

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**IN RE MARSH & MCLENNAN COMPANIES,
INC. SECURITIES LITIGATION**

:
: CIVIL ACTION
: **NO: 04-CV-08144 (CM)**
:
:

**LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR FINAL APPROVAL OF SETTLEMENT**

GRANT & EISENHOFER P.A.
Jay W. Eisenhofer
Keith M. Fleischman
485 Lexington Avenue
29th Floor
New York, NY 10017
Telephone: (646) 722-8500
Facsimile: (646) 722-8501

-and-

Geoffrey C. Jarvis
Stephen G. Grygiel (*admitted pro hac vice*)
Lesley E. Weaver (*admitted pro hac vice*)
Mary S. Thomas (*admitted pro hac vice*)
James P. McEvelly, III (*admitted pro hac vice*)
1201 North Market Street
Wilmington, DE 19801
Telephone: (302) 622-7000
Facsimile: (302) 622-7100

jeisenhofer@gelaw.com
kfleischman@gelaw.com
gjarvis@gelaw.com
sgrygiel@gelaw.com
lweaver@gelaw.com
mthomas@gelaw.com
jmcevilly@gelaw.com

BERNSTEIN LIEBHARD LLP
Stanley D. Bernstein
U. Seth Ottensoser
Felecia L. Stern
Brian S. Cohen
Michael S. Bigin
Stephanie M. Beige
10 East 40th Street, 22nd Floor
New York, NY 10016
Telephone: (212) 779-1414
Facsimile: (212) 779-3218

bernstein@bernlieb.com
ottensoser@bernlieb.com
stern@bernlieb.com
cohen@bernlieb.com
begin@bernlieb.com
beige@bernlieb.com

Co-Lead Counsel for Class Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

FACTUAL BACKGROUND..... 2

 A. Summary Of The Settlement 3

 B. Notice Of The Settlement 4

 C. The Objections Received 4

ARGUMENT 5

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE 5

 A. Standards For Approval Of A Class Action Settlement 5

 B. Application Of The Grinnell Factors Supports Approval Of The Settlement 6

 1. The Complexity, Expense And Likely Duration Of The Litigation 6

 2. The Reaction Of The Class To The Settlement 8

 3. The Stage Of The Proceedings And The Amount
 Of Discovery Completed 8

 4. The Risks Of Establishing Liability..... 9

 5. The Risks Of Establishing Damages..... 10

 6. The Risk Of Maintaining The Class Action Through Trial..... 11

 7. The Ability Of The Defendants To Withstand A Greater Judgment 12

 8. The Range Of Reasonableness Of The Settlement Fund
 In Light Of The Best Possible Recovery And All The
 Attendant Risks Of Litigation..... 12

 C. The Proposed Settlement Is Procedurally Fair..... 13

II. CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE
 UNDER FEDERAL RULE OF CIVIL PROCEDURE 23..... 14

 A. This Case Satisfies The Prerequisites Of Rule 23(a) 15

 1. The Settlement Class Is Sufficiently Numerous 16

 2. There Are Questions Of Law Or Fact
 Common To Members Of The Class 17

3.	Lead Plaintiffs’ Claims Are Typical Of Those Of The Class	18
4.	Lead Plaintiffs Have Fairly And Adequately Protected The Interests Of The Class.....	19
B.	The Class Representatives’ Claims Satisfy The Prerequisites Of Rule 23(b)(3)..	20
1.	Common Questions Of Law Or Fact Predominate	20
2.	A Class Action Is The Superior Method Of Adjudication.....	21
III.	TRANSMISSION OF THE NOTICE TO THE CLASS SATISFIED BOTH THE PRELIMINARY ORDER AND APPLICABLE LAW	23
IV.	THE PLAN OF ALLOCATION IS REASONABLE, FAIR AND EQUITABLE	24
	CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Abdul-Malik v. Coombe</i> , 1996 WL 706914 (S.D.N.Y. Dec. 6 1996)	18
<i>Albert Fadem Trust v. Duke Energy Corp.</i> , 214 F. Supp. 2d 341 (S.D.N.Y. 2002).....	22
<i>In re AOL Time Warner, Inc.</i> , 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006).....	10, 11
<i>In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.</i> , 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006).....	22
<i>In re Baldwin-United Corp.</i> , 105 F.R.D. 475 (S.D.N.Y. 1984)	15, 16
<i>In re Baldwin-United Corp. Litig.</i> , 122 F.R.D. 424 (S.D.N.Y. 1986)	18
<i>Banyai v. Mazur</i> , 2007 WL 927583 (S.D.N.Y. Mar. 27, 2007)	13
<i>Berwecky v. Bear, Stearns & Co.</i> , 197 F.R.D. 65 (S.D.N.Y. 2000)	17
<i>City of Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974)	5, 6, 12
<i>County of Suffolk v. Long Island Lighting Co.</i> , 907 F.2d 1295 (2d Cir. 1990).....	6
<i>In re Crazy Eddie Sec. Litig.</i> , 135 F.R.D. 39 (E.D.N.Y. 1991).....	19
<i>Cutler v. Perales</i> , 128 F.R.D. 39 (S.D.N.Y. 1989)	17
<i>In re Deutsche Telekom AG Sec. Litig.</i> , 229 F. Supp. 2d 277 (S.D.N.Y. 2002).....	16
<i>Dietrich v. Bauer</i> , 192 F.R.D. 119 (S.D.N.Y. 2000)	16

<i>In re Drexel Burnham Lambert Group, Inc.</i> , 960 F.2d 285 (2d Cir. 1992).....	20
<i>Dura-Bilt Corp. v. Chase Manhattan Corp.</i> , 89 F.R.D. 87 (S.D.N.Y. 1999)	18
<i>In re EVCI Career Colleges Holding Corp. Sec. Litig.</i> , 2007 WL 2230177 (S.D.N.Y. Jul. 27, 2007)	<i>passim</i>
<i>German v. Fed. Home Mortgage Loan Corp.</i> , 885 F. Supp. 537 (S.D.N.Y. 1995).....	17
<i>In re Gilat Satellite Networks, Ltd.</i> , 2007 WL 1191048 (E.D.N.Y. Apr. 19, 2007)	7
<i>In re Global Crossing Sec. & ERISA Litig.</i> , 225 F.R.D. 436 (S.D.N.Y. 2004)	<i>passim</i>
<i>In re Globalstar Sec. Litig.</i> , 2004 WL 2754674 (S.D.N.Y. Dec. 1, 2004)	16
<i>Green v. Wolf Corp.</i> , 406 F.2d 291 (2d Cir. 1968).....	21, 22
<i>Hnot v. Willis Group Holdings Ltd.</i> , 241 F.R.D. 204 (S.D.N.Y. 2007)	15
<i>In re Initial Pub. Offering Sec. Litig.</i> , 471 F.3d 24 (2d Cir. 2006).....	11, 15
<i>In re Lloyd's Am. Trust Fund. Litig.</i> , 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002).....	9, 10
<i>In re Luxottica Group S.p.A. Litig.</i> , 233 F.R.D. 306 (E.D.N.Y. 2006)	7, 10
<i>Maley v. Del Global Tech. Corp.</i> , 186 F. Supp. 2d 358 (S.D.N.Y. 2002).....	10
<i>In re Marsh & McLennan, Inc. Sec. Litig.</i> , No. 1744, 04 Civ. 8144, 2006 WL 2057194 (S.D.N.Y. Jul. 19, 2006)	3, 9, 21
<i>Maywalt v. Parker & Parsley Petroleum Co.</i> , 67 F.3d 1072 (2d Cir. 1995).....	5
<i>In re NASDAQ Market Makers</i> , 187 F.R.D. 465 (S.D.N.Y. 1998)	13

<i>In re NASDAQ Market-Makers Antitrust Litig.</i> , 172 F.R.D. 119 (S.D.N.Y. 1997)	18
<i>Newman v. Stein</i> 464 F.2d 689 (2d Cir. 1972).....	12
<i>In re Nortel Networks Corp. Sec. Litig.</i> , 2003 WL 22077464 (S.D.N.Y. Sept. 8, 2003).....	15
<i>In re Omnicom Group, Inc. Sec. Litig.</i> , 2007 WL 1300781 (S.D.N.Y. May 1, 2007)	17, 18, 20
<i>Oscar Private Equity Inv. v. Allegiance Telecom, Inc.</i> , 2007 WL 1430225 (5th Cir. May 16, 2007)	11
<i>In re Oxford Health Plans, Inc. Sec. Litig.</i> , 191 F.R.D. 369 (S.D.N.Y. 2000)	16, 20
<i>In re PaineWebber Ltd. Partnerships Litig.</i> , 171 F.R.D. 104 (S.D.N.Y.), <i>aff'd</i> , 117 F.3d 721 (2d Cir. 1997).....	5, 12
<i>In re Prudential Ins. Co. of America Sales Practices Litig.</i> , 962 F. Supp. 450 (D.N.J. 1997)	23, 24
<i>In re Prudential Sec. Inc. Ltd. P'ship Litig.</i> , 107 F.3d 3 (2d Cir. 1996)	22
<i>In re Prudential Sec. Inc. P'ships Litig.</i> , 163 F.R.D. 200 (S.D.N.Y. 1995)	15, 21
<i>Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.</i> , 482 F.3d 372 (5th Cir. 2007)	11
<i>Robinson v. Metro-North Commuter R.R. Co.</i> , 267 F.3d 147 (2d Cir. 2001).....	18
<i>In re Salomon Analyst Metromedia</i> , 236 F.R.D. 208 (S.D.N.Y. 2006)	21
<i>Strougo v. Bassini</i> , 258 F. Supp. 2d 254 (S.D.N.Y. 2003).....	8, 10
<i>In re Sumitomo Copper Litig.</i> , 189 F.R.D. 274 (S.D.N.Y. 1999)	<i>passim</i>
<i>In re Telik, Inc. Sec. Litig.</i> , 576 F. Supp. 2d 570 (S.D.N.Y. 2008)	<i>passim</i>

<i>Thompson v. Metropolitan Life Ins. Co.</i> , 216 F.R.D. 55 (S.D.N.Y. 2003)	23
<i>In re Towers Fin. Corp. Noteholders Litig.</i> , 177 F.R.D. 167 (S.D.N.Y. 1997)	17
<i>Trief v. Dun & Bradstreet Corp.</i> , 144 F.R.D. 193 (S.D.N.Y. 1992)	18
<i>In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.</i> , 718 F. Supp. 1099 (S.D.N.Y. 1989).....	12
<i>In re Vivendi Universal SA Sec. Litig.</i> , 242 F.R.D. 76 (S.D.N.Y. 2007)	<i>passim</i>
<i>Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.</i> , 396 F.3d 96 (2d Cir. 2005).....	8
<i>In re Warner Commc'ns Sec. Litig.</i> , 798 F.2d 35 (2d Cir. 1986).....	22
<i>Weinberger v. Kendrick</i> , 698 F.2d 61 (2d Cir. 1982).....	15
<i>White v. First American Registry, Inc.</i> , 2007 WL 703926 (S.D.N.Y. March 7, 2007)	6, 14
<i>In re WorldCom, Inc. Sec. Litig.</i> , 388 F. Supp. 2d 319 (S.D.N.Y. 2005).....	8
<i>In re WorldCom, Inc. Sec. Litig.</i> , 2004 WL 2591402 (S.D.N.Y. Nov. 12, 2004).....	5
<i>Zerkle v. Cleveland-Cliffs Iron Co.</i> , 52 F.R.D. 151 (S.D.N.Y. 1971)	12

RULES

Fed. R. Civ. P. 23	<i>passim</i>
--------------------------	---------------

Lead Plaintiffs the Public Employees Retirement System of Ohio, the State Teachers Retirement System of Ohio, the Ohio Bureau of Workers' Compensation, and the State of New Jersey, Department of the Treasury, Division of Investment, on behalf of itself and the Common Pension Fund A, the DCP Equity Fund and the Supplemental Annuity Collective Trust Fund (collectively, "Lead Plaintiffs"), on behalf of themselves and the Class (as herein defined), respectfully submit this memorandum of law in support of their motion for final approval of a proposed settlement (the "Settlement"), with Defendants Marsh & McLennan Companies, Inc. ("MMC"), Marsh, Inc. ("Marsh"), Jeffrey Greenberg ("Greenberg"), and Roger Egan ("Egan") (collectively, "Defendants"). Lead Plaintiffs submit that the Settlement, which the Court preliminarily approved in its Order of November 10, 2009 ("the Preliminary Approval Order"), is fair and in the best interests of the Class.¹

After more than five years of intense litigation, including the completion of merits discovery, Lead Plaintiffs are convinced that the proposed Settlement of \$400 million is an outstanding result for all Class members. Indeed, this Court itself commented at the preliminary approval hearing that a jury verdict after trial would be "unpredictable" and that even assuming a verdict in Lead Plaintiffs' favor, the Class would likely not see any recovery until 2013, at the earliest.² Moreover, the Court noted that the notice of Settlement (the "Notice") provided to Class members in this action is "the best drafts of these I have ever seen."³ The fact that only a handful of these well-informed Class members offer any objection to the Settlement further demonstrates the significance of the result Lead Plaintiffs achieved.

¹ A copy of the Stipulation and Agreement of Settlement (the "Stipulation") was filed on November 13, 2009 as Docket Item ("D.I.") 300.

² See Nov. 10, 2009 Tr. at 27.

³ *Id.* at 23.

FACTUAL BACKGROUND

Lead Plaintiffs allege that Defendants engaged in a systematic plan to increase insurance placement revenues through improper bid manipulation and illicit client steering, all designed to generate a critical source of income known as “contingent commissions.” Lead Plaintiffs further allege that Defendants violated federal securities laws by making materially false and misleading statements about their contingent commission practices, which caused the price of MMC stock to be artificially inflated during the Class Period (as defined herein), and to precipitously drop when the truth about the scheme was finally revealed, causing hundreds of millions of dollars in losses to investors. A more detailed description of the facts and procedural history is set forth by counsel for Lead Plaintiffs (“Lead Counsel”) in the Joint Declaration of Keith M. Fleischman and Stanley D. Bernstein (the “Joint Declaration” or “Jt. Dcl.”) filed contemporaneously herewith and incorporated herein by reference.

Lead Plaintiffs’ brought claims against all Defendants under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated under Section 10 of the Exchange Act, 17 C.F.R. § 240.10b-5, and 15 U.S.C. § 78(r). Lead Plaintiffs also brought a claim against MMC under Section 11 of the Securities Act of 1933 (the “Securities Act”), 15 U.S.C. §§ 77k. Specifically, Lead Plaintiffs’ Second Amended Consolidated Class Action Complaint (the “Complaint”) (D.I. 142) alleges, *inter alia*, that Defendants lied to the investing public by misrepresenting that: (1) contingent commission payments played no role in Marsh’s recommendations to its clients about which carrier to choose for insurance coverage; (2) contingent commissions were paid in exchange for “services” provided by Marsh to the insurance carriers; and (3) Marsh fully disclosed contingent

commissions to its clients.⁴ Lead Plaintiffs further allege that when the scheme ultimately was revealed in late 2004, following a suit brought by the New York Attorney General (“NYAG”), and the truth about Defendants’ misstatements began to come out, MMC’s stock price collapsed and investors suffered billions of dollars in damages. Although MMC agreed to pay \$850 million to clients to settle the charges brought by the NYAG and related charges by the New York State Insurance Department (the “NYSID”), up until this Settlement the Defendants have paid nothing to MMC shareholders, who have been the only uncompensated victims of Defendants’ fraud.

A. Summary Of The Settlement

The Settlement is the result of several rounds of mediation between Lead Plaintiffs and Defendants, conducted before the Honorable Daniel Weinstein, an experienced mediator and retired Judge of the Superior Court of California. *See* Jt. Dcl. ¶¶ 77-91. Judge Weinstein has submitted an affidavit that is being filed contemporaneously herewith, attesting to his belief that the Settlement is a fair and reasonable resolution of this matter, taking into account the complexities of the issues involved, the strengths and weaknesses of each party’s position, and the uncertainty of continued litigation. *See* Declaration of Judge Weinstein (“Weinstein Decl.”) ¶ 14.

The Settlement provides for the payment of \$400 million for the benefit of Lead Plaintiffs and the Class into a settlement fund (the “Settlement Fund”). Additionally, the Stipulation

⁴ On July 19, 2006 Judge Kram ruled on Defendants’ motion to dismiss a prior version of the Complaint and sustained three classes of alleged misrepresentations: (1) disclosures regarding the nature of services provided in exchange for contingent commissions; (2) disclosures about MMC’s commitment to clients; and (3) disclosures that Marsh’s clients were fully apprised of contingent commissions. *In re Marsh & McLennan Companies, Inc. Sec. Litig.*, MDL No. 1744, 04 Civ. 8144, 2006 WL 2057194, at *16 (S.D.N.Y. Jul. 19, 2006).

allows counsel for Lead Plaintiffs to request an attorneys' fee of up to 13.5% of the Settlement Fund and reimbursement of expenses, including expert witness fees, not to exceed \$13 million, and a request for reimbursement to Lead Plaintiffs.⁵

B. Notice Of The Settlement

Pursuant to the Preliminary Approval Order, Lead Plaintiffs provided Notice of the Settlement to Class members in several significant ways: (1) Lead Plaintiffs, through their claims agent, caused the Court-approved form of Notice to be mailed by first class mail, postage prepaid, to all reasonably identifiable Class members and their nominees (*see* Jt. Dcl. ¶ 96; Young Aff. ¶ 11); (2) Lead Plaintiffs caused a copy of the Summary Notice to be published in the national edition of *The Wall Street Journal* (*see* Jt. Dcl. ¶ 97; Young Aff. ¶ 6); (3) Lead Plaintiffs caused a copy of the Notice to be transmitted over *Business Wire* (*see* Jt. Dcl. ¶ 98; Young Aff. ¶ 6); and (4) Lead Plaintiffs established the web site MMCSecuritiesLitigation.com on which was published the Notice, a Proof of Claim form, various Court documents, and other additional information (*see* Jt. Dcl. ¶ 99; Young Aff. ¶ 7). The Notice described the terms of the Settlement, explained the claims and defenses in the lawsuit, provided instruction for Class members to exclude themselves from the Settlement or to object to any part of the Settlement, provided detailed information about the final Settlement approval hearing, and provided contact information for the claims agent and Lead Plaintiffs' counsel, among other things.

C. The Objections Received

As of this filing, Lead Plaintiffs have received only 7 purported objections from Class members. *See* Jt. Dcl. ¶ 115. In addition, as of this filing, 20 purported Class members have

⁵ A detailed explanation of the requested attorneys' fees and expenses is set forth in Lead Plaintiffs memorandum in support of their request for attorneys' fees and expenses, and in the separate declarations from Lead Counsel.

requested to be excluded from the Settlement, and some of these did not purchase MMC securities during the Class Period. *See* Jt. Dcl. ¶ 113; Young Aff. ¶ 14 .

ARGUMENT

“Settlement approval is within the Court’s discretion, which should be exercised in light of the general judicial policy favoring settlement.” *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *3 (S.D.N.Y. Jul. 27, 2007) (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999)); *see also In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y.), *aff’d*, 117 F.3d 721 (2d Cir. 1997). In evaluating a proposed settlement under Rule 23 of the Federal Rules of Civil Procedure, the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995); *see also In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *10 (S.D.N.Y. Nov. 12, 2004). In a class action settlement, there is a “presumption of correctness” when the settlement is “the product of arms-length negotiations conducted by experienced, capable counsel.” *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (McMahon, J.) (citations omitted); *see also Sumitomo*, 189 F.R.D. at 280 (presumption of fairness where settlement is result of “arms-length negotiations between experienced, capable counsel after meaningful discovery,”) (citing *Manual for Complex Litigation*, Third ¶ 30.42 (1995)).

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. Standards For Approval Of A Class Action Settlement

“The standards governing approval of class action settlements are well-established in this Circuit.” *In re EVCI*, 2007 WL 2230177 at *4 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d

448, 463 (2d Cir. 1974)). In *Grinnell*, the Second Circuit held that the following factors should 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 at 463 (citations omitted); *see also County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990); *In re Telik*, 576 F. Supp. At 575 (“Courts in this Circuit examine the fairness, adequacy and reasonableness of a class action settlement according to the *Grinnell* factors”). “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) (citation omitted). 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.*, 2007 WL 703926, at *2 (S.D.N.Y. March 7, 2007).

B. Application Of The Grinnell Factors Supports Approval Of The Settlement

The Settlement satisfies the *Grinnell* criteria for approval of class action settlements.

1. The Complexity, Expense And Likely Duration Of The Litigation

“In 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.” *In re EVCI*, 2007 WL 2230177 at *5, *quoting Sumitomo*, 189 F.R.D. at 281 (emphasis in

original). This complexity, difficulty and uncertainty is certainly true with respect to the claims in this case. Here, the litigation involved not only complex issues of securities law, but also discrete issues involving the insurance industry and its use and understanding of contingent commissions. *See* Jt. Decl. ¶ 15. These industry-specific issues were complex enough to require Lead Plaintiffs hiring two separate industry experts, at significant expense, to assist Lead Counsel during most of the five-year history of the litigation. *See id.* ¶ 74.

This case would also have been extremely complicated to bring to trial, with the results for Lead Plaintiffs and the Class being very uncertain. According to this Court, the most optimistic estimates would have trial in this case commencing in early 2011, with the Class not receiving any recovery, assuming success, until at least 2013. Nov. 10, 2009 Tr. at 27. Absent the Settlement, there would have been significant additional resources and costs expended to prosecute the claims against the Defendants through trial and the inevitable appeals of any judgments. As the Court stated at the preliminary approval hearing “we were looking ahead to a substantial amount of litigation . . . And if the verdict went against Marsh, it was a certainty that this case was going to be appealed, that the appeal process was going to take up another year at the very least.” *Id.* In contrast, the Settlement offers the opportunity to provide definite and substantial recompense to the Class now, rather than await the uncertain outcome prompted by the effort and time devoted to trial and likely appeals. “Add[ing] on time for a trial and appeals, and the class would have seen no recovery for years. Class counsel properly considered this factor as well.” *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007) (citation omitted.) *See also In re Luxottica Group S.p.A. Sec. Litig.*, 233 F.R.D. 306, 314 (EDNY 2006) (“Post-trial motions and appeals – even dubious ones – are a potential risk in any litigation.”) (citing cases in which large verdicts were overturned on appeal). The

complexity, difficulty and uncertainty of the litigation therefore supports approval of the Settlement.

2. The Reaction Of The Class To The Settlement

The Class's reaction to the Settlement also supports approval. As set forth in the Joint Declaration (¶¶ 96-98) and the Affidavit of Charlene Young (¶¶ 6, 7, 11), Lead Plaintiffs provided Notice by mail and by publication to all ascertainable Class members, and a website was established to handle inquiries. As noted above, this Court has already commented on the high quality of the Notice Lead Plaintiffs provided, and as of this filing Lead Plaintiffs have received only 7 purported objections and 20 requests for exclusion. This is an exceptionally strong indication of the fairness of the Settlement. *See, e.g., In re Telik*, 576 F. Supp. 2d at 577-78 (approving settlement where only three objections filed).⁶

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

At the time of the Settlement, the parties had just completed merits discovery and were in the process of conducting expert depositions. Jt Dcl. ¶ 76. The parties had already exchanged expert reports and rebuttal reports. *Id.* at 74. By this time, Lead Plaintiffs had, *inter alia*; (i) inspected, reviewed and analyzed over 34 million pages of documents produced by Defendants; (ii) subpoenaed 100 non-parties and inspected, reviewed and analyzed over 2 million pages produced by non-parties; (iii) taken and defended over 100 depositions; and (iv) researched the

⁶ *See also, e.g., In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 337-38 (S.D.N.Y. 2005); *Global Crossing*, 225 F.R.D. at 457 (settlement favored by fact that only six timely objections and six untimely objections were filed to the proposed partial settlement) (citations omitted); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005). “[C]ourts routinely approve settlements involving far more dissent than has arisen here.” *Global Crossing*, 225 F.R.D. at 457 (citing, *inter alia*, *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979), in which objections from only 16% of class was held “persuasive” of settlement’s adequacy).

applicable law concerning Lead Plaintiffs' claims, potential defenses thereto, and numerous pre-trial issues. The advanced stage of the litigation and extensive discovery and preparation for trial put the parties' counsel in a position to evaluate the fairness of the proposed settlement. *See In re Telik*, 576 F. Supp. 2d at 578 (finding that this factor supports approval where "[a]fter considerable discovery, Plaintiffs and Lead Counsel were able to realistically evaluate the strengths and weaknesses of the claims"); *see also In re Lloyd's Am. Trust Fund. Litig.*, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002); *see also Sumitomo* 189 F.R.D. at 281-82 (the stage of the proceedings "strongly" favored approval of settlements reached after "[p]laintiffs had conducted extensive discovery, investigation and analyses, and the proceedings were in the advanced stage of pointing or preparing for trial"). These extensive efforts convinced Lead Counsel that the Settlement was fair and in the best interest of the Class. This factor, therefore, strongly support approval.

4. The Risks Of Establishing Liability

While Lead Plaintiffs believe that their claims against the Defendants are valid, there is a real risk that they ultimately might fail to establish Defendants' liability. With respect to the claims under Section 10(b) and Rule 10b-5, for example, this Court explained that Lead Plaintiffs must show that the Defendants "(1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury." *In re Marsh & McLennan, Inc. Sec. Litig.*, 2006 WL 2057194, at *9 (citations omitted).

The Court denied Defendants' motions to dismiss the claims in the Complaint (*Id.* at *19), and while Lead Plaintiffs believe that the Court's decision was correct, it remains true that Lead Plaintiffs may not have prevailed on some or all of their claims at trial. For example, Lead

Plaintiffs may have had difficulty proving that Defendants acted with scienter, or that the alleged decline in MMC's stock price was due entirely to the conduct alleged in the Complaint and not some other unrelated factors. Courts have acknowledged that "the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages." *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) (citations omitted); *see also Luxottica Group*, 233 F.R.D. at 312-13 (finding that "[t]he risks of establishing liability and collecting a judgment were substantial" where defendants vigorously denied the claims against them, and aggressively defended the case on various legal and factual grounds).

5. The Risks Of Establishing Damages

While Lead Plaintiffs believe that they could prove substantial damages at trial, they remain cognizant of the fact that "[a] jury could be swayed by experts for the Defendants, who [c]ould minimize the amount of Plaintiffs' losses." *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 365 (S.D.N.Y. 2002). *See also Strougo*, 258 F. Supp. 2d at 259; *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *21. As the Court explained at the preliminary approval hearing, "if there is anything in this world that is uncertain when one takes one of these cases to trial in a classic battle of the experts over damages, it is what the jury is going to come up with as a number . . ." Nov. 10, 2009 Tr. at 26. The risk of being unable to establish damages attributable to the Defendants' conduct that would exceed the \$400 million payment the proposed Settlement provides to the Class supports approval of this Settlement. *See, e.g., Maley*, 186 F. Supp. 2d at 365 ("Even if plaintiffs . . . were successful in establishing liability, plaintiffs have avoided substantial risks in proving damages by virtue of this proposed Class Settlement.").

6. The Risk Of Maintaining The Class Action Through Trial

There is also the possibility that the Court might have denied Lead Plaintiffs' motion for class certification, and thereby precluded any recovery for the Class whatsoever. At the time of the Settlement, the motion for class certification was fully briefed and ripe for decision by the Court. Jt. Dcl. ¶ 32. Defendants had vigorously contested class certification arguing, *inter alia*, that class certification would be improper because of the predominance of individual issues, because the alleged misstatements were not material, and because Lead Plaintiffs are not entitled to a presumption of fraud-on-the-market. Jt. Dcl. ¶ 33. While Lead Plaintiffs believe that class certification is proper, it is possible that the Court would have rejected the motion for certification, with the result that no class action could be sustained and each Class member would be required to pay for separate counsel and bring a separate lawsuit.

Indeed, while the Defendants have stipulated to the certification of the Class for purposes of the Settlement, there would have been no such stipulation had Lead Plaintiffs prosecuted the Class' claims to trial. This Court has acknowledged "the incredible complexity of the briefing" and "the intensity with which every conceivable issue relating to class certification was being fought." Nov. 10, 2009 Tr. at 24. The Court further acknowledged that "the law on class certification is fluid right now." *Id.* Moreover, even if a class was certified, courts have subsequently decertified securities fraud classes. *See Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007); *In re Initial Pub. Offering Sec. Litig. ("IPO")*, 471 F.3d 24 (2d Cir. 2006); *Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*, 2007 WL 1430225 (5th Cir. May 16, 2007). The uncertainty supporting class certification, therefore, strongly supports final approval of the Settlement. *See generally, e.g., In re AOL*, 2006 WL 903236, at *12 (risk of succeeding in certifying class supported approval of settlement); *Global Crossing*, 225 F.R.D. at 460 (same).

7. The Ability Of The Defendants To Withstand A Greater Judgment

It is undeniable that the current economic climate is not strong. Indeed, the Court itself commented at the preliminary approval hearing that Marsh's financial condition has been adversely affected by "what has happened in the economy in the last year." Nov. 10, 2009 Tr. at 26. Moreover, the value of MMC stock has not recovered since the alleged wrongdoing cited in the Complaint became public in 2004. As stated in the Complaint, in October 2004 the value of MMC stock dropped from \$46.01 per share to \$24.10 during the five days following the announcement of the NYAG's lawsuit. Complaint ¶ 10. After five years, MMC stock is currently trading even lower, at approximately \$22 per share. Given the general economic climate, and the continued weak performance of MMC stock during the five years since the events in the Complaint, Lead Plaintiffs have a legitimate concern that the Defendants might not be able to pay an award higher than the Settlement, even if Lead Plaintiffs were to prevail at trial. This factor, therefore, also supports approval of the Settlement.

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

Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber*, 171 F.R.D. at 130 (citation omitted); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989). Rather, "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); *Zerle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971). As the Second Circuit stated, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. The Second Circuit further explained that, "[i]n fact there is no

reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.” *Id.* at 455 n.2. This recovery far exceeds that.

Lead Plaintiffs submit that the Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. A recovery totaling \$400 million for claims that are not certain of success, where a motion for class certification is being vigorously challenged, and where the condition of the economy and of MMC in particular is questionable, is by any measure an excellent result. Accordingly, the eighth and ninth *Grinnell* factors support approval of the Settlement.

C. The Proposed Settlement Is Procedurally Fair

“In addition to ensuring the substantive fairness of the settlement through full consideration of the *Grinnell* factors, the Court must also ‘ensure that the settlement is not the product of collusion.’” *Global Crossing*, 225 F.R.D. at 461 (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998)). However, “[a]s long as the integrity of the negotiating process is ensured by the Court, it is assumed that the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides.” *Banyai v. Mazur*, 2007 WL 927583, at *12 (S.D.N.Y. Mar. 27, 2007) (approving settlement reached after months of good faith, arms-length negotiations) (quoting *In re PaineWebber*, 171 F.R.D. at 132).

As set forth in the accompanying Joint Declaration, Lead Counsel entered into this Settlement after conducting extensive discovery and arm’s-length negotiations, based on their good-faith belief that this Settlement is in the Class’ best interests. The Settlement was the result of protracted, difficult negotiations that stretched out over a year and a half. Jt. Decl. ¶¶ 77. Moreover, negotiations were conducted with the assistance of Judge Weinstein, a highly

regarded mediator with extensive experience in securities litigation who has submitted an affidavit in support of the Settlement. *See* Weinstein Affidavit ¶ 14; Jt. Decl. ¶88. Where, as here, the “settlement is the result of arm’s length negotiations conducted by experienced counsel after adequate discovery and the settlement provokes only minimal objections, then it is entitled to ‘[a] strong initial presumption of fairness.’” *Global Crossing*, 225 F.R.D. at 461 (citation omitted); *see White*, 2007 WL 703926, at *2. There is no reason to doubt that the Settlement is procedurally fair.

II. CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

The Preliminary Approval Order appropriately certified the Class pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all persons that purchased or otherwise acquired MMC securities between October 14, 1999 and October 13, 2004, inclusive (the “Class Period”), and that claim to have suffered losses as a result of such purchase or acquisition. Preliminary Approval Order ¶ 3. The class excludes the following: (1) MMC and Marsh and the officers, directors, employees, affiliates, parents, subsidiaries, representatives, predecessors and assigns of each of them; (2) Greenberg and Egan and the immediate families, employees, affiliates, representatives, heirs, predecessors, successors and assigns of each of them and any entity in which either of them has a controlling interest; and (3) those persons that would otherwise be members of the Class but that submit valid and timely requests for exclusion in accordance with the Preliminary Approval Order. *Id.*

In the Preliminary Approval Order, the Court recognized, for purposes of Settlement, that the requirements for Rule 23 have been satisfied, including that: (1) the number of Class members is so numerous that joinder of all members thereof is impractical; (b) there are questions of law and fact common to the Class; (c) the claims of the Lead Plaintiffs are typical of

the claims of the Class; (d) Lead Plaintiffs and Lead Counsel will fairly and adequately represent the interests of the Class; (e) the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members of the Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Id.* ¶ 4. The Court also certified Lead Plaintiffs and Lead Counsel, for purposes of Settlement only, pursuant to Rule 23 of the Federal Rules of Civil Procedure. *Id.* ¶ 5.

The Second Circuit “has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement.” *In re EVCI*, 2007 WL 2230177, at *12 (citing *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982)); *see also In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984). Classes certified for settlement purposes, like all other classes, must meet the requirements of Rule 23(a) and at least one of three requirements set forth in Rule 23(b). *In re Prudential Sec. Inc. P’ships Litig.*, 163 F.R.D. 200, 205-10 (S.D.N.Y. 1995).

In analyzing the class certification requirements, the Second Circuit “has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation and has explicitly noted its preference for class certification in securities cases.” *In re Nortel Networks Corp. Sec. Litig.*, 2003 WL 22077464, at *2 (S.D.N.Y. Sept. 8, 2003) (citations omitted). In *In re IPO*, the Second Circuit held that a district court must continue to refrain from making “a merits inquiry *unrelated* to a specific Rule 23 . . . requirement” in evaluating whether to certify a class. 471 F.3d at 35 (emphasis in original); *see Hnot v. Willis Group Holdings Ltd.*, 241 F.R.D. 204, 208 (S.D.N.Y. 2007) The proposed Settlement Class meets the requirements of Rule 23 and should be certified for purposes of the Settlement.

A. This Case Satisfies The Prerequisites Of Rule 23(a)

Certification under Rule 23(a) is proper if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the

claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

1. The Settlement Class Is Sufficiently Numerous

Rule 23(a)(1) requires Lead Plaintiffs to show that the Class is so numerous that joinder of all members is impracticable. Generally, “[n]umerosity is presumed when a class consists of forty or more members.” *In re EVCI*, 2007 WL 2230177, at *12 (citing *Worldcom*, 219 F.R.D. at 279). “In securities fraud class actions relating to 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 Vivendi Universal SA Sec. Litig.*, 242 F.R.D. 76, 84 (S.D.N.Y. 2007) (citations omitted).⁷ At the time of the Complaint, MMC was the largest insurance broker in the United States, and one of the largest in the world, with approximately \$11 billion in annual revenues. Complaint ¶ 43. During all relevant times, MMC has traded on the NYSE and undoubtedly had millions of outstanding shares at any given time. In light of the huge number of shares issued, outstanding, and traded during the Class Period, the numerosity of the Class cannot seriously be disputed.⁸ Further, Lead Plaintiffs have caused Notice of the Settlement to be mailed to thousands of potential Class members or

⁷ See also *In re Globalstar Sec. Litig.*, 2004 WL 2754674, at *3-4 (S.D.N.Y. Dec. 1, 2004) (“[I]t is not unusual for district courts to certify plaintiff classes in securities actions based on the volume of outstanding shares.”) (citations omitted); *In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 280 (S.D.N.Y. 2002) (“Class certification is frequently appropriate in securities fraud cases involving a large number of shares traded publicly in an established market.”).

⁸ See, e.g., *Dietrich v. Bauer*, 192 F.R.D. 119, 123 (S.D.N.Y. 2000) (allegations in securities action that defendant company was traded on the NASDAQ National Market System and had 22.5 million shares outstanding held by approximately 522 record holders allowed Court to reasonably “infer that the class is sufficiently large to meet Rule 23(a)’s numerosity requirement”); *In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369, 374 (S.D.N.Y. 2000) (“Here, because Oxford stock was traded in high volume during the class period, the precise number of Class members could be, and very likely is, numbered in the thousands The numerosity requirement is satisfied.”).

nominees, and there have been over 7,005 viewers at the Settlement website. Young Aff. ¶ 8. These facts are sufficient to establish numerosity for purposes of Rule 23(a)(1).

2. There Are Questions Of Law Or Fact Common To Members Of The Class

Rule 23(a)(2) requires a showing that common issues of fact or law affect all Class members. “The commonality requirement, particularly in securities fraud litigation, is ‘generally considered a ‘low hurdle’ easily surmounted.’ Commonality does not demand that every question of law or fact be common to every class member, but instead merely requires that the ‘claims arise from a common nucleus of operative facts.’” *In re Omnicom Group, Inc. Sec. Litig.*, 2007 WL 1300781, at *3 (S.D.N.Y. April 30, 2007) (citations omitted); *Vivendi*, 242 F.R.D. at 84 (commonality is applied “permissively” in securities litigation). Where plaintiffs allege that class members have been injured by the same fraudulent scheme, the commonality requirement is satisfied. *See, e.g., Berwecky v. Bear, Stearns & Co.*, 197 F.R.D. 65, 68 (S.D.N.Y. 2000) (commonality satisfied where allegations that defendants “entered into a scheme to defraud investors of the securities of the promoted companies by engaging in ‘parking’ of securities, unauthorized purchases, and other fraudulent practices”); *In re Towers Fin. Corp. Noteholders Litig.*, 177 F.R.D. 167, 170 (S.D.N.Y. 1997) (common questions included whether “defendants employed devices, schemes or artifices to defraud the class”). A single common question may be sufficient to satisfy the commonality requirement.⁹

⁹ *See, e.g., German v. Fed. Home Mortgage Loan Corp.*, 885 F. Supp. 537, 553 (S.D.N.Y. 1995); *Cutler v. Perales*, 128 F.R.D. 39, 44 (S.D.N.Y. 1989) (commonality “does not mean that all issues must be identical as to each [class] member, but it does require that plaintiffs identify some unifying thread among the members’ claims that warrants class treatment”) (internal quotation omitted).

Lead Plaintiffs allege that they and all members of the Class were injured by a fraudulent scheme to artificially inflate and maintain the market price of MMC securities, and that the Defendants engaged in manipulative and deceptive acts in furtherance of such scheme by, among other things, making false and misleading representations about the nature of their contingent commission practices and revenues. Common questions include: (1) whether Defendants engaged in a fraudulent scheme; (2) whether Defendants acted with scienter; (3) whether Defendants' acts affected the market for MMC securities; and (4) whether Defendants' conduct had the effect of concealing the circumstances that bore on the ultimate loss. Clearly there are sufficient common questions to satisfy Rule 23(a)(2).

3. Lead Plaintiffs' Claims Are Typical Of Those Of The Class

Rule 23(a)(3) requires plaintiffs to show that their claims are typical of those of the class. Plaintiffs' claims are "typical" where, as here, they "arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *Vivendi*, 242 F.R.D. at 85 (citations omitted). Typicality thus embraces the principle that class representatives "have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individual actions." *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126 (S.D.N.Y. 1997) (citation and internal quotation marks omitted).

The typicality requirement of Rule 23(a)(3) is not demanding. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001). Further, "typical" does not mean "identical." *Omnicom Group*, 2007 WL 1300781, at *4; *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 200 (S.D.N.Y. 1992). Accordingly, the "typicality requirement is not defeated by minor variations in the fact patterns of individual class members' claims." *Abdul-Malik v. Coombe*, 1996 WL 706914, at *3 (S.D.N.Y. Dec. 6 1996). Numerous cases hold that factual

differences involving the date of acquisition, type of securities purchased, and manner by which the investor acquired his securities will not destroy typicality if each class member was the victim of the same material omissions and the same fraudulent course of conduct. *See, e.g., In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y. 1986); *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981).

Lead Plaintiffs' claims are clearly typical of those of the Class because their claims arise out of the same course of conduct, namely, the Defendants' participation in and actions in furtherance of the fraudulent scheme to artificially inflate and maintain the market price of MMC securities. Lead Plaintiffs each transacted in MMC securities on numerous occasions during the Class Period. Accordingly, Lead Plaintiffs—like the members of the Class they seek to represent—purchased MMC securities during the Class Period and suffered significant losses as a result of the violations of the federal securities laws alleged in the Complaint. Lead Plaintiffs stand in the same position as other investors who purchased MMC securities during the Class Period, having suffered the same type of injury (purchasing MMC securities at artificially inflated prices and suffering losses when the fraud was revealed) as a result of Defendants' actions. Such a showing is sufficient to meet the typicality requirement. *See, e.g., In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 40 (E.D.N.Y. 1991) (“Plaintiffs’ claims are typical of those of absent class members. They allege injury resulting from the same course of conduct that injured the absent Class members and are based on the same theories of recovery.”) (citations omitted).

4. Lead Plaintiffs Have Fairly And Adequately Protected The Interests Of The Class

Rule 23(a)(4) is satisfied if “the representative parties will fairly and adequately protect the interests of the class.” Courts consider two factors in measuring adequacy: (1) whether the claims of the class representative conflict with those of the class; and (2) whether the plaintiffs’

counsel is qualified, experienced, and generally able to conduct the litigation. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *In re Oxford Health Plans*, 191 F.R.D. 369, 376 (S.D.N.Y. 2000). In assessing adequacy, “many courts have observed [that] the issues of typicality and adequacy tend to merge because they ‘serve as guideposts for determining whether . . . the named plaintiff’s claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.’” *Vivendi*, 242 F.R.D. at 85. The adequacy requirement is “unmistakably lenient.” *Omnicom Group*, 2007 WL 1300781 at *6.

As previously discussed, Lead Plaintiffs have been injured by the same wrongful course of conduct as were the members of the Class they seek to represent and, accordingly, it is in their interest to vigorously prosecute this action on behalf of the putative Class. With respect to the adequacy of Lead Counsel, it is respectfully submitted that, as the Court found when appointing them, Lead Counsel are experienced securities class action law firms and they adequately represent the interests of the Class. Jt. Decl., ¶¶ 135-142.

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

Rule 23(b)(3) authorizes class certification if “the Court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Both of these requirements are satisfied here.

1. Common Questions Of Law Or Fact Predominate

“Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.” *Vivendi*, 242 F.R.D. at 90 (internal citations and quotation marks

omitted). “Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions.” *Prudential Sec.*, 163 F.R.D. at 206 (quoting *Dura-Bilt Corp.*, 89 F.R.D. at 93). Accordingly, “the Supreme Court has noted that ‘[p]redominance is a test readily met in certain cases alleging . . . securities fraud.’” *Vivendi*, 242 F.R.D. at 90 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

Here, in order to sustain the claims against Defendants, the critical issues for establishing the liability include whether the Defendants “(1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs’ reliance was the proximate cause of their injury.” *In re Marsh & McLennan*, 2006 WL 2057194, at *9 (citations omitted). Each of these issues is susceptible of generalized proof and, accordingly, the predominance requirement is satisfied. *See, e.g., In re Salomon Analyst Metromedia*, 236 F.R.D. 208, 218 (S.D.N.Y. 2006).

2. A Class Action Is The Superior Method Of Adjudication

In addition, the last prong of Rule 23(b)(3) requires a court to consider whether a class action is superior to other methods of adjudication. A class action is particularly appropriate for addressing the claims at issue in this case. Lead Plaintiffs seek to represent a Class consisting of a large number of investors in MMC securities whose individual damages are likely small enough to render individual litigation prohibitively expensive. Superiority is readily found where, as here, “the alternatives [to a class action] are either no recourse for thousands of [defrauded investors]” or “a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake.” *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968).

Rule 23(b)(3) specifies four factors that a Court should consider in determining whether a class action is “superior” to other methods of adjudication: (1) the interests of members of the

class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.¹⁰ Each of these factors weighs in favor of certification of the Settlement Class.

Individual Class members have limited interest in individually controlling the prosecution or defense of separate actions given the prohibitive cost of instituting individual actions for securities fraud. Accordingly, the courts recognize that a class action is uniquely suited to resolving securities claims. *See, e.g., Vivendi*, 242 F.R.D. at 91; *see also Green*, 406 F.2d at 296. This point is underscored by the fact that, to date, only a small number of Class members have opted out of this class action. Further, concentrating litigation in a single forum plainly has a number of benefits, including eliminating the risk of inconsistent adjudications and promoting the fair and efficient use of the judicial system. “[T]he Southern District of New York is well known to have expertise in securities law.” *Albert Fadem Trust v. Duke Energy Corp.*, 214 F. Supp. 2d 341, 344 (S.D.N.Y. 2002). And finally, a court may also consider “the management difficulties likely to be encountered if the action is continued as a class suit, such as the burden of complying with Rule 23’s notice requirements.” *Vivendi*, 242 F.R.D. at 107. Securities class actions are routinely certified and raise no unusual manageability issues.¹¹ Indeed, as shown below, the streamlined and timely manner by which Lead Plaintiffs identified and notified Class

¹⁰ Yet, “[w]here, as here, a class is being certified solely for settlement purposes, the Court need not consider the manageability issues that would arise if the case were to be litigated as a class action.” *Global Crossing*, 225 F.R.D. at 454 (citing *Amchem* 521 US. at 620).

¹¹ *See, e.g., In re Prudential Sec. Inc. Ltd. P’ship Litig.*, 107 F.3d 3 (2d Cir. 1996); *In re Warner Commc’ns Sec. Litig.*, 798 F.2d 35 (2d Cir. 1986); *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006); *Global Crossing*, 225 F.R.D. 436.

members of the Settlement demonstrates that class treatment here is manageable and efficient.

III. TRANSMISSION OF THE NOTICE TO THE CLASS SATISFIED BOTH THE PRELIMINARY ORDER AND APPLICABLE LAW

Rule 23(c)(2)(B) requires that notice of class certification must be served on all Class members who can be identified through reasonable efforts. Further, Rule 23(e)(1) instructs courts to “direct notice in a reasonable manner to all class members who would be bound by the proposal.” Such notice to class members “need only be 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 Prac. Litig.*, 962 F. Supp. 450, 527-28 (D.N.J. 1997) (citations omitted). “Although no rigid standards govern the contents of notice to class members, the 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.’” *Thompson v. Metropolitan Life Inc. Co.*, 216 F.R.D. 55, 67 (S.D.N.Y. 2003) (rejecting challenges to adequacy of notice) (citations omitted).

The Notice provided here is similar to the notice this court approved in *Thomson*. In that case, the notice was held to be adequate where it provided, “in language easily understandable to a layperson, the essential terms of the settlement, including the claims asserted; who would be covered by the settlement; how to participate in or opt-out of the settlement; the settlement benefits; the contact information of the lawyers representing the class members and the amount sought for named Class members; how to object to the settlement and the time and place of the Court’s scheduled fairness hearing if an objector or his counsel wished to appear; and who to contact if further information is sought.” *Id.* at 68 (citations omitted). In addition, the notice advised class members that they would be bound by the settlement agreement unless they took

steps to exclude themselves. *Id.* The Notice that Lead Plaintiffs provided to Class members in this litigation included all of this information, and the Court has already stated on the record that the Notice was among the best the Court has encountered. Nov. 10, 2009 Tr. at 23.

The Preliminary Order authorized Lead Plaintiffs to retain Rust Consulting, Inc. as the Claims Administrator, and directed the Claims Administrator (1) to cause the Notice and Proof of Claim to be mailed, by first class mail, postage prepaid, by November 13, 2009, to all reasonably identifiable Class Members; (2) to cause the Summary Notice to be published in the *Wall Street Journal* and transmitted over the *Business Wire*; and (3) to file proof of the publication of the Summary Notice and mailing of the Notice with the Court at least three days before the final approval hearing. Lead Plaintiffs have complied with these requirements and more. *See* Jt. Dcl. ¶¶ 96-98; Young Aff. ¶¶ 6, 7, 11. This is sufficient to satisfy Rule 23. *In re Prudential Ins. Co. of Am. Sales Prac. Litig.*, 962 F. Supp. at 527-28. Accordingly, the form and manner of Notice provided to Class members satisfies both the Preliminary Order and Rule 23.

IV. THE PLAN OF ALLOCATION IS REASONABLE, FAIR AND EQUITABLE

“When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds ‘need have only a reasonable, rational basis.’” *In re Telik*, 576 F. Supp. 2d at 580 (quoting *Global Crossing*, 225 F.R.D. at 462)). Numerous courts have affirmed that “a plan of allocation need not be perfect.” *In re EVCI*, 2007 WL 2230177 at *11 (citing cases). “In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel.” *Id.*, (citing *In re PaineWebber*, 171 F.R.D. at 133) (additional citations omitted).¹² As the Joint

¹² Courts also consider the class’ reaction to a plan of allocation. *In re EVCI*, 2007 WL 2230177 at *11 (approving plan where no class member objected); *In re Telik*, 576 F. Supp. 2d at 581 (approving, over one objection, plan that drew appropriate distinctions). To date there have been no objections to the Plan.

Declaration establishes, the plan here meets these standards of rationality and reasonableness. The Plan of Allocation is the product of Lead Counsel's investigation, discovery, and consultation with their damages expert. In developing the Plan of Allocation, Lead Counsel and their experts considered numerous factors, including: (1) the volume of publicly traded MMC securities purchased, acquired or sold during the Class Period; (2) the time period in which an MMC security was purchased or acquired, or an MMC put option was sold; (3) whether the security was held until after the end of the Class Period or whether it was sold during the Class Period, and if so, when it was sold and at what price; (4) the artificial inflation in the price of MMC securities (or "artificial deflation" for put options) allegedly attributable to Defendants' false statements; and (5) the type of security involved. The Plan is thus rational and reasonable.

CONCLUSION

Lead Plaintiffs respectfully request that the Court certify the Settlement Class, find that appropriate notice has been given, and grant final approval of the proposed Settlement.

Dated: December 18, 2009

GRANT & EISENHOFER P.A.

By: /s/ Keith M. Fleischman
Jay W. Eisenhofer
Keith M. Fleischman
485 Lexington Avenue, 29th Floor
New York, NY 10017
Telephone: (646) 722-8500
Facsimile: (646) 722-8501
-and-
Geoffrey C. Jarvis
Stephen G. Grygiel (*admitted pro hac vice*)
Lesley E. Weaver (*admitted pro hac vice*)
Mary S. Thomas (*admitted pro hac vice*)
James P. McEvelly, III (*admitted pro hac vice*)
1201 North Market Street
Wilmington, DE 19801
Telephone: (302) 622-7000
Facsimile: (302) 622-7100

Respectfully submitted,

BERNSTEIN LIEBHARD LLP

By: /s/ Stanley D. Bernstein
Stanley D. Bernstein
U. Seth Ottensoser
Felecia L. Stern
Brian S. Cohen
Michael S. Bigin
Stephanie M. Beige
10 East 40th Street, 22nd Floor
New York, NY 10016
Telephone: (212) 779-1414
Facsimile: (212) 779-3218
Co-Lead Counsel for the Class