SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In re Virgin Media Inc. Shareholders Litigation	Index No. 650537/2013 (Consolidated) The Honorable Jeffrey K. Oing, J.S.C.

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES, AND IN RESPONSE TO OBJECTION

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Plaintiffs respectfully submit this Reply Brief in Further Support of Plaintiffs' Motion for Class Certification, Final Approval of Class Action Settlement, and for an Award of Attorneys' Fees and Expenses (the "Motion"),[1] and in response to the objection (the "Weinstein Objection") of Jeffrey Weinstein ("Weinstein") to the Settlement.[2]

I. PRELIMINARY STATEMENT

In their September 3, 2013 Motion and supporting papers, Plaintiffs demonstrated that the Settlement is fair, reasonable and adequate to the Class, constitutes a significant benefit for Virgin Media's former shareholders, and emerged from hard fought and arms'-length litigation. Plaintiffs' litigation efforts focused on whether the Virgin Media Board adequately considered alternatives before entering into the Liberty transaction, while not giving potential alternatives a fair chance to emerge after the Liberty transaction was publicly disclosed. *See* Joint Affirmation of Mark Lebovitch and Mark S. Reich in Support of Plaintiffs' Motion for Class Certification, Final Approval of Class Action Settlement, and for an Award of Attorneys' Fees and Expenses, dated September 3, 2013 ("Joint Aff.") at ¶¶5,7. The Settlement corrected these governance failures without requiring an injunction hearing and protracted litigation by making it much easier for Virgin Media to share confidential due diligence information with other potential bidders, limiting Liberty's matching rights from unlimited to only one round, and reducing the termination fee by $100 million. *Id.* at ¶8. Defendants also agreed to make supplemental disclosures regarding the existence of other potential

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[1] All capitalized terms in this memorandum are as defined in the opening Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, Final Approval of Class Action Settlement, and for an Award of Attorneys' Fees And Expenses, dated September 3, 2013 ("Plaintiffs' Brief"), Motion Seq. No. 72.

[2] A copy of the Weinstein Objection is attached as Exhibit 3 to the Joint Reply Affirmation of Mark Lebovitch and Mark S. Reich in Further Support of Plaintiffs' Motion for Class Certification, Final Approval of Class Action Settlement, and for an Award of Attorneys' Fees and Expenses, and in Response to Objection, dated September 30, 2013 (the "Joint Reply Aff.").

bidders and the value of the Liberty transaction for Virgin Media shareholders. *Id.* at ¶47. The Settlement allowed a meaningful market-check to take place before Virgin Media shareholders voted on the Liberty transaction and, as a result, the Class voted on the deal knowing that market forces indicated that the price that Liberty offered to pay for Virgin Media was the highest achievable and maximized shareholder value.

Achieving this result was no small task. Besides litigating against determined and well-funded adversaries who hired several of the most skilled defense firms in the country, Plaintiffs, through their counsel, received over 100,000 pages of discovery, took depositions in London, England, Englewood, Colorado, and New York City of Virgin Media's and Liberty's CEOs, Virgin Media Board members and a Goldman Sachs banker on a very expedited schedule. *Id.* at ¶¶36-37. Plaintiffs also prepared substantial Court submissions, including a motion seeking a preliminary injunction of the special meeting of shareholders to vote on the Liberty transaction. *Id.* at ¶40.

Against this background and based on the Court's first-hand knowledge of how heated this litigation was over the course of expedited discovery and the preliminary injunction briefing, Plaintiffs submit that the Court can easily approve the Motion in its entirety. None of the sophisticated institutional investors who held Virgin Media shares have objected to the Settlement. *See* Joint Reply Aff. at ¶3. Of course, the Settlement is fully supported by Plaintiffs, including the City of Westland Police and Fire Retirement System – itself a sophisticated institutional investor. Indeed, of over 19,000 Virgin Media shareholders to have received a copy of the Notice, only Weinstein – a serial objector with a long history of frivolous objections – purported to object to the Settlement. *Id.* at ¶¶9, 19. While Plaintiffs always treat all shareholders with the highest respect,

Weinstein's actions leading to and since the filing of his objection are not in good faith and his objection should be rejected.[3]

Weinstein comes to this Court with unclean hands. Although Weinstein has refused to disclose the number of Virgin Media shares he actually held, the redacted trading records that he has belatedly provided (since no proof of ownership was provided with his objection despite the clear requirement that he do so) indicate that he purchased less than ten shares on February 6, 2013, ***the day after the Liberty transaction was publicly announced***. *See* Joint Reply Aff. Ex. 4.[4] In other words, unlike the thousands of Virgin Media shareholders who actually had standing because they bought their shares before Defendants' alleged breaches of duty, Weinstein could never have even pursued the claims at issue because he was not a stockholder at the time the terms of the Liberty transaction were agreed upon and disclosed. *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1166 (Del. Ch. 2002) (dismissing claims because "definitive terms of the merger were agreed to, and publicly disclosed, before plaintiff acquired shares in the target corporation"). A traditional shareholder – one who is assumed to buy shares in order to benefit if their value rises – who purchases shares the day after a merger and erroneously pursues an objection suggests a mistaken understanding of the rules of standing, but even this innocent example does not excuse the application of those rules. In the case of Weinstein, a lawyer who has developed a prolific class action objection practice, the only logical inference from the timing of his purchase is that he bought his handful of shares after the Liberty transaction was announced for the sole and improper purpose of disrupting whatever settlement may emerge in order to extract a payment.

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[3] Plaintiffs will serve Weinstein with a copy of this reply memorandum and the supporting papers when it is filed with the Court. *See* Joint Reply Aff. ¶13.

[4] A copy of the email and redacted trading records sent by Weinstein to Plaintiffs' Counsel on September 26, 2013 is attached hereto as Ex. 4 to the Joint Reply Aff.

Moreover, the substance of the Weinstein Objection itself is not just objectively wrong, it is downright frivolous. ***First***, Weinstein complains that he has not been given the right to opt-out of the Class in order to seek money damages. *See* Weinstein Objection at 7-8. But paragraph 2 of the Settlement Agreement expressly provides Weinstein with the right he complains not to have. Plaintiffs' Counsel contacted Weinstein on September 26, 2013 to inform him of the incorrect premise of his objection because Plaintiffs specifically negotiated a carve-out to ensure that shareholders like Weinstein could opt-out to seek money damages. *See* Joint Reply Aff. at ¶10. Weinstein refused to withdraw at least this aspect of his objection, confirming the vexatious purpose for his objection.

Second, Weinstein complains that Plaintiffs have purportedly given away his ability to seek injunctive or declaratory relief. *See* Weinstein Objection at 7-8. This assertion is just as frivolous. As noted, since he bought his shares after the alleged breaches of fiduciary duty occurred, Weinstein did not have standing to seek the injunctive relief he now complains was barred by the Settlement. Moreover, the Liberty transaction closed on June 7, 2013. Now that the Liberty transaction has closed, there is absolutely no legal basis for any of the ***former*** Virgin Media shareholders to seek or obtain injunctive or declaratory relief, even if Weinstein had standing to do so in the first place (which he did not). The only remedy reasonably available after the Liberty transaction closed is monetary damages. As explained above, Weinstein has the option to pursue money damages if he so chooses.

Weinstein's delay in asserting a desire for injunctive relief is itself unreasonable. While Plaintiffs invested thousands of hours of time and significant out-of-pocket discovery and expert expenses fighting to enjoin the Liberty transaction before the Settlement was reached, Weinstein did nothing to protect his rights. Even after the Settlement was publicly announced and implemented

before the Liberty transaction closed, Weinstein did nothing to protect his rights. Weinstein has not even asserted, let alone shown, that he actually voted his handful of shares against the Liberty transaction, much less took any action to obtain the injunctive or declaratory relief that he now says he cherishes.

Third, Weinstein's "off-the-shelf" generic assertions about a class action settlement not providing sufficient value to warrant a release fails to discuss the actual facts of this Action, and the risks of continuing the Action in the absence of a settlement, much less to assess the true circumstances of this Action against the actual terms of the Settlement. As the lone objector, Weinstein bears the burden of showing that the Settlement is inadequate. *See In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 838 F. Supp. 729, 737 (S.D.N.Y. 1993). Weinstein cannot meet his burden. In contrast, Plaintiffs' opening papers, including the Joint Affirmation of Mark Lebovitch and Mark S. Reich, detail the benefits of the Settlement in light of the *In r Colt Industries Shareholders Litigation*, 155 A.D.2d 154 (1st Dep't 1990) factors. Accordingly, Weinstein's unsubstantiated objection should be rejected and the Settlement approved.

Fourth and finally, Weinstein insists that Plaintiffs' Counsel should not receive a fee award. Weinstein's interest in the request for attorneys' fees is not personal or direct. If approved by the Court, Defendants' payment of the requested fee will not affect or reduce the benefits of the Settlement to the Class. In any event, Weinstein bases his objections to the proposed fee award exclusively on his frivolous assertions about the purported flaws of the Settlement. Once his factually wrong objections are rejected, there is no substance to his arguments about the proposed fee award. Indeed, considering Justice Driscoll's recent $4,000,000 fee award in *In re Goodrich Shareholder Litigation*, Index No. 13699/2011 (N.Y. Sup. Ct. Nassau Cnty. May 15, 2013) in connection with a settlement that provided supplemental disclosures but, unlike here, did not include

comparable improvements to the sales process or elimination of the deal protections, Weinstein provides no reason for this Court to hesitate from granting the requested fee award of $2,700,000.

II. ARGUMENT

A. Plaintiffs Overcame Considerable Hurdles to Achieve The Substantial Benefits of the Settlement

A settlement of a class action should be approved if it is fair, reasonable and was negotiated at arms' length. *See Rosenfeld v. Bear Stearns & Co.*, 237 A.D.2d 199 (1st Dep't 1997).

Through the Settlement, Plaintiffs secured significant reductions to the deal protections – including a $100 million reduction of the termination fee and limiting Liberty's matching rights (plus meaningful supplemental disclosures) – effectively enabling an informed market check before the Company's shareholders voted on the Liberty transaction. Plaintiffs achieved these benefits following extensive discovery and the filing of preliminary injunction papers pursuant to a very expedited schedule and despite facing significant challenges. As noted in Plaintiffs' opening papers, even if Plaintiffs persuaded the Court that they had a reasonable likelihood of success in proving Defendants' breach of fiduciary duties, the Court could still have denied a preliminary injunction based on a balancing of the equities. *See In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 434 (Del. Ch. 2012) (finding that the "balance of harms counsel[ed] against a preliminary injunction"). Further, the exculpation clause in Virgin Media's charter presented a significant hurdle for obtaining money damages because the Director Defendants were only liable for breaches of the duty of loyalty. *See* Plaintiffs' Brief at 16. Proving damages in this Action would have been difficult and, in any event, it was unlikely that the Director Defendants would have been able to pay a substantial judgment in connection with successful claims involving this $23 billion transaction. *Id.* Thus, Plaintiffs faced significant risks that, if they continued to litigate, there would be no change in the

onerous deal protections before the Company's shareholders voted on the Liberty transaction and that shareholders would receive little or no monetary damages at any subsequent trial. *Id.*

B. The Class Supports Approval of the Settlement

"It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. Nov. 9, 2012) (citation omitted); *see also Willson v. N.Y. Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652, at *80-*81 (Sup. Ct. N.Y. Cnty. Nov. 8, 1995) ("The small number of opt outs and objections from Class Members relative to the size of the Class, and the lack of merit of the objections that were made support approval of the settlement.") (citation omitted); *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (citation omitted).[5] In addition, a lack of objections by institutional investors also weighs in favor of the proposed settlement. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 479 (S.D.N.Y. 1998).

Here, following notice that complied with the terms of the Preliminary Approval Order (*see* Affidavit of Mailing of David B. Hennes, dated September 23, 2013 ("Hennes Aff.")),[6] out of the

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[5] *See also Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548 (RLE), 2012 WL 1320124, at *7 (S.D.N.Y. Apr. 20, 2012) ("'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'") (quoting *Wal-Mart*, 396 F.3d at 118); *Banyai v. Mazur*, No. 00 Civ. 9806 (SHS), 2008 U.S. Dist. LEXIS 93593, at *14 (S.D.N.Y. Nov. 18, 2008) ("a small number of objections received when compared to the number of notices sent weighs in favor of approval") (citation omitted).

[6] A copy of the Hennes Aff. is attached hereto as Exhibit 5 to the Joint Reply Aff. Weinstein also maintains that he received a copy of the Notice on September 18, 2013. However, as detailed in the Affidavit of Charlene A. Barker, dated September 30, 2013 (the "Barker Aff."), the notice procedures used for providing Weinstein with the Notice complied with the Preliminary Approval Order. *See* Barker Aff. at ¶¶2-10. A copy of the Barker Aff. is attached hereto as Exhibit 6 to the Joint Reply Aff.

more than 19,000 shareholders holding Virgin Media's approximately 269,000,000 outstanding shares, only one individual shareholder with less than ten shares is objecting to the Settlement. *See* Joint Reply Aff. ¶11.[7] Thus, the reaction of the Class weighs overwhelmingly in favor of approving the Settlement. *See Wal-Mart*, 396 F.3d at 118 (settlement deemed fair where "[o]nly eighteen class members out of five million objected to the Settlement"); *In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("Of approximately 175,000 class members only 22 (0.0126%) have chosen to opt out of the class, and only 45 have voiced objections," thereby "support[ing] approval of the Settlement").[8]

C. Weinstein's Objection Should be Rejected

1. Weinstein Comes with Unclean Hands

In violation of the Court-ordered requirements for any valid objection, Weinstein has refused to disclose the number of Virgin Media shares he held during the class period. *See* Notice at 13. His redacted trading records suggest, however, that he purchased less than ten shares on February 6, 2013, the day after the Liberty transaction was announced. *See* Joint Reply Aff. ¶11. Thus, Weinstein was not a Virgin Media shareholder when Defendants' alleged breaches of duty occurred

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[7] After dissemination of the Notice, two shareholders other than Weinstein contacted Plaintiffs' Counsel regarding the Settlement. *See* Joint Reply Aff. ¶¶4, 7. Neither shareholder objected to the Settlement or the proposed fee award. One shareholder asked for additional information; the other asked to be excluded from the Class, explaining that she asks to be excluded from all class actions as a matter of course. *Id.* Plaintiffs' Counsel promptly responded to these overtures. *Id.* at ¶¶5-6, 8.

[8] The out-of-State cases that Weinstein cites to (*see* Weinstein Objection at 6) are readily distinguished because, unlike here, those classes consisted mainly of consumers who may not have had the knowledge or resources to object. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 218 (5th Cir. 1981) (noting that the Court may place greater weight on corporate objectors as opposed to individuals); *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 813 (3d Cir. 1995) (portion of the consumer class lacked knowledge to object due to deficient notice); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1137 (7th Cir. 1979), *cert denied*, 444 U.S. 870 (1979) (settlement was unfair to a minority of the consumer class); *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001) (finding settlement fair and reasonable despite 41 objecting class members).

and he could not have pursued Plaintiffs' claims in this Action. As the Delaware Chancery Court explained in *Brown v. Automated Marketing Systems, Inc.*, No. 6715, 1982 Del. Ch. LEXIS 571 (Del. Ch. Mar. 22, 1982):

> The transaction of which [plaintiff] complains is the act of [defendant's] board in passing a resolution approving the merger on terms which [plaintiff] feels to be unfair to the public shareholders . . . it is not the merger itself that constitutes the wrongful act, but rather it is the fixing of the terms of the transaction which will be finalized by the consummation of the merger which provides the foundation for the suit. So viewed, there is no continuing wrong but only an alleged wrong which occurred prior to the date on which plaintiff purchased her stock.

Id. at *5-*6 (denying standing). *See also In re Beatrice Cos., Inc. Litig.*, 1987 Del. Ch. LEXIS 1036, at *7-*8 (Del. 1987) (holding that "[i]n the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of the consummation, which are challenged") (citation omitted); *Omnicare*, 809 A.2d at 1166 (dismissing breach of duty claims where "definitive terms of the merger were agreed to, and publicly disclosed, before plaintiff acquired shares in the target corporation").

Thus, courts routinely deny standing based on post-announcement stock purchases in order to prevent purported shareholder-plaintiffs from purchasing a lawsuit. *See id.* at 1169 (noting "the evil of purchasing stock in order to attack a transaction which occurred prior to the purchase of the stock") (citation omitted). Nor has Weinstein asserted, let alone shown, that he voted his handful of shares against the Liberty transaction and that he did not accept its benefits. *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 848 (Del. 1987) (shareholder cannot challenge the fairness of a merger when he "votes in favor of the merger").

If Weinstein had been a shareholder without a history of frivolous objections, the timing of his purchase of a few Virgin Media shares the day following the announcement of the Liberty transaction might not have raised a concern that his true intent was to purchase an objection in order to disrupt a settlement and extort a payment. *See Barnes v. Fleetboston Fin. Corp.*, No. 01-10395-

NG, 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006) (noting that "professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors"). But this is not the first time that Weinstein has presented a baseless objection to extort a payment. Attached as Exhibit 7 to the Joint Reply Aff. is a non-exhaustive list of recent cases in which Weinstein lodged (either in his personal capacity or as counsel) objections that were overruled as meritless or were withdrawn.[9] In fact, Weinstein has lodged at least thirteen objections over the past seven years. *See* Joint Reply Aff. at Ex. 7.

Judges across the country have recognized Weinstein's cynical tactics and often rejected his assertions. For example, in *Turner v. General Electric Co.*, No. 05-cv-186 (M.D. Fla.), Weinstein withdrew his objection after it was revealed that he had attempted to extort class counsel into making a $125,000 contribution to a charity that would allow him to share in the proceeds. *See* Joint Reply Aff. Exs. 7 and 8. *Turner* was not an isolated incident. In *Progressive Corp. Ins. Underwriting and Rating Practices Litig.*, MDL No. 1519 (N.D. Fla.), class counsel informed the court of an identical attempt by Weinstein to extort a payment in exchange for withdrawing his objection. *See* Joint Reply Aff. Ex. 9. *See also In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 294-95 (S.D.N.Y. 2010) (noting that Weinstein is a known "serial objector" and concurring with "numerous courts that have recognized that professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients").

Here, the factual premises of his objection are demonstrably wrong. *See infra* at II.C.2.a and b. Yet, when Plaintiffs' Counsel informed Weinstein of his errors, he refused to concede his mistake

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[9] Weinstein has refused to provide a list of other class action matters in which he has objected or represented an objector in the past three years in violation of the Court-approved Notice. *Compare* Weinstein Objection at 21 *with* Notice at 13.

and withdraw his frivolous objections. *See* Joint Reply Aff. ¶11 and Ex. 4. Weinstein's off-the-shelf objections and his subsequent conduct in this Action further reveal Weinstein's true purpose for lodging his objection: disrupting the Settlement in hopes of extorting a payment. As discussed below, Weinstein's generic arguments fail to discuss the facts of the case, the risks of continuing the Action in the absence of a settlement, or any application of the circumstances of the case against the terms of the Settlement. *See infra* at II.C.2.c; *O'Keefe v. Mercedes–Benz USA, LLC*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) ("courts are increasingly weary of professional objectors: [s]ome of the objections were obviously canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests").

In sum, Weinstein purchased an objection, could never have pursued Plaintiffs' claims in this Action, and comes with unclean hands. The Court should reject the Weinstein Objection.

2. Weinstein's Objection is Without Merit

a. Weinstein Can Opt-Out to Pursue a Damages Claim Because Plaintiffs Negotiated that Precise Right for Class Members

Weinstein claims that Plaintiffs have stripped him of his ability to pursue damages claims against Defendants. *See* Weinstein Objection at 7-8. Not so. In reality, Plaintiffs arduously negotiated a settlement with a carve-out from the release that specifically allows Weinstein to opt-out and pursue his damages claims.

The Settlement Agreement clearly preserves Weinstein's right to pursue damages claims.[10] The Notice, in plain language, advised shareholders, including Weinstein, of this right.[11] Yet, rather

[10] "The Settlement Class shall be a mandatory non-opt out Class with respect to all claims for injunctive, declaratory and other equitable relief. ***Non-New York resident members of the Settlement Class may opt out solely to pursue potential claims for monetary damages*** but will otherwise be bound by the Settlement's terms. Those persons (if any) who timely and validly request exclusion from the Settlement Class pursuant to the Notice (defined below) to be sent to potential Settlement Class Members are excluded from the Settlement Class solely with respect to

than pursue the damage claims that are already available to him under the terms of the Settlement, Weinstein has elected to file an objection in order to (ostensibly) secure that very same right. Considering that Plaintiffs' Counsel provided the courtesy of contacting Weinstein to correct any innocent misimpression but that he refuses to withdraw this part of his objection, it is clear that Weinstein not only has failed to give his objection the slightest bit of good faith consideration, but his objection is really just a means to commit mischief. Accordingly, the Court should disregard Weinstein's baseless contention.

Indeed, Plaintiffs should be credited with attaining this opt-out right on behalf of Weinstein and the Settlement Class. The CPLR does not explicitly require parties to a class action (particularly one brought primarily for injunctive or declaratory relief) to give absentee class members opt-out rights. *See* CPLR §904(a). Opt-out rights are not deemed necessary because when, like here, class members have the same interests (*i.e.*, have the same claims and are similarly situated for the purposes of relief), the likelihood of individual class members pursuing their own claims is minimal. *See, e.g.*, David Siegel, New York Practice 186 (1978) ("When the remedy sought is one which will likely redound to the whole class automatically, opting out will seldom if ever be appropriate").[12]

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any right they may have to pursue potential claims for monetary damages." Settlement Agreement at ¶2 (emphasis added).

[11] "NON-NEW YORK RESIDENTS' RIGHTS TO BE PARTIALLY EXCLUDED FROM THE SETTLEMENT CLASS. ***Any individual or entity that is a non-New York resident falling within the definition of the Settlement Class that so desires may be excluded from the Settlement and the Settlement Class solely for the purpose of pursuing potential claims for monetary damages***." Notice at 14-15 (emphasis added).

[12] For the same reason, courts considering merger cases similar to this one have consistently held that actions that seek predominantly equitable relief but include claims for incidental damages can be certified for class-wide resolution even though class members have no right to opt out. *See, e.g., Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1611 (Cal. App. 1st Dist. 1991) (holding that the trial court did not abuse its discretion by treating the coordinated cases as ones with no right to opt out and did not deny plaintiffs due process despite the fact that both equitable and monetary relief were sought). What is more, "Delaware courts repeatedly have held that actions challenging the

Clearly, providing for an opt-out right for shareholders in cases such as this Action is the exception rather than the norm. Plaintiffs nevertheless negotiated a provision that would allow the Company's out-of-State shareholders – including Weinstein – to opt-out and pursue damages claims. Weinstein's objection to a settlement that provides him with the precise relief he now says he was denied, even after any innocent misunderstanding about the Settlement terms was corrected, is frivolous and should be rejected.

b. Weinstein's Contention that Disapproval of the Settlement Will Preserve Injunctive Rights for the Class is Erroneous

Weinstein also complains that Class Members will lose their right to bring claims for injunctive relief if the Court approves the Settlement. *See* Weinstein Objection at 7. Once again, Weinstein's factual premise is demonstratively wrong. There is nothing to enjoin. Every Class Member lost any injunctive rights they may have had with respect to the shareholder vote on the Liberty transaction (and the transaction itself) once that transaction closed on June 7, 2013. *See, e.g., McMillan v. Intercargo Corp.*, 768 A.2d 492, 500 (Del. Ch. 2000) ("Having unsuccessfully attempted to obtain an injunction against the consummation of the merger, the metaphorical merger eggs have been scrambled. Under our case law, it is generally accepted that a completed merger cannot, as a practical matter, be unwound.") (citation omitted). Thus, the injunctive rights that Weinstein purportedly seeks to preserve are nonexistent. Weinstein's unfounded and baseless claim that disapproval of the Settlement will somehow preserve injunctive rights for Class Members should – as with every other "argument" in the Objection – be rejected.

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propriety of director conduct in carrying out corporate transactions are properly certifiable" as non-opt-out classes even when, as here, the class seeks "monetary damages in addition to declaratory or injunctive relief." *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 432-33 (Del. 2012).

c. Weinstein's Off-The-Shelf Objections Are Baseless

Weinstein further argues that the Settlement is inadequate because there is no benefit to the Class and there is no consideration for the release. *See* Weinstein Objection at 8-16.

Weinstein does not mention the litigation risks assumed by Plaintiffs and their counsel while he sat idly by. Indeed, Weinstein – holding less than ten of Virgin Media's 269,000,000 shares – stands alone in his desire to sacrifice the benefits of the Settlement to continue litigation, even though he has no standing to pursue any of Plaintiffs' claims, nor shown any willingness or ability to do so. *See NASDAQ*, 187 F.R.D. at 479 (explaining that "an objection based on an assertion or argument not readily supported at trial should not be permitted to bar settlement"). The Weinstein Objection is meritless and should be rejected.

As established in Plaintiffs' Brief, the Settlement provided substantial benefits to the Class by making it much easier for an alternative suitor to make a competitive bid ***if*** the price offered by Liberty was too low and did not maximize shareholder value and by providing meaningful supplemental disclosures. *See* Plaintiffs' Brief at 20. The Class enjoyed the benefits of the resulting pre-vote market check regardless whether a topping bid was actually made. *See In re Del Monte Foods Co. S'holders Litig.*, No. 6027-VCL, 2011 Del. Ch. LEXIS 94, at *14 (Del. Ch. June 27, 2011) ("[revised deal protection provisions] provide[] the opportunity for a topping bid, and this benefit exist[s] whether or not a competing bidder materialize[s]"); *In re Compellent Techs., Inc.*, No. 6084-VCL, 2011 Del. Ch. LEXIS 190, at *56-*57 (Del. Ch. Dec. 9, 2011) ("Loosening a no-shop clause, weakening information rights or matching rights, and ameliorating restrictions on a board changing its recommendation should, all else equal, increase the chance of a topping bid").

Weinstein is wrong that the Settlement provided no benefits simply because no higher bids were made.[13]

The Settlement required Defendants to publicly disclose the Modified Deal Terms and the Supplemental Disclosures contemporaneously with entering into the Term Sheet and well in advance of the shareholder vote. *See* Plaintiffs' Brief at 9-10. Thus, Defendants caused Virgin Media to publicly file with the SEC two Forms 8-K that detailed the terms of the Settlement, thereby: (1) informing potential suitors of the revised merger conditions that made it much easier for them to launch a competitive bid; and (2) providing significant benefits to the Class ***when those disclosures were made***. *See* Plaintiffs' Brief at 9-10. In return, Plaintiffs agreed to release their claims and, subject to Court approval, the claims of the Class. *See* Settlement Agreement ¶1. The only way for Plaintiffs' Counsel to have obtained those significant benefits for the Class was to commit, in a contract, that they will ask the Court to provide Defendants the release. Indeed, the premise of Weinstein's argument is that Plaintiffs and their counsel, having induced a contract that contemplated immediate performance by Defendants, should have in bad faith breached that contract by refusing to seek the release that supplies the consideration for those very benefits. Thus, Weinstein's assertion that the benefits of the Settlement constitute worthless "past consideration" for a release and that Class members "did not receive a single thing that they did not already have" is absurd.[14]

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[13] Weinstein asserts that the Modified Deal Terms provided no value because no "lower" bids were made. *See* Weinstein Objection at 12. Presumably, Weinstein meant that the Settlement did not provide benefits because no "higher" bids were made – something that Weinstein would have cared much more about if he had purchased more than a handful of Virgin Media shares. Either way, his objection is meritless.

[14] Weinstein's cases are readily distinguishable. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (finding that settlement unfair because the named plaintiff received compensation but class members received nothing); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 389 (C.D. Cal. 2007) (rejecting settlement because it afforded economic relief only to a select portion of the proposed

Moreover, although out-of-State shareholders (like Weinstein) received the benefits of the Settlement, Plaintiffs negotiated a carve-out to allow them to nevertheless pursue their own individual damages claims. Settlement Agreement ¶2. Having decided not to opt-out of the Class, Weinstein should not be heard to complain about being bound to a release with respect to claims that he decided not to pursue (even assuming *arguendo* that he would have had standing to bring claims based on his post-merger announcement purchases in the first place).[15]

D. The Court Should Approve Plaintiffs' Request for Attorneys' Fees

Weinstein also objects to the approval of the requested award of attorneys' fees sought by Plaintiffs' Counsel. *See* Weinstein Objection at 17-18. However, if approved by the Court, Defendants' payment of the requested fee will not affect or reduce the benefits of the Settlement to the Class. Moreover, contrary to Weinstein's bald assertion that Plaintiffs' Counsel have not "earned" a fee, the record makes further clear that the amount that Defendants have agreed to pay for Plaintiffs' attorneys fees and expenses is fair and reasonable. *See* Joint Aff. at ¶¶53-54. Defendants' agreement to pay this fee should carry significant weight.[16] The fee was only negotiated after the parties had reached agreement on the terms of the Settlement, and Defendants had every reason to seek to minimize the size of any fee request by Plaintiffs' Counsel. *See id.* at ¶¶52-53. Yet

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class); *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 285-86 (7th Cir. 2002) (reversing approval of settlement that included as part of the settlement class claims that were "sharply different").

[15] Weinstein's cited cases, involving true *ex post facto* releases in connection with employment agreements, do not hold differently. *See, e.g., Van Brunt v. Rauschenberg*, 799 F. Supp. 1467, 1470 (S.D.N.Y. 1992) (noting that the case involved the question of whether an implied employment agreement existed between two individuals).

[16] In the first instance, the United States Supreme Court has encouraged a consensual resolution of attorneys' fees as the ideal toward which litigants should strive. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the United States Supreme Court said that "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Id.* at 437; *accord In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys' fees).

Defendants agreed to pay $2,700,000, surely in light of, among other things: (i) the meaningful benefits that the Settlement provided to shareholders in advance of the shareholder vote to approve the Liberty transaction; (ii) the magnitude of the work completed, including the difficulty, the time and skill required, and the prosecution of Plaintiffs' claims on a fully contingent fee basis; and (iii) the quality of the services of Plaintiffs' Counsel, as well as the work performed in pursuing and resolving the complex factual and financial issues, and legal and equitable claims alleged by Plaintiffs, including the investigation and analysis of the underlying facts and successful negotiations with Defendants and their financial and legal advisors. Indeed, the $2,700,000 that Plaintiffs' Counsel agreed to accept following contentious arms'-length negotiations is significantly lower than one of the most recent precedents involving a comparable transaction. In *Goodrich*, Justice Driscoll awarded $4,000,000 in fees and expenses in connection with a settlement that provided supplemental disclosures but, unlike here, did not include comparable improvements to the sales process or elimination of the deal protections.

The Modified Deal Terms and the Supplemental Disclosures confer a compensable benefit on the Settlement Class such that Plaintiffs' Counsel has established that an award of fees and expenses is merited. *See* Plaintiffs' Brief at 19-26; Joint Aff. at ¶¶49-53. In addition to *Goodrich*, numerous courts have approved attorneys' fees and expenses in line with, or more than, what the parties negotiated in this Action. *See Phillips v. Reckson Assocs. Realty Corp.*, No. 06-12871 (N.Y. Sup. Ct. Nassau Cnty. Jan, 20, 2009) (Final Order and Judgment Approving Settlement and Fees and Expenses awarding $5,000,000 in fees and expenses); *In re New York Stock Exch./Archipelago*

Merger Litig., No. 601646/05 (N.Y. Sup. Ct. N.Y. Cnty. Feb. 21, 2006) (awarding $8,500,000 in fees and $595,511 in expenses).[17]

The Weinstein Objection does not address any of the merits of Plaintiffs' application for attorneys' fees and expenses. It does not discuss the substantial benefit theory. It ignores the benefits for the Settlement Class obtained by Plaintiffs here. It does not mention the contingent risk assumed here by Plaintiffs' Counsel, or its impact on the amount of the agreed-to fee. It ignores that Defendants have agreed to pay the fee in arms'-length non-collusive negotiations taking into account this Court's most recent precedents. And it fails to otherwise address any of the legal analysis which establishes the reasonableness of the agreed-to fee. *See* Weinstein Objection at 17-18. Simply claiming the fee has not been "earned," without more, is insufficient to object to the proposed fee. *See Willson*, 1995 N.Y. Misc. LEXIS 652, at *61-*62, *94-*95 (overruling objections that a requested fee award that provided a 4.60 multiplier was "excessive").

Accordingly, Weinstein's arguments concerning the requested fee should be rejected, and, for the reasons stated in Plaintiffs' Brief, Plaintiffs' Counsel respectfully submits that the requested fee award is reasonable and should be approved.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) certify the Settlement Class; (2) approve the Settlement; (3) approve an award of $2,700,000, inclusive of litigation expenses, to Plaintiffs' Counsel, to be allocated by Co-Lead Counsel; and (iv) overrule the Weinstein Objection.

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[17] Plaintiffs respectfully refer the Court to the compendium filed as Exhibit 5 to the Affirmation of Mark Lebovitch in Support of Plaintiffs' Motion for Class Certification, Final Approval of Class Action Settlement, and for an Award of Attorneys' Fees and Expenses, dated September 3, 2013, submitted with the Motion, for the full text of these decisions, as well as *Goodrich*.

DATED: September 30, 2013

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