UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

LEAD PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF (I) MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND (II) MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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Lead Plaintiffs City of Atlanta Firefighters' Pension Fund and City of Atlanta Police Officers' Pension Fund, on behalf of themselves and the Class, and Lead Counsel respectfully submit this reply memorandum of law in further support of: (1) Lead Plaintiffs' motion for final approval of the proposed Settlement and approval of the Plan of Allocation; and (2) Lead Counsel's motion for an award of attorneys' fees and expenses.[1]

I. INTRODUCTION

In exchange for a cash payment of $6 million, the proposed Settlement resolves all the claims asserted in this Litigation, other than those against BDO, which the Court dismissed on September 30, 2019. ECF No. 151. As detailed in Lead Plaintiffs' and Lead Counsel's opening papers (ECF Nos. 153-157), the $6 million Settlement is the product of hard-fought litigation and extensive arm's-length settlement negotiations, and represents a favorable result for the Class in light of the substantial challenges that Lead Plaintiffs would have faced in proving liability and damages. Indeed, as explained in the opening papers, the Court's dismissal of the claims against Defendants was all but certain absent the proposed Settlement. Further, given Iconix's worsening financial condition and rapidly wasting insurance policy, it was highly unlikely that Lead Plaintiffs could have recovered more even if they had been successful at trial.

Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice (the "Preliminary Approval Order"), dated September 23, 2019 (ECF No. 149), the Claims

[1] Unless otherwise noted, capitalized terms shall have the meanings ascribed to them in the Stipulation of Settlement and Release (ECF No. 147), the Joint Declaration of Class Counsel 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 (ECF No. 157), and the memoranda of law submitted therewith (ECF Nos. 154 and 156).

In addition, unless otherwise indicated, all references to "¶" and "¶¶" refer to paragraphs in the Second Amended Complaint (ECF No. 114), and all citations and internal quotation marks are omitted from quoted material.

Administrator, under the supervision of Lead Counsel, conducted an extensive notice program, which included mailing over 70,000 copies of the Notice and the Proof of Claim and Release form ("Claim Form") (together, "Notice Package") to potential Class Members and nominees. In response to this notice program, only one Class Member – a professional objector known to this Court (James J. Hayes) – has objected to any aspect of the Settlement, Plan of Allocation, or fee and expense application. *See* Section III below. And only three individual (non-institutional) shareholders have requested exclusion.

As explained below, the overwhelmingly favorable reaction of the Class further demonstrates that the proposed Settlement, Plan of Allocation, and request for attorneys' fees and expenses are fair and reasonable and should be approved.

II. THE REACTION OF THE CLASS SUPPORTS APPROVAL OF THE MOTIONS

Lead Plaintiffs and Lead Counsel respectfully submit that their opening papers demonstrate why approval of the motions is warranted. But now that the time for objecting to the Settlement or requesting exclusion from the Class has passed, the fact of only a single objection and three opt outs provides even more support for granting the two motions.

Pursuant to the Court's Preliminary Approval Order, over 70,000 copies of the Notice Package have been mailed to potential Class Members and their nominees. *See* Supplemental Declaration of Mishka Ferguson Regarding Notice Dissemination and Requests for Exclusion Received to Date ("Supp. Ferguson Decl."), submitted herewith, ¶¶3-4. The Notice informed Class Members of the terms of the proposed Settlement and Plan of Allocation, and that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Amount, as well as payment of litigation expenses in an amount not to exceed $250,000, plus

interest earned on both amounts (at the same rate as earned by the Settlement Fund). *See* Notice (ECF No. 157-2, Ex. A) at 2.

The Notice also apprised Class Members of their right to object to the proposed Settlement, the Plan of Allocation, and/or the request for attorneys' fees and expenses, the right to exclude themselves from the Class, and the December 30, 2019 deadline for filing objections and making requests for exclusion. *See id*. at 1, 8-9. The Summary Notice, which likewise informed readers of the proposed Settlement, how to obtain copies of the Notice Package, and the deadlines for the submission of Claim Forms, objections, and requests for exclusion, was published in *The Wall Street Journal* and transmitted over *Business Wire*. *See* ECF No. 157-2 (Declaration of Mishka Ferguson Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date), ¶11. In addition, the Claims Administrator established a case-specific website that provided information and links to relevant documents. *Id.*, ¶13.

As noted above, after this notice program, only one Class Member – with a history of serial objections – objected to any aspect of the Settlement, the Plan of Allocation, or fee and expense application. That objection is discussed in the following section. In addition, only three requests for exclusion were received. *See* ECF No. 157-2, ¶15 & Ex. D (thereto); Supp. Ferguson Decl., ¶6.

The assertion of only one objection and three requests for exclusion supports a finding that the Settlement is fair, reasonable, and adequate. Indeed, "the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in [the] *Grinnell* inquiry." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005). Although a "certain number of objections are to be expected in a class action with an extensive notice campaign and a potentially large number of class members," *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *16 (E.D.N.Y. Dec. 16, 2019), "'[i]f only

a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'" *Id.* (quoting *Wal-Mart*, 396 F.3d at 118).[2] As Judge Sweet has recognized: "The overwhelmingly positive reaction – or absence of a negative reaction – weighs strongly in favor of confirming the Proposed Settlement." *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 410 (S.D.N.Y. Nov. 26, 2018).

In addition, no institutional investors have objected to the Settlement or have requested exclusion. The absence of objections by these sophisticated Class Members is further evidence of the fairness of the Settlement. *See, e.g.*, *id.* ("That not one sophisticated institutional investor objected to the Proposed Settlement is indicia of its fairness."); *see also In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013) (holding that the reaction of the class supported the settlement where "not a single objection was received from any of the institutional investors that hold the majority of Citigroup stock").

Finally, the positive reaction of the Class should also be considered with respect to Lead Counsel's motion for an award of attorneys' fees and expenses. "'That only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable.'" *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *13 (S.D.N.Y. Sept. 9, 2015) (quoting *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 594 (S.D.N.Y. 2008)). In particular, the lack of any objections by institutional investors supports approval of the fee and expense request. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (the fact that "a significant number of investors in the class were 'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive" and did not do so supported approval of the fee

[2] *See also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 176 (S.D.N.Y. 2014) (same); *Athale v. Sinotech Energy Ltd.*, 2013 WL 11310686, at *4 (S.D.N.Y. Sept. 4, 2013) (same).

request); *In re Bisys Sec. Litig.*, 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (absence of objections by institutional investors supported approval of the request because "the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive").

III. THE SINGLE OBJECTION – BY A PROFESSIONAL OBJECTOR – IS WITHOUT MERIT

A. Mr. Hayes Is a Professional Objector

Although the lone objection to the proposed Settlement and requested fee award – by James J. Hayes – can and should be rejected entirely on the merits (*see* Section III.B below), the Court may also consider the fact that Hayes is a professional objector.[3] Indeed, the Court already has. At the final-approval hearing in *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, No. 1:11-cv-4665 (S.D.N.Y. Dec. 28, 2015) (ECF No. 90), during which the Court rejected Mr. Hayes' objections, the Court stated:

> The remaining objector, Mr. James J. Hayes, is a 'serial objector' who regularly filed objections in class action settlements, citing *In Re Initial Public Offering Securities Litigation*, 728 F. Supp. 2d 289, 294 (S.D.N.Y. 2010). 'Federal courts are increasingly weary of professional objectors,' citing *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 note 26, (E.D. Pa. 2003). Given that a court need only find that a settlement is fair and reasonable and that a plan of allocation is fair and reasonable, not that the plan of allocation is perfect, I conclude that Mr. Hayes' objections do not present grounds for me rejecting the settlement, citing *In Re Merrill Lynch & Company, Inc. Research Reports Securities Litigation*, 2007 WL 313474 at *11, (S.D.N.Y, Feb. 1, 2007).

Id. at 12:2-15.

[3] Mr. Hayes filed his objection as ECF No. 158 ("Objection"), but it is also attached as Exhibit 1 to the Reply Declaration of Kyla Grant in Further Support of Lead 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 ("Grant Decl."), submitted herewith.

This Court is not the only one to recognize Mr. Hayes' status as a professional objector – a role he himself has embraced as his "business."[4] In a November 2018 decision, for example, Judge Sweet – in the course of rejecting Mr. Hayes' objections – characterized him as having "a well-known history of filing class action objections in federal court." *Facebook*, 343 F. Supp. 3d at 410. In support of that characterization, Judge Sweet quoted the Second Circuit's description of Mr. Hayes as a "frequent class action objector," *id.* (quoting *Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 23 n.1 (2d Cir. 2013)), as well as this Court's decision in *City of Brockton*, *id.*, and cited Judge Scheindlin's requirement that he post an appeal bond under Fed. R. App. P. 7. *Id.* (citing *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 294 (S.D.N.Y. 2010) (referring to Mr. Hayes as a "serial objector")).

Moreover, Mr. Hayes has been sanctioned for "'unreasonable and vexatious'" litigation that was "'the quintessential case for the application of sanctions.'" *In re Genesis Health Ventures, Inc.*, 362 B.R. 657, 662 (D. Del. 2007) (quoting and affirming sanctions determination of Bankruptcy Court). The Bankruptcy Court's description of Mr. Hayes' conduct is worth quoting: "'Suffice it to say that Mr. Hayes has turned the system inside and out . . . There is no opportunity in this system to keep coming back to the same issue. The same party, the same issue, the same response. . . . Enough is enough. Indeed there is the need for sanctions . . . .'" *Id.* (quoting Bankruptcy Court transcript). In affirming, the District Court wrote: "In the Court's view, the Bankruptcy Court's findings are sufficient to support a conclusion of bad faith." *Id.*

[4] *See* David Glovin, *'Vexatious' Geologist Makes Class-Action Fights His Business*, Bloomberg, Nov. 10, 2011 (Grant Decl., Ex. 2).

B. Mr. Hayes' Objection Is Without Merit

Even putting aside Mr. Hayes' status as a professional objector, his objection reflects a fundamental misunderstanding of both Lead Plaintiffs' claims and the federal securities laws, and is itself misleading.

Mr. Hayes purports to object to the proposed Settlement "on behalf of Class Members purchasing Iconix shares after January 2, 2015, a period in which Iconix did not form the overseas joint ventures that were the basis of Lead Plaintiffs[‘] scheme fraud allegations." Objection at 1. He then suggests that Lead Counsel "overlooked fraud on the market allegations when constructing" the operative complaints, and that such allegations would have been "infinitely superior to scheme fraud for Iconix purchasers near the end of the class period." *Id.* And he envisions a new amended complaint that "would not allege scheme fraud under Section 10b-5(a) and Rule 10b-5(a)," such that "it would not be necessary to include allegations of scienter." *Id.* at 2 (last paragraph). Almost every aspect of Mr. Hayes' analysis is fundamentally mistaken.

First, Mr. Hayes' belief that Lead Plaintiffs alleged only "scheme" liability, as opposed to what he refers to as "fraud on the market claims" – by which he appears to mean Rule 10b-5(b) claims alleging materially false or misleading statements or omissions[5] – is simply wrong. The Second Amended Complaint alleges claims under all three subsections of Rule 10b-5: for "scheme" liability under subsection (a), for statement or omission liability under subsection (b), and for

[5] Mr. Hayes states: "Section 10b-5(b) [*sic*] and Rule 10b-5(b) of the Exchange Act define fraud on the market claims for any person 'to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made… not misleading.'" Objection at 2 (last paragraph). As the Second Circuit has explained, the term "fraud-on-the-market cases" merely refers to "cases involving public securities markets." *Dalberth v. Xerox Corp.*, 766 F.3d 172, 183 (2d Cir. 2014).

"course-of-business" liability under subsection (c). *See* ¶473.[6] Indeed, the Second Amended Complaint has a 58-page section specifically devoted to Defendants' "Materially False and Misleading Statements." *See* ¶¶126-295. So Mr. Hayes' claim that Lead Counsel failed "to include fraud on the market allegations," Objection at 1, is just wrong. *See also* ¶¶466-468 (specifically pleading the applicability of the "fraud on the market doctrine").[7]

Second, Mr. Hayes' understanding that, under Rule 10b-5(b), it is not "necessary to include allegations of scienter," *see* Objection at 2 (last paragraph), is also incorrect. It is fundamental, black-letter law that scienter is an essential element of a claim asserted under Rule 10b-5(b). *See Shetty v. Trivago N.V.*, 2019 WL 6834250, at *3 (2d Cir. Dec. 16, 2019) ("To state a claim under Section 10(b) and Rule 10b-5(b), a plaintiff must plead . . . scienter . . . .") (summary order; citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014)).

Third, the fact that Iconix formed no new overseas joint ventures after January 2, 2015, *see* Objection at 1, is irrelevant. Lead Plaintiffs alleged that, because Defendants concealed their improper accounting, the Company's stock price continued to be inflated at the time Mr. Hayes purchased his shares in March 2015, and remained so until the end of the Class Period. Although there was a partial disclosure of the truth in December 2014 (*see* ¶¶251-253) – before Mr. Hayes

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[6] Under the heading "COUNT I, Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder Against All Defendants," ¶473 states: "Defendants: (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's securities during the Class Period."

[7] In this context, it is also worth noting Mr. Hayes' contention that scheme fraud allegations are "precisely the [type of] abusive securities litigation that the Private Securities Litigation Reform Act (PSLRA) intended to eliminate . . . ." Objection at 2 (first full paragraph). Lead Counsel are aware of no authority even remotely suggesting this statement is true, and Rule 10b-5(a) continues to be in full force and effect, and an accepted basis for asserting Section 10(b) liability. *See, e.g.*, *Lorenzo v. SEC*, 139 S. Ct. 1094, 1099 (2019).

purchased his shares – Lead Plaintiffs alleged additional partial disclosures in April 2015 (*see* ¶¶264-268, ¶¶269-272), August 2015 (*see* ¶¶278-284, ¶¶285-289), and November 2015 (*see* ¶¶290-295), at the end of the Class Period. Thus, the absence of new international joint ventures after January 2015 makes no difference: the Company's stock price was inflated throughout the Class Period.

And fourth, even if Lead Plaintiffs had not pleaded Mr. Hayes' preferred theory of liability under Rule 10b-5(b) – which they did – that would not be a proper basis for objection. As Judge Sweet observed in *Facebook*, "[i]t is axiomatic . . . that a lead plaintiff has the sole authority to determine what claims to pursue on behalf of the class." 343 F. Supp. 3d at 410. Mr. Hayes' remedy for a strategic disagreement with Lead Counsel was not to object to the Settlement, but to exclude himself from the Class so as to assert his own claim. Having chosen to remain in the Class, however, he should not be heard to complain about Lead Plaintiffs' strategic choices– especially since his principal complaint is simply mistaken.

In addition to these fundamental misconceptions, Mr. Hayes also makes assertions that are just not true. For example, he contrasts the purportedly "minuscule Class recovery" with "Lead Counsels' [*sic*] $242 average hourly fee award." Objection at 1. Mr. Hayes apparently reached this figure by dividing Lead Counsel's requested fee of $1.5 million by the total number of attorney hours set forth in Lead Plaintiffs' opening papers. *See* ECF No. 157-3, Ex. A; ECF No. 157-4, Ex. A. But this calculation excludes 950 hours of *non*-attorney time – time devoted to the case by a forensic accountant, case and economic analysts, research analysts, investigators, paralegals, and shareholder relations personnel, among others. *See id.* Thus, the "$242 average hourly fee award" cited by Mr. Hayes – though reasonable in and of itself – is materially inflated by his omission of the time of other important personnel.

Similarly, Mr. Hayes claims that the only real beneficiaries of the proposed Settlement include Lead Plaintiffs themselves, implying that Lead Plaintiffs will be receiving awards disproportionate to those of other Class Members. *See* Objection at 2 (top paragraph). But the awards to Lead Plaintiffs will be calculated under the same Plan of Allocation governing the award to every other Class Member. Lead Plaintiffs are not requesting "the award of reasonable costs and expenses" expressly permitted by 15 U.S.C. §78u-4(a)(4) – an award that in any event is intended to compensate representative parties for their actual, reasonable costs and expenses, not as the windfall Mr. Hayes appears to be suggesting.[8]

Finally, Mr. Hayes attempts to impugn Lead Counsel's motives, contending that Lead Counsel prepared the Second Amended Complaint "in a desultory fashion designed to salvage contingent attorney fees and expenses in a mediated settlement." Objection at 2 (first paragraph). Lead Counsel categorically reject that suggestion. As noted in Lead Plaintiffs' opening papers, the Second Amended Complaint is 106 paragraphs longer than its predecessor, includes substantial additional allegations about Defendants' alleged misconduct, and adds BDO as a defendant, alleging that BDO conspired with Defendants to fraudulently conceal the true nature of the joint ventures at issue. *See* ECF No. 157, ¶32. Among other changes, the Second Amended Complaint alleged that the joint ventures in question were shams from the start. *See id.* Changes of this magnitude – substantive changes – are far from "desultory."

[8] *See, e.g., Christine Asia Co. v. Yun Ma*, 2019 WL 5257534, at *20 (S.D.N.Y. Oct. 16, 2019) ("Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.").

IV. CONCLUSION

For the foregoing reasons, as well as the reasons in their opening papers, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate, and Lead Counsel respectfully request that the Court award attorneys' fees of 25% of the Settlement Amount, plus expenses in the amount of $165,465.92, plus interest on both amounts. They also respectfully request that the Court reject in its entirety the one and only objection asserted to the proposed Settlement and request for attorneys' fees.

DATED: January 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert M. Rothman, hereby certify that on January 16, 2020, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to receive such notice. I further certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 16, 2020, at Melville, New York.

/s/ Robert M. Rothman
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