

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:17-cv-00304-WJM-NRN

PEACE OFFICERS' ANNUITY AND BENEFIT FUND OF GEORGIA, Individually and on  
Behalf of All Others Similarly Situated, and  
JACKSONVILLE POLICE AND FIRE PENSION FUND, Individually and on Behalf of All  
Others Similarly Situated,

Plaintiffs,

v.

DAVITA INC.,  
KENT J. THIRY,  
JAMES K. HILGER, and  
JAVIER J. RODRIGUEZ,

Defendants.

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**LEAD PLAINTIFFS' NOTICE OF NON-OPPOSITION AND REPLY IN FURTHER  
SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT  
AND PLAN OF ALLOCATION AND MOTION FOR AN AWARD OF ATTORNEYS'  
FEES AND REIMBURSEMENT OF LITIGATION EXPENSES**

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Lead Plaintiffs respectfully submit this notice of non-opposition and reply brief in further support of their (i) Motion for Final Approval of Class Action Settlement and Plan of Allocation (ECF No. 107, the “Final Approval Motion”); and (ii) Motion for an Award of Attorneys’ Fees and Reimbursement of Litigation Expenses (ECF No. 108, the “Fee Motion”).<sup>1</sup>

## **I. PRELIMINARY STATEMENT**

As set forth in Lead Plaintiffs’ opening papers, the \$135 million Settlement in this Action represents an outstanding recovery for the Settlement Class that is supported by each of the factors that courts in the Tenth Circuit consider in the settlement approval process. By way of update, both the February 16, 2021 deadline for objections and exclusions, and the March 16, 2021 deadline for responses or oppositions to the motions, have now passed. Lead Plaintiffs are pleased to report that *not a single Settlement Class Member* opposed either motion or objected to any aspect of the Settlement, the Plan of Allocation, or the fee and expense request. Moreover, Lead Plaintiff received only one valid exclusion request, and that request was submitted on behalf of an individual representing a *de minimis* number of shares.

The exceedingly positive reaction from the Settlement Class is particularly meaningful in this case, because the vast majority of DaVita’s shares—approximately 87%—are owned by institutional investors, including some of the largest, most sophisticated institutions in the world who have historically taken an active role in securities litigation by opting-out or objecting to settlements when warranted. In light of the endorsement of the Settlement Class and the remaining factors set forth in Lead Plaintiffs’ motions, Lead Plaintiffs respectfully submit that the Court should grant the Final Approval Motion and the Fee Motion in their entirety.

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<sup>1</sup> Unless otherwise indicated, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement (ECF No. 103-1), the Final Approval Motion, the Fee Motion or in the Declaration of Joseph E. White, III in Support thereof (ECF No. 107-1). All citations and internal quotations are omitted, and all emphasis is added.

## II. ARGUMENT

### A. **Lead Plaintiffs Completed the Court-Approved Notice Program**

Lead Plaintiffs fully complied with all aspects of the Court-approved Notice program set forth in the Court’s Preliminary Approval Order, pursuant to which the Claims Administrator (i) mailed 137,901 Notice Packets to potential Settlement Class members; (ii) published the Summary Notice in *Investor’s Business Daily* and over the *PR Newswire* on December 7, 2020; and (iii) maintained a toll-free telephone hotline and a dedicated website for the Settlement. *See* ECF Nos. 106-1; 107-5; Declaration of Matthew Mulvihill, Ex. D, at ¶¶4-10. The Notice informed Settlement Class Members of their right to opt-out or object to the Settlement, Plan of Allocation, or Lead Counsel’s fee request, and the deadline for doing so. Final Approval Motion at 12-14.<sup>2</sup> In response to this extensive Notice program, Plaintiffs received *no objections* to any aspect of the Settlement, the Plan of Allocation, or Lead Plaintiffs’ fee request.

### B. **The Endorsement of the Settlement Class Supports Final Approval**

The fact that not a single Settlement Class Member has opposed any aspect of the Settlement, the Plan of Allocation, or Lead Counsel’s fee and expense request, constitutes a compelling endorsement from the Settlement Class that fully supports final approval of the Settlement and the fee and expense request. *See Ramos v. Banner Health*, 2020 WL 6585849, at \*3 (D. Colo. Nov. 10, 2020) (Martínez, J.) (“[t]he fact that no class member objects shows that the class also considers this settlement fair and reasonable”); *In re Oppenheimer Rochester*

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<sup>2</sup> Pursuant to the Preliminary Approval Order, the Notice also informed potential Settlement Class Members that all Claim Forms must be postmarked by March 20, 2021. *See* ECF No. 104 at ¶13; ECF No. 103-3. As of March 22, 2021, the Claims Administrator has received 14,783 Claim Forms from Potential Settlement Class Members. *See* Ex. D at ¶11. Once a plan of allocation is approved and submitted Claim Forms have been processed, the Claims Administrator will be able to begin determining Recognized Claims of all Authorized Claimants, and subsequently, Distribution Amounts for each Authorized Claimant. *See* ECF No. 103-3 at 15-21 and Ex. C.

*Funds Grp. Sec. Litig.*, 2014 WL 12768451, at \*2 (D. Colo. July 31, 2014) (Kane, J.) (awarding 30% fee award, noting “[t]here have been no objections to the fee and expense application”).<sup>3</sup>

Significantly, the Settlement Class’s wholly positive reaction carries substantial weight here given the fact that the vast majority of DaVita’s shares outstanding are owned by large institutional investors, including John Hancock, Dimensional, Goldman Sachs and JP Morgan—“sophisticated business entities” who have the resources, acumen and financial incentive to object or opt-out of the Settlement if warranted; indeed, while these funds have taken such steps in securities class actions in the past, in this Action, *they have already submitted claims*.<sup>4</sup> Furthermore, Lead Plaintiffs—large institutional investors themselves who actively supervised the Action—fully endorse both the Settlement and the fee and expense award. ECF No. 107-3 and 107-4 at ¶¶8-14 (Georgia Peace Officers and Jacksonville P&F “strongly endorse[] approval of the Settlement”; “take[] seriously [their] role as a lead plaintiff to ensure that attorneys’ fees are fair in light of the result achieved for the Class”; and “fully support” the Fee Motion).

### C. The Settlement Is Fair, Adequate and Reasonable

Lead Plaintiffs’ opening papers set forth the numerous reasons why the Settlement is fair, adequate and reasonable. The Settlement is the result of extensive, arm’s length negotiations during six mediation sessions overseen by one of the most respected mediators in the country—former Federal District Court Judge Layn R. Phillips, who sat by designation on the Tenth

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<sup>3</sup> Further evidencing the Settlement Class’s approval of the Settlement and fee application, Lead Plaintiffs have received only one valid exclusion request, which represents a *de minimis* 1,425 shares out of the approximately **200 million** publicly-held DaVita shares outstanding during the Class Period.

<sup>4</sup> See, e.g., *John Hancock Capital Series et al. v. BP, PLC et al.*, 4:15-cv-02704 (S.D. Tex.) (John Hancock opt-out); *Dimensional Emerging Markets Value Fund et al. v. Petroleo Brasileiro S.A. – Petrobras*, No. 1:15-cv-02165 (S.D.N.Y.) (Dimensional opt-out); see also *In re Rayonier Inc. Sec. Litig.*, 2017 WL 4542852, at \* 3 (M.D. Fla. Oct. 5, 2017) (awarding 30% fee award and finding the fact that four “sophisticated business entities”—BlackRock, Vanguard, JPMorgan and T. Rowe Price—owned 43% of the company’s outstanding shares and “certainly ha[ve] the business acumen and financial ability to opt out [] or object [but] none of them did so,” confirmed that the settlement was “objectively outstanding.”).

Circuit, and who endorsed the Settlement as “fair and reasonable.” ECF No. 107-2 (“I strongly support the Court’s approval of the settlement in all respects”). Furthermore, each of the factors that courts in the Tenth Circuit consider in evaluating a class action settlement fully support final approval of the proposed Settlement. *See* Final Approval Motion at 4-14 (applying the factors of Rule 23 and *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002)).

In addition, the proposed Plan of Allocation, which is substantially similar to plans approved in securities class actions nationwide and was formulated in consultation with Lead Plaintiffs’ damages expert, is similarly fair and reasonable. Final Approval Motion at 14-15.

**D. Lead Plaintiffs’ Request for an Award of Attorneys’ Fees and Reimbursement of Litigation Expenses is Fair and Reasonable**

Lead Plaintiffs’ request for an attorneys’ fee award of 30% of the Settlement Fund and reimbursement of \$547,409.27 in Litigation Expenses is also eminently reasonable. Each *Johnson* factor fully supports the requested award, including, among others: the extensive time and labor devoted by Lead Counsel; the size of the Settlement, which represented as much as 43% of the Class’s likely maximum recoverable damages (up to *eleven times* greater than typical recoveries in securities class actions); the considerable risks of the Action; the contingent nature of the representation; the “undesirability” and difficulty of the case; the quality of the representation against highly-qualified defense firms; Lead Plaintiffs’ full endorsements of the requested fee; and the fact that *not a single Settlement Class Member has objected or opposed the fee request*. *See* Fee Motion at 5-14 (applying the factors from *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1979)). Awards in other securities and complex class actions, both in this Circuit and nationwide, confirm that the fee sought by Lead Counsel is also fair and reasonable. *See* Fee Motion at 9-11 (collecting cases).

Significantly, Judge Phillips has also endorsed the attorneys' fee request as fair and consistent with fees in similar cases. *See* ECF No. 107-2 at ¶26 (attesting that "the substantial recovery here was due in substantial part to Lead Counsel's experience, reputation, and advocacy capabilities," which "warrant granting Lead Counsel's fee request of 30% of the settlement fund"). Lastly, as a cross-check, the 2.75 lodestar multiplier—which is well within the range of multipliers awarded in class action settlements within the Tenth Circuit—amply supports the fee request. *See* Fee Motion at 11-12.

Finally, Lead Plaintiffs, Georgia Peace Officers and Jacksonville P&F, seek reimbursement of \$10,000 each as Representative Reimbursements pursuant to the PSLRA for their participation and supervision of the Action (*see* Fee Motion at 15). These reimbursement awards are particularly appropriate here given Lead Plaintiffs' extensive participation in the Action and the lack of objections or oppositions to the request.

### **III. CONCLUSION**

As set forth above and in Lead Plaintiffs' opening papers, Lead Plaintiffs respectfully request that the Court grant final approval of the Settlement, the Plan of Allocation, and Lead Plaintiffs' motion for attorneys' fees and reimbursement of Litigation Expenses.

For the Court's convenience, the Parties' agreed-upon proposed Final Judgment and Order of Dismissal is attached hereto as Exhibit A; the proposed Order Approving Plan of Allocation is attached hereto as Exhibit B; and the proposed Order Awarding Attorneys' Fees and Litigation Expenses is attached hereto as Exhibit C.

Dated: March 23, 2021

Respectfully submitted,

/s/ Rusty E. Glenn

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2021, I caused to be electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered participants.

/s/ Rusty E. Glenn  
Rusty E. Glenn