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

----------X

ANNMARIE MALLOZZI, individually and on behalf of all others similarly situated,

Plaintiff,

v.

INDUSTRIAL ENTERPRISES OF AMERICA, INC.; JOHN MAZZUTO; JORGE YEPES; DENNIS O'NEILL; and JAMES MARGULIES,

Defendants.

CASE No.: 07-CV-10321 (GBD)

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**MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR: (1) FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT; AND (2) AWARD OF COUNSEL FEES AND REIMBURSEMENT OF EXPENSES**

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## I. INTRODUCTION

Lead plaintiffs Carl Meisner (on behalf of himself and his minor children), Ronald Goldenberg, and Carl Haeussler ("Lead Plaintiffs"), on behalf of themselves and the Class,[1] respectfully submit this memorandum in support of the: (i) motion for final approval of the proposed settlement with defendants Industrial Enterprises of America, Inc., ("IEAM" or the "Company"), John Mazzuto ("Mazzuto"), Jorge Yepes ("Yepes"), Dennis O'Neill ("O'Neill"), James Margulies ("Margulies"), and Robert "Dan" Redmond ("Redmond") (collectively, "Defendants"); and (ii) motion for an award of attorneys' fees and reimbursement of expenses.[2]

The Gross Settlement Amount is $3,400,000 in cash. The Gross Settlement Amount consists of a Payment Fund of $2,400,000 in cash (includes $100,000 for previously incurred notice costs that were paid by Defendants' Insurer),_and a Holdback Fund of $1,000,000 in cash. The Payment Fund, after deduction of attorneys' fees and expenses and award to Lead Plaintiffs, will be paid to Class Members on a pro rata basis in accordance with the terms of the Superseding Stipulation and Agreement of Settlement, dated December 9, 2010, docket no. 127-

[1] "Class" and "Class Members" mean, for purposes of this Settlement, all persons who purchased or otherwise acquired any common stock of IEAM directly or indirectly during the period from December 4, 2006 through and including November 7, 2007, and were damaged thereby. Excluded from the Class are (1) Defendants, (2) the members of Defendants' immediate families, (3) Defendants' legal representatives, heirs, predecessors, successors and assigns, and any entity in which any Defendant has or had a controlling interest, (4) Trinity Bui, with respect to the Bui Shares, (5) Peter Vanucci, (6) Catherine Tamme, (7) River Valley Asset Management, LLC, and (8) any entity in which Peter Vanucci, Catherine Tamme, and River Valley Asset Management, LLC, has or had a controlling interest. Also excluded from the Class are those persons who file valid and timely requests for exclusion. Also excluded from the Class are the "Existing Opt Out Parties" that timely requested exclusion from the prior settlement class certified by the Court's Order filed and entered as of April 17, 2009, and therefore includes the parties set forth in Exhibit A to the operative Second Amended Complaint filed with the Court on November 24, 200, Docket no. 120.

[2] "Plaintiffs' Counsel" is The Rosen Law Firm P.A. ("Rosen Firm") and Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein").

1 (the "Stipulation").[3] The Holdback Fund may be drawn to fund Holdover Proceedings that may be filed against the one or more of the Defendants by Existing Opt Out Parties at any time up to and including two years and a day from the date of the filing of the Second Amended Complaint as to the Existing Opt Out Parties (the "Statutory Period"). Following the expiration of the Statutory Period, if no Holdover Proceedings have been initiated or if funds remain in the Holdback Fund following the resolution of Holdover Proceedings, the balance of the Holdback Fund, after deduction of attorneys' fees and expenses, will be distributed to Class Members in accordance with the Stipulation.

This settlement is a fair, reasonable, and adequate resolution of the pending claims against the Defendants after taking into account the parties' respective claims and defenses and the substantial risks and obstacles in continuing the action to judgment—especially here where IEAM has filed a petition under Chapter 11 of the Bankruptcy Code; and a number of individual defendants face criminal probes. The settlement is the result of arm's-length negotiations between the parties and their experienced counsel. For these reasons and those set forth below, Lead Plaintiffs respectfully submit that the proposed settlement strongly warrants approval by this Court as fair, reasonable and adequate.

Having achieved a significant cash benefit for the Class, Plaintiffs' Counsel seeks an attorneys' fees award of one-third of the Payment Fund. In relation to the Payment Fund of

[3] Capitalized terms used herein shall have the same meaning as set forth in the Stipulation.

$2,400,000 the requested attorneys' fees award represents a multiplier of .94 based on Plaintiffs' Counsel's lodestar of $848,858.50 (for 1,719 hours of attorney and paralegal work).[4]

In light of the risks faced, the complexity of the case, the quality of legal work performed, the amount of time and effort expended by Plaintiffs' Counsel, and the size of the fee in relation to the settlement achieved, the fee request of one-third of the Payment Fund is both fair and reasonable under the standards used in this Circuit.

Plaintiffs' Counsel also seeks reimbursement of their out of pocket litigation expenses incurred or expected to be incurred in connection with the prosecution of this action in the amount of $60,917.28 to be paid from the Payment Fund.[5] These expenses were necessary for the successful prosecution and resolution of the claims against the Defendants. Plaintiffs' Counsel also seeks a nominal award of $1,500 to each of the Lead Plaintiffs.

Pursuant to an order of the Court dated February 3, 2011, docket no. 129 (the "Preliminary Approval Order"), 8,919 settlement notices were mailed to potential Class Members and their nominees, as well as large brokerage firms and other institutions believed likely to have names and addresses of potential class members. In addition, on or before February 17, 2011, a summary notice was published in *Investor's Business Daily* and disseminated electronically over *Marketwire*.[6] Objections are due by April 27, 2011 and as of

[4] Wolf Haldenstein spent 845.5 hours litigating this action for a lodestar of $372,287.00. Rosen Firm spent 775 hours litigating this action for a lodestar of $420,954.00. The law firm of Donovan Searles, LLC, spent 98.5 hours litigating this action for a total lodestar of $55,617.50.

[5] Such expenses include computer research, duplication and secretarial expenses relating to the preparation and submission of these settlement approval papers.

[6] A copy of each notice is attached to the Affidavit of Paul Mulholland, CPA, CVA Concerning Mailing of Notice of Pendency and Settlement of Class Action and Proof of Claim Form, dated April 18, 2011 ("Mulholland Decl.") as Ex. B. The Mulholland Decl. is attached as Ex. 2 to the Kim Declaration.

that date (and the date of this writing) no objections to the settlement have been filed. The deadline to seek exclusion from the settlement, (i.e. "Opt-Out") is May 4, 2011. To date, three shareholders have sought to Opt-Out of the Settlement. Moreover, the Claims Administrator mailed the settlement notices and claim forms to the Existing Opt Out Parties by registered U.S. Mail with return receipt. To date, none of the Existing Opt Out Parties have not elected to opt-in to the settlement.

Not a single Class Member has objected to any aspect of the settlement and the fee and expense request or to the request for an award to each of the Lead Plaintiffs.

## II. BACKGROUND

A detailed description of procedural history, settlement negotiations, and the considerations leading to the settlement of this action is set forth in the Declaration of Phillip Kim ("Kim Declaration") filed herewith.

### A. Events Leading to The Complaint

IEAM, through its wholly owned operating subsidiaries, markets anti-freeze, motor oil and other chemical products used in automobiles. Throughout the Class Period,[7] IEAM repeatedly assured its investors that the Company maintained stringent accounting policies and was enjoying strong growth prospects. In reality, however, these results and assurances were the product of the Company's conscious or reckless failure to follow both generally accepted accounting principles ("GAAP") and internal revenue recognition policies. When the truth about IEAM's actual accounting practices and financial results was finally revealed, the Company was forced to restate its previously announced results, exposing the Company's precarious financial

[7] December 4, 2006 through and including November 7, 2007.

situation. The restatement revealed that the Company overstated its reported revenue for the second and third quarters of 2007 by 22.2% and 38.5% respectively and overstated reported EBITDA for the second, third and fourth quarters of 2007 by between 28.9% and 184%. ¶ 3.[8]

The Company's surprising revelation that it failed to follow either GAAP or its own revenue recognition policies caused significant harm to both the Company and its shareholders; Company stock value declined precipitously and resulted in the Company's delisting from the NASDAQ Capital Market in February of 2008. ¶ 19. Numerous IEAM executives were terminated or otherwise ended their relationship with the Company following the reduction. ¶ 78. In short, Defendants perpetuated the accounting fraud by materially overstating revenue reported in the Company's publicly filed financial statements and other public announcements with the purpose and effect of artificially inflating the market price of IEAM stock to facilitate their windfall of rewards, ultimately leaving IEAM shareholders holding an empty bag when the truth was revealed.

IEAM stock traded near $5 per share at the beginning of the Class Period. At the same time, the Company reassured investors about the Company's health when it issued a press release concerning second fiscal quarter 2007 forecasts. Specifically, defendant Mazzuto, then the Company's CEO, commented, "Our first quarter results, as previously announced, are in line with guidance provided by the Company. During this, our second quarter, ***we anticipate a significant increase in revenues as we continue to increase our production capacity with similar gross margins***…." ¶ 47. The following day, defendant Mazzuto projected that the Company could anticipate revenues of $16 million for the second fiscal quarter of 2007,

[8] References to "¶ ___" are to Second Amended Complaint (the "Complaint").

$20 million for the third quarter and over $50 million for the fourth quarter. Additionally, defendant Mazzuto projected earnings per share of approximately $0.22, $0.33 and $0.50, respectively, for the second, third and fourth quarters of fiscal 2007.

The Company subsequently reported that it exceeded its projected $16 million in revenues for the second quarter of 2007, reporting revenues of almost $17 million on February 16, 2007 and reporting EBITDA within range of Company estimates. ¶ 49. In connection with these reported results, defendant Mazzuto stated, in relevant part: "[w]e exceeded our revenue target while EBITDA came within an acceptable range. . . ." Defendant Mazzuto also noted that "[b]y focusing on non-seasonal items and limiting our winter inventory, our production, up 70% from just three months ago, allowed us to grow dramatically." As a result of the Company's February 16, 2007 announcement, IEAM stock price increased yet again, reaching $6.59 per share by late March 2007. ¶ 56.

On May 22, 2007 the Company issued a press release reporting revenues of approximately $17.6 million for the third quarter of 2007 and EBITDA of $6.8 million for the nine months ended March 31, 2007. Defendant Mazzuto noted that the Company was "very pleased with [its] overall financial results, with EBITDA on target prior to the inventory accounting correction. Revenues were lower than previously guided due to mild weather during the quarter, and a higher than expected number of contract packaging contracts which recognize only processing fees." Defendant Mazzuto also stated that the Company's "order flow continues to outpace shipments, and we will continue to leverage our production capacity and look at opportunistic acquisitions that can improve our asset utilization." On the same day, the Company held an investor conference during which defendant Mazzuto unequivocally assured investors that the Company's revenue recognition practices complied with GAAP, in pertinent

part, as follows: "We recognize sales when it's gone to a wholesaler and they moved it off our premises and it is in their warehouse." ¶ 60.

On July 12, 2007, the Company announced fourth quarter and full year financial results for the quarter and year ended June 30, 2007. The Company's EBITDA for the fourth quarter of 2007 was $4 million and met the Company's prior guidance. The Company also announced that its revenues would be lower than anticipated "due to a change in product mix." Additionally, the Company's accounts receivable balance was reduced by those bulk sales that had been collected.

After repeatedly assuring its investors about the propriety of the Company's revenue recognition policy and practices, on October 15, 2007, the Company issued a press release announcing a review of its accounting practices. For the first time, the Company disclosed that it was engaging in "bill and hold" arrangements. As a result of the review, the Company stated that it was unable to timely file its annual report for fiscal year ended June 30, 2007. ¶ 66. This announcement caused the Company's stock fell nearly $.62 per share – 15.5% – to $3.37 per share the following day

Finally, on November 7, 2007, the Company issued a press release concerning its "bill and hold" accounting arrangements. The press release informed investors, ***for the very first time***, that the Company's previous financial statements should not be relied upon and that the previously reported results would require a restatement. The announcement alerted Company shareholders to, *inter alia*, the following:

- The Company determined that it did not properly follow GAAP revenue recognition procedures. ¶ 73.
- Bill and hold transactions for the quarter ended December 31, 2006 in the amount of approximately $3.1 million would be cancelled. *Id*.
- Bill and hold sales for the quarter ended March 31, 2007 in the amount of $4.9 million would also be cancelled. *Id*.

- Bill and hold transactions that were to take place in the fourth quarter had already been cancelled. *Id*.

Notably, the Company explained that the restatement was the result of the following:

- All bill and hold purchases were paid in full, and cash was received prior to June 30, 2007, but because the buyers were unable to take delivery of their merchandise, the Company was forced to cancel these transactions and will reflect an approximate $8 million in liabilities on its books at the year ended June 30, 2007. *Id*.

In fact, the buyers subsequently "agreed to settle their potential claims for these cancelled sales for 2.4 million shares of restricted stock and the above purchase and delivery of product." This disclosure – the revelation that the Company did not and had not recognized sales only "when it's gone to a wholesaler and they moved it off our premises and it is in their warehouse" – caused the Company's stock to decline an astonishing ***63.5%*** – $1.39 per share on over 2.9 million shares traded – more than 20 times the previous day's volume. Company stock declined an additional 15.1% or $.12 per share on heavy volume the following day. ¶ 74.

The Company's revelation of the misleading disclosures concerning its finances and its revenue recognition policy caused IEAM's shareholders significant harm. In stark contrast, however, IEAM's executives were the beneficiaries of the scheme. For example, during this time:

- Defendant Mazzuto and an associate sold IEAM stock based upon non-public information provided by Mazzuto in order to maximize proceeds from each sale, wiring the proceeds from the Scottrade account to a Wachovia bank account registered to "Industrial Enterprises" from December 2006 through March of 2007. ¶ 88.

- The Company improperly extended a non-bank "credit line" to defendant Mazzuto, who subsequently assumed over $4 million of unsecured debt initially incurred in July 2007 as part of a non bank "credit line." ¶ 78(a).

- The Company also failed to disclose defendant Mazzuto's prior bankruptcy petition (¶ 78(e)), repeatedly restated its financial statements prior to the Class

Period (¶ 78(f)), and watched a parade of executives arrive and depart the Company's ranks immediately following the revelation of the Company's improper accounting practices. ¶ 78(g).

- By April of 2008, the SEC had commenced an investigation into the Company's practices.

**B. The Litigation**

On November 14, 2007, plaintiffs filed an initial complaint alleging that Defendants overstated the Company's revenue in publicly filed financial statements and other public announcements in violation of §10(b) and §20(a) of the Securities Exchange Act of 1934. Plaintiffs filed the First Amended Complaint – incorporating additional facts – on July 2, 2008. After Defendants' motion to dismiss and responsive briefing was completed, the parties entered into a stipulation and agreement of settlement and filed it with the Court on April 8, 2009 (the "First Settlement"). On April 17, 2009, the Court entered an order preliminarily approving the First Settlement and scheduled the final approval hearing on July 29, 2009. Following the filing of Plaintiffs' motion for final approval of the First Settlement, defendant O'Neill exercised his right to terminate the First Settlement as the agreed upon threshold for opt-outs were exceeded. Therefore, the First Settlement was terminated.

Following several months of negotiations and numerous settlement conferences with Magistrate Judge Ellis, Plaintiffs filed the operative Second Amended Complaint on November 24, 2009. The Second Amended Complaint specifically excluded from the litigation the parties that had previously opted-out of the First Settlement. The Second Amended Complaint was also served on those Existing Opt-Out Parties by registered U.S. Mail with return receipt.

Following the submission of the operative Stipulation and supporting documents, on February 3, 2011 the Court entered the Preliminary Approval Order. The court preliminarily found that the Class met the certification requirements of Fed. R. Civ. P. 23 and that the Class

consisted of "all persons who purchased or otherwise acquired any common stock of Industrial Enterprises of America, Inc, during the period from 12/4/06 through and including 11/7/07, and were damaged thereby." The Court also preliminarily designated the Lead Plaintiffs to act as representatives of the Class for the purposes of effectuating the settlement. The Court scheduled a final hearing on the settlement for May 18, 2011 at 10 a.m. in Courtroom 21D, 500 Pearl Street, New York, NY 10007.

### C. The Settlement

Settlement negotiations between Plaintiffs' Counsel and Defendants' counsel took place periodically throughout the litigation. In relation to the First Settlement, on November 17, 2008, the parties and Defendants' insurance carrier met face-to-face to conduct settlement discussions at the law offices of Wolf Haldenstein. The First Settlement was achieved by the conclusion of the meeting.

The instant Settlement was achieved after protracted negotiations between counsel for the Parties and Defendants' Insurer. These negotiations were aided though numerous settlement conferences before Magistrate Ellis.

#### 1. Cash Consideration and Release

The settlement provides for a payment of $3.4 million plus interest to pay claims of investors who purchased IEAM stock between December 4, 2006 through and including November 7, 2007. The settlement amount is comprised of the $2.4 million Payment Fund (includes $100,000 for previously incurred notice costs that were paid by Defendants' Insurer) and $1 million Holdback Fund. Upon final approval of the settlement, the Payment Fund, less attorneys' fees and expenses and award to Lead Plaintiffs will be distributed to Class Members. Should there be any remaining sums in the Holdback Fund following the Statutory Period those amounts will be distributed to Class Members, less attorneys' fees and expenses.

The settlement represents an average recovery of $0.15 per share of IEAM stock for the estimated 26 million shares outstanding and available for purchase during the Class period (and represents an average recovery of $0.10 per share of IEAM stock after deduction of attorneys' fees and expenses). The settlement amount will be paid in its entirety by ACE American Insurance Co. The settlement represents a nearly 100% recovery of all available insurance proceeds. More specifically, IEAM's Directors, Officers and Company Securities Liability policy provides for a $5 million limit of liability, including defense costs. The $3.4 million settlement amount represents nearly all of the remaining insurance policy coverage. If the settlement is finally approved by the court, the Lead Plaintiffs, on behalf of the Class, will forever release their claims alleged against Defendants.

**2. Notice to the Class**

On or before February 17, 2011, pursuant to the Preliminary Approval Order, Plaintiffs' Counsel caused notice of the settlement to be published. The notice that was mailed to potential Class Members advised them that Plaintiffs' Counsel would seek a fee award not to exceed one-third of the Payment Fund, an expense award not to exceed $75,000, plus a proportionate share of any interest earned by the settlement amount, and awards to each Lead Plaintiff not to exceed $1,500. The notice also advised Class Members that Plaintiffs' Counsel reserved the right to seek additional attorneys' fees and expenses from any funds remaining in the Holdback Fund. Kim Decl., Ex. 2, Mulholland Decl., ¶¶ 6, 8 & Ex. A. The notice also advised Class Members that any objections to this fee and expense request were due to be filed and served no later than May 4, 2011.

As of April 18, 2011, over 8,900 copies of the notice were mailed to potential Class Members[9] and not a single Class Member has objected to the fee and expense request.[10]

**3. Bankruptcy Filing**

On May 1, 2009, IEAM filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware. On July 7, 2009, the United States Bankruptcy Court for the District of Delaware granted the parties' motion and ordered that that the Lead Plaintiffs were entitled to relief from the automatic stay imposed by 11 U.S.C. § 362 for the limited purpose of consummating the settlement of this action. [11]

## III. ARGUMENT

### A. Final Approval of Proposed Class Action Settlement

#### 1. Certification of the Settlement Class Pursuant to Fed. R. Civ. P. 23 is Appropriate

To effectuate the proposed settlement, Lead Plaintiffs seek certification of a settlement class. Fed. R. Civ. P. 23(a) imposes four threshold requirements on a putative class action: numerosity, commonality, typicality, and adequacy of representation. In addition, Rule 23(b) requires that: (i) common questions must predominate over any questions affecting only individual members; and (ii) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy.

[9] *See* Kim Declaration, Ex. 2, Mulholland Decl., at ¶¶ 8.

[10] Certain shareholders have opted-out of the settlement as set forth below.

[11] A copy of the order is attached to the Kim Declaration as Ex. 1.

**a. Numerosity**

During the Class Period, the Company variously reported tens of millions of IEAM common stock outstanding, owned by thousands of geographically diverse shareholders. Since the entry of the Preliminary Approval Order, the claims administrator sent out over 8,900 separate claim packets to potential Class Members. Kim Decl., Ex. 2, Mulholland Decl. ¶5. The numerosity requirement of Rule 23(a)(1) is easily met here. *See Teachers' Ret. Sys. of La. v. ACLN Ltd.*, 01 Civ. 11814, 2004 WL 2997957, at *3 (S.D.N.Y. Dec. 27, 2004); *In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 280 (S.D.N.Y. 2002).

**b. Commonality**

Fed. R. Civ. P. 23(a)(2) is satisfied where, as here, there are questions of law or fact common to the class. Among the questions of law or fact common to the settlement Class are whether: (i) Defendants violated Sections 10(b) of the Exchange Act, and whether the Defendants are further liable for violations of Section 20(a) of the Exchange Act; (ii) information disseminated by Defendants to the investing public during the Class Period contained material misrepresentations or omissions; (iii) Defendants acted knowingly, willfully, or recklessly; and (iv) the members of the Settlement Class sustained damages and, if so, what is the proper measure of such damages. Virtually identical common questions have been found to be sufficient in numerous securities law class actions. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290-91 (2d Cir. 1992); *In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 374-75 (S.D.N.Y. 2000).

**c. Typicality**

Fed. R. Civ. P. 23(a)(3) is satisfied when the claims of the representative plaintiffs "arise from the same course of conduct that gives rise to the claims of the other Class members." *In re Independent Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 480 (S.D.N.Y. 2002) (quoting *In*

*re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126-27 (S.D.N.Y. 1997)). Here, Lead Plaintiffs' claims are undeniably typical of the claims of the settlement Class members in that the claims arise out of the same uniform pattern of conduct alleged to be false and are based on the same legal and remedial theories. Lead Plaintiffs stand in the same position as do other purchasers of IEAM common stock during the Class Period.

**d. Adequacy**

Fed. R. Civ. P. 23(a)(4) requires that the representative plaintiff must adequately protect the interests of the Class. The adequacy prong requires that: (i) class counsel be qualified, experienced and generally able to conduct the litigation; and (ii) that the class members must not have interests that are antagonistic to one another. *See In re Ashanti Goldfields Sec. Litig.*, 00 Civ. 0717, 2004 U.S. Dist. LEXIS 5165, at *44 (E.D.N.Y. Mar. 30, 2004).

As set forth above, Lead Plaintiffs have been damaged in the same manner as other Class Members by Defendants' allegedly false and misleading statements during the Class Period. Lead Plaintiffs are not subject to any unique defenses, and Lead Plaintiffs have vigorously prosecuted these claims in order to recover their own losses as well as the damages suffered by the settlement Class. *See In re Chase Manhattan Corp. Sec. Litig.*, 90 Civ. 6092, 1992 WL 110743, at *2 (S.D.N.Y. May 13, 1992). Throughout this process, Lead Plaintiffs have remained actively involved in the litigation and have conferred with Plaintiffs' Counsel on a number of occasions concerning various aspects of the action, including this settlement.

Moreover, the requirement of adequacy of representation is amply satisfied by Plaintiffs' Counsel, who have extensive experience and expertise in securities class action litigation and are capable of "competently and vigorously prosecuting the litigation." *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 165 (S.D.N.Y. 2000). *See* Kim Decl., Exs. 3-4. Plaintiffs' Counsel has, *inter alia*, conducted an extensive investigation of both public and non-public

sources of information relating to the claims and the underlying events alleged in the Complaint; it researched the applicable law concerning the claims and the potential defenses thereto; it consulted a reputable forensic accountant concerning the alleged GAAP violations in this action; it consulted with a reputable damages expert to analyze their claims and possible recovery, and undertook extensive arm's length negotiations with counsel for Defendants in an effort to achieve this settlement. Plaintiffs' Counsel protected the interests of the Class as counsel worked to successfully lift the stay imposed by the Bankruptcy Code after the Company filed for bankruptcy. Absent Lead Plaintiffs Counsel's efforts, the stay imposed by the Bankruptcy Code would have precluded the successful resolution of this action and the Company's stockholders would have received nothing. Consequently, the adequacy requirement is clearly met.

**e. 23(b) Requirements are Satisfied**

In addition to satisfying Rule 23(a), a class action must satisfy the requirements of at least one of the subdivisions of Rule 23(b). In this case, the requirements of Rule 23(b)(3) are met. When "determining whether common questions of fact predominate [for purposes of Rule 23(b)(3)], a court's inquiry is directed primarily toward whether the issue of liability is common to members of the class." *In re Indep. Energy*, 210 F.R.D. at 486. Further, "Rule 23(b)(3) does not require that all questions of law or fact be common; it only requires that the common questions predominate over individual questions." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981). It is well established that "predominance is a test readily met in certain cases alleging …securities fraud." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). *See also In re Livent Noteholders Sec. Litig.*, 210 F.R.D. 512, 517 (S.D.N.Y. 2002). Defendants' liability would have to be established or defeated on a class-wide basis, and, accordingly, class issues predominate over individual issues such as individual damage amounts.

When considering whether a proposed class is superior for purposes of settlement, the court 'need not inquire whether the case, if tried, would present intractable management problems…for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Accordingly, a class should be certified for settlement purposes**.** To Lead Plaintiffs Counsel's knowledge, no other litigation has been brought elsewhere on behalf of the same class. Because Class Members are dispersed throughout the country, it is desirable to concentrate the lawsuit in one forum as a class action, as opposed to having thousands of separate trials. In sum, the settlement Class here meets all of the requirements of Fed. R. Civ. P. 23 and should be finally certified for purposes of settlement. *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 132 (S.D.N.Y. 2008).

**f. Lead Counsel Satisfies Rule 23(g) Standards**

Rule 23(g) provides that class counsel "must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g). Class counsel must be "qualified, experienced and generally able to conduct the litigation." *In re Drexel Burnham Lambert Group, Inc*., 960 F.2d at 291. Plaintiffs' Counsel is highly qualified in conducting complex litigation and has effectively prosecuted this case on behalf of the class which culminated in this settlement.

**2. Final Approval of the Settlement Should be Granted Because the Proposed Settlement is Fair, Adequate and Reasonable Under the Second Circuit's *Grinnell* Factors**

As a matter of public policy, courts strongly favor the settlement of lawsuits. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1983). This is particularly true in connection with complex class action litigation. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). When evaluating a proposed settlement under Fed. R. Civ. P. 23(e), a court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate, and was not the product of collusion. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995); *Varljen v. H.J. Meyers & Co., Inc.*, 97 Civ. 6742, 2000 WL 1683656, at *3 (S.D.N.Y.

Nov. 8, 2000); *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. at 132. A proposed class action settlement enjoys a presumption of fairness where, as here, it was the product of arm's-length negotiations conducted by capable counsel who are well-experienced in class action litigation arising under the federal securities laws. *See, e.g., In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 05 Civ. 10240, 2007 WL 2230177 (S.D.N.Y. July 27, 2007); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003). Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993) (citation omitted). The principal factors in evaluating the fairness of a proposed settlement in the Second Circuit are well-settled:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Wal-Mart*, 396 F.3d at 117 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). In weighing these factors, courts recognize that settlements usually involve a significant amount of give and take between the negotiating parties; therefore courts do not attempt to rewrite settlement agreements or try to resolve issues that are left undecided as a result of the parties' compromise. *See, e.g., In re Warner Commc'ns. Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("It is not a district judge's job to dictate the terms of a class settlement."). Lead Plaintiffs submit that the proposed settlement is fair, reasonable and adequate when measured under the foregoing criteria and should be approved by this Court.

**a. Complexity, Expense and Likely Duration of the Litigation**

Securities class action cases are particularly "difficult and notoriously uncertain" with respect to both liability and damages issues. *See In re Sumitomo Copper Litig.*, 189 F.R.D 274, 281 (S.D.N.Y. 1999). While Plaintiffs' Counsel believe the claims alleged in the Complaint are quite viable, uncertainty in litigation always remains.

The complexity of Lead Plaintiffs' claims weigh in favor of the settlement. As further explained the Kim Decl., at ¶¶ 65-69, this action presents a mosaic of accounting fraud involving numerous complicated accounting issues that would require in depth analysis of various GAAP provisions, and would require testimony from accounting and potentially other experts, as well as numerous fact witnesses from IEAM, its auditors and customers. Lead Plaintiffs would also have to prove the Defendants' scienter, loss causation and damages, which always carry significant risks. *See* Kim Decl., ¶¶ 60-63. Nor was class certification completely assured based on potential challenges Defendants could raise regarding whether IEAM stock traded in an efficient market. *See* Kim Decl., ¶ 64. Moreover, a trial would be both lengthy and costly.

Further, a favorable judgment for Lead Plaintiff could be the subject of post-trial motions and appeals, delaying any payment to settlement Class members even if Lead Plaintiffs were to prevail at trial and then on appeal. *See Slomovics v. All For A Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggests that settlement is in the best interests of the Class."); *See also Stieberger v. Sullivan*, 792 F. Supp. 1376, 1377 (S.D.N.Y. 1992); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 213 (S.D.N.Y. 1992). Finally, the settlement represents the recovery of nearly all of the available insurance proceeds. Any additional litigation would simply deplete available funds that will be distributed to Class Members as a result of the settlement.

**b. Adequate Notice and Reaction of the Class**

It has been repeatedly held that "one indication of the fairness of a settlement is the lack of or small number of objections." *Strougo*, 258 F. Supp. 2d at 258 (citing *Hammon v. Barry*, 752 F. Supp. 1087, 1093 (D.D.C. 1990)). *See also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478-80 (S.D.N.Y. 1998) (approving settlement where "minuscule" percentage of the class objected); *Grinnell*, 495 F.2d at 462 (approving settlement where 20 objectors appeared from group of 14,156 claimants); *Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922 (E.D. Mich. 2007) (approving settlement where 80 objectors appeared from a class of 11,000 people).

To date, not a single party has objected to the terms of the settlement. The lack of objections to the settlement strongly favors approval of the settlement. Three purported class members have opted-out of the settlement. Two of the purported opt-outs were made by the Singer Children's Management Trust and the Gary and Karen Singer Children's Trust. *See* Kim Decl., Ex 2, Mulholland Decl., Ex. D**.** However, these shareholders are complete in-and-out traders who collectively bought and sold 104,600 shares prior to the revelation of the fraud, *i.e.* prior to October 15, 2007. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342 (2005) ("But if, say, the purchaser sells the shares before the relevant truth begins to leak out, the misrepresentation will not have led to any loss."). The other opt-out, who did purportedly purchased shares during the Class Period merely represents 48,000 shares. *See* Kim Decl., Ex. 2, Mulholland Decl., Ex. D. As a consequence of the opt-outs, the per-share recovery of each of the Class Members electing to be bound by the terms of the settlement will increase.

Pursuant to the Preliminary Approval Order, and because the deadline to object to the settlement or opt-out is May 4, 2011, Plaintiffs will submit reply papers addressing any additional opt-outs or objections.

**c. Stage of Proceedings and Discovery Completed**

This settlement was entered into after years of litigation activity, during which Plaintiffs' Counsel: (i) conducted an extensive factual investigation into the events and circumstances underlying the claims in the Complaint that led to the interview of numerous witnesses who had personal knowledge of facts supporting the allegations in this case; (ii) obtained and reviewed IEAM's relevant regulatory filings, press releases and other news reports; (iii) discovered and reviewed numerous documents that otherwise were not publicly available through Plaintiffs' Counsel's extensive investigation; (iv) thoroughly researched the law regarding the claims brought against the Defendants and the potential defenses thereto; and (v) retained a damages expert to perform a preliminary analysis of the amount of damages that could be recovered for the settlement Class. *See* Kim Decl., ¶¶ 9, 70-71. As a result, prior to entering into the settlement, Lead Counsel had a comprehensive understanding of the strengths and weaknesses of Lead Plaintiffs' case. *See In re Warner Commc'ns. Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (settlement approved where the parties "have a clear view of the strengths and weaknesses of their cases."). Furthermore, any additional litigation would simply reduce available insurance proceeds as additional defense costs would erode the Company's directors, officers and company liability policy. Resolution at this stage maximizes the recovery to the Class and minimizes the erosion of insurance proceeds. Kim Decl., ¶ 16.

**d. Risks of Establishing Liability and Damages**

In assessing the Settlement, the Court should balance the immediacy and certainty of a recovery for the class against the continuing risks of litigation. *See In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591-92 (S.D.N.Y. 1992); *In re Warner*, 618 F. Supp. at 741. While the claims asserted in this action were brought in good faith and Lead Plaintiffs believe

they have merit, there are always some risks in achieving a better result for a class through continued litigation.

One challenge in this case would be establishing loss causation. Defendants have contended that Lead Plaintiffs are unable to prove the causal nexus between the alleged misstatements made by Defendants during the Class Period and the decline in IEAM's stock price. *See* Kim Decl., ¶ 14.

In addition, the Supreme Court's decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), and its progeny have made proving loss causation more difficult. For example, in *In re Omnicom Group, Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 552-53 (S.D.N.Y. 2008), the court held that an announcement that a company would buy back two companies that it previously spun off could not be deemed a corrective disclosure, because the announcement did not suggest that the original spin off transaction was a sham. The court further found that even if the news could somehow be deemed a corrective disclosure, plaintiffs could not prove that the market reacted to that disclosure, as opposed to other information that was also released about the company. Because plaintiffs failed to distinguish the alleged fraud from the "tangle of [other] factors" that affects the price of a company's stock, the court found loss causation was not established. *Id.* at 553 (internal quotations omitted).

Similarly, in *60223 Trust v. Goldman, Sachs & Co.*, 540 F. Supp. 2d 449 (S.D.N.Y. 2007), plaintiffs alleged that over a five month period Goldman Sachs issued false research reports about Exodus Communications that contained inflated earnings projections. Plaintiffs alleged that the false information artificially inflated Exodus's stock price and once the truth was revealed, the stock price plummeted. The court held that since Exodus's stock had been gradually losing value over the course of the class period, the report that eventually lowered

Goldman's rating of Exodus could not have caused the stock's loss of value during the class period.

Here, IEAM's stock price was trending downward throughout the Class Period. In order to establish loss causation, Lead Plaintiffs would have to prove that Defendants' improper bill and hold accounting and its subsequent corrective revelation caused the drop in IEAM's stock price. In short, Lead Plaintiffs would face a difficult, but surely not insurmountable obstacle in proving loss causation at trial.

Lead Plaintiffs would also bear the burden of proving scienter at trial, which would require Lead Plaintiffs to prove "intent to deceive, manipulate or defraud." *Ganino v. Citizens Utils. Co*., 228 F.3d 154, 168 (2d Cir. 2000). The Complaint alleges certain insider selling by Defendants, as well as strong circumstantial evidence of conscious misbehavior or recklessness by the Defendants. *See Elliot Assocs. L.P. v. Hayes*, 141 F. Supp. 2d 344, 357 (S.D.N.Y. 2000).

Defendants, however, would not concede the point. It is likely they would have argued that they reasonably believed that their improper methods of accounting were merely accounting errors and would have argued, as they did in their memorandum in support of their motion to dismiss the Complaint, that plaintiffs' allegations concerning GAAP violations, insider trading, and accounting improprieties were not sufficient to establish scienter. Thus, a risk existed that a jury could find that the Defendants acted, at worst, negligently, which is insufficient to satisfy the scienter requirement. *See* Kim Decl., ¶ 63.

Lead Plaintiffs also faced risks in proving damages. Proof of damages in a securities fraud case is always difficult and invariably requires highly technical expert testimony. The experts retained by Lead Plaintiffs and Defendants no doubt would have widely divergent views as to the range of recoverable damages at trial. *See* Kim Decl., ¶ 62. Where it is impossible to

predict which expert's testimony or methodology would be accepted by the jury, courts have recognized the need for compromise. *See generally In re American Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) (stating that "[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses"); *see also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

**e. Range of Reasonableness of the Settlement**

Reality dictates that, in order to settle a case, some discount needs to be offered to the defendants or they would otherwise have no economic incentive to settle. Meanwhile, in the context of a factually and legally complex securities class action lawsuit such as this, responsible class counsel cannot be certain that they will be able to obtain a judgment at or near the full amount of the class-wide damages that they would propose. Thus, the possibility that a class "might have received more if the case had been fully litigated is no reason not to approve the settlement." *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1206 (6th Cir. 1992) (citation omitted).

The Second Circuit has stated that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455 (footnote omitted); *accord In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006). "In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n.2. *See also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically recovered "between 5.5% and 6.2% of the class members'

estimated losses") (citation omitted). Courts agree that the determination of a "reasonable" settlement is not susceptible to a single mathematical equation yielding a particularized sum. *In re PaineWebber*, 171 F.R.D. at 130; *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989).

In this case, Plaintiffs' Counsel retained a damages expert who concluded that the damages in this case were in the range of approximately $31.5 – $46.2 million. A range of potential damages was appropriate due to discrepancies in the number of total shares of the Company's stock during the Class Period. Kim Decl. , ¶ 17. The expert reached this conclusion after conducting an event study analysis to determine whether the alleged false and misleading information and omissions affected IEAM's stock price and/or were material to investors. The Settlement Amount of $3,400,000 represents 7.3% to 10.7% of the total recovery in the *best* possible outcome of this action. Moreover, the settlement provides for payment to settlement Class members, without delay, not some wholly speculative payment of a hypothetically larger amount years down the road. "[M]uch of the value of a settlement lies in the ability to make funds available promptly." *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985). Perhaps most importantly, the settlement represents a recovery to Class Members of the Company's entire insurance policy (with the exception of a small amount to allow the Company to continue to defend itself in a related SEC investigation). Any additional recovery would be speculative at best, and would require many years of additional litigation with no promise of recovering any personal assets of the individual defendants.

Furthermore, additional litigation could theoretically result in a large trial award, but such a process would cost the Defendants millions of dollars worth of litigation expense, eroding the Company's insurance policy. Such a result would be a Pyrrhic victory because any large award

would be virtually uncollectible due to a depleted insurance policy and potentially bankrupt company. *See* Kim Decl., ¶¶ 75-76. Additionally, Plaintiffs faced the substantial risk that IEAM's insurer would disclaim coverage altogether given that intentional acts are alleged in this case and the pending criminal investigations of the Company by the New York County District Attorney's Office. Kim Decl., ¶ 75. Given the obstacles and uncertainties attendant to this complex litigation, as well as the Company's ever-eroding insurance policy, Lead Plaintiffs submit that the settlement is well within the range of reasonableness, and is unquestionably better than the possibility of no recovery at all.

**f. Settlement Resulted From Arm's-Length Negotiations**

The experience and reputation of the parties' counsel and the arm's-length nature of the negotiations is entitled to great weight. *See, e.g.*, *Wal-Mart*, 396 F.3d at 116 (quoting *Manual Third* § 30.42) ("A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'"); *American Bank Note*, 127 F. Supp. 2d at 428 ("Courts have looked to ensure that the settlement resulted from arm's-length negotiations between counsel possessed of experience and ability necessary to effective representation of the class's interests.") (quotations omitted).

The record of the case demonstrates the procedural fairness of the settlement. The proposed settlement was the result of lengthy negotiations between Plaintiffs' Counsel and Defendants' counsel over several months with the aid of Magistrate Judge Ellis. *See* Kim Decl., ¶ 12. The attorneys on both sides are experienced and thoroughly familiar with the factual and legal issues as evidenced by the procedural history of the case and the issues briefed before the District Court. Courts recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. See *Sumitomo*, 189 F.R.D. at 280

("when settlement negotiations are conducted at arm's length, "great weight" is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation") (quoting *In re Paine Webber Ltd. P'ships. Litig*., 171 F.R.D. at 125; *In re Salomon Inc. Sec. Litig*., 91 Civ. 4442, 1994 U.S. Dist. LEXIS 8038, at *39 (S.D.N.Y. June 15, 1994) (judgment of experienced counsel "weighs strongly in favor of the proposed settlement"); 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41 at 87-89 (4th ed. 2002).

Plaintiffs' Counsel urges final approval of the proposed settlement based upon their experience, their knowledge of the strengths and weaknesses of the case, their analysis of what their investigation has uncovered to date, the likely recovery at trial and on appeal, and all the other factors considered in evaluating proposed class action settlements.

**g. Greater Judgment**

Given the fact that the Company's entire remaining insurance policy coverage will be used in connection with the settlement (with the exception of a small fraction to cover potential future defense costs), the possibility of greater recovery than provided by the settlement is uncertain at best. *See, e.g., In re American Bank Note*, 127 F. Supp. 2d at 427. The prospects of securing speculative proceeds from certain individual defendants could take many years and result in no recovery to Class Members. In fact, the possibility of such a recovery must be weighed against the Company's eroding insurance policy. In short, the possibility of any greater recovery is highly unlikely especially in light of the Company's bankruptcy and the state of the economy. *See* Kim Decl., ¶¶ 72-78. Accordingly, the settlement should be granted because it is fair, adequate and reasonable under the Second Circuit's *Grinnell* factors.

### B. Approval of Plaintiffs' Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses

#### 1. Legal Standards for Award of Attorneys' Fees

The Supreme Court has long recognized that where counsel's efforts have created a "common fund" for the benefit a class, counsel should be compensated from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 393 (1970); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123 (1885). Courts in this Circuit agree. *See, e.g., Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000); *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80, 84 (E.D.N.Y. 2002).

Awards of attorneys' fees from a common fund serve the dual purpose of encouraging representatives to seek redress for damages caused to an entire class of persons, as well as discouraging future misconduct of a similar nature. *Dolgow v. Anderson*, 43 F.R.D. 472, 481-84 (E.D.N.Y. 1968). The Supreme Court has emphasized that private securities actions "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

Similarly, the Second Circuit has long held that a party that has secured a benefit on behalf of a class of individuals is entitled to recover its costs, including reasonable attorneys' fees, from the common fund created as a part of the settlement agreement. *See Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999). This common fund doctrine is designed to prevent the unjust enrichment of class members who benefit from a lawsuit without paying for its costs. *See Boeing Co.*, 444 U.S. at 478.

**2. The Requested Fee is Fair Under the Percentage-of Recovery Method and the Second Circuit's *Goldberg* Factors**

The Supreme Court consistently has held that the percentage of recovery approach is a correct method for determining attorneys' fees in common fund cases. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). District Courts in the Second Circuit also use the percentage of the recovery method in common fund cases. *See In re Arakis Energy Corp. Sec. Litig.*, 95 Civ. 3431, 2001 WL 1590512 (E.D.N.Y. Oct. 31, 2001); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, 98 Civ. 4318, 2001 WL 709262, at *4 (S.D.N.Y. June 22, 2001) ("use [of] the percentage method is consistent with the trend in the Circuit.").

In *Goldberger*, 209 F. 3d 43, the Second Circuit examined the history of the alternative methods for calculating attorneys' fees and expressly approved use of the percentage of recovery method in awarding fees from a common fund. *Id.* at 50. Indeed, the clear trend within this Circuit and this District is to utilize the percentage of recovery approach when awarding attorneys' fees in common fund cases. *See Strougo v. Bassini*, 258 F. Supp. 2d at 262 (stating that "the trend [is] in favor of the percentage-of-recovery approach ... within this district."); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) ("*Del Global*") (citing *Goldberger*, and noting "the trend within this Circuit is to use the percentage of recovery method to calculate fee awards to class counsel" in common fund cases); *In re Bayer AG Secs. Litig.*, 03 Civ. 1546, 2008 U.S. Dist. LEXIS 101350 (S.D.N.Y. Dec. 15, 2008).

In determining a reasonable fee under the percentage of recovery approach, courts look to the following factors: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *In re AOL Time Warner Inc. Sec. & "ERISA" Litig.*, MDL No. 1500, 2006 U.S. Dist. LEXIS 78101, at *31

(S.D.N.Y. Sept. 28, 2006) (*citing Goldberger*). Each of these factors supports the fee request here.

**a. Time and Labor Expended By Counsel**

As set forth in the Kim Declaration, Plaintiffs' Counsel expended 1,179 hours for an aggregate lodestar of $848,858.50 in the litigation of this case. Kim Decl., ¶ 95, Exs. 5-7. Plaintiffs' Counsel, among other things: (i) conducted an extensive factual investigation into the events and circumstances underlying this action and drafted an initial and amended complaint; (ii) obtained and reviewed IEAM's relevant regulatory filings, press releases and other news reports; (iii) thoroughly researched the law regarding the claims brought against the Defendants and the potential defenses thereto; (iv) drafted the opposition to Defendants' motion to dismiss; (v) consulted with their damages expert to analyze the amount of damages recoverable from the Defendants on behalf of the settlement Class; (vi) negotiated and drafted all relevant settlement documents including the Settlement Agreement, Preliminary Approval Order and the notice documents; and (vii) negotiated and drafted all relevant bankruptcy documents concerning the stay imposed by the Bankruptcy Code. Kim Decl., ¶ 9. Accordingly, the time and labor expended by Plaintiffs' Counsel here amply supports the requested fee.

**b. The Magnitude and Complexities of the Litigation**

This action includes highly complex securities fraud claims. The Complaint alleges that Defendants: (i) improperly accounted for the Company's bill and hold transactions; (ii) overstated the Company's financial results; (iii) did not fully comply with GAAP; and (iv) engaged in insider trading.

In addition, the Complaint alleged a mosaic of fraud that involved numerous accounting issues that Plaintiffs' Counsel was required to learn in order to prosecute this action. Plaintiffs' Counsel worked diligently from the start in order to understand these complex accounting issues

and analyze the accounting-related issues. The complexity of the accounting issues in this litigation, as well as the other liability and damages issues in this securities fraud action, fully supports approval of this fee and expense request.

**c. The Risks of the Litigation**

Given the risks of any litigation, including the uncertainty of establishing scienter and loss causation, the prospect of a large recovery was not assured. Lead Plaintiffs faced potential difficulty in establishing that the drop in IEAM's stock price was the result of the disclosure of the misleading statements and omissions alleged in the Complaint. Lead Plaintiffs also faced hurdles in establishing scienter. Nevertheless, Lead Plaintiffs were very confident in the prospects of this action and believe that the action has significant merit and would ultimately result in a successful verdict at trial. However, the Company's insurance policy is deteriorating and a nearly full recovery of the existing insurance proceeds now, rather than a protracted litigation with the prospect of no insurance policy proceeds in the long run, will not benefit the Class. In addition, success in litigation is never a certainty, and likelihood of establishing liability and significant damages here is not certain. In fact, cases far less complex than this action have been lost on motion, at trial, or on appeal. As stated in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971):

> It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

The Second Circuit explicitly recognizes that the attorneys' "risk of litigation" is an important factor to be considered in making an appropriate fee award. In *Grinnell*, the Second Circuit explained:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

*Grinnell*, 495 F.2d at 470-71 (quoting *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)).

The risk of non-recovery in complex cases such as this action are real and increase when plaintiffs' counsel press, as they did here, to achieve the very best result for those whose interests they represent. There are numerous cases where plaintiffs' counsel have spent thousands of hours and received no payment.[12] Furthermore, Plaintiffs' Counsel submits that the risk of a lower recovery, or no recovery at all, will only increase if the action is prosecuted any further. Any additional recovery will entail years of protracted litigation at the expense of the Company's existing insurance policy.

[12] *See In re Sapiens Sec. Litig.*, 94 Civ. 3315 (RPP), 1996 WL 689360, at *7 (S.D.N.Y. Nov. 27, 1996):

> [S]ecurities class actions can be lost. There are numerous cases in which juries have awarded no damages. Under these circumstances, it is certainly in the public interest to have experienced and able counsel willing to commit the enormous financial resources and legal talent necessary to make defendants realize (1) that dilatory tactics are not going to prevail, and (2) that a less than fair and adequate resolution for class members will not be allowed when such class members have, in fact, been wronged by defendants' conduct.

**d. The Quality of Representation**

The result achieved and the quality of the services provided are also important factors to be considered in determining the amount of reasonable attorneys' fees under a percentage of the fee analysis. *See Goldberger*, at 209 F.3d at 50; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. at 748-49. Despite the significant risk of no recovery in this action, as a result of the high quality legal representation provided by Plaintiffs' Counsel, including successfully lifting the stay imposed by the Bankruptcy Code and successfully obtaining the vast majority of the Company's insurance policy proceeds to settle the action, a substantial cash settlement was secured for the Class.

The standing and prior experience of Plaintiffs' Counsel is relevant in determining fair compensation. *See, e.g., Grinnell*, 495 F.2d at 470; *Eltman v. Grandma Lee's Inc.*, 82 Civ. 1912, 1986 U.S. Dist. LEXIS 24902, at *25 (E.D.N.Y. May 28, 1986). The Kim Declaration includes the firm resumes of Rosen Law and Wolf Haldenstein (attached as Exhibits 3 and 4 respectively). As their firm resumes demonstrate, Plaintiffs' Counsel are highly experienced in the specialized field of shareholder securities litigation. Plaintiffs' Counsel have brought their significant experience to bear in achieving this settlement.

The quality and vigor of opposing counsel is also important in evaluating the services rendered by plaintiffs' counsel. *See, e.g., Warner Commc'ns*, at 749. Here, the Defendants were represented by prominent, highly experienced and aggressive counsel. The fact that Plaintiffs' Counsel achieved this settlement for the Settlement Class in the face of formidable legal opposition further evidences the quality of their work.

**e. The Requested Fee in Relation to the Settlement**

The fee request of one-third of the Payment Fund is well within the range of percentages courts in this Circuit have awarded in similar securities class action settlements of this size. *See,*

*e.g.*, *In re Blech Sec. Litig.*, 94 Civ. 7696, 2002 WL 31720381 (S.D.N.Y. Dec. 4, 2002) (awarding 33-1/3% of $2,795,000 settlement fund); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (one-third fee of $7.8 million, is "well within the range accepted by courts in this circuit"); *Berchin v. General Dynamics Corp.*, 93 Civ. 1325, 1996 WL 465752 at * 2 (S.D.N.Y. Aug. 14, 1996) (33% of first $3 million); *In re Veeco Instruments, Inc. Secs. Litig.*, 05 Civ. 01695, 2007 WL 4115808, at * 7 (S.D.N.Y. Nov. 7, 2007) (30% of $5.5 million); *Del Global Tech*, 186 F. Supp. 2d 358 (awarding 33-1/3% of $11.5 million settlement fund); *Adair v. Bristol Tech. Sys., Inc.*, 97 Civ. 5874, 1999 WL 1037878, at *3 (S.D.N.Y. Nov. 16, 1999) (33%); *Klein v. PDG Remediation, Inc.*, 95 Civ. 4954, 1999 WL 38179, at *3-4 (S.D.N.Y Jan. 28, 1999) (33%); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320 (E.D.N.Y. 1993) (33.8% of $42 million settlement fund); *Cohen v. Apache Corp.*, 89 Civ. 0076, 1993 WL 126560, at *1 (S.D.N.Y. Apr. 21, 1993) (awarding of one-third of $6,750,000 settlement fund); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (upheld fee award of 33.3% of $1.725 million settlement); *In re StockerYale, Inc. Secs. Litig.*, 2007 WL 4589772, at * 6 (D.N.H. Dec. 18, 2007) (33% of $3.4 million settlement fund); *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272, at * 10 (E.D. Pa. Apr. 11, 2007) (33% of $750,000).

Under the percentage of recovery approach, the fee Plaintiffs' Counsel seeks is fair and reasonable in a litigation of this kind and consistent with the decisions of courts in this Circuit.

**f. Public Policy Considerations**

Private lawsuits serve to further the objective of the federal securities laws to protect investors and consumers against fraud and other deceptive practices. *Eltman*, 1986 U.S. Dist. LEXIS 24902, at *25. As a practical matter, those lawsuits can be maintained only if competent counsel can be obtained to prosecute them. *Id.* Competent counsel can be obtained if courts award reasonable and adequate compensation for their services where successful results are

achieved. "To make certain that the public is represented by talented and experienced trial counsel; the remuneration should be both fair and rewarding." *Id*. *See also* Kim Decl., ¶¶ 100-104. Public policy thus supports the award of the attorneys' fees requested here.

For all of the reasons set forth above, including the result achieved for the settlement Class, as well as the substantial efforts and considerable expenses undertaken on a contingent fee basis in a risky case, it is respectfully requested that the Court grant the request for an attorneys' fee award of one-third of the gross settlement fund.

### 3. Requested Fee is Reasonable Under the Lodestar "Cross-Check"

This Court may also consider whether the requested fee determined under the percentage approach is consistent with an award that would result under the lodestar/multiplier approach. *AOL Time Warner*, at *40 (describing this second analysis as the "lodestar cross-check"); *Twinlab*, 187 F. Supp. 2d at 85.

The Second Circuit has encouraged the practice of performing this lodestar "cross-check" on the reasonableness of a fee award based on the percentage of recovery approach. When doing so, however, the hours documented "need not be exhaustively scrutinized." *Goldberger*, at 50. The lodestar/multiplier method involves calculating the product of the number of hours worked and counsel's respective hourly rates, *i.e.* the "lodestar," and adjusting the lodestar for contingency, risk and other factors by applying a "multiplier" to the lodestar. *Grinnell*, 495 F.2d at 470-71.

As set forth in the Kim Declaration, Plaintiffs' Counsel expended 1,719 hours for lodestar of $848,858.50 in the litigation of this case. Kim Decl., ¶ 95.[13] The lodestar multiplier—the requested one-third fee divided by counsel for Plaintiffs' lodestar is .94. A negative multiplier of .94 is well within the lower range of lodestar multipliers approved by Courts in this Circuit and further demonstrates the reasonableness of the requested fee. As Judge McMahon explained "[l]odestar multipliers of nearly 5 have been deemed 'common' by courts in this District." *In re EVCI Colleges Holding Corp.*, 2007 WL 2230177, at * 17, no. 7 (citing cases); *see also In re AT&T Corp.*, 455 F.3d at 173 (reaffirming prior holding that 2.99 multiplier was reasonable in case that lasted "four months, 'discovery was virtually nonexistent'").

**4. Reimbursement of Litigation Expenses**

Plaintiffs' Counsel further requests that in addition to awarding them reasonable attorneys' fees, the Court grant their request for reimbursement of $60,917.28 in litigation costs and expenses incurred by them or expected to be incurred in connection with the prosecution of this Action. *See* Kim Declaration, ¶ 105. No Class Member objected to the request for reimbursement of expenses to be paid from the Payment Fund up to $75,000 as set forth in the notice. The expenses are set forth by category for each firm in their respective declarations. *See* Kim Declaration, Exs. 5-7. Courts routinely note that counsel is entitled to reimbursement from

[13] In computing the lodestar, the hourly billing rate to be applied is the "market rate", *i.e.*, the hourly rate that is normally charged in the community where counsel practices. *See, e.g., Blum*, 465 U.S. at 895; *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) ("market standards should prevail"); *In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) ("[I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order.") (holding that district court committed legal error in placing "a ceiling of $175 on the hourly rates of all lawyers for the class, including lawyers whose regular billing rates were almost twice as high"); *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) ("value of an attorney's time generally is reflected in his normal billing rate").

the common fund for reasonable litigation expenses. *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993); *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987); *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. at 143.

**5. Award to Lead Plaintiffs**

In the exercise of their discretion, courts may award special compensation to class representatives, and routinely do so "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (internal citation omitted); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 401 (7th Cir. 2000) (incentive awards appropriate if compensation would be necessary to induce an individual to become a named plaintiff in the suit) (citations omitted).

Plaintiffs' Counsel request that the Lead Plaintiffs be awarded a nominal amount of $1,500 each for their efforts on behalf of the Class in this action. These representatives came forward to represent the Class and took time away from professional and family obligations to carry out their obligations as Lead Plaintiffs by: (1) reviewing the Complaint; (2) staying informed of the case and making themselves available on multiple occasions to discuss the case with Lead Counsel; (3) providing Plaintiffs' Counsel with extensive information and materials. *See* Kim Decl., ¶¶ 106-108. The initiative, time and efforts of Lead Plaintiffs were essential to the successful prosecution of the case.

The requests are in line with awards granted under similar circumstances, and represent a fair and reasonable amount in light of the benefit that the Lead Plaintiffs helped to achieve for the Class. *See, e.g.,*; *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d at 463 (upholding $5,000 incentive award to representative plaintiffs) (citing *In re SmithKline Beckman Corp., Inc. Secs. Litig.*, 751 F. Supp. 525, 535 (E.D. Pa. 1990) ("special awards to the class representatives are

appropriate")); *Xcel*, 364 F. Supp. 2d 980 (total of $100,000 distributed to eight plaintiffs); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 376 (S.D. Ohio 1990) (total of $215,000 distributed to five named plaintiffs); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 00 Civ. 584, 2004 U.S. Dist. LEXIS 1819 (S.D. Ill. Jan. 22, 2004) (approving $20,000 incentive fees to each named plaintiff); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003) (providing incentive awards to certain representative plaintiffs in amounts between $2,500 and $75,000); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118 (S.D.N.Y. 2001) (reviewing case law supporting awards from $2,500 to $85,000).

The notice provided that Plaintiffs' Counsel would be applying to the Court for compensation in an amount not to exceed $1,500 per Lead Plaintiff. No Class member has objected to this request for incentive awards. Accordingly, a nominal award to each of the three Lead Plaintiffs in the amount of $1,500 is reasonable and justified.

## IV. CONCLUSION

For all of the foregoing reasons, Lead Plaintiffs respectfully request that the Court finally approve the proposed class action settlement and motion for award of counsel fees and reimbursement of expenses.

Dated: April 20, 2011

Respectfully submitted,

**THE ROSEN LAW FIRM, P.A.**

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***Lead Plaintiffs' Counsel***

**CERTIFICATE OF SERVICE**

I hereby certify that on this on the 20th day of April, 2011, a true and correct copy of the foregoing document was served by CM/ECF to the parties registered to the Court's CM/ECF system.

/s/ Phillip Kim