UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re ICONIX BRAND GROUP, INC., et al	Case No.: 1:15-cv-04860-PGG
This Document Relates to:	CLASS ACTION
ALL ACTIONS.	

LEAD PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
(I) FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND
(II) APPROVAL OF PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

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Pursuant to Rule 23(e) of the Federal Rules of Federal Procedure, Lead Plaintiffs City of Atlanta Firefighters' Pension Fund and City of Atlanta Police Officers' Pension Fund (together, "Plaintiffs" or "Lead Plaintiffs"), on behalf of themselves and the Class, respectfully submit this memorandum of law in support of their motion for final approval of the $6,000,000 Settlement (the "Settlement Amount") reached in this action (the "Litigation") and approval of the Plan of Allocation (the "Plan"). The terms of the Settlement are set forth in the Stipulation of Settlement and Release dated September 16, 2019 (the "Stipulation"). ECF No. 147.[1]

I. INTRODUCTION

Lead Plaintiffs' $6 million recovery is the result of their rigorous three-year effort to prosecute this highly contested litigation, in addition to extensive arms' length settlement negotiations by their experienced and knowledgeable counsel, overseen by nationally renowned mediators. The Settlement represents a very good result for the Class and easily satisfies each of the Rule 23(e)(2) factors, as well as the factors set forth in the Second Circuit decision of *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).[2]

The Settlement is especially beneficial to the Class in light of the substantial litigation risks Lead Plaintiffs faced. The gravamen of Lead Plaintiffs' claims was that, during the Class Period, Defendants caused Iconix to enter into sham overseas joint ventures to artificially inflate the Company's revenues. While Lead Plaintiffs believed in the merit of their claims, Defendants

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[1] All capitalized terms not otherwise defined herein shall have the meanings set forth in the Stipulation and the Joint Declaration of Robert M. Rothman and Steven B. Singer in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Joint Decl."), submitted herewith.

[2] BDO USA, LLP ("BDO"), which was also named as a defendant in the Second Amended Complaint, is neither a party to the Settlement nor included in the term "Defendants." As discussed herein, the claims against BDO, which was Iconix's independent auditor during the Class Period, have now been dismissed. ECF No. 151.

had strong and credible arguments that: (1) they had publicly disclosed the Company's accounting treatment of the alleged sham joint ventures, as well as the problematic structures of those joint ventures; (2) the joint ventures were independently approved by BDO, the Company's outside auditor; and (3) Lead Plaintiffs could not establish the critical element of scienter. Indeed, at the time the Settlement was reached, the Court had already dismissed Lead Plaintiffs' Consolidated Amended Class Action Complaint (the "Consolidated Complaint") on the basis that it failed to adequately allege Defendants' scienter, and Defendants' and BDO's formidable motions to dismiss the Second Amended Complaint on that same basis (among others) were pending before the Court.

Lead Plaintiffs and Lead Counsel thus had a thorough understanding of the strengths and weaknesses of the case before reaching the Settlement, as they had engaged in two rounds of briefing in connection with Defendants' and BDO's motions to dismiss, two rounds of mediation, and consultation with various experts. Based on this experience, Lead Plaintiffs knew that Defendants' motions to dismiss the Second Amended Complaint were strong, and that if Defendants and BDO were to prevail on those motions, Lead Plaintiffs would receive no recovery at all. Moreover, a skilled and highly reputable securities litigation mediator – Jed D. Melnick, Esq., of JAMS – also assessed the risks and merits of Lead Plaintiffs' claims, and issued a proposal indicating those claims were worth approximately $6 million.

Lead Plaintiffs' concerns about the significant risks associated with the Litigation proved to be well-founded. On September 30, 2019 – only seven days after the Court preliminarily approved the Settlement on September 23, 2019 (ECF No. 149) – the Court dismissed the Second Amended Complaint as to defendant BDO, which was not a party to the Settlement. In so doing, the Court expressly concluded that "the SAC does not demonstrate that the Iconix

Defendants [the settling Defendants here] committed fraud." ECF No. 151 at 30. Thus, without the $6 million Settlement – or a successful appeal, which would have taken years with no guarantee of recovery, particularly in light of Iconix's poor financial condition (with the Company's stock currently trading near $1 per share) and wasting insurance policy – the Class would have recovered *nothing*.

Given this reality, Lead Plaintiffs respectfully submit that the $6 million Settlement and the Plan of Allocation – which was prepared with the assistance of Lead Plaintiffs' damages expert, and is substantially similar to numerous other such plans that have been approved in this District – are fair and reasonable in all respects. Accordingly, Lead Plaintiffs request that the Court approve them under Rule 23(e) of the Federal Rules of Civil Procedure.

II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Lead Plaintiffs respectfully refer the Court to the accompanying Joint Declaration for a detailed discussion of the factual background and procedural history of the Litigation, the extensive efforts undertaken by Lead Plaintiffs and their counsel during the course of the Litigation, the risks of continued litigation, and the negotiations leading to the Settlement. Joint Decl., ¶¶6-36.

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

a. The Law Favors and Encourages Settlements

"Courts examine procedural and substantive fairness in light of the 'strong judicial policy favoring settlements' of class action suits." *McMahon v. Olivier Cheng Catering and Events, LLC*, 2010 WL 2399328, at *2 (S.D.N.Y. Mar. 3, 2010) (Gardephe, J.) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)); *see also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be

conserved by avoiding the time, cost and rigor of prolonged litigation."). Thus, the Second Circuit has instructed that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Grinnell*, 495 F.2d at 462.

As set forth below, the $6 million Settlement here, particularly in light of the significant litigation risks Lead Plaintiffs faced, is manifestly reasonable, fair and adequate under all of the pertinent factors Courts use to evaluate a settlement. Accordingly, the Settlement warrants final approval from this Court.

b. The Settlement Must Be Procedurally and Substantively Fair, Adequate and Reasonable

Federal Rule of Civil Procedure 23(e) requires judicial approval of a class action settlement. Rule 23(e)(2), as recently amended, provides that courts should consider certain factors when determining whether a class action settlement is "fair, reasonable and adequate" such that final approval is warranted:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

- (i) the costs, risks and delay of trial and appeal;
- (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
- (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and
- (iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

In addition, the Second Circuit considers the following factors (the "*Grinnell* factors"), which overlap with the Rule 23(e)(2) factors, when determining whether to approve a class action settlement: (1) the complexity, expense and likely duration of the litigation; (2) the

reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation. *Grinnell*, 495 F.2d at 463; *see also In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) (explaining that "the new Rule 23(e) factors [] add to, rather than displace, the *Grinnell* factors," and "there is significant overlap" between the two "as they both guide a court's substantive, as opposed to procedural, analysis").

For a settlement to be deemed substantively and procedurally fair, reasonable and adequate, not every factor need be satisfied. "[R]ather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)). Additionally, "[a]bsent fraud or collusion, courts should be hesitant to substitute their judgment for that of the parties who negotiated the settlement." *Yuzary v. HSBC Bank, USA, NA*, 2013 WL 5492998, at *4 (S.D.N.Y. Oct. 2, 2013) (Gardephe, J.); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (courts should not substitute their "business judgment for that of counsel, absent evidence of fraud or overreaching").

Under the recently amended Rule 23(e)(2), courts now "must assess at the preliminary approval stage whether the parties have shown that the court will likely find that the [Rule 23(e)(2)] factors weigh in favor of final approval." *In re Payment Cord Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019). As set forth in Lead

Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement (ECF No. 146 at 8-15), as acknowledged by this Court's Preliminary Approval Order (ECF No. 149), and as set forth further below, both the Rue 23(e)(2) factors and the *Grinnell* factors clearly weigh in favor of final approval of the Settlement.

c. The Proposed Settlement is Procedurally and Substantively Fair, Adequate, and Reasonable

1. The Settlement Satisfies the Requirements of Rule 23(e)(2)

(a) Lead Plaintiffs and Lead Counsel Have Adequately Represented the Class

The determination of adequacy "typically entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced, and able to conduct the litigation." *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007). Here, Lead Plaintiffs' interests are not antagonistic to, and in fact are directly aligned with, the interests of other members of the Class. Additionally, Lead Plaintiffs and Lead Counsel have adequately represented the Class by zealously prosecuting this action, including by, among other things, conducting an extensive investigation of the relevant factual events, drafting two highly detailed amended complaints, consulting with damages experts, engaging in two rounds of briefing to oppose Defendants' motions to dismiss the Consolidated Complaint and the Second Amended Complaint, and preparing for and participating in multiple rounds of hard-fought, in-person mediation sessions before experienced securities litigation mediators. Joint Decl. ¶¶6-8, 25-36. Through each step of the Litigation, Lead Plaintiffs and Lead Counsel have strenuously advocated for the best interests of the Class. Lead Plaintiffs and Lead Counsel therefore satisfy Rule 23(e)(2)(A) for purposes of final approval.

(b) The Proposed Settlement Was Negotiated at Arm's Length Before an Experienced Mediator

Lead Plaintiffs satisfy Rule 23(e)(2)(B) because the Settlement is the product of arm's-length negotiations between the parties' counsel before a neutral mediator, resulting in the parties' acceptance of the mediator's proposal, for which there was no hint of collusion. Joint Decl. ¶¶7-8, 35-36. Indeed, the use of the mediation process provides compelling evidence that the Settlement is not the result of collusion. *See In re Facebook, Inc., IPO Sec. and Deriv. Litig.*, 343 F. Supp. 3d 394, 408-09 (S.D.N.Y. 2018) (settlement was procedurally fair where it was "based on the suggestion by a neutral mediator"). *McMahon*, 2010 WL 2399328, at *4 (Gardephe, J.) ("Arm's length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process.") (citing *Wal-Mart Stores*, 396 F.3d at 116); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). Moreover, the Settlement negotiations were "carried out under the direction of Lead Plaintiffs, sophisticated institutional investors whose involvement suggests procedural fairness." *Facebook*, 343 F. Supp. 3d at 409.

It is well-settled in this Circuit that "a class action settlement enjoys a strong presumption of fairness where it is the product of arm's length negotiations conducted by experienced corporate counsel." *In re Advanced Battery Tech., Inc. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014) (citing *Wal-Mart Stores*, 396 F.3d at 116); *see also Charron v. Pinnacle Group NY LLC*, 874 F. Supp. 2d 179, 194 (S.D.N.Y. 2012) ("Recommendations of experienced counsel are entitled to great weight in evaluating a proposed settlement in a class action because such counsel are most closely acquainted with the facts of the underlying litigation."); *McMahon*,

2010 WL 2399328, at *4 (Gardephe, J.) (settlement was "procedurally fair, reasonable, adequate and not a product of collusion" where it was reached after "arm's-length negotiations between the parties"). Accordingly, this factor weighs heavily in favor of the Court issuing final approval of the Settlement.

(c) The Proposed Settlement is Adequate in Light of the Litigation Risks, Costs, and Delays of Trial and Appeal

Rule 23(e)(2)(C)(i) and the first, fourth and fifth *Grinnell* factors overlap, as they address the substantive fairness of the Settlement in light of the risks posed by continuing litigation. As set forth below, these factors weigh in favor of final approval.

(i) The Risks of Establishing Liability at Trial

In considering this factor, "the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2009). As a preliminary matter, the significant unpredictability and complexity posed by securities class actions generally weigh in favor of final approval. Indeed, "[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." *Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *10 (S.D.N.Y. Oct. 16, 2019); *see also In re FLAG Telecom Holdings*, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (same); *In re AOL Time Warner Inc. Sec & "ERISA" Litig.*, 2006 WL 903236, at *11 (S.D.N.Y.. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation.").

These risks were especially significant here. As set forth above, at the time of the Settlement, the Court had already dismissed the Consolidated Complaint based on its determination that Defendants had publicly disclosed the alleged improper accounting methods

for the sham joint ventures, that their accounting was separately approved by Iconix's independent auditor, BDO, and Lead Plaintiffs had not adequately alleged scienter. *See, e.g.*, *Kalnit v. Eichler*, 99 F. Supp. 2d 327, 327 (2d Cir. 2000) ("The element of scienter is often the most difficult and controversial aspect of a securities fraud claim."). Additionally, Defendants' and BDO's formidable motions to dismiss the Second Amended Complaint on the same grounds (among others) were then pending before the Court as the parties resumed their mediation. In light of the difficulty of pleading scienter in securities fraud class actions under the high bar of the PSLRA, and the Court's prior dismissal of the Consolidated Complaint, Lead Plaintiffs knew they faced a substantial risk that the Court would grant Defendants' motions, leaving Plaintiffs with no recovery at all.

Lead Plaintiffs' concerns were well-founded. Only a week after the Court issued its order preliminarily approving the Settlement, the Court granted BDO's motion to dismiss the Second Amended Complaint – and in so doing, expressly found that the Second Amended Complaint again failed to allege the key element of scienter against not only BDO, but every Defendant in the case, including the settling Defendants. ECF No. 151 at 30. Thus, had the parties not reached the Settlement, Plaintiffs' recovery would have been *zero* absent a successful appeal, which would have involved all the same difficult issues.[3]

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[3] Plaintiffs note that while the fact that Defendants were recently indicted for the conduct alleged in the Second Amended Complaint (*see* Joint Decl. ¶14) would have improved Plaintiffs' chances of a successful appeal, as discussed below, the appeals process would have inevitably taken years with no guarantee that Plaintiffs would recover anything at all – particularly in light of Iconix's worsening financial condition (with its stock currently trading near $1 per share) and its wasting insurance policy due to this Litigation and the SEC investigation.

(ii) The Risks of Establishing Damages at Trial

The risks of establishing liability apply with equal force to establishing damages. Had Plaintiffs not settled the case, the Court would have dismissed the action, in which case Plaintiffs' damages would have been zero. Even if Plaintiffs managed to prevail on appeal, Plaintiffs would have relied heavily on expert testimony to establish their damages, likely leading to a battle of the experts at trial and a *Daubert* challenge. If the Court were to determine that one or more of Lead Plaintiffs' experts should be excluded from testifying at trial, Lead Plaintiffs' case would become much more difficult to prove.

In light of the very significant risks Lead Plaintiffs faced at the time of Settlement with regard to establishing liability and damages – the most significant of which materialized only a week after this Court granted preliminary approval of the Settlement – this factor clearly weighs in favor of final approval.

(iii) The Settlement Eliminates the Additional Costs and Delay of Continued Litigation

The anticipated complexity, cost, and duration of the Litigation – with Plaintiffs' claims having a very low probability of success (given the Court's decision dismissing the Second Amended Complaint as to BDO) – would be considerable. *See Advanced Battery*, 298 F.R.D. at 175 ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement"). Indeed, if not for the Settlement, the Litigation, which has already been pending for well over three years, would have continued through the appeals process, which alone would likely have lasted another year or more. Even if Plaintiffs were successful on appeal, the subsequent motions for class certification and summary judgment, as well as the preparation for what would likely be a multi-week trial, would have caused the action to persist for several years more before Plaintiffs could receive any recovery. Such a lengthy and

highly uncertain appeals and trial process would not serve the best interests of the Class compared to the immediate, certain monetary benefits of the Settlement. *See Stougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the action through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."). The risks of delay are especially salient here, as Iconix's financial condition has been steadily worsening over the last few years (with its stock currently trading near $1 per share), and its insurance policy has been significantly depleted as a result of this Litigation and the SEC investigation.

Accordingly, the Rule 23(e)(2)(C)(i) factor, as well as the first, fourth and fifth *Grinnell* factors, weigh in favor of final approval.

(d) The Proposed Method for Distributing Relief is Effective

With respect to Rule 23(e)(2)(C)(ii), Lead Plaintiffs and Lead Counsel have taken appropriate steps to ensure that the Class is notified about the Settlement. Pursuant to the Preliminary Approval Order (ECF No. 149), more than 68,000 copies of the Notice and Proof of Claim were mailed to potential Class Members and nominees, and the Summary Notice was published in *The Wall Street Journal* and transmitted over a national newswire service. Additionally, a settlement-specific website was created where key Settlement documents were posted, including the Stipulation, Notice, Proof of Claim, and Preliminary Approval Order. Class Members have until December 30, 2019 to object to the Settlement or request exclusion

from the Class. While that date has not yet passed, to date there have been no objections to the Settlement, and only one request for exclusion.[4] Joint Decl. ¶4. This claims process is similar to that typically used in securities class action settlements. *See Christine Asia Co.*, 2019 WL 257534, at *14 ("[t]his type of claims processing and method for distributing settlement proceeds is standard in securities and other class actions and is effective"). This factor therefore supports final approval.

(e) Lead Counsel's Request for Attorneys' Fees is Reasonable

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Consistent with the Notice, and as discussed in Lead Counsel's fee brief, Lead Counsel seeks an award of attorneys' fees in the amount of 25% of the Settlement Amount, and expenses in the amount of $165,465.92, in addition to interest on both amounts.

As set forth in Lead Counsel's fee brief, this request is in line with, and in some cases below, recent fee awards in this District, including fee awards from this Court in similar common-fund cases. *See, e.g.*, *In re Virtus Investment Partners, Inc. Sec. Litig.*, 2018 WL 6333657, at *4-*5 (Dec. 4, 2018) (awarding attorneys' fees of 25% of $5.5 million settlement); *In re BioScrup, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 496 (S.D.N.Y. 2017) (awarding attorneys' fees of 25% of $10.9 million settlement and finding that percentage fell "within the range of percentages regularly awarded in analogous common fund cases"); *Christine Asia Co., Ltd.*, 2019 WL 5257534, at *17 (awarding attorneys' fees of 25% of $250 million settlement and stating that "[d]istrict courts in the Second Circuit routinely award fees upwards of 25%" in securities litigations); *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 2016 WL

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[4] The single request for exclusion received to date is from an individual purchaser of 500 shares of Iconix common stock. *See* accompanying Declaration of Mishka Ferguson Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Ferguson Decl."), Ex. D.

10519025, at *1 (S.D.N.Y. Mar. 14, 2016) (awarding attorneys' fees of 30% of $4.2 million settlement); *McMahon*, 2010 WL 2399328, at *7 (Gardephe, J.) (awarding attorneys' fees of 33% of $400,000 settlement and finding that percentage "consistent with the norms of class litigation in this circuit"); *Martignago v. Merrill Lynch & Co., Inc.*, 2013 WL 12316358, at *8-*10 (S.D.N.Y. Oct. 3, 2013) (Gardephe, J.) (awarding attorneys' fees of 25% of $12 million settlement and stating that percentage was "reasonable and, in fact, below the norm class litigation in this circuit"); *Yuzary*, 2013 WL 5492998, at *10 (Gardephe, J.) (awarding attorneys' fees of 31.7% of $15.6 million settlement and finding this percentage "consistent with the norms of class litigation in this circuit").[5]

Because Lead Counsel's fee request is reasonable, and because Lead Plaintiffs have ensured that the Class is fully apprised of the terms of the proposed award of attorneys' fees, including the timing of such payments, this factor supports final approval of the Settlement.

(f) The Parties Have No Other Agreements Besides Opt-Outs

Rule 23(e)(2)(C)(iv) requires the consideration of any agreement required to be disclosed under Rule 23(e)(3). As disclosed in connection with Lead Plaintiffs' motion for preliminary approval of the settlement, ECF No. 146 at 7, the parties have entered into a standard supplemental agreement providing that, in the event Class Members with a certain aggregate amount of valid claims opt out of the Settlement, Defendants shall have the option to terminate the Settlement. Because this agreement has no bearing on the fairness of the Settlement, this factor weighs in favor of final approval. *See Christine Asia Co., Ltd.*, 2019 WL 5257534, at *15

[5] The Notice also explains that any attorneys' fees and expenses awarded by the Court shall be paid to Lead Counsel when the Court executes the Judgment and Order awarding such fees and expenses. *See* Ex. A-1 (ECF No. 148-2) at 13; *see also Pelzer v. Vassalle*, 655 Fed Appx. 352, 365 (6th Cir. 2016) (finding the "quick-pay provision" did "not harm the class members in any discernible way, as the size of the settlement fund available to the class will be the same regardless of when the attorneys get paid").

(stating that opt-out agreements are "standard in securities class action settlements and ha[ve] no negative impact on the fairness of the Settlement").

(g) The Settlement Ensures Class Members are Treated Equitably

Rule 23(e)(2)(D), the final factor, considers whether Class Members are treated equitably. As discussed further below in Part IV, Lead Counsel developed the Plan of Allocation in consultation with their damages expert to treat Class Members equitably relative to each other by: (i) taking into account the timing of their purchases, acquisitions, and sales of Iconix securities; and (ii) providing that each Authorized Claimant shall receive his, her, or its *pro rata* share of the Net Settlement Fund based on their recognized losses. Lead Plaintiffs will be subject to the same formula for distribution of the Net Settlement Fund as every other Class Member. This factor therefore merits granting final approval of the Settlement.

Based on the foregoing, Lead Plaintiffs and Lead Counsel respectfully submit that each of the Rule 23(e)(2) factors support granting final approval of the Settlement.

2. The Settlement Satisfies the Remaining *Grinnell* Factors

(a) The Lack of Objections to Date Supports Final Approval

The reaction of the Class to the Settlement "is considered perhaps the most significant factor to be weighed in considering its adequacy," *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007), such that the "absence of objections may itself be taken as evidencing the fairness of a settlement." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014).

While the deadline to submit objections and exclusions has not yet passed, no objections have been received to date, and only one request for exclusion has been received. Joint Decl. ¶4; Ferguson Decl., Ex. D. This positive reaction of the Class supports approval of the Settlement. *See Yuzary*, 2013 WL 5492998, at *6 (Gardephe, J.) (the "favorable response" from the class

"demonstrates that the class approves of the settlement and supports final approval"); *Facebook*, 343 F. Supp. 3d at 410 ("[t]he overwhelming positive reaction – or absence of a negative reaction – weighs strongly in favor" of final approval).

(b) Lead Plaintiffs Had Sufficient Information to Make an Informed Decision Regarding the Settlement

Under the third *Grinnell* factor, "the question is whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012); *Martignago*, 2013 WL 12316358, at *6 (Gardephe, J.) ("The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating."). "To satisfy this factor, parties need not have even engaged in formal or extensive discovery." *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *7 (S.D.N.Y. Dec. 19, 2014) (noting that in cases brought under the PSLRA, discovery cannot commence until the motion to dismiss is denied); *see also Global Crossing*, 225 F.R.D. at 458 ("Formal discovery is not a perquisite; the question is whether the parties had adequate information about their claims.").

Lead Plaintiffs and Lead Counsel had sufficient information to assess the adequacy of the Settlement. As detailed in the Joint Declaration, Lead Plaintiffs and Lead Counsel negotiated the Settlement only after conducting an extensive factual investigation, which included the review of Iconix's SEC filings, news reports, and other publicly available information. Joint Decl. ¶¶6-8, 25-36. Additionally, Lead Counsel conducted numerous witness interviews, and retained a consultant on the issue of damages. *Id.* Lead Counsel's thorough investigation continued with the drafting of two detailed amended complaints, and vigorously opposing two rounds of

motions to dismiss. Lead Plaintiffs also participated in multiple hard-fought, in-person mediation sessions with Defendants, overseen by experienced and nationally renowned mediators, which ultimately resulted in the Settlement. *Id.* During those sessions, Defendants' counsel pressed the arguments raised in their motions to dismiss, including their argument that Plaintiffs failed to adequately allege scienter, in addition to further arguments they intended to make if the case were to progress. *Id.*

Thus, by the time of the Settlement, Lead Plaintiffs were well-versed in the strengths and weaknesses of the case. This factor weighs in favor of final approval.

(c) Maintaining Class-Action Status Through Trial Presents a Substantial Risk

Lead Plaintiffs' ability to maintain class-action status through trial presented a substantial risk in this Litigation. Although Lead Plaintiffs believe they would have prevailed on a motion to certify the class, Defendants were poised to vigorously oppose the motion. Moreover, even if the motion had been granted, Defendants could still have moved to decertify the Class or trim the Class Period before trial or on appeal, as class certification may be reviewed at any stage of the litigation. *See Christine Asia Co., Ltd.*, 2019 WL 5257534, at *13 (stating that this risk weighed in favor of final approval because "a class certification order may be altered or amended any time before a decision on the merits"); Fed. R. Civ. P. 23(c) (authorizing a court to decertify a class at any time). "The risk of maintaining class status throughout trial [] weighs in favor of final approval." *McMahon*, 2010 WL 2399328, at *5 (Gardephe, J.).

(d) Defendants' Ability to Withstand a Greater Judgment

It is not clear that Iconix could withstand a judgment greater than $6 million. The Company is in poor financial condition, with its stock price trading around $1 per share (as opposed to over $190 per share at the outset of the Class Period), and its insurance policy has

been greatly depleted by an ongoing SEC investigation and defending the Litigation. *See McMahon*, 2010 WL 2399328, at *5 (Gardephe, J.) ("The risk that Defendants would not be able to satisfy a judgment in excess of the settlement amount weighs heavily in favor of final approval."). Even if Defendants could have withstood a greater judgment, however, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Castagna v. Madison Square Garden, L.P.*, 2011 WL 2208614, at *7 (S.D.N.Y. June 7, 2011); *see also City of Providence v. Aseropastale*, 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014) (courts "generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement"). This factor weighs in favor of final approval.

(e) The Settlement Amount is Reasonable in View of the Best Possible Recovery and the Risks of Litigation

The adequacy of the amount offered in a settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of strengths and weaknesses of plaintiff's case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984); *aff'd*, 818 F.2d 145 (2d Cir. 1987). A court need only determine whether the settlement falls within a "range of reasonableness" that "recognizes the uncertainties of law and fact" in the case and "the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *see also Global Crossing*, 225 F.R.D. at 461 ("the certainty of [a] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery").

Here, "[b]ecause Plaintiffs face serious challenges to establishing liability, consideration of Plaintiffs' best possible recovery must be accompanied by the risk of non-recovery." *Facebook*, 343 F. Supp. 3d at 414; *see also In re Bear Stearns*, 909 F. Supp. 2d 259, 270

(S.D.N.Y. 2012) (stating this *Grinnell* factor is "a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery"). Indeed, at the time of the parties' Settlement negotiations, the Court had already dismissed the Consolidated Complaint for failure to adequately plead scienter, a key element of Plaintiffs' claims, and Defendants' and BDO's formidable motions to dismiss the Second Amended Complaint on the same basis were pending before the Court. The risk of non-recovery was therefore highly significant, as subsequent events have demonstrated: only a week after this Court granted preliminary approval of the Settlement, it issued a decision granting BDO's motion to dismiss the Second Amended Complaint, expressly finding that the Second Amended Complaint had failed to allege scienter with respect to *all* Defendants – including the settling Defendants. ECF No. 151 at 30.

Moreover, the $6 million Settlement Amount "was agreed upon only after careful consideration, both by competent lead counsel and by [a neutral mediator]" – all of whom concluded the settlement represented a very good recovery for the Class in light of the substantial litigation risks Plaintiffs faced. *See Facebook*, 343 F. Supp. 3d at 414; *see also id.* (finding that even if the settlement "amounts to one tenth – or less – of Plaintiffs' potential recovery," such a recovery is within "the range of reasonableness" where "the risks of a zero – or minimal – recovery scenario are real."). This factor weighs in favor of final approval.

IV. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

The standard for approval of the Plan is the same as the standard for approving the Settlement as a whole: namely, "it must be fair and adequate." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). "When formulated by competent and experienced

class counsel, a plan for allocation of net settlement proceeds need only have a reasonable, rational basis." *Advanced Battery*, 298 F.R.D. at 180.

Here, as set forth in the Notice, the Plan was prepared with the assistance of Lead Plaintiffs' damages consultant and has a rational basis, as it is based on the same methodology underlying Lead Plaintiffs' measure of damages: the amount of artificial inflation in the price of Iconix securities during the Class Period. Joint Decl. ¶¶40-42; *see Facebook*, 343 F. Supp. 3d at 414 (plan of allocation was fair where it was "prepared by experienced counsel along with a damages expert – both indicia of reasonableness"). This is a fair method to apportion the Net Settlement Fund among Authorized Claimants, as it is based on, and consistent with, the claims alleged.

The Net Settlement Fund will be distributed to Authorized Claimants who timely submit valid Proofs of Claim and Release that are approved for payment from the Net Settlement Fund under the Plan. Joint Decl. ¶¶40-42. The Plan treats all Class Members equally, as everyone who submits a valid and timely Proof of Claim and Release Form, and does not otherwise exclude himself, herself, or itself from the Class, will receive a *pro rata* share of the Net Settlement Fund in the proportion that the Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants, so long as such Authorized Claimant's payment amount is $10.00 or more. *See id.*; *see also* Exhibit A-1, ECF No. 148-2, at 10-11.

Lead Plaintiffs and Lead Counsel believe that the Plan is fair and reasonable, and respectfully submit that it should be approved by the Court. Indeed, notably, there have been no objections to the Plan to date, which supports the Court's approval. Joint Decl. ¶42; *Veeco*, 2007 WL 4115809, at *7.

V. THE COURT SHOULD FINALLY CERTIFY THE CLASS FOR PURPOSES OF EFFECTUATING THE SETTLEMENT

In their motion for preliminary approval of the Settlement, Lead Plaintiffs requested that the Court certify the Class for settlement purposes only so that notice of the Settlement, the Settlement Hearing, and the rights of Class Members to object to the Settlement, request exclusion from the Class, or submit Proof of Claim and Release Forms, could be issued. *See* ECF No. 146 at 17-23. In the Preliminary Approval Order, the Court addressed the requirements for class certification as set forth in Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The Court found that Lead Plaintiffs had met the requirements for certification of the Class for purposes of settlement. ECF No. 149 at 3. Specifically, in the Preliminary Approval Order, the Court preliminarily certified a class of "all Persons who, during the Class Period, purchased or otherwise acquired Iconix securities." *Id.* at 1. In addition, the Court preliminarily certified Lead Plaintiff as class representative and Lead Counsel as class counsel. *Id.* at 2.

Since the Court's entry of the Preliminary Approval Order, nothing has changed to alter the propriety of the Court's preliminary certification of the Class for settlement purposes. Thus, for all of the reasons stated in Lead Plaintiffs' motion for preliminary approval (incorporated herein by reference), Lead Plaintiffs respectfully request that the Court affirm its preliminary certification and finally certify the Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), and appoint Lead Plaintiffs as class representatives and Lead Counsel as class counsel.

VI. NOTICE TO THE CLASS SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Rule 23 requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," Fed. R. Civ. P. 23(c)(2)(B), and that it be directed to class members in a

"reasonable manner." Fed. R. Civ. P. 23(e)(1). Notice of a settlement satisfies Rule 23(e) and due process where it fairly apprises "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." *Wal-Mart Stores*, 396 F.3d at 114; *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26-27 (2d Cir. 2014). Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (citing *Wal-Mart Stores*, 396 F.3d at 114).

The Notice and the method used to disseminate the Notice to potential Class Members satisfy these standards. The Court-approved Notice and Proof of Claim and Release (the "Notice Packet") amply inform Class Members of, among other things: (i) the pendency of the Litigation; (ii) the nature of the Litigation and the Class' claims; (iii) the essential terms of the Settlement; (iv) the proposed Plan; (v) Class Members' rights to request exclusion from the Class or object to the Settlement, the Plan, or the requested attorneys' fees or expenses; (vi) the binding effect of a judgment on Class Members; and (vii) information regarding Lead Counsel's motion for an award of attorneys' fees and expenses. The Notice also provides specific information regarding the date, time, and place of the Settlement Hearing, and sets forth the procedures and deadlines for: (i) submitting a Proof of Claim and Release; (ii) requesting exclusion from the Class; and (iii) objecting to any aspect of the Settlement, including the proposed Plan and the request for attorneys' fees and expenses.

The Notice also contains all the information required by the PSLRA, including: (i) a statement of the amount to be distributed, determined in the aggregate and on an average per share basis; (ii) a statement of the potential outcome of the case; (iii) a statement indicating the

attorneys' fees and expenses sought; (iv) identification and contact information of counsel; and (v) a brief statement explaining the reasons why the parties are proposing the Settlement.

In accordance with the Preliminary Approval Order, Gilardi & Co. LLC ("Gilardi"), the Court-approved Claims Administrator, commenced the mailing of the Notice Packet by First-Class Mail to potential Class Members, brokers, and nominees on October 8, 2019. As of December 17, 2019, more than 68,000 copies of the Notice Packet have been mailed. Ferguson Decl. ¶10. Gilardi also published the Summary Notice in *The Wall Street Journal* and transmitted it over a national newswire service. *Id.* ¶11, Ex. C. Additionally, Gilardi posted the Notice Packet, as well as other important documents, on the website maintained for the Settlement. *Id.* ¶13.

The combination of individual First-Class Mail to all potential Class Members who could be identified with reasonable effort, supplemented by mailed notice to brokers and nominees and publication of the Summary Notice in a relevant, widely-circulated publication and internet newswire, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also Padro v. Astrue*, 2013 WL 5719076, at *3 (E.D.N.Y. Oct. 18, 2013) ("Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notices, so long as class counsel acted reasonably in choosing the means likely to inform potential class members."). Indeed, this method of providing notice has been routinely approved for use in securities class actions and other similar class actions. *E.g.*, *Christine Asia Co., Ltd.*, 2019 WL 5257534, at *16 (finding that direct First Class Mail combined with print and Internet-based publication of Settlement documents was "the best notice practicable under the circumstances"); *Dornberger v. Metro Life Ins. Co.*, 203 F.R.D. 118, 123-24 (S.D.N.Y. 2001) (same).

VII. CONCLUSION

The $6 million Settlement obtained by Lead Plaintiffs and Lead Counsel represents a substantial recovery for the Class, particularly in light of the significant litigation risks Plaintiffs faced, including the very real risk of the Class receiving no recovery at all. For the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate.

DATED: December 19, 2019

Respectfully submitted,

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