UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MOL GLOBAL, INC. SECURITIES LITIGATION	No. 14-Civ-9357 (WHP) **ECF Case**

LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR (I) PRELIMINARY APPROVAL OF SETTLEMENT, (II) CERTIFICATION OF THE SETTLEMENT CLASS FOR PURPOSES OF THE SETTLEMENT, (III) APPROVAL OF NOTICE TO THE SETTLEMENT CLASS, AND (IV) APPOINTMENT OF SETTLEMENT ADMINISTRATOR

Daniel Hume
Ira M. Press
Meghan J. Summers
KIRBY McINERNEY LLP
825 Third Avenue, 16th Floor
New York, NY 10022
Telephone: (212) 371-6600
Facsimile: (212) 751-2540
dhume@kmllp.com
ipress@kmllp.com
msummers@kmllp.com

Lead Counsel for Class and Counsel for Lead Plaintiff TAP Retirement Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

I. INTRODUCTION

Court-appointed lead plaintiff Lembaga Tabung Amanah Pekerja (the "TAP Retirement Fund" or "Lead Plaintiff") in the above-captioned putative class action (the "Action") respectfully submits that the proposed $8.5 million cash settlement satisfies all of the relevant legal standards for preliminary approval under Rule 23 of the Federal Rules of Civil Procedure. The Settlement[1] is eminently fair considering the substantial recovery to the Settlement Class and the risks and costs attendant to further, protracted litigation. The Settlement resulted from intensive arm's-length negotiations during a mediation process conducted by former U.S. District Court Judge Layn Phillips (Ret.) of Phillips ADR Enterprises, P.C. (the "Mediator"). The Settlement reflects a reasoned compromise based on Lead Plaintiff's and Lead Counsel's[2] knowledge of the strengths and weaknesses of the case gained through an extensive pre-complaint investigation, thorough and detailed amended complaints, motion practice, consultations with experts, and through the adversarial arms-length mediation process.

II. PROCEDURAL BACKGROUND AND SUBSTANTIVE ALLEGATIONS

A. Procedural Background

Between November 24, 2014 and December 2, 2014, investors filed three separate putative class action lawsuits against MOL Global, Inc. ("MOL" or the "Company"), certain of its officers and directors, and the underwriters of MOL's IPO: *Freedman v. MOL Global, Inc.*,

---

[1] All capitalized terms not otherwise defined shall carry the meaning set forth in the Stipulation of Settlement, dated April 11, 2016 with exhibits thereto (the "Stipulation"), attached as Exhibit 1 to the accompanying Declaration of Daniel Hume dated April 12, 2016 ("Hume Decl.").

[2] "Lead Counsel" or "Interim Lead Counsel" refers to the law firm of Kirby McInerney LLP, which the Court appointed interim lead counsel for the putative class by Order dated May 8, 2015 [ECF No. 65].

No. 14 Civ. 9357 (S.D.N.Y.); *Jewell v. MOL Global, Inc.*, No. 14 Civ. 9493 (S.D.N.Y.); and *Grodko v. MOL Global, Inc.*, No. 14 Civ. 9397 (S.D.N.Y.). *Grodko* was filed on November 25, 2014, but was voluntarily dismissed on December 22, 2014. The *Freedman* and *Jewell* actions alleged violations of Sections 11, 12 and 15 of the Securities Act of 1933 (the "Securities Act") in connection with MOL's October 9, 2014 initial public offering ("IPO"). While both cases shared 11 defendants, *Freedman* named two additional director defendants who were not named in *Jewell*, and also alleged additional Exchange Act violations. *Jewell* named an additional defendant – the Company's controlling shareholder – who was not named in *Freedman*.

Pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA") (15 U.S.C. § 77z-1(a)(3)(B)), several members of the putative class moved for appointment as lead plaintiff on or before January 23, 2015, including the TAP Retirement Fund. By an order dated May 8, 2015 (the "Order") [ECF No. 65], the Court consolidated the *Freedman* and *Jewell* actions, appointed TAP Retirement Fund as Lead Plaintiff and appointed Kirby McInerney LLP as Lead Counsel for the putative class.

Lead Plaintiff subsequently filed a consolidated class action complaint on July 7, 2015 [ECF No. 69]. Pursuant to the Court's rules, Defendants submitted a letter on July 27, 2015 [ECF No. 70], requesting a pre-motion conference and setting forth the basis of its forthcoming motion to dismiss. Lead Plaintiff filed its opposition on August 3, 2015 [ECF No. 71]. Following a pre-motion conference before the Court on September 3, 2015, the Court entered a revised scheduling order allowing Lead Plaintiff to file an amended complaint and setting a motion to dismiss briefing schedule. [ECF No. 80].

In accordance with the revised scheduling order, on October 7, 2015, Lead Plaintiff filed the Consolidated Amended Class Action Complaint (the "CAC") [ECF No. 81] on behalf of all

persons and entities that purchased MOL's American Depositary Shares ("ADS") pursuant and/or traceable to the IPO's registration statement and prospectus (collectively, the "Offering Documents"). The CAC alleged violations of Sections 11, 12(a)(2), and 15 of the Securities Act against MOL, the Underwriter Defendants, and certain Individual Defendants.[3]

On November 6, 2015, Defendants moved to dismiss the CAC [ECF Nos. 84-87]. On December 7, 2015, Lead Plaintiff filed its opposition to Defendants' motions to dismiss the CAC [ECF Nos. 89 and 90]. Defendants filed replies in support of their motions to dismiss on December 21, 2015 [ECF Nos. 93 and 95]. During the pendency of the motion to dismiss, the parties agreed to explore a negotiated resolution through mediation.

On January 11, 2016, counsel for Lead Plaintiff and Defendant MOL participated in mediated settlement negotiations before the Mediator, Judge Layn Phillips (Ret.). The Mediator continued to hold discussions with the parties in the weeks that followed, and with the Mediator's assistance, Lead Plaintiff and MOL ultimately reached an agreement in principle to settle the Consolidated Action, for $8.5 million, to be paid or caused to be paid by MOL for the benefit of the Settlement Class, as was set forth in a Settlement term sheet executed on February 23, 2016.

The Stipulation of Settlement ("Stipulation") together with exhibits and certain other documents referred to herein, has been duly executed by the undersigned signatories on behalf of

[3] Citigroup Global Markets Inc., Deutsche Bank Securities Inc., and UBS Securities LLC are collectively referred to as the "Underwriter Defendants." Defendants Ganesh Kumar Bangah, Allan Sai Wah Wong, Craig White, Yit Fei Chang, Tek Kuang Cheah, Mun Kee Chang, Eric He, Noah J. Doyle, and Tan Sri Dato' Seri Vincent Tan are collectively referred to as the "Individual Defendants," and together with MOL, are referred to as the "MOL Defendants." The MOL Defendants and the Underwriter Defendants are collectively referred to as the "Defendants."

their respective clients, and reflects the final and binding agreement between the parties. *See* Hume Decl. Ex. 1.

B. Substantive Allegations

The factual allegations of the Complaint have been set forth at length in briefing on the motion to dismiss. Lead Plaintiff alleged that the Offering Documents filed with the SEC in connection with MOL's IPO: (i) materially misrepresented MOL's revenue during 2013 and the first half of 2014; (ii) materially misrepresented the revenue recognition policies underlying such revenues; (iii) omitted to disclose material weaknesses in MOL's internal controls; and (iv) omitted to disclose MOL's disappointing financial results for the recently-completed third quarter of 2014.

After the close of trading on November 20, 2014, MOL announced that its Chief Financial Officer had resigned and that the disclosure of MOL's results would be delayed until early December. In response, MOL's ADS lost more than half their value, falling from $8.86 per ADS on November 20, 2014 to $4.09 per ADS on November 21, 2014. Trading in MOL ADS was thereafter halted.

Then on December 1, 2014, MOL disclosed, among other things, that throughout 2013 and the first half of 2014, MOL's accounting practices had deviated from the revenue recognition policies stated in the Offering Documents and as a result, the revenue reported in the Offering Documents was overstated. These accounting errors had forced MOL to delay its Q3 results, which MOL disclosed on December 1, 2014. As trading resumed following these disclosures, MOL's ADS price fell an additional 58.68% from its frozen ADS price of $4.09 per ADS to $1.69 per ADS.

III. REASONS FOR THE SETTLEMENT

The principal reason for the Settlement is the significant benefit that it provides to the Settlement Class now. This benefit must be weighed against the risk that the Settlement Class would receive no recovery had Lead Plaintiff elected to continue litigating and been defeated at the motion to dismiss, class certification or summary judgment phases, trial, or appeal.

Lead Plaintiff's decision to settle this matter was fully informed and the product of Lead Counsel's rigorous prosecution of this matter through the date of the parties' agreement. Specifically, in assessing whether the Settlement is in the best interest of the Settlement Class, Lead Plaintiff and Lead Counsel evaluated: (i) the merits of the parties' claims and defenses; (ii) the likelihood of defeating any *Daubert* or summary judgment motions, and prevailing at trial; and (iii) the likelihood of obtaining, and collecting on, a superior recovery in the event that plaintiffs were to succeed at trial.

Although Lead Plaintiff believes that the Defendants made materially false and/or misleading statements in MOL's Offering Documents, Defendants have raised a host of factual and legal challenges, increasing the uncertainty of a favorable outcome absent settlement. For example, the defenses raised by Defendants in their motion to dismiss included: (a) defendants' admitted accounting error was not material; (b) statements concerning internal controls in the Offering Documents were not false; (c) defendants had no duty to pre-disclose the results for the third quarter of 2014; (d) the disclosure on November 20, 2014 was not corrective; and (e) the drop in MOL's ADS price on December 1, 2014 was caused largely by news that was not related to any actionable misrepresentations or omissions. Even if Lead Plaintiff were to defeat the dismissal motion in its entirety, Lead Plaintiff still faced the possibility that the Court would reject Lead Plaintiff's damages analysis under *Daubert*. Moreover, even if Lead Plaintiff were

to overcome all challenges and prevail on all of its claims at trial, it would face the potential difficulty of enforcing a judgment in Malaysia. By settling the action now, Lead Plaintiff and the Settlement Class can share in what would amount to a recovery of over 19% of estimated class-wide damages. *See infra* at V.A.2.f.

Similarly, although Defendants deny each and all of Lead Plaintiff's claims and contentions, they nevertheless have concluded that it is desirable to fully and finally resolve this litigation in the manner and on the terms set forth in the Stipulation. For Defendants, resolution of the Action limits further expense and inconvenience and eliminates the uncertainty and risks inherent in any litigation.

Accordingly, Lead Plaintiff and Lead Counsel respectfully submit that the Court should preliminarily approve the proposed Settlement because it represents a significant all-cash compensation for the Settlement Class and will eliminate the significant risk that continued litigation may result in a smaller recovery or possibly no recovery at all. Defendants do not oppose this motion for preliminary approval of the proposed class action Settlement.

IV. THE TERMS OF THE SETTLEMENT

The Settlement resolves all claims of Lead Plaintiff and the Settlement Class against all Released Parties. *See* Hume Decl., Ex. 1. MOL has agreed to cause $8.5 million in cash to be paid into a Settlement Fund on behalf of Lead Plaintiff and the Settlement Class. Under the terms of the Stipulation, the Settlement Fund will be deposited into an escrow account within 15 business days after the entry of the Preliminary Approval Order and in accordance with the payment instructions to be provided by Lead Counsel, and will then earn interest until distributed to the Settlement Class.

The Stipulation also provides for the form and manner of class notice, the proof of claim procedures, the procedures by which potential Settlement Class members may seek exclusion or object to any terms of the Settlement, and the procedure by which Lead Counsel will apply for attorneys' fees and reimbursement of expenses incurred in prosecuting this Action.

V. ARGUMENT

A. The Settlement Should Be Preliminarily Approved

The law expresses a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal citation and quotations omitted).

A court's review of a proposed class action settlement generally involves a two-step process: preliminary approval and a subsequent fairness hearing. *See In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005) (citing *Manual for Complex Litigation, Fourth* § 21.632 (2004)). *See also* Fed. R. Civ. P. 23(e); *Newberg on Class Actions,* §§ 11.22, *et seq.* (4th ed. 2002). At the preliminary approval stage, a court will review the proposed settlement and make an initial determination as to its fairness, reasonableness, and adequacy. "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *Initial Pub. Offering*, 226 F.R.D. at 191. These procedures safeguard class members' procedural due process rights and enable the court to fulfill its role as the guardian of class interests.

Whether a proposed settlement is fair is a determination left to the trial court's sound discretion. *See In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991); *Newman v.*

Stein, 464 F.2d 689, 692 (2d Cir. 1972). When exercising its discretion, a court should review the proposed settlement in light of the strong judicial and public policies that favor settlements. *See In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999). There is a strong initial presumption that a proposed settlement negotiated during the course of litigation is fair and reasonable. *See Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992) (citation omitted). Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993) (citation omitted).

Preliminary approval requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Newberg*, § 11.25. To grant preliminary approval, a court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n E. R.Rs.*, 627 F.2d 631, 634 (2d Cir. 1980) (citing *Manual for Complex Litigation* § 1.46 at 55 n.10 (1977)). "Courts determine the fairness of a settlement by looking both at the terms of the settlement and the negotiation process leading up to it." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008). As detailed below, both the negotiation process and the terms of the Settlement support a finding of fairness. As such, Lead Plaintiff and Lead Counsel respectfully submit that preliminary approval is warranted.

1. The Settlement Was Negotiated at Arm's-Length and Is Supported by Lead Plaintiff and Experienced Counsel

The Settlement was negotiated at arm's-length by counsel who are experienced in complex securities litigation and who were acting in an informed manner. During the mediation process, the parties submitted confidential mediation statements and participated in mediated settlement negotiations before the Mediator. At the conclusion of the mediation, after continued

discussions with the Mediator in the weeks that followed, the parties accepted the Mediator's proposal to settle and release all claims for $8.5 million in cash. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("mediator's involvement . . . ensure[d] that the proceedings were free of collusion and undue pressure"); *see also In re Advanced Battery Techs., Sec. Litig.*, 298 F.R.D. 171, 179 (S.D.N.Y. 2014) ("[A] strong initial presumption of fairness attaches to the proposed settlement, if, as here, the settlement is reached by experienced counsel after arm's-length negotiations."); *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689, 2003 WL 22244676, *4 (S.D.N.Y. Sept. 29, 2003) ("[T]hat the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable.").

Lead Counsel and Lead Plaintiff consider the proposed settlement to be an excellent outcome for the Settlement Class in light of their understanding of the Action's strengths and weaknesses. That understanding arises from Lead Counsel's: (i) initial pre-filing factual investigation; (ii) research and filing of extremely thorough and detailed amended complaints; (iii) consultations with damages and legal experts; (iv) analysis of the law applicable to the parties' claims and defenses; and (v) intensive settlement negotiations including mediation sessions facilitated by a private mediator. These circumstances give rise to a presumption of fairness. The Settlement was reached only after the parties were sufficiently familiar with the factual and legal issues of this case which enabled them to evaluate the case on its merits and agree on a settlement figure that was acceptable to Defendants, but also reasonable, fair, and adequate to the Class.

2. The Settlement Terms Are Fair, Reasonable and Adequate Under the *Grinnell* Factors

In determining whether the substantive terms of a settlement are fair, reasonable, and adequate, courts in this Circuit look to the *Grinnell* factors.[4] An evaluation of these factors weighs in favor of preliminary approval of the proposed settlement.

a. Continued Litigation Would Be Complex, Expensive, and Protracted

Courts have consistently recognized that the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement, especially in a securities class action. *See, e.g.*, *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* MDL No. 1500, 02 Civ. 5575, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006); *Hicks v. Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *5-6 (S.D.N.Y. Oct. 24, 2005).

Reaching a settlement at this juncture avoids the uncertainty of the class certification and summary judgment phases of the litigation, and, assuming Lead Plaintiff's success at these stages, a complex and costly trial and likely appeals. Throughout this process Lead Plaintiff would face numerous hurdles such as challenges to loss causation, and arguments that there were no actionable misrepresentations during the Class Period, no recoverable damages, that any

[4] These factors are: (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 through 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. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Because the second *Grinnell* factor – the reaction of the class to the settlement – is only applicable at the "fairness hearing" stage, it is not addressed below.

misrepresentations or omissions were not material, and that any omitted information was not subject to a duty of disclosure.

Moreover, even if Lead Plaintiff were to prevail at all stages of the litigation, any potential recovery (in the absence of a settlement) likely would only occur years in the future, substantially delaying payment to the Settlement Class, and only after costly appeals and additional protracted post-judgment and post-appeal proceedings in Malaysia to enforce such judgment against Malaysian defendants. By contrast, the Settlement offers the opportunity to provide definite recompense to the Settlement Class now. *See Hicks*, 2005 WL 2757792, at *6 ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

b. Lead Plaintiff Has Sufficient Information to Make an Informed Decision as to Settlement

The third *Grinnell* factor, which looks to the "stage of the proceedings and the amount of discovery completed," *Wal-Mart*, 396 F.3d at 117, focuses on whether the plaintiffs "obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207, 2010 WL 3119374, at *3 (S.D.N.Y. Aug. 6, 2010). As noted above, the proposed Settlement follows extensive investigation, motion practice and mediation discussions. Accordingly, this factor also supports approval of the Settlement.

c. Lead Plaintiff Faced Significant Risks in Establishing Liability and Damages

In analyzing the risks concerning liability, the Court does not "need to decide the merits of the case or resolve unsettled legal questions." *Cinelli v. MCS Claim Servs., Inc.*, 236 F.R.D. 118, 121 (E.D.N.Y. 2006) (internal quotations and alterations omitted). Rather, the Court weighs the likelihood of success on the merits against the relief provided by the Settlement. *See id.*

Courts routinely approve settlements where plaintiffs would have faced significant legal and factual obstacles to establishing liability. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

In assessing the Settlement, the Court should balance the benefits afforded the Settlement Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See AOL Time Warner,* 2006 WL 903236, at *11 (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *In re Alloy, Inc. Sec. Litig.*, No. 03 Civ. 1597, 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (finding that issues present in a securities action presented significant hurdles to proving liability).

While Lead Counsel believes that they would prove Lead Plaintiff's claims, they also recognize that they would face substantial hurdles. First, Lead Plaintiff would bear the burden of showing that the evidence they elicited during discovery was sufficient to establish its claims despite any credible defenses. Although Lead Plaintiff believes that documentary and testimonial evidence would support its claims, there is no way to determine without substantial additional litigation whether such evidence would withstand a summary judgment motion, and would convince a jury to accept Lead Plaintiff's theory over Defendants' competing narrative. Among other factual defenses, Defendants have argued that MOL's: (i) misstatements regarding MOL's revenue and revenue recognition policies were immaterial; and (ii) that the Offering Documents were not false and/or misleading because they identified certain material weakness in internal controls and complied with MOL's disclosure obligations.

Second, Lead Plaintiff would also face the risk that they would be unable to prevail on questions concerning loss causation and damages. *See In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993) (approving settlement of a small percentage of the total damages sought because the magnitude of damages often becomes a "battle of experts . . . with no guarantee of the outcome"); *see also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) *aff'd*, 117 F.3d 721 (2d Cir. 1997). To prevail on those issues, Lead Plaintiff would be required, with the assistance of an expert, to defeat Defendants' expert-assisted contentions that the price of MOL ADS declined for reasons unrelated to correction of any misleading statements in the Offering Documents.

Further, at the summary judgment stage, Defendants would likely continue to challenge Lead Plaintiff's calculation of damages or argue that any decline in the price of MOL ADS resulted from factors other than disclosures relating to MOL's restated financial information or its disappointing Q3 results. Even if the Action were permitted to go to trial, it is not possible to determine which party's expert the jury would find more credible.

Accordingly, the proposed class faces a very real risk of no recovery, possibly after years of additional proceedings absent settlement. Conversely, the Settlement will provide tangible, certain and substantial relief to the proposed class now, "without subjecting them to the risks, complexity, duration, and expense of continuing litigation." *In re Global Crossing*, 225 F.R.D. at 456-57.

d. Risks of Maintaining Class Action Status Through Trial

Lead Counsel is confident that it would have obtained class action status and maintained that status through trial. Nonetheless, Defendants would likely raise challenges to class certification, and would likely move to de-certify the Class before trial or on appeal at the conclusion of trial, even if Lead Plaintiff's class certification motion were successful. *See* Fed.

R. Civ. P. 23(c); *Chatelain*, 805 F. Supp. at 214 ("Even if certified, the class would face the risk of decertification. This factor indicates that settlement is advantageous to the class at this time.").

e. Ability to Withstand Greater Judgment

MOL's solvency is questionable. MOL's October 9, 2014 IPO was priced at $12.50 per ADS but MOL ADS currently trades below $0.75 per ADS. The Underwriter Defendants may be solvent but there is no guarantee that Lead Plaintiff would be to overcome their due diligence defense (a defense that is not available to MOL). Furthermore, even if all Defendants were capable of withstanding a greater judgment – which is not a certainty here – that factor alone is insufficient to defeat approval of the Settlement, especially where, as here, the other *Grinnell* factors weigh in support of approving the Settlement. *See D'Amato*, 236 F.3d at 86 (the ability to withstand higher judgment, "standing alone, does not suggest that the settlement is unfair"); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 1695, 2007 WL 4115809, at *11 (S.D.N.Y. Nov. 7, 2007) (defendant's substantial net worth "alone does not prevent the Court from approving the Settlement where the other *Grinnell* factors are satisfied").

f. The Settlement Amount Is in the Range of Reasonableness in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The size of the Settlement provides support for its reasonableness when viewed in light of the best possible recovery and all of the risks of litigation. *See Wal-Mart*, 396 F.3d at 119 ("[t]here is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion") (internal citation omitted).

According to a 2016 report by NERA Economic Consulting entitled "Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review," the "median of settlement value as a percentage of investor losses" was 8.6% for cases with investor losses in the range of $20 to 49

million. *See* Hume Decl. Ex. 2 at 33. Accordingly, the $8.5 million settlement here, which represents over 19% of the estimated class-wide damages of $43.7 million, represents a truly remarkable result. Thus, the Settlement represents a recovery well in excess of the median settlement for securities class actions with comparable estimated class-wide damages in recent years.

The Settlement is even more impressive when one considers the very real risks and challenges that plaintiffs and the Class would have experienced collecting on any judgment in the event that plaintiffs were to succeed at trial on liability and damage issues. MOL and the Individual Defendants are residents of Malaysia. There is considerable uncertainty as to whether a Malaysian court would enforce a U.S. class action judgment against Malaysian defendants. Needless to say, this risk does not exist in most PSLRA actions, as they generally involve defendants that are based, or have some presence, in the United States.

B. A Settlement Class Should Be Certified

In granting preliminary settlement approval, the Court should also certify the Settlement Class for purposes of the Settlement under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure.

It is well-settled that a court may certify a class for settlement purposes, *see Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144, 2009 WL 5178546, at *8 (S.D.N.Y. Dec. 23, 2009), provided that the court conducts an inquiry under Rules 23(a) and (b). *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). While a class generally must meet all of the requirements of Rule 23, "[s]ettlement is relevant to a class certification" and is "a factor in the calculus." *Amchem Prods., Inc. v.*

Windsor, 521 U.S. 591, 619, 622 (1997).[5] Lead Plaintiff respectfully submits that the Court should: make a determination that the proposed settlement class satisfies Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, and at least one of the subsections of Rule 23(b); and provisionally certify the settlement class, and appoint Kirby McInerney LLP as Lead Class Counsel and Tap Retirement Fund as the class representative.

Applying the allocations of the Settlement Amount developed for the Plan of Allocation, Class Members would receive an average of approximately $0.44 per affected share before Court-approved fees and expenses and costs of notice and claims administration. This figure also assumes that every eligible Class Member asserts a valid claim. The actual claim rate is likely to be much less than 100%, making the proportional recovery per claimant much higher.

As discussed below, all of the certification requirements for settlement purposes are met for this proposed settlement class, and Defendants consent to provisional certification (for settlement purposes only). *See* Hume Decl., Ex. 1 (Stipulation of Settlement) at ¶¶ 43, 72.[6]

1. Numerosity

The numerosity requirement is satisfied when a plaintiff can demonstrate that "the class is so numerous that joinder of all members is impracticable." *Comer v. Cisneros*, 37 F.3d 775, 796 (2d Cir. 1994) (quoting Fed. R. Civ. P. 23). In satisfying the numerosity requirement, "a

[5] In determining whether to certify a settlement class, the manageability concerns of Rule 23(b)(3) are not at issue. *See Amchem*, 521 U.S. at 593.

[6] *See Newberg*, § 11.27 at 11-40 ("When the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only."); *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989) ("It is appropriate for the parties to a class action suit to negotiate a proposed settlement of the action prior to certification of the class."), *aff'd*, 907 F.2d 1295 (2d Cir. 1990).

plaintiff need not show that joinder is impossible. Nor need the plaintiff know the exact number of class members." *Saddle Rock Partners Ltd. v. Hiatt*, No. 96 Civ. 9474, 2000 WL 1182793, at *2 (S.D.N.Y. Aug. 21, 2000) (citations omitted). Rather, while "[t]here is no strict numerical test for determining impracticability of joinder[,] . . . [w]hen class size reaches substantial proportions . . . the impracticability requirement is usually satisfied by the numbers alone." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).[7] Judicial consensus is that a class with as few as 40 members satisfies the requirement.[8] Moreover, "[i]n securities fraud actions brought against publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855, 2003 WL 22077464, at *2 (S.D.N.Y. Sept. 8, 2003) (quoting *In re Frontier Ins. Grp., Inc. Sec. Litig.*, 172 F.R.D. 31, 40 (E.D.N.Y. 1997)).[9]

Lead Plaintiff believes that the Settlement Class consists of thousands of geographically diverse members. Throughout the Class Period, investors actively traded MOL ADS on the NASDAQ stock exchange with approximately 13.5 million ADS issued, average weekly trading volume of approximately 3,456,059 shares and average daily volume of approximately 756,154

---

[7] *See, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (citing *Marisol A. v. Giuliani*, 929 F. Supp. 662, 689-90 (S.D.N.Y. 1996)).

[8] *See, e.g., Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *In re NTL, Inc. Sec. Litig.*, No. 02 Civ. 3013, 2006 WL 330113, at *5 (S.D.N.Y. Feb. 14, 2006).

[9] *See In re Globalstar Sec. Litig.*, No. 01 Civ. 1748, 2004 WL 2754674, at *3 (S.D.N.Y. Dec. 1, 2004) ("based upon the number of shares outstanding . . . it is reasonable to assume that the number of class members is in the hundreds, if not thousands. Plaintiffs need not set forth an exact class size as a precondition to show numerosity"); *Dietrich v. Bauer*, 192 F.R.D. 119, 123 (S.D.N.Y. 2000); *In re Ashanti Goldfields Sec. Litig.*, No. 00 Civ. 717, 2004 WL 626810, at *11-12 (E.D.N.Y. Mar. 30, 2004).

shares. *See* Hume Decl., Ex. 3. Thus, numerosity is readily established. *See, e.g.*, *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 423 (S.D.N.Y. 2014) (numerosity requirement satisfied with a proposed class of purchasers of common stock of a corporation with millions of shares outstanding and average weekly trading volume of 6 million); *In re Frontier Ins. Grp. Sec. Litig.*, 172 F.R.D. at 40 (E.D.N.Y. 1997) (numerosity requirement met with 13 million shares of common stock outstanding).

2. Commonality

Rule 23(a)(2) requires that, in order for an action to be properly maintained as a class action, there must be questions of law or fact common to the class. The Second Circuit has held that the commonality requirement is satisfied if the named plaintiffs share at least one question of fact or law in common with the purported class. *See Marisol A.*, 126 F.3d at 376. Federal securities cases like this one easily meet the commonality requirement, which is satisfied where "putative class members have been injured by similar material misrepresentations and omissions." *Initial Pub. Offering*, 243 F.R.D. 79, 85 (S.D.N.Y. 2007). There are numerous questions of law or fact common to plaintiffs and the Settlement Class including: (a) whether the federal securities laws were violated by Defendants' acts as alleged herein; (b) whether statements disseminated by Defendants to the investing public during the Class Period omitted and/or misrepresented material facts about MOL's business and operations; and (c) whether the members of the Settlement Class have sustained damages and, if so, what is the proper measure of such damages. These issues are prototypical examples of those which have been found to present "common questions" of law or fact meriting class certification.

3. Typicality

Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement is readily met where "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (citation omitted); *see In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 375 (S.D.N.Y. 2000); *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y. 1986). In this regard, the requirements of commonality and typicality tend to merge. *See Marisol A.*, 126 F.3d at 376. In essence, "[t]he crux of both requirements is to ensure that 'maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id*. (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). There is no requirement, however, that the claims of all members of a purported class be identical. *In re Marsh*, 2009 WL 5178546, at *10; *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 379 (S.D.N.Y. 1996); *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981) (internal citations omitted).

The allegations in this case include a common course of unlawful conduct by the Defendants. Lead Plaintiff, like all who comprise the putative Settlement Class, acquired MOL ADS pursuant to MOL's Offering Documents, which misrepresented and/or omitted material information. Lead Plaintiff and their fellow Settlement Class members were all damaged when the value of MOL ADS declined materially following the disclosures of accounting errors that forced MOL to delay reporting of its Q3 results. Accordingly, Lead Plaintiff's and the

Settlement Class' interests are directly aligned and Lead Plaintiff's claims are typical of the proposed Settlement Class.

4. Adequacy

Federal Rule of Civil Procedure Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interest of the class." The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625 (citing *Falcon*, 457 U.S. 147, 157-58, n.13). The requirement is met if it appears that: (1) the named plaintiffs' interests are not antagonistic to the class' interests; and (2) the named plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation. *See In re Drexel Burnham Lambert Grp.*, 960 F.2d 285, 291 (2d Cir. 1992); *In re Marsh*, 2009 WL 5178546, at *10.

Lead Counsel is eminently qualified, experienced and able to conduct this litigation. Kirby McInerney LLP specializes in class action and complex securities litigation in courts throughout the country, as documented in its résumé. *See* Hume Decl., Ex. 4. Moreover, as discussed above, because Lead Plaintiff and the Settlement Class were injured by the same alleged misconduct, their interests and claims are coextensive.

5. Predominance of Common Questions and Superiority to Other Methods of Adjudication

To certify a class under Rule 23(b)(3), a court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *In re Marsh*, 2009 WL 5178546, at *11. The Supreme Court has defined this inquiry as establishing "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. This inquiry is "similar" to

Rule 23(a)(3)'s typicality requirement. *Id*. at 623 n.18. The Court added that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Id*. at 625.

Here, the predominance requirement is readily satisfied. The essence of the Complaint is that the Offering Documents contained material misrepresentations and/or omissions concerning MOL's accounting practices and business prospects. Under these circumstances, Lead Plaintiff's Securities Act claims are susceptible to proof applicable to all class members. Lead Plaintiff will prove each element of its claim through common evidence of Defendants' public statements, MOL's internal business practices and procedures, and the impact of corrective disclosures on MOL ADS which traded on an efficient market.

Rule 23(b)(3) also sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: "(A) the class members' interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . class members; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Courts have recognized that the "class action is uniquely suited to resolving securities claims," because "the prohibitive cost of instituting individual actions" in such cases gives class members "limited interest in individually controlling the prosecution or defense of separate actions." *In re Marsh*, 2009 WL 5178546, at *12.

The scope and complexity of Lead Plaintiff's claims against Defendants, together with the high cost of individualized litigation, make it unlikely that the vast majority of the Settlement Class Members would be able to obtain relief without class certification. Moreover, it is clearly

desirable to concentrate the claims of all Settlement Class Members in this forum, and Lead Plaintiff does not foresee any difficulties in the management of this Action as a class action. Accordingly, the requirements of Rule 23(b)(3) are satisfied.

C. The Form of Notice Should be Approved

1. The Proposed Schedule and Form of Notice

If the Court preliminarily approves the Settlement, Lead Plaintiff proposes two forms of notice, a long form notice ("Notice") and a summary notice ("Summary Notice"). The Notice will be sent by mail to all identifiable Settlement Class Members at their last known address, and the Summary Notice will be published once in *Investor's Business Daily* and issued once electronically over the *PRNewswire*, an internet wire service, for those Settlement Class Members whose addresses cannot be identified. Substantively, the Notices: describe the Action and define the Settlement Class; describe the claims, defenses, and issues on which the parties disagree; notify Settlement Class Members of their rights to appear, object, and opt out; clearly explain the binding nature of the settlement; and set forth the plan of allocation pursuant to which the Net Settlement Fund would be allocated among Settlement Class Members. *See generally* Exs. A-1 and A-2 to the Stipulation. Consistent with the PSLRA, the Notices also provide the relevant statements of recovery, potential outcomes of the case, fees and expenses sought, attorney information, and the reasons for the Settlement. *See* 15 U.S.C. § 77z-1(a)(7).

2. The Proposed Method of Class Notice Is Appropriate

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Accordingly, the Second Circuit has held

that the adequacy of a class action settlement notice is "measured by reasonableness." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007).[10]

"For any class certified under Rule 23(b)(3), the court must direct to class members 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. Rule 23(c)(2)(B). Where "the parties seek simultaneously to certify a settlement class and to settle a class action, the elements of Rule 23(c) notice (for class certification) are combined with the elements of Rule 23(e) notice (for settlement or dismissal)." *In re Global Crossing*, 225 F.R.D. at 448. Rule 23(c)(2) requires the "best practicable notice," while Rule 23(e) requires notice that is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 527 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998). Neither Rule 23 nor due process requires actual notice to each possible class member.[11]

A combined notice under Rule 23(c)(2) and Rule 23(e) must include the following information: (1) notification that the Court will exclude a class member if he/she/it so requests by a certain date; (2) notification that the judgment will include all members of the class who do not request exclusion; (3) notification that any class member who does not request exclusion may enter an appearance through counsel; (4) the nature of the pending litigation; (5) the settlement's

[10] "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice 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. Notice is adequate if it may be understood by the average class member." *Id*. (internal citations omitted).

[11] *See In re Marsh,* 2009 WL 5178546, at *23-24; *Buxbaum v. Deutsche Bank AG*, 216 F.R.D. 72, 80-81 (S.D.N.Y. 2003); *In re NASDAQ Market-Makers Antitrust Litig.,* No. 94 Civ. 3996, 1999 WL 395407, at *2 n.3 (S.D.N.Y. June 15, 1999).

general terms; (6) notification that complete information is available from the court files; and (7) notification that any class member may appear and be heard at the Fairness Hearing. The PSLRA imposes additional requirements for notice in securities fraud actions.[12]

Here, the proposed Notice and Summary Notice, *see* Stipulation Exs. A-1 & A-2, satisfy Rule 23, and the PSLRA's statutory requirements. Moreover, due process is satisfied because the notice program includes both individual notice and general publication. *See, e.g.*, *In re Marsh* 2009 WL 5178546, at *23-24; *Buxbaum*, 216 F.R.D. at 81. Because the Notices give absent Settlement Class Members reasonable notices of their rights, the Court should approve them.

D. Garden City Group Should be Appointed as Settlement Administrator

Lead Plaintiff proposes that the Court appoint Garden City Group, LLC ("GCG") as Settlement Administrator to administer the settlement under the supervision of Lead Counsel. GCG was one of the firms that submitted proposals in response to a request for proposal by Lead Counsel. GCG has extensive experience in administering settlement of securities class actions (*see* Hume Decl. Ex. 5), and based on Lead Counsel's review, GCG submitted a proposal that

[12] These additional requirements are: (a) the amount of the settlement proposed to be distributed to the parties as determined in the aggregate and on an average per-share basis; (b) if the parties do not agree on the average amount of damages per share that would be recoverable in the event plaintiffs prevailed, as is the case here, a statement from each settling party concerning the issue(s) on which the parties disagree; (c) a statement indicating which parties or counsel intend to make an application for attorneys' fees and costs, the amount that will be sought, and a brief explanation in support of the request; (d) the name, telephone number, and address of one or more representatives of counsel for the Class who will be reasonably available to answer questions concerning any matter contained in the notice; (e) a brief statement explaining why the parties are proposing the settlement; and (f) such other information as may be required by the Court. 15 U.S.C. § 77z-1(a)(7).

provided that the claims of settlement class members would be processed in a cost-efficient and timely manner.

VI. CONCLUSION

For the reasons set forth in this memorandum, Lead Plaintiff respectfully requests that the Court enter an order: (1) granting preliminary approval of the proposed Settlement; (2) conditionally certifying the Settlement Class for settlement purposes; (3) appointing Interim Lead Counsel as Lead Class Counsel; (4) approving the parties' proposed form and method of giving notice of the pendency of this Action and the Settlement to the Settlement Class; (5) directing that notice be given to the Settlement Class members; and (6) scheduling a hearing at which the Court considers (a) the parties' request for final approval of the Settlement Class, the Settlement, the Plan of Allocation, and entry of the Judgment and (b) Interim Lead Counsel's application for an award of attorneys' fees and reimbursement of expenses.

Dated: April 12, 2016

Respectfully submitted,

KIRBY McINERNEY LLP

By: /s/ *Daniel Hume*

Daniel Hume
Ira M. Press
Meghan J. Summers
825 Third Avenue, 16th Floor
New York, NY 10022
Telephone: (212) 371-6600
Facsimile: (212) 751-2540

Lead Counsel for Class and Counsel for Lead Plaintiff TAP Retirement Fund