

Plaintiff Susan Swetz (“Plaintiff”), along with Plaintiff Phillip White in *White v. GlaxoSmithKline Consumer Healthcare Holdings (US) LLC*, Case No. 5:20-cv-04048-SVK (N.D. Cal.) (“*White*”) (collectively, “Plaintiffs”), individually and on behalf of all others similarly situated, respectfully submit this supplemental memorandum of law in support of Plaintiffs’ Motion for Final Approval of Class Action Settlement.¹

INTRODUCTION

If final approval is granted, then this settlement will create a Gross Settlement Fund of \$6.5 million under the Settlement Agreement the parties executed on May 10, 2021 (the “Settlement Agreement”). In granting Plaintiffs’ unopposed Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class and Approval of Notice Plan (“Motion for Preliminary Approval”) on June 8, 2021, the Court made a preliminary determination that the settlement is fair, reasonable, and adequate. *See* Order Granting Preliminary Approval to Class Action Settlement, Provisionally Certifying Settlement Class, Directing Notice to the Settlement Class, and Scheduling Final Approval Hearing, ECF No. 48 ¶ 2 (“Preliminary Approval Order”). Plaintiffs, by and through Class Counsel and the Settlement Administrator, successfully implemented the Notice Plan approved by the Court, and the Settlement Class has been notified about the settlement. *Id.* ¶ 21a.; *see also* Declaration of Gina M. Intrepido-Bowden Regarding Settlement Administration and Notice Plan, ECF No. 62 (“Intrepido-Bowden Decl.”).²

Plaintiffs filed their Motion for Final Approval on August 3, 2021 (ECF No. 53) with the

¹ Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Settlement Agreement (ECF No. 46-1). References to “§” are to sections of the Settlement Agreement and all Settlement Agreement exhibits are referred to as “Ex. [#].”

² Pursuant to Preliminary Approval Order, on November 12, 2021, the Settlement Administrator will file a Supplemental Declaration regarding the implementation of the Notice Plan and summary of the claims data. Class Counsel have been in regular contact with the Settlement Administrator regarding the review of claim data in preparation for the filing of the Supplemental Declaration.

accompanying Memorandum demonstrating that the Settlement is fair, reasonable and adequate pursuant to Fed. R. Civ. P. 23. *See* ECF. No. 54. At the time of filing of Plaintiffs’ Motion for Final Approval, the deadline for filing objections and requests for exclusions had not yet passed. The time period within which Settlement Class Members could submit objections and/or requests for exclusions expired on September 7, 2021. During that time, no objections were submitted and only one valid request for exclusion has been received.³ The complete lack of any objections and single timely and valid opt-out demonstrate the overwhelmingly favorable reaction of the Settlement Class and are strong evidence of the fairness and reasonableness of the settlement.

ARGUMENT

A. The Favorable Reaction of the Settlement Class Supports Final Approval

“It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy. In fact, the lack of objections may well evidence the fairness of the Settlement.” *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB) (JO), 2019 U.S. Dist. LEXIS 217583, at *186 (E.D.N.Y. Dec. 16, 2019); *accord Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002); *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 218 (S.D.N.Y. 2015). Courts have recognized that a favorable reaction by the settlement class members strongly supports final

³ The Supplemental Declaration of the Settlement Administration will provide confirmation of the lack of objections and single valid opt-out timely received. However, pursuant to their duties in the Preliminary Approval Order, Class Counsel has been advised by the Settlement Administrator regarding objections and opt-outs. One additional request for exclusion was submitted to the Settlement Administrator. The individual stated that she does not want to participate in the settlement but has no interest in pursuing claims against Defendants. The opt out does not comply with the Court’s Preliminary Approval Order because the individual failed to include the information required to identify the individual (*e.g.*, a telephone number, email address, and date of birth).

approval of the settlement. *Viafara v. MCIZ Corp.*, No. 12 CIV. 7452 RLE, 2014 U.S. Dist. LEXIS 60695, at *17 (S.D.N.Y. May 1, 2014); *accord Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001).

Here, the time to file objections and requests for exclusions has expired, and no Settlement Class Members have objected, and only one has validly opted out. *See infra* n.3. The response demonstrates the overwhelming majority of Settlement Class Members support the settlement. “The fact that the vast majority of class members neither objected nor opted out is a strong indication of fairness.” *DeLeon v. Wells Fargo Bank, N.A.*, No. 1:12-CV-04494, 2015 U.S. Dist. LEXIS 65261, at *9 (S.D.N.Y. May 11, 2015); *see also Hi-Crush Partners*, 2014 U.S. Dist. LEXIS 177175, at *17 (“The overwhelmingly positive reaction of the Settlement Class evidences the Class’[s] approval.”).

Moreover, Class Counsel have worked diligently to understand the status of the Claim Form submissions and reaction of the Settlement Class Members. As will be apparent from the Supplemental Declaration to be filed on November 12, 2021 per the Preliminary Approval Order, the Claim activity in reaction to the settlement has been robust, indicating that Settlement Class Members are satisfied with the remedy provided by the Settlement Agreement. Indeed, the Claims Administrator has received 281,509 Claim Forms. The Claims Administrator has yet to complete claim validation, which will include allowing a 30-day process to cure deficiencies, identifying fraudulent Claim Form filings, de-duplicating Claim Forms and confirming Qualifying Proof of Purchase.

Given the favorable response to the Settlement Agreement, payment for valid Claims will likely be adjusted *pro rata* downward to compensate the Settlement Class as set forth in the Settlement Agreement. Despite this, Settlement Class Members still are receiving a significant

settlement benefit, especially given the complexities of the damages methodologies required to demonstrate a price premium in a class action. Based on Class Counsel’s extensive class action and trial experience, the average settlement payment here—which currently is estimated to be, on average, at least \$15.00 per Eligible Claimant—will be in excess of what Settlement Class Members could have received in the event Plaintiffs successfully tried the case to verdict. In fact, the vast majority of Eligible Claimants will receive this significant monetary benefit without having to show any Qualifying Proof of Purchase.

The monetary relief, in conjunction with the significant injunctive relief, is well within the range of reasonableness because Settlement Class Members are receiving far more than they would likely receive even if they prevailed at trial. *See Grinnell*, 495 F.2d at 455 & n.2 (“In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.”); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 48 (E.D.N.Y. 2019) (stating that the Second Circuit did not take issue with original settlement recovery of 2.5% of the largest possible class award); *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984) (“The dollar amount of the settlement by itself is not decisive in the fairness determination. The fact that the settlement amount may equal but a fraction of potential recovery does not render the settlement inadequate.”). The settlement provides a significant and immediate cash payment to the Settlement Class, which also supports a finding of fairness. *Sykes v. Mel Harris & Assocs., LLC*, 2016 WL 3030156, at *14 (S.D.N.Y. May 24, 2016) (“[M]uch of the value of a settlement lies in the ability to make funds available promptly”).

Altogether, the claims administration process has shown that the Settlement Class has had an overwhelmingly favorable response to the settlement. Eligible Settlement Class Members will

receive a significant and immediate cash payment from the Net Settlement Fund, which will be fully allocated to pay Settlement Class Members, and the labels of the Covered Products will be changed to remove the deception alleged in this Litigation. Not a single Settlement Class Member has objected. Only one has opted out. The robust and favorable response from the Settlement Class strongly supports a finding that the Settlement is fair, adequate and reasonable.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Final Approval of Class Action Settlement should be GRANTED.

Dated: November 10, 2021

Respectfully submitted,

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