.35 remains in the distribution account at Huntington National Bank as a result of uncashed checks. *See* ¶5 of the Declaration

² The number of Settlement Units was determined by the average per unit closing price of such common units during the ten trading days immediately preceding the Court’s entry of the Judgment.

of Stuart L. Berman (“Berman Declaration”) submitted herewith. Separately, as of July 30, 2015, there is a total of \$406,000.84 in the escrow account at Huntington National Bank reflecting, *inter alia*, interest on the settlement proceeds, dividends earned on the settlement units since the initial distribution of the cash portion of the Settlement Fund in August 2013, proceeds from the sale of the settlement units remaining in escrow following distribution of the settlement units (see *infra*), and the proceeds that have been paid to or for the benefit of the SemGroup Class on the Lehman Claim to date (i.e., \$267,300.00). *Id.* at ¶6.

In October 2014, Rust, with the assistance of American Stock Transfer & Trust Company LLC (the “Transfer Agent”), distributed the Net Settlement Units (*i.e.*, the Settlement Units, net of any taxes on the income thereof, and net of any proceeds used to pay Court-awarded attorneys’ fees and expenses) to those eligible SemGroup Class Members who (i) cashed their check from the initial distribution of the Net Cash Settlement Amount or requested a reissuance of their initial distribution check by the stale date listed on the check and (ii) met the Transfer Agent’s criteria for registering a security. *See* Distribution Order at p. 4.

Rust shall conduct a re-distribution of any funds remaining in the Net Settlement Fund, if determined to be cost effective, pursuant to the Distribution Order.³

³ Pursuant to the Distribution Order, “any funds remaining six (6) months after the initial distribution of the Net Cash Settlement Amount because of uncashed distributions, returned funds, or other reasons (including the proceeds resulting from liquidated Settlement Units) and after Rust has made reasonable and diligent efforts to have Authorized Claimants cash their distribution checks, shall become eligible for redistribution to Class Members who have cashed their initial distributions and who would receive at least \$10.00 from such redistribution based on their Recognized Claims, after payment of any unpaid costs or fees incurred in administering the Net Cash Settlement Amount and the Net Settlement Units” and “additional redistributions of any funds remaining in the Net Cash Settlement Amount after such initial redistribution shall be conducted in six-month intervals until Lead Counsel, in consultation with Rust, determine that a redistribution is not cost effective, and then any remaining balance shall be donated to non-sectarian, not-for-profit §501(c)(3) organization(s) designated by Lead Counsel and approved by the Court.” *See* Distribution Order at p. 5.

C. Pertinent Background Regarding the Lehman SIPA Proceeding and the Current Status of the Bankruptcy Claims

On March 11, 2013, the Bankruptcy Court entered an order pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rules 3007 and 9019(b) approving settlement procedures for general creditor claims. Shortly thereafter, Lead Counsel, through its bankruptcy attorneys, Lowenstein Sandler LLP (“Lowenstein”), negotiated and entered into an agreement to settle the Bankruptcy Claims with the trustee for the Lehman SIPA Proceeding. This agreement is embodied in the Stipulation Regarding Proofs of Claim of Harvest Fund Advisors LLC (Nos. 5631, 5632) dated July 19, 2013, attached to the Berman Declaration as Exhibit B (the “Bankruptcy Stipulation”). Pursuant to the Bankruptcy Stipulation, the parties agreed to settle the SemGroup Class’s claim (Claim No. 5632) for an allowed claim of \$990,000.00 (the “SemGroup Class’s Claim”) and, as set forth in the agreement, the SemGroup Class’s Claim shall receive “proportionately at least the same in payments or distributions (including with respect to the timing and type of payments or distribution) for the [SemGroup Class’s Claim] as is generally received by holders of general allowed unsecured claims.” See Bankruptcy Stipulation at ¶4. Pursuant to the Bankruptcy Stipulation, Lead Plaintiff agreed to withdraw its individual claim (Claim No. 5631). *Id.*

Pursuant to an order issued in the Lehman bankruptcy proceeding, a first interim distribution to holders of allowed general unsecured claims began in September 2014 (the “First Interim Distribution”). Lehman SIPA Proceeding, Dkt. No. 9520. The First Interim Distribution translated into a distribution of approximately 17 cents on the dollar to each holder of an allowed general unsecured claim. *Id.* at Dkt. No. 9839. A second interim distribution to holders of allowed general unsecured claims began in April 2015 (the “Second Interim Distribution”). *Id.* at Dkt. No. 11358. The Second Interim Distribution translated into a distribution of

approximately 10 cents on the dollar to each holder of an allowed general unsecured claim. *Id.* at Dkt. No. 11876. To date, Lead Plaintiff has received \$267,300.00 in proceeds from the SemGroup Class's Claim pursuant to these distributions ("Claim Proceeds"). Berman Decl. at ¶7. On July 13, 2015, Lehman's estate filed a motion seeking a third interim distribution. Lehman SIPA Proceeding, Dkt. No. 12478. The hearing to approve the third interim distribution is scheduled for August 4, 2015. *Id.* If the estate's motion is granted, the SemGroup Class could receive an additional \$79,920.00 in proceeds from the Claim. Until this motion is ruled upon, the amount and timing of this potential payment as well as subsequent potential payments is not known.

II. LEAD COUNSEL REQUESTS THE COURT'S AUTHORIZATION TO DEPOSIT THE CLAIM PROCEEDS AND ANY FUTURE PROCEEDS FROM THE SEMGROUP CLASS'S CLAIM IN THE LEHMAN SIPA PROCEEDING INTO THE SETTLEMENT FUND

Pursuant to the Judgment in this Litigation, the Court has continuing jurisdiction over the "disposition of the Settlement Fund," giving the Court the power to authorize the deposit or transfer of additional proceeds or assets to the Settlement Fund for the benefit of the SemGroup Class. Through this Motion, Lead Plaintiff seeks the Court's authorization to deposit the Claim Proceeds received to date and to deposit future proceeds paid on the SemGroup Class's Claim into the Settlement Fund for the benefit of the SemGroup Class.

There can be no dispute that the Bankruptcy Claims were pursued by Lead Plaintiff for the benefit of the SemGroup Class and that Lead Plaintiff's actions ultimately reaped a monetary benefit for the SemGroup Class. Lehman was a named defendant in several of the initial complaints that were filed regarding the events that lead to this Litigation. As a result of Lehman's subsequent bankruptcy, Lead Plaintiff took steps to participate in the Lehman SIPA Proceeding to protect the interests of the then putative SemGroup Class in recovering from

Lehman's alleged violations of the federal securities laws concerning the Secondary Offering. That Lead Plaintiff ultimately was successful in obtaining any recovery on behalf of the SemGroup Class at all, let alone proceeds of \$267,300.00 to date and the right to receive distributions up to a total of \$990,000.00, from the Lehman SIPA Proceeding is unusual in and of itself, given the SemGroup Class's status as a general unsecured creditor to a bankruptcy estate.⁴

The Claim Proceeds and the right to receive future proceeds from the Lehman SIPA Proceeding ensure that each participating SemGroup Class member will be further compensated for their losses due to the conduct alleged in this Litigation. Accordingly, the Court should exercise its jurisdiction over the Settlement Fund and authorize the deposit of the Claim Proceeds and future proceeds received from the SemGroup Class's Claim into the Settlement Fund for the benefit of the SemGroup Class.

III. LEAD COUNSEL REQUESTS ATTORNEYS' FEES AND EXPENSES FROM THE ADDITIONAL PROCEEDS OBTAINED FOR THE BENEFIT OF THE SEMGROUP CLASS THROUGH THE LEHMAN SIPA PROCEEDING

In connection with final approval of the Settlement in this Litigation and pursuant to its Order Awarding Attorneys' Fees and Expenses and Reimbursement to Lead Plaintiff (Dkt. No. 363) ("Fee Order"), the Court awarded Lead Counsel attorneys' fees in the amount of 19% of the Settlement Fund.⁵ For its continuing efforts in securing an additional recovery for the SemGroup Class through the filing and resolution of the SemGroup Class's Claim in the Lehman SIPA

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Because of the remote possibility that there would be a payout on the Bankruptcy Claims, Lead Counsel inadvertently neglected to remind the Court of the existence of, and the possible payout on, the Bankruptcy Claims at the settlement stage. As such, the Bankruptcy Claims were omitted from the Settlement Fund, as defined.

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Not a single objection was received in connection with Lead Counsel's request for attorneys' fees and expenses.

Proceeding, Lead Counsel respectfully requests that the Court award Lead Counsel, consistent with its prior Fee Order, 19% of the proceeds that have been received on the Lehman Claim to date (i.e., \$50,787.00) and 19% of any future proceeds received on the Lehman Claim.⁶ *See generally Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (Courts have long held that “[an attorney] who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1444 (10th Cir. 1995) (The common fund doctrine provides for “the successful plaintiff [to be] awarded attorney fees because his suit creates ‘a common fund, the economic benefit of which is shared by all members of the class.’”) (citation omitted).

Lead Counsel also respectfully requests the Court to approve reimbursement of its out-of-pocket expenses incurred in connection with the SemGroup Class’s Claim in the amount of \$41,909.07, to be paid from the additional proceeds obtained from the SemGroup Class’s Claim.⁷ *See* Berman Decl. at ¶2; Exh. A. In addition, Lead Counsel respectfully requests the

⁶ At the time of Lead Counsel’s fee request at the settlement stage, Plaintiffs’ Counsel had devoted over 14,300 hours to the investigation, prosecution and resolution of the Litigation, resulting in an aggregate lodestar of \$5,912,565.10. *See* Memorandum of Law in Support of Lead Counsel’s Motion for an Award of Attorneys’ Fees and Expenses and Reimbursement to Lead Plaintiff (Dkt. No. 338), at §II.B.2.c.ii. Thus, the award of attorneys’ fees in the amount of 19% of the Settlement Fund represented a *negative* multiplier of 0.90 to Plaintiffs’ Counsel’s lodestar – reflecting a discount on the time Plaintiffs’ Counsel actually spent litigating the matter. *Id.* Since that fee request, Lead Counsel has spent substantial additional hours on this Litigation including, *inter alia*, assisting members of the SemGroup Class with their claim forms, overseeing the processing of claims by Rust, preparing the motion for distribution which was granted by the Court on July 8, 2013 (Dkt. No. 375), overseeing the distribution of the Net Cash Settlement Amount and the Net Settlement Units to the SemGroup Class, as well as working with Lowenstein to successfully resolve the SemGroup Class’s Claim in the Lehman SIPA Proceeding.

⁷ To date, Lead Counsel has made payments to its bankruptcy counsel, Lowenstein, in the amount of \$39,773.17. This amount reflects fees and expenses incurred by Lowenstein in connection with resolving the SemGroup Class’s Claim and monitoring the Lehman SIPA Proceeding through June 30, 2015. *See* Exh. A to Berman Decl. This amount is separate from

Court to approve reimbursement of any additional expenses to be incurred by Lead Counsel following this submission in an amount up to \$2,500.00.⁸ *See generally, Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, at *11 (D. Colo. Mar. 9, 2000) (“As with attorneys’ fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred.”).

IV. ADDITIONAL NOTICE TO THE SEMGROUP CLASS IS NOT NECESSARY

Courts have held that where amendments to a proposed settlement expand or improve rights for the class, new notice may not be required. *See In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001); *see also Vought v. Bank of Am., NA*, No. 10-CV-2052, 2013 U.S. Dist. LEXIS 9347, at *16-17 (C.D. Ill. Jan. 23, 2013) (finding enhancement of settlement where “each Class Member will receive an additional benefit in the form of a payment representing a pro rata share of the remaining RESPA funds” did not require additional notice to class); *Manners v. Am. Gen. Life Ins. Co.*, No. 3-98-0266, 1999 U.S. Dist. LEXIS 22880, at *37 (M.D. Tenn. Aug. 11, 1999) (finding additional notice to class was not necessary where the amendments to the settlement “enhance[d] the relief provided to Class Members”).

Here, notice to SemGroup Class Members advising them of the additional proceeds obtained through the resolution of the SemGroup Class’s Claim in the Lehman SIPA Proceeding is not required or practicable under the circumstances. Conducting an additional notice mailing would be costly and would only serve to reduce the additional benefit obtained for the SemGroup Class. Lead Counsel will post Lead Plaintiff’s Motion, this supporting Memorandum

the amount previously requested by and reimbursed to Lowenstein in connection with Lead Counsel’s Motion for an Award of Attorneys’ Fees and Expenses and Reimbursement to Lead Plaintiff (Dkt. No. 336).

⁸ Lowenstein has informed Lead Counsel that it anticipates that it will incur additional fees and expenses in connection with the SemGroup Class’s Claim in an amount not to exceed \$2,500.00.

and any Order(s) entered by the Court in connection with the Motion on the website maintained for the Settlement, www.semgroupsecuritiessettlement.com.

V. CONCLUSION

Based on the foregoing, Lead Plaintiff respectfully requests that the Court enter an order (i) authorizing Lead Counsel to deposit the Claim Proceeds and any and all future proceeds paid to or for the benefit of the SemGroup Class from the Lehman Claim into the Settlement Fund for the Litigation; and (ii) approving Lead Counsel's request for attorneys' fees and reimbursement of expenses from the additional proceeds obtained and to be obtained for the benefit of the SemGroup Class from the Lehman Claim. A proposed order granting the Motion is being submitted herewith.

Dated: July 31, 2015

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CERTIFICATE OF SERVICE

I certify that on the 31st day of July 2015, I electronically transmitted the foregoing to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF Registrants:

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