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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

In re VESTAS WIND SYSTEMS A/S SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Case No. 3:11-cv-00585-MO CLASS ACTION DECLARATION OF TRIG R. SMITH IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT, PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS, AND APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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I, TRIG R. SMITH, declare as follows:

1. I am an attorney licensed to practice before all the courts of the States of California and Colorado, and I have been admitted in this case *pro hac vice*. I am a member of Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), Lead Counsel for Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund ("Pipefitters" or "Lead Plaintiff") and the Class.[1] I have been actively and directly involved in the prosecution and resolution of this case, am familiar with its proceedings and have personal knowledge of the matters set forth herein based upon my supervision of and participation in all material aspects of the litigation.

2. I submit this Declaration in support of Lead Plaintiff's motion, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for final approval of: (a) the Stipulation of Settlement dated as of June 26, 2014 (the "Stipulation"), which provides for a cash settlement of $5,000,000 (the "Settlement"); (b) the Plan of Allocation of Settlement proceeds; and (c) Lead Counsel's application for an award of attorneys' fees and expenses.

I. PRELIMINARY STATEMENT

3. This case has been zealously litigated from its commencement in March 2011 through settlement, the final terms of which were not finalized by the parties until shortly before a June 30, 2014 status conference before Magistrate Judge Acosta. *See* Doc. 121. The proposed Settlement was achieved only after Lead Counsel, *inter alia*: (a) conducted and supervised a detailed investigation of the case, including interviews of former Vestas Wind Systems A/S ("Vestas" or the "Company") employees; (b) drafted and prepared detailed amended complaints; (c) opposed

[1] Capitalized terms not otherwise defined in this Declaration have the same meanings set forth in the Stipulation. *See* Doc. 117.

defendants' comprehensive Rule 12(b)(6) motion to dismiss; (d) worked with experts and consultants in the fields of economics and loss causation and corporate governance; and (e) engaged Vestas in prolonged and comprehensive settlement negotiations with the assistance of two highly respected mediators.[2]

4. This Settlement is the product of over two years of vigorous litigation between the parties and takes into consideration the significant and well-known risks specific to the case. The Settlement also is the result of multiple arm's-length settlement negotiations between the parties. These negotiations were conducted by experienced counsel who, with their clients, developed a fulsome understanding of the strengths and weaknesses of this securities class action. In addition, almost all the settlement discussions were facilitated by well-known mediators with decades of experience in assisting to resolve scores of highly complex securities class actions. The settlement for $5,000,000 represents a very good recovery in light of the significant risks Lead Plaintiff and the Class faced in bringing this action.

5. A detailed investigation, extensive informal discovery, complex motion practice and multiple mediations informed Lead Counsel that, while it believed the case was meritorious, there were weaknesses in the case that had to be carefully evaluated in determining what course – *e.g.*, whether to settle and on what terms, or to continue to litigate through discovery, summary judgment

[2] The defendants named in the operative pleading are Vestas, Vestas-American Wind Technology, Inc. ("Vestas Americas"), Bent Erik Carlsen, Ditlev Engel and Henrik Nørremark. *See* Doc. 73. In connection with this Settlement, Lead Plaintiff has filed a proposed Second Amended Complaint, which no longer names Vestas Americas, Bent Erik Carlsen, Ditlev Engel and Henrik Nørremark as defendants. *See* Doc. 120. The parties have agreed these defendants were dismissed without prejudice from the Action, and upon final approval of the Settlement, will be dismissed with prejudice. *See* Doc. 117. The remaining defendant named in the Second Amended Complaint is Vestas.

and a trial on the merits – was in the best interest of the Class. As set forth in further detail below, despite the fact that Lead Plaintiff's claims would be supported by legal authority and evidence, the specific circumstances in this case presented uncertainties with respect to Lead Plaintiff's ability to prevail through the different procedural stages of the case and, if necessary, trial.

6. This action arises out of the Company's alleged misleading statements during the Class Period (February 11, 2009 through February 9, 2012, inclusive) concerning reported revenues, earnings and product quality related to the Company's wind turbine products. Lead Plaintiff's proffered Second Amended Complaint for Violation of the Federal Securities Laws ("Second Amended Complaint") alleges that Vestas violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 promulgated thereunder, by withholding material information from investors concerning the Company's lack of compliance with International Accounting Standards ("IAS") and product quality issues during the Class Period. *See* Doc. 120. Lead Plaintiff further alleged that because the Company's senior-most officers and directors knew Vestas was not in compliance with IAS, Vestas would be unable to meet aggressive revenue and earnings guidance provided to investors.[3] *Id.*

7. As a result of Vestas' conduct, Vestas American Depositary Receipts ("ADRs") and domestically traded common stock traded at allegedly artificially inflated prices during the Class Period, and when corrective disclosures were made concerning the Company's violations of IAS and

[3] The operative complaint in this action is the First Amended Complaint for Violation of the Federal Securities Laws ("First Amended Complaint"). *See* Doc. 73. The purpose of the Second Amended Complaint is to conform the pleading to the facts of this case, as well as to the terms and conditions of the Settlement.

product quality problems, the prices of Vestas ADRs and common stock decreased, causing economic harm to investors. *Id*.

8. In choosing to settle this case, Lead Plaintiff and Lead Counsel took into consideration the significant risks associated with pursuing the claims alleged. For instance, Vestas, in moving to dismiss the case, argued that Lead Plaintiff's claims failed as a matter of law because the Court did not have subject matter jurisdiction to hear this case under *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010). *See* Doc. 88. The Company also argued that even though it corrected past financial statements in order to present them in conformity with IAS, Lead Plaintiff had not adequately alleged falsity and the alleged misrepresentations in this case were not made with *scienter*, as required to establish liability under §10(b) and Rule 10b-5. *Id*.

9. Had Lead Plaintiff prevailed over the Company's motion to dismiss and this case proceeded to full discovery, class certification, summary judgment and/or trial, Lead Plaintiff almost certainly would have repeatedly faced similar arguments. Further, Vestas would have certainly offered credible evidence and opinions, including from highly experienced and persuasive experts, to argue that Vestas was always in compliance with IAS and that the Company made non-actionable statements concerning product quality matters. While Lead Plaintiff is confident it could support its claims with sufficient and credible evidence, including qualified and persuasive expert testimony, jury reactions to that evidence would be inherently difficult to predict.

10. Lead Plaintiff also faced risks in establishing loss causation and damages had the litigation advanced pass the motion to dismiss stage. For example, Lead Plaintiff expected the Company to persist in arguing that irrespective of whether certain Class Period statements were false or misleading, Lead Plaintiff could not demonstrate any harm to itself or the Class because the

Company's alleged corrective disclosures addressed neither accounting issues nor product quality problems. While Lead Plaintiff and Lead Counsel believe that they have a convincing argument that the Company's cascading disclosures revealed the alleged fraud and caused real economic harm, Lead Plaintiff is also certain that Vestas would retain well-known and readily qualifiable experts to present credible evidence and opinions to dispute Lead Plaintiff's showing.

11. On balance, considering all the circumstances and risks both sides faced were the case to continue, both Lead Plaintiff, for itself and on behalf of the Class, and Vestas have concluded that settlement of this litigation is in their respective best interests.

12. Lead Plaintiff's counsel prosecuted this action on a wholly contingent basis and their litigation related expenses and charges exceed $250,000. Lead Plaintiff's counsel shouldered the risk of a potential unfavorable result at various stages in the litigation. Lead Plaintiff's counsel have not received compensation for their efforts and have not been compensated for any expenses. The complex nature and broad scope of the facts and law underlying the securities violations alleged, the associated litigation proceedings and extensive mediation have resulted in Lead Plaintiff's counsel having litigation related expenses and charges in excess of $250,000, as well as the investment of over 2,400 hours of attorney and other professional and paraprofessional time. *See* Exhibits A and B to the Declaration of Henry Rosen Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Rosen Decl."), and Exhibits A and B to the Declaration of Mark A. Friel Filed on Behalf of Stoll Stoll Berne Lokting & Shlachter PC in Support of Application for Award of Attorneys' Fees and Expenses, submitted herewith.

13. The fee application for 25% of the Settlement Amount is fair both to the Class and to Lead Counsel. This fee request is within the range of the fee percentages frequently awarded in this

type of action and, under the particular circumstances of this case, warrants approval in light of the substantial benefits conferred on the Class, the risks undertaken, the quality of representation, the nature and extent of the legal services performed and the fact that a considerable cash settlement was far from certain at the outset of the case. In addition, both the Settlement Amount and the fee request have been independently approved by Lead Plaintiff. *See* ¶¶4 and 5 of the Declaration of Roger Morgan in Support of Final Approval of Settlement, Plan of Allocation and Application for an Award of Attorneys' Fees, submitted herewith. This is the kind of result envisioned by Congress in enacting the Private Securities Litigation Reform Act of 1995 ("PSLRA") and is entitled to significant weight by the Court deciding a reasonable fee to be awarded to Lead Counsel.

14. Lead Counsel seeks an award of $250,000 for expenses or charges reasonably and necessarily committed to the prosecution of this case. These expenses include: (a) the costs of meals, hotels and transportation incurred in the case; (b) the fees and expenses of consultants and experts whose services Lead Counsel required in order to resolve this matter; (c) the fees and expenses associated with the investigation of the case, including, but not limited to, interviews of former Vestas employees located in the U.S. and Europe; (d) photocopying and imaging expenses; (e) filing fees; (f) online legal media fees; and (g) compensating the mediators of this action. As will be seen from the discussion of the efforts by Lead Counsel to both prosecute the case and achieve this Settlement, these expenditures were reasonable and necessary.

15. The following is a summary of the principle events that transpired during the litigation, including a description of the legal services provided by Lead Plaintiff's counsel.

II. THE LITIGATION

A. Commencement of the Action

16. On May 13, 2011, following an investigation by Robbins Geller, Seth Thomas Reed filed a Complaint for Violation of the Federal Securities Laws.[4] Doc. 1. The initial pleading asserted claims under §§10(b) and 20(a) of the Exchange Act against Vestas, Vestas Americas, Bent Erik Carlsen ("Carlsen"), Ditlev Engel ("Engel"), Henrik Nørremark ("Nørremark") and Martha Wyrsch ("Wyrsch"). *Id.* During the Class Period, Carlsen served as Chairman of the Board of Vestas, Engel served as CEO of Vestas, Nørremark served as CFO of Vestas and Wyrsch served as President of Vestas Americas.

17. On May 17, 2011, Pipefitters moved for appointment as Lead Plaintiff and for approval of its selection of Robbins Geller as Lead Counsel and Stoll Stoll Berne Lokting & Shlachter PC ("Stoll Berne") as Liaison Counsel for the proposed class. *See* Docs. 3-5. By Order dated June 7, 2011, Magistrate Judge Acosta granted the Pipefitters' motion in its entirety. *See* Doc. 8.

18. On July 12, 2011, Magistrate Judge Acosta ordered: (i) Lead Plaintiff to file an amended complaint by September 2, 2011; (ii) defendants to answer or otherwise respond to the amended pleading by October 24, 2011; (iii) Lead Plaintiff to file an opposition to a motion to dismiss by December 16, 2011; and (iv) defendants to file reply papers by January 17, 2012. *See* Doc. 28.

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[4] The action against defendants was originally commenced in the U.S. District Court for the District of Colorado on March 18, 2011. On May 24, 2011, that action was dismissed without prejudice pursuant to Fed. R. Civ. P. 41(a).

19. Prior to, between and after Magistrate Judge Acosta's June 7, 2011 and July 12, 2011 Orders, Lead Counsel continued to investigate the facts underlying the litigation. Lead Counsel's investigative efforts included extensive interviews of numerous former Vestas employees in the U.S. and in Europe. Lead Counsel, with the assistance of in-house forensic accountants, also continued its research and analysis of applicable accounting and disclosure standards relevant to the allegations of financial statement fraud.

20. After enactment of the PSLRA, the use of investigators to gather detailed, fact-specific information from knowledgeable witnesses is often helpful in drafting the type of particularized pleadings mandated by the PSLRA and Rule 9 of the Federal Rules of Civil Procedure. Here, before filing the original complaint in May 2011, Lead Counsel conducted a supervised investigation into the facts of this case, including utilization of in-house investigative and consultative resources. In June 2011, Lead Counsel also retained an experienced private investigator to assist with the ongoing investigation of the facts of the case.

21. Prior to the filing of the First Amended Complaint on February 19, 2013, Lead Counsel's private investigator identified, gathered and recorded contact information for over 180 potential witnesses having potentially relevant information concerning the allegations. These individuals were identified after extensive database and other investigative searches, as well as through meetings and discussions with other former Vestas employees. In total, Lead Plaintiff's private investigator contacted 74 potential witnesses (including former Vestas employees), 49 of whom agreed to provide in person and/or telephonic interviews (sometimes on more than one occasion), in the process of investigating the allegations of securities fraud relevant to this case.

Following the interviews, Lead Plaintiff's investigator drafted detailed memoranda for Lead Counsel's review.

22. While continuing its extensive investigation, Lead Counsel, on behalf of Lead Plaintiff and the Class, began the process of amending the initial pleading to incorporate newly developed facts and legal theories of potential liability. Prior to the filing deadline for the First Amended Complaint, however, the parties met and conferred and requested an extension to the filing deadline of the pleading so that the parties could explore a potential resolution to the action. On August 31, 2011, Magistrate Judge Acosta granted the first requested extension. *See* Doc. 36. Thereafter, the Court granted several additional extensions to the filing and briefing schedule on the First Amended Complaint to accommodate the parties' continued good-faith efforts to resolve the case. *See* Docs. 39, 42, 45, 49, 52, 57.

23. Between January 5, 2012 and February 17, 2012, the parties participated in three arm's-length and formal mediation sessions before the late, former U.S. District Judge Nicholas H. Politan (D.N.J.). The parties, however, were unable to resolve the case after these mediation sessions. While the parties' early attempts to resolve the litigation in 2012 did not prove fruitful, over the course of the following year, they continued to discuss a potential framework for a mutually agreeable resolution. Between February 2012 and December 2012, the parties' counsel continued to exchange drafts of documents concerning a potential settlement of claims of U.S. and non-U.S. purchasers of Vestas securities and proposed that Vestas incorporate internal reforms that would address allegations implicating the Company's internal controls over financial reporting. As part of this effort, Lead Counsel engaged experts and consultants specializing in corporate reform and establishing legal foundations necessary to implement proposed corporate reform measures and

potentially settle non-U.S. claims. The parties, moreover, continued to educate themselves regarding the facts and the strengths and weaknesses of the respective claims and defenses. Ultimately, however, the parties informed Magistrate Judge Acosta that they were unable to finalize a global settlement despite these extensive and exhaustive efforts.

24. Accordingly, on February 19, 2013, Lead Plaintiff filed its First Amended Complaint. *See* Doc. 73. The gravamen of the First Amended Complaint is that, in violation of §§10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder, defendants participated in an allegedly fraudulent scheme to hide from investors that Vestas had improperly booked billions of Euros in revenue and hundreds-of-millions of Euros in earnings in violation of IAS and European Union ("EU") law. Lead Plaintiff alleged that defendants provided revenue and earnings guidance that lacked a reasonable basis because it did not account for changes in revenue recognition standards imposed by the International Accounting Standards Board and the European Commission in 2008 and 2009. *Id.* Lead Plaintiff further alleged that defendants failed to disclose that the Company had accumulated over €1.0 billion in scrap wind turbine inventory that would hamper delivery of product to customers and place a further strain on Vestas' ability to meet financial guidance provided to investors. *Id.*

25. Lead Plaintiff claimed that defendants' alleged misleading statements caused the Company's ADR and stock prices to be artificially inflated during the Class Period. *Id.* When the truth about Vestas' accounting scheme began to reach the market in August 2010, the Company's ADR and stock prices significantly declined. *Id.*

B. Defendants' Motion to Dismiss the First Amended Complaint

26. On April 22, 2013, Vestas and the other defendants moved to dismiss the First Amended Complaint. *See* Docs. 88-90. Defendants' motion ran to more than 60 pages of briefing, citing over 50 cases and raised more than nine legal issues and sub-issues. In sum, the Company argued that Lead Plaintiff: (a) failed to establish that §10(b) applies to the claims at issue; (b) failed to specify any false or misleading statements or the reasons why they were false or misleading; (c) failed to plead *scienter*; (d) failed to plead materiality; (e) failed to plead sufficient facts to invoke the presumption of reliance; and (f) failed to plead loss causation with respect to inventory/product issues. *Id*. Defendants also contended that Lead Plaintiff failed to demonstrate that it had satisfied the pleading requirements for a §20(a) control person claim. *Id*.

27. On June 21, 2013, Lead Plaintiff filed its opposition to the motion to dismiss. *See* Doc. 100. In its 43-page opposition, Lead Plaintiff argued, *inter alia*, that: (a) it had adequately alleged false and misleading statements regarding reported financial results and product quality issues; (b) those statements were made with the requisite state of mind; (c) it had invoked the fraud-on-the-market presumption of reliance; (d) it had adequately pled loss causation; (e) it had adequately pled a §20(a) control person claim; and (f) the Company's Class Period conduct was subject to the investor protections provided in §§10(b) and 20(a) of the Exchange Act (*i.e.*, this Court had subject matter jurisdiction over the case). Lead Plaintiff cited more than 60 cases and made forceful and unique arguments in opposition to the motion to dismiss, with Lead Counsel spending significant time and resources performing the legal research necessary to draft an effective opposition and satisfy the strict pleading burdens imposed by the PSLRA and Rule 9(b). *Id*.

28. On August 5, 2013, the Company filed its reply brief in support of the motion to dismiss. *See* Doc. 103. While the fully briefed motion to dismiss was *sub judice* before Magistrate Judge Acosta, the parties commenced additional efforts to determine whether the case could be settled before the Court ruled on the motion. Accordingly, in September 2013, the parties informed Magistrate Judge Acosta that they had renewed settlement discussions and requested that any decision on the motion to dismiss be held in abeyance.

29. In September 2013, the parties engaged in two additional arm's-length mediation sessions before former California Superior Court Judge Daniel Weinstein. As a result of these sessions, a general outline for the final resolution of this case was agreed to by the parties' counsel, subject to the preparation of settlement documents and approval by their respective clients.

30. On June 27, 2014, the parties filed the Stipulation of Settlement with the Court, in consideration for which Vestas would pay or cause its insurers to pay the Settlement Amount of $5,000,000. *See* Doc. 117. On the same day, Lead Plaintiff filed its Unopposed Motion for Preliminary Approval of Proposed Settlement of Securities Class Action. *See* Docs. 115-116. On July 30, 2014, this Court issued an order preliminarily approving the Settlement (the "Preliminary Approval Order"). *See* Doc. 126.

III. THE FACTORS AFFECTING SETTLEMENT

31. The proposed Settlement is the result of over two years of spirited litigation, including several rounds of arm's-length mediation and extensive settlement discussions. The proposed Settlement of $5,000,000 represents a substantial recovery for the Class both in absolute terms and when considered against numerous risks of continued litigation. The proposed Settlement avoids the uncertainties regarding burdensome discovery costs, as well as the hurdles the Class

would have faced at the litigation stages of motion to dismiss, class certification, summary judgment, as well as trial. The proposed Settlement represents a reasonable and realistic assessment by both sides of the strengths and weaknesses of their respective claims and defenses and the risks of further litigation.

32. The following factors have been held to be the pertinent criteria for the evaluation of the fairness of a settlement: (a) the amount offered to settle the action; (b) the reaction of the class to the settlement; (c) the strength and weaknesses of plaintiffs' case; (d) the risks of further litigation; (e) the stage of the underlying proceedings; (f) the experience and views of lead counsel; and (g) the risk of maintaining class action status throughout trial. *See Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (observing that in making the determination of whether final approval should be granted, the weight of any "particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances" of the case). Below, this Declaration addresses each factor announced in *Officers for Justice*.

33. As a preliminary matter, the proposed Settlement is not the product of collusion. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). Over the course of this litigation, the parties have engaged in five mediation sessions before two well-known mediators with decades of experience in mediating securities class actions. Both sides zealously advocated their clients' respective positions during each mediation session. But for the proposed Settlement, moreover, both sides were fully prepared to continue litigating their cases all the way through a jury trial.

A. The Settlement Amount

34. Under the terms of the Settlement, the Class will receive $5,000,000 in cash, less payment of Court-approved attorneys' fees and expenses and the expenses of giving notice to the Class and processing claims. Lead Plaintiff, by and through counsel and economic experts, has estimated total provable damages for the Class to be approximately $48 million. Accordingly, the proposed Settlement Amount represents approximately 10.4% of total damages; above the average recovery in similar securities cases. *See* Dr. Renzo Comolli & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review*, at 32-33 (NERA Jan. 21, 2014). As described herein, defendants' subject matter jurisdiction defense in this case posed a substantial risk to Lead Plaintiff's claims, and if accepted by the Court at any stage in the proceedings, would have barred any recovery. As such, without exposing the Class to the risk and further expense of continued litigation or trying this case, the Settlement represents a real and substantial recovery.

35. Moreover, since the commencement of this litigation, Vestas engaged in a series of corporate governance and operational reforms in 27 different organizational areas. *See* Declaration of Alan H. MacDougall Regarding Vestas' Corporate Governance and Operational Reforms ("MacDougall Decl."), ¶¶9, 11-19, submitted herewith. Among the factors that caused Vestas to implement these changes were the Lead Plaintiff's and Lead Counsel's efforts in the lawsuit. The corporate reforms enacted by Vestas have led to obtaining clarity of the Company's Board of Directors' roles and responsibilities, as well as those of Vestas' executive management. *Id*., ¶9. It is Lead Counsel's opinion that the reforms undertaken have had and will continue to have a positive financial impact on Vestas and will further improve the transparency of the Company's disclosures concerning financial and operational results.

B. Putative Class Members' Reaction to the Terms of Settlement

36. The reaction of the proposed Class to the terms of the Settlement supports final approval. The Court-approved Claims Administrator, Gilardi & Co. LLC, and Lead Counsel, in accordance with the class notice procedures established in the July 30, 2014 Preliminary Approval Order, undertook a program to ensure that notice of this case and the proposed Settlement was widely disseminated to potential Class Members. Those procedures include mailing the Notice of: (1) Pendency and Proposed Settlement of Class Action and (2) Hearing on Proposed Settlement ("Notice") to all Class Members who could be identified with reasonable effort as well as nominees. To date, copies of the Notice have been mailed to over 80,000 Class Members and nominees. To date, not one recipient of the Notice has objected to the Settlement and only four requests for exclusion have been received.

C. The Strengths and Weaknesses of the Case

37. Lead Plaintiff believes that its case against Vestas is meritorious and that the Class could ultimately prevail in establishing both liability and damages. However, Lead Plaintiff and Lead Counsel are cognizant of the potential weaknesses in the case and the uncertainties inherent in continued prosecution. For instance, while Lead Counsel believes that documentary evidence and deposition testimony would demonstrate that the allegations are supported, and would have supported class certification and denial of any motion for summary judgment, there still remained the distinct possibility the Court would disagree and dismiss the case. Further, Vestas has continued to maintain its factual and legal defenses and has adamantly denied liability. The Company's potential defenses, if accepted, could bar recovery for the Class at any stage of the proceedings.

Further, there is the potential that the Class would recover nothing if a jury sided with Vestas on even one of its numerous anticipated factual and legal defenses.

38. The defendants' motion to dismiss the First Amended Complaint remains outstanding and, therefore, posed a significant risk that the action could have been dismissed before the strengths and weaknesses of the case were even tested through formal discovery. Moreover, even if Lead Plaintiff defeated the Rule 12(b)(6) motion to dismiss, it was anticipated that the parties would engage in expansive discovery in order to support and/or oppose class certification and dispositive motions on the parties' claims and defenses.

39. Even if Lead Plaintiff cleared all of the significant procedural hurdles in the case, Lead Plaintiff would then still commit significant time and expense in preparing the case for trial, where, notwithstanding its belief in the merits of the claims asserted, there would be a substantial risk that Lead Plaintiff would be unable to establish the Company's liability or that damages would be less than the amount currently guaranteed by the Settlement. Specifically, there was a risk that Lead Plaintiff would not be able to prove *scienter* – *i.e.*, that the Company acted with knowledge of or with recklessness as to the alleged falsity of the statements and omissions – at trial. Thus, it was quite possible that Lead Plaintiff would depose all individuals with knowledge of the facts, and yet adduce insufficient evidence to satisfy its burden of proof on this issue at trial.

40. Lead Plaintiff also faced a risk that a jury could ultimately find that the Company's alleged false statements were not materially misleading or were otherwise non-actionable projections and/or immaterial expressions of corporate optimism. While Lead Plaintiff would have argued that Class Period statements at issue were not only false, but also reflected statements of verifiable and objective fact material to a reasonable investor to consider in making an investment decision, there

was a possibility a jury could reach an opposite factual finding. Although Lead Plaintiff believes that sufficient evidence would be uncovered to demonstrate that the alleged misrepresentations and omissions were false and misleading, the Company would undoubtedly counter that the evidence established the exact opposite: That the alleged misrepresentations were truthful and, in any event, not made with the requisite *scienter* to establish liability under the Exchange Act.

41. There was also a risk that Lead Plaintiff might not be able to prove loss causation and damages at trial. A plaintiff alleging securities fraud must prove that the defendants' fraud caused an economic loss. Lead Plaintiff believes that at trial, through expert testimony, it would be able to demonstrate loss causation as to the Company's challenged statements, and corrective disclosures, throughout the Class Period. However, Lead Plaintiff recognizes that Vestas would present expert testimony purportedly demonstrating the absence of a causal link between the various stock price declines and those disclosures. As a result, Vestas would no doubt argue that Lead Plaintiff could not prove the loss causation and damage elements of the case. Because the determination of loss causation and damages is a complicated process requiring expert testimony, compounding the above factors was also the risk that the Court could grant a motion by the Company to exclude the opinion and testimony of Lead Plaintiff's loss causation and damages expert at trial. Even if Lead Plaintiff's expert survived a *Daubert* motion, the loss causation and damages assessments of the parties' experts would be reduced to a risky "battle of experts." If the jury agreed with Vestas, Lead Plaintiff would risk its damages being significantly reduced, or even completely eliminated.

42. Even if Lead Plaintiff prevailed on liability on any or all of its claims and was awarded some or all of its damages, there was the virtual certainty that the Company would appeal the verdict and award. The appeals process would likely span several years, during which time the

Class would receive no distribution on any damage award. In addition, an appeal of any verdict would carry with it the risk of reversal, in which case the Class would receive no distribution despite having prevailed on the claims at trial.

43. In summary, there are multiple procedural hurdles as well as significant merits-based risks involved in proceeding with the litigation, each of which was carefully considered by Lead Plaintiff and Lead Counsel in making the determination to settle on the agreed terms.

D. The Risks of Further Litigation

44. As described above, Lead Plaintiff faced, *inter alia*, risks associated with establishing subject matter jurisdiction, liability, loss causation and damages. Lead Plaintiff also faced substantial risk and uncertainty in taking this case to trial.

45. One additional risk of further litigation has been avoided in light of the proposed Settlement. Specifically, the Supreme Court recently altered the legal landscape of the fraud-on-the-market presumption of reliance in securities fraud cases. *See Halliburton Co. v. Erica P. John Fund, Inc.*, ___ U.S. ___, 134 S. Ct. 2398 (2014) (holding that a defendant may rebut the fraud-on-the-market presumption of reliance at any time during the litigation by showing the alleged fraud had no "price impact" on the security in question). Certainly, Vestas and its able counsel would have challenged the issue of price impact at the earliest stage of this case and by no later than briefing on class certification. This factual issue would have required costly and time-consuming expert analysis. As such, by settling the case now, Lead Plaintiff has avoided imposing this additional cost on the Class.

46. In addition, the costs associated with formal discovery, summary judgment, *Daubert* motions, *in limine* motions, a trial and any post-trial appeals would have been substantial. Naturally,

all of this legal work would likely have taken years and increased the risks that the Class would receive no recovery.

E. The Stage of the Proceedings

47. While the parties have not engaged in formal discovery, Lead Plaintiff has performed confirmatory discovery sufficient to determine whether the Settlement is fair and reasonable. Lead Counsel has reviewed hundreds of key documents made available by Vestas in a production of over 86,000 pages of documents to confirm the parties' stances on the relative strengths and weaknesses of the action. The knowledge and insight obtained over the course of litigation and while mediating this case has provided Lead Plaintiff and Lead Counsel with more than sufficient information to evaluate the strengths and weaknesses of the case. Based on this experience, Lead Counsel believes the proposed Settlement to be fair, adequate and reasonable.

F. The Experience and View of Counsel

48. Lead Counsel is a highly experienced and accomplished law firm specializing in class action securities cases. *See* Rosen Decl., at Ex. F. As noted herein, Lead Counsel has vigorously prosecuted this case since 2011. Lead Counsel is intimately familiar with the facts and legal theories underpinning this case. In view of the risks involved in further litigation, Lead Counsel believes that the proposed Settlement is in the best interest of the Class.

49. Lead Plaintiff believes it would have survived the pending motion to dismiss on the basis of subject matter jurisdiction, falsity and *scienter*, proceeded successfully through class certification, and prevailed in further motions for summary judgment and at trial. There were numerous issues, however, about which the parties disagreed, including: (i) whether Lead Plaintiff could plead and prove that *scienter*; (ii) whether the statements made or facts allegedly omitted were

material, false, misleading, or actionable; and (iii) the amount by which the prices of Vestas ADRs and domestically traded common stock were allegedly artificially inflated (if at all) during the Class Period. There also existed a very real risk that Lead Plaintiff could not have convinced a jury that the Company acted with *scienter* or that the alleged misrepresentations and omissions were materially false or misleading when made. There was also a risk that even if Lead Plaintiff prevailed at trial, Vestas would appeal, which would take years to resolve and presented the risk of reversal of an otherwise favorable jury verdict.

50. Having considered the foregoing, and evaluating all the pertinent defenses, it is the informed judgment of Lead Counsel, based upon all proceedings to date and counsel's extensive experience in litigating shareholder class actions under the federal securities laws, that the Settlement before the Court is fair, reasonable and adequate, and in the best interests of the Class. Informal and confirmatory discovery conducted by Lead Counsel supports this conclusion. Further, the Settlement provides a means of immediate recovery for members of the Class.

G. The Risk of Maintaining Class Action Status Throughout Trial

51. Had this case survived the pending motion to dismiss, it is a certainty that Vestas would have presented a robust challenge to the Court during class certification proceedings pursuant to Rule 23. Clearly, the Company would have challenged whether the trading market for Vestas securities was efficient, whether the proposed class representative was adequate and whether the class was entitled to a class-wide presumption of reliance under the fraud-on-the-market doctrine. Further, Vestas would have likely re-asserted those arguments at summary judgment and, if necessary, during a trial. If the Court or a jury accepted the Company's positions on these issues at any time, the proposed Class' ability to recover anything would have been at risk.

IV. SETTLEMENT NEGOTIATIONS AND TERMS OF THE SETTLEMENT

52. In July 2011, the parties initiated informal settlement discussions. While informative, the preliminary negotiations were not successful and Lead Plaintiff and its counsel continued to vigorously prosecute the action.

53. In September 2011, the parties continued informal negotiations, which included the potential settlement of claims of investors in foreign markets and whether to proceed to a formal mediation. At the end of these negotiations, the parties agreed to conduct formal mediation to potentially resolve all U.S. and non-U.S. based securities claims.

54. Between January 5, 2012 and February 17, 2012, the parties conducted prolonged mediation sessions before Judge Politan in Boca Raton, Fl. During these spirited sessions, both parties exhibited a thorough understanding of the facts of the case and the merits of the claims due to extensive reviews of public information, interviews of several former Vestas employees and the parties' history of settlement discussions in the case. After completing these sessions, it was generally believed that the parties' counsel had resolved the case on a global basis, subject to the parties' consent. Over the course of the next several months, the parties continued to negotiate specific terms and conditions of a proposed stipulation of settlement.

55. During the multiple mediation sessions that occurred in this case, the parties also engaged in detailed discussions concerning proposed corporate reforms the Company could implement to address alleged and perceived weaknesses in Vestas' internal controls over financial reporting. While the parties were unable to include these concepts into a formal settlement, the Company did, in fact, implement many of the proposed reforms as the parties continued to litigate and negotiate a settlement in this action. *See* Doc. 117, at Ex. G. Here, the specificity of the

implemented reforms evidence the detailed negotiations the parties undertook in this action and further evidence benefits obtained by both Class Members and future acquirors of the Company's securities on both an international and domestic basis.

56. In fact, the parties continued to negotiate a potential global settlement of this case through January 2013, when the parties ultimately determined they could not finalize a global settlement. As a result, Lead Plaintiff filed the First Amended Complaint on February 19, 2013. After the motion to dismiss was completely briefed, the parties informed Judge Acosta, in September 2013, that they believed they might be in a position to settle the litigation, but would need additional time to finalize a formal stipulation of settlement. Accordingly, Judge Acosta provided the parties a number of extensions to briefing deadlines for the purpose of finalizing terms of the Settlement. *See* Docs. 110-114.

57. In September 2013, the parties conducted additional mediation sessions before former Judge Weinstein. During these sessions, the parties agreed that they had finally reached mutually agreeable settlement terms and conditions, but the parties would need additional time to get settlement documents finalized and prepared for filing due to various factors, including, but not limited to, the fact that additional legal complexities had arisen due to then recent revelations of additional alleged misconduct concerning a former high-ranking executive at the Company.

58. Ultimately, on June 27, 2014, the parties presented the Stipulation and preliminary approval papers to the Court. *See* Docs. 115-120.

59. On July 1, 2014, this case was re-assigned from Magistrate Judge Acosta to this Court. *See* Doc. 122. On July 30, 2014, the Court granted preliminary approval of the Settlement,

as well as the form and manner of the Notice to be distributed to potential Class Members. *See* Doc. 126.

V. THE PLAN OF ALLOCATION

60. The Net Settlement Amount will be distributed to Class Members who submit a valid and timely Claim Form and are entitled to a distribution under the Plan of Allocation ("Authorized Claimant"). Subject to the Court's approval of the Plan of Allocation, Authorized Claimants will receive a *pro rata* distribution from the Net Settlement Amount in accordance with the Plan of Allocation that was set forth in the Notice mailed to Class Members.

61. The Plan of Allocation was developed in consultation with Lead Plaintiff's damages consultant and reflects the damage theory of the case. The Plan of Allocation is designed to distribute the Net Settlement Amount fairly to those Class Members who suffered economic loss as a result of the alleged fraud, as opposed to loss caused by general market conditions or other non-fraud-related factors.

62. Thus, "Recognized Claim Amounts" are based on the level of alleged artificial inflation in the price of Vestas securities at the time of purchase or acquisition. Lead Plaintiff alleges that Vestas made false statements and omitted material facts from February 11,2009 through and including February 9, 2012 and that those alleged misstatements or omissions were corrected by disclosures on August 18, 2010, October 26, 2010, November 22, 2010, October 31, 2011, and February 8, 2012. Recognized Claim Amounts are based on the timing of trades in Vestas securities in relation to these corrective disclosure dates.

63. To the extent an Authorized Claimant had a market ***gain*** from overall U.S. transactions in Vestas securities during the Class Period, the value of the Recognized Claim Amount

will be zero. To the extent an Authorized Claimant suffered a market ***loss*** on overall U.S. transactions in Vestas securities during the Class Period, but that market loss was less than the total Recognized Claim Amount, the Authorized Claimant's Recognized Claim Amount will be limited to the amount of the actual market loss.

VI. LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES IS REASONABLE

A. The Requested Fee of 25% of the Settlement Amount Is Fair and Reasonable

64. In addition to seeking final approval of the Settlement and Plan of Allocation, Lead Counsel is applying to the Court for an award of attorneys' fees and expenses. As set forth in the accompanying Lead Plaintiff's Memorandum in Support of Unopposed Motion for Final Approval of Class Action Settlement, Plan of Allocation of Settlement Proceeds, and Application for an Award of Attorneys' Fees and Expenses ("Memorandum"), Lead Counsel is seeking attorneys' fees of 25% of the Settlement Amount ($1,250,000), expenses not to exceed $250,000, and interest on both amounts at the same rate as earned on the Settlement Amount.

65. The prosecution of the action required Lead Plaintiff's counsel, their paraprofessionals and other professionals to perform over 2,400 hours of work to date resulting in a lodestar of $1.36 million and to incur in excess of $250,000 in expenses.

66. For its efforts on behalf of the Class, Lead Counsel is applying for compensation from the Settlement Amount on a percentage basis. The percentage method is the appropriate method of awarding fees because, among other things, it aligns the lawyers' interest in being paid a fair fee with the interest of a class in achieving the maximum recovery in the shortest amount of time required under the circumstances, is supported by public policy and has been recognized as

appropriate for cases of this nature. Importantly, the fee and expense request has been approved by the Lead Plaintiff, who was involved throughout the litigation, and who had significant stakes in this case.

67. Lead Counsel requests a fee of 25% of the Settlement Amount. As set forth in the Memorandum, numerous courts have applied the percentage-of-recovery method in awarding fees in "common fund" cases. The percentage sought is merited in this case in light of the effort required and the results obtained.

68. The $5,000,000 Settlement was achieved as a result of diligent and zealous prosecutorial and investigative efforts, and complicated motions practice and settlement negotiations, as detailed herein. As a result of this Settlement, thousands of Class Members will benefit and receive compensation for their losses and avoid the very substantial risk of no recovery had the Settlement not been achieved.

69. As discussed in greater detail above, this case had significant risks concerning liability and damages. Lead Plaintiff's success was by no means assured. Defendants disputed whether Lead Plaintiff could establish liability and would no doubt contend, as the case proceeded to expert discovery, that even if liability existed, the amount of damages was substantially lower than Lead Plaintiff alleged, or even that there were no damages. Were this Settlement not achieved, and even if Lead Plaintiff prevailed at trial, Lead Plaintiff faced potentially years of costly and risky appeals, with ultimate success being far from certain. It is also possible that a jury could have found no liability or no damages. Lead Counsel is entitled to 25% of the Settlement Amount because of the risk factors involved in this case.

70. As more fully set forth in the Memorandum, Lead Counsel believes that the fee request is reasonable given the favorable recovery obtained for the benefit of the Class, the risks of continued litigation, the contingent nature of counsel's representation, the complexity of the legal and factual questions at issue and the extensive efforts of counsel, awards in similar cases and the Lead Plaintiff's approval of the requested fee.

71. The expertise and experience of Lead Counsel is an important consideration in determining the quality of the legal services provided to the Class. Lead Counsel has consistently demonstrated a willingness and ability to prosecute complex cases such as this. Lead Counsel is well-known among its peers and by courts across the country as some of the most experienced and skilled practitioners in the field of securities litigation. Likewise, Vestas is represented by very experienced counsel, who also possess substantial experience, expertise and resources in the defense of complex securities litigation.

B. The Requested Attorneys' Fees Are Fair and Reasonable Considering the High-Risk, Contingent Nature of the Representation

72. The litigation was undertaken by Lead Counsel on a wholly-contingent basis. From the outset, Lead Counsel understood that it was embarking on a potentially complex, expensive, and lengthy litigation with no guarantee of ever being compensated for the significant investment of time and expense the case would require. In undertaking that responsibility, Lead Counsel was obligated to assure that sufficient attorney and paraprofessional resources were dedicated to the prosecution of the litigation and that funds were available to compensate staff and to pay for the considerable expenses that a case such as this entails. Lead Plaintiff's counsel have received no compensation for their services during the course of the litigation and have significant expenses in litigating and

negotiating the Settlement for the benefit of the proposed Class. Any fee or expense award to Lead Plaintiff's counsel has always been completely contingent on the result achieved.

73. Because the fee to be awarded in this matter is entirely contingent, the only certainty from the outset was that there would be no fee without a successful result, and that such a result would be realized only after focused and determined effort. Under the circumstances, Lead Counsel respectfully submits that it is entitled to the award of a reasonable percentage fee based on the benefit conferred and the common fund obtained. Under all of the circumstances present here, Lead Counsel respectfully submits that a 25% fee plus $250,000 in expenses, is fair and reasonable.

VII. CONCLUSION

74. For all of the foregoing reasons, Lead Counsel respectfully requests the Court to approve the Settlement, the Plan of Allocation of Settlement proceeds, and award Lead Counsel 25% of the Settlement Amount plus $250,000 in expenses, plus the interest earned thereon at the same rate and for the same period as that earned on the Settlement Amount until paid.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of November, 2014, at San Diego, California.

s/ Trig R. Smith
TRIG R. SMITH

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 4, 2014.

s/ Trig R. Smith
TRIG R. SMITH

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Mailing Information for a Case 3:11-cv-00585-MO In re: Vestas Wind Systems A/S Securities Litigation

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)