UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAWRENCE A. SCHULER, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. NIVS INTELLIMEDIA TECHNOLOGY GROUP, INC., TIANFU LI, SIMON ZHANG, ALEXANDER CHEN, KWOK FU WONG, RUXIANG NIU, MINGHUI ZHANG, GENGQIANG YANG, CHARLES MO, RODMAN & RENSHAW LLC, WESTPARK CAPITAL, INC., and MALONEBAILEY, LLP, Defendants.	Civil Action No. 1:11-cv-02484-KMW CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Other Authorities

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Allan Lyons ("Lead Plaintiff") and Plaintiffs Henry C. Beinstein and Michael A. Short (collectively with Lead Plaintiff, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for preliminary approval of the proposed Settlement reached with defendants NIVS IntelliMedia Technology Group, Inc. ("NIVS"), Tianfu Li ("Li"), Simon Zhang ("Zhang"), Alexander Chen ("Chen"), Kwok Fu Wong ("Wong"), Ruxiang Niu ("Niu"), Minghui Zhang ("Minghui"), Gengqiang Yang ("Yang"), Charles Mo ("Mo"), MaloneBailey, LLP ("MaloneBailey") and WestPark Capital, Inc. ("WestPark") (the "Settling Defendants"), conditionally certifying a settlement class, setting a date for a fairness hearing, and approving a notice program agreed to by the parties.

I. INTRODUCTION

Plaintiffs and the Settling Defendants have negotiated, at arms' length, a proposed Settlement of the claims brought against NIVS, the Individual Defendants[1], MaloneBailey and WestPark.[2] Plaintiffs generally alleged that Defendants[3] engaged in conduct that violated the United States securities laws during the Class Period[4], in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 promulgated thereunder; and Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 ("Securities Act") on behalf of all persons and entities who purchased or otherwise acquired shares of NIVS common stock during

[1] The Individual Defendants are Li, Zhang, Chen, Wong, Niu, Minghui, Yang, and Mo.

[2] Defendant Rodman & Renshaw LLC ("R&R") filed a Suggestion of Bankruptcy with the Court on January 17, 2013 (Dkt. No. 96). As such, R&R was not involved in the Settlement negotiations.

[3] The Defendants were NIVS, Tianfu Li, Simon Zhang, Alexander Chen, Kwok Fu Wong, Ruxiang Niu, Minghui Zhang, Gengqiang Yang, Charles Mo, MaloneBailey, R&R and WestPark.

[4] The Class Period is March 24, 2010 through March 25, 2011, inclusive.

the Settlement Class Period, and/or directly in the Company's Secondary Public Offering of common stock (the "SPO") [5]. The Settlement provides for a cash Settlement Amount of $1,350,000, which represents an exceptional recovery for the Class in this action[6].

Plaintiffs are fully informed of the strengths and weaknesses of the action, having had the opportunity to engage in an extensive investigation in preparation of the various stages of briefing, as well as consulting with highly respected experts before agreeing to the proposed Settlement. Plaintiffs also appreciate the complex and highly uncertain nature of trying this action before a jury, complicated even further by the Chinese domicile of important fact witnesses. Plaintiffs also anticipate that they would face significant hurdles in establishing Defendants' liability, as well as the full amount of the Settlement Class's damages if they were to proceed to trial. Of course, even if the Settlement Class were to prevail at trial, Defendants would likely appeal any favorable judgment, delaying and possibly jeopardizing any recovery. Plaintiffs fully endorse and respectfully recommend the proposed Settlement, as they believe it is in the best interests of the Settlement Class.

The terms of the proposed Settlement are set forth in the executed Stipulation and Agreement of Settlement dated April 22, 2014 ("Stipulation").[7] The Stipulation includes several exhibits, including:

- Exhibit A, the [Proposed] Order Preliminarily Approving Settlement, Certifying Settlement Class and Providing for Notice of Settlement ("Preliminary Order");

[5] The SPO commenced on or about April 20, 2010, with common stock priced at $3.29 per share.

[6] "Class" and "Class Members" are used interchangeably herein with "Settlement Class" and "Settlement Class Members", which are described in the Stipulation as: persons or entities that purchased or otherwise acquired shares of NIVS securities between March 24, 2010 and March 25, 2011, who were allegedly damaged thereby.

[7] Capitalized terms not defined herein shall have those meanings ascribed to them in the Stipulation.

- Exhibit A(1), the Notice of Proposed Class Action Settlement ("Notice"), which contains the proposed Plan of Allocation ("Plan of Allocation");
- Exhibit A(2), the Proof of Claim and Release form ("Proof of Claim");
- Exhibit A(3), the Summary Notice for publication; and
- Exhibit B, the [Proposed] Order and Final Judgment of Dismissal with Prejudice ("Judgment").

As shown below, the proposed Settlement is an excellent result for the Settlement Class, as it is exceedingly fair, reasonable and adequate under the governing standards in this Circuit, and should be preliminarily approved by the Court.

The Parties therefore respectfully request that the Court enter an order: (1) preliminarily certifying a class for settlement purposes; (2) preliminarily approving the proposed Settlement; (3) approving the notice to the Settlement Class and authorizing the dissemination of notice to Settlement Class Members; (4) setting dates and procedures for a fairness hearing on the proposed settlement; (5) setting forth procedures and deadlines for Settlement Class Members to file objections to the proposed settlement; and (6) setting forth procedures and deadlines for Settlement Class Members to request exclusion (opt out) from the Settlement Class.

II. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig*., 147 F.3d 132, 138 (2d Cir. 1998). Approving a settlement "is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (internal quotations omitted).

Preliminary approval of a proposed settlement "is the first in a two-step process required before a class action may be settled." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). First, "the court reviews the proposed terms of settlement and makes a

preliminary determination on the fairness, reasonableness and adequacy of the settlement terms." *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005). 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, preliminary approval is granted." *Id.* (*quoting NASDAQ Market-Makers*, 176 F.R.D. at 102).[8]

Where the settlement, as here, is "reached in arm's-length negotiations between experienced, capable counsel" then a "presumption of fairness, adequacy, and reasonableness may attach." *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (*quoting Manual for Complex Litigation, Third* § 30.42 (1995)).

A. The Proposed Settlement is Fair, Reasonable and Adequate

1. The Proposed Settlement is the Result of Non-Collusive, Arms' Length Negotiations

The proposed Settlement of $1.35 million represents an excellent result for the Class, and is the product of extensive arms' length negotiations between Plaintiffs and the Settling Defendants. These arms' length negotiations were partially facilitated through mediation before Mediator Jed Melnick, Esq. of JAMS.

Plaintiffs, WestPark, MaloneBailey and their respective counsel participated in a mediation on September 12, 2013 in New York City. Prior to this mediation session, the parties

[8] The Second Circuit has laid out nine factors for courts to consider when determining whether a class action settlement is fair, reasonable and adequate. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). The Court should consider these factors in its final approval of the Settlement, not on the motion for preliminary approval of the Settlement. *In re Prudential Sec. Inc. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995); *see also Authors Guild v. Google, Inc.*, 2009 WL 4434586, at *1 (S.D.N.Y. Dec. 1, 2009) ("In evaluating a proposed class action settlement agreement for preliminary approval . . . a full fairness analysis is neither feasible nor appropriate.").

had prepared comprehensive mediation statements and submitted them to the mediator. At the conclusion of this mediation session, only MaloneBailey and the Plaintiffs came to an actualized agreement. In the months following the mediation session, a series of follow-up discussions between Plaintiffs and various defendants, including WestPark, NIVS and the Individual Defendants (the "NIVS Defendants") were held in an effort to resolve these impasses. After months of intense discussions, proposals and counter-proposals, Plaintiffs and the Settling Defendants agreed on a $1.35 million cash Settlement. Following three separate memoranda of understanding being executed by Plaintiffs with MaloneBailey, WestPark, and the NIVS Defendants, the Settling Parties spent additional weeks negotiating the specific terms of the Settlement, which terms are embodied in the Stipulation that was executed by the Settling Parties on April 22, 2014.

At all times, the Settling Parties' negotiations were conducted at arms' length, and the process required all Settling Parties and their counsel to assess difficult and uncertain outcomes. There can be no doubt that the proposed Settlement is "the product of serious, informed, non-collusive negotiations." *Initial Pub. Offering*, 226 F.R.D. at 194 (finding proposed settlement the product of non-collusive negotiations where settlement negotiations were facilitated by a retired United States District Judge acting as a mediator); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) (the use of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion"); *In re Currency Conversion Fee Antitrust Litig.*, 2006 WL

3247396, at *5 (S.D.N.Y. Nov. 8, 2006) ("Judge Infante's participation in the negotiations substantiates the parties' claim that the negotiations took place at arm's length.").

2. The Complexity, Expense and Likely Duration of the Litigation Support the Settlement

Courts have repeatedly recognized that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007); *see also Sumitomo*, 189 F.R.D. at 281 ("[I]n evaluating the settlement of a securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain."). This action is no different.

If this action were to be tried, rather than settled, the parties would have to engage in another round of briefing pursuant to Defendants' likely motions to dismiss, continue their trial preparation efforts, and attempt to complete an extensive and time-consuming discovery process, involving the depositions of numerous NIVS' employees and various third parties, expert discovery, and the inevitable round of motions for summary judgment. The fact that NIVS and many fact witnesses are located in China immensely magnifies the costs and complexity of prosecuting this action. *Gilat*, 2007 WL 1191048, at *10 ("[T]he costs of litigating are anticipated to be 'extremely high,'" since defendant corporation is located overseas, "which will increase the cost and complexity of discovery."); *Schwartz v. Novo Industri A/S*, 119 F.R.D. 359, 363 (S.D.N.Y. 1988) (discovery process complicated by defendant's Danish headquarters, which limits the subpoena power of the court).

The Parties would also have to conduct expert discovery, involving both the preparation of experts' reports and the depositions of various experts in the fields of finance, forensic accounting, and information systems implementation. *See Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 240 (E.D.N.Y. 2010) ("If litigation of this action continued, the parties

would have to undergo the time and expense of expert discovery. . . ."). Assuming that the Class's claims survived Defendants' inevitable summary judgment motions, trial preparation would result in further efforts that would come at great expense to the Class. Trial issues would run several weeks and involve numerous attorneys, experts, the introduction of voluminous documentary and deposition evidence, vigorously contested motions *in limine*, and the expenditure of enormous amounts of judicial and financial resources.

Moreover, even a jury verdict in favor of the Class would not guarantee a recovery of damages for the Class. *See, e.g., In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011) (overturning jury verdict in favor of plaintiff class, and granting judgment as a matter of law in favor of defendants). Defendants would undoubtedly appeal any verdict favorable to the Class, and the appellate process could last several years. *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("Delay, not just at the trial stage but through post-trial motions and the appellate process, would cause class members to wait years for any recovery, further reducing its value"). Finally, there is still no guarantee that Chinese courts will recognize or enforce an American securities fraud class action judgment. If the Chinese courts refuse to recognize a judgment, the Class will receive only a minimal amount of recovery.

Were this action to be tried to conclusion, instead of settled, it would be complex, time-consuming and expensive, with the chance of obtaining a recovery greater that that provided by the Settlement—or any recovery at all—far from assured. The Settlement secures a $1.35 million benefit for the Settlement Class without the delay, risk, and uncertainty of continued litigation. In these circumstances, "it is proper to take the bird in the hand instead of the

prospective flock in the bush." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) (citation omitted).

3. The Risk of Maintaining Class Action Status Supports Settlement

Plaintiffs expect to prevail on their motion for class certification, however, there is still a genuine possibility that the motion could be denied, or that the class certification would not be maintained. Although likely to be approved, Plaintiffs are not aware of the possible challenges that Defendants would present to class certification. If the settlement is not approved, Defendants are free to challenge class certification for any reason, and thus, settlement eliminates any risk of having to defend a contested motion to certify the Class. A contested class certification motion would be time consuming and costly for all parties.

Additionally, there is, however, "no assurance of obtaining class certification through trial, because a court can re-evaluate the appropriateness of certification at anytime [sic] during the proceedings." *Bellifemine v. Sanofi-Aventis U.S. LLC*, 2010 WL 3119374, at *4 (S.D.N.Y. 2010); s*ee also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) ("[I]f insurmountable management problems were to develop at any point, class certification can be revisited at any time . . . ."). Settlement would remove this uncertainty, and give Settlement Class Members a substantial payment without the burden and risk of establishing that the Class is certifiable before having to prove meritorious claims.

4. The Proposed Settlement is in the Best Interests of the Class

The $1.35 million proposed Settlement represents an exceptional recovery for the Class. Because of "the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class." *Prudential Partnerships Litig.*, 163 F.R.D. at 210. The proposed Settlement will allow the Class to receive a concrete benefit now, not a hypothetical benefit after years of uncertain litigation and a far-from-guaranteed jury

verdict. *See In re AOL Time Warner, Inc.*, 2006 WL 903236, at *13 (S.D.N.Y. Apr. 6, 2006) (immediate, substantial and concrete benefit of settlement outweighs possibility of a higher recovery after trial).

An immediate and concrete benefit for Class Members is especially important in an action like this where the defendants include a foreign corporation, whose principal place of business is in China, and Chinese citizens, some of whom are no longer employed by the corporate defendant. *See Gilat*, 2007 WL 1191048, at *10 (noting increased costs and complexity of discovery where defendant was located overseas). Moreover, as stated above, even if Plaintiffs were to obtain a favorable jury verdict that would survive the inevitable round of appeals, there is still no guarantee that the Chinese courts will recognize or enforce an American securities fraud class action judgment.

In sum, nothing in the course of the Parties' negotiations, or the terms of the Settlement itself, discloses any grounds to doubt the fairness of the Settlement. On the contrary, the substantial recovery for the Settlement Class, the extensive investigation and discovery conducted, the Parties' litigation efforts over the course of more than two years, the arms'-length nature of the negotiations and the participation of an experienced mediator, amply support a finding that the proposed Settlement is well "within the range of possible approval" so as to justify notice to the Settlement Class and the scheduling of a hearing for final approval.

B. The Plan of Allocation is Fair and Reasonable

"An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re American Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (internal quotations omitted). The court's "principal obligation is simply to ensure that the fund distribution is fair and

reasonable." *Id*. (*quoting Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983)).

Here, the proposed Plan of Allocation was drafted by Dr. Adam Werner of Gnarus Advisors, LLC, who has significant experience in securities litigation, including in drafting plans of allocation, and the proposed Plan of Allocation was carefully reviewed and approved by Lead Counsel.[9] Mr. Werner's Plan of Allocation provides a reasonable, rational basis for Class Members to recover their damages based upon the dates of their transactions. As such, the proposed Plan of Allocation is fair and reasonable, and should be approved. *See Danieli v. IBM Corp.*, 2009 WL 6583144, at *5 (S.D.N.Y. Nov. 16, 2009) (approving plan of allocation where it "is rationally related to the relative strengths and weaknesses of the respective claims asserted", and falls within the range of possible approval).

III. PRELIMINARY CLASS CERTIFICATION IS APPROPRIATE AND NECESSARY FOR SETTLEMENT PURPOSES

One of the Court's duties in reviewing a proposed settlement of a class action is to determine whether the action may be maintained as a class action under Fed. R. Civ. P. 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). Courts often provisionally certify the class along with preliminary approval of the settlement. *See Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 347 (S.D.N.Y. 2005). Following arm's-length negotiations, the Parties have agreed to a Settlement, and Plaintiffs hereby seek preliminary and conditional class certification for settlement purposes.

For the Court to certify a class under Fed. R. Civ. P. 23(a), the Court must find that the requirements of numerosity, commonality, typicality and adequacy of representation are met. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The action must also meet one

[9] *See* http://www.gnarusllc.com/wp-content/uploads/2013/11/Press-Release-Final-Revised-2013-1105.pdf

of the prerequisites of Rule 23(b) to be maintained as a class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974). Since the Parties have agreed that the "stipulation to a Settlement Class is for settlement purposes only" (*See* Stipulation ¶11.1), the Court need only address certification under Rule 23(a) briefly. *Harris v. U.S. Physical Therapy, Inc.*, 2012 WL 3277278, at *7. Plaintiffs submit that the Class satisfies each of the requirements as set forth below.

A. The Requirements of Rule 23(a) Are Met

1. The Proposed Class is Sufficiently Numerous

Rule 23(a) requires that the plaintiff demonstrate that the class is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Numerosity is generally presumed when the proposed class would have at least 40 members. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (citing Newberg on Class Actions 2d, §3.05 (1985 Ed.)). In "securities class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *In re Nortel Networks Corp. Sec. Litig.*, 2003 WL 22077464, at *2 (S.D.N.Y. Sept. 8, 2003) (quoting *In re Frontier Ins. Group, Inc. Sec. Litig.*, 172 F.R.D. 31, 40 (E.D.N.Y. 1997).

During the Class Period, there were millions of shares of NIVS that were sold and/or actively traded on the NYSE Amex exchange. As of November 3, 2010, the Company had approximately 47.97 million shares outstanding. *See* Second Amended Complaint (Dkt. No. 99). These shares were bought and owned by thousands of individual shareholders. Accordingly, the numerosity requirement of Rule 23(a) is clearly satisfied because the Class is so large that "joinder of all members is impracticable." *Comer v. Cisneros*, 37 F.3d 775, 796 (2d Cir. 1994).

2. Questions of Law and Fact are Common to the Class

A class has sufficient commonality "if there are questions of fact and law which are common to the class." Fed. R. Civ. P. 23(a)(2). This rule has been construed permissively, as all questions of fact and law need not be common. *See In re Viviendi Universal S.A.*, 242 F.R.D. 76, 84 (S.D.N.Y. 2007). The Second Circuit has held that the commonality requirement is satisfied if the named plaintiffs share at least one question of fact or law that are in common with the purported class. *See Marisol A. v. Guiliani*, 126 F. 3d 372, 376 (2d Cir. 1997); *In re Veeco Instruments, Inc. Sec. Litig*., 235 F.R.D. 220, 238 (S.D.N.Y. 2006) ("it is sufficient if a single common issue is shared by the class).

Here, the issues common to the Class include: whether Defendants engaged in acts or conduct in violation of the securities laws, whether the Offering Documents contained materially false and misleading statements regarding NIVS's financial and operating results, and whether the stock price was artificially inflated as a result of Defendants' misconduct. Given that these legal issues are shared by the putative Class Members, and are based on a common core of salient facts, the commonality requirement is met. *See In re Oxford Health Plans, Inc.,* 191 F.R.D. 369, 374 (S.D.N.Y. 2000) (finding that the commonality requirement was met where "there exists a common nucleus of operative facts"). The Class Members' claims all spring from the same common source, and are capable of class wide resolution; therefore, the commonality requirement is met.

3. Plaintiffs' Claims are Typical of the Claims of the Class

The typicality prerequisite of Rule 23(a) is fulfilled if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Like the commonality requirement, the typicality requirement is "permissive", and is satisfied "when each class member's claim arises from the same course of events, and each class member

makes similar legal arguments to prove the defendant's liability." *Cent. States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007) (citation omitted). Here, Plaintiffs' claims are "typical" of other Class Members' claims because they have similar legal arguments that arise out of the same alleged course of events.[10] *See Viviendi*, 242 F.R.D. at 85 (citations omitted).

Additionally, Plaintiffs' claims against Defendants are typical because the alleged damages sustained by Plaintiffs, and the other members of the Class, arise from the same course of misconduct. Here, Plaintiffs alleged that they were injured, like the other Class Members, by purchasing and/or acquiring NIVS securities at prices that were inflated because Defendants, in violation of the federal securities laws, issued materially false and misleading statements during the Class Period. Defendants' misconduct is not unique to Plaintiffs, and such conduct has caused similar injuries class wide. *See In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80, 83, 514 (E.D.N.Y. 2002) ("the element of typicality is met because the class members have been allegedly harmed by the same course of conduct.").

Plaintiffs meet the standard for typicality because "the purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Therefore, the nature of Plaintiffs' claims is "typical" because Plaintiffs' interests in the litigation are representative of the interests of the class.

4. Plaintiffs will Fairly and Adequately Protect the Interests of the Class

The adequacy requirement, pursuant to Rule 23(a)(4), is met in this action because Plaintiffs will fairly and adequately protect the interests of the Class. To satisfy constitutional

[10] The U.S. Supreme Court has recognized that the commonality and typicality analyses "tend to merge" but are stated differently. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982).

due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them.[11] *Hanlon*, 150 F.3d at 1020 *(*citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, (1940). If a plaintiff does not have interests that are antagonistic to those of the class, and his chosen counsel is qualified, experienced and generally able to conduct the litigation, then this requirement is met. *See Baffa v. Donaldson*, 222 F.3d 52, 60 (2d Cir. 2000).

Plaintiffs are well suited to serve as Class Representatives for settlement purposes because their interests do not conflict with any members of the class. A party's interests will only be deemed antagonistic to those of the rest of the class if the conflict is fundamental—going to the specific issues in controversy. 1 Newberg & Conte, NEWBERG ON CLASS ACTIONS §3.25 at 3-319 to 141; §3.26 at 3-143 to 144 (3d ed. 1992). Indeed, given that Plaintiffs' claims are identical to other Class Members and are subject to no unique defenses, there is no question of the lack of conflicts of interests. In fact, there are no actual or potential adverse interests between the proposed Settlement Class Members and the Plaintiffs because each Class Member was allegedly harmed by the exact same conduct in the form of artificially inflated stock prices.

Plaintiffs also retained qualified and experienced counsel who are capable of conducting this litigation. *See* Saxena White P.A. Firm Resume (Dkt. No. 27-4); The Law Offices of Curtis V. Trinko Resume (Dkt. No. 27-5). The adequacy of Plaintiffs' counsel "requires the Court to analyze 'whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation.'" *Hester v. Vision Airlines, Inc.*, 2009 WL 4893185, at *5 (D. Nev. Dec. 16, 2009) (quoting *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985)). Lead Counsel have

[11] "A securities class is often composed of numerous individual plaintiffs, each of whom engaged in relatively small transactions involving only common stock. Such a case may require relatively little scrutiny, leading courts sometimes to suggest that securities classes will be certified as a matter of course." *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 596 n.20 (C.D. Cal. 2009).

considerable experience, having successfully prosecuted many securities and complex class actions in courts throughout the United States. *See Hester*, 2009 WL 4893185, at *5 (counsel was adequate based on list of the firm's successful class action representations, and the lack of dispute emanating from the defendant).

Further, prior to reaching the Settlement, Lead Counsel undertook an extensive investigation, drafted a detailed amended complaint, prepared various briefing documents, engaged in a formal day-long mediation session, and consulted with experts. By the time settlement discussions began, Plaintiffs' Counsel were clearly informed of the strengths and weaknesses of Plaintiffs' claims, and were able to use this knowledge to engage in a rigorous, lengthy negotiation process with Defendants. Thus, the adequacy requirement is also met.

The Rule 23(a) requirements of numerosity, commonality, typicality and adequacy are easily met in this action; therefore, the circumstances warrant provisional certification of a class for settlement purposes.

B. The Requirements of Rule 23(b)(3) are met

In addition to satisfying the criteria of Rule 23(a), a party seeking class certification must also satisfy one of the three alternative requirements of Rule 23(b). Only one of the conditions of Rule 23(b) must be satisfied to merit class certification. Certification of this Action under Rule 23(b)(3) is proper. Pursuant to Rule 23(b)(3), the Court must consider: (1) whether issues of law or fact common to class members predominate over questions affecting only individual class members; and (2) whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. Common Questions of Law and Fact Predominate

As demonstrated above, this litigation involves both questions of law and fact common to the Class. In determining whether common questions predominate over individual questions, "a

court's inquiry is directed toward whether the issue of liability is common to the members of the class." *Veeco Instruments,* 235 F.R.D. at 240; *see also In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 486 (S.D.N.Y. 2002) (same). Thus, "[p]laintiffs only need to show that issues in the class action subject to generalized proof... predominate over those issues that are subject to individualized proof." *In re Omnicom Group, Inc. Sec. Litig.*, 2007 WL 1280640, at *7 (S.D.N.Y. Apr. 30, 2007). Further, predominance "does not require a plaintiff to show that there are no individual issues." *In re NYSE Specialists Sec. Litig*, 260 F.R.D. 55, 75 (S.D.N.Y. 2009).

Plaintiffs submit that there are no significant individual issues in this case; rather a common nucleus of facts and potential legal remedies dominates this litigation. Courts have frequently recognized that common questions of law or fact will predominate in securities fraud actions that allege that materially false representations or omissions were made to large groups of investors. *See, e.g., Oxford*, 191 F.R.D. at 377 ("[A]ll class members' claims arise from a common nucleus of facts: Defendants' alleged concealment and/or misrepresentations of material facts affecting the market price of the stock. . . ."); *In re Arakis Energy Corp. Sec. Litig.*, 1999 WL 1021819, at *10 (E.D.N.Y. Apr. 27, 1999) ("In securities fraud class actions in which the fraud is alleged to have been carried out through public communications to a wide variety of market participants, common issues of law and fact will generally predominate over individual issues.") (*citing In re Towers Fin. Corp. Noteholders Litig.*, 177 F.R.D. 167, 171 (S.D.N.Y. 1997)).

Where, as here, all Class Members are subject to the same alleged misrepresentations and omissions, and it is alleged that Defendants misrepresentations were part of a common course of conduct, common questions predominate. In fact, if each Class Member were to bring individual

actions, they would each be required to prove the same wrongdoing by Defendants in order to establish liability.

2. A Class Action is the Superior Method of Adjudication

Rule 23(b)(3) also sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: "(A) the class members' interests in individually controlling the prosecution…of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by…class members; (C) the desirability…of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Here, the class action device is also the superior method for resolving the claims in this Action. Moreover, "[i]n general, securities suits such as this easily satisfy the superiority requirement of Rule 23." *Wagner v. Barrick Gold Corp.*, 251 F.R.D. 112, 120 (S.D.N.Y. 2008).

First, a class action is the only economically feasible method of adjudication where those who have been injured are in a poor position to seek legal redress, either because of a lack of sufficient information, or due to the disproportionate expense of pursuing individual claims. *See In re BellSouth Corp.*, 2006 WL 870362, at *4 (N.D. Ga. Apr. 3, 2006) (finding the class action to be superior method for litigating a federal securities action because "prosecution by individual shareholders would be prohibitive from both the individual plaintiff's and the court's perspectives."). Courts have long recognized that the class action is not only a superior method, but also may be the only feasible method to fairly and efficiently adjudicate a controversy involving a large number of purchasers of securities injured by violations of the securities law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (noting that "[m]ost of the plaintiffs would have no realistic day in court if a class action were not available"). The interests

of the members of the Class to individually control prosecution of separate actions are minimal, supporting a finding of superiority.

Moreover, certification of the Class for settlement purposes will allow the Settlement to be administered in an organized and efficient manner. The alternative to certifying the Class for settlement purposes would be to unleash hundreds, if not thousands, of individual actions into the judicial system, which could result in varying adjudications of liability, or risk that many, if not most, Class members would be unable to seek redress because they could not afford to proceed on an individual basis. *See Wagner*, 251 F.R.D. at 120 ("Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would neither be 'fair' nor an adjudication of their claims."). In many cases, litigation costs would surpass potential recovery making the cost and expense of such individual actions prohibitive to seeking redress. *Hanlon*, 150 F.3d at 1023 ("In most cases, litigation costs would dwarf potential recovery. In this sense, the proposed class action is paradigmatic."). As such, there is no dispute that this Court is a desirable forum for concentrating the litigation of Class Members' claims.

Finally, Plaintiffs do not envision any significant difficulties likely to be encountered in the continued management of this case as a class action, or in the administration of the proposed Settlement. Therefore, certification of the Class for settlement purposes is the superior method for resolving the claims of the Plaintiffs and the Class.

In light of the foregoing, all of the requirements of Rules 23(a) and 23(b)(3) have been satisfied, and thus, the Court should certify this Class for settlement purposes.[12]

[12] Additionally, Rule 23(g)(1)(A) states that, "a court that certifies a class must appoint class counsel." Fed. R. Civ. Pr. 23(g)(1)(A). Lead Counsel satisfies the requirements of Rule 23(g) and should be appointed as Class Counsel. As discussed above, Saxena White P.A. has fairly and

IV. THE PROPOSED FORM AND METHOD OF CLASS NOTICE ARE ADEQUATE

Once a court preliminarily approves a settlement as fair, adequate and reasonable, then "it must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing." *Initial Pub. Offering*, 226 F.R.D. at 191.

A. The Scope of the Notice Program

Plaintiffs have selected Epiq Solutions, Inc., a highly experienced and diligent class action claims administrator, to serve as the Claims Administrator for the proposed Settlement. In connection with the proposed Settlement, the Claims Administrator will receive shareholder lists from NIVS containing the names and addresses of NIVS shareholders during the Class Period. The Claims Administrator will make an initial mailing of the Notice and Proof of Claim to these Class members, as well as to the thousands of nominees contained in its proprietary nominee database.

Plaintiffs will also publish a Summary Notice, which provides a summary of the action and the proposed Settlement, and also explains how to obtain the more detailed Notice and Proof of Claim. The Summary Notice will be published in the *Investor's Business Daily*, as well as posted on *Business Wire*, not later than 30 calendar days after the entry of the proposed Preliminary Order (subject to Court approval).

Plaintiffs have also instructed the Claims Administrator to maintain a website, at www.nivssecuritieslitigation.com. This website will provide more detailed information on the Settlement, including downloadable copies of the Notice, Proof of Claim and Stipulation.

---

adequately represented the Class, and will continue to do so. Proposed Class Counsel is knowledgeable about the applicable law, are experienced in handling class actions, have performed substantial work in vigorously pursuing the Class' claims here, and have committed substantial resources to representing the Class. *See* Fed. R. Civ. Pr. 23(g)(1)(B).

B. The Notice Program Comports with Due Process

The standard for determining the adequacy of a class action settlement notice under either the Due Process Clause or the Federal Rules is reasonableness. *Wal-Mart*, 396 F.3d at 113. The Second Circuit has explained:

> There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings. Notice is adequate if it may be understood by the average class member.

Id. at 114 (internal citation and quotations omitted). In addition, the PSLRA sets forth several items of information that must be present in securities fraud settlement notices. *See* 15 U.S.C. § 78u-4(a)(7).

The proposed Notice has been carefully drafted to contain all necessary information. All of the information is provided in a format that is easily accessible to the reader. The Notice clearly advises recipients of their legal rights and obligations in connection with the Settlement, including the right to object to any portion of the Settlement, exclude themselves from the Settlement Class, or submit a completed Proof of Claim in order to be eligible to share in the Settlement. Contact information for both Lead Counsel and the Claims Administrator is provided, as well as a toll-free number and website for the recipient if there are any further questions.

As described above, and further outlined in the proposed Preliminary Order, Plaintiffs will (i) notify Settlement Class Members of the Settlement by mailing the Notice and Proof of Claim to all potential Settlement Class Members who can be identified with reasonable effort,[13]

[13] Plaintiffs, through the assistance of the Claims Administrator, will also use reasonable efforts to give notice to nominee purchasers, such as brokerage firms and other Persons who purchased

(ii) cause the Summary Notice to be published in *Investor's Business Daily* and transmitted over *BusinessWire*, and (iii) maintain a website with relevant information at www.nivssecuritieslitigation.com. Notice programs such as this have been approved in a multitude of class action settlements. *See, e.g., Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 106 (D. Conn. 2010) (approving notice program where notice was mailed to class members identified from transfer records, summary notice was published, and settlement website was maintained for further information); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2007 WL 313474, at *8 (S.D.N.Y. Feb. 1, 2007) (notice program approved where claims administrator disseminated notice and proof of allocation to class members, and published summary notice "in appropriate publications"); *In re Prudential Secs. Inc. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (approving proposed notice, and noting mailing of notice to each identifiable class member's last known address is "a procedure that has been given wide-spread approval in other class actions").

Plaintiffs' proposed manner of providing notice, which includes individual notice by mail to all Class Members who can be reasonably identified, represents the best notice practicable under the circumstances, and satisfies the requirements of Due Process and Rule 23 of the Federal Rules. Therefore, Plaintiffs respectfully submit that the Court should approve the form and content of the Notice.

---

or otherwise acquired NIVS shares during the Class Period as record owners, but not as beneficial owners.

V. PROPOSED SCHEDULE

Plaintiffs respectfully submit the following procedural schedule for the Court's review and approval, which schedule summarizes the deadlines in the proposed Preliminary Order:

Event	**Proposed Deadline**
Mailing of Notice (including Plan of Allocation and Proof of Claim) *See* Preliminary Order ¶7(a)	20 calendar days after entry of Preliminary Order (the "Notice Date")
Publication of Summary Notice *See* Preliminary Order ¶7(b)	10 calendar days after the Notice Date
Submission of Requests for Exclusion *See* Preliminary Order ¶10	30 calendar days prior to the Settlement Fairness Hearing
Submission of Motion for Final Approval of Settlement and Attorneys' Fees and Expenses *See* Preliminary Order ¶17	21 days prior to the Settlement Hearing
Submission of Objections *See* Preliminary Order ¶13	14 calendar days prior to the Settlement Fairness Hearing
Submission of Reply in Support of Final Approval and Attorney's Fees and Expenses *See* Preliminary Order ¶17	7 days prior to the Settlement Hearing
Submission of Proofs of Claim *See* Preliminary Order ¶11	90 calendar days after the Notice Date
Settlement Fairness Hearing *See* Preliminary Order ¶5	At least 90 days after entry of the Preliminary Order[14]

[14] Pursuant to 28 U.S.C. § 1715, the Settling Defendants will be notifying certain federal and state officials of the proposed Settlement within 10 days from the entry of the Preliminary Order. Subsection (d) requires the Court to wait 90 days from the date these officials are served to give final approval to the proposed Settlement. In order to comply with the statute, Plaintiffs respectfully request that the Court schedule the Fairness Hearing to occur at least 90 days from the date the Settlement is preliminarily approved, subject to the Court's convenience.

VI. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter the proposed Order Preliminarily Approving Settlement, which will provide for (1) preliminary approval of the proposed Settlement; (2) approval of the form and manner of giving notice of the proposed Settlement to the Settlement Class; and (3) a time and date for the Settlement Fairness Hearing, to consider final approval of the Settlement and related matters.

Dated: April 28, 2014

Respectfully submitted,

LAW OFFICES OF CURTIS V. TRINKO, LLP

/s/ Curtis V. Trinko
Curtis V. Trinko (CT-1838)
Jennifer Traystman (JT-7583)
C. William Margrabe (CM-7734)
16 West 46th Street, 7th Floor
New York, NY 10036
Telephone: (212) 490-9550
Facsimile: (212) 986-0158
Email: Ctrinko@trinko.com

Liaison Counsel for Plaintiffs

SAXENA WHITE P.A.
Maya S. Saxena
Joseph E. White, III
Lester R. Hooker
Brandon T. Grzandziel
2424 N. Federal Hwy., Suite 257
Boca Raton, FL 33431
Telephone: (561) 394-3399
Facsimile: (561) 394-3382

Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the April 28, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered users.

/s/ Curtis V. Trinko
Curtis V. Trinko