UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MBIA, INC., SECURITIES LITIGATION	File No. 08-CV-264-KMK

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, the Teachers' Retirement System of Oklahoma ("Lead Plaintiff"), on behalf of itself and the Class,[1] respectfully submits this memorandum of law in support of its motion for final approval of the proposed settlement of this securities class action (the "Action") against defendants MBIA Inc. ("MBIA" or the "Company"), Gary C. Dunton and C. Edward Chaplin (collectively, "Defendants"), and for approval of the proposed plan of allocation of the settlement proceeds (the "Plan of Allocation").[2]

PRELIMINARY STATEMENT

The Settlement achieved by Lead Plaintiff – which provides for payment of $68,000,000 in cash plus interest – is an excellent result for the Class. The Settlement is the product of hard-fought litigation, which included Lead Plaintiff's successful opposition of MBIA's motion to

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[1] In its Order Preliminarily Approving Proposed Settlement and Providing for Notice dated September 20, 2011 (ECF No. 76) (the "Preliminary Approval Order"), the Court certified for settlement purposes only a Class of all persons or entities who purchased or otherwise acquired the common stock of MBIA Inc. during the period from July 2, 2007 through and including January 9, 2008 (the "Class Period"), and who were damaged thereby (the "Class"). Excluded from the Class by definition are Defendants; the members of each Individual Defendant's Immediate Family; MBIA's current or former Section 16 Officers or directors; MBIA's past or present parents, subsidiaries or affiliates and each of their current or former Section 16 Officers, directors, partners, or members; any entity in which any Defendant has or had a controlling interest; and the legal representatives, heirs, beneficiaries, successors or assigns of any such excluded party. Also excluded from the Class are any persons or entities who exclude themselves by filing a request for exclusion in accordance with the requirements set forth in the Notice.

The basis for class certification is set forth in Lead Plaintiff's Memorandum of Law in Support of Motion for (I) Preliminary Approval of Settlement, (II) Certification of the Class for Purposes of Settlement and (III) Approval of Notice to the Class filed September 6, 2011 (ECF No. 74), which is incorporated herein by reference.

[2] The Plan of Allocation is set forth in the Notice of Pendency of Class Action and Proposed Settlement, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses, which has been mailed to potential Class Members pursuant to the Court's Preliminary Approval Order.

dismiss, and is also the result of intensive, arm's-length negotiations conducted under the auspices of retired Judge Daniel Weinstein, a highly respected mediator with extensive experience in the mediation of complex securities class actions. The Settlement will result in the Class recovering a substantial percentage of its likely recoverable damages, and is even more noteworthy when viewed in light of the considerable risks of continued litigation. These risks included the risks of establishing liability, including proving that Defendants made materially false statements and acted with *scienter*, and also of the collectability of any judgment achieved, given MBIA's financial condition. It is Lead Plaintiff's and Lead Counsel's informed opinion that, in light of these significant risks and the delay, expense and uncertainty of pursuing the Action through trial and any subsequent appeals, the Settlement is an outstanding result for the Class.

The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement dated September 6, 2011 (the "Stipulation"), which was previously submitted to the Court (ECF No. 73-1). If approved, the Settlement will resolve this Action against all Defendants.[3] In the Preliminary Approval Order, the Court preliminarily approved the Settlement, certified the Class for settlement purposes and directed that notice of the proposed Settlement be given to the Class.

The Settlement was reached at a point at which Lead Plaintiff and Lead Counsel understood the facts and challenges posed by the claims and defenses in the Action, and the factors that would impact a future recovery. This understanding was informed by: (i) a

[3] Under the terms of the Stipulation, Lead Plaintiff has filed a notice of voluntary dismissal with prejudice of the claims against the Individual Defendants. However, the Individual Defendants have agreed that, should the Settlement not be finally approved or the Effective Date otherwise fail to occur, they shall be reinstated without objection as Defendants in the Action, that any statute of limitations, statute of repose or other time-related defense is tolled from the date of filing the notice of dismissal, and they and Lead Plaintiff shall revert to their respective positions in the Action immediately prior to July 7, 2011.

substantial investigation into the facts; (ii) consultation with experts in structured finance products, accounting, loss causation and damages; (iii) preparation of two detailed amended complaints; (iv) responding to two rounds of motions to dismiss by Defendants; (v) preparing multiple mediation statements on the issues of liability and damages; (vi) reviewing and assessing the mediation statements prepared by Defendants: and (vii) engaging in extensive settlement negotiations over the course of months that included two formal mediation sessions under the auspices of Judge Weinstein.[4]

In reaching the Settlement, Lead Plaintiff and Lead Counsel considered the numerous risks associated with continuing the litigation. While Lead Plaintiff had succeeded in having its claims against MBIA sustained in large measure on Defendants' motion to dismiss, the claims against the Individual Defendants (for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder) had been dismissed and, at the time the agreement to settle was reached, those defendants had filed a renewed motion to have the repled claims against them dismissed as well. Additionally, while the Court rejected many of the arguments posited by Defendants, it noted that those assertions required fact-intensive inquiries and, thus, were not appropriate for determination on a motion to

[4] Lead Plaintiff is simultaneously submitting herewith the Declaration of Steven B. Singer in Support of (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Singer Declaration" or "Singer Decl."), submitted herewith. The Singer Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action through the submission of the Settlement to the Court; the nature of the claims asserted in the Action; the negotiations leading to the Settlement; the value of the Settlement to the Class, as compared to the risks and uncertainties of continued litigation; the terms of the Plan of Allocation for the Settlement proceeds; and a description of the services Lead Counsel provided for the benefit of the Class. Unless otherwise noted, capitalized terms have the meanings set out in the Singer Declaration and in the Stipulation.

dismiss. It clearly left open the possibility that Defendants might be able to satisfy their burden on a motion for summary judgment or that a jury could agree with them. Thus, for example, Defendants would have continued to press their arguments (i) that they had fully disclosed MBIA's exposure to collateralized debt obligations ("CDOs") containing residential mortgage-backed securities ("RMBS") and had not made actionable misstatements or omissions, (ii) that any misstatements or omissions were, at most, the result of negligence and not fraud, and (iii) that the price of MBIA common stock had not declined as a result of the disclosure of the allegedly concealed facts, but had reacted to other news regarding the Company or the general financial crisis. Lead Plaintiff and Lead Counsel recognized that they would face significant risks in overcoming these arguments and establishing all the elements of Lead Plaintiff's claims against Defendants.

Moreover, even if Lead Plaintiff were successful in establishing liability, it faced a substantial risk that Defendants would not have been able to pay an amount significantly larger than, or even as much as, the Settlement Amount, at the conclusion of a trial (and after the resolution of appeals that would certainly be taken). This was a particularly significant risk in this Action, because, at the time the Settlement was agreed to, MBIA had lost its triple-A rating, which was critical to its ability to generate new business. In addition, Defendants' insurance coverage was a wasting asset that would have been depleted by the continuing costs of this Action.

In light of these significant obstacles, and the substantial time and expense that continued litigation would require, Lead Plaintiff and Lead Counsel respectfully submit that the Settlement – which provides an immediate substantial benefit of $68 million for the Class – is an

outstanding result for the Class, and provides a fair and reasonable resolution of the claims against the Defendants in this Action.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Under Rule 23(e) of the Federal Rules of Civil Procedure, a class action settlement must be approved by the Court. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *3 (S.D.N.Y. May 13, 2011); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *4 (S.D.N.Y. Dec. 23, 2009). In this Circuit, public policy favors the settlement of disputed claims, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted); *Marsh & McLennan*, 2009 WL 5178546, at *4 ("Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement."); *In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d 319, 337 (S.D.N.Y. 2005) ("public policy favors settlement, especially in the case of class actions").

A. Application of the *Grinnell* Factors Supports Approval of the Settlement

The standards governing approval of class action settlements are well established in this Circuit. In *City of Detroit v. Grinnell Corp.*, the Second Circuit held that the following were factors to be considered in evaluating a class action settlement:

> (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.

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also Wal-Mart*, 396 F.3d at 117; *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)). In deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04-cv-1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

Here, the Settlement easily satisfies the criteria for approval articulated by the Second Circuit in *Grinnell*.

1. The Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement

"[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *Flag Telecom*, 2010 WL 4537550, at *15 (citation omitted). Indeed, courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute," *In re Gilat Satellite Networks, Ltd.*, No. 02-cv-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In*

re Luxottica Grp. S.p.A. Sec. Litig., 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citations omitted); *see also Strube v. Am. Equity Inv. Life Ins*. Co., 226 F.R.D 688, 698 (M.D. Fla. 2005) (noting the "overriding public interest in favor of settlement" because it is "common knowledge that class action suits have a well-deserved reputation as being most complex").

Lead Plaintiff would have had to overcome numerous hurdles in order to achieve a litigated verdict in this Action. As set forth in the Singer Declaration, the Parties had already litigated a motion to dismiss the First Amended Complaint. *See* Singer Decl. at ¶¶ 18-20. Following the Court's Order on this motion and the filing of the Second Amended Complaint, the Individual Defendants renewed their motion to dismiss, which was pending when the agreement to settle was reached. *Id*. at ¶¶ 22-23. In the absence of the Settlement, continued litigation of the Action would have required the resolution of this renewed motion, followed by extensive factual and expert discovery, contested motions for class certification and summary judgment, culminating in a trial that would have required substantial expert and factual testimony. Finally, whatever the outcome of any eventual trial, it is virtually certain that appeals would be taken from any verdict. All of the foregoing would pose substantial expense for the Class and delay the Class's ability to recover – assuming, of course, that Lead Plaintiff was ultimately successful on its claims.

The subject matter involved in the Action – including the nature of MBIA's financial insurance business, and the structure, valuation and risks of securities such as RMBS, CDOs, and CDO-squared securities in its portfolio – added to the complexity of the litigation. Lead Plaintiff and Lead Counsel recognized that if the Class were to prevail on its claims at trial they would have to marshal and analyze a great deal of complex financial data and work closely with experts to present the claims to a jury in a simple and comprehensible manner. Lead Counsel was

prepared to do so, but it cannot be disputed that achieving a litigated verdict in this Action would require a substantial investment of time and resources by attorneys for the Class and experts working on their behalf. The multiple defenses that Defendants would interpose, as previewed in their motions to dismiss, including the lack of any misstatements, the lack of *scienter*, and the lack of loss causation, would also have added to the complexity of the case.

In contrast to complex, lengthy, and uncertain litigation, the Settlement provides an immediate, significant and certain recovery of $68 million for members of the Class. Accordingly, this factor supports approval of the Settlement.

2. The Reaction of the Class to the Settlement

The reaction of the Class to the Settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g., In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695 (CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007); *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002).

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, The Garden City Group, Inc. ("GCG"), began mailing copies of the Notice and Claim Form to potential Class Members and nominees on October 12, 2011. *See* Affidavit of Jose C. Fraga Regarding (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date, Exhibit 1 to the Singer Declaration ("Fraga Aff."), at ¶¶ 2-3. As of November 8, 2011, more than 109,000 copies of the Notice and Claim Form had been mailed to potential Class Members. *See id*. at ¶ 6. In addition, a Summary Notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire* on October 19, 2011. *See id*. at ¶ 7. The Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to opt out of the Class or object to any aspect of the Settlement, as well as the procedure for submitting

Claim Forms. While the deadline set by the Court for Class Members to exclude themselves or object to the Settlement has not yet passed, to date, Lead Counsel has received no objections to the Settlement or the Plan of Allocation and only one request for exclusion. The deadline for submitting objections and requesting exclusion from the Class is November 25, 2011. As provided in the Preliminary Approval Order, Lead Plaintiff will file reply papers on December 8, 2011 addressing any objections that may be received and the requests for exclusion.

3. The Stage of the Proceedings and the Amount of Information Reviewed and Analyzed Support Approval of the Settlement

Lead Counsel spent significant time and resources analyzing and litigating the key legal and factual issues in this case. Lead Counsel conducted a substantive investigation into these issues prior to initiating the lawsuit and in the process of preparing the First Amended Complaint and the Second Amended Complaint. Among other things, Lead Counsel (i) conducted a thorough review of publicly available information about MBIA, including the Company's filings with the United States Securities and Exchange Commission, analyst reports, investor presentations, news articles and other public data, (ii) interviewed numerous former MBIA employees, and (iii) retained and consulted with experts in structured finance products, accounting and loss causation. Singer Decl. at ¶¶ 17, 21.

Lead Counsel also learned the core defenses to the claims asserted in the Action through briefing of the motion to dismiss and the Individual Defendants' renewed motion to dismiss, as well as from its analysis of multiple mediation statements on both liability and damages that were prepared by Defendants and the two full-day mediation sessions that were attended by both Lead Plaintiff's and Defendants' damages experts. Singer Decl. at ¶¶ 32-34. At the time the agreement in principle to settle was reached, Lead Plaintiff and Lead Counsel well understood the strengths and weaknesses of the case. *Id*. at ¶ 6.

Lead Plaintiff has also had the benefit of substantial due diligence discovery, which was a condition of the agreement to settle. *See* Singer Decl. at ¶ 24. In connection with this due diligence discovery, Lead Counsel obtained, reviewed and analyzed tens of thousands of pages of internal MBIA documents. *Id*. at ¶ 25. Lead Counsel also conducted interviews with several key employees of MBIA on the subject of Lead Plaintiff's claims. *Id*.[5]

As a result of Lead Counsel's substantive investigation, the litigation of the motions to dismiss, and the negotiation process, and as confirmed by the due diligence discovery, Lead Plaintiff and Lead Counsel had a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06-cv-5173 (RPP), 2008 WL 1956267, at *7 (S.D.N.Y. May 1, 2008) ("pre-settlement informal discovery and confirmatory discovery . . . allowed the parties to develop the facts necessary to evaluate the claims and adequacy of the Settlement"); *Maley*, 186 F. Supp. 2d at 364 (even where discovery had not begun, "Plaintiffs' Counsel possessed a record sufficient to permit evaluation of the merits of Plaintiffs' claims, the strengths of defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement"). Based on the information developed, Lead Plaintiff and Lead Counsel were well aware of the strengths and weaknesses of their claims and the potential defenses and believe that the Settlement represents a resolution that is highly favorable to the Class without the substantial uncertainty and delay of continued litigation.

[5] Lead Counsel interviewed MBIA's current head of investor relations, who also held that position during the Class Period; the Managing Director of Insured Portfolio Management who, during the Class Period, was a Managing Director and Head of Structured Finance Insurance Portfolio Management; and Individual Defendant Chaplin, who is currently President and Chief Financial Officer of MBIA. *See* Singer Decl. at ¶ 25.

4. The Risks of Establishing Liability and Damages Support Approval of the Settlement

Grinnell holds that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability . . . the risks of establishing damages [and] the risks of maintaining the class action through the trial." 495 F.2d at 463 (citations omitted). While Lead Plaintiff and Lead Counsel believe that the claims asserted against Defendants have merit, they also recognize that there were significant risks as to whether they would ultimately be able to prove liability and establish damages on their claims under Section 10(b) of the Exchange Act. These risks included serious challenges in (i) proving that there were misrepresentations and omissions; (ii) proving that the misrepresentations were material; (iii) proving that Defendants acted with *scienter*; and (iv) proving loss causation and damages. In addition, Lead Plaintiff and Lead Counsel also considered there to be a substantial risk that, even if they were successful in establishing liability, Defendants might not be able to pay an amount significantly larger than the Settlement Amount – or even as much as the Settlement Amount – in light of MBIA's financial condition and the fact that Defendants' insurance coverage was a wasting asset that would have been depleted by the continuing costs of this Action and the other litigation against MBIA.

First, there was a risk that, at summary judgment or trial of the Action, Lead Plaintiff would not be able to establish that Defendants' statements and omissions about MBIA's exposure to CDOs and CDO-squared securities were false and misleading. Singer Decl. at ¶ 28. For example, Defendants would point to the detailed disclosures about the Company's exposure to CDOs that they had made – including periodic reports posted to the Company's website about the composition of MBIA's multi-sector CDO portfolio and statements made during multiple analyst conference calls, including a conference call dedicated to the subject in August 2007. *Id.*

In this context, Defendants had plausible arguments that they had made the required disclosures regarding MBIA's total exposure to CDOs and that they did not have an independent legal obligation to separately disclose MBIA's exposure to the CDO-squared securities. Defendants would also have argued that any alleged omissions were, in any event, not material to investors in light of the other detailed disclosures that the Company made on these subjects. While Lead Plaintiff and Lead Counsel nonetheless believe that their claims have merit, there could be no assurance that that view would prevail before the Court or a jury. *Id.*

Defendants would also have argued vigorously that any omissions in the Company's disclosures were, at most, the result of negligence and not fraud and that, therefore, they lacked *scienter* – a necessary element for liability under Section 10(b) of the Exchange Act. Singer Decl. at ¶ 29. In support of this argument, Defendants would have been able to argue that the Company had specifically disclosed the CDO-squared exposure at issue to its rating agencies and the New York State Insurance Department and that they had no incentive to hide MBIA's exposure to the CDO-squared securities because these securities were rated triple-A during the Class Period. Defendants would also have argued that they lacked a financial motive to commit fraud because the Individual Defendants had not sold any stock and the Company had not conducted any public offerings during the Class Period. *Id.* Additionally, Defendants would have continued to argue that the undisclosed CDO-squared exposure comprised only a small part of MBIA's total insurance portfolio and that the Individual Defendants lacked the detailed knowledge about the undisclosed CDO-squared exposure necessary to support a claim that they were reckless in not disclosing this information. *Id.* The challenges of proving *scienter* in this Action were underscored by the fact that the claims asserted against the Individual Defendants in

the First Amended Complaint were dismissed by the Court on the grounds that Lead Plaintiff had not adequately pled facts establishing that they acted recklessly or with fraudulent intent. *Id.*

Lead Plaintiff would also have faced challenges in establishing that the price of MBIA common stock declined as a result of the disclosure of the allegedly concealed facts about MBIA's exposure to the CDO-squared securities, rather than other news or market factors. Singer Decl. at ¶ 30. Defendants would have argued that the stock price decline that occurred following the December 19, 2007 disclosure was largely due to what they claimed was the over-reaction of one analyst (and that other analysts disagreed with that analyst). *Id.* Defendants could also point to the fact that a credit rating agency had placed MBIA on "negative rating watch" on the same day that the market price reacted to the principal alleged corrective disclosure, creating a situation in which it might be difficult for Lead Plaintiff to prove whether the price declines were due to revelation of the alleged omissions about MBIA's CDO exposure or to confounding, non-fraud-related news. *Id.*

Additionally, as in any securities class action, the calculation of damages would be vigorously contested. Proof of loss causation and damages would ultimately have required expert testimony before the jury. While Lead Plaintiff would have been able to present a cogent and persuasive expert's view establishing loss causation and damages, there is little doubt that Defendants would have been able to present a well-qualified expert who would opine against a finding of loss causation with respect to most or all of the price declines. Lead Plaintiff could not be certain which expert's view would be credited by the jury and who would prevail at trial in this "battle of the experts." *See Flag Telecom*, 2010 WL 4537550, at *18 ("Undoubtedly, in this action, establishing the amount of damages at trial would have resulted in a 'battle of experts.' The jury's verdict with respect to damages would thus depend on its reaction to the

complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *Maley*, 186 F. Supp. 2d at 365 (there was a risk that a "jury could be swayed by experts for the Defendants, who would minimize the amount of Plaintiffs' losses"); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses").

5. The Ability of the Defendants to Withstand a Greater Judgment Supports Approval of the Settlement

The risk that Defendants might not be able to satisfy a judgment larger than or even as large as the $68 million Settlement is another important factor favoring approval of the Settlement.

In addition to the risks of establishing liability and damages, there was a significant risk that Defendants would not be able to satisfy a substantial judgment in the Class's favor even if Lead Plaintiff were to prevail at trial and on any subsequent appeals. Defendants' ability to pay a substantial judgment was a particular risk in this Action because MBIA had lost its triple-A rating, which was critical to its ability to generate new business. Moreover, because Defendants' insurance coverage was a wasting asset, the amount available to satisfy a judgment was continually being reduced by the ongoing costs of this Action and the other litigation against MBIA. Indeed, Lead Plaintiff and Lead Counsel believed that the insurance available to Defendants would have been depleted by the time that a litigated judgment could be achieved in this Action. Thus, there were serious questions as to whether the Company would be able to pay a judgment equal to or larger than the $68 million settlement after the conclusion of a trial and appeals, most likely several years in the future.

The risk that the Class might not be able to recover on a judgment larger than the Settlement strongly supports approval of the Settlement. *See, e.g., Marsh & McLennan*, 2009 WL 5178546, at *7 ("There exists the legitimate concern that Defendants might not be able to pay an award higher than the Settlement, even if Lead Plaintiffs were to prevail at trial. Accordingly, this factor supports approval of the Settlement."); *Maley*, 186 F. Supp. 2d at 365 (settlement warranted where "obtaining a greater recovery than provided by the Settlement would have been difficult" in light of defendant company's financial condition).

6. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and all the Attendant Risks of Litigation Supports Approval of the Settlement

The last two substantive factors courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks. In analyzing these last two factors, the issue for the Court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. The court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997) (citation and internal quotations omitted). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Lead Plaintiff submits that the Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. The $68 million Settlement Amount achieved represents a substantial percentage of the damages to the Class that Lead Plaintiff would likely be able to establish if it prevailed on liability at trial. Lead Plaintiff's

damages expert estimated that the likely damages that the Class could establish in this case would have been no more than several hundred million dollars. *See* Singer Decl. at ¶ 35. Defendants' damages expert would have opined that damages were a fraction of that amount. *Id.* Thus, the $68 million recovery provided by the Settlement represents a substantial percentage of the Class's maximum recoverable damages. This recovery is particularly commendable in light of the significant risks of establishing liability and collecting on a judgment in this Action discussed above.

In addition, in assessing whether a settlement is fair, reasonable and adequate, courts often examine "the negotiating process by which the settlement was reached" to determine whether the settlement was the result of "arm's-length negotiations" between counsel with "the experience and ability . . . necessary [for] effective representation of the class's interests." *Weinberger v. Kendrick*, 698 F.2d 61, 74-75 (2d Cir. 1982). Here, the Settlement is the product of informed arm's-length negotiations between Lead Counsel and Defendants' counsel, which included multiple in-person mediation sessions conducted under the auspices of Judge Weinstein. Singer Decl. at ¶¶ 32-34. The active involvement of an experienced and independent mediator in negotiating the Settlement adds support to a presumption of reasonableness. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576-77 (S.D.N.Y. 2008) ("Judge Weinstein's role in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion . . . [and that] the process leading to the Settlement was fair to absent Class Members"); *In re Sterling Foster & Co., Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 484 (E.D.N.Y. 2002) ("[a] strong presumption of fairness attaches to proposed settlements that have been negotiated at arm['s]-length").

The recommendation of Lead Plaintiff, which is a sophisticated institutional investor, also supports the fairness of the Settlement. A representative of Lead Plaintiff took an active role in supervising this litigation, as envisioned by the PSLRA, attending the hearing on the motion to dismiss as well as both mediation sessions. *See* Declaration of Regina Switzer, Assistant Attorney General for the State of Oklahoma, attached as Exhibit 2 to the Singer Declaration ("Switzer Decl."), at ¶¶ 6-7. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *Veeco,* 2007 WL 4115809, at *5; *see In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05-cv-10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007) (same). "Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *Id*. at *4 (internal quotations omitted). In addition, Lead Counsel, which has extensive experience prosecuting complex securities class actions and is intimately familiar with the facts of this case, believes that the Settlement is not just fair and adequate, but an excellent result for Lead Plaintiff and the Class. Singer Decl. at ¶ 35. This opinion is entitled to "great weight." *PaineWebber*, 171 F.R.D. at 125; *see also Veeco,* 2007 WL 4115809, at *12.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *Maley,* 186 F. Supp. 2d at 367; *see In re Initial Pub. Offerings Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Because it is impossible in a large class to calculate each member's claim with mathematical precision, courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed

apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133.

Here, the Plan of Allocation, which was prepared with the assistance of Lead Plaintiff's damages expert, provides for the distribution of the Net Settlement Fund on a *pro rata* basis based on a formula tied to liability and damages. *See* Singer Decl. at ¶¶ 47-50. Lead Plaintiff's damages expert calculated the reasonable amount of artificial inflation present in the per share closing price of MBIA common stock throughout the Class Period that was purportedly caused by the alleged fraud. *Id*. at ¶ 48. The damages expert's analysis entailed studying the declines in the price of MBIA common stock associated with alleged corrective disclosures, adjusted to eliminate the effects attributable to general market or industry conditions or to confounding Company-specific information that was unrelated to the allegations. *Id.* Under the Plan of Allocation, the calculation of each Claimant's "Recognized Claim" will depend upon several factors, including when the Claimant's shares of MBIA common stock were purchased during the Class Period, whether these shares were sold during the Class Period, and if so, when. *Id.* at ¶ 49.

In sum, the proposed Plan of Allocation was designed to fairly and rationally allocate the Net Settlement Fund among Authorized Claimants based on the amount of alleged artificial inflation present in MBIA common stock. *See* Singer Decl. at ¶ 50. Although Class Members may benefit differently pursuant to the allocation formula, "there is no rule that settlements benefit all class members equally." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). Instead, the general rule is that an allocation formula need only have a reasonable and rational basis, particularly if recommended by experienced and competent counsel. *See Am. Bank Note*, 127 F. Supp. 2d at 429-30; *EVCI*, 2007 WL 2230177, at *11 ("In determining

whether a plan of allocation is fair, courts look primarily to the opinion of counsel."). The proposed Plan of Allocation, which, to date, has received no objections from Class Members, is recommended by Lead Counsel. Lead Counsel's conclusion that the Plan of Allocation is fair and reasonable is entitled to great weight. *See Am. Bank Note*, 127 F. Supp. at 430 (approving allocation plan and according counsel's opinion "considerable weight" because there were "detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery").

Accordingly, for all of the reasons set forth herein and in the Singer Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

III. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114 (quoting *Weinberger*, 698 F.2d at 70).

Both the substance of the Notice and the method of its dissemination to potential Class Members satisfy these standards. The Court-approved Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the action and claims; (ii) a definition of the Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an

explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of the right to opt-out of the Class or object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.

As noted above, in accordance with the Court's Preliminary Approval Order, since October 12, 2011, the Claims Administrator has mailed over 109,000 copies of the Notice by first-class mail to potential Class Members. *See* Fraga Aff. at ¶¶ 2-6. In addition, Lead Plaintiff caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire* on October 19, 2011 and copies of the Notice and Claim Form were made available on a dedicated website maintained by GCG and on Lead Counsel's website. *See* Fraga Aff. at ¶¶ 7, 9; Singer Decl. at ¶ 43. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., Marsh & McLennan*, 2009 WL 5178546, at *12-*13; *Global Crossing,* 225 F.R.D. at 448-49.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court approve the proposed Settlement as fair, reasonable and adequate and approve the Plan of Allocation as fair and reasonable.

Dated: November 10, 2011

Respectfully submitted,

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