UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PENN WEST PETROLEUM LTD. SECURITIES LITIGATION	Master File No. 14-cv-6046-JGK

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

Dated: June 24, 2016

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Lead Plaintiffs, the City of Miami Fire Fighters' and Police Officers' Retirement Trust and Avi Rojany ("Lead Plaintiffs"), on behalf of themselves and the Settlement Class, and Co-Lead Counsel respectfully submit this memorandum of law in further support of (i) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation (*see* ECF No. 134); and (2) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (*see* ECF No. 136).[1]

I. PRELIMINARY STATEMENT

Following hard-fought litigation and intensive, arm's-length settlement negotiations conducted under the auspices of a well-respected mediator, Lead Plaintiffs proposed a US$19,759,282 Settlement for approval by the Court. The reaction of the Settlement Class confirms that the Settlement is an excellent result. Following an extensive Court-approved notice program – including the mailing of over 315,000 Notices to potential Settlement Class Members and nominees – no Settlement Class Member has objected to the Settlement, the proposed Plan of Allocation, or Co-Lead Counsel's application for attorneys' fees and expenses. As explained below, while two brief "objections" were submitted by individuals who are not members of the Settlement Class, those individuals lack standing to object and, in any event, their objections are without merit.

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[1] Unless otherwise noted, capitalized terms used herein have the meanings set out in the Joint Declaration of John Rizio-Hamilton and Lionel Z. Glancy in Support of: (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses dated June 3, 2016 (*see* ECF No. 138) or in the Stipulation and Agreement of Settlement dated February 12, 2016 (*see* ECF No. 121-1).

Furthermore, only five valid requests for exclusion from the Settlement Class have been received. In total, these exclusion requests indicate that the individual investors purchased only 1,580 Penn West trust units or common shares – which amounts to 0.0007% of the estimated affected shares, an infinitesimally small percentage of the Settlement Class.

Notably, institutional investors held approximately half of the shares of Penn West common stock and trust units outstanding during the Settlement Class Period, but no institutional investor requested exclusion or submitted an objection. The absence of any objection or request for exclusion by these sophisticated class members is additional evidence of the fairness and reasonableness of the proposed Settlement, Plan of Allocation, and the fee and expense request.

II. THE REACTION OF THE SETTLEMENT CLASS SUPPORTS APPROVAL OF THE SETTLEMENT, THE PLAN OF ALLOCATION AND THE REQUESTED ATTORNEYS' FEES AND LITIGATION EXPENSES

In accordance with the Preliminary Approval Order (*see* ECF No. 124), on March 29, 2016, the Court-appointed Claims Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), began mailing copies of the Notice and Claim Form (together, the "Notice Packet") to potential Settlement Class Members and their nominees. *See* Declaration of Stephanie A. Thurin Regarding: (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date (*see* ECF No. 138-4) (the "Thurin Decl."), ¶¶ 3-5. As of June 23, 2016, Epiq has disseminated a total of 315,717 Notice Packets to potential members of the Settlement Class and nominees. *See* Supplemental Declaration of Stephanie A. Thurin (the "Suppl. Thurin Decl."), attached as Exhibit 1 to the Supplemental Declaration of John Rizio-Hamilton (the "Suppl. Rizio-Hamilton Decl.") filed herewith, ¶ 2. In addition, the Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on April 12, 2016, and the Notice, Claim Form, Stipulation, and Preliminary Approval Order, among other documents, were posted on the website specifically created for the Settlement. *See* Thurin Decl.

¶¶ 9, 14. Both the Notice and Summary Notice informed Settlement Class Members of the June 20, 2016 deadline to submit an objection to the Settlement, Plan of Allocation or fee and expense application, or request exclusion from the Settlement Class.[2]

On June 3, 2016, 17 days prior to the objection deadline, Lead Plaintiffs and Co-Lead Counsel filed their opening papers in support of the Settlement, Plan of Allocation, and fee and expense request. The motions are supported by declarations of Lead Plaintiffs, Co-Lead Counsel, and the Claims Administrator. These papers are available on the public docket (*see* ECF Nos. 134-138) and Settlement website. *See* Suppl. Thurin Decl. ¶ 3.

Following this extensive notice process, only two objections – both from individuals that are not members of the Settlement Class and do not have standing to object – and five valid requests for exclusion have been received. *See* Suppl. Thurin Decl. ¶¶ 6-7.[3] These requests for exclusion do not include any trades in Penn West options, and include total purchases of only

[2] By Order dated June 1, 2016, the Court granted Lead Plaintiffs' request to reschedule the Settlement Fairness Hearing to June 28, 2016, at 4:30 p.m. *See* ECF No. 133. Notice of the change of the hearing date was published on the Settlement website and transmitted over the *PR Newswire*. *See* Suppl. Thurin Decl. ¶ 4. In addition, Co-Lead Counsel provided the two objectors with notice of the new hearing date by email.

[3] In addition to the five valid requests for exclusion, the Claims Administrator received twenty-nine invalid opt-out requests. *See* Suppl. Thurin Decl. ¶ 7. These invalid opt-outs include individuals whose exclusion requests did not provide the information required by the Preliminary Approval Order and the Notice, indicated they were not Settlement Class Members, or were received after the June 20, 2016 deadline.

1,580 Penn West trust units or common shares, or approximately 0.0007% of the over 219 million shares estimated to have been affected – a miniscule percentage.

Lead Plaintiffs and Co-Lead Counsel respectfully submit the lack of objections from Settlement Class Members and the small number of requests for exclusion received support 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); *see also In re Sturm, Ruger, & Co. Sec. Litig.*, No. 3:09cv1293 (VLB), 2012 WL 3589610, at *5 (D. Conn. Aug. 20, 2012) ("[T]he absence of objectants may itself be taken as evidencing the fairness of a settlement.") (citation omitted); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010) ("The absence of objections to the Settlement supports the inference that it is fair, reasonable and adequate."); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484(JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) ("minimal number of objections and requests for exclusion militates in favor of approving the settlement as be[ing] fair, adequate, and reasonable").

Also, as noted above, no institutional investors – which held roughly half of the shares of Penn West common stock and trust units outstanding during the Settlement Class Period – have objected or requested exclusion from the Settlement Class. The absence of objections by these sophisticated class members is further evidence of the fairness of the Settlement. *See In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 156 (S.D.N.Y. 2013) (the reaction of the class supported the settlement where "not one of the objections or requests for exclusion was submitted by an institutional investor"); *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (the lack of objections from institutional

investors supported approval of settlement).

The uniformly favorable reaction of the Settlement Class also supports approval of the Plan of Allocation. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 240 (E.D.N.Y. 2013) (conclusion that the proposed plan of allocation was fair and reasonable was "buttressed by the relatively small number of opt-outs and absence of objections from class members"); *In re Veeco Instruments Inc. Sec. Litig*., No. 05 MDL 01695(CM), 2007 WL 4115809, at *14 (S.D.N.Y. Nov. 7, 2007) ("not one class member has objected to the Plan of Allocation which was fully explained in the Notice of Settlement sent to all Class Members. This favorable reaction of the Class supports approval of the Plan of Allocation.") (citation omitted).

Finally, the reaction of the Settlement Class should also be considered with respect to Co-Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses. The absence of any objections from Settlement Class Members, particularly institutional investors, to the requested fee supports a finding that the fee and expense request is fair and reasonable. *See, e.g.*, *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (the reaction of class members to a fee and expense request "is entitled to great weight by the Court" and the absence of any objection "suggests that the fee request is fair and reasonable") (citation omitted); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (the lack of any objection to the fee request supported its approval).

III. TWO OBJECTIONS WERE SUBMITTED BY INDIVIDUALS WHO LACK STANDING TO OBJECT AND ARE WITHOUT MERIT

A. Neither Objector Has Standing to Object

In response to the notice program, Co-Lead Counsel are in receipt of two brief "objections" submitted by individuals who are not Settlement Class Members and, therefore, have no standing to object in this Action. Elaine and Philip Shapiro, on behalf of The Shapiro Family Trust UAD

12/10/93 (the "Shapiro Family Trust"), have submitted a one-page objection indicating that the Shapiro Family Trust did not purchase any Penn West Securities during the Settlement Class Period.[4] The other objection, submitted by Jesse E. Thompson, is a three paragraph email to the Claims Administrator which states that Mr. Thompson has received the Notice, but to the best of his recollection he never owned Penn West Securities.[5] Thus, given that neither the Shapiro Family Trust nor Mr. Thompson are members of the Settlement Class, their objections should be rejected by the Court. *See, e.g.*, *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) (non-class member could not object to proposed settlement); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 916 F. Supp. 2d 454, 459 (S.D.N.Y. 2013) ("[non-class member] does not have standing under Rule 23 to object to the Settlement"); *In re Citigroup, Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 379 (S.D.N.Y. 2013) (excluding objections "from individuals who did not provide the required evidence of class membership or who provided evidence indicating they were not class members").

B. The Objections are Without Merit

Even if the objections were considered, both lack merit. In their objection, Mr. and Mrs. Shapiro take issue with the fact that the Shapiro Family Trust is excluded from this class action because "you had to have bought this stock from Feb. 18, 2010 and owned it through Nov. 5, 2013

[4] A copy of the Shapiro objection is attached as Exhibit 2 to the Suppl. Rizio-Hamilton Decl. The Shapiro objection indicates that the Shapiro Family Trust purchased 592 Penn West shares on October 4, 2007, more than two years prior to the beginning of the Settlement Class Period, and sold 584 shares during the Settlement Class Period on August 7, 2013.

[5] A copy of Mr. Thompson's objection is attached as Exhibit 3 to the Suppl. Rizio-Hamilton Decl.

to be included in this suit." In essence, the Shapiros are objecting to the Settlement Class Period and the requirement under the Plan of Allocation that Settlement Class Members hold their shares over a corrective disclosure. As an initial matter, the Shapiro Family Trust purchased Penn West shares on October 4, 2007, and thus, any claims based on those purchases are barred by the statute of repose. The initial complaint in this Action was filed on August 4, 2014, and based on the five-year statute of repose, the earliest possible start date for the class period would have been August 4, 2009 – nearly two years after the Shapiros purchased their shares. Moreover, Lead Plaintiffs properly based the start of the class period on the issuance of the first set of misstated financials that they could allege with particularity within the applicable statute of repose period – namely, Penn West's 2009 financial statements, which were issued on February 18, 2010.

Moreover, the Plan of Allocation appropriately excludes recovery for shares sold before the first alleged corrective disclosure, which occurred before the opening of trading on November 6, 2013. In order for losses to be compensable under the Exchange Act, the disclosure of the allegedly misrepresented information must be the cause of the decline of the price of the security. Accordingly, investors who sold their shares before the first corrective disclosure on November 6, 2013 (*i.e.*, prior to the close of trading on November 5, 2013) are appropriately excluded from recovery because they would not be able to establish loss causation. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) (a securities plaintiff must prove that economic loss is proximately caused by the revelation that an alleged misrepresentation was false or misleading; where the "purchaser sells the shares . . . before the relevant truth begins to leak out, the misrepresentation will not have led to any loss"). As a result, plans of allocation in securities class actions appropriately require that shares be held through at least one corrective disclosure to be eligible for a recovery. *See Nguyen v. Radient Pharm. Corp.*, No. SACV 11-00406 DOC (MLGx),

2014 WL 1802293, at *5-7 (C.D. Cal. May 6, 2014) (approving, over objection, a plan of allocation that provided no recovery for "in and out traders" based on *Dura* and the plaintiffs' expert's conclusion as to the relevant corrective disclosure dates).

Equally without merit is Mr. Thompson's unsubstantiated objection to the fee request. Leaving aside Mr. Thompson's standing issues, as set forth in Co-Lead Counsel's opening papers, a 25% fee award would be well within the range of reasonableness. *See* Co-Lead Counsel's Fee Memorandum (ECF No. 137), at 6-8. In addition, the subject matter of this litigation was not "fictitious" given Penn West's restatement and the other allegations set forth in the Complaint. Accordingly, both objections should be overruled.

IV. CONCLUSION

For all the foregoing reasons, and those set forth in their opening papers, Lead Plaintiffs and Co-Lead Counsel respectfully request that the Court approve the Settlement, the Plan of Allocation, and the request for attorneys' fees and reimbursement of Litigation Expenses.

Dated: June 24, 2016

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