

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM McGEE and LEE McGEE,
Individually and on Behalf of All Others
Similarly Situated,

Plaintiffs,

vs.

CONSTANT CONTACT, INC., et al.,

Defendants.

) No. 1:15-cv-13114-MLW
)
) CLASS ACTION
)
) REPLY MEMORANDUM OF LAW IN
) FURTHER SUPPORT OF: (A) LEAD
) PLAINTIFF'S MOTION FOR FINAL
) APPROVAL OF CLASS ACTION
) SETTLEMENT, APPROVAL OF THE PLAN
) OF ALLOCATION, AND CERTIFICATION
) OF THE CLASS FOR SETTLEMENT
) PURPOSES; AND (B) LEAD COUNSEL'S
) MOTION FOR AN AWARD OF
) ATTORNEYS' FEES AND PAYMENT OF
) LITIGATION EXPENSES, CHARGES AND
) COSTS

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Lead Plaintiff North Collier Fire Control and Rescue District Firefighter Pension Plan (“North Collier”), on behalf of the proposed Class, and Lead Counsel respectfully submit this reply memorandum of law in further support of: (i) Lead Plaintiff’s Motion for Final Approval of Class Action Settlement, Approval of the Plan of Allocation, and Certification of the Class for Settlement Purposes (ECF No. 102); and (ii) Lead Counsel’s Motion for an Award of Attorneys’ Fees and Payment of Litigation Expenses, Charges and Costs. ECF No. 104.¹ Lead Plaintiff and Lead Counsel also respectfully request that the Court hold the Settlement Hearing, as scheduled, on May 27, 2020, *via* teleconference or video conference.²

I. PRELIMINARY STATEMENT

In accordance with the Court’s Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 97) (the “Preliminary Approval Order”), the Court-approved Claims Administrator for the Settlement, Gilardi & Co. LLC (“Gilardi”), conducted an extensive notice program, including mailing over 22,300 copies of the Notice Package (consisting of the Notice and Proof of Claim and Release) to potential Class Members and their nominees.³ The Notice informed recipients of, among other things, the essential terms of the \$13 million Settlement, the Plan of Allocation, and Lead Counsel’s intention to apply to the Court for attorneys’ fees in the amount of 25% of the Settlement Amount and payment of litigation expenses in an amount not to exceed \$120,000, plus interest on

¹ All capitalized terms not defined herein have the same meanings set forth in the Stipulation of Settlement dated May 18, 2018. *See* ECF No. 69. Internal citations are omitted, and emphasis is added throughout, unless otherwise indicated.

² Defendants do not oppose the request to hold the Settlement Hearing on May 27, 2020 *via* these methods.

³ *See* Supplemental Declaration of Ross D. Murray Regarding Notice Dissemination and Requests for Exclusion Received to Date, dated May 12, 2020 (“Supp. Mailing Decl.”), attached hereto as Exhibit 1.

both amounts. In addition, the Notice Package, along with the papers in support of final approval of the Settlement, the Plan of Allocation, and Lead Counsel's fee and expense requests, were made available on the website established for the action, www.ConstantContactSecuritiesLitigation.com. The Summary Notice was published in the national edition of *The Wall Street Journal* and transmitted over the *Business Wire* on December 24, 2019. *See* ECF No. 107, ¶12. The deadline to file an objection to any aspect of the Settlement or for persons to request exclusion from the Class (April 24, 2020) has now passed.

Lead Plaintiff and Lead Counsel are pleased to advise the Court ***that they have not received a single objection*** to any aspect of the Settlement, the Plan of Allocation, or the requested attorneys' fees and expenses. Further, only three timely requests for exclusion have been received. *See* Supp. Mailing Decl., ¶¶5-6.⁴ Additionally, the institutional lead plaintiff appointed by the Court to prosecute, monitor, and oversee this securities fraud class action has expressly endorsed both the Settlement and Lead Counsel's requested attorneys' fees and expenses in a sworn declaration (*see* ECF No. 86-1, ¶¶13-15) and in testimony provided to the Court at the November 22, 2019 preliminary approval hearing. *See* ECF No. 99 at pp. 29:4-59:8. The Lead Plaintiff's support and the total absence of objections are clear testaments to the fairness, adequacy, and reasonableness of the Settlement, the Plan of Allocation, and the fee and expense requests. Therefore, for all the reasons set forth in the briefs and declarations filed in support, the Court is requested to approve the Settlement, Plan of Allocation, and attorneys' fees, expenses and costs.

⁴ Gilardi recently reviewed an untimely request for exclusion, but it is invalid inasmuch as it fails to provide any of the information necessary to determine if the purported Class Member is indeed a Member of the Class.

II. ARGUMENT

A. The Class' Reaction Strongly Supports Approval of the Settlement and the Plan of Allocation

Lead Plaintiff and Lead Counsel respectfully submit that the opening papers in support of the motion for final approval of the proposed \$13 million Settlement and Plan of Allocation amply demonstrate that the motion should be granted. Now that the time for objecting has passed, the Class' reaction also clearly supports approval.

Courts recognize that the “favorable reaction of [the] class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval.” *Hill v. State St. Corp.*, No. 09-12146-GAO, 2015 WL 127728, at *8 (D. Mass. Jan. 8, 2015); *see also Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) (“The number of requests for exclusion from the settlement, as well as the number and substance of objections filed . . . constitutes strong evidence of fairness of the proposed settlement and supports judicial approval.”). Following the extensive notice program undertaken in accordance with the Court's Preliminary Approval Order, the fact that there was *not a single* objection strongly supports approval of the Settlement.

In addition, there have been no objections to the Plan of Allocation. As discussed in Lead Plaintiff's opening papers, just like the Settlement as a whole, the Plan of Allocation must be fair and reasonable. *See Hill*, 2015 WL 127728, at *11 (“A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate.”). Here, Lead Counsel believe that the Plan of Allocation, which was developed after careful consideration and analysis and in consultation with a consulting damages expert, is fair and reasonable. The Class' reaction provides additional strong support for approving the Plan of Allocation.

B. The Class' Reaction Also Strongly Supports Approval of Lead Counsel's Fee and Expense Requests

As is true with the Settlement, not a single Class Member has objected to Lead Counsel's motion for an award of attorneys' fees of 25% of the Settlement Fund and payment of litigation expenses, charges and costs of \$60,773.99. The fact that there are no objections is strong evidence that the requested amount of fees and expenses is reasonable. *See, e.g., Hill*, 2015 WL 127728, at *19 (“[T]he favorable reaction of the class . . . support[s] approval of the requested fees.”); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 351 (D. Mass. 2015), *aff'd* 809 F.3d 78 (1st Cir. 2015) (finding “overwhelmingly positive” reaction of class to settlement and “quite low number of opt-outs” weighed in favor of requested fee).

III. THE COURT SHOULD HOLD THE MAY 27, 2020 SETTLEMENT HEARING ON THE DATE AND TIME SCHEDULED VIA TELEPHONE OR VIDEO CONFERENCE

Consistent with the guidelines recently adopted by this District, Lead Plaintiff believes that the Court should conduct the Settlement Hearing *via* telephone or video conference at the date and time already noticed broadly to the Class to address the circumstances arising from the COVID-19 pandemic and avoid unnecessary confusion or delay. *See* General Order 20-2, In re Coronavirus Public Emergency; Order Concerning Jury Trials and Other Proceedings at ¶8 (March 12, 2020) (“Judges are strongly encouraged to conduct court proceedings by telephone or video conference where practicable.”). Numerous courts have approved similar requests. *See In re Deutsche Bank AG Sec. Litig.*, No. 1:09-cv-01714-GHW-RWL, Order at 1 (S.D.N.Y. May 12, 2020) (ECF No. 318) (ordering that final settlement hearing in securities class action to proceed at date and time scheduled in the notice but be conducted telephonically); *Plymouth Cty. Ret. Ass'n v. Advisory Bd. Co., et al.*, No. 1:17-cv-01940-RC, Order at 1 (D.D.C. Apr. 22, 2020) (ECF No. 45) (same); *In re Valeant*

Pharm. Int'l Inc. Sec. Litig., No. 3:15-cv-07658-MAS-LHG, Letter Order at 1 (D.N.J. Apr. 17, 2020) (ECF No. 535) (same).⁵

Lead Plaintiff proposes providing notice of a call-in number and/or access code for the hearing on the Settlement website so Class Members interested in attending may do so by telephone or video conference. In fact, it may well enhance the potential for class participation in the settlement process. While no Class Member has indicated his, her or its intention to appear at the hearing, should any seek to do so, instructions will be clear and easy to follow.

Lead Plaintiff believes that holding the Settlement Hearing on the scheduled date by telephone or video conference is in the best interests of the Parties and the Class because it would permit a prompt resolution of the case, as scheduled in the notice provided to the Class. Defendants consent to this request and, as discussed below, holding the hearing by telephone or video conference would not prejudice any Class Members. Indeed, maintaining the noticed date and time for the Settlement Hearing would minimize any potential confusion among Class Members as well as avoid delay.

On November 26, 2019, the Court ordered that notice setting the Settlement Hearing for May 27, 2020, at 2:00 p.m. be disseminated to Members of the Class. ECF No. 97. Beginning on December 26, 2019, Notices including that information were disseminated to over 22,300 potential Class Members and nominees. ECF No. 107, at ¶¶5-11 and Supp. Mailing Decl., ¶4.

The Notice informed Class Members that the date or time of the Settlement Hearing could change without further written notice and directed Class Members to consult with Lead Counsel before making plans to attend. *See* Notice at 9 (“You should be aware that the Court may change the

⁵ On April 29, 2020 this Court heard a motion for summary judgment *via* video conference. *See O’Donoghue v. Bank of America Corp., et al.*, No. 1:10-cv-11175-MLW (ECF No. 196) (Clerk’s Notes for proceedings “via teleconference, remotely”).

date and time of the Settlement Hearing without another notice being sent to Class Members. If you want to attend the hearing, you should check with Lead Counsel or the Settlement website www.ConstantContactSecuritiesLitigation.com beforehand to be sure that the date and/or time has not changed.”). The Notice also provided that any Class Member who wished to appear and be heard orally at the Settlement Hearing must file a written objection and notice of appearance by April 24, 2020. *Id.* To date, no Class Member has filed an objection or otherwise provided notice of their intention to appear at the Settlement Hearing.

Lead Plaintiff would notify Class Members of the dial-in number or video conference access code to participate in the Settlement Hearing by publishing a prominent notice on the home page of the Settlement website, www.ConstantContactSecuritiesLitigation.com. Although the deadline for filing objections has passed, and none were filed, should any objections be filed prior to the date of the Settlement Hearing, Lead Counsel will personally notify the objectors of the access information.

If the Court grants this request, unless the Court prefers an alternative method, Lead Counsel will arrange for a telephone or video conference call facility for the Settlement Hearing, publish that information as described above, initiate a call to the Court at the time of the Settlement Hearing, and provide for a “roll call” of all attorneys (and any Class Members) who will appear on the record.

IV. CONCLUSION

For the foregoing reasons and the reasons detailed in Lead Plaintiff’s and Lead Counsel’s opening papers, Lead Plaintiff and Lead Counsel respectfully request that the Court convene the May 27, 2020 Settlement Hearing either by telephone or video conference, and approve: (i) the Settlement; (ii) the Plan of Allocation; and (iii) Lead Counsel’s request for attorneys’ fees and expenses.⁶

⁶ Attached hereto as Exhibit 2 is a [Proposed] Order and Final Judgment, which includes the three timely exclusion requests that were received. Attached as Exhibit 3 is a [Proposed] Order

DATED: May 13, 2020

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
DARREN J. ROBBINS (*pro hac vice*)
ELLEN GUSIKOFF STEWART (*pro hac vice*)

/s/ Ellen Gusikoff Stewart

ELLEN GUSIKOFF STEWART

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
darrenr@rgrdlaw.com
elleng@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
JACK REISE (*pro hac vice*)
STEPHEN R. ASTLEY (*pro hac vice*)
ELIZABETH A. SHONSON (*pro hac vice*)
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)
jreise@rgrdlaw.com
sastley@rgrdlaw.com
eshonson@rgrdlaw.com

Lead Counsel for Plaintiff

SUGARMAN & SUSSKIND
ROBERT SUGARMAN
100 Miracle Mile, Suite 300
Coral Gables, FL 33134
Telephone: 305/529-2801
305/447-8115 (fax)
sugarman@sugarmansusskind.com

Additional Counsel for Plaintiff

Approving Plan of Allocation. Attached as Exhibit 4 is a [Proposed] Order Awarding Attorneys' Fees and Payment of Litigation Expenses, Charges and Costs.

LAW OFFICE OF ALAN L. KOVACS
ALAN L. KOVACS (BBO #278240)
257 Dedham Street
Newton, MA 02461
Telephone: 617/964-1177
617/332-1223 (fax)
alankovacs@yahoo.com

Liaison Counsel

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on May 13, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the Court's Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the Court's Manual Notice List.

/s/ Ellen Gusikoff Stewart

Ellen Gusikoff Stewart

ROBBINS GELLER RUDMAN
& DOWD LLP

655 West Broadway, Suite 1900

San Diego, CA 92101-8498

Telephone: 619/231-1058

619/231-7423 (fax)

E-mail: elleng@rgrdlaw.com