UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CHINA MEDIAEXPRESS HOLDINGS, INC. SHAREHOLDER LITIGATION	Civil Action No. 11-cv-0804 (VM)
This Document Relates to: ALL ACTIONS	CLASS ACTION ECF Case Electronically Filed

THE CLASS REPRESENTATIVES' MEMORANDUM IN SUPPORT OF THEIR UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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I. INTRODUCTION

Lead Plaintiffs Irrevocable FBO Lansing Davis and the Davis Partnership LP and additional named plaintiffs John Haughton, Ethan Lamar Pierce, and John Shaffer (collectively, the "Class Representatives"), through their legal counsel, respectfully submit this memorandum in support of the Stipulation and Agreement of Settlement dated May 5, 2015 (the "Settlement").[1] The Class Representatives request that the Court enter an order: (1) preliminarily approving the Settlement; (2) preliminarily approving the Plan of Allocation; (3) approving the form and method for providing notice of the Settlement to the Class; (4) approving the retention of the proposed Class Administrator; and (5) scheduling a Settlement Hearing at which the Court will consider: i) final approval of the Settlement; ii) final approval of the Plan of Allocation; iii) Class Counsel's request for fees and expenses; and iv) entry of the Final Judgment and Order.

The Settlement provides an immediate and substantial benefit of $12 million. In addition, Defendant Deloitte Touche Tohmatsu (Hong Kong Partnership) ("DTT") will separately pay the notice and administration costs. *See* Section III, *infra* at 6. The Settlement meets the standard for preliminary approval because it was the product of arm's-length negotiation between experienced counsel; has no obvious deficiencies; does not grant preferential treatment to any portion of the Class; and falls within the range of possible approval. *See*, Section V, *infra* at 6-12.

The Court should also grant preliminary approval of the proposed Plan of Allocation because it seeks to disburse the settlement amount to Class members based on their proportionate loss, and is thus "rationally based on legitimate considerations." *See*, Section VI, *infra* at 12.

[1] A copy of the Stipulation is attached as Exhibit A to the Declaration of Karl P. Barth (the "Barth Decl.").

The Court should also approve the proposed Notice and method of notice to Class members because the Notice complies with the requirements of Rule 23(c)(2)(B) and the PSLRA, and the proposed method of notice satisfies the requirements of Rule 23 and due process. *See*, Section VII, *infra* at 12-16. Additionally, the Court should approve the Claims Administrator selected by the Class Representatives to administer the method of notice and administration of the Settlement proceeds. *See,* Section VIII, *infra* at 16.

Lastly, the Court should schedule a final hearing for at least 120 days after the preliminary approval order is entered, to allow sufficient time for providing the Notice to Class Members, and allowing them to object or exclude themselves from the Class, as well as sufficient time for the Class Representatives to review any objections and to file a motion for Final Approval. *See*, Section IX, *infra* at 16-17.

II. FACTUAL BACKGROUND

A. Allegations of the Action

Defendant DTT is a Hong Kong accounting firm that served as the independent auditor for China MediaExpress, Holdings Inc. ("CCME") from December 4, 2009, to March 11, 2011.[2] On March 31, 2010, CCME filed its Form 10-K annual report for the 2009 fiscal year with the SEC, which included DTT's audit opinion on CCME's financial statements for the year ended December 31, 2009.[3]

The Class Representatives alleged that the audit report issued by DTT was materially false and misleading because, despite DTT's representations to the contrary, its audit did not comply with Public Company Accounting Oversight Board ("PCAOB") auditing standards and CCME's financial statements did not comply with Generally Accepted Accounting Principles

[2] *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 421 (S.D.N.Y. 2014) (the "CCME Class Cert. Order").

[3] *Id*.

("GAAP").[4] Plaintiffs further alleged that these false statements were made with the requisite scienter, and caused CCME to trade at artificially inflated prices during the Class Period.[5]

B. Procedural Background

Beginning on February 4, 2011, a series of proposed class actions was filed in this Court alleging violations of the Securities Exchange Act of 1934 in connection with alleged misrepresentations and omissions in the financial statements and other public statements of CCME.[6] On June 7, 2011, this Court appointed Irrevocable Trust FBO Lansing Davis under agreement dated October 1, 1979, and the Davis Partnership LP to serve as Lead Plaintiff, appointed Hagens Berman Sobol Shapiro LLP as Interim Lead Counsel and appointed Cohen Milstein Sellers & Toll, PLLC as Interim Co-Counsel for the Class.[7] Lead Counsel and Co-Counsel are hereinafter collectively referred to as "Class Counsel."

On October 25, 2011, Class Representatives filed an Amended and Consolidated Complaint (the "Complaint") asserting claims under Sections 10(b) (and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5)), and 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b) and 78t(a)) on behalf of all persons who suffered losses as a result of their purchase of shares of CCME common stock, purchase of CCME call options, and/or their sale of CCME put options (the "Action") against DTT and various other parties. Dkt. No. 63.[8]

On January 31, 2012, Defendants Bird and Green filed a motion to dismiss the Complaint. Dkt. No. 79. On February 6, 2012, two affiliates of DTT filed motions to dismiss the Complaint (Dkt. Nos. 86, 91), as did Defendant A.J. Robbins (Dkt. No. 98). On March 15,

[4] *McIntire v. China MediaExpress Holdings, Inc.*, 927 F. Supp. 2d 105, 133 (S.D.N.Y. 2013) (the "CCME MTD Order").

[5] *CCME Class Cert. Order*, 38 F. Supp. 3d at 435.

[6] *CCME Class Cert. Order*, 38 F. Supp. 3d at 422.

[7] *Id.*

[8] Certain errata were corrected by the filing of a corrected version of this Complaint on October 31, 2011. Dkt. No. 64-1.

2015, Defendant CCME filed its Amended Motion to Dismiss the Complaint. Dkt. No. 109. On April 4, 2012, Plaintiffs filed an omnibus opposition to the five filed motions to dismiss. Dkt. No. 121. On May 18, 2012, DTT filed a motion to dismiss the Complaint (Dkt. No. 135); on July 6, 2012, Class Representatives filed an opposition to the motion (Dkt. No. 142); and, on August 7, 2012, DTT filed a reply to the opposition (Dkt. No. 145). On February 28, 2013, the Court issued an Order granting the motions to dismiss of various parties, but denying the motions to dismiss of CCME and DTT. Dkt. No. 152.[9]

On March 25, 2013, after the resignation and withdrawal of CCME's counsel, Plaintiffs moved for a Certificate of Default against CCME (Dkt. No. 160), which was issued on June 17, 2013. Dkt. No. 171. A default judgment was entered on January 17, 2014. Dkt. No. 193.

On July 17, 2013, after successfully negotiating a Protective Order, the Class Representatives served requests for production of documents on DTT. They also served subpoenas on various third parties.[10] Beginning on October 11, 2013, and continuing through February 2014, DTT produced thousands of pages of documents, many of which were written in Chinese.[11] Class Counsel reviewed thousands of documents produced by the parties in the Action and various third parties.[12] Class Counsel has also consulted extensively with experts in accounting, auditing, financial markets, econometrics, and Chinese law.

On August 16, 2013, the Class Representatives filed a motion to certify a class action of the claims against DTT on behalf of all purchasers of common stock of CCME between April 1, 2010, and March 11, 2011 (Dkt. No. 177).[13] On April 22, 2014, DTT filed an opposition to the

[9] *See also CCME MTD Order*, 927 F. Supp. 2d at 105.

[10] Barth Decl., ¶ 5.

[11] *Id*. at ¶ 6.

[12] *Id*.

[13] The Class Period asserted against DTT began at a later date than the period in the Complaint, because the Class Representatives did not allege any false statements made by DTT prior to April 1, 2010.

motion for class certification (Dkt. No. 202), as well as a motion to strike the opinion of the Class Representatives' expert (Dkt. No. 204); on June 2, 2014, the Class Representatives filed a reply to DTT's opposition to class certification (Dkt. No. 211) and an opposition to DTT's motion to strike (Dkt. No. 213); on July 14, 2014, DTT filed a reply in support of their motion to strike and a surreply to the Class Representatives' reply in support of class certification (Dkt. Nos. 216 and 217); and on August 6, 2014, Class Representatives filed an opposition to DTT's surreply (Dkt. No. 219). While class certification briefing was ongoing, DTT deposed and Class Counsel defended the depositions of each Class Representative and the Parties each deposed an expert witness proffered by the other side. On August 15, 2014, the Court granted Class Representatives' Motion for Class Certification, and appointed Hagens Berman Sobol Shapiro LLP as Lead Counsel and Cohen Milstein Sellers & Toll PLLC as Co-Counsel for the Class (Dkt. No. 223).

C. The Six-Month Mediation Process

On March 19, 2014, while the briefing regarding the motion for class certification was ongoing, Class Counsel and DTT's Counsel participated in a mediation with Jed Melnick of J.A.M.S. ("Mr. Melnick") in Washington, DC.[14] The parties were nowhere close to reaching an agreement by the end of that day-long session. However, Mr. Melnick continued to mediate between the parties through the conclusion of the briefing on, and ultimately the Court's decision certifying the Class.[15] Mr. Melnick spoke with counsel for both sides on numerous occasions over the next six months, with the parties sending supplemental legal analysis of their relative positions to each other through Mr. Melnick. Although these discussions were helpful in considerably narrowing the gap between the Parties, they were unable to agree on a settlement

[14] Barth Decl., ¶ 7.

[15] *Id*. at ¶ 8.

amount.[16] However, on September 8, 2014, Mr. Melnick made a mediator's proposal to both sides, which was accepted on September 11, 2014, and formed the basis of the Settlement.[17]

III. THE TERMS OF THE SETTLEMENT

The basic terms of the Settlement are: A) a cash payment of $12,000,000.00 to be made by DTT to the Settlement Fund within ten (10) business days of the Court's entry of Final Judgment; and B) the payment of all reasonable notice and administration costs by DTT; in exchange for a release of all claims against DTT and related entities.

IV. REASONS FOR THE SETTLEMENT

The Settlement represents a significant recovery for the Class and avoids the costs and risks associated with continued litigation, including the danger of no recovery. DTT asserted defenses to liability, damages, and class certification, each of which represented a significant risk at summary judgment or trial.[18] In light of these issues, the Class Representatives concluded that the "prompt, guaranteed payment of the settlement money" is preferable to the "speculative payment of a hypothetically larger amount years down the road."[19]

V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

"There is a strong judicial policy in favor of settlements, particularly in the class action context."[20] A court's review of a proposed class action settlement generally involves a two-step process: 1) preliminary approval; and 2) a subsequent fairness hearing regarding final approval, *after* notice of the settlement has been disseminated to Class members.[21] On preliminary approval, the Court does not make a full and final determination regarding the fairness and

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[16] *Id*.

[17] *Id*. at ¶ 9.

[18] These defenses are discussed in more detail in Section V(A)(3), *infra* at 9-12.

[19] *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2004).

[20] *In re Marsh ERISA Litig*., 265 F.R.D. 128, 138 (S.D.N.Y. 2010). *See also McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005).

[21] *See In re Initial Pub. Offering Sec. Litig*. ("*IPO I*"), 226 F.R.D. 186, 191 (S.D.N.Y. 2005) (citing MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.632 (2004)).

adequacy of the settlement terms, but rather "make[s] a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms."[22] In the second step, *after* notice of the proposed settlement has been provided and a hearing has been held to consider the proposed settlement, the court considers whether the settlement warrants "final approval."[23]

A. Legal Standard for Preliminary Approval

Preliminary approval requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and is often granted without requiring a hearing or a court appearance.[24] Preliminary approval is "not tantamount to a finding that [a proposed] settlement is fair and reasonable."[25] In granting preliminary approval, the Court must only find that the terms of the Proposed Settlement are "at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard."[26] Preliminary approval is "at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness."[27] Accordingly, preliminary approval should be granted where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval."[28] The Settlement meets each of these factors, as described below.

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[22] *In re Initial Pub. Offering Sec. Litig*. ("*IPO II*"), 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (citation omitted).

[23] *IPO I*, 226 F.R.D. at 191, 200 n.71.

[24] *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 179 (S.D.N.Y. 2014).

[25] *In re Traffic Exec. Ass'n - E. R.R.s*, 627 F.2d 631, 634 (2d Cir. 1980).

[26] *In re NASDAQ Mkt.-Makers Antitrust Litig*., 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

[27] *In re Traffic Exec*., 627 F.2d at 634.

[28] *IPO II*, 243 F.R.D. at 87 (citing *In re NASDAQ*, 176 F.R.D. at 102). The standard for demonstrating that a settlement is sufficiently "fair, adequate, and reasonable, and not a product of collusion" in order to obtain *final approval* is more exacting and includes consideration of the nine *Grinnell* factors articulated by the Second Circuit in *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds*, *Goldberger v. Integrated Res., Inc*., 209 F.3d 43 (2d Cir. 2000). The Plaintiffs will demonstrate the substantive fairness of the Settlement pursuant to these factors at the final fairness hearing, and move the Court to enter a Final Judgment and Order substantially in the form as Exhibit B to this Memorandum.

1. The Settlement was the product of arm's-length negotiations.

Class Counsel reviewed thousands of pages of documents produced by DTT and various third parties. *See*, Section II(B), *supra* at 4. As this Court has previously recognized, Class Counsel has "extensive experience" in prosecuting class action securities fraud cases.[29] After carefully considering the factual and legal merits of the Action, Class Counsel believes that the Settlement is fair, reasonable, and adequate and recommends approval.[30]

"In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery."[31] "Absent fraud or collusion, courts should be hesitant to substitute their judgment for that of the parties who negotiated the settlement."[32] Every aspect of this litigation has been non-collusive and vigorously contested by the parties at arm's length, as the lengthy docket will attest (including a hard-fought motion to dismiss and a heavily disputed motion for class certification). Accordingly, "great weight' should be accorded to this recommendation of Class Counsel.[33]

Further, a "mediator's involvement in … settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"[34] The fact that Mr. Melnick served as the mediator for almost six months in this case involving the public securities of a Chinese

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[29] *CCME Class Cert. Order*., 38 F. Supp. 3d at 426.

[30] Barth Decl., ¶ 10.

[31] *deMunecas v. Bold Food, LLC*, 2010 WL 3322580, at *4 (S.D.N.Y. Aug. 23, 2010) (quoting *In re BankAmerica Corp. Sec. Litig*., 210 F.R.D. 694, 700 (E.D. Mo. 2002)). *See also Clark v. Ecolab Inc*., 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010).

[32] *deMunecas*, 2010 WL 3322580, at *4; *Clark*, 2010 WL 1948198, at *4; *In re EVCI Career Colleges Holding Corp. Sec. Litig*., 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

[33] *In re Global Crossing*, 225 F.R.D. at 461 (quoting *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) (citation omitted)).

[34] *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *In re Penthouse Exec. Club Comp. Litig*., 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013).

company is particularly compelling evidence that the Settlement was free of collusion because of his "specific experience in the area of Chinese securities litigation."[35]

Because the Settlement was negotiated at arm's length by sophisticated counsel before an experienced mediator after significant discovery was obtained from the Defendant, "a strong initial presumption of fairness attaches to the proposed settlement."[36]

2. The Settlement does not improperly grant preferential treatment to the Class Representatives or other segments of the Class.

The Plan of Allocation is designed to compensate all Class Members equally based on their losses. See Section VI, *infra* at 12. There is no preferential treatment for the Plaintiffs or any other segment of the Class, which further supports granting preliminary approval.[37]

3. The Settlement has no obvious deficiencies and falls within the range of possible approval.

In considering a settlement for preliminary approval, the Court need not reach any ultimate conclusions on the issues of fact and law underlying the dispute, and need not engage in a trial on the merits.[38] Instead, the Court should grant preliminary approval if a proposed settlement appears to fall within the "range of possible approval."[39] "[T]he dollar amount of the settlement by itself is not decisive in the fairness determination, and the fact that the settlement fund may equal only a fraction of the potential recovery at trial does not render the settlement

[35] *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) (also holding that "participation of this highly qualified mediator strongly supports a finding that negotiations were conducted at arm's length and without collusion"). *See also In re Telik, Inc. Sec. Litig*., 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) (the use of Hon. Daniel Weinstein (Ret.) and Mr. Melnick as mediators "strongly supports a finding that they were conducted at arm's-length and without collusion").

[36] *In re Holocaust Victim Assets Litig*., 2007 WL 805768, at *23 (E.D.N.Y. Mar. 15, 2007) (quoting *In re NASDAQ Mkt.-Makers Antitrust Litig*., 187 F.R.D. 465, 474 (S.D.N.Y. 1998)); *McReynolds*, 588 F.3d at 803 (quoting *Wal-Mart Stores, Inc.*, 396 F.3d at 116).

[37] *IPO II*, 243 F.R.D. at 87.

[38] *Grinnell*, 495 F.2d at 455 n.2.

[39] *Lizondro-Garcia*, 300 F.R.D. at 180.

inadequate."[40] "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."[41] The adequacy of the amount offered in settlement must be judged "not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case."[42] The substantial relief that will be received by the Class in this Settlement is quite favorable in light of the litigation risks.

The Settlement provides the substantial benefit of $12 million that will be paid promptly following final approval of the Settlement, without further risk to the Class. Due to the complexities inherent in this case, the certainty of this substantial settlement amount has to be judged in this context of the legal and practical obstacles to obtaining a large recovery against DTT.[43] Had the case continued, the Class faced significant legal challenges at summary judgment or trial that could have resulted in no recovery at all for the Class. As evidenced by DTT's voluminous briefing on its motion to dismiss and its various oppositions to class certification, there were difficult and complex legal and factual issues that presented risks to the Class, such as scienter, loss causation, and proportionate liability. For example, the Class faced the difficult task of *proving* DTT's scienter at trial under the heightened legal standard protecting independent auditors, and in the face of strong opposition from DTT.[44] DTT raised numerous additional defenses related to loss causation, "price impact" and whether DTT made any

[40] *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 260 (S.D.N.Y. 2003) (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Secs. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y.1989)).

[41] *Grinnell*, 495 F.2d at 455 n.2.

[42] *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y.), *aff'd sub nom., In re PaineWebber Inc. Ltd. P'ships Litig.*, 117 F.3d 721 (2d Cir. 1997). *See also In re Global Crossing*, 225 F.R.D. at 461; *Grinnell*, 495 F.2d at 455 ("The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims.").

[43] *In re Global Crossing*, 225 F.R.D. at 461.

[44] The Class would need to prove that DTT's audit was "so deficient that the audit amounted to no audit at all, or an egregious refusal to see the obvious, or to investigate the doubtful, or that the accounting judgments which were made were such that no reasonable accountant would have made the same decisions if confronted with the same facts." *CCME MTD Order*, 927 F. Supp. 2d at 130.

"material false statement." Had DTT prevailed on *any one* of these issues on summary judgment, at trial or on appeal, the Class would have received nothing.

Additionally, continued litigation against DTT presented special logistical problems in proving DTT's liability because many of the documents and witnesses that Plaintiffs would otherwise rely upon in trial are in China, and would be difficult, if not impossible to obtain.[45]

Even had the Class prevailed on each one of these difficult issues related to liability and loss causation, the "proportionate liability" provisions of the PSLRA could have limited damages to DTT's "percentage of responsibility" in the case.[46] Because it was CCME and its officers that are alleged to have actually cooked CCME's books, DTT would argue that those defendants would have been assigned the great majority of the "percentage of responsibility" for the damages in this Action. There is a significant risk that the finder of fact could determine that DTT's percentage of responsibility was extremely small under these circumstances.

Moreover, even if the Class Representatives had tried the case and prevailed, DTT likely would have appealed the verdict, thus adding years of further delay and expense to the litigation and further diminishing the value of the potential larger judgment as compared to the $12 million Settlement that will be available promptly.[47] Finally, even if the Class obtains a larger judgment, there is a substantial risk that it would be uncollectible against Hong Kong-based DTT.

The Class faced considerable litigation risks at summary judgment and at trial, and almost certain delays of many years in obtaining a judgment and proceeding through the appeals process. Given that the substantial Settlement of $12 million is currently available to the Class,

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[45] *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 158 (S.D.N.Y.), *aff'd*, 2011 U.S. Dist. LEXIS 80677 (S.D.N.Y. Nov. 14, 2011). *See also* Minning Yu, *Benefit of the Doubt: Obstacles to Discovery in Claims Against Chinese Counterfeiters*, 81 FORDHAM L. REV. 2987, 3002 (2013) ("obtaining evidence from China via a letter of request can be time consuming and ultimately unfruitful").

[46] Unless the Class proved DTT "knowingly" violated the federal securities laws, the PSLRA's proportionate liability limitation would apply. 15 U.S.C. § 78u-4(f)(2)-(3); *CCME Class Cert. Order*, 38 F. Supp. 3d at 435-36.

[47] *See, e.g., In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002); *Strougo*, 258 F. Supp. 2d at 258.

the Class Representatives believe it is advantageous "to take the bird in the hand instead of the prospective flock in the bush."[48] For these reasons, the amount of the Settlement is very much within the "range of reasonableness" required for judicial approval.

VI. THE PROPOSED PLAN OF ALLOCATION IS FAIR AND REASONABLE

The proposed Plan of Allocation is described in the Notice, and was prepared with the assistance of an expert damages consultant, Professor Stephen E. Christophe, Ph.D., and the further assistance of Kurtzman Carson Consultants.[49] The Plan of Allocation seeks to disburse the monies in the Net Settlement Account according to the proportionate loss suffered by each purchaser of CCME stock or options during the Class Period.[50] The Class Representatives receive no special treatment or different allocation than any other Class Member. There is no basis to doubt the fairness of the proposed Plan of Allocation for purposes of preliminary approval. Even at the final-approval stage, "[a]n allocation formula need only have a reasonable, rational basis [to warrant approval], particularly if recommended by "experienced and competent class counsel."[51]

Because it is "rationally based on legitimate considerations" and treats Class Members fairly and equally, the Court should preliminarily approve the Plan of Allocation.[52]

VII. THE FORM AND METHOD OF NOTICE SHOULD BE APPROVED

The [Proposed] Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order"), which is attached as Exhibit A, mandates that within twenty-

[48] *Strougo*, 258 F. Supp. 2d at 258.

[49] The Plan of Allocation is attached as Exhibit B to the Barth Decl., and is identical to the Plan of Allocation described in the Notice.

[50] *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 135 (S.D.N.Y. 2008) ("A plan of allocation that calls for the pro rata distribution of settlement proceeds on the basis of investment loss is presumptively reasonable.").

[51] *Am. Bank Note Holographics*, 127 F. Supp. 2d at 429-30; *Maley*, 186 F. Supp. 2d at 367.

[52] *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. at 131 (Plan of Allocation should be approved if it is "rationally based on legitimate considerations.").

eight (28) calendar days of the Court's order preliminarily approving the Settlement, Lead Plaintiffs' Counsel shall provide notice to Class Members through mailing to all identifiable Class Members whose name and address are provided by any nominee: i) the proposed Notice of Pendency and Settlement of Class Action (the "Notice") (substantially in the form annexed as Exhibit A-1 to the Preliminary Approval Order); and ii) the Proof of Claim and Release (substantially in the form annexed as Exhibit A-3 to the Preliminary Approval Order). 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.

Additionally, within thirty-five (35) calendar days after entry of the Preliminary Approval Order, Lead Counsel shall cause a Summary Notice, substantially in the form annexed as Exhibit A-2 to the Preliminary Approval Order) to be published in the WALL STREET JOURNAL and INVESTOR'S BUSINESS DAILY and distributed over the BUSINESS WIRE newswire service.

The form and method of notice proposed by the Class Representatives are appropriate because the *form* of the Notice complies with the requirements of both Rule 23(c)(2)(B)(i)-(vii) and the PSLRA; and the *method* of notice complies with Rule 23(c)(2)(B) and due process requirements by providing the "best notice that is practicable under the circumstances."

A. The Proposed Form of Notice is Appropriate

The content of notice to Class Members must satisfy both the requirements of Rule 23(c)(2)(B)(i)-(vii) and the additional requirements set forth in the Private Securities Litigation Reform Act (the "PSLRA"). As described below, the Notice meets each of these requirements.

1. Rule 23(c)(2)(B) requirements.

The Notice complies with the specific requirements of Rule 23(c)(2)(B) that a class notice must contain: (i) the nature of the case (*see* Notice, pp. 4-5); (ii) the class definition (Notice, pp. 1, 4 and 6); (iii) the claims, issues, and defenses in the action (Notice, pp. 2 and 4-6),

(iv) that a Class Member may enter an appearance through an attorney (Notice, pp. 12 and 14); (v) Class Members' right to exclude themselves from the class (Notice, pp. 3, 6 and 11-12), (vi) the time and manner for requesting exclusion (Notice, p. 12); and (vii) the binding effect of a class judgment on all Class Members who do not request exclusion (Notice, pp. 11-13).[53]

2. PSLRA Notice requirements.

The Notice also complies with the PSLRA requirement that notice to Class Members must contain the following additional information in securities class actions: [54]

> (A) Statement of recovery—the amount of the settlement determined in the aggregate and on an average per share basis (Notice, pp. 1 and 6);
>
> (B) Statement of potential outcome of case—amount of damages per share recoverable if plaintiffs were to prevail on every claim. If the parties are unable to agree on damages, a statement concerning the issues on which the parties disagree (Notice, pp. 1-2);
>
> (C) Statement of attorneys' fees—statement of fees and costs to be applied for in the aggregate and on a per share basis (Notice, pp. 2 and 12);
>
> (D) Identification of lawyers' representatives—the name, telephone number, and address of counsel available to answer questions (Notice, pp. 2 and 13); and
>
> (E) Reasons for settlement—a brief statement explaining the reasons why the parties are proposing the settlement (Notice, pp. 2 and 5-6).

The Notice also complies with the PSLRA requirement to include a cover page summarizing the information required by the above-described subsections (A) through (E) (Notice, pp. 1-2).[55]

Because the Notice meets all of the requirements of both Rule 23(c)(2)(B) and the PSLRA, it should be approved for distribution to the members of the Class.

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[53] Fed. R. Civ. P. 23(c)(2)(B)(i)-(vi). *See also In re Citigroup Inc. Bond Litig*., 296 F.R.D. 147, 154 (S.D.N.Y. 2013); *In re Global Crossing*, 225 F.R.D. at 449.

[54] 15 U.S.C. § 78u-4(a)(7); *In re Global Crossing*, 225 F.R.D. at 449 (citing *In re Indep. Energy Holdings PLC Sec. Litig*., 302 F. Supp. 2d 180, 184 (S.D.N.Y. 2003)).

[55] 15 U.S.C. § 78u-4(a)(7).

B. The Proposed Method of Class Notice is Appropriate

Where, as here, "the parties seek simultaneously to [provide notice] of certification of a class and to settle a class action, the elements of Rule 23(c) notice (for class certification) are combined with the elements of Rule 23(e) notice (for settlement or dismissal)."[56] Neither Rule 23(c)(2)(B) nor Rule 23(e) requires *actual* notice to each possible class member.[57] Rather, Rule 23(c)(2)(B) requires " the *best notice that is practicable under the circumstances*, including individual notice to all members who can be identified through reasonable effort."[58] Rule 23(e) requires only that notice be directed in a 'reasonable manner" to class members. Because "Rule 23(e)'s notice requirements are less specific than that of Rule 23(c)," the Court should focus its inquiry on the higher requirement of "best notice practicable" set forth in Rule 23(c)(2)(B).[59]

The method of notice outlined above is identical to methods of notice that have been approved in securities fraud class actions by this Court and others within this District as the "best practicable notice."[60] Likewise, the proposed plan of notice complies with all of the requirements of Rule 23 and due process because it is "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."[61]

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[56] *In re Global Crossing*, 225 F.R.D. at 448. Rule 23(e)(1) provides that "[t]he court must direct notice in a *reasonable manner* to all class members who would be bound by the proposal."

[57] *In re Marsh & McLennan Cos., Inc. Sec. Litig*., 2009 WL 5178546, at *24 (S.D.N.Y. Dec. 23, 2009); *Buxbaum v. Deutsche Bank AG*, 216 F.R.D. 72, 80-81 (S.D.N.Y. 2003).

[58] Fed. R. Civ. P. Rule 23(c)(2)(B).

[59] *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 185 (S.D.N.Y. 2012).

[60] *See, e.g.*, Order Preliminarily Approving Settlement and Providing for Notice, *Varghese v. China Shenghuo Pharmaceutical Holdings, Inc.*, No. 1:08-cv-7422 (VM) (S.D.N.Y.) (Marrero, J.), Nov. 16, 2010 (Dkt. No. 73); *In re Advanced Battery Techs., Inc. Sec. Litig*., 298 F.R.D. 171, 182-83 (S.D.N.Y. 2014) (individual notice provided by "postcard" and summary notice transmitted over PR NEWSWIRE and published in INVESTOR'S BUSINESS DAILY); *In re Hi-Crush Partners L.P. Sec. Litig*., 2014 WL 7323417, at *11 (S.D.N.Y. Dec. 19, 2014) (individual mailed notice and summary notice publication in INVESTOR'S BUSINESS DAILY and transmission over BUSINESS WIRE); *City of Providence v. Aeropostale, Inc*., 2014 WL 1883494, at *2 (S.D.N.Y. May 9, 2014) (same).

[61] *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

The Court should approve both the proposed form and method of Notice because they both comply with all Rule 23, PSLRA and due process requirements.[62]

VIII. THE PROPOSED CLAIMS ADMINISTRATOR SHOULD BE APPROVED

The Class Representatives have proposed Kurtzman Carson Consultants ("KCC") as their Claims Administrator to execute the proposed method of Notice. Recognized as a leading class action settlement administrator, KCC has more than twenty years' experience administering securities class action claims, including administering more than 55 Securities settlements (including shareholder and merger litigation, 10b-5 cases and mutual fund matters) in the past 12 months. KCC has been approved as the Claims Administrator of numerous recent class action settlements in this District.[63] A more detailed explanation of KCC's experience can be reviewed in the accompanying Declaration of Daniel J. Marotto.[64] The Court need not consider the fees charged by KCC because these expenses will not be deducted from the Settlement Fund.[65] Accordingly, the Court should approve KCC as the Claims Administrator.

IX. PROPOSED SCHEDULE OF EVENTS

The Class Representatives respectfully propose the following schedule:

Event	**Date**
Deadline for posting the Stipulation, the Preliminary Approval Order, and a copy of the Notice to be posted on the following website: www.ChinaMediaExpressSettlement.com.	15 calendar days after entry of a preliminary approval order (Preliminary Approval Order ¶ 7(a)).

[62] *In re IMAX*, 283 F.R.D. at 185 (compliance with Rule 23 satisfies due process requirements).

[63] *See, e.g.*, *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 477 (S.D.N.Y. 2013); *Sukhnandan v. Royal Health Care of Long Island LLC*, 2014 WL 3778173, at *15 (S.D.N.Y. July 31, 2014) (citing *Hernandez v. Merrill Lynch & Co.*, 2013 WL 1209563, at *7 (S.D.N.Y. Mar. 21, 2013); *Ramirez v. Lovin' Oven Catering Suffolk, Inc.*, 2012 WL 651640, at *4 (S.D.N.Y. Feb. 24, 2012)).

[64] Attached as Exhibit C to the Barth Decl.

[65] Although KCC was selected in an RFP process run by Lead Counsel based on both its qualifications and price proposal, the Court need not consider the level of KCC's expenses in deciding whether to approve it as the Claims Administrator, because the costs of notice and administration are borne by DTT and are not deducted from the Settlement Fund. Settlement Agreement, ¶ 27.

Deadline for the mailing of the Long Form Notice and Claim Notice ("Notice Date")	28 calendar days after entry of a preliminary approval order (Preliminary Approval Order ¶ 7(b)).
Deadline for publishing summary notice	35 calendar days after entry of a preliminary approval order (Preliminary Approval Order ¶ 7(c)).
Declaration of Mailing of Notice	80 calendar days after entry of a preliminary approval order (Preliminary Approval Order ¶ 7(d)).
Filing of briefs in support of final approval of Settlement, Plan of Allocation, and Class Counsel's fee and expense request	50 calendar days before the Settlement Hearing (Preliminary Approval Order ¶ 9).
Deadline for objections and Requests for Exclusion from the Class	35 calendar days before the Settlement Hearing (Preliminary Approval Order ¶¶ 12-13).
Filing of reply memoranda in support of Final Approval of Settlement, Plan of Allocation, and of Class Counsel's application for attorneys' fees and reimbursement of expenses	14 calendar days before the Settlement Hearing (Preliminary Approval Order ¶ 9).
Settlement Hearing	To be determined by the Court.
Deadline for submitting Claim Forms	120 calendar days following the Notice Date (Preliminary Approval Order ¶ 19).

This schedule is similar to those used in numerous class action settlements and provides due process for the putative Class Members with respect to their rights concerning the Settlement. *Plaintiffs respectfully recommend that the Court schedule the Settlement Hearing at least one hundred twenty (120) calendar days after entering the Preliminary Approval Order* in order to allow for sufficient time for mailing the Notice and Proof of Claim and Release, publishing the Summary Notice, filing the motions in support of final approval of the Settlement and the Plan of Allocation and for application for attorneys' fees and reimbursement of expenses, and any objections or requests for exclusion that may be made by Class Members.

X. CONCLUSION

Counsel for the Parties reached this Settlement following extensive discussions and arm's-length negotiations, and after significant discovery and motions practice. At this juncture, the Court need not answer the ultimate question: Whether the Settlement is fair, reasonable, and

adequate. The Court is being asked only to permit notice of the terms of the Settlement to be sent to the Class and to schedule a Settlement Hearing to consider: i) any views expressed by the putative Class Members; ii) the fairness of the Settlement; iii) the fairness of the Plan of Allocation; and iv) Class Counsel's request for an award of attorneys' fees and reimbursement of expenses. For all the above-stated reasons, Plaintiffs request that the Court (1) preliminarily approve the Settlement as set forth in the Stipulation; (2) preliminarily approve the Plan of Allocation; (3) approve the form and manner of notice; (4) approve KCC as the Claims Administrator; and (5) set a Settlement Hearing date for final approval of the proposed Settlement.

DATED: May 5, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I am the ECF User whose ID and password are being used to electronically file the foregoing with the Clerk of the Court using the CM/ECF system on May 5, 2015, which will send notification of such filing to the e-mail addresses registered, as denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

/s/ Karl P. Barth
KARL P. BARTH

Mailing Information for a Case 1:11-cv-00804-VM-GWG

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