

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

IN RE MBIA, INC., SECURITIES  
LITIGATION

File No. 08-CV-264-KMK

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

**BERNSTEIN LITOWITZ BERGER &  
GROSSMANN LLP**

Steven B. Singer  
Beata Gocyk-Farber  
Kurt Hunciker  
John Rizio-Hamilton  
1285 Avenue of the Americas  
New York, NY 10019  
Tel: (212) 554-1400  
Fax: (212) 554-1444

Dated: September 6, 2011

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

BACKGROUND OF THE LITIGATION..... 4

ARGUMENT ..... 7

I. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL..... 7

II. CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE..... 11

    A. The Class Satisfies The Requirements Of Rule 23(a)..... 12

        1. The Class Members Are Too Numerous To Be Joined ..... 12

        2. There Are Common Questions Of Law And Fact ..... 13

        3. Lead Plaintiff’s Claims Are Typical Of Those Of The Class..... 14

        4. Lead Plaintiff Will Fairly And Adequately Protect The Interests Of The Class..... 15

    B. The Class Satisfies The Requirements Of Rule 23(b)(3)..... 16

        1. Common Legal And Factual Questions Predominate..... 16

        2. A Class Action Is Superior To Other Methods Of Adjudication..... 17

III. NOTICE TO THE CLASS SHOULD BE APPROVED ..... 19

CONCLUSION..... 20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	12, 16, 17
<i>In re Blech Sec. Litig.</i> , 187 F.R.D. 97 (S.D.N.Y. 1999) .....	17, 18
<i>Central States Se. &amp; Sw. Areas Health &amp; Welfare Fund v. Merck-Medco Managed Care, LLC</i> , 504 F.3d 229 (2d Cir. 2007) .....	12, 13
<i>Cohen v. J.P. Morgan Chase &amp; Co.</i> , 262 F.R.D. 153 (E.D.N.Y. 2009) .....	8
<i>Consol. Rail Corp. v. Town of Hyde Park</i> , 47 F.3d 473 (2d Cir. 1995).....	12, 13
<i>D'Amato v. Deutsche Bank</i> , 236 F.3d 78 (2d Cir. 2001).....	10
<i>Denney v. Deutsche Bank AG</i> , 443 F.3d 253 (2d Cir. 2006).....	11
<i>In re Drexel Burnham Lambert Group, Inc.</i> , 960 F.2d 285 (2d Cir. 1992).....	15
<i>In re Global Crossing Sec. &amp; ERISA Litig.</i> , 225 F.R.D. 436 (S.D.N.Y. 2004) .....	10, 19
<i>In re Globalstar Sec. Litig.</i> , No. 01 Civ 1745 (PKC), 2004 WL 2754674 (S.D.N.Y. Dec. 1, 2004) .....	13
<i>In re Initial Pub. Offering Sec. Litig.</i> , 243 F.R.D. 79 (S.D.N.Y. 2007) .....	8, 13, 17
<i>Lapin v. Goldman Sachs &amp; Co.</i> , 254 F.R.D. 168 (S.D.N.Y. 2008) .....	13
<i>In re Marsh &amp; McLennan Cos. Sec. Litig.</i> , No. 04 Civ. 8144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009).....	passim
<i>In re Monster Worldwide, Inc. Sec. Litig.</i> , 251 F.R.D. 132 (S.D.N.Y. 2008) .....	18

<i>In re Oxford Health Plans, Inc.</i> , 191 F.R.D. 369 (S.D.N.Y. 2000) .....	13, 14, 15
<i>In re Polaroid ERISA Litig.</i> , 240 F.R.D. 65 (S.D.N.Y. 2006) .....	15
<i>In re Prudential Sec. Inc. Ltd. P’ships Litig.</i> , 163 F.R.D. 200 (S.D.N.Y. 1995) .....	7, 8, 11
<i>Robidoux v. Celani</i> , 987 F.2d 931 (2d Cir. 1993).....	12, 14
<i>Robinson v. Metro-North Commuter R.R.</i> , 267 F.3d 147 (2d Cir. 2001).....	13
<i>Teachers’ Ret. Sys. of La. v. ACLN Ltd.</i> , No. 01 Civ. 11814 (LAP), 2004 WL 2997957 (S.D.N.Y. 2004).....	13, 14
<i>In re Telik, Inc. Sec. Litig.</i> , 576 F. Supp. 2d 570 (S.D.N.Y. 2008).....	10
<i>In re Vivendi Sec. Litig.</i> , 242 F.R.D. 76 (S.D.N.Y. 2007) .....	14
<i>Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.</i> , 396 F.3d 96 (2d Cir. 2005).....	7, 19
<i>In re Warner Chilcott Ltd. Sec. Litig.</i> , No. 06 Civ. 11515 (WHP), 2008 WL 5110904 (S.D.N.Y. Nov. 20, 2008).....	19
<i>Weinberger v. Kendrick</i> , 698 F.2d 61 (2d Cir. 1982).....	11
<b>STATUTES</b>	
Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).....	4, 5
Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 7t(a) .....	4, 5
Section 21D(a)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(a)(7) .....	3, 19
<b>OTHER AUTHORITIES</b>	
SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 .....	4, 5
Fed. R. Civ. P. 23 .....	3, 4, 19

Fed. R. Civ. P. 23(a) .....11, 12  
Fed. R. Civ. P. 23(a)(1).....12, 13  
Fed. R. Civ. P. 23(a)(2).....13, 14  
Fed. R. Civ. P. 23(a)(3).....14, 15  
Fed. R. Civ. P. 23(a)(4).....15, 16  
Fed. R. Civ. P. (b)(3).....11, 12, 16, 17, 18  
Fed. R. Civ. P. 23(g) .....16

Lead Plaintiff the Teachers' Retirement System of Oklahoma, on behalf of itself and the Class, respectfully submits this memorandum of law in support of its motion for: (i) preliminary approval of the settlement of this securities class action (the "Action") as set forth in the Stipulation and Agreement of Settlement dated September 6, 2011 (the "Stipulation") entered into with Defendants MBIA Inc. ("MBIA" or the "Company"), Gary C. Dunton and C. Edward Chaplin (collectively, the "Defendants");<sup>1</sup> (ii) certification of the proposed Class and Lead Plaintiff as Class representative and appointment of Lead Counsel as Class counsel for purposes of the Settlement; (iii) approval of the form and manner of giving notice of the proposed Settlement to putative Class Members; and (iv) scheduling a hearing on final approval of the Settlement and Lead Counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses.

### **INTRODUCTION**

Lead Plaintiff has reached an agreement with Defendants to settle this Action for \$68 million in cash in return for the dismissal and release of all claims asserted against Defendants. If approved by the Court, the Settlement will resolve the Action.<sup>2</sup>

---

<sup>1</sup> The Stipulation is attached as Exhibit 1 to Lead Plaintiff's Notice of Motion for (I) Preliminary Approval of Settlement, (II) Certification of the Class for Purposes of Settlement and (III) Approval of Notice to the Class. Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Stipulation.

<sup>2</sup> Under the terms of the Stipulation, Lead Plaintiff has agreed to file a notice of voluntary dismissal with prejudice of the claims against the Individual Defendants within three business days of the entry of an order preliminarily approving the proposed Settlement. In return, the Individual Defendants have agreed that, should the Settlement not be finally approved or the Effective Date otherwise fail to occur, they shall be reinstated without objection as Defendants in the Action, that any statute of limitations, statute of repose or other time-related defense is tolled from the date of filing the notice of dismissal, and they and Lead Plaintiff shall revert to their respective positions in the Action immediately prior to July 7, 2011. In the event that the Individual Defendants are reinstated as Defendants, Lead Plaintiff has agreed that it will not

*(Cont'd)*

Lead Plaintiff and Lead Counsel believe that the proposed Settlement represents an excellent result and is in the best interests of the Class. The Settlement provides the Class with a substantial and immediate monetary benefit in the form of a \$68 million cash payment. This significant benefit must be considered in the context of the serious risks that further protracted and contested litigation might lead to no recovery, or to a smaller recovery, from the Defendants in this Action. Lead Plaintiff and Lead Counsel recognized that this Action presented a number of substantial risks in establishing the liability of Defendants and damages to the Class, including challenges in establishing that Defendants' statements were materially misleading, in proving that the alleged omissions were the result of fraud and not merely negligence, and in establishing loss causation. In addition, in light of MBIA's financial condition and likelihood that this Action and other litigation against MBIA would substantially deplete Defendants' insurance coverage, Lead Plaintiff and Lead Counsel also believed that there was a substantial risk that, even if they were successful in establishing liability at trial (and after appeals from any verdict), Defendants would not have been able to pay an amount significantly larger than the Settlement Amount or even as much as the Settlement Amount. In light of these risks, Lead Plaintiff and Lead Counsel believe that the proposed \$68 million Settlement is fair, reasonable and adequate, and in the best interests of the Class.

Moreover, the Settlement was reached only after the parties engaged in a mediation process presided over by former Judge Daniel Weinstein (ret.) and at a time when the Parties understood the strengths and weaknesses of their respective positions in the litigation. Lead Plaintiff had conducted an investigation into the claims asserted in the Action, which included

---

object to reinstatement of their Renewed Motion to Dismiss the Complaint which has been rendered moot by the proposed Settlement.

conducting numerous witness interviews with former MBIA employees and others. The multiple mediation statements prepared by the Parties and their respective presentations concerning liability and damages at the mediation sessions also provided Lead Plaintiff with a further basis upon which to assess the relative strengths and weaknesses of its position and Defendants' position in the Action.<sup>3</sup>

At the final settlement hearing ("Settlement Hearing"), the Court will have before it more detailed motion papers submitted in support of the proposed Settlement, and will be asked to make a determination as to whether the Settlement is fair, reasonable and adequate. At this time, Lead Plaintiff requests only that the Court grant preliminary approval of the Settlement so that notice may be provided to the Class. Specifically, Lead Plaintiff requests that this Court enter the [Proposed] Order Preliminarily Approving Proposed Settlement and Providing for Notice (the "Preliminary Approval Order"), attached as Exhibit A to the Stipulation, which, among other things, will:

- (i) Preliminarily approve the Settlement on the terms set forth in the Stipulation;
- (ii) Approve the form and content of the Notice, Claim Form and Summary Notice attached as Exhibits 1, 2 and 3 to the Preliminary Approval Order;
- (iii) Find that the procedures established for distribution of the Notice and Proof of Claim Form and publication of the Summary Notice in the manner and form set forth in the Preliminary Approval Order constitute the best notice practicable under the circumstances, and comply with the notice requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and Section 21D(a)(7) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78u-4(a)(7), as amended by the Private Securities Litigation Reform Act (the "PSLRA"); and

---

<sup>3</sup> Additionally, Lead Plaintiff obtained the right to conduct due diligence discovery of Defendants and the right to withdraw from the proposed Settlement if it determines that information produced during the due diligence renders the proposed Settlement unfair, unreasonable or inadequate.

- (iv) Schedule the Settlement Hearing and set out a schedule and procedures for: disseminating the Notice and Claim Form and publishing the Summary Notice; requesting exclusion from the Class; objecting to the Settlement, the proposed Plan of Allocation, and/or Lead Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses; and submitting papers in support of final approval of the Settlement.

Lead Plaintiff also requests certification of the Class, certification of Lead Plaintiff as class representative and appointment of Lead Counsel as counsel for the Class, for purposes of the Settlement only, under Rule 23 of the Federal Rules of Civil Procedure.

### **BACKGROUND OF THE LITIGATION**

Beginning in January 2008, three securities class action complaints were filed in this Court alleging that MBIA and its senior officers had misled investors about MBIA's exposure to residential mortgage backed securities ("RMBS"). In July 2008, the Court ordered that these actions be consolidated; appointed the Teachers' Retirement System of Oklahoma as Lead Plaintiff for the Action; and approved Lead Plaintiff's selection of Bernstein Litowitz Berger & Grossmann LLP as Lead Counsel.

Lead Counsel conducted an investigation that included, among other things, a review of MBIA's filings with the United States Securities and Exchange Commission, analyst research reports, investor presentations, news articles concerning MBIA and other public data; interviews with numerous former MBIA employees and others; and legal analysis of Lead Plaintiff's claims against Defendants and their potential defenses.

On October 17, 2008, Lead Plaintiff filed its Consolidated Amended Class Action Complaint (the "Consolidated Complaint") asserting claims against all Defendants under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder, and against Gary C. Dunton and C. Edward Chaplin (the "Individual Defendants") under Section 20(a) of the Exchange Act. The Consolidated Complaint alleged that Defendants

made materially false and misleading statements and omissions about, among other things, the nature and extent of MBIA's exposure to collateralized debt obligations ("CDOs") containing RMBS, including MBIA's exposure to CDOs comprised of other CDOs containing RMBS (so-called "CDO-squared securities"). The Consolidated Complaint further alleged that the price of MBIA common stock was artificially inflated as a result of Defendants' allegedly false and misleading statements and omissions, and declined when the truth about MBIA's exposure to the CDO-squared securities in its portfolio was revealed.

On January 30, 2009, Defendants moved to dismiss the Consolidated Complaint. The motion was fully briefed, and following a hearing on March 5, 2010, the Court issued an Opinion and Order on March 31, 2010 denying in part and granting in part Defendants' motion to dismiss. The Court largely sustained Lead Plaintiff's claim under Section 10(b) of the Exchange Act against MBIA, but dismissed, with leave to amend, the claims against the Individual Defendants on the grounds that Lead Plaintiff had not sufficiently pled particular facts alleging that the Individual Defendants had acted with *scienter*. The Court also dismissed, with leave to amend, certain claims against all Defendants regarding misstatements or omissions about MBIA's control rights and payment obligations on the CDOs.

On April 30, 2010, Lead Plaintiff filed its Second Consolidated Amended Class Action Complaint (the "Complaint" or "SAC"). Like the Consolidated Complaint, the Complaint asserted claims against MBIA and the Individual Defendants under Section 10(b) of the Exchange Act and Rule 10b-5, and against the Individual Defendants under Section 20(a) of the Exchange Act. The Complaint alleged claims substantially similar to those in the Consolidated Complaint but asserted several new allegations regarding the Individual Defendants' alleged recklessness in failing to disclose MBIA's exposure to the CDOs. On September 3, 2010, the

Individual Defendants filed a Renewed Motion to Dismiss the Complaint, which Lead Plaintiff opposed on October 8, 2010.

In early 2011, the Parties agreed to explore the possibility of reaching a settlement. The Parties agreed to mediation under the auspices of Judge Daniel Weinstein (Ret.), an experienced mediator of complex securities class actions. The Parties exchanged detailed mediation statements and, on April 1, 2011, participated in a full-day mediation session before Judge Weinstein. The session ended without any agreement being reached.

Over the course of the next few months, Judge Weinstein conducted further separate discussions with the Parties and a second mediation session was scheduled for July 2011. In advance of the second session, the Parties exchanged detailed supplemental mediation statements addressing both liability and damages. On July 7, 2011, the Parties participated in the second mediation session with Judge Weinstein and, after a full day of negotiations, the Parties reached an agreement in principle to settle the Action in exchange for payment of \$68 million in cash.

Because of the mandatory PSLRA stay of discovery pending resolution of the motions to dismiss, Lead Plaintiff had not been able to conduct formal discovery. As part of the agreement to settle, Lead Plaintiff obtained Defendants' agreement to provide due diligence discovery and reserved the right to withdraw from the proposed Settlement at any time prior to filing its motion for final approval of the proposed Settlement if, in its good faith discretion, it determines that information produced during the due diligence renders the proposed Settlement unfair, unreasonable or inadequate. Lead Plaintiff, through Lead Counsel, is currently pursuing this due diligence discovery.

As noted above, prior to reaching the agreement-in-principle to settle, Lead Plaintiff, through Lead Counsel, analyzed the evidence adduced during its pre-filing investigation, which

included a review of relevant publically available information and numerous witness interviews with former MBIA employees and others, and researched the applicable law with respect to the claims of Lead Plaintiff and the other members of the Class against Defendants and the potential defenses thereto. Additionally, the multiple mediation statements prepared and exchanged as well as the Parties' respective presentations concerning liability and damages also provided Lead Plaintiff with a detailed basis upon which to assess the strengths and weaknesses of the Class's claims against Defendants.

In light of the substantial benefits achieved (the payment of \$68,000,000 for the benefit of the Class), the cost and risks of continuing the litigation against Defendants through trial and appeals, and the fact that the proposed Settlement is the result of arm's-length negotiations assisted by an experienced mediator and has been approved by the Court-appointed institutional investor Lead Plaintiff, it is respectfully submitted that the Settlement warrants the Court's preliminary approval so that notice can be provided to the Class. It is further submitted that the Court should, for purposes of the Settlement, certify the Class and Lead Plaintiff as representative of the Class and appoint Lead Counsel as Class counsel.

## **ARGUMENT**

### **I. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

The settlement of complex class action litigation is favored by public policy and strongly encouraged by the courts. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (internal quotation marks and citation omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is

an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.”).

When reviewing a proposed settlement in the context of preliminary approval, courts make a preliminary determination regarding the fairness, reasonableness, and adequacy of the settlement terms prior to allowing notice to be sent to the potential class. At preliminary approval, the Court’s function is “to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing.” *Prudential*, 163 F.R.D. at 209. In making this preliminary determination, “[w]here 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.” *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); accord *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009).

The terms of the proposed Settlement are well “within the range of possible approval.” *Initial Pub. Offering*, 243 F.R.D. at 87. First, while Lead Plaintiff believes that the claims asserted against Defendants are meritorious, it recognizes that this Action presented a number of substantial litigation risks with respect to establishing liability and damages. For example, Defendants had advanced arguments that they had made all required disclosures; and that if there had been any omissions in the Company’s disclosures, they were, at most, the result of negligence as opposed to an intent to defraud. In support of these arguments, Defendants would have been able to argue that MBIA had specifically disclosed the exposure at issue to its rating agencies and the New York State Insurance Department and that Defendants had no incentive to

hide MBIA's exposure to CDO-squared securities because those securities were rated triple-A during the Class Period. Defendants would also have argued that they lacked a motive to commit fraud because the Individual Defendants did not sell any stock and the Company did not conduct any public offerings during the Class Period. Indeed, the claims asserted against the Individual Defendants in the Consolidated Complaint were dismissed by the Court on the grounds that Lead Plaintiff had not adequately pled facts establishing that they acted recklessly or with fraudulent intent, and, at the time the Settlement was reached, the Individual Defendants had a pending motion to dismiss the Complaint on similar grounds. Lead Plaintiff would also have faced challenges in establishing that the price of MBIA common stock declined as a result of the disclosure of the allegedly concealed facts about MBIA's exposure to the CDO-squared securities, rather than other news or market factors, and in proving the amount of damages to the Class.

Lead Plaintiff and Lead Counsel also considered there to be a substantial risk that, even if they were successful in establishing Defendants' liability at trial (and after resolution of appeals that were certain to be taken, which could take years to resolve), Defendants would not have been able to pay an amount significantly larger than the \$68 million Settlement Amount or even as much as the Settlement Amount. The risk that Defendants would be unable to pay a significant judgment in this Action – years into the future, after a trial and all appeals were resolved – was a particularly significant risk here because MBIA had lost its triple-A rating in 2008 and MBIA faced other litigation that was further depleting the insurance coverage available to satisfy a judgment. The insurance coverage, which was a wasting asset, would have been seriously depleted, if not exhausted, by the continuing costs of this Action and the other litigation against MBIA. Thus, the substantial payment of \$68,000,000, when viewed in the context of

these risks and the uncertainties involved with any litigation, makes the Settlement an excellent result for the Class.

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. In addition to conducting an extensive pre-filing investigation, which included interviewing numerous former MBIA employees, and detailed briefing in opposition to Defendants' motion to dismiss, Lead Plaintiff also consulted with experts on, among other things, damages and loss causation and had the benefit of mediation statements and presentations by Defendants setting forth their arguments on liability and damages. As a result, Lead Plaintiff and Lead Counsel had an adequate basis for assessing the strength of the Class's claims and Defendants' defenses at the time they entered into the Settlement. Moreover, since entering into the agreement-in-principle to settle on July 7, 2011, Lead Plaintiff, through Lead Counsel, has been conducting due diligence discovery to further confirm the adequacy of the Settlement. While that discovery is ongoing, to date, Lead Counsel has not discovered information that runs counter to the belief that the proposed Settlement is an excellent result for the Class.

As noted above, the Settlement was achieved with the significant assistance of Judge Weinstein, a highly experienced mediator, and is endorsed by Lead Plaintiff, a sophisticated institutional investor. Both of these factors also support approval of the Settlement. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) (the use of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion."); *In re Global Crossing*

*Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (the participation of sophisticated institutional investor lead plaintiffs in the settlement process supports approval of settlement). For all of these reasons, Lead Plaintiff respectfully submits that the Court should preliminarily approve the Settlement.

**II. CERTIFICATION OF THE CLASS  
FOR SETTLEMENT PURPOSES IS APPROPRIATE**

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

The proposed Class, which has been stipulated to by the Parties, consists of:

all persons and entities who purchased or otherwise acquired MBIA common stock during the period from July 2, 2007 through and including January 9, 2008 (the “Class Period”), and who were damaged thereby (the “Class”). Excluded from the Class are the Defendants; the members of each Individual Defendant’s Immediate Family; MBIA’s current or former Section 16 Officers or directors; MBIA’s past or present parents, subsidiaries or affiliates and each of their current or former Section 16 Officers, directors, partners, or members; any entity in which any Defendant has or had a controlling interest; and the legal representatives, heirs, beneficiaries, successors or assigns of any such excluded party. Also excluded from the Class is any person or entity who or which properly excludes himself, herself, or itself by filing a valid and timely request for exclusion in accordance with the requirements set forth in the Notice

*See* Preliminary Approval Order ¶ 1.

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at \*8 (S.D.N.Y. Dec. 23, 2009). Indeed, certification of a settlement class “has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants.” *Prudential*, 163 F.R.D. at 205.

A settlement class, like other certified classes, must satisfy all the requirements of Rules 23(a) and (b). *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006).

Nevertheless, the manageability concerns of Rule 23(b)(3) are not at issue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) (“Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested”).

As demonstrated below, certification is appropriate here because the proposed Class meets all the requirements of Rule 23(a) and Rule 23(b)(3).

**A. The Class Satisfies The Requirements Of Rule 23(a)**

Certification is appropriate under Rule 23(a) 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.” Fed. R. Civ. P. 23(a).

**1. The Class Members Are Too Numerous To Be Joined**

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be “impracticable.” Fed. R. Civ. P. 23(a). “Impracticable does not mean impossible,” *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993), but “only that the difficulty or inconvenience of joining all members of the class make the use of the class action appropriate.” *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 244-45 (2d Cir. 2007). Numerosity is presumed when a class consists of forty members or more. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Here, the Class is comprised of purchasers of the more than 125 million shares of MBIA common stock that were outstanding during the Class Period. Although the number of Class Members cannot be identified with specificity at this time, it is likely to be at least in the hundreds. Thus, the Class is sufficiently numerous that joinder of all members would be

impracticable and Rule 23(a)(1) is satisfied. *See Consol. Rail Corp.*, 47 F.3d at 483; *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 175 (S.D.N.Y. 2008) (class of shareholders numbering in hundreds or thousands satisfied the numerosity requirement); *Teachers' Ret. Sys. of La. v. ACLN Ltd.*, No. 01 Civ. 11814 (LAP), 2004 WL 2997957, at \*3 (S.D.N.Y. 2004) (“Plaintiffs are not obligated to prove the exact class size to satisfy numerosity . . . the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period.” (internal quotation marks and citations omitted)).

## 2. There Are Common Questions Of Law And Fact

Rule 23(a)(2) requires the existence of at least one question of law or fact common to the class. *See Central States*, 504 F.3d at 245; *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001). 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. at 85; *see In re Globalstar Sec. Litig.*, No. 01 Civ 1745 (PKC), 2004 WL 2754674, at \*4 (S.D.N.Y. Dec. 1, 2004) (“Common questions of law and fact in this action include whether certain statements were false and misleading, whether those statements violated the federal securities laws, whether those statements were knowingly and recklessly issued, and ensuing causation issues.”); *In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 374 (S.D.N.Y. 2000) (“Where the facts as alleged show that Defendants’ course of conduct concealed material information from an entire putative class, the commonality requirement is met.”).

Lead Plaintiff has asserted claims against Defendants under Sections 10(b) and 20(a) of the Exchange Act. These claims present many questions of law and fact which are common to all Class Members, including:

- whether the federal securities laws were violated by Defendants’ conduct;

- whether Defendants' statements concerning MBIA's exposure to CDOs and other public statements disseminated to the investing public during the Class Period contained material misstatements or omitted to state material information;
- whether Defendants acted with *scienter*;
- whether and to what extent the market price of MBIA common stock was artificially inflated during the Class Period due to the alleged omissions and/or misstatements; and
- whether the members of the Class sustained damages as a result of the Defendants' alleged misconduct and, if so, the proper measure of damages.

See SAC ¶ 197. Because these questions of law and fact are common to all members of the Class, the commonality requirement of Rule 23(a)(2) is easily met.

### **3. Lead Plaintiff's Claims Are Typical Of Those Of The Class**

Rule 23(a)(3) requires that the claims of a class representative be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). Typicality is established where "the claims of the named plaintiff[] arise from same practice or course of conduct that gives rise to the claims of the proposed class members." *In re Vivendi Sec. Litig.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (citation omitted); see *Oxford Health Plans*, 191 F.R.D. at 375. "Typical" does not mean "identical." See *Marsh & McLennan*, 2009 WL 5178546, at \*10. The focus of the typicality inquiry is not the plaintiff's behavior, but rather the defendants' actions. See *ACLN*, 2004 WL 2997957, at \*4. The critical question is whether the proposed class representative and the class can point to a "common course of conduct" by defendants to support a claim for relief. Accordingly, "[f]actual differences involving the date of acquisition, type of securities purchased and manner by which the investor acquired the securities will not destroy typicality if each class member was the victim of the same material misstatements and the same fraudulent course of conduct." *Marsh & McLennan*, 2009 WL 5178546, at \*10; see also *Robidoux*, 987 F.2d at 936-37 ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and

the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.”).

Here, the injuries to Lead Plaintiff and the other members of the Class are unquestionably attributable to the same alleged course of conduct by Defendants, and liability for this conduct is predicated on the same legal theories. Lead Plaintiff alleges that it, like the rest of the Class, paid artificially-inflated prices for MBIA common stock during the Class Period as a result of materially misleading public statements made by Defendants. Lead Plaintiff’s claims and the claims of absent Class Members are based on the same theories and would be proven by the same evidence. Accordingly, the Rule 23(a)(3) typicality requirement is satisfied.

**4. Lead Plaintiff Will Fairly And Adequately Protect 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.” Fed. R. Civ. P. 23(a)(4). The Court must measure the adequacy of representation by two standards: (1) whether the claims of the lead plaintiff conflict with those of the class; and (2) whether the lead plaintiff’s counsel are qualified, experienced, and generally able to conduct the litigation. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *Marsh & McLennan*, 2009 WL 5178546, at \*10; *Oxford Health Plans*, 191 F.R.D. at 376.

Lead Plaintiff here is a sophisticated institutional investor with a substantial financial stake in the litigation and it has and will continue to represent the interest of the Class fairly and adequately. Lead Plaintiff and the other members of the Class share the common objective of maximizing their recovery from Defendants, and there are no conflicts of interest between them. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) (“Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between

the class representatives and other class members”). In addition, Lead Counsel Bernstein Litowitz Berger & Grossmann LLP has extensive experience and expertise in complex securities litigation and class action proceedings throughout the United States. Lead Counsel is well qualified and able to conduct this litigation, as the Court recognized when approving its appointment as lead counsel for the putative class under the PSLRA. Therefore, Rule 23(a)(4) is satisfied.<sup>4</sup>

**B. The Class Satisfies The Requirements Of Rule 23(b)(3)**

Rule 23(b)(3) authorizes class certification if “the court finds that the 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.” Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) is “designed to secure judgments binding all class members save those who affirmatively elect[] to be excluded,” where a class action will “achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem*, 521 U.S. at 614-15 (citation omitted). Certification of the Class here will serve these purposes.

**1. Common Legal And Factual Questions 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.” *Marsh & McLennan*, 2009 WL 5178546, at \*11 (quoting *Moore v. Paine*

---

<sup>4</sup> Lead Counsel has and will continue to fairly and adequately represent the interests of the Class. Accordingly, Lead Counsel should be appointed as counsel for the Class under Rule 23(g).

*Webber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002)). Common issues will predominate where each class member is alleged to have suffered the same kind of harm pursuant to the same legal theory arising out of the same alleged course of conduct, and the only individualized questions concern the amount of damages. *See Marsh & McLennan*, 2009 WL 5178546, at \*11; *Initial Pub. Offering*, 243 F.R.D. at 92; *In re Blech Sec. Litig.*, 187 F.R.D. 97, 107 (S.D.N.Y. 1999) (“In determining whether common questions of fact predominate, a court’s inquiry is directed primarily toward whether the issue of liability is common to members of the class.”). As the Supreme Court has noted, predominance is a test “readily met” in cases alleging securities fraud. *Amchem*, 521 U.S. at 625.

Here, the same alleged course of conduct by Defendants – a series of public statements about MBIA’s exposure to CDOs – forms the basis of all Class Members’ claims. There are numerous common issues relating to Defendants’ liability which predominate over any individualized issues. The predominance requirement of Rule 23(b)(3) is therefore satisfied.

## **2. A Class Action Is Superior To Other Methods Of Adjudication**

Rule 23(b)(3) 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 or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.” *See Fed. R. Civ. P. 23(b)(3)*.

Considering these factors, this consolidated class action is clearly “superior to other available methods for fairly and efficiently adjudicating” the federal securities law claims of the large number of purchasers of MBIA common stock during the Class Period. Indeed, courts

have concluded that the class action device in securities cases is usually the superior method by which to redress injuries to a large number of individual plaintiffs:

In general, securities suits such as this easily satisfy the superiority requirement of Rule 23. Most violations of the federal securities laws, such as those alleged in the Complaint, inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible. Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would neither be “fair” nor an adjudication of their claims. Moreover, although a large number of individuals may have been injured, no one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf.

*In re Blech*, 187 F.R.D. at 107. See also *Marsh & McLennan*, 2009 WL 5178546, at \*12 (recognizing that the “class action is uniquely suited to resolving securities fraud 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 Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 139 (S.D.N.Y. 2008) (“as a general rule, securities fraud cases ‘easily satisfy the superiority requirement [as] [m]ost violations of the federal securities laws . . . inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible’”).

Here, the complexity of the claims against Defendants and the high cost of individualized litigation make it unlikely that the vast majority of Class Members would be able to obtain relief without class certification. Moreover, any potential difficulties of managing the class action in further litigation and at trial need not be considered here because the parties seek to certify the Class solely for the purposes of settlement. Accordingly, the requirements of Rule 23(b)(3) are satisfied.

### **III. NOTICE TO THE CLASS SHOULD BE APPROVED**

As outlined in the Preliminary Approval Order, Lead Plaintiff will notify Class Members of the Settlement by mailing the Notice and Claim Form to all Class Members who can be identified with reasonable effort. The Notice will advise Class Members of (i) the pendency of the class action; (ii) the essential terms of the Settlement; and (iii) information regarding Lead Counsel's motion for attorneys' fees and reimbursement of litigation expenses. The Notice will also provide specifics on the date, time and place of the Settlement Hearing and set forth the procedures, as well as deadlines, for opting out of the Class, for objecting to the Settlement, the proposed Plan of Allocation and/or the motion for attorneys' fees and reimbursement of litigation expenses, and for submitting a Claim Form. The proposed Preliminary Approval Order further requires Lead Counsel to cause the Summary Notice to be published in *Investor's Business Daily* and to be transmitted over *PR Newswire* within ten (10) business days of the mailing of the Notice. Lead Counsel will also post a copy of the Notice and Claim Form on the website to be developed for the Settlement.

The form and manner of providing notice to the Class satisfy the requirements of due process, Rule 23, and the PSLRA, 15 U.S.C. § 78u-4(a)(7). The Notice and Summary Notice "fairly apprise the prospective members of the class of the terms of the proposed settlement[s] and of the options that are open to them in connection with the proceedings" *Wal-Mart*, 396 F.3d at 114 (internal quotation marks omitted). The manner of providing notice, which includes individual notice by mail to all Class Members who can be reasonably identified, represents the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. *See In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at \*3 (S.D.N.Y. Nov. 20, 2008); *Global Crossing*, 225 F.R.D. at 448-49.

**CONCLUSION**

For all the foregoing reasons, Lead Plaintiff respectfully requests that the Court (i) preliminarily approve the proposed Settlement as within the range of fairness, reasonableness and adequacy; (ii) certify the Class and Lead Plaintiff as Class representative and appoint Lead Counsel as Class counsel for purposes of the Settlement only; (iii) approve the proposed form and manner of notice to putative Class Members; and (iv) schedule a date and time for the Settlement Hearing to consider final approval of the Settlement and related matters. The proposed Preliminary Approval Order is attached to Notice of Motion as Exhibit 2.

Dated: September 6, 2011

Respectfully submitted,

**BERNSTEIN LITOWITZ BERGER &  
GROSSMANN LLP**

/s Steven B. Singer

Steven B. Singer  
Beata Gocyk-Farber  
Kurt Hunciker  
John Rizio-Hamilton  
1285 Avenue of the Americas  
New York, NY 10019  
Tel: (212) 554-1400  
Fax: (212) 554-1444

#568009