

**SUPERIOR COURT OF FULTON COUNTY  
BUSINESS CASE DIVISION  
STATE OF GEORGIA**

IN RE ENDOCHOICE HOLDINGS, INC.  
SECURITIES LITIGATION

Civil Action File No. 2016 CV 277772

(Consolidated with Civil Action No.  
2016 CV 281193)

CLASS ACTION

**REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' AND CLASS  
COUNSEL'S MOTIONS, RESPECTIVELY, FOR (A) FINAL APPROVAL OF CLASS  
ACTION SETTLEMENT AND PLAN OF ALLOCATION AND (B) ATTORNEYS' FEES  
AND LITIGATION EXPENSES**

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Dated: June 8, 2020

Court-appointed Class Representatives Jesse Bauer and Kenneth T. Raczewski (“Lead Plaintiffs”)<sup>1</sup> and Class Counsel respectfully submit this memorandum in further support of, respectively, Lead Plaintiffs’ Final Approval Motion and Class Counsel’s Fee Motion.

## **I. BACKGROUND AND THE NOTICE PROGRAM**

On February 11, 2020, the Court issued its Preliminary Approval Order, which preliminarily approved the proposed \$8.5 million all-cash Settlement, and directed that Notice regarding the Settlement and related matters be issued to the Class Members. Pursuant to that Order, the Claims Administrator (Kurtzman Carson Consultants LLC or “KCC”) has implemented the comprehensive Court-approved Notice Plan by, *inter alia*:

- (1) mailing the Court-approved individual “Notice” (which contained detailed information concerning the Settlement, Plan of Allocation, Class Counsel’s requested attorneys’ fees and expenses, and Class Members’ rights to “opt out” or object) to roughly **10,000** potential Class Members or their “broker nominees”;
- (2) publicly posting copies of the Notice, a copy of the full Stipulation of Settlement, the preliminary approval papers, and various other case-related documents, at [www.endochoicesecuritieslitigation.com](http://www.endochoicesecuritieslitigation.com) (the “Settlement Website”);
- (3) publishing the Court-approved Summary Notice in *Investor’s Business Daily*, and transmitting it over *PR Newswire*, on March 9, 2020 (which Summary Notice also advised Class Members of the Settlement, and further directed them to the individual Notice and the Settlement Website for more detailed information).

*See* accompanying Supplemental Affidavit of Justin R. Hughes Regarding (A) Mailing of the Notice and Proof of Claim Form; and (B) Report on Requests for Exclusion Received to Date, dated June 8, 2019 (“Suppl. Hughes Decl.”), at ¶¶2-4.

Plaintiffs and their counsel’s opening papers have already addressed the primary factors that support approval of both the Settlement and the requested fee and expense application. However, now that the May 25, 2020 deadline for Class Members to submit any requests for

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<sup>1</sup> Unless otherwise noted, capitalized terms have the same meanings as in the Parties’ Stipulation of Settlement and in Lead Plaintiffs’ opening memorandum in support of Final Approval, filed May 11, 2020.

exclusion or objections has passed, it is appropriate to update the Court as to one additional relevant factor – the “reaction of the Class.” Here, Lead Plaintiffs are pleased to report that, although roughly 10,000 Notices were mailed to putative Class Members pursuant to the Court’s comprehensive Notice Plan, no objections and no requests for exclusion have been received by the Claims Administrator. *See* Suppl. Hughes Aff. at ¶¶5-6. Nor have any objections or “opt-out” requests been received by counsel for any party or filed with Court.

## II. THE CLASS’S REACTION PROVIDES FURTHER STRONG SUPPORT FOR APPROVAL OF THE SETTLEMENT AND PLAN OF ALLOCATION<sup>2</sup>

The Class’s reaction to a proposed settlement is an important factor in considering whether a settlement is fair, reasonable, and adequate. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

When few class members object to a settlement, a court may appropriately infer that a settlement is fair, adequate, and reasonable. *In re Home Depot Inc., Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT, 2016 U.S. Dist. LEXIS 200113, at \*42 (N.D. Ga. Aug. 23, 2016) (“The low percentage of objections demonstrates the reasonableness of the Settlement and supports ... approval.”). Indeed, here the lack of any objections or “opt-out” requests, ***from a Class of roughly 10,000 members***, provides strong support for finding that the \$8.5 million Settlement is fair, reasonable, and adequate. *See, e.g., Ellison v. Southstar Energy Services LLC*, 2008-CV-147195, 2012 WL 2050514, at \*5-6 (Fulton Super. Ct., Apr. 6, 2012) (Shoob, J.) (absence of objections supports approval); *Thorpe v. Walter Inv. Mgmt. Corp.*, No. 1:14-cv-20880-UU, 2016 WL 10518902, at \*4 (S.D. Fla. Oct. 17, 2016) (no objections and a single request for exclusion supports approval); *In re Arby’s Rest. Grp., Inc. Data Sec. Litig.*, 2019 WL 2720818, at \*1 (N.D. Ga. June 6, 2019) (lack of objections is a “**strong** indicator” that settlement

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<sup>2</sup> In cited cases, all internal quotes and citations are omitted, and all emphasis is added.

is reasonable and fair”); *In re NetBank, Inc. Sec. Litig.*, 2011 WL 13176646, at \*5 (N.D. Ga. Nov. 9, 2011) (same); *Access Now, Inc. v. Claire Stores, Inc.*, 2002 WL 1162422, at \*7 (S.D. Fla. May 7, 2002) (absence of objections “strongly favors approval”).

The lack of objections also supports approval of the Plan of Allocation. *See, e.g., 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.”); *In re Lucent Techs., Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 649 (D.N.J. 2004) (where there are no objections, such “favorable reaction” also supports approving proposed plan of allocation).

### **III. THE CLASS’S REACTION ALSO PROVIDES ADDITIONAL SUPPORT FOR APPROVAL OF CLASS COUNSEL’S REQUESTED FEES AND EXPENSES**

Similarly, the lack of any objections to Class Counsel’s requested 33 $\frac{1}{3}$  % attorneys’ fee and reimbursement of \$121,361.41 in litigation expenses also provides strong support for finding that these requests are fair and reasonable. *See, e.g., Arby’s*, 2019 WL 2720818, at \*1 (“The lack of objection is a strong indicator that both the settlement agreement *and* Application [for attorneys’ fees and expenses] are reasonable and fair.”); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 2012 WL 12540344, at \*7 (N.D. Ga. Oct. 26, 2012) (“absence of any objection by class members” supported approval of requested 33 $\frac{1}{3}$  % attorney fee award); *Pinto v. Princess Cruises Lines, Ltd.*, 513 F. Supp. 2d 1334, 1343 (S.D. Fla. 2007) (“That this sizeable class did not give rise to a single objection on the fees request further justifies the full award.”). This is especially true here where (a) the Notice expressly advised the more than 10,300 potential Class Members that Class Counsel would seek a 33 $\frac{1}{3}$  % fee award, *see* Notice (attached as Ex. A to Initial Hughes Aff. dated May 8, 2020), at §17 (“Class Counsel will ask the Court to award of

attorneys' fees from the Settlement Fund in an amount not to exceed one third (33 1/3%) of the Settlement Fund"), and (b) copies of all papers filed in support of Class Counsel's fee and expense application were (as the Notice advised they would be) posted on the Settlement Website promptly after they were filed. Suppl. Hughes Aff. at ¶3.

Moreover, although the Notice advised that Class Counsel would seek reimbursement of up to \$190,000 in expenses, in fact they seek reimbursement of the *lower* sum of \$121,361.41 in expenses. *A fortiori*, the lack of objections to \$190,000 in expenses further supports approval of counsel's request for reimbursement of the materially lesser amount. *See, e.g., In re Food Serv. Equip. Hardware Antitrust Litig.*, 2011 WL 13175440, at \*4 (N.D. Ga. Dec. 28, 2011) ("The lack of objections to the attorneys' fee and expense award is evidence that the requested fee is fair"). The lack of objections similarly supports approving both Lead Plaintiffs' requests for an award for their service to the Class.

#### **IV. CONCLUSION**

Primarily for the reasons set forth in Lead Plaintiffs' and Class Counsel's opening papers, but also for the additional reasons set forth herein, it is respectfully requested that the Court (a) enter the Parties' [Proposed] Final Order and Judgment in the form previously agreed to by the Parties and submitted to the Court as Exhibit B to the Stipulation; and (b) approve Class Counsel's request for a 33 1/3% attorneys' fee and reimbursement of expenses in the amount of \$121,361.41, and each Lead Plaintiff's request for an award \$15,000 for their service to the Class.

Respectfully submitted this 8<sup>th</sup> day of June, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' AND CLASS COUNSEL'S MOTIONS, RESPECTIVELY, FOR (A) FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION AND (B) ATTORNEYS' FEES AND LITIGATION EXPENSES to be filed with the Clerk of Court through the Odyssey eFileGA system and served a true and correct copy of the same by electronic mail upon the following:

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This 8<sup>th</sup> day of June, 2020.

*/s/ David A. Bain*  
David A. Bain

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