UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES J. HAYES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. HARMONY GOLD MINING COMPANY LIMITED, Defendant.	CASE NO. 1:08 Civ. 03653-BSJ-MHD

MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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Class Counsel respectfully submits this memorandum of law in support of the motion for preliminary approval of the proposed Settlement reached with Harmony Gold Mining Co., Ltd. ("Harmony Gold").

I. INTRODUCTION

Class Counsel and Defendant's Counsel have negotiated, at arms' length, a proposed Settlement of all claims asserted on behalf of all Class Members who purchased Harmony Gold ADRs or call options, or sold Harmony Gold put options during the Class Period. The Settlement provides for a Cash Settlement Amount of $9,000,000, which represents an exceptional recovery for holders of these securities. Class Counsel is fully informed of the strengths and weaknesses of the action, having had the opportunity to engage in extensive discovery and consult with highly respected experts before agreeing to the proposed Settlement. Class Counsel also appreciates the complex and highly uncertain nature of trying this action before a jury, complicated even further by the South African domicile of all fact witnesses, and anticipates that it would face significant hurdles in establishing Harmony Gold's liability and damages if it were to proceed to trial. Of course, even if the Class were to prevail at trial, Harmony Gold would likely appeal any favorable judgment, delaying and possibly jeopardizing any recovery. Class Counsel fully endorses and respectfully recommends the proposed Settlement, as it is in the best interests of the Class.

The proposed Settlement is contained in the executed Stipulation and Agreement of Settlement dated July 18, 2011 ("Stipulation"). The Stipulation includes several exhibits, including:

- Exhibit A, Notice of Proposed Settlement of Class Action and Motion for Attorneys' Fees and Fairness Hearing ("Notice"). The Notice contains the proposed Plan of Allocation ("Plan of Allocation") and Proof of Claim and Release form ("Proof of Claim");

- Exhibit B, a summary notice of proposed settlement and motion for attorneys' fees, for publication ("Summary Notice");
- Exhibit C, the Order Preliminarily Approving Settlement and Providing for Notice of Settlement ("Preliminary Order"); and
- Exhibit D, the Order and Final Judgment Approving Settlement and Dismissing the Action with Prejudice ("Order and Final Judgment").

Class Counsel seeks entry of the proposed Preliminary Order, which (1) preliminarily approves the proposed Settlement, including the Plan of Allocation; (2) approves the form and manner of giving notice of the proposed Settlement to the Class by means of the Notice and Summary Notice; and (3) sets a hearing date for final approval of the Settlement ("Fairness Hearing"), along with a schedule for various deadlines relevant to the Fairness Hearing. These deadlines include mailing the Notice and publishing the Summary Notice, the submission of all objections or requests for exclusion, and the submission of Proofs of Claim.

As shown below, the proposed Settlement is an excellent result for the Class, as it is exceedingly fair, reasonable and adequate under the governing standards in this Circuit, and should be approved by the Court.

II. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998). Approving a settlement "is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (internal quotations omitted).

Preliminary approval of a proposed settlement "is the first in a two-step process required before a class action may be settled." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). First, "the court reviews the proposed terms of settlement and makes a

preliminary determination on the fairness, reasonableness and adequacy of the settlement terms." *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005). Where the proposed settlement "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *Id.* (*quoting NASDAQ Market-Makers*, 176 F.R.D. at 102).[1]

Where the settlement, as here, is "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery," then a "presumption of fairness, adequacy, and reasonableness may attach." *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (*quoting Manual for Complex Litigation, Third*, § 30.42).

A. The Proposed Settlement is Fair, Reasonable and Adequate

1. The Proposed Settlement is the Result of Non-Collusive, Arms' Length Negotiations

The proposed Settlement of $9 million presents an excellent result for the Class, and is the product of extensive arms' length negotiations between Class Counsel and Defendant's Counsel. These arms' length negotiations were facilitated by the Hon. Layn R. Phillips (Ret.), who the parties selected as a mediator.[2] Judge Phillips is submitting a Declaration reflecting his perspective on the proposed Settlement which is attached as Exhibit A.

[1] The Second Circuit has laid out nine factors for courts to consider whether a class action settlement is fair, reasonable and adequate. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). The Court should consider these factors in its final approval of the Settlement, not on the motion for preliminary approval of the settlement. *In re Prudential Secs. Inc. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995); *see also Authors Guild v. Google, Inc.*, 2009 WL 4434586, at *1 (S.D.N.Y. Dec. 1, 2009) ("In evaluating a proposed class action settlement agreement for preliminary approval . . . a full fairness analysis is neither feasible nor appropriate.") (Chin, J.).

[2] Judge Phillips formerly served with distinction, first as a United States Attorney, and then as a United States District Judge, and is one of the most widely-respected mediators in the nation.

The parties conducted a formal, day-long mediation session in New York before Judge Phillips on February 17, 2011. In attendance at the mediation were Class Counsel, Liaison Counsel, the Class Representative (Mr. James. J. Hayes), Defendant's Counsel, and other authorized representatives on behalf of Harmony. The parties prepared and exchanged comprehensive mediation statements and replies prior to the mediation. The mediation progressed into the evening on February 17, but impasses arose on several key issues.

In the months following this mediation session, Judge Phillips and his staff held a series of follow-up discussions with Class Counsel and with Defendant's Counsel in an effort to resolve these impasses. On May 25, 2011, these discussions finally culminated in Judge Phillips issuing a mediator's proposal for a $9 million cash settlement, which, after due consideration, both Defendant, its Counsel, and Class Counsel accepted. At all times, the negotiations were conducted at arms' length, and the process required all parties and their counsel to assess difficult and uncertain outcomes. There can be no doubt that the proposed Settlement is "the product of serious, informed, non-collusive negotiations." *Initial Pub. Offering*, 226 F.R.D. at 194 (finding proposed settlement the product of non-collusive negotiations where settlement negotiations were facilitated by a retired United States District Judge acting as a mediator); *In re Currency Conversion Fee Antitrust Litig.*, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) ("Judge Infante's participation in the negotiations substantiates the parties' claim that the negotiations took place at arm's length.").

2. The Settlement was Reached by Capable Counsel after Meaningful Discovery

The factual issues raised in this action were extremely complex. But, as the Court recognized in its Order of November 17, 2010 (D.E. 66), Class Counsel "is well-qualified to prosecute this case on behalf of the class."

As an initial matter, Class Counsel did not agree to start the mediation process without having reviewed an extensive amount of internal company documents. This review was to ensure that Class Counsel had sufficient information to properly evaluate the strengths and weaknesses of the claims asserted in the Complaint. In all, Class Counsel painstakingly analyzed over 190,000 pages of internal company documents, and did not agree to the proposed Settlement until every one of these documents was reviewed.[3] In addition, Class Counsel consulted with a respected financial expert, Dr. John D. Finnerty. Dr. Finnerty conducted an event study and a series of other financial analyses, and concluded that (1) the market for Harmony Gold's ADRs and options was efficient; (2) it was overwhelmingly likely that the drop in Harmony Gold's ADR price on August 6 and 7, 2007 was related to disclosures regarding Harmony Gold's alleged fraud; and (3) it was economically and financially feasible to calculate the economic loss for purchasers of Harmony Gold's ADRs and call options, and for sellers of Harmony Gold's put options. *See* Declaration of John D. Finnerty, Ph.D. (D.E. 60).

Class Counsel thus had a clear and detailed view of the factual strengths and weaknesses of the case. *Initial Pub. Offering*, 226 F.R.D. at 194 (preliminarily approving settlement where "[t]he settling parties are represented by experienced and talented counsel that share expertise in this field and an extensive knowledge of the details of this case."); *see also In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000) (preliminarily approving settlement where counsel consulted experts and reviewed 86,000 company documents); *Great Neck Capital Appreciation Inv. P'ship, LP v. Pricewaterhouse Coopers, LLP*, 212 F.R.D. 400, 410 (E.D. Wis. 2002) ("[T]he settlement was reached after PwC's motion to dismiss had been decided and after

[3] Class Counsel also engaged a team of forensic accountants to review and assess important accounting documents.

merits discovery was well underway. Thus, plaintiffs' counsel's evaluation of the case was based on a reasonable amount of information.").

3. The Proposed Settlement is in the Best Interests of the Class

The $9 million proposed Settlement represents an exceptional recovery for the Class. "Securities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007); *see also In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) ("[I]n evaluating the settlement of a securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain."). Because of:

> [T]he lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class. In the circumstances of such a case as this, it may be preferable to take the bird in the hand instead of the prospective flock in the bush.

Prudential, 163 F.R.D. at 210. The proposed Settlement will allow the Class to receive a concrete benefit now, not a hypothetical benefit after years of uncertain litigation and a far-from-guaranteed jury verdict. *See In re AOL Time Warner, Inc.*, 2006 WL 903236, at *13 (S.D.N.Y. Apr. 6, 2006) (immediate, substantial and concrete benefit of settlement outweighs possibility of higher recovery after trial).

An immediate and concrete benefit for Class Members is especially important in an action like this where the sole defendant is a foreign corporation whose principal place of business is in the Republic of South Africa. *See Gilat*, 2007 WL 1191048, at *10 (noting increased costs and complexity of discovery where defendant was located overseas). Even if Class Counsel were to obtain a favorable jury verdict that would survive the inevitable round of appeals, there is still no guarantee that South African courts will recognize or enforce a securities

fraud class action judgment. If the South African courts refuse to recognize a judgment, the Class will receive nothing.[4]

B. The Plan of Allocation is Fair and Reasonable

"An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re American Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (internal quotations omitted). The court's "principal obligation is simply to ensure that the fund distribution is fair and reasonable." *Id.* (*quoting Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983)).

Here, the proposed Plan of Allocation[5] was drafted by Dr. Finnerty, who has significant experience in drafting plans of allocation, and approved by Class Counsel. It is consistent with Dr. Finnerty's damages calculations, and takes into account the relative strengths and weaknesses of the claims asserted in the Complaint. It provides a reasonable, rational basis for Class Members to recover their pro rata damages based upon the specific Harmony Gold security in which they transacted, and the date on which that transaction occurred. The proposed Plan of Allocation also prohibits Class Members from receiving a windfall by limiting recovery only to those Class Members who suffered actual losses. The proposed Plan of Allocation is fair and reasonable, and should be approved. *See Danieli v. IBM Corp.*, 2008 WL 6583144, at *5 (S.D.N.Y. Nov. 16, 2009) (approving plan of allocation where it "is rationally related to the

[4] On November 4, 2010, the Court ordered the Clerk to transmit letters rogatory to the South African Department of Justice and Constitutional Development to request that Class Counsel and Defendant's Counsel be permitted take the depositions of two witnesses in South Africa. D.E. 63. To date, no response has been received from the South African authorities. While Class Counsel fully appreciate and understand the complexities of international litigation, the long periods of time involved for the depositions of only two witnesses (to say nothing of the other potential deponents) only serves to magnify the concrete benefit the Class would receive now from the proposed Settlement.

[5] The proposed Plan of Allocation is found in the Notice, which is attached as Exhibit A to the Stipulation.

relative strengths and weaknesses of the respective claims asserted" and falls within the range of possible approval).

III. THE PROPOSED FORM AND METHOD OF CLASS NOTICE AND THE PROOF OF CLAIM ARE ADEQUATE

Once a court preliminarily approves the settlement as fair, adequate and reasonable, then "it must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing." *Initial Pub. Offering*, 226 F.R.D. at 191.

A. The Scope of the Notice Program

Class Counsel has selected the Garden City Group, Inc. ("GCG") to serve as the Claims Administrator for the proposed Settlement. The Court has previously approved Class Counsel's selection of GCG to administer the Class Notice.[6] *See* Order of Feb. 1, 2011 (D.E. 70). In connection with the distribution of the Class Notice, GCG has received from Harmony Gold's transfer agent the names and addresses of over 2,300 record holders of Harmony Gold securities during the Class Period. GCG will make an initial mailing of the Notice and Proof of Claim[7] to these Class Members, as well as approximately 2,400 nominees contained in GCG's proprietary nominee database.

Class Counsel will also publish a Summary Notice,[8] which provides a summary of the action and the proposed Settlement, and also explains how to obtain the more detailed Notice and Proof of Claim. The Summary Notice will be published in *Investor's Business Daily*, not later than 14 days after the entry of proposed Preliminary Order (subject to Court approval).

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[6] GCG will distribute the Notice and Proof of Claim to everyone who previously registered pursuant to the Class Notice.

[7] The Notice (including Proof of Claim) is attached as Exhibit A to the Stipulation.

[8] The Summary Notice is attached as Exhibit B to the Stipulation.

Class Counsel have also instructed GCG to maintain a website, at www.harmonygoldadrlitigation.com. This website will provide more information on the Settlement, including copies of the Notice, Proof of Claim, and Stipulation.

B. The Notice Program Comports with Due Process

The standard for determining the adequacy of a class action settlement notice under either the Due Process Clause or the Federal Rules is reasonableness. *Wal-Mart*, 396 F.3d at 113. The Second Circuit has explained:

> There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings. Notice is adequate if it may be understood by the average class member.

Id. at 114 (internal citation and quotations omitted). In addition, the PSLRA sets forth several items of information that must be present in securities fraud settlement notices. *See* 15 U.S.C. § 78u-4(a)(7).

The proposed Notice has been carefully drafted to contain all necessary information. It is substantially similar in content and form to the model published by the Federal Judicial Center.[9] All of the information is provided in a format that is easily accessible to the reader. The Notice clearly advises recipients of their legal rights and obligations, including that they can object to any portion of the Settlement, exclude themselves from the Settlement, or submit an attached Proof of Claim to share in their pro rata portion of the Settlement. Contact information for both Class Counsel and GCG is provided, as well as a toll-free number and website for the recipient

[9] The FJC model is available at http://www.fjc.gov/public/pdf.nsf/lookup/ClaAct13.pdf/$file/ClaAct13.pdf (last visited, July 18, 2011). The Summary Notice is also substantially similar in form and content to the FJC's publication notice model, available at http://www.fjc.gov/public/pdf.nsf/lookup/ClaAct14.pdf/$file/ClaAct14.pdf.

if there are any further questions. Therefore, Class Counsel respectfully submits that the Court should approve the form and content of the Notice.

As described above, Class Counsel will ensure that the Notice and Proof of Claim is mailed to all potential Class Members, will publish the Summary Notice in *Investor's Business Daily*, and maintain a website with relevant information at www.harmonygoldardlitigation.com. Notice programs such as this have been approved in a multitude of class action settlements. *See, e.g.*, *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 106 (D. Conn. 2010) (approving notice program where notice was mailed to class members identified from transfer records, summary notice was published, and settlement website was maintained for further information); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 WL 313474, at *8 (S.D.N.Y. Feb. 1, 2007) (notice program approved where claims administrator disseminated notice and proof of allocation to class members and published summary notice "in appropriate publications"); *In re Prudential Secs. Inc. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (approving proposed notice and noting mailing of notice to each identifiable class member's last known address is "a procedure that has been given wide-spread approval in other class actions").

IV. PROPOSED SCHEDULE

Class Counsel respectfully submits the following procedural schedule for the Court's review and approval, which summarizes the deadlines in the proposed Preliminary Order:

Event	**Proposed Deadline**
Mailing of Notice (including Plan of Allocation and Proof of Claim) *See* Preliminary Order ¶4	14 days after entry of Preliminary Order
Publication of Summary Notice *See* Preliminary Order ¶4	14 days after entry of Preliminary Order
Submission of Requests for Exclusion *See* Preliminary Order ¶8	21 days prior to the Fairness Hearing

Submission of Objections *See* Preliminary Order ¶9	21 days prior to the Fairness Hearing
Submission of Proofs of Claim *See* Preliminary Order ¶12	60 days after the Fairness Hearing
Fairness Hearing *See* Preliminary Order ¶2	100 days after entry of the Preliminary Order[10]

V. CONCLUSION

For these reasons, Class Counsel respectfully requests that the Court enter the proposed Order Preliminarily Approving Settlement and Providing for Notice of Settlement, which will provide (1) preliminary approval of the proposed Settlement; (2) approval of the form and manner of giving notice of the proposed Settlement to the Class; and (3) a time and date for the Fairness Hearing, to consider final approval of the Settlement and related matters.

Dated: July 18, 2011

Respectfully submitted,

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[10] 28 U.S.C. § 1715 requires Harmony Gold to notify certain federal and state officials of the proposed Settlement within 10 days from today. Subsection (d) requires the Court to wait 90 days from the date these officials are served to give final approval to the proposed Settlement. In order to comply with the statute, Class Counsel respectfully requests that the Court schedule the Fairness Hearing to occur at least 100 days, and no later than 120 days, from the date the Settlement is preliminarily approved, subject to the Court's convenience.

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Class Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the July 18, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered users.

/s/ Curtis V. Trinko
Curtis V. Trinko