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' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR (I) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, (II) CERTIFICATION OF THE CLASS, AND (III) APPROVAL OF NOTICE TO THE CLASS**

**TABLE OF CONTENTS**

**Page**

**Page**

## TABLE OF AUTHORITIES

**Page**

**CASES**

**Page**

**Page**



**STATUTES, RULES AND REGULATIONS**

Lead Plaintiffs City of Atlanta Firefighters' Pension Fund and City of Atlanta Police Officers' Pension Fund (collectively, "Lead Plaintiffs" or "Plaintiffs") respectfully submit this memorandum of law in support of their unopposed motion for: (i) preliminary approval of the proposed Settlement between Lead Plaintiffs, on behalf of themselves and the proposed Class, and defendants Iconix Brand Group, Inc. ("Iconix" or the "Company"), Neil Cole, Warren Clamen, Jeff Lupinacci, David Blumberg, Seth Horowitz, David K. Jones and F. Peter Cuneo (the "Individual Defendants," and collectively, "Defendants," and together with Lead Plaintiffs, the "Parties"); (ii) certification of the proposed Class for purposes of the Settlement;[1] (iii) approval of the form and manner of the settlement notices to Members of the Class; and (iv) the scheduling of a hearing (the "Final Approval Hearing" or "Settlement Hearing") on the final approval of the Settlement, proposed Plan of Allocation and Lead Counsel's application for an award of attorneys' fees and litigation expenses. The Parties' agreed-upon Order Preliminarily Approving Settlement and Providing for Notice (the "Preliminary Approval Order") is filed herewith.

## PRELIMINARY STATEMENT

Lead Plaintiffs and Defendants have negotiated, at arm's length and with the assistance of an experienced and neutral mediator, a proposed settlement of all claims in this Action for $6 million in cash. This resolution, which represents a substantial recovery that falls well within the range of possible approval, involved a thorough investigation, the filing of two detailed amended complaints, consultation with experts, and a formal mediation involving rigorous and extensive negotiations. The terms of the Settlement are set forth in the Stipulation of Settlement and Release ("Stipulation"),

[1] As detailed more fully below, the "Class" consists of persons who purchased or otherwise acquired Iconix common stock during the Class Period of February 22, 2012 through November 5, 2015, inclusive.

filed simultaneously herewith.[2] Claims against Iconix's auditor during the time of the alleged fraud, defendant BDO USA, LLP ("BDO"), are not included in the Settlement and continue to be litigated by Lead Plaintiffs.

Lead Plaintiffs and Lead Counsel approve of the Settlement. Lead Plaintiffs are institutional investors that oversaw the litigation and authorized the Settlement. Lead Counsel have substantial securities litigation experience, and are recognized as leaders in the field. Based upon their experience and evaluation of the facts and the applicable law, Lead Counsel and Lead Plaintiffs submit that the proposed Settlement is fair, reasonable and adequate, and is in the best interests of the Class. This is especially so in light of the risk that the Class might recover substantially less (or nothing) if the action were litigated through dispositive motions, trial, and the likely post-trial motions and appeals that would follow (a process that could last several years). Indeed, Lead Plaintiffs face significant risks with regard to establishing liability and damages, including the risk that Defendants' second motion to dismiss would be successful, the difficulty in collecting a judgment in light of Iconix's poor financial condition, and the fact that the Company's insurance proceeds have already been significantly diminished, with any remaining proceeds to be consumed by the ongoing SEC investigation of the Company. Given these and other risks inherent in this complex securities class action, and the Settlement's substantial value, the Settlement represents a very good result for the Class.

At this preliminary approval stage, the Court need only make a preliminary evaluation of the Settlement's fairness, such that the Class should be notified of the proposed Settlement. In light of the substantial recovery obtained, and the risks and expenses posed by protracted litigation against

[2] Unless otherwise stated or defined, all capitalized terms used herein shall have the meanings provided in the Stipulation. All emphasis is added and all citations are omitted unless otherwise noted.

Defendants, Lead Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement and enter the Preliminary Approval Order, which will, among other things:

(i) preliminarily approve the Settlement on the terms set forth in the Stipulation;

(ii) certify the proposed Class for purposes of the Settlement;

(iii) approve the form and content of the Notice and Summary Notice attached as Exhibits A-1 and A-3 to the proposed Preliminary Approval Order;

(iv) find that the procedures for distribution of the Notice and publication of the Summary Notice in the manner and form set forth in the Preliminary Approval Order constitute the best notice practicable under the circumstances, and comply with the notice requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and the Private Securities Litigation Reform Act of 1995 ("PSLRA"); and

(v) set a schedule and procedures for: disseminating the Notice and publication of the Summary Notice; requesting exclusion from the Class; objecting to the Settlement, the Plan of Allocation or Lead Counsel's application for an award of attorneys' fees and litigation expenses; submitting papers in support of final approval of the Settlement; and the Settlement Hearing.

## I. HISTORY OF THE LITIGATION

Beginning on June 23, 2015, three putative class actions were filed on behalf of investors in this Court, alleging violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 and United States Securities and Exchange Commission Rule 10b-5. On March 14, 2016, the Court: (1) consolidated the three putative class actions, (2) appointed the City of Atlanta Police Officers' Pension Fund and the City of Atlanta Firefighters' Pension Fund as lead plaintiffs, and (3) approved

Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and Saxena White P.A. ("Saxena White") as co-lead counsel. ECF No. 53.

Following an extensive investigation and after consultation with various experts, Lead Plaintiffs filed their Consolidated Amended Class Action Complaint ("Consolidated Complaint") on May 13, 2016, asserting that Defendants engaged in a multitude of accounting improprieties over an almost four-year period. As a result of these improprieties, Defendants had to file two separate restatements covering 18 quarters from 2011 to 2015.

On July 27, 2016, Defendants moved to dismiss the Consolidated Complaint, claiming that Lead Plaintiffs failed to allege, among other things: (1) a strong inference of scienter; (2) actionable misstatements; (3) loss causation; and (4) control-person liability. Lead Plaintiffs opposed Defendants' motion. On October 25, 2017, the Court granted Defendants' motion to dismiss without prejudice, concluding that Lead Plaintiffs had not sufficiently alleged scienter because Defendants' accounting practices had been sanctioned by its independent auditor, BDO; however, the Court gave Lead Plaintiffs leave to file a second amended complaint. ECF No. 113.

After substantial additional work, on November 14, 2017, Lead Plaintiffs filed their Second Consolidated Amended Class Action Complaint ("Second Amended Complaint") refocusing their allegations of improprieties of Iconix's accounting with respect to its creation of sham overseas joint ventures that were designed to create "paper" revenues and conceal the Company's deteriorating financial condition, and alleging that the Defendants made materially false statements to the SEC and investors about the legitimacy of those joint ventures. The Second Amended Complaint included substantial additional detail about Defendants' alleged misconduct and added BDO as a defendant, based on allegations that BDO had approved Iconix's accounting treatment of the overseas joint ventures despite its awareness of numerous "red flags" showing they were shams.

In response to the Second Amended Complaint, Defendants prepared a joint motion to dismiss dated February 2, 2018, and BDO separately moved to dismiss on the same day. Defendants again argued that Lead Plaintiffs failed to adequately allege scienter, falsity, loss causation, and control-person liability. BDO argued that Lead Plaintiffs failed to plead scienter, falsity, and loss causation. Lead Plaintiffs served their omnibus opposition to Defendants' and BDO's motions to dismiss on March 29, 2018, refuting each of Defendants' and BDO's arguments. Defendants and BDO served their replies in further support of their motions on April 27, 2018. The motions to dismiss the Second Amended Complaint are pending before the Court.

## II. SETTLEMENT NEGOTIATIONS

In 2017, the Parties engaged in a series of mediation sessions before Judge Daniel Weinstein, one of the most respected mediators in the country, in an attempt to settle the case. Unfortunately, the Parties were not able to agree on a fair settlement number and no settlement was reached. Then, in early 2019, while Defendants' and BDO's motions to dismiss the Second Amended Complaint were pending, the Parties[3] resumed settlement discussions, both independently and with the aid of Jed Melnick, Esq., a well-respected JAMS mediator with extensive experience in resolving securities class actions. On June 14, 2019, Lead Counsel, Defendants' counsel, and Defendants' insurers attended an in-person mediation session that was overseen by Mr. Melnick in New York.

After extensive, hard-fought and arm's-length negotiations, Mr. Melnick, based on his familiarity with the facts and law of the case, proposed that the Parties settle the Action for $6 million in cash. The parties accepted this proposal on July 31, 2019, and informed the Court the same day that they had reached an agreement-in-principle to settle the case. In light of this

[3] BDO, which, as set forth above, is not a party to the Stipulation, did not participate in the renewed settlement discussions.

substantial benefit to the Class, and the significant costs and risks of protracted litigation – and in recognition of the fact that the proposed Settlement is the result of arm's-length negotiations by experienced counsel overseen by a well-respected mediator – Lead Plaintiffs respectfully submit that the proposed Settlement warrants preliminary approval so that notice can be provided to the Class. Lead Plaintiffs further submit that the Court should, preliminarily and for purposes of the Settlement only, certify the Class, appoint Lead Plaintiffs as class representatives, and appoint Lead Counsel as class counsel.

## III. THE SETTLEMENT TERMS

The Settlement provides that Defendants will cause their insurers to pay $6 million into the Escrow Account, which amount plus accrued interest comprises the Settlement Fund. Stipulation, ¶3.2. Notice to the Class and the cost of settlement administration ("Notice and Administration Costs") will be funded by the Settlement Fund. *Id.*, ¶3.9. Lead Plaintiffs propose a nationally recognized class action settlement administrator, Gilardi & Co. LLC. ("Gilardi"), to be retained here subject to the Court's approval. *Id.*, ¶1.4.

The Notice provides that Lead Counsel will submit an application with their opening papers in support of final approval of the Settlement for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Amount and litigation expenses in an amount not to exceed $250,000, plus interest accrued on both amounts at the same rate as earned by the Settlement Fund.[4] The Notice explains that such fees and expenses shall be paid from the Settlement Fund upon entry of the order awarding such fees and expenses.

[4] In accordance with the PSLRA, Lead Counsel may also apply for the reimbursement of the costs and expenses of Lead Plaintiffs (including lost wages) directly related to their representation of the Class. Pursuant to the terms of the Stipulation, any award of expenses will be paid from the Settlement Amount.

Once Notice and Administration Costs, Taxes, Tax Expenses, Court-approved attorneys' fees and expenses, and any award to Lead Plaintiffs in connection with their representation of the Class have been paid from the Settlement Fund, the remaining amount – the Net Settlement Fund – shall be distributed pursuant to the Court-approved Plan of Allocation to Authorized Claimants who are entitled to a distribution of at least $10. Any amount remaining following the distribution shall be redistributed in an economically feasible manner. The Plan of Allocation treats all Class Members equitably based on the timing of their Iconix common stock purchases, acquisitions and sales. The proposed Plan of Allocation, which is set forth in the Notice to be mailed to Class Members, is comparable to plans of allocation approved in numerous other securities class actions.

The Parties have entered into a Supplemental Agreement that provides that if, prior to the Final Approval Hearing, the number of shares of Iconix common stock purchased or acquired, represented by valid claims by persons who would otherwise be Members of the Class, but who request exclusion from the Class, exceeds a certain amount, Defendants shall have the option to terminate the Stipulation. Stipulation, ¶9.3.

In exchange for the benefits provided under the Stipulation, Class Members will release the "Released Plaintiffs' Claims," which include:

> All claims, suits, actions, appeals, causes of action, damages (including, without limitation, compensatory, punitive, exemplary, rescissory, direct, consequential, or special damages, and restitution and disgorgement), demands, rights, debts, penalties, costs, expenses, setoffs, fees, injunctive relief, attorneys' fees, expert or consulting fees, prejudgment interest, indemnities, duties, liabilities, losses, or obligations of every nature and description whatsoever, known or unknown, whether or not concealed or hidden, accrued or unaccrued, fixed or contingent, direct or indirect, anticipated or unanticipated, whether legal, contractual, rescissory, statutory, or equitable in nature, whether arising under federal, state, common, or foreign law, against the Released Defendant Parties that are based upon, arise from, or relate to both: (i) the allegations, transactions, facts, matters, events, disclosures, public filings, acts, occurrences, representations, statements, financial statements, restatements of financial statements, accounting treatments, omissions and/or failures to act that were alleged, in the Consolidated Complaint or Second Amended

> Complaint and any other complaints filed in connection with this Action, or could have been alleged by Lead Plaintiffs or any Class Member in this Action; and (ii) the purchase or acquisition of Iconix securities during the Class Period. The Released Plaintiffs' Claims will not include any claims of any person or entity who or which submits a request for exclusion that is accepted by the Court. "Released Plaintiffs' Claims" expressly includes "Unknown Claims" as defined in ¶1.41 [of the Stipulation]. "Released Plaintiffs' Claims" does not include Lead Plaintiffs' claims against Defendant BDO, which remain pending in the Litigation. Stipulation, ¶1.30.

The proposed Settlement is a very good recovery on the claims asserted in this Action, and is in all respects fair, adequate, reasonable, and in the best interests of the Class.

## IV. PRELIMINARY APPROVAL IS WARRANTED AND WILL ALLOW LEAD PLAINTIFFS TO NOTIFY THE CLASS

In the Second Circuit, there is a "'strong judicial policy in favor of settlements, particularly in the class action context.'" *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

Federal Rule of Civil Procedure 23(e) requires judicial approval of a class action settlement. Fed. R. Civ. P. 23(e) ("The claims . . . [of] a class proposed to be certified for purposes of settlement . . . may be settled . . . only with the court's approval."). The approval process typically takes place in two stages. Pursuant to recently amended Rule 23(e)(1), the preliminary approval of a settlement is appropriate where "the parties . . . show[] that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Rule 23(e)(2), which governs final approval, identifies factors that courts must consider in determining whether a class action settlement is "fair, reasonable, and adequate," including whether:

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 attorney's 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, known as the *Grinnell* factors (some of which overlap with Rule 23(e)(2)): "(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 the 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 the attendant risks of litigation." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *see also Pantelyat v. Bank of America, N.A*, 2019 WL 402854, at *3-*4 (S.D.N.Y. Jan. 31, 2019). A proposed settlement is substantively fair if the totality of the nine *Grinnell* factors weigh in favor of that conclusion. *See Wal-Mart*, 396 F.3d at 117 (citing *Grinnell*, 495 F.2d at 463); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004).

Here, Lead Plaintiffs are requesting only that the Court take the first step in the settlement approval process, and grant preliminary approval of the proposed Settlement. As stated above, the proposed Settlement provides a Settlement Amount of $6 million in cash, a substantial recovery that is unquestionably beneficial to the Class, and plainly "within the range of possible approval." *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007).

As discussed below, the proposed $6 million Settlement satisfies each of the applicable Rule 23(e)(2) factors such that Notice of the proposed Settlement should be sent to the Class in advance of the Final Approval Hearing.

### A. Lead Plaintiffs and Lead Counsel Have Adequately Represented the Class

As discussed in §V(A)(4) below, Lead Plaintiffs' interests in this case are directly aligned with those of the other Class Members. Lead Plaintiffs have demonstrated their ability and willingness to pursue the Action on the Class' behalf through their active involvement in the litigation and in approving the Settlement. Lead Plaintiffs and their counsel zealously advocated for the interests of Iconix shareholders and have obtained excellent results. Lead Plaintiffs' decision to settle this case was informed by a thorough investigation of the relevant claims; the filing of two detailed amended complaints; consultation with various experts; and participation in extensive, hard-fought mediation. The Settlement is demonstrably the product of well-informed negotiations and vigorous advocacy on behalf of Iconix shareholders. Accordingly, this factor weighs in favor of approval.

### B. The Proposed Settlement Is the Result of Good-Faith, Arm's-Length Negotiations

Courts presume that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations between counsel. *Wal-Mart*, 396 F.3d at 116. As described above, the

Settlement was reached only after extensive, arm's-length negotiations before Mr. Melnick, a nationally recognized mediator experienced in securities class actions. *See, e.g., D'Amato*, 236 F.3d at 85 (stating that a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). After intense back-and-forth negotiations, the Parties reached an agreement-in-principle to settle the Action.

In addition, the Parties and their counsel were knowledgeable about the strengths and weaknesses of the case prior to reaching an agreement to settle. Lead Plaintiffs conducted an extensive investigation prior to drafting and filing both the Consolidated Complaint and the Second Amended Complaint, which included, among other things, a thorough review of: (i) Iconix's public filings and correspondence with the SEC; (ii) presentations, press releases, media and analyst reports made by or about the Company; (iii) transcripts of Iconix's conference calls with analysts and investors; (iv) publicly available data relating to Iconix common stock; (v) interviews with former employees of the Company; (vi) consultations with relevant experts; (vii) review of other materials and data concerning the Company; and (viii) research of the applicable law with respect to the claims asserted in the Action, and the potential defenses thereto. Lead Plaintiffs and Lead Counsel therefore had an adequate basis for assessing the strength of the Class' claims and Defendants' defenses thereto when they agreed to the Settlement.

Under these circumstances, a presumption of fairness attaches to the proposed Settlement. *See Wal-Mart*, 396 F.3d at 116 (stating that 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'"); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *4 (S.D.N.Y. Dec. 23, 2009) (same). Moreover, the Settlement was negotiated at the direction of Lead Plaintiffs, who are sophisticated institutional investors. This

fact further strengthens the presumption of fairness. *See Global Crossing*, 225 F.R.D. at 462 (participation of sophisticated institutional investor lead plaintiffs in settlement process supports approval of settlement).

### C. The Relief Provided by the Settlement Is Adequate When Weighed Against the Risks of Litigation

In assessing a settlement, courts consider the range of reasonableness in light of both the best possible recovery and litigation risks, assessing "not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case." *City of Providence v. Aeropostale, Inc*., 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014). The Court thus need only determine whether the Settlement falls within a range of reasonableness that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Pantelyat*, 2019 WL 402854, at*7.

If approved, the Settlement will provide Class Members with $6 million in cash, less reasonable attorneys' fees, litigation expenses, the Lead Plaintiffs' service awards, Notice and Administration Costs, Taxes, and Tax Expenses. The amount obtained for the Class represents a very good result for the Class, particularly in light of Iconix's poor and deteriorating financial condition (the Company's stock currently trades at less than $2 per share), and the Company's diminishing insurance proceeds, which will be further significantly depleted due to the SEC's ongoing investigation of the Company.

Additionally, although Lead Plaintiffs and Lead Counsel believe their case against Defendants is strong, they acknowledge that Defendants have put forth substantial arguments concerning liability, loss causation and damages. If any of these arguments were to be accepted in whole or in part, either at the motion to dismiss stage or at a later stage of the litigation, it could eliminate or dramatically reduce any potential recovery. Further, Lead Plaintiffs would have to

prevail against Defendants at several stages – at the motion to dismiss stage, on class certification, at summary judgment, and at trial, and even if Lead Plaintiffs prevailed at each of those stages, they would also have to prevail on the appeals that would likely follow.

The proposed Settlement balances the risks, costs and delays inherent in complex securities class action cases such as this one. When viewed in the context of these risks and the uncertainty of any later recovery from Defendants, the Settlement is extremely beneficial to the Class.

**D. The Proposed Method for Distributing Relief Is Effective**

The method and effectiveness of the proposed notice and claims administration process are effective. Specifically, this includes well-established, effective procedures for processing claims submitted by potential Class Members and efficiently distributing the Net Settlement Fund. The notice plan includes direct mail notice to all those who can be identified with reasonable effort, supplemented by the publication of the Summary Notice in the national edition of *The Wall Street Journal* and once over a national newswire service. Also, a settlement-specific website will be created where key documents will be posted, including the Stipulation, Notice, Proof of Claim and Preliminary Approval Order.

The claims process is also effective and includes a standard claim form that requests the information necessary to calculate a claimant's claim amount pursuant to the Plan of Allocation. The Plan of Allocation will govern how Class Members' claims will be calculated and how money will be distributed to Authorized Claimants. The Plan of Allocation was prepared with the assistance of Lead Plaintiffs' damages consultant, and is based primarily on the consultant's event-study analysis estimating the amount of alleged artificial inflation in the price of Iconix common stock during the Class Period.

Finally, Gilardi, the Claims Administrator selected by Lead Counsel subject to Court approval, will process claims under the guidance of Lead Counsel, allow claimants an opportunity to cure any deficiencies in their claims or request the Court to review a denial of their claims, and will distribute the Net Settlement Fund pursuant to the Court-approved Plan of Allocation. Stipulation, ¶6.7.

**E. Lead Counsel's Fee and Expense Request Is Fair and Reasonable**

As set forth in the Notice, Lead Counsel will apply for an award of attorneys' fees of up to 25% of the Settlement Amount, plus litigation expenses in an amount not to exceed $250,000 incurred in connection with the prosecution and resolution of this Litigation. This request is reasonable and in line with, if not below, other fee awards in this District. *See, e.g.*, *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) awarding attorneys' fee of 33% of $11.5 million settlement); *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 2016 WL 10519025, at *1 (S.D.N.Y. Mar. 14, 2016) (awarding attorneys' fee of 30% of $4.2 million settlement); *In re Deutsche Telekom AG Sec. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 9, 2005) (awarding 28% of $120 million settlement); *Pantelyat*, 2019 WL 402854, at *8 (awarding 25% of $5.5 million settlement).[5]

Further, as explained in the Notice, Lead Plaintiffs intend to request an award for reimbursement for their time and expenses in representing the Class in an amount not to exceed $5,000 each. *See, e.g.*, *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (describing payments ranging from $2,500 to $85,000).

[5] A motion for final approval of the Settlement, including a motion for attorneys' fees and expenses, will be filed 35 days before the Settlement Hearing, and Lead Counsel will request that any fees awarded will be paid when the Court executes the Judgment and order awarding such fees and expenses pursuant to the Stipulation following final approval of the Settlement. *See* Stipulation, ¶7.2.

### F. All Class Members Are Treated Equitably Relative to Each Other

Rule 23(e)(2)(D) requires courts to evaluate whether the settlement treats class members equitably relative to one another. Here, the proposed Plan of Allocation is fair, reasonable and adequate because it does not treat Lead Plaintiffs or any other Class Member preferentially. The Plan of Allocation, which is set out in the Notice, explains how the Settlement proceeds will be distributed among Authorized Claimants. Each Authorized Claimant, including the Lead Plaintiffs, will receive a distribution pursuant to the Plan of Allocation. Lead Plaintiffs, just like all other Class Members, will be subject to the same formulas for distribution of the Settlement.

### G. The *Grinnell* Factors Are Also Met

**The Complexity, Expense, and Likely Duration of the Litigation Supports Approval of the Settlement**. The first factor of the *Grinnell* analysis overlaps with the Rule 23(e)(2)(C)(i) factor of "the costs, risks, and delay of trial and appeal" addressed above. In addition, this case is a testament to the complexity, expense and duration of securities class actions. Plaintiffs advanced numerous complex legal and factual issues under the federal securities laws.

**The Reaction of the Class to the Settlement**. Plaintiffs have participated throughout the prosecution of the case and were actively involved in the decision to enter into the Settlement. This factor is otherwise inapplicable as notice regarding the Settlement has not yet been mailed or otherwise distributed.

**The Stage of the Proceedings**. The volume and substance of Plaintiffs' and Lead Counsel's knowledge of the merits and potential weaknesses of the claims alleged are certainly adequate to support the Settlement, as discussed above in §IV.B. The resultant accumulation of information permitted Plaintiffs and Lead Counsel to intelligently weigh the strengths and weaknesses of their case and to engage in effective settlement discussions with Defendants. *See Global Crossing*, 225

F.R.D. at 458 ("Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims."). This factor strongly supports preliminary approval of the Settlement.

**The Risk of Establishing Liability and Damages**. The fourth *Grinnell* factor is addressed above under Rule 23(e)(2)(C)(i) ("costs, risks, and delay of trial and appeal"). For the same reasons explained above why Plaintiffs have satisfied the Rule 23(e)(2)(C)(i) factor, Plaintiffs have satisfied the fourth *Grinnell* factor.

**The Risks of Maintaining the Class Action Through Trial**. Class certification motion practice had commenced by the time of settlement. Thus, the Class had not been certified, which presented risk to Plaintiffs and the proposed Class. In fact, even assuming class certification was achieved, the Court could have revisited certification at any time – presenting a continuous risk that this case, or particular claims, might not be maintained on a class-wide basis through trial. *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("the risk that the case might be not certified is not illusory"). Thus, this factor weighs in favor of preliminary approval of the Settlement.

**The Ability of Defendants to Withstand a Greater Judgment**. A court may also consider a defendant's ability to withstand a judgment greater than that secured by settlement, although it is not generally one of the determining factors. *See D'Amato*, 236 F.3d at 86. While it is unclear if in fact Defendants here could withstand a judgment in excess of $6 million, 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, and, in fact, the ability of defendants to pay more money does not render a settlement unreasonable. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *6 (E.D.N.Y. Oct. 23, 2012).

**The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation**. The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' 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). The Court need only determine whether the Settlement falls within a "range of reasonableness" – a range which "recognizes the uncertainties of law and fact in any particular 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 (noting that "the certainty of [a] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery"); *In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 WL 22244676, at *3-*4 (S.D.N.Y. Sept. 29, 2003) (noting few cases tried before a jury result in full amount of damages claimed).

Given both the risks at trial and the recognition that not all Class Members will seek recovery, the size of the recovery strongly supports preliminary approval. Accordingly, this factor weighs in favor of the Court granting preliminary approval.

## V. CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE

Lead Plaintiffs request that the Court certify the proposed Class for purposes of the Settlement under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. Pursuant to paragraph 2.1 of the Stipulation, the Parties have stipulated to class certification of the following proposed Class:

> [A]ll Persons who, during the Class Period, purchased or otherwise acquired Iconix securities. Excluded from the Class are: (i) Defendants; (ii) members of the immediate family of each Individual Defendant; (iii) any person who was an officer

> or director of Iconix during the Class Period; (iv) any firm, trust, corporation, officer, or other entity in which any Defendant has or had a controlling interest; (v) any person who participated in the wrongdoing alleged herein; and (vi) the legal representatives, agents, affiliates, heirs, beneficiaries, successors-in-interest, or assigns of any such excluded party.

The Parties further stipulate to certification of Lead Plaintiffs as Class Representatives for the Class, and appointment of Lead Counsel Saxena White and Robbins Geller as co-Class Counsel for the Class.

Certification of a class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *Prudential*, 163 F.R.D. at 205. A class must satisfy all the requirements of Rules 23(a) and (b), although the manageability concerns of Rule 23(b)(3) are not at issue. *See In re Am. Int'l Grp.*, 689 F.3d 229, 240 (2d Cir. 2012); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested. . . ."). The proposed Class meets all the requirements of Rule 23(a) and Rule 23(b)(3), there is no likelihood of abuse of the class action device, and the Settlement remains subject to the Court's approval at the Settlement Hearing.

### A. The Class Satisfies the Requirements of Rule 23(a)

#### 1. Numerosity

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be "impracticable." Fed. R. Civ. P. 23(a)(1). The Second Circuit and courts within it have repeatedly held that numerosity is presumed when the proposed class would have at least 40 members. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *In re Dynex Capital, Inc. Sec. Litig.*, 2011 WL 781215, at *1 (S.D.N.Y. Mar. 7, 2011).

As of November 2015, the end of the Class Period, Iconix had approximately 48 million shares of common stock outstanding, which traded on the New York Stock Exchange. While the exact number of Members of the Class is unknown to Lead Plaintiffs, Lead Plaintiffs estimate that there are thousands of investors residing in a geographically disbursed area. Accordingly, the Members of the Class are so numerous that their joinder would be impracticable.

**2. Commonality**

Rule 23(a)(2) requires the existence of at least one question of law or fact common to the class. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 245 (2d Cir. 2007). Securities cases easily meet the commonality requirement, because commonality is "plainly satisfied [where] the alleged misrepresentations . . . relate to all the investors, [because] the existence and materiality of such misrepresentations obviously present important common issues." *Korn v. Franchard Corp.*, 456 F.2d 1206, 1210 (2d Cir. 1972).

Here, the record reflects the existence of numerous common questions, including the following:

(1) Whether Defendants violated the federal securities laws;

(2) Whether Defendants misrepresented or omitted material facts concerning Iconix's business and financial status;

(3) Whether Defendants acted with scienter;

(4) Whether Defendants' misrepresentations and omissions caused Class Members to suffer a compensable loss;

(5) Whether the prices of Iconix's common stock were artificially inflated; and

(6) The extent of damages sustained by Members of the Class, and the appropriate measure of those damages.

These and other common questions are sufficient to establish Rule 23(a)(2) "commonality." *See, e.g., Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 106 (S.D.N.Y. 2011)

(finding "commonality" established, explaining that "[t]he common questions presented by this case – essentially, whether the Offering Documents were false or misleading in one or more respects – are clearly susceptible to common answers").

**3. Typicality**

Rule 23(a)(3) requires that the claims of the class representatives be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). Typicality is satisfied where "'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). "'Typical' does not mean 'identical.'" *Marsh & McLennan*, 2009 WL 5178546, at *10.

As with commonality, typicality is plainly satisfied here. Like the other Members of the Class, Lead Plaintiffs allege that they purchased Iconix common stock at artificially inflated prices due to Defendants' material misstatements and omissions regarding sham overseas joint ventures Iconix entered into to conceal its deteriorating financial condition, and were damaged when the truth emerged. Thus, the claims of Lead Plaintiffs and of the Class Members rely on the same facts and legal theories to establish liability. Accordingly, the typicality requirement is met. *See, e.g.*, *Merrill Lynch*, 277 F.R.D. at 107.

**4. Adequate Representation**

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Adequacy '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.'" *Flag Telecom*, 574 F.3d at 35.

Here, Lead Plaintiffs' interests do not conflict with those of the Class. Rather, given that the Class was injured by the same materially false and misleading statements as Lead Plaintiffs, Lead Plaintiffs' interests are directly aligned with the interests of the Class. *See, e.g.*, *Merrill Lynch*, 277 F.R.D. at 110 (citing *Hicks v. Morgan Stanley & Co.*, 2003 WL 21672085, at *3 (S.D.N.Y. July 16, 2003)).

Lead Plaintiffs have otherwise already demonstrated their commitment to prosecuting this Action on behalf of the Class, as discussed above in §IV.A. Indeed, Lead Plaintiffs are the very type of institutional investors that Congress sought to lead securities litigation when it passed the PSLRA.

Lead Plaintiffs have also retained counsel who are qualified, experienced, and able to adequately conduct the litigation. Lead Counsel have demonstrated that they are qualified and capable of prosecuting this Action, having prosecuted many securities class actions (including within this Circuit and before this Court) for many years with a proven track record of success.[6] *See* websites of Saxena White (www.saxenawhite.com) and Robbins Geller (www.rgrdlaw.com).

Accordingly, the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy are fully met in this Action.

[6] *See In re Tower Group Int'l, Ltd. Sec. Litig.*, No. 1:13-cv-05852-AT (S.D.N.Y. Nov. 23, 2015) (Docket No. 179) (judgment approving class action settlement and affirming the adequacy of Saxena White as lead counsel); *Schuler v. NIVS IntelliMedia Tech. Group, Inc., et al.*, No. 1:11-cv-02484-KMW (S.D.N.Y. Mar. 31, 2015) (Tr. at 11) ("Saxena White's work has been outstanding."); *Alaska Electrical Pension Fund v. Bank of America Corp.*, No. 1:14-cv-07126-JMF-OTW (Transcript at 27-28) (S.D.N.Y. Nov. 9, 2018) ("[Robbins Geller] did an extraordinary job here . . . I think you have done an extraordinary job and deserve thanks and commendation for that."); *Jones v. Pfizer Inc.*, No. 1:10-cv-03864 (Transcript at 42-43) (S.D.N.Y. July 30, 2015) ("Without the quality and toughness that [Robbins Geller] ha[s] exhibited, our society would not be as good as it is with all it problems . . . You did a really good job. Congratulations.").

### B. Rule 23(b)(3) Is Satisfied

Rule 23(b)(3) authorizes class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

#### 1. Common Legal and Factual Questions Predominate

Common issues predominate where each member of a class is alleged to have suffered the same kind of harm pursuant to the same legal theory arising out of the same alleged course of conduct. *See Marsh & McLennan*, 2009 WL 5178546, at *11. As the U.S. Supreme Court has noted, predominance is a test "readily met" in cases alleging securities fraud. *Amchem*, 521 U.S. at 625. Common issues also predominate "'if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *Marsh & McLennan*, 2009 WL 5178546, at *11 (quoting *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002)).

Here, because Class Members are subject to the same misrepresentations and omissions, and because it is alleged that Defendants' misrepresentations were part of a common course of conduct, common questions predominate. Lead Plaintiffs' claims and the claims of the Class are also susceptible to common evidence and proof, as if Lead Plaintiffs and each Class Member were to bring individual actions, they would each be required to prove the same wrongdoing by Defendants in order to establish liability. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195-96 (2013); *see also Merrill Lynch*, 277 F.R.D. at 114. Rule 23(b)(3)'s predominance requirement is therefore satisfied.

### 2. A Class Action Is Superior to Other Methods of Adjudication

The class action device is the superior method for resolving the claims in this Action. Courts have long recognized that the class action is not only a superior method, but also may be the only feasible method to fairly and efficiently adjudicate a controversy involving a large number of purchasers of securities injured by violations of the securities laws. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (stating that "most of the plaintiffs would have no realistic day in court if a class action were not available").

This class action is clearly "superior to other available methods for fairly and efficiently adjudicating" the federal securities law claims of the large number of investors at issue here. *See Merrill Lynch*, 277 F.R.D. at 120. This is especially true in light of the fact that, without the Class device, Defendants could not obtain a class-wide release, and therefore would have had little, if any, incentive to agree to the Stipulation. Moreover, certification of the Class for settlement purposes will allow the Settlement to be administered in an organized and efficient manner.

## VI. NOTICE TO THE CLASS SHOULD BE APPROVED

As outlined in the agreed-upon form of proposed Preliminary Approval Order, and described above, Lead Plaintiffs will notify Members of the Class by mailing the Notice and Claim Form to all Members of the Class who can be identified with reasonable effort, using multiple sources of data, including: (i) a list provided by Iconix (as required by paragraph 6.2 of the Stipulation) identifying the holders of Iconix common stock during the Class Period; and (ii) a proprietary list maintained by the Claims Administrator of the largest and most common U.S. banks, brokers, and other nominees, and the Depository Trust Company, which acts as a clearinghouse to process and settle trades in securities. The Notice will advise the Members of the Class of: (i) the pendency of the class action; (ii) the essential terms of the Settlement; and (iii) information regarding Lead Counsel's application

for an award of attorneys' fees and expenses. The Notice also will provide specifics on the date, time and place of the Settlement Hearing and set forth the procedures for submitting valid and timely Claim Forms pursuant to the proposed Plan of Allocation, objecting to the Settlement, the proposed Plan of Allocation and/or the application for attorneys' fees and expenses, and the procedure for requesting exclusion from the Class.

In addition to mailing the Notice and Claim Form, the Claims Administrator will cause publication of a Summary Notice in the national edition of *The Wall Street Journal* and once over a national newswire service. Also, as set forth in the Class Action Fairness Act of 2005 ("CAFA"), Defendants will timely serve a CAFA notice within ten (10) days of the filing of the Stipulation. *See also* Stipulation, ¶6.17.

The form and manner of providing notice to the Class satisfy the requirements of due process, Rule 23, and the PSLRA. In short, the Notice and Summary Notice "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart*, 396 F.3d at 114. The manner of providing notice, which includes individual notice by mail to all Members of the Class who can be reasonably identified, represents the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. *See In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008).

## VII. PROPOSED SCHEDULE OF SETTLEMENT EVENTS

Lead Plaintiffs propose the following schedule for the Settlement-related events in this case:

| Event | Proposed Due Date |
|---|---|
| Deadline for commencing mailing of the Notice and Claim Form to the Class (which date shall be the "Notice Date") (Preliminary Approval Order, ¶10) | Up to 10 business days after entry of Preliminary Approval Order |
| Deadline for publishing the Summary Notice (Preliminary Approval Order, ¶11) | Up to 14 calendar days after the Notice Date |

| Event | Proposed Due Date |
|---|---|
| Deadline for filing of papers in support of final approval of Settlement, Plan of Allocation, and Lead Counsel's application for attorneys' fees and expenses (Preliminary Approval Order, ¶23) | 35 calendar days prior to Settlement Hearing |
| Deadline for receipt of exclusion requests or objections (Preliminary Approval Order, ¶¶18, 21) | 21 calendar days prior to Settlement Hearing |
| Settlement Hearing (Preliminary Approval Order, ¶7) | 100 calendar days after the date of the Preliminary Approval Order |
| Deadline for filing reply papers (Preliminary Approval Order, ¶23) | 7 calendar days prior to Settlement Hearing |
| Deadline for submitting Claim Forms (Preliminary Approval Order, ¶15) | 90 calendar days after the Notice Date |

## VIII. CONCLUSION

Lead Plaintiffs respectfully request that the Court: (i) certify the proposed Class for purposes of the Settlement; (ii) approve the proposed form and manner of notice given to the Class; and (iii) schedule a hearing on Lead Plaintiffs' motion for final approval of the Settlement and Lead Counsel's application for an award of attorneys' fees and expenses. The Parties' agreed-upon form of proposed Preliminary Approval Order, and exhibits thereto, is filed herewith.

DATED: September 17, 2019

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
ROBERT M. ROTHMAN

s/ Robert M. Rothman
ROBERT M. ROTHMAN

58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
srudman@rgrdlaw.com
rrothman@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
JACK REISE (*Pro Hac Vice*)
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)
jreise@rgrdlaw.com

SAXENA WHITE P.A.
JOSEPH E. WHITE
150 East Palmetto Park Road, Suite 600
Boca Raton, FL 33432
Telephone: 561/394-3399
561/394-3382 (fax)
jwhite@saxenawhite.com

Co-Lead Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

I, Robert M. Rothman, hereby certify that on September 17, 2019, 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 September 17, 2019, at Melville, New York.

s/ Robert M. Rothman
ROBERT M. ROTHMAN