

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SHEET METAL WORKERS LOCAL 32	)	No. 3:09-cv-02083-RNC
PENSION FUND, Individually and on Behalf	)	(Consolidated)
of All Others Similarly Situated,)	
	)	<u>CLASS ACTION</u>
Plaintiff,)	
	)	REPLY MEMORANDUM OF LAW IN
vs.	)	FURTHER SUPPORT OF PLAINTIFFS'
	)	MOTION FOR FINAL APPROVAL OF
TEREX CORPORATION, et al.,	)	SETTLEMENT AND APPROVAL OF PLAN
	)	OF ALLOCATION AND FOR AN AWARD
Defendants.	)	OF ATTORNEYS' FEES AND EXPENSES
	)	AND AWARDS TO PLAINTIFFS
	)	PURSUANT TO 15 U.S.C. §78u-4(a)(4)

Lead Plaintiffs, Sheet Metal Workers Local 32 Pension Fund and Ironworkers St. Louis District Council Pension Fund and additional plaintiff Sheet Metal Workers Local #218(S) Pension Fund (“Plaintiffs”), on behalf of themselves and the Settlement Class, and Lead Counsel respectfully submit this memorandum of law in further support of Plaintiffs’ motion for final approval of the Settlement and approval of the Plan of Allocation and for an award of attorneys’ fees and expenses and awards to Plaintiffs.¹

I. PRELIMINARY STATEMENT

The proposed Settlement resolves this Litigation in its entirety in exchange for a cash payment of \$10,000,000. As detailed in Plaintiffs’ and Lead Counsel’s opening papers (ECF Nos. 126-133), the Settlement is the product of hard-fought litigation and extensive arm’s-length settlement negotiations, and represents a very favorable result for the Settlement Class in light of the substantial challenges that Plaintiffs would have faced in proving liability and damages, and the costs and delays of continued litigation through summary judgment and trial, as well as potential appeals.

Pursuant to the Court’s Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 119) (the “Preliminary Approval Order”), the Claims Administrator, under the supervision of Lead Counsel, conducted an extensive notice program, including mailing over 145,500 copies of the Notice and the Proof of Claim and Release form (“Claim Form”) (together, “Notice Package”) to potential Settlement Class Members and nominees. *See* Declaration of Mishka Ferguson Regarding Notice Dissemination and Requests for Exclusion Received to Date (“Ferguson Decl.”), ¶3, submitted herewith. In response to this notice program, no Settlement Class Member has objected to

¹ Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Settlement Agreement (ECF No. 118-4) or in the Declaration of Robert J. Robbins in Support of Motion for Final Approval of Settlement and Approval of Plan of Allocation and for an Award of Attorneys’ Fees and Expenses and an Award to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) (ECF No. 130).

any aspect of the Settlement, Plan of Allocation, or fee and expense application; nor has any Settlement Class Member requested exclusion from the Settlement Class. As explained further below, this reaction of the Settlement Class further demonstrates that the proposed Settlement, the Plan of Allocation, and the request for attorneys' fees and expenses are fair and reasonable, and should be approved.

II. THE REACTION OF THE SETTLEMENT CLASS SUPPORTS APPROVAL OF THE MOTION

Plaintiffs and Lead Counsel respectfully submit that their opening papers demonstrate why approval of the motion is warranted. Now that the time for objecting or requesting exclusion from the Settlement Class has passed, the lack of any objections or opt outs from the Settlement Class provides additional support for approval of the motion.

Pursuant to the Court's Preliminary Approval Order, more than 145,500 copies of the Notice Package have been mailed to potential Settlement Class Members and their nominees. *See* Ferguson Decl., ¶3. The Notice informed Settlement Class Members of the terms of the proposed Settlement and Plan of Allocation, that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 31% of the Settlement Amount and payment of litigation expenses in an amount not to exceed \$225,000, and that Plaintiffs may seek awards for their time and expenses incurred in representing the Settlement Class in an amount not to exceed \$7,500 in the aggregate. *See* Notice (ECF No. 123), at 2, 10. The Notice also apprised Settlement Class Members of their right to object to the proposed Settlement, the Plan of Allocation and/or the request for attorneys' fees and expenses, their right to exclude themselves from the Settlement Class, and the July 3, 2019 deadline for filing objections and requests for exclusion. *See id.* at 2, 9-10. The Summary Notice, which informed readers of the proposed Settlement, how to obtain copies of the Notice Package, and the deadlines for the submission of Claim Forms, objections, and requests for exclusion, was published in *The Wall Street Journal* and released over the *Business Wire*. *See* ECF No. 123, ¶11. In addition,

the Claims Administrator established a case-specific website which provided information and links to relevant documents, *id.*, ¶13, and a case-specific toll-free telephone helpline. *Id.*, ¶12.

As noted above, following this notice program, no Settlement Class Member objected to any aspect of the Settlement, the Plan of Allocation, or fee and expense application, or requested exclusion from the Settlement Class.

The absence of objections and requests for exclusion supports a finding that the Settlement is fair, reasonable, and adequate. Indeed, “the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in [the] *Grinnell* inquiry.” *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005); *see also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 176 (S.D.N.Y. 2014) (“The absence of . . . objections and minimal investors electing to opt out of the Settlement provides evidence of Class members’ approval of the terms of the Settlement.”); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, No. 3:09cv1293 (VLB), 2012 WL 3589610, at *5 (D. Conn. Aug. 20, 2012) (“[T]he absence of objectants may itself be taken as evidencing the fairness of a settlement.”) (citation omitted); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010) (“The absence of objections to the Settlement supports the inference that it is fair, reasonable and adequate.”).

Importantly, no institutional investors have objected to the Settlement or requested exclusion. The absence of objections by these sophisticated Settlement Class Members (as well as from any retail Settlement Class Members) is further evidence of the fairness of the Settlement. *See In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013) (the reaction of the class supported the settlement where “not a single objection was received from any of the institutional investors that hold the majority of Citigroup stock”); *In re AOL Time Warner, Inc. Sec. & “ERISA”*

Litig., No. MDL 1500, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (the lack of objections from institutional investors supported approval of settlement).

The lack of objections from institutional or retail Settlement Class Members also supports approval of the Plan of Allocation. *See, e.g., Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 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.”).

Finally, the positive reaction of the Settlement Class should also be considered with respect to Lead Counsel’s request for an award of attorneys’ fees and expenses. The absence of any objections to the requested fee and expenses supports a finding that the fee and expense request is fair and reasonable. *See, e.g., In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (the reaction of class members to a fee and expense request “is entitled to great weight by the Court” and the absence of any objection “suggests that the fee request is fair and reasonable”) (citation omitted); *Maley*, 186 F. Supp. 2d at 374 (the lack of any objection to the fee request supported its approval). In particular, the lack of any objections by institutional investors supports approval of the fee and expense request. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (the fact 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 the fee request); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (lack of objections from institutional investors supported the approval of fee request because “the class included numerous institutional investors who presumably had the

means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive”).

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs’ and Lead Counsel’s opening papers, it is respectfully requested that the Court approve the Settlement, the Plan of Allocation, and the request for fees and expenses. Copies of the proposed Final Judgment and Order of Dismissal with Prejudice, Order Approving Plan of Allocation, and Order Awarding Attorneys’ Fees and Expenses and Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) are submitted herewith.

DATED: July 17, 2019

Respectfully submitted,

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Certificate of Service

I hereby certify that on this July 17, 2019, a copy of the foregoing was filed electronically and served by mail upon anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

By: /s/ Jonathan P. Whitcomb
Jonathan P. Whitcomb