UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JIHONG WANG, QI LI, LES AKIO OMORI, and ALAN BECK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CHINA FINANCE ONLINE CO. LIMITED,

Defendant.

Case No.: 1-15-CV-07894-RMB

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Motion Date: February 21, 2017

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR (A) FINAL APPROVAL OF SETTLEMENT AND (B) APPROVAL OF PLAN OF ALLOCATION

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I. INTRODUCTION[1]

Lead Plaintiffs Jihong Wang, Qi Li, and Les Akio Omori ("Plaintiffs"), on behalf of themselves and the Class,[2] respectfully submit this memorandum in support of the motion for final approval of the proposed Settlement.

The Settlement proposes to resolve this litigation in its entirety in exchange for $3,000,000 in cash. The Settlement is eminently fair, reasonable, and adequate. It was reached through arm's-length negotiations at a mediation by experienced counsel with an in-depth understanding of the strengths and weaknesses of the case. The case presents nearly insurmountable evidentiary challenges. Plaintiffs have not found a cooperating witness, and all third party witnesses are located in the People's Republic of China (the "PRC"), which likely would not enforce third party discovery. And this is a case that demands third-party discovery. Plaintiffs would have to show that third parties (i.e., the Strawmen) were controlled by the CEO and a former director of China Finance Online Ltd. ("CFO") through a network of third-party companies, but would be unable to take discovery from either the third parties or the third-party companies.

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[1] Citations to "¶_" are to Paragraphs of the Complaint. Citations to "Horne Dec. ¶__" are to Paragraphs of the Declaration of Jonathan Horne Concerning Final Approval, filed herewith. Citations to "Bravata Supp. Dec. ¶__" are to Paragraphs of the Supplemental Declaration of Josephine Bravata Concerning the Mailing of Notice and Claim Form, Requests For Exclusions and Objections, filed as Exhibit 1 to the Horne Dec. Citations to "Bravata Dec. ¶__" or "Ex. __" are to Paragraphs of or Exhibits to the Declaration of Josephine Bravata Concerning Mailing of Notice of Pendency and Proposed Settlement of Class Action and Proof of Claim and Release, dated December 16, 2016, dkt. # 133-1. Citations to "Hochberg Dec. ¶__" are to Paragraphs of the Declaration of Hon Faith S. Hochberg (Ret.) In Support of Proposed Settlement, filed as Exhibit 3 to the Horne Dec.

[2] Unless otherwise indicated, all capitalized terms take have the same meanings as set forth in the Stipulation and Agreement of Settlement (the "Stipulation") filed with the Court on November 2, 2016 (Dkt. # 129).

Maximum potential damages are approximately $42.6 million from four corrective disclosures. Yet this case presents difficult loss causation challenges, since two of the corrective disclosures were earnings releases. These releases revealed quite a bit about CFO's operations, but Plaintiffs would have to disaggregate the impact of the specific corrective disclosure that CFO was experiencing delays in collecting payments. And a third simply regurgitated facts revealed in a previous corrective disclosure.

Total possible damages for the remaining corrective disclosure are approximately $9.9 million, after offsetting class period gains. The Settlement thus recovers about 30% of the damages Class Members could likely recover, were they able to survive Defendants' motion to dismiss, certify a class, survive summary judgment, prove transaction causation, falsity, materiality, scienter, and loss causation to the jury's satisfaction, prove to the jury that the entirety of this remaining stock drop could be attributed to revelation of the fraud, survive Defendants' post-trial motions and appeals, and enforce a judgment – in China, which does not enforce U.S. judgments.

Pursuant to an order of the Court dated November 18, 2016 (the "Preliminary Approval Order") (Dkt # 132), 31,042 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. Bravata Supp. Dec. ¶3. A copy of the Notice is attached as Ex. A to the Bravata Dec. On December 5, 2016, the Summary Notice was disseminated electronically over *PR Newswire* and in print in the *Wall Street Journal* and *Investor's Business Daily*. Bravata Dec. ¶6. Requests for exclusion and objections must be mailed to the Claims Administrator by March 3,

2017. Bravata Supp. Dec. ¶¶5, 6. As of the date of this writing, there have been no requests for exclusion or objections. *Id.*

II. FACTS

In 2012, CFO announced that it would undertake a strategic business transition, which would require it to hold "ample" cash. ¶¶65, 66. In 2013, however, having barely begun its transition, CFO placed about a third of its ready cash in an illiquid early-stage real estate development project with developer Langfang Shengshi Real Estate Development Co. Ltd. ("Langfang Development"), which was still on the drawing board (the "Langfang Investment"). ¶¶67, 71. CFO said the purpose of the investment was to earn a return on its cash during its strategic transition without sacrificing liquidity. ¶72.

The transaction was puzzling on its face, since real estate has nothing to do with CFO's business, and an investment in a real estate construction project is illiquid. But the facts CFO allegedly concealed from investors explain the investment. CFO's co-investor in the Langfang Investment was Beijing Bluestone Investment Management Co. Ltd. ("Beijing Bluestone"), whose two principals were CFO's CEO Zhiwei Zhao ("Zhao") and Ling Wang ("Wang"), a longtime CFO director and then-director of one of CFO's principal subsidiaries. ¶90.a. Wang and Zhao allegedly concealed the related-party nature of the Langfang Investment by having Beijing Bluestone initially hold its stake in Langfang Investment through four strawmen, one of whom was the Chair of Beijing Bluestone's Board of Directors (the "Strawmen"). ¶¶74, 75.

The securities laws and Generally Accepted Accounting Principles ("GAAP") require that foreign private issuers like CFO disclose related-party transactions in their annual reports on Form 20-F – including transactions with companies owned by the company's management. ¶¶48-56. Yet CFO's 20-Fs did not disclose that the Langfang Investment and two later

transactions with Beijing Bluestone were related-party transactions. ¶¶67-68, 105. One reason disclosure is required is that the economic substance of related-party transactions may differ considerably from their stated terms. Here, what was disclosed as an investment seeking to maximize CFO's returns was allegedly actually a sweetheart deal designed to benefit CFO's management at CFO's expense. ¶12. Further, the fact that CFO's counterparty in the Langfang Investment was (Plaintiffs allege) CFO's management made it more likely that CFO would not take aggressive action to protect its investment, since CFO's managers were unlikely to sue themselves. ¶86.

Plaintiffs allege that Defendant's false statements concerning related-party transactions caused the Settlement Class losses on four occasions. On two occasions, on September 30, 2014, and March 23, 2015, CFO issued earnings releases that divulged (among other things) that CFO had failed to collect the amounts it was owed on the Langfang Investment and subsequent transactions, in violation of contractual terms calling for payment to CFO from Beijing Bluestone. ¶¶111-113, 120-121. Plaintiffs allege that these events were materialization of the risks of CFO's engaging in business transactions with its management, since to enforce the agreement, CFO's managers must cause CFO to sue themselves. On two other occasions – a December 15, 2014 Chinese-language expose, and a June 3, 2015 article targeting U.S. investors – third parties revealed that Beijing Bluestone was a related party. ¶¶117-119, 122-124. Plaintiffs allege that these were corrective disclosures.

III. PROCEDURAL HISTORY

This securities class action (the "Action") brought on behalf of a class of purchasers of CFO American Depository Shares ("CFO ADSs") was filed in the United States District Court for the Central District of California in June 2015 (the "California Court"). In September 2015,

the California Court appointed Lead Plaintiffs, and appointed The Rosen Law Firm, P.A. ("Lead Counsel") as Lead Counsel. Dkt. # 31. Then, pursuant to the Parties' stipulation, the Action was transferred to this Court. Dkt. # 36.

In October 2015, Lead Plaintiffs and named plaintiff Alan Beck (the "Plaintiffs") timely filed their Consolidated Class Action Complaint for Violation of the Federal Securities Laws. Dkt. # 44. But even after filing, Plaintiffs' investigation continued, and uncovered additional material facts. The Court granted Plaintiffs' request to file their Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws (the "Complaint") to allege these new facts in November 2015, and Plaintiffs timely filed the Complaint in December 2015. Dkt. # 78.

The Complaint brought claims on behalf of a class of all persons who purchased CFO ADSs between April 29, 2013 and June 3, 2015. ¶1. The Defendants were CFO, its CEO Zhiwei Zhao, its CFO Jun Wang (together, the "Officer Defendants"), its current and former directors Rongquan Leng, Neo Chee Beng, Kheng Nam Lee (the "Director Defendants"), and its current and former auditors Grant Thornton and BDO China Shu Lun Pan Certified Public Accountants LLP (the "Auditor Defendants").

CFO had waived service of process, and appeared. At the time the Complaint was filed, Plaintiffs had unsuccessfully sought to have the Officer and Director Defendants waive service of process. Plaintiffs had also submitted requests to Chinese authorities to serve the Officer and Auditor Defendants pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"), the only way to serve a defendant with process in mainland China. *See generally* dkt. # 74.

Hague Convention service requests are notoriously time-consuming, and Plaintiffs were stymied in serving the Director Defendants because they could not find service addresses for them. Accordingly, in December 2015, Plaintiffs sought leave to file a motion requesting an order compelling CFO to (a) accept service of process on behalf of the Officer and Director Defendants, and/or (b) provide current or last-known service addresses for the Director Defendants. Dkt. # 74. At roughly the same time, CFO sought leave to file a motion to dismiss. Dkt. # 84. The Court resolved the two requests by ordering CFO to provide service addresses for the Director Defendants, and denying CFO leave to file a motion to dismiss without prejudice to renewal once all parties had been served and appeared. Dkts. # 86, 88. Because service through the Hague Convention could not be completed within a reasonable amount of time, in March 2016, Plaintiffs dismissed all unserved Defendants to permit the action to proceed against CFO. Dkt. # 93.

CFO thereupon immediately renewed its request to file a motion to dismiss. Dkt. # 92. The Court granted CFO's request to file its motion, which CFO timely filed (dkt. # 96), and Plaintiffs timely opposed. Dkt. # 101. On May 18, 2016, after CFO's motion was fully briefed, CFO and Plaintiffs appeared at a mediation before the Hon. Faith S. Hochberg, U.S.D.J. (ret.). The mediation was successful, and Plaintiffs and Defendants reached the [proposed] $3.0 million Settlement, which the Court preliminarily approved in November 2016. Dkt. # 132.

IV. ARGUMENT

A. Final Approval of Proposed Class Action Settlement

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

Pursuant to the Preliminary Approval Order, the class was preliminarily certified as to "all Persons who purchased or otherwise acquired CFO's American Depositary Shares between

April 29, 2013 and June 3, 2015. Excluded from the Class are: (a) such persons or entities who submit valid and timely requests for exclusion from the Class; (b) such persons or entities who settled an actual or threatened lawsuit or other proceeding and released from any further Claims those individuals and entities whom the Settlement Agreement releases from any further Claims; and (c) Defendants who have previously been dismissed from this action; family members of any of the foregoing, and their legal representatives, heirs, successors, or assigns; and any entity in which any of those individuals or entities whom the Settlement Agreement releases from any further Claims has or had a Controlling Interest, as defined at page 9 of the Settlement Agreement." Preliminary Approval Order ¶2. The Court also preliminarily found that the requirements of Federal Rule of Civil Procedure 23 and the PSLRA appeared to be satisfied. Id. ¶3.l

No changes have occurred since the Preliminary Approval Order. Thus the Court should finally certify this as a class action for the purposes of the Settlement.

2. The Court should grant Final Approval of the Settlement because it is Fair, Reasonable, and Adequate Under the Second Circuit's *Grinnell* Factors

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). As a matter of public policy, though, courts strongly favor settlement. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1983). This is particularly true of complex class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

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. *Wal-Mart*, 396 F.3d at 116. Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 CM, 2014 WL 7323417, at *3 (S.D.N.Y. Dec. 19, 2014) (internal quotations 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.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). In weighing these factors, courts recognize that settlements usually involve significant 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."). The proposed settlement meets the *Grinnell* factors and the Court should therefore approve it.

i. Complexity, Expense and Likely Duration of the Litigation

The complexity of Lead Plaintiffs' claims weigh in favor of the Settlement. To begin with, 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). This case is more complex and expensive than most. First, it is more

complex because it would require extensive translation. CFO conducts substantially all of its business in Chinese. Former Defendant Zhao, its CEO and the primary participant in the alleged fraud, even uses a translator to address investors on conference calls. Horne Dec. ¶11. While Lead Counsel assigned a Chinese-speaking attorney to this case, any documents would still have to be translated into English to be understood by the whole litigation team. Beyond cost, in Lead Counsel's litigation experience, Chinese-to-English translations are very frequently disputed. Horne Dec ¶12. These translation issues would also carry over into depositions and trial. Plaintiffs must show that Zhao acted with scienter. The precise meaning of documents, Zhao's communications, and deposition answers will thus be critical; translation disputes add to the uncertainty of the result.

Second, the case raises difficult practical evidentiary issues. Plaintiffs have not been able to locate a cooperating witness. Horne Dec ¶5. The Strawmen and the companies that make up CFO's *de facto* conglomerate are all located in the PRC. Discovery in the PRC must proceed through letters rogatory rather than subpoena. As further set out below, there are strict limits to parties' ability to obtain evidence through letters rogatory.

Third, all of the corrective disclosures in this case contained confounding information. Two of the corrective disclosures were earnings releases. The two others were articles discussing both that Beijing Bluestone was a related party and that CFO's CEO and numerous associates faced a corruption investigation, a claim Plaintiffs do not allege was the revelation of any fraudulently concealed fact. Expert testimony would be required to disaggregate the impact of the corrective information from the news that did not reveal fraud. This would add to the expense and complexity of litigation, while also significantly reducing recoverable damages.

Even without the language barrier and witnesses located a 16-hour flight away,[3] absent a Settlement, Plaintiffs and CFO would expend a significant amount of funds further litigating this case. But because CFO and its officers are based in China, it is highly likely that they would refuse to comply with any judgment entered against them in this case, rendering such judgment a pyrrhic victory. See 14, below.

Further, a favorable judgment for Lead Plaintiffs would inevitably be tested in post-trial motions and appeals, delaying any payment to Class Members. *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 suggest 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).

ii. Adequate Notice and Reaction of the Class

Courts have 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 82 objectors appeared from a class of 11,000 people).

[3] Because depositions in mainland China are prohibited, depositions of witnesses who reside there customarily take place in Hong Kong instead. Hong Kong is a 16 hour flight from New York.

Plaintiffs fully complied with the Court's order concerning notice. The Court's Order was designed to provide Class Members with constitutionally sufficient notice of the Action and of their opportunity to be heard, and was written in plain, easily-understood English.

The notice advised Class Members of their right to opt-out of or object to any part of the Settlement by March 3, 2017. Bravata Supp. Dec. ¶¶5, 6. To date, there have been no requests for exclusions or objections. *Id.* This weighs in favor of approving the Settlement.

iii. Stage of Proceedings and Discovery Completed

As further set out in the Fee Brief, the Settlement was only reached after Lead Plaintiffs (a) reviewed the extensive record of Defendants' public statements and media reports about CFO (including in Chinese); (b) conducted an on-the-ground investigation in China, which involved obtaining corporate records of more than a dozen companies and speaking with more than 10 former CFO employees to flesh out the relationships between Wang, Zhao, and the Strawmen; and (c) consulted with accounting experts consulting the disclosure obligations of both CFO and its auditors. *E.g.* Horne Dec. ¶¶3-10. As a result, prior to entering into the Settlement, Lead Counsel understood 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").[4] Moreover, further prosecution of the action against the Defendants continuing to

[4] That no formal discovery was taken did not bar Plaintiffs from obtaining enough facts to evaluate the claims at issue. "[I]n the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (internal quotations omitted). Informal information sharing is especially appropriate where an action is stayed pursuant to the PSLRA's discovery stay, which stays discovery until after a motion to dismiss is decided. *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007). If discovery were a prerequisite to settlement approval, it

trial would erode the Defendants' insurance policy, leaving less for the Class. Resolution at this stage of the case maximizes the recovery to the Class. Further, as part of confirmatory discovery, Defendants have provided Plaintiffs with certain contracts relating to Beijing Bluestone; none showed related party transactions, and all appeared to be at arm's-length. Horne Dec. ¶15.

This weighs in favor of approving the Settlement.

iv. 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. This case was exceptionally risky.

a. Risks Posed In Obtaining Discoverable Evidence

Prosecuting this case to trial raises substantial difficulties not seen in most other securities class actions. Because most of the relevant evidence is located in the PRC, third party discovery in this case would have to proceed through letters rogatory – interposing severe practical impediments.

First, third party depositions of unwilling witnesses are absolutely out of the question. "China does not permit attorneys to take depositions in China for use in foreign courts." U.S. State Department, International Judicial Assistance: Country Information—China, Obtaining Evidence In Civil and Commercial Matters.[5] The customary solution is to hold depositions of willing witnesses in nearby jurisdictions that allow them. But if the witnesses are ***not*** willing to

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would be impossible to settle a PSLRA action before denial of a motion to dismiss. But in fact, 30% of the securities class action settlements approved in 2015 were reached before a motion to dismiss. Horne Dec. Ex. 4, at 20.

[5]Available at < http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/china.html>.

have their depositions taken, they cannot be compelled to appear. Thus, unless the Strawmen volunteered to sit for their deposition – and it is difficult to imagine their doing so – Plaintiffs would not be able to use their testimony to establish that they were, indeed, strawmen. And even party depositions present additional difficulties since they must be conducted outside of the PRC, typically in Hong Kong.

Second, there are severe practical limitations on document discovery. First, China has nothing like the broad U.S. system of discovery of relevant information. Zhong Jianhua and Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved this Goal?*, 13 J. Transnat'l L. & Pol'y 393, 409 (2004) ("Strictly speaking, there is no system comparable to discovery in China."); *See* Jacques Delisle and Elizabeth Trujillo, *Consumer Protection in Transnational Contexts*, 58 Am. J. Comp. L. 135, 161 (2010) ("Discovery in China for litigation in the United States faces formidable barriers[.]")

Rather, in order to obtain documents, plaintiffs must obtain documents through letters rogatory pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"). Obtaining evidence through the Hague Evidence Convention would require the PRC's cooperation. The PRC has enacted sweeping state secrets laws that prohibit disclosure of potentially sensitive information. But "[t]hese laws have broad sweep and can preclude disclosure of a host of nebulously defined categories of information." *Munoz v. China Expert Tech., Inc.*, No. 07 CIV. 10531 AKH, 2011 WL 5346323, at *1 (S.D.N.Y. Nov. 7, 2011). This case is potentially sensitive to the Chinese government, as it involves several CFO officials accused or convicted of having violated Chinese criminal law. Accordingly, it is likely that the PRC government would invoke its state secrets laws to prohibit discovery. There is thus no reasonable assurance that the Chinese government

would even process letters rogatory. *See Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 102 (S.D.N.Y. 2015) (finding that Hague Evidence Convention requests in China were not a viable alternative method of securing information sought by subpoena).

And even parties often contest discovery on the basis that their corporate documents are protected by the PRC State Secret Law. *Munoz*, 2011 WL 5346323. Because Chinese State Secrets laws generally prohibit export of documents, plaintiffs are sometimes forced to fly to China to inspect documents in person at a defendants' counsel's Chinese offices, at a cost of tens of thousands of dollars in attorney travel time per attorney. Horne Dec. ¶13.

Therefore, there is significant risk in obtaining the proof necessary to prevail at trial.

b. Risks Posed by Obstacles to Collecting a Judgment & possibility of a greater

Plaintiffs would face difficulty enforcing any judgment against a company whose operations and assets are almost exclusively located in the PRC. Chinese courts will likely not enforce U.S. civil judgments. *See* Dan Harris, Chart on Enforcing Judgments Around the World, Including China, China Law Blog (June 22, 2013) ("When it comes to enforcing US court judgments in China, the law has been clear and remains clear. China won't do it. Not now. Not later. Maybe not ever.")[6]; Jason Hsu, *Judgment Unenforceability in China*, 19 Fordham J. Corp. & Fin. L. 201 (2013) (similar). This poses a significant risk to the class because even if Plaintiffs obtain a judgment, they may be unable to collect it against Defendant or its officers.

c. Risks in establishing damages

Proof of damages in a securities case is always difficult and invariably requires highly-technical expert testimony. The experts retained by Lead Plaintiffs and Defendants have widely

[6]Available at <http://www.chinalawblog.com/2013/06/chart-on-enforcing-judgments-around-the-world-including-china.html>.

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).

This case presents particular risks of proving damages. Two of the loss causation news events identified in the Complaint were earnings releases. These earnings releases contained the information Plaintiffs claimed were corrective disclosures – the fact that CFO had not been able to collect on the loan and sale of its equity investment in connection with the Langfang Investment. But they also contained updates on that quarter's financial performance, news about developments in CFO's business, and other important news. Horne Dec. ¶21. Disaggregating the fraud-related news from the non-fraud news would require an expert, would be uncertain and risky, and would reduce damages considerably. *Id.*

Second, two corrective disclosures directly revealed that Beijing Bluestone was a related party. But therein lies the problem – although it did provide additional ***evidence*** that Beijing Bluestone was a related party, the fourth corrective disclosure merely repeated the third. Nor is the third corrective disclosure completely on point, since it also revealed at length the corruption of Wang and a group of his associates – claims that are not at issue in this case.

v. Range of Reasonableness of the Settlement

Some discount needs to be offered to a settling defendant or it would have no economic incentive to settle. Additionally, in a factually and legally complex securities class action,

responsible class counsel cannot be certain that they will be able to obtain – and enforce – a judgment at or near the full amount of the class-wide damages that they would propose.

The Second Circuit has held 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.2dat 455, n.2. This reflects the fact that there are many ways to lose a case, such as failing to plead or prove falsity, scienter, loss causation, or failing to show entitlement to class certification, or failing to show full entitlement to damages. Faltering at any of these steps means no – or at least a much reduced – recovery. Thus, the deck is stacked against even a plaintiff with a strong case.

Plaintiffs retained an expert to provide a preliminary damages estimate based on a trading model that considered price decline, trading volume, and adjusted purchase volume to calculate damages. Horne Dec. ¶18. Total estimated "plaintiffs' style"[7] damage, offsetting Class Members' gains from selling shares at elevated prices, are approximately $42.6 million; the Settlement recovers 7.0% of that total figure. *Id.* Moreover, CFO also obtained an estimate of plaintiffs' style damages, which showed substantially lower damages. Horne Dec. ¶19.

Moreover, the $42.6 million estimate includes all four corrective disclosures. Including only the corrective disclosure that first revealed that Beijing Bluestone was a related party, total

[7] Plaintiffs' style damages assume that the entirety of a stock drop following a corrective disclosure is attributable to the revelation of the fraud.

damages after gains offsets are $9.9 million. Horne Dec. ¶20.The Settlement recovers 30.3% of this more realistic estimate of damages.

The recovery of 7.0% of maximum damages and 30.3% of most likely damages is well within the range that courts in this District have approved. *See In re China Sunergy Sec. Litig*., No. 07-Civ.7895, 2011 WL 1899715, at *15 (S.D.N.Y. May 13, 2011) (noting that the average settlement in securities class actions ranges from 3% to 7% of the class' total estimated losses); *Velez v. Novartis Pharm. Corp.*, 04 CIV 09194 CM, 2010 WL 4877852, *14 (S.D.N.Y. Nov. 30, 2010) (noting that "courts often approve class settlements even where the benefits represent 'only a fraction of the potential recovery'" and collecting cases from the Southern District where settlements were approved for percentages of estimated damages such as 1.6%, 2%, and 5%). Indeed, according to Cornerstone Research, in 2015, the median settlement in cases with estimated damages of less than $50 million recovered just 6.7% of total damages. *Securities Class Action Settlements: 2015 Review and Analysis*, at 9 (Cornerstone Research 2016).[8] The Settlement of $3.0 million thus represents a significantly better than average recovery.

Moreover, "much 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). 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.

vi. The 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 for Complex Litigation, Third*, § 30.42 (1995)) ("A 'presumption of fairness, adequacy, and

[8] Horne Dec. Ex. 4.

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") (internal quotations omitted).

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 recommendations 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; 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41 at 87-89 (4th ed. 2002).

The record demonstrates the procedural fairness of the Settlement. The proposed Settlement was the result of lengthy negotiations between Lead Plaintiffs' Counsel and defense counsel, with the aid of a nationally-regarded mediator, Judge Faith S. Hochberg (Ret.) *See* Hochberg Dec. ¶3. Counsel respectfully represent that, in their opinion, the Settlement is fair, reasonable, and adequate. Horne Dec. ¶23.

Courts also find probative declarations from the mediator involved in the case. *Farrell v. OpenTable, Inc.*, No. C 11-1785 SI, 2012 WL 1379661, at *2 (N.D. Cal. Jan. 30, 2012) (mediator's declaration supported non-collusive nature of negotiations); *In re Atmel Corp. Derivative Litig.*, No. C 06-4592 JF (HRL), 2010 WL 9525643, at *13 (N.D. Cal. Mar. 31, 2010) (similar). Indeed, the Second Circuit has held that "[t]he participation of [a] mediator [] in this case, while by no means ensuring fully adequate representation, does make it more likely that the

parties reached the limits of compromise." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 263 (2d Cir. 2011)

The mediator, Judge Hochberg, who wholeheartedly supports the Settlement, declares that counsel "came to the mediation well prepared and knowledgeable about the strengths and weaknesses of their respective positions and on the applicable law, and the proposed settlement is the result of their robust arm's length negotiations." Hochberg Dec. ¶16. While the ultimate decision is the Court's, Judge Hochberg believes that the settlement is fair, reasonable, and adequate, and she respectfully supports its approval. Hochberg Dec. ¶18.

B. The Court should approve the Plan of Allocation

The Plan of Allocation was fully described in the Notice sent to the members of the Class, at pages 5-8 thereof. Bravata Dec., Ex. A. It was formulated by Lead Plaintiffs' Counsel, after consultation with a financial consultant, 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. To that end, the 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. Once these considerations are taken into account, the Plan of Allocation provides that 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* Horne Dec. ¶¶22; Bravata Dec. Ex. A.

In addition to excluding those who incurred no provable damages, the Plan of Allocation also recognizes differences in damages incurred by those who bought and sold their shares at different times during the Class Period, reflecting the different damages due to the purchase and sale prices that they paid. *See* Bravata Dec. Ex. A. After taking into account lack of loss causation and the timing of Class Members stock purchases and sales, the Plan of Allocation does not discriminate between Class Members in the same position: the Net Settlement Fund is distributed on a *pro rata* basis depending on a Class Members' recognized losses.

In short, the Plan of Allocation has a rational basis, Lead Plaintiffs' Counsel believes it fairly compensates Class Members, and this Court should approve it. *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.'").

V. CONCLUSION

For all of the foregoing reasons, Lead Plaintiffs respectfully request that the Court finally approve the proposed class action settlement.

Dated: February 21, 2017

Respectfully submitted,

THE ROSEN LAW FIRM, P.A.

/s/ Jonathan Horne, Esq.
Jonathan Horne, Esq.
Laurence Rosen, Esq.
275 Madison Avenue, 34th Floor
New York, New York 10016
Telephone: (212) 686-1060
Fax: (212) 202-3827
pkim@rosenlegal.com
lrosen@rosenlegal.com

Counsel for Lead Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that on this on the 21st day of February, 2017 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/ Jonathan Horne