UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BOSTON RETIREMENT SYSTEM, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. ALEXION PHARMACEUTICALS, INC., LEONARD BELL, DAVID L. HALLAL, VIKAS SINHA, Defendants.	Civ. No. 3:16-cv-2127 (AWT) Hon. Alvin W. Thompson

REPLY MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION AND CO-CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES

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Class Representatives, Erste Asset Management GmbH, f/k/a Erste-Sparinvest Kapitalanlagegesellschaft mbH (hereinafter, "Erste AM") and the Public Employee Retirement System of Idaho ("PERSI," and together with Erste, "Class Representatives"), and Co-Class Counsel, Motley Rice LLC and Labaton Sucharow LLP (collectively, "Co-Class Counsel"), respectfully submit this reply memorandum of law in further support of: (i) Class Representatives' Motion for Final Approval of Settlement and Plan of Allocation, ECF No. 315; and (ii) Co-Class Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses, ECF No. 317.[1]

PRELIMINARY STATEMENT

In their moving papers, Class Representatives and Co-Class Counsel explain why their Motion for Final Approval of Class Action Settlement and Plan of Allocation and Co-Class Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses should be granted. The moving papers discuss the applicable law and show why the proposed settlement and the plan of allocation are fair, reasonable, and adequate, and why the requested fees and expenses are reasonable under the circumstances.

Class Representatives and Co-Class Counsel are pleased to inform the Court of the overwhelmingly positive reaction of the Class to the proposed Settlement and the fee and expense application since the moving papers were filed. Since then, the Court-approved notice program has been completed, and the deadline for objections and requests for exclusion has passed. After more than 316,800 Notices were disseminated to potential Class Members or their

[1] Unless noted, all capitalized terms that are not otherwise defined in this memorandum have the meanings given to them in the Stipulation and Agreement of Settlement, dated as of September 11, 2023 (the "Stipulation"), ECF No. 306.

brokers/nominees,[2] Co-Class Counsel received only one objection to the Settlement (from a non-Class Member) and only one request for exclusion (which was submitted without supporting documentation). Thus, the Class has broadly endorsed the fairness, adequacy, and reasonableness of the proposed Settlement and Plan of Allocation and the requested award of attorneys' fees, litigation expenses, and an award of $51,960, in total, to Class Representatives for the time and resources they dedicated to representing the Class over the past six years, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").[3] Accordingly, the Class Members' positive response, when considered together with the other factors set forth in previous filings, *see* ECF Nos. 316, 318 & 319, supports final approval of the Settlement, Plan of Allocation, and Co-Class Counsel's fee and expenses request.

ARGUMENT

I. THE REACTION OF THE CLASS STRONGLY SUPPORTS APPROVAL OF THE SETTLEMENT, PLAN OF ALLOCATION, AND FEE AND EXPENSE APPLICATION

"One of the factors most courts consider is the reaction of the absent class members, specifically the quality and quantity of any objections and the quantity of class members who opt out." *In re Synchrony Fin. Sec. Litig.*, 2023 WL 4992933, at *7 (D. Conn. Aug. 4, 2023) (citation omitted). "Courts may consider two reactions: opt outs and objections." *Id.* "If 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 Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (quoting 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41, at 108

[2] *See* Suppl. Decl. of Lance Cavallo Regarding (A) Update on Mailing of the Notice Packet; (B) Update on Telephone Hotline and Settlement Website; and (C) Report on Reqs. for Exclusions Received ¶ 2 (the "KCC Decl.," attached hereto as Ex. A).

[3] This proposed award of $51,960 is broken down as follows: (a) Erste AM: $24,000, and (b) PERSI: $27,960.

(4th ed. 2002))); *see also In re AOL Time Warner, Inc.*, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) ("The reaction of the class is generally gauged by reference to the extent of objection to the settlement.").

Here, the deadline to submit an objection has now passed, and only one objection and one request for exclusion have been received. As discussed below, the very low number of objections and exclusion requests supports approval of the Settlement, the Plan of Allocation, and the Fee and Expense Application.

First, a lack of objections by institutional investors, who typically have the greatest financial stake and are experienced fiduciaries, strongly weighs in favor of the requested relief. *See, e.g.*, *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013) ("[N]ot a single objection was received from any of the institutional investors that hold the majority of Citigroup stock."); *In re AOL Time Warner*, 2006 WL 903236, at *10 (lack of objections from institutional investors supported approval of settlement); *In re AT&T Corp. Sec. Litig.*, 2005 WL 6716404, at *4 (D.N.J. Apr. 25, 2005) (the reaction of the class "weigh[ed] heavily in favor of approval" when "no objections were filed by any institutional investors who had great financial incentive to object"). Here, no institutional investor has objected to any aspect of the Settlement, the Plan of Allocation, or the motion for fees and expenses.

Second, the one objection received, submitted by Frederick C. Appel, ECF Nos. 321 & 322, is without merit and should be overruled because Mr. Appel is not a Class Member and he therefore lacks standing to object. Rule 23(e)(5) provides that "[a]ny ***class member*** may object [to a proposed settlement] if it requires court approval under [Rule 23(e)]." Fed. R. Civ. P. 23(e)(5) (emphasis added). Consistent with this textual command, courts have recognized that "[o]nly Class members have standing to object to the Settlement of a class action." *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). In contrast, "[n]onparties to a settlement generally do not have standing to object to a settlement of a class action." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) (citation omitted).[4]

Here, from the unambiguous description of the Class set out in the Court's April 13, 2023 Ruling on Motion for Class Certification, the certified Class in this case consists only of "persons or entities who purchased or otherwise acquired ***the publicly traded common stock*** of [Alexion] from January 30, 2014 to May 26, 2017, inclusive . . . and who were damaged thereby." ECF No. 267 at 48 (emphasis added). This definition does ***not*** include holders of options to purchase or sell Alexion stock. However, according to the brokerage statement submitted with his objection, Mr. Appel's only documented interest in Alexion stock was his holdings of option contracts to purchase shares of Alexion stock. *See* ECF No. 322 at 4. Significantly, Mr. Appel does not claim to have ever purchased or acquired Alexion stock during the Class Period or to have exercised an option to purchase Alexion stock.

Thus, Mr. Appel is not a member of the Class. And, "[b]ecause [Mr. Appel] is not a class member, [he] does not have an affected interest in the class Plaintiffs' claims against [Defendants] to be able to assert [his] objections." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 916 F. Supp. 2d 454, 459 (S.D.N.Y. 2013) (quoting *Merck-Medco*, 504 F.3d at 244); *see also Sherin v. Gould*, 679 F. Supp. 473, 475 (E.D. Pa. 1987) ("Ms. Katz objects as an option purchaser, not a common stock

[4] *See also* 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 6:10 (20th ed. 2023) ("Generally, non-parties . . . lack standing to object to most provisions of a partial settlement, because their rights are usually not affected by the settlement."). "The objector, as a party seeking to generate a court ruling, has the burden of demonstrating her standing." 4 William B. Rubenstein, *Newberg on Class Actions* § 13:22 (6th ed. 2023).

purchaser. In her capacity as option purchaser, Ms. Katz is not a member of the class and she lacks standing to object to this settlement. Consequently, the settlement is approved.").

In addition, while Mr. Appel's non-membership in the Class—and resulting lack of standing—is alone sufficient to dispose of his objection, his protestation that the settlement inappropriately excludes options on the stock of Alexion, ECF No. 322 at 1, is substantively without merit.

As an initial matter, it is well-recognized that "a lead plaintiff is empowered to control the management of the litigation as a whole, and it is within the lead plaintiff's authority to decide what claims to assert on behalf of the class." *In re Bank of Am. Corp. Sec., Derivative, & ERISA Litig.*, 2010 WL 1438980, at *2 (S.D.N.Y. Apr. 9, 2010). Indeed, "courts in this Circuit have consistently held that a lead plaintiff has the ***sole*** authority to determine what claims to pursue on behalf of the class.'" *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 2013 WL 4399215, at *3 (S.D.N.Y. Aug. 13, 2013). Hence, even if Mr. Appel were a Class Member, his objection should still be overruled as an attempt to usurp the Class Representatives' role to manage the litigation by choosing to pursue claims on behalf of stock purchasers and the Class as previously certified by the Court. ECF No. 267.

Moreover, Mr. Appel is essentially requesting that the Court rewrite the terms of the Settlement reached by the Parties by changing the definition of the covered securities to include holders of options to purchase or sell Alexion stock. Because the Action does not assert claims on behalf of option traders, it is appropriate for the Settlement to not include them. It is also well established that a court may not modify settlement terms, but instead must accept or reject the settlement as a whole. As the Supreme Court has recognized: "Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a

settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986). Thus, "it is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms." *In re Warner Commc'ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986); *see also Lackawanna Chiropractic P.C. v. Tivity Health Support, LLC*, 2019 WL 7195309, at *3 (W.D.N.Y. Aug. 29, 2019) ("The proposed settlement 'must stand or fall in its entirety', and I may not 'delete, modify or substitute' its terms.") (citation omitted). Thus, under controlling precedent, the Court should decline any invitation to rewrite the terms of the negotiated Settlement and should overrule the objection.

Third, that only one potential Class Member has submitted a request for exclusion also weighs in favor of final settlement approval. Courts have recognized that a "minimal number of . . . requests for exclusion militates in favor of finding the settlement to be fair, adequate, and reasonable." *In re Merrill Lynch & Co. Rsch. Reps. Sec. Litig.*, 2007 WL 4526593, at *10 (S.D.N.Y. Dec. 20, 2007); *see also Fleisher v. Phx. Life Ins. Co.*, 2015 WL 10847814, at *7 (S.D.N.Y. Sept. 9, 2015) (describing response of class as "overwhelming" when 758 notices were mailed and only three class members requested exclusion); *Visa U.S.A.*, 396 F.3d at 118 (noting that, "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement" when there were only eighteen objections out of the five million individuals notified of settlement) (quoting 4 Newberg § 11.41, at 108).[5]

[5] *See also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 177 (S.D.N.Y. 2014) (approving settlement when 14 shareholders "chose to opt out of the settlement" but, "[b]y contrast, 1,640 completed claims forms ha[d] been received," finding "[t]his attests to the overwhelming support for the settlement among class members"); *In re Citigroup Inc. Sec. Litig.*, 2014 WL 2112136, at *3 (S.D.N.Y. May 20, 2014) (finding when, "[o]ut of 7,409 class members

In addition, the one exclusion request that was received,[6] is defective since it "does not provide supportive documentation or assert [that the individual] purchased shares during the Class Period." *Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *4 (S.D.N.Y. Sept. 29, 2022) (finding "opt out requests" lacking "supportive documentation" were "deficient"); *see also* ECF No. 309 at 31-32 ("Each request for exclusion must also . . . [state] the date(s), price(s), and number(s) of shares of all purchases, acquisitions, and sales of Alexion publicly traded common stock during the Class Period.").

Apart from the foregoing, it is significant that no objection was made to the proposed Plan of Allocation. The uniformly favorable reaction of the Class to the Plan of Allocation also supports its approval. *See In re Veeco Instruments Inc. Sec. Litig.*, 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."); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) ("[T]he favorable reaction of the Class supports approval of the proposed Plan of Allocation.").

And finally, no Class Member has objected to Co-Class Counsel's fee and expense application or the requested award to the Class Representatives. The lack of any objections constitutes strong evidence that the requested fee and expense award is fair and reasonable and supports the approval of same. *See, e.g.*, *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) ("[T]he reaction by members of the Class [to the fee and expense request] is entitled to great weight by the Court [and the absence of any objection] suggests

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to whom notice of this settlement was sent, . . . only one requested exclusion," "[t]his positive reaction weighs heavily in favor of approval of the settlement").

6 *See* Ex. A to KCC Decl.

that the fee request is fair and reasonable.") (citation omitted); *Vaccaro v. New Source Energy Partners L.P.*, 2017 WL 6398636, at *8 (S.D.N.Y. Dec. 14, 2017) ("The fact that no class members have explicitly objected to these attorneys' fees supports their award."); *Asare v. Change Grp. N.Y., Inc.*, 2013 WL 6144764, at *16 (S.D.N.Y. Nov. 18, 2013) ("[N]ot one potential class member has made an objection, a factor held by courts as supporting approval of an attorneys' fees award.").

* * *

As discussed above, the "favorable reception by the class constitutes 'strong evidence'" that the Settlement and its constituent parts are "fair." *In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593, at *2 (S.D.N.Y. June 16, 2020) (quoting *In re Citigroup*, 965 F. Supp. 2d at 382). Accordingly, that favorable reaction strongly supports approval of the Settlement, Plan of Allocation, and the fee and expense request.

CONCLUSION

In view of the foregoing and the detailed record herein, Class Representatives and Co-Class Counsel respectfully request that the Court approve: (i) the proposed Settlement; (ii) the proposed Plan of Allocation; and (iii) Co-Class Counsel's fee and expense application.[7]

DATED: December 13, 2023

Respectfully submitted,

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[7] Copies of the (i) proposed Final Order and Judgment, (ii) proposed Order Approving Plan of Allocation of Net Settlement Fund, and (iii) proposed Order Awarding Attorneys' Fees and Litigation Expenses are attached hereto as Exhibits B, C, and D, respectively.

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