UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. PIERCE DIVISION

Case No. 2:12-CV-14333-MARTINEZ-LYNCH

In re Digital Domain Media Group, Inc.
Securities Litigation

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION AND FINAL CERTIFICATION OF THE CLASS WITH INCORPORATED MEMORANDUM OF LAW

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Lead Plaintiffs and Class Representatives, Patricof Family Limited Partnership, Edward Nusblatt, and Robert Dziedzic (collectively the "Lead Plaintiffs" or "Class Representatives"), respectfully move for final approval of class action settlement, plan of allocation, and final certification of the class. This Motion is based upon Lead Plaintiffs incorporated memorandum of law, accompanying declarations being filed herewith, and this Court's Order Preliminarily Approving Settlement, dated July 25, 2016 (the "Preliminary Approval Order"), pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.[1] Plaintiffs' Motion for and Incorporated Memorandum of Law in Support of an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Plaintiffs, is being filed simultaneously herewith.

The proposed Settlement that is before the Court for approval is the result of over four years of litigation, including over a year of intensive, multiparty mediation discussions. The proposed Settlement creates a common fund in the amount of $5.5 million. Over 7,000 Notices have been disseminated and, as of October 12, 2016, there have been no objections to the proposed Settlement and no requests for exclusion. The proposed Settlement avoids the very real possibility of the Class receiving nothing after trial and represents an immediate and significant recovery for the Class.

Lead Plaintiffs respectfully request that the Court approve the Settlement and Plan of Allocation and finally certify the Class.

BACKGROUND OF THE LITIGATION

The Consolidated Class Action, and Appointment of Lead Plaintiffs and Lead Counsel

On September 20, 2012, a complaint captioned *St. Cyr v. Teaford, et al.*, Civil Action No. 12-14333-CIV-MARTINEZ/LYNCH (the "Original Complaint"), was filed in the United States District Court for the Southern District of Florida, Fort Pierce Division, as a putative class action on behalf of persons who purchased the publicly traded securities of Digital Domain Media Group ("DDMG" or the "Company"). The Original Complaint asserted claims for violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 promulgated thereunder (the "Exchange Act") on behalf of purchasers of DDMG common stock on the public market during the Class Period, and §§ 11,

[1] Capitalized terms, not otherwise defined herein, have the meaning set forth in the Stipulation of Settlement filed with the Court on June 17, 2016.

12(a)(2) and 15 of the Securities Act of 1933 (the "Securities Act"), on behalf of IPO purchasers, for alleged misstatements and material omissions regarding DDMG's financial condition. The action was brought against the Individual Defendants and Underwriters.[2] DDMG was not named as a defendant because it had filed a Voluntary Petition under Chapter 11 of the U.S. Bankruptcy Code, Case No. 12-12568 (Bankr. D. Del.) ("Bankruptcy Action"), on September 11, 2012.

On March 12, 2013, the Court consolidated all pending actions under the caption *In re Digital Domain Media Group, Inc. Securities Litigation*, Civil Action No. 12-14333-CIV-MARTINEZ/LYNCH (the "Action"), and appointed Lead Plaintiffs. Also, the law firms of Berman DeValerio ("Berman"), Wolf Popper ("Wolf"), and Levi & Korsinsky ("Levi") were appointed as "Co-Lead Counsel."

On June 31, 2013, Lead Plaintiffs filed Plaintiffs' Consolidated Amended Class Action Complaint (the "Complaint"), which alleges, among other things, that Defendants deliberately failed to disclose material problems concerning DDMG's cash flow and ability to continue to fund its operations, both in its IPO offering documents and throughout the Class Period, and therefore, the Defendants made material misrepresentations or omissions concerning DDMG in DDMG's IPO offering documents and in other public statements, including Securities and Exchange Commission ("SEC") filings, during the Class Period. The Complaint alleges violations of the Securities Act and/or Exchange Act against the Individual Defendants, Underwriters, and SingerLewak for allegedly disseminating untrue and misleading statements to investors about, *inter alia*, DDMG's cash flow, its ability to fund operations, its use of proceeds of the IPO, and a secret loan from PBC to Textor for $10 million that Textor used to purchase shares in the IPO.[3]

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[2] Defendants John Textor ("Textor"), Jonathan Teaford ("Teaford") and John Nichols ("Nichols") are collectively referred to herein as the "Individual Defendants." Defendants Roth Capital Partners, LLC ("Roth Capital") and Morgan Joseph TriArtisan, LLC ("Morgan Joseph") are collectively referred to herein as the "Underwriters."

[3] Defendants John Kluge, Jeffrey W. Lunsford, Kaleil Isaza Tuzman, Kevin C. Ambler, and Casey Cummings ("Director Nominee Defendants"); and PBC Digital Holdings, LLC, PBC GP III, LLC, PBC MGPEF DDH, LLC, Palm Beach Capital, PBC DDH Warrants, LLC, and PBC Digital Holdings II, LLC ("Palm Beach Capital Defendants") were named in the Complaint but were dismissed without prejudiced by the Court on October 8, 2013.

On October 1, 2013, the Individual Defendants, SingerLewak, and the Underwriter Defendants separately moved to dismiss the Complaint. Among the issues raised in the motions to dismiss were arguments that Defendants had not made any misstatements of fact and had not acted with scienter. Lead Plaintiffs filed three separate briefs opposing the motions to dismiss. Defendants filed three replies. On September 23, 2014, the Court entered the Order Staying Case. No rulings were rendered on any of the motions to dismiss.

Available Liability Insurance Policies

The Individual Defendants are covered by five directors' and officers' liability insurance policies, which together have aggregate $50 million limit of liability (the "D&O Policies"). The D&O Policies are "wasting" policies. They indemnify directors and officers for the defense costs that are incurred but payment of those costs erodes the policies' limits. Costs paid to defend the directors and officers diminishes the limits of the policy proceeds that might otherwise be available to satisfy any settlements or judgments against the directors and officers. As of March 31, 2016, the total aggregate amount of defense costs incurred under the D&O Policies was approximately $10.1 million, leaving less than $40 million available.

Competing Claims for Insurance Policy Proceeds

In addition to the claims asserted in this Action, there were claims by other parties competing for proceeds from the available insurance policies ("Other DDMG Litigants"). A review of the pending claims and available funds for settlement, and consultation with the Mediator, made clear that the funds available for settlement were vastly insufficient to satisfy the aggregate amount of claims asserted against the Defendants in the numerous actions. Claims against some, or all of the Defendants, include the following: (i) claims by senior lenders who acquired DDMG senior convertible notes in an aggregate amount of $35 million and common stock for approximately $8.5 million and claims by the Official Committee of Unsecured Creditors ("Creditors Committee") on behalf of DDMG estates, believed to exceed $100 million; (ii) claims by the State of Florida in connection with a $20 million grant paid to DDMG and claims by the City of Port St. Lucie in connection with $50 million of incentives, including land given to DDMG; (iii) claims by Palm Beach Capital in connection with $25 million in investments in DDMG; (iv) claims by several individual investors in state court lawsuits in connection with DDMG's approximate $33 million in private offerings.

Summary of the Settlement and Plan of Allocation

On March 11 and 12, 2015, the parties participated in a comprehensive mediation with Bruce Greer, Esq. The mediation took place at the offices of Carlton Fields Jorden Burt in Miami, Florida ("First Session"). Counsel for all parties were present at the mediation as well as representatives and counsel from DDMG's insurance carriers. The mediation also included the Additional DDMG Litigants. After the First Session, the parties were unable to reach a settlement. The parties, however, continued to negotiate with one another in an effort to reach a global resolution.

The parties conducted a second mediation session with Mr. Greer, on May 14, 2015, at the offices of Carlton Fields Jorden Burt in Miami, Florida. The parties again attempted to come to a global resolution, but did not succeed. Multiple conversations were held thereafter in an effort to reach an agreement in principle to resolve this matter. On or around September 9, 2015, the parties were finally able to execute a term sheet memorializing an agreement in principle.

Over the course of the next six months, the parties engaged in further negotiations to finalize a Global Settlement Agreement resolving all matters involving Defendants, DDMG's estate, and all related interested parties. The Global Settlement Agreement was executed on April 18, 2016. Pursuant to the Global Settlement Agreement, settlement payments totaling $38.3 million were paid from the D&O Policies ($33.2 million), SingerLewak ($4.25 million) and Underwriters ($650,000).[4] This Action was allocated $5.5 million of the $38.3 million of settlement payments. The Committee and senior lenders were allocated $15 million; State of Florida, City of Port St. Lucie, and Palm Beach Capital were allocated $14 million; and the individual investors were allocated $3.8 million. In support of this Settlement, Mr. Greer has submitted a declaration (referred to herein as "Greer Decl.") attesting to the complex nature of the settlement negotiations, the diligence of the Parties, and opining that the settlement is fair, adequate, and reasonable based on his experience. *See* Greer Decl., submitted herewith, at ¶ 8.

The proposed Settlement consists of a $5.5 million settlement payment, which was paid into an escrow account after the Bankruptcy Court approved (on May 5, 2016) the Global

[4] An additional $200,000 was contributed from Falcon Mezzanine Partners II, L.P., which was not a defendant named in this Action.

Settlement Agreement between the Lead Plaintiffs, the Other DDMG Litigants, and the Defendants and their insurers.

The formula proposed for allocating the gross Settlement Fund (including any accrued interest), less all taxes, approved attorneys' fees and expenses related to this Action (the "Net Settlement Fund") is the Plan of Allocation set forth in the Notice and discussed further below. The Plan of Allocation is also described in the Declaration of Co-Lead Counsel in support of this Motion ("Co-Lead Counsel Decl."), filed herewith. *See* Co-Lead Counsel Decl. ¶¶ 36-39.

The Plan of Allocation, described below, provides the way in which the Net Settlement Fund will be allocated among the Class Members and is consistent with Lead Plaintiffs' damages theory. Depending upon when during the Class Period a Class Member purchased shares, different levels of price inflation and, therefore, different levels of damages will apply.

ARGUMENT[5]

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

Rule 23(e) requires that a settlement of a class action be approved by the district court. Fed. R. Civ. P. 23(e). The Eleventh Circuit mandates that "[a] proposed settlement action should be approved as long as it is 'fair, adequate and reasonable and it is not the product of collusion between the parties.'" *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 672 (S.D. Fla. 2006) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). *See also Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 537 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). The proposed Settlement meets these criteria.

A. Standards for Judicial Approval of Settlements Under Rule 23(e)

The Eleventh Circuit has noted that "public policy strongly favors the pretrial settlement of class action lawsuits." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). In that action, the court noted:

> Complex litigation ─ like the instant [class action] case ─ can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive. Accordingly, the Federal Rules of Civil Procedure authorize District Courts to facilitate settlements . . . .

Id.

[5] Unpublished opinions cited herein are attached to the Co-Lead Counsel Decl. as Exhibit 9 (Compendium of Unpublished Opinions).

The logic of this reasoning and public interest advantages to avoiding protracted litigation, especially in the class action context, have been recognized time and again by this jurisdiction. *See, e.g.*, *In re Checking Account Overdraft Litig. (Checking Acct. Overdraft I)*, 830 F. Supp. 2d 1330, 1341 (S.D. Fla. 2011) ("Federal courts have long recognized a strong policy and presumption in favor of class action settlements."); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1319 (S.D. Fla. 2007) ("[T]here exists 'an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.'") (citations omitted); *Behrens*, 118 F.R.D. at 538 ("When exercising its discretion, a court should always review the proposed settlement in light of the strong judicial policy that favors settlements. . . . This policy has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources, and achieve the speedy resolution of justice . . . .") (internal citations omitted).

In determining whether a proposed settlement is "fair, adequate and reasonable," the Eleventh Circuit in *Bennett* directed the district court to examine the following factors:

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

737 F.2d at 986.[6]

The Court must also determine that the settlement is not the product of fraud or collusion between the parties. *Figueroa*, 517 F. Supp. 2d at 1321 (S.D. Fla. 2007). But "a presumption exists that settlement negotiations were conducted properly in the absence of collusion if the

[6] *See also Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. App'x 429, 434 (11th Cir. Jul. 20, 2012); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1379-80 (S.D. Fla. 2007) (Seitz, J.) (applying *Bennett* factors in determining if settlement is fair, adequate, and reasonable); *Allapattah Servs., Inc. v. Exxon Corp.*, No. 91-0986-CIV, 2006 WL 1132371, at **10-11 (S.D. Fla. Apr. 7, 2006) (Gold, J.) (same); *Borcea*, 238 F.R.D. at 672-73 (Cooke, J.) (same); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1314-15 (S.D. Fla. 2005) (Altonaga, J.) (same). Other factors relevant to a court's inquiry are: the terms of the settlement, the procedure afforded to notify class members of the proposed settlement, and the judgment of counsel. *Cotton*, 559 F.2d at 1330; *Warren v. City of Tampa*, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988).

terms of the proposed settlement are demonstrably fair." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 845-46 (E.D. La. 2007)). "In addition, the judgment of experienced counsel is relevant to approval." *Borcea*, 238 F.R.D. at 673 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) (finding the trial court is "entitled to rely on the judgment of experienced counsel for the parties" in evaluating a settlement")).

The application of these factors is left to the sound discretion of the trial judge. *In re U.S. Oil & Gas Litig.*, 967 F.2d at 496-97; *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). However, in the absence of fraud or collusion, the district court "'should be hesitant to substitute its own judgement for that of counsel.'" *Nelson*, 484 Fed. App'x. at 434 (quoting *Cotton*, 559 F.2d at 1330). *See also In re Smith*, 926 F.2d 1027, 1028-29 (11th Cir. 1991) (same).

Although there are several factors for the Court to consider, the function of a settlement hearing is not to engage in a trial on the merits. *Cotton*, 559 F.2d at 1330; *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 (S.D. Fla. 2001). As the court in *Cotton* noted, "in evaluating the terms of the compromise in relation to the likely benefits of a successful trial, the trial judge ought not try the case in the settlement hearings." *Cotton*, 559 F.2d at 1330. Rather courts have focused on the negotiation process to determine whether the settlement was achieved through counsels' arm's-length negotiations, and was not the product of the parties' collusion. *See Behrens*, 118 F.R.D. at 544. Also, "[i]n evaluating a settlement's fairness, 'it should not be forgotten that compromise is the essence of a settlement.'" *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 468 (S.D. Fla. 2002) (quoting *Cotton*, 559 F.2d at 1330). "Above all, the court must be mindful that inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Amoco*, 211 F.R.D. at 467 (citations and internal quotation marks omitted).

Application of these standards warrants the approval of this Settlement as fair, reasonable, and adequate. Co-Lead Counsel engaged in an exhaustive and extensive investigation into the facts underlying the allegations of the Complaint, including extensive interviews with former DDMG employees, as well as other confidential witnesses; engaged in two full sessions of in-person mediation over three days, and numerous telephone mediation sessions, during which the original agreement to settle the Action was achieved; and addressed issues involving the D&O Policies and claims of Other DDMG Litigants. Throughout the four

year span of this litigation, Lead Plaintiffs and Co-Lead Counsel have been able to determine the strengths and weaknesses of the parties' respective positions and to reach an informed compromise based on this analysis.

B. Due Notice of the Proposed Settlement Has Been Achieved

Pursuant to the Court's Preliminary Approval Order, potential Class Members were notified of the terms of the Settlement and the Plan of Allocation through an extensive program of mailing the Notice. As of October 12, 2016, 7,020 Notices were mailed to potential Class Members. *See* Declaration of Justin R. Hughes Regarding (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of the Summary Notice; (C) Establishment of the Telephone Hotline; (D) Establishment of the Settlement Website; (E) Report on Objections Received to Date; and (F) Report on Requests for Exclusion Received to Date, dated October 13, 2016 ("Hughes Declaration" or "Hughes Decl."), ¶ 6. Additionally, a Summary Notice was transmitted over the *Investor's Business Daily* and *Business Wire* on August 22, 2016. *Id.* ¶ 7. The Notice and Summary Notice, both of which were approved by the Court in the Preliminary Approval Order, describe the terms of the proposed Settlement and the Plan of Allocation, advise Class Members of their rights under the Settlement, and inform Class Members of the date for the Settlement Fairness Hearing. *Id.* at ¶¶ 2, 7 and Exhibits A and B attached thereto.

The Notice provided detailed information concerning the: (a) rights of Class Members, including the manner in which objections and requests for exclusion must be filed; (b) nature, history, and progress of the Action; (c) proposed Settlement; (d) process for filing Proofs of Claim; (e) description of the Plan of Allocation; (f) fees and expenses to be sought by Co-Lead Counsel (the "Fee and Expense Application"); (g) applications for awards under the PSLRA to the Lead Plaintiffs, and (h) necessary information for any Class Member to examine the Court records, should he or she desire to do so. The Notice also sets forth instructions to securities brokers and other nominee holders for forwarding the Notice to those persons for whom the nominees held shares in street name.[7]

Significantly, the deadline for filing requests for exclusion from the Class and objections

[7] Because most shares of publicly-held stock are held in street name by brokerage firms, the cooperation of brokerage firms that hold shares for their clients is required to ensure that Class Members receive timely Notice of the Settlement.

to the Settlement, Plan of Allocation, and/or Fee and Expense Application is November 2, 2016. As of October 12, 2016, no Class Members have requested exclusion from the Class and, more significantly, no Class Member have objected to the Settlement, Plan of Allocation, or Fee and Expense Application. Hughes Decl. ¶¶ 10-11. *See Checking Acct. Overdraft I*, 830 F. Supp. 2d at 1343 ("The near 'unanimous approval of the proposed settlements by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlements.'") (citations omitted). The form of the Notice sent to Class Members was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and thus, amply satisfies due process and Rule 23(e) of the Federal Rules of Civil Procedure. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974).

C. The Proposed Settlement is the Product of Non-Collusive, Good Faith, Arm's Length Negotiations Among Competent and Experienced Counsel

In analyzing the proposed Settlement and the opinion of counsel, it is appropriate for the Court to examine the negotiating process that took place between the parties to confirm that there was no collusion in reaching the Settlement. *Behrens*, 118 F.R.D. at 544. This Action has been vigorously litigated among the parties with the Defendants asserting that the claims should be dismissed in their entirety. Experienced counsel for the parties negotiated this settlement at arm's length with the assistance of an experienced mediator, Bruce Greer, Esq., who is an experienced commercial litigator who has been practicing law since 1973 and who has been appointed as a mediator by U.S. District Courts since 1993. Greer Decl. ¶ 1. There was no collusion involved in producing this Settlement. *Id.* ¶ 5. Counsel for the parties engaged in a two formal mediation sessions spanning three days over several months, and numerous follow up telephone settlement discussions. *Id*. ¶¶ 2-4. On or around September 9, 2015, all parties executed a term sheet memorializing an agreement in principle. Over the course of the next six months, the parties engaged in further negotiations to finalize a Global Settlement Agreement resolving all matters involving Defendants, DDMG's estate, and Other DDMG Litigants. Co-Lead Counsel Decl. ¶¶ 24-25. On May 5, 2016, the DDMG bankruptcy court approved the Global Settlement Agreement.

There can be no doubt that the proposed Settlement is the product of serious, informed, non-collusive negotiations. *Borcea*, 238 F.R.D. at 675 (settlement reached after attendance at

mediation was "the product of good-faith, arm's length negotiations rather than collusion or overreaching by the parties").

D. Application Of The Bennett Factors

1. The Likelihood of Success at Trial

The Settlement before the Court provides an all-cash payment to the Class of $5,500,000, plus accrued interest, before deducting fees and expenses. While this represents a favorable settlement under any measure, this is especially so in light of the risks Lead Plaintiffs faced had the case been tried on the merits. Indeed, Co-Lead Counsel believes that even if Lead Plaintiffs were successful at trial, there was a significant likelihood that a judgment would not be satisfied given the competing claims against Defendants and the erosion of D&O Policies as defense costs accumulated in multiple legal proceedings.

Lead Plaintiffs were in a challenging position because the Court had not ruled on the three pending motions to dismiss, which could have gutted the claims of the Class Members.[8] Even if Lead Plaintiffs claims were intact upon this Court's ruling on the motions to dismiss, Lead Plaintiffs would still face risks in litigating this Action to a verdict, which would require that they prevail on all matters at class certification, summary judgment, pretrial motions, and trial. Even if Lead Plaintiffs prevailed at trial, there remained the risk that any judgment in Lead Plaintiffs' favor could subsequently be overturned on appeal. Lead Plaintiffs could have ended up recovering nothing or substantially less than the Settlement Amount. Further, as noted above, a number of other parties had pending claims against multiple Defendants in other actions in amounts far in excess of the D&O Policies, which are wasting policies being rapidly depleted by multi-venue litigation.

The Settlement provides a concrete current benefit to the Class of $5,500,000, plus accrued interest, and eliminates any further risk to the Class arising from continued litigation.

[8] This case also presented several challenges to establishing liability. For example, Lead Plaintiffs would have to prove that Defendants acted with scienter - actual knowledge or severe recklessness, and would have had to show that misstatements regarding the Company's financial condition were false when made. Further, as to claims under the Securities Act of 1933, the Defendants had a "negative causation" defense, which could materially reduce recoverable damages. Also, certain Defendants had an affirmative due diligence defense, which could offer a complete defense to liability.

2. The Range of Possible Recovery and the Comparison of the Settlement to that Range

The second and third *Bennett* factors are "easily combined" and are usually analyzed together. *Figueroa*, 517 F. Supp. 2d at 1326 (citing *Behrens*, 118 F.R.D. at 541); *Lipuma*, 406 F. Supp. 2d at 1322. The factors considered are the range of possible recovery and the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable. As noted in *Behrens*, to determine the adequacy of the settlement, two important maxims should be kept in mind: "(1) proof of damages in a securities fraud case is always difficult and requires expert testimony [] and (2) the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate . . . ." 118 F.R.D. at 542. *See also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 325 (N.D. Ga. 1993) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("'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.'"); *Behrens*, 118 F.R.D. at 542-43 (approving settlement equal to 3% to 5% of the per share recovery sought by plaintiffs and observing that "the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate"). While there is a possibility that Lead Plaintiffs may prevail at trial and win a significant monetary award, Lead Plaintiffs also face the risk that they will receive nothing after trial and may have to overcome numerous appeals, extending well into the future.

Based on Co-Lead counsel's consultation with a damages expert, approximately 8.9 million shares of DDMG common stock were potentially damaged. Co-Lead Counsel Decl. ¶¶ 3, 26. Given the $5.5 million Settlement Amount, the average recovery per share of DDMG common stock is approximately $0.62 per share before the deduction of attorneys' fees, costs, and expenses. This is an excellent result as it amounts to a recovery (before the deduction of attorneys' fees, costs and expenses, as approved by the Court) of 42.2% of the $1.47 maximum recognized loss per share. *Id*. This recovery is dramatically higher than the median recoveries reported in similar securities class action settlements. *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, at 33 (NERA Economic Consulting Jan. 25, 2016) (median 18.9% recovery in cases with investor losses below $20 million); Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class*

Action Settlements: 2015 Review and Analysis, Cornerstone Research (2016), at 8-9 (median 11.4% recovery in cases with investor losses below $50 million), attached to Co-Lead Counsel Decl., Exhibits. 10-11, respectively.

The proposed Settlement allows the Class to immediately recover a significant amount of money that it might not recover for years, if at all, and should be approved.

3. The Complexity, Expense and Likely Duration of the Litigation

"Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources . . . ." *Behrens*, 118 F.R.D. at 538. While Co-Lead Counsel believe that the claims asserted in the Action have considerable merit, the complexities, and the uncertainties those complexities engender, are characteristic of securities litigation. Those uncertainties favor approval of the proposed Settlement. The likely duration and associated expenses of continued litigation also favor approval of the Settlement. *See City of Tampa*, 693 F. Supp. at 1059 ("The parties estimate that a trial of this case would take three weeks of Court time, and would costs [sic] hundreds of thousands of dollars in attorneys' fees, expert witness fees, and costs. These factors militate in favor of a decision to accept the proposed settlement"). Co-Lead Counsel was well aware that further litigation would be expensive, complex, and time-consuming. Moreover, there was a strong likelihood of appeal by the unsuccessful party at trial.

This case is clearly complex, made even more so by DDMG's bankruptcy, and, except for the proposed Settlement, would continue to be strongly contested by all parties. As a result of the Settlement, the Action will conclude with the Class receiving a significant recovery, without occupying weeks of the Court's trial docket, while the D&O Policies continue to waste away.

> The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise of the mere possibility of relief in the future, after protracted and extensive litigation. In this respect, "[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush."

Borcea, 238 F.R.D. at 674 (quoting *In re Shell Oil Refinery*, 155 F.R.D. 552, 560 (E.D. La. 1993). *See also In re U.S. Oil & Gas Litig.*, 967 F.2d at 493 (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive"). Thus, the complexity of this case and the likely duration and expense that would be involved in further litigation militate in favor of

the proposed Settlement.

4. The Reaction of the Class to the Settlement

"In determining whether a proposed settlement is fair, reasonable and adequate, the reaction of the class is an important factor." *Lipuma*, 406 F. Supp. 2d at 1324. A low percentage of objectors in the class demonstrates that the proposed settlement is reasonable. *Id*.

The deadline for Class Members to file an objection to the proposed Settlement and the Plan of Allocation is November 2, 2016. As of October 12, 2016, not a single objection has been received, and no Class Members (out of the approximately 7,020 potential Class Members that received the Notice of the Settlement) have requested exclusion from the proposed Settlement. *See* Hughes Decl. ¶¶ 10-11. The absence of objections and requests for exclusion also weighs in favor of approval of this Settlement. *See, e.g.*, *David v. Am. Suzuki Motor Corp.*, No. 08-cv-22278, 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010) (noting minimal opposition in concluding that a settlement was fair, reasonable, and adequate). Clearly, the Class's reaction to the Settlement and the Plan of Allocation is favorable. Courts have looked at the absence of meaningful objections to a proposed settlement as further support for approval of the settlement. *Checking Acct. Overdraft I*, 830 F. Supp. 2d at 1343 (unanimous approval of proposed settlements by class given "nearly dispositive" weight) (citation and internal quotation marks omitted). *See also Sunbeam*, 176 F. Supp. 2d at 1332 (lack of objections "militates strongly in favor of the Court finding that the proposed settlement should be approved").

5. Stage of the Proceeding When Settlement Was Achieved

The purpose of considering the stage of the proceeding is to ensure that plaintiffs have had access to sufficient information to evaluate the case and determine the adequacy of the settlement proposal. *Behrens*, 118 F.R.D. at 543-44. As discussed above, and in detail in the accompanying declarations, this Settlement was reached after four years of litigation, following extensive factual investigation, motion practice, and two in-person mediation sessions spanning three days with an experienced mediator, plus numerous telephone mediation sessions.

Co-Lead Counsel conducted an extensive investigation, which included, among other things: a review and analysis of DDMG's SEC filings; a review and analysis of certain wire and press releases, public statements, and other publications disseminated by or concerning DDMG; a review and analysis of DDMG's press conferences, analyst conference calls, conferences, and

DDMG's corporate website; a review and analysis of other publicly available information concerning DDMG, including pleadings and discovery in DDMG-related litigation; a review of DDMG bankruptcy filings; consultation with an in-house forensic accountant; consultations with a damages expert. Co-Lead Counsel Decl. ¶ 14. In addition to analyzing public information, Co-Lead Counsel engaged their in-house investigators to research, identify and locate potential witnesses, including former employees of DDMG or its predecessor entities, with specific, personal knowledge of the DDMG claims and DDMG's internal operations and finances. The investigators spent a significant time tracking down potential leads. Upon identifying and locating potential witnesses, the investigators conducted several extensive interviews revealing material non-public information regarding the claims asserted in this Action. Several of these interviews were necessary to support allegations in the Complaint. *Id.* ¶ 14.

Co-Lead Counsel reviewed 117 boxes and 4 file-cabinets of Textor's documents maintained at DDMG headquarters. *Id.* ¶ 16. In connection with the Settlement, Co-Lead Counsel negotiated for and reviewed confidential deposition testimony from DDMG's bankruptcy proceedings of the Individual Defendants, former DDMG directors, and a DDMG financial advisor, along with confidential documents.

Based on this record, Co-Lead Counsel was in a position to evaluate responsibly the strengths and weaknesses of the claims and to conclude that the proposed Settlement provides a fair, reasonable, and adequate recovery. *See also Sunbeam*, 176 F. Supp.2d at 1332 (where case "progressed to a point where each side was well aware of the other side's position and the merits thereof . . . weighs in favor of the Court finding the proposed settlement to be fair, adequate, and reasonable").

6. The Opinions of Class Counsel and the Class Representatives

In considering the fairness of the proposed Settlement, the Court is entitled to rely heavily on the opinion of competent counsel. *Behrens*, 118 F.R.D. at 543. This is especially true where, as here, the extensive amount of independent investigation, consultation with experts, legal research, briefing and discovery indicate that counsel are fully capable of evaluating the merits of plaintiffs' case and the probable course of future litigation. *See Cotton*, 559 F.2d at 1330. Co-Lead Counsel, who has extensive experience in the successful prosecution and resolution of complex securities class action cases, has made a well-reasoned judgment that the proposed Settlement and Plan of Allocation are fair and reasonable for the

Class. *See* Co-Lead Counsel Decl. ¶ 61.

Lead Plaintiffs also came to the conclusion that the proposed Settlement reflects a fair, adequate, and reasonable result. *See* Declarations of Lead Plaintiffs, appended to Co-Lead Counsel Decl. as Exhibits 6-8, at ¶ 5, respectively. The Court is entitled to rely on that analysis and judgment in evaluating the fairness, adequacy, and reasonableness of the Settlement.

II. THE PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED

The proposed Plan of Allocation should also be approved as fair, reasonable, and adequate. The Plan of Allocation, fully described in the Notice, was formulated by Co-Lead Counsel in consultation with an expert damages consultant, ensuring its fairness and reasonableness. The Plan of Allocation was formulated in accordance with the damages provisions of Section 10(b) of the Exchange Act and Sections 11 and 12 of the Securities Act.

The Plan of Allocation provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis, based on a formula tied to liability and damages. In developing the Plan of Allocation, Lead Plaintiffs' consulting damages expert calculated the reasonable amount of artificial inflation present in DDMG's common stock throughout the Class Period that was purportedly caused by the alleged material misstatements and omissions. The consulting damages expert's analysis entailed studying the price declines associated with DDMG's allegedly corrective disclosures, adjusted to eliminate the effects attributable to general market or industry conditions.

A "Recognized Loss Amount" will be calculated for member of the Settlement Class that submits a valid claim (a "Claimant"). Each Claimant's Recognized Loss Amounts will be based on the difference between the price of DDMG common stock prior to, and after, the corrective disclosures on September 4, 2012, September, 5, 2012, and September 7, 2012. The following table demonstrates how a Recognized Loss Amount is calculated:

Date Shares Purchased	Date Shares Sold				
		Prior to 9/4/12	9/4/12 -9/5/12	9/6/12-9/7/12	After 9/7/12
	Prior to 9/4/12	$0/share	$0.66/share	$1.09/share	$1.47/share
	9/4/12 -9/5/12	N/A	$0/share	$0.43/share	$0.81/share
	9/6/12-9/7/12	N/A	N/A	$0/share	$0.38/share
	After 9/7/12	N/A	N/A	N/A	$0/share

Depending on when a Claimant purchased and sold shares of DDMG common stock, the Recognized Loss Amount will be equal to the amount of shares held on the date of a corrective disclosure multiplied by the decline in DDMG's common stock price caused by such disclosure.

The calculations made pursuant the Plan of Allocation are not intended to be estimates of, nor indicative of, the amounts that Settlement Class members might have been able to recover after a trial. Nor are the calculations pursuant to the Plan of Allocation intended to be estimates of the amounts that will be paid to Authorized Claimants pursuant to the Settlement. The computations under the Plan of Allocation are only a method to weigh the claims of Authorized Claimants against one another for the purposes of making allocations of the Net Settlement Fund.

In this Action, there are claims asserted under both the Securities Act and the Exchange Act. All Settlement Class Members have claims under the Exchange Act; however, not all Settlement Class Members have claims under the Securities Act and not all Defendants were alleged to have violated both acts, *e.g.*, there are no allegations that any of the Underwriter Defendants violated the Exchange Act. Accordingly, the Settlement will be distributed to Authorized Claimants based on the claims they have and, to that end, the proceeds are divided into two separate funds:

> Fund 1: Representing 87% of the Settlement Fund (net of attorneys' fees, expenses, and administration costs), this fund applies to claims asserted under the Exchange Act. As a result, all Authorized Claimants, to the extent they have Recognized Loss Amounts, will be eligible to receive a pro rata distribution from Fund 1, subject to their satisfying the other conditions for receiving a distribution.
>
> Fund 2: Representing 13% of the Settlement Fund (net of attorneys' fees, expenses, and administration costs), Fund 2 applies to claims asserted only under the Securities Act and shall be paid to Authorized Claimants who purchased shares in or traceable to DDMG's IPO, based on their Recognized Loss Amounts.

The percentage allocated to Fund 2 (13%) reflects the proportionate amount contributed to the Settlement Payment by Defendants who faced liability under the Securities Act only.

Kurtzman Carson Consultants LLC, the Court-approved Claims Administrator, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's total Recognized Loss Amount compared to the aggregate Recognized Loss Amount of all Authorized Claimants, as calculated in accordance with the Plan of Allocation. As noted above, calculation of the Recognized Loss Amount will depend upon

several factors, including when the Authorized Claimant's DDMG common stock was purchased, or otherwise acquired, during the Class Period, whether it was purchased in the IPO, and whether the common stock was sold during the Class Period, and if so, when. Class Members who do not submit acceptable Proofs of Claim will not share in the Settlement proceeds. Class Members who do not submit either a request for exclusion or an acceptable Proof of Claim will, nevertheless, be bound by the Settlement and the Order and Final Judgment of the Court dismissing this litigation.

The proposed Plan of Allocation, developed in consultation with Lead Plaintiffs' consulting damages expert, was designed to fairly and rationally allocate the Net Settlement Fund among Authorized Claimants based on the amount of alleged artificial inflation present in DDMG common stock that was purportedly caused by the Company's misstatement of its financial condition. It also reflects the differences among Claimants with Claims under the Securities Exchange Act and those Claimants with Claims under the Securities Act (some Claimants will have Claims under both).

It is appropriate for allocations to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue. *See* ***Sunbeam***, 176 F. Supp. 2d at 1328 n.2 (approving settlement and "well-constructed" plan of allocation "based upon an analysis of the level of price inflation of Sunbeam stock and an evaluation of Sunbeam's various disclosures concerning its financial status" that would "equitably distribute the settlement fund").

Co-Lead Counsel acted fairly in developing the Plan of Allocation, taking into account the relative strength of the claims and whether the shares were sold or held. Thus, the proposed Plan of Allocation, which is based on the statutory damages requirements and developed in consultation with an expert experienced in allocation of complex settlement distributions, is designed to fairly and rationally allocate the proceeds of the Settlement among Class Members. The Plan of Allocation recognizes that since Exchange Act claims were not alleged against SingerLewak or the Underwriter Defendants, the percentage of the Settlement Fund attributable to these defendants shall only be allocated to those Class Members with Securities Act claims.

Accordingly, Co-Lead Counsel respectfully submits that the proposed Plan of Allocation is fair and reasonable and should be approved.

III. THE REQUIREMENTS FOR CLASS CERTIFICATION HAVE BEEN MET AND THE CLASS SHOULD BE CERTIFIED

It is well established that "[a] class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue." *Borcea*, 238 F.R.D. at 671 (citations and internal quotation marks omitted). In making such a decision, "a court must consider the same factors that it would consider in connection with a proposed litigation class—*i.e.*, all Rule 23(a) factors [numerosity, commonality, typicality, and adequacy of representation] and at least one subsection of Rule 23(b) [*e.g.*, predominance of common issues and superiority] must be satisfied—except that the Court need not consider the manageability of a potential trial, since the settlement, if approved, would obviate the need for a trial." *In re Checking Account Overdraft Litig. (Checking Acct. Overdraft II)*, 275 F.R.D. 654, 659 (S.D. Fla. 2011)). This Court conditionally certified the proposed Class in its Preliminary Approval Order, and, as detailed below, the proposed Class satisfies the requirements of Rules 23(a) and (b)(3).

A. Numerosity, Commonality and Typicality

The Class meets the numerosity, commonality and typicality standards of Rule 23(a)(1)-(3). Over 7,000 copies of the Notice were mailed to potential Class Members. *See* Hughes Decl. ¶6. *See also Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity is satisfied where plaintiffs identified at least 31 class members "from a wide geographical area"); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (noting that the numerosity requirement of Rule 23(a) is satisfied by the impracticability of joinder, which is generally presumed if a putative class amounts to more than forty individuals). *See also In re Scientific-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1325 (N.D. Ga. 2007) ("[I]n federal securities fraud cases, 'numerosity is generally presumed when a claim involves nationally traded securities.'") (citations omitted). Thus, the Rule 23(a)(1) numerosity requirement is met.

Further, there are substantial questions of law and fact common to all Class Members (*e.g.*, whether statements made by the Defendants to the investing public in the IPO, during the Class Period, misrepresented or omitted material facts about the Company's financial condition, its use of IPO proceeds, the secret loan from PBC to Textor, and whether the Individual Defendants acted with the scienter in misrepresenting these material facts). "Commonality

requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009) (citation and internal quotation marks omitted). *See also Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001) (same). Here, the commonality requirement is satisfied because there are multiple questions of law and fact that are common to the Class. Moreover, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624-25 (1997), the Supreme Court noted that the common issues test is readily met in securities cases. Additionally, Lead Plaintiffs' claims are "typical" of other Class Members' claims because they allege a common course of fraudulent conduct, arise from the same legal theories, and allege the same types of harm and entitlement to relief. *Checking Acct. Overdraft II*, 275 F.R.D. at 659. *See also Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they "possess the same interest and suffer the same injury as the class members"). Rule 23(a)(3) is, therefore, satisfied.

B. Adequacy of Representation

The adequacy requirement of Rule 23(a)(4) requires plaintiffs to demonstrate that: (1) there is no conflict of interest between Lead Plaintiffs and the other Class Members; and (2) Co-Lead Counsel is qualified, experienced and capable of conducting the litigation. *In re Scientific-Atlanta*, 571 F. Supp. 2d at 1331; *LaGrasta v. First Union Secs., Inc.*, No. 2:01-cv-251-FTM-29DNF, 2005 WL 1875469, at *7 (M.D. Fla. Aug. 8, 2005).

First, no conflict exists between Lead Plaintiffs' interests and the interests of the other Class Members. Lead Plaintiffs' claims are the same and not antagonistic to those of other Class Members; all share the common goal of maximizing recovery. As discussed above, all claims arise from the same nexus of operative facts and the same course of conduct. Additionally, Lead Plaintiffs have expressed a desire to prosecute this case and have actively monitored the litigation. Lead Plaintiffs are, therefore, well suited to prosecute this case on behalf of the Class.

Second, Lead Plaintiffs have retained counsel with extensive experience in prosecuting shareholder class actions. Co-Lead Counsel has successfully prosecuted hundreds of securities and other complex class actions in courts throughout the United States, and has vigorously and skillfully prosecuted this case, securing for the Class a $5,500,000 recovery. Lead Plaintiffs,

therefore, are adequate representatives of the Class, and Co-Lead Counsel are qualified, experienced, and capable of prosecuting this litigation. *See Checking Acct. Overdraft II*, 275 F.R.D. at 659-60 (adequacy requirement satisfied where there were "no conflicts of interest between the Plaintiffs and the Class, and Plaintiffs have retained competent counsel to represent them and the Class"). Accordingly, the requirements of Rule 23(a)(4) have been met.

C. Predominance of Common Issues and Superiority

Certification of a class under Federal Rule of Civil Procedure 23(b)(3) requires that common issues predominate over individual issues and that the class action mechanism is superior to other methods of adjudicating the controversy. Common questions of fact or law will predominate if they, "have a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *David*, 2010 WL 1628362, at *5 (quoting *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, No. 08-16430, 2010 WL 1196420, at *6 (11th Cir. Mar. 30, 2010)). "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 624-25. As stated in *Borcea*:

> Common issues predominate when, as here, liability can be determined on a class-wide basis, even when there are some individualized damages. As a result, when determining whether common questions predominate, courts focus on the liability issue and if the liability issue is common to the class, as in the case at bar, common questions are held to predominate over individual questions.

238 F.R.D. at 676. Here, the issues of liability are common to all members of the Class and clearly predominate over any individual issues.

Second, resolution of this litigation through a class action is far superior to litigating thousands of individual claims, where the expense for an investor in pursuing a separate action would likely exceed the investor's losses in DDMG common stock, and the interests of justice will be better served by resolving the common disputes of potential class members in one forum. *See Borcea*, 238 F.R.D. at 676-77. In light of the foregoing, all of the requirements of Rules 23(a) and 23(b)(3) are satisfied, and thus, the Court should grant final certification of the Class.

CONCLUSION

For all the aforesaid reasons, Lead Plaintiffs respectfully request that the Court approve the Settlement and the Plan of Allocation and certify the Class.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by the following methods on the following dates on all counsel or parties of record on the Service List below.

By: /s/ Jay W. Eng
Jay W. Eng, Esq.

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By and through the Southern District of Florida's CM/ECF system on October 21, 2016 upon:

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