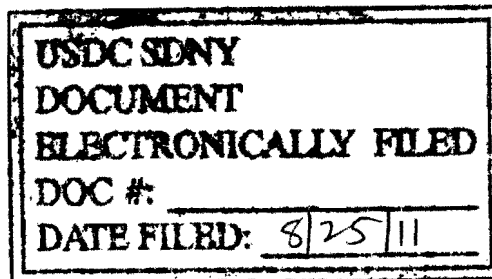


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



----- X  
IN RE: INITIAL PUBLIC OFFERING  
SECURITIES LITIGATION

MEMORANDUM OPINION  
AND ORDER

MASTER FILE  
NO. 21 MC 92 (SAS)

----- X  
SHIRA A. SCHEINDLIN, U.S.D.J.:

By orders dated May 17, 2011 and July 12, 2011,<sup>1</sup> the Second Circuit remanded to this Court three appeals of James J. Hayes – the sole remaining objector to the \$586 million global settlement reached in this case after nearly a decade of litigation, and approved by this Court in October of 2009.<sup>2</sup> The Second Circuit directed this Court “to determine whether *pro se* objector Hayes is a class member.”<sup>3</sup>

In order to be a class member, Hayes must have “purchased or otherwise acquired any of the Subject Securities at issue in such case during the

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<sup>1</sup> See Docket Nos. 6282, 6287.

<sup>2</sup> See *In re IPO Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009). In granting plaintiffs’ motion for final approval of the proposed settlement and for an award of attorneys’ fees, I rejected Hayes’ objections to the settlement. I did not address whether Hayes was a class member (and therefore had standing to object to the settlement). See *id.* at 493-94.

<sup>3</sup> Docket No. 6287.

Settlement Class Period applicable to such Action and *[have been] damaged thereby.*<sup>4</sup> Hayes originally objected to the settlement based on his assertion of membership in three IPO settlement classes: (1) *In re JNI Corp. IPO Securities Litigation* (“JNI”),<sup>5</sup> (2) *In re Ticketmaster Online IPO Securities Litigation* (“Ticketmaster”),<sup>6</sup> and (3) *In re deCode Genetics, Inc. IPO Securities Litigation* (“deCode”).<sup>7</sup> However, he now confesses – for the first time in over two years – that he did not purchase the stock of JNI or Ticketmaster during the class period.<sup>8</sup> As for deCode, his (untimely) submission of a “CSFBDIRECT brokerage

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<sup>4</sup> *In re IPO Sec. Litig.*, 671 F. Supp. 2d at 472 (emphasis in original).

<sup>5</sup> 01 Civ. 101740.

<sup>6</sup> 01 Civ. 10822.

<sup>7</sup> 01 Civ. 11219. *See* 8/10/09 James J. Hayes Objection to Settlement Class Certification, Settlement Adequacy and Attorney Fee Award, Ex. B. to the Declaration of Christian Siebott in Support of Plaintiffs’ Response to this Court’s July 20, 2011 Order Addressing Whether *Pro Se* Objector James J. Hayes Is a Class Member (“Siebott Decl.”), at 1

<sup>8</sup> *Compare* 6/14/11 Letter from James J. Hayes to the Court (“6/14/11 Hayes letter”), Ex. I to Siebott Decl., at 2 (emphasis added) (explaining that he “receiv[ed] [Settlement] Notices for Ticketmaster and JNI Corp., *which were apparently not purchased during the respective class periods*”) with 3/9/11 Letter from James J. Hayes to the Court (“3/9/11 Hayes letter”), Ex. G to Siebott Decl., at 1 (“Hayes also asserts membership in several other classes, including Decode [] and Ticketmaster [], on the basis of his trades during the class period.”).

statement[.]”<sup>9</sup> shows that he suffered no loss in association with his alleged purchase of 300 shares of that stock.<sup>10</sup> Because he was not “damaged” by his purchase of deCode stock, he falls outside the definition of a class member, and therefore lacks standing to object to the settlement on that basis.<sup>11</sup>

However, Hayes now asserts that he is a class member based on his alleged purchase of stock in Tut Systems, Inc. (“Tut Systems”), another of the 309 issuers whose securities are at issue in this litigation.<sup>12</sup> As noted above, in his original objections to the proposed settlement, Hayes did not assert membership in the Tut Systems class. Only after this Court ordered Hayes to show cause “why an

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<sup>9</sup> 8/8/11 Letter from James J. Hayes to the Court (“8/8/11 Hayes letter”), Appendix A.

<sup>10</sup> See James J. Hayes 2000 Tax Information Statement, Exhibit to 8/8/11 Hayes letter.

<sup>11</sup> See Fed. R. Civ. P. 23(e)(5) (emphasis added) (“Any *class member* may object to the [settlement] proposal . . .”); *In re Drexel Burnham Lambert Grp., Inc.*, 130 B.R. 910, 923 (S.D.N.Y. 1991), *aff’d*, 960 F.2d 285 (2d Cir. 1992) (“Only Class members have standing to object to the Settlement of a class action” because “[o]bjectors who are non-Class members lack standing to object to the fairness, reasonableness and adequacy of the Settlement.”); see also *In re AOL Time Warner, Inc.*, No. MDL 1500, 02 Civ. 5575, 2006 WL 903236, at \*15 n.17 (S.D.N.Y. Apr. 6, 2006) (citing *New York v. Reebok Int’l Ltd.*, 96 F.3d 44, 47 (2d Cir. 1996)) (summarily dismissing objector whose account statements demonstrated a profit on the subject securities, holding “[w]ithout an injury, Heyburn does not have standing to object”).

<sup>12</sup> See 6/14/11 Hayes letter; 3/9/11 Hayes letter at 1.

Order should not be issued dismissing his motion to reduce the Appeal Bond for lack of standing” and to “furnish proof to the Court that he is in fact a class member”<sup>13</sup> did he submit “proof of membership for the Tut Systems class.”<sup>14</sup> That “proof” consisted of a “portion[] of his 1999 personal income tax form reporting a \$2,317 trading loss in Tut Systems, Inc. during the class period.”<sup>15</sup>

Hayes’ proof fails to establish his class membership for two reasons. *First*, it is untimely. Although Hayes timely objected to the JNI, Ticketmaster, and deCode settlements – all of which he lacked standing to object to – he failed to “identify” Tut Systems among the “securities [he] purchased,” as required by the Notice of Pendency and Proposed Global Settlement.<sup>16</sup> Nor did he submit a proof of claim form for Tut Systems.<sup>17</sup> Although this Court considered Hayes’

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<sup>13</sup> Docket No. 6260.

<sup>14</sup> 3/9/11 Hayes letter.

<sup>15</sup> *Id.* (footnote omitted). *See* James J. Hayes 1999 Schedule D (Form 1040), Exhibit to 3/9/11 Hayes letter.

<sup>16</sup> Notice of Pendency and Proposed Global Settlement, Ex. A to Siebott Decl., at 12.

<sup>17</sup> *See* Proof of Claim and Release, *In re IPO Sec. Litig.*, available at <http://iposecuritieslitigation.com/poc.pdf>, § D (requiring putative class members to represent that they “have enclosed photocopies of the stockbroker’s confirmation slips, stockbroker’s statements, or other documents evidencing each purchase, sale or retention of the Subject Securities transactions listed above in support of my claim. (IF ANY SUCH DOCUMENTS ARE NOT IN YOUR POSSESSION, PLEASE OBTAIN A COPY OR EQUIVALENT DOCUMENTS FROM YOUR

objections on the merits, he lacked standing to assert those objections on the basis of membership in the JMI, Ticketmaster, and deCode classes at the time he objected. His after-the-fact assertion of membership in a wholly different class cannot cure this deficiency in standing.<sup>18</sup> The time to object to the Tut Systems settlement has long passed. Because Hayes submitted no evidence whatsoever of the sole basis for his alleged class membership until roughly two years after the deadline to do so – nor referenced that alleged class membership in his objections – he has given up his “legal rights and options in this settlement.”<sup>19</sup> He is not a

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BROKER BECAUSE THESE DOCUMENTS ARE NECESSARY TO PROVE AND PROCESS YOUR CLAIM.)”).

<sup>18</sup> *Accord Feder v. Electronic Data Sys. Corp.*, 248 Fed. Appx. 579, 581, 2007 WL 2800135, at \*2 (5th Cir. 2007) (“[W]here the proof of claims period has closed and the settlement has been finally approved by the district court, the burden of proving class membership cannot be satisfied by the appellant’s unsupported assertions of class membership. [Appellant] did not submit a proof of claim form. Nor did he provide the documentary evidence required by the claim form to support his contention that he bought or sold EDS stocks during the class period. His objection did not include the required information as to the number or type of EDS securities that [appellant] alleges to have dealt in during the period.”).

<sup>19</sup> Notice of Pendency and Proposed Global Settlement at 1 (explaining that “[t]he only way to get payment” is to “submit a claim form by December 10, 2009”; that the deadline to object is August 10, 2009; and that if putative class members “do nothing” they “get no payment” and “give up rights”). *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 09-4813-cv (2d Cir. Apr. 6, 2010), Ex. M to Siebott Decl. (dismissing an appeal for lack of standing because an objector to a class action settlement “did not file a claim to a portion of the settlement fund”); *Braud v. Transport Serv. Co. of Ill.*, Nos. 05-1898, 05-1977, 05-5557, 06-0891, 2010 WL 3283398, at \*5 (E.D. La. Aug. 17, 2010) (rejecting plaintiffs’ objections

member of any class.

*Second*, even if Hayes’ proof of class membership were timely, it is insufficient. Not only does Hayes’ unsigned, unsworn, unauthenticated 1999 tax form fall short of the documentation required to support a proof of claim;<sup>20</sup> it also falls short of establishing Hayes’ class membership by a preponderance of the evidence.<sup>21</sup> “Allowing someone to object to settlement in a class action based on this sort of weak, unsubstantiated evidence would inject a great deal of unjustified uncertainty into the settlement process.”<sup>22</sup> For all of these reasons, I hold that Hayes is not a class member.

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to class settlement where “[t]here is no evidence in the record that putative plaintiffs filed timely proof of claim forms” because “[i]t is axiomatic that one must file a proof of claim form to become a member of a class”).

<sup>20</sup> See Proof of Claim and Release § D.

<sup>21</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (holding that standing “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation”); see also *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 340 (S.D.N.Y. 2005) (holding that objector lacked standing to object to settlement where she “submitted a ‘Notice Regarding the Court’s Inquiry Regarding Standing’ reaffirming that [she] had an out-of-pocket loss arising from her purchase of WorldCom securities during the Class Period” but failed to submit a proof of claim).

<sup>22</sup> *Feder*, 248 Fed. Appx. at 581.

SO ORDERED:



Shira A. Scheindlin  
U.S.D.J.

Dated: August 25, 2011  
New York, New York

**- Appearances -**

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## **Appendix A**

James J. Hayes  
4024 Estabrook Dr.  
Annandale, VA 22003

August 8, 2011

Hon. Shira A. Scheindlin  
United States District Court  
Southern District of New York  
500 Pearl Street, Rm 1620  
New York, NY 10007

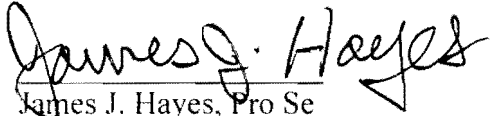
08/08/11

Re: Initial Public Offering Litigation, 21 MC 92 (SAS)

Dear Judge Scheindlin:

I first learned of the Court's July 20, 2011 Order today when it was included as an exhibit in the plaintiffs' August 5, 2011 response. Had I received that order, I would have submitted proof of my transactions in Decode Genetics Inc. The attached copies of my CSFBDIRECT brokerage statements show that I purchased 300 shares on 8/18/2000 and sold those shares on 9/20/2000. These transactions are within the class period, which begins on 7/16/2000 and ends on 12/6/2000.

Respectfully submitted,

  
James J. Hayes, Pro Se

c. Stanley D. Bernstein

Attachment: CSFB Statements

Account Number: [REDACTED]

Recipient's Name and Address:

YOUR TAX INFORMATION  
STATEMENT

Recipient's Identification Number [REDACTED]

JAMES J HAYES  
4024 ESTABROOK DR

Summary Of Transactions We Do Not Report To The IRS (See enclosure for additional information)

	Amount
Equity Options Transactions	
Equity Options Proceeds and Expirations .....	[REDACTED]
Securities Purchased	
Net Cost of Securities Purchased .....	[REDACTED]
Margin Interest Expense Charged to Your Account .....	

2000 Form 1099-B PROCEEDS FROM BROKER AND BARTER EXCHANGE TRANSACTIONS  
(For individuals, report details on Form 1040; Schedule D; Line 1 or 8.)

OMB No. 1545-0715

This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if this income is taxable and the IRS determines that it has not been reported.

Description (Box 5)	CUSIP (Box 1b)	Trade/Process Date (Box 1a)	Quantity	Proceeds (Less Commissions & Fees) (Box 2)	Federal Income Tax Withheld (Box 4)
FRUIT OF THE LOOM LTD SHS A ISIN#KYG3682L1059	G3682L105	12/28/2000	1,000	144.99	
ADVANCED DIGITAL INFO CORP	007525108	12/15/2000	1,000	19,979.33	
BOB EVANS FARMS INC	096761101	02/11/2000	1,000	15,166.99	
DANKA BUSINESS SYS PLC ADR	236277109	12/27/2000	1,000	292.48	
DECODE GENETICS INC COM	243586104	09/20/2000 09/20/2000	100 200	2,780.75 5,561.47	
				8,342.22	
DIONE X CORP	254546104	07/10/2000 07/10/2000	500 500	14,239.53 14,239.52	
				28,479.05	
DONALDSON LUKIN & JENNETTE INC DLJDIRECT COM	257661504	09/14/2000	500	3,823.62	

2000

Account Number: [REDACTED]

Recipient's Name and Address:

YOUR TAX INFORMATION  
STATEMENTRecipient's Identification  
Number: [REDACTED]JAMES J HAYES  
4024 ESTABROOK DR

## TRANSACTIONS WE DO NOT REPORT TO THE IRS

## EQUITY OPTIONS TRANSACTIONS

(Continued)

Description	Expiration Date/ Strike Price	Trade/Process Date	Transaction Type	Quantity	Purchase Amount	Proceeds
CALL 100 TEKELEC CUSIP: 8791019CJ	EXP 03-18-00 @ 50	02/28/2000 03/20/2000	Sell Open Expiration	10 10		3,572.37 .00 ----- 3,572.37
Total					.00	12,544.77

## SECURITIES PURCHASED

Description	CUSIP	Trade/Process Date	Quantity	Net Cost	Accrued Interest Purchased Amount	Purchased Security Type
GAMBLO TECHNOLOGY LTD SHS ISIN#110010825029	M47298100	01/19/2000 01/19/2000	500 500	10,916.25 10,947.50 ----- 21,863.75		
RAVITH W SOFTWARE LTD SHS	M81867109	08/09/2000	100	1,000.00		
ADVANCED DIGITAL INFO CORP	007525108	08/18/2000 08/18/2000	200 800	2,204.00 8,816.00 ----- 11,020.00		
BOSTON BEER INC CLASS A	100557107	11/02/2000 11/02/2000	300 700	2,443.50 5,701.50 ----- 8,145.00		
DECODE GENETICS INC COM	243586104	08/18/2000	300	8,307.50		
DIONEX CORP	254546104	07/07/2000 07/07/2000	500 500	11,260.00 11,260.00 ----- 22,520.00		