

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

<p>In Re:</p> <p>DISPOSABLE CONTACT LENS ANTITRUST LITIGATION</p>	<p>Case No. 3:15-md-2626-HES-LLL</p> <p>Judge Harvey E. Schlesinger</p> <p>Magistrate Judge Laura Lothman Lambert</p>
<p>THIS DOCUMENT RELATES TO: All Class Actions</p>	

**CLASS COUNSEL'S RESPONSE TO
CERTAIN CLAIMANTS' MOTIONS FOR RECONSIDERATION**

Class Counsel respectfully submit this response (“Response”) to the Objectors’ Motion for Reconsideration and Motion to Stay Order, filed by Stan Franklin and Scott Pierce (the “Franklin & Pierce Motion,” ECF No. 1407), and the “Motion Reconsideration” [*sic*], filed by Jill Swanson (the “Swanson Motion,” ECF No. 1408),¹ both of which seek to undo the Court’s November 29, 2023 Order Authorizing Second Distribution of the Net Settlement Funds to Claimants (the “Second Distribution Order,” ECF No. 1403).

For the reasons set forth below and in Class Counsel’s Response to Certain Claimants’ Objections to the Supp. Distribution of Net Settlement Funds (the “Objection Response,” ECF No. 1406), the Court should deny Objectors’ Motions.

In the meantime, Class Counsel has instructed the Court-appointed Claims Administrator, Epiq Class Action & Claims Solutions (“Epiq”), to wait to make any payments authorized by the Second Distribution Order until the Objectors’ Motions are resolved.

I. ARGUMENT

A. Class Counsel Previously Addressed Objectors’ Concerns in Their Objection Response.

Class Counsel already addressed the Objectors’ earlier concerns in their Objection Response.² For example, Objectors’ stated concern that they will not be

¹ The Franklin & Pierce Motion and the Swanson Motion are collectively referred to herein as the “Motions,” and the individuals lodging these objections are collectively referred to herein as the “Objectors.”

² These Objectors previously filed objections with the Court. *See* Objectors’ Opp. to Class Counsel’s Mot. to Authorize a Supp. Distribution of Net Settlement

paid their *pro rata* distribution or that their funds are being reallocated is wholly unfounded. *See* Swanson Mot. at 1; Franklin & Pierce Mot. at 1 (purporting to incorporate the Swanson Objection and the Franklin & Pierce Objection). The Second Distribution Order does **not** redistribute the Objectors' funds; instead, it explicitly allows Epiq to make distributions to the Objectors and other Re-Issue Claimants in the original amounts. *See* Objection Response at 9-10. Indeed, by permitting these payments to be re-issued via EpiqPay, the Court's Second Distribution Order will provide claimants, including Objectors, with an easier and faster way to obtain their funds. Rather than rehashing all of those same arguments here, however, Class Counsel simply incorporates by reference their Objection Response as if fully set forth herein.

B. Objectors' "Notice" Arguments Are Without Merit.

While the Objection Response largely dispenses with the arguments raised by the Motions, the Objectors' Motions also challenge the Second Distribution Order for alleged lack of notice. This argument also lacks merit.

As an initial matter, it simply is incorrect that the Class Counsel's Motion to Authorize Supplemental Distribution of Net Settlement Funds (the "Second Distribution Motion," ECF No. 1402) was "buried," Swanson Mot. at 1, or that it was not posted on the settlement website until "several days after the filing date." Franklin & Pierce Mot. at 1 (emphasis removed). As outlined in the Second

Funds (the "Franklin & Pierce Objection," ECF No. 1404); *Untitled Filing* (the "Swanson Objection," ECF No. 1405).

Supplemental Declaration of Jeanne Chernila Regarding Certain Claimants’ Objections to the Supplemental Distribution of Net Settlement Funds (the “Second Chernila Declaration,” ECF No. 1406-3), Epiq updated the banner language on the settlement website on November 22, 2023—the day after the Second Distribution Motion was filed—to unambiguously announce the filing of this motion and link directly to it. Second Chernila Decl., ¶ 15 & Ex. E; *see also* Objection Response at 8 (setting forth the same).

No more notice than this was required under the Rules or caselaw. Additional notice, with an opportunity to be heard, is only required where class members’ rights would be materially or substantially impaired. As the United States District Court for the Southern District of Florida recently explained:

[T]he determination of whether additional notice is required is within the discretion of the Court. . . . [O]ther courts have found that additional notice is required only when the interests of the class have been materially or substantially impaired since the original notice was disseminated. Conversely, when the interests of the class are minimally impacted, or not impacted at all, by events subsequent to the dissemination of the original notice, additional notice is neither necessary nor required.

The Court concludes that the Parties disseminated the Notice in the manner and form approved by the Court . . . and that the Notice complied with the requirements of Rule 23.1 of the Federal Rules of Civil Procedure and satisfied the requirements of due process. The Court further concludes that all [class members] were provided the opportunity to object to or comment on the Settlement. There have been no modifications or changes to the terms of the Settlement since that Notice was disseminated. And subsequent events have not strengthened the [class members’] claims or otherwise rendered the Settlement a less desirable outcome for [class members]. Based on the foregoing, the Court concludes additional notice to [class members] is neither necessary nor required.

Hugo ex rel. BankAtlantic Bancorp, Inc. v. Levan, No. 08-61018-CIV, 2011 WL 13173025, at *11-12 (S.D. Fla. July 12, 2011) (internal citations omitted); *see also Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2023 WL 3603492, at *2 (S.D. Fla. May 4, 2023), *report and recommendation adopted*, No. 03-22778-CIV, 2023 WL 3600064 (S.D. Fla. May 23, 2023) (“Class Counsel’s request for a 33% contingency fee on the earlier Distributions was fully noticed to Class Members, none of whom objected. The Court finds that no additional notice is required, and that the fees and expenses requested are reasonable.”).

This rule extends to the disposition of residual settlement funds. *See Keepseagle v. Vilsack*, 102 F. Supp. 3d 306, 314-15 (D.D.C. 2015) (holding that “an amendment that neither adds to the *res judicata* effect of a judgment by expanding the scope of covered claims nor otherwise limits any legal right held by a class member need not be subject to a renewed Rule 23(e) process” and concluding that changing the procedures for the distribution of residual settlement funds did not necessitate a new round of notice and opportunity to be heard because the proposed change did not alter the legal rights of class members).

Here, Class members, including Objectors, are in the same position they have been in since at least June 2022, when they received notice, including instructions on how to object or opt out, that Class Counsel intended to distribute available settlement funds to eligible claimants on a pro-rata basis. *See Decl. of Cameron R. Azari, Esq. on Implementation of Settlement Notice Plan*, ¶¶ 18-21,

35; Ex. 9, ¶ 32 (ECF No. 1351). Since then, class members have been repeatedly informed of this fact, including in July 2022³ and May 2023.⁴ At no point did any Class members object to this proposed *pro rata* distribution,⁵ and the Court subsequently approved this proposed *pro rata* distribution on June 5, 2023 (ECF No. 1371).

Consistent with the foregoing, Class Counsel filed their Second Distribution Motion on November 21, 2023. The Second Distribution Motion also sought approval of *pro rata* distributions to eligible claimants – just as had been done previously without objection. *See* Second Distribution Mot. at 2. Because the Second Distribution Motion simply sought to distribute funds in the same manner previously approved by the Court (such that Class members’ rights were not

³ *See* Pls.’ Mot. for Final Approval of Settlement Agreements with Defs. Alcon Vision, LLC and Johnson & Johnson Vision Care, Inc. and Mem. of Law in Supp. Thereof at 4-5 (noting Class Counsel’s intention to distribute the available settlement funds “at a later date on a *pro rata* basis among eligible Settlement Class Members who do not opt out of the Settlements”) (ECF No. 1348).

⁴ *See* Pls.’ Mot. to Authorize Distribution of Net Settlement Funds to Claimants at 7 (“[s]hould the Court approve the disbursement, award payments will be made based on *pro rata* calculations. Specifically, Epiq has determined the *pro rata* amount that will be paid on each of these valid claims on a settlement fund by-settlement fund basis by calculating each Eligible Product Purchase price percentage of the total allowed covered Eligible Product Purchases and applying that percentage to the total dollar value for each applicable net settlement fund available for distribution.”) (ECF No. 1370).

⁵ *See* Pls.’ Supp. Mem. of Law in Further Supp. of Pls.’ Mot. for Final Approval of Settlement Agreements with Defs. Alcon Vision, LLC and Johnson & Johnson Vision Care, Inc. and Lead Counsel’s Application for an Award of Attorneys’ Fees and Reimbursement of Expense at 2-3 (“[a]s of September 6, 2022, no objections have been received by Epiq or Lead Counsel.”) (ECF No. 1357).

materially or substantially impaired) without even a single objection, there was no need to re-notice Class members. This being the case, the argument that Class Counsel somehow breached their fiduciary duty to the Class is false.

Indeed, the Objectors' argument, if accepted, would deprive other eligible claimants of the same *pro rata* allocation that the Objectors agree they are entitled to. Specifically, as set forth in the Second Distribution Motion, roughly half of the individuals proposed to be paid through the Second Distribution Motion are Re-Issue Claimants, including the Objectors; the other half are individuals who, after further review by Epiq and Class Counsel, could have received a distribution as part of the earlier *pro rata* distribution but did not. *See* Second Distribution Mot. at 2. While Objectors agree that the first category is entitled to a *pro-rata* distribution, they argue that the second is not without first noticing the Class and providing an opportunity to be heard. But Objectors cannot have their cake and eat it, too. All eligible claimants are being treated the same, and there is no colorable claim that the Second Distribution Order harms Objectors.⁶

In sum, the Second Distribution Order authorizes Epiq to make the same *pro rata* distribution to eligible claimants that was first noticed to the Class in June

⁶ Nor can Objectors claim that they will be materially harmed because they will receive less money if these other eligible claimants receive their *pro rata* distributions. As set forth in the Objection Response, Objectors are not entitled to any additional funds, as they have already been more than compensated for the harm incurred by the allegedly anticompetitive conduct. *See* Objection Response at 3 (noting that "First Round Claimants received, on average, more than 5.45 times their damages, as computed by Plaintiffs' expert") (footnote omitted); *see also id.* at 15-16.

of 2022. The Objectors' time to voice their alleged concerns with this proposed distribution plan was 18 months ago when they initially received notice that this was Class Counsel's intention. Tellingly, they chose to remain silent and should not now be permitted to deprive other eligible claimants of the same benefit they have claimed for themselves.

II. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request the Court enter an order denying the Motions and reaffirming its Second Distribution Order.

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/s/ Michael E. Lockamy

Michael E. Lockamy
Florida Bar No. 69626
BEDELL, DITTMAR, DEVAULT,
PILLANS & COXE, P.A.
101 East Adams Street
Jacksonville, FL 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307
mel@bedellfirm.com

Plaintiffs' Local Counsel

Joseph P. Guglielmo
SCOTT+SCOTT
ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com

Nathaniel C. Giddings
HAUSFELD LLP
888 16th Street NW, Suite 300
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201
ngiddings@hausfeld.com

Benjamin Steinberg
ROBINS KAPLAN LLP
1325 Avenue of the Americas
Suite 2601
New York, NY 10019
Telephone: (212) 980-7400
Facsimile: (212) 980-7499
bsteinberg@robinskaplan.com

Christopher L. Lebsock
HAUSFELD LLP
600 Montgomery Street, Suite 320
San Francisco, CA 94111
Telephone: (415) 633-1908
Facsimile: (415) 217-6813
clebsock@hausfeld.com

Co-Lead Class Counsel