

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	X	
CARRIE SCHEUFELE, JEFFREY	:	Civil Action No. 1:17-cv-05753-JGK
SCHEUFELE and NICHOLAS ORAM,	:	
Individually and on Behalf of All Others	:	<u>CLASS ACTION</u>
Similarly Situated,	:	
	:	REPLY MEMORANDUM OF LAW IN
Plaintiffs,	:	FURTHER SUPPORT OF: (1) FINAL
	:	APPROVAL OF CLASS ACTION
vs.	:	SETTLEMENT; (2) APPROVAL OF PLAN
	:	OF ALLOCATION; AND (3) AN AWARD
TABLEAU SOFTWARE, INC., CHRISTIAN	:	OF ATTORNEYS' FEES AND EXPENSES
CHABOT, THOMAS WALKER, PATRICK	:	
HANRAHAN and CHRISTOPHER STOLTE,	:	
	:	
Defendants.	:	
	:	
	X	

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Plaintiff United Association National Pension Fund (f/k/a The Plumbers and Pipefitters National Pension Fund) (“Plaintiff”), on behalf of itself and the Class, and Class Counsel respectfully submit this reply memorandum of law in further support of Plaintiff’s motion for final approval of the Settlement and approval of the Plan of Allocation and Class Counsel’s motion for an award of attorneys’ fees and expenses.¹

I. PRELIMINARY STATEMENT

The Settlement resolves this Litigation in its entirety and establishes a common fund of \$95,000,000 for the benefit of Class Members. As detailed in Plaintiff’s and Class Counsel’s opening papers (ECF Nos. 182-189), the Settlement is the product of hard-fought litigation and extensive arm’s-length negotiations achieved with the assistance of two mediators – former Ambassador Jeffrey Bleich, Esq. and retired federal district court judge Layn R. Phillips. It represents a very favorable result for the Class in light of the substantial risks and challenges that Plaintiff and the Class faced in proving liability and defeating Defendants’ many arguments in response, as well as the costs and delays of continued litigation, including the partial reopening of discovery which would occur absent this Settlement.

In response to the extensive Court-approved notice program, which involved mailing over 78,800 copies of the Notice of Proposed Settlement of Class Action (the “Notice”) and the Proof of Claim and Release form (the “Proof of Claim”) (collectively, the “Notice Package”) to potential Class Members and nominees and publishing the Summary Notice in *The Wall Street Journal* and

¹ Unless otherwise noted, all capitalized terms are defined in the April 16, 2021 Stipulation of Settlement (“Stipulation”) (ECF No. 173) or in Plaintiff’s and Class Counsel’s opening memoranda of law in support of these motions, dated August 10, 2021. ECF Nos. 183, 185. The Supplemental Declaration of Ross D. Murray Regarding Notice Dissemination and Requests for Exclusion Received to Date (“Supp. Murray Decl.”), dated August 30, 2021, is submitted herewith. All citations are omitted and emphasis is added, unless otherwise indicated.

over *Business Wire*, only one member of the class filed an objection. No other class member objected to the settlement or the request for fees or otherwise asked to be excluded.² The Class's reaction further demonstrates that the proposed Settlement, the Plan of Allocation, and the request for fees and expenses are fair and reasonable and should be approved.

II. THE CLASS OVERWHELMINGLY SUPPORTS THE SETTLEMENT

Plaintiff and Class Counsel respectfully submit that their opening briefs and declarations demonstrate why approval of the motions is warranted. Now that the time for objecting or requesting exclusion from the Class has passed, the virtual lack of objections and absence of additional opt outs from the Class provides additional support for approval of the motions.

The Notice program in this case was robust. Pursuant to the Court's Preliminary Approval Order, the Claims Administrator mailed more than 78,800 copies of the Notice Package to potential Class Members and their nominees. *See* Supp. Murray Decl., ¶4. The Notice informed Class Members of the terms of the proposed Settlement and Plan of Allocation, and that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 28% of the Settlement Amount and payment of litigation expenses in an amount not to exceed \$1,500,000. *See* ECF No. 187-1 (Notice) at 3. The Notice also apprised Class Members of their right to object to the proposed Settlement, the Plan of Allocation and/or the request for attorneys' fees and expenses, their right to exclude themselves from the Class, the August 24, 2021 deadline for filing objections and requests for exclusion, and the August 24, 2021 deadline for submitting Proofs of Claim. *See id.* at 1.

The Notice program also involved publishing notice in widely distributed publications. The Claims Administrator published the Summary Notice in *The Wall Street Journal* and released it over

² Four requests for exclusion were received in response to the Notice of Pendency provided in 2020. *See* ECF No. 145.

Business Wire, which informed readers of the proposed Settlement, how to obtain copies of the Notice Package, and the deadlines for the submission of Proofs of Claim, objections, and requests for exclusion. *See* ECF No. 187 (Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date), ¶12. The Claims Administrator also updated the previously-established case-specific website to provide information and links to relevant settlement documents (*id.*, ¶14), and the case-specific toll-free telephone helpline. *Id.*, ¶13. The notice program was clearly targeted to reach the intended audience.

The result is remarkable. Following this extensive notice program, only one single Class Member has objected to any aspect of the Settlement, the Plan of Allocation, or fee and expense application.³ The sole objection, filed by Mark Martin (who purchased 225 shares of Tableau stock), should be overruled. Mr. Martin’s assertion that Class Counsel did not “fight hard for the members of the class action” is belied by the history of this Litigation. As the Court is aware from its oversight of this case since its inception in 2017, and as detailed in the Declaration of David A. Rosenfeld in Support of Motions for: (1) Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) an Award of Attorneys’ Fees and Expenses (ECF No. 186), this case has been vigorously litigated, through Defendants’ motion to dismiss, Plaintiff’s motion for class certification, extensive fact discovery, including the production and review of over two million pages of documents, the taking or defending of over two dozen depositions, and propounding and responding to written discovery, and expert retention, report preparation and discovery. *See generally*, ECF No. 186 (Rosenfeld Declaration). Lead Plaintiff’s Counsel invested over 24,000 hours during the course of this Litigation, all on a contingent basis. Likewise, at the time of

³ As previously noted, the four requests for exclusion were submitted in response to the Notice of Pendency.

settlement, Class Counsel had invested over \$1 million in expenses, charges and costs, all of which would have been forfeited had the case been lost.⁴

The virtual absence of objections strongly supports a finding that the Settlement, Plan of Allocation, and fee and expense requests are fair, reasonable, and adequate. *See Bellifemine v. Sanofi-Aventis U.S., LLC*, No. 07 Civ. 2207(JGK), 2010 WL 3119374, at *3 (S.D.N.Y. Aug. 6, 2010) (“A favorable reception by the class constitutes ‘strong evidence’ of the fairness of a proposed settlement and supports judicial approval.”). “[T]he favorable reaction of the overwhelming majority of class members . . . is perhaps the most significant factor.” *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005). Although a “‘certain number of objections are to be expected in a class action with an extensive notice campaign and a potentially large number of class members,’” *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB) (JO), 2019 WL 6875472, at *16 (E.D.N.Y. Dec. 16, 2019), “[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.” *Id.* (quoting *Wal-Mart*, 396 F.3d at 118). As Judge Robert W. Sweet recognized, “[t]he overwhelmingly positive reaction – or absence of a negative reaction – weighs strongly in favor of confirming the Proposed Settlement.” *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 410 (S.D.N.Y. Nov. 26, 2018), *aff’d*, 822 F. App’x 40 (2d Cir. 2020).

Importantly, not a single institutional investor has objected or requested exclusion, providing further evidence that sophisticated investors consider the Settlement to be fair and reasonable and the Plan of Allocation to be appropriate. *See In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013) (the reaction of the class supported the settlement where “not a single objection was

⁴ If Mr. Martin believed he could recover a larger portion of his losses on his own, he had the right to opt out of the Class and bring his own litigation. He did not do so.

received from any of the institutional investors that hold the majority of Citigroup stock”); *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); *see, e.g., Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115809, at *14 (S.D.N.Y. Nov. 7, 2007) (“[N]ot 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.”).

The Court should also consider the Class’s positive reaction in its assessment of Class Counsel’s request for attorneys’ fees and expenses. A single objection to this request following an expansive notice campaign supports a finding that the 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”); *Maley*, 186 F. Supp. 2d at 374 (the lack of any objection to the fee request supported its approval). And the lack of any objections by institutional investors supports approval. *See In re Bisy Sec. Litig.*, No. 04 Civ. 3840(JSR), 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (lack of objections from institutional investors supported the approval of fee request because “the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive”).

III. CONCLUSION

Class Counsel obtained a very favorable Settlement for the Class. For the reasons discussed herein and in Plaintiff’s and Class Counsel’s opening papers, it is respectfully requested that the

Court approve the Settlement and Plan of Allocation and award the requested attorneys' fees and expenses, and overrule the sole objection to the Settlement.⁵

DATED: September 7, 2021

Respectfully submitted,

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⁵ The proposed: (i) Final Judgment; (ii) Order Approving Plan of Allocation; and (iii) Order Awarding Attorneys' Fees and Expenses, are submitted herewith.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Individual Practices of Judge John G. Koeltl, dated July 23, 2021, the undersigned certifies that the Reply Memorandum of Law in Further Support of Motions for: (1) Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) an Award of Attorneys' Fees and Expenses complies with all formatting rules and contains 1,713 words, excluding the cover page, this certification of compliance, table of contents, table of authorities, and counsels' signature blocks.

/s/ David A. Rosenfeld

DAVID A. ROSENFELD

CERTIFICATE OF SERVICE

I, David A. Rosenfeld, hereby certify that on September 7, 2021, 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 received 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 September 7, 2021, at Melville, New York.

/s/ David A. Rosenfeld

DAVID A. ROSENFELD