

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FRANK MICHOLLE, Individually and on Behalf of All Others Similarly Situated,	:	Civil Action No. 1:17-cv-00210-VSB-GWG <b>(Consolidated)</b>
	:	
Plaintiff,	:	<u>CLASS ACTION</u>
	:	
vs.	:	
	:	
OPHTHOTECH CORPORATION, DAVID R. GUYER and SAMIR PATEL,	:	
	:	
Defendants.	:	

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTIONS FOR FINAL  
APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF  
ALLOCATION AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AN  
AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)

Lead Plaintiff Sheet Metal Workers' Pension Plan of Southern California, Arizona, and Nevada, on behalf of itself and the Class, and Lead Counsel respectfully submit this reply memorandum of law in further support of Lead Plaintiff's motion for final approval of the Settlement and approval of the Plan of Allocation and Lead Counsel's motion for an award of attorneys' fees and expenses and an award to Lead Plaintiff.<sup>1</sup>

## **I. PRELIMINARY STATEMENT**

The Settlement resolves this Litigation in its entirety and establishes a common fund of \$29 million for the benefit of Class Members. As detailed in Lead Plaintiff's and Lead Counsel's opening papers, the Settlement is the product of hard-fought litigation and extensive arm's-length negotiations achieved with the assistance of mediator Hon. Layn R. Phillips (Ret.). It represents a very favorable result for the Class in light of the substantial risks and challenges that Lead 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 against Defendants.

In response to the robust Court-approved notice program, which involved mailing 55,817 copies of the Notice of Pendency and Proposed Settlement of Class Action (the "Notice") and Proof of Claim and Release form (the "Proof of Claim") (collectively, the "Claim Package") to potential Class Members and nominees and publishing the Summary Notice in *The Wall Street Journal* and over *Business Wire*, not a single objection was filed, and only two requests for exclusion from the Class have been received. This reaction of the Class further demonstrates that the proposed

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<sup>1</sup> Unless otherwise noted, all capitalized terms are defined in the September 8, 2021 Stipulation of Settlement ("Stipulation") (ECF 129) or in Lead Plaintiff's and Lead Counsel's opening memoranda of law in support of these motions, dated August 4, 2022. ECF 141, 143. The Supplemental Declaration of Ross D. Murray Regarding Notice Dissemination and Requests for Exclusion Received to Date ("Supplemental Murray Decl."), dated August 31, 2022, is submitted herewith. All citations are omitted and emphasis is added, unless otherwise indicated.

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**

Lead Plaintiff and Lead 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 lack of objections and virtual absence of opt outs from the Class provides additional support for approval of the motions.

Pursuant to the Court's Preliminary Approval Order, more than 55,800 copies of the Claim Package have been mailed to potential Class Members and their nominees. *See* Supplemental Murray Decl., ¶4. The Notice informed Class Members of the terms of the proposed Settlement and Plan of Allocation, that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 30% of the Settlement Amount and payment of litigation expenses in an amount not to exceed \$500,000, and that Lead Plaintiff may seek an award for its time and expenses incurred in representing the Class in an amount not to exceed \$7,500. *See* Notice (ECF 146-2), at 7. The Notice also apprised Class Members of: (1) their right to object to the proposed Settlement, the Plan of Allocation and/or the request for attorneys' fees and expenses; (2) their right to exclude themselves from the Class; (3) the August 1, 2022 deadline for filing objections; (4) the August 18, 2022 deadline for submitting requests for exclusion; and (5) the July 6, 2022 deadline for submitting Proofs of Claim. *See id.* at 2. The Summary Notice, which informed readers of the proposed Settlement, how to obtain copies of the Claim Package, and the deadlines for the submission of Proofs of Claim, objections, and requests for exclusion, was published in *The Wall Street Journal* and released over *Business Wire*. *See* ECF 146, Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date, ¶12. In addition, the

Claims Administrator established a case-specific website which provided information and links to relevant documents (*id.*, ¶14), and a case-specific toll-free telephone helpline. *Id.*, ¶13.

As noted above, following this notice program, no Class Members objected to any aspect of the Settlement, the Plan of Allocation, or fee and expense application, and only two requested exclusion from the Class.

The absence of objections and small number of requests for exclusion strongly supports a finding that the Settlement, Plan of Allocation, and fee and expense requests are fair, reasonable, and adequate. *See, e.g., In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013); *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 311 (E.D.N.Y. 2006) (A “[I]ack of objections is strong evidence of the settlement’s fairness.”); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 85629, at \*40 (S.D.N.Y. Nov. 7, 2007). “[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.*, 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 Sweet recently recognized, “The 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. 2018), *aff’d*, 822 F. App’x 40 (2d Cir. 2020).

Importantly, the absence of any objection or requests for exclusion by sophisticated institutional investors is further evidence of the fairness of the Settlement. *See Citigroup*, 965 F.

Supp. 2d at 382 (the reaction of the class supported the settlement where “not a single objection was received from any of the institutional investors that hold the majority of Citigroup stock”); *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, 2006 WL 903236, at \*10 (S.D.N.Y. Apr. 6, 2006) (the lack of objections from institutional investors supported approval of settlement).

Similarly, the paucity of requests for exclusion reflects the Class’s approval of the Settlement and offers clear support for the Court’s final approval thereof. *See In re Bear Stearns Cos. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012) (noting the absence of significant exclusion requests weighs “strongly in favor of approval” where 115 requests for exclusion were received). Here, in response to the 55,817 Claim Packages mailed, the Claims Administrator received only *two* requests for exclusion from the Class. *See* Supplemental Murray Decl., ¶¶5-6.

The lack of objections from institutional or retail Class Members also supports approval of the Plan of Allocation. *See, e.g., Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *Veeco*, 2007 U.S. Dist. LEXIS 85629, at \*40 (“[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.”).

Finally, the positive reaction of the Class should also be considered with respect to Lead Counsel’s request for an award of attorneys’ fees and expenses. The absence of any objections to the requested fee and expenses supports a finding that the request is fair and reasonable. *See, e.g., In re Veeco Instruments Inc. Sec Litig.*, 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). In particular,

the lack of any objections by institutional investors supports approval of the fee and expense request. *See In re Bisys Sec. Litig.*, 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

For each of these reasons, and the reasons set forth in Lead Plaintiff’s and Lead 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 award to Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4).<sup>2</sup>

DATED: September 1, 2022

Respectfully submitted,

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<sup>2</sup> The proposed: (i) Final Judgment; (ii) Order Approving Plan of Allocation; and (iii) Order Awarding Attorneys’ Fees and Expenses and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4), are submitted herewith.

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Lead Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

I, Erin W. Boardman, hereby certify that on September 1, 2022, 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.

*s/ Erin W. Boardman*

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