MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

MICHAEL JIANNARAS, on Behalf of Himself and All Others Similarly Situated, Plaintiff, - against - MIKE ALFANT, MIKE KOPETSKI, J. ALLEN KOSOWSKY, JAMES MEYER, AFSANEH NAIMOLLAH, THOMAS WEIGMAN, ON2 TECHNOLOGIES, INC. and GOOGLE, INC., Defendants.	INDEX NO. 21262/09 MOTION SEQ. NO. BY: GRAYS, J. DATED:

The court has before it an application to approve a proposed class action settlement agreement dated February 22, 2010. The court held a hearing on October 13, 2010 and January 5, 2011.

I. Overview

On 2 Technologies, Inc. (On 2) developed technology relating to video compression which allowed the sending of video over the internet using less bandwith. Google, Inc. (Google) became more interested in acquiring On2 than in merely licensing its technology.

On or about August 7, 2009, plaintiff Michael Jiannaras began this action, which he sought to maintain as a class action on behalf of shareholders of On2, against On2,

its board of directors, and Google. The case arose out of the proposed sale of On2 to defendant Google pursuant to which each share of On2 common stock would be exchanged for 60 cents worth of Google Class A common stock. Google intended to make On2 its wholly owned subsidiary whose stock would no longer be publicly traded.

On August 4, 2009, On2 entered into a merger agreement with Google and Oxide, Inc. (Google's subsidiary formed for the purpose of facilitating the transaction) pursuant to which Google agreed to acquire each share of On2 common stock in consideration of 60 cents worth of Google Class A common stock. On2's total common stock then had a market value of approximately $106,500,000. On2's stock ended trading on August 4, 2009 at 38 cents per share, the date preceding the public announcement of the merger.

The original complaint in the instant action alleged that under Delaware law On2's directors breached their fiduciary duties to stockholders in regard to the proposed transaction by, inter alia, "(i) failing to ensure that they will receive maximum value for their shares; (ii) failing to conduct an appropriate sale process; (iii) implementing preclusive deal protections that will inhibit an alternate transaction; (iv) favoring the interests of certain 'insider' shareholders over the interests of other shareholders; (v) falsely portraying the Proposed Transaction as one in which the On2 shareholders will receive Google stock in exchange for their shares; and (vi) attempting to extinguish shareholder derivative standing to evade liability for admitted accounting improprieties that resulted in the generation of false

financial statements." The complaint further alleged that Google aided and abetted the breaches of fiduciary duty. The complaint demanded, inter alia, the rescission of the merger agreement and an injunction prohibiting the proposed sale until certain conditions were satisfied. By an amended complaint served on September 17, 2009, plaintiff Jiannaras made the additional allegation that the directors also breached their fiduciary duty to On2 shareholders by making materially misleading or inadequate disclosure in a preliminary proxy.

In August 2009, other shareholders of On2 began related actions based on similar allegations in the Delaware Court of Chancery: *Miller v Kosowsky* (C.A. No. 4793-CC); *Lowinger v Alfant* (C.A. No. 4804-CC); *Yadhati v Kosowsky* (C.A. No. 4824-CC); and *Powers v On2 Technologies*, (C.A. No. 4823-CC). By order dated August 31, 2009, the Delaware Court consolidated these cases under the caption *"In re On2 Technologies, Inc. Shareholder Litigation* (Consol. C.A. No. 4793-CC)."

On October 9, 2009, the defendants began to make document disclosure, and a total of 78,562 pages of documents were produced for examination by the plaintiff's attorneys.

The court preliminarily determined that the instant action could be maintained as a non-opt out class action for settlement purposes only on behalf of a class essentially comprised of all persons and entities who held shares of the common stock of On2, either of record or beneficially, at any time between August 4, 2009 and February 19, 2010.

A settlement agreement has been reached which is intended to be dispositive of the action pending in this court and of the action pending in the Delaware court.

II. Final Class Action Certification

Pursuant to CPLR 901, a class action may be maintained only if: "(1) the proposed class is so numerous that joinder of all members is impracticable; (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . ." (*Klein v Robert's American Gourmet Food, Inc.,* 28 AD3d 63, 69-70.)

"CPLR 902 provides that the court may permit a class action to be maintained only if it finds that all of the prerequisites under CPLR 901 have been satisfied . . . ." (3 Weinstein-Korn-Miller, NY Civ Prac par 902.06.) "Where, as here, a class is certified for settlement purposes only, these prerequisites-and particularly those designed to protect absentee class members-must still be met and, indeed, 'demand undiluted, even heightened, attention' . . . ." (*Klein v Robert's American Gourmet Food, Inc.*, *supra*, 70, quoting *Amchem Prods., Inc. v Windsor*, 521 US 591, 620.)

The plaintiff has the burden of showing that the criteria of CPLR 901 and 902 have been satisfied. (*Bettan v Geico General Ins. Co.,* 296 AD2d 469; *Ackerman v Price*

Waterhouse, 252 AD2d 179; *Small v Lorillard Tobacco Co.*, 252 AD2d 1; *Canavan v Chase Manhattan Bank*, 234 AD2d 493.) Plaintiff Jiannaras successfully carried this burden. (*See, e.g., Hurrell-Harring v State of New York*, 81 AD3d 69; *Brody v Catell*, 16 Misc 3d 1105 [Table], 2007 WL 1865080 [Text] [nor].) The court notes in particular the numerosity of the class and the presence of common questions of law and fact that predominate over individual issues, if any. (*See*, *Hurrell-Harring v State of New York*, *supra*.)

Those shareholders who are not residents of New York State must be afforded the right to "opt-out" of the settlement agreement. (*See*, *Phillips Petroleum Co. v Shutts,* 472 US 797.) "[I]f the class complaint seeks only monetary relief or both substantial monetary relief and equitable relief, the trial judge is required to give out-of-state class members the opportunity to opt out of the class once it is certified, regardless of whether they had notice of the action and could have chosen to appear, since a class member's cause of action for monetary relief or both substantial monetary relief and equitable relief is a constitutionally protected property interest." (3A Carmody-Wait 2d § 19:336; *see*, *Colt Industries Shareholder Litigation v Colt Industries, Inc*., 77 NY2d 185.) Moreover, the settlement agreement in the case at bar calls for the execution of releases. "[N]onresident class members must be allowed to opt out if a settlement of the class action includes equitable relief but also extinguishes the class members' ability to seek damages . . . ." (3 NY Prac Com Litig in New York State Courts § 20:21 [3d ed]; *see*, *Colt Industries Shareholder Litigation v Colt Industries Inc*., *supra*.) The plaintiff's argument that cases arising from a

merger are not subject to opt-out rights is unpersuasive. According to representations made at the settlement hearing, some Delaware cases have drawn a distinction, but the cases in this jurisdiction do not do so. (*See, e.g.*, *Colt Industries Shareholder Litigation v Colt Industries Inc*., *supra* [class action brought by shareholders of acquired corporation seeking rescission of merger and settlement requiring shareholders to give up damages claims].)

The court otherwise has discretion to permit On2 shareholders to opt-out (*see*, CPLR 903), but the court finds that no further exclusion of class members is warranted under the facts and circumstances of this case. This class action will accomplish economies of time, effort and expense, and it will promote uniformity of result as to persons similarly situated. (*See*, *Friar v Vanguard Holding Corp*., 78 AD2d 83.)

III. The Settlement Agreement

A. The Broad Outline of the Settlement Agreement

After negotiations, the parties eventually entered into a Memorandum of Understanding (MOU) dated October 23, 2009 settling the claims of the plaintiff, and the parties expected that the settlement terms would subsequently be detailed in a Stipulation of Settlement.

Pursuant to the MOU, the settling defendants agreed to disclose additional information to On2 shareholders which was not included in the preliminary proxy. The additional disclosures were made in a revised proxy filed with the Securities and Exchange

Commission on October 26, 2009 by Google, and the additional disclosures included information about, inter alia, (1) employment agreements proposed by Google to key On2 engineers and two On2 executives, (2) the data reviewed by Covington Associates, LLC (On2's financial advisor) in preparing a fairness opinion, and (3) financial analyses prepared by Covington. The additional financial disclosure was intended to increase the shareholders' understanding of how and why On2's financial advisors reached the conclusions they arrived at, the prospects and value of Google and On2, and the value of the consideration offered by the acquiring corporation.

As summarized in the notice of pendency of class actions and proposed settlement of class actions, the stipulation provided for a broad release of, inter alia, claims against the settling defendants "that have been, could have been, or in the future can or might be asserted in the New York action, the Delaware action, or in any court, tribunal, or proceeding . . . which have arisen, could have arisen, arise now, or hereafter may arise out of or relate in any manner to the acts, events . . . or any other matter whatsoever set forth in or otherwise related, directly or indirectly, to the allegations in the New York action, the Delaware action, the Merger, the Merger Agreement . . . ." David F. Wertheimer, Esq., representing the On2 defendants, stated to the court: "[T]he release in the settlement releases only those claims arising out of the merger. . . . And that's all that we are doing here, we are releasing all claims that arise out of the merger." (Tr., 24.)

The stipulation further called for (1) the dismissal of the instant action on the merits and with prejudice as to all defendants and against plaintiff and all members of the Settlement Class, with some exceptions, and (2) the plaintiffs in the Delaware action to obtain its dismissal "on the merits and with prejudice, as to all defendants."

During the pendency of the New York and Delaware actions, Google raised its offered price by nearly $20,000,000. Google agreed to purchase each share of On2 common stock for 15 cents in cash in addition to 0.0010 Google Class A common stock per share (as well as cash payable in lieu of any fractional shares of Google Class A common stock).

B. Attorney's Fees

The settlement agreement calls for the payment of $450,000 by On2 toward attorney's fees and expenses incurred by the plaintiffs in the instant action and in the Delaware action.

C. Shareholder Approval

On February 17, 2010, On2 announced that shareholders holding more than a majority of its outstanding shares had approved the merger.

IV. Relevant Law Pertaining to Class Action Settlements

CPLR 908, "Dismissal, discontinuance or compromise," provides in relevant part: "A class action shall not be dismissed, discontinued, or compromised without the approval of the court." (*See*, *Klein v Robert's American Gourmet Food, Inc*., 28 AD3d 63; *Rosenfeld v Bear Stearns & Co., Inc*., 237 AD2d 199.) In approving a class action settlement, the Court must determine whether the proposed settlement is fair, adequate, reasonable, and in the best interests of the class members. (*Klein v Robert's American Gourmet Food, Inc*., *supra*; *Rosenfeld v Bear Stearns & Co., Inc*., *supra*.)

"Though the court's approval is not conditioned by the statute on prescribed guidelines, case law suggests the components which should be considered in reviewing a settlement: the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact . . . ." (*Klurfeld v Equity Enterprises, Inc*., 79 AD2d 124, 133; *In re Colt Industries Shareholder Litigation* 155 AD2d 154, *affd*, 77 NY2d 185; *Lasker v Kanas* 2007 WL 3142959; *Cox v Microsoft Corp*., 2006 WL 6554176.) "The court should also take into account the risks and costs of continued litigation and balance those risks and costs against the benefits to be derived from the settlement . . . ." (*Conolly v Universal American Financial Corp*., 2008 WL 4514098.) In other words, "[w]here, as here, the action is primarily one for the recovery of money damages, determining the adequacy of a proposed settlement generally involves balancing the value of that settlement against the present value

of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation . . . ." (*Klein v Robert's American Gourmet Food, Inc*., *supra*, 73; *Fiala v Metropolitan Life Ins. Co., Inc.*, 27 Misc 3d 599.) A court should give varying weight to these factors in light of the circumstances presented by different cases. (*See*, *Klurfeld v Equity Enterprises, Inc*., *supra*.)

"A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." (*Wal-Mart Stores Inc. v Visa USA Inc*., 396 F3d 96, 116; *McReynolds v Richards-Cantave*, 588 F3d 790; *Fiala v Metropolitan Life Ins. Co., Inc*., *supra*.) This presumption is consistent with the "strong judicial policy in favor of settlements, particularly in the class action context." (*In re PaineWebber Ltd. P'ships Litig.*, 147 F3d 132, 138; *McReynolds v Richards-Cantave*, *supra; Wal-Mart Stores, Inc. v Visa U.S.A., Inc*., *supra*.)

V. The Settlement Hearing

The court conducted a settlement hearing to determine whether: (1) to grant final certification of this action as a class action for settlement purposes, (2) to approve the settlement agreement as fair, reasonable, adequate, and in the best interests of the settlement class, (3) to enter a judgment which would, inter alia, dismiss the instant action with prejudice and bar the further prosecution of all released claims, and (4) to award attorney's

fees and expenses in the negotiated amount ($450,000) which On2 has agreed to pay and which would compensate plaintiffs' attorneys in the instant action and in the Delaware action.

Jonathan Massey, Esq. appeared at the settlement hearing to represent approximately 239 objectors to the settlement. The objections concerned, inter alia, the price Google offered for On2 shares and the release to be given the directors.

Frank Horrocks, one of the objectors and a hardware PC technician, testified at the settlement hearing. He objected to the merger price because in 2009 On2, a growing company, was showing signs of profitability and Google would have greatly benefitted from using On2's technology. Horrocks admitted that he voted in favor of the merger upon the final vote.

Sammy Braswell, a second objector, also testified at the settlement hearing. He thought the merger price was unfair, considering the potential of On2, and he questioned why the board didn't solicit offers for the company. He thought that On2 had supplied its financial advisors with information that was inaccurate. The witness testified about the yearly increases in the company's earnings, and he projected that those earnings would increase because of the use of On2 technology in new devices such as cell phones and PDA's. According to the witness, considering the demand for video, Google would benefit tremendously from the use of On2's technology. Braswell also expressed his dissatisfaction with some attorney conduct in the class action litigation that resulted from the merger, and

he objected to a non-opt-out settlement. On cross-examination, the witness admitted knowing that Google had agreed to pay a premium over the price that it had been trading and he admitted knowing that no company topped Google's offer for On2. He did not exercise his appraisal rights.

James Serdula, another objector, complained that On2's chief technology officers had been given permission to make contractual arrangements with Google and that they would be given "1, 500 shares of Google upon the consummation of the merger." On cross-examination, the witness admitted that On2 had made attempts to restrict Google's solicitation of its engineers up until close to the end of the merger negotiations. The witness also admitted that shareholders voted to approve of the merger despite their knowledge of the employment agreements with Google. According to the witness, On2 "was worthless when that agreement was made with those engineers," but the witness was evasive when asked if he knew that the agreements were to be effective only upon the closing of the merger.

Joseph M. Weideman, another objector, complained about insider trading or stock manipulation. The witness alleged that the board of directors manipulated the price of the stock "by simply announcing the sale of the company prior to announcing second quarter results." According to the witness, the board of On2 encouraged short sellers for the purpose of keeping the price of On2 shares low enough to induce shareholders to vote for the merger.

VI. Discussion

A. The Risks of Litigation

Under Delaware law, the board of directors of a corporation has the ultimate responsibility of managing its business and affairs, and in doing their work, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. (*Revlon, Inc. v MacAndrews & Forbes Holdings, Inc*., 506 A2d 173.) This fiduciary duty requires the directors to make a diligent and good faith attempt to get the best price for shareholders for the sale of the corporation. (*See*, *Lyondell Chemical Co. v Ryan*, 970 A2d 235.)

The On2 directors have asserted that they are immunized, as a matter of law, from any claim for damages based on a failure to exercise due care in regard to the merger. Article XII of On2's certificate of incorporation includes a provision authorized by Delaware General Corporation Law § 102(b)(7) barring the assertion of a claim against the directors based on the duty of care. "[A] Section 102(b)(7) charter provision bars a claim that is found to state only a due care violation . . . ." (*Malpiede v Townson, 780 A2d 1075, 1095.*)

In regard to the directors' alleged breach of the duty of loyalty, the plaintiff shareholders had the burden of proving that the directors negotiated the merger in bad faith or placed their own interests above those of the shareholders and corporation. (*See*, *Lyondell Chemical Co. v Ryan,* 970 A2d 235; *Revlon, Inc. v MacAndrews & Forbes Holdings, Inc., supra; Unocal Corp. v Mesa Petroleum Co.,* 493 A2d 946.) The record in this case shows that the directors were prepared to vigorously dispute any claim based on the breach of the

duty of loyalty. They were prepared to prove, inter alia, (1) that they received the same benefits from the merger as did other shareholders of On2, (2) that they insisted that Google increase its offering price, (3) that Google increased its merger price over 66% from its initial bid, (4) that two independent financial advisors gave favorable opinions on the fairness of the merger price (*see*, *Lyondell Chemical Co. v Ryan, supra*), (5) that Google threatened to end the attempt at a merger and to develop a competing product if On2's directors rejected its final offer, and (6) the directors did not receive any other bids for On2 after Google's offer became public knowledge. Under all of these circumstances, an attempt to prove that the directors failed to obtain an adequate price for On2 despite the company's reaching an "inflection point," i.e., reaching profitability for the first time, would entail substantial risk. Other allegations concerning, inter alia, unfair "deal protection" devices and the use of pessimistic financial protections could be proven only with difficulty, if at all.

In sum, the court finds that the grave risks of litigation faced by the shareholders in this case virtually compels a settlement. (*See, e.g., Brody v Catell*, *supra*.)

B. The Benefits of the Settlement to On2's Shareholders

Google initially offered to purchase a share of On2 common stock by exchanging 0.0010 share of Google Class A common stock for it, the latter valued at 60 cents. Google eventually agreed to an amendment of the terms of the merger agreement so that the acquiring company had to offer an additional 15 cents in cash for each share of On2

stock. This increase in the merger price has a total value to On2 shareholders of nearly $20,000,000. The settlement agreement now allows On2 shareholders to receive a substantial benefit in cash from the transaction, and they have also received appraisal rights under Delaware law which they could exercise if they found the consideration for their On2 shares to still be inadequate.

C. The judgment of counsel

The attorneys for the plaintiffs have represented that they have reviewed the proposed settlement for (1) the benefits which would accrue to On2 shareholders if the merger went through on its revised terms, (2) the relevant facts and law, (3) the attendant risks of continued litigation, and (4) the benefits which would accrue to On2 shareholders from the settlement. The attorneys for the plaintiffs concluded that the settlement would be fair, reasonable, adequate, and in the best interests of the shareholders. The attorneys for the plaintiffs have reviewed the settlement agreement in accordance with standards imposed by New York law (*see*, *Klein v Robert's American Gourmet Food, Inc.*, *supra*; *Rosenfeld v Bear Stearns & Co., Inc.*, *supra*) and the court places heavy weight upon their professional opinion.

D. Fairness and Reasonableness

The terms of the settlement agreement are fair to the parties in regard to (1) the consideration to be paid by Google for the On2 shares, (2) the releases to be given to the defendants, and (3) the attorney's fees to be paid by On2.

The objector's testimony at the settlement hearing was unpersuasive. Surmise, conjecture, and suspicion about alleged misconduct by corporate principals, stock manipulation, and the board's motivation for the merger do not suffice to derail the settlement of this class action. While the court listened to the expression of a lot of disappointment from the objector shareholders concerning the price they received for their shares, the court finds that after efforts by On2's board, its financial advisors, the plaintiffs' attorneys and their financial advisors a fair and reasonable price was arrived at.

The objectors had to admit that On2 received no competing bids for the company after the announcement of the merger, and this "market check" is an important indication of the fairness of the transaction. (*See*, *Brody v Catell*, *supra*.)

The objectors received appraisal rights. As explained by attorney Rothman: "While majority ruled with respect to whether or not the company would be merged with Google, importantly, when the shareholders received the extra $25,000,000, they also received what was known as an appraisal right. If they did not like the price that they received for their Google shares- for their On2 shares, they had the right to go and have those shares appraised and be paid what the appraisal showed those shares were worth. None of

the objectors, to my knowledge, filed for an appraisal. They had an ability to get more money if the company was really worth more money." (Tr., 9-10.)

The amount of the consideration was finally arrived at with the assistance of the plaintiffs' attorneys and their financial experts. The attorneys have affirmed that they engaged in good faith bargaining and arm's length negotiations after the conduct of extensive discovery. (*See*, *Weinberger v Kendrick*, 698 F2d 61; *In re Austrian and German Bank Holocaust Litigation,* 80 F Supp 2d 164.) The shareholders have overwhelmingly approved Google's final offered price which is substantially better than the price first offered, and the objectors are relatively few in number. (*See*, *In re Austrian and German Bank Holocaust Litigation, supra* ["If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement"].)

While the releases to be given by the plaintiffs are broad, the court recognizes that the defendants have a legitimate interest in putting an end to the disputes arising from the merger. The court construes the release to apply only to the merger transaction, as represented to the court by the attorney for the On2 defendants, and the objection to the release as more extensive than that has no merit. In any event, derivative claims of former On2 shareholders now belong to Google, and claims against the directors could be proven only with difficulty, if at all.

The award of $450,000 to the plaintiffs' attorneys to compensate them for their efforts and expenses in the instant action and in the Delaware action is fair and reasonable.

The plaintiffs' attorneys, inter alia, (1) investigated and researched the potential claims of On2's shareholders arising from the corporate acquisition, (2) prepared the pleadings, (3) engaged in motion practice concerning disclosure, (4) attended a preliminary conference in this court and negotiated a discovery schedule that coordinated discovery efforts in the actions pending in New York and Delaware, (5) reviewed and analyzed nearly 80,000 pages of documents related to the acquisition, (6) analyzed SEC filings, (7) consulted with a financial expert concerning the terms of the transaction and the adequacy of the disclosure made to shareholders, (8) with the assistance of a financial expert analyzed the preliminary proxy to determine whether adequate disclosure had been made to the stockholders and whether the consideration offered adequately valued the company, (9) negotiated the terms of the proposed settlement, (10) prepared and participated in the settlement hearing, and (11) communicated with shareholders.

Through the efforts of the plaintiffs' attorneys, On2's shareholders obtained additional disclosure which enabled them to cast a more informed vote on the proposed transaction. (*See*, *Brody v Catell*, *supra*.) After receiving more information, On2's shareholders rejected the proposed acquisition, and Google thereafter made a $20,000,000 cash increase in its offer. On2's shareholders thereafter overwhelmingly approved the acquisition. "[T]hrough the efforts of plaintiffs' counsel, the merits of the proposed merger have been independently vetted and revealed to the class members, who have determined that

it is desirable and provides a favorable return on their investment. Such benefit is both sufficient and meaningful." (*Brody v Catell*, *supra*, 7.)

The factors which should be taken into account in determining reasonable attorney's fees include, inter alia, the difficulty of the case, the skill required to process the case, the amount of time expended on the case, the amount involved, and the benefit obtained for the client. (*Miller Realty Associates v Amendola*, 51 AD3d 987; *Utica Mut. Ins. Co. v Magwood Enterprises, Inc.*, 15 AD3d 471; *M. Sobol, Inc. v Wykagyl Pharmacy,* 282 AD2d 438; *Giblin v Murphy*, 125 AD2d 884, *affd*, 73 NY2d 769.) All of these factors in this case, complex in its legal, financial, and technical aspects, support an award in the amount sought by the plaintiffs' attorneys. During the pendency of the New York and Delaware actions, as a result of the efforts of counsel, Google raised its offering price by nearly $20,000,000. Robert M. Rothman, a member of Robbins Geller Rudman & Dowd, LLP, the law firm representing plaintiff Michael Jiannaras, affirms that the attorneys for the plaintiffs spent 1,426,98 hours on this case for a "total lodestar" of $724,189.60 and incurred aggregate expenses of $27,303.40 in prosecuting the actions. (The term "lodestar" is "used in connection with an award of attorneys fees made by the court which is based on time spent on the case and an hourly fee." [www.classaction litigation.com/glossary.html].) The plaintiffs attorneys have agreed to accept only approximately 60% of the sum of the total lodestar and expenses.

According to the plaintiffs' attorneys, an award of attorney's fees in the amount of $450,000 is consistent with the amount awarded by other courts in the settlement of class action merger litigation. (*See, e.g.*, *In re Marvel Entertainment, Inc. Shareholder Litigation,* [NY County Index No.602706/09] [$800,000]; *In re Aeroflex Shareholder Litigation* [Nassau County Index No. 3943/07] [$850,000]; In re Bausch & Lomb, Inc. Buyout Litigation [Monroe County Index 6384/07] [$3,500,000].)

According to attorney Rothman: "No shareholder has objected to the request for fees."

E. Support from the Parties

Those On2 shareholders who voted overwhelmingly supported the settlement. (*See*, *Hibbs v Marvel Enterprises, Inc.,* 19 AD3d 232.) "Such an imprimatur of approval by the vast majority of the subject class indicates that the stock price represented fair value and that the terms of the Settlement are adequate." (*Brody v Catell supra*, 6.) The court also notes that the attorney who represents the plaintiffs in this case stated at the settlement hearing that to his knowledge none of the objectors exercised their appraisal rights after receiving Google's final offer.

At the time of the final vote on the merger, shareholders held approximately 178,000,000 shares of On2 stock. The 239 objectors represented at the hearing claimed to hold only approximately 14,000,000 to 15,000,000 shares.

F. Conclusion

The proposes settlement agreement is fair, adequate, reasonable, and in the best interests of the class members.

VI.Disposition

The court grants final class action certification to this case for an opt-out class. The parties are directed to provide adequate notice to shareholders.

The court will approve the settlement agreement revised, if necessary, in light of nonresident shareholders' opt-out rights.

Settle judgment and any necessary orders.

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J.S.C.