CITATION: Zaniewicz v. Zungui Haixi Corporation, 2013 ONSC 5490
COURT FILE NO.: 11-CV-436360-00CP
DATE: August 27, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JERZY ROBERT ZANIEWICZ and EDWARD C. CLARKE

Plaintiffs

\- and -

ZUNGUI HAIXI CORPORATION, E&Y, FENGYI CAI, JIXU CAI, YANDA CAI, MICHELLE GOBIN, MICHAEL W. MANLEY, PATRICK A. RYAN, ELLIOTT WAHLE, MARGARET CORNISH, CIBC WORLD MARKETS INC., CANACCORD GENUITY CORP. (f.k.a. CANACCORD FINANCIAL LTD)., GMP SECURITIES LP and MACKIE RESEARCH CAPITAL CORPORATION (f.k.a. RESEARCH CAPITAL CORPORATION)

Defendants

REASONS FOR DECISION

Perell, J.

Released: August 27, 2013.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Parker Hannifin Corp. v. North Sound Properties, S.D.N.Y., July 12, 2013

2010 WL 4537550
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. New York.

In re FLAG TELECOM HOLDINGS, LTD. SECURITIES LITIGATION.
This Document Relates to: All Actions.

Master File No. 02–CV–3400 (CM)(PED).
|
Nov. 8, 2010.

DECISION AND ORDER APPROVING THE SETTLEMENT, CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES, APPROVING THE PLAN OF ALLOCATION OF THE SETTLEMENT FUND, AND AWARDING ATTORNEYS' FEES

McMahon, District Judge.

***1** Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs and Class Representatives Peter T. Loftin and Joseph Coughlin (collectively, "Lead Plaintiffs" or the "Class Representatives") have moved for an order granting: (1) final approval of the proposed settlement of this action (the "Action") against Citigroup Global Markets, Inc. ("CGMI") and seven former officers and directors (the "Individual Defendants") [1] of FLAG Telecom Holdings, Limited ("FLAG") [2] (collectively, with CGMI, "Defendants") for $24.4 million in cash; (2) final approval of the proposed Plan of Allocation of the settlement proceeds; (3) an award of attorneys' fees and reimbursement of counsels' expenses incurred in connection with the prosecution and settlement of the Action; and (4) an award to Lead Plaintiffs for their services in prosecuting the Action. The motion is not opposed by defendants.

I. PRELIMINARY STATEMENT

This Settlement is the culmination of more than eight years of intense, complex and unremitting litigation. The claims and defenses, which center on allegations of materially false statements made by Defendants in a scheme to artificially inflate the value of FLAG'S common stock, were sharply disputed and aggressively litigated by all parties. Despite the long pendency of this case, it would be a mistake to presume that the pace of the litigation was, at any time, "leisurely." A detailed chronology of the case, attached as Exhibit A to the moving Declaration of Brad N. Friedman, demonstrates that significant activity occurred throughout the entire eight year period. The major judicial proceedings which—included two motions to dismiss, a motion for judgment on the pleadings, a motion for partial summary judgment, numerous discovery motions, a petition for a Writ of Mandamus, class certification and the appeal of class certification to the Second Circuit, as well as significant litigation in the District Court for the District of Columbia and in the High Court of Justice in England—represent just a small fraction of the nearly-constant activity in the case.

Discovery and discovery-related disputes required massive time and effort: Plaintiffs reviewed more than 2.4 million pages of documents produced by Defendants; analyzed privilege logs with more than 9,000 entries; issued document requests by subpoena or Hague Request to over fifty (50) non-parties, including companies in France and England, and received nearly 300,000 pages of documents in response; and conducted sixteen (16) fact depositions, including seven taken in Europe pursuant to Hague Convention requests. Each of three proposed Class Representatives, as well as Plaintiffs' expert, were deposed by the Defendants. Frequent and protracted discovery disputes resulted in hundreds of letters and emails among the parties, and multiple written opinions from multiple jurisdictions in the U.S., and in London.

Settlement negotiations in this case were extraordinarily complicated due, among other reasons, to a Directors and Officers Insurance policy involving twenty-two insurance carriers on eight separate layers of coverage. Negotiations were further complicated by parallel litigation, [3] which also had to be settled for the Individual Defendants to achieve total peace. The Settlement eventually was achieved with the assistance of the Honorable Daniel Weinstein, a retired California Superior Court Judge, after three full-day mediation sessions that were preceded by extensive written submissions from the parties on both liability and damage issues. Along the way, Plaintiffs also mediated a division of any recovery with the *Rahl* plaintiffs, in a mediation overseen by the Honorable Nicholas H. Politan, a retired Judge from the U.S. District Court for the District of New Jersey. Ultimately, all parties, including the *Rahl* plaintiffs, agreed to Judge Weinstein's "Mediator's Proposal."

***2** Even the drafting of the settlement documents was fiercely contested. From the time the Mediator's Proposal was signed by all parties on November 6, 2009, it took more than seven months, scores of emails, and multiple written submissions to and binding rulings by the mediator, for the parties to agree on the terms of the Stipulation and Agreement of Settlement and other settlement documents.

Members of the Class appear to agree with Lead Counsel's conclusion that the proposed Settlement is fair, reasonable and adequate and that the requested fee is fair and reasonable. Pursuant to the Court's Preliminary Order, as of August 31, 2010, over 43,450 copies of the Notice have been mailed to Class Members or their nominees. (Fishbein Aff., ¶ 8.) In addition, a Summary Notice was published in the national editions of The Wall Street Journal and over the National Circuit of *Business Wire* on July 21, 2010. (Andrejkovics Aff., ¶ 2.) The Notice informed potential Class Members of their right to object or request exclusion from the Class by September 22, 2010. No one has filed an objection to any aspect of the Settlement, including counsel's request for attorneys' fees and reimbursement of expenses, and no member of the Class has requested exclusion from the Class.

II. FACTUAL BACKGROUND%

At all times relevant to this Action, FLAG functioned as a global telecommunications network and services provider, offering a range of products and services to international telecommunications carriers, application service providers and Internet service providers. FLAG offered its shares to the general public in an initial public offering ("IPO") that commenced on February 11, 2000 and closed on February 16, 2000, during which FLAG sold 27,963,980 common shares at $24.00 per share and pre-IPO shareholders sold 8,436,320 shares at that price for total net proceeds to the company of approximately $634.6 million.

FLAG stated in its IPO Prospectus, which was incorporated into the Registration Statement filed with the SEC, that its goal was to become "the leading global carriers' carrier by offering a wide range of cost-effective capacity use options and wholesale products and services across our global network." To further that goal, FLAG was constructing the FLAG Atlantic cable system (the "FA–1 system"), a 50/50 joint venture with GTS TransAtlantic Carrier Services Ltd. ("GTS"), which would connect London and Paris to New York and have a potential capacity of fifteen times the maximum of the most advanced cable system in service on the Atlantic at that time. FLAG'S IPO prospectus stated, among other things, that FLAG intended to finance the construction of the FA–1 system with $600 million in bank financing and presale capacity commitments in excess of $750 million. [4]

Plaintiffs allege that, in FLAG's IPO Prospectus and, indeed, throughout the Class Period, the market was misled about the source and nature of FLAG's presales relating to the FA–1 system, the demand for FLAG's telecommunications bandwidth, the value of FLAG's assets, and FLAG's profitability. Plaintiffs claim that FLAG's IPO Prospectus was misleading and omissive because, among other things, a substantial portion of the supposed $750 million in presales were "at cost"—including $200 million to FLAG'S co-venture partner, GTS. Plaintiffs allege that these "at cost" sales were mere financing facilities rather than true presales and, therefore, were not true indicators of profit or demand on the FA–1 system. Plaintiffs also allege that the motivating factor behind the "at cost" presales was to satisfy bank covenants so that FLAG could obtain financing to build the FA–1 system. Plaintiffs claim that, in turn, the motivating factor for FLAG's construction of the FA–1 system was to create a positive story and, therefore, favorable conditions for an IPO of FLAG's common stock, notwithstanding the failure of FLAG's previously existing cable system and FLAG management's substantial doubts about FLAG and FA–1's future prospects.

***3** Plaintiffs also contend that certain Defendants (1) artificially and fraudulently inflated FLAG's reported revenues and EBITDA during fiscal years 2000 and 2001 by causing FLAG to enter into reciprocal "swap" sales with its competitors (such as Qwest and Global Crossing), which did not need the capacity, and then immediately booking the revenue from those sales while amortizing the cost over time; (2) failed to record a substantial impairment of FLAG'S long-lived assets in a timely fashion; and (3) made false and misleading statements about the demand in the marketplace for FLAG'S products and services between April 24, 2001 and November 6, 2001.

Plaintiffs' claims arise under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (the "′33 Act claims") and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b–5 promulgated thereunder (the "′34 Act claims").

Defendants contend that Plaintiffs' allegations are untrue and without any factual support and that Defendants made no false or misleading or omissive statements.

Two years after the IPO, on February 13, 2002, FLAG announced that "approximately 14% of GAAP revenues for the full year 2001 was associated with reciprocal transactions entered into with other telecommunications companies and service providers" and that FLAG anticipated that, if business conditions did not improve, the company would run out of cash sometime in 2003 unless it was able to obtain cash from another source. Following this announcement, the market price of FLAG common stock, which had traded as high as $41 per share during the Class Period, declined by 46% from its February 12, 2002 closing price, to a closing price of $0.36 per share on February 13, 2002, on trading volume more than 10 times its daily average.

III. HISTORY OF THE LITIGATION

A. *Plaintiffs' Investigation, the Initial Complaint, and the Appointment of Lead Counsel*

Beginning in early 2002, Plaintiffs conducted extensive legal and factual investigations into the facts ultimately alleged in the initial complaint. This investigation and research included, *inter alia:* collecting and analyzing FLAG'S financial statements and other public statements; assembling and reviewing a comprehensive collection of analyst reports, SEC filings and major financial news service reports on FLAG and the telecom industry from a variety of sources; consulting with Lead Counsels' in-house forensic accounting experts and analyzing the relevant provisions of GAAP and related commentary; and extensively researching the applicable law.

As a direct result of Plaintiffs' investigatory efforts, the initial complaint on behalf of plaintiff Peter T. Loftin was filed on May 1, 2002. On October 18, 2002, the Honorable William C. Conner consolidated several related actions under the caption above and appointed Mr. Loftin as Lead Plaintiff and Milberg LLP, f/k/a Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg"), as Lead Counsel.

***4** Plaintiffs thereafter began work on a Consolidated Amended Complaint. Lead Counsel's in-house investigative unit, working with outside investigators both in the United States and in England, identified, located and interviewed more than thirty potential witnesses, six of whom became confidential sources who provided information set forth in the Complaint, In addition, Plaintiffs retained and consulted extensively with damages expert Dr. Scott Hakala. Plaintiffs filed a Consolidated Amended Complaint on March 20, 2003.

Lead Plaintiff and eventual Class Representative Peter Loftin played a central role during this period, devoting many days to assisting the research and development of Plaintiffs' claims. Mr. Loftin, who lost more than $24 million on his FLAG investment, was particularly instrumental in shaping Plaintiffs' claims against former defendant Verizon Communications, Inc. ("Verizon") and even contributed draft allegations for the complaint.

On November 19, 2003, J. Andrew Rahl, as Trustee of the Flag Litigation Trust (the "Trustee"), filed the *Rahl* action in State Court in New York against some of the same defendants as this Action, and others. The *Rahl* Defendants removed that action to this Court, where it was assigned to Judge Conner as a related case. Plaintiffs' Lead Counsel and Trustee's counsel in *Rahl* thereafter entered into an informal joint prosecution agreement.

B. *The Amended and Second Amended Complaint and the Motions to Dismiss the Second Amended Complaint*

Plaintiffs filed a 76–page, 226–paragraph Corrected Consolidated Amended Complaint on April 15, 2003, which three different sets of law firms (Shearman & Sterling for the Individual Defendants and former defendant FLAG; Milbank Tweed for CGMI; and Kirkland & Ellis for Verizon) moved and filed separate briefs against. Plaintiffs filed a Second Consolidated Amended Complaint (the "2CAC") that made a technical correction to the name of the defendant FLAG entity (from FTGL to FLAG), on December 1, 2003, and the prior briefing was deemed directed towards that pleading. In their various briefs, the then-defendants argued that (1) the challenged statements in the Registration Statement were neither false nor misleading; (2) Plaintiffs failed to allege facts to establish that the Defendants knew, but failed to disclose, information they had a legal duty to disclose; (3) the challenged statements regarding market demand and bandwidth pricing made during the Class Period were neither false nor misleading; and (4) the allegations of GAAP violations relating to allegedly improper swap transactions and the failure to timely write down assets were inaccurate and/or insufficiently specific and/or vitiated by the fact that the challenged transactions had been reviewed by outside auditors.

In a forty-three page decision issued on February 25, 2004, the Court dismissed the 2CAC without prejudice. [5]

C. *The Third Amended Complaint and the Motions to Dismiss That Complaint*

***5** Pursuant to the Court's Order, Plaintiffs then filed a 109–page, 299–paragraph Third Consolidated Amended Complaint ("3CAC"), on April 14, 2004. In response to the Court's concerns expressed in its February 25, 2004 decision about standing under Section 12(a) (2) of the ′33 Act, in addition to Peter T. Loftin, the 3CAC included as an additional plaintiff Norman H. Hunter, who purchased 200 FLAG shares in FLAG'S IPO. Mr. Hunter sold those shares prior to the end of the Class Period. Joseph Coughlin, who purchased shares traceable to the IPO in February 2000 and additional shares in February 2001, and who held his shares throughout the Class Period, moved to intervene as an additional plaintiff and proposed class representative on February 11, 2005.

The 3CAC contained a plethora of new facts to support Plaintiffs' claims. On June 23, 2004, the Individual Defendants and FLAG moved to dismiss the 3CAC, renewing their claims regarding the inadequacy of Plaintiffs' allegations of misleading statements and omissions and, in addition, asserting that Hunter's claims were time-barred because of his late entry into the case. Verizon and CGMI, separately, moved to dismiss as well.

After extensive briefing, the Court issued a sixty-five page decision on January 12, 2005, denying in part and granting in part the motions to dismiss. [6] The Court held that Plaintiffs had not pled facts demonstrating that the statements regarding demand in FLAG's prospectus were false as of the time of the IPO; however, the Court held that Plaintiffs *had* "alleged facts sufficient to demonstrate that the Prospectus contained a material misstatement or omission in connection with the Alcatel Sales Agreement," an agreement by which FLAG had (allegedly) fraudulently inflated the amount of its FA–1 presales. [7] The Court also held that the 3CAC included allegations sufficient to sustain Plaintiffs' claims regarding: (1) improper accounting related to FLAG's swap transactions; (2) FLAG'S failure to write down the value of its assets in a timely manner; and (3) misstatements concerning demand and the optimistic outlook for FA–1 made by Bande and McCormack between April 1, 2001 and the end of the Class Period. The Court also held that the allegations in the 3CAC raised the requisite strong inference of *scienter* required for the ′34 Act claims against Bande, McCormack and Bautista, but not Evans.

The Court upheld Plaintiffs' claims that FLAG'S financial results issued between June 23, 2000 and February 13, 2002 were materially false or misleading when issued because FLAG had entered into improper swap transactions to artificially inflate its revenues. In this regard, the Court specifically cited supporting statements Lead Counsel had obtained from confidential sources developed during its investigation. The Court further held that Hunter's claims had been tolled by the filing of Plaintiffs' May 2002 complaint and, thus, were timely raised in the 3CAC.

***6** Plaintiffs' ′33 Act claims against defendants Bautista and Evans were dismissed because they had not signed the Registration Statement and, despite "a host of new allegations" in the 3CAC regarding Verizon's alleged status as a control person of FLAG and use of FLAG as a corporate piggy bank, the Court again dismissed Plaintiffs' claims against Verizon. [8] Plaintiffs' claims against FLAG and Evans were dismissed with prejudice and the claims against Verizon were dismissed without prejudice. The motions to dismiss by Bande, McCormack, Rubin, Petri, McQuaid, Seskin, Suan, and Salomon Smith Barney, Inc. n/k/a CGMI, were denied.

D. *Motion for Judgment on the Pleadings*

On June 23, 2005, CGMI moved to dismiss Plaintiffs' Securities Act claims pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, based on an affirmative defense of negative causation. CGMI also asserted that Plaintiffs' claims were barred by the statute of limitations. On January 23, 2006, the Court denied Defendants' motion in its entirety, holding that (1) Defendants had failed to establish "that the decline [in FLAG'S stock price] was not due, at least in part, to the alleged misrepresentations concerning pre-sales in Flag's Prospectus" and (2) that the new allegations in the 3CAC arose from the same conduct charged in the May 2002 complaint and were, therefore, not time-barred. [9]

E. *Motion for Class Certification*

On February 11, 2005, Plaintiffs moved to certify a class and also moved to have Joseph Coughlin, who purchased shares traceable to the IPO in February 2000 and additional shares in February 2001, intervene as an additional plaintiff and proposed Class Representative. Defendants aggressively opposed this motion, filing a fifty-page brief and a declaration with more than 1,850 pages of exhibits.

Defendants also challenged the adequacy of the named Plaintiffs to represent the class, claiming that the Plaintiffs were insufficiently engaged in the management of the case and, in particular, were not sufficiently concerned with the then-pending indictment of Lead Counsel and its potential consequences, although Defendants themselves said they did "not [challenge] the competence or adequacy" of Lead Counsel. [10]

Plaintiffs responded with a twenty-page reply brief refuting Defendants' contentions, accompanied by a sworn Declaration from one of Plaintiffs' previously confidential sources (FLAG's former Vice President of Sales for North America); a sworn Declaration from damages expert Dr. Scott Hakala (eighty-five pages with exhibits); and a sworn Declaration of Lead Counsel (491 pages with exhibits). Defendants submitted a 256–page sur-reply (including exhibits). Plaintiffs filed a twenty-five page response to Defendants' sur-reply. On September 4, 2007, the District Court issued a fifty-page decision granting Plaintiffs' motion for class certification. The Court included in-and-out traders in the class because, "in light of Hakala's affidavit ... it is conceivable" that the in-and-out purchasers may be able to prove loss causation based on events prior to the end of the Class Period. [11] The Court appointed Peter T. Loftin, Norman H. Hunter, and Joseph Coughlin as the Class Representatives, and appointed Milberg as Class Counsel.

F. *Discovery and Discovery Disputes*

***7** Discovery in this case was, itself, a multi-front war with battles frequently occurring simultaneously on two continents. Defendants opposed or objected to nearly every discovery request. Productions were often delayed, at least in part because documents, and especially critical accounting documents, were resident on difficult-to-access computer systems owned by overseas non-party FTGL. Disputes over discovery were frequently the subject of letters to the Court, resulting in numerous court appearances, multiple written Court decisions, a petition (by the Individual Defendants) for a Writ of Mandamus to the Court of Appeals, and thousands of pages of briefs and correspondence among the parties.

Plaintiffs have, since 2005, obtained approximately 2,391,600 pages of documents from the Individual Defendants, including approximately 2,381,800 pages of documents from FTGL that were produced by Defendant McCormack pursuant to an unusual court Order. In addition, Plaintiffs ultimately received 39,425 pages of accounting documents generated from FTGL's accounting system under an agreement with the Individual Defendants pursuant to which a third-party vendor generated reports and Plaintiffs (with the *Rahl* Trustee) paid one-half of the costs. Plaintiffs also obtained 37,725 pages of documents from CGMI and another 268,500 pages of documents from more than fifty (50) non-parties to whom Plaintiffs issued subpoenas and/or the Court issued Hague Convention requests in England and France.

Plaintiffs deposed sixteen witnesses, six of whom were deposed overseas pursuant to Requests for International Judicial Assistance Pursuant to the Hague Convention. At the time of the Settlement, eight additional Hague Convention requests had been issued by the Court and more overseas depositions had been scheduled.

In connection with class certification, the proposed Class Representatives, including Norman Hunter, were deposed and produced over 4,000 pages of documents. Defendants also deposed and obtained documents from Plaintiffs' damages expert, Dr. Scott Hakala.

At the time of the Settlement, Plaintiffs had issued Plaintiffs' Notice of Deposition to CGMI pursuant to Fed.R.Civ.P. 30(b)(6); Plaintiffs' Second Set of Supplemental Interrogatories to CGMI and Request for Production of Documents; and Plaintiffs' Corrected First Set of Requests for Admission to CGMI.

The parties to this Action and the *Rahl* litigation entered into a number of stipulations governing the conduct of discovery. While these stipulations greatly enhanced the efficiency of discovery for all parties, and permitted the plaintiffs in the two litigations each to access the discovery obtained by the other, the process of negotiating and drafting the stipulations was complex and extremely time-consuming.

It is totally unnecessary to recount here the massive amount of discovery litigation (and concomitant sanctions litigation) in which the parties engaged once discovery finally commenced (due to the PSLRA stay, discovery did not begin until 2005!). Suffice it to say that the parties are still unable to read each others' descriptions of their many discovery battles without having war break out anew. Nothing between the parties came easily.

***8** Plaintiffs' efforts to obtain discovery from non-parties also required huge investments of time and effort. As mentioned above, Plaintiffs issued subpoenas and/or the Court issued Hague Convention requests to more than fifty (50) non-parties. Several of those parties resisted discovery, necessitating collateral litigation. There was litigation between plaintiffs and the law firm of Gibson, Dunn & Crutcher, which previously represented FLAG in certain matters and which received a subpoena to produce documents in this case. Multiple hearings relating to discovery in this matter were held by the High Court of Justice in London, which required Plaintiffs to retain a Barrister in addition to their Solicitor. There were also interlocutory appeals relating to third party discovery in the Second Circuit.

G. *The Motions for Summary Judgment and the Operative Complaint*

On June 25, 2007, in response to the Individual Defendants' request for permission to file a motion for partial summary judgment dismissing Plaintiffs' ′33 Act claims in their entirety, Plaintiffs moved for leave to amend the 3CAC to further detail their ′33 Act claims. That motion was granted. Plaintiffs filed the Fourth Consolidated Amended Complaint on October 15, 2007. The final and operative complaint, the Corrected Fourth Consolidated Amended Complaint (the “Complaint”), was filed on January 10, 2008 . [12]

After the completion of further discovery targeted specifically at the more detailed ′33 Act allegations, on May 13, 2008, both sets of remaining Defendants (the Individual Defendants and CGMI) filed a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure seeking summary judgment on Plaintiffs' ′33 Act claims. Defendants asserted in their motion that the Registration Statement was not false or misleading because:

(i) FLAG had approximately $774 million in FA–1 presales at the time of the IPO and, therefore, the challenged statement at issue—that FLAG had “presales in excess of $750 million”—was true;

(ii) the challenged statement could not have misled potential investors about market demand because the statement was in a section of the Registration Statement dealing with financing, not demand;

(iii) even if a reasonable investor could have understood the challenged statements to be about demand for capacity on the FA–1 system, cautionary language in the Registration Statement about future demand for FLAG'S products was sufficient to make the Registration Statement on the whole not misleading; and

(iv) the specific presales transactions challenged by Plaintiffs were legitimate and the relevant terms of the transactions were disclosed in the Registration Statement.

Collectively, the briefing on this motion included over 175 pages of legal memoranda and over 3,300 pages of declarations and appendices.

On March 23, 2009, the Court issued a twenty-three page opinion denying Defendants' motion in its entirety. [13]

H. *The Rule 23(f) Appeal of Class Certification*

***9** On September 19, 2007, Defendants each filed a petition pursuant to Rule 23(f) of the Federal Rules of Civil Procedure seeking interlocutory review of the Court's class certification decision. The Second Circuit granted Defendants' Rule 23(f) petitions on December 12, 2007.

On July 22, 2009, the Second Circuit affirmed virtually all of the Court's class certification Order, rejecting all but one of the Defendants' arguments. However, the Second Circuit agreed with Defendants that “as a matter of law” there was insufficient evidence of loss causation prior to the last day of the Class Period for in-and-out traders to remain in the Class. The Court of Appeals therefore vacated the Court's class certification Order with respect to those Class Members who sold their FLAG common stock prior to February 13, 2002, and ruled that Norman H. Hunter, who sold all of his shares before the end of the Class Period, could not serve as a Class Representative. Unfortunately for Plaintiffs, this decision dramatically reduced the total potential recovery in this case, from more than $360 million to approximately $14.2 million. [14]

On August 5, 2009, Plaintiffs filed a petition pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure seeking rehearing of the appeal and/or rehearing *en banc.* By Order dated October 6, 2009, the Second Circuit Court of Appeals denied Plaintiffs' petition for rehearing and/or rehearing *en banc.*

I. *Judge Conner's Death and the September 2009 Status Conference*

In early July 2009, the parties learned that the Judge who had so ably presided over this matter since its inception, Judge Conner, had died. Shortly thereafter the case was re-assigned, and on August 7, 2009, the parties were advised that the Court would hold a status conference on September 17, 2009. At that status conference, the Court informed the parties that it would not be overly sympathetic to resolving prior to trial yet another defense motion for partial summary judgment, this time on the ′34 Act claims, because a trial was already a near certainty in light of the denial of the motion for summary judgment on the ′33 Act claims. The Court also informed the parties that it thought the motion for rehearing in the Second Circuit (which was then pending) was unlikely to be granted, and that if it was in fact denied, the Court would not be sympathetic to a renewed motion, based on additional evidence, to certify a class of in-and-out traders. The Court set a schedule to complete discovery and advised the parties that it expected the case to be resolved—whether by settlement or trial—within the year.

IV. HISTORY OF THE SETTLEMENT NEGOTIATIONS

In a case of this complexity and magnitude, one expects to encounter certain obstacles to settlement. In this case, settlement negotiations were exponentially more complicated than usual due to the Byzantine structure of the Directors and Officers ("D & O") Insurance policy covering the Individual Defendants, disputes between the two sets of defendants and among the insurance carriers and the Defendants, and the existence of the parallel *Rahl* action.

***10** The $250 million D & O policy is comprised of one primary and seven excess coverage layers, with multiple carriers sharing each layer. For example, the second excess layer includes five carriers. In all, there are 22 different carriers, with several appearing in more than one layer. [15] According to the terms of the policy, the carriers in any particular layer are not obligated to make any payment unless and until all the coverage layers below are exhausted. This coverage structure results in a situation where any carrier that would be required to pay into a possible settlement can effectively veto the settlement even though that veto may expose carriers on higher layers to greatly increased liability; and, unless the vetoing carrier itself appears on a higher layer, it has no incentive to accept the settlement. Further complicating the situation, certain carriers in the insurance tower, at various times, threatened to and/or did disclaim coverage of the ′33 Act claims [16] and/or coverage of CGMI.

The parties' long-running dispute over loss causation also posed a very significant obstacle to settlement. In addition to raising the issue in their motions to dismiss, motion for judgment on the pleadings, summary judgment motion, opposition to class certification and in their appeal of the class certification decision, Defendants continually asserted causation as a defense throughout the settlement negotiations, maintaining that damages were only a small fraction of those claimed by Plaintiffs.

A. *Judge Weinstein Presides Over the First Mediation Session Between Plaintiffs and the Individual Defendants*

On October 17, 2007, Plaintiffs' Lead Counsel (with the assistance of Mr. Loftin's personal in-house counsel), counsel for the Individual Defendants (with the assistance of defendant McCormack), and counsel for several of the insurance carriers, conducted a full-day mediation session before retired California Superior Court Judge Daniel Weinstein of JAMS. [17] Formal written mediation statements were submitted by both sides in advance of the mediation. At the Mediator's request, both sides also submitted a supplemental mediation statement on the issue of loss causation. At the beginning of the mediation counsel for both sides, as well as Mr. McCormack, made oral presentations. At the conclusion of the session Plaintiffs made a settlement demand to which the Individual Defendants did not respond, and the mediation ended without success.

B. *Periodic Efforts Continue Over the Next Year and a Half*

Although formal mediation did not resume until June 2009, Judge Weinstein periodically kept in contact with both sides, and even occasionally met in person with several of the insurance carriers to discuss this case—including at least once for breakfast in the summer of 2008. However, Lead Counsel refused to attend any further meetings absent a commitment that such a meeting would result in a meaningful response to the outstanding settlement. As the insurance carriers would not make such a commitment, no meeting occurred.

***11** In addition, Lead Counsel exchanged a few telephone calls with counsel for CGMI, to see whether CGMI had any interest in discussing settlement. Counsel for CGMI had no interest at that time in mediation, but was willing to consider a direct negotiation if the parties were in the same financial ballpark. It quickly became clear that the parties were not in the same ballpark, and so no such negotiations occurred.

C. *Judge Weinstein Presides Over the Second Mediation Session Between Plaintiffs and the Individual Defendants*

By Spring 2009, the insurance carriers finally agreed to make a meaningful response to Lead Counsel's outstanding settlement demand, and on June 2, 2009, Plaintiffs' Lead Counsel (again with the assistance of Mr. Loftin's in-house counsel), counsel for the Individual Defendants, and counsel for several of the insurance carriers (including counsel for certain additional insurance carriers who had not attended the prior mediation session), renewed their mediation efforts before Judge Weinstein. By this time, the primary insurance layer was entirely or almost entirely exhausted by defense costs. Once again, however, the mediation was unsuccessful.

D. *Judge Politan Presides Over a Mediation Session Between Plaintiffs and the Plaintiff in Rahl*

Lead Counsel and plaintiff's counsel in *Rahl* agreed that, for a variety of reasons, it would make sense if the plaintiffs in the two competing actions could agree (subject to the later approval by this Court now being sought) upon an allocation between them of any recovery in both cases. Accordingly, on June 24, 2009, Plaintiffs' Lead Counsel and counsel for the Trustee in *Rahl* conducted a full-day mediation session before retired United States District Court Judge Nicholas H. Politan, to see whether these two sets of plaintiffs could agree upon a division between them of any future recovery. This mediation resulted in an agreement that the Class would receive 70% of any recovery from the Individual Defendants, plus 100% of any recovery from CGMI. Certain document production issues were also mediated and resolved as between the Trustee and the Class.

In retrospect, the importance of this agreement cannot be overstated. At the time—June 2009—the Second Circuit had not yet issued its ruling on loss causation. Had Lead Plaintiffs won the loss causation issue in the Circuit (as Lead Counsel reasonably believed they would) the 70–30 split with *Rahl* might well have turned out to be a mildly bad deal, or at least a neutral deal, for the Class. *However,* by "hedging" against the possibility of a bad result in the Circuit, Plaintiffs ultimately were able to achieve *more* than a full recovery in their negotiations with the Defendants. This agreement also removed a significant complication in connection with achieving a global settlement.

E. *Judge Weinstein Presides Over a Third Mediation Session. This Time Among the Plaintiffs in Both Cases, the Individual Defendants, and CGMI*

***12** The mediation before Judge Weinstein finally convened for the third time on October 29, 2009, this time with the addition of counsel for the Trustee, as well as counsel for CGMI, who learned about the planned mediation shortly before-hand and requested (and was granted) permission to attend. The parties did not reach agreement during this session. However, this session did eventually result in a "Mediator's Proposal" that was accepted by all parties on November 6, 2009. As a result of this proposal, and Plaintiffs' earlier agreement with the Trustee, Plaintiffs have agreed to settle this action for 70% of the $34 million in cash being paid on the Individual Defendants' behalf to settle this action and *Rahl,* plus $600,000 in cash being paid by CGMI (all of which is going to the Class in this Action). The total settlement consideration to the Class in this Action is $24.4 million.

F. *"Litigation" Ensues Before Judge Weinstein Over the Terms of the Final Settlement Agreement*

Even the signing of the Mediator's Proposal did not end the legal battle. Over a period of more than seven months after the Mediator's Proposal was signed, the parties exchanged multiple drafts of the Stipulation and Agreement of Settlement, Notice of Pendency and other documents, but were not able to resolve all outstanding issues. Fortunately, however, as part of the Mediator's Proposal to which all parties agreed, Judge Weinstein retained "binding authority" to resolve any disputes in connection with finalizing the settlement papers.

In February and March 2010, numerous issues were submitted to Judge Weinstein for decision pursuant this binding authority, and multiple responses and replies were submitted by Plaintiffs and the Individual Defendants. Additional disputes, as between the insurance carriers and the Individual Defendants, were also submitted to Judge Weinstein for resolution, thereby causing further delay. The Stipulation and Agreement of Settlement was finally executed on June 21, 2010.

V. THE ISSUANCE OF NOTICE AND THE REACTION OF THE CLASS TO THE PROPOSED SETTLEMENT

Subsequent to the Settlement, Lead Plaintiffs retained a claims administrator on behalf of the Class (the "Claims Administrator"). The Claims Administrator was chosen after a competitive bidding process and extensive negotiations thereafter to significantly reduce third party costs, such as broker nominee charges typically incurred during securities class action settlement administrations.

After the parties submitted documentation requesting preliminary approval of the Settlement, this Court entered an Order on June 23, 2010, preliminarily approving the Settlement embodied in the Stipulation (the "Preliminary Approval Order"). The Preliminary Approval Order: (1) approved a form of Notice; (2) approved the form of publication notice; (3) ordered that any Class members wishing to exclude themselves from the Class do so by letters postmarked no later than September 22, 2010; (4) ordered that any Class members wishing to object to the Settlement file their papers by September 22, 2010; and (5) ordered a fairness hearing to take place at 2 p.m. on October 29, 2010. The Court also approved the Claims Administrator in the Preliminary Approval Order.

***13** In accordance with the Preliminary Approval Order, on July 16, 2010, Lead Counsel caused the Notice to be mailed to all Class members who could be identified from FLAG'S stock transfer records and through the efforts of the Claims Administrator. As of August 31, 2010, a total of over 43,450 Notices were sent to potential Class members. (Fishbein Aff., ¶ 8.) Additionally, and also pursuant to the Preliminary Approval Order, on July 21, 2010, a Summary Notice was published in the national editions of The Wall Street Journal and over the National Circuit of *Business Wire.* (Andrejkovics Aff., ¶ 2.)

The Notice provided a detailed description of: (1) the Action; (2) the nature of the claims; (3) the history of the litigation; (4) the potential outcome if this Action were to proceed to trial; (5) the terms of the proposed settlement and the Plan of Allocation, including the manner in which the Settlement Fund would be divided among the Class; (6) the process and deadline for filing objections, requests for exclusion and claim forms; (7) the date, time, and place of the Court's hearing to determine the fairness of the Settlement; (8) the right of Class members to be heard at the hearing; and (9) the claims to be released. The Notice also informed the Class that Lead Plaintiffs would apply for: (1) reimbursement of their expenses in the approximate amount of two million dollars, plus an award of attorneys' fees in the amount of 30% of the remaining balance of the Gross Settlement Fund after reimbursement of these expenses and payment of any PSLRA awards to the Lead Plaintiffs; and (b) awards to the Lead Plaintiffs for their services in prosecuting the Action in the amounts of $100,000 for Lead Plaintiff Peter T. Loftin and $5,000 for Lead Plaintiff Joseph Coughlin.

Both the Notice and Summary Notice are available on the Internet on the websites of Lead Counsel and the Claims Administrator and at the website flagtelecomsecuritiessettlement.com. To date, Lead Plaintiffs have paid $66,714.44 out of the Settlement Fund to cover the costs related to Settlement notice and administration.

Pursuant to the terms of the Notice and the Court's preliminary approval Order of June 23, 2010, Class Members have until September 22, 2010 to opt-out of or object to this Settlement pursuant to Fed.R.Civ.P. 23. No Class Members have exercised their right to opt out and no Class Members have objected to the proposed Settlement.

VI. THE COURT GRANTS FINAL APPROVAL TO THE PROPOSED SETTLEMENT

A. *The Standard for Evaluating Class Action Settlements*

The standard for reviewing a proposed class action settlement is whether the settlement is "fair, reasonable and adequate." *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* Nos. 05 Civ. 10240(CM) *et. al.,* 2007 WL 2230177, at *3 (S.D.N.Y. July 27, 2001) (*citing Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1027, 1079 (2d. Cir.1995)). "A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws." *EVCI,* 2007 WL 2230177, at *4 (*citing In re Sumitomo Copper Litis.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999)); *New York & Maryland v. Nintendo of Am.,* 775 F.Supp. 676, 680–81 (S.D.N.Y.1991)); *accord* *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir.2005), *cert. denied,* 544 U.S. 1044, 125 S.Ct. 2277, 161 L.Ed.2d 1080 (2005). "There is a 'strong judicial policy in favor of settlements, particularly in the class action context.' " *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 575 (S.D.N.Y.2008) (*quoting In re Paine Webber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998)). Moreover, " 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 366 (S.D.N.Y.2002) (internal quotation and citation omitted).

***14** The presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation supervised by Judge Weinstein. *See* *In re Telik,* 576 F.Supp.2d at 576 ("Judge Weinstein's role in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion."); *In re Elan Sec. Litig.,* 385 F.Supp.2d 363, 369 (S.D.N.Y.2005) ("[T]he Court has no reason to question that the Settlement was the product of extended 'arm's length' negotiations, including, among other things, the two-day settlement conference before Judge Politan."); *In re Interpublic Sec. Litig.,* Nos. 02 Civ. 6527(DLC), 03 Civ. 1194(DLC), 2004 WL 2397190, at *7 (S.D.N.Y. Oct. 26, 2004) (negotiations were arm's-length where, among other things, parties met with magistrate judge and document discovery was complete).

All parties were represented throughout the Settlement negotiations by able counsel experienced in class action and securities litigation: Plaintiffs by Brad N. Friedman of Milberg, LLP; CGMI by Douglas Henkin of Milbank, Tweed, Hadley and McCloy; and the Individual Defendants by Jerome Fortinsky of Shearman & Sterling. The Trustee was represented by Grant & Eisenhofer. *See* *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 461 (S.D.N.Y.2004) ("Both sides have been represented well.... Counsel for plaintiffs, the Settling Defendants, and STB possessed the requisite expertise to negotiate a fair settlement."); *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 466, 474 (S.D.N.Y.1998) (approving settlement where "[t]he process by which the parties reached the Proposed Settlements was arm's-length and hard fought by skilled advocates").

In sum, the Settlement was negotiated at arm's-length by sophisticated counsel before an experienced mediator, and after the completion of significant discovery. These facts establish that the process leading to the Settlement was fair to absent Class Members. The Court should therefore accord the strongest presumption of fairness to the Settlement in this case.

B. *The Settlement Is Fair, Reasonable and Adequate and in the Best Interests of the Class*

Courts in this Circuit evaluate the fairness, adequacy and reasonableness of a class action settlement according to the *"Grinnell* factors:"

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of the litigation.

***15** *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974); *see also* *County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1323–24 (2d Cir.1990); *In re Sumitomo,* 189 F.R.D. at 281. "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.' " *In re Global Crossing,* 225 F.R.D. at 456 (*quoting Thompson v. Metropolitan Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003)).

i. Continued Litigation Would Be Complex and Consume Substantial Judicial and Private Resources

The complexity, expense and possible duration of this litigation weigh in favor of settlement. "[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.' " Sumitomo, 189 F.R.D. at 281 (*quoting In re Michael Milken and Assoc. Sec. Litig.,* 150 F.R.D. 46, 53 (S.D.N.Y.1993)). Indeed, the courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.,* No. CV–02–1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Thus, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Group S.p .A. Litig.,* 233 F.R.D. 306, 310 (E.D.N.Y.2006) (citations omitted).

Although Plaintiffs have conducted significant fact discovery, the costs and duration of completing fact discovery, conducting expert discovery, additional motion practice, trial preparation, the trial itself, post-trial motions, and any appeals would be substantial. At the time this proposed Settlement was reached, six additional overseas depositions were scheduled. In total, at least twelve additional depositions would have been conducted by Plaintiffs in preparation for trial. Expert discovery would be particularly expensive and time-consuming as both sides would require the services of experts in the telecommunications industry in addition to accounting and damages experts.

Finally, whatever the outcome of any eventual trial, which would likely require several months and involve the introduction of hundreds (if not thousands) of exhibits, vigorously contested motions and significant expenses, it is virtually certain that appeals would be taken from any verdict. All of the foregoing would delay the ability of the Class to recover for years assuming, of course, that Plaintiffs would ultimately be successful in proving their claims. Settlement at this juncture unequivocally results in a substantial and tangible present recovery for the Class, without any attendant risk of delay, or of continued litigation through, for example, summary judgment on the '34 Act claims, a protracted trial, and post-trial proceedings. *See Hicks v. Stanley,* No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct.19, 2005) ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

ii. The Reaction of the Class to the Proposed Settlement Has Been Overwhelmingly Positive

***16** The reaction of the Class to the Settlement is a significant factor—perhaps the most significant factor to be weighed in considering its adequacy. *In re Veeco Instruments Secs. Litig. ("Veeco I"),* No. 05 MDL 0165(CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov.7, 2007); *see also Maley,* 186 F.Supp.2d at 362; *In re American Bank Note Holographics, Inc., Sec. Litig.,* 127 F.Supp.2d 418, 425 (S.D.N.Y.2001).

The Class's reaction to the Settlement in this case is overwhelmingly positive. More than 43,450 Notices were mailed to Class Members or their nominees. To date, no Class Members have exercised their right to opt out and no Class Members have objected to the proposed Settlement. This is an exceptionally strong indication of the fairness of the Settlement. *See Strougo v. Bassini,* 258 F.Supp.2d 254, 258 (S.D.N.Y.2003) (*citing In re SmithKline Beckman Corp. Sec. Litig.,* 751 F.Supp. 525, 530 (E.D.Pa.1990) ("Both the utter absence of objections and the nominal number of shareholders who have exercised their right to opt out ... militate strongly in favor of approval of the settlement."). The absence of objections to the Settlement supports the inference that it is fair, reasonable and adequate. *See Maley,* 186 F.Supp.2d at 374.

iii. Settlement Was Reached at an Advanced Stage of Litigation After Significant Discovery and Extensive Consultation with a Damages Expert

The advanced stage of this litigation and the extensive amount of discovery completed militate in favor of approval of the Settlement. As detailed above, the parties have been vigorously litigating this case for more than eight years, through multiple motions to dismiss, a motion for judgment on the pleadings, discovery and countless discovery motions, a class certification motion, a motion for partial summary judgment, and an interlocutory appeal of the Court's class certification Order. Plaintiffs have reviewed more than 2.5 million pages of documents and taken 16 depositions. Defendants have deposed each of the Class Representatives plus plaintiff Norman Hunter and Plaintiffs' damages expert. The parties conducted multiple full-day mediation sessions before Judge Weinstein (plus Plaintiffs' and the Trustee's mediation before Judge Politan) and exchanged extensive mediation statements on both liability and damages. Throughout all phases of the litigation, Lead Counsel has consulted with and received the advice of Dr. Scott Hakala, a recognized expert on the subject of damages in securities cases.

Thus, the parties reached an agreement to settle the litigation at a point when they had a well-informed understanding of the legal and factual issues surrounding the case. Having sufficient information to properly evaluate the strengths and weaknesses of their case, Lead Counsel were able to settle the litigation on terms highly favorable to the Class without the substantial risk, uncertainty, and delay of continued litigation. *See Veeco I,* 2007 WL 4115809, at *8 ("It is evident that Plaintiffs have a clear view of the strengths and weaknesses of their case and of the adequacy of the Settlement.") (internal quotations omitted) (*citing Meijer, Inc. v. 3M,* Civil Action No. 04–5871, 2006 WL 2382718, at *14 (E.D.Pa. Aug.14, 2006) (Parties had "an adequate appreciation of the merits" of case at time settlement negotiated where Class Counsel, *inter alia,* reviewed hundreds of thousands of pages of documents and depositions and consulted extensively with economic expert; and parties engaged in mediation, including exchange of mediation statements regarding merits of respective positions in order to inform and facilitate negotiations.)).

iv. Establishing Liability, Particularly with Respect to Defendants' *Scienter,* Involves Significant Risks

***17** While Plaintiffs maintain that their claims against Defendants are valid, they would face significant legal challenges if this case were to continue, and there is a real risk that they would ultimately fail to establish liability. "Courts routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear." *In re Top Tankers, Inc., Sec. Litig.,* No. 06 Civ. 13761(CM), 2008 WL 2944620, at *4 (S.D.N.Y. July 31, 2008); *see In re AOL Time Warner, Inc. Sec. & ERISA Litig.,* No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *4 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation."); *In re Indep. Energy Holdings PLC Sec. Litig.,* No. 00 Civ. 6689(SAS), 2003 WL 22244676, at *3 (S.D.N.Y. Sept.29, 2003) (noting difficulty of proving *scienter*); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 321–22, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

In their various motions, answers to the Complaint, and during the multiple mediation sessions, the Individual Defendants have asserted that:

- the disclosures in FLAG's registration statement regarding presales were accurate and not misleading;

- the Individual Defendants' Class Period statements regarding demand were true and not misleading;

- all of FLAG's accounting for capacity sales during the Class Period was accurate and in accordance with GAAP;

- the allegedly improper "swap" transactions were legitimate business transactions and were properly accounted for;

- FLAG was not required to report an impairment during the Class Period; and

- Plaintiffs could not prove causation and damages.

Defendant CGMI has asserted numerous additional defenses, including negative causation and that it conducted sufficient due diligence. Had this case not settled, Defendants could be expected to gather additional evidence for each of these defenses and to assert them in a motion for summary judgment and/or at trial and, if necessary, on appeal.

The Individual Defendants have also claimed that Plaintiffs face insurmountable hurdles in proving *scienter* against the three remaining Individual Defendants on Plaintiffs' '34 Act claims. Plaintiffs believe they would ultimately prevail on this issue but acknowledge that proving *scienter* in this case would be particularly challenging in light of the following: (1) there is no evidence that any of the '34 Act Defendants exercised options on or sold FLAG stock during the Class Period; (2) the '34 Act Defendants claim to have relied in good faith on the advice of multiple sets of accountants who approved the relevant accounting decisions; and (3) the '34 Act Defendants claim their alleged misstatements were supported by contemporaneous documents and reports that, in and of themselves, negate any inference of *scienter.*

Moreover, at trial, Plaintiffs would face the additional risks posed by conflicting evidence and testimony. Since many witnesses likely would be aligned with Defendants and, as a result, would be hostile to Plaintiffs' case, Plaintiffs would be required to rely primarily on documents and expert witnesses to establish their case. The risk of establishing liability would be exacerbated by the risks inherent in all shareholder litigation, such as the unpredictability of a lengthy and complex jury trial, the risks that witnesses would suddenly become unavailable or jurors could react to the evidence in unforeseen ways, and the risks that the jury would find that Defendants reasonably believed in the propriety of their actions at the time and, consequently, Plaintiffs failed to prove *scienter.*

v. Establishing Recoverable Damages, Particularly with Respect to Loss Causation, Also Involves Significant Risks

***18** Plaintiffs also faced significant risk in proving causation and the amount of damages.

> In order to prove loss causation and damages, Lead Plaintiff would be required to prove that Defendants' alleged false and misleading statements and omissions of material fact inflated the price of [defendant's] common stock during the Class Period, and that upon the Company's disclosure of such misinformation, the price of [defendant's] common stock dropped and damaged Lead Plaintiff and the Class. Lead Plaintiff would also be required to prove the amount of artificial inflation in the price of [defendant's] common stock.

In re Top Tankers, 2008 WL 2944620, at *5. Plaintiffs anticipate that, in the absence of settlement, Defendants would move for summary judgment on the ′ 34 Act claims at the close of discovery, renewing the multiple arguments made in their motions to dismiss and for judgment on the pleadings.

The most significant risk to Plaintiffs' claim for damages was actually realized in this case, when the Second Circuit held, as a matter of law, that there was insufficient evidence on which in-and-out traders could establish the element of loss causation. As previously noted, this decision probably caused a very significant reduction in Plaintiffs' recoverable damages, from over $360 million to approximately $14.2 million. Although Plaintiffs initially considered a motion asking that the District Court reformulate the Class to include at least some of the individuals excluded by the Second Circuit's decision, the likelihood of success on such a motion was slim, and the Court so advised the parties during the September 17, 2009 status conference.

With regard to the damages remaining viable in the case, Defendants likely would contend that actual damages, if indeed there were any at all, were far less than even $14.2 million. First, Defendants would claim that any losses suffered by the Class during the Class period were caused not by the acts of the Individual Defendants but, rather, by the general stock market decline and, in particular, the collapse of the telecommunications market. Second, Defendants would argue that the decline in FLAG'S stock price following its announcement on February 13, 2002 resulted primarily from statements indicating that the company might not be able to continue operations in 2003, not from the "corrective disclosures" related to the fraud alleged by Plaintiffs. Finally, even if Plaintiffs prevailed on issues of liability and damage causation, Defendants would likely present an expert to testify that the proper calculation of damages would result in a recovery of only minimal damages at most.

Even in a less challenging case, "[c]alculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud." *Global Crossing,* 225 F.R.D. at 459 (*quoting* *Mayley,* 186 F.Supp.2d at 365). Undoubtedly, in this action, establishing the amount of damages at trial would have resulted in a "battle of experts." The jury's verdict with respect to damages would thus depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable. *See EVCI Career College,* 2007 WL 2230177, at *8 (*citing In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 129 (S.D.N.Y.1997), *aff'd,* 117 F.3d 721 (2d Cir.1997) (noting unpredictability of outcome of battle of damage experts)).

***19** Thus, the very substantial challenges facing Plaintiffs in their attempts to prove liability, loss causation and damages weigh heavily in favor of approval of the proposed Settlement.

vi. The Risk of Maintaining a Class Action Through Trial Also Weighs in Favor of Approval

In addition to the risks of establishing liability and damages, the nature of the Second Circuit's decision was such that there remained a risk of maintaining class status through trial. From the beginning of the case, Defendants strongly contested class certification on various grounds. It is likely that, after the conclusion of expert discovery, Defendants would renew their argument that conflicts among class members relating to liability and damages make class treatment improper or, alternatively, require the certification of subclasses. The Second Circuit, while upholding the certification of a single class including both '33 Act and '34 Act plaintiffs, cautioned:

> [W]e do not suggest that the issue described by Defendants does not deserve the careful and continued attention of the district court, but merely that it does not inevitably lead at the present time to the decertification of the class. As the lower court recognized, if Plaintiffs are able to prove loss causation with respect to both the '33 and '34 Act claims, then it will be necessary for a jury "to determine the extent of harm caused by each [misstatement], and it is here that the interests of class members could diverge." We are confident in the lower court's wisdom and ability to utilize the available case management tools to see that all members of the class are protected, including but not limited to the authority to alter or amend the class certification order pursuant to Rule 23(c)(1)(C), to certify subclasses pursuant to Rule 23(c)(5), and the authority under Rule 23(d) to issue orders ensuring "the fair and efficient conduct of the action."

In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 37 (2d Cir.2009) (internal citations omitted) (*citing* *In re Flag,* 245 F.R.D. at 160). Thus, there remained in this case the very real risk of decertification or modification of the class at a later stage of the proceedings. *See In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 466, 476–77 (S.D.N.Y.1998) (decertification can occur if management problems arise during litigation; decertification or reversal of certification would deprive class of any recovery).

vii. The Ability of the Defendants to Withstand a Greater Judgment

If Plaintiffs somehow were successful in undoing the implications of the Second Circuit's loss causation ruling, then the '34 Act Defendants would lack sufficient insurance, and presumably would lack sufficient resources, to pay a judgment in the full amount of the claimed damages. CGMI recently needed a well-publicized infusion of taxpayer dollars just to survive. In any event, "the mere ability to withstand a greater judgment does not suggest the settlement is unfair." *AOL Time Warner,* 2006 WL 903236, at *42, This is particularly true where, as here, the settlement appears to exceed the recoverable damages, in light of the Second Circuit's ruling.

viii. The Settlement is Reasonable When Viewed in Light of the Best Possible Recovery and the Risks of Continued Litigation

***20** The last two substantive factors courts consider are the range of reasonableness of the settlement funds in light of (1) the best possible recovery and (2) litigation risks. In analyzing these last two factors, the issue for the Court is not whether the Settlement represents the "best possible recovery," but how the Settlement relates to the strengths and weaknesses of the case. The Court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell,* 495 F.2d at 462. Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *PaineWebber,* 171 F.R.D. at 130 (*quoting* *Milken,* 150 F.R.D. at 66). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972); *see* *Indep. Energy,* 2003 WL 22244676, at *4.

Under the proposed Settlement, the Class will receive $24.4 million, well in excess of the $14.2 million estimated by Plaintiffs' expert to be the potential damages in light of the Second Circuit ruling excluding in-and-out traders from the Class. More aggressive methods of calculation could result in damages ranging from approximately $25 million to approximately $120 million .[18] Even under the most favorable, $120 million scenario, the proposed settlement amounts to over 20% of the potential damages, well within the "range of reasonableness." *See In re Merrill Lynch Research Rep. Sec. Litig.,* Nos. 02 MDL 1484(JFK), 02 Civ. 3176(JFK), 02 Civ. 7854(JFK), 02 Civ. 10021(JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (settlement representing 6.25% of estimated damages found to be "at the higher end of the range of reasonableness of recovery in class action securities litigations"); *In re PaineWebber,* 171 F.R.D., at 132 (recovery between 7% and 20% is "well within the range of reasonableness"); *see also* *In re Telik,* 576 F.Supp.2d at 580 (settlement representing 25% of recoverable damages is "well above that in most securities class actions"); *Veeco I,* 2007 WL 4115809, at *11 (settlement representing 23.2% of possible recovery is "squarely within the range of reasonableness") (internal quotations omitted).

By all measures, the proposed Settlement compares favorably with settlements reached in other securities class actions in recent years. According to objective data recently published by Cornerstone Research, the $24.4 million recovery here is more than three times the median settlement ($7.4 million) in class actions reported during the period 1996 through 2008 and three times the median settlement ($8.0 million) reported for 2009 settlements. The median settlement in class actions securities cases was 2.9% of estimated damages for the period 2002 through 2008 and 2.3% of estimated damages in 2009. In cases with estimated damages of less than $50 million, the median settlement was 11.4% of estimated damages for the period 2002 through 2008 and 12% of estimated damages in 2009. Here, the settlement amount represents 170% of the potential damages (with damages of $14.2 million), and 20% of the maximum potential damages under the most aggressive possible approach (with damages of $120 million).

***21** In light of these circumstances and all of the delay and uncertainty that would be inherent in continued litigation, the Settlement falls well within the range of possible recovery considered fair, reasonable and adequate.

VII. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

A Plan of Allocation is fair and reasonable as long as it has a "reasonable, rational basis." *Maley,* 186 F.Supp.2d at 367. Courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." PaineWebber, 171 F.R.D. at 133. An allocation formula need only have a reasonable and rational basis, particularly if recommended by experienced and competent counsel. Counsel's conclusion here that the Plan of Allocation is fair and reasonable is therefore entitled to great weight. *American Bank Note,* 127 F.Supp.2d at 430 (approving allocation plan and according counsel's opinion "considerable weight" because there were "detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery").

The Plan of Allocation proposed herein has been prepared by Plaintiffs' Lead Counsel utilizing their Damages Expert's report and data concerning causation and damages. The Plan reflects the proposition that the price of FLAG common stock was artificially inflated from the beginning of the '33 Act Class Period on February 11, 2000, and at the beginning of the '34 Act Class Period on March 6, 2000, and through February 12, 2002, but that much of the artificial inflation was suddenly eliminated on February 13, 2002 when FLAG made disclosures that at least partially corrected its prior misstatements, and that any remaining artificial inflation was eliminated by April 11, 2002. The Plan reflects the requirements for establishing damages promulgated by *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), and complies with the requirements of the PSLRA.

The Plan of Allocation separately allocates the Net Individual Defendants' Settlement Fund differently than the CGMI Settlement Fund, based on the fact that CGMI was only alleged to be liable under the Securities Act for the IPO, while the Individual Defendants were alleged to be liable under both the Securities Act for the IPO and under Section 10(b) of the Exchange Act for the Class Period.

The Plan provides for the distribution of the Net Individual Defendants' Settlement Fund to all Class Members on a *pro rata* basis based on a formula that takes into account the alleged artificial inflation paid on the shares of FLAG stock purchased during the entire period February 11, 2000 through February 12, 2002, that were still held at the close of trading on February 12, 2002.

The Plan separately provides for the distribution of the Net CGMI Settlement Fund to all IPO Class Members on a *pro rata* basis based on a formula that takes into account the alleged artificial inflation paid on shares of FLAG stock purchased during the IPO period February 11, 2000 through May 10, 2000, that were still held at the close of trading on February 12, 2002.

***22** The Plan's formula subtracts the Asserted Value of the shares on the day of purchase from the purchase price actually paid to calculate the amount of artificial inflation allegedly paid, and either uses that, or a maximum of $5.08 per share, the amount by which the corrective disclosure reduced the alleged inflation, to give the Claimant a "Recognized Claim" from those shares. If the shares were sold after February 12, 2002 for more than their Asserted Value, then the amount received in excess of the Asserted Value can reduce the Recognized Claim. The Net Individual Defendants' Settlement Fund will be distributed *pro rata* to Class Members who submit acceptable Proofs of Claim ("Authorized Claimants") based on their particular

Recognized Claim as compared to the total of all Class Members' Recognized Claims. The Net CMGI Settlement Fund will be distributed *pro rata* to Authorized Claimants based on their particular IPO Recognized Claim as compared to the total of all IPO Class Members' Recognized Claims.

The Plan of Allocation is set forth in full in the Settlement Notice, and there have been no objections to the Plan.

Accordingly, the court concludes that the Plan of Allocation provides a fair and reasonable method for allocating the Net Settlement Funds among Class Members based on their relative compensable losses, and should be approved.

VIII. LEAD COUNSEL'S REQUEST FOR FEES AND EXPENSES IS FAIR AND REASONABLE

Lead Counsel, having achieved recovery of $24.4 million in what appears to be a case worth substantially less, seek reimbursement of expenses in the amount of $1,910,420.76, plus an award of attorneys' fees in the amount of 30% of the *remaining* balance of the Settlement Fund *after* reimbursement of these expenses and payment of any PSLRA awards to the Class Representatives; *i.e.,* Lead Counsel seek a fee award that is 30% of the Settlement Fund "net" of expenses and awards to the Class Representatives. On the more traditional "gross" basis, this would amount to an award of only approximately 27.5%. In dollar terms this amount—approximately $6,715,374, plus a *pro rata* share of the accrued interest—is less than 32% of Lead Counsel's approximately $21,000,000 of lodestar in this case.

The $24.4 million Settlement obtained for the benefit of the Class is the result of literally tens of thousands of hours spent by Lead Counsel and the skill and perseverance of Lead Counsel in litigating this Action. It represents a remarkable result for the Class in a complex case that posed a great many obstacles to recovery. Lead Counsel's considerable expenditure of time and resources on a difficult and protracted case, where Lead Counsel ultimately obtained a superior result in light of the size of the Class and the amount of recoverable damages, justifies the requested fee.

Lead Counsel devoted over 45,500 hours to the prosecution of this case over more than eight years. Lead Counsel prosecuted the Action on an entirely contingent-fee basis. The significant outlay of cash and personnel resources by Lead Counsel has been completely at risk. Given the uncertainties inherent in securities class actions generally and the difficulties in this particular case, there was a significant possibility that Lead Counsel would recover nothing for their substantial efforts. They are in any event recovering only a portion of their outlay.

***23** Courts in this District and throughout the nation, recognizing the risks and effort generally expended by counsel to obtain favorable results, have not hesitated to award 30% of the "gross" recovery, or more, in complicated securities fraud cases such as this. Furthermore, the Settlement amount here far exceeds the national medians—in straight dollar terms and as a percentage of the recovery compared to the total alleged damages—for class action securities settlements after the passage of the PSLRA.

The reaction of the Class (or, rather, the lack of reaction of the Class) to the proposed fee award supports Lead Counsel's request. The support of the Class is not surprising, for even after payment of expenses of $1,910,420.76, PSLRA awards to Loftin of $100,000 and to Coughlin of $5,000, and Lead Counsel's requested fee of 30% of the remainder, the net payment to the Class—approximately $15,669,205, plus interest—still would be more than 100% of a $14.2 million damage figure.

A. *Lead Counsel Are Awarded Fees from the Common Fund Created as a Result of the Settlement*

Courts have long recognized that " 'attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work.' " *Veeco I,* 2007 WL 4115809, at *2 (*quoting American Bank Note,* 127 F.Supp.2d at 430); *see* *Boeing Co. v. Van Gemert,* 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to prevent the unjust enrichment of persons who benefit from a lawsuit without shouldering its costs. *Mills v. Electric Auto–Lite Co.,* 396 U.S. 375, 392, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). Moreover, awards of attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature." *In re Telik,* 576 F.Supp.2d at 585. Accordingly, Lead Counsel are entitled to an award of attorneys' fees and expenses from the Settlement Fund.

Courts traditionally have used two methods to calculate attorneys' fees in common fund cases: the percentage method, which awards attorneys' fees as a percentage of the common fund created for the benefit of the class; and the lodestar/multiplier or "presumptively reasonable fee" approach, which multiplies the number of hours expended by counsel by the hourly rate normally charged for similar work by attorneys of comparable skill and experience, and enhances the resulting lodestar figure by an appropriate multiplier to reflect litigation risk, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors. *Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir.1999). The Second Circuit has held that both the percentage and lodestar/multiplier methods are available to district courts in awarding attorneys' fees in common fund cases. *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 50 (2d Cir.2000). However, as has often and emphatically been noted, the percentage of recovery methodology is considered the "most efficient and logical means" for calculating attorneys' fees. *In re Telik,* 576 F.Supp.2d at 584.

***24** Under either method—percentage or lodestar/multiplier—the fees awarded in common fund cases must be "reasonable" under the circumstances. *Goldberger,* 209 F.3d at 47; *In re Fine Host Corp. Sec. Litig.,* No. MDL 1241, 3:97–CV–2619 JCH, 2000 WL 33116538, at *4 (D.Conn. Nov.8, 2000). The Second Circuit has instructed that, in the exercise of their discretion,

> [D]istrict courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation .... (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."

Goldberger, 209 F.3d at 50 (*quoting In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.,* 724 F.Supp. 160, 163 (S.D.N.Y.1989)).

The fee requested in this case—30% of the "net" Settlement Fund (approximately 27.5% of the "gross" Settlement Fund) is reasonable in light of the extensive efforts and risks faced over the course of nearly eight years of litigation and is well within the range of fees awarded (even on "gross" settlements) by courts in this Circuit. *See, e.g., In re Bisys Sec. Litig.,* No. 04 Civ. 3840(JSR), 2007 WL 2049726, at * 2 (S.D.N.Y. July 16, 2007) (30% of $65.87 million settlement); *In re Priceline.com, Inc Sec. Litig.,* No. 3:00–CV–1884(AVC), 2007 WL 2115592, at *4–5 (D.Conn.2007) (30% of $80 million settlement); *Hicks v. Stanley,* No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct.24, 2005) (30% of $10 million settlement); *In re Warnaco Group. Inc. Sec. Litig.,* No. 00 Civ. 6266(LMM), 2004 WL 1574690, at *3 (S.D.N.Y. July 13, 2004) (30% of $12.85 million settlement); *Kurzweil v. Phillip Morris Co., Inc.,* Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 WL 1076105, at *1 (S.D.N.Y. Nov. 30, 1999) (30% of $123 million settlement).

Indeed, as this Court wrote in *In re Veeco Instruments* (*"Veeco II"*), there are numerous other common fund cases in this District alone where fees were awarded in the amount of 33 1/3% of the gross settlement fund. *Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695(CM), 2007 WL 4115808, at *4 n. 5 (S.D.N.Y. Nov.7, 2007) (*"Veeco II"*) (collecting cases). [19]

Likewise, courts in other circuits around the country commonly award attorneys' fees equal to or higher than the compensation requested here. "Awards of 30% or more of a settlement fund are not uncommon in § 10(b) common fund cases such as this." *Ressler v. Jacobson,* 149 F.R.D. 651, 655 (M.D.Fla.1992); *see also In re Rite Aid Corp. Sec. Litig.,* 146 F.Supp.2d 706, 735 (E.D.Pa.2001) (noting that in a study of 287 settlements ranging from less than $1 million to $50 million, "the median turns out to be one-third"). As this Court observed in *In re Telik* (awarding attorneys' fees of 25% of the settlement amount):

> ***25** The requested fee is also less than the fee awards in many cases such as this throughout the rest of the country. *See, e.g., In re Ravisent Techs., Inc. Sec. Litig.,* 2005 WL 906361, at *15 (E.D.Pa. Apr.18, 2005) (awarding attorneys' fees of one-third of $7 million settlement); *In re Corel Corp. Inc. Sec. Litig.,* 293 F.Supp.2d 484, 497 (E.D.Pa.2003) ("[T]he 33 1/3% fee request in this complex case is within the reasonable range."); *Faircloth v. Certified Fin. Inc.,* 2001 WL 527489, at *12 (E.D.La. May 16, 2001) (awarding attorneys' fees of 35% of settlement plus interest and reimbursement of expenses).

In re Telik, 576 F.Supp.2d at 587 (additional citations omitted). [20]

The Second Circuit "encourages" an analysis of counsel's lodestar "as a 'cross check' on the reasonableness of the requested percentage." *Goldberger,* 209 F.3d at 50; EVCI, 2007 WL 2230177, at * 17. Where the lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger, 209 F.3d at 50*.

A lodestar analysis begins with the calculation of the lodestar, which is "comprised of the amount of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel." *In re Prudential Sec. Inc. Ltd. Pshps, Litig.,* 985 F.Supp. 410, 414 (S.D.N.Y.1997), Here, Lead Counsel devoted over 45,500 hours to this matter and their lodestar was $20,955,697.50. (Milberg Decl., ¶ 6 and Exh. A.)[21] Lead Counsel's efforts are described in detail *supra,* and in the accompanying Friedman Declaration. Lead Counsel is also overseeing all aspects of the settlement process, a responsibility that will continue into the coming months.

Lead Counsel are highly experienced in prosecuting complex securities class action cases. (Milberg Decl., Exh. D.) Consequently, Lead Counsel "were presumably able to perform the various tasks necessary to advance Plaintiffs' and the Class's interests in a more efficient manner than would have counsel with a lesser degree of specialization in the field." *In re Telik,* 576 F.Supp.2d at 588–89 (*citing Teachers Ret. Sys. of La. v. A.C.L.N ., Ltd.,* No. 01–CV–11814(MP), 2004 WL 1087261, at *6 (S.D.N.Y. May 14, 2004) (noting that the skill and prior experience of counsel in the specialized field of shareholder securities litigation is relevant in determining fair compensation)).

Finally, in evaluating the reasonableness of the hours expended on this case, it is critical to note that until the Second Circuit decision on July 22, 2009—that is, for more than seven years of the pendency of this case—the estimated amount of damages available to the Class was between $362 million and $465.5 million.

In a lodestar analysis, the appropriate hourly rates are " 'those [rates] prevailing in the community for similar services of lawyers of reasonably comparable skill, experience and reputation.' " *Cruz v. Local Union No. 3 of the IBEW,* 34 F.3d 1148, 1159 (2d Cir.1994) (*quoting Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *see also Luciano v. Olsten Corp.,* 109 F.3d 111, 115–16 (2d Cir.1997); *Veeco II,* 2007 WL 4115808, at *9. In complex securities class actions in this Circuit and around the country, courts have repeatedly found rates similar to those charged by Lead Counsel here to be reasonable; indeed, the American Lawyer recently reported that the *median* billing rate for partners at many leading law firms exceeds $900/hour.[22] The median rates for the firms representing defendants in this case were reported to be $950/hour for Shearman & Sterling and $900/hour for Milbank, Tweed, Hadley & McCloy. And, of course, we know that counsel for the Individual Defendants, Shearman & Sterling, who were paid currently and on a risk-free basis, long ago exhausted the entirety of a $20 million primary layer of insurance on defense costs.

***26** "Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144(CM), 2009 WL 5178546, at *20 (S.D.N.Y. Dec.23, 2009) (*citing Goldberger,* 209 F.3d at 47); *Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir.1999). "In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court." *In re Telik,* 576 F.Supp.2d at 590 (a multiplier of 4 .65 was "well within the range awarded by courts in this Circuit and courts throughout the country") (*citing Maley,* 186 F.Supp.2d at 369). In this case, the percentage fee requested represents a fractional multiplier of less than 0.32 times the lodestar. Thus, even though Lead Counsel here assumed very substantial risk in prosecuting this case and achieved an excellent result considering all the circumstances, they will nevertheless recoup far less than their lodestar.

Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request. *See In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 515 (S.D.N.Y.2009) (awarding fees of 33 1/3%, noting that even in a mega-fund case, there is "no real danger of overcompensation" where the award represents a fractional multiplier to the lodestar); *Veeco II,* 2007 WL 4115808, at *10 ("Not only is Plaintiffs' Counsel not receiving a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar 'cross-check' unquestionably supports a percentage fee award of 30%.”); *In re Blech Sec. Litig.,* Nos. 94 CIV. 7696(RWS), 95 CIV. 6422(RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000) (awarding lead counsel 30% of the settlement, and confirming that the award was reasonable because it represented a fractional multiplier of lead counsel's lodestar).

Finally, the Second Circuit has stated that whether the Court uses the percentage method or the lodestar approach, it should continue to consider the following traditional criteria: (1) the time and labor expended by counsel; (2) the risks of the litigation; (3) the magnitude and complexity of the litigation; (4) the requested fee in relation to the settlement; (5) the quality of representation; and (6) public policy considerations. *Goldberger,* 209 F.3d at 50. An analysis of these factors demonstrates that the requested fee is reasonable.

Lead Counsel has devoted over 45,500 hours to the prosecution and settlement of this case. (Milberg Decl., ¶ 6 and Exh. A.) As detailed *supra* and in the accompanying Friedman Declaration, these efforts were reasonable and necessary to the effective prosecution of this Action.

***27** The reasonableness of the requested fee is also supported by an evaluation of the risks undertaken by Lead Counsel in prosecuting this Action. The Second Circuit has recognized that “despite the most vigorous and competent of efforts, success is never guaranteed.” *Grinnell,* 495 F.2d at 471. Securities class actions such as this are “notably difficult and notoriously uncertain.” *In re Sumitomo,* 189 F.R.D. at 281.

Lead Counsel undertook this Action on a wholly contingent basis, investing substantial amounts of time and money to prosecute this litigation with no guarantee of compensation or even the recovery of out-of-pocket expenses. Unlike counsel for Defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel have not been compensated for any time or expenses since this case began more than eight years ago. Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award. *See, e.g., American Bank Note,* 127 F.Supp.2d at 433 (concluding it is “appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award”); *In re Prudential,* 985 F.Supp.2d at 417 (“Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.”).

Lead Counsel prosecuted this action essentially by itself against teams of defense lawyers from two large and well-funded firms—Shearman & Sterling and Milbank, Tweed, Hadley & McCloy—plus other substantial defense firms who represented earlier defendants (*e.g.,* Kirkland & Ellis on behalf of Verizon) and/or who appeared in connection with discovery disputes (*e.g.,* Gibson Dunn, appearing *pro se*).

Moreover, there was no prior governmental action against FLAG on which Lead Counsel could “piggy back.” The burden and the risk here were borne solely by Lead Counsel. As this Court wrote in *Veeco II:*

> Indeed, the risk of non-payment in complex cases, such as this one, is very real. There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. There is no guarantee of reaching trial, and even a victory at trial does not guarantee recovery. As the Court stated in *Warner:* “Even a victory at trial is not a guarantee of ultimate success.... An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself.” 618 F.Supp. at 747–48.

2007 WL 4115808, at *6 (*quoting In re Warner Commc'n Sec. Litig.,* 618 F.Supp. 735, 747–48 (S.D.N.Y.1985)).

The risks involved in this case were compounded by the complexity of the issues. Lead Counsel faced enormous obstacles in proving the liability of the Defendants. Assuming these hurdles could be overcome, Lead Counsel still faced the burden of proving both the extent of the Class's damages and that those damages were caused by Defendants' conduct, a “complicated and uncertain” process at best. *Global Crossing,* 225 F.R.D. at 459. Moreover, the risk of this case for Lead Counsel increased as a result of developments in the law during the course of this litigation, especially in the areas of loss causation and class certification.

***28** Much of the risk borne by Lead Counsel here was realized when the Second Circuit held that in-and-out traders should be excluded from the Class, because there was no loss causation prior to the end of the Class Period (thus also arguably limiting the remaining Class's damages). As a result of this decision, the maximum potential damages available to the Class arguably were reduced from more than $362 million to potentially as little as $14.2 million.

Notwithstanding the foregoing significant risks of continued litigation, Lead Counsel zealously represented the Class and secured for them a sizable recovery—indeed, a recovery greater than what may have been the maximum potential recoverable damages. The risks associated with this litigation clearly support the reasonableness of Lead Counsel's fee request.

As discussed above, the proposed fee—30% of the "net" Settlement amount—is well within the range of fees awarded by courts in this Circuit and other circuits in securities class actions. Thus, this factor weighs in favor of the reasonableness of the requested fee.

The quality of the representation and the standing of Lead Counsel are important factors that also support the reasonableness of the requested fee. Lead Counsel have immense experience in complex federal civil litigation, particularly the litigation of securities and other class actions and have received significant recognition for their work. Lead Counsel's experience allowed them to identify the complex issues involved in this case and formulate appropriate and effective litigation strategies. Lead Counsel aggressively prosecuted this Action for roughly eight years and ultimately obtained an extraordinary recovery for the Class.

The skill and sophistication of Lead Counsel's representation in this case enabled Plaintiffs to prevail in battle after battle, critical motion after critical motion, including, most notably, the motions to dismiss, the motion for judgment on the pleadings, countless discovery motions, the motion for class certification (in which Plaintiffs also won every issue on appeal other than loss causation), and the partial summary judgment motion. But nowhere was the skill of Lead Counsel more dramatically displayed than in the mediation and negotiation with the *Rahl* Trustee and the subsequent mediation with the Defendants, which led to the Plaintiffs obtaining FLAG's privileged documents from FTGL, and ultimately to the Plaintiffs receiving 70% of the total recovery from the Individual Defendants in both cases.

Furthermore, the Settlement was obtained in the face of extremely aggressive opposition from the Defendants, represented by the pre-eminent defense firms of Shearman & Sterling and Milbank, Tweed, Hadley & McCloy. The quality of the opposition should be taken into consideration in assessing the quality of Lead Counsel's performance. *See, e.g., Teachers Ret. Sys.,* 2004 WL 1087261, at *20; *Maley,* 186 F.Supp.2d at 373.

***29** Courts in the Second Circuit have held that "[p]ublic policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *In re Merrill Lynch Tyco,* 249 F.R.D. 124, 141–42 (S.D.N.Y.2008) (" 'In order to attract well qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.' ") (*quoting In re Worldcom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005)). Moreover, "public policy supports granting attorneys fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *In re Bristol–Myers,* 361 F.Supp.2d 229, 236 (S.D.N.Y.2005); *see also Maley,* 186 F.Supp.2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *In re Visa Check/Master Money Antitrust Litig.,* 297 F.Supp.2d 503, 524 (E.D.N.Y.2003) ("The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future."), *aff'd sub nom. Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96 (2d Cir.2005).

If this important public policy is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook. In this case, Lead Counsel seeks a fee that is significantly less than its accrued lodestar. As such, public policy considerations favor granting the fee request.

Finally, numerous courts have noted that the lack of objection from members of the class is one of the most important factors in determining the reasonableness of a requested fee. *Maley,* 186 F.Supp.2d at 374 ("The reaction by members of the Class is entitled to great weight by the Court."); *Ressler,* 149 F.R.D. at 656 (lack of objections is "strong evidence" of the reasonableness of the fee request); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 912 F.Supp. 97, 103 (S.D.N.Y.1996) (court determined that an "isolated expression of opinion" should be considered "in the context of thousands of class members who have not expressed themselves similarly"), *aff'd, Toland v. Prudential Sec. P'ship Litig.,* 107 F.3d 3 (2d Cir.1996).

Over 43,450 Notices have been mailed to potential Class Members and a Summary Notice was also published in *The Wall Street Journal* . (Fishbein Aff., ¶ 8; Andrejkovics Aff., ¶ 2.) The Notice mailed to Class Members stated that Lead Counsel would seek reimbursement of expenses in the approximate amount of $2 million, plus an award of attorneys' fees in the amount of 30% of the remaining balance of the Gross Settlement Fund after reimbursement of these expenses and payment of any PSLRA awards to the Lead Plaintiffs. Notably, not one Class Member has objected to this request. The overwhelmingly positive response to date by the Class attests to the approval of the Class with respect to both the Settlement and the fee and expense application.

IX. THE REQUEST FOR REIMBURSEMENT OF EXPENSES IS REASONABLE AND APPROPRIATE

***30** It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class. *See, e.g., Teachers' Ret. Sys.,* 2004 WL 1087261, at *6; *American Bank Note,* 127 F.Supp.2d at 430. " 'Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.' " *EVCI,* 2007 WL 2230177, at * 18 (*quoting In re McDonnell Douglas Equip. Lease Fee Litig.,* 842 F.Supp. 733, 746 (S.D.N.Y.1994)). Courts have awarded such expenses so long as counsel's documentation of them is "adequate." *NASDAQ Market–Makers,* 187 F.R.D. at 489.

In the Milberg and Finkelstein Declarations, counsel have detailed and documented the $1,910,420.76 in expenses that they incurred in connection with this action.[23] These expenses are of the type that law firms typically bill to their clients, including photocopying of documents, mediation fees, court filing fees, deposition transcripts, fees for foreign counsel, on-line research, creation of a document database, messenger service, postage and next day delivery, long distance and facsimile expenses, transportation, travel, and other expenses directly related to the prosecution of this Action. All of these expenses are customary and necessary expenses for a complex securities action, and were necessary for Lead Counsel to successfully prosecute this case.

In addition, Lead Counsel retained accounting, damages and other experts. These experts assisted Lead Counsel in the factual investigation and analysis in connection with the amended complaints and during merits discovery, and also assisted Lead Counsel in preparing their submissions for mediation and a potential trial. This Court and others have reimbursed such expert witness fees where "[t]he expenses incurred were essential to the successful prosecution and resolution of [the] Action." *Veeco II,* 2007 WL 4115808, at *11 (quoting EVCI, 2007 WL 2230177, at *18.)

Finally, the expenses for which reimbursement is sought amount to less than the expense figure of $2 million referred to in the Notice, to which no objection was filed.

Accordingly, Lead Counsel's request for reimbursement of these expenses is granted.

X. LEAD PLAINTIFFS ARE ENTITLED TO AN AWARD PURSUANT TO 15 U.S .C. § 78U–4(A)(4)

Under the PSLRA, the Court may award "reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. § 78u–4(a)(4). *See also Hicks,* 2005 WL 2757792, at *10. Lead Plaintiffs devoted substantial amounts of their time to the oversight of, and participation in, the litigation on behalf of the Class. (*See* Loftin Declaration at ¶¶ 6–17; Coughlin Declaration at ¶¶ 5–9.)

As Judge Conner wrote in his decision granting class certification, the Lead Plaintiffs "all received and reviewed the pleadings, consulted with [Lead Counsel] on various issues relevant to the lawsuit, produced documents and participated in depositions. Loftin, for example, is intimately familiar with the claims and was uniquely involved in the drafting of the Complaint, particularly with respect to the decision to initially name Verizon as a defendant.... And Coughlin, during his deposition, cogently explained the underlying basis for the litigation."[24]

***31** The Settlement Notice advised Class Members that application "will also be made for reimbursement to the Lead Plaintiffs for an amount not to exceed $100,000 for Lead Plaintiff Peter T. Loftin and for an amount not to exceed $5,000 for Lead Plaintiff Joseph Coughlin."[25]

No objections to these requests have been filed. They are granted.

Mr. Loftin, who lost over $24 million in FLAG stock, has been actively involved in this litigation since its inception in 2002.[26] As set forth in the Loftin Declaration, he reviewed and authorized the various complaints, as well as countless other pleadings, and, incredibly, even assisted in researching and drafting significant parts of the complaint. He consulted regularly with counsel, and insisted on Lead Counsel visiting him at his home in Florida for a full-day in-person briefing. He also traveled from Miami to New York for his deposition, which lasted a full day, as well as a preparation session the day before. He also produced over 4,000 pages of documents from his and his business's files. And, of course, he also sent his in-house counsel to attend several of the mediation sessions in person. In total, Mr. Loftin estimates that he has spent more than four hundred hours on this litigation over the eight years it has been pending. (Loftin Decl., ¶ 17.)

Mr. Coughlin responded to Lead Counsel's statutory lead plaintiff notice at the beginning of the case, but because his loss was much smaller than Mr. Loftin's, he did not seek to intervene as an additional Lead Plaintiff and Class Representative until February 2005, in response to threats from the Defendants that they would challenge Mr. Loftin as a Class Representative in light of his prior work for BTI.[27] Because he became involved significantly later in the case, Mr. Coughlin spent much less time on this matter than did Mr. Loftin, but he still spent a meaningful amount of time. In addition to reviewing the complaint and other pleadings and communicating with Lead Counsel, Mr. Coughlin collected his documents for production to the Defendants, and travelled from Florida to New York to sit for a half-day deposition, and also spent time preparing for his deposition the night before. In total, Mr. Coughlin estimates that he has spent approximately twenty hours on this litigation, including travel time. Coughlin Decl., ¶ 9.

XI. CONCLUSION

For the reasons set forth above, the Court grants the motion for an order granting: (1) final approval of the proposed Settlement; (2) final approval of the proposed Plan of Allocation for the settlement proceeds; (3) reimbursement of $1,910,420.76 for expenses incurred in connection with the prosecution and settlement of the Action and attorneys' fees in the amount of 30% of the remaining balance of the Settlement Fund after reimbursement of these expenses and payment of any PSLRA awards to the Lead Plaintiffs; and (4) awards to Lead Plaintiffs for their services in prosecuting the Action in the amounts of $100,000 for Lead Plaintiff Peter T. Loftin and $5,000 for Lead Plaintiff Joseph Coughlin.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4537550

Footnotes

1 The seven individual defendants are Andres Bande, Edward McCormack, Edward McQuaid, Philip Seskin, Daniel Petri, Dr. Lim Lek Suan and Larry Bautista.

2 Former Defendant/non-party FLAG filed a Chapter 11 bankruptcy petition on April 12, 2002. FLAG emerged from its Chapter 11 proceeding on October 9, 2002, with FLAG Telecom Group Limited ("FTGL") becoming its successor. In late 2003, FTGL was purchased by Reliance Gateway Net Limited, a subsidiary of Reliance Communications Limited.

3 *Rahl v. Bande,* C.A. No. 04–CV–1019 (CM)(PED) (*"Rahl"*).

4 In telecom industry parlance, "presales" are capacity sales made on a system prior to the date the system is put into service.

5 *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 308 F.Supp.2d 249 (S.D.N.Y.2004).

6 *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 352 F.Supp.2d 429 (S.D.N.Y.2005).

7 *Id.* at 451.

8 *Id.* at 457.

9 *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 411 F.Supp.2d 377 (S.D.N.Y.2006).

10 Defendants' Joint Memorandum of Law In Opposition to Plaintiffs' Motion for Class Certification, at 22 n. 65.

11 *Id.* at 167.

12 The Correction removed vestigal references to Verizon as a defendant.

13 *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 618 F.Supp.2d 311 (S.D.N.Y.2009).

14 Prior to the Second Circuit's decision, Plaintiffs' damage expert, Dr. Scott Hakala, calculated that the potential damages in this case were in the range of $362.3 million to $465.5 million, depending on whether one used the economic loss method or the investment loss method of calculating damages, and whether the date of the first significant corrective disclosure is considered to be April 2, 2001 or June 18, 2001.

15 The first layer is $20 million (two carriers share 50/50); the second layer is $30 million after the first $20 million is exhausted (two carriers share 50/50); the third layer is $50 million after the prior $50 million is exhausted (five carriers have 20% each); the fourth layer is $50 million after the prior $100 million is exhausted (one carrier has 82.16%, plus two others); the fifth layer is $25 million after the prior $150 million is exhausted (one is 40% and three others are 20% each); and the sixth through eighth layers are $25 million each (each is a different single carrier).

16 Astoundingly, certain excess insurance policies in the tower did not "follow form."

17 CGMI and plaintiff's counsel in *Rahl* were not part of the initial mediation efforts.

18 To achieve these results, Class Members (those who held their shares throughout the Class Period) would have to prove loss causation prior to the end of the Class Period notwithstanding the Second Circuit's holding that "as a matter of law" there is insufficient evidence of such loss causation. In addition, to obtain the most favorable damages scenario ($120 million), Plaintiffs would need to argue that the Court should calculate damages based on the "constant percentage inflation" method, not the "constant dollar" method—*i.e.,* that artificial inflation (and, consequently, damages) should be measured by the *percentage* by which FLAG'S stock price dropped when corrective information was revealed to the market, not simply by the *dollar amount* by which FLAG's price dropped upon the disclosure of corrective information. While Plaintiffs believe that each of these approaches for calculating legally compensable damages is economically sound, and while valid legal and factual arguments exist in support of each of these approaches, such approaches are not universally accepted and have not been accepted by all courts. *See, e.g., In re Williams Sec. Litig.,* 496 F.Supp.2d 1195, 1270 (N.D.Okla.2007) (rejecting the "constant percentage inflation" method), *aff'd,* 558 F.3d 1144 (10th Cir.2009).

19 *See also In re Blech Sec. Litig.,* 2002 WL 31720381, at * 1 (S.D.N.Y. Dec.4, 2002) (33.3%); *In re APAC Teleservice, Inc. Sec. Litig.,* 1999 WL 1052004, at *1 (S.D.N.Y. Nov.19, 1999) (33 1/3% of $21 million settlement); *Becher v. Long Island Lighting Co.,* 64 F.Supp.2d 174, 182 (E.D.N.Y.1999) (one-third fee, plus expenses, is "well within the range accepted by courts in this circuit"); *In re Medical X–Ray Film Antitrust Litig.,* 1998 WL 661515, at *2 (E.D.N.Y. Aug.7, 1998) (awarding 33 1/3% of $39.36 million after concluding such an award is "well within the range accepted by courts in this circuit").

20 *See also In re Managed Care Litig.,* 2003 WL 22850070, at *2 (S.D.Fla. Oct.24, 2003) (awarding 35.5%).

21 In addition, Finkelstein Thompson devoted 46.9 hours to this matter on a fully contingent basis, and their lodestar was $17,590.00, in connection with Lead Counsels' efforts to compel the production of documents from Gibson, Dunn & Crutcher. (Finkelstein Decl. ¶¶ 2, 5 and Exh. 1.) All other law firms that assisted Lead Counsel were foreign firms that may not legally be paid contingently, or, in one instance, an American bankruptcy firm that would not work contingently, and so these fees and expenses were advanced by Lead Counsel and are being treated by Lead Counsel as an expense to Lead Counsel. (Milberg Decl., Exhs. B and C.)

22 *Bankruptcy Billing,* The American Lawyer, February 2010, at 44–45.

23 Of the total expenses set forth in text, only a relatively small amount—$1,165.83—were incurred by Finkelstein Thompson.

24 *In re Flag Telecom,* 245 F.R.D. at 160–63.

25 Settlement Notice, at 2.

26 Mr. Loftin founded and was, for many years, the Chairman and CEO of a domestic long distance phone company named BTI. Today he owns Casa Casuarina, an upscale South Beach, Florida hotel and event location in the former Versace Mansion. Over the course of the Class Period, especially the summer of 2000, he purchased a total of 1,700,000 FLAG shares at various prices, primarily in the range of $15.50 per share. He sold 297,300 of these shares in early April 2001, at prices ranging from approximately $2.72 to $4.02 per share, and held the remainder until FLAG filed for bankruptcy.

27 Mr. Coughlin served in the Air Force from 1958 to 1962, and then spent six years with the CIA in cryptographic communications, at times posted overseas in classified locations; both positions required a security clearance. He then spent six years as a facilities analyst at IBM. Prior to retiring he spent 20 years as a court reporter. Mr. Coughlin purchased 250 shares traceable to the IPO at prices just under $31.25 per share on February 23, 2000, and purchased an additional 100 shares on July 3, 2001 for $5.17 per share. He held these shares until FLAG filed for bankruptcy.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Amaprop Ltd. v. Indiabulls Financial Services Ltd., S.D.N.Y., March 16, 2011

671 F.Supp.2d 467
United States District Court,
S.D. New York.

In re INITIAL PUBLIC OFFERING SECURITIES LITIGATION.

Master File No. 21 MC 92.
|
Oct. 5, 2009.

Synopsis
Background: Following preliminary approval of the proposed settlement of consolidated securities class actions brought against issuers and underwriters of technology stocks, investors moved for an order of final approval of the settlement, plan of allocation, and class certification. Investors' executive committee moved for attorney fees and reimbursement of expenses and Private Securities Litigation Reform Act (PSLRA) awards to the lead plaintiffs and class representatives of the 309 settled actions.

Holdings: The District Court, Shira A. Scheindlin, J., held that:

proposed $586 million settlement of 309 securities class actions was fair, reasonable, and adequate, and therefore would be approved, and

attorney fee of one-third of the net settlement fund, which amounted to $170,084,950, was appropriate.

Motions granted.

Attorneys and Law Firms

***469** Stanley D. Bernstein, Esq., Rebecca M. Katz, Esq., Christian Siebott, Esq., Bernstein Liebhard LLP, Robert A. Wallner, Esq., Ariana J. Tadler, Esq., Peter G.A. Safirstein, Esq., Neil Fraser, Esq., Milberg LLP, Jules Brody, Esq., Stull, Stull ***470** & Brody LLP, Howard B. Sirota, Esq., Sirota & Sirota LLP, Fred Taylor Isquith, Esq., Thomas H. Burt, Esq., Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY, David Kessler, Esq., Barroway Topaz Kessler Meltzer & Check LLP, Radnor, PA, for Plaintiffs' Executive Committee.

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OPINION AND ORDER

SHIRA A. SCHEINDLIN, United States District Judge:

I. INTRODUCTION

This consolidated action comprises hundreds of securities class actions brought against issuers and underwriters of technology stocks that had their initial public offerings ("IPOs") during the late 1990s. On April 2, 2009, the parties filed a Stipulation and Agreement of Settlement ("Stipulation") that seeks to conclude eight years of litigation in all 309 coordinated class actions. Following the Court's preliminary approval of the proposed settlement, plaintiffs now move for an Order of Final Approval of the Settlement, Plan of Allocation, and Class Certification. The Plaintiffs' Executive Committee (the "Committee") moves the Court to grant Attorneys' Fees and Reimbursement of Expenses and Private Securities Litigation Reform Act ("PSLRA") Awards to the Lead Plaintiffs and Class Representatives of the 309 settled actions. For the reasons stated below, plaintiffs' motion for an Order of Final Approval of the Settlement, Plan of Allocation, and Class Certification is granted. The Committee's motion for the Award of Attorneys' Fees and Expenses and PSLRA Awards is granted, but not for the amounts requested.

II. BACKGROUND

A. Plaintiffs' Allegations

Plaintiffs' allegations are discussed at length in a series of earlier Opinions.[1] In brief, plaintiffs allege that the underwriters of hundreds of IPOs required allocants in those IPOs to purchase shares in the aftermarket, often at inflated prices, and to pay the underwriters undisclosed compensation.[2] Additionally, the underwriters allegedly prepared analyst reports that contained inaccurate information and recommendations.[3] Plaintiffs allege that the issuers participated in or were at least aware of this misconduct and benefitted financially by large run-ups in the prices of their stock.[4] Finally, plaintiffs allege that they lost billions of dollars as a result of these manipulations and the fraudulent statements made to cover up the scheme. Plaintiffs have brought claims under both the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act").

B. Settlement Terms

In April 2009, the parties entered into a global settlement of the 309 cases, which is ***471** subject to this Court's approval.[5] The Stipulation provides that defendants will pay a total of $586 million ("Settlement Amount") in exchange for plaintiffs releasing all Settled Claims against them.[6] The Stipulation further provides that the Settlement Amount less any advances will be deposited into an escrow account at least fourteen days before the date of the fairness hearing.[7] The parties have stipulated that final approval of the settlement in all of the actions is required.[8]

C. Class Certification

On October 13, 2004, I issued an Opinion and Order certifying classes in each of six focus cases.[9] The classes consisted of "all persons and entities that purchased or otherwise acquired the securities of [the issuer] during the Class Period and were damaged thereby, subject to various exclusions."[10] The Class Periods for the Exchange Act claims were the periods from the respective IPOs through December 6, 2000. For the Securities Act Claims, the Class Periods were limited to periods in which all tradeable shares in the market could be traced to the IPOs.[11]

In June 2005, the Second Circuit granted defendants' petition for leave to appeal pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. The Circuit directed the parties to address the proper standard for a class certification motion and whether the *Basic v. Levinson* presumption of reliance was appropriately extended to plaintiffs' claims.[12]

On December 5, 2006, the Second Circuit announced its Opinion in *Miles v. Merrill Lynch & Co.* ("*Miles I* ").[13] In *Miles I,* the Circuit revised the standard to be applied in class certification actions and then applied that new standard to this case.[14]

The court also concluded that plaintiffs "cannot satisfy the predominance requirement for a(b)(3) class action" because individual questions predominated over common questions in the areas of knowledge and reliance.[15] *First,* the court held that plaintiffs could not take advantage of the *Basic* presumption of reliance.[16] The ***472** court noted that "the market for IPO shares is not efficient," citing the fact that no analyst reports are published during the 25–day "quiet period."[17] *Second,* the court ruled that many potential claimants would have known that the price was "affected by the alleged manipulation," thereby making it difficult for plaintiffs to prove that they were ignorant of inflated prices, a prerequisite of a section 10(b) claim.[18] The court noted that the classes as defined included initial IPO allocants, who were "required to purchase in the aftermarket" and who were "fully aware of the obligation that is alleged to have artificially inflated share prices."[19] It also noted plaintiffs' admission that there was an "industry-wide understanding" of aftermarket purchases, evidenced by the knowledge of the many thousands of people employed by the institutional investors who had been parties to the tie-in agreements and by news reports and a Securities Exchange Commission ("SEC") Staff Legal Bulletin that had publicized such practices in 1999 and 2000.[20]

This appeared to close the door on any opportunity for class certification in these cases. However, on April 6, 2007, the *Miles* panel issued a decision denying rehearing of *Miles I* but clarifying certain points in its original opinion ("*Miles II* ").[21] Plaintiffs had argued in their petition for rehearing that the Circuit had erred both in finding that predominance could not be satisfied and in failing to remand to this Court for evaluation of the class under the clarified standard.[22] Specifically, plaintiffs argued that non-allocants who purchased shares in the aftermarket "would have relied on the market price of the shares and would have lacked knowledge of the alleged fraud...."[23]

The Circuit explained that its decision in *Miles I* applied only to the broad class certified by this Court.[24] Thus, the

Circuit resolved both of plaintiffs' arguments by observing that "[n]othing in [*Miles I*] precludes the Petitioners from returning to the District Court to seek certification of a more modest class, one as to which the Rule 23 criteria might be met, according to the standards we have outlined." [25] The Circuit concluded, "we leave it to the Petitioners in the first instance to seek whatever relief they deem appropriate from the District Court, which can be expected to give such a request full and fair consideration." [26]

According to the Stipulation, the parties have agreed to class certification in each of the 309 cases pursuant to Rule 23(a) and Rule 23(b)(3):

> [A]ll Persons who purchased or otherwise acquired any of the Subject Securities at issue in such case during the Settlement Class Period applicable to such action and *were damaged thereby.*
>
> (a) Subject to the review provisions provided in Paragraph 20 [of the Stipulation], [27] excluded from the Settlement Class is each Person, other than a Natural ***473** Person, that was identified as a recipient of an allocation of shares from the "institutional pot" in the IPO or Other Charged Offering of any of the 309 Subject Securities, according to a list derived from the final "institutional pot" list created at the time of each IPO or Other Charged Offering by the lead Underwriter in that Offering ("Excluded Allocants").
>
> (b) Also excluded from the Settlement Classes are (i) each Person that currently is or previously was a named defendant in any of the 309 Actions (hereafter "Named Defendant"), (ii) any attorney who has appeared in the Actions on behalf of a Named Defendant, (iii) members of the immediate family of any Named Defendant, (iv) any entity in which any Excluded Allocant or Named Defendant has or during any of the class periods had a majority interest, (v) the legal representatives, heirs, successors or assigns of any Excluded Allocant or Named Defendant; and (vi) any director, officer, employee, or beneficial owner of any Excluded Allocant or Named Defendant during any of the Settlement Class Periods. Notwithstanding the prior sentence, a person shall not be excluded from the Settlement Classes merely by virtue of his, her or its beneficial ownership of the securities of a publicly-traded Excluded Allocant or Named Defendant. [28]

In each settled action, the Class Period is from the date of the IPO until December 6, 2000. [29]

In a June 10, 2009 Opinion and Order ("June Opinion and Order"), I certified the settlement classes in this case after reconsidering the Rule 23(a) and (b) factors in light of the Circuit's new standards. [30] I held that plaintiffs had demonstrated by the preponderance of the evidence that reliance and loss causation could be proven on a class-wide basis. [31] I also ruled that "when the classes are properly circumscribed and institutional allocants are excluded, individual questions of knowledge will not predominate over common ones." [32] Finally, the class no longer excludes those *retail investors* who may have "paid any undisclosed compensation to the allocating underwriter(s)," which the Second Circuit found problematic in *Miles I.* [33] Instead, the settlement classes exclude *all institutional investors* who were also initial allocants whether or not they may have paid improper and undisclosed compensation to the underwriter defendants, therefore resolving the ascertainability problems in the 2004 class certification motion. [34]

D. Fees and Expenses

The Committee [35] requests that the Court award attorneys' fees of one-third of ***474** the Total Designation Amount in each Action and expenses of approximately fifty million dollars in connection with the prosecution of the Actions. [36] In support of its fee motion, the Committee has submitted summary time sheets demonstrating that the attorneys of the firms comprising the Committee have collectively spent 677,000 hours for a lodestar of $276 million. [37] It also notes that it has advanced approximately forty-three million dollars in expenses. [38] The fifty-plus other plaintiffs' firms that were involved in this litigation have reported spending over 350,000 hours, for over one hundred million dollars in lodestar and approximately $7.5 million in expenses. [39]

The Committee also supports the payment of "reasonable" class representative awards for lead plaintiffs, proposed class representatives, and/or proposed settlement class representatives. [40] It has submitted the declarations of over four hundred lead plaintiffs and class representatives attesting to the hours spent and hourly wages lost performing work for this litigation. [41] The Committee requests that the Court grant an aggregate award to lead plaintiffs and class representatives not to exceed four million dollars. [42]

*475 E. Plan of Designation and Allocation

According to the Stipulation, the Settlement Amount is to be distributed to all Authorized Claimants in accordance with the Plan of Allocation, and none shall revert to defendants under any circumstances. [43] The Stipulation further provides that the Plan of Allocation is "not a necessary term of the Stipulation" and is "not a condition of this Stipulation or the Settlement that any particular Plan of Allocation be approved." [44]

The proposed Plan of Allocation (the "Plan") is set forth in the Notice of Pendency. According to the Plan, the $586 million Settlement Amount and interest earned will be reduced by taxes, costs, fees, and expenses to produce a "Net Settlement Fund." [45] This Net Settlement Fund will then be allocated to the Actions in proportion to the amount of potentially recoverable damages in accordance with a table of amounts as set forth in Schedule 2 of the Notice of Pendency ("Net Designation Amounts"). [46] For those cases in which the applied damage methodology resulted in a Net Designation Amount of less than $300,000 for a particular action, it is proposed that such case would be allotted a "floor" or minimum Net Designation Amount of $300,000. [47] This floor applies only in thirty-five cases, "resulting in total additional designations (to those cases) of $3,925,139, over and above the designation amounts resulting from the damage methodology." [48] The highest Net Designation Amount in the 309 cases is approximately twenty million dollars. [49]

Authorized Claimants will be eligible to receive a pro rata share of the Net Settlement Fund designated for the case or cases for which they have a claim up to the amount of their recognized losses ("Recognized Claim"). [50] Where the Net Designation Amount for a particular case exceeds the actual amount of the recognized losses of all Authorized Claimants, the excess will "flow into a pot to be combined with excess Net Designation Amounts from all other Actions ... and will be utilized to pay underfunded Recognized Claims in all Actions." [51] Finally, once all Recognized Claims are paid, any excess funds will be pooled and distributed to all Authorized Claimants in proportion to each Authorized Claimant's "Unpaid Market Loss." [52] The Unpaid Market Loss is calculated by subtracting the Recognized Claim from the Overall Market Loss—equal to the purchase price paid ("PPP") minus the sales proceeds received from a Subject Security ("SPR") or the PPP minus the holding price per Subject Security ("HPS"). [53] The HPS values are calculated using the closing price of the Subject Security as of December 6, 2000. [54]

Recognized Claims will be calculated according to the following formula: For Subject Securities purchased during the Class Period but sold prior to December 6, 2000, ***476** the Recognized Claim is the lesser of (a) the alleged inflation in the price of the security ("IPS") at the date of purchase minus the IPS at the date of sale, multiplied by the number of securities purchased and sold, or (b) the PPP minus the SPR, multiplied by the number of securities purchased and sold. [55] For those Subject Securities purchased during the Class Period and held as of December 6, 2000, the Recognized Claim will be calculated as the IPS on the date of purchase multiplied by the number of securities purchased during the Class Period. [56] For those Authorized Claimants who have purchased and sold a Subject Security more than once during the Class Period, their Recognized Claim will be determined on a Last In First Out or "LIFO" basis. [57] Finally, each Authorized Claimant is entitled to a minimum distribution amount of ten dollars no matter the size of his, her, or its Recognized Claim. [58]

F. Class Representative Approvals

Plaintiffs inform the Court that in each of the 309 cases, at least one of the proposed settlement class representatives affirmatively approved the settlement. [59] However, they also report that in five cases, the lead plaintiff disapproved of the settlement. [60] Nevertheless, they note that none of these lead plaintiffs objected to the settlement or requested exclusion. [61] In addition, they inform the Court that in each of these five cases, a class member who desires to serve as settlement class representative has approved the settlement. [62]

G. Notice

Following this Court's preliminary approval of the settlement, The Garden City Group ("GCG")—Claims Administrator for these actions—mailed more than seven million copies of the Notice of Pendency to potential class members. [63] The Summary Notice was also published in three national newspapers—*The Wall Street Journal, The New York Times,* and *USA Today*—and as a press release over the *PR Newswire.* [64]

Each of the seven million potential class members received a Summary "Frontispiece" that identifies the Subject Security purchased by the class member and summarizes the settlement terms, the Notice of Pendency (the "Notice"), and a Proof of Claim form and instructions for completing the form. [65] Pursuant to the PSLRA, the Notice and attached schedules include the following information: (1) a Statement of Plaintiff Recovery, detailing the aggregate recovery and the recovery on an average per-share basis; (2) a Statement of Potential Outcome of the Case, explaining the ***477** litigation positions of both plaintiffs and defendants at the time of settlement; (3) a Statement of Attorneys' Fees and Costs Sought and Request for PSLRA Awards Reimbursing Reasonable Time and Expense for Representative Plaintiffs, stating the intention of plaintiffs' counsel to seek fees not to exceed one-third of the gross settlement and lead plaintiffs and class representatives awards not to exceed four million dollars and providing the fees and costs on a per-share basis; (4) contact information for members of the Plaintiffs' Executive Committee; and (5) a Statement of the Reason for the Settlement, noting the creation of a $586 million settlement fund for class members. [66]

Pursuant to Federal Rule of Civil Procedure 23(c)(2), the Notice also provides information about the litigation, including a description of plaintiffs' claims and the defenses put forth by defendants. [67] It sets forth the class definition and the settlement benefits. [68] It further provides instructions for submitting a proof of claim, requesting exclusion, and objecting to the settlement. [69] The Notice also informs class members of their ability to hire separate counsel to represent them in this litigation. [70] The Notice informs class members of the date of the fairness hearing, the consequences of failing to act, and how a class member can obtain more information. [71] Finally, it includes details of the Plan of Allocation and a message to securities brokers and other nominees informing them of the Court's Order to submit the names and last known addresses of any entity or person for which they purchased securities during the class period within twenty days of receiving the Notice. [72]

GCG maintains a website at www.iposecuritieslitigation.com ("IPO website"), which includes information regarding the litigation, explains the proposed settlement, and allows class members to submit proofs of claim. [73] GCG also maintains a 24–hour toll-free hotline and an email address to assist class members with their questions. [74] As of August 25, 2009, GCG had received 371 requests for exclusion and 85,848 Proofs of Claim. [75] As of the date of the fairness hearing, GCG had received over 100,000 Proofs of Claim. [76] Although the deadline to request exclusion has passed, class members will have until December 10, 2009 to submit Proofs of Claim. [77]

H. Fairness Hearing

A fairness hearing was held on September 10, 2009. Six objectors spoke at the hearing, and they presented a wide range ***478** of concerns, including objections with respect to the class definition, the Notice, the requested attorneys' fees and expenses, and the requested PSLRA awards. [78] The Committee was given the opportunity to respond to all objections. [79]

III. APPLICABLE LAW

A. Final Approval

Unlike settlements in ordinary suits, the settlement of a class action must by approved by the court. [80] The court owes a duty to class members to ensure that the proposed settlement is "fair, reasonable and adequate." [81] In making this determination, the court's "primary concern is with the substantive terms of the settlement;" accordingly, the court must "compare the terms of the compromise with the likely rewards of litigation." [82] The trial judge must " 'apprise[ ] himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.' " [83] The court should not go so far as to effectively conduct a trial on the merits, but should make "findings of fact and conclusions of law whenever the propriety of the settlement is seriously in dispute." [84] The court must also scrutinize the negotiating process leading up to the settlement. "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." [85]

In determining whether a settlement is "fair, reasonable and adequate," courts in this Circuit look to the following factors: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation (collectively, the "*Grinnell* factors").[86] Ultimately, the approval of the proposed settlement of a class action is a matter of discretion for the trial court.[87] Nevertheless, a court should be mindful of the " 'strong judicial ***479** policy in favor of settlements, particularly in the class action context.' "[88]

B. Plan of Allocation

" 'To warrant approval, the plan of allocation must meet the standards by which the ... settlement was scrutinized—namely, it must be fair and adequate.' "[89] "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel."[90] Nevertheless, "where a proposed settlement provides favorable treatment to some segment of the class, careful judicial scrutiny is required to prevent injustice and to ensure that the burden of settlement is not shifted arbitrarily to a small group of class members."[91]

C. PSLRA Awards

Section 27(a)(4) of the PSLRA states:

> The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.[92]

D. Attorneys' Fees

Federal Rule of Civil Procedure 23(h) provides: "In a certified class action, a court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." " '[A] party that secured a fund for the benefit of others, in addition to himself, may recover his costs, including his attorney's fees, from the fund itself or directly from the other parties enjoying the benefit.' "[93] "This principle is known as the common fund doctrine."[94] " 'The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.' "[95]

Courts may award attorneys' fees in common fund cases under either the "lodestar" method or the "percentage of the fund" method.[96] "The lodestar method ***480** multiplies hours reasonably expended against a reasonable hourly rate. Courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys."[97] "The trend in this Circuit is toward the percentage method, [ ] which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.... In contrast, the lodestar creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits."[98] Nevertheless, "the lodestar remains useful as a baseline even if the percentage method is eventually chosen."[99]

"Irrespective of which method is used, the '*Goldberger* factors' ultimately determine the reasonableness of a common fund fee. They include: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."[100] Finally, "[r]ecognizing that economies of scale could cause windfalls in common fund cases, courts have traditionally awarded fees for common fund cases in the lower range of what is reasonable."[101]

IV. DISCUSSION

A. Final Approval

1. Settlement Discussions

The Court requested and the parties provided affidavits from retired Judges Nicholas Politan and Daniel Weinstein, the two mediators that assisted the parties to come to the terms of the instant settlement. [102] Judges Politan and Weinstein have both attested that the settlement "was fully negotiated, was the best that the settlement classes could obtain, and is fair, adequate and reasonable to the members of the classes." [103] They inform the Court that negotiations spanned nine months, included seven full mediation sessions, and countless phone conferences and other meetings with individual parties. [104] In addition, they confirm that the terms were the product of arms' length bargaining. [105] They note specifically that "[c]ounsel on all sides were well-prepared, extremely ***481** knowledgeable about the facts and the law, and advocated vigorously for their client." [106] Thus, a presumption of fairness, adequacy, and reasonableness attaches to this settlement.

2. The *Grinnell* Factors

Courts in this Circuit look to the nine *Grinnell* factors to determine whether a settlement is "fair, reasonable and adequate" in accordance with Rule 23(e). Although I have already evaluated eight of the nine factors in the June Opinion and Order, [107] I nevertheless consider each of the factors or group of factors again.

a. The Complexity, Expense and Likely Duration of the Litigation

It has been eight years since thousands of investors brought the class action lawsuits that are the subject of this consolidated action. [108] These actions alleged that fifty-five underwriters, more than three hundred issuers, and hundreds of individuals associated with these issuers defrauded the public. [109] On August 9, 2001, the Chief Judge of the United States District Court for the Southern District of New York entered an Order transferring each of these cases to this Court's docket for pre-trial coordination. [110] In an Order dated August 12, 2003, a similar action in Florida was transferred to this Court for pre-trial supervision. [111] Ultimately, all of these cases would have been re-assigned to judges in this district had the actions gone to trial. In addition, plaintiffs note that "a vast amount of additional factual and expert discovery remains to prepare for trials, and motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable." [112] This Court has already issued twenty-nine Opinions in this case. The Court of Appeals has issued three. No one disputes that adjudication of these actions would have been a daunting task, and the expense and effort involved would certainly have been burdensome to the parties and the Court. This factor therefore weighs heavily in favor of final approval.

b. Stage of Proceedings and Amount of Discovery Completed

This factor is aimed at ensuring that the parties have a "thorough understanding of their case" prior to settlement. [113] Litigation in this case has been ongoing for eight years. The Court has decided multiple motions to dismiss, considered numerous motions for class certification, and the parties have submitted more than a dozen expert reports, taken more than a hundred depositions, and reviewed tens of millions of pages in discovery. [114] In addition, ***482** plaintiffs have informed the Court that they are "proposing this settlement with eyes open." [115] I find that this factor weighs in favor of final approval.

c. Risks of Class Prevailing (Establishing Liability, Damages, and Maintaining the Class Through Trial)

Plaintiffs concede that "establishing liability is, at best, uncertain." [116] They contend that defendants have denied any wrongdoing in the case, arguing that the tie-in agreements were really "underwriters gauging 'indications of interest' as part of the IPO price discovery process." [117] Plaintiffs admit that it is possible that a jury might find defendants' version of events to be more compelling, reducing their recovery to nothing. [118] Plaintiffs also acknowledge that if history is any indication, their chances of success at trial is—at best—fifty percent. [119]

Even more complicated is the issue of loss causation and damages. Plaintiffs' expert, Daniel R. Fischel, has proposed a method of proving that the alleged scheme inflated stock prices as early as the beginning of trading and that this inflation dissipated throughout the class period. [120] Defendants have challenged this proposed methodology during previous motions for class certification, submitting reports from a number of other experts in the field. [121] There is a likelihood that defendants' theories might be credited by the jury, thereby limiting the amount of recovery plaintiffs would receive. [122]

Finally, the maintenance of class certification in these cases through trial is fraught with risks. Plaintiffs inform the Court that defendants have compromised on several issues that defendants had previously argued would make these class actions unmanageable if they went to trial. [123] In addition, decertification is always a likely possibility during trial in complex class actions such as these. These factors therefore weigh in favor of final approval.

d. Ability of Defendants to Withstand a Greater Judgment

Although plaintiffs previously argued—and this Court agreed—that the economic climate and the insolvency of many of the defendants made it imperative " 'to take the bird in hand instead of a prospective flock in the bush,' " [124] they now retreat from this argument. In its final approval motion, plaintiffs state that they "do not contend that defendants could not collectively withstand a greater judgment." [125] Indeed, the economy shows signs of recovery, and a number of the underwriter defendants no longer appear to be faltering. While " '[t]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate,' ***483** " [126] this factor weighs against final approval.

e. Range of Reasonableness of Settlement Fund in Light of Best Possible Recovery and Attendant Risks of Litigation

The Second Circuit has held that a settlement that is within a range " 'that recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion,' " will not be reversed on appeal. [127] The Settlement Amount has been one of the most scrutinized parts of the Stipulation. [128] The $586 million settlement represents two percent of the aggregate expected recovery in the 309 actions [129] and is less than the one billion dollar guarantee provided by the Issuer defendants that the Court previously preliminarily approved in 2005. [130] However, a few points are worth noting.

First, and most importantly, it cannot be disputed that the Second Circuit's decision in *Miles I* changed the negotiating positions of plaintiffs and defendants dramatically. Although the Circuit subsequently revived the litigation in *Miles II*—opining that nothing in *Miles I* bars plaintiffs from returning to this Court with a more modest class definition—its ruling in *Miles I* effectively prevented institutional investors who were initial allocants in the IPOs from participating in any class. The exclusion of these institutional investors is largely the reason why the expected recovery in this litigation has decreased from fifty-five billion dollars to thirty-two billion dollars. Plaintiffs cannot expect to receive the same aggregate recovery after *Miles I.*

Second, although a number of objectors noted that the settlement was minuscule compared to the expected recovery in the ***484** case, the Second Circuit has held that a settlement amount of even a fraction of the potential recovery does not render a proposed settlement inadequate. [131] And while the proposed settlement is being compared—justifiably or not—to the expected recovery amount as calculated by plaintiffs' damages expert, plaintiffs note that the expected recovery is based largely on assumptions, "any of which, if wrong, could doom any recovery at all or certainly drastically reduce any recovery even if successful at trial." [132]

Finally, although the billion dollar guarantee provided by the Issuer defendants in 2005 was larger than the current proposed settlement, it was negotiated prior to the Second Circuit's decision in *Miles I.* As noted above, the class size was restricted and the expected recovery severely limited following that decision. It is therefore inappropriate to compare the proposed settlement to the 2005 settlement.

Nevertheless, as I noted in my June Opinion and Order, the 2005 settlement is distinguishable because it was merely a guarantee. None of the proceeds were to be distributed to putative class members until "after the conclusion of all of the above-mentioned proceedings with respect to the Underwriters." [133] In addition, the guarantee required plaintiffs to continue to litigate their claims against the Underwriters. [134] Forcing plaintiffs to litigate the matter until verdict (and potentially through an appeal) would have been not only costly but uncertain. In the end, plaintiffs could have lost against the underwriters after expending significant additional costs. [135]

And while the Settlement Amount is less than the billion dollar guarantee in absolute terms, the class definition has been significantly narrowed. All institutional investors who received IPO allocations from the "institutional pots" are now excluded from recovery, thereby severely limiting the number of potential claimants. Plaintiffs estimate that "there are roughly 7,000 unique entities (other than natural persons) that received allocations from the institutional pot list" and that they and their employees and defendants' employees are now excluded from the settlement class. [136] As a result, although the "pie" is smaller, each Authorized Claimant should ***485** receive a larger slice. [137] I therefore find that the settlement is reasonable in light of the expected recovery and attendant risks.

f. Reaction of the Class to Settlement

The final *Grinnell* factor that I must consider is the reaction of the class to the settlement. " 'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.' " [138] The Second Circuit has also previously provided guidance as to what percentage of the class must object before a settlement would be rendered unfair, indicating that an otherwise fair settlement should not be deemed unfair because of opposition by thirty-six percent of the total class. [139] As noted, over seven million notices were sent to potential class members, and the Committee informed the Court at the Fairness Hearing that GCG has received over 100,000 Proofs of Claim as of that date. GCG reports that as of August 25, 2009, it has received 371 requests for exclusion. As of the date of this Opinion, the Court has received objections from approximately 140 class members—less than a hundredth of one percent. Nevertheless, because many of the objectors have raised valid concerns, I will discuss and respond to each of them. [140]

i. Notice Was Inadequate

Some class members opined that the Notice was inadequate and incomplete. For instance, Douglas Parker contends that the Notice fails to: (1) give details of the 2005 proposed settlement so that class members can compare that settlement with the current settlement; (2) set forth the aggregate amount of estimated damages or the contributions of the underwriters to the settlement; (3) provide evidence that the defendants are unable to withstand a greater settlement; (4) disclose the reasons why five of the lead plaintiffs declined to approve the settlement; and (5) disclose any information substantiating plaintiffs' counsel's request for fees and expenses. [141] At the fairness hearing, a number of objectors opined that the Notice was inadequate because it failed to provide information substantiating the Committee's request for PSLRA lead plaintiff and class representative awards not to exceed an aggregate of four million dollars. [142] Objectors argued that class members need to know how much is being awarded to these class representatives before they decide whether to participate in the settlement. [143]

As an initial matter, neither the PSLRA nor Rule 23 requires greater disclosure than the contents of the Notice of Pendency ***486** that was disseminated in these actions. [144] And although the PSLRA provides that a court may direct notice of additional information to class members, I noted at the fairness hearing that providing too much information may also pose significant problems—doing so may confuse class members and make it impossible for them to locate the information in which they are most interested. [145] Nevertheless, I will discuss each of the above objections in turn.

The 2005 Settlement

Although I predicted that class members might compare the current settlement to the 2005 settlement and therefore distinguished the two settlements in my June Opinion and Order and again in this Opinion, that settlement should not be a relevant factor in a class member's consideration of the current offer. The 2005 settlement was offered by the Issuer defendants prior to the Second Circuit's decisions in *Miles I* and *Miles II* and was derailed by those opinions. In any case, the settlements are easily distinguishable because the 2005 settlement was not only based on a larger expected recovery, but provided only a *guarantee* of recovery some time in the future.

Aggregate Amount of Estimated Damages

Although the Notice does not include the aggregate amount of estimated damages for all 309 actions, it includes the estimated recovery for each of the actions, which is all that is required under the PSLRA. [146] A class member need only add all of the individual damages figures to obtain an aggregate figure. And while the Notice did not specify how much of the settlement is being paid by the underwriters as opposed to the issuers, the Court has since directed plaintiffs' counsel to disclose on the IPO website the fact that the bulk of the settlement is being paid by the underwriters and "a portion is being paid by the insurance companies for the Issuers." [147] The Court can now disclose that although the Underwriter defendants (and/or their insurers) and the insurers of the Issuer defendants participated in the settlement, no portion of the settlement is being paid by the Issuer defendants themselves. Plaintiffs' counsel note that they have not been able to identify one case in which notice was deemed inadequate because of a lack of disclosure of the contributions of each defendant to the settlement, and objectors ***487** have cited to none. [148]

Evidence of Defendants' Ability to Withstand Greater Judgment

As noted, whether the defendants can withstand a greater judgment is one of the *Grinnell* factors a court must consider when determining whether to approve a proposed settlement. However, this factor should not be over-emphasized. Just because a defendant is capable of making a larger payment does not mean that the settlement is inadequate. What is required is only a determination that the settlement is fair, reasonable, and adequate. Nevertheless, the Court has already held that this factor weighs against approval of the proposed settlement.

Reasons that Five of the Lead Plaintiffs Did Not Approve the Settlement

Although the refusal of five lead plaintiffs to approve the settlement may appear troubling, the substitution of unnamed class members for named plaintiffs who fall out of a case because of settlement "is a common and normally an unexceptionable [ ] feature of class action litigation...." [149] And the Committee has informed the Court that those reasons cannot be disclosed without a waiver of the attorney-client privilege with respect to communications between plaintiffs' counsel and those five lead plaintiffs. [150] The Committee also notes that none of these five lead plaintiffs have opted out of the class, nor have any of them objected to the settlement. [151]

Substantiation of Request for Attorneys' Fees and Expenses

Pursuant to Court order, the Committee posted a short summary of the work it has performed on this litigation on the IPO website. [152] Class members were therefore able to evaluate the request for fees in light of the work performed in the litigation prior to the deadline for submission of objections. In addition, the request for attorneys' fees and expenses has since been filed with the Court and posted on the IPO website, pursuant to Court order. [153] An additional period of time has been extended to class members to object to plaintiffs' counsel's application. [154] The Court has carefully considered these objections and the application in determining the proper and fair amount to award to ***488** plaintiffs' counsel. [155]

Substantiation of Request for PSLRA Awards

Some objectors opined at the fairness hearing that class members could not consider the proposed settlement without information regarding each individual lead plaintiff's or class representative's request for PSLRA awards. [156] As noted at the fairness hearing, however, I am not aware of any settlement in which a court has ruled on fee applications prior to providing notice to the class. [157] Moreover, the Notice included plaintiffs' counsel's request of awards to lead plaintiffs and class representatives not to exceed four million dollars. For purposes of deciding whether to participate in the settlement, the amount that individual lead plaintiffs or class representatives are requesting is irrelevant. Furthermore, as with the attorneys' fees, each award request has since been posted on the IPO website for review by class members. [158] Any argument that failing to give notice of such information by mail is in contravention of the PSLRA is erroneous. The Notice provides the information required by the PSLRA, including the maximum amount of the award request and the PSLRA Statement of Fees, Expenses and PSLRA Award Requests per damaged share. [159]

ii. Required Documentation Is Too Burdensome

A number of objectors noted that the documentation required to substantiate ***489** their claims is unreasonably burdensome considering the small recovery they will receive and the lapse of time since their investments. [160] Some objectors question how plaintiffs' counsel and GCG have been able to locate enough information to identify potential class members but nonetheless cannot find the other information needed to substantiate class members' claims. [161] Plaintiffs' counsel respond that a "vast majority" of class members were notified during the 2005 settlement that they should retain documentation to support their claims. [162]

A requirement that potential class members provide documentation is not unusual in securities litigations. This measure is implemented for the purpose of reducing the number of fraudulent claims. Nevertheless, any documentation requirements must be reasonable in light of the time that has passed since many of these securities were traded. The Court had therefore ordered plaintiffs' counsel and GCG to post a notice on the IPO website, notifying potential class members that they should submit all proofs of claim no matter the lack of appropriate documentation. [163] Thus, all potential class members who wish to participate in this settlement but who cannot locate appropriate documentation are nonetheless encouraged to submit their claims documents —GCG and plaintiffs' counsel are directed to attempt, in good faith, to determine each claim's eligibility for participation.

iii. Claims Lack Merit

A few objectors contend surprisingly that the claims in this action have no merit. For instance, one class member opined ***490** that "[t]he lawsuit [is] frivolous. The only sin committed by the 309 companies was that they conducted their IPO[s] just before the bubble burst and the stock market crashed." [164] Two other objectors state, "[w]e believe the claims are without merit and therefore we beg the court to rule against the plaintiffs." [165] Yet another objector contends "[w]ere this case to go to trial, it seems readily apparent that, while expensive, the defense would win and the plaintiffs and their attorneys and representatives would receive absolutely nothing." [166] Finally, one objector believes that "the case is based too much on plausibility and based insufficiently in reality. The court documents I reviewed indicate that nothing has been proved." [167]

Because the parties agreed to settle this litigation in the midst of discovery, the Court has not made any rulings regarding the merits of the actions. Nonetheless, this objection makes no sense—particularly in light of the fact that the Issuer defendants are not contributing to this settlement. That plaintiffs' counsel were able to negotiate a settlement with defendants over allegedly weak claims indicates that plaintiffs' counsel have represented their clients well. [168]

iv. The Objections of Theodore Bechtold

On behalf of thirty-nine objectors, attorney Theodore Bechtold filed a number of letters voicing objections to the proposed settlement. [169] Some of the objections have been addressed above, such as the inadequacy of the settlement amount and the inadequacy of the Notice. [170] Bechtold argues additionally, however, that (1) the same person cannot serve as lead plaintiff in more than one action, and (2) that this ***491** Court's "participation in some related IPOs" exacerbates the concerns about possible conflicts of interest. [171]

Both of these contentions have been adequately addressed by the Court in previous opinions and rulings. For instance, in 2002, this Court held that it was appropriate for the same person to serve as a lead plaintiff in multiple IPO cases. [172] Moreover, I agree with plaintiffs' counsel's argument that such challenge has surely been waived when none of Bechtold's clients have ever questioned the appointment of any of the lead plaintiffs until now or moved to be appointed lead plaintiff or class representative. [173] Bechtold's second objection was also addressed in one of my previous decisions. [174] I held there that I had nothing more than a " 'remote, contingent, or speculative' " interest in the litigation and therefore dismissed any claim that there was a conflict of interest. [175]

Bechtold also submitted a letter that criticizes the appointment as lead plaintiff in several cases in this litigation of Saul Kassin, who Bechtold claims is the same Saul Kassin that was arrested recently on federal money laundering charges. [176] Bechtold argues that Saul Kassin's involvement in this case "taints [the] involvement of [all of the Kassins] in the IPO Securities Litigation...." [177] The Committee has confirmed that the Saul Kassin that is serving as lead plaintiff in several cases is not the same man as the Saul Kassin that was arrested. [178] Bechtold's arguments are therefore rejected. [179]

v. Conclusion

Having carefully considered and addressed the objections to the proposed settlement, I conclude that the *Grinnell* factors weigh—on balance—in favor of approving the proposed settlement. I therefore find that the proposed settlement is fair, reasonable, and adequate, and the settlement is hereby approved.

B. Class Certification

In addition to challenging the fairness of the settlement, some of the objectors also criticized the Court's certification of the settlement classes in these actions. I will address each of these issues in turn.

1. Class Definition

JKM Company contends that the class definition incorrectly includes investors "who were damaged." [180] JKM Company suggests that the class certification should include only those individuals who purchased shares of the Subject Securities during the class period regardless of whether they were damaged. [181] It argues ***492** that inclusion of such a phrase in the class definition "(1) does not provide a precise, objective and presently ascertainable way to identify class members, (2) requires a 'mini trial' to determine whether a particular person is in the class, and (3) requires the Court to address the central issue of liability (whether a person has suffered damages)." [182]

This argument has no merit. Class definitions are important because (1) they identify the individuals who are precluded from bringing suit in the future, in accordance with the Stipulation's bar provision, and (2) they identify the individuals who may recover pursuant to the Plan of Allocation.

First, an investor who was not damaged by defendants' alleged misconduct would not otherwise be able to bring a claim based on the same misconduct in a subsequent action. It is therefore of little consequence that the class definition contains the "and were damaged thereby" phrase. [183] For purposes of determining who can bring suit in the future, that phrase is simply superfluous because an investor who is not damaged would not have a viable claim.

Second, at the fairness hearing, JKM Company argued further that it could not ascertain easily whether it was a member of the class because the phrase "and were damaged thereby" was not defined. [184] But an investor incurs damages on his, her, or its purchase by losing money. A quick look at trading records would show whether JKM Company had lost money on its investments. Thus, the cases to which JKM Company cites are inapposite. *Chiang v. Veneman* and *Williams v. Glickman* are discrimination cases. [185] In these cases, the Third Circuit and a district court in the District of Columbia rejected class definitions that required a determination as to whether potential class members suffered discrimination. [186] Similarly, in ***493** *Kenro, Inc. v. Fax Daily, Inc.,* the district court refused to certify a class defined as "all persons or entities who have received ... a publication from Fax Daily, Inc .... without the prior expressed invitation or permission of such person or entity." [187] In each of these cases, class membership hinged on the courts' ability to determine whether an individual was discriminated against or whether he or she had invited the advertisements, necessitating individual mini-trials. [188] This is not the case here.

Moreover, the Plan of Allocation defines how damages will be determined. Those who believe they have been damaged will submit their proofs of claim, and each claim will be evaluated based upon an objective formula pursuant to the Plan of Allocation. Thus, to the extent that JKM Company is questioning how a determination will be made regarding who has been damaged, its objection is properly directed to the Plan of Allocation, which I discuss later in this Opinion. [189]

Finally, while this particular issue has never been addressed by the Second Circuit, the Fifth Circuit has affirmed a class definition with the phrase "and were damaged thereby" [190] and similar classes have been certified by other courts in this district. [191] JKM Company's objection is therefore unfounded.

2. Class Period

Objector James J. Hayes contends that the class period is too long because any alleged inflation would have dissipated after the first quarterly earnings statement was issued by each issuer, apprising potential class members of the actual value of their investments and uncovering possible manipulation. [192] However, whether the first earnings report of any of the issuers would have informed shareholders and potential investors about the true value of their investment is an issue common to all class members. Class certification requires only that the Court assess whether each element of plaintiffs' claim can be resolved class-wide. The question of whether plaintiffs could succeed in showing that the alleged inflation persisted for the entire class period is properly addressed ***494** after class certification. [193]

3. Adequacy of Representation

Hayes also claims that the Court failed to find by a preponderance of the evidence the adequacy of the representation with respect to plaintiffs' counsel. [194] In the June Opinion and Order, I appointed class counsel pursuant to Rule 23(g), noted that several of the findings that I made in 2004 regarding class certification would not change even when evaluated against the preponderance of the evidence standard, and found that plaintiffs had satisfied the adequacy of representation requirement with respect to *class representatives.* [195] I will now address the adequacy of representation with respect to *plaintiffs' counsel.*

In order to conclude that the adequacy of representation requirement has been satisfied, courts must determine that "plaintiff's attorneys are qualified, experienced and able to conduct the litigation." [196] Each of the firms that comprise the Committee has tremendous experience in complex securities litigation. [197] They have secured multi-million dollar settlements in a number of class actions, have won awards for their advocacy, and been praised by judges in other litigation. [198] They have expended enormous resources to litigate these actions and negotiate this settlement, as is clear from the documentation they have submitted in support of their fee and expense request. They are knowledgeable about the issues and have vigorously represented the interests of class members. Hayes notes that counsel are inadequate because the recovery they negotiated was small compared to the expected damages, [199] but that is properly an objection to plaintiffs' counsel's fees, rather than to the adequacy of their representation. I therefore hold that the adequacy of representation requirement has been met.

4. Knowledge

Leslie Baum, Mike Hart, and Sue Shadley, through counsel, filed a joint letter contending that the new settlement class definition does not resolve the question of knowledge. [200] They note that although the ***495** settlement classes have been narrowed to exclude those *institutional investors* who received allocations in the IPOs, they do not exclude *natural persons* who were identified as recipients of an allocation of shares from the "institutional pot." [201] However, the Second Circuit in *Miles I* was largely concerned with the knowledge of institutional investors who were initial allocants and their employees. [202] Also, the Amended Master Allegations state that "the overwhelming majority of retail allocants, who generally receive relatively small allocations, also traded in ignorance of the scheme, as the Underwriter Defendants focused their requirements on certain investors, who generally receive relatively large allocations." [203]

Additionally, this Court has held that plaintiffs are entitled to a presumption of reliance. [204] While some natural persons who received initial allocations *may* have possessed knowledge of the scheme, objectors have not produced evidence to show that the number of such investors was more than a very small percentage of retail investors. Thus, the presumption remains unrebutted.

Finally, in *Miles I,* the Second Circuit noted in particular plaintiffs' identification of more than eleven thousand institutions and individuals that were allegedly induced into improper trading arrangements by defendants, ruling that this statistic called into doubt the vitality of the presumption of reliance.[205] Plaintiffs have determined that seven thousand "unique entities (other than natural persons) [ ] received allocations from an institutional pot list."[206] That means that only four thousand retail allocants *may* have been aware of the scheme. When these investors are compared to the more than one hundred thousand class members who have submitted proofs of claim thus far, it is clear that common issues will predominate over individual issues. The exclusion of institutional investors who were initial allocants from the classes therefore resolves the predominance problem.

5. Reliance

Baum, Hart, and Shadley also challenge the application of the *Affiliated Ute* presumption to cases involving price manipulation.[207] They cite to the Ninth Circuit case of *Desai v. Deutsche Bank Securities, Ltd.* for the proposition that the presumption is only applicable to cases that " 'can be characterized as ... primarily alleg[ing] omissions' " and that " 'manipulative conduct has always been distinct from actionable omissions.' "[208] Because the Court held in its June Opinion and Order that plaintiffs had failed to show by a preponderance of the evidence that the markets for shares were efficient during the quiet period for each stock and therefore that plaintiffs are not entitled to rely ***496** on the *Basic* presumption,[209] Baum, Hart, and Shadley argue that the class should exclude all investors who purchased during the quiet periods.[210]

However, *Affiliated Ute* itself was a case based on manipulative conduct. *Affiliated Ute* involved the partition of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah.[211] According to the articles of the Ute Distribution Corporation ("UDC")—the corporation that was established for the purpose of managing the assets—any mixed-blood shareholder wishing to sell his shares in the UDC was required to offer a right of first refusal to other full-blood and mixed-blood members of the tribe prior to making the same offer to a non-member.[212] In violation of the UDC articles, two non-Indian men—employees of the bank that was the transfer agent of these shares—concocted a scheme whereby they solicited and purchased UDC shares from mixed-blood Indians for themselves or for other non-Indian purchasers and made a profit doing so.[213] The Supreme Court concluded that "defendants had devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their decisions to sell" such as that they were profiting from their purchases of shares.[214] The Court thus held that in this situation, involving "primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery."[215]

Similarly, here, plaintiffs allege that defendants engaged in a scheme to induce the purchase of IPO shares at inflated prices and for undisclosed compensation and also sustained the price inflation by publishing misleading analyst reports.[216] They further allege that defendants failed to disclose the nature of the scheme and the underwriter and analyst compensation in the prospectuses that were sent to investors.[217] The Supreme Court specifically contemplated that *Affiliated Ute* would apply in this situation. And the Second Circuit has given no indication that the *Affiliated Ute* presumption should not apply in this case.[218] This argument is therefore rejected.

6. Conclusory Objections

Finally, a number of objectors argue conclusorily that the settlement classes should not be certified because the revised class definition does not adequately resolve issues of reliance, causation, and ascertainability.[219] In my June Opinion and Order, ***497** I discussed in detail plaintiffs' burden in meeting these requirements. I found that plaintiffs had demonstrated by a preponderance of the evidence that reliance and loss causation could be proven on a class-wide basis and determined that the settlement classes were ascertainable. Nothing in these objections persuade me of the need to revisit the conclusions in my June Opinion and Order. I am therefore fully satisfied that plaintiffs have demonstrated by a preponderance of the evidence that the class certification requirements have been met.

C. Plan of Allocation

A Plan of Allocation has been recommended by plaintiffs' counsel, a group of competent and qualified counsel. As such, I need only review the plan to confirm that it has a reasonable, rational basis. After a thorough review of the plan, I conclude that it is fair and reasonable.

Because defendants would only agree to a global settlement of all of the actions, the parties propose a minimum designation from the Settlement Fund of $300,000 per case in this settlement. [220] Plaintiffs' counsel assert that the purpose of this "floor" is to allow class members from each of the actions to participate meaningfully in the proposed settlement even where the expected damages for such action was comparatively small. [221] Only thirty-five cases will receive a $300,000 minimum designation, and the total additional designations to these cases is $3,925,139 over the amount that would be paid if no "floor" were to apply. [222] Because only a small portion of the gross settlement fund is deducted in order to provide these minimum designations and such decrease in the fund affects the remaining 274 actions equally, I find that these minimum designations are reasonable and just.

According to the Plan of Allocation, each Authorized Claimant will receive a pro rata share of the Net Settlement Fund in proportion to the damages he or she sustained. [223] Where Subject Securities are purchased *and sold* during the class period, an Authorized Claimant's "Recognized Claim" is calculated as the lesser of either the difference between the alleged inflation of the shares at the time of purchase and the alleged inflation at the time of sale or the difference between the purchase price paid and the sales proceeds received. ***498** [224] Where Subject Securities are purchased during the class period *and held* throughout the rest of the class period, the Recognized Claim is equal to the inflation per share at the date of purchase multiplied by the number of shares purchased during the class period. [225]

The Plan of Allocation also provides a minimum claim amount. Each Authorized Claimant with a valid Recognized Claim will receive—at a minimum—ten dollars no matter how small his, her, or its Recognized Claim. [226] Many of the objectors have calculated their recovery to be insubstantial. They complain that the proposed settlement is insufficient to cover postage for the proof of claim and the efforts expended to retrieve documents. [227] Just as the minimum designation amounts are necessary and reasonable to enable each case to participate meaningfully in the proposed settlement, a minimum claim amount is required to enable class members with relatively small claims to participate meaningfully.

Finally, any excess from the Net Settlement Fund in a case will be re directed to satisfy the Recognized Claims of Authorized Claimants in all other cases. [228] No Authorized Claimant will be paid more than his or her Recognized Claim until all Authorized Claimants have been paid fully. [229] In the unlikely scenario that there are remaining funds after distribution, they will be pooled together and distributed to all Authorized Claimants in proportion to each Authorized Claimant's "Unpaid Market Loss." [230] No objections have been received with respect to the Plan. Because I find that the Plan is fair and reasonable, it is hereby approved.

D. PSLRA Awards

The Committee has submitted a request for PSLRA awards on behalf of 439 lead plaintiffs, class representatives, and settlement class representatives in the 309 actions. As explained in the Notice, the Committee is seeking no more than four million dollars in awards for class representatives.

Section 27(a)(4) of the PSLRA mandates that a class representative should not receive a greater share of the settlement than other class members. [231] Nevertheless, it also permits this Court to award "reasonable costs and expenses (including lost wages) directly relating to the representation of the class." [232] In a number of recent district court decisions in this Circuit, the court declined to award reasonable fees and expenses where the representative failed to show how the expenditure of time " 'resulted in actual losses, whether in the form of diminishment in ***499** wages, lost sales commissions, missed business opportunities, use of leave or vacation time or actual expenses incurred.' " [233] Indeed, the language of section 27(a)(4) indicates the intent that no class representative benefit disproportionately from a settlement.

The Court has reviewed all of the declarations submitted in support of the PSLRA applications. Each declaration is based on a form declaration; the only unique information is the hours the representative attests to spending on the litigation and his or her hourly wage, if employed. [234] If the representative was employed by the hour, he or she was instructed by counsel to provide his or her highest hourly rate. [235] If the representative was employed in salaried work, he or she was instructed to take his or her highest annual income and divide it by 2,080 hours to determine the appropriate hourly rate. [236] If the representative was not employed during the litigation, he or she was instructed by counsel to request an hourly wage of twenty-five dollars per hour. [237] In some declarations, the paragraph that provides this information includes the following sentence: "Had I not been working on this litigation, the time I spent would have otherwise been directly devoted to my employment as a _____ and therefore amounts to foregone income opportunities." [238] Other declarations do not contain this sentence. [239]

Each declaration further provides that the representative reviewed drafts of pleadings, pleadings, and other documents pertinent to the litigation. [240] Each representative also attests to having completed a "detailed" questionnaire that was provided to defendants. [241] Each declaration states that the representative has not been "provided or promised any consideration or benefit, directly or indirectly...." [242] Finally, each declarant states that "[a]t all times during this litigation, I have taken my obligations as representative party seriously and have been committed to performing my duties in a manner that benefits the best interests of the Class." [243] Plaintiffs' counsel, David Kessler, informs the Court that a number of focus case representatives sat for depositions during the litigation and their declarations reflect the work performed for those depositions. ***500** [244]

Those representatives who were unemployed during the litigation have submitted declarations attesting that they were not working and requesting twenty-five dollars per hour for work performed on this litigation. The PSLRA makes clear that only lost wages may be awarded. Simply put, unemployed representatives cannot show that they incurred any lost wages. Their requests are therefore denied.

The requests of those representatives who were employed during the litigation but who attest only to the hours spent on this litigation and their hourly rate are also denied. These representatives make no mention of having *lost* wages as a direct result of the work performed on these cases and thus are not entitled to awards for lost wages.

That leaves those representatives who were employed during the litigation and who attest that they "would have" otherwise devoted time spent on this litigation to their employment. I note that the declarations of these representatives fail to give further details of the vacation time foregone to perform work for this litigation or that work for this litigation was performed during normal working hours. Such generalized assertions would, under other circumstances, be insufficient. Nevertheless, given the extraordinary length of this litigation and the difficulties I suspect many representatives encountered difficulties identifying the occasions in which lost wages were incurred, such assertions are sufficient. However, I cannot refrain from making certain observations regarding these requests.

As noted by a number of objectors who appeared at the fairness hearing, some of the requests are plainly excessive. [245] For instance, Saswata Basu—a class representative and settlement class representative in the Lante Corporation, Neoforma, Onvia.com, Ventre Corporation, Corvis, and Avenue A actions and lead plaintiff in the Lante Corporation, Neoforma, Corvis, and Avenue A actions—attests to spending 1,200 hours "monitoring the progress of the case" and reviewing "drafts of pleadings, pleadings, discovery requests and various status letters" provided by counsel in this litigation. [246] Because he is an entrepreneur who would have otherwise spent the time on other opportunities, he asks for $500 per hour. [247] Basu thus requests a total of $600,000 for his representation of the classes. [248] Such request is exorbitant when measured against any scale of reasonableness.

A number of representatives hold executive positions in corporations and are paid handsomely. For instance, Marc Gelman, lead plaintiff, class representative, and settlement class representative for ITXC, is the Chief Executive Officer of Enhanced Affordable Development and ZRS Construction. [249] He asks to be paid at his hourly rate of $2,000. [250] He attests to spending thirty-five hours performing work as a class representative and therefore requests a total award of $70,000. [251] ***501** Jack Schwartz, lead plaintiff of Drkoop.com, is the President of Jack Schwartz Shoes, Inc. [252] In that capacity, he makes $1,200 per hour. [253] Because he spent 120 hours on this litigation, he requests an award of $144,000. [254]

In yet other instances, class representatives requested a fee award that exceeds the hours spent working on this litigation multiplied by their hourly rate. [255] The declarations provide no explanation for why the requested amount exceeds the lost wages.

After reviewing all of the declarations, I am imposing the following rules to ensure the reasonableness of the fee awards. *First,* I have limited the hours expended by each representative eligible to receive an award to the median number of hours expended by focus case representatives and the median number of hours spent by non-focus case representatives. The median number of hours for focus case representatives is one hundred hours. The median number of hours spent by representatives in non-focus cases is fifty hours. Although a number of individuals are serving as class representatives in multiple actions, all 309 actions have proceeded during the last eight years as one consolidated action, and these representatives should not have performed a substantially greater amount of work than those who are representatives in only one action.

Second, I am also imposing a two hundred dollar cap on the hourly rate of all representatives. This is appropriate given that all representatives were instructed by counsel to provide their highest hourly rate notwithstanding that this litigation has been ongoing for eight years, and therefore, these individuals may not have been earning the hourly rate requested for the entire period. In addition, awarding these individuals such high rates without documentation substantiating their compensation or providing further details regarding specific instances of lost wages would be unjust.

Third, some class representatives attested to being employed for only part of the litigation period, without specifying the length during which they were employed. For those representatives, I limited the number of hours of work performed at half of their reported hours.

Fourth, a few class representatives also request out-of-pocket expenses. For instance, Abraham Kassin, a class representative and settlement class representative in nineteen actions and lead plaintiff in seven actions, requests $18,960 in expenses for "obtaining documents, copying documents, [ ] shipping documents, and meeting with counsel, among other things." [256] There is no itemized list, nor are any receipts attached to substantiate these costs. Another representative attaches receipts to substantiate his expenses, but there is also an indication that the expenses were already reimbursed by plaintiffs' counsel. [257] Only one representative ***502** attests to having incurred out-of-pocket expenses of fifty dollars and informs the Court that receipts will be produced if requested. [258] Because no representative properly submitted an itemized list of expenses, attached receipts, *and* attested that none of the expenses had already been reimbursed, I decline to grant any request for out-of-pocket expenses. [259]

Based on the above rules, I have determined the awards of each lead plaintiff and class representative. A list of these awards is appended to this Opinion and Order as Exhibit 1. The PSLRA awards for class representatives total $1,303,593.05.

E. Attorneys' Fees and Reimbursement of Expenses

Almost all of the objectors criticized the amount of the requested attorneys' fees, claiming that plaintiffs' counsel are getting a big pay day at the expense of class members. Without denigrating these objections, one point is worth making at the outset. A class action is a policy device that was designed to "overcome the problems that small recoveries do not provide the incentive for any individual to bring a sole action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually the attorney's) labor." [260] It is precisely the promise of a reasonable fee that encourages plaintiffs' attorneys to accept cases such as these and risk spending their own financial resources and personal efforts for years until recovery can be obtained for the class. Nevertheless, the Second Circuit has instructed district courts considering fee requests by class action counsel to act "as a fiduciary who must serve as a guardian of the rights of absent class members." [261]

1. Reimbursement of Expenses

The Committee requests $50,354,709.03 in expenses on behalf of all of the firms that comprise plaintiffs' counsel. [262] These expenses alone represent approximately 8.6 percent of the gross settlement fund. In support of these expenses, the Committee has submitted a summary expense report for each of the firms comprising the Committee and a summary report of the expenses for all of the other firms. [263] ***503** These costs include routine expenses relating to copying, court fees, postage and shipping, staff overtime, phone charges, and travel and transportation. [264] Plaintiffs' counsel also request the reimbursement of those expenses incurred and paid for by the Plaintiffs' Litigation Fund (the "Fund"), to which each firm contributed, for a total of $14,174,318.32. [265] The Fund was used for similar routine expenses such as copying and travel costs, as well as other costs unique to this litigation such as bank charges, rental and relocation costs associated with a document depository, and temporary personnel. [266]

As noted, the Court entered an Order on August 17, 2009 directing the Committee to post counsel's fee and expense application on the IPO website and allowing class members an additional period within which to submit objections to that application. [267] Although a number of attorneys and class members objected generally to the fee application—in writing and at the fairness hearing—only one objection was received with respect to the expense request.

The objection letter, submitted on September 8, 2009 by counsel for class members James J. Mary, Mark Merrill, Vondell Tyler, Ernest Browne, Jr., and Susan Browne, asks the Court to scrutinize the expense request carefully. [268] The letter notes that no substantiation of any of the expenses has been submitted in order to allow the Court to properly ensure that reasonable rates were charged for items such as copying and travel expenses. [269] The letter also raises a question regarding the firms' request for reimbursement of their contributions to the Fund, noting that many of the Fund's expenses have also been requested in each individual firm's summary report. [270] Finally, the letter argues that the Court should deny counsel's request for computerized research fees, contending that these charges are properly part of a law firm's overhead and should not be charged to the class. [271]

On September 17, 2009, the Committee submitted a response to this objection. In its submission, the Committee represents that most of the firms charged ten cents per copy, but noted that reimbursement of copying at a rate of twenty-five cents per copy is "not uncommon." [272] The Committee also represents that there is no overlap between the expenses incurred by each firm and the expenses incurred by the Fund. [273] Moreover, the Committee argues that the Second Circuit has allowed reimbursement of computer research fees as part of a fee award. [274] It also notes, in ***504** any case, that the costs under the category of "Computer & Other Research Fees" include primarily expenses associated with electronic discovery management. [275] Finally, the Committee concedes that some of its attorneys may have flown business or first-class when traveling, but notes that "[t]he instances were limited, [ ] and in the exercise of each lawyer's business judgment." [276]

The Committee attaches a list itemizing the combined expenses under each category of the firms comprising the Committee, the fifty other firms, and those paid for from the Fund. [277] On September 14, 2009, this Court issued an Order directing the Committee to file a declaration explaining any guidelines imposed on counsel with respect to travel charges, phone charges, copying costs, and other expenses. [278] In response, Stanley Bernstein, Chair of the Committee, submitted a declaration stating that the Committee "limited to $250 the daily living expenses of out-of-town personnel traveling to New York for long-term assignments at the IPO headquarters." [279] Bernstein also attests that each firm was expected to "charge its expenses at its customary rates and as it would in the normal course of business." [280]

Although the Committee has attempted to clarify some of the rates underlying the various costs for which plaintiffs' counsel are collectively requesting reimbursement, its submission is woefully inadequate. While submitting receipts to substantiate every expense would have been unreasonably taxing on counsel and burdensome for the Court to review, counsel's request is otherwise unsupported by any detailed information upon which the Court can rely in ascertaining whether the rates charged are reasonable. For instance, plaintiffs' counsel are asking for over four million dollars in commercial copying costs, but have not provided information related to the per-copy cost they are charging nor the number of copies made. The Committee argues that "[m]ost firms charged $0.10 per copy," but it does not identify which portion of the costs were charged at that rate, nor does it inform the Court of the reasons why so much copying appears to have been sent outside of the firms. Although it is unclear what the difference is between "Commercial Copies" and "Reproduction," the Court will assume—to the Committee's benefit—that "Reproduction" is the category of expenses detailing charges due to in-house copying while the category of "Commercial Copies" includes charges related to outside copying. Accordingly, I am reducing expenses associated with "Commercial Copies" by thirty percent to account for copies that could have been made in-house. I am also reducing "Reproduction" expenses by ten percent to account for those firms who charged more than ten cents per copy.

Some of the firms comprising the Committee are requesting reimbursement of costs related to secretarial and other staff overtime, but it is unclear how many overtime hours were worked or at what hourly rates. [281] I am therefore also reducing the ***505** expenses related to such overtime costs by fifty-seven percent. [282] I have also reduced the costs associated with "Temporary Personnel" by the same percentage.

A $250 per day limit on lodging and meal expenses seems reasonable. However, no reasons are given for why some of these firms incurred hotel costs for their attorneys when the New York office of their firm was spearheading this litigation. [283] In addition, the Committee concedes that some attorneys may have flown business or first-class to work on this litigation. A cap that includes only lodging and meals has little significance if no limit exists for airfare and other travel costs. I am therefore reducing travel costs by twenty percent. [284]

Finally, because the Second Circuit has allowed expenses associated with computer research fees to be reimbursed, I am reimbursing the costs of all such research. [285] The Committee has also represented that it has not included in the Fund request any expenses that are duplicative of the expenses reported by individual firms. [286] I accept this representation. Plaintiffs' counsel are therefore awarded reimbursement of expenses in the total amount of $46,941,556.96.

2. Award of Fees

In addition to over fifty million dollars in expenses, the Committee also requests a total fee of one-third of the gross settlement fund, or $195 million, for *all* counsel. [287] Although only a few of the objectors expressed concern regarding the expense request, almost every objector opined that the fee request in this case is unreasonable.

a. Counsel's Lodestar

Although I intend to use the percentage method to award fees in this matter, the lodestar is often used as a cross-check. I will therefore review the requested lodestar before evaluating the *Goldberger* factors.

The Committee contends that its lodestar is $278 million. In support of this lodestar, the Committee has submitted a summary of the hours expended by and ***506** the billing rates for every attorney, paralegal, and staff member that worked on this litigation over the last eight years. Because the lodestar is being used merely as a cross-check, it is unnecessary for the Court to delve into each hour of work that was performed by counsel to ascertain whether the number of hours reportedly expended was reasonable. [288] However, a review of the rates charged by counsel suggests that there is ample room for downward adjustment.

First, I note that the rates charged are the current billing rates of each attorney, paralegal, and staff member. [289] In those cases in which the attorney has since left the firm, the Committee used the attorney's rate at the time of departure. [290] In a litigation as long as this one, it is obvious that current billing rates are likely to be much higher than those used in 2001. In fact, during the eight years of this litigation, a junior associate could have been promoted to partner, and his or her billing rate could have increased two or three-fold. It would therefore be unreasonable to apply his or her current billing rates to all of the hours worked throughout the eight years of litigation. I therefore find the rates charged by counsel to be excessive. [291]

Second, although the appropriate hourly rates are " 'those [rates] prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation,' " [292] I note that it is often the practice among law firms to accord clients a discount on fees while maintaining high billing rates. Therefore, while a partner's stated hourly rate might be nine hundred dollars per hour, the client may not actually pay this rate. In addition, a number of firms have begun utilizing flat fees, which are often substantially less than the fees a firm would receive if it billed by the hour. [293]

Based on these two observations, I have decided to reduce the hourly rates of all attorneys and paralegals and recalculate the Committee's lodestar. In determining maximum rates for partners and associates, I considered the proposed hourly rates of the most senior partners and associates. For instance, Arthur Miller of Milberg LLP charges $995 per hour. Such rate is clearly exorbitant. Although senior partners from large law firms were known to charge such rates in 2007, [294] it is hard to imagine clients from almost a decade ago, much less today, paying such rates. While the Committee may argue that Miller's high billable rate is justified by his status ***507** as a nationally renowned scholar of civil procedure, his expertise in that field was not instrumental in this case.

I therefore capped partners' fees at five hundred dollars per hour and assigned that rate to only the most senior partners at each firm. Senior associates were assigned a rate of three hundred dollars per hour. The rates for partners and associates decrease according to experience. Where the Committee provided attorney biographies, I reviewed that information when assigning a reasonable billable rate for a particular lawyer. Where the Committee failed to provide such information—which is the case for a large portion of the attorneys who worked on this matter—there was no way for me to ascertain the experience of the attorneys. Because most junior partners for whom I had information were assigned a rate of $425 per hour, partners for which I had no information were assigned the lesser of $425 per hour or that particular partner's requested rate. Because most junior associates for whom I had information were assigned a rate of two hundred dollars per hour, associates for whom I had no information were assigned the lesser of two hundred dollars per hour or that particular associate's requested rate.

Finally, all paralegals were assigned either the lesser of their requested rate or one hundred dollars per hour. The requested rate of compensation for paralegals was both shocking and unconscionable. The maximum requested fee for such service was $355 per hour. Typically, a paralegal is a college graduate with no legal training whatsoever. My assigned rates are more than reasonable, considering the lack of professional information for a number of the attorneys and my decision not to reduce the number of hours counsel assert was spent on this litigation.

I note that the Committee also requested compensation for work performed by clerks. Clerks are identified separately from paralegals, even though it is unclear what type of work a clerk performs and how it differs from that performed by paralegals. I can only assume that clerks perform work that is similar to that done by secretaries and other support staff. In addition, compensation is sought for a number of individuals who are identified as "other." I assume that this category includes secretaries and other support staff. Because the salaries of secretaries and other support staff are usually considered overhead costs and included as part of the attorneys' fees, I am denying compensation for clerks and those individuals under the "other" category. [295] I also excluded the lodestar of experts and investigators because their fees were already included the expense request. The "adjusted lodestar" for the Committee is therefore $159,099,407.75.

No lodestar summaries were provided by the fifty other plaintiffs' firms in support of their one hundred million dollar lodestar. This number appears to be an estimate rather than actual calculation. Based on the lack of information supporting this figure, I am reducing the lodestar of these firms by the same percentage as the Executive Committee firm with the ***508** highest percentage reduction—fifty-seven percent. [296] The "adjusted lodestar" for the fifty other firms is $43,260,015.88. The "total adjusted lodestar" for all firms is therefore $202,359,423.63.

b. *Goldberger* Factors

Having determined the appropriate lodestar for purposes of comparison, I turn next to the *Goldberger* factors to determine the reasonable fee that should be awarded in this case. I will discuss each factor in turn.

i. Time and Labor Expended by Counsel

As noted, the Committee has expended over 677,000 hours, [297] producing an adjusted lodestar of more than $159 million. The Committee expects additional time to be expended in conjunction with the approval of the proposed settlement and the administration and distribution of the settlement funds. [298] These amounts do not include the hours and lodestar of the over fifty firms that were involved in this litigation. Collectively, those firms have reported spending over 350,000 hours on this litigation [299] and almost forty-three million dollars in adjusted lodestar.

In some ways, these extraordinary figures are not surprising. As discussed in this Court's evaluation of the *Grinnell* factors, this litigation spanned eight years and has involved the review of over thirty million pages of documents and the taking of 145 depositions. [300] The parties briefed numerous procedural and substantive motions, [301] after which this Court issued twenty-nine opinions. The Court of Appeals has issued three opinions resolving various motions filed by the parties, each of which were preceded by extensive briefing and oral argument. [302]

ii. Magnitude and Complexities of the Litigation

This litigation will certainly go down in history as one of the longest and most protracted multi-district securities litigations in the country. Over one thousand initial complaints were filed. [303] The actions were filed against fifty-five securities underwriters, over three hundred issuers, and one thousand officers and directors of the issuers. [304]

Defendants were represented by over 110 law firms, not including the law firms that represented insurance companies with an interest in the litigation. [305]

Plaintiffs' counsel submitted more than three hundred amended pleadings in the actions, successfully defended against and opposed numerous motions to dismiss, and briefed and argued three hotly contested class certification motions. [306] In addition, counsel engaged in extensive discovery efforts, including the serving of over six hundred third-party subpoenas and the retention of twelve experts. [307]

***509** Not only were the cases factually complex, but the issues were also legally complicated. Defendants consistently maintained that the allegations in the Complaints should be dismissed and that plaintiffs would fail to prove "liability, loss causation, damages or that the classes were even appropriate for certification." [308] The Notice of Pendency sets out additional key issues upon which the parties disagreed, including (1) whether the alleged misconduct by the defendants was actionable; (2) whether the alleged omissions and misrepresentations were material; (3) whether there existed an appropriate economic model for determining artificial inflation during the settlement class period; (4) the amounts by which the Subject Securities were allegedly inflated during the period; (5) the extent to which other market forces influenced the trading prices of the Subject Securities during the period; and (6) the extent to which the conduct of defendants and their statements allegedly influenced the trading prices of the Subject Securities during the period. [309]

iii. The Risk of the Litigation

Plaintiffs' counsel have not been paid any fees during this litigation. [310] Counsel have advanced millions of dollars and attorney hours without reimbursement. [311] Of course, this is not unusual in class actions, and plaintiffs' counsel concede that they undertook this complex litigation knowing that fees and costs would only be paid upon a successful outcome. [312] That is precisely what they did, completing eight years of work and demonstrating a commitment to vigorously prosecuting plaintiffs' claims.

Although "[i]t is well-established that litigation risk must be measured as of when the case is filed," [313] the risk of losing it all was heightened with the Second Circuit's decision in *Miles I.* The findings in *Miles I* dramatically increased the risks of continuing this litigation by severely restricting the class size and reducing the estimated aggregate damages.

Counsel could have thrown up their hands at this juncture, reasoning that further efforts would likely fail to lead to any concrete results. Instead, they petitioned the Court of Appeals for a rehearing (resulting in *Miles II*) and filed amended complaints in each of the six focus cases and an amended set of "Master Allegations" that re-defined the class pursuant to the Second Circuit's rulings. [314] They also submitted extensive briefing opposing defendants' motions to dismiss. [315] After this Court largely denied defendants' motions, [316] counsel then moved for class certification again. In response, counsel notes, defendants "unleashed an army of countervailing expert reports." [317] Plaintiffs' counsel then engaged in protracted settlement negotiations with defendants that lasted nine months. [318] There was a serious ***510** risk that work performed even in the last three years would fail to yield any results.

iv. The Quality of Representation

I have presided over these cases since their commencement and have nothing but the highest respect for the professionalism of the many attorneys that comprise the Committee. These law firms are some of the most reputable in the country—the "cream of the crop" among plaintiffs' firms. Over the years, they have recovered millions, if not billions, of dollars for their clients. [319] In addition, many of them have received judicial accolades for their efforts in other litigations. [320]

Indeed, the hurdles overcome in this litigation further underscore the high quality of representation by plaintiffs' counsel. Not only did counsel successfully defend against numerous motions to dismiss, but they also exhibited extraordinary perseverance when they petitioned the Court of Appeals for rehearing of *Miles I* and obtained clarification in *Miles II* that the action was not precluded from continuing, albeit with certain restrictions. Finally, notwithstanding the reduction in the expected damages and class size, counsel was able to negotiate a fair settlement with defendants.

Courts have also looked to the quality of defense counsel as an indicator of the quality of representation of plaintiffs' counsel.[321] Here, plaintiffs' counsel were pitted against 110 of the most prominent national defense firms, including Sullivan & Cromwell LLP and Morrison & Foerster LLP, liaison counsel for the defendants. That plaintiffs' counsel were able to prosecute this action for eight years against such formidable opponents is an impressive feat.

Still, the Second Circuit has held that "the quality of representation is best measured by results, and that such results may be calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.' "[322] In this case, plaintiffs' counsel has admittedly been able to secure only two percent of the estimated damages. Although the Circuit also opined in *Grinnell* that for the purposes of approving a settlement, a "satisfactory" settlement could represent one-thousandth of one percent of the estimated damages in an action,[323] a recovery of two percent is surely on the low end of any spectrum. Indeed, this is one case in which the result is underwhelming despite counsel's best efforts. This factor weighs in favor of reducing the fee award.

v. The Requested Fee in Relation to the Settlement

Not only is the recovery in this case small, but the stark difference between counsel's fee request and each class member's share of the settlement gives this Court great pause. The request for attorneys' fees and expenses amounts to approximately forty-three percent of the gross settlement fund. If this amount were awarded, the class members would recover less than one cent on every dollar ***511** lost.[324] This remains the case even considering the reduction in the PSLRA awards and counsel's expenses.[325] Indeed, the Committee admits that the fee request is on "the higher side of the range of fee requests."[326] This factor also weighs in favor of reducing the fee award.

vi. Public Policy Considerations

Finally, I consider what fee would adequately encourage plaintiffs' counsel to continue bringing cases of merit in the future. Courts have noted that in considering this factor, "[t]he fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future."[327] Certainly, plaintiffs' counsel would not have taken this case and vigorously prosecuted the action had it not been for the expectation of a reasonable fee at the conclusion of the litigation. That counsel continued to zealously represent class members in this litigation even after a devastating loss before the Court of Appeals is a testament to their commitment. Such tenacity should be rewarded.

Nevertheless, objectors urge this Court to consider another public policy issue. They suggest that plaintiffs' counsel settled this action for pennies on the dollar in order to ensure payment of their fees.[328] Some objectors even accuse plaintiffs' counsel of "blackmail[ing]" defendants—implying that they brought these claims for the sole purpose of settling with defendants and obtaining compensation.[329] The objectors ask the Court not to endorse such tactics.[330]

***512** After many years of presiding over class action securities cases, I note that there is an inherent conflict of interest between plaintiffs' counsel and the class members they represent.[331] As Douglas Parker expressed at the fairness hearing, from class members' perspectives, the recovery in these cases is so small that proceeding to trial would pose little risk for class members and refusing to participate in the settlement would present little loss.[332] Instead, it is plaintiffs' counsel with the most at stake. Plaintiffs' counsel therefore have a strong incentive to settle, even if the recovery obtained is a fraction of the expected damages. Indeed, because plaintiffs' attorneys exercise control over class actions, they may be motivated to file dubious claims seeking large damages with the expectation that the litigation will settle and they will be compensated handsomely.[333]

However, any suggestion that by approving this settlement and awarding counsel fees, this Court is somehow encouraging the plaintiffs' bar to file meritless claims is simply wrong. It may be true that the viability of plaintiffs' claims from the start was doubtful—their claims were certainly called into question when the Circuit found plaintiffs' allegations of widespread knowledge to negate reliance and opined that the IPO markets were not efficient. But the Circuit also dealt an unexpected blow to counsel by modifying its class certification standards—making it more difficult for these classes to be certified—in the middle of this litigation. Even after *Miles I* substantially narrowed the claims in this litigation, plaintiffs' counsel were still able to negotiate a settlement with defendants. The fact that defendants agreed to settle at all indicates that plaintiffs' claims were not entirely meritless.

Moreover, although I am mindful of these concerns, forcing this case to go to trial will not benefit anyone—not plaintiffs' counsel, not the defendants, not this Court, and certainly not class members who have been waiting nearly a decade for some recovery and resolution of this litigation. Indeed, disapproving this settlement would have a significant chilling effect on future class actions—a bad result at a time when serious questions have been raised over ***513** the conduct of many banks during the recent financial crisis. [334]

c. Specific Objections and Counsel's Responses

After giving great thought to the *Goldberger* factors, I now turn to specific objections I have received with respect to the requested fee and the Committee's responses. A number of objectors—pointing to the Second Circuit's decision in *Goldberger* dismiss plaintiffs' counsel's request as out-of-hand. [335] In *Goldberger,* plaintiffs' counsel requested a fee of twenty-five percent of the settlement, but the district court awarded only a four percent fee. [336] The Court of Appeals held that this award was not an abuse of discretion, notwithstanding awards in similar common fund cases in the range of eleven to nineteen percent. [337]

The objectors also note that courts have routinely decreased the percentage fee as the size of the fund increases. [338] They argue that a fund of $586 million is certainly at the top of the range of settlement fund sizes and that plaintiffs' counsel should therefore receive a percentage fee much lower than what they are requesting. [339]

Finally, some objectors contend that this Court should award a percentage of the *net* settlement fund, rather than the *gross* settlement fund. For instance, David Murray and Jacqueline Pio, who appeared at the fairness hearing through counsel, opined that granting a percentage fee based on the gross settlement fund would mean that plaintiffs' counsel would not only receive reimbursement for their expenses, but also a percentage of those expenses as part of their fee. [340]

The Committee responds that the requested fee is reasonable, comparing its request to other mega-fund cases in which the fee award was approximately thirty percent. [341] In addition, the Committee argues ***514** that the global settlement represents 309 individual settlements, and it is therefore appropriate to consider cases in which the settlement amounts ranged from $300,000 to twenty million dollars. [342] The Committee notes that a one-third fee appears to fall within the range of reasonableness for settlements within that range. [343]

It further notes that the fee requested represents a negative multiplier of 0.7 based on the lodestar calculated by the Committee. [344] The inclusion of the lodestar of the other fifty firms produces a 0.5 negative multiplier. [345] The Committee contends that "a negative multiplier fully supports a higher percentage fee request." [346]

Finally, with respect to objectors' opinions that the percentage fee should be based on the net settlement fund, the Committee conceded at the fairness hearing that courts have awarded fees based on both the net and gross settlement funds. [347] The Committee nevertheless emphasized that it believed its request was "fair." [348]

d. The Court's Award

After reviewing the *Goldberger* factors and considering the arguments by the objectors and by the Committee, I make the following determinations. *First,* there is simply no reason why plaintiffs' counsel should be awarded a percentage of their expenses in addition to being reimbursed for those reasonable expenses. I therefore find that the percentage fee should be based on the net settlement fund rather than the gross settlement fund. [349]

Second, there are certainly cases in which it would be reasonable to award a fee in the lower range of reasonableness. Indeed, the Second Circuit recently quoted one of my previous decisions in reasoning that " 'a given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent.' " [350]

Nonetheless, this principle cannot be considered in isolation without also reviewing ***515** the amount of work and time spent by counsel in this litigation. For those cases in which settlement is quick and the time and labor expended by counsel is low, a high percentage fee would be a windfall and therefore inappropriate. Thus, in *Goldberger* and other recent Second Circuit class action fee decisions, the Circuit affirmed awards of a low percentage fee, but noted that such fees represented positive multipliers to counsel's lodestar figures. [351] This case is different. Here, counsel is requesting a high percentage fee, but that fee ($195 million) still represents a negative multiplier to the total adjusted lodestar as calculated by this Court ($202 million). There is therefore no real danger of overcompensation.

Third, in other cases for which I have awarded fees to counsel, I have applied an additional discount to the adjusted lodestar for limited success. [352] There is plenty of support for doing the same here. Although plaintiffs' counsel managed to resolve this litigation in favor of class members and obtained a large gross settlement fund, the results, in general, are disappointing. *First,* the per-share recovery is very small and class members are expected to receive only one cent on each dollar lost. *Second,* the settlement is based on a much smaller class and lower expected damages than contemplated at the commencement of this litigation. As a result, the discounted fee of fifty-two percent of the lodestar and a further discount of the adjusted lodestar is particularly appropriate where the fees awarded to the attorneys are taken from the settlement fund.

But counsel's requested fee already reflects a discount because the amount of time and labor counsel spent on this litigation is highly disproportionate to the settlement they achieved on behalf of the class. Moreover, the incremental benefit to each class member is trivial. [353] Quite frankly, reducing counsel's fees will not put more money in class members' pockets. Because counsel has already imposed a discount on its own fee, applying a further reduction will serve only to further penalize counsel and chill other class actions.

Finally, the important function that class actions serve in policing securities transactions should not be under-emphasized. Indeed, class actions serve as private enforcement tools when the Securities and Exchange Commission or other regulatory entities fail to adequately protect investors from securities fraud. Thus, plaintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences. Although the defendants in this action did not admit to wrongdoing by agreeing to settle, this class action succeeded —at the very least—in penalizing them for questionable conduct. ***516** Awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

I therefore award plaintiffs' counsel a fee of one-third of the net settlement fund, which amounts to $170,084,950.00. [354] This fee takes into account the risks counsel undertook to represent class members and the hard work that was put into resolving this litigation (particularly after the *Miles* decisions). It also appropriately accounts for the small recovery that was ultimately obtained for each class member.

Although the adjusted lodestar is used as a cross-check, there is no need for the adjusted lodestar and the percentage fee to be equivalent. Indeed, the only difference between the fee award and counsel's request is that the fee award is based on the net rather than gross settlement fund. And the remaining difference between the adjusted lodestar and the Committee's request is trivial.

This fee should therefore adequately compensate—but not overcompensate—counsel for their extraordinary time and labor. The award of fees and expenses are intended to compensate plaintiffs' counsel for all of the time and labor spent until the conclusion of this litigation, including that associated with the distribution of the settlement fund.

V. CONCLUSION

For the reasons stated above, plaintiffs' motion for an Order of Final Approval of the Settlement, Plan of Allocation, and Class Certification is granted. The Committee's motion for Attorneys' Fees and Reimbursement of Expenses and PSLRA Awards to the Lead Plaintiffs and Class Representatives of the 309 settled actions is also granted but not for the amounts requested. The Clerk of the Court is directed to close this motion [document no. 5837 in action 21 MC 92],21 MC 92], this action, and the 309 individual actions that comprise this multi-district litigation.

SO ORDERED.

EXHIBIT 1:

PSLRA AWARDS

Name	Award

Brenda Abbruzzino	$	1,250.00
Salvatore Abbruzzino	$	1,750.00
Joni Ray Abrams	$	1,075.00
Aaron H. Fleck	$	9,000.00
Barry Agranat	$	10,000.00
George J. Alexander	$	3,060.00
Katherine V. Alexander	$	1,923.00
Frederick Alfano	$	7,500.00
Richard S. Allegood	$	1,000.00
Thomas Allen	$	2,447.50
Horacio Altamirano	$	4,235.00
Claude Amsellem	$	3,995.00
Nicholas Anderson	$	3,200.00
Roger Anderson	$	6,017.00
Greg Antoniono	$	—
Frank Arduino	$	—
James F. Ashburn	$	—
John P. Ashou	$	7,000.00
Michael Atlas	$	6,000.00
Donald Attfeild	$	2,150.00
Philip Attfield	$	3,173.00
Seth Atwood	$	4,520.00
James August	$	6,600.00
Michael August	$	9,615.50
John Bagnasco	$	—
Gordon L. Bailey	$	—
Paulsen K. Bailey	$	—

Greg Balfanz	$	—
Kenneth Bank	$	900.00
Howard Barto/Darlyne Barto	$	1,000.00
Marek Bartula	$	7,246.50
Radi Batarseh	$	1,934.80
Terrance Bates	$	1,534.00
Joseph Baum	$	1,295.00
Tony Bedwell	$	110.00
Floyd Benigni	$	3,250.00
Donald E. Benjamin	$	7,200.00
Ben Berman	$	7,200.00
David Bertoli	$	2,644.00
David Best	$	4,807.50
Mary Best	$	2,404.00
James H. Bevels	$	730.00
Ryan Beveridge	$	—
Russell H. Blackstone	$	—
Heather O'Gorman	$	1,250.00
Roland Borromeo	$	1,400.00
Howard Bonis	$	—
Korky Bostwick	$	5,400.00
Charles M. Bower	$	1,260.00
David F. Boyd	$	—
Jeffry D. Breen	$	4,000.00
Daniel Burchfield	$	9,750.00
Percy C. Burns	$	4,500.00
Jason Calabrese	$	3,365.50
Joseph Calcaterra, Jr.	$	1,875.00

Ronald Calderone	$	692.32
Joseph Capece	$	—
Gregory S. Carroll	$	10,000.00
Walter Challenger	$	7,500.00
Terry Chandler	$	2,046.50
Nelson Chang	$	3,145.00
Ronald Chapman	$	384.00
Michael Chaves	$	10,000.00
Adrian Chin	$	942.60
Jimmy Chin	$	—
Thomas Chipain	$	4,800.00
Marat Chorny	$	1,435.00
Neils Peter Christenson	$	10,000.00
Jonathan Clifford	$	6,424.50
Ronald Wyles	$	3,750.00
Jack L. Cobb	$	4,600.00
Todd Cohen	$	—
Jack Ezon	$	—
Jaun Carlos Sanchez Garcia	$	2,500.00
Nathan Cosnowsky	$	3,125.00
Gary M. Craft	$	—
Gary Crandall	$	1,008.00
Marvin Crenshaw	$	1,700.00
Melvin Crenshaw	$	2,832.00
Laura A. Cunningham	$	820.50
Rosalie Cutter	$	1,125.00
Paul Cyrek	$	950.00

Paul Dachsteiner	$	6,418.50
Shalom Daskal	$	10,000.00
Rutherford Dawson	$	10,000.00
Richard M. Dearnley	$	6,250.00
Louis Decola, Jr.	$	—
Arsenio Deguzman	$	3,096.50
Clay De Mattei	$	10,000.00
Louis DePietro	$	1,750.00
Wallace Depuy	$	4,500.00
Avinash M. Desai	$	10,000.00
Donald Dezarn	$	—
Joseph Diamant	$	4,800.00
Jeffrey Diamond	$	2,394.00
Charles Difazio, Jr.	$	5,000.00
Jeffry Dillon	$	627.50
Raymond Doerr	$	—
Metha Doescher	$	—
Arthur Dokes	$	721.00
Gene Dolzhansky	$	1,890.00
Edward Donahue	$	10,000.00
Raymond Dooley	$	2,383.00
John Ecklund	$	2,884.50
Ronald Eddy	$	—
Bernard Edmonds	$	7,500.00
Claire Eff	$	—
Eric Egelman	$	8,094.50
Ralph R. Elefant	$	5,000.00
Robert Elkas	$	10,000.00

Siegfried Endlichofer	$	—
Robert Eslick	$	5,000.00
Craig A. Euritt	$	1,472.00
Mark Evens	$	—
Lawrence A. Fantoli	$	1,618.00
John Farrell	$	—
Bradley Fay	$	—
Angelo Fazari	$	—
Todd Feldman	$	3,125.00
Vincent Ferrer	$	2,356.00
Daniel Field	$	1,130.00
Thomas Fields	$	—
Pat Figueiredo	$	—
E.L. Fike	$	9,615.00
Walter Finnegan	$	1,216.50
Steven Fiore	$	4,500.00
John Fitapelli	$	2,400.00
Patrick Fitapelli	$	4,800.00
Jerome Fitzmaurice	$	—
Wendell Flatter	$	—
Harvey Fleishman	$	2,283.50
Joseph Fontenot	$	3,750.00
Carl Foote	$	—
Robert Ford	$	3,846.00
Gabriel T. Frrest	$	5,000.00
Timothy J. Fox	$	—
Richard S. Freeman	$	—

Mark Fried	$	3,500.00
Temma Furman	$	—
David Gambini	$	1,490.50
Michael Gardner	$	—
Bernard Gateau	$	—
Richard L. Gay	$	—
Peter Gelfand	$	10,000.00
Marc Gelman	$	7,000.00
Joseph Genco	$	475.00
Simon Gendler	$	3,694.95
Wayne Gilbert	$	10,000.00
Salvatore Giordano	$	—
Kenneth J. Goffreda	$	4,250.00
William Goggins	$	3,125.00
Mark Goldberg	$	—
Alberto Gonzalez	$	—
Gordon Gordon	$	2,644.00
Dora Gowdy	$	—
Ezra Graber	$	3,341.50
Ann Grace	$	—
Daniel Grahl	$	7,692.50
Robin E. Greif	$	—
Narinder Grewal	$	—
Bernard Grizzaffi	$	1,640.00
Christian Grubb	$	—
Fremont Gruss	$	6,009.50
Rio Guzman	$	4,791.50
Dror Hadari	$	—

Hanna Hadari	$	—
Tal Hadari	$	—
Stanely Haiduk	$	—
Buck D. Hallen	$	2,700.00
William Hamilton	$	—
Jerome Hammonds	$	2,009.50
Nina Hardoff	$	—
Ralph Harrison	$	—
Morris Kipper Harward	$	—
Mariam Heelan	$	1,237.50
David Heitz	$	1,960.00
John Higman	$	4,134.50
Richard Hirsch	$	2,400.00
John F. Hodgson	$	7,500.00
James B. Holman	$	—
Pher Holmberg	$	9,800.00
Hanson Wah Horn	$	—
Raymond Homan	$	—
Steven Hovedsven	$	—
Edward Howden	$	1,100.00
Carl Huang	$	2,700.00
Bernd Huber	$	—
Steven F. Marino, Esq.	$	5,540.50
Daniel C. Irish	$	—
Benjamin R. Isaiah	$	10,000.00
Sanjay Israni	$	3,000.00
Marv Jaffe	$	2,331.50

Richard Jaross	$	9,342.50
Sieglinde Jeffries	$	2,239.92
Daniel Johnson	$	—
Rachel Johnson	$	2,732.00
H. Wayne Jones	$	—
Terry Jones	$	—
Michelle D. Stell	$	1,250.00
Ken Kalla	$	1,750.00
Mary Ellen Kana	$	3,894.00
Barry Kantrowitz	$	10,000.00
Gary Kaplowitz	$	10,000.00
Abraham Kassin	$	10,000.00
Morris Kassin	$	10,000.00
Saul Kassin	$	10,000.00
Val Kay	$	3,750.00
Cindy Marie Keller	$	1,202.00
Thomas Kenney	$	2,884.50
Dr. Suresh Kahnna	$	3,000.00
Ian Kideys	$	7,800.00
Carolyn Kiefer	$	—
E. Howard King, Jr.	$	1,920.00
K. Peter Koch	$	—
James Kotsopoulos	$	6,512.00
Linda Frey Kremer	$	675.00
Todd J. Krouner, Esq.	$	10,000.00
Arvind Kumra	$	6,300.00
Gary W. Kurtz	$	—
John L. Labansky	$	—

Jacqueline Lachance	$	—
Donald Lamps	$	1,000.00
Robert Lang	$	1,538.40
David Langer	$	10,000.00
Craig Larocco	$	—
Gregory Lawton	$	1,225.70
Jonathan Lawton	$	157.50
Lawrence Lawton	$	—
Sarah Lerner	$	625.00
Ronald Lessnau	$	3,250.00
Carl Letts	$	2,404.00
Richard Levien	$	2,750.00
Brian Levy	$	1,000.00
Han Lew	$	—
James Liapakis/Christine Liapakis	$	1,800.00
Paul Lightbody	$	2,271.50
Stanley Lindon	$	3,726.00
Bart Lloyd	$	9,279.00
Martin Lowenstein	$	504.00
Caryn Pace	$	—
Kristina Ly	$	—
Thomas Lynch	$	—
Ciaran Macneill	$	2,400.00
Shailendra Majmundar	$	1,750.00
Robert Malafronte	$	3,000.00
Marilyn Male	$	—
Roy Manawendra	$	665.00

Michael Mangan	$	1,125.00
Zachary Maragoudakis	$	3,750.00
Jeff D. Martin	$	7,500.00
Marry Ann Martindale	$	—
Norman Martindale	$	—
W. Carl Mayer	$	—
Thomas McDaniel	$	10,000.00
Barbara L. McFarland	$	—
Richard W. McKee	$	10,000.00
Charles Medalie	$	1,750.00
Jose Daniel Vivieros De Medieros	$	6,972.50
Sharon Merkin	$	400.00
Solomon N. Merkin	$	500.00
Scott Middleton	$	—
Patrick Miller	$	6,009.50
Frank Mistretta	$	990.20
William S. Mitchell	$	3,000.00
Steven Mizerovsky	$	5,000.00
Dr. Theodore Mobley	$	6,000.00
Natalia Baron	$	—
Kenneth H. Moeslein	$	10,000.00
Brian Mohr	$	5,760.00
Mark L. Monroe	$	—
Anthony Montanaro	$	2,650.00
Domenica Montanaro	$	—
David J. Moody	$	750.00
Evonne Moore	$	1,100.00
Luciano Mor	$	—

James Morris	$	5,288.50
Stephen Mountain	$	3,450.00
Kathleen Mundy	$	1,800.00
Robert F. Munsey	$	—
Adeline Murphy(Shattuck)	$	1,875.00
George Murphy	$	—
Donald K. Natale	$	—
Jonathan P. Nelson	$	—
Paul Ng/Therese Ng	$	540.00
Paul Nguyen	$	733.00
Maria Nishanian/Taniel Nishanian	$	—
Dane Scott Nuanes	$	832.50
Marcus Oates	$	—
Edward T. O'Brien	$	1,422.80
John O'Hern	$	3,108.50
Dareld Olson	$	1,084.50
David Orange	$	—
Donald Ormond	$	3,747.50
Evelyn Ortiz	$	—
Pat O'Shea	$	4,000.00
Darrell M. Padgette	$	1,803.00
Richard Palladino	$	2,163.50
Lyle Paquette	$	—
Alice Paulin	$	—
Claudine Paulin	$	4,800.00
Stafford Perkins	$	2,070.00
Loenard Perlman	$	—

Don Peterson	$	—
Roslyn Pfeffer	$	—
Robert Phillips	$	2,750.00
Wallace Pierce	$	—
Thomas Pilarz	$	2,884.50
Branko Polak	$	2,250.00
Dean Polizzotto	$	—
Gabriel Poloni	$	5,800.00
Robert Ponce	$	1,941.36
Antoine Porges	$	—
John Pouliot	$	2,400.00
Sujan Armand Pradhan	$	4,250.00
B.V. Prasad	$	250.00
Willliam Price	$	1,442.50
Suzanne Privette	$	375.00
Robert Procaccianti	$	—
Janis Prusis	$	1,840.50
Susan Prusis	$	800.00
Jamil S. Quwaider	$	1,400.00
Manuel Raimi	$	3,000.00
Renee Raimi	$	1,150.00
Joseph Rana	$	—
Barbara Raskob	$	8,918.50
Carlos Reeberg	$	10,000.00
Drew A. Ricco	$	7,200.00
James Robert Rickey	$	—
Harry Ridgely	$	1,995.00
Dane Risley	$	—

Michael Rivers	$	—
Sompong Singshinsuk	$	5,750.00
Peter Rooney	$	6,000.00
Joey F. Rosario	$	1,211.70
Julian Rosenberg	$	—
Joseph C. Rowe, Jr.	$	10,000.00
Andrew Rowley	$	10,000.00
Kathleen Ruane	$	706.80
Thomas Ruane	$	1,136.00
Judy Rubin	$	1,513.50
Linda Rubin	$	—
Michael Sabbia	$	4,912.00
Sayed Sadat	$	—
Amir Sahebi	$	10,000.00
Diane Salvadore	$	5,280.00
Javad Samadi	$	2,500.00
Mathew Samuel	$	2,120.00
Jay Schainholz	$	6,250.00
Jack Schwartz	$	10,000.00
Zhen Shao	$	3,005.00
Major Sherwin	$	1,067.40
Stuart Shiltz	$	2,625.00
William Siegel	$	5,000.00
Farideh Sigari	$	—
Samuel Sinay	$	7,500.00
Simon Siu	$	4,250.00
Allan Sklar	$	8,328.50

Arie Slot	$	—
Richard L. Slotkin	$	3,750.00
Carl Smith	$	—
Eugene Smith	$	913.50
John Smith	$	10,000.00
Steven E. Smith	$	750.00
Tracy Spaeth	$	10,000.00
Michael Spero	$	1,682.50
Vladimir Spira	$	8,000.00
Dr. Pradeep Srivastava	$	10,000.00
Paul Statham	$	7,200.00
Richard Stein	$	—
Thomas R. Stelter, Trustee for the Thomas R. Stelter Declaration of Trust	$	1,000.00
Glenn Stept	$	4,200.00
Patrick Stevenson	$	—
Scott Stitcher	$	—
Steven J. Stranieri	$	4,807.50
Diane Strauss	$	814.00
Gary Stubbers	$	2,750.00
Aleksandr Sukennik	$	8,250.00
Allen Sumner	$	1,250.00
Jimmy A. Sutton	$	4,375.00
James Swearngin, Jr.	$	1,925.00
Michael Szmanowski	$	2,406.00
Allen Taylor	$	10,000.00
Thomas Thale	$	500.00
Angela Thompson	$	1,350.00

William Todd Thompson	$	1,200.00
David Tomei	$	7,211.50
James Tran	$	5,750.00
Pamela Trujillo	$	—
Richard Trujillo	$	3,337.50
Tony Tse	$	1,650.00
Robert F. Tuele	$	1,933.00
Brad Turck	$	1,856.50
Barry S. Unger	$	5,200.00
Jeffrey Van Ryen	$	—
Amy Varani	$	196.60
Guy Vitello	$	—
Clyde W. Waite	$	3,870.00
Murray L. Waldron	$	—
Michael Wallace	$	6,697.00
Grace Walsh	$	200.00
Lee S. Walsh	$	400.00
Vick Walsh	$	750.00
Wendy Wanderman	$	2,022.00
John M. Warner	$	—
James Weber	$	—
Richard Wettergreen	$	2,000.00
Gary Whittenghill	$	4,705.00
Maurice Wilber	$	2,000.00
John G. Williams	$	—
Dale Wilson	$	2,569.50
Mitchell Wolf	$	2,404.00
Ralph B. Wood	$	—

Edward Woodard, Jr.		$	4,807.50
Robert M. Wright		$	—
Emmett Zahn		$	10,000.00
Saswata Basu		$	20,000.00
Spiros Gianos		$	—
Frederick B. Henerson		$	—
Michael Lance Huff		$	12,350.00
Steven Janicak		$	—
Krikor Kasbarian		$	11,300.00
Barry Lemberg		$	7,600.00
Geroges Levy		$	12,500.00
John G. Miles		$	—
Stathis Pappas		$	4,454.00
Leonard Peddy		$	—
Deborah Belcore		$	—
Sean Rooney		$	15,000.00
J. Chris Rowe		$	5,288.00
Harald Zagoda		$	16,400.00
Joseph Zhen		$	2,960.00
Alvaro Tomas		$	—
Anita Budich		$	8,750.00
Linda Caldwell		$	—
Diane Collins		$	2,500.00
James Collins		$	2,500.00
Vasanthakumar Gangaiah		$	7,093.00
Harlan Getman		$	—
Mary Jane Gianos		$	—
	Total	$	1,303,593.05

All Citations

671 F.Supp.2d 467, Fed. Sec. L. Rep. P 95,369

Footnotes

1 *See, e.g., In re Initial Pub. Offering Sec. Litig.,* 227 F.R.D. 65 (S.D.N.Y.2004).
2 *See* Amended Master Allegations ("Am. Master Allegations") ¶¶ 14, 17.
3 *See id.* ¶ 86.
4 *See id.* ¶ 112.
5 *See* 4/1/09 Stipulation and Agreement of Settlement ("Stipulation").
6 *See id.* ¶¶ 9, 25. "Settled Claims" means "any and all claims (including but not limited to claims under Section 11 of the Securities Act, or Section 10(b) or Section 16(b) of the Exchange Act, or any rules promulgated under any such section or Act, or claims under state statutes or common law) that were, could have been or might have been asserted against any or all of the Protected Persons in the Actions or in any other proceedings, that arise out of, are based upon or relate to the conduct alleged to be wrongful in the Actions." *Id.* ¶ 1(pp). For a general understanding of the release provisions, "Protected Persons" means "all of the Issuers, Underwriters, Insurers, and the issuers and underwriters in the IPOs [ ] at issue in the IPO Litigation, whether or not named as defendants in any of the Actions...." *Id.* ¶ 1(mm).
7 *See id.* ¶ 9(b).
8 *See id.* ¶ 7(a).
9 *See In re Initial Pub. Offering Sec. Litig.,* 227 F.R.D. at 122.
10 *Id.* at 74 (quotation omitted).
11 *See id.* at 118–19.
12 In *Basic v. Levinson,* the Supreme Court determined that an investor may invoke a rebuttable presumption that she relied on the integrity of the price set by the market if the market is efficient. *See* 485 U.S. 224, 247, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988).
13 471 F.3d 24 (2d Cir.2006).
14 *See id.* at 40.
15 *Id.* at 45.
16 *See id.* at 42.
17 *Id.* at 43.
18 *Id.*
19 *Id.*
20 *Id.*
21 *See Miles v. Merrill Lynch & Co.* ("*Miles II* "), 483 F.3d 70 (2d Cir.2007).
22 *See id.* at 72.
23 *Id.*
24 *See id.* at 73.

25 *Id.*

26 *Id.*

27 The Stipulation provides that a Settlement Class Member will be treated as an "Authorized Claimant" if a number of conditions are met, including the submission of a Proof of Claim. *See id.* ¶ 20.

28 Stipulation ¶¶ 8, 8A (emphasis added).

29 *See* Schedule 1 to Notice of Pendency and Proposed Global Settlement of 309 Class Actions, Motion for Approval of Settlement, Plan of Allocation, Attorneys' Fees and Expenses, PSLRA Awards of Reimbursement of Representatives' Time and Expenses and Settlement Fairness Hearing ("Notice of Pendency").

30 *See* *Initial Pub. Offering Sec. Litig.,* 260 F.R.D. 81 (S.D.N.Y.2009).

31 *See* *id.* at 105–06, 113–14.

32 *Id.* at 115.

33 *See* *Miles I,* 471 F.3d at 44.

34 *See* *Initial Pub. Offering Sec. Litig.,* 260 F.R.D. at 115–16. The Amended Master Allegations state that the defendants focused their requirements on institutional investors and that the majority of retail allocants "traded in ignorance of the scheme." Am. Master Allegations ¶ 35.

35 Where fees are discussed in this Opinion, the Plaintiffs' Executive Committee includes the six firms that comprise it and Plaintiffs' Steering Committee member Lovell Stewart Halebian LLP.

36 *See* Memorandum of Law in Support of Plaintiffs' Executive Committee's Application for an Award of Attorneys' Fees, Reimbursement of Expenses for Plaintiffs' Counsel and An Award of Costs and Expenses to Representative Parties ("Pl. Fee Mem.") at 1.

37 *See* Summary of Lodestar and Expenses Incurred by Executive Committee Firms and Steering Committee Member Lovell Stewart Halebian LLP ("Summary of Lodestar and Expenses"), Ex. A to Compendium of Plaintiffs' Executive Committee Fee and Expense Affidavits ("Fee Compendium"); Declaration of Stanley D. Bernstein Submitted on Behalf of Bernstein Liebhard LLP in Support of Joint Application by Plaintiffs' Lead Counsel for Attorneys' Fees and Reimbursement of Expenses ("Bernstein Decl."), Ex. D to Fee Compendium; Declaration of Neil Fraser Submitted on Behalf of Milberg LLP in Support of Joint Application by Plaintiffs' Lead Counsel for Attorneys' Fees and Reimbursement of Expenses ("Fraser Decl."), Ex. E to Fee Compendium; Declaration of David Kessler Submitted on Behalf of Barroway Topaz Kessler Meltzer & Check, LLP in Support of Joint Application by Plaintiffs' Lead Counsel for Attorneys' Fees and Reimbursement of Expenses ("Kessler Decl."), Ex. F to Fee Compendium; Declaration of Howard B. Sirota Submitted on Behalf of Sirota & Sirota LLP in Support of Joint Application by Plaintiffs' Lead Counsel for Attorneys' Fees and Reimbursement of Expenses ("Sirota Decl."), Ex. G to Fee Compendium; Declaration of Jules Brody Submitted on Behalf of Stull, Stull & Brody in Support of Joint Application by Plaintiffs' Lead Counsel for Attorneys' Fees and Reimbursement of Expenses ("Brody Decl."), Ex. H to Fee Compendium; Declaration of Fred T. Isquith Submitted on Behalf of Wolf Haldenstein Adler Freeman & Herz LLP in Support of Joint Application by Plaintiffs' Lead Counsel for Attorneys' Fees and Reimbursement of Expenses ("Isquith Decl."), Ex. I to Fee Compendium; Declaration of Victor Edwin Stewart Submitted on Behalf of Lovell Stewart Halebian LLP in Support of Joint Application by Plaintiffs' Lead Counsel for Attorneys' Fees and Reimbursement of Expenses ("Stewart Decl."), Ex. J to Fee Compendium. Lodestar is a term that is used to describe the value of a firm's work on a particular litigation. It is derived from multiplying hours reasonably expended by a reasonable hourly rate.

38 *See* Summary of Lodestar and Expenses.

39 *See* Pl. Fee Mem. at 2; Expenses for all Non–Executive Committee Firms ("Summary Expense Report for Non–Executive Committee Firms"), Ex. B to Fee Compendium.

40 Pl. Fee Mem. at 4.

41 *See* Declaration of David Kessler Submitted in Connection with PSLRA Award Requests ("Kessler PSLRA Decl.") ¶ 6.

42 *See* Pl. Fee Mem. at 34.

43 *See* Stipulation ¶ 17.

44 *Id.* ¶ 16.

45 *See* Notice of Pendency at 14.

46 *See id.;* Schedule 2 to Notice of Pendency.

47 *See* Notice of Pendency at 8.

48 *Id.*

49 *See* Schedule 2 to Proposed Notice of Pendency.

50 *See* Notice of Pendency at 14.

51 *Id.*

52 *See id.*

53 *See id.* at 15.

54 *See id.* at 14.

55 *See id.* at 14–15.

56 *See id.* at 15.

57 *See id.*

58 *See id.*

59 *See* Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Settlement, Plan of Distribution, and Class Certification ("Pl. Mem.") at 9.

60 *See id.* The five cases are Agilent Technologies, Avici, Eloquent, ePiphany, and Focal Communications. *See id.* at 10 n. 8.

61 *See id.* at 9–10.

62 *See id.* at 10.

63 *See* 8/25/09 Affidavit of Stephen J. Cirami, Vice President of Operations for The Garden City Group, Inc. ("Cirami Aff."), ¶ 67.

64 *See id.* ¶ 50.

65 The Court received and reviewed a sample of the papers from the Plaintiffs' Executive Committee.

66 *See* Notice of Pendency at 2–3.

67 *See id.* at 2, 6–7. Rule 23(c)(2) requires reasonable notice to the class to include "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

68 *See* Notice of Pendency at 7–9.

69 *See id.* at 9–13.

70 *See id.* at 11.

71 *See id.* at 13.

72 *See id.* at 14–16.

73 *See* Cirami Aff. ¶¶ 53, 54.

74 *See id.* ¶¶ 59, 64.

75 *See id.* ¶¶ 70, 72.

76 *See* 9/10/09 Transcript of Fairness Hearing ("Fairness Hearing Tr.") at 17:24–25.

77 *See* Cirami Aff. ¶¶ 70, 71.

78 *See* Fairness Hearing Tr. at 19:9–23:16; 25:14–70:8.

79 *See id.* at 23:17–25:12; 70:10–77:13.

80 *See* Fed.R.Civ.P. 23(e).

81 Fed.R.Civ.P. 23(e)(2).

82 *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2d Cir.1995).

83 *Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir.1982) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968)).

84 *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983).

85 *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir.2005) (citing *Manual for Complex Litigation, Third,* § 30.42 (1995)).

86 *See* *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974), *abrogated on other grounds by* *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43 (2d Cir.2000). *See also* *D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir.2001) (citing *Grinnell* and applying its nine-factor test to evaluate class action settlement).

87 *See* *Joel A. v. Giuliani,* 218 F.3d 132, 139 (2d Cir.2000).

88 *Wal–Mart Stores,* 396 F.3d at 116 (quoting *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998)).

89 *In re Warner Chilcott Ltd. Sec. Litig.,* No. 06 Civ. 11515, 2009 WL 2025160, at *3 (S.D.N.Y. July 10, 2009) (quoting *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 367 (S.D.N.Y.2002)).

90 *Id.* (quoting *Maley,* 186 F.Supp.2d at 367).

91 *Parker v. Time Warner Entm't Co., L.P.,* 631 F.Supp.2d 242, 262 (E.D.N.Y.2009) (citations omitted).

92 15 U.S.C. § 78u–4(a)(4).

93 *Parker,* 631 F.Supp.2d at 263–64 (quoting *In re Holocaust Victim Assets Litig.,* 424 F.3d 150, 157 (2d Cir.2005)).

94 *Id.*

95 *Id.* (quoting *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980)).

96 *See* *Wal–Mart Stores,* 396 F.3d at 121 (citing *Goldberger,* 209 F.3d at 50). Although the Second Circuit has recently abandoned use of the lodestar, it did so in the context of fee shifting to a prevailing plaintiff under the Voting Rights Act of 1964. *See* *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections,* 522 F.3d 182, 190 (2d Cir.2008). Since that opinion, the Circuit has reaffirmed the principle that the *Goldberger* factors should still be considered in determining a reasonable fee in class actions. *See* *In re Nortel Networks Corp. Sec. Litig.,* 539 F.3d 129, 134 (2d Cir.2008). *But see* *Cavalieri v. General Elec. Co.,* No. 06 Civ. 315, 2009 WL 2426001, at *3 (N.D.N.Y. Aug. 6, 2009) (while ruling on a class action fee motion, noting that the lodestar method had been replaced by the "presumptively reasonable fee" as set out in *Arbor Hill*). Nevertheless, this Court has always adjusted lodestars when it has determined them to be unreasonable or unsupportable. *Arbor Hill's* ruling that the "presumptively reasonable fee" should apply, *see* 522 F.3d at 183, is therefore not new to this Court's practice when it determines the appropriate fees to award.

97 *Wal–Mart Stores,* 396 F.3d at 121 (citing *Goldberger,* 209 F.3d at 47).

98 *Id.* (citations and quotation marks omitted).

99 *Goldberger,* 209 F.3d at 50.

100 *Wal–Mart Stores,* 396 F.3d at 121 (citing *Goldberger,* 209 F.3d at 50).

101 *Id.* at 122 (citing *Goldberger,* 209 F.3d at 52).

102 *See* 5/8/09 Affirmation of the Honorable Nicholas H. Politan ("Politan Aff."); 5/8/09 Affirmation of the Honorable Daniel Weinstein ("Weinstein Aff.").

103 Politan Aff. ¶ 2; Weinstein Aff. 12.

104 *See* Politan Aff. ¶ 16; Weinstein Aff. ¶ 16.

105 *See* Politan Aff. ¶ 18; Weinstein Aff. ¶ 18.

106 Politan Aff. ¶ 18; Weinstein Aff. ¶ 18.

107 In that Opinion, I held that it was premature to consider the reaction of the class to the settlement.

108 *See* Joint Declaration of Stanley D. Bernstein and Ariana J. Tadler in Support of Motion for Final Approval of Settlement, Plan of Distribution, Class Certification, and Petition for an Award of Attorneys' Fees and Reimbursement of Expenses ("Bernstein and Tadler Decl.") ¶ 4.

109 *See* *In re Initial Pub. Offering Sec. Litig.,* 227 F.R.D. at 71.

110 *See* Bernstein and Tadler Decl. ¶ 26.

111 *See* *In re Initial Pub. Offering (IPO) Sec. Litig.,* 277 F.Supp.2d 1375, 1376–77 (2003).

112 Pl. Mem. at 13.

113 *Wal–Mart Stores,* 396 F.3d at 118.

114 *See* Pl. Mem. at 14; Bernstein and Tadler Decl. ¶ 5 (noting that plaintiffs' counsel reviewed more than 30 million pages in discovery and trading records, 600 third-parties were subpoenaed, and 145 depositions were taken or defended throughout the United States and overseas).

115 Pl. Mem. at 14.

116 *Id.* at 15.

117 *Id.* at 14.

118 *See id.* at 15.

119 *See id.* n. 9 (citing a Practicing Law Institute Securities Litigation & Enforcement Institute study finding that of the twelve securities cases that were tried to jury verdict—six went to the defense and six went to the plaintiffs).

120 *See id.* at 15.

121 *See id.*

122 *See id.* at 16.

123 *See id.*

124 Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Settlement at 17 (quoting *State of W. Va. v. Chas. Pfizer & Co.,* 314 F.Supp. 710, 743 (S.D.N.Y.1970)).

125 Pl. Mem. at 16.

126 *Parker,* 631 F.Supp.2d at 261 (quoting *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 129 (S.D.N.Y.1997)).

127 *Wal–Mart Stores,* 396 F.3d at 119 (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972)).

128 *See, e.g.,* 7/13/09 Objection of James P. Tuthill and Wendy B. Tuthill (noting that he would recover "three ten thousandths" of his loss from the proposed settlement); 7/14/09 Objection of Melvin and Vicki Keeney (lamenting a settlement recovery of 20 cents); 7/19/09 Objection of Martin Lerner (informing the Court that he will receive one to three dollars); 8/6/09 Objection of Aldona Ulanecka (calculating her actual loss to be 1295 times larger than what she would receive under the proposed settlement). Undated objections are dated in this Opinion and Order according to when this Court received the objection. The Court has not verified these class members' potential claims, but notes that the objectors failed to consider that if they are determined to be eligible for recovery, they will receive at least ten dollars from the settlement. *See* Notice of Pendency at 15.

129 *See* Pl. Mem. at 17 (noting that the aggregate expected recovery is $32 billion). Two objectors who jointly filed an objection appear confused as to why the expected recovery is now $32 billion when the previous 2005 settlement disclosed aggregate damages to be $55 billion. *See* 8/10/09 Objection of Michael J. Rinnis and Babette B. Rinnis ("We thought only the Federal government could so casually lo[se] $23 billion [the

difference between $55 billion and 32 billion]"). However, plaintiffs explain that the difference in expected recovery is primarily the result of the narrowing of the class definition and exclusion of institutional investors. *See* Pl. Mem. at 32.

130 *See In re Initial Pub. Offering Sec. Litig.,* 226 F.R.D. 186 (S.D.N.Y.2005). Nevertheless, a recent law review article suggests that the proposed settlement, though small, is consistent with recent settlements in securities class actions. *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 Cardozo L.Rev. 407, 414 (2008) ("According to one well-known study, the ratio of securities class action settlements to investors' economic losses has ranged over recent years between two and three percent.").

131 *See Grinnell,* 495 F.2d at 455 & 455 n. 2 ("[T]hat a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved ... In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.").

132 Pl. Mem. at 17.

133 *In re Initial Pub. Offering Sec. Litig.,* 226 F.R.D. 186, 192 (S.D.N.Y.2005).

134 Indeed, as I noted in my Opinion and Order preliminarily approving the prior settlement, according to that Stipulation, plaintiffs would not receive any recovery from the settling Issuer defendants if there was a settlement with the Underwriter defendants. *See id.* at 192 n. 27 (citing 2004 Stipulation and Agreement of Settlement ¶ 1(ff)).

135 Douglas Parker criticizes the Court's arguments, noting that even if plaintiffs' counsel had lost at trial against the underwriters, the class would still have been entitled to one billion dollars from the issuers. *See* 7/13/09 Objection of Douglas M. Parker ("Parker Objection") at 4. However, this settlement was withdrawn after the Second Circuit's opinions in *Miles I* and *II.* Even if the litigation had continued, it could have taken another decade to resolve, and Parker underestimates the disadvantages of delaying relief to class members and the additional out-of-pocket costs counsel would have expended that would have severely decreased the one billion dollar payout.

136 Pl. Mem. at 24.

137 Parker also attempts to refute this argument, contending that inclusion of any recovery from the underwriters would have increased the size of the pie. *See* Parker Objection at 5. However, it is unclear that plaintiffs would have been successful against the underwriters. Comparing the proposed settlement to a speculative recovery in the future is unreasonable.

138 *Wal–Mart Stores,* 396 F.3d at 118 (quoting 4 Newburg § 11.41, at 108).

139 *See Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 24 (2d Cir.1987) ("We perceive no reason why a settlement cannot be considered fair despite opposition from all who responded when the responding class members were significantly less than half of the class.") (citing *TBK Partners, Ltd. v. Western Union Corp.,* 675 F.2d 456, 462 (2d Cir.1982)).

140 The vast majority of the objections related to the settlement amount. The Court has responded to these objections in its discussion of whether the proposed settlement is within the reasonable range of settlements. *See supra* Part IV.A.2.e.

141 *See* Parker Objection at 7–8.

142 *See* Fairness Hearing Tr. at 33:19:34:2.

143 *See id.* at 36:17–19.

144 *See* 15 U.S.C. § 78u–4(a)(7) (providing that the notice must include a Statement of Plaintiff Recovery, Statement of Potential Outcome of Case, Statement of Attorneys' Fees and Costs Sought, Statement of the Reasons for Settlement, and must identify representatives of the plaintiffs' attorneys); Fed.R.Civ.P. 23(c)(2) (requiring that reasonable notice to the class must include "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an

appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)"); *Wal–Mart Stores,* 396 F.3d at 114 (internal quotations and citation omitted) ("There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.").

145 *See* Fairness Hearing Tr. at 65:3–10.

146 *See* Schedule 2 to Notice of Pendency.

147 IPO Securities Litigation website, http.//www.iposecurities litigation.com/. This notice was posted on July 30, 2009, prior to the deadline for objections.

148 *See* Pl. Mem. at 28–29.

149 *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.,* No. 00 Civ. 1898, 2006 WL 1004725, at *4 (S.D.N.Y. Apr. 17, 2006).

150 *See* Pl. Mem. at 29.

151 *See id.* at 9–10.

152 *See* Brief Summary of Work Performed By Plaintiffs' Counsel, http://www.iposecuritieslitigation.com/objectionsnew.php3.

153 *See* 8/17/09 Order; Memorandum of Law in Support of Plaintiffs' Executive Committee's Application for an Award of Attorneys' Fees, Reimbursement of Expenses for Plaintiffs' Counsel and an Award of Costs and Expenses to Representative Parties, dated August 25, 2009, http://www. iposecuritieslitigation.com/papers_d.pdf; Bernstein and Tadler Decl., http://www.iposecuritieslitigation.com/papers_c.pdf; Declaration of Neil Fraser, plaintiffs' counsel, in Support of Plaintiffs' Executive Committee's Application for an Award of Attorneys' Fees, Reimbursement of Expenses for Plaintiffs' Counsel and an Award of Costs and Expenses to Representative Parties, dated August 25, 2009, http://www.iposecurities litigation.com/papers_e.pdf; Compendium of Plaintiffs' Executive Committee Fee and Expense Affidavits, http://www.iposecuritieslitigation.com/papers_ h.pdf.

154 *See* 8/17/09 Order (giving class members the option of objecting in writing by September 3, 2009 or objecting orally at the fairness hearing on September 10, 2009).

155 *See infra* Part IV.E.

156 *See, e.g.,* Fairness Hearing Tr. at 36:17–37:16 (Bechtold's objection on behalf of his clients who are class members); 51:15–18 (Pentz's objection on behalf of David Murray and Jackie Pio).

157 *See id.* at 27:1–6.

158 *See* Declaration of David Kessler, plaintiffs' counsel, Submitted in Connection with PSLRA Award Requests, dated August 25, 2009, http://www.iposecuritieslitigation.com/papers_f.pdf; Focus Case Plaintiffs' PSLRA Declarations, http://www.iposecuritieslitigation. com/papers_i.pdf; NonFocus Case Plaintiffs' PSLRA Declarations (A–F), http://www.iposecuritieslitigation.com/papers_j.pdf; Non–Focus Case Plaintiffs' PSLRA Declarations (G–L), http://www.iposecuritieslitigation. com/papers_k.pdf; Non–Focus Case Plaintiffs' PSLRA Declarations (M–Q), http://www.iposecuritieslitigation.com/papers_l.pdf; Non–Focus Case Plaintiffs' PSLRA Declarations (R–Z), http://www.iposecuritieslitigation. com/papers_m.pdf.

159 One objector notes that he was a potential class member in other actions of which he had not received notice. *See* 8/8/09 Objection of James White at 1. However, the Second Circuit has held that "each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *Weigner v. City of New York,* 852 F.2d 646, 649 (2d Cir.1988). GCG notes that it first sent claim packets to over 5.8 million potential class members, over 2,400 potential class members in GCG's nominee database, and nineteen nominees and one underwriter defendant that had previously requested copies of the claim packet for forwarding to class members. *See* Cirami Aff. ¶¶ 31, 32. GCG received numerous names from various sources, including the underwriter defendants, after the

initial mailing. *See id.* ¶¶ 37–39. It sent out over 580,000 additional claim packets to these potential class members. *See id.* It also engaged in extensive telephone outreach efforts to potential nominees which led to the mailing of approximately 240,000 additional packets. *See id.* ¶¶ 40–47. After over a million notices were returned undelivered, GCG also ran a search through the United States Postal Service's National Change of Address database to see if updated address information could be located. *See id.* ¶ 49. Such searches were run several times per week, and more recently, every business day. *See id.* GCG has re-mailed over 250,000 packets to potential class members for which an address has been found. *See id.* I find these efforts to be reasonable and consistent with class counsel's due process obligations.

160 *See, e.g.,* 7/6/09 Objection of Marc K. Unterhalter on behalf of Leon Unterhalter, Leon Unterhalter Revocable Trust, Lee Gail Unterhalter Revocable Trust, and Lee Gail Unterhalter ("The requirements to prepare documentation for a valid claim cost more in time and effort than any small settlement can compensate for."); 7/7/09 Objection of Earl Morgenstern ("Would I like to search for 9 year old records, complete claim forms, spend postage and pay taxes on $59? No...."); 7/7/09 Objection of Marilyn and Neil Bersch ("We received, in the mail, today six different offers to file a claim in this litigation. What fun! Six different opportunities to rummage through 10 years of financial records to see if we could qualify for a piece of this significant 'pie' after the lawyers take their share...."); 7/7/09 Objection of Mark A. Absher ("Who has records of stock transactions from 10 years ago? I have certain electronic records, dating back 7 years ago, and I believe that I'm the exception. Many of the brokerage firms with records are long gone."); 7/10/09 Objection of Michael G. Cowan ("To approve a settlement that requires documentation that is nearly 10–years old and not available and not recoverable is unfair and unreasonable to myself and I suspect many other members of the class.").

161 *See, e.g.,* 7/10/09 Objection of Brian L. Abrams ("The same discovery that revealed the identity of settlement class members through securities sales [should] also reveal[ ] purchase and sales data that verify class member[s'] claims are authentic...."); 7/13/09 Objection of Fred C. Aldridge, Jr., Esq. ("Given the size of the proposed Settlement pool of five hundred eighty-[six] million dollars, the Class Plaintiffs and the Defendants should certainly be able to identify the members of each Class who are eligible to participate and the information required on Schedule C of the Proof of Claim or at least the number of shares or other securities purchased in the Class Period, on which a settlement could be based.").

162 Pl. Mem. at 27.

163 *See* IPO Website, http://www.iposecuritieslitigation.com/ ("**SUBMIT YOUR CLAIM EVEN IF YOU CANNOT PROVIDE APPROPRIATE SUPPORTING DOCUMENTATION.** While there are no guarantees of eligibility, you may submit your claim even if you cannot locate the appropriate supporting documentation at this time. All claims will be considered by the Claims Administrator, Plaintiffs' Executive Committee and/or the District Court."). This notice was posted on the website on July 30, 2009.

164 7/8/09 Objection of Jeanne and Duncan MacVicar.

165 7/20/09 Objection of William and Claire Clausen.

166 7/21/09 Objection of Nan Buford Kipp ("Kipp Objection") at 2.

167 8/7/09 Objection of Kenneth Kuhn ("Kuhn Objection") at 1.

168 One objector compares the large fee the Committee has requested to the small recoveries each class member will receive and opines that the Court would only be encouraging plaintiffs' attorneys to file meritless claims for the purpose of receiving enormous fees. *See* Kipp Objection at 2 ("This kind of scurrilous litigation with no economic foundation (other than the enrichment of the attorneys involved through the 'legal' method of 'greenmail') continues to undermine the credibility of the legal system, drive up the costs of the administration of justice, drive up the costs of the pursuit of civil or criminal justice in cases of actual economic damage and crowd the timely resolution of legitimate claims off the Court's dockets."). He argues that such litigation tactics should not be condoned by the Court. This objection is addressed in my discussion of attorneys' fees. *See infra* Part IV.E.2.b.vi.

169 *See* 7/22/09, 7/29/09, 8/5/09, and 8/9/09 Objections of Theodore Bechtold. Plaintiffs' counsel contend that Bechtold's representation of his clients and submission of objections against the proposed settlement violates Disciplinary Rule 1.9(b) of the New York Rules of Professional Conduct that provides that an attorney may

not represent another client whose interests are materially adverse to the interests of a former client in the same litigation without the informed consent of the former client. *See* Pl. Mem. at 33–34 n. 16. I also note that Bechtold's registration with the New York State Bar Association is listed as "delinquent." *See* Website of the New York State Bar Association, http:// www.nysba.org/AM/Template.cfm?Section=Home&Template=/Templates/NYSBA_Home. cfm, last accessed on September 2, 2009. Both the allegation of misconduct by the Committee and Bechtold's delinquent status with the State Bar call into question his continued ability to serve as counsel for these objectors.

170 *See* 7/22/09 Objection of Theodore Bechtold.

171 8/9/09 Objection of Theodore Bechtold at 2.

172 *See* *In re Initial Pub. Offering Sec. Litig.,* 224 F.R.D. 550, 555 n. 23 (S.D.N.Y.2004) (citing Transcript of April 16, 2002 Hearing).

173 *See* Pl. Mem. at 34.

174 *See* *In re Initial Pub. Offering Sec. Litig.,* 174 F.Supp.2d 70, 92 (S.D.N.Y.2001).

175 *Id.* (quoting *Hook v. McDade,* 89 F.3d 350, 356 (7th Cir.1996), *cert. denied,* 519 U.S. 1071, 117 S.Ct. 718, 136 L.Ed.2d 637 (1997)).

176 *See* 7/29/09 Objection of Theodore Bechtold.

177 *Id.* at 1.

178 *See* Pl. Mem. at 35.

179 Bechtold submitted two letters challenging the proposed settlement after the objections period had concluded. This Court has not considered those letters because they were untimely.

180 8/6/09 Objection of JKM Company ("JKM Objection") at 2.

181 *See* Fairness Hearing Tr. at 19:21–22 (arguing that including the phrase "and damaged thereby" is problematic).

182 JKM Objection at 3.

183 Ironically, others—erroneously believing that the class definition *failed* to exclude those investors who profited from the alleged manipulative scheme—argue that the class definition is unfair and overbroad. *See* 8/4/09 Objection of Ronald L. Haddad ("Haddad Objection") at 2 (noting that " 'releasing claims of parties who receive[ ] no compensation in the settlement is a recurring potential abuse of the class action settlement process' ") (quoting *Manual for Complex Litigation,* Fourth, § 21.61); *see* 8/10/09 Objection of Lester Baum, Mike Hart, and Sue Shadley ("Baum, Hart, and Shadley Objection") at 8–11 (arguing that the putative settlement class is overbroad because the class definition does not parallel the class definition rejected by the Second Circuit in *Miles I* which required investors to have been damaged in order to participate as class members). It should be noted that although Haddad calls himself an "objector" to the proposed settlement, the profit that he made from his trades renders him ineligible to be a class member and an objector. *See* Haddad Objection at 2 (noting that Haddad had sold his shares in Handspring, one of the Subject Securities, for a profit). Because those individuals who were not damaged by defendants' alleged misconduct have no viable claims, certification of a class that included such individuals and releasing their claims would have no practical significance.

184 *See* Fairness Hearing Tr. at 20:21–21:7 (arguing that a mini-trial would be necessary to determine JKM Company's membership in the class).

185 *See* *Chiang v. Veneman,* 385 F.3d 256 (3d Cir.2004); *Williams,* No. 95 Civ. 1149, 1997 WL 33772612 (D.D.C. Feb. 14, 1997).

186 *See* *Chiang,* 385 F.3d at 260 (defining the proposed class in pertinent part as "[a]ll persons who are Black, Hispanic, female and /or Virgin Islanders ... who believe they were discriminated against on the basis of race, gender or national origin."); *Williams,* 1997 WL 33772612, at *3 (defining the proposed class in pertinent part as "[a]ll African American or Hispanic American persons who, between 1981 and the present, have suffered from racial or national origin discrimination in the application for or the servicing of loans or credit from the FmHA (now Farm Services Agency) of the USDA....").

187 962 F.Supp. 1162, 1169 (S.D.Ind.1997).

188 *See In re Natural Gas Commodities Litig.,* 231 F.R.D. 171, 179 n. 1 (S.D.N.Y.2005) (contrasting the class definition in that case—which identified class members as those who purchased securities during the class period and "who suffered losses by reason of defendants' manipulation"—to the class definition in the 2004 class certification in this litigation and noting that where the definition includes the phrase "and were damaged thereby," "[i]t is readily ascertainable from an examination of a potential class member's trading records of that specific security whether that investor suffered damages, *i.e.,* a financial loss, as a result of purchasing that security").

189 *See infra* Part IV.C. Plaintiffs' counsel have also pointed to a decision of the Second Circuit approving a plan of allocation that distributed the proceeds of a settlement fund only to class members who suffered out-of-pocket losses as a result of the defendants' alleged fraudulent conduct. *See* Pl. Mem. at 30 (citing *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC,* 467 F.3d 73, 84 (2d Cir.2006)).

190 *See Feder v. Electronic Data Sys. Corp.,* 429 F.3d 125, 129 n. 2, 140 (5th Cir.2005).

191 *See, e.g., In re Parmalat Sec. Litig.,* No. 04 Civ. 30, 2008 WL 3895539, at *1 (S.D.N.Y. Aug. 21, 2008); *Wagner v. Barrick Gold Corp.,* 251 F.R.D. 112, 114 (S.D.N.Y.2008); *In re Warner Chilcott Ltd. Sec. Litig.,* 2008 WL 344715, at *1 (S.D.N.Y. Feb. 4, 2008).

192 *See* 8/10/09 Objection of James J. Hayes ("Hayes Objection") at 1–2.

193 Hayes also argues throughout his letter that the Court's finding of market efficiency in each of the stocks is not consistent with prolonged periods of inflation. *See id.* at 5–6. This argument was addressed in the Court's June Opinion and Order. *See In re Initial Pub. Offering Sec. Litig.,* 260 F.R.D. at 110–11.

194 *See* Hayes Objection at 2–4.

195 *See In re Initial Pub. Offering Sec. Litig.,* 260 F.R.D. at 96–97 & 96 n. 138.

196 *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 60 (2d Cir.2000) (citing *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 291 (2d Cir.1992)).

197 *See* Firm Resume of Bernstein Liebhard LLP ("Bernstein Liebhard Firm Resume"), Ex. 1 to Bernstein Decl., at 1; Firm Resume of Milberg LLP ("Milberg Firm Resume"), Ex. 1 to Fraser Decl., at 1; Firm Resume of Barroway Topaz Kessler Meltzer Check LLP, Ex. 1 to Kessler Decl., at 1; Firm Resume of Sirota & Sirota LLP, Ex. 1 to Sirota Decl., at 1; Firm Resume of Stull, Stull & Brody LLP, Ex. 1 to Brody Decl., at 1; Firm Resume of Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein Firm Resume"), Ex. 1 to Isquith Deck, at 2–3; Firm Resume of Lovell Stewart Halebian LLP, Ex. 1 to Stewart Deck, at 1.

198 *See, e.g.,* Milberg Firm Resume at 1 (noting settlements in the millions and billions); Bernstein Liebhard Firm Resume at 1 (noting that the firm was one of only two firms named by The National Law Journal to the "Plaintiffs' Hot List" for six years in a row); Wolf Haldenstein Firm Resume at 1 (noting that it has received judicial recognition for work performed on other litigations).

199 *See* Hayes Objection at 2.

200 *See* Baum, Hart, and Shadley Objection at 3–5.

201 *See id.*

202 *See Miles I,* 471 F.3d at 43.

203 Am. Master Allegations ¶ 35.

204 *See Initial Pub. Offering Sec. Litig.,* 260 F.R.D. at 105–06.

205 *See Miles I,* 471 F.3d at 43.

206 Pl. Mem. at 24.

207 Plaintiffs in a securities fraud omission case are entitled to rely on the *Affiliated Ute* presumption for satisfaction of the reliance requirement so long as plaintiffs show that defendants had an obligation to disclose

the information and the information withheld is material. *See* *Affiliated Ute Citizens of the State of Utah v. United States,* 406 U.S. 128, 154, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972).

208 Baum, Hart, and Shadley Objection at 6–7 (quoting *Desai v. Deutsche Bank Sec. Ltd.,* 573 F.3d 931, 940–41 (9th Cir.2009)).

209 *See* *In re Initial Pub. Offering Sec. Litig.,* 260 F.R.D. at 105–06.

210 *See* Baum, Hart, and Shadley Objection at 7–8.

211 *See* *Affiliated Ute,* 406 U.S. at 133–34, 92 S.Ct. 1456.

212 *See* *id.* at 137, 92 S.Ct. 1456.

213 *See* *id.* at 148–49, 92 S.Ct. 1456.

214 *Id.* at 153, 92 S.Ct. 1456.

215 *Id.*

216 *See* Am. Master Allegations ¶¶ 32, 36, 86.

217 *See id.* ¶¶ 33, 35.

218 If the Circuit has given *any* indication, it is that the *Affiliated Ute* presumption *is* available in omissions cases where the plaintiff alleges that the defendant failed to disclose the price manipulation. *See, e.g.,* *Black v. Finantra Capital, Inc.,* 418 F.3d 203, 209 (2d Cir.2005) (in a price manipulation case, indicating that the plaintiff may rely on the *Affiliated Ute* presumption because defendants had failed to disclose the scheme but that in any event he was entitled to the *Basic* presumption and that defendants had presented insufficient evidence that he had not relied on the price when purchasing the stock).

219 *See* 8/4/09 Objection of David Murray and Jackie Pio ("While manageability may no longer be a concern in a settlement context since there will be no trial, the reasons that led the Second Circuit to reverse certification —reliance, causation, and ascertainability—are not eliminated by the settlement."); 8/10/09 Objection of Timothy Sears ("[T]he class certification will likely be reversed by the Second Circuit as it did in [*Miles I*]. This settlement has not eliminated the issues that led to reversal of certification in *Miles:* reliance, causation and ascertainability."). Plaintiffs note that the counsel that represent these objectors are professional objectors. For instance, they inform the Court that attorney John Pentz, who filed the objection on behalf of David Murray and Jackie Pio, has been criticized by courts for his canned objections. *See* *In re AOL Time Warner ERISA Litig.,* No. 02 Civ. 8853, 2007 WL 4225486, at *3 (S.D.N.Y. Nov. 28, 2007) (calling Pentz and another attorney's arguments "counterproductive" and "irrelevant or simply incorrect"); *In re Royal Ahold N.V. Sec. & ERISA Litig.,* 461 F.Supp.2d 383, 386 (D.Md.2006) (noting that Pentz is a professional objector who "attached himself" to a plaintiff and holding that his objection was "not well reasoned and was not helpful."); *Taubenfeld v. AON Corp.,* 415 F.3d 597, 599 (7th Cir.2005) (faulting Pentz for failing to articulate his client's argument and putting forth "conclusory assertions" in his client's written objection).

220 *See* Notice of Pendency at 8.

221 *See* Pl. Mem. at 25.

222 *See* Notice of Pendency at 8.

223 *See id.* at 14.

224 *See id.* at 14–15.

225 *See id.* at 15.

226 *See id.*

227 *See, e.g.,* 7/6/09 Objection of Erin Hall Meade ("The amount of settlement monies paid out to damaged sharesholders relative to the amount paid out to attorneys seems disproportionately small.... For the paltry amount I would receive, it is not worthwhile for me to fill out the required paperwork."); 7/17/09 Objection of Greg Linden ("For investors with 1000 or less shares, the [ ] burden of filing the documentation exceeds the expected payment from the settlement."); 7/28/09 Objection of Tomaz Slivnik ("In my own case, by the

time I have read all the paperwork, paid for postage and bank charges, I have spent the entire amount of the proposed compensation and then some.").

228 *See* Notice of Pendency at 14.

229 *See id.*

230 *See id.*

231 *See* 15 U.S.C. § 78u–4(a)(4).

232 *Id.*

233 *In re Merrill Lynch & Co., Inc. Research Reports Sec.,* No. 02 MDL 1484, 2007 WL 313474, at *25 (S.D.N.Y. Feb. 1, 2007) (quoting *In re KeySpan Corp. Sec. Litig.,* No. 01 Civ. 5852, 2005 WL 3093399, at *21 (E.D.N.Y. Sept. 30, 2005)). *Accord* *In re AMF Bowling,* 334 F.Supp.2d 462, 470 (S.D.N.Y.2004) ("There is no assertion that either [class representative] lost time at work or gave up employer-granted vacation time. Neither cites to lost sales commissions nor missed business opportunities.").

234 *See* Kessler PSLRA Decl. ¶ 3.

235 *See id.* ¶ 4.

236 *See id.*

237 *See id.*

238 *See, e.g.,* 8/13/09 Declaration of Saswata Basu ("Basu Decl."), Ex. 1 to Focus Case Plaintiffs' PSLRA Declarations ("Focus Case Decl."), ¶ 8.

239 *See, e.g.,* 7/13/09 Declaration of Greg Antoniono ("Antoniono Decl."), Ex. 15 to Non–Focus Case Plaintiffs' PSLRA Declarations ("Non–Focus Case Decl."), ¶ 5 (attesting only that he was a Manager of Strategic Sourcing for a Health Insurance Company during the course of this litigation and informing the court of his maximum compensation level).

240 *See, e.g.,* Basu Decl. ¶ 7.

241 *Id.*

242 *Id.* ¶ 9.

243 *Id.* ¶ 10.

244 *See* Kessler PSLRA Decl. ¶ 5.

245 *See* Fairness Hearing Tr. at 26:14–15 (objection of Steve Miller); 34:24–35:8 (objection of Bechtold).

246 Basu Decl. ¶¶ 6–7.

247 *See id.* ¶ 8.

248 *See id.*

249 *See* 7/22/09 Declaration of Marc Gelman, Ex. 145 to Non–Focus Decl., ¶¶ 2, 3, 4, 8.

250 *See id.* ¶ 8.

251 *See id.*

252 *See* 7/23/09 Declaration of Jack Schwartz, Ex. 349 to Non–Focus Decl., ¶¶ 2, 6.

253 *See id.* ¶ 6.

254 *See id.*

255 *See, e.g.,* 7/22/09 Declaration of Claude Amsellem, Ex. 12 to NonFocus Case Decl. ¶ 8 (attesting to spending forty-seven hours on this litigation at eighty-five dollars per hour and requesting $7,990).

256 7/17/09 Declaration of Abraham Kassin, Ex. 204 to Non–Focus Case Decl., ¶ 8.

257 *See* 7/28/09 Declaration of Paulsen K. Bailey, Ex. 27 to Non–Focus Case Decl. (attaching receipts for expenses associated with fulfilling his representative duties, but also an invoice addressed to Neil Fraser, plaintiffs' counsel, for such expenses).

258 *See* Antoniono Decl., Ex. 15 to Non–Focus Case Decl., ¶ 5.

259 Finally, there are two class representatives in the non-focus cases who capped their own requests. In other words, although they could have requested a higher award based on the number of hours spent and multiplied by their hourly rate, they have requested a lower amount. Because in both cases, their requested amount was less than the maximum I have awarded others in non-focus cases, I granted their requests without modification.

260 *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (citing *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir.1997)).

261 *Goldberger,* 209 F.3d at 52.

262 *See* 9/8/09 Letter from Bernstein Liebhard on behalf of the Plaintiffs' Executive Committee ("9/8/09 Letter") (also informing the Court that the August 25, 2009 submission incorrectly requested a reimbursement of expenses of $50,400,390.71).

263 *See* Summary Expense Report for Bernstein Liebhard LLP ("Bernstein Expense Report"), Ex. 3 to Bernstein Decl.; Summary Expense Report for Milberg LLP, Ex. 3 to Tadler Decl.; Summary Expense Report for Barroway Topaz Kessler Meltzer & Check LLP, Ex. 3 to Kessler Decl.; Summary Expense Report for Stull, Stull & Brody LLP, Ex. 3 to Brody Decl.; Summary Expense Report for Wolf Haldenstein Adler Freeman & Herz LLP, Ex. 3 to Isquith Decl.; Summary Expense Report for Lovell Stewart Halebian LLP, Ex. 3 to Stewart Decl.; Summary Expense Report for Non–Executive Committee Firms.

264 *See, e.g.,* Bernstein Expense Report, Ex. 3 to Bernstein Decl.

265 This equals the total contributions to the litigation fund of $14,245,000 minus $30,365.16 in "non-reimbursable litigation fund expenses" and the leftover balance of the fund of $40,316.52. *See* 9/8/09 Letter.

266 *See* Schedule of Litigation Fund Expenses ("Fund Expenses Report"), Ex. C to Fee Compendium.

267 *See* 8/17/09 Order.

268 *See* 9/8/09 Objection of James J. Mary, Mark Merrill, Vondell Tyler, Ernest Browne, Jr. and Susan Browne at 4.

269 *See id.*

270 *See id.* at 5.

271 *See id.* at 6.

272 9/17/09 Letter from Bernstein Liebhard on behalf of plaintiffs' counsel ("9/17/09 Letter") at 2 (citing two cases in other districts).

273 *See id.*

274 *See id.* (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 369 F.3d 91, 98 (2d Cir.2004) (noting that "the use of online research services likely reduces the number of hours required for an attorney's manual search, thereby lowering the lodestar" and holding that if the law firm usually charges clients fees associated with computer research, this expense should be included in the attorneys' fee award)).

275 *See id.*

276 *Id.*

277 *See id.* at Exhibit A.

278 *See* 9/14/09 Order.

279 9/17/09 Supplemental Declaration of Stanley D. Bernstein ¶ 2.

280 *Id.*

281 *Id.*

282 Later in this opinion I will address the lodestar of the fifty other firms who failed to submit hourly rates and hours and explain why it is reasonable to reduce their lodestar by fifty-seven percent. *See infra* Part IV.E.2.a.

283 For instance, Isquith's declaration specifically attests to the $250 limit on travel expenses and notes that these travel costs are associated with "out-of[-]town attorneys who spent dedicated periods in New York City working on these cases during the discovery phase of the litigation." Isquith Decl. ¶ 6. However, the headquarters of Wolf Haldenstein Adler Freeman & Herz LLP is in New York, and Isquith himself practices in the New York office. While some attorneys may have traveled outside of New York for depositions or other discovery-related activities, Isquith did not provide any such explanation and neither did Bernstein in his supplemental declaration.

284 Reimbursement was requested for "External Box Storage," "Internal Box Storage," and "Storage Costs." Because the Committee has not explained the differences in these categories, I have disallowed the expenses

under "Storage Costs." Reimbursement of costs associated with "External Box Storage" and "Internal Box Storage" is granted.

285 *See* *Arbor Hill,* 369 F.3d at 98.

286 *See* 9/17/09 Letter at 2.

287 *See* Bernstein and Tadler Decl. ¶ 114. This request represents fifty-two percent of the alleged lodestar of the firms in the Committee and all other firms—$195 million divided by $378 million ($278 million lodestar for the Committee + $100 million lodestar for the other firms) = a forty-eight percent reduction.

288 *See* *Goldberger,* 209 F.3d at 50 (citing *In re Prudential Ins. Co. Am. Sales Litig.,* 148 F.3d 283, 342 (3d Cir.1998)) ("Of course, where [the lodestar is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.").

289 *See* Bernstein Decl. ¶ 7; Fraser Decl. ¶ 3; Kessler Decl. ¶ 3; Sirota Decl. ¶ 3; Brody Decl. ¶ 3; Isquith Decl. ¶ 3; Stewart Decl. ¶ 3.

290 *See id.*

291 In coming to this conclusion, I have considered the role of inflation in the rate increase. Also, because counsel's compensation has been deferred for a number of years, rates somewhat higher than the 2001 rates are appropriate.

292 *Reiter v. MTA New York City Transit Auth.,* 457 F.3d 224, 232 (2d Cir.2006) (quoting *Blum v. Stenson,* 465 U.S. 886, 896, 104 S.Ct. 1541, 79 L.Ed.2d 891 n. 11 (1984)).

293 *See* Nathan Koppel and Ashby Jones, *'Billable Hour' Under Attack,* Wall St. J., Aug. 24, 2009, http://online.wsj.com/article/SB 125106954159552335.html.

294 *See* Nathan Koppel, *Lawyers Gear Up Grand New Fees,* Wall St. J., Aug. 22, 2007, http://online.wsj.com/article/SB118775188828405048.html.

295 *See* *Kowal v. Andy Const., Inc.,* No. 05 Civ. 576, 2008 WL 4426996, at *3 (E.D.N.Y. Sept. 25, 2008) (" '[C]ourts of this Circuit have recognized that clerical and secretarial services are part of overhead and are not generally charged to clients.' ") (quoting *Sulkowska v. City of New York,* 170 F.Supp.2d 359, 368–69 (S.D.N.Y.2001)). Stull, Stull & Brody LLP did not identify which of the individuals categorized under "paralegals/clerks" were paralegals and which were clerks. As a result, I recalculated the lodestar based on the adjusted hourly rate of one hundred dollars and halved that amount. *See* Stull, Stull & Brody Time & Lodestar Chart, Ex. 2 to Brody Deck, at 2–3.

296 The Executive Committee firm with the highest percentage reduction is Stull, Stull & Brody LLP ($22,850,372.45 reduced to $9,885,074.75).

297 *See* Bernstein and Tadler Decl. ¶ 116.

298 *See id.*

299 *See id.* ¶ 121.

300 *See id.* ¶ 118.

301 *See id.*

302 *See id.*

303 *See id.* ¶ 5.

304 *See id.*

305 *See id.*

306 *See id.* ¶ 122.

307 *See id.* ¶ 5.

308 *Id.* ¶ 7.

309 *See* Notice of Pendency at 2.

310 *See* Bernstein and Tadler Decl. ¶ 114.

311 *See id.*

312 *See id.* ¶ 126.

313 *Goldberger,* 209 F.3d at 55 (citations omitted).

314 *See* Bernstein and Tadler Decl. ¶ 68.

315 *See id.* ¶ 69.

316 *See* *In re Initial Pub. Offering Sec. Litig.,* 544 F.Supp.2d 277 (S.D.N.Y.2008).

317 Bernstein and Tadler Decl. ¶ 73.

318 *See id.* ¶¶ 77, 80 (noting that negotiations began in June 2008 and a settlement agreement was finally signed on April 1, 2009).

319 *See, e.g.,* Bernstein Liebhard Firm Resume at 1; Milberg Firm Resume at 1.

320 *See, e.g.,* Wolf Haldenstein Firm Resume at 1.

321 *See* *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 373 (S.D.N.Y.2002) (citing *In re Computron Software, Inc.,* 6 F.Supp.2d 313, 322 (D.N.J.1998)).

322 *Goldberger,* 209 F.3d at 55 (quoting *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.,* 540 F.2d 102, 118 (3d Cir.1976)).

323 *See* 495 F.2d at 455 n. 2.

324 Other costs and expenses include the administrator's fee of $27.5 million and the request for PSLRA awards of four million dollars, as well as counsel's expense request of over fifty million dollars.

325 This assumes PSLRA awards of approximately $1.3 million, reimbursement of expenses of approximately forty-seven million dollars, and the administrator's fee of $27.5 million.

326 Pl. Fee Mem. at 27.

327 *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 524 (E.D.N.Y.2003). *Accord* *Goldberger,* 209 F.3d at 51 (citations omitted) ("There is also commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.").

328 *See, e.g.,* 7/14/09 Objection of Gary L. Hall ("Attorneys get millions .... all the other plaintiffs [ ] get pennies on the dollar, not hundreds of dollars back [in] compensation.... Your Honor [ ], I have lost all faith in the financial and judicial system here in the old 'U.S. of A.' "); 7/28/09 Objection of Jim Rushton ("This lawsuit benefits the victim none and does nothing more than fill the pockets of greedy lawyers.... They retrieve pennies for the victim and take home millions of dollars in the process. Flat out an egregious use of our court and judicial process."); 8/1/09 Objection of Douglas G. Yule ("After reading the information which has been sent [to] me about this settlement I am left with the very strong impression that this set of settlements have been proposed primarily to assure that the attorneys involved in the case receive remuneration for their involvement in the [ ] original claims filed against the various companies.").

329 7/6/09 Objection of Niels Riemers ("This appears simply another case of legal blackmail of American corporations, where the overwhelming beneficiaries are the law firms bringing the class action, not members of the class, which receive pennies.... The system of excessive enrichment of class action attorneys is outrageous and the Judge of the District Court of the Southern District of New York is as complicit in the system of legal blackmail as are the plaintiff law firms."); Kuhn Objection ("I have zero doubt that Agilent Technologies et al. was coerced to settle the case to bring closure to [the] costly and endless legal blackmail known as discovery.").

330 *See, e.g.,* 7/9/09 Objection of William Sword, Jr. ("[W]hat public good can possibly come from this case and all of the lawyers and 'experts' feasting on it? I hope your Honor will take a deep breath and throw the whole thing out ....").

331 *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 Cardozo L.Rev. 407, 414 (2008) ("Th[e] thesis, that plaintiff's attorneys tend to be motivated to settle 'cheaply' on terms that class members, if they had perfect knowledge and full control over their 'agent,' would reject, is corroborated by the extraordinarily low rate of recovery in securities class actions."); Martha Pacold, *Attorneys' Fees in Class Actions Governed by Fee Shifting Statutes,* 68 U. Chi. L.Rev. 1007,

1028 (2001) ("Attorneys' self-interests may persist over their clients' interests, resulting in few class actions that actually reach judgment ... plaintiffs' attorneys settle in their own best interests at the expense of the classes they purport to represent.").

332 *See* Fairness Hearing Tr. at 68:20–24 ("Well, once you actually disapprove the settlement, if that's all your Honor did, I think it would have a marvelous [effect of] concentrating the minds of the lawyers. But if it didn't, frankly, as a class member, the loss of half of 2 percent would not be a big loss.").

333 Parker put it eloquently at the fairness hearing, "I think the inconvenient truth is that a great many securities class actions are commenced on the theory that if there is a large damage claim made, those cases will be settled at some point along the way and they will be settled at a level that will provide more than adequate compensation to the lawyers without regard to whether it provides a meaningful settlement to the class, and [ ] I think that's an issue that deserves consideration...." Fairness Hearing Tr. at 69:18–70:1.

334 *See, e.g.,* Zachary Kouwe, *S.E.C. to Proceed With Trial in B of A Case,* N.Y. Times, Sept. 21, 2009, http://dealbook.blogs.nytimes. com/2009/09/21/sec-to-proceed-with-trial-inbofa-case/ (reporting about Judge Jed Rakoff's decision to reject the proposed settlement between the Securities and Exchange Commission and Bank of America over its non-disclosure of excessive bonuses to Merrill Lynch employees, forcing the case to proceed to trial); Jonathan D. Glater, *Financial Crisis Provides Fertile Ground for Boom in Lawsuits,* N.Y. Times, Oct. 18, 2008 at BI (noting that the financial crisis is likely to lead to increased litigation and discussing four lawsuits filed against financial institutions); Jenny Anderson, *Florida Pension Fund Is Suing A.I.G.,* N.Y. Times, May 22, 2008 at C3 (discussing a class action lawsuit filed against A.I.G. and its "top executives" accusing A.I.G. of "understanding the company's exposure to the subprime mortgage crisis in order to inflate its stock prices artificially").

335 *See, e.g.,* 8/6/09 Objection of James J. Mary, Mark Merrill, Vondell Tyler, Ernest Browne, Jr., Susan Browne, Richard Paul Warren Sep, and D & S Partnership # 2 ("Mary, Merrill, Tyler, Browne, Sep, and D & S Objection") at 3; Baum, Hart, and Shadley Objection at 14.

336 *See* *Goldberger,* 209 F.3d at 53.

337 *See id.*

338 *See* Mary, Merrill, Tyler, Browne, Sep, and D & S Objection at 4 (quoting *In re Interpublic Sec. Litig.,* No. 02 Civ. 6527 and No. 03 Civ. 1194, 2004 WL 2397190, at *11 (S.D.N.Y. Oct. 26, 2004) (quotations omitted) ("In cases where a class recovers more than $75–$200 million ... fees in the range of 6–10 percent and even lower are common.")).

339 *See id.* at 5.

340 *See* Fairness Hearing Tr. at 56:6–13. *See also id.* at 57:22–58:1 (Counsel for Lester Baum, Mike Hart, and Sue Shadley noting that basing the percentage fee on the gross settlement rather than the net settlement could make a large difference).

341 *See* Pl. Fee Mem. at 42 (citing *In re Priceline.com,* No. 00 Civ. 1884, 2007 WL 2115592, at *5 (D.Conn. July 20, 2007) (awarding a fee of thirty percent for an eighty million dollar fund); *In re Ikon,* 194 F.R.D. 166, 197 (E.D.Pa.2000) (awarding a fee of thirty percent of the net settlement fund for a $111 million recovery); *In re Prudential,* 912 F.Supp. 97, 104 (S.D.N.Y.1996) (awarding a fee of twenty-seven percent for a $110 million recovery or thirty percent of the net settlement fund)).

342 *See id.*

343 *See id.* (citing a list of unpublished slip opinions in which the court awarded a fee of 30 to 33 1/3 percent for recoveries of between half a million to twenty million dollars).

344 *See* Bernstein and Tadler Decl. ¶ 134. A multiplier that is less than one is called a "negative multiplier."

345 *See id.*

346 Pl. Fee Mem. at 31 (citing *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 1695, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007)).

347 *See* Fairness Hearing Tr. at 76:18–21 ("There was a short discussion about whether the fee is based on a percentage of the gross recovery or the net recovery. Courts go both ways....").

348 *Id.* at 77:4–7.

349 I have previously awarded percentage fees net of expenses. *See* *In re Indep. Energy Holdings PLC,* No. 00 Civ. 6689, 2003 WL 22244676, at *9 (S.D.N.Y. Sept. 29, 2003).

350 *Wal–Mart Stores,* 396 F.3d at 122 (quoting *In re Indep. Energy,* 2003 WL 22244676, at *6).

351 *See, e.g., Nortel,* 539 F.3d at 134 (ruling that a district court's fee award of three percent of the fund or more than two times the lodestar was not an abuse of discretion); *Wal–Mart Stores,* 396 F.3d at 123 (noting that the 7.2 percent fee nevertheless represented a 3.5 multiplier on counsel's lodestar); *Goldberger,* 209 F.3d at 46 (noting that the four percent fee was equal to a positive lodestar multiplier).

352 *See, e.g., Scott v. City of New York,* No. 02 Civ. 9530, 2009 WL 2610747, at *3 (S.D.N.Y. Aug. 25, 2009). Although *Scott* was a fee-shifting opinion, there is no reason why the same principles would not apply when determining the appropriate fees to award class action counsel.

353 For instance, even if I were to award counsel half of their requested fees, or one hundred million dollars, the benefit to each class member would be three-tenths of a cent per dollar lost.

354 The net settlement fund is $510,254,849.99, which is calculated by subtracting $27,500,000 (administrator's fee), $1,303,593.05 (PSLRA awards), and $46,941,556.96 (expenses) from the gross settlement fund of $586,000,000.

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CITATION: Brazeau v. Canada (Attorney General), 2020 ONSC 7229
COURT FILE NO.: CV-15-53262500-CP
Reddock v. Canada (Attorney General), 2020 ONSC 7232
COURT FILE NO.: CV-17-570771-00CP
DATE: 2020/11/25

ONTARIO **SUPERIOR COURT OF JUSTICE**	**SUPERIOR COURT (Class Action Division)**
	CANADA PROVINCE OF QUÉBEC DISTRICT OF MONTRÉAL No.: 500-06-000781-167
Between:	**Between:**
CHRISTOPHER BRAZEAU and DAVID KIFT **Plaintiffs** **- and -** **ATTORNEY GENERAL OF CANADA** **Defendant**	**ARLENE GALLONE** **Plaintiff** **c.** **PROCUREUR GÉNÉRAL DU CANADA** **Defendant**
Proceeding under the *Class Proceedings Act, 1992*	
And Between: **JULLIAN JORDEA REDDOCK** **Plaintiff** **- and -** **ATTORNEY GENERAL OF CANADA** **Defendant**	
Proceeding under the *Class Proceeding Act, 1992*	

Date hearing/d'audience: October 6-8, 2020

Counsel:
James Sayce, Charles Hatt, and *Nathalie Gondek,* for the Plaintiffs in *Brazeau and Kift v. Attorney General of Canada*

H. Michael Rosenberg, James Sayce, *Charles Hatt, Charlotte-Anne Malischewski* and *Jacob Klugsberg* for the Plaintiff in *Reddock v. Attorney General of Canada*

André Lespérance, Clara Poissant-Lespérance, and *Marianne Dagenais-Lespérance* for the Demanderesse in *Gallone c. Procureur Général du Canada*

Susan Gans, Negar Hashemi, Sean Stynes, Lucan Gregory and *Diya Bouchedid* for the Defendant ou Défenderesse in: (a) *Brazeau and Kift v. Attorney General of Canada;* (b) *Reddock v. Attorney General of Canada*; and (c) *Gallone c. Procureur Général du Canada*

Lory Beauregard for the Fond d'aide aux actions collective

REASONS FOR DECISION/JUGEMENT – Part I

MASSE, J. and PERELL, J.

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*[1], Justice Paul Perell of the Ontario Superior Court of Justice is case managing the Ontario class actions, *Brazeau v. Canada (Attorney General)* and *Reddock v. Canada (Attorney General)*. Pursuant to the Québec *Code of Civil Procedure*,[2] Justice Chantal Masse, of the Superior Court of Québec is case managing the Québec class action, *Gallone c. Canada (Attorney General)*.[3] As will soon become apparent, *Brazeau, Reddock, and Gallone* are intertwined class proceedings against the federal government of Canada.

[2] This is our jointly written decision or judgment in *Brazeau, Reddock, and Gallone*. While it is a jointly written decision, it may and should be read as separate decisions of the Ontario Superior Court of Justice and of the Superior Court of Québec. We collaborated in reaching the decision/judgment, but we independently came to our own decisions in accordance with the law and practice of our respective jurisdictions. In other words, this decision should be read as Justice Perell's decision in *Brazeau* and *Reddock* and Justice Masse's decision in *Gallone* that have been combined into one decision.

[3] For reasons that will soon become readily apparent, it was salutary for our respective courts and for the parties for us to collaborate and write a joint decision that would combine our independent decisions.

[4] In each of *Brazeau, Reddock*, and *Gallone,* the Class Members were or are inmates of penitentiaries operated by the Correctional Service of Canada ("CSC"). In each of *Brazeau, Reddock,* and *Gallone*, the Class Members were awarded a judgment for aggregate damages. They

[1] S.O. 1992, c. 6.
[2] CQLR, c. C-25.01.
[3] C.S.Q Court File No.: 500-06-000781-167.

are entitled to a distribution of those awards. In each of the actions, the Class Members were awarded damages as a partial remedy for their unlawful placement in administrative segregation contrary to ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*.[4] In each of *Brazeau, Reddock*, and *Gallone,* the Class Members were also granted judgments to have their individual damages determined.

[5] In each of *Brazeau, Reddock*, and *Gallone,* Class Counsel now bring motions for court approvals of: (a) Distribution Protocols for the Aggregate Award of Damages; and (b) an Individual Issues Protocol setting out the procedure for the individual issues determinations.

[6] In so far as the Distribution Protocols are concerned, it shall be important to keep in mind that the award made in in *Gallone* is proportionally similar to the awards made in *Brazeau* and *Reddock*.

[7] Typically, in class actions, designing a distribution plan and designing a procedure for adjudicating individual issues are addressed in settlement agreements, where subject to court approval, the parties can by contract, resolve the issues. In the immediate cases, however, the parties disagreed about the terms of the Distribution Protocol and of the Individual Issues Protocol. There is no settlement agreement, and it is for the courts of Ontario and Québec to adjudicate a Distribution Protocol and an Individual Issues Protocol.

[8] In Ontario, the Distribution Protocol and the Individual Issues Protocol would be settled pursuant to the authority provided by the *Class Proceedings Act, 1992,* the *Rules of Civil Procedure*[5] and the *Charter*. In Québec, the Distribution Protocol and the Individual Issues Protocol would be settled pursuant to Québec *Code of Civil Procedure* and the *Charter.*

[9] In the immediate cases, settling the protocols is a daunting challenge because: (a) the jurisprudence is underdeveloped in both Ontario and Québec; (b) there are problems finding answers for two jurisdictions; (c) the approaches of the parties evolved and changed numerous times before and during the joint hearing of the motions; and (d) there were numerous contentious points.

[10] It was desirable for efficiency, economy, administration, management, and fairness to co-ordinate the determination of the Distribution Protocol and the Individual Issues Protocol. Thus, the superior courts of Ontario and Québec agreed to hold a joint hearing. The hearing was held in a virtual courtroom on October 6-8, 2020. The hearing was also pursuant to the Canadian Bar Association's revised *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice*, also known as the 2018 Protocol.

[11] Before the hearing, between September 23 and September 25, 2020, the parties met to attempt to negotiate a resolution and to design their own protocols. The Honourable Dennis O'Connor acted as mediator. The parties were mostly successful with respect to the proposed Distribution Protocol and far less so with respect to the Individual Issues Protocol.

[12] Before the hearing, Class Counsel proposed Distribution Protocols and Individual Issues Protocols for each of the three class actions. Attached as Schedule "A" is the Individual Issues Protocol originally proposed for *Brazeau,* which was the most complicated of the individual issues proposals. Canada responded with counterproposals. Canada had its own proposal for the

[4] Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.
[5] R.R.O. 1990, Reg. 194.

Individual Issues Protocol. Canada's draft of an Individual Issues Protocol is attached as Schedule "B".

[13] When the virtual hearing commenced, Class Counsel had a proposal for a combined Distribution Protocol for *Brazeau, Reddock*, and *Gallone* and separate proposals for Individual Issues Protocols for *Brazeau, Reddock*, and *Gallone*. During the hearing, Class Counsel were asked about the possibility of a combined Distribution and Individual Issues Protocol, and they submitted a draft combined protocol for the three actions, which is attached as Schedule "C".

[14] To summarize. the ultimate Distribution and Individual Issues proposal of Class Counsel, for *Brazeau, Reddock,* and *Gallone* (Schedule C) has eleven major elements.

a. The first element is the appointment of an Administrator and of a Roster of Medical Referees and of Claims Referees by agreement of the parties or by order of the court.

b. The second element is a plan for the dissemination of a Notice to the Class Members along with a Claims Form.

c. The third element is the establishment of two combined funds from the Aggregate Damages Awards of *Brazeau*, *Reddock*, and *Gallone*.

i. One combined fund is for the Class Members of *Brazeau* and *Gallone* who were Seriously Mentally Ill ("SMI") when they were placed in administrative segregation.

ii. The second combined fund is for Class Members of *Brazeau, Reddock,* and *Gallone* who were placed in administrative segregation for more than 15 days; *i.e.,* a fund for non-SMI Class Members.

d. The fourth element is that the Administrator would disseminate to the Class Members a Notice of the right to a share of one of the two combined funds along with a Claims Form.

e. The fifth element is that Class Members may complete the Claims Form to make one of three choices; namely:

i. to apply for a share of the SMI-Fund or of the non-SMI Fund;

ii. to apply for a share of the SMI-Fund or the non-SMI Fund and to apply for compensation for general or moral damages of less than $100,000 pursuant to the Simplified Track procedure; or,

iii. to apply for a share of the SMI-Fund or the non-SMI Fund and to apply for compensation of more than $100,000 pursuant to a Motion Track procedure.

f. The sixth element is that where a Class Member makes a claim for a share of the SMI-Fund, a Medical Referee, who has been provided with copies of the Class Member's prison file, would determine whether the Class Member is eligible for a share. There is an appeal of the Medical Referee's determination to the court.

g. The seventh element is that where a Class Member makes a claim for compensation for general or moral damages of less than $100,000 (Simplified Track), the claim would be determined by a Claims Referee based on a paper record. The Claims Referee would apply a *per diem* rate for the days the Class Member was placed in administrative segregation. There is a different *per diem* rate for SMI Class Members and for non-SMI Members. As proposed by Class Counsel, this is a mechanical exercise based on the paper record of days in administrative segregation, and there would be no appeal of the Claims Referee's determination to the court.

h. The eighth element is that where a Class Member makes a claim for compensation for damages of more than $100,000 (Motion Track), the claim would be determined by the court pursuant to a motion procedure akin to a summary judgment motion.

i. The ninth element of Class Counsel's proposal is that the Administrator would manage the distribution of the Class Members' share of the two funds and of individual issues awards.

j. The tenth element is that there would be a deadline for making claims. The deadline would be nine months after the first publication of Notice to the Class Members subject to the court granting leave for late claims.

k. The eleventh element is that Class Counsel's retainer agreement with the Representative Plaintiff would carry over to the completion of the individual issues determinations.

[15] To summarize the proposed Distribution and Individual Issues Protocol of Canada, it has ten major elements that differentiate it from Class Counsels' proposal. The ten elements are as follows:

a. The first element is the appointment of an Administrator and a Roster of Referees pursuant to Rule 54 of the *Rules of Civil Procedure.* This element requires Canada's consent.

b. The second element is the establishment of four combined funds from the Aggregate Damages Awards of *Brazeau*, *Reddock*, and *Gallone*.

i. The first fund is for the Class Members of *Brazeau* and *Gallone* who were Seriously Mentally Ill ("SMI") and who were placed in administrative segregation for 1-5 days.

ii. The second fund is for the Class Members of *Brazeau* and *Gallone* who were Seriously Mentally Ill ("SMI") and who were placed in administrative segregation for 6-15 days.

iii. The third fund is for the Class Members of *Brazeau* and *Gallone* who were Seriously Mentally Ill ("SMI") and who they were placed in administrative segregation for more than 15 days.

iv. The fourth fund is for Class Members of *Brazeau, Reddock*, and *Gallone* who were placed in administrative segregation for more than 15 days; *i.e.,* a fund for non-SMI Class Members. A share of this fund would be capped at $2,200 per Class Member.

c. The third element of Canada's proposal is that a Class Member would self-designate his or her eligibility for a share of a SMI fund, which self-designation could be challenged by Canada, in which case, if there were a dispute about Canada's designation of the Class Member, the dispute would be resolved by a motion to the court.

d. The fourth element is that once all the eligibility disputes were determined, the Administrator would distribute the non-SMI fund shares and the court would determine how the SMI funds should be apportioned and then distributed by the Administrator.

e. The fifth element is that once the court had determined the allocation of shares of the funds to the Class Members, any unallocated funds would revert to Canada to be applied to awards made in the individual issues adjudications.

f. The sixth element of Canada's proposal is that if a Class Member makes a claim for additional damages, there would be three individual issues tracks; namely:

i. A Small Claims Track, where damages would be determined by a Referee from the Roster of Referees for claims up to $35,000. The only issue would be quantum of damages above and beyond the Class Member's share of the Aggregate Damages Award allocated to him or her.

ii. A Simplified Track, which would be a summary motion track, where damages would be determined by a judge, for claims over $35,000 and up to $100,000.

iii. A Regular Action Track for claims, where damages would be determined by a judge, for claims above $100,000.

g. The seventh element is that claims in the Small Claims Track would be adjudicated by a Referee based on a written record pursuant to a motion under Rules 20 and 55.01 of the Ontario *Rules of Civil Procedure.* Any cross-examinations would take place out of court. The Referee's Reasons would be deemed a report under Rule 54 of the *Rules of Civil Procedure*. Any disagreement about a decision of a Referee would be resolved by way of a report confirmation motion under Rule 54.

h. The eighth element is that for claims over $35,000 (Simplified Track) and for claims over $100,000 (Regular Action Track), the claims would be adjudicated by a judge and subject to rights of appeal.

i. The ninth element is that to be eligible for compensation under the Simplified Track or the Regular Action Track, a Class Member would have to prove on the balance of probabilities that his or her placement in administrative segregation caused the alleged harms that are above and beyond the base level of harm established in the common issues phase of the class actions.

j. The tenth element of Canada's proposal is that Class Members wishing to file a Claim must do so within one year of the final resolution of his or her entitlement to a share in the distribution of the funds. Any claim received after the Claims Deadline would not be accepted except with leave of the Supervising Judge.

[16] By the end of the hearing, the parties agreed on an approach for the courts to follow to determine the Protocols. The parties agreed that the joint hearing should be adjourned so that we, Justices Masse and Perell, could consult and draft a *Distribution and Individual Issues Protocol* ("*Draft D&I Protocol*") for our respective courts.

[17] Our draft would be a provisional decision of the courts of Ontario and Québec. Before the respective courts issued a final Order, the draft would be provided to Class Counsel and to Canada, and the parties would have an opportunity to make submissions in writing and, if necessary, oral submissions. (The parties also would have the opportunity to consider the courts' draft and to negotiate an alternative proposal for court approval.)

[18] Thus, on October 8, 2020, the joint hearing was adjourned on terms as set out in Justice Perell's Endorsement as follows:

> […]
>
> 5. In accordance with the following directions, the joint hearing is adjourned *sine die*. The directions are:
>
> > a. On consent, the parties agree to forthwith file the evidentiary record from the *Brazeau v. Canada (Attorney General)* and *Reddock v Canada (Attorney General)* summary judgment motions for the *Gallone c. Canada (Attorney General)* distribution and individual issues motion.
> >
> > b. On consent, the parties agree to forthwith file the evidentiary record from the *Gallone c. Canada (Attorney General)* distribution and individual issues motion for the *Brazeau v. Canada (Attorney General)* and *Reddock v. Canada (Attorney General)* distribution and individual issues motions.
> >
> > c. After receipt of the evidentiary records, the respective courts shall release provisional decisions settling a Distribution Protocol and an Individual Issues Protocol, and the courts shall invite the parties to show cause in writing why the provisional decisions should not be made final Orders for the respective courts.
> >
> > d. The written submissions shall be simultaneous exchanged in accordance with a schedule set by the respective courts.
> >
> > e. Before releasing a final decision, the respective courts shall provide further directions as to whether there should be oral submissions in addition to the written submissions.

[19] Attached as Schedule "D" is the *Draft D&I Protocol* that we prepared for our respective courts. To summarize, it has nine major elements as follows:

a. The first element is the appointment of an Administrator and a Roster of Manager/Experts by agreement of the parties or by order of the court. (It is shall be important to note that a Manager/Expert is **not** appointed as a referee with adjudicative authority.)

b. The second element is the establishment of one Aggregate Damages Award fund combining the awards made in *Brazeau, Reddock,* and *Gallone* into one fund. (This ensures that all Class Members from across the country are treated equivalently.)

c. The third element is court approval of a plan for the dissemination of a Notice to the Class Members along with a Claims Form.

d. The fourth element is that the Administrator would disseminate a Notice to Class Members along with a Claims Form. The Claims Form would provide Class Members the selection of making a claim under one of three tracks; namely:

i. Track 1 (*Distribution and Release of Claim Track*).

ii. Track 2 (*Distribution and Under-$50,000 Track*).

iii. Track 3 (*Distribution and Over-$50,000 Track*).

e. The fifth element is that where a Class Member selects Track 1 (*Distribution and Release of Claim Track*), a Manager/Expert would determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert would report his or her decision to the parties and the Administrator. The Class Member would release all other claims. (There would be no appeal of the Manager/Expert's decision, which is an administrative not an adjudicative decision.).

f. The sixth element is that where a Class Member selects Track 2 (*Distribution and Under-$50,000 Track*),

i. a Manager/Expert would determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file, and the Manager/Expert would report his or her decision to the Administrator and the parties. (There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility, which is an administrative not an adjudicative decision.);

ii. the Manager/Expert would inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Class Member's claim by reviewing the Claims Form, the Class Member's CSC file, and the affidavit material, transcripts, and factums filed by the Class Member and Canada; and,

iii. Either party may move without additional evidence to the Ontario Superior Court of Justice or to the Superior Court of Québec for an Order determining the quantum of the Track 2 claim.

g. The seventh element is that where a Class Member selects Track 3 (*Distribution and Over-$50,000 Track*),

i. a Manager/Expert would determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file, and the Manager/Expert would report his or her decision to the Administrator and the parties. (There would be no appeal of the Manager/Expert's decision with respect with respect to a Class Member's eligibility, which is an administrative not an adjudicative decision.); and,

ii. a judge of the Ontario Superior Court of Justice or of the Superior Court of Québec would determine the Class Member's claim pursuant to a summary judgment procedure under Rule 20 of Ontario's *Rules of Civil Procedure* or an analogous procedure pursuant to s. 600 of Québec's *Code of Civil Procedure*.

h. The eighth element concerns the fees that may be charged for legal services for Tracks 1, 2, and 3 as follows:

i. If a Class Members selects Track 1, then Class Counsel or the lawyer retained to act for the Class Member cannot charge for his or services for the Class Member with respect to the Track 1 claim.

ii. If a Class Member selects Track 2, then Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member with respect to the Track 2 claim, such fee not to exceed 15% of the damages awarded plus reasonable disbursements.

iii. If the Class Member selects Track 3, then Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member as may be approved by the court.

[20] In accordance with the Adjournment Endorsement, the parties shall have 30 days to show cause in writing why the *Draft D&I Protocol* should not be made final Orders for the courts. Those written submissions shall be simultaneous exchanged and simultaneously delivered to the Ontario Superior Court of Justice or to the Superior Court of Québec.

[21] What follows is our explanation and the rationale for the *Draft D&I Protocol* set out in Schedule "D". To repeat what was noted above, the joint decision is a provisional decision of the courts of Ontario and Québec respectively. Part 1 of our joint decision includes the invitation to the parties to make submissions in writing, and orally if necessary, before the hearing is concluded and a final Order is made by our respective courts.

[22] In other words, the *Draft D&I Protocol* is not written in stone, and we will consider the critiques of the parties before making a final order for our respective courts. Also as noted parenthetically above, the parties are invited to negotiate and settle the protocols consensually. Negotiated protocols are subject to court approval. As the discussion below will reveal, we appreciate that by settlement, the parties may design procedures that may be beyond the courts' jurisdiction to design.

B. Factual Background

1. Brazeau

[23] The *Brazeau* action was commenced on July 17, 2015. In *Brazeau*, the Representative Plaintiffs, Christopher Brazeau and David Kift, sue the Government of Canada (represented by the Defendant Attorney General of Canada) for breaches of ss. 7 and 12 of the *Canadian Charter of Rights and Freedom*. On December 14, 2016, *Brazeau* was certified as a class proceeding.[6]

[24] Koskie Minsky LLP is Class Counsel in *Brazeau*.

[6] *Brazeau v. Attorney General (Canada)*, 2016 ONSC 7836.

[25] With a carve out for Class Members of the *Gallone* action, the *Brazeau* Class is composed of inmates of federal penitentiaries who were placed in administrative segregation for any period of time after November 1, 1992 if: (a) they were diagnosed by a medical doctor with an Axis I Disorder (excluding substance abuse disorders), or Borderline Personality Disorder; and (b) suffered significant impairment from their disorder.

[26] During the course of the hearing of the *Brazeau* summary judgment motion, because the Representative Plaintiffs discontinued certain claims that did not involve administrative segregation but were concerned about Correctional Service Canada's alleged failures in providing health care to the Class Members, Messrs. Brazeau and Kift were granted leave to amend the Class Definition.

[27] After the summary judgment hearing, there was a further amendment on consent to carve out from the Class Definition certain inmates in Québec penal institutions because they are Class Members in the parallel class action; *i.e.,* in, *Gallone*. As a result of these amendments, Messrs. Brazeau and Kift are the Representative Plaintiffs for the following class, which may be referred to as the SMI (Serious Mentally Illness) Class:

> All offenders in federal custody, who were placed in administrative segregation in a federal institution situated outside Québec after February 24, 2013, or who placed in administrative segregation in a federal institution anywhere in Canada before February 24, 2013 were diagnosed by a medical doctor with an Axis I Disorder (excluding substance use disorders) or Borderline Personality Disorder, who suffered from their disorder, in a manner described in Appendix A, and reported such during their incarceration, where the diagnosis by a medical doctor occurred either before or during incarceration in a federal institution and the offenders were incarcerated between November 1, 1992 and the present, and were alive as of July 20, 2013.

[28] Appendix "A" of the *Brazeau* Class Definition lists the ways in which inmates diagnosed with an Axis I Disorder (excluding substance use disorders) or Borderline Personality Disorder ("BPD"), suffered from their disorder and can be identified as Class Members. Appendix A states:

> (a) significant impairment in judgment (including inability to make decisions; confusion; disorientation); (b) significant impairment in thinking (including constant preoccupation with thoughts, paranoia; (c) delusions that make the offender a danger to self or others); (d) significant impairment in mood (including constant depressed mood plus helplessness and hopelessness; (e) agitation; (f) manic mood that interferes with ability to effectively interact with other offenders, staffs or follow correctional plan); (g) significant impairment in communications that interferes with ability to effectively interact with other offenders, staff or follow correctional plan; (h) significant impairment due to anxiety (panic attacks; overwhelming anxiety) that interferes with ability to effectively interact with other offenders, staff or follow correctional plan; (i) other symptoms: hallucinations; delusions; (j) severe obsessional rituals that interferes with ability to effectively interact with other offenders, staff or follow correctional plan; (k) chronic and severe suicidal ideation resulting in increased risk for suicide attempts; (l) chronic and severe self-injury; or, (m) a GAF [Global Assessment of Functioning scale] score of 50 or less.

[29] On this motion, Canada provided evidence about the placement of Class Members in administrative segregation. In his affidavit dated August 13, 3020, Mike Hayden, who is a manager and statistical data analyst in the Policy Sector of CSC, deposed that:

a. Since 2009, 3,026 inmates had a placement between 100 and 300 days and 246 inmates had a placement longer than 300 days.

b. Since 2011, 56% of the placements in administrative segregation have been for less than 60 days.

[30] On March 25, 2019, the *Brazeau* Representative Plaintiffs were granted a summary judgment in which the Class Members were awarded aggregate *Charter* damages of $20 million for vindication and deterrence.[7]

[31] Although later overturned on appeal, in *Brazeau*, the $20 million award less Class Counsel's fee were to be paid by Canada paying for additional mental health or program resources at its penitentiaries. In the initial summary judgment decision, in *Brazeau*, the Class Members recovered no aggregate damages for compensation and no pre-judgment interest.[8] Their individual compensatory damages were to be assessed at individual issues trials. Thus, the initial summary judgment in *Brazeau* was only for vindication and deterrence damages.[9]

[32] To recognize the impact of limitation periods, the judgment in *Brazeau* was granted for Class Members who were subjected to administrative segregation after July 20, 2009. Other Class Members were at liberty to refute the presumptive running of the limitation period by proving that they lacked capacity to bring suit.

[33] In the *Brazeau* decision, it was noted that the practical consequence of this conclusion about limitation periods was that subject to individual rebuttals in accordance with the laws relating to prescription and the limitation of actions in force in a province, the number of Class Members with claims, which included inmates from 1992 (estimated to be a class size of 6,750), was reduced to the number of inmates placed in administrative segregation from July 20, 2009 (estimated to be a class size of 1,500). In *Brazeau,* Justice Perell stated at para. 387 of his decision:

> 387. The claims of inmates who were placed in administrative segregation only before July 20, 2009 are statute-barred unless they can rebut the running of the limitation period by establishing that: (a) their claim was not discoverable in their particular case: or (b) the running of the limitation period was suspended due to the inmate not having litigation guardian and being incapable of commencing a legal proceeding due to his or her mental condition (estimated to be 500 inmates). Thus, if there is an operative limitation period, Messrs. Brazeau and Kift estimate the total class size to be 2,000 inmates.

[34] Class Counsel has re-calculated and advises that approximately 3,636 *Brazeau* Class Members were granted a judgment and an entitlement to share in the distribution of the Aggregate Damages Award.[10]

[35] Canada appealed the *Brazeau* summary judgment.

[36] On August 9, 2019, a Class Counsel fee award was made in *Brazeau*.[11] It was a complex award.[12] The outcome was that the net aggregate damages award to be distributed in *Brazeau* is

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[7] *Brazeau v. Attorney General (Canada),* 2019 ONSC 1888.
[8] *Brazeau v. Attorney General (Canada),* 2019 ONSC 3426.
[9] $20 million was arrived at by using the multiplier of $10,000 for each of the then estimated 2,000 Class Members, which multiplier was selected by analogy to the common experience payment ("CEP") that the Federal Government agreed to pay in the Indian Residential School Settlement Agreement. *Brazeau v. Attorney General (Canada)* 2019 ONSC 3426 at para. 445 *et seq*.
[10] The Claimant Class was calculated by class counsel on the basis of data provided by the Counsel for Canada in 2020. They represent 18.3% of those inmates who had stays of any duration during the *Brazeau* class period.
[11] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721.
[12] Class Counsel was awarded a fee of $6,660,000 plus $865,800 for HST. There were disbursements of $435,627.66 (inclusive applicable taxes). Pursuant to s.10 of Regulation 771/92 of the *Law Society Act*[12], the Class Proceedings Fund was entitled to a levy out of the aggregate damages award of $1,280,857.23. The Fund It was also entitled to reimbursement for its share of the disbursement funding. Canada was also obliged to pay Class Counsel $530,973, plus HST of $69,027, for a total of $600,000 pursuant to a Costs Order of June 5, 2019. With Canada's

$11,527,661.11.

[37] The Ontario Court of Appeal heard the *Brazeau* appeal and the *Reddock* appeal together.

[38] On March 9, 2020, the Ontario Court of Appeal affirmed the *Charter* damages award in *Reddock,* and the Court affirmed the judgment on liability but not the methodology of the *Charter* damages award in *Brazeau*.[13] In *Brazeau*, the Court of Appeal remitted the matter of the *Charter* damages for redetermination.

[39] The damages re-determination was heard as a motion in writing, and on March 28, 2020, Justice Perell released his decision in *Brazeau* about the *Charter* damages.[14] This time, he awarded the *Brazeau* Class Members $20 million for vindication, deterrence, compensation, and pre-judgment interest pursuant to the *Courts of Justice Act* without breaking down the award. For the purposes of individual issues trials, the damages award was deemed to be compensatory damages. The Reasons for Decision stated at paragraphs 27-40:

> 27. Based on the evidence in the immediate case as confirmed and supported by the evidence and the lessons learned from *Reddock*, which Canada concedes involves the same evidentiary footprint as *Brazeau*, while the totality of the Class Members' *Charter* damages claims cannot be determined in the aggregate on this summary judgment motion, there is a foundation for a base level of *Charter* damages that can be awarded to the class.
>
> 28. In the immediate case, each Class Member suffered from their confinement in administrative segregation. Here it should be noted that the Class Definition in *Brazeau* defined the Class Members as the sickest of the mentally sick. The evidence on liability and on the assessment of damages was that these Class Members should not have experienced administrative segregation as the means to secure their security or the security of the penitentiaries.
>
> 29. As was the case in *Reddock*, the contravention of any of the *Charter* breaches would on a class-wide basis support vindication and deterrence damages for the whole class, all of whom suffered physical or psychiatric harm.
>
> 30. In the immediate case, the evidence establishes that all of the Class Members suffered psychiatric harm from being placed in administrative segregation, which in truth is solitary confinement contrary to the *Mandela Rules*. For a certainty, the evidence in the immediate case establishes that all those Class Members who were in prolonged administrative segregation suffered a base level of compensable harm. Indeed, the evidence establishes that the whole class, who are by definition seriously mentally ill, suffered profoundly. Rule 45 of the *Mandela Rules* require a complete ban on solitary confinement for the mentally ill. The Court of Appeal for Ontario has now twice recognized the application of the *Mandela Rules* in Canada. In *CCLA v. Canada*,[15] the Court of Appeal ruled that there should be a ban for the mentally ill in solitary confinement. In the immediate case, Drs. Grassian, Chaimowitz, and Haney all opined that the mentally ill suffer more, and suffer greater and more permanent harm, than those who do not suffer from mental illness. Dr. Austin and Dr. Haney opined that the placement of any seriously mentally ill inmate into solitary confinement is inappropriate and should be forbidden. The determination of whether a mentally ill prisoner should

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payment for costs, the remaining $6,129,027 in fees, plus $796,773 in HST, ($6,925,800 total), shall be payable out of the Aggregate Damages Award. The $200,000 in disbursements were to be paid by Canada to the Fund pursuant to the Costs Order of June 5, 2019, and the remaining $235,627.66 in disbursements was to be distributed out of the Aggregate Damages Award as follows: (i) current disbursements and $100,000 in future disbursements payable to Koskie Minsky LLP; (ii) $117,239.63; and, (iii) disbursements payable to the Fund in the amount of $118,388.03; and, that a $15,000 honorarium shall be payable to each of David Kift and Christopher Brazeau out of the Aggregate Damages Award.

[13] 2020 ONCA 184.

[14] *Brazeau v. Canada (Attorney General)*, 2020 ONSC 3272.

[15] 2019 ONCA 243.

be placed in segregation for any period of time should be made by a medical professional, not by the warden of an institution.

[…]

32. Based on the evidence in the immediate case, I conclude that there is a base level of *Charter* damages that I would value at $20 million across the class. This base level award is for the entire class for vindication, deterrence, and compensation for the breaches of the *Charter*. The compensatory portion of the claim is inclusive of pre-judgment interest.

33. For the purposes of distributing the $20 million, it is not necessary to break down the $20 million award into the heads of damages of vindication, deterrence, and compensation because I am satisfied that $20 million does not overstate Canada's liability in the aggregate. If, anything, $20 million understates Canada's liability.

34. However, for the purposes of the individual issues trials that are to follow, I would designate each Class Member's share of the $20 million without deduction for Class Counsel's legal fees as compensatory damages. This is very fair to Canada because for many if not most of the Class Members they will not need to proceed to individual damages assessments for compensation because they will already have been fully compensated for this head of damages, and vindication and deterrence will also have been achieved on a class-wide basis by the aggregate award.

[…]

38. I appreciate that if the $20 million less Class Counsel's fees and expenses are distributed *per capita*, there are arguments that the Class Members whose claim is based solely on section 7 of the *Charter* and whose placement or placements were less than five days might be treated differently than the Class Members whose placements were for more than five days but less than 15 days and that there are arguments that Class Members whose placement were for more than five days but less than 15 days might be treated differently that the Class Members whose placements were for more than 15 days, but these are matters to be determined on the motion to settle how the $20 million should be distributed. I will deal with the scheme for distribution later.

39. The distribution of the $20 million is a matter for which Canada should be indifferent because it remains the case that the $20 million does not overstate Canada's liability and attributing the $20 million as compensatory inclusive of pre-judgment interest for the purposes of the individual damages assessment is very favourable to Canada.

40. In the context of class proceedings of the nature of the one in the immediate case, in my view, it is salutary to assess a base level of damages that understates the defendant's liability and then to leave it to Class Counsel at a hearing to resolve the distribution of those funds to develop a scheme to do so fairly. It will always be the case that there will be some over-compensation and some under-compensation for individual Class Members, but the defendant will not pay more than he, she, or it is liable and those Class Members who are under-compensated have the right to individual assessments for the deficiency. The $20 million aggregate award of *Charter* damages in the immediate case is fair to the Class Members and it is fair to Canada.

2. Reddock

[40] The *Reddock* action was commenced on March 3, 2017. In *Reddock*, the Representative Plaintiff, Jullian Jordea Reddock, sues Canada for breaches of s. 7 and 12 of the *Canadian Charter of Rights and Freedom*. On June 21, 2018, the action was certified as a class proceeding.[16]

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[16] *Reddock v. Canada (Attorney General)*, 2018 ONSC 3914.

[41] Koskie Minsky LLP and McCarthy Tétrault LLP are co-Class Counsel in *Reddock*.

[42] With a carve out for Class Members of the *Brazeau* or *Gallone* actions, the *Reddock* class is composed of inmates of federal penitentiaries who were placed in administrative segregation for more than 15 days after November 1, 1992. The Class Definition for the *Reddock* action is:

> All persons, except Excluded Persons, as defined below, who were involuntarily subjected to a period of Prolonged Administrative Segregation, as defined below, at a Federal Institution, as defined below, between November 1, 1992 and the present, and were alive as of March 3, 2015 ("the Class");
>
> Excluded person are:
>
> > i. All offenders incarcerated at a Federal Institution who were diagnosed by a medical doctor with an Axis I Disorder (excluding substance abuse disorders), or Borderline Personality Disorder, who suffered from their disorder in a manner described in Appendix "A", and reported such during their incarceration, where the diagnosis by a medical doctor occurred either before or during incarceration in a federal institution and the offenders were incarcerated between November 1, 1992 and the present and were alive as of July 20, 2013; and
> >
> > ii. All persons who were involuntarily subjected to Prolonged Administrative Segregation, as defined below, only at a Federal Institution situated in the Province of Québec after February 24, 2013. Persons who were involuntarily subjected to Prolonged Administrative Segregation at Federal Institutions situated in Québec and another Canadian province, or at a Federal Institution situated in Québec prior to February 24, 2013, are not Excluded Persons.
> >
> > "Administrative Segregation" is defined as sections 31 to 37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.
> >
> > "Prolonged Administrative Segregation" is defined as the practice of subjecting an inmate to Administrative Segregation for a period of at least fifteen (15) consecutive days.
> >
> > "Federal Institutions" are defined as the system of Federal correctional facilities across Canada that is administered by the Correctional Service of Canada, a Federal Government body.

[43] The *Reddock* class is made up of inmates who have spent more than fifteen consecutive days in administrative segregation. The Class definition was reached on consent to exclude *Brazeau* Class Members and to exclude the Class Members in *Gallone*, which concerns claims for damages suffered in Québec from February 24, 2013 onward.

[44] It is to be noted that *Reddock* includes claims for damages that were suffered by inmates in Québec before February 24, 2013. In other words, some persons who are or were inmates in Québec are Class Members in *Reddock.*

[45] Between November 1, 1992 and April 7, 2019, excluding segregation placements in Québec that continued past February 24, 2013, The Federal Government placed 27,817 inmates in administrative segregation for more than fifteen days for a total of 79,605 placements. The individual inmates were, on average, placed in segregation three times. The placements lasted an average of 71 days.

[46] Before the application of limitation periods barring claims, the *Reddock* class comprises

24,229 Class Members.[17]

[47] Applying a presumptive six-year limitation period, excluding placements in Québec that continued past February 24, 2013, the Federal Government placed 10,247 inmates in administrative segregation for more than fifteen days between March 3, 2011 and April 7, 2019 for a total of 21,641 placements. The inmates were, on average, placed in segregation twice. The placements lasted an average of 59 days. Applying a presumptive six-year limitation period, the *Reddock* Claimant class comprises 8,934 Class Members.[18]

[48] On August 29, 2019, Mr. Reddock was granted a summary judgment in which the Class Members were awarded aggregate damages of $20 million for vindication, deterrence, and compensatory damages with additional compensatory damages to be payable after individual issues trials.[19] The Class also received pre-judgment interest of $1,120,797 for pre-judgment interest on the compensatory portion of the damages award, so that the judgment was around $21 million for *Charter* damages.

[49] To recognize the impact of limitation periods, the $22 million were attributed to those *Reddock* Class Members placed in administrative segregation after March 3, 2011. Approximately 8,531 Reddock Class Members were granted judgment.[20]

[50] In *Reddock*, the compensatory portion of the award was assessed as having a value of $500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, the compensatory portion of the award was valued as being worth approximately $9 million. Once pre-judgment interest was added and Class Counsel's fees and disbursements subtracted, each Class Member could receive a minimum award of $2,200.

[51] On the matters of causation and the quantification of the base level of damages, the decision in *Reddock* stated at paragraphs 268-272 and 381-397:

> 268. The contraventions of the rights to life, liberty, and security of the person caused severe psychological distress, including anxiety, hypersensitivity, cognitive dysfunction, significant impairment of ability to communicate; hallucinations, delusions, loss of control, severe obsessional rituals, irritability, aggression, depression, rage, paranoia, panic attacks, psychosis, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. There are new psychological symptoms and exacerbated psychiatric conditions in those with diagnosed or undiagnosed mental illnesses. The negative health effects from administrative segregation can occur within a few days of segregation and those harms increase as the duration of the time in administrative segregation increases and the expert evidence in the immediate case establishes that there is physical and mental harm from prolonged administrative segregation, which is to say that every inmate placed in administrative segregation for more than fifteen days suffers a base level of psychiatric and physical harm.

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[17] The Federal Government admits that 18.3% of male inmates have both (i) a current Axis I Disorder (excluding substance use disorders) or a Borderline Personality Disorder, and (ii) a Global Assessment of Function score of 50 or less (pursuant to the World Health Organization's Modified GAF Scale) and that 50% to 70% of these inmates have a clinical diagnosis. Conservatively, therefore, 12.8% of inmates placed in administrative segregation for fifteen days or longer are Class Members of the *Brazeau* Case.
[18] The Class Definition does not include all inmates who have been placed in administrative segregation. Inmates who were placed in administrative segregation for less than fifteen days are not Class Members.
[19] *Reddock v. Canada (Attorney General)* 2019 ONSC 5053.
[20] The Claimant Class for the award was recalculated by Class Counsel on the basis of data provided by Canada. The Claimants represent 81.7% of those inmates who had placement of 16 days or more during the *Reddock* class period.

269. The personal stories, Messrs. Campbell, Cansanay, McMath, Reddock, and Spence about their experiences in administrative segregation, the academic literature, and the expert evidence of Drs. Chaimowitz, Grassian, and Martin and of Professor Méndez prove that while an inmate will suffer differentially from his or her placement in administrative segregation, they will also suffer to some degree and there is a base level of suffering that all will suffer from a placement in administrative segregation for more than fifteen days.

270. In a factual finding that was upheld by the Ontario Court of Appeal in the *Cdn Civil Liberties Assn* Case, Associate Chief Justice Marrocco concluded that keeping a person in administrative segregation exposes that person to abnormal psychological stress. The evidence in the immediate case (and also the evidence in the *Brazeau* Case) revealed that once the placement had become prolonged the stress and anxiety was serious and to borrow the language of the Supreme Court in *Mustapha v. Culligan of Canada Ltd*.[21] and *Saadati v. Moorhead*,[22] the stress and anxiety was above the ordinary annoyances, anxieties and fears that come with living in a penitentiary. In *Mustapha* and in *Saadati*, the Supreme Court spoke about the comparator of stress and anxiety in a civil society but the point to emphasize is that to be a compensable harm, the stress and anxiety must be serious and extraordinary. The evidence in the *Reddock* Case proves that the stress and anxiety from prolonged administrative segregation rises to the level that the inmate suffers a mental shock that is a compensable harm.

271. That there is a base level of harm for every inmate is now a matter of issue estoppel and *stare decisis*. In this regard, it is worth noting that in the *Cdn Civil Liberties Assn* Case, although the Ontario Court of Appeal was not prepared to find that administrative segregation was inherently cruel and unusual punishment for young persons or persons with a mental illness, it included these inmates as those suffering a cruel and unusual punishment if the segregation was more than fifteen days. It was the prolonged duration of the administrative segregation, not the idiosyncratic character of the inmate, that was determinative. Justice Benotto stated at paragraphs 66-67 of her judgment:

> 66. While I agree with the application judge's resolution of the apparent conflict between CD-709 and the Act, I do not share his confidence about the efficacy of s. 87(a) in preventing serious harm to inmates with a mental illness. In principle, I agree with the CCLA that those with mental illness should not be placed in administrative segregation. However, the evidence does not provide the court with a meaningful way to identify those inmates whose particular mental illnesses are of such a kind as to render administrative segregation for any length of time cruel and unusual. I take some comfort in my view that a cap of 15 days would reduce the risk of harm to inmates who suffer from mental illness -- at least until the court has the benefit of medical and institutional expert evidence to address meaningful guidelines. This issue therefore remains to be determined another day.
>
> 67. Based on the record as it presently exists, I would not therefore make the determination sought by the CCLA on this issue.

272. Thus, the Court of Appeal’s decision was categorical about administrative segregation being unconstitutional when the placement was for more than fifteen days. And the unconstitutionality was universal for anyone placed in administrative segregation and not based on personality traits of the inmate. Moreover, the universality did not distinguish between voluntary or involuntary admissions to administrative segregation.

[…]

381. As I shall explain below, I conclude that there is a base level of *Charter* damages that I would value at $20 million. This base level award is for: (a) vindication and deterrence for the breach of s. 7 of the *Charter* that the Federal Government does not dispute; and (b) vindication, deterrence and compensation for the other breaches of sections 7 and 12 of the *Charter*. I would assess the

[21] 2008 SCC 27.
[22] 2017 SCC 28.

compensatory portion of this award as having a value of $500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, I would value the compensatory portion of the award as having a value of approximately $9 million.

382. It is true that each Class Member has a unique or idiosyncratic claim for a remedy for having his or her *Charter* rights violated. It is also true that the totality of all the discrete claims of the Class Members can only be determined after individual issues trial, which is to say that an aggregate assessment of the totality of the Class Member's claims is not possible. However, while the totality of the Class Members' Charter damages claims cannot be determined in the aggregate on this summary judgment motion, there is a foundation for a base level of Charter damages that can be awarded to the class on this summary judgment motion.

383. The contravention of any of the *Charter* breaches would on a class-wide basis support vindication and deterrence damages even if every member of the class could not be said to have suffered physical or psychiatric harm from the violation of his or her *Charter* rights.

384. Also, as noted above, that there is a base level of harm for every Class Member, who by definition has been in administrative segregation for more than fifteen days, is now a matter of issue estoppel and *stare decisis*. This follows because the Ontario Court of Appeal in the *Cdn Civil Liberties Case* held that administrative segregation for more than fifteen days is a cruel and unusual treatment that contravenes s. 12 of the *Charter*. It follows that there is a base level of harm caused by the breaches of sections 7 and 12 of the *Charter*.

385. Further, in any event, based on the evidence in the immediate case, I am satisfied that there is a base level of mental suffering that has been suffered by all Class Members. Further still, in any event, the evidence on this summary judgment motion is that every inmate would have suffered general damages for the assault on their *Charter* rights and this assault is worthy of compensation regardless of whether or not the Class Member suffered physical or mental harm. There is thus an evidentiary foundation for a base level *Charter* damages award, and in this part of my Reasons for Decision, I shall quantify that award.

386. I appreciate that I shall be going farther in the *Reddock* Case than I did in the *Brazeau* Case where I made a class-wide Charter damages award for vindication and deterrence but did not include compensatory damages, which were to be left to be assessed at individual issues trials.

387. I also appreciate that courts have rejected claims for aggregate damages in cases of personal injury where liability cannot be determined on a class-wide basis and that claims of psychological injury are generally not amenable to an aggregate assessment because of the individual nature of damages as well as causation. Indeed, I refused to make an award for psychological injury in *Healy v Lakeridge Health Corporation*,[23] in a judgment that was affirmed by the Ontario Court of Appeal. […]

388. However, as a result of the Supreme Court of Canada's decision in *Saadati v. Moorhead*,[24] about damages for mental harm, I am fairly able to decide without requiring a trial that there is a base level of compensatory harm for the contraventions of the *Charter* or for systemic negligence. The Supreme Court in *Saadati* overturned the authority of Healy v Lakeridge Health Corporation and other cases as to what counts as a compensable psychiatric injury.

389. Prior to the *Saadati v. Moorhead* decision, the conventional view was that recovery for mental injury required a claimant to prove with expert medical opinion evidence a recognized psychiatric illness, which came to mean an illness within the classification of mental disorders contained in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), published by the American

[23] *Healey v Lakeridge Health Corporation*, 2010 ONSC 725, aff'd 2011 ONCA 55.
[24] 2017 SCC 28.

Psychiatric Association, and the International Statistical Classification of Diseases and Related Health Problems ("ICD"), published by the World Health Organization.

390. But after *Saadati v. Moorhead*, while an expert's opinion is relevant it is not a necessity and in order to establish a compensable mental injury, the claimant need not prove that he or she was suffering a recognized psychiatric illness. Rather, the claimant needs to prove that as a result of the defendant's negligence he or she suffered a mental disturbance that is serious and prolonged and that rises above the ordinary annoyances, anxieties and fears that come with living in civil society

391. In the case at bar, I am satisfied from the evidence in the *Reddock* Case that for every Class Member the stress and anxiety was serious and prolonged and to borrow the language of the Supreme Court in *Mustapha v. Culligan of Canada Ltd.* and *Saadati v. Moorhead*, the stress and anxiety was above the ordinary annoyances, anxieties and fears that come with living in a penitentiary.

392. In the *Reddock* Case, Class Counsel submitted that the quantum of damages should be guided by other *Charter* damages cases and provided the following examples: (a) In *Vancouver (City) v. Ward*, discussed above, the plaintiff recovered $5,000 for two days of wrongful incarceration and a strip search; (b) in *Carr v. Ottawa Police Services Board*,[25] the plaintiff recovered $7,500 for an unlawful arrest, detention, and strip-search; (c) in *Curry v. Canada*,[26] a prisoner detained in a dry cell for an illegal cavity search and x-ray searches recovered $10,000; (d) In *Elmardy v. Toronto Police Services Board,*[27] the plaintiff who was wrongfully detained based on racial profiling recovered $50,000 for breaches of sections 8, 9, 10, and 15 of the *Charter*; and (e) in *Ogiamien v. Ontario,*[28] the plaintiff recovered $60,000 for a violation of s. 12 of the *Charter*.

393. While opposing the notion that could be any quantification on a class wide basis, the Federal Government provided a few more examples of *Charter* damages awards; namely: (a) *Hill v. British Columbia*,[29] where the plaintiff recovered $500 because there was a failure to conduct a 5-day review of his placement in administrative segregation and the plaintiff was segregated for an additional 11 days; and (b) *Brandon v. Canada (Correctional Service)*,[30] where the plaintiff recovered $680 for 68 days of unlawful detention in disciplinary segregation and administrative detention; and, (c) *Hermiz v. R.,*[31] where the plaintiff recovered $6,000 for a wrongful two-month detention in jail.

394. There is, however, no established formula or juridical science to assessing *Charter* damages. I agree with what Justice Sharpe and Professor Roach say in their book, R.J. Sharpe and K. Roach, *The Charter of Rights and Freedoms*, (Toronto: Irwin Law, 2009) at pp. 384-5

> It can be extremely difficult to measure in money terms the amount appropriate to compensate the plaintiff for physical injuries or for damages to reputation, dignity, or privacy or simply for the violation of a *Charter* right. Translating into money the extent of the injury amounts to little more than sophisticated guesswork. In many cases, the damage suffered as a result of a *Charter* violation will fall into this intangible territory. The rights and freedoms guaranteed by the *Charter* are abstract and intangible and thus assessment of the extent of the injury in monetary terms will often be difficult. Low awards for the violation of a *Charter* right might trivialize the right while high awards may create an unjustified windfall for the applicant.

[25] 2017 ONSC 4331 at para. 248.
[26] 2006 FC 63 at para. 33.
[27] 2017 ONSC 2074 at para. 5.
[28] 2016 rev'd on liability 2017 ONCA 667.
[29] [1997] B.C.L.R. (3rd) 211 (C.A.)
[30] [1996] F.C.J. No. 1 (T.D.)
[31] 2013 FC 764.

> 395. The assessment of *Charter* damages is made somewhat easier in the immediate case, because only a base level award is being requested. In the *Brazeau* Case, I awarded *Charter* damages for vindication and deterrence of $20 million and I see no reason to award any less in the immediate case.
>
> 396. I would include in this amount a base level award for compensatory damages which include damages for the mental suffering of the Class Members and general damages for the assault on their *Charter* rights. I assess that base level compensatory award as worth $500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, I would value the compensatory portion of the award as having a value of approximately $9 million.
>
> 397. I, therefore, conclude that there is a base level of *Charter* damages that I would value at $20 million. This base level award is for vindication, deterrence, and compensation.

[52] Canada appealed the *Reddock* decision.

[53] On October 10, 2019, Mr. Reddock was awarded costs of $1,122,590.33, all inclusive, for the summary judgment motion.[32]

[54] On December 5, 2019,[33] based on a contingency fee retainer agreement that provided for a 33% share of the judgment, the Class Counsel fee was approved. The court $7,033,225.40, plus HST of $914,319.30 for a total fee of $7,947,544.70. Also approved was: (a) an honorarium for Mr. Reddock of $15,000; and (b) the statutory levy payable to the Law Foundation of Ontario pursuant to s. 10 of Regulation 771/92 of the *Law Society Act*. The amount of the statutory levy was $1,395,097.68.

[55] The outcome of these awards is that the net amount to be distributed in *Reddock* is approximately $12,831,135.95. The sum is approximate because of accruing interest.

[56] As noted above, the Ontario Court of Appeal heard the *Brazeau* appeal and the *Reddock* appeal together, and on March 9, 2020, the Ontario Court of Appeal affirmed the judgment and the *Charter* damages award in *Reddock.*[34]

3. *Gallone*

[57] The *Gallone* action was commenced on February 24, 2016. In *Gallone,* Arlene Gallone sues Canada for breaches of ss. 7 and 12 of the *Charter*. On January 13, 2017, *Gallone* was authorized as a class proceeding.

[58] Trudel Johnston & Lespérance is Class Counsel in *Gallone*.

[59] As noted above, the *Gallone* Class is carved out of the *Brazeau* and *Reddock* classes, and it is composed of inmates of federal penitentiaries who were placed in administrative segregation in Québec after February 24, 2013, either for more than 72 consecutive hours or for any period of time if they were diagnosed by a medical doctor with an Axis I Disorder (excluding substance abuse disorders), or Borderline Personality Disorder, and suffered significant impairment from their disorder.

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[32] *Reddock v. Canada (Attorney General)*, 2019 ONSC 6151.
[33] *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090.
[34] 2020 ONCA 184.

[60] The Class Definition for *Gallone* is:

Class members in prolonged solitary confinement

All persons held in "solitary confinement", such as in administrative segregation but excluding disciplinary segregation, after February 24, 2013 for more than 72 consecutive hours, in a federal penitentiary situated in Quebec, including consecutive periods totalizing more than 72 hours separated by periods of less than 24 hours;

And

Class members with mental health disorders

All persons held in "solitary confinement", such as in administrative segregation but excluding disciplinary segregation, after February 24, 2013 in a federal penitentiary situated in Quebec who were, prior to or during such "solitary confinement", diagnosed by a medical doctor either prior to or during such "solitary confinement" with an Axis I Disorder (excluding Substance Use Disorders), or Borderline Personality Disorder, who suffered from their disorder, in a manner described at Appendix A, and reported such prior to or during their stay in "solitary confinement".

Appendix A:

- Significant impairment in judgment (including inability to make decisions; confusion; disorientation)
- Significant impairment in thinking (including constant preoccupation with thoughts, paranoia; delusions that make the offender a danger to self or others)
- Significant impairment in mood (including constant depressed mood plus helplessness and hopelessness; agitation; manic mood that interferes with ability to effectively interact with other offenders, staffs or follow correctional plan)
- Significant impairment in communications that interferes with ability to effectively interact with other offenders, staff or follow correctional plan
- Significant impairment due to anxiety (panic attacks; overwhelming anxiety) that interferes with ability to effectively interact with other offenders, staff or follow correctional plan
- Other symptoms: hallucinations; delusions; severe obsessional rituals that interferes with ability to effectively interact with other offenders, staff or follow correctional plan
- Chronic and severe suicidal ideation resulting in increased risk for suicide attempts
- Chronic and severe self-injury; or
- A GAF score of 50 or less.

[61] There are approximately 3,257 *Gallone* Class Members, some of whom are also members of the *Brazeau* and *Reddock* class. The multi-class membership arises because some *Gallone* Class Members were also placed in administrative segregation outside of Québec or their placements in Québec came before the commencement of the *Gallone* class period.[35]

[62] There has been no trial in the *Gallone* action. However, Canada agreed to a consent

[35] These figures have been calculated by Class Counsel on the basis of data provided by the Counsel for Canada in 2020.

judgment in which it agreed to a liability proportionate to its liability in *Brazeau* and *Reddock*. On September 10, 2020, Justice Masse ordered that the amount of aggregate damages in *Gallone* be determined for the same purpose and in the same manner as in *Brazeau* and *Reddock*, on a *pro rata* basis for the class size in *Gallone*. Thus, on consent, the *Gallone* Class Members recovered a judgment of $5,948,769.23 comprised of an aggregate award of $5,624,400 plus interest (5%) of $250,919.40 plus additional indemnity $73,449.83.

[63] Using data provided by Canada in July 2020, which identified 3,994 persons who had been placed in administrative segregation in Québec during the period covered by the *Gallone* action, and applying a prevalence of serious mental health disorders of 18.3%, there would be 731 SMI Class Members and 3,263 non-SMI Class Members from *Gallone*.

[64] The net award in *Gallone* is broken down in the following chart:

Gross Aggregate Award	$5,948,769.23
Class Counsel Fee	($1,784,630.77)
Taxes	($267,248.46)
Anticipated Expenses	($87,013.22)
Net Distribution	$3,809,876.78

[65] Of the net distribution sum, the parties allocated $1,692,439.14 to the SMI Class Members in *Gallone* and $2,117,431.64 to the non-SMI Class Members in *Gallone*.

C. Discussion and Analysis: Settling the *D&I Protocol*

1. Introduction

[66] As noted in the Introduction, the parties could not agree about the Distribution Protocol or about the Individual Issues Protocol. There were disputes about the major elements of the rival proposals. Ultimately, unless the parties agree to a consensual proposal, it is for the courts of Ontario and Québec to settle the protocols.

[67] As noted in the Introduction, attached as Schedule "D" is a *Draft Distribution and Individual Issues Protocol* prepared by Justice Masse and Justice Perell for the courts of Ontario and Québec. The major elements of the *Draft D&I Protocol* are summarized in the Introduction to this decision.

[68] We shall now discuss, the legislative background, the issues raised during the joint hearing address, and the disputes between the parties. We shall now explain the rationale of the *Draft D&I Protocol*.

2. Statutory and Rules Background for *Brazeau, Reddock* and *Gallone*.

[69] There are two major branches to the motion before the court. One branch concerns the court's authority with respect to the distribution of a judgment granted after a common issues trial or summary judgment motion. The second branch concerns the court's authority in a class action to design the procedure for the determination of the individual issues that remain after the common issues have been decided. The text of the relevant statutory provisions and rules of court for Ontario are set out in Schedule “E” and the text for the relevant statutory provisions and rules of court for Québec are set out in Schedule “F”

(a) Distribution Protocol

[70] In Ontario, s. 26 of the *Class Proceedings Act, 1992* empowers the court to direct any means of distribution of amounts awarded where there is an aggregate assessment (section 24) and empowers the court to distribute monies where there are individual issues trials (section 25).

[71] In Québec, s. 596 of the *Code of Civil Procedure* allows the court to make provision for individual liquidation of the class members’ claim or for distribution of an amount to each class member where there is an aggregate assessment under s.592 and s.595. Sections 599-600 of the *Code of Civil Procedure* do not make provision with regards to the distribution of awards to be recovered individually.

[72] Distribution protocols are an intrinsic element of class actions and will arise in one of two ways. Where the defendant agrees to a settlement and to pay compensation to the class, then a distribution protocol will arise as an aspect of the settlement. Where the defendant is found liable, distribution protocols will arise after there is a trial or a summary judgment motion determining the quantum of the class member’s damages, which is what occurred in *Brazeau* and *Reddock.*

[73] In Ontario, the court’s authority to approve a Distribution Protocol is grounded in its jurisdiction to approve settlements.[36] The same can be said in Québec.[37] Subject to court approval, Class Counsel are required to develop a distribution protocol that is in the best interests of the class.[38] A protocol will be appropriate if it is fair, reasonable, and in the best interests of the class.[39] Deciding what is fair and reasonable can involve considerations of what is economical and practical on the facts of a particular case.[40]

[74] The test for approving a distribution plan is analogous to the test that the court applies when deciding whether to approve a settlement.[41] A settlement must fall within a zone of reasonableness to be approved.[42] The zone of reasonableness assessment allows for variation between settlements (and distribution plans) depending upon the subject matter of the litigation and the nature of the damages for which the settlement provides compensation.[43] A settlement and a distribution plan

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[36] S. 27.1 of the *Class Proceedings Act, 1992. Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493.
[37] S.590 of the *Code of civil procedure.*
[38] *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para. 108.
[39] *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59; *Bouchard* c. *Abitibi Consolidated Inc.*, J.E. 2004-1503 (C.S.), 2004 CanLii 26353 (QCCS), at para.16; *Option Consommateurs* c. *Banque Amex du Canada*, 2018 QCCA 305 at para. 8 and 83-84
[40] *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at para 34; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891; *Bouchard* c. *Abitibi Consolidated Inc.*, J.E. 2004-1503 (C.S.) at para.23-24; *Option Consommateurs* c. *Banque Amex du Canada*, 2017 QCCS 200 at para.43, affd. 2018 QCCA 305 at para.8 and 83-84.
[41] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192; *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59; *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082; *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para 74.
[42] *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at para 12; *Leslie v. Agnico-Eagle Mines,* 2016 ONSC 532 at para. 8.
[43] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

is to be reviewed on an objective standard; that standard recognizes the inherent difficulty in crafting a universally satisfactory settlement or distribution plan.[44] In other words, to quote from the decision rendered by Justice Pierre-C. Gagnon in *M.G.* c. *Association Selwyn House*[45] :

> 25. The French philosopher Voltaire wrote *Le mieux est l'ennemi du bien*, meaning *The better is the enemy of the good.* He meant that often it is preferable to opt for a fair and reasonable outcome rather than turning down anything less than perfection.

[75] The *Class Proceedings Act, 1992* and the *Code of Civil Procedure* envision that distribution protocols may differentiate between Class Members, who do not all have to receive the same allocation of the settlement proceeds. In other words, while in some cases it may be appropriate to distribute the judgment or the settlement funds *per capita* dividing the fund by the number of class members, pursuant to s.26 (1) of the *Class Proceedings Act, 1992* or pursuant to s.596 of the *Code of Civil Procedure*, the courts may direct any means of distribution that they consider appropriate.

[76] Ideally or optimally, if the access to justice goals of the *Class Proceedings Act, 1992*, of the Title III of the *Code of Civil Procedure* and other class action statutes across the country are to be achieved, the judgment or the settlement funds should be distributed to the Class Members and not be refunded to the defendant or distributed *cy-près*, which achieves behaviour modification but not access to justice for individual Class Members.

[77] In approving plans of distribution, courts have found that distinguishing between different types of Class Members is reasonable and appropriate. For example, in *Gould v BMO Nesbitt Burns Inc.*,[46] Justice Cullity approved a Plan where there were discounts for the claims of secondary market purchasers to reflect increased certification and substantive litigation risks affecting their claims.[47] However, in *Zaniewicz v. Zungui Haixi Corp.*[48] the court held that it was inappropriate and unfair to include persons as Class Members and then to exclude them from a distribution.

(b) Individual Issues Protocol

[78] Turning to the matter of the Individual Issues Protocol, where following the common issues judgment, there are individual issues to be determined, in Ontario, s. 25 of the *Class Proceedings Act, 1992*, empowers the court to design the procedure for the individual issues trials. Section 25 is connected to sections 24, 26, and 27.

[79] The court's power under ss. 24 to 27 of the *Class Proceedings Act, 1992*, which are considerable,[49] is augmented by other sections of the *Class Proceedings Act, 1992,* most

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[44] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 at para 80 (S.C.J).
[45] 2009 QCCS 989, at para. 25.
[46] *Gould v. BMO Nesbitt Burns Inc*, [2007] O.J. No. 1095 at paras 2, 19-23 (S.C.J.).
[47] U.S. courts have also approved of this approach to plans of distribution. A reasonable plan may consider the relative strength and values of different categories of claims: *In re IMAX Sec Litig*, 283 FRD 178 (SDNY 2012). Particularly in the case of a large class action, the apportionment of a settlement can never be tailored to the rights of each Plaintiff with mathematical precision: *In re PaineWebber Ltd P'ships Litig*, 171 FRD 104 (SDNY 1997), aff'd, 117 F.3d 721 (2d Cir 1997). Exactitude is not required in allocating consideration to the class, provided that the overall result is fair, reasonable and adequate: *Silberblatt v. Morgan Stanley*, 524 F Supp 2d 425 (SDNY 2007).
[48] 2013 ONSC 5490. See also *Welsh v. Ontario*, 2018 ONSC 3217 at para 13.
[49] *Jiang v Peoples' Trust*, 2017 BCCA 119; *Lundy v VIA Rail Canada Inc.,* 2015 ONSC 7063.

particularly s.12.

[80] Section 35 of the *Class Proceedings Act, 1992* specifies that the *Rules of Civil Procedure* apply to class proceedings. The court's powers are also augmented by the court's powers on a summary judgment motion under rule 20.05.

[81] Thus, in the immediate case, relevant to settling the protocol for the distribution of the Aggregate Damages Award and for the resolution of the individual issues are Rules 1.04, 20, 52.03, 54 and 55 of the *Rules of Civil Procedure.*

[82] In Québec, the relevant provisions can be found at ss. 17, 18, 19, 157, 158, 234, 236, 238, 572, 592 and 600 of the *Code of Civil Procedure*.

[83] The urgings of the Supreme Court of Canada in *Hryniak* v. *Mauldin*[50] to employ those powers when justice can be done without requiring a regular trial are directed at all Canadian judges. Creativity and the principles of proportionality have a role to play in designing the individual issues stage of a class action.

[84] Further, as to the courts' authority on the motions before the courts, we agree with Class Counsels' submissions that in the immediate case, the courts' powers are further augmented, if necessary, by the court's remedial – and substantive – authority under s. 24 of the *Charter* to creatively fashion an appropriate remedy.

[85] Nevertheless, as mentioned by the Supreme Court of Canada in *Hryniak* v. *Mauldin*[51], our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. Therefore, the major constraint on the design of the procedure for determining the individual issues is that the courts' procedural and evidentiary choices must be consistent with justice to Class Members and to defendants. What is consistent with justice will depend upon the nature of the particular case and upon the fundamental principles of justice and of natural justice.[52]

[86] In the immediate case, as noted above, it is for the courts to determine the terms of the Distribution and Individual Issues Protocols, but there are limits on our creativity. As a matter of settlement (but subject to court approval), the parties could select adjudicators that are not judges or court officers. In the immediate cases, it may be recalled that Canada in its proposal (Schedule B) and Class Counsel in its proposal (Schedule C) proposed the use of referees to adjudicate certain claims. In the rival proposals, the appointment of referees required the consent of the parties. However, as will be discussed further below, civil courts cannot outsource their adjudicative powers to external referees as adjudicators without the parties' consent. Courts do have, however, the power to use Court-appointed experts to assist the court. We foreshadow here that our *Draft Distribution and Individual Issues Protocol Draft* envisions the use of experts (Manager/Experts) to assist the court with respect to distribution and to provide expert evidence for the Track 2 claims.

3. The Funds for Distribution

[87] Class Counsel proposed that there should be two combined funds for distribution, one for

[50] 2014 SCC 7 at para. 23-34.

[51] *Id.*, at para. 23. See also, in Québec, s.23 of the *Charter of Human Rights and Freedoms*, CQLR, c. C-12 and s.17 of the *Code of Civil Procedure*.

[52] *Lundy v VIA Rail Canada Inc.*, 2015 ONSC 7063.

SMI Class Members from *Brazeau* and *Gallone* and the other fund for non-SMI Class Members from *Reddock* and *Gallone*. As noted in the Introduction, Canada proposed that there be four combined funds for distribution of the Aggregate Damages Award. Three of the funds would be for SMI Class Members from *Brazeau* and *Gallone*, and the fourth fund would be for non-SMI Class Members from *Reddock* and *Gallone.*

[88] Under Class Counsels' proposal, eligibility for the SMI Fund would be dependent on the Class Member having a psychiatric assessment that he or she was serious mentally ill as defined by the class definition in *Brazeau* and *Gallone*. Class Counsel proposed that eligibility would be determined by Referees with medical profession credentials or with legal-medical professional credentials.

[89] Under Class Counsels' proposal, eligibility for the non-SMI Fund would be dependent on the inmate having been placed in administrative segregation for more than fifteen days, and Class Counsel proposed that an administrator could determine eligibility based on the Class Member's Claim Form and on the penitentiary records to be produced by Canada, which is a mechanical exercise that does not require medical expertise. Under Class Counsels' proposal, if Canada disputed the Referees' eligibility assessment, then there would be a distribution holdback and the Class Member's eligibility would be delayed and determined as part of the Individual Issues Protocol. After a year for the program to determine eligibility, the aggregate award would be distributed less the holdbacks.

[90] The premises of the two-fund approach promoted by Class Counsel were that: (a) because of their pre-existing mental conditions SMI Class Member Claimants suffered more than a non-SMI Class Members; (b) there were fewer SMI Class Members; and (c) their share of the aggregate damages awards in *Brazeau* and *Gallone* should not be diluted by combining the aggregate awards from all three actions.

[91] The following chart breaks out the allocation and distribution of funds for an SMI Fund, a non-SMI Fund, and also for a combined fund.

Net SMI Fund *Brazeau + Gallone*	Net Non-SMI Fund *Reddock + Gallone*	Net Combined Fund *Brazeau + Reddock + Gallone*	Gross Combined Fund *Brazeau + Reddock + Gallone*
3,636 731 4,367 Class Members	8,934 3,363 12,297 Class Members	4,367 12,297 16,664 Class Members	4,367 12,297 16,664 Class Members
$11,527,661.11 1,692,439.14 $13,220,100.25 Fund	$12,831,135.95 2,117,431.64 $14,948,567.59 Fund	$13,220,100.25 14,948,567.59 $28,168,667.84 Fund	$20,000,000.00 21,120.797.00 5,948,769.23 $47,069,566.23 Fund
100% Take-up: **$3,027** Allocation ($13,220,100.25/4,367)	100% Take-up: **$1,216** Allocation ($14,948,567.59/12,297)	100% Take-up: **$1,690** Allocation ($28,168,667.84/16,664)	100% Take-up: **$2,824.62** Credit ($47,069,566.23/16,664)
66% Take-up: **$4,587** Allocation ($13,220,100.25/2,882)	66% Take-up: **$1,841** Allocation ($14,948,567.59/8,116)	66% Take-up: **$2,561** Allocation ($28,168,667.84/10,998)	66% Take-up: **$4,2279.83** Credit ($47,069,566.23/10,998)

50% Take-up: **$6,053** Allocation ($13,220,100.25/2,184)	50% Take-up: **$2,431** Allocation ($14,948,567.59/6,148)	50% Take-up: **$3,381** ($28,168,667.84/8,3323)	50% Take-up: **$5,649.25** Credit ($47,069,566.23/8,332)

[92] The approach of the *Draft D&I Protocol* does not accept the premise that there should be two or more separate funds differentiated by whether the Class Member was SMI or non-SMI. The determinations made under s. 24 (1) of *Class Proceedings Act, 1992* and under s. 595 of the *Code of Civil Procedure* as to the defendant's aggregate liability to Class Members determines the amount of the defendant's aggregate liability. Nevertheless, under s. 26 (1) of *Class Proceedings Act, 1992* and under s. 596 of the *Code of Civil Proceedure* the courts may direct any means of distribution of the amounts awarded.

[93] As already alluded to above, the approach of the *Draft D&I Protocol* has one fund (gross $47.0 million; net 28.2 million) with eligibility determined in accordance with the *Reddock* standard of eligibility. The distribution approach of the *Draft D&I Protocol* is as follows:

> Aggregate Damages Award means the gross award of aggregate damages, costs, and interest made in *Brazeau*, *Reddock*, and *Gallone*, less:
>
> (a) Class Counsel's fees and disbursements as approved by the Courts;
>
> (b) the Class Proceedings Fund's levy, applicable to the Reddock and Brazeau actions;
>
> (c) the allocation to the Fond d'aide aux actions collective; and
>
> (d) any other deductions approved by the Courts
>
> (for a net aggregate damages award of approximately $28.0 million).
>
> A share in Aggregate Damages Award is equal to the Aggregate Damages Award divided by the number of Class Members eligible to receive a share as determined by the Roster of Manager/Experts.
>
> A Class Members who selects Track 1, Track 2 or Track 3 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.
>
> Where a Class Member selects Track 1, Track 2, or Track 3, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the parties and the Administrator.
>
> There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

[94] In our opinion, there should be one fund comprised of the Aggregate Damage Awards of *Brazeau, Reddock,* and *Gallone.* Two funds are ultimately unfair and unreasonable and make the distribution of the award cumbersome, slow, expensive, and possibly unmanageable. With two or four funds, there is the prospect of unfair distributions and unnecessary inequalities between the treatment of Class Members from *Gallone* that were imprisoned in Québec depending on whether they were also members of *Reddock.*

[95] Visualize: under the two fund approach, if a putative SMI Fund Class Member from *Brazeau* and *Gallone* failed the eligibility psychiatric assessment, then he or she likely would be eligible for a share of the aggregate award as a non-SMI Class Member, and if Canada was successful in challenging the eligibility of a large number of SMI Fund Claimants, this would lead to overcompensation of the remaining SMI Class Members or possibly a very large *cy-près* distribution or possibly a reversion to Canada. These discrepancies were not intended when the awards were made in *Brazeau, Reddock,* and *Gallone*.

[96] Further, the matter of whether a SMI Class Member should obtain more compensation than a non-SMI Class Member is a matter much more relevant to the determination of his or her individual issues claim than it is to the matter of whether he or she should take a larger share of the Aggregate Damages Award.

[97] In other words, it is not reasonable to differentiate between SMI and non-SMI Class Members in the Distribution Protocol. For the purposes of the distribution of the Aggregate Damages Award, all the Class Members should be treated the same. The awards in *Brazeau, Reddock,* and *Gallone* were class-wide awards, and they should be allocated and distributed taking into consideration that the SMI Class Members would default to being non-SMI Class Members.

[98] Moreover, it was the same wrongdoing by Canada inflicted on the *Brazeau, Reddock,* and *Gallone* Class Members. All of the Class Members share the commonality of being placed in administrative segregation contrary to the *Charter*. One fund avoids all the possible anomalous distributions that are described in Canada's factum and it avoids any reversion to Canada, and a one-fund distribution largely avoids a *cy-près* distribution. There is good substantive and practical sense in just creating one fund for the major commonality of all three class actions.

[99] In our opinion, the scheme of the *Draft D&I Protocol* about the scheme for distribution of the Aggregate Damages Award is fair and reasonable and preferable to the approaches of either Class Counsel or Canada.

4. Claims Deadline and Fund Distribution

[100] Under Class Counsels' protocol, the deadline for claims would be nine months after the first publication of Notice subject to the court granting leave for late claims and the Aggregate Damages Award would be distributed on a date no later than ninety (90) days after the close of the Claims Filing Deadline, or the final determination of any Class Member's SMI Class membership, whichever is later.

[101] Under Canada's Distribution Protocol, the deadline for claims would be one-year after the first publication of Notice subject to the court granting leave for late claims and the Aggregate Damages Award would be distributed after all the eligibility disputes were resolved, which might take some time given the eligibility dispute scheme proposed by Canada.

[102] The approach of the *Draft D&I Protocol* is straightforward and far less cumbersome. The *Draft D&I Protocol* provides for a one-year claims deadline subject to the court granting leave for late claims.[53] It should be noted that unlike Class Counsel's and Canada' protocols, the *Draft D&I Protocol* specifies the criterion for granting leave to file an untimely claim. Leave shall be granted only if the Class Member establishes that the failure to file a timely Claims Form was due to circumstances beyond his or her control or that provide a reasonable explanation for the delay.

[53] In Québec, with regards to individual recovery of claims, this is allowed under s. 84 and 599 (2) of the *Code of Civil Procedure*.

With a robust notice program, there should be little room for excuses for late filings.

[103] Before the deadline, the eligibility claims can be determined on a rolling basis by the Manager/Experts. The standard for eligibility is the standard from *Reddock* for all Class Members from *Brazeau, Reddock,* and *Gallone*. There is no appeal from the Manager/Expert's decision, which is administrative in nature based on the duration of the placement in administrative segregation and not on whether the Class Member is SMI or non-SMI, and once the Manager/Expert's has processed the timely claims, the Aggregate Damages Award can be distributed along with the Manager/Experts' Awards for the Track 2 adjudications. If a late claim arrives and leave is granted for the late claim to proceed, the Class Member is too late for a share of the Aggregate Damages Award and his or her claim would just proceed for an individual issues determination on Tracks 2 or 3.

[104] Thus, the approach of the Draft D&I Protocol as to administering the distribution of the Aggregate Damages Award is as follows:

> Claims Form" means the electronic or paper claims form in English or in French that a Class Member must complete and submit before the Claims Filing Deadline to participate in the distribution of the aggregate damages and to have his or her individual issues determined in *Brazeau, Reddock,* and *Gallone*.
>
> Claims Filing Deadline means the date by which the Claims Form (and the required supporting documentation) must be electronically submitted, sent via mail, or received in person by the Administrator, which date shall be one year after the first publication of Notice.
>
> Before the Claims Filing Deadline, a Class Member may submit a Claims Form (and the required supporting documentation) to the Administrator.
>
> After the Claims Filing Deadline, with leave of the court, Class Members may file Claims Forms for Tracks 2 or 3, and leave shall be granted only if the Class Member establishes that the failure to file a timely Claims Form was due to circumstances beyond his or her control or that provide a reasonable explanation for the delay.
>
> Within twenty days of receipt of a Claims Form, the Administrator shall provide a copy of the Claims Form and any associated documents to:
>
> (a) a Manager/Expert from the Roster;
>
> (b) Class Counsel or the lawyer retained to act for the Class Member; and
>
> (c) Canada.
>
> A Class Members who selects Track 1 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.
>
> Where a Class Member selects Track 1, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the parties and the Administrator.
>
> There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.
>
> A Class Members who selects Track 2 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

> Where a Class Member selects Track 2, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.
>
> There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.
>
> A Class Members who selects Track 3 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.
>
> Where a Class Member selects Track 3, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.
>
> There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligility to receive a share of the Aggregate Damages Award.
>
> For Track 1 Claims, the Administrator shall pay the Class Member's share of the Aggregate Damages award within sixty days after the Roster of Manager/Experts has determined all timely submitted Claims Forms.
>
> For Track 2 and Track 3 Claims, the Administrator shall hold the Class Member's share of the Aggregate Damages Award in trust pending the completion of the Class Member's Track 2 or Track 3 Claim, after which the Administrator shall pay the Class Member his or her share.

[105] In our opinion, the scheme of the *Draft D&I Protocol* about a claims deadline and the timing of the fund distribution is fair and reasonable and preferable to the approaches of either Class Counsel or Canada.

5. Appointment of Manager/Experts

[106] Under Class Counsels' proposal, two kinds of referees would be appointed. First there would be Medical Referees with medical expertise; these Referees would decide whether Class Members were eligible as SMI Fund claimants for a share in the distribution of the Aggregate Damages Award. Second there would be Claims Referees; these Referees would apply the *per diem* damages grids for SMI Class Members and for non-SMI Class Members. The damages grids are based on the duration of the Class Member's placement in administrative segregation.

[107] Canada opposed Class Counsels' proposal. Although we were told at the hearing that Canada intended internally to hire experts with medical expertise to challenge the eligibility of claimants, it opposed the use of Medical Referees for this purpose, and Canada asserted that the courts did not have the jurisdiction to appoint Medical Referees without Canada's consent. Canada's counterproposal was that eligibility for a share of the three discrete SMI funds should be determined by the courts by motion after a challenge process.

[108] Under Canada's rival proposal, there would be referees not to determine eligibility for a share of the distribution but referees to determine individual issues. These referees, who Canada would consent to being appointed, would not decide eligibility but would adjudicate individual issues claims under Canada's Small Claims Track for claims up to $35,000.

[109] In our opinion, the proposals of both Class Counsel and of Canada are not fair and reasonable and should not be approved.

[110] The approach of the *Draft D&I Protocol*, which in our opinion, is fair and reasonable and in the best interests of the Class Members, is to impanel a Roster of Manager/Experts as follows:

> No later than ninety (90) days from the of the court approval of the Notice and Claims Form, Class Counsel and Canada shall constitute the Roster of Manager/Experts failing which the courts shall appoint the Manager/Experts to constitute the Roster from a list of candidates submitted by Class Counsel and/or Canada.
>
> A Manager/Expert shall be:
>
> (a) a person licensed to practice medicine in any Canadian jurisdiction;
>
> (b) a person licensed to practice psychology in any Canadian jurisdiction;
>
> (c) a person registered as a psychotherapist in any Canadian jurisdiction;
>
> (d) a person registered as a psychiatric nurse in any Canadian jurisdiction; or
>
> (e) a person licensed as a psychiatric social worker in any Canadian Jurisdiction.

[111] Under the *Draft D&I,* the Manager/Expert would determine a Class Member's eligibility for a share of the pooled Aggregate Damages Award for Class Members proceeding on Track 1 (*Distribution and Release of Claim Track*), Track 2 (*Distribution and Under-$50,000 Track*), and Track 3 (*Distribution and Over-$50,000 Track*).

[112] Under the *Draft D&I Protocol,* for Track 2 claims, the Manager/Expert would inquire into and report to the Ontario Superior Court of Justice or to the Superior court of Québec his or her findings and conclusions as to the quantum of the Class Member's claim by reviewing the Claims Form, the Class Member's CSC file, and the affidavit material, transcripts, and factums filed by the Class Member and Canada. The Manager/Expert would then report to the courts, and then either party may move without additional evidence for an Order determining the quantum of the Track 2 claim.

[113] The courts do not require the consent of the parties to appoint an expert under the *Rules of Civil Procedure* or under the comparable provisions under the Québec *Code of Civil Procedure*.

[114] It should be noted that under the *Draft D&I Protocol,* it is only with respect to the Track 2 Claims that a Manager/Expert requires medical knowledge.

[115] Under the *Draft D&I Protocol,* eligibility for a share of the Aggregate Damages Award for Tracks 1, 2, and 3 is based on the *Reddock* class definition standard and, eligibility does not depend on qualifying for a separate fund for SMI Class Members. Under the *Draft D&I Protocol,* there is one fund, with eligibility determined in accordance with the standard of the *Reddock* class definition. That standard does not require medical knowledge and satisfying the standard can be determined based on a review of the CSC's records about placements in administrative segregation. The determination of eligibility is an administrative not an adjudicative task.

[116] In the immediate case, the courts of Ontario and Québec are confronted with the challenge of providing a meaningful remedy. It is conceivable that over 10,000 present and former inmates of federal penitentiaries will apply for a *Charter* remedy because of their unlawful placement in administrative segregation. In the immediate case, even ignoring the strains caused by the Covid-19 pandemic, without the assistance of Manager/Experts, the courts of Ontario and Québec do not have the resources to provide access to justice for thousands of claimants simultaneous bringing

claims. The appointment of Manager/Experts with the competence to understand the physical and psychological effects of administrative segregation for claims with values under $50,000 is within the court's jurisdiction under s. 24 of the *Charter* and under the *Rules of Civil Procedure* and the comparable provisions under Québec's *Code of Civil Procedure.* The courts have this authority to appoint an expert to assist the court without the consent of the perpetrator of the *Charter* breach to make this appointment.

[117] In *Lundy v VIA Rail Canada Inc.,*[54] it was stated that the court has no ability to outsource its adjudicative function beyond that provided by the *Class Proceedings Act, 1992* and by Rules 54 and 55 of the *Rules of Civil Procedure*. *Lundy* was a negligence class action about a train derailment where: (a) the Class was less than 50 persons; (b) there were no serious injuries; (c) there was no aggregate assessment of damages, (d) the individual issues were genuine individual issues not an issue about asserting a claim to a share to an aggregate damages award; and (e) *Lundy* did not involve any breach of the *Charter*.

[118] The cases at bar are different than *Lundy*, and although the courts do not have the ability to outsource their adjudicative function for the Track 2 claims, the courts do have the authority to have the assistance of Manager/Experts as they adjudicate the Track 2 claims. (Although, by settlement, the parties could facilitate matters further by agreeing to have the panel of Manager/Experts act as court appointed referees.)

[119] And the courts have the jurisdiction to give directions to the Manager/Experts and to fix their remuneration and to order Canada to pay the Manager/Experts for their services to the administration of justice.

6. Issues for the Manager/Experts

[120] Class Counsel's Individual Issues Protocol envisions that where a Class Member has a limitation period issue or where the Class Member asserts a claim of over $100,000, he or she would proceed under a somewhat modified summary judgment procedure. For claims under $100,000, (Simplified Track) Class Counsel proposes that the Class Member would release all claims save for general or moral damages claimed up to $100,000.

[121] Class Counsel's Individual Issues Protocol envisions that the Class Member's under-$100,000 claim would be decided by a Referee applying a *per diem* rate of $300/day for the *Brazeau* Class Members and the SMI Class Members of *Gallone*. The Referee would apply a $200/day for the *Reddock* Class Members and for the non-SMI members of *Gallone*.

[122] Canada vehemently opposed Class Counsel's proposal as unfair.

[123] Canada objected to what would amount to a mechanical exercise of determining days in administrative segregation from the CSC's records and submitted that: (a) causation of harm had not been proven for individual damages claims; (b) there was not a necessary correlation between days in administrative segregation and the harm, if any, suffered by a Class Member; and (c) it was unfair to the extreme to preclude Canada from advancing evidence that there were mitigating factors in individual cases that were relevant to the determination of the quantum of an individual Class Member's claim.

[124] Canada's rival Individual Issues Protocol was substantially different than Class Counsels',

[54] 2015 ONSC 7063.

although Canada's rival proposal for the determination of individual issues claim did involve determinations by a Referee. Under Canada's proposal, the Referee would decide cases under a Small Claims Track for claims under $35,000. Where a Class Member selected the Small Claims Track, he or she would still have the burden of proof of proving causation and every other element of his or her claim.

[125] Under Canada's Individual Issues Protocol, the Referee's decision would be deemed to be a Report under Rule 54 of the *Rules of Civil Procedure*, which is to say that it would be subject to a confirmation procedure by motion to the court.

[126] Under Canada's proposal, the Referee's jurisdiction would end at $35,000, and then Canada proposed a Summary Motion Track, where damages would be determined by a judge, for claims over $35,000 and up to $100,000.

[127] Canada proposed a Regular Action Track where the Class Member claimed damages above $100,000.

[128] We agree with some but certainly not all of Canada's objections to Class Counsels' approach. We do not agree with Canada's proposal for individual issues determinations. In any event, the approach of the *Draft D&I Protocol* as to the role of the Manager/Expert is different from the proposals of the parties, and is as follows:

> In this Protocol, "Roster" means the group of Manager/Experts appointed by the parties or by the court:
>
> > (a) to determine eligibility for a share of the distribution of the Aggregate Damages Award; and.
> >
> > (b) to inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Damages Award for Class Members who elect to make a Track 2 claim.
>
> In the Claims Form, a Class Member shall elect to proceed on one of the following tracks:
>
> > (a) Track 1 (Distribution and Release of Claim Track);
> >
> > (b) Track 2 (Distribution and Under-$50,000 Track); or
> >
> > (c) Track 3 (Distribution and Over-$50,000 Track.)
>
> A Class Member whose claim is presumptively barred by a limitation period shall elect to proceed by Track 3.
>
> In the Claims Form, a Class Members shall provide the following information:
>
> > (a) his or her name;
> >
> > (b) his or her date of birth;
> >
> > (c) his or her Social Insurance Number;
> >
> > (d) his or her Prison Number;
> >
> > (e) his or her inmate classification;
> >
> > (f) the correctional institutions in which he or she was incarcerated;

(g) the admission date and or transfer date to each of the correctional institutions in which he or she was incarcerated;

(h) the date of placement and the release date for each placement in administrative segregation

(i) his or her mailing address, email address, and phone numbers, if any;

(j) for other than Incarcerated Class Members a direction as to how the Class Members should be paid his or her share of the distribution and his or her individual issues award

(k) an acknowledgement that the Administrator is authorized to contact the Class Member to obtain further information;

(l) if other than Class Counsel, the name and contact information for the lawyer retained to act for the Class Member;

(m) a declaration that the information submitted in the Claims Form is true and correct.

Where the Class Member selects Track 2, he or she may annex to his or her or her Claims Form:

(a) an affidavit from the Class Member of no more than 30 pages in length, including exhibits, in support of the Track 2 Claim;

(b) no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol;

(c) the transcript of any cross-examinations; and

(d) a factum of no more than 30 pages.

Within twenty days of receipt of a Claims Form, the Administrator shall provide a copy of the Claims Form and any associated documents to:

(a) a Manager/Expert from the Roster;

(b) Class Counsel or the lawyer retained to act for the Class Member; and

(c) Canada.

Within thirty (30) days of its receipt of a copy of the Claims Form, Canada shall send a copy of the Class Member's CSC file to the Manager/Expert assigned the claim.

Where the Class Member selects Track 2, Canada may also deliver to the Manager/Expert and to the Class Member:

(a) an affidavit from a representative of the Canada Correctional Service of no more than 30 pages in length, including exhibits, in opposition to the Track 2 Claim;

(b) no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol;

(c), the transcript of any cross-examinations; and

(d) a factum of no more than 30 pages.

Where a Class Member selects Track 2, after the parties have delivered their affidavits, a deponent may be summonsed for an out of court cross-examination by the opposing party, with the duration of the cross-examination not to exceed 60 minutes.

A Class Members who selects Track 2 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

Where a Class Member elects to proceed on Track 2, he or she shall be deemed to have released Canada from all claims arising from his or her placement(s) in administrative segregation save for the claims as set out in the damages grid set out below:

Criteria for Award	**Award**
15-60 days in administrative segregation	Up to $10,000
More than 60 days in administrative segregation	Up to $20,000
SMI Eligible	Up to $10,000
Any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder ("BPD")	Up to $20,000

Damages awarded under Track 2 shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post-judgment interest shall accrue at the rate of 3%, from the date of the Damages award.

The Class Member's share of the gross aggregate damages award is a credit to the payment of the damages awarded under Tracks 2.

Where a Class Member selects Track 2, the Manager/Expert shall inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Class Member's claim by reviewing the Claims Form and the Class Member's CSC file.

There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

Where a Class Members selects Track 2, the parties are bound by the findings of fact made in the *Brazeau*, *Reddock*, and *Gallone* actions including causation of harm and the Manager/Expert shall inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Class Member's claim by reviewing the Claims Form, the Class Member's CSC file, and the affidavits, transcripts, and factums filed by the Class Member and Canada. The Referee Expert's report shall be no more than ten pages in length.

Where a Class Member selects Track 2, after the Manager/Expert delivers his or her report to the court, either party may move without additional evidence for an Order determining the quantum of the Track 2 claim

Where a Class Member selects Track 2, the court may award costs not to exceed $6,000.

Where the Class Member makes a successful claim under Track 2, Canada shall pay any award to the Administrator within 30 days after the final disposition of the claim.

Canada shall pay that Manager/Expert:

(a) $1,000 for a Track 1 or a Track 3 decision; and

(b) $5,000 for a Track 2 decision and report.

[129] The explanation for the approach of the *Draft D&I Protocol* begins by noting that there are issue estoppels and « *chose jugée implicite* »[55] from the common issues determinations in *Brazeau* and *Reddock*. The *Gallone* decision was based on the findings made in *Brazeau and Reddock.* Thus, the common issues phase made findings that are binding on Canada in all three cases. The *Draft D&I Protocol* does not reopen the common issues phase but rather properly employs it for the determination of individual issues.

[130] The issue estoppels and « *chose jugée implicite* » from *Brazeau and Reddock* are binding on Canada and establish that: (a) Canada breached the *Charter*; (b) an unlawful placement in administrative segregation - regardless of the duration of that placement causes - physical and psychological personal injuries to each and every Class Member; (c) the physical and mental harm caused by administrative segregation is likely greater for SMI Inmates; and (d) the physical and mental harm caused by administrative segregation and likely greater for both SMI Inmates and non-SMI inmates the longer the duration of the placement.

[131] Based on the factual findings in *Brazeau, Reddock* and *Gallone* and the legal findings in of the Ontario Court of Appeal in *Brazeau, Reddock,* and *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen,*[56] the following are matters for which there are issue estoppels in Ontario and findings that result in « *chose jugée implicite* » or that have to be considered as relevant juridical facts in Québec[57]:

a. Canada contravened the *Charter* rights of all Class Members and the Class Members suffered similar injuries of different intensities.

b. Administrative segregation causes serious physical and serious psychological harm to any inmate placed in administrative segregation and the harm is particularly acute for those already suffering from serious mental diseases and disabilities.

c. Administrative segregation causes the following effects: aggression, anxiety, cognitive dysfunction, delusions, depression, hallucinations, hopelessness, hypersensitivity, impaired memory and concentration, irritability, loss of control, panic attacks, paranoia, psychosis, rage, severe obsessional rituals, self-mutilation, significant impairment of ability to communicate, sleep disturbances, suicidal ideation and behaviour, withdrawal, and a sense of impending emotional breakdown.

d. Negative health effects from administrative segregation can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.

e. The harm from administrative segregation does not stop with the end of the placement but continues long after the inmate returns to the general population and in some inmates the harm is permanent.

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[55] Section 2848 of the *Québec Civil Code*; *162568 Canada inc.* c. *4499450 Canada inc.*, 2018 QCCA 237 at para. 20-21; *Nasigoflu* c. *Complexe St-Ambroise inc.*, 2005 QCCA 559; *Pesant* c. *Langevin*, (1926) 41 B.R. 412, p.423.
[56] 2019 ONCA 243.
[57] *St-Marc-sur-Richelieu (Municipalité de)* c. *Lagacé* , 2009 QCCS 5013, at para. 48-53; *Solomon* c. *Québec (Procureur general)*, 2008 QCCA 1832 at para. 44-50, 55-54, 57.

f. All of the Class Members suffered psychiatric harm from being placed in administrative segregation, which in truth is solitary confinement contrary to the *Mandela Rules*.

g. It has been widely recognized from 2011 that prolonged solitary confinement of any inmate caused serious harm and should be avoided.

[132] In addition, to the above binding issue estoppels or findings resulting in « *chose jugée implicite* » or having to be considered as relevant juridical facts, we agree with the expert report of Dr. Chaimowitz, filed on this motion, which Canada did not challenge, that the longer a person spends in solitary confinement the more severe the harm they suffer.

[133] Where we disagree with Dr. Chaimowitz and where we agree with Canada is that a mechanical *per diem* approach is not something that can be extrapolated from the issue estoppels in the immediate cases.

[134] General causation of harm is no longer an issue at the individual issues stage of *Brazeau, Reddock*, and *Gallone.* Apart from the general damages from the illegal placement in administrative segregation, specific causation of particular harms remains an individual issue[58].

[135] The Class Members are entitled to receive general or moral damages for their similar injuries, but what remains to be determined at the individual issues stage is specific causation and the quantum of the compensation to be provided for the harm caused by the Class Member's unlawful placement into administrative segregation. We agree with Canada that the issue of quantum is idiosyncratic and cannot be determined by a mechanical application of a *per diem* rate.

[136] While the duration of placement in administrative segregation has already been proven on a class-wide basis to be a relevant factor in calculating the harm suffered, it still is an idiosyncratic factor. Comparatively speaking, some inmates might suffer more from a short duration placement than other inmates who had longer duration placements.

[137] The approach of the *Draft D&I Protocol* is that where a Class Member's placement is between 15 – 60 days, the Manager/Expert may make findings and conclusions for an award up to $10,000 for the general or moral damages caused by the placement and up to an additional $10,000 if the inmate is an SMI Class Member and report these findings to the court. If the evidence establishes as a matter of specific causation that the Class Member also experienced any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder ("BPD"), the Manager/Expert may make findings and conclusions up to $20,000 more.

[138] The approach of the *Draft D&I Protocol* is that where a Class Member's placement is more than 60 days, the Manager/Expert may make findings and conclusions for an award up to $20,000 for the general damages caused by the placement and up to an additional $10,000 if the inmate is an SMI Class Member and report these findings to the court. If the evidence establishes as a matter of specific causation that the Class Member also experienced any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in

[58] For a comparison of the applicable principles in civil law and *common law* with regards to causation, see the Québec Court of Appeal decision in *Imperial Tobacco Canada ltée* c.*Conseil Québécois sur le tabac et la santé*, 2019 QCCA 358, at para. 660-671 and 840. The decision also discusses general and specific causation but in the context of a specific legislation allowing causation to be established at the collective level of a population.

Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder ("BPD"), the Manager/Expert may make findings and conclusions up to $20,000 more.

[139] The approach of the *Draft D&I Protocol* for a Class Member who was placed in administrative segregation for less than 15 days is that if he or she is SMI Class Member, the Manager/Expert may make findings and conclusions for an award between $0 and $10,000 and if the evidence establishes as a matter of specific causation that the Class Member also experienced any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder ("BPD"), the Manager/Expert may make findings and conclusions up to $20,000 more and report these findings to the court.

[140] Thus, under the *Draft D&I Protocol*:

a. For a Class Member who was placed in administrative segregation for less than 15 days, and who is SMI eligible, the court on the motion to determine the quantum of the Track 2 claim could award between <u>$0 to $30,000</u>.

b. For a Class Member who was placed in administrative segregation for between 15 and 60 days, the court on the motion to determine the quantum of the Track 2 claim could award between <u>$0 to $30,000</u> for a non-SMI eligible Class Member.

c. For a Class Member who was placed in administrative segregation for between 15 and 60 days, the court on the motion to determine the quantum of the Track 2 claim could award between <u>$0 to $40,000</u> for a SMI eligible Class Member.

d. For a Class Member who was placed in administrative segregation for more than 60 days, the court on the motion to determine the quantum of the Track 2 claim could award between <u>$0 to $40,000</u> for a non-SMI eligible Class Member.

e. For a Class Member who was placed in administrative segregation for more than 60 days, the court on the motion to determine the quantum of the Track 2 claim could award between <u>$0 to $50,000</u> for a SMI eligible Class Member.

[141] The Manager/Experts, who have the professional qualifications to assess medical and psychiatric evidence and reports, are well placed (and perhaps better placed than a judge without similar training) to provide a report about the quantum of the individual issues awards, which will range between $0 to $50,000 by reviewing the Claims Form, the Class Member's CSC file, and the affidavit material and factums filed both by the Class Member and also be Canada. As we shall explain further below, general causation not being an issue, a Manager/Expert is able to address the individual issues associated with specific causation and quantum based on the material filed by the parties and report those findings to the court.

[142] In our opinion, for Track 2 claims (which cannot exceed a recovery of $50,000 and for which: (a) Canada's liability has been established; and (b) general causation for general and moral damages has already been proven), cross-examination of the deponents is likely unnecessary and disproportionate, but the *Draft D&I Protocol,* nevertheless, provides a time-limited right to cross-examine.

[143] The procedure under the *Draft D&I Protocol* is proportionate, efficient, and fair to both the Class Member and to Canada. The Class Member must present individualized evidence in

support of his or her claim including evidence of specific causation of particular harms that are generally caused by an illegal placement in administrative segregation. Canada may file individualized evidence in response. For example, if Canada sought to argue that a Class Member did not mitigate damages because he or she did not follow medical advice, then Canada could file evidence with the Manager/Expert.

[144] It is an adverse costs regime, and the court may award costs not to exceed $6,000. The procedure does not sacrifice justice on the altar of expediency. Apart from the issue of general causation, Canada can file evidence and a factum to dispute the quantum of the award based on idiosyncratic factors and is not denied due process. Canada has the right to raise legal and factual defences that address the idiosyncrasies of each Class Member's experience in administrative segregation. Impartial Manager/Experts have the expertise to assist the court in adjudicating the Track 2 claims.

[145] There is no adjudication of Track 1 claims which are about a distribution of an already adjudicated award. Judges will adjudicate the Track 3 claims, to which we now turn our attention.

7. Court Adjudicated Individual Issue Claims under Track 3 (*Distribution and Over-$50,000 Track*)

[146] Under Class Counsels' proposed Individual Issues Protocol, if a Class Member makes a claim for compensation for damages of more than $100,000, the claim would be determined by the court pursuant to a motion procedure akin to a summary judgment motion.

[147] Under Canada's proposed Individual Issues Protocol, there is a Simplified Track, which is a summary motion track, where damages would be determined by a judge, for claims over $35,000 and up to $100,000. Under Canada's proposal for claims above $100,000, the claim would proceed as a regular action to be determined by a judge. Thus, under Canada's proposal, a summary judgment procedure would just be for claims between $35,000 and $100,000. Under Class Counsel's proposal, the summary judgment process would be for claims over $100,000.

[148] The design of the *Draft D&I Protocol* is closer to the proposal of Class Counsel than it is to Canada's. The design of the *Draft D&I Protocol* is that where a Class Member selects Track 3 (*Distribution and Over-$50,000 Track*), a judge shall determine the Class Member's claim pursuant to a summary judgment procedure.

[149] In Québec, the « *court may determine special methods of proof and procedure* » pursuant to s. 600 of *Code of Civil Procedure*. Given the culture shift required from Canadian judges in *Hryniak* v. *Mauldin*[59], justice Masse has no hesitation to conclude that she can determine the Class Member's claim pursuant to the summary judgement procedure applicable in Ontario on the basis of s. 600 or the *Code of Civil Procedure*.

[150] Track 3 of the *Draft D&I Protocol* has a summary judgment procedure for all claims over $50,000 and unlike Canada's proposal, the *Draft D&I Protocol* would not preclude a summary judgment procedure for claims over $100,000. Under the *Rules of Civil Procedure*, the summary judgment procedure already factors into its test for granting a summary judgment whether a regular trial is required; rule 20.04 (2) of Ontario's *Rules of Civil Procedure* already provides that the court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial

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[59] 2014 CSC 7, at para. 22-33.

with respect to a claim or defence. In other words, if the claim is not suitable for a summary judgment, then the courts will order a trial.

[151] The approach of the *Draft D&I Protocol* for court-adjudicated claims under Track 3 is as follows:

> In this Protocol, "Roster" means the of group of Manager/Experts appointed by the parties or by the court:
>
> (a) to determine eligibility for a share of the distribution of the Aggregate Damages Award; and.
>
> (b) to inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Damages Award for Class Members who elect to make a Track 2 claim.
>
> In the Claims Form, a Class Member shall elect to proceed on one of the following tracks:
>
> (a) Track 1 (Distribution and Release of Claim Track);
>
> (b) Track 2 (Distribution and Under-$50,000 Track); or
>
> (c) Track 3 (Distribution and Over-$50,000 Track.)
>
> A Class Member whose claim is presumptively barred by a limitation period shall elect to proceed by Track 3.
>
> In the Claims Form, a Class Members shall provide the following information:
>
> (a) his or her name;
>
> (b) his or her date of birth;
>
> (c) his or her Social Insurance Number;
>
> (d) his or her Prison Number;
>
> (e) his or her inmate classification;
>
> (f) the correctional institutions in which he or she was incarcerated;
>
> (g) the admission date and or transfer date to each of the correctional institutions in which he or she was incarcerated;
>
> (h) the date of placement and the release date for each placement in administrative segregation
>
> (i) his or her mailing address, email address, and phone numbers, if any;
>
> (j) for other than Incarcerated Class Members a direction as to how the Class Members should be paid his or her share of the distribution and his or her individual issues award
>
> (k) an acknowledgement that the Administrator is authorized to contact the Class Member to obtain further information;
>
> (l) if other than Class Counsel, the name and contact information for the lawyer retained to act for the Class Member;
>
> (m) a declaration that the information submitted in the Claims Form is true and correct.

Where the Class Member selects Track 3, he or she shall annex to his or her Claims Form a Statement of Claim.

Within twenty days of receipt of a Claims Form, the Administrator shall provide a copy of the Claims Form and any associated documents to:

(a) a Manager/Expert from the Roster;

(b) Class Counsel or the lawyer retained to act for the Class Member; and

(c) Canada.

Within thirty (30) days of its receipt of a copy of the Claims Form, Canada shall send a copy of the Class Member's CSC file to the Manager/Expert assigned the claim.

A Class Members who selects Track 3 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

Where a Class Member elects to proceed on Track 3, his or her individual issues claim shall be determined in accordance with the Track 3 summary judgment procedure described in this Protocol.

Where a Class Member selects Track 3, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.

There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

For Class Members who select Track 3, the Manager/Expert shall determine only the Class Member's eligibility to receive a share of the distribution of aggregate damages and the balance of the claim shall be determined in accordance with the procedures for Track 3.

Damages awarded under Track 3 shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post-judgment interest shall accrue at the rate of 3%, from the date of the Damages award.

The Class Member's share of the gross aggregate damages award is a credit to the payment of the damages awarded under Tracks 3.

Where the Class Member selects Track 3, the claim shall proceed by an individual issues summary judgment motion in accordance with the Ontario *Rules of Practice* before a judge of the Ontario Superior Court of Justice save and except for Class Members of *Gallone*, whose summary judgment motion shall proceed before a judge of the Superior Court of Québec in accordance with s.600 of the Québec *Code of Civil Procedure* as follows:

(a) Within twenty days after the receipt of the Claim Form and the Statement of Claim from the Administrator, Canada shall deliver its Statement of Defence;

(b) Within twenty days after receipt of the Statement of Defence, the Class Member shall deliver:

(i) his or her Reply;

(ii) a Notice of Motion for Summary Judgment; and

(iii) his or her supporting affidavit(s) for the motion.

(c) Within ninety days after receipt of the Class Member's Notice of Motion for Summary Judgment, Canada shall deliver:

(i) an Affidavit of Documents , including the Class Member's CSC medical file and CSC inmate file;

(ii) its affidavits to respond to the summary judgment motion.

(d) Within thirty days after receipt of Canada's responding materials, the Class Member may deliver his or her reply affidavits, if any.

(e) After thirty days from the receipt of Canada's responding materials, the Class Member shall bring a motion to fix a timetable for the balance of the summary judgment motion.

[152] In our opinion, the scheme of the *Draft D&I Protocol* about the determination of individual issues is fair and reasonable and preferable to the approaches of either Class Counsel or Canada.

8. Retainer of Class Counsel and the Involvement of the Class Proceedings Fund and the Fonds d'aide aux actions collectives

[153] The *Draft D&I Protocol* addresses the retainer of Class Counsel and the involvement of the Class Proceedings Fund as follows:

Retainer of Class Counsel

Unless the Class Member in his or her Claim Form provides the name and contact information for the lawyer retained to act for the Class Member, Class Counsel shall continue to have a solicitor and client relationship with the Class Member.

If a Class Members selects Track 1, then Class Counsel or the lawyer retained to act for the Class Member cannot charge for his or services for the Class Member with respect to the Track 1 claim.

If a Class Member selects Track 2, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member with respect to the Track 2 claim, such fee not to exceed 15% of the damages awarded plus reasonable disbursements.

If the Class Member selects Track 3, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member as may be approved by the court.

Class Proceedings Fund and the Fonds d'aide aux actions collectives

Where the Class Member selects Tracks 2 or 3, Class Counsel may continue to receive funding from the Class Proceedings Fund ("CPF") or the Fonds d'aide aux actions collectives, subject to its approval.

Where the Class Member selects Tracks 2 or 3, disbursements and indemnities may be provided by the CPF to Class Members of *Reddock* and *Brazeau* classes proceeding before the Ontario Superior Court subject to its approval.

[154] Class Counsels' Protocol for the Individual Issues stage of the class proceeding assumes that: (a) Class Counsel continue to have a lawyer and client relationship with the individual Class Members with attendant fiduciary responsibilities; and (b) the Contingency Fee Agreements with the Representative Plaintiffs continue to operate as do the arrangements with the Class Proceedings Fund with respect to the *Brazeau* and *Reddock* action and with the Fonds d'aide aux actions

collectives with respect to the *Gallone* action.

[155] The *Draft D&I Protocol* treats the retainers of Class Counsel and the involvement of the Class Proceedings Fund and the Fonds d'aide aux actions collectives somewhat differently than proposed by Class Counsel.

[156] The matter of the nature of Class Counsel's lawyer and client relationship with individual class members once a class action reaches the individual issues stage is largely unexplored legal territory in Ontario and Québec.[60]

[157] We would agree with Class Counsel that up until the individual issues stage of the Class Action, Class Counsel is entitled, subject to court approval, to charge a fee for his or her services to the Class in accordance with the contingency fee agreement between Class Counsel and the Representative Plaintiff, which agreement binds the Class Members insofar as Class Counsel is acting for the class (as it is on this motion to settle the Distribution and Individual Issues Protocols). In Québec, s.593 of the *Code of Civil Procedure* allows that fee agreement.

[158] In our opinion, once the action reaches the individual liquidation or recovery stage, the individual Class Member is the one (not the Representative Plaintiff) that gives Class Counsel instructions about these individual issues.

[159] At the individual issues stage, it does not follow that for the individual issues determinations, the individual Class Member is bound by the contingency fee agreement signed by the representative plaintiff. The individual Class Member has his or her own litigation autonomy. He or she does not need a representative plaintiff. The individual Class Member's risk assessments that underlie a contingency fee agreement are now totally different and idiosyncratic and the Class Member is now personally exposed to adverse costs awards.

[160] Once the class action reaches the individual issues stage, the individual Class Member, is free to hire the lawyer of his or her choice. Although hiring a lawyer other than Class Counsel is rarely done and likely would be a foolish decision, given what Class Counsel knows and has learned about the particular class action; nevertheless, in law and in practice, a Class Member is free to hire another lawyer to prosecute the individual issues phases of the action.

[161] This prospect may be a weakness in the Class action regime because other lawyers might poach on the crop of individual issues files harvested by Class Counsel, but it is a theoretical reality.

[162] The approach of the *Draft D&I Protocol* recognizes and responds to the new circumstances of the individual issues phase. The *Draft D&I Protocol* recognizes that it is highly likely that the Class Members will continue to retain Class Counsel, but the protocol acknowledges that a Class Member has the right to retain a different lawyer to prosecute the individual issues.

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[60] Some of these issues are discussed directly or indirectly in: *Cobourn and Watson's Metropolitan Home Ltd. (c.o.b. Metropolitan Home) v. Home Depot of Canada Inc.*, 2019 BCCA 308; *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2018 QCCA 1727; *Trottier c. Canadian Malartic Mine*, 2018 QCCA 1075; *Lundy v. VIA Rail Canada Inc*., 2015 ONSC 1879; *Filion c. Québec (Procureure générale)*, 2015 QCCA 352; *Imperial Tobacco Canada Ltd. c. Létourneau,* 2012 QCCA 2013; *Barry v. Pulley*, 2011 ONSC 927; *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, aff'g [2008] O.J. No. 4928 (Div. Ct.), aff'g [2008] O.J. No. 1536 (S.C.J.); *Société des loteries du Québec c. Brochu*, 2006 QCCA 1117. P.M. Perell, "Class Proceedings and Lawyers' Conflicts of Interest" (2009), 35 Adv. Q. 202. Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution*, (Cowansville, Yvon Blais, 2006), p. 9.

The *Draft D&I Protocol* recognizes that while the contingency fee agreement between the Representative Plaintiff and Class Counsel continues to operate for class wide matters, it does not operate for individual Class Members. The *Draft D&I Protocol* addresses the matter of fees for the individual issues phase.

[163] The *Draft D&I Protocol* specifies that if a Class Member selects Track 1, then Class Counsel or the lawyer retained to act for the Class Member cannot charge for his or services for the Class Member with respect to the Track 1 claim. This makes sense because Class Counsel, has already been paid for achieving the Aggregate Damages Award and once the Distribution Protocol is approved by the Court, Class Counsel will be paid in costs for its services in regard for settling the scheme of distribution. For Class Counsel or a new lawyer to receive a fee based just on the individual Class Member's share of the Distribution Protocol is in a sense double billing the Class Member.

[164] The *Draft D&I Protocol* specifies that if a Class Member selects Track 2, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member with respect to the Track 2 claim, but the fee is not to exceed 15% of the damages awarded plus reasonable disbursements.

[165] The maximum recovery for a Track 2 is $40,000 for a non-SMI Class Member and is $50,000 for an SMI Class Member. Some of these claims may not be challenged by Canada or may be difficult to challenge. A fee of more than 15% of the damages awarded would not be fair or reasonable, particularly for Class Counsel who already has received almost $14 million in Counsel fees in *Brazeau and Reddock* based on a much different risk assessment than that of a Track 2 claimant.

[166] The *Draft D&I Protocol* specifies that if a Class Member selects Track 3, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member as may be approved by the court. For Track 3 claims, a contingency fee agreement may be appropriate, but it will be a different agreement than the one between the Representative Plaintiff and Class Counsel.

[167] Before turning to the involvement of the Class Proceedings Fund and Fonds d'aide aux actions collectives, on the topic of retainers, we add that we believe that for the individual issues phase, the court has the jurisdiction to regulate the lawyer and client relationship and the fees of Class Counsel, or the fees of a new lawyer retained by an individual Class Member. The court could, for instance, specify that if a new lawyer was retained, the new lawyer would be obliged to share the fee recovered for the individual issues phase of the proceeding, much like an undertaking to protect a lawyer's account when there is a change of lawyer during a regular action.

[168] Beyond what is described above, the exercise of this regulatory jurisdiction is not necessary in the immediate case, but in other cases, this jurisdiction may be necessary to prevent a new lawyer from what amounts to an after-the-fact carriage fight to expropriate the work of Class Counsel that took the case to the individual issues phase.

[169] Poaching would be particularly unfair in a case where apart from costs, the common issues phase yielded no aggregate damages award and it remained for the individual issues phase for there to be any prize for Class Counsel apart from costs awards. In other words, this jurisdiction to regulate the retainers for the individual issues phase may be necessary to protect the integrity of the class action regime and to encourage Class Counsel to take on cases that may not yield a