

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN L. DOUGHERTY, Individually)	Civ. No. 2:16-cv-10089-AJT-RSW
and on Behalf of All Others Similarly)	
Situated,)	<u>CLASS ACTION</u>
Plaintiff,)	LEAD PLAINTIFFS' REPLY IN
vs.)	FURTHER SUPPORT OF (1) CLASS
ESPERION THERAPEUTICS, INC., et)	REPRESENTATIVES' MOTION FOR
al.,)	FINAL APPROVAL OF CLASS
Defendants.)	ACTION SETTLEMENT AND
_____)	APPROVAL OF PLAN OF
	ALLOCATION; AND (2) CLASS
	COUNSEL'S MOTION FOR AN
	AWARD OF ATTORNEYS' FEES,
	LITIGATION COSTS AND
	EXPENSES AND AWARDS TO
	CLASS REPRESENTATIVES

Lead Plaintiffs and Class Representatives Ronald E. Wallace and Walter J. Minett (together, “Lead Plaintiffs” or “Class Representatives”) and Lead Counsel respectfully submit this reply in further support of: (1) their motion for final approval of the proposed class action settlement (the “Settlement”) and approval of the Plan of Allocation; and (2) Class Counsel’s motion for an award of attorneys’ fees and expenses and awards to Lead Plaintiffs pursuant to 15 U.S.C. §78u-4(a)(4). ECF Nos. 215-216.¹

I. PRELIMINARY STATEMENT

Lead Plaintiffs are pleased to advise the Court that there has been near unanimous approval from the Class to the proposed \$18,250,000 Settlement, Plan of Allocation, and the fee and expense application. As described in the accompanying Supplemental Declaration of Ross D. Murray Regarding Notice Dissemination and Requests for Exclusion Received to Date (“Suppl. Murray Decl.”) and prior Murray Declaration (ECF No. 220),² notice of the Settlement was sent to more than 13,400 potential Class Members and their nominees. Notice was also published in *Investor’s Business Daily*, transmitted over *Business Wire* and posted on the Claims Administrator’s case-dedicated website, www.EsperionSecuritiesSettlement.com. The

¹ Unless otherwise noted, all capitalized terms not defined herein have the same meanings set forth in the Stipulation of Settlement. ECF No. 211.

² See Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date.

deadline for objections was August 2, 2021, and only one letter was received by counsel, and there is no proof that the writer of the letter is even a Class Member. Further, no Class Members have asked to be excluded from the Class. The Class' overwhelming support demonstrates the fairness, adequacy and reasonableness of the Settlement, Plan of Allocation and the fee and expense application.

II. THE REACTION OF THE CLASS STRONGLY SUPPORTS APPROVAL OF THE SETTLEMENT AND PLAN OF ALLOCATION

The reaction of a class to a settlement is an important factor in assessing the fairness and adequacy of the settlement. “[A] relatively small number of class members who object is an indication of a settlement’s fairness.” *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). Indeed, “[t]he lack of objections by class members in relation to the size of the class highlights the fairness of the settlements to unnamed class members and supports approval of the settlements.” *In re Southeastern Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155379, at *6 (E.D. Tenn. May 17, 2013).

Here, not a single Class Member objected to the substance of the Settlement or Plan of Allocation or requested exclusion from the Class. The letter submitted by Sonja Peterson complains about the claims process (and securities litigation in general). The claims process here, however, comports with due process and is identical to those approved by hundreds, if not thousands, of courts nationwide in

securities class action litigation and is required to properly distribute settlement proceeds to Class Members who suffered compensable losses and to no one else. Even Ms. Peterson acknowledges there is nothing unique about the claims process in this litigation. Instead, she claims that “[t]here is no reason why every class member should be subjected to the unreasonable proof of claim demands” and that “[e]very class member should get a share of the proceeds, even if they cannot come up with the documentation.” ECF No. 213 at 1. That proposition is clearly untenable and finds no support in the law.

Neither the Claims Administrator nor Esperion knows the identity of those individuals and entities who traded in the Company’s stock during the Class Period. Securities transactions are anonymous and take place through stockbrokers or online, on or outside the market. Most shares are held in “street name,” *i.e.*, by banks and brokerages. A claims process, such as the one approved here, is the only method by which the Claims Administrator can identify who is actually in the class and ensure that only those Class Members who suffered losses as a result of their Esperion transactions recover for those losses. It is simply not possible for the Claims Administrator (or Esperion) to distribute the Settlement Fund in any other way.³

³ Notably, Ms. Peterson has not provided any proof that she or her parents are actually Class Members.

The positive reaction of the Class to the Settlement, together with the relevant factors discussed in Lead Plaintiffs' opening brief in support of the Settlement, strongly support the Court's final approval of the Settlement and Plan of Allocation. *See* ECF No. 215 at 6-20; *see also In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, at *13 (E.D. Mich. Dec. 13, 2011) (“[U]nanimous approval of the proposed settlement [] by the class members is entitled to nearly dispositive weight in the court's evaluation of the proposed settlement.”) (citation omitted).

III. THE REACTION OF THE CLASS SUPPORTS APPROVAL OF THE FEE AND EXPENSE APPLICATION

Not a single Class Member has objected to Lead Counsel's request for attorneys' fees and expenses, and no Class Member has objected to Lead Plaintiffs' requested awards. The fact that there have been no objections demonstrates the fairness and reasonableness of the requested fee and expense awards. *See Packaged Ice*, 2011 WL 6209188, at *19 (noting that “[t]here were no objections to the fee request . . . that was disclosed in the Notice to settlement class members” in approving fee request).

As set forth in greater detail in Lead Counsel's opening brief in support of an award of their fees and expenses, Lead Counsel's fee request of 32.5% of the Settlement Amount, which Lead Plaintiffs support, is well within the normal range of awards for similar class action litigations and is both fair and reasonable under the *Ramey* factors. ECF No. 216 at 9-22. The reaction of the Class following the Court-

approved notice program reinforces that conclusion and further supports the requested \$833,716.99 in expenses incurred by Plaintiffs' Counsel in prosecuting this action and the requested awards of \$7,500 to each Lead Plaintiff for the time they spent representing the Class.

IV. CONCLUSION

The \$18.25 million Settlement, which was achieved after five years of hard-fought litigation, represents a significant recovery for Class Members. For the reasons set forth herein and in their prior submissions, Lead Plaintiffs and Lead Counsel respectfully request that the Court approve the Settlement and the Plan of Allocation as fair, reasonable and adequate, and approve Lead Counsel's request for an award of attorneys' fees and expenses and the awards sought by Lead Plaintiffs pursuant to 15 U.S.C. §78u-4(a)(4).

DATED: August 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on August 16, 2021, 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 attached 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 attached Manual Notice List.

s/ ELLEN GUSIKOFF STEWART

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Mailing Information for a Case 2:16-cv-10089-AJT-RSW Dougherty v. Esperion Therapeutics, Inc. et al

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

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