UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM BURNS and THERESA BLACK, Individually and on Behalf of All Others Similarly Situated, Plaintiff, -against- FALCONSTOR SOFTWARE, INC.; ESTATE OF REIJANE HUAI; SHUWEN HUAI, as Executor/Fiduciary of the ESTATE OF REIJANE HUAI; and JAMES WEBER Defendants.	No. 10-CV-4572 (ERK) (CLP)

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, REIMBURSEMENT OF EXPENSES, AND AWARD TO LEAD PLAINTIFF

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I. INTRODUCTION

Lead Plaintiff William Burns ("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 Lead Plaintiff and the FalconStor Defendants[2] and (ii) motion for an award of attorneys' fees and reimbursement of expenses to Lead Plaintiff's Counsel, and an award to Lead Plaintiff for his time away from professional and family obligations to carry out his obligations as Lead Plaintiff by: (1) reviewing the Complaint; (2) staying informed of the case and making himself available on multiple occasions to discuss the case with Lead Plaintiff's Counsel; and (3) providing Lead Plaintiff's Counsel with information and material.

The Settlement, which seeks to resolve this litigation in its entirety between the Settling Parties, provides for a cash fund of $5,000,000. Although less than the total amount of damages alleged, the Settlement is eminently fair, reasonable, and adequate because of FalconStor's financial resources are limited and the complexities and risks of continued litigation. The Settlement is the result of arm's-length negotiations among the Settling Parties, that included a mediation with nationally regarded mediator David Geronemus, Esq. of JAMS and further negotiations by experienced counsel. For these reasons and those set forth below, Lead Plaintiff

[1] "Class" means the preliminarily certified class for the purposes of settlement, set forth in the Preliminary Approval Order, Dkt. #78, ¶1: "all persons who purchased the publicly traded common stock of FalconStor during the period from March 12, 2008 through September 29, 2010, inclusive. Excluded from the Class are Defendants, the officers and directors of FalconStor tor during the Class Period, members of their immediate families and their legal representatives, heirs, successors, and assigns and any entity in which any Defendant bas or had a controlling interest." Also excluded from the Class are those Persons who file valid and timely requests for exclusion in accordance with the Preliminary Approval Order.

[2] Unless otherwise indicated, all capitalized terms herein shall have the same meanings as set forth in the Stipulation and Agreement of Settlement filed with the Court on June 14, 2013, (Dkt. No. 66)

respectfully submits that the proposed Settlement strongly warrants approval by this Court as fair, reasonable and adequate.

Additionally, as explained herein, the Plan of Allocation of the net Settlement proceeds was formulated by experienced counsel in consultation with a damages consultant and comports with loss causation principles. For these reasons, the Plan of Allocation has a rational basis and should be approved as fair and reasonable.

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, or $1,666,666 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 $20,271.28. Kim Decl., ¶84, & Ex. 2 thereto. These expenses were both reasonable and necessary for the successful prosecution and resolution of the claims against the Defendants.

Pursuant to an order of the Court dated November 1, 2013 (Dkt No. 78) (the "Preliminary Approval Order"), 9,393 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. A copy of the Notice is attached as Ex. A to the Declaration of Josephine Bravata Concerning Mailing of Notice of Pendency and Proposed Settlement of Class Action and Proof of Claim and Release Form, dated January 27, 2014 ("Bravata Decl."). The Bravata Affidavit is

attached as Ex. 1 to the Kim Declaration. On December 4, 2013, the Publication Notice was disseminated electronically over *GlobeNewswire* and in the *Investor's Business Daily*. Bravata Decl. ¶7.

Requests for exclusion must have been filed and served by January 20, 2014. As of the date of this writing, no requests for exclusion have been received. Bravata Decl. ¶9.

Objections to the Settlement are due on February 10, 2014. As of this writing, not one single Class Member has objected to the Settlement, the proposed Plan of Allocation or the request for attorneys' fees and expense reimbursement and award to the Lead Plaintiffs. *See* Bravata Decl., ¶10.

II. BACKGROUND[3]

FalconStor is a Delaware corporation that develops, manufactures, and sells network storage software solutions in the United States, and internationally. It also provides related maintenance, implementation, and engineering services. Lead Plaintiff alleges that the Individual Defendants-- CEO, Chairman, and President ReiJane Huai, and CFO, Treasurer and Vice President James Weber signed and filed Sarbanes-Oxley Act of 2002 ("SOX") certifications with the U.S. Securities and Exchange Commission ("SEC") during the Class Period, attesting that they had disclosed all fraud within the Company to the Company's auditor and the audit committee, which were materially false and misleading. The SOX certifications fail to disclose that Defendants were engaged in an illicit scheme to bribe employees of JPMorgan Chase & Co. so that such employees would cause JPMorgan to purchase FalconStor's products and services.

Lead Plaintiff alleges further that the truth of the misstatements began to enter the market on January 14, 2010 when the Company issued a press release announcing its preliminary fourth

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

quarter and full year results ended December 31, 2008, which revealed a revenue shortfall. This revenue shortfall was the result of the diminishing and unsustainable revenue generated from the alleged bribery scheme. This announcement, made after market close, damaged the class by causing the Company's stock to fall $.80 per share, or 17.8%, to $3.69 per share on January 15, 2010, and to $3.49 per share by January 20, 2010.

Then, on September 29, 2010, FalconStor revealed that ReiJane Huai disclosed that certain "improper payments" were made to a FalconStor customer and resigned from all his positions with FalconStor—a company he founded, and that there was a regulatory and an internal investigation concerning the unspecified "improper payments." This disclosure damaged the Class by causing the Company's stock to fall $.91 per share, or 22.4%, to $3.15 per share on September 29, 2010, and an additional $.29 per share the next three trading days.

Subsequent to this disclosure of improper payments, a FalconStor manager, Jie Lin a/k/a Jason Lin, and a JPMorgan employee, Ted Zahner, pled guilty to violations of the Travel Act to commit commercial bribery. On September 26, 2011, days before ReiJane Huai were to plead guilty to a criminal information for violation of the Travel Act to commit commercial bribery, he committed suicide.

A. The Litigation

The operative Consolidated Second Amended Complaint (Dkt. No. 41) (the "Complaint") was filed on December 19, 2011. Defendants filed a motion to dismiss and responsive briefing was completed. While the motion to dismiss was pending, on April 26, 2012 the parties engaged in an all-day mediation with David Geronemus, Esq. of JAMS in New York City. While the Litigation was not settled during the mediation, counsel for the Settling Parties continued their arm's length negotiations over the course of the following months causing the parties to agree to

resolve this case through settlement. The Settling Parties' agreement was ultimately documented in the Stipulation that was filed with the Court on June 14, 2013. (Dkt. No. 66).

On November 1, 2013, the Court entered an order: granting preliminary approval of the Settlement; preliminarily certifying the Class for the purposes of settlement; preliminarily designated the Lead Plaintiff as representative of the Class for the Settlement; and set a final approval hearing for March 3, 2014 at 2:00 p.m. (Dkt.No. 78).

B. The Settlement

1. Cash Consideration and Release

The Settlement provides for a payment of $5,000,000 in cash to pay claims of investors who purchased FalconStor stock between March 12, 2008, through and including September 29, 2010. The Settlement represents an average recovery of $0.15 per share of FalconStor stock for the estimated 33 million shares held by Class members who were damaged. After deduction of the requested attorneys' fees and expenses and award to Lead Plaintiff, the Settlement represents an average recovery of $0.10 per share. *See* Bravata Decl., Ex. A. The Settlement represents a significant portion of all available insurance proceeds. FalconStor's D&O policies provides for a $15 million limit of liability, including defense costs. If the Settlement is finally approved by the Court, the Lead Plaintiff, on behalf of the Class, will forever release his claims alleged against Defendants. The settlement represents 17.4% of Lead Plaintiff's best case scenario of damages estimate of $28.7 million. , *i.e.*, Lead Plaintiff prevails on all counts and his damages model is accepted. Kim Decl., ¶14.

2. Notice to the Class

On or before November 29, 2013, pursuant to the Preliminary Approval Order, Lead Plaintiff's Counsel caused the Notice to be mailed. The Notice advised Class Members of the

terms of the Settlement and Plan of Allocation, and 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 $45,000, and an award to Lead Plaintiff not to exceed $2,500. Bravata Decl., 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 February 10, 2014.

As of the date of this writing, 9,393 copies of the Notice were mailed to Class Members, and not one Class Member has objected to any aspect of the settlement or, in the alternative, requested to be excluded. Bravata Decl., ¶¶9-10. The claims filing deadline was January 20, 2014 and as of the date of this writing, 2,337 claim forms have been received. *Id*. at ¶11.

3. The Plan of Allocation

The Plan of Allocation was fully described in the Notice sent to the members of the Class, at Paragraph 8 thereof. Bravata Decl., Ex. A. It was formulated by Lead Plaintiff's Counsel 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* Kim Decl., ¶71.

III. ARGUMENT

A. Final Approval of Proposed Class Action Settlement

1. Final Certification of the Class is Appropriate

To effectuate the proposed settlement, Lead Plaintiff seeks certification of a Class for the purposes of settlement only. Fed. R. Civ. P. 23(a) imposes four threshold requirements on a putative class action: numerosity, commonality, typicality, and adequacy of representation. In addition, Fed. R. Civ. P. (b)(3) 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.

Pursuant to the Preliminary Approval Order entered on November 1, 2013 (Dkt. No. 78), the class was preliminarily certified as to "all persons who purchased the publicly traded common stock of FalconStor during the period from March 12, 2008 through September 29, 2010, inclusive. Excluded from the Class are Defendants, the officers and directors of FalconStor during the Class Period, members of their immediate families and their legal representatives, heirs, successors, and assigns and any entity in which any Defendant has or had a controlling interest. Also excluded from the Class are those Persons who file valid and timely requests for exclusion in accordance with this preliminary approval order." (Dkt. No. 78, ¶1).

No changes have occurred since the issuing of the Preliminary Approval Order, thereby all requirements for Fed. R. Civ. P. 23(a) and 23(b) are satisfied. The class should be certified for purposes of this Settlement.

The Claims Administrator sent out 9,393 separate claim packets to potential Class Members throughout the country. Bravata Decl. ¶5. Therefore, the Class is too numerous for joinder to be practicable and Fed. R. Civ. P. 23(a)(1) is easily met here. *See Teachers' Ret. Sys.*

of La. v. ACLN Ltd., 2004 WL 2997957, at *3 (S.D.N.Y. Dec. 27, 2004). Fed. R. Civ. P. 23(a)(2) is satisfied when virtually identical common questions exist in securities law class actions. *See, In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290-91 (2d Cir. 1992). Here, the allegation that FalconStor's SOX certifications were materially false and misleading is common to all Class Members. Additionally, Fed. R. Civ. P. 23(a)(3) is satisfied when the claims of the representative plaintiff's "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)). 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 fraudulent conduct alleged. Moreover, Lead Plaintiff and Lead Plaintiff's Counsel have adequately protected the interests of the Class satisfying Fed. R. Civ. P. 23(a)(4). 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). Lead Plaintiff's Counsel has extensive experience and expertise in securities class action litigation and are capable of competently and vigorously prosecuting the litigation. *See* Kim Decl., Ex. 2.

In addition to satisfying Fed. R. Civ. P. 23(a), the requirements of Fed. R. Civ. P. 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). 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.

Fed. R. Civ. P. 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. Kim Decl. ¶8.

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.*, 2000 WL 1683656, at *3 (S.D.N.Y. Nov. 8, 2000); *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 132 (S.D.N.Y. 2008). 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.*, 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 believes the claims alleged in the Complaint are valid and provable, uncertainty in litigation always remains.

The complexity of Lead Plaintiff's claims weigh in favor of the Settlement. As further explained in the Kim Declaration at ¶¶44-55, this action presents a mosaic of complex issues. There is an issue of first impression as to whether SOX certifications can be deemed false when the signatories are engaged in criminal bribes. Defendants strenuously argued that the legislative history of SOX shows that SOX certifications did not create a duty to disclose such criminal conduct. Though Lead Plaintiff disagrees with these arguments, the arguments are colorable and presented serious risk this action would be dismissed in its entirety given the sole misrepresentations in this case involve the SOX certifications. *See, gen., Zaluski v. United American Healthcare Corp.*, 527 F.3d 564, 573-77 (6th Cir. 2008) (no duty to disclose criminal bribes to state senator and affirming dismissal of complaint).

Lead Plaintiff also faced costly and expensive "battle of the experts" on loss causation and damages; nor could Lead Plaintiff predict which competing damage model or loss causation theory would be accepted by the fact finder. Such a "battle of the experts" would have occurred at class certification as well, as Defendant would have contested the fraud-on-the-market presumption of reliance, which would have been costly and protracted as well. The complexity of the class certification would be heightened given the Supreme Court is revisiting the fraud-on-the-market presumption of reliance, which could change or alter the standard to invoke the presumption. This would be an expensive and costly process.

There is no doubt a trial in this action would be both lengthy and costly. Further, a favorable judgment for Lead Plaintiff could be the subject of post-trial motions and appeals, delaying any payment to Class Members even if Lead Plaintiff was to prevail at trial. *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).

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 deadline for objections to any aspect of the Settlement is February 10, 2014. To date, Lead Plaintiff and counsel have not received any objections to the Settlement. *See* Bravata Decl., ¶10.

c. Stage of Proceedings and Discovery Completed

The Settlement was achieved after three years of litigation, during which time Lead Plaintiff's Counsel: (i) conducted an extensive factual investigation into the events and circumstances underlying the claims in the Complaint; (ii) obtained, reviewed, and analyzed FalconStor's relevant regulatory filings, press releases and other news reports; (iii) thoroughly researched the law regarding the claims brought against the Defendants and the potential defenses thereto; (iv) retained a damages expert to evaluate class-wide damages; and (v)

researched, prepared and filed a notice of claim and affidavit of contingent claim against the estate of ReiJane Huai. *E.g.*, Kim Decl., ¶6. As a result, prior to entering into the Settlement, Lead Plaintiff's Counsel understood 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").

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 risks in attempting to achieve a better result for a class through continued litigation. Kim Decl., ¶¶44-50.

As noted above, Lead Plaintiff faced palpable risk that the Court would find that the sole category of misrepresentations in this case, the SOX certifications, were not materially false and misleading because there is no duty to disclose criminal activity and because the SOX certifications were not intended to disclose criminal activity. *See, gen., Zaluski* 527 F.3d at 573-77 (no duty to disclose criminal bribes to state senator and affirming dismissal of complaint). If this argument was accepted Lead Plaintiff's case would be dismissed.

Lead Plaintiff faced the risk of attempting to prove the January 14, 2010 press release was an actual partial corrective disclosure. The disclosure made no mention of bribery scheme and as the case went forward could have been viewed merely as an earnings miss. *See, e.g., In re*

Oracle Corp. Sec. Litig., 627 F.3d 376, 392-93 (9th Cir. 2010) (at summary judgment, missed earnings announcement failed to create a triable issue on loss causation, as the alleged fraud--misrepresenting the quality of a product--was not revealed in missed earnings announcements because the earnings misses were the result of several lost deals). If Defendants' prevailed on their argument, the damages in this case would have been reduced substantially, given it is alleged that the January 14, 2010 announcement caused a 17.8% price decline in FalconStor stock; whereas the September 29, 2010 corrective disclosure revealing the "improper payments" caused a 22.4% stock price decline.

Lead Plaintiff also faced risks in proving damages. 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).

Lead Plaintiff also faced the unique risk of Defendants' insurers disclaiming coverage under intentional acts and fraud exclusions under the applicable insurance policies. Lead Plaintiff would have to prove that defendant Huai was engaged in criminal conduct, i.e. paid illegal bribes, to prove his case. Thus, as Lead Plaintiff built his case, Lead Plaintiff would

indirectly provide more reason for Defendants' insurers' to disclaim coverage over Huai's actions. Kim Decl. ¶50.

Lastly, even if Lead Plaintiff could overcome all of these risks and prevail at trial and appellate levels, it is not likely Lead Plaintiff could collect on the judgment. Huai's estate's wealth is tied to its ownership in FalconStor stock. Kim Decl. ¶59. FalconStor has consistently reported growing losses and its stock is currently a penny stock. *Id.*

e. Range of Reasonableness of the Settlement

Reality dictates that, to settle a case, some discount needs to be offered to the Defendants, or they would otherwise have no economic incentive to settle. Additionally, in the context of a factually and legally complex securities class action lawsuit, 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. 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).

Indeed, 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.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, Lead Plaintiff's Counsel retained a damages expert who concluded that Lead Plaintiff's "best case" damages recovery, *i.e.*, were Lead Plaintiff successful in opposing all of Defendants' arguments and completely prevailed on every claim, would be $28.7 million. Kim Decl., ¶14. Defendants have disputed Lead Plaintiff's damages estimates and, under their analysis, assert Class-wide damages to be much less. *Id*.

The Settlement Amount of $5,000,000 is an outstanding result. This amount represents approximately 17.4% of the total recovery in the best possible outcome of this action, which is an excellent recovery. *See In re Prudential Sec., Inc. L.P. Litig.*, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6% and 5% of claimed damages); *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).

Indeed, recent studies indicate that the median settlement value as a percentage of damages for cases such as this one with $28.7 million in damages is 9.1%, while the average is 10.2%. *See* Dr. Renzo Comolli, Ron Miller, John Montgomery, Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012 Mid-Year Review*, at p. 29, attached as Ex. 3 to Kim Decl. Here, the Settlement provides Class Members with approximately 17.4% of Lead Plaintiff's estimated best possible result, assuming not only complete victory (including proof of loss causation), but also Defendants' unlimited resources for payment of a judgment. The result

here is 91% higher than the historical median, and 70% higher better than the historical average.[4] This is an excellent result.

Additionally, the Settlement provides for payment to Class Members now, without delay, and 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 Defendants' insurance coverage totaling $15 million—which were wasting policies that would be substantially depleted or gone by the time this action was tried and survived the expected post-trial motions and appeals. Any additional recovery would be highly speculative, and would require many years of additional litigation with no promise of recovering any personal assets of the individual defendants.

Additionally, Plaintiffs faced the substantial risk that FalconStor's insurers would disclaim coverage altogether given the criminal acts are alleged in this case. Kim Decl., ¶50. Given the obstacles and uncertainties attendant to this complex litigation and the Defendants' eroding insurance policies, the Settlement is well within the range of reasonableness. It is unquestionably better than the unfortunate likelihood 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 for Complex Litigation, Third, § 30.42 (1995)) ("A 'presumption of fairness, adequacy, and

[4] The percentage for the mean was calculated by taking the difference between 17.4% and the mean, and dividing the difference with the mean. The percentage for the median was calculated the same way taking the difference from 17.4% and dividing it into the median.

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).

The record demonstrates the procedural fairness of the Settlement. The proposed Settlement was the result of lengthy negotiations between Lead Plaintiff's Counsel and Defense counsel, preceded by an all-day mediation with a nationally-regarded mediator. Kim Decl., ¶39. The attorneys on both sides are experienced and thoroughly familiar with the factual and legal issues posed in the litigation (as evidenced by the procedural history of the case and the issues briefed before the 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.*, 1994 WL 265917, at *13 (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: knowledge of the strengths and weaknesses of the case, analysis of the investigation to date and the likely recovery at trial and/or appeal, and experience in evaluating proposed class action

settlements. The Defendants are represented by highly-capable counsel; they too endorse the Settlement achieved following extensive negotiation.

g. Greater Judgment

For the reasons explained herein, the possibility of greater recovery than provided by the Settlement is very unlikely because the D&O insurance policies will be further depleted if this case proceeds to trial. *See, e.g., In re American Bank Note*, 127 F. Supp. 2d at 427. Further, the prospects of securing speculative proceeds from certain individual defendants could take many years and result in no recovery to Class Members. In fact, the possibility of such a recovery must be weighed against the Company's eroding insurance policies. Accordingly, the Settlement should be granted because it is fair, adequate and reasonable under the Second Circuit's Grinnell factors.

B. Approval of the Plan of Allocation Is Warranted

The standard for approval of a plan of allocation is not rigorous. "When formulated by competent and experienced class counsel," a plan of allocation "need have only a 'reasonable, rational basis."' *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004). The Plan of Allocation was formulated with the principles of loss causation in mind. Therefore, those shareholders who bought and then sold shares, "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., ¶71. 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 amounts of information in the market pertaining to the alleged fraud. (Dkt. No. 66-2 at 8-9). 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 Class Members' recognized losses. For these reasons, the Plan of Allocation is fair and adequate and should be approved.

C. The Application for an Award of Attorneys' Fees and Reimbursement of Expenses Is Reasonable and Should Be Approved

1. Legal Standards for Award of Attorneys' Fees

The Supreme Court, the Second Circuit, and courts within this Circuit have all recognized that where counsel's efforts have created a "common fund" for the benefit of a class, counsel should be compensated from that common fund. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *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); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999).

Awards of attorneys' fees from a common fund serve the dual purposes of encouraging representatives to seek redress for damages caused to an entire class of persons and discouraging future misconduct of a similar nature. *Dolgow v. Anderson*, 43 F.R.D. 472, 481-84 (E.D.N.Y. 1968). The common fund doctrine is also 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. Because the common fund doctrine thus provides both incentives for plaintiffs and their counsel and serves to deter similar misconduct, 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)).

The use of the percentage of recovery method also comports with the language of the Private Securities Litigation Reform Act of 1995 ("PSLRA") which states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceeds a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class…." 15 U.S.C. § 78u-4(a)(6); *Maley v. Del Global Technologies Corp.*, 186 F.Supp.2d 358, 370 (S.D.N.Y. 2002) (at to the PSRLA, Congress "indicated a preference for the use of the percentage method").

2. The Requested Fee is Fair Under the Percentage-of Recovery Method and the Second Circuit's Goldberger 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.*, 2001 WL 1590512 (E.D.N.Y. Oct. 31, 2001); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, 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 is to utilize the percentage-of-recovery approach when awarding attorneys' fees in common fund cases. *See Strougo*, 258 F. Supp. 2d at 262 (stating that "the trend [is] in favor of the percentage-of-recovery approach ... within this district"); *Maley.*, 186 F. Supp. 2d at 370

(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.*, 2008 WL 5336691 (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.*, 2006 WL 3057232, at *11 (S.D.N.Y. October 25, 2006) (citing *Goldberger*). Each factor supports the fee request here.

a. Time and Labor Expended By Counsel

As set forth in the Kim Declaration, Lead Plaintiff's Counsel expended 671.5 hours for an aggregate lodestar of $350,894.50 in the litigation of this case. Kim Decl., ¶82. 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, reviewed, and analyzed FalconStor's relevant regulatory filings, press releases and other news reports; (iii) thoroughly researched the law regarding the claims brought against the Defendants and their potential defenses thereto; (iv) engaged in research and drafted the opposition to the Defendants' motion to dismiss; (v) consulted with their damages expert to analyze the amount of damages recoverable from the Defendants on behalf of the Class; (vi) drafted mediation submission and engaged in extensive settlement negotiations; (vii) prepared and filed a notice of claim and affidavit of contingent claim against the estate of ReiJane Huai; and (viii) negotiated and drafted the terms of all relevant settlement documents including the

Stipulation, Preliminary Approval Order and the notice documents. Kim Decl., ¶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, due to the circumstance of this case – wasting insurance policies and assets likely outside of the reach of a U.S. judgment – Lead Plaintiff's Counsel

submits that the risk of obtaining a smaller recovery, or no recovery at all, will only increase if the action is prosecuted any further.

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, Lead Plaintiff's Counsel successfully obtained a substantial cash settlement for the Class.

The standing and prior experience of Lead Plaintiff's Counsel is also relevant in determining fair compensation. *See, e.g., Grinnell*, 495 F.2d at 470; *Eltman v. Grandma Lee's Inc.*, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986). Here, Lead Plaintiff and the Class are represented by Lead Plaintiff's Counsel, The Rosen Law Firm, P.A. As its firm resume demonstrates, the firm representing the Class has substantial experience in the specialized field of shareholder securities litigation. Kim Decl. ¶8.

The quality and vigor of opposing counsel is also important in evaluating the services rendered by plaintiffs' counsel. *See, e.g., Warner Commc'ns*, 618 F. Supp. at 749. Here, the FalconStor Defendants are represented by Paul Weiss, Rifkind, Wharton & Garrison LLP and the Huai Estate is represented by Cravath, Swaine & Moore LLP. Defense counsel are experienced counsel who aggressively represented their clients' interests. The fact that Lead Plaintiff's Counsel achieved this settlement for the Class in the face of high quality legal opposition further evidences the quality of Lead Plaintiff's Counsel's efforts herein.

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.*, 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.*, 1996 WL 465752 at *2 (S.D.N.Y. Aug. 14, 1996) (33% of first $3 million); *Maley*, 186 F. Supp. 2d at 358 (awarding 33-1/3% of $11.5 million settlement fund); *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);

Further, the requested fee is comparable to the average of fee awards in a study of securities class actions conducted by the NERA which found: "For settlements below $5 million, median fees and expenses represented 34.2% of the settlement." *See* Dr. Renzo Comolli, Ron Miller, John Montgomery, Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* (the "NERA Study"), at p. 29, attached as Ex. 4 to the Kim Decl. It also found that for settlements between $5 million to $10 million, median plaintiffs' attorneys' fees and expenses represented 33.6% of the settlement from January 1996 to December 2009 and 34.2% from January 2010 to December 2012. *Id.*

Under the percentage-of-recovery approach, the attorneys' fee Lead Plaintiff's Counsel requests is fair and reasonable for litigation of this kind and is wholly consistent with previous awards made by Courts both within and outside this Circuit.

e. Public Policy Considerations

Private lawsuits further the objective of the federal securities laws to protect investors and consumers against deceptive practices. *Eltman*, 1986 WL 53400, at *9. As a practical matter, those lawsuits can be maintained only if competent counsel can be obtained to prosecute them. *Id*. In turn, competent counsel can be obtained only 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 adopt the percentage-of-recovery approach and award attorneys' fees equal to 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"). The lodestar/multiplier method involves calculating the product of the number of hours worked and counsel's 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. Although 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, the hours documented "need not be exhaustively scrutinized." *Goldberger*, at 50.

As set forth in the Kim Declaration, Lead Plaintiff's Counsel expended 671.5 hours for lodestar of $350,849.50 in the litigation of this case. Kim Decl., ¶82.[5] The lodestar multiplier—is 4.75. *Id*. at 83. The fractional multiplier of 4.75 is well within the range of reasonableness. 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); *Maley*, 186 F.Supp.2d at 371 ("modest multiplier of 4.65 is fair and reasonable.").

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 $20,271.28 in litigation costs and expenses incurred or expected to be incurred in connection with the prosecution of this Action. *See* Kim Decl., ¶84. Courts routinely hold that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses that would have been reimbursed by a paying client. *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.

Counsel are seeking reimbursement for a damages consultant, a private investigator, mediation fees, court fees/service of process, document retrieval, postage, online legal research,

[5] 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.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").

and notices to class members. All of the expenses were actually billed and paid in connection with this case. These are the expenses which are reimbursed in the "paying, arm's length market". *In re Global Crossing Sec. & ERISA Litig.*, 225F.R.D. at 468 ("The expenses incurred - which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review - are the type for which the 'paying, arm's length market' reimburses attorneys [and] are properly chargeable to the Settlement fund"); *In re Merrill Lynch Tyco Research Sec. Litig.*,249 F.R.D. at 144 (similar). Lead Plaintiff's Counsel had a duty to the class to minimize expenses, and, moreover, Lead Plaintiff's Counsel was advancing its own money to the Class, which it would not recover if it lost the case; for these reasons, Lead Plaintiff's Counsel exercised caution and made only necessary expenditures. *See* Kim Decl., Ex.2.

5. Nominal Award to Lead Plaintiff is Warranted

Lead Plaintiff requests that the Court award him a nominal amount of $1,000 in connection with the reasonable costs and expenses incurred through his representation of the Settlement Class. The PSLRA provides that courts are empowered to approve such awards to reimburse plaintiffs for reasonable costs and expenses related to the representation of the class. *See* 15 U.S.C. §78u-4(a)(4). Lead Plaintiff has diligently and completely fulfilled his duties as representative plaintiff in the present action by: (1) reviewing the initial complaint and the Amended Complaints; (2) reviewing the parameters of the Settlement and participating in the negotiations thereof; and (3) discussing all of the foregoing matters with Lead Plaintiff's Counsel. Thus, it is respectfully submitted that under the circumstances present here, approval of this nominal award is warranted. *See, In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D.

151, 166 (S.D.N.Y. 2011); *In re Marsh & McLennan Companies, Inc. Sec. Litig.*, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009).

The Notice informed shareholders that Lead Plaintiff would seek an award no greater than $2,500 Bravata Decl., Ex. A. To date, no objection has been received to the award—further demonstrating that the smaller amount requested here, $1,000, is fair and reasonable and should be approved.

IV. CONCLUSION

For all of the foregoing reasons, Lead Plaintiff respectfully request that the Court finally approve the proposed class action settlement and his counsel's application for an award of attorneys' fees and reimbursement of reasonable expenses.

Dated: January 27, 2014

Respectfully submitted,

THE ROSEN LAW FIRM, P.A.

/s/ Phillip Kim

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Lead Plaintiff's Counsel for Plaintiff and the Class

CERTIFICATE OF SERVICE

I hereby certify that on this on the 27th day of January, 2014 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
Phillip Kim, Esq.