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*Counsel for Lead Plaintiff SEB Investment Management AB
and Lead Counsel for the Settlement Class*

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

SEB INVESTMENT MANAGEMENT AB,
Individually and on Behalf of All Others Similarly
Situating,

Plaintiff,

v.

ALIGN TECHNOLOGY, INC., JOSEPH M.
HOGAN, and JOHN F. MORICI,

Defendants.

Case No. 3:18-cv-06720-VC

CLASS ACTION

**LEAD PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
DISTRIBUTION PLAN AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: March 9, 2023
Time: 10:00 a.m.
Courtroom: 4, 17th Floor
Judge: Hon. Vince Chhabria

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NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 9, 2023 at 10:00 a.m., in Courtroom 4 on the 17th Floor of the United States District Court for the Northern District of California, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, the Honorable Vince Chhabria presiding, Court-appointed Lead Plaintiff SEB Investment Management AB (“Lead Plaintiff”), by and through its counsel, will and hereby does move this Court for an Order pursuant to Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”) which will, *inter alia*: (i) approve the administrative determinations of the Court-authorized Claims Administrator, JND Legal Administration (“JND”), accepting and rejecting Claims submitted in connection with the Settlement reached in the above-captioned Action as set forth in the Declaration of Luiggy Segura in Support of Lead Plaintiff’s Motion for Approval of Distribution Plan (“Segura Declaration” or “Segura Decl.”), submitted herewith;¹ (ii) approve payment of \$42,424.89 out of the Net Settlement Fund to JND for its outstanding fees and expenses incurred in connection with the administration of the Settlement and its estimate for the work to be performed in connection with the Initial Distribution of the Net Settlement Fund; (iii) direct the Initial Distribution of the Net Settlement Fund to Claimants whose Claims are accepted by JND as valid and approved by the Court (“Authorized Claimants”); (iv) direct that distribution checks issued in the Initial Distribution state that the check must be cashed within ninety (90) days after the issue date; (v) direct that Authorized Claimants will forfeit all recovery from the Settlement if they fail to cash their distribution checks in a timely manner; (vi) approve the recommended plan for redistribution and/or contribution of any funds remaining in the Net Settlement Fund following the Initial Distribution; (vii) release claims related to the administration process; (viii) authorize the destruction of Claims and supporting documents as set forth in the Segura Declaration; and (ix) provide that the Court retains jurisdiction to consider any further applications concerning the administration of the Settlement, and such other and further relief as this Court deems appropriate.

¹ All terms with initial capitalization not defined herein shall have the meanings ascribed to them in the Segura Declaration and in the Stipulation and Agreement of Settlement previously filed with the Court (ECF No. 189-2) (“Stipulation”).

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities that follow, and the Segura Declaration.

Lead Counsel has provided Defendants' Counsel advance notice of this Motion. Defendants take no position on the Motion.²

² Defendants have no role in or responsibility for the administration of the Settlement Fund or processing of Claims, including determinations as to the validity of Claims or the distribution of the Net Settlement Fund. *See* Stipulation, ¶ 19. (“[N]one of Defendants, nor any of the other Released Defendants’ Parties, shall have any involvement in or any responsibility, authority, or liability whatsoever for the selection of the Claims Administrator, the development or application of the Plan of Allocation, the administration of the Settlement, the Claims process, or the disbursement of the Net Settlement Fund, and shall have no liability whatsoever to any person or entity, including, but not limited to, Lead Plaintiff, any other Settlement Class Members, or Lead Counsel in connection with the foregoing.”).

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should approve JND's administrative determinations regarding the acceptance and rejection of submitted Claims.
2. Whether the Court should authorize payment from the Net Settlement Fund to JND for its outstanding fees and expenses and its estimated fees and expenses for the work to be performed in connection with the Initial Distribution of the Net Settlement Fund.
3. Whether the Court should approve the recommended plan for distribution of the Net Settlement Fund.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Court-appointed Lead Plaintiff SEB Investment Management AB, through Lead Counsel, respectfully submits this Memorandum of Points and Authorities in support of its Motion for an order, pursuant to Rule 23(e), approving the proposed plan for distributing the Net Settlement Fund to eligible Settlement Class Members (“Distribution Plan”) as set forth in the accompanying Segura Declaration, submitted on behalf of the Court-authorized Claims Administrator, JND.

II. BACKGROUND ON THE SETTLEMENT

Lead Plaintiff, on behalf of itself and the Settlement Class, and defendants Align Technology, Inc. (“Align”), Joseph M. Hogan, and John F. Morici (collectively, “Defendants” and, together with Lead Plaintiff, the “Parties”) entered into the Stipulation wherein the Parties agreed, in substance, that in exchange for consideration of \$16,000,000 in cash, there would be a full and complete settlement of all Released Claims (as defined in Paragraph 1(hh) of the Stipulation) against Defendants and the other Released Defendants’ Parties (as defined in Paragraph 1(ii) of the Stipulation).

By its Order Preliminarily Approving Settlement and Proving for Notice (ECF No. 198), the Court directed that the Notice and Claim Form (together, the “Notice Packet”) be mailed or emailed to potential Settlement Class Members at the mailing addresses and/or email addresses set forth in the records provided or caused to be provided by Defendants, or who otherwise may be identified through further reasonable effort. The mailing and emailing were conducted in accordance with the Preliminary Approval Order.³ As set forth in the Segura Declaration, JND has mailed over 149,000 Notice Packets to potential Settlement Class Members and their nominees. Segura Decl., ¶ 5. The Notice informed Settlement Class Members that if they wished to be eligible to participate in the distribution of the Net Settlement Fund, they were required to complete and submit a Claim Form to JND. *Id.*, ¶ 8.

³ See Declaration of Luiggy Segura Regarding (A) Dissemination of Notice Packet; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion and Claims Received to Date (ECF No. 210-1) and Supplemental Declaration of Luiggy Segura Regarding (A) Continued Dissemination of Notice Packet; (B) Update on Call Center Services and Settlement Website; and (C) Report on Requests for Exclusion and Claims Received (ECF No. 214-1).

On April 28, 2022, the Court held a hearing to consider, among other things, whether the proposed Settlement should be granted final approval. By its Order Approving Class Action Settlement dated April 28, 2022 (ECF No. 215) (“Final Approval Order”) and Judgment dated April 28, 2022 (ECF No. 218), the Court: (i) approved the Settlement provided for in the Stipulation, finding it fair, reasonable, and adequate to the Settlement Class; (ii) found the notice procedures to be proper; and (iii) dismissed with prejudice the claims asserted against Defendants in the Action. By its Order Approving Plan of Allocation dated April 28, 2022 (ECF No. 216), the Court approved Lead Plaintiff’s proposed plan for allocating the settlement proceeds among eligible Settlement Class Members (“Plan of Allocation”).

Pursuant to Paragraphs 28 and 35 of the Stipulation, the Effective Date of the Settlement has occurred and the Net Settlement may be distributed to Authorized Claimants. Accordingly, pursuant to Paragraph 28 of the Stipulation, Lead Plaintiff respectfully requests the Court enter the [Proposed] Order Approving Distribution Plan (“Class Distribution Order”) submitted herewith.⁴

III. THE NET SETTLEMENT FUND

As set forth in the Stipulation, the Settlement Amount (i.e., \$16,000,000) has been deposited into the escrow account established by Lead Counsel (“Escrow Account”). In total, \$90,475.13 in income has been earned on the Settlement Amount. In addition, the following amounts have been paid from the Escrow Account: (i) \$607,575.11 in Notice and Administration Costs;⁵ and (ii) \$3,070,772.81 in Court-awarded attorneys’ fees and expenses.⁶ As of January 31, 2023, the balance of the Escrow Account was \$12,412,127.21.

⁴ The Court retained continuing and exclusive jurisdiction over, among other things, the disposition of the Settlement Fund and any motion to approve the Class Distribution Order. *See* Final Approval Order, ¶ 17.

⁵ Under the terms of the Stipulation and the Preliminary Approval Order, following the Effective Date, Lead Counsel was authorized to pay from the Escrow Account, without further approval from Defendants or further order of the Court, all Notice and Administration Costs exceeding the Notice and Administration Costs Cap (i.e., \$250,000). *See* Stipulation, ¶ 15; Preliminary Approval Order, ¶ 22.

⁶ Pursuant to its Order Awarding Attorneys’ Fees and Expenses dated April 28, 2022 (ECF No. 217), the Court awarded 20% of the Settlement Fund (i.e., \$3,200,000 plus interest of \$392.57) in attorneys’ fees and \$190,419.50 in expenses. The amount of Court-awarded attorneys’ fees and expenses paid from the Settlement Fund to date consists of 90% of the fee award (\$2,880,000) plus expenses and interest. The remaining 10% of the fee award will be paid to Lead Counsel following its filing of the Post-Distribution Accounting required by this District’s Procedural Guidance for Class Action Settlements.

IV. CLAIMS ADMINISTRATION

All Claims received by JND through January 17, 2023, have been fully processed in accordance with the Stipulation and the Court-approved Plan of Allocation set forth in the Notice. Segura Decl., ¶ 8.⁷ JND has responded to all inquiries regarding the Action, the Settlement, and the procedures for completing and submitting Claims, and has worked with Claimants throughout this administration to help them perfect their Claims. *See generally id.*, ¶¶ 10, 24-34.

As discussed in the Segura Declaration, a large portion of the Claims submitted in connection with the Settlement were initially deficient or ineligible for one or more reasons, including that they were not signed, were not properly documented, or indicated no eligible transactions in Align common stock during the Settlement Class Period, which required follow-up work by JND. *Id.*, ¶¶ 21, 24, 27. For the Claims that were determined to be deficient or ineligible, JND mailed a notice (or sent an email in the case of Electronic Claims) to the Claimant describing the defects in, or the ineligibility of, their Claim and advising what, if anything, was necessary to complete the Claim. *Id.*, ¶¶ 25, 27-29.⁸ These notices/emails advised Claimants that they were required to submit the appropriate information and/or documentary evidence to complete their Claim(s) within twenty (20) days from the date of the notice/email or their Claim(s) would be recommended for rejection to the extent the deficiency(ies) or condition(s) of ineligibility were not cured. *Id.*, ¶¶ 25, 28.

In addition to advising Claimants of what was required to cure the Claim(s), the notices/emails advised Claimants of their right to request the Court's review of their Claim(s) if they contested JND's administrative determination to reject their Claim(s) in whole or in part. *Id.*, ¶¶ 25, 28, 35. During the

⁷ In anticipation of completing the administration for the Settlement, January 17, 2023 was chosen as the cut-off date, after which no additional Claims would be accepted for processing or considered for inclusion in the Initial Distribution of the Net Settlement Fund. *Id.*, ¶ 37. Claims received or adjusted after January 17, 2023, will be eligible to participate in subsequent distributions subject to the provisions of Paragraphs 48(e)–(f) of the Distribution Plan set out in the Segura Declaration.

⁸ Sample deficiency/ineligibility notices are attached as Exhibit A to the Segura Declaration. For Electronic Claims, JND emailed Claimants to notify them of any deficiencies in or the ineligibility of their Electronic Claims. These emails attached an Excel spreadsheet containing detailed information associated with the Claims contained in the electronic submission, including which of the Claims were deficient or ineligible. *Id.*, ¶ 27.

course of this administration, one (1) request for Court review was received, but was resolved as a result of JND's additional explanation and discussions with the Claimant. Accordingly, there are no outstanding disputes requiring Court review. *Id.*, ¶ 35.

Throughout this administration, JND spent considerable time addressing deficient and ineligible Claims and assisting Claimants in curing the deficiencies in their Claims in order to be eligible to participate in the Settlement. *See generally id.*, ¶¶ 31-34. As a result of JND's efforts, many Claimants who submitted Claims with curable deficiencies were able to properly complete their Claims and are now eligible to participate in the Settlement and receive a payment from the Net Settlement Fund.

V. ADMINISTRATIVE DETERMINATIONS FOR CLAIMS

A. Claims Recommended for Acceptance

As set forth in the Segura Declaration, a total of 72,397 Claims were received by JND in connection with the Settlement. Segura Decl., ¶ 42. A total of 39,067 of these Claims have been provisionally accepted by JND. *Id.*, ¶¶ 43-44; *see also id.* at Exs. C & D (listing all accepted Claims and their Recognized Claim amounts, in Claim number order). Of the 39,067 Claims being recommended for acceptance and approval by the Court, 421 Claims were submitted after the postmark deadline set forth in the Notice (i.e., March 31, 2022), but were received by JND on or before January 17, 2023. *Id.*, ¶¶ 36, 44. Although these 421 Claims were submitted late, they were received while the processing of timely Claims was ongoing. Due to the amount of time needed to process the timely Claims received for the Settlement, the processing of these late Claims did not delay the completion of the Claims administration process or the distribution of the Net Settlement Fund. Accordingly, Lead Counsel believes that it would be appropriate to allow these Late But Otherwise Eligible Claims to share in the Net Settlement Fund. *Id.*, ¶ 36.⁹

The total Recognized Claims for the 39,067 Claims being recommended for acceptance is \$532,146,227.17 (\$468,091,042.80 for the Timely Eligible Claims listed on Exhibit C to the Segura

⁹ It is within the Court's discretion to allow late submitted claims. Pursuant to Paragraph 11 of the Preliminary Approval Order: "*Unless the Court orders otherwise*, all Claim Forms must be postmarked no later than March 31, 2022. Notwithstanding the foregoing, Lead Counsel may, at its discretion, accept for processing late Claims provided such acceptance does not delay the distribution of the Net Settlement Fund to the Settlement Class." (emphasis added).

Declaration and \$64,055,184.37 for the Late But Otherwise Eligible Claims listed on Exhibit D to the Segura Declaration). *Id.*, ¶¶ 43-44. Lead Counsel respectfully requests that the Court approve JND's administrative determinations with respect to the Claims being recommended for acceptance as listed on Exhibits C and D to the Segura Declaration.

B. Claims Recommended for Rejection

Of the total Claims received by JND through January 17, 2023, 33,330 Claims are being recommended for rejection. Segura Decl., ¶ 45; *see also id.* at Ex. E (listing all Claims being recommended for rejection and the reasons for rejection, in Claim number order). The 33,330 Claims being recommended for rejection were determined to be ineligible for the following reasons: (i) 26,889 Claims did not fit the definition of the Settlement Class (i.e., these Claims did not reflect any purchase(s)/acquisition(s) of Align common stock during the Settlement Class Period); (ii) 4,308 Claims did not result in a Recognized Claim pursuant to the Court-approved Plan of Allocation; (iii) 2,087 Claims had uncured deficiencies; (iv) 31 Claims were duplicates of Claims previously submitted; and (v) 15 Claims were withdrawn by the filer. *Id.*, ¶ 45. Lead Counsel respectfully requests that the Court approve JND's administrative determinations with respect to the Claims being recommended for rejection as listed on Exhibit E to the Segura Declaration.

VI. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with JND's agreement with Lead Counsel to act as the Claims Administrator for the Settlement, JND was responsible for, among other things, disseminating notice of the Settlement to the Settlement Class, creating and maintaining a website and toll-free telephone hotline dedicated to the Settlement, processing Claims, and allocating and distributing the Net Settlement Fund to Authorized Claimants. As set forth in the accompanying Segura Declaration, JND has been paid a total of \$607,575.11¹⁰ from the Settlement Fund to date, in accordance with the Stipulation and the Preliminary

¹⁰ Of this amount, \$68,168.78 was for the costs of brokers and nominees for their work in connection with the notice campaign. Segura Decl., ¶ 47; *see also* Preliminary Approval Order, ¶ 9 ("Upon full compliance with this Order, such nominees may seek reimbursement of their reasonable expenses actually incurred in complying with this Order by providing the Claims Administrator with proper documentation supporting the expenses for which reimbursement is sought. Such properly documented expenses incurred

Approval Order, for its work in connection with the Settlement. Segura Decl., ¶ 47.

During the course of the administration, JND agreed to cap its fees and expenses at \$650,000.00 and will not charge for its fees and expenses exceeding \$650,000.00. *Id.*, ¶ 47 n.4. Accordingly, JND has outstanding fees and expenses of \$19,571.68 and expects to incur an additional \$22,853.21 in fees and expenses to conduct the Initial Distribution. *Id.*; *see also id.* at Ex. F.

Lead Counsel respectfully requests that the Court direct payment of JND's outstanding fees and expenses of \$19,571.68. Lead Counsel also respectfully requests that the Court approve payment of up to \$22,853.21 for the fees and expenses JND expects to incur to conduct the Initial Distribution.

VII. DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND

The Net Settlement Fund is ready to be distributed at this time. Lead Counsel, therefore, respectfully requests the Court enter an order approving JND's determinations concerning the acceptance and rejection of the Claims received through January 17, 2023, and approving the Distribution Plan set forth in the Segura Declaration. If JND's administrative determinations are approved by the Court, each of the Authorized Claimants will receive their *pro rata* share of the Net Settlement Fund based on his, her, or its Recognized Claim calculated pursuant to the Plan of Allocation compared to the total Recognized Claims of all Authorized Claimants. Segura Decl., ¶ 48(a)(i). As set forth in the Plan of Allocation, if an Authorized Claimant's distribution payment calculates to less than \$10.00 it will not be included in the calculation and no distribution will be made to the Authorized Claimant. *Id.*, ¶ 48(a)(ii).

It is expected that not all of the checks sent to the Authorized Claimants will be cashed promptly and some of these checks will remain uncashed.¹¹ Following the Initial Distribution, and after JND has made reasonable and diligent efforts to have Authorized Claimants cash their Initial Distribution checks, any balance remaining in the Net Settlement Fund (from all void stale-dated checks) will, if cost-effective to do so, be redistributed to Authorized Claimants who have cashed their Initial Distribution checks and

by nominees in compliance with the terms of this Order shall be paid from the Settlement Fund, with any disputes as to the reasonableness or documentation of expenses incurred subject to review by the Court.”).

¹¹ In order to encourage Authorized Claimants to promptly deposit their payments, the Class Distribution Order requires that Initial Distribution checks state: “CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY 90 DAYS AFTER ISSUE DATE.” *Id.*, ¶ 48(b).

who would receive at least \$10.00 from such redistribution. *Id.*, ¶ 48(d).

Additional distributions to Authorized Claimants who have cashed their prior checks and who would receive at least \$10.00 on such distributions may occur thereafter if Lead Counsel, in consultation with JND, determines that additional distributions would be cost-effective. *Id.* At such time as it is determined that further distribution of the funds remaining in the Net Settlement Fund is not cost-effective, Lead Counsel requests that, in its discretion, it may pay any Claims received after January 17, 2023, or any earlier received Claims for which an adjustment was received after January 17, 2023, that resulted in an increased Recognized Claim, their distribution amounts or additional distribution amounts on a *pro rata* basis, to the extent that funds are available, that would bring these Claimants into parity with other Authorized Claimants that have cashed all of their prior distribution checks. *Id.*, ¶¶ 48(e)–(f).

In the unlikely event that there is a balance remaining in the Net Settlement Fund following the foregoing distribution(s), the remaining balance, as set forth in the Court-approved Plan of Allocation, “shall be contributed, subject to Court approval, to Charitable Smiles, a 501(c)(3) organization helping people who cannot afford dental treatment get the care they need (*see* www.charitablesmiles.org).” *See* Notice, p. 19 (ECF No. 210-2).

VIII. RELEASE OF CLAIMS

In order to allow for the full and final distribution of the Net Settlement Fund, it is necessary to bar any further claims against the Net Settlement Fund beyond the amount allocated to Authorized Claimants, and to provide that all persons and entities involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement of this Action, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund, be released and discharged from any and all claims arising from such involvement. Accordingly, Lead Counsel respectfully requests the Court release and discharge all persons and entities who are involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement of this Action, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund from any and all claims arising out of such involvement, and, pursuant to the release terms of the Settlement, bar all Settlement

Class Members, whether or not they are to receive payment from the Net Settlement Fund, from making any further claim against the Net Settlement Fund or the parties released pursuant to the Settlement beyond the amount allocated to them by the Settlement as approved by the Court.¹²

IX. RECORD RETENTION AND DESTRUCTION

Lead Counsel respectfully requests that the Court authorize JND to destroy paper copies of Claims and all supporting documentation one year after the Second Distribution, if that occurs, or, if there is no Second Distribution, two years after the Initial Distribution and all electronic copies of the same one year after all funds have been distributed. Segura Decl., ¶ 48(g).

X. CONCLUSION

Based on the foregoing, Lead Plaintiff respectfully requests that the Court approve its Motion for Approval of Distribution Plan and enter the [Proposed] Order Approving Distribution Plan.

Dated: February 2, 2023

Respectfully submitted,

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¹² Similar language has been routinely approved by courts, including this Court, in connection with the distribution of settlement proceeds. *See, e.g., In re Sunrun Inc. Sec. Litig.*, No. 3:17-cv-02537-VC, slip op. at 1-2 (N.D. Cal. July 24, 2019), ECF No. 127 (“The Court finds that the administration of the Settlement and proposed distribution of the Net Settlement Fund comply with the terms of the Stipulation and the Plan of Allocation and that all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the claims submitted herein, or otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund, including, but not limited to Lead Counsel and the Court-appointed Claims Administrator, Strategic Claims Services (‘SCS’), are released and discharged from any and all claims arising out of such involvement, and all Class Members are barred from making any further claims against the Net Settlement Fund or the Released Parties beyond the amount allocated to them pursuant to this Order.”); *accord, e.g., In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-CM-SDA, slip op. at 5-6 (S.D.N.Y. Nov. 17, 2021), ECF No. 275; *Rabkin v. Lion Biotechnologies, Inc.*, No. 3:17-cv-2086-SI, slip op. at 4 (N.D. Cal. June 30, 2021), ECF No. 152; *Thorpe v. Walter Inv. Mgmt., Corp.*, 2018 WL 3672266, at *2 (S.D. Fla. May 24, 2018), *adopting report and recommendation*, 2018 WL 3672239, at *1 (S.D. Fla. June 8, 2018); *Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd. Co.*, 2015 WL 12839121, at *1 (E.D. Pa. Jan. 21, 2015); *In re Toyota Motor Corp. Sec. Litig.*, 2014 WL 12586787, at *3 (C.D. Cal. Aug. 4, 2014).

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