

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ST. LUCIE COUNTY FIRE DISTRICT)
FIREFIGHTERS' PENSION TRUST FUND,)
and TOWN OF NORTH BRANFORD)
PENSION COMMITTEE, on Behalf of)
Themselves and All Others Similarly Situated,)

Plaintiffs,)

vs.)

MOTOROLA, INC., EDWARD J. ZANDER,)
THOMAS MEREDITH and GREGORY Q.)
BROWN,)

Defendants.)

No. 1:10-cv-00427

Honorable Virginia M. Kendall

**UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

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UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

Lead Plaintiff St. Lucie County Fire District Firefighters' Pension Trust Fund and named plaintiff Town of North Branford Pension Committee (collectively, "Plaintiffs"), hereby move the Court, pursuant Fed. R. Civ. P 23(e), for an order: (1) preliminarily approving the proposed settlement in this action ("Settlement") as memorialized in the Settlement Agreement ("Settlement Agreement"), attached hereto as Exhibit 1; (2) approving the form of Class notice described in the Notice of Proposed Settlement of Class Action, attached to the Settlement Agreement as Exhibit A-1; (3) approving the form of the Proof of Claim and Release, attached to the Settlement Agreement as Exhibit A-2; (4) approving the form of the Summary Notice, attached to the Settlement Agreement as Exhibit A-3; and (5) scheduling a hearing to determine whether the Settlement should be given final approval ("Final Approval Hearing") and establishing dates for submission of proofs of claim, dissemination of the Class notice, and other relevant deadlines. A proposed order is attached to the Settlement Agreement as Exhibit A. Defendants are unopposed to this motion for purposes of settlement only and expressly reserve their right to contest the statements set forth below or relief requested herein outside the context of this Settlement, including, but not limited to, Plaintiffs' statements in Section II below regarding the elements of Rule 23.

The following is a proposed timetable to help the Court establish the necessary deadlines in the Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Order" or "Prelim. Order"), provided that the Preliminary Order is entered on or before July 11, 2011:

<u>Event</u>	<u>Proposed Deadline</u>
Motorola to Provide Names and Addresses of Class Members to Claims Administrator (See Prelim. Order ¶ 6(a))	July 14, 2011

Mailing of Notice (See Prelim. Order ¶ 6(b))	July 28, 2011
Summary Notice Publication (See Prelim. Order ¶ 6(c))	August 8, 2011
Filing of Opening Briefs in Support of Final Approval of Settlement, Plan of Allocation, and Application for Fees and Expenses (See Prelim. Order ¶ 16)	September 20, 2011
Filing Requests for Exclusion (See Prelim. Order ¶ 12)	October 3, 2011
Filing Objections (See Prelim. Order ¶ 14)	October 3, 2011
Filing of Reply Briefs in Response to Objections (See Prelim. Order ¶ 16)	October 19, 2011
Proof of Publication and Mailing of Notice (See Prelim. Order ¶ 6(d))	October 26, 2011
Final Approval Hearing (See Prelim. Order ¶ 3)	November 2, 2011
Deadline for Proofs of Claim (See Prelim. Order ¶ 10)	November 25, 2011

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

After a mediation session conducted in accordance with the Seventh Circuit's Settlement Conference Program, the parties negotiated a Settlement of the claims asserted in this Action on behalf of all persons who purchased the common stock of Motorola, Incorporated ("Motorola" or the "Company") on the open market between October 25, 2007 and January 22, 2008, inclusive.¹ The Settlement amount of \$3,150,000 in cash, plus the payment of up to \$200,000 towards the cost of administering the Settlement, represents a substantial recovery for Motorola shareholders given the procedural posture of the case. Although Plaintiffs believe in the merits of the case,

¹ The "Action" is defined in the Settlement Agreement.

they recognize that the case had been dismissed by this Court, and that even if they were to prevail before the Seventh Circuit and the dismissal was reversed, they would face serious obstacles in establishing liability and damages should this case proceed to trial. Moreover, even if this case were to proceed to trial, Defendants could appeal any judgment favorable to the Class, delaying any recovery to Class Members. Defendants deny each and all of the claims and contentions alleged by Plaintiffs. Nonetheless, Defendants have concluded that further conduct of the Action would be protracted and expensive, and that it is desirable that the Action be fully and finally settled in the manner and upon the terms and conditions set forth in the Settlement Agreement.

The Settlement Agreement has exhibits attached, including: (1) the Preliminary Order as Exhibit A; (2) the Notice of Proposed Settlement of Class Action (“Notice”) as Exhibit A-1; (3) the Proof of Claim and Release (“Proof of Claim”) as Exhibit A-2; (4) the Summary Notice (“Summary Notice”) as Exhibit A-3; and (5) the [Proposed] Final Judgment and Order of Dismissal with Prejudice as Exhibit B.

The Preliminary Order provides for the members of the Class to be apprised of the terms of the Settlement by disseminating the Notice via first-class mail to all Class Members who can be identified with reasonable effort and by publishing the Summary Notice on the Internet and in the national edition of *Investor’s Business Daily*. The Preliminary Order also establishes deadlines for the following events necessary to consummate the Settlement: (1) mailing the Notice; (2) publication of the Summary Notice; (3) Class Members’ requests for exclusion from the Class; (4) filing objections to the terms of the Settlement and the Plan of Allocation of the Settlement proceeds; (5) filing Proofs of Claim by Class Members; and (6) filing of papers for

final approval of the Settlement, Plan of Allocation and Application for Attorneys' Fees and Expenses.

I. PLAINTIFFS BELIEVE THAT THE SETTLEMENT OF THE ACTION IS IN THE BEST INTEREST OF THE CLASS

Fed. R. Civ. P. 23(e) requires court approval for any compromise of a class action. In determining whether to approve the Settlement, the Court should be guided by the "strong federal policy favoring the voluntary resolutions of disputes." *Pesek v. Donahue*, No. 04 C 4525, 2006 WL 1049969, at *4 (N.D. Ill. Feb. 9, 2006) (citing *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562 (7th Cir. 1995)).² Indeed, this policy has particular application to voluntary settlements of class action litigation. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."). Accordingly, the Court should "consider the facts in the light most favorable to the settlement." *Henry v. Sears Roebuck & Co.*, No. 98-CV-4110, 1999 WL 33496080, at *8 (N.D. Ill. Jul. 23, 1999). *See also Bennett v. Behring Corp.*, 96 F.R.D. 343, 348 (S.D. Fla. 1982) (Settlements of class actions are "highly favored in the law and will be upheld whenever possible because they are means of amicably resolving doubts and preventing lawsuits.").

The complexity and size of class actions warrant this approach. "Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998). There is also an initial presumption made in favor of the settlement's fairness, absent contrary evidence. *See Hispanics United of DuPage County v. Village of Addison, Ill.*, 988 F. Supp. 1130, 1150 n.6 (N.D. Ill. 1997).

² Internal citations, footnotes, and quotations are omitted, and emphasis is added, unless otherwise noted.

The parties here have memorialized their agreement to settle this action in the Settlement Agreement. The Settlement Agreement contains all the material terms of the Settlement, including, among other things, the manner and form of notice to the Class and the contingencies or conditions to the Settlement's final approval. Plaintiffs believe that the Settlement is in the best interest of the Class.

II. THE PROPOSED CLASS MEETS THE PREREQUISITES FOR CLASS CERTIFICATION UNDER RULE 23

One of the Court's functions in reviewing a proposed settlement of a class action is to determine whether the action may be maintained as a class action under Fed. R. Civ. P. 23. *See Amchem Prods. v. Windsor*, 51 U.S. 591 (1997). Rule 23(a) establishes four prerequisites to class certification: (i) "numerosity," (ii) "commonality," (iii) "typicality," and (iv) "adequacy" of representation. *See Id.* at 613. In addition, the Class must meet one of the three requirements of Rule 23(b). *See Fed. R. Civ. P. 23*. The Seventh Circuit has acknowledged that Rule 23 must be liberally construed in this context: "Its policy is to favor maintenance of class actions. This policy operates just as surely in cases where securities fraud is charged. It is especially strong in instances where denial of class status would effectively terminate further litigation of the securities fraud claims." *King v. Kan. City S. Indus., Inc.*, 519 F.2d 20, 26 (7th Cir. 1975). As further detailed below, Plaintiffs assert that the proposed settlement Class satisfies Rule 23's requirements.³

A. Rule 23(a)(1) – Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, the number and location of the putative Class Members is such that it is impractical to join all of the Class Members in one lawsuit. *See In re*

³ The settlement Class is defined in ¶ 1.4 of the Settlement Agreement.

Mills Corp. Sec. Litig., 257 F.R.D. 101 (E.D. Va. 2009); *Tatz v. Nanophase Techs, Corp.*, No. 01-8440, 2003 WL 21372471, at *6 (N.D. Ill. Jun. 13, 2003). There are thousands of potential Class Members, which is more than sufficient to find that joinder of all parties is impracticable under Rule 23(a)(1). Indeed, during the Class Period, Motorola's common stock was listed and actively traded on the New York Stock Exchange, an open and efficient market. "[I]n securities fraud suits involving nationally traded securities, numerosity may be assumed." *In re Sys. Software Assocs., Inc. Sec. Litig.*, No. 97 C 177, 2000 WL 1810085, at *1 (N.D. Ill. Dec. 8, 2000). *See also In re NeoPharm, Inc. Sec. Litig.*, 225 F.R.D. 563, 565 (N.D. Ill. 2004) (certifying class where the company had more than 16 million shares being traded on NASDAQ such that it could be "reasonably inferred that hundreds, if not thousands, of persons would be included in the proposed class"). Thus, numerosity has been met.

B. Rule 23(a)(2) – Commonality

Rule 23(a)(2) is satisfied where there are questions of law or fact common to the class. Complete identity of a named plaintiff's claims with those of the class is not required. *See In re Hartmarx Sec. Litig.*, No 01 C 7832, 2002 WL 31103491, at *4 (N.D. Ill. Sept. 19, 2002). "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). "Rule 23(a)(2) commonality is not a demanding requirement; one issue of fact or law common to all class members will suffice." *Abrams v. Van Kampen Funds, Inc.*, No. 01 C 7538, 2002 WL 1989401, at *3 (N.D. Ill. Aug. 27, 2002). Common questions of law and fact clearly predominate in this action. Here, the overarching question applicable to all Class Members is whether the Defendants made misrepresentations or omitted information necessary to be disclosed, and whether the alleged misrepresentations or omissions were material. *See Tatz*, 2003 WL

21372471, at *6 (certifying a class where common questions included whether the federal securities laws were violated by the defendants' acts and omissions, and whether the defendants participated in and pursued the common course of conduct). Thus, commonality is satisfied.

C. Rule 23(a)(3) – Typicality

The typicality requirement of Rule 23(a)(3) is satisfied where a plaintiff's claims arise from the same course of conduct that gives rise to the claims of other Class Members and are based on the same legal theory. *See Rosario*, 963 F.2d at 1018. Here, Plaintiffs and all other members of the proposed Class allege that they suffered damages as a result of Defendants' dissemination of materially false and misleading public information, which artificially inflated the price of Motorola's common stock throughout the Class Period. Plaintiffs' claims are typical of other Class Members' claims because they, like all other members of the Class, purchased Motorola securities on the open market during the Class Period. Moreover, Plaintiffs' claims, like the claims of the Class, are premised on the same legal theories – Defendants' violations of Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5 promulgated thereunder, as well as violations of Section 20(a) of the 1934 Act. Typicality is, therefore, satisfied. *See Software Assocs.*, 2000 WL 1810085, at *2 (granting class certification where plaintiffs' claims arose from the same "course of action that g[ave] rise to the claims of other class members and [we]re based on the same legal theory").

D. Rule 23(a)(4) – Adequacy of Representation

Plaintiffs meet the "adequacy" requirement of Rule 23. Rule 23(a)(4) requires a finding that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirements of Rule 23(a)(4) will be met where: (i) the claims of the class representatives and other members of the class are not antagonistic; (ii) the

class representatives are sufficiently interested in the outcome of the case; and (iii) experienced, competent counsel represents them. *See Silverman v. Motorola, Inc.*, 259 F.R.D. 163, 173 (N.D. Ill. 2009); *Tatz*, 2003 WL 21372471, at *8. Here, Plaintiffs satisfy all three prongs of the adequacy test of Rule 23(a)(4).

First, Plaintiffs have no interests antagonistic to the interests of the Class. Plaintiffs are members of the Class, and they therefore suffered the same type of alleged economic damages as the other Class Members. Accordingly, because their interests are squarely in line with each other, there is no conflict between Plaintiffs and the members of the Class. Second, Plaintiffs collectively purchased a significant number of shares of Motorola stock during the Class Period. As a result, Plaintiffs allege that they suffered substantial losses based on Defendants' wrongful conduct. Thus, Plaintiffs have sufficient interest in the outcome of the case. Third, Plaintiffs retained attorneys that are highly qualified, experienced, and able to successfully conduct this litigation. Plaintiffs' counsel has extensive experience in litigating complex class actions. Given the lack of conflict, their interest in the outcome of this case, and their retention of highly experienced and competent counsel, Plaintiffs are adequate class representatives.

E. The Class May Be Properly Certified Under Rule 23(b)(3)

In addition to satisfying all of the criteria of Rule 23(a), a party seeking class certification must also satisfy one of the requirements of Rule 23(b). Certification of a class under Rule 23(b)(3) requires that common issues predominate over individual issues and that the class action mechanism is superior to other methods of adjudicating the controversy. Both of these requirements are satisfied here.

The predominance inquiry focuses on the existence of common issues. As the Supreme Court recognized in *Amchem*: "Predominance is a test readily met in certain cases alleging

consumer or securities fraud or violations of the antitrust laws.” 521 U.S. at 625. To determine whether common questions predominate, courts look to whether there is a “common nucleus of operative facts.” *Tatz*, 2003 WL 21372471, at *9. In this case, Plaintiffs assert that the same set of operative facts, and the issues of falsity, materiality, scienter and causation are common to all Class Members and clearly predominate over any individual issues. *See Software Assocs.*, 2000 WL 1810085, at *4 (“The principal issues of law and fact relate to defendants’ alleged misrepresentations. The issues are common to the members of the class and predominate over any questions affecting only individual members.”).

Further, resolution of this case through a class action is far superior to litigating thousands of individual claims where the expense for a single investor in pursuing a separate action could exceed the individual’s loss. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (class action device permits pooling of claims where it would be uneconomical to litigate individually).⁴

In sum, Plaintiffs believe that this Action meets all of the requirements of Rule 23(a) and (b)(3).⁵ It should, therefore, be certified as a class action in conjunction with the Settlement.

III. THE PROPOSED NOTICE IS ADEQUATE

The parties have negotiated the form of the Notice and Summary Notice to notify the Class of the terms of the Settlement, the Class Members’ rights in connection with the Settlement, and the date of the Final Approval Hearing. The Notice, which will be sent by mail to Class Members, has been carefully drafted to comply with the provisions of the Private

⁴ As noted, Defendants reserve their right to contest the foregoing outside the settlement context, including on manageability ground. As the Supreme Court held in *Amchem*, however, manageability need not be considered in addressing a proposed settlement, since the claims being settled will obviously not be litigated or tried. *See Amchem*, 521 U.S. at 620.

⁵ Moreover, and as demonstrated throughout this case, Lead Counsel satisfy the requirements of Rule 23(g).

Securities Litigation Reform Act of 1995. *See* 15 U.S.C. §78u-4(a)(7). Along with the Notice, Class Members will receive a Proof of Claim form on which to provide their purchase and sale information for their Motorola common stock. Class Members who wish to share in the Settlement proceeds will complete and mail their Proofs of Claim to Garden City Group, Inc., the claims administrator retained by Plaintiffs' counsel.

The parties have agreed to use the traditional methods for notifying Class Members of the Settlement: notification by mail, and publication on the Internet and in a national newspaper focusing on investors. Following the entry of the Preliminary Order, the claims administrator will mail the Notice and the Proof of Claim forms to Class Members who can be identified from stock transfer records.⁶ The claims administrator will cause the Summary Notice to be published on the Internet and in the national edition of *Investor's Business Daily*. Notice by mail and by publication satisfies the requirements of due process in this type of litigation. *See, e.g., Sears Roebuck & Co.*, 1999 WL 33496080, at *4 (notice mailed by first-class mail to identifiable class members, along with publication of summary notice in a national newspaper, deemed "best notice practicable under the circumstances").

Upon notification of the Settlement, Class Members have three choices: (1) approve the Settlement and share in the Settlement proceeds by submitting a Proof of Claim; (2) exclude themselves from the Settlement by "opting out" of the Class, in which case they will not participate in the Settlement recovery and will retain their individual claims against Defendants; or (3) disapprove of the Settlement and/or attorneys' fees and expense petition by objecting to its

⁶ The Preliminary Order provides that nominees who purchased Motorola securities on behalf of beneficial owners shall send the Notice and Proofs of Claim to those beneficial owners within 10 calendar days of the receipt of such documents. Prelim. Order ¶ 7. This provision ensures that brokers or other entities that purchased Motorola securities for others will forward the documents to the beneficial owners who are the appropriate signatories to the Proof of Claim forms.

terms. To participate in the Settlement, Class Members must submit their Proofs of Claim within the time specified in the Preliminary Order. Class Members who wish to exclude themselves from the Settlement must submit a timely request for exclusion. Class Members who wish to object to the Settlement must file and serve a notice of their intention to appear and object. Objectors can submit a memorandum of law in opposition to the Settlement and can appear before the Court at the Final Approval Hearing. This Court should find that the Notice and the procedures for its dissemination are reasonably calculated to provide notice of the Settlement to the Class.

IV. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

Approval of the Settlement is at the discretion of the Court. *Isby*, 75 F.3d at 1196. To preliminarily approve the Settlement, the Court must determine whether the Settlement has been negotiated at arm's length and is fair, reasonable, adequate, and in the best interests of the Settlement Class. *McKinnie v. JP Morgan Chase Bank, N.A.*, No. 07-CV-774, 2009 WL 4782736, at *1 (E.D. Wis. Apr. 8, 2009). The Court should examine whether there is a probability that the Settlement could be finally approved, thus warranting notification to the Class. *See generally Id.* The Court must "determine that the settlement is neither illegal nor collusive." *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 211 (S.D. Ohio 1997). *See also Isby*, 75 F.3d at 1196 (the Court's inquiry "is limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate"). However, courts should exercise restraint in examining a proposed settlement and recognize: "Settlements, by definition, are compromises which need not satisfy every single concern of the plaintiff class, but may fall anywhere within a broad range of upper and lower limits." *In re Saxon Sec. Litig.*, No. 82 Civ. 3103 (MJL), 1985 WL 48177, at *4 (S.D.N.Y. Oct. 30, 1985). Given that courts should "refrain from resolving the

merits of the controversy or making a precise determination of the parties' respective legal rights," the sole focus is upon "the general principles governing approval of class actions and settlements and not upon the substantive law governing the claims asserted in the litigation." *Isby*, 75 F.3d at 1196-97.

To be sure, a court should not engage in a trial of the merits when considering the propriety of the settlement:

In examining a proposed compromise...the Court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial. As more recently stated, the trial court in approving the settlement...[does not] have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute...A settlement hearing is not a rehearsal of the trial.

Nelson v. Waring, 602 F. Supp. 410, 413 (N.D. Miss. 1983).

Indeed, "the merits of the case are not at issue during the settlement review process. Otherwise, a primary goal of settlement – to avoid the expense and delay of trial – would be thwarted." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 843 (E.D. La. 2007). "The Court may not resolve contested issues of fact or law, but instead is concerned with the overall fairness, reasonableness, and adequacy of the proposed settlement as compared to the alternative litigation." *Id.*

The Settlement is a product of extensive arm's-length negotiations between counsel for the parties, including a mediation session conducted in accordance with the Seventh Circuit's Settlement Conference Program with the assistance of Rocco J. Spagna, Esq. The negotiations extended over a period of time, and the parties made concessions and won positions on difficult and hard-fought issues. Providing a substantial recovery for members of the Class, the Settlement is fair, reasonable, adequate, and in the best interests of the Class. Therefore, the Settlement should be preliminarily approved.

At the Final Approval Hearing, Class Members who have timely filed and served their notices of intention to appear may voice their objections. The Court can then consider the merits of the Settlement in light of any objections and determine whether to grant final approval of the Settlement. Plaintiffs' counsel will have submitted briefs and other documents in support of the Settlement and in support of their request for attorneys' fees and reimbursement of expenses, and the Court will be asked to determine the appropriate amounts to be awarded. If the Court finds the Settlement fair and reasonable, the Court should enter the Final Judgment Order of Dismissal with Prejudice, dismissing this action and effecting a release of all claims as provided for in the Settlement Agreement.

CONCLUSION

Plaintiffs respectfully request that this Court enter the attached order, and find preliminarily that (i) the Settlement is reasonable and fair, and (ii) notification of the Class Members of the terms of the Settlement and of their rights in connection with the Settlement is warranted.

DATED: June 17, 2011

Respectfully Submitted,

/s/ Beth A. Kaswan
BETH A. KASWAN (#ILND-GB-2256)
GEOFFREY JOHNSON
SCOTT+SCOTT LLP
500 Fifth Avenue, 40th Floor
New York, NY 10110
Tel: 212-223-6444
Fax: 212-223-6334

*Lead Counsel for Lead Plaintiff St. Lucie
County Fire District Firefighters' Pension
Trust Fund and Named Plaintiff Town of
North Branford Pension Committee*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically via the Court's CM/ECF system this 17th day of June, 2011. This document was served electronically upon all those registered to receive electronic notice, and via regular U.S. mail upon all parties not so registered. All parties may access this document through the Court's CM/ECF system.

SCOTT+SCOTT LLP

/s/ Beth A. Kaswan

BETH A. KASWAN (#ILND-GB-2256)
500 Fifth Avenue, 40th Floor
New York, NY 10110
Tel: 212-223-6444
Fax: 212-223-6334

*Lead Counsel for Lead Plaintiff St. Lucie
County Fire District Firefighters' Pension Trust
Fund and Named Plaintiff Town of North
Branford Pension Committee*