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and Lead Counsel for the Settlement Class*

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

SEB INVESTMENT MANAGEMENT AB,
Individually and on Behalf of All Others Similarly
Situated,

Plaintiff,

v.

ALIGN TECHNOLOGY, INC., JOSEPH M.
HOGAN, and JOHN F. MORICI,

Defendants.

Case No. 3:18-cv-06720-VC

CLASS ACTION

**REPLY MEMORANDUM IN FURTHER
SUPPORT OF (I) LEAD PLAINTIFF'S
MOTION FOR FINAL APPROVAL OF
PROPOSED SETTLEMENT AND PLAN OF
ALLOCATION; AND (II) LEAD COUNSEL'S
MOTION FOR AN AWARD OF
ATTORNEYS' FEES AND LITIGATION
EXPENSES**

Hearing Date: April 28, 2022
Time: 2:30 p.m.
Courtroom: 4, 17th Floor
Judge: Hon. Vince Chhabria

Case No. 3:18-cv-06720-VC

REPLY MEMORANDUM IFSO (I) LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF
PROPOSED SETTLEMENT AND PLAN OF ALLOCATION; AND (II) LEAD COUNSEL'S
MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES

Court-appointed Lead Plaintiff,¹ on behalf of itself and the Settlement Class, and Lead Counsel respectfully submit this reply memorandum in further support of (i) Lead Plaintiff’s Motion for Final Approval of Proposed Settlement and Plan of Allocation (ECF No. 210); and (ii) Lead Counsel’s Motion for an Award of Attorneys’ Fees and Litigation Expenses (ECF No. 211) (together, the “Motions”).

I. PRELIMINARY STATEMENT

As detailed in Lead Plaintiff’s and Lead Counsel’s opening papers in support of the Motions filed on February 24, 2022 (ECF Nos. 210-12) (“Opening Papers”), the proposed Settlement—providing for a \$16,000,000 cash payment in exchange for the resolution of all claims asserted in the Action against Defendants—is an excellent result for the Settlement Class. The Settlement takes into account the risks, complexities, and expense of continued litigation and is the result of protracted arm’s-length negotiations between experienced counsel, including two formal mediation sessions before Gregory P. Lindstrom of Phillips ADR. Likewise, Lead Counsel’s request for a 20% fee—a request substantially below the Ninth Circuit’s 25% benchmark award—and Litigation Expenses is also fair and reasonable, especially considering the result achieved for the Settlement Class, the caliber of work performed, the risks of litigation, and comparable fee and expense awards.

Given the quality of the Settlement, it is no surprise that the Settlement Class’s response to the Settlement, the Plan of Allocation, and Lead Counsel’s request for attorneys’ fees and Litigation Expenses has been overwhelmingly positive. In accordance with the Court’s November 2, 2021 Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 198), the Court-authorized Claims Administrator, JND Legal Administration (“JND”), conducted an extensive notice campaign, including mailing Notices to over 149,000 potential Settlement Class Members and brokers/nominees, publishing a summary notice in *The Wall Street Journal* and transmitting the same over *PR Newswire*, and posting relevant information and documents—including the Opening Papers—on the Settlement Website,

¹ Capitalized terms not otherwise defined herein shall have the meanings contained in the Stipulation and Agreement of Settlement dated June 30, 2021 (ECF No. 189-2), or in the Declaration of Jennifer L. Joost in Support of (I) Lead Plaintiff’s Motion for Final Approval of Proposed Settlement and Plan of Allocation; and (II) Lead Counsel’s Motion for an Award of Attorneys’ Fees and Litigation Expenses dated February 24, 2022 (ECF No. 212).

www.AlignSecuritiesLitigationSettlement.² In addition, Defendants have issued notice pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715 et seq. ECF No. 202. The foregoing notice efforts have informed Settlement Class Members of the Settlement, the Plan of Allocation, and the requested fees and Litigation Expenses, as well as, *inter alia*, Settlement Class Members' options in connection with the Settlement. *See, e.g.*, Initial Segura Decl., Exs. A & B (ECF Nos. 210-2 & 210-3).³

Following this notice campaign, ***not a single member of the Settlement Class has objected to any aspect of the Settlement, the Plan of Allocation, or the requested fees and Litigation Expenses.*** Lead Plaintiff—a sophisticated institutional investor—also supports the Settlement and the fee and expense request. Further, out of the tens of thousands of potential Settlement Class Members that received notice of the Settlement, only two requests for exclusion from the Settlement Class have been received, further underscoring the positive reaction of the Settlement Class. *See* Supp. Segura Decl., ¶ 7.⁴ Additionally, to date, approximately 71,729 Claims have been received from potential Settlement Class Members seeking a distribution from the Settlement. Supp. Segura Decl., ¶ 8.⁵ Clearly, the Settlement Class's reaction is a

² *See* Supplemental Declaration of Luigy Segura Regarding (A) Continued Dissemination of Notice Packet; (B) Update on Call Center Services and Settlement Website; and (C) Report on Requests for Exclusion and Claims Received (“Supplemental Segura Declaration” or “Supp. Segura Decl.”) submitted herewith, as well as the previously filed Declaration of Luigy Segura dated February 24, 2022 (ECF No. 210-1) (“Initial Segura Decl.”).

³ On April 20, 2022, JND posted the updated time for the Final Approval Hearing on the Settlement Website, along with the instructions for attending the Final Approval Hearing via Zoom webinar. Supp. Segura Decl., ¶ 4.

⁴ It is worth nothing that one of these two requests for exclusion was submitted on behalf of an estate that may not even be a Settlement Class Member; indeed, the personal representative for the estate has no records indicating the estate's purchase or ownership of Align common stock. *See* ECF No. 210-4.

⁵ Given that JND is in the early stages of reviewing Claims, this number is preliminary and subject to change, and is not intended to be construed as a final count of valid Claims. *Id.*, ¶ 9, n.4. In addition, the number of Claims received by JND to date (and relatedly, the total number of Notices mailed) is substantially higher than the number of Claims that JND estimated it would receive (and the number of Notices it estimated would be mailed) at the outset of the administration. In particular, in estimating the administration costs for the Settlement, JND estimated, based on historical settlement data from other securities class action settlements administered by JND, that it would mail approximately 50,000 Notices and would receive 7,500 to 12,500 claims. *See* ECF No. 189-7, ¶ 15. To date, JND has mailed over 149,000 Notices and has received over 71,000 Claims. Supp. Segura Decl., ¶¶ 2, 8. Accordingly, JND currently estimates that administration costs for the Settlement will be \$600,000 to \$700,000, which is higher than the \$300,000 to \$375,000 in administration costs that JND estimated at the outset of the administration (ECF No. 189-7, ¶ 23). *See, e.g.*, Supp. Segura Decl., ¶ 8, n.3, *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-CM-SDA (S.D.N.Y. Nov. 12, 2021), ECF No. 273, ¶¶ 4, 7, 44 (\$908,555.40 in administration costs incurred where approximately 207,000 notices mailed and 59,635 claims received); Distribution Plan Brief, *Palazzolo, et al. v. Fiat Chrysler Autos. N.V., et al.*, No. 4:16-cv-12803-LVP-SDD

further indication that the Settlement, the Plan of Allocation, and Lead Counsel’s request for attorneys’ fees and Litigation Expenses are fair and reasonable and should be approved.

II. THE SETTLEMENT CLASS’S REACTION PROVIDES ADDITIONAL SUPPORT FOR APPROVAL OF THE MOTIONS

In their Opening Papers, Lead Plaintiff and Lead Counsel demonstrated that the Settlement, the Plan of Allocation, and the request for attorneys’ fees and Litigation Expenses are fair and reasonable and warrant the Court’s approval. Now that the time for objecting or requesting exclusion has passed, the Settlement Class’s reaction also clearly supports approval.

A. The Settlement Class’s Reaction Supports Approval of the Settlement and Plan of Allocation

The Ninth Circuit instructs district courts to consider the reaction of the class in determining whether to approve a class action settlement. *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).⁶ Moreover, “[i]t is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004).

Here, the absence of *any* objections from Settlement Class Members strongly supports approval of the Settlement and Plan of Allocation. *See In re Extreme Networks, Inc. Sec. Litig.*, 2019 WL 3290770, at *9 (N.D. Cal. July 22, 2019) (“[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.”) (alteration in original); *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *13 (N.D. Cal. Feb. 11, 2016) (“By any standard, the lack of objection of the Class Members favors approval of the Settlement.”); *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992)

(E.D. Mich. Dec. 4, 2020), ECF No. 77 at 2, 6, 9 (\$720,707.24 in administration costs incurred where approximately 100,000 notices mailed and 19,194 claims received); Post Distribution Report, *In re Volkswagen “Clean Diesel” Mktg., Sales Practice, & Prods Liab. Litig.*, No. 3:15-md-02672 CRB (JSC) (N.D. Cal. Aug. 4, 2020), ECF No. 7639 at 1 (\$705,650 in administration costs incurred where approximately 217,000 notices mailed and 70,631 claims received).

⁶ Unless otherwise noted, all internal quotation marks, citations, and other punctuation are omitted, and all emphasis is added.

(confirming district court’s approval of plan of allocation as fair, reasonable, and adequate over one objection); *Patel v. Axesstel, Inc.*, 2015 WL 6458073, at *7 (S.D. Cal. Oct. 23, 2015) (approving plan of allocation where it “was laid out in detail in the notice, and no class members objected”). In particular, the absence of any objections from institutional investors, who possessed ample means and incentive to object to the Settlement if they deemed it unsatisfactory, is further evidence of the Settlement’s fairness. *See, e.g., Extreme Networks*, 2019 WL 3290770, at *9 (“Many potential class members are sophisticated institutional investors; the lack of objections from such institutions indicates that the settlement is fair and reasonable.”); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2017 WL 2481782, at *4 (N.D. Cal. June 8, 2017) (absence of any entity objection supports “the inference that the class approves of the settlement is even stronger”).

Likewise, the fact that only two requests for exclusion—one from an entity that may not even be a Settlement Class Member—were received following extensive notice efforts further supports approval of the Settlement. *See, e.g., Destefano*, 2016 WL 537946, at *14 (noting that a low number of exclusions supports the reasonableness of a securities class action settlement); *Bostick v. Herbalife Int’l of Am., Inc.*, 2015 WL 12731932, at *26 (C.D. Cal. May 14, 2015) (approving settlement with 687 exclusion requests and noting that “[c]ourts generally consider a low number of requests for exclusion [] to weigh strongly in favor of settlement approval”); *Custom LED, LLC v. eBay, Inc.*, 2014 WL 2916871, at *5 (N.D. Cal. June 24, 2014) (finding .04% opt-out rate with one objection to be “overwhelmingly positive reaction” from class members). By way of comparison, JND has received approximately 71,729 Claims from potential Settlement Class Members seeking to receive a distribution from the Settlement. Supp. Segura Decl., ¶ 8.

B. The Settlement Class’s Reaction Also Supports Approval of Lead Counsel’s Request for Attorneys’ Fees and Litigation Expenses

The reaction of the Settlement Class similarly supports Lead Counsel’s motion for an award of attorneys’ fees and Litigation Expenses. Here, the lack of *any* objections is strong evidence that the requested fees and expenses are reasonable. *See Destefano*, 2016 WL 537946, at *18 (finding “the lack of objection by any Class Members” to support the 25% fee award); *see also, e.g., Waldbuesser v. Northrop Grumman Corp.*, 2017 WL 9614818, at *5 (C.D. Cal. Oct. 24, 2017) (finding receipt of two objections to fee request “remarkably small given the wide dissemination of notice,” which justified fee award of one-

third of settlement fund); *In re Nuvelo, Inc. Sec. Litig.*, 2011 WL 2650592, at *3 (N.D. Cal. July 6, 2011) (finding one objection to the fee request to be “a strong, positive response from the class, supporting an upward adjustment of the benchmark” fee award). And, as with the Settlement and Plan of Allocation, the lack of any objections by institutional investors particularly supports approval of the fee request. *See, e.g., In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (that “a significant number of investors in the class were ‘sophisticated’ institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive” and did not do so, supported approval of request); *Heffler v. Wells Fargo & Co.*, 2018 WL 6619983, at *15 (N.D. Cal. Dec. 18, 2018) (“[T]he lack of objections from institutional investors who presumably had the means, the motive, and the sophistication to raise objections weighs in favor of approval.”).

Accordingly, the favorable reaction of the Settlement Class provides strong support for the Settlement, the Plan of Allocation, and Lead Counsel’s request for attorneys’ fees and Litigation Expenses.

III. CONCLUSION

For the foregoing reasons, and those set forth in their Opening Papers, Lead Plaintiff and Lead Counsel respectfully request that the Court approve the Settlement, the Plan of Allocation, and the request for attorneys’ fees and Litigation Expenses. Copies of (i) the [Proposed] Order Approving Class Action Settlement;⁷ (ii) the [Proposed] Judgment;⁸ (iii) the [Proposed] Order Approving Plan of Allocation of Net Settlement Fund; and (iv) the [Proposed] Order Awarding Attorneys’ Fees and Litigation Expenses⁹ are being submitted herewith.

⁷ Pursuant to the Court’s Standing Order for Civil Cases (“Standing Order”) at 16-17, Lead Plaintiff’s [Proposed] Order Approving Class Action Settlement includes a timeline for the settlement administration and Post-Distribution Accounting. *See* [Proposed] Order Approving Class Action Settlement, ¶¶ 20-21.

⁸ Pursuant to the Court’s Standing Order at 16, Lead Plaintiff is filing a proposed judgment separately from its proposed order granting final approval.

⁹ Pursuant to the Court’s Standing Order at 17, Lead Counsel’s [Proposed] Order Awarding Attorneys’ Fees and Litigation Expenses proposes that 10% of the attorneys’ fees granted by the Court will be withheld until the Post-Distribution Accounting has been filed. Lead Counsel believes that 10% is a reasonable hold-back percentage given its commitment to litigating this Action on behalf of the Settlement Class for nearly three years without receiving any compensation for its efforts. *See* [Proposed] Order Awarding Attorneys’ Fees and Litigation Expenses, ¶ 4.

Dated: April 21, 2022

Respectfully submitted,

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