UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FUWEI FILMS SECURITIES LITIGATION	:	Case no. 07-CV-9416 (RJS)
	:	CLASS ACTION

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

I. INTRODUCTION

Lead plaintiff Nijat Tonyaz ("Lead Plaintiff"), on behalf of himself and the Class,[1] respectfully submits this memorandum in support of the: (i) motion for final approval of the proposed settlement between Named Plaintiffs and the Fuwei Defendants and the Underwriter Defendants[2] (Named Plaintiffs, Fuwei Defendants and Underwriter Defendants are collectively the "Settling Parties"); and (ii) motion for an award of attorneys' fees and reimbursement of expenses to Lead Plaintiff's Counsel, and an award to Lead Plaintiff.

The Settlement, which seeks to resolve this litigation in its entirety,[3] provides for a cash fund of $2,150,000 (Two Million, One Hundred Fifty Thousand Dollars), and for the balance of that payment, after payment of attorneys' fees and expenses and an award to Lead Plaintiff, to be

[1] "Class" and "Class Members" mean, for purposes of this Settlement, all persons who purchased or otherwise acquired any common stock of Fuwei during the period from December 19, 2006 through and including November 12, 2007, and were allegedly damaged thereby. Excluded from the Class are Defendants, the members of their immediate families, Defendants' legal representatives, heirs, predecessors, successors and assigns, and any entity in which any Defendant has or had a controlling interest, and any persons who have separately filed actions against one or more of Defendants, based in whole or in part on any claim arising out of or relating to any of the alleged acts, omissions, misrepresentations, facts, events, matters, transactions, or occurrences referred to in the Litigation or otherwise alleged, asserted, or contended in the Litigation. Also excluded from the Class are those persons who file valid and timely requests for exclusion in accordance with the Court's Order of Preliminary Approval of Settlement ("Preliminary Approval Order") concerning this Stipulation.

[2] Unless otherwise indicated, all capitalized terms herein shall have the same meanings as set forth in the Stipulation and Agreement of Settlement dated September 16, 2010, docket no. 77. Therefore, the Named Plaintiffs refers to Lead Plaintiff and named plaintiffs Daniil Reouk and Jerome Sahlman. The "Fuwei Defendants" refer to defendants Fuwei Films (Holdings) Co., Ltd. ("Fuwei" or the "Company"), Xiaoan He, and Mark Stulga. The "Underwriter Defendants" refers to Maxim Group LLC, WR Hambrecht + Co., and Chardan Capital Markets, LLC.

[3] The Settlement seeks to resolve all of Lead Plaintiff's claims, including claims against the "Shareholder Defendants," who are Jun Yin, Tongju Zhou, and Duo Wang. The Shareholder Defendants never appeared in this action, and upon information and belief, are in the custody of People's Republic of China ("PRC") officials or deceased.

distributed to Class members who submit acceptable proofs of claim. Of the Settlement Amount, $1,150,000 will be paid by Chartis (individual defendants' insurer), and $1,000,000 will be paid by Fuwei. Fuwei was not an insured under the Chartis insurance policy. Of the $1,000,000 to be paid by Fuwei, $200,000 will not be paid until 10 business days after the date the Court issues the Order and Final Judgment or July 1, 2011, whichever date is later. To date, $1,950,000 has been received into the interest bearing Escrow Account.

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 Fuwei and other Individual Defendants are located in the PRC, and where the liability insurance is only $5 million and does not cover Fuwei; much of which much has been depleted to cover the costs of litigating this action, and which would likely be entirely consumed if the litigation were to proceed to trial. The Settlement is the result of arm's-length negotiations between the various Settling Parties along with their experienced counsel. For these reasons and those set forth below, Lead Plaintiff respectfully submits that the proposed Settlement strongly warrants approval by this Court as fair, reasonable and adequate.

Having achieved an immediate and significant cash benefit for the Class, Lead Plaintiff's Counsel seeks an attorneys' fees award of one-third of the Settlement Amount. The requested attorneys' fees award represents a lodestar multiplier of 1.24 based on Lead Plaintiff's Counsel's lodestar of $576,751 (for 1,131.7 hours of attorney and paralegal work). *See* Declaration of Phillip Kim ("Kim Decl." or "Kim Declaration"), filed herewith, ¶¶93-95.

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 Lead Plaintiff's Counsel, and the size of

the fee in relation to the Settlement achieved, the fee request of one-third of the Settlement Amount is both fair and reasonable under the standards used in this Circuit.

Lead Plaintiff's Counsel also seeks reimbursement of their out-of-pocket litigation expenses incurred in connection with the prosecution of this action in the amount of $38,590.64.[4] Kim Decl., ¶97, & Ex. 3 thereto. These expenses were necessary for the successful prosecution and resolution of the claims against the Defendants.

Pursuant to an order of the Court dated January 4, 2011 (docket no. 80) (the "Preliminary Approval Order"), approximately 21,323 copies of the Notice of Pendency and Settlement of Class Action (the "Notice") 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.[5] In addition, on or before February 8, 2011, the Summary Notice was disseminated electronically over *GlobeNewswire* and in the *Investor's Business Daily*.

Objections must be filed and served by April 13, 2011. As of the date of this writing, only one objection (or in the alternative to opt-out) has been filed and served. That objection has been made by Gautam Sathe and Aratidevi Sathe (the "Sathes"). Mulholland Aff., Ex. C. The Sathes disagree with the Plan of Allocation and request that their clam be excluded from the Settlement if the objection is overruled. *Id*. As explained herein, because the Plan of Allocation was formulated by experienced counsel in consultation with a reputable damages expert and

[4] Such expenses include computer research, duplication and secretarial expenses relating to the preparation and submission of these settlement approval papers, private investigators, including PRC based investigators, damages consultant, translation services, and service of process fees.

[5] A copy of the 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 and Release Form, dated March 28, 2011 ("Mulholland Aff.") as Ex. A. The Mulholland Aff. is attached as Ex. 1 to the Kim Declaration.

comports with loss causation and negative causation principles, the Plan of Allocation is fair and reasonable and should be approved. Therefore the objection should be overruled, and the Sathes' claim should be excluded. Requests to opt-out of the Settlement were due on March 10, 2011. No other Class Member has sought exclusion from the Settlement. *See* Mulholland Aff., ¶ 10. Not a single Class Member (nor the Sathes) has objected to the attorneys' fee and expense request or to the request for an award to the Lead Plaintiff. *See* Mulholland Aff., ¶ 9.

II. BACKGROUND

A detailed description of procedural history, settlement negotiations, and the considerations leading to the Settlement is set forth in the Kim Declaration.

Fuwei develops, manufactures, and distributes high-quality plastic film from its production facilities in the PRC. The Company's principal operating assets are the Bruckner and DMT production lines (the "Production Lines"), which were acquired through two public auction proceedings from the now bankrupt Shandong Neo-Luck Plastics Co., Ltd. In December 2006, the Company commenced its initial public offering of stock ("IPO") on the NASDAQ Global Market. Gross proceeds from the IPO were $35.7 million.

Lead Plaintiff alleges, in relevant part, that the Company's Registration Statement and Prospectus (the "Offering Documents") were materially false and misleading when issued because prior to the IPO, (a) there were undisclosed pending investigations and legal proceedings against defendants Fuwei, Yin, and Wang; and (b) the Offering Documents failed to disclose the Shareholder Defendants' involvement in the transfer of the Productions Lines.

The truth of the misstatements in the Offering Documents entered the market in a piecemeal fashion damaging the Class. On the morning of June 25, 2007, Fuwei disclosed for the first time the pendency of criminal proceedings against the Shareholder Defendants. As a result of this announcement, Fuwei's stock fell $1.01/share or 14%. On October 16, 2007, Fuwei

announced that Chinese authorities had formally arrested the Shareholder Defendants for "suspicion of the crime of irregularities for favoritism and to sell state-owned assets at low prices," causing a 23.5% or $2.25/share decline in Fuwei's stock price. On November 6, 2007 Fuwei announced that Murrell, Hall, McIntosh & Co PLLP ("Murrell Hall") had resigned as auditor because of the arrest of the Shareholder Defendants, causing Fuwei's stock to fall 17.5% or $1.12/share. On November 12, 2007, Fuwei announced that its plan to commence operation of a third production line was delayed because it was unable to obtain financing as a result of the charges against the Shareholder Defendants. This announcement caused the Company's stock to fall 33.5% or $1.57/share.

On March 10, 2009, Fuwei announced that the Shareholder Defendants and others were found guilty by a Chinese court for the crime of misappropriation of state-owned assets concerning the Production Lines. Defendant Yin was sentenced to death with a stay of execution for two years. Defendants Zhou and Wang were both sentenced to life imprisonment. The Chinese court also ordered that all personal property of the Shareholder Defendants be confiscated by PRC government, including their combined 65% controlling stake of Fuwei. On November 12, 2009, Fuwei announced that the convictions were upheld on appeal.

A. The Litigation

Following the filing of the initial complaint, on March 14, 2008 Lead Plaintiff filed the Consolidated Amended Complaint (docket no. 28) (the "Complaint") alleging claims under Sections 11 and 12(a)(2) of the Securities Act against the Fuwei Defendants, Zhou and Underwriter Defendants; and Section 15 control person claims against the Shareholder Defendants, and He and Stulga.

After defendants' motions to dismiss and responsive briefing was completed, on July 10, 2009 this Court granted in part and denied the motions to dismiss and ruled that Lead Plaintiff

had properly alleged the misstatements and omissions in the Offering Documents about the following: (a) the pending investigations and legal proceedings against defendants Fuwei, Yin, and Wang; and (b) the non-disclosure of the Shareholder Defendants involvement in the transfer of the Productions Lines. *See Fuwei Films Sec. Litig.*, 634 F.Supp.2d 419, 438-42 (S.D.N.Y. 2009). The Court dismissed the claims concerning the alleged nondisclosure of pending arbitration proceedings against Fuwei as immaterial as a matter of law. *Id.* at 442-44. The Court also found that plaintiffs did not have standing to bring claims under Section 12(a)(2) on behalf of after-market purchasers of Fuwei stock during the Class Period. *Id.* at 444.

Lead Plaintiff engaged in substantial document discovery, including serving Defendants with requests for production of documents and interrogatories and issuing subpoenas to Fuwei's former auditors KPMG and Murrell Hall. Prior to achieving the Settlement, Lead Plaintiff's Counsel had received and reviewed nearly 75,000 pages of documents in response to these discovery efforts. Thus, Lead Plaintiff and his counsel had an adequate understanding of the strengths and weaknesses of the claims in this action. *E.g.*, Kim Decl., ¶¶6-7.

Following extended negotiations, the parties agreed to resolve this case in its entirety through settlement, and ultimately documented the terms of the settlement through the Stipulation that was filed with the Court on September 16, 2010 (docket no. 77). On January 5, 2011, the Court preliminarily approved the Settlement (docket no. 80). 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 the publicly traded common stock of Fuwei during the period from December 19, 2006 through November 12, 2007, inclusive" with the exceptions set forth in the Stipulation. The Court also preliminarily designated the Lead Plaintiff to act as

representative of the Class for the purposes of effectuating the Settlement. The Court scheduled a final hearing on the Settlement for April 27, 2011 at 10:00 a.m.

B. The Settlement

On March 26, 2010, the Settling Parties and Chartis engaged in engaged in a mediation conference with a nationally regarded mediator at JAMS, Michael Young, Esq. While the mediation did not result in a settlement, the Settling Parties and Chartis, with the aid of Mr. Young, continued their negotiations over the course of the following months and eventually reached a settlement. Kim Decl., ¶47.

1. Cash Consideration and Release

The Settlement provides for a payment of $2,150,000 in cash to pay claims of investors who purchased Fuwei stock between December 19, 2006 through and including November 12, 2007. The Settlement represents an average recovery of $0.50 per share of Fuwei stock for the 4,312,500 shares that were issued in connection with the IPO. After deduction of attorneys' fees and expenses and award to Lead Plaintiff, the Settlement represents an average recovery of $0.31 per share. The Settlement represents a significant portion of all available insurance proceeds. Fuwei does not have any insurance coverage and the individual defendants' D&O policy provides for a $5 million limit of liability, including defense costs. Moreover, Fuwei and other Individual Defendants are located in the PRC where it would likely be impossible to enforce against them a judgment entered by this Court. Furthermore, the cost of conducting full discovery in this case would be exorbitant. Almost all of the documentary evidence is in the PRC, much of it in Chinese. The cost of litigating through trial would almost certainly drain what is left of the individual defendants' D&O policy, and Plaintiffs' costs would likely total a substantial portion of any collectable judgment, significantly reducing the amount that could be

distributed to Class Members. If the Settlement is finally approved by the Court, the Lead Plaintiff, on behalf of the Class, will forever release their claims alleged against Defendants.

2. Notice to the Class

On or before January 25, 2011, pursuant to the Preliminary Approval Order, Lead Plaintiff's Counsel caused the Notice of the Settlement to be mailed. The Notice advised Class Members that Lead Plaintiff's Counsel would seek a fee award not to exceed one-third of the Settlement Amount, an expense award not to exceed $75,000, and an award to Lead Plaintiff not to exceed $2,500. Mulholland Aff., ¶¶ 4, 9, & Ex. A. The Notice also advised Class Members that any objections to any aspect of the Settlement, or fees and expense request were due to be filed and served no later than April 13, 2011.

As of the date of this writing, over 21,300 copies of the Notice were mailed to Class Members,[6] and only a single Class Member, the Sathes, have objected to the Plan of Allocation and, in the alternative, requested to be excluded. Mulholland Aff., ¶9, & Ex. C.

3. The Plan of Allocation

The Plan of Allocation was fully described in the Notice sent to the members of the Class, at Paragraph 7 thereof. Mulholland Aff., Ex. A. It was formulated by Lead Plaintiff's Counsel, in consultation with an independent damages expert, John Hammerslough, with the goal of reimbursing Class Members in a fair and reasonable manner consistent with the federal securities laws, and the principles of loss causation and negative causation.[7] To that end, the

[6] *See* Mulholland Aff., ¶ 5.

[7] Loss causation and negative causation are "mirror images" and the difference between the two lie in which party has the burden of proof. In an Exchange Act case, the Plaintiff has the burden of proving loss causation, whereas, in a Securities Act case negative causation is an affirmative defense. *See In re Vivendi Universal, S.A. Sec. Litig.*, 634 F.Supp.2d 352, 360 (S.D.N.Y. 2009).

Plan of Allocation does not compensate losses resulting from "in and out" transactions, *i.e.* losses from sales made prior to revelation of truth. *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 Plan of Allocation requires any gains from Class Period transactions to be netted with losses from Class Period transactions, which is rational and reasonable. Perhaps most importantly, the Plan of Allocation does not discriminate between the partial corrective disclosures, as each authorized claimant will receive a *pro rata* share of the Net Settlement Fund (i.e., Settlement Amount less attorneys' fees and expenses, and award to Lead Plaintiff). *See* Kim Decl., ¶¶81-85.

III. ARGUMENT

A. Final Approval of Proposed Class Action Settlement

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

To effectuate the proposed settlement, Lead Plaintiff seeks certification of a 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.

a. Numerosity

Over 4.3 million shares of Fuwei stock were sold in the IPO. Since the entry of the Preliminary Approval Order, the Claims Administrator sent out over 21,300 separate claim packets to potential Class Members throughout the country; identified through shareholder lists maintained by Fuwei, the Underwriters, and major brokerage houses. Mulholland Aff. ¶¶4-6.

Therefore, 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 Class are whether: (i) certain Defendants violated Sections 11, 12(a)(2) of the Securities Act; and certain defendants are liable for violations of Section 15(a) of the Securities Act; (ii) Offering Documents contained inaccurate statements of material facts; and (iii) the members of the Class sustained damages thereby; and, if so, (iv) 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 Plaintiff's claims are undeniably typical of the claims of the Class Members in that the claims arise out of the same uniform pattern of conduct alleged, *i.e.,* false Offering Documents, based on the same legal and remedial theories. Lead Plaintiff stands in the same position as do other purchasers of Fuwei 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.

As set forth above, Lead Plaintiff has been damaged in the same manner as other Class Members by the allegedly false and misleading statements made by the Defendants in the Offering Documents. Lead Plaintiff is not subject to any unique defenses, and Lead Plaintiff has vigorously prosecuted his claims in order to recover his own losses as well as the damages suffered by the 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 Plaintiff has been involved in the litigation and has conferred with Lead Plaintiff's Counsel concerning various aspects of the action, including this Settlement.

Moreover, the requirement of adequacy of representation is amply satisfied by Lead Plaintiff's Counsel, who have extensive experience and expertise in securities class action litigation and are capable of competently and vigorously prosecuting the litigation. *See* Kim Decl., Ex. 2. Lead Plaintiff's 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; retained and consulted private investigators, including PRC based investigators and translators to develop leads and support the claims in this action; it consulted a reputable damages expert to analyze their claims and possible recovery, and undertook extensive arm's length negotiations with counsel for the Settling Parties and Chartis in an effort to achieve this Settlement. Thus, 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 Plaintiff's 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 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. Lead Plaintiff's 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 Plaintiff submits 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 Lead Plaintiff's Counsel believe the claims alleged in the Complaint are quite viable, uncertainty in litigation always remains.

The complexity of Lead Plaintiff's claims weigh in favor of the Settlement. As further explained the Kim Declaration at ¶¶51-64, this action presents a mosaic of issues under PRC law concerning the acquisition of the Production Lines and whether the alleged facts were known or

knowable when the Offering Documents were filed with the SEC; particularly when a significant portion of the events demonstrating falsity came to light after the IPO. The Individual Defendants claim to have relied on the advice of counsel and other professionals at the time of the IPO. To prove Lead Plaintiff's claims would have required an in-depth analysis of PRC law, as well as numerous fact-witnesses affiliated with Fuwei, the Underwriters, and Fuwei's PRC based lawyers.

Lead Plaintiff would also have to address Defendants' negative causation defense as to damages, which always carries significant risks. Moreover, a trial would be both lengthy and costly.

As a practical matter, this case presents the unusual situation where the merits based on currently available evidence and information are in Plaintiffs' favor, yet such strength is of little import in light of the costs of continued litigation. Fuwei is headquartered in the PRC and conducts all of its operations in the PRC. The underlying events and transactions that form the basis of the alleged misstatements and omissions, i.e. the improper transfer of the Production Lines and related investigations and proceedings, also occurred in the PRC involving PRC individuals and entities. Thus, the bulk of the relevant documentation and communications will be in Chinese, and the percipient witnesses are likely to speak only Chinese. These issues are further complicated by the fact that depositions are not permitted in China and so the cost of travel, interpreters, videographers, and the like will be extremely high. Even without language barriers, absent a Settlement the parties would expend a significant amount of funds attempting to rebut each others experts on damages, class certification, and PRC law matters.

Further, a favorable judgment for Lead Plaintiff could be the subject of post-trial motions and appeals, delaying any payment to Class Members even if Lead Plaintiff was 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).

The Settlement represents the recovery of a significant portion of Individual Defendants' 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). The time to object to any aspect of the Settlement is April 13, 2011.

To date, Lead Plaintiff and counsel are aware of and have only received the Sathes' objection and, in the alternative, request for exclusion. *See* Mulholland Aff., ¶¶9-10, & Ex. C. The Sathes object to the terms of the Plan of Allocation because it determines they have no recognizable losses. The only support for the objection is the fact the Sathes' suffered *financial losses* of over $42,000 from their purchases and sales during the Class Period. Mulholland Aff., Ex. C. To the extent any further objections are received, Lead Plaintiff's Counsel shall address them in reply pursuant to the Preliminary Approval Order.

While Lead Plaintiff and counsel are sympathetic to Sathes' situation, the objection should be overruled and the Court should grant the Sathes' alternative request to be excluded from the Settlement (*See* Mulholland Aff., Ex. C) because (i) financial loss is not the same as compensable loss under the securities laws, and (ii) the Plan of Allocation was formulated by experienced counsel in consultation with an experienced financial consultant, and (iii) the allocation has a rational basis. *See* Kim Decl., ¶¶81-85; *see In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) ("When formulated by competent and experienced class counsel, an allocation plan need have only a reasonable, rational basis").

The Plan of Allocation was formulated with the principles of negative causation and loss causation in mind. Therefore, those shareholders who bought and then sold shares, like the Sathes, "before the relevant truth begins to leak out" have no recognized losses under the Plan of Allocation because "the misrepresentation will not have led to any loss." *Dura*, 544 U.S. at 342; *see also In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable"). Kim Decl., ¶82. The Sathes' have no recognizable losses because between December 19, 2006 (the start of the Class Period) and prior to the first partial corrective disclosure of June 25, 2007,[8] the Sathes' *purchased and sold* 65,207 shares of Fuwei stock. Kim Decl., ¶83. While the Sathes' have a financial loss of approximately $55,000 on these particular purchases and sales, those losses are not recoverable under the Plan of Allocation as the Sathes

[8] The Plan of Allocation takes into account the partial corrective disclosures during the Class Period: (a) June 25, 2007, Pendency of criminal proceedings against the Shareholder Defendants, $1.01/share or 14% stock price decline; (b) October 16, 2007, Chinese authorities arrest Shareholder Defendants, $2.25/share or 24.5% stock price decline; (c) November 6, 2007, Murrell Hall resigns because of arrests, $1.12/share or 17.5% stock price decline; and (d) November 12, 2007, third production line financing could not be obtained due to Shareholder Defendants' arrest, $1.57/share or 33.5% stock price decline.

sold their shares prior to any revelation of the truth. *See* Kim Decl., ¶83 & Ex. 4; *Dura*, 544 U.S. at 342. The next two set of purchases and sales by the Sathes' actually resulted in net gains of approximately $7,800 and $4,800. *See* Kim Decl., Ex. 4.

The Plan of Allocation does not discriminate between Class Members, and the Net Settlement Fund is distributed on a pro rata basis depending on a Class Members' recognized losses. Under these circumstances, the Plan of Allocation is fair and adequate and should be approved.

c. Stage of Proceedings and Discovery Completed

This settlement was entered into after about three years of litigation, during which Lead Plaintiff's Counsel: (i) conducted an extensive factual investigation into the events and circumstances underlying the claims in the Complaint; (ii) obtained and reviewed Fuwei's relevant regulatory filings, press releases and other news reports in the U.S. and in the PRC; (iii) discovered and reviewed nearly 75,000 pages of documents that otherwise were not publicly available through Lead Plaintiff's 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 Class. *E.g.*, Kim Decl., ¶6. As a result, prior to entering into the Settlement, Lead Plaintiff's Counsel had a comprehensive understanding of the strengths and weaknesses of Lead Plaintiff's 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 Individual Defendants' D&O policy. Resolution at this stage maximizes the recovery to the Class and minimizes the erosion of insurance proceeds.

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 Commc'ns. Sec. Litig.*, 618 F. Supp. at 741. While the claims asserted in this action were brought in good faith and while Lead Plaintiff believes they have merit, as further explained in the Kim Declaration, there are always some risks in attempting to achieve a better result for a class through continued litigation. ¶¶53-58.

Lead Plaintiff faced the significant and costly task of discovering and obtaining admissible evidence of falsity, in light of the discovery challenges faced with PRC based defendants and third parties. Depositions are not permitted in the PRC and compelling production of documents held by third parties located in PRC is nearly impossible. Moreover and substantively, Lead Plaintiff faced the risk associated with Defendants' contention that when put to the proofs, the allegations that demonstrate falsity concerning events subsequent to the IPO, do not demonstrate that the Offering Documents contain a false statement or that Defendants had a duty to disclose the omitted information. *Id*. at ¶53.

While Fuwei is subject to strict liability for the issuance of the inaccurate Offering Documents, Fuwei itself was not covered by any insurance coverage. Fuwei is a micro-cap company and the Company's shares currently trade for less than $5.00 per share. *See* Kim Decl., ¶69. Therefore, Fuwei has no real means to raise funds in the capital markets to pay a judgment. Moreover, even if Lead Plaintiff were to prevail and obtain a judgment against Fuwei, it would likely be nearly impossible to enforce it in the PRC. Likewise, the Shareholder Defendants, who have had all their assets confiscated by the PRC government and have been imprisoned and/or sentenced to death are judgment proof. *Id.* at ¶70.

As to the Underwriter Defendants and individual Fuwei Defendants, Lead Plaintiff faced the statutory due diligence defense to liability under the Securities Act. Throughout this litigation, these Defendants contended that they relied on the advice of numerous in-house and outside professionals in passing on the IPO prospectus. While Lead Plaintiff's counsel believed that there was a triable issue on the due diligence defense and that Lead Plaintiff could prevail on summary judgment and at trial, a positive result was not guaranteed. *Id.* at ¶57.

One challenge in this case would be negating Defendants' negative causation affirmative defense. Defendants have contended that the declines in Fuwei's stock price was not caused by the alleged misstatements or omissions, but rather other market forces or adverse events that were not causally related to the disclosure of any misstatement or omission found in the Offering Documents. *Id.* at ¶54.

Proof of damages in a securities case is always difficult and invariably requires highly technical expert testimony. The experts retained by Lead Plaintiff and Defendants no doubt would have widely divergent views as to the range of recoverable damages at trial. 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." *Grinnell*, 495 F.2d 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, Plaintiffs' best case damages scenario, meaning if Plaintiffs were successful in opposing Defendants' arguments and prevailed on every claim and contention, the maximum recoverable damages in this case would be $12.4 million. Kim Decl., ¶16. The Settlement Amount of $2,150,000 represents 17.3% of the total recovery in the *best* possible outcome of this action. Defendants

have disputed Plaintiffs' damages estimates, and under their analysis, estimated Class-wide damages are $2.3 million. And the Settlement represents 93% of that. *Id.* Additionally, a very likely damages scenario is $5.95 million. Under Section 11(e) of the Securities Act, damages are capped at the offering price less the value of the security when suit was brought. As the action was filed on October 19, 2007 when Fuwei stock closed at $6.90 per share, and the IPO price was $8.28 per share, maximum damages is difference between the two - $1.38/share- multiplied by 4,320,000 IPO shares or $5.95 million. Under this scenario, the Settlement represents 36.4% of class-wide damages. *Id.*

Moreover, the Settlement provides for payment to Class Members now, 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). Moreover, the Settlement represents a recovery to Class Members of a significant portion of the Individual Defendants' insurance policy (especially considering that a substantial portion of it has been depleted in defending this action). 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.

Although additional litigation could theoretically result in a large trial award, such a process would cost the Defendants millions of dollars in litigation expenses, depleting the insurance proceeds, and it is doubtful Lead Plaintiff could collect a judgment against Fuwei and other Individual Defendants who are located in the PRC. Such a result would be a Pyrrhic victory because any large award would be virtually uncollectible due to a depleted insurance policy and Fuwei's status as a micro-cap company. Kim Decl., ¶¶69-70. Given the obstacles and

uncertainties attendant to this complex litigation, as well as the Individual Defendants' ever-eroding insurance policy, and Fuwei's lack of insurance coverage, Lead Plaintiff submits 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 demonstrates the procedural fairness of the Settlement. The proposed Settlement was the result of lengthy negotiations between Lead Plaintiff's Counsel, defense counsel, and Chartis, with the aid of a nationally regarded mediator. Kim Decl., ¶47. 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).

Lead Plaintiff's 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 Fuwei lacks insurance coverage and the wasting D&O policy of the Individual Defendants, 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 Fuwei, Underwriters, or the Individual Defendants could take many years and result in no recovery to Class Members. 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, Lead Plaintiff's Counsel expended 1,131.7 hours for an aggregate lodestar of $576,751 in the litigation of this case. Kim Decl., ¶93. Lead Plaintiff's 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 Fuwei's relevant regulatory filings, press releases and other news reports in the U.S. and in the PRC; (iii) thoroughly researched the law regarding the claims brought against the Defendants and their potential defenses thereto; (iv) drafted the opposition to Defendants' two motions to dismiss; (v) consulted with their damages expert to analyze the amount of damages

recoverable from the Defendants on behalf of the Class; (vii) conducted extensive party and non-party document discovery, which culminated in the review of over 75,000 pages of documents; and (vii) negotiated and drafted all relevant settlement documents including the Stipulation, Preliminary Approval Order and the notice documents. Kim Declaration, ¶6. Accordingly, the time and labor expended by Lead Plaintiff's Counsel here amply supports the requested fee.

b. The Magnitude and Complexities of the Litigation/Risks of Litigation

The magnitude, complexities and the risks of the litigation are addressed above. Although Lead Plaintiff believes that this action has significant merit, given the risks of any litigation, the prospect of a favorable verdict was far from assured. Moreover, 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.

495 F.2d at 470-71 (quoting *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)). There are numerous cases where Lead Plaintiff's Counsel have spent thousands of hours and received no payment. Furthermore, Lead Plaintiff's 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 , the defense of which will deplete the limited insurance proceeds.

c. 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 Lead Plaintiff's Counsel, including successfully obtaining a substantial cash settlement for the Class.

The standing and prior experience of Lead Plaintiff's 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 resume of Rosen Law Firm (attached as Exhibit 2). As their firm resume demonstrates, Lead Plaintiff's Counsel are highly experienced in the specialized field of shareholder securities litigation. Lead Plaintiff's 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 experienced and aggressive counsel. The fact that Lead Plaintiff's Counsel achieved this settlement for the Class in the face of substantial legal opposition further evidences the quality of their work.

d. The Requested Fee in Relation to the Settlement

The fee request of one-third of the gross settlement 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. Sec. 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. Sec. 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 attorneys' fee Lead Plaintiff's Counsel seeks is fair and reasonable for litigation of this kind and consistent with the decisions of courts in this Circuit.

e. Public Policy Considerations

Private lawsuits serve to further the objective of the federal securities laws to protect investors and consumers against 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.* 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 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, Lead Plaintiff's Counsel expended 1131.7 hours for lodestar of $576,751 in the litigation of this case. Kim Declaration, ¶93.[9] The lodestar multiplier—the requested one-third fee divided by Lead Plaintiff's Counsel's lodestar is 1.24. A multiplier of 1.24 is 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, n.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'").

[9] 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").

4. Reimbursement of Litigation Expenses

Lead Plaintiff's Counsel further requests that in addition to awarding them reasonable attorneys' fees, the Court grant their request for reimbursement of $38,590.64 in litigation costs and expenses incurred by them or expected to be incurred in connection with the prosecution of this Action. *See* Kim Decl., ¶97. The expenses are set forth by category in Exhibit 3 to the Kim Declaration. Courts routinely note that counsel is entitled to reimbursement from 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.

IV. CONCLUSION

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

Dated: March 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this on the 28th day of March, 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